Denver Journal of International Law & Policy

Volume 10
Number 3 *Spring*

Article 3

January 1981

The Iran Hostage Crisis and the International Court of Justice: Aspects of the Case Concerning United States Diplomatic and Consular Staff in Tehran

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Keywords

International Court of Justice, States, International Law: History, Right to Travel

ARTICLE

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I. INTRODUCTION

On November 29, 1979, the United States took its dispute with Iran over the hostage issue to the International Court of Justice by submitting an application[1] under article 40(1) of the Court's Statute[2] in which it charged the Government of Iran with violation of various legal principles embodied not only in customary international law but also in four treaties to which both countries are party: namely, the Vienna Conventions on Diplomatic and Consular Relations;[3] the 1955 Treaty of Amity, Economic Relations, and Consular Rights;[4] and the 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents.[5] In defiance of its commitments under these treaties, the application alleged *inter alia,* that Iran had failed to protect the American embassy during the events on and following November 4, 1979; had in fact supported and was continuing to support the

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1. Application by the United States, United States Diplomatic and Consular Staff in Tehran, [1980] I.C.J. 3, *reprinted in* 80 DEP'T STATE BULL. 38 (Jan. 1980).

2. The Statute of the International Court of Justice, article 40(1), provides that cases are brought before the Court "either by notification of the special agreement or by a written application addressed to the Registrar." The United States brought the case to the Court by proceeding in the latter of the two methods provided.

3. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3230, T.I.A.S. No. 7502, 500 U.N.T.S. 241 [hereinafter cited as Diplomatic Relations Convention]; Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820, 596 U.N.T.S. 261 [hereinafter cited as Consular Relations Convention].

4. Treaty of Amity, Economic Relations, and Consular Rights, Aug. 15, 1955, United States-Iran, 8 U.S.T. 899, T.I.A.S. No. 3853 [hereinafter Treaty of Amity].

5. Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, *opened for signature* Dec. 14, 1973, 28 U.S.T. 1977, T.I.A.S. No. 8532.

actions against the embassy and its personnel; and was threatening judicial proceedings against the hostages.[6] The United States asked the Court to find that Iran had violated its international legal obligations to the United States and to order corrective action, *viz.*, the release of the hostages and their safe departure from Iran, reparations to the United States and its affected nationals, and the prosecution of those responsible for the embassy seizure.[7] The U.S. Government appended to its principal application a request for interim measures,[8] asking the Court to direct Iran to release the hostages and arrange for their safe departure, to restore the occupied premises to U.S. control, to ensure that the U.S. diplomatic and consular staff were accorded the protections necessary to carry out their official functions, and to refrain from any form of criminal action against the hostages.[9]

The action precipitating the crisis occurred during the course of an anti-American demonstration on November 4, 1979, about two weeks after and in protest against the admission of the former Shah to the United States for medical treatment.[10] On that day, the American embassy was overrun and its personnel were taken hostage by an armed group of several hundred militant students. The United States alleged that the responsible Iranian officials took no action to prevent the embassy seizure

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6. Application by the United States, United States Diplomatic and Consular Staff in Tehran, [1980] I.C.J. 3, *reprinted in* 80 DEP'T STATE BULL. 38, 40 (Jan. 1980).

7. *Id.*

8. Request for Interim Measures by the United States, United States Diplomatic and Consular Staff in Tehran, [1979] I.C.J. 7 (order granting provisional measures), *reprinted in* 80 DEP'T STATE BULL. 40 (Jan. 1980). Under the I.C.J. Statute article 41(1), the Court may indicate, "if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party." The Court's jurisprudence has determined that the rights to be so protected are those which stand in danger of "irreparable prejudice." Aegean Sea Continental Shelf Case (Greece v. Turkey), [1976] I.C.J. 3, 9, para. 25 (order denying interim protection). *See* Gross, *The Dispute Between Greece and Turkey Concerning the Continental Shelf in the Aegean*, 71 AM. J. INT'L L. 31 (1977).

What the term "irreparable" implies is open to varying interpretations. In *Aegean Sea*, some judges were inclined to give it a liberal definition. Judge Elias, for instance, contended in his separate opinion that under certain conditions, offending the national susceptibilities of a state may satisfy the test. [1976] I.C.J. at 30. In the present case, as will appear below, note 59 *infra*, the Court seemed to imply that the rights claimed by the United States stood in danger of irreparable harm under any definition of the term. For a view that the Court, in considering whether to indicate interim measures, ought not rely exclusively on the concept of irreparable harm, see Adebe, *The Rule on Interlocutory Injunctions under Domestic Law and the Interim Measures of Protection under International Law: Some Critical Differences*, 4 SYRACUSE J. INT'L L. & COM. 277, 289-96 (1976-77).

9. Request for Interim Measures by the United States, United States Diplomatic and Consular Staff in Tehran, [1979] I.C.J. 7 (order granting provisional measures), *reprinted in* 80 DEP'T STATE BULL. 40 (Jan. 1980).

10. Chronology of Events in Iran, Nov. 1979, 80 DEP'T STATE BULL. 44 (Jan. 1980). The following paragraphs describe events pertinent to the issues of law in the case. An extensive reiteration of all the events surrounding the crisis is beyond the scope of this article and is not necessary here.

or to rescue the hostages.[11] Repeated protests and attempts at negotiations by the United States produced no positive response from Iran,[12] with the result that, except for the release of thirteen female and black hostages,[13] the situation remained essentially unchanged until the final resolution of the crisis in January 1981.[14]

Once the embassy seizure was complete, Iranian officials, including the Ayatollah Khomeini, issued statements endorsing the militants' action.[15] These official and semi-official statements prompted the United States to claim that, having first defaulted on their obligation to protect the American embassy and its staff, the Iranian authorities had become wholehearted participants in the violations of international law that had occurred.[16] In the meantime, the militants had proceeded to seize em-

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11. Application by the United States, United States Diplomatic and Consular Staff in Tehran, [1980] I.C.J. 3, *reprinted in* 80 DEP'T STATE BULL. 38, 38 (Jan. 1980).

12. Immediately after the embassy takeover, President Carter commissioned former Attorney General Ramsey Clark to open negotiations with the authorities in Tehran. The Clark mission, however, aborted after the Ayatollah Khomeini issued an order forbidding any official of the Iranian government to meet with Mr. Clark. The same order ruled out negotiations with any other U.S. envoy. Oral Argument by Applicant (U.S. Agent Roberts Owen), United States Diplomatic and Consular Staff in Tehran, [1980] I.C.J. 3, *reprinted in* 80 DEP'T STATE BULL. 36, 39 (May 1980). Likewise, representations by other governments on behalf of the United States proved fruitless, N.Y. Times, Dec. 9, 1979, at 1, col. 6, as did mediation efforts by representatives of the Palestinian Liberation Organization and the Pope. *See* Chronology of Events, *supra* note 10, at 44-45; N.Y. Times, Nov. 11, 1979, at 1, col. 6; *id.* Nov. 12, 1979, at 1, col. 6. The Ayatollah Khomeini also undercut U.N. diplomatic efforts by opposing plans for a Security Council session to discuss the crisis on the ground that the outcome had already been dictated by the United States. *Id.*, Nov. 28, 1979, at 1, col. 6.

13. Three hostages—one woman and two black men—were released on Nov. 18, 1979. N.Y. Times, Nov. 19, 1979, at 1, col. 6. A second group of ten female and black hostages were released on Nov. 19, 1979. *Id.*, Nov. 20, 1979, at 1, col. 4.

14. The information supplied to the Court by the United States showed that, after the release of the 13 blacks and women, 50 hostages remained. Of that number, 28 had recognized diplomatic rank, 20 were employed as members of the administrative and technical staff and therefore also entitled to protection under article 37 of the Diplomatic Relations Convention, note 3 *supra*, and two private U.S. nationals without diplomatic or consular status. United States Diplomatic & Consular Staff in Tehran, [1979] I.C.J. 7, 17-18, para. 34 (order granting provisional measures). In addition to the 50 hostages detained at the U.S. Embassy, three diplomatic agents, including the U.S. chargé d'affaires, were kept at the Iranian Ministry of Foreign Affairs. United States Diplomatic and Consular Staff in Tehran, [1980] I.C.J. 3, 14, para. 25.

15. Immediately after the embassy takeover, the militants received encouragement from Iranian religious leaders. N.Y. Times, Nov. 6, 1979, at 1, col. 5. The Ayatollah Khomeini at various points in the crisis expressed support for the militants. *See, e.g., id.*, Nov. 8, 1979, at 1, col. 6; *id.* Nov. 12, 1979, at 1, col. 6; *id.* Nov. 21, 1979, at 13, col. 1. In a December 16, 1979 statement, he described the militants' action as reflecting the will of the Iranian people. *Id.*, Dec. 18, 1979, at 1, col. 4. Bani-Sadr, then Foreign Minister of Iran, also supported the militants, while pledging to try to find a way out of the crisis. *Id.*, Nov. 11, 1979, at 1, col. 6. *See also id.*, Nov. 14, 1979, at 1 col. 4 for a report on the statement by Ghotbzadeh, then head of Iranian radio and television, implying endorsement of the embassy takeover.

16. Oral Argument by Applicant (U.S. Agent Roberts Owen), United States Diplomatic

bassy documents and archives, were interrogating the hostages, and were threatening to put them on trial for alleged espionage activities. These threats were periodically echoed in official judicial and political circles throughout the hostage crisis.[17]

Against this background, the United States instituted parallel proceedings before the political and judicial organs of the United Nations, that is, the Security Council and the International Court of Justice.[18] Iran vigorously denied any jurisdiction on the part of the Court and, following the precedent set by France,[19] Iceland,[20] and Turkey[21] in previous cases of contested jurisdiction, took no part in the oral pleadings. Nor did Iran avail itself of its right under the Court's Statute[22] to appoint an ad hoc judge or produce anything like a cohesive statement of its position on the law and facts of the case. Two brief messages with overlapping contents constituted the extent of Iran's participation in judicial proceedings. One was sent on December 9, 1979, while the Court was considering the American request for interim measures. Iran's basic position, as indicated in its message of December 9, was that the hostage dispute had to be considered in its wider context and, consequently, was not appropriate for adjudication by the Court.[23] Iran reiterated the same objection during the course of the merit proceedings on March 17, 1980.[24]

The nonappearance of a party to a dispute submitted to the Court brings into operation article 53 of the Statute which directs the Court to "satisfy itself, not only that it has jurisdiction, but also that the case is well founded in fact and law."[25] The Court concluded that the data sup-

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and Consular Staff in Tehran, [1980] I.C.J. 3, *reprinted in* 80 DEP'T STATE BULL. 36, 41 (May 1980).

17. *Id.* at 50-51.

18. *See* U.N. CHRON., Jan. 1980, at 5.

19. Nuclear Tests Case (Australia v. France), [1973] I.C.J. 99; (New Zealand v. France), [1973] I.C.J. 135 (orders granting interim protection); (Australia v. France), [1974] I.C.J. 253; (New Zealand v. France), [1974] I.C.J. 457.

20. Fisheries Jurisdiction Case (United Kingdom v. Iceland), [1972] I.C.J. 12; (Federal Republic of Germany v. Iceland), [1972] I.C.J. 30 (orders granting interim protection); (United Kingdom v. Iceland), [1974] I.C.J. 3; (Federal Republic of Germany v. Iceland), [1974] I.C.J. 175.

21. Aegean Sea Continental Shelf Case (Greece v. Turkey), [1976] I.C.J. 3 (order denying interim protection); [1978] I.C.J. 3.

22. The I.C.J. Statute article 31(2) provides that "[i]f the Court includes upon the Bench a Judge of the nationality of one of the parties, any other party may choose a person to sit as a judge."

23. Letter to the Court from the Minister of Foreign Affairs of Iran (Dec. 9, 1979), *reprinted in* United States Diplomatic and Consular Staff in Tehran, [1979] I.C.J. 7, 10-11, para. 8 (order granting provisional measures) [hereinafter cited as Letter of Dec. 9, 1979].

24. Letter to the Court from the Minister of Foreign Affairs of Iran (Mar. 16, 1980), *reprinted in* United States Diplomatic and Consular Staff in Tehran, [1980] I.C.J. 3, 8, para. 10.

