

CASE LAW

DIPLOMATIC PRIVILEGES AND THE INTERNATIONAL COURT OF JUSTICE — PROTECTION OR PLATTITUDES ?

*UNITED STATES v. IRAN*¹

Introduction

The principal judicial organ of the United Nations is the International Court of Justice (hereinafter referred to as the Court), whose primary function is the peaceful settlement of disputes between States.² However, the failure of the Court to resolve satisfactorily the dispute which arose from the seizure of the United States Embassy in Tehran by militant students in November 1979, raises questions as to the effectiveness of the Court in fulfilling its function. This failure arose despite the unanimity of the judges as to the Court's jurisdiction, and on the relevant principles of diplomatic law. In this note it is proposed to consider separately the following matters:

- (a) jurisdiction and provisional measures,
- (b) diplomatic privileges and state responsibility,
- (c) the right of self-defence,

before making some observations on the implications of the decision for the future of the Court.

The Fact Situation

The absence of Iran from the proceedings, on the basis that the Court could not and should not take cognizance of the case, brought into operation Article 53 of the Statute of the Court. This article allows the Court to give judgment by default, but before doing so it must satisfy itself that it has jurisdiction, and also that the applicant's claim is well founded in fact and law. As regards the facts, the Court concluded:

The essential facts of the present case are for the most part matters of public knowledge which have received extensive coverage in the world press and in radio and television broadcasts . . . The information available (all supplied by the United

¹ *United States Diplomatic and Consular Staff in Tehran, Provisional Measures, Order of 15 December 1979*, I.C.J. Reports 1979, 7. *United States Diplomatic and Consular Staff in Tehran, Judgment*, I.C.J. Reports 1980, 3.

² Articles 1, 36, 37, 38 of the *Statute of the International Court of Justice*.

States) is wholly consistent and concordant as to the main facts and circumstances of the case.³

In short they were that, on 4th November, 1979, the United States Embassy in Tehran, and on the following day, Consulates in Tabriz and Shiraz, were seized by militant Iranian students, following demonstrations against the admission of the exiled former ruler of Iran, the Shah, to the United States. As a result, diplomatic, consular and other personnel were detained as hostages, and Embassy records and documents were removed. On the basis of these facts, and following the Iranian government's unwillingness to facilitate the release of the hostages, the United States began proceedings in the Court, by means of a unilateral application on 29th November, 1979. The Court, finding the existence of a dispute and adequate grounds for the exercise of its jurisdiction, issued an order for provisional measures on 15th December, 1979, and, following further proceedings, handed down final judgment on 24th May, 1980. The facts will be examined in greater detail later, in discussing the breach of diplomatic immunities and Iran's consequent responsibility.

Matters of Jurisdiction

(a) Provisional Measures

The decision of the Court as to jurisdiction on the merits was taken after the Order for Provisional Measures had been given. In fact paragraph 45 of that Order expressly reserved the right of the Court subsequently to decide the issue of jurisdiction on the merits.⁴ It would appear from this that the Court unanimously considers that Article 41 of its Statute confers a separate jurisdiction, if jurisdiction on the merits appears to be highly probable.⁵

The unanimity of the judges is significant because it has been suggested that in previous cases there was a divergence of opinion of the Court in this regard, with Judges Morozov (U.S.S.R.), Forster (Senegal) and Tarazi (Syria) denying that Article 41 gave any power to the Court to order provisional measures, unless it was absolutely certain of jurisdiction as to the merits being present under Article 36.⁶ Even if Article 41 does allow the award of provisional measures, there remains the difficulty of finding an appropriate rule as to when they will be awarded. The problem has been to find a rule that takes account both of the fact that the Court may ultimately decide it lacks jurisdiction, and of the fact that, unless an order is made, the rights of the parties may be irreparably damaged.

³ 1980 I.C.J. Reports 9-10.

⁴ 1979 I.C.J. Reports 20.

⁵ *Id.* at 17-20. Article 41(1) reads: "The Court shall have the power to indicate . . . any provisional measures which ought to be taken to preserve the respective rights of either party".

⁶ These issues are discussed in J. Diplock, "Interim Relief in Cases of Contested Jurisdiction" (1977) 8 *Sydney Law Review* 477.