25. I.C.J. STAT. art. 53. For a discussion of the legal effects of the nonappearance of a party, see Eisemann, *Les Effets de la Non-Comparution Devant la Cour Internationale de Justice*, 19 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 235 (1973).

plied by the United States constituted "a massive body of information" concerning the facts and circumstances of the case.[26] It also noted that the information supplied by the United States, which had been communicated to Iranian officials, had evoked neither denial nor questioning on their part. The bench was thus satisfied that the allegations of fact on which the United States based its claims were well founded within the meaning of article 53 of the Statute.[27]

In its order of December 15, 1979,[28] the Court, by unanimous vote, granted interim relief as requested by the United States. In its judgment on the merits, delivered May 24, 1980,[29] the Court unanimously reiterated the measures already indicated to Iran in its interim order, but split on the more sensitive issues of the extent of Iran's liability and its obligation to pay reparations for the harm caused to the United States and its nationals.[30]

United States Diplomatic and Consular Staff is undoubtedly one of the most important cases ever handled by the International Court. The substantive law issues raised in this case—more specifically, those concerning Iran's violations of its obligations under customary, codified rules of international diplomacy—were simple ones; they required no unusual time for decision and afforded little opportunity for judicial lawmaking. Yet, in two respects, the Court's interim and final judgments are significant even beyond the law and facts of the case. First, the Court made important contributions to the international lawmaking process by illuminating and settling certain questions of international jurisprudence, notably those related to the indication of interim protection and to the relationship between international adjudication and the political functions and processes of the United Nations. Second, and more important, the hostage issue being one of the most politicized cases ever brought before an international tribunal, its disposition by the Court raises crucial questions about the boundary between law and politics in the world community and, particularly, the role that devolves on the Court as the principal judicial organ of the United Nations in defining and adjusting that boundary. This aspect of the case, to be commented on in sections VI and VII, offers fertile ground for speculation regarding the function and the potential of the Court in the peacekeeping processes of the international community.

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26. [1980] I.C.J. at 3, 10, para. 13.

27. *Id.*

28. [1979] I.C.J. at 7 (order granting provisional measures).

29. [1980] I.C.J. at 3.

30. Among the points which divided the Court was the view of the minority that the unilateral military and economic measures undertaken by the United States between the interim order and the final judgment—*i.e.*, the aborted rescue mission and President Carter's Exec. Order No. 12205, 3 C.F.R. 248 (1980) regarding the future disposition of frozen Iranian assets—cast doubt on U.S. intentions to settle the dispute by exclusively peaceful means. [1980] I.C.J. at 51, 58 (Morozov, J., and Tarazi, J., dissenting). For a report on the rescue operation, see N.Y. Times, Apr. 25, 1980, at 1, col. 6.

This article examines both the law and certain policy implications of the interim order and final judgment entered in *United States Diplomatic and Consular Staff*. Section II discusses the order of December 15, 1979, in which the Court granted interim measures; section III contains an analysis of the jurisdictional issues in the case; and section IV examines the separation of judicial and political powers in the United Nations. A discussion of the decision on the merits, with particular focus on the Court's breakdown in unanimity, is contained in section V. The justiciability of politicized international disputes, together with the broader implications of the case, are considered in section VI. Section VII summarizes the substantive law contributions and, based on the case concerning the *United States Diplomatic and Consular Staff*, suggests the implementation of a wider scope of inquiry in the resolution of adversary claims in politicized North-South disputes.

II. THE ORDER OF DECEMBER 15, 1979

The interim measures of protection indicated by the Court coincided closely with the measures requested by the United States. They enjoined Iran to restore the occupied premises to U.S. control, to ensure the immediate release of the hostages and their safe departure from Iran, and to afford to all members of the U.S. diplomatic and consular staff the protections to which they were entitled under customary and conventional law, including protection from any kind of criminal jurisdiction. At the same time, the Court took it upon itself to call on both parties to refrain from any action which might aggravate the tension between them or render the existing crisis more difficult of solution.[31]

A. *The Special Features of the U.S. Interim Claims*

One novel feature of the interim order in this case is that, together with preventive actions—restraint from putting the hostages on trial and from tension-aggravating acts—the Court, for the first time in its history, required positive measures,[32] not to preserve the status quo, but to reestablish "the last uncontested status prior to the controversy."[33] In the absence of any duplication between an application and request for interim measures, this broadening of the scope of interim protection poses no legal difficulty. It is possible that, as in the present case, affirmative measures would be needed to preserve the rights claimed by one party or another, and this possibility seems in fact anticipated in the provision of article 75(1)-(2) of the Court's revised rules of procedure which contemplates the indication of interim measures that "ought to be *taken* or com-

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31. [1979] I.C.J. at 21, para. 47.

32. The Court ordered, *inter alia*, the release of the hostages, their safe departure, and the restoration of the occupied premises to U.S. control. *Id.*.

33. This phrase was suggested in E. DUMBAULD, INTERIM MEASURES IN INTERNATIONAL CONTROVERSIES 187 (1932).

plied with."[34] (Emphasis added.) In the present case, however, the positive actions indicated to Iran created a special situation because they partially preempted the measures requested by the United States in its application for a decision on the merits: the U.S. interim request and principal application both sought, *inter alia*, the release of the hostages and their safe departure.[35]

The duplication of the appeal for the release of the hostages and their safe departure in the interim request and the principal application inevitably opened up the United States to the charge that it aimed to obtain a favorable judgment on the merits through interim relief. Iran raised this issue in its first message, objecting that the granting of the interim measures requested by the United States would amount to a "judgment on the actual substance of the case."[36] Some authority for Iran's position derived from the *Chorzów Factory* case,[37] wherein the Permanent Court of International Justice ruled that Poland had acted contrary to its international obligations in expropriating certain German interests. Germany then sued to recover damages, and, *pendente lite*, requested interim measures in the form of a prepayment on the final award. The Permanent Court declined the request on the ground that it was designed to give the applicant an interim judgment on part of the substantive claim.[38]

Responding to Iran's objection, the Court in the present case limited and distinguished the *Chorzów Factory* precedent, summarily noting that, on the one hand, the circumstances in that case "were entirely different," and, on the other, that "the request there sought to obtain from the Court a final judgment on a claim for a sum of money."[39] It is difficult to discern from the elliptical language of the Court what precisely in the subject matter of the German request or the circumstances surrounding it operated to make it inapplicable to the facts of the U.S. request in the hostage case. To help understand the Court's meaning, it is necessary to

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34. I.C.J. RULES, *reprinted in* ACTS AND DOCUMENTS CONCERNING THE ORGANIZATION OF THE COURT, No. 4 (1978). Art. 75(1)-(2) provides as follows:

> (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.
>
> (2) When a request for provisional measures has been made, the Court may indicate measures that are in whole or in part other than those requested, or that ought to be *taken* or complied with by the party which has itself made the request. [Emphasis added.]

35. *See* Oral Argument by Applicant (U.S. Agent Roberts Owen), United States Diplomatic and Consular Staff in Tehran, [1980] I.C.J. 3, *reprinted in* 80 DEP'T STATE BULL. 43, 47 (Feb. 1980).

36. Letter of Dec. 9, 1979, note 23 *supra*.

37. Case Concerning the Factory at Chorzów, [1927] P.C.I.J. ser. A., No. 12 (order denying interim measures). The International Court of Justice succeeded the Permanent Court of Justice.

38. *Id.* at 10.

39. [1979] I.C.J. at 16, para. 28.

put the reasoning it applied to justify the indication of protective measures in the context of its case law on the subject. The result is illuminating: the indication of provisional measures in *United States Diplomatic and Consular Staff* closes a gap in international jurisprudence by supplying a formula for evaluating the admissibility of interim claims when they duplicate and preempt the subject matter of the principal application.

Turning to the Court's case law, it appears that in three cases—*Polish Agrarian Reform and the German Minority*,[40] *Interhandel*,[41] and *Aegean Sea Continental Shelf*[42]—the Court or its predecessor declined to order interim measures solely[43] or partially[44] because of the absence of a link between the measures requested and the subject matter of the principal action. The order in *United States Diplomatic and Consular Staff* confirms this line of jurisprudence by noting that "a request for provisional measures must by its very nature relate to the substance of the case since, as Article 41 expressly states, their object is to preserve the respective rights of either party."[45]

United States Diplomatic and Consular Staff is thus consistent with previous case law in requiring a link between the injunctive measures and the substance of the principal action. At the same time, the case raised a related question: Even though a link between interim and substantive measures is required, could a case be made that the two measures must not overlap, for if they did the granting of the request would inevitably entail a judgment on the merits?[46] Until the hostage case, the Court's jurisprudence did not supply a clear answer to this question. As already noted, the Permanent Court's disposition of the German request in the *Chorzów Factory* case seemed to suggest an affirmative answer on its face: that any overlap between the two would result in a denial of interim measures.[47]

On the other hand, in two releatively recent cases—*Fisheries Jurisdiction*[48] and *Nuclear Tests*[49]—the *Chorzów Factory* holding notwith-

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40. Case Concerning the Polish Agrarian Reform and the German Minority, [1933] P.C.I.J., ser. A/B, No. 58, at 175 (order denying interim measures).

41. Interhandel Case (Switzerland v. United States), [1957] I.C.J. 105, 111-12 (order denying interim measures).

42. Aegean Sea Continental Shelf Case (Greece v. Turkey), [1976] I.C.J. at 14, para. 46 (order denying interim protection).

43. Case Concerning the Polish Agrarian Reform and the German Minority, [1933] P.C.I.J., ser. A/B, No. 58, at 178 (order denying interim measures).

44. Interhandel Case, [1957] I.C.J. at 111-12; Aegean Sea Continental Shelf Case, [1976] I.C.J. at 11.

45. [1979] I.C.J. at 16, para. 28.

46. For a discussion of the problems presented by overlapping interim and substantive claims, see Cot, *Affaires des Essais Nucléaires*, 19 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 252, 266 (1973).

47. *See* text accompanying notes 37 and 38 *supra*.

48. (United Kingdom v. Iceland), [1972] I.C.J. 12; (Federal Republic of Germany v. Iceland), [1972] I.C.J. 30 (orders granting interim protection). The United Kingdom and the Federal Republic of Germany filed these parallel actions challenging the validity of Iceland's

standing—the Court acted as if an overlap in itself did not rule out injunctive relief. In *Fisheries Jurisdiction,* the Court directed the respondent, Iceland, to withhold enforcement of its new fisheries jurisdiction *pendente lite.*[50] The interim measures ordered amounted, in effect, to a provisional judgment on the substantive claims of the applicants, the United Kingdom and West Germany, but the Court sought to limit the impact of the interim measures on Iceland by directing the applicants to restrict the fish catch of their nationals during the pendency of the case.

The interim order in *Nuclear Tests* was less balanced: France alone was directed to refrain from action—that is, to refrain from conducting atmospheric nuclear tests in the Pacific pending a judgment on the substantive issues involved.[51] Since the substantive issues involved the legality or illegality of such tests and therefore their continuance or permanent cessation, Judges Forster[52] and Gros[53] protested that the Court was in fact rendering a provisional judgement on behalf of the applicants.[54]

Preemptive as the orders in *Fisheries Jurisdiction* and *Nuclear Tests* may have appeared, they still left the respondents with the option of resuming the exercise of their rights—to extend fisheries jurisdiction and resume tests, respectively—in the event of a decision on the merits in their favor. The order in the hostage case, on the other hand, left no such option to the respondent, who was being directed to reinstate the *status quo ante* through irreversible acts. The interim order thus appeared not as a provisional but a final judgment on a portion—and a substantial one at that—of the principal claims. Indeed, so fully did the interim order preempt the substantive issues that had the respondent elected to comply with the order it would have found itself in the awkward position of joining the proceedings only to settle the extent and nature of the reparations it owed to the United States. It was perhaps with a view to making this

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decision to extend its exclusive fisheries jurisdiction to a 50 nautical mile zone. The legal issues involved in the two actions were identical. *See* Favoreu, *Les Arrêts du 2 Février 1973,* 19 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 272 (1973).

49. (Australia v. France), [1973] I.C.J. 99; (New Zealand v. France), [1973] I.C.J. 135 (orders granting interim protection). The litigation arose from parallel applications filed by Australia and New Zealand challenging the legality of the French nuclear tests in the South Pacific. *See* Elkind, *French Nuclear Testing and Article 41—Another Blow to the Authority of the Court,* 8 VAND. J. TRANSNAT'L L. 39 (1974-75); Lellouche, *The Nuclear Tests Cases: Judicial Silence v. Atomic Blasts,* 16 HARV. INTL. L.J. 614 (1975); McWhinney, *International Law-Making and the Judicial Process: The World Court and the French Nuclear Tests Case,* 3 SYRACUSE J. INT'L L. & COM. 9 (1975).

50. [1972] I.C.J. at 17; [1972] I.C.J. at 35.

51. [1973] I.C.J. at 106; [1973] I.C.J. at 142.

52. [1973] I.C.J. at 111; [1973] I.C.J. at 148 (Forster, J., dissenting).

53. [1973] I.C.J. at 115; [1973] I.C.J. at 149 (Gros, J., dissenting).

54. Judge Forster observed pointedly that the requested measures were "so close to the actual subject-matter" as to be "practically indistinguishable therefrom. . . ." He went on to charge Australia (and, by implication, New Zealand) with seeking "an actual judgement on the legality, or rather the illegality, of further nuclear tests" through the interim route. [1973] I.C.J. at 113 (Forster, J., dissenting).

prospect more acceptable that the Court in its interim order went out of its way to show how the adjudicative process could be used by Iran not only to defend itself against U.S. reparation claims, but also to submit claims of its own related to the alleged inequities attributed to the U.S. Government.[55] Thus when making the usual disclaimer that the decision in the interim proceedings did not prejudge "any question relating to the merits themselves," the Court invited the respondent to present arguments regarding the activities of the United States in Iran "either by way of defense . . . or by *way of counterclaims filed under* Article 80 or the Rules of Court."[56] (Emphasis added.)

The foregoing discussion yields two observations. First, until *United States Diplomatic and Consular Staff*, international case law on the availability of interim protection which anticipates measures requested in the principal application was inconclusive. The Permanent Court denied interim measures in *Chorzów Factory* on the ground that the measures sought encroached too heavily on the substantive questions. Later, the International Court granted interim measures in *Fisheries Jurisdiction* and *Nuclear Tests* in spite of the apparent overlap with the claims advanced for adjudication in the principal applications. Neither *Fisheries Jurisdiction* nor *Nuclear Tests*, taken alone or together, provided clear guidelines for the consideration of requests for interim measures in future cases. Second, the U.S. request in *United States Diplomatic and Consular Staff* preempting, as it did, a pivotal portion of the claims advanced in the principal application, placed the question of overlapping requests in its most acute form, and in response, the Court confronted the issues in terms that seem to have yielded a definitive criterion for the admissibility of such requests.

The Court's reasoning was as follows. The object of interim measures, it observed, is to protect the rights claimed by either party from "irreparable prejudice" *pendente lite*.[57] The rights claimed in this case included those of U.S. nationals to "life, liberty, protection and security"[58] which, given the conditions under which the hostages were being held, stood in grave danger of irreparable harm and thus needed protection of the kind requested by the United States.[59] That these rights overlapped with those claimed in the principal application, the Court seemed to imply, was no bar to granting protection as long as it could be shown that the purpose of the U.S. request was "not to obtain a judgment, in-

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55. [1979] I.C.J. at 10, para. 45.

56. *Id.* at 15, para. 24. Article 80(1) provides as follows: "A counter-claim may be presented provided that it is directly connected with the subject-matter of the claim of the party and that it comes within the jurisdiction of the Court." I.C.J. RULES, note 34 *supra*.

57. [1979] I.C.J. at 19, para. 36.

58. *Id.* para. 37, quoting from the request for interim measures by the United States.

59. *Id.* at 20, para. 42. The Court stated that the continuance of the situation which gave rise to the request would expose "the human beings concerned to privation, hardship, anguish and even danger to life and health and thus to a serious possibility of irreparable harm."

terim or final, on the merits of its claims but to preserve the substance of the rights in claims *pendente lite*."[60] Thus, the controlling criterion in deciding the availability of preemptive interim protection is not the content but the purpose of the request. The question to be asked is whether the request intends to obtain through the interim route a judgment on the merits. If so, as in *Chorzów Factory*, it must be denied as inadmissable. If, on the other hand, the request seeks in good faith to protect the rights asserted by the claimant state, the preemptive character of interim claims is only incidental to the circumstances of the dispute and does not in itself preclude the granting of provisional relief.[61] Whether relief is granted or not then depends on the existence of the second condition posited by the Court, namely, that the rights claimed by the requesting party stand in danger of irreparable prejudice.[62]

The authority behind the formula implicit in the Court's finding is doubly impressive: not only was the decision reached by a unanimous vote, but also the bench included Judges Forster and Gros who rallied to the official opinion even though the ground they invoked for their dissent in *Nuclear Tests*[63]—the practical indistinguishability of the interim measures from the substance of the principal action—described the circumstances present in *United States Diplomatic and Consular Staff* perhaps even better than it described those present in *Nuclear Tests*.[64]

B. *The Parties' Reactions to the Interim Order*

It is well known that Iran did not comply with the Court's order.[65] Less well known is the regrettable fact that Iran's reaction in this case fits the pattern set by respondents in all prior cases of contested jurisdiction. Since its establishment in 1946, the Court has received nine requests for interim measures,[66] six of which it granted.[67] In no case so far has the

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60. *Id.* at 16, para. 28.

61. Jean-Pierre Cot, *supra* note 46, at 269, suggested an almost identical criterion when he wrote, "Conservatory measures are distinguishable from a provisional judgment not by their object but by their objective. The objective is, in [the former] case, to conserve the rights of the parties; in [the latter], to adjudicate a part of the merits."

62. The irreparable prejudice test was established in Aegean Sea Continental Shelf Case (Greece v. Turkey), [1976] I.C.J. 3 (order denying interim protection).

63. (Australia v. France), [1973] I.C.J. at 111, 115; (New Zealand v. France), [1973] I.C.J. at 137, 138 (Forster, J., and Gros, J., dissenting).

64. Since Judges Forster and Gros endorsed the order granting provisional measures without comment, the reasons for their support of the order in this case as compared with their opposition to the granting of interim protection in *Nuclear Tests* cannot be determined with certainty. While their endorsement may indicate a modification of their earlier emphatically articulated positions, it is not unreasonable to suggest that their support of the provisional measures indicated in *United States Diplomatic and Consular Staff* may have been facilated by (1) the clarity of applicable law as regards both jurisdiction and merits and (2) the tactical desire of the bench to close ranks and thus enhance the psychological impact of its opinion in the face of Iran's order-threatening conduct.

65. [1980] I.C.J. at 35, para. 75.

66. In addition to the present case, the Court received requests for interim measures in Aegean Sea Continental Shelf Case (Greece v. Turkey), [1976] I.C.J. 3 (order denying in-

respondent accepted or complied with the order.

While the prevailing legal opinion holds that Court orders lack binding force,[68] one can hardly avoid the conclusion that widespread noncompliance with Court orders is bound to undermine confidence in the credibility of international adjudication. In *United States Diplomatic and Consular Staff*, the challenge to the prestige and authority of the Court was doubly serious; it emanated not only from the party contesting its jurisdiction, but from the applicant as well. That challenge came in the form of the April 1980 military operation within Iranian territory to rescue the hostages.[69] The U.S. action, as the Court did not fail to point out,

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terim protection); Nuclear Tests Case (Australia v. France), [1973] I.C.J. 99; (New Zealand v. France), [1973] I.C.J. 135 (orders granting interim protection); Case Concerning Trial of Pakistani Prisoners of War (Pakistan v. India), [1973] I.C.J. 328 (order denying interim measures); Fisheries Jurisdiction Case (United Kingdom v. Iceland), [1972] I.C.J. 12; (West Germany v. Iceland), [1972] I.C.J. 30 (orders granting interim protection); Anglo-Iranian Oil Co. Case (United Kingdom v. Iran), [1951] I.C.J. 89 (order granting interim measures); Interhandel Case (Switzerland v. United States), [1957] I.C.J. 105 (order denying interim measures).

67. The Court issued orders indicating interim measures in *Anglo-Iranian Fisheries Jurisdiction* (two orders), *Nuclear Tests* (two orders), and *United States Diplomatic and Consular Staff*.

In *Anglo-Iranian Oil*, Iran refused to comply with the order, but the order was subsequently revoked when the Court upheld Iran's claim that it lacked jurisdiction to determine the merits. [1952] I.C.J. at 93. In all the cases so far, refusal to comply has been motivated by the respondent's denial of the Court's competence to hear the substance of the principal application. For a discussion of pre-1974 cases, see Mendelson, *Interim Measures of Protection in Cases of Contested Jurisdiction*, 46 BRIT. Y.B. INT'L L. 259 (1972-73).

68. An early and authoritative inquiry into the drafting history of article 41 of the STATUTE OF THE PERMANENT COURT, which is reproduced almost verbatim in the present Statute, concluded, "[t]here is no question of a binding order." E. DUMBAULD, *supra* note 33, at 168. *See also* Adebe, *supra* note 8, at 299; Goldsworthy, *Interim Measures of Protection in the International Court of Justice*, 68 AM. J. INT'L L. 259, 273-76 (1974).

The plain meaning of the relevant provisions in the Court's Statute and procedural rules reinforces this interpretation. Only "decisions," by implication distinguishable from "orders," have "binding force." I.C.J. STAT., art. 59. Under article 41, the Court has the power to "indicate" or "suggest" interim measures, which again reflects the framers' intent to withhold from "orders" the force of res judicata. More conclusive still, the Court itself seems to attach no adverse legal or procedural consequences to noncompliance of a party with interim measures.

There is, however, a minority view claiming binding force for interim orders. *See, e.g.*, Hambro, *The Binding Character of the Provisional Measures of Protection Indicated by the International Court of Justice*, in RECHTSFRAGEN DER INTERNATIONALEN ORGANISATION 170 (H. von Walter Schatzel & H.J. Schlochauer eds. 1956). *See also* 6 U.N. SCOR (559th mtg.) para. 18, U.N. Doc. S/Agenda 554/Rev. 1 (1951), for the view presented to the Security Council by the U.K. representative following Iran's refusal to comply with the interim order in Anglo-Iranian Oil Co. Case (United Kingdom v. Iran), [1951] I.C.J. 89 (order granting interim measures). Essentially, that view held that the findings of the Court in an interim order give rise to international obligations.

69. *See* N.Y. Times, Apr. 25, 1980, at 1, col. 6, for a report on the rescue attempt. In his message to Congress, President Carter defended the rescue attempt under the U.N. CHARTER art. 51 and explained that it was carried out in the exercise of a country's inherent right of self-defense "with the aim of extricating American nationals" who were the victims of the

was in breach of the spirit of the interim order which, as discussed above, enjoined the parties from any action which might aggravate tensions between them.

The bench divided in its response to the attempted rescue. The Court majority showed particular sensitivity to the fact that the operation had been planned and carried out while the proceedings adjudicating the claims of the United States were still pending.[70] It was quick, however, to point out that the question of the legality of the rescue operation was not before the Court, and, in consequence, would have no adverse bearing on the claims of the United States.[71]

The majority decision against allowing the rescue attempt to have an adverse impact on the U.S. claims drew protests from two dissenting judges. Judge Tarazi described the U.S. military attempt as "not conducive to facilitating the judicial settlement of the dispute"[72] and invoked it as partial ground for his conclusion that not only Iran but the United States too had "incurred responsibility"[73] in the present case. Judge Morozov spoke in sharper terms. In his judgment, by attempting what he called "a military attack on the territory of the Islamic Republic of Iran"[74] in defiance of the Court's order and "simultaneously with the judicial proceedings,"[75] the United States had "forfeited the legal right as well as the moral right to expect the Court to uphold any claim for reparation."[76] Neither Tarazi nor Morozov went so far as to claim a binding quality for interim orders; at the same time, contrary to the majority opinion, they both implicitly contended that noncompliance with an order can create legal liabilities and thus affect the outcome on their merits.

"Iranian armed attack" on the U.S. embassy. Letter from Pres. Carter to House Speaker O'Neill and Sen. Magnusen (Apr. 27, 1980), *reprinted in* N.Y. Times, Apr. 28, 1980, at 11, col. 3. U.N. CHARTER art. 51 provides in part: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations . . . ." Carter's language reflects a dubious interpretation of the concept of self-defense which, within the meaning of article 51 of the U.N. Charter, covers only defense against attacks crossing territorial borders. *See* P. JESSUP, A MODERN LAW OF NATIONS 166 (1948); Brownlie, *The Use of Force in Self-Defense*, 37 BRIT. Y.B. INT'L L. 183, 266 (1961); Falk, *The Beirut Raid and the International Law of Retaliation*, in GREAT ISSUES OF INTERNATIONAL POLITICS 32, 46-48 (M. Kaplan ed. 1970); Wright, *The Cuban Quarantine*, 57 AM. J. INT'L L. 546, 559-63 (1963).

70. [1980] I.C.J. at 43, para. 93. It was observed by the majority that "an operation undertaken in those circumstances, for whatever motive, is of a kind calculated to undermine respect for the judicial process in international relations."

71. *Id.* para. 94.

72. *Id.* at 64 (Tarazi, J., dissenting).

73. *Id.* at 65.

74. *Id.* at 54 (Morozov, J., dissenting).

75. *Id.* at 55.

76. *Id.* at 53.

III. JURISDICTIONAL ISSUES

A. *Incidental Jurisdiction*

In proceedings before the International Court no less than in domestic judicial proceedings, the preliminary question of jurisdiction must be resolved before the bench can reach the substantive legal issues. Furthermore, since international jurisdiction is consensual—that is, established by the will of the party against whom it is invoked—the Court's power to adjudicate a claim hinges on the existence of an instrument conferring jurisdiction on it to do so. When, as in the present case, the principal application is accompanied by a request for interim measures, the jurisdictional issues must be addressed for purposes both of the interim order (incidental jurisdiction) and of the merit judgment (substantive jurisdiction). Incidental jurisdiction inevitably confronts the Court with a delicate legal question: To what extent is it necessary to investigate its substantive jurisdiction at this early stage? The need to act expeditiously to protect the rights of one party or the other militates against an exhaustive, and consequently prolonged, investigation. Yet, there must be at least a presumption in favor of jurisdiction on the merits before the Court can consider a request for interim relief. Predictably, the Court's attempt to achieve a balance between the two considerations has provoked considerable controversy.

The first time the Court faced the issue of its incidental jurisdiction was in connection with the British request for interim measures in *Anglo-Iranian Oil Co.*[77] There, the Court overruled Iran's objection and granted interim relief, observing simply that it could not "be accepted *a priori*" that a claim based on an alleged violation of international law, as the British claim in that case was, "falls completely outside the scope of international jurisdiction."[78] In the *Fisheries Jurisdiction* case,[79] the Court abandoned the *a priori* test in favor of a somewhat more conclusive showing of substantive jurisdiction as a precondition for the indication of interim measures. This time it settled on two tests suggested by Sir Hersch Lauterpacht in his concurring opinion in the *Interhandel Case*.[80] In its adoption of these two tests, the Court observed: first, that the bench "will not act under Article 41 in cases in which absence of jurisdiction on the merits is manifest"; and then, that a 1961 exchange of notes invoked by the United Kingdom as the foundation for the Court's jurisdiction appeared, "*prima facie*, to afford a possible basis on which the jurisdiction of the Court might be founded."[81]

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77. (United Kingdom v. Iran), [1951] I.C.J. 89 (order granting interim measures).

78. *Id.* at 93.

79. (United Kingdom v. Iceland), [1972] I.C.J. 12; (Federal Republic of Germany v. Iceland), [1972] I.C.J. 30 (orders granting interim protection).

80. [1957] I.C.J. 105, 117 (order denying interim measures) (Lauterpacht, J., concurring).

81. Fisheries Jurisdiction Case (United Kingdom v. Iceland), [1972] I.C.J. 12, 15-16 (order granting interim protection).

Thus, *Fisheries Jurisdiction* marks the point at which the Court moved to the use of a positive test—that of prima facie evidence of a basis on which jurisdiction might be found—in determining whether incidental jurisdiction exists. In all subsequent decisions, the Court has applied the positive test in generally the same terms as appeared in *Fisheries Jurisdiction*. As a result, the *prima facie* possibility test has become, in the words of Judge Singh, "not only the latest but also the settled jurisprudence of the Court on the subject."[82] At the same time, majority opinions, regardless of the test applied, have invariably provoked dissent from those who favor a fuller investigation into the Court's substantive jurisdiction before the examination of grounds for provisional protection.[83] Judges Winiarski and Badawi Pasha, for instance, in their *Anglo-Iranian Oil Co.* dissenting opinion, took the position that the Court "ought not to indicate interim measures of protection unless its competence . . . appears . . . to be . . . reasonably probable."[84] Judge Forster, in his *Nuclear Tests* dissent, went even further, stating that he would require that substantive jurisdiction be established with "absolute certainty" at the interim stage.[85]

In only one case prior to *United States Diplomatic and Consular Staff* did the Court's interim order produce something like a unanimous vote. This was in *Aegean Sea Continental Shelf* where all twelve titular judges participating in the proceedings voted to decline Greece's request for interim measures.[86] Even so, the vote was nonetheless characterized

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82. Nuclear Tests Case (Australia v. France), [1973] I.C.J. 99, 108-109 (Singh, J., concurring).

83. *See, e.g.*, Aegean Sea Continental Shelf Case (Greece v. Turkey), [1976] I.C.J. 3, 32 (order granting interim protection) (Tarazi, J., dissenting); Nuclear Tests Case (Australia v. France), [1973] I.C.J. 99, 113 (order granting interim protection) (Forster, J., dissenting), 123 (Gros, J., dissenting), 160 (Petren, J., dissenting); Fisheries Jurisdiction Case (United Kingdom v. Iceland), [1972] I.C.J. 12, 20 (order granting interim protection) (Nervo, J., dissenting); Anglo-Iranian Oil Co. Case (United Kingdom v. Iran), [1951] I.C.J. 89, 96 (order granting interim measures) (Winiarski, J. and Badawi Pasha, J., dissenting).

84. [1951] I.C.J. 89, 96-97 (order granting interim measures) (Winiarski, J. and Badawi Pasha, J., dissenting).

85. [1973] I.C.J. 99, 113 (order granting interim protection) (Forster, J., dissenting). Judge Forster's opinion, however, included the following qualification which seems to imply that the "absolute certainty" test was suggested for cases where there are obstacles to the Court's taking jurisdiction to determine the merits. He stated as follows: "The Order made this day is an incursion into a French sector of activity placed strictly out of bounds by the third reservation of 16 May 1966. To cross the line into that sector, the Court required no mere probability but absolute certainty of possessing jurisdiction." *Id.*

The third reservation referred to in Judge Forster's opinion was one excluding from the Court's compulsory jurisdiction all matters relating to "national defense." The French Government contended that the subject matter of the applications—the legality of atmopheric nuclear tests—fell under the "national defense" reservation. *See generally* Lacharriere, *Commentaires sur la Position Juridique de la France à l'Egard de la Licéité de ses Expériences Nucléaires*, 19 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 235 (1973).

86. (Greece v. Turkey), [1976] I.C.J. 3 (order denying interim protection). The sole dissenting opinion was filed by the ad hoc judge appointed by Greece under the Statute of the International Court of Justice, article 31(2).

by serious differences among the judges as to jurisdictional and other questions. Of the twelve judges participating, eight concurred specially in six separate opinions, one of which—that of Judge Morozov—endorsed the "absolute certainty" test[87] which had been articulated by Judge Forster in his dissenting opinion in *Nuclear Tests*.[88] Set against this background, the Court's unanimity at the interim stage of the hostage case was remarkable: not only did all fifteen judges vote in favor of provisional measures, but none filed separate opinions, a record all the more impressive because the bench included such erstwhile dissenters as Judges Forster and Morozov.

In spite of the adherence of these former dissenters, the interim order appears not to have resolved the question of the Court's incidental jurisdiction. Rather, the language of the opinion indicates the continued coexistence of the two views concerning the requisite degree of certainty that the Court has substantive jurisdiction. After reiterating the usual pronouncement that "on the request for provisional measures . . . the Court ought to indicate such measures only if the provisions invoked by the Applicant appear, *prima facie*, to afford a basis on which the jurisdiction of the Court might be founded,"[89] the order indicated that at least two of the provisions invoked by the United States provided "in the clearest manner" for the Court's compulsory jurisdiction[90] and that it was "manifest" that the terms of these provisions furnished "a basis on which the jurisdiction of the Court might be founded . . . ."[91] This language leaves little doubt that, from an early stage in the proceedings, the balance of the probabilities weighed heavily in favor of the Court's taking jurisdiction, and, consequently, in the interest of achieving unanimity, the interim order was couched in terms that accommodated not only the prima facie possibility test, but also the more stringent requirements posited by Judges Forster and Morozov in their former opinions.

B. *Substantive Jurisdiction*

Pronouncements on incidental and substantive jurisdiction often overlap, and this case was no exception. In the following paragraphs, relevant portions of the interim and merit opinions are considered together for the purpose of reconstructing the Court's findings on the subject. In rendering its decision, the Court based its substantive jurisdiction on three of the four treaties cited in the U.S. memorial:[92] the two Protocols attached to the Diplomatic and Consular Relations Conventions[93] and the

87. [1976] I.C.J. at 21 (Morozov, J., concurring).

88. [1973] I.C.J. at 113 (Forster, J., dissenting).

89. [1979] I.C.J. at 13, para. 15.

90. *Id.* at 14, para. 17.

91. *Id.* para. 18.

92. Memorial of the United States, United States Diplomatic and Consular Staff in Tehran, I.C.J. Pleadings 1 (1980).

93. Vienna Convention on Diplomatic Relations Optional Protocol Concerning the Compulsory Settlement of Disputes, Apr. 18, 1961, 23 U.S.T. 3374, T.I.A.S. No. 7502; Vi-

1955 Treaty of Amity between Iran and the United States.[94]

There was never any doubt that articles one in each of the two Protocols appended to the Vienna Conventions[95] conferred jurisdiction on the Court. In identical terms, these articles provide that disputes about the interpretation and application of each convention "shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any Party to the dispute being a Party to the present protocol."[96] After satisfying itself that both Iran and the United States had acceded to the Optional Protocols,[97] the bench concluded that articles one of each of the two Protocols furnished a basis "on which the jurisdiction of the Court might be founded" with respect to all but two of the hostages.[98]

In support of the Court's jurisdiction to hear the claims involving its two private nationals, the United States invoked the Treaty of Amity[99] between itself and the respondent. This treaty obligates each party to ensure that within its territory, the nationals of the other party receive "the most constant protection and security,"[100] and that any dispute regarding the interpretation and application of the treaty "not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice."[101]

Thus, unlike the jurisdictional clause in the Protocols to the Vienna Conventions,[102] the provision in the Treaty of Amity for the submission of disputes to the I.C.J.[103] does not create in express terms a unilateral right to take a dispute to the Court. Nevertheless, the United States contended that it had been the intention of the negotiating parties to create, just as analogous clauses in other amity and establishment treaties generally do, a right of unilateral recourse.[104] The bench accepted this interpre-

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enna Convention on Consular Relations Optional Protocol Concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, 21 U.S.T. 325, T.I.A.S. No. 6820 [hereinafter cited as Protocols to the Vienna Conventions].

94. Note 4 *supra*.

95. Note 93 *supra*.

96. *Id.*

97. [1979] I.C.J. at 13-14, para. 16.

98. *Id.* at 14, para. 18.

99. Treaty of Amity, note 4 *supra*.

100. *Id.* art. II, para. 4.

101. *Id.* art. XXI, para. 2.

102. Protocols to the Vienna Conventions, note 93 *supra*.

103. Treaty of Amity, art. XXI, para. 2, note 4 *supra*.

104. The United States also contended that, while the Treaty of Amity provides that disputes "not satisfactorily adjusted by diplomacy" be taken to the Court, Iran's persistently negative attitude toward negotiation in the hostage case made it "indisputable that under the treaty of amity," the case was properly before the Court. Oral Argument by the United States (U.S. Agent Roberts Owen), United States Diplomatic and Consular Staff in Tehran, [1980] I.C.J. 3, *reprinted in* 80 DEP'T STATE BULL. 40, 45 (Feb. 1980). The Court majority accepted the U.S. contention, noting "the refusal of the Iranian Government to enter into any discussion of the matter." [1980] I.C.J. at 27, para. 51.

tation in the merit judgment;[105] for purposes of the interim order, however, it was satisfied that the Protocols to the Vienna Conventions had sufficiently established the Court's jurisdiction to cover all U.S. claims including those related to the two private individuals.[106] The interim order reached this result with great subtlety of argument, pointing out that the acts against the private individuals had been committed in the embassy compound and as such came within the purview of the same jurisdictional clause which conferred authority on the Court to adjudicate disputes arising under the Vienna Conventions.[107] Thus, striking a blow for the promotion of international human rights, the Court went beyond the literal meaning of the Vienna Conventions to create rights for nondiplomats when found on internationally protected grounds.

The merit decision addressed the issue of the jurisdictional significance of the Treaty of Amity. The American Government contended that article XXI, paragraph 2 of the Treaty created a right of unilateral appeal to the International Court.[108] The Court had reserved its position on that question in the interim order,[109] but it agreed with the United States in its judgment on the merits. It observed, "Provisions drawn in similar terms are very common in bilateral treaties of amity or of establishment, and the intention of the parties in accepting such clauses is clearly to provide for such a right of unilateral recourse to the Court . . . ."[110] Two of the judges did not share the majority's endorsement of the U.S. views on the applicability of the Treaty of Amity, and that difference of opinion was one of the questions over which the unanimity which characterized the interim order broke down.[111] Judge Morozov faulted the Court's reliance on the Treaty of Amity as both unnecessary for the jurisdictional needs of the case—as shown by the Court itself in the interim order—and legally unsound.[112] The latter conclusion rested on the premise that, being indisputably consensual, the jurisdiction of the Court cannot be inferred unless expressly provided for by the parties in prior or *ad hoc* agreements.[113] Moreover, both Judges Morozov and Tarazi invoked the unilateral measures taken by the United States against Iran to conclude that the applicant had forfeited the right to rely on the Treaty of

105. [1980] I.C.J. at 27, para. 52.

106. [1979] I.C.J. at 14, para. 19.

107. *Id.*

108. *See* text accompanying note 104 *supra.*

109. [1979] I.C.J. at 14-15, para. 21.

110. [1980] I.C.J. at 27, para. 52. Given the common use of clauses analagous to art. XXI, para. 2 in the Treaty of Amity, note 4 *supra*, the Court's consecration of the right of unilateral application amounts to a considerable widening of its potential jurisdictional base. The U.S. Memorial cited 17 treaties of establishment concluded by the United States since 1945 which contain jurisdictional provisions analogous to art. XXI, para. 2. Memorial by the United States, United States Diplomatic and Consular Staff in Tehran, I.C.J. Pleadings 1, 72-73 (1980).

111. [1980] I.C.J. at 51, 58 (Morozov, J., and Tarazi, J., dissenting).

112. *Id.* at 51-52, para. 3 (Morozov, J., dissenting).

113. *Id.* at 52.

Amity.[114]

Next, the Court addressed the question of the justiciability of the dispute, a question raised by Iran in its message of December 9, 1979. The objection is stated in the following passage, quoted at length here because the language indicates the perspective from which Iran viewed the hostage crisis:

> [The hostage] question only represents a marginal and secondary aspect of an overall problem, one such that it cannot be studied separately, and which involves, *inter alia*, more than 25 years of continual interference by the United States in the internal affairs of Iran, the shameless exploitation of our country, and numerous crimes perpetrated against the Iranian people, contrary to and in conflict with all international and humanitarian norms.
>
> The problem involved in the conflict between Iran and the United States is thus not one of the interpretation and the application of the treaties upon which the American Application is based, but results from an overall situation containing much more fundamental and more complex elements. Consequently, the Court cannot examine the American Application divorced from its proper context, namely the whole political dossier of the relations between Iran and the United States over the last 25 years. This dossier includes, *inter alia*, all the crimes perpetrated in Iran by the American Government, in particular the coup d'etat of 1953 stirred up and carried out by the CIA, the overthrow of the lawful national government of Dr. Mossadegh, the restoration of the Shah and of his regime which was under the control of American interests, and all the social, economic, cultural, and political consequences of the direct interventions in our internal affairs, as well as grave, flagrant and continuous violations of all international norms, committed by the United States in Iran.[115]

Its excessive rhetoric notwithstanding and even though only cryptically formulated, the above-quoted passage raised a serious question about the justiciability of the dispute. Iran's position, as appears from this passage, was that more fundamental principles of international and humanitarian laws which the United States allegedly violated in its relations with Iran over the twenty-five years previous overcame the U.S. claims. Implicit in Iran's objection was the position that a highly politicized dispute could not be separated from its politico-historical context.

The Court rejected Iran's objection with two arguments. In the interim order, it unanimously responded that the seizure of an embassy and

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114. *Id.* at 52, 65 (Morozov, J., and Tarazi, J., dissenting).

115. Letter of Dec. 9, 1979, note 23 *supra*. Iran's position in this message rests on a typical Third World premise encountered frequently in legal disputes arising from the decolonization process—namely, that legal claims must be assessed in their larger historical and political contexts to arrive at an equitable allocation of rights and responsibilities. *See generally* J. GAMBLE & D. FISCHER, THE INTERNATIONAL COURT OF JUSTICE 23 (1976); S. ROSENNE, LAW AND PRACTICE OF THE INTERNATIONAL COURT 103 (1965); Anand, *Attitude of the Asian-African States Toward Certain Problems of International Law*, 15 INT'L & COMP. L.Q. 55 (1966).

its internationally protected staff "cannot . . . be regarded as something 'secondary' or 'marginal', having regard to the importance of the legal principles involved . . . ."[116] To this, the Court majority added a second argument in its merit decision, to wit:

> [N]ever has the view been put forward before that, because a legal dispute submitted to the Court is only one aspect of a political dispute, the Court should decline to resolve for the parties the legal questions at issue between them. Nor can any basis for such a view of the Court's functions or jurisdiction be found in the Charter or the Statute of the Court . . . .[117]

In its first response to Iran's objection to the justiciability of the dispute, the Court missed a subtle but critical element in Iran's reasoning: that reasoning did not imply, as the Court seemed to assume, that the hostage issue was "secondary" or "marginal" in itself; rather, it described the issue as a secondary and marginal aspect of the "overall problem" of Iran's grievances against the United States. Nonetheless, the Court's second response deserves particular attention as it confirms and expands an important point of its *Aegean Sea Continental Shelf* jurisprudence. In that case, the Court held that a dispute with "*some political element*"[118] is neverthless justiciable when "it is manifest that legal rights lie at the root of the dispute."[119] (Emphasis added.) In the present case, the majority went beyond *Aegean Sea Continental Shelf* by holding justiciable legal claims which are "*only one aspect* of a political dispute."[120] (Emphasis added.)

IV. THE SEPARATION OF JUDICIAL AND POLITICAL POWERS IN THE LAW OF THE UNITED NATIONS

In terms of the law of the United Nations, the most interesting feature of the hostage case is that it was brought simultaneously before the Security Council and the International Court.[121] This parallel pursuit of political and judicial remedies in turn led the Court to address the question of the separation of powers between the Court and the Security Council—a matter of central importance in the workings of the United Nations and one which had been left unclear after the *Aegean Sea Continental Shelf* case.[122] Because the Court went opposite ways on similar facts in *Aegean Sea* and *United States Diplomatic and Consular Staff*,[123] this section discusses both cases and concludes with suggestions as to the meaning of *United States Diplomatic and Consular Staff* for the law on

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116. [1979] I.C.J. at 15, para. 23.
117. [1980] I.C.J. at 20, para. 37.
118. [1978] I.C.J. at 13.
119. *Id.*
120. [1980] I.C.J. at 20, para. 37.
121. *See* U.N. CHRON., Jan. 1980, at 5.
122. Aegean Sea Continental Shelf Case (Greece v. Turkey), [1976] I.C.J. 3 (order denying interim protection).
123. [1980] I.C.J. at 21-22, para. 40.

concurrent jurisdiction between political and judicial organs of the United Nations.

While it is beyond the scope of this article to offer an indepth examination of the actions and proceedings of the Security Council in connection with the hostage crisis, a brief review of the activities of the Council will help pinpoint the parallels and differences between the present case and *Aegean Sea Continental Shelf*. As noted above, shortly after the embassy takeover, the U.S. Government reported the incident to the Security Council and requested that it undertake deliberations as to what might be done to resolve the crisis.[124] Following this initiative, the U.N. Secretary-General, Kurt Waldheim, urgently requested the Security Council to act on the Iran hostage situation which he described as posing a serious threat to international peace and security.[125] This request came on November 29, 1979, only four days after the United States submitted its application and request for interim measures to the Court. The Council convened on November 29 and December 4, and on the latter date it unanimously passed resolution 457, calling on Iran to free the embassy personnel immediately, to provide them with protection, and to allow them to leave the country.[126] The resolution called on the parties to take steps to resolve by peaceful means the remaining issues between them and instructed Secretary-General Waldheim to lend his good offices for achieving the object of the resolution and report to the Council of his efforts.[127] In the meantime, the Council was to "remain actively seized of the matter."[128]

The Security Council met again on December 31, 1979—sixteen days after the Court handed down its interim order—and adopted a second resolution in which it reiterated the content of resolution 457 and once again instructed the Secretary-General to lend his good offices to bring about a peaceful resolution of the crisis.[129] Acting on this instruction, Secretary-General Waldheim visited Tehran January 1-3, 1980, and on February 20, in agreement with the Governments of the United States and Iran, set up a Commission of Inquiry to undertake a fact-finding mission in Tehran, to hear Iran's grievances against the United States and to seek an early solution to the crisis.[130] The Commission went to Tehran, held

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124. For a review of U.N. action on the hostage issue, see U.N. CHRON., Mar. 1980, at 17.

125. Letter from Secretary-General Waldheim to the Security Council Pres. (Nov. 25, 1979). 34 U.N. SCOR, U.N. Doc. S/13646 (1979).

126. S.C. Res. 457, 34 U.N. SCOR, Supp. (Res. & Dec.) _, U.N. Doc. S/Res/457 (1979), *reprinted in* U.N. CHRON., Jan. 1980, at 13.

127. *Id.*

128. *Id.*

129. S.C. Res. 461, 34 U.N. SCOR, Supp. (Res. & Dec.), U.N. Doc. S/Res/461 (1979), *reprinted in* U.N. CHRON., Mar. 1980, at 26.

130. The Commission was composed of Andres Aguilar (Venezuela), Mohamed Bedjaoui (Algeria), N.W. Jayewardene (Sri Lanka), Louis-Edmond Pettiti (France), and Adib Daoudy (Syria). U.N. CHRON., Apr. 1980, at 16.

several meetings with the Iranian authorities, but under the political conditions prevailing in Iran, was unable to meet the hostages as had been promised.[131] On March 10, it suspended its activities, announcing however that it was prepared to return to Tehran when conditions changed in order to complete its mandate.[132]

The United Nations' political involvement in the crisis raised questions about the impact such proceedings would have on the Court's handling of the U.S. application and interim request in light of the denial of provisional measures in *Aegean Sea Continental Shelf*. That case arose from competing claims by Greece and Turkey to the continental shelf of the sea separating the two countries. Greece brought the case before the International Court and the Security Council in parallel actions.[133] In the proceedings before the Court, the Greek Government requested that the Court order both parties to refrain from all exploration activity and scientific research in the continental shelf areas and to refrain from actions which might endanger their peaceful relations.[134] The Court declined this request on the ground that, the Security Council having met on the issue with the participation of the representatives of Greece and Turkey and having urged the parties to do anything in their power to reduce tensions in the area, it was inappropriate for the Court to duplicate the recommendation of the Council.[135] The Court went on to observe that "both Greece and Turkey . . . have expressly recognized the responsibility of the Security Council for the maintenance of international peace and security" and that "it is not to be presumed that either State will fail to heed the recommendation of the Security Council . . . ."[136]

Thus, *Aegean Sea Continental Shelf* raised the important constitutional question of concurrent jurisdiction between the political and judicial organs of the United Nations, or, more specifically, whether the pursuit of parallel political action in a policy-making organ inhibits the Court from ruling on issues submitted for adjudication. The tenor of the decision lends itself to the interpretation that the Court was giving application to the rule *electa una via*,[137] perhaps not as a general principle of the

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131. *Id.*, May 1980, at 5.

132. *Id.*

133. *See generally* Gross, note 8 *supra*.

134. [1976] I.C.J. at 4-5, para. 2.

135. *Id.* at 13, paras. 41-42.

136. *Id.* para. 41.

137. Under *electa una via*, a state must exhaust the procedure of settlement already selected. Applied to *United States Diplomatic and Consular Staff*, it would have required the exhaustion of the political remedies through the Security Council and allowed resort to another mechanism or forum only in case of failure. That the Court's decision in *Aegean Sea Continental Shelf* may be interpreted as an application of the rule *electa una via* is suggested by Coussirat-Coustere, *Indication de Mesures Conservatoires dans l'Affaire de Personnel Diplomatique et Consulaire des Etats-Unis à Téhéran*, 25 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 297, 300 (1979). For a general discussion of the doctrines of litispendence and *electa una via* in the context of the law of the United Nations, see Ciobanu, *Litispendence Between the International Court of Justice and the Political Organs of the*

law of the United Nations, but at least as a matter of self-restraint practiced by the Court with a view to preventing conflicting resolutions of the same issue by two or more organs of the World Organization. At the same time, this judicial deference to the Security Council resolution provoked reservations from some judges who, even though supportive of closer integration of the Court in the U.N. system, nonetheless favor a more dynamic approach to its power assignment under the Charter. This position was set out with force and logic by Judge Lachs whose separate concurring opinion in *Aegean Sea Continental Shelf* merits quotation at length because, after *United States Diplomatic and Consular Staff*, it now reflects the official opinion of the Court.

> There are obviously some disputes which can be resolved only by negotiations, because there is no alternative in view of the character of the subject-matter involved and the measures envisaged. But there are many other disputes in which a combination of methods would facilitate their resolution. The frequently unorthodox nature of the problems facing States today requires as many tools to be used and as many avenues to be opened as possible, in order to resolve the intricate and frequently multi-dimensional issues involved. It is sometimes desirable to apply several methods at the same time or successively. Thus no incompatibility should be seen between the various instruments and fora to which States may resort, for all are mutually complementary. Notwithstanding the interdependence of issues, some may be isolated, given priority and their solution sought in a separate forum. In this way it may be possible to prevent the aggravation of a dispute, its degeneration into a conflict. Within this context, the role of the Court as an institution serving the peaceful resolution of disputes should, despite appearances, be of growing importance.[138]

In the case instituted by the United States against Iran, the parallels with the facts of *Aegean Sea Continental Shelf* were inescapable. Here too the Security Council had met and adopted, in advance of any action by the Court, a resolution which called for the very same thing that the United States request aimed to achieve, namely, the release and safe departure of the hostages. That the United States was concerned lest the *Aegean Sea Continental Shelf* holding adversely affect its case before the Court was clear from a statement by its U.N. representative following the Security Council's unanimous vote on resolution 457. In that statement, Mr. McHenry reminded his Council colleagues that their vote "was not intended to displace peaceful efforts in other organs of the United Nations," and further that "[n]either the United States nor any other member intended that the adoption of the resolution should have any prejudicial impact whatever on the request of the United States for the indication of provisional measures of protection by the ICJ."[139] In pro-

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United Nations, in THE FUTURE OF THE INTERNATIONAL COURT OF JUSTICE 209, 216 (L. Gross ed. 1976). *See also* S. ROSENNE, note 115 *supra*.

138. [1976] I.C.J. at 19, 20 (Lachs, J., concurring).

139. 34 U.N. SCOR (_ mtg.) 11, U.N. Doc. S/P.V. 2178 (1979).

ceedings before the Court, the U.S. Agent pursued the same line by first distinguishing the present case from *Aegean Sea Continental Shelf* on several grounds including Iran's persistent refusal to negotiate, and then reminding the Court that no disposition in any text governing its functions precluded the Court from adjudicating in accordance with international law such disputes as are properly brought before it.[140]

The interim order in *United States Diplomatic and Consular Staff* implicitly accepted the United States' position by indicating the measures requested, but without addressing the question of concurrent jurisdiction at all.[141] In the merit decision, however, the Court returned to the subject, and this time offered a reasoned presentation of its views regarding the relationship between I.C.J. proceedings and activities of other U.N. organs.[142] In summary, the basic proposition the Court sought to establish is that there is no constitutional obstacle to the exercise by the I.C.J. of its judicial functions with regard to a question which is pending before the Security Council or, by extension, before any other principal or subsidiary organ of the United Nations. To establish this, the judgment invoked article 12 of the Charter[143] which, while expressly forbidding the General Assembly from taking any action with regard to disputes or situations under consideration by the Security Council, puts no such restriction on the functions of the Court.[144] An illuminating passage in the decision states that "[i]t is for the Court, the principal judicial organ of the United Nations, to resolve any legal questions that may be in issue between parties to a dispute; and the resolution of such legal questions by the Court may be an important, and sometimes decisive, factor in promoting the peaceful settlement of a dispute."[145] The Court also pointed out that article 33 enumerates arbitration and judicial settlement together with the political processes of negotiation, inquiry, mediation, and conciliation as methods for the peaceful settlement of conflicts.[146] Following a detailed examination of events in the Security Council and the establishment of the Commission of Inquiry, the Court concluded that "neither the mandate given by the Security Council to the Secretary-Gen-

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140. Oral Argument by the United States, United States Diplomatic and Consular Staff in Tehran, [1980] I.C.J. 3, *reprinted in* 80 DEP'T STATE BULL. 40, 47-48 (Feb. 1980).

141. The order made only a brief reference to the Security Council action on the hostage issue, and that in a context unrelated to the issue under discussion here. [1979] I.C.J. at 15, para. 23.

142. [1980] I.C.J. at 20-24, paras. 39-44. This part of the judgment is all the more remarkable as it was included without the invitation of either party. It was as if the judges were looking for a way to set the record straight as to their place in the overall U.N. peacekeeping framework.

143. Article 12, paragraph 1 provides: "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."

144. [1980] I.C.J. at 21-22, para. 40.

145. *Id.* at 22, para. 40.

146. *Id.* at 23, para. 43.

eral in resolutions 457 and 451 of 1979, nor the setting up of the Commission by the Secretary-General, can be considered as constituting any obstacle to the exercise of the Court's jurisdiction . . . ."[147] Even though the Court did not discuss it, indirect support for its holding can be drawn from the practice of the political organs themselves, which, while in some cases finding it unwise to take action on an issue which is before the Court, have never acknowledged the principle of unity of proceedings as a binding rule in the law of the United Nations.[148]

United States Diplomatic and Consular Staff therefore suggests a division of functional responsibilities between the Court and other U.N. organs, one that does not preclude, or indeed may even dictate, the simultaneous application of political and legal methods to the resolution of inter-state disputes. This dynamic view of the Court's power assignment is, however, balanced in the merit judgment by two unstated but implicit qualifications. First, the tenor of the decision suggests that, even though entitled to the independent exercise of its judicial functions, the Court nevertheless would exercise self-restraint if it is shown that its activities might obstruct the political organs. Thus, the Court would have at least postponed its proceedings had it been given to understand that their continuance would impede the efforts of the Security Council, the Secretary-General, or the Commission of Inquiry.[149] The judges went out of their way to show that neither the Government of Iran, nor that of the United States,[150] nor any spokesman for the United Nations had suggested that the Court's proceedings might be affected by the existence of the Commission of Inquiry or by the mandate given to the Secretary-General.[151]

A second qualification implicit in the decision is that Court proceedings might be affected by the decision of a political organ to set up an adjudicative or quasi-adjudicative body with respect to the dispute under

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147. *Id.* at 23-24, para. 44.

148. *See* S. ROSENNE, *supra* note 115, at 226. In *Aegean Sea Continental Shelf*, the fact that the legal aspects of the dispute had been submitted to the Court was well known to the Security Council but did not prevent it from passing a resolution on the matter. *See* text accompanying notes 135, 136 *supra*. The Government of South Africa raised the objection of *sub judice* in the General Assembly debate in connection with the *South West Africa Cases* but without success. Gross, *supra* note 8, at 37.

149. This conclusion is based on the language and tone of the Court's opinion in paragraphs 40, 41, and 42. [1980] I.C.J. at 21-22. *See, e.g.*, note 150 *infra*.

150. The Court noted that, at one point in the proceedings, the U.S. Government requested that the Court defer setting a date for the opening of oral argument. In making the request, the U.S. agent invoked the delicate stage of negotiations then pending on the release of the hostages. The following day, February 20, 1980, the U.N. Commission was established. Responding to an invitation to clarify the U.S. position as regards the future proceedings, the U.S. agent advised the Court on February 27 that the Commission would not address itself to the legal claims of the United States and that his government was anxious to secure an early judgment on the merits. The United States suggested March 1 for the opening of the oral proceedings, but still reserved the right to request a postponement if the circumstances warranted. [1980] I.C.J. at 22, para. 41.

151. *Id.* at 22-23, para. 42.

consideration. Had the Secretary-General, in fulfilling the mission given him by the Security Council, opted to set up a tribunal instead of a non-adjudicative commission to examine the matter of law in dispute between Iran and the United States, *United States Diplomatic and Consular Staff* may not have been decided as it was. In its opinion, the Court observed that the Commission of Inquiry "was not set up by the Secretary-General as a tribunal empowered to decide the matters of fact or of law in dispute between Iran and the United States; nor was its setting up accepted by them on any such basis."[152] In exactly what way the appointment of a tribunal would have affected the Court proceedings is not clear. The Court's observations nonetheless indicate that it acknowledges that, while the principal judicial organ of the United Nations, it does not have a monopoly on the adjudicative processes contemplated under article 33 of the Charter.

V. THE MERIT DECISION

To determine the existence and nature of Iran's liability, the Court took a two-step approach to the facts, examining first the extent to which the acts in question were imputable to the Government of Iran, and second, the status of those acts under applicable treaty and general international law provisions.[153] It found Iran guilty of acts of omission and commission: in the initial phase, by failing to protect the embassy and its staff,[154] and, in the second phase, by endorsing the continued occupation of the embassy and detention of the hostages.[155] Repeated endorsements of the militants by official organs of the Iranian State fundamentally transformed the legal nature of the hostage situation. "The militants," the Court concluded, "had now become agents of the Iranian State for whose acts the State itself was internationally responsible."[156]

The bench was unanimous in upholding the American claim that the acts thus attributable to Iran were incompatible with the norms of customary international law as codified in the 1961 and 1963 Vienna Conventions. Particularly, Iran had violated its obligations, laid down in identical terms in the two conventions, to protect the diplomatic and consular premises, archives, and other documents,[157] to ensure respect for the free-

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152. *Id.* at 23, para. 43.

153. *Id.* at 28-29, para. 56.

154. The Court concluded that the militants' attack on the embassy had an "initially independent and unofficial character." *Id.* at 30, para. 59. This, however, did not absolve Iran of responsibility in regard to the attack. Iran, the Court observed, failed to carry out its obligations under the Diplomatic and Consular Relations Conventions, note 3 *supra*, "to take appropriate steps to ensure the protection" of the embassy, its staff, and archives. [1980] I.C.J. at 30, para. 61.

155. *Id.* at 33-37, paras. 71-78.

156. *Id.* at 35, para. 74.

157. Articles 22 and 24 of the Diplomatic Relations Convention, note 3 *supra*, proclaim the inviolability of the premises and archives of a diplomatic mission. Analogous provisions are found in articles 31(3) and 33 of the 1963 Consular Relations Convention, note 3 *supra*,

dom and dignity of the embassy personnel,[158] and to allow them full facilities and protection for the performance of their official functions.[159] Likewise, Iran had defaulted on its obligation under the Treaty of Amity to afford protection within its territory to U.S. private nationals.[160] In light of these findings, the merit decision unanimously renewed the earlier call for the release and safe departure of the hostages and the restoration of the embassy compound to U.S. possession.[161] Once again the Iranian authorities were warned against subjecting the detained diplomats and consular agents to any form of judicial proceedings.[162]

The Court's unanimity broke down when it came time to assess the legal consequences of the violations set out in the judgment. Still, there was a large majority to uphold most of the remaining U.S. claims: the judges voted thirteen to two that Iran had incurred responsibility vis-à-vis the United States[163] and twelve to three that it owed reparations to the U.S. Government.[164] The Court did not rule on the U.S. request for the prosecution of the militants.

The implicit but major point of disagreement between the majority and dissenting judges was whether Iranian assertions regarding the alleged pattern of indirect U.S. aggression against Iran had legal validity and, if so, whether these assertions could be considered in assessing the blame of one side or the other. Iran's communications to the Court[165] cited various U.S. acts going back to and including alleged CIA complicity in the events of 1953 as overriding the U.S. claims.[166] In a passage remarkable for its adherence to the strict rules of judicial procedure, the Court majority rejected these charges, first, as unsupported by evidence owing chiefly to Iran's failure to plead its case,[167] and second, as irrele-

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regarding consular premises and archives.

158. Article 29 of the Diplomatic Relations Convention, note 3 *supra*, provides as follows: "The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving state shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom, and dignity." For consular officers, article 40 of the Consular Relations Convention, note 3 *supra*, provides as follows: "The receiving state shall treat consular officers with due respect and shall take all appropriate steps to prevent any attack on their person, freedom, or dignity," but article 41(a), while exempting consular officers from liability to "arrest or detention," provides that such exemption does not apply "in the case of a grave crime and pursuant to a decision by the competent judicial authority."

159. Article 25 of the Diplomatic Relations Convention, note 3 *supra*, and article 28 of the Consular Relations Convetion, note 3 *supra*, obligate the receiving state to "accord full facilities for the performance of," respectively, "the functions of the [diplomatic] mission" and "the consular post."

160. Treaty of Amity, art. II, para. 4, note 4 *supra*.

161. [1980] I.C.J. 3, 44-45, para. 3.

162. *Id.* at 45, para. 4.

163. *Id.* at 44, para. 2 (Morozov, J., and Tarazi, J., dissenting).

164. *Id.* at 45, para. 6 (Lachs, J., Morozov, J., and Tarazi, J., dissenting).

165. See text accompanying notes 23 & 24 *supra*.

166. *Id.*

167. [1980] I.C.J. at 38, para. 82.

vant to the merits even if established with requisite proof.[168] To defend this second proposition, the majority appealed to what it called the "self-contained"[169] character of the rules of diplomatic law, which, in the majority's description, balances the obligations imposed on the receiving state with "efficacious"[170] means of defense against illicit actions by diplomatic and consular agents. These means include, first, the privilege accorded to the receiving state to declare any member of a diplomatic mission *persona non grata* and secure that person's recall,[171] and second, the more radical remedy of breaking diplomatic relations with the offending state.[172] Having failed to resort to remedies afforded by diplomatic law for dealing with alleged U.S. activities, Iran could not cite those activities to justify its conduct or mitigate its responsibilities.[173]

Judges Morozov and Tarazi, by contrast, acknowledged the validity of Iran's allegations and concluded that they must be brought to bear on the final assessment of the parties' contending claims.[174] Iran's liabilities, in the words of Judge Tarazi, were "relative," not "absolute."[175] It was chiefly for this reason that both judges voted to dissent from the majority finding that Iran owed reparations to the United States.

VI. JUSITICIABILITY OF POLITICIZED DISPUTES: THE BROADER IMPLICATIONS OF THE CASE

That *United States Diplomatic and Consular Staff* made important contributions to the international law-making process has been amply demonstrated in the preceding pages. In addition to these contributions, there is yet another respect in which the case is likely to stand out as a landmark in the annals of the International Court. Since its founding, the Court has remained on the periphery of the major international problems.[176] With one possible exception,[177] no major order-threatening

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168. *Id.* para. 83.

169. *Id.* at 40, para. 86.

170. *Id.* at 40-41, para. 87.

171. Under article 9(1) of the Diplomatic Relations Convention, note 3 *supra*,

> The receiving State may at any time and without having to explain its decision, notify the sending State that the head of the mission or any member of the diplomatic staff of the mission is *persona non grata* . . . . In any such case, the sending State shall, as appropriate, either recall the person concerned or terminate his functions with the mission.

172. [1980] I.C.J. at 39-40, para. 85.

173. *Id.* at 40-41, paras. 87 & 89.

174. *Id.* at 52 (Morozov, J., dissenting), and 59 (Tarazi, J., dissenting).

175. *Id.* at 61 (Tarazi, J., dissenting).

176. *See generally* J. GAMBLE & D. FISCHER, note 115 *supra*.

177. South West Africa Cases, [1966] I.C.J. 6. These cases dealt with the status of Namibia. South Africa failed to comply with the Court's advisory opinions which recognized the United Nations as the successor to the League of Nations in the supervision of the surviving League mandates. Ethiopia and Liberia then filed separate proceedings with the object of transforming the advisory opinions into binding decisions. The Court was thus invited to rule on a major international issue. However, it dismissed the actions on the narrow procedural ground that the applicants lacked sufficient legal interest to file a claim. *See*

issue arising from the Cold War or the decolonization process—the two major axes of conflict in post-War politics—was brought to the Court for adjudication. Against this background, the hostage case is an exception to the trend: in it the Court was invited to rule on one of the most complicated, politicized, tension-laden cases in the post-War period. Accepting the challenge, the Court reaffirmed the justiciability of politicized disputes and suggested that the range of justiciable disputes is even broader than the range suggested by the language on that question in *Aegean Sea Continental Shelf*.[178]

Such disputes, however, confront a court of law with the problem of deciding whether and to what extent judicial inquiry can be extended to include the history or the nonlegal, usually political, aspects of the case. Faced with this question, the Court majority came down squarely on the side of narrowly defined, conservative notions of justiciability—hence, its terse dismissal of all Iranian charges against U.S. diplomacy as either unrelated to the issues before the Court or only vaguely defined and therefore unsubstantiated.

The possible reasons for the Court's decision in this regard are varied. To be sure, Iran's absence from the proceedings made it difficult for its claims to be articulated with requisite precision and proof. Perhaps too, considerations of judicial strategy played a role in influencing the majority's choice of justiciable issues: faced with an action that struck at one of the foundations of the international public order, the judges may have felt the need to define in the most uncompromising terms the overriding character of the norms being violated. Any manifestation of judicial sympathy for Iran's long-standing political grievances, the judges may have felt, would only dilute what was intended to appear as an emphatic and unambiguous defense of the institutions governing the conduct of inter-state relations. Finally, considerations of judicial strategy aside, there was solid theroretical grounding for the Court's reluctance to extend the range of inquiry into the history and politics of the case—namely, the traditional notion that the judiciary must shun involvement in essentially political activities. According to this view, politicized disputes are justiciable, but only to the extent that they involve legal issues which must be separated from their context and adjudicated through impartially administered rules of international law.

Whatever the practical or theoretical merits of the majority's methodological choice, it is arguable that, since it was characterized by a narrow framing of relevant issues, the majority's approach was less than commensurate with the challenge presented by politicized disputes which occur in the context of North-South politics.[179] Such disputes often in-

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R. FALK, THE STATUS OF LAW IN INTERNATIONAL SOCIETY 378 (1970).

178. *See* text accompanying notes 118-120 *supra*.

179. The term "North-South" is used to describe relations between developing and developed, *i.e.*, Western countries.

volve deep-seated, long-standing grievances, and it is difficult to see how the international adjudicatory machinery can resolve them equitably unless it applies a wide enough framework of judicial appraisal to accommodate the claims arising from the historical antecedents or even from the politics of the case. This point was implicit in Judge Tarazi's dissenting opinion in the present case. He wrote as follows:

> It has been argued that more [that is, delving more deeply into the history of U.S.-Iran relations] would mean examining deeds of a political nature which lay outside the framework of the Court's powers. But is it possible to ignore historical developments which have direct repercussions on legal conflicts?[180]

Following Judge Tarazi's lead, this section examines the relevance of some of Iran's claims arising from the historical and political contexts of the hostage crisis. It inquires whether the majority's reluctance to allow the historical or political aspects of the case to affect its final determination impaired its ability to produce fair and effective results. Based on this analysis, the discussion then focuses on whether a historically based, less judicially inhibited framework of inquiry would be more suitable to the resolution of adversary claims in politicized North-South disputes.

A. *Iran's Historically Based Claims*

Undoubtedly, some Iranian charges against U.S. policies were exaggerated and, moreover, so vaguely framed that in Iran's absence from the proceedings, they remained unsubstantiated. Among these were Iranian charges related to "the social, economic, cultural, and political consequences of . . . [American] intervention in internal [Iranian] affairs"[181] or "flagrant and continuing violations of all international norms committed by the United States in Iran."[182]

On the other hand, the central and most far-reaching piece in the catalogue of Iranian allegations has been so amply documented by non-Iranian, notably American sources, as to have been easily verifiable through independently conducted Court inquiry.[183] The reference is to the events surrounding the 1953 coup in Iran that overthrew the lawfully elected and popular Mossadegh government and brought the Pahlavi dynasty back to the throne. Even though absent from the proceedings, in its written communications Iran charged the CIA with responsibility for the 1953 coup.[184] The issue was thus properly before the Court, and given the vast volume of information on the subject, the Court could have inquired

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180. [1980] I.C.J. at 60 (Tarazi, J., dissenting).

181. Letter of Dec. 9, 1979, note 23 *supra*.

182. *Id.*

183. *See* R. COTTAM, NATIONALISM IN IRAN 332 (2d rev. ed. 1979), described as the most reliable interpreter of Iranian political developments by Falk in *Editorial Comment*, 74 AM. J. INT'L L. 411, 411 (1980). For an account by a participant in the 1953 events, see K. ROOSEVELT, COUNTERCOUP: THE STRUGGLE FOR THE CONTROL OF IRAN (1979).

184. Letter of Dec. 9, 1979, note 23 *supra*.

on its own initiative into the truth of the Iranian assertions. Authorization for such inquiry could be found in article 53 of the Court's Statute which grants the judges wide powers of investigation into the facts and law of cases where a party fails to go through Court proceedings.[185]

There is nothing in the language of the Court's merit decision that indicates why the Court chose to disregard Iran's 1953-based allegations. It is arguable, however, that, as Judge Tarazi intimated in the above-quoted passage,[186] the majority's disregard, and thus implied dismissal of these allegations, stemmed partly from a methodological choice—that is, from its choice of a narrow time frame for selecting legally relevant issues, which led it to exclude the issues related to the historical antecedents of the case. Yet, Iran's allegations regarding the U.S. role in the overthrow of the Mossadegh government raised questions related not only to the application of diplomatic law, but also to the central issue before the Court: if established, Iran's allegations would have shown that the United States had derogated in 1953 from the same body of legal rules as it now invoked to condemn the lawlessness of Iran's course of action during the hostage crisis.

Iran's assertions charged that in 1953 the United States had used its embassy as a staging ground for a CIA coup that overthrew the constitutional government of the country. Such conduct, if proven, would derogate from the Diplomatic and Consular Relations Conventions,[187] which simply codified the pre-existing customary law and which impose a duty on diplomats and consular agents not to interfere in the internal affairs of the receiving state or use the protected grounds in any manner incompatible with their mission.[188]

The principle of reciprocity is fundamental to the diplomatic system. It means that the receiving state respects the inviolability of diplomatic missions and assumes responsibility for their protection, while the sending state obligates itself to ensure that its diplomats do not interfere in the internal affairs of the receiving country. To be sure, interference is a flexible and relative notion and minor measures of it may be deemed harmless and tolerable, just as minor violations of diplomatic immunity sometimes go unnoticed or are overlooked. But Iran's assertions against the United States raised a serious charge, pointing to acts that dislodged a legally constituted government and subjected the country to a long pe-

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185. Article 53 of the I.C.J. Statute mandates that in case of nonappearance of a party, the Court must satisfy itself that "the claim is well founded in fact and law." In his dissenting opinion, Judge Tarazi noted as follows: "In spite, and perhaps because, of the absence of the Government of Iran from the proceedings, it behoved the Court to elucidate this particular point [the respondent's claim concerning post-1953 U.S. involvement in Iran's internal affairs] before pronouncing on the responsibility of the Iranian State." [1980] I.C.J. at 60 (Tarazi, J., dissenting).

186. *See* text accompanying note 180 *supra*.

187. Note 3 *supra*.

188. Diplomatic Relations Convention, art. 41(1) and (3), note 3 *supra*; Consular Relations Convention, art. 55(1) and (2), note 3 *supra*. *See* [1980] I.C.J. at 38, para. 84.

riod of dictatorial, often brutal rule. That Iran in 1979-80 had failed to live up to its obligations under the Diplomatic and Consular Relations Conventions was readily acknowledged by both the majority and dissenting judges. But the majority's condemnation of Iran's culpability without inquiry into the U.S. role in the events of 1953 could only raise serious questions about the ability of the international adjudicatory process to deliver equal justice.

The Court majority's choice of a narrow time frame in selecting justiciable questions also accounts for a major flaw in a central point in its opinion, namely, its interpretation of diplomatic law as constituting a "self-contained regime."[189] The regime was so described, it will be recalled, in the sense of carrying within itself "efficacious" means of defense available to the receiving state against illicit activities by diplomats and consular agents. The means of defense consist of expulsion of the offending agents or the severance of diplomatic ties with the rule-breaking state. From this the Court majority concluded that the proper remedy "for dealing with [U.S.] activities of the kind of which [Iran] now complains" were available within the diplomatic system.[190] It added that "Iran did not have recourse to the normal and efficacious means at its disposal, but resorted to coercive action against the United States Embassy and its staff."[191]

The Court's description of diplomatic law as "self-contained" has practical validity if the U.S. activities of which Iran complained were committed after the collapse of the Shah's regime—February 1979—that is, in the period when Iran had a genuine option to exercise the means of defense supplied by the rules of diplomatic law. But the language of Iran's communications to the Court made it clear that its assertions against the United States related to actions undertaken prior to the fall of the Shah, most notably actions during the events of 1953.[192] Since expulsion of diplomatic personnel as undesirable or severance of diplomatic relations or both are more appropriate responses to immediate situations, the diplomatic system provided less than adequate means by which Iran could frame its response. Once the 1953 coup was complete, the only authority internationally competent to bring the diplomatic means of defense into operation was the Shah's government itself; is it realistic to expect that a government put in place through a foreign-sponsored coup would call to account the coup-sponsoring power for the very acts that put the client government in power in the first place? If not, which seems to be the obvious answer, the opportunity for Iran to call the United States to account for alleged misdeeds committed in 1953 did not effectively arise until after the fall of the Shah. Under these circumstances, the denial of an effective hearing on Iranian claims on the

189. [1980] I.C.J. at 40, para. 86.
190. *Id.*
191. *Id.*
192. *See* Letter of Dec. 9, 1979, note 23 *supra*.

grounds—implicit in the majority opinion—that the Court could not consider the historical or political context, amounted, in effect, to a denial of justice.

The question of what the effect on the Court's findings would have been had it opted for a broader time frame to accommodate Iran's 1953-based claims is now in order. Had the Court established the truth of Iran's assertions, there are at least two possible results to consider. One was suggested by Judge Tarazi who, having unsuccessfully invited the bench to investigate Iran's allegations, conducted his own inquiry and concluded than Iran's "responsibility [in the hostage affair] ought to be qualified as relative and not absolute."[193] An alternative solution would have been for the Court to condemn Iran's delinquency in unqualified fashion as was done in the majority opinion, but couple this denunciation with parallel pronouncements regarding the U.S. offense against Iran in derogation of established diplomatic norms. In the latter case, the Court might have declared two separate breaches of international undertakings, each entailing a separate obligation to make reparations.

B. *Political Conditions*

In addition to the historically based claims, there are several conditions surrounding the hostage case that a less inhibited method of inquiry would cite as circumstances which would affect the nature and amount of reparations owed by Iran to the United States. Two such conditions are of particular importance and may be reviewed in brief. One was the admission of the Shah into the United States against warnings by the Iranian government—then headed by Bazargan, a moderate in the post-revolutionary spectrum—that such action may provoke hostile mob action against the U.S. embassy.[194]

In their dissenting opinions both Judges Morozov and Tarazi invoked the depth of Iranian feelings about the man as well as the history of U.S. dealings with him to conclude that the admission of the Shah constituted a provocative act that must enter into the assessment of the respective responsibilities of the two parties. To be sure, nothing in the established norms of international law would preclude a sovereign state from opening its borders to a former head of state or from refusing to extradite him in the absence of an extradition treaty, which, in any event, as normally drafted would not cover "political crimes."[195] So, as the Court majority assumed, the Carter Administration was technically within its rights as regards its dealings with the former Shah. Yet, there is a question whether a panel more sensitive to the equities of the case would not have regarded these aspects of U.S. relations with the former Shah as some-

193. [1980] I.C.J. at 60 (Tarazi, J., dissenting).

194. *See* Kifmer, *How a Sit-In Turned into a Siege*, N.Y. Times, May 10, 1981 (Magazine), at 54; Smith, *Why Carter Admitted the Shah*, *id.*, at 36.

195. *See* Bassiouni, *The Political Offense Exception in Extradition Law and Practice*, in INTERNATIONAL TERRORISM AND POLITICAL CRIMES 398 (C. Bassiouni ed. 1975).

thing more than, to quote judge Morozov's characterization of what the majority judgment suggests, "merely ordinary acts which just happened to give rise to a 'feeling of offense.' "[196]

The second condition which might have been considered in assessing the responsibilities of Iran and the United States toward one another has to do with the chaotic political situation in post-revolutionary Iran, a situation in fact approaching a state of anarchy. Generally speaking, international law looks at the state as a monolithic entity, disregarding for purposes of assessing rights and liabilities the peculiarities of its internal structure and decisional processes. Each state has a government to speak for its people in international fora, to accept obligations and press claims on their behalf. This model of inter-state relations is useful in normal times when there is a need for the Court to keep variables relevant to the determination of claims and responsibilities within manageable proportions. But a case can be made that under revolutionary conditions or in situations approaching anarchy, which seems an apt description of Iran in the post-revolutionary period, the internal circumstances of a defaulting state must be brought to bear on the final allocation of liabilities. Judge Tarazi touched on this essential point: in his view it was "unjust to lay all the facts complained of at the door of the Iranian government without subjecting the circumstances in which the acts took place to the least preliminary examination."[197] Instead, the Court majority uncritically accepted the information supplied by the United States and proceeded under the assumption that Iran enjoyed a coherent structure of power in the ordinary sense, when it was quite clear from the press and media reports—as indeed conceded by the Carter Administration itself in pronouncements not intended for the Court[198]—that this picture of a responsible government in control of Iranian administration and policy was wide off the mark.

The above paragraphs may be summarized as follows. The analysis in this section indicates that a wider framework of appraisal than the one used in the majority opinion is more likely to arrive at fair and equitable results for politicized disputes arising in the context of relations between developing and developed, *i.e.* Western states. Furthermore, the international adjudicatory process being essentially consensual—in the sense of

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196. [1980] I.C.J. at 57 (Morozov, J., dissenting).

197. *Id.* at 63 (Tarazi, J., dissenting).

198. *See, e.g., Hearings Before the Subcomm. on International Economic Policy and Trade and the Subcomm. on Europe and the Middle East of the House Comm. on Foreign Affairs*, 96th Cong., 2d Sess. (1980) (statement of Peter Constable). Then Deputy Assistant Secretary for Near Eastern and South Asian Affairs, Mr. Constable said,

> We are dealing with a government in Iran that has few of the attributes we expect of national authorities. Iran is a country torn apart by continuing revolutionary turmoil. Our people are hostage not only to the militants but to internal power struggles and rivalries. And we are dealing with a nation that faces not only the threat of internal disintegration but external threats to its independence and territorial integrity from nations on its borders.

depending for enforcement on consensus and cooperation of the parties—a framework of inquiry and appraisal that is capable of producing fair results also stands a better chance of meeting the requirements of effectiveness, that is, of producing results with which parties may voluntarily comply. Of course, it is arguable that no matter what method of inquiry the Court had selected and regardless of its ultimate findings, the decision would not have been "effective" in this case since the chaotic political conditions and near total lack of leadership in Iran made it all but impossible for any Court-based solution to be accepted. This is a plausible argument; but the Court's choice of method and the impact of this choice on its findings must be evaluated in terms of their longer-range effects on state attitudes, particularly attitudes in the Third World in view of the North-South overtones of the hostage case. Viewed from this perspective, the Court's refusal to adjudicate the equities of the hostage case is likely to have an adverse effect on its future business by reinforcing Third World perceptions of the international adjudicatory process as unable to accommodate claims arising from the politics of North-South relations.[199]

VII. CONCLUDING OBSERVATIONS

The Court's handling of the Iran hostage crisis is relevant beyond the substantive law contained in its two opinions, and deserves more comprehensive analysis. Accordingly, this article has examined not only the law of the case, but also the implications of the scope of inquiry adopted by the Court.

On the one hand—as evidenced by the cohesion achieved by the bench on most issues—the hostage case presented the Court with simple, clear-cut questions of law. Neither the jurisdiction of the Court nor the substance of applicable law left room for argument. The clarity of applicable procedural and substantive rules enabled the Court to produce bases for decision around which the entire bench could rally; and this, in turn, added authority and effectiveness to the Court's pursuit of its traditional judicial function of illuminating, settling, and developing points of international judicial doctrine. This point is worth making in view of the recent trend in the Court toward plural-opinion judgments which, even in cases of unanimous opinions like the one rendered in *Aegean Sea Continental Shelf*, has often made it difficult to discern the Court's *ratio decidendi*, thus diminishing the precedent-setting value of its findings. In *United States Diplomatic and Consular Staff*, by contrast, the Court produced two disciplined opinions which together appear to confirm, clarify, and settle several important issues of its case law. Five areas of contribution may be singled out for emphasis.

First, the Court has confirmed the "irreparable prejudice" test as a

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199. The non-Western, Third World countries have been notoriously skeptical of the content and processes of customary international law. *See* note 115 *supra*.

condition for the indication of interim measures of protection. Clearer guidelines, however, as to what constitutes "irreparable prejudice" are still needed. In *Aegean Sea Continental Shelf,* the Court held that an injury which is "capable of reparation by appropriate means" did not qualify as "irreparable."[200] Without explicitly saying so, the ruling in *United States Diplomatic and Consular Staff* seems to have applied a similar criterion of "irreparability." The language of the interim opinion implied that the injury capable of becoming "irreparable" in *United States Diplomatic and Consular Staff* case was the exposure of the detained personnel to "privation, hardship, anguish and even danger to life and health"[201]—in other words, the kind of injury which cannot be compensated either monetarily or in kind.

Second, the interim opinion can also be read as indicating the continued adherence of a majority of the bench to the "prima facie possibility of jurisdiction" test, namely, the view that for contemplating an award of interim protection no more is required than a showing that there is prima facie some possibility of jurisdiction on the merits. It will be recalled that the interim opinion took pains to reaffirm this test[202] even though it was "manifest" that the Court had jurisdiction to determine the merits.[203]

Third, the Court has now established a judicial principle for evaluating the admissibility of interim claims which overlap with those advanced for decision on the merits. In future cases, the Court should examine the purpose behind such claims to determine whether they are submitted in good faith to protect the rights asserted in the principal application.

Fourth, the decision on the merits reformulates the 1976 *Aegean Sea Continental Shelf* holding on the separation of powers in the law of the United Nations in a manner that will allow closer integration of the Court in the political activities of the world organization. At the very least, this reformulation should lift any constitutional obstacle that may have been inferred from *Aegean Sea Continental Shelf* to preclude collaborative judicial and political actions for the resolution of international conflicts.

Finally, the Court has reaffirmed—in language which indicates a range which may exceed that of its previous jurisprudence—the justiciability of legal issues arising from political disputes.

Beyond the legal contributions of *United States Diplomatic and Consular Staff,*[204] the case presents a unique opportunity to examine the relationship between law and politics in the society of states or, more precisely, the question, ever present in politicized legal disputes, of which the hostage crisis was a prime example, of whether and to what extent inquiry into legal claims can be extended to cover the underlying historical

200. [1976] I.C.J. at 11, para. 32.
201. [1979] I.C.J. at 20, para. 42.
202. *Id.* at 13, para. 15.
203. *Id.* at 14, para. 18.
204. [1979] I.C.J. 7 (order granting provisional measures); [1980] I.C.J. 3.

setting of a dispute. On this issue, the Court came down squarely on the side of traditional judicial notions that discourage inquiry into situations not directly or immediately related to the claims submitted in litigation; hence, its terse dismissal of Iran's political allegations as unsubstantiated and in any case irrelevant to the determination of the merits. The analysis contained in the above sections has suggested that a historically based and equity-oriented framework of inquiry is more likely to produce results that are fair and effective. It is suggested here too that such a framework would have a positive impact on the Court's future business by allaying doubts among the Third World countries about the adequacy of Court-based adjudication for the vindication of claims arising in North-South political contexts.

Perhaps the most encouraging aspect of the United Nations' handling of the hostage crisis is that, haphazard as it may have appeared at times,[205] in its broad outlines it set forth a model of inquiry that can be adapted to meet the operational requirements of a framework of judicial appraisal and settlement of the kind recommended in this article. This section concludes with some general observations about the creative possibilities implicit in the U.N. model of inquiry and offers comments on how this model can be developed and refined to implement a more suitable approach than afforded by the present processes of international adjudication for the resolution of claims arising from politicized disputes.

The model of inquiry implicit in parallel Court-U.N. commission actions suggests that the task of implementing a multidimensional framework of appraisal does not necessitate a restructuring of the Court and its processes. Indeed, it seems desirable to retain the Court's present structure and processes as best suited for the pursuit of its judicial functions in nonpoliticized cases. On the other hand, for disputes requiring a wider scope of appraisal, Court-based action can be supplemented by investigation into the extra-legal dimensions of the conflict by a panel like the U.N. Commission of Inquiry. The attempt failed in the present case in part because neither the task of the Commission nor its relations, if any, with the Court were clearly defined, and in large measure because of the inability of the revolutionary leadership in Iran to exploit the advantages which the U.N. approach offered. But failure in one case need not prevent inquiry into the creative possibilities that the parallel approach holds for the future.

To explore in detail how this approach can be improved for future action is beyond the scope of this article. Two critically important steps, however, are suggested below. First, the investigating panel must be institutionalized on a continuing basis and its functions must be clearly defined. Second, a link, missing in the present case, must be established

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205. For the conditions surrounding the formation and workings of the U.N. Commission, see Smith, *Putting the Hostages' Lives First*, N.Y. Times, May 10, 1981 (Magazine), at 77 & 88-91.

between the International Court and the proposed panel. The latter would report its findings to the Court, which could then use them in reaching a decision on the claims of the contending parties. The panel itself could operate under one of the U.N. political organs or, alternatively, as an agency of the Court under the terms of article 50 of its Statute which empowers the bench to "entrust any individual, body, bureau, commission or any other organization that it may select with the task of carrying out an inquiry."[206] Entrusting the essentially political task of investigating the equities of a given situation to a panel linked to but separate from the Court has the advantage of protecting the Court's integrity as a judicial body. At the same time, closer integration of the Court into the dispute-settling processes of the United Nations would enhance the Court's institutional capital, making it more relevant to the resolution of order-threatening international conflicts. In the long run, it may be the most effective means for reversing the trend towards underuse of the Court's adjudicatory processes—a trend which has virtually brought the Court's contentious business to a vanishing point.

No doubt the Court's increased involvement in the politics of international disputes, even if carried out indirectly as proposed here, would conflict with traditional notions that define the function of the judiciary as one of declaring and applying the law. But the post war experience with international adjudication has shown that application of this definition in the existing world context places the Court at risk of atrophy. The solution suggested here, on the other hand, offers a promising compromise between the requirements of protecting the judicial integrity of the Court while at the same time transforming it into a more relevant and frequently-used body in the settlement of international disputes.

206. I.C.J. STAT., art. 50.