In the *Anglo-Iranian Oil Case* the Court held provisional measures were available unless *a priori* the dispute was completely outside its jurisdiction.⁷ Sir Hersch Lauterpacht contributed towards clarifying the issue by formulating the '*prima facie* test' in the *Interhandel Case*.⁸ In the *Fisheries Jurisdiction Cases* the Court decided "it ought not to act under Article 41 of the Statute if the absence of jurisdiction on the merits is manifest".⁹ The following year in the *Nuclear Tests Case* the Court appeared to follow the same approach but the voting was much closer, and the four dissenting judges who gave separate opinions had been in the majority in the *Fisheries Jurisdiction Cases*. In the present case the Court was unanimously of the opinion that the correct test was the '*prima facie* test':

Whereas on the request for provisional measures in the present case the Court ought to indicate such measures only if the provision invoked by the Applicant appears *prima facie* to afford a basis on which the jurisdiction of the Court might be founded.¹⁰

It is to be hoped that this test will become settled law and applied without divergence in the future. Such a development is not inherently likely, due to Article 59 of the Statute of the Court which prohibits any doctrine of binding precedent, but it would make international jurisprudence and domestic common law practice substantially the same on the criteria for the award of interim measures.¹¹ If such a development occurred it would mean that the award of provisional measures under Article 41 would be an integral part of the Court's proceedings, whenever a *prima facie* case was established, and the circumstances require an order.

This development would be in accord with that advocated by Jane Diplock,¹² but would not be as flexible as the test advocated by Dr Mendelson in his recent review of provisional measures.¹³ The case now being reviewed also reinforces the view that consent of both parties is not necessary for the award of provisional measures, although it had been suggested Judges Morozov, Forster and Tarazi previously had believed that consent was vital for an exercise of jurisdiction under

⁷ *Anglo-Iranian Oil Co., Interim Protection*, Order of 5 July 1951, I.C.J. Reports 1951, 89.

⁸ *Interhandel, Interim Protection*, Order of 24 October 1957, I.C.J. Reports 1957, 105 at 118-119. "The Court may properly act under the terms of Article 41 provided that there is in existence an instrument . . . emanating from the Parties to the dispute, which *prima facie* confers jurisdiction upon the Court. . . ."

⁹ *United Kingdom v. Iceland*, I.C.J. Reports 1972, 12. *Federal Republic of Germany v. Iceland*, I.C.J. Reports 1972, 30.

¹⁰ I.C.J. Reports 1979, 15 (emphasis of the court).

¹¹ Leading domestic cases include *Beecham Group Ltd. v. Bristol Laboratories* (1968) 118 C.L.R. 618, and *Ashburton Oil N.L. v. Alpha Minerals* (1971) 123 C.L.R. 614.

¹² *Supra* n. 6 at 490-492.

¹³ N.M. Mendelson, "Interim Measures of Protection" (1975) 46. *B.Y.B.I.L.* 259 at 318. See also S. Rosenne, *The Law and Practice of the International Court* (1965) at 424-428.

Article 41.¹⁴ In view of the previous opposition of these three judges, in particular, the present case should not be viewed as authority for the proposition that Article 41 founds an independent source of jurisdiction. Rather the Order of 15th December, 1979, is better viewed as an example of a situation where eventual jurisdiction under Article 36 was seen as highly probable. However, it still remains that in paragraph 45 the Court unanimously and unequivocally reserved its right to deny jurisdiction on the merits.

Although the Court did order provisional measures, including the release of the hostages, these were not complied with by Iran, leaving doubts as to the efficacy of an Order for the indication of provisional measures, especially in the absence of one party. Similar results occurred in the abovementioned cases, where the Court made an Order for provisional measures.

(b) *Jurisdiction on the Merits*

In invoking the jurisdiction of the Court the United States relied on Article 36(1) of the Statute of the Court, which confers jurisdiction in ". . . all matters specifically provided for . . . in treaties and conventions in force". Although this jurisdiction is by the consent of the parties it may be described as being 'compulsory' in that the treaty or convention, assuming one to exist and to be 'in force', confers jurisdiction in advance of the dispute in question.¹⁵ The United States alleged violations of four treaties and conventions, to which both itself and Iran were parties on 4th November, 1979, the relevant date of these proceedings. It appears that in considering whether the United States claim was well founded in law, the Court considered the treaties bound the Islamic Republic of Iran.¹⁶

The four treaties relied upon by the United States to found jurisdiction, all of which were alleged to have been breached by Iran, were:

- (a) Vienna Convention on Diplomatic Relations 1961;
- (b) Vienna Convention on Consular Relations 1963;
- (c) Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran 1955; and
- (d) Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents 1973.

Appended to each of the Vienna Conventions is an Optional Protocol Concerning the Compulsory Settlement of Disputes which may be signed and ratified separately. This had been done by the United States and Iran. Article 1 of each Optional Protocol provides:

¹⁴ *Supra* n. 6 at 490.

¹⁵ I. Brownlie, *Principles of Public International Law* (1979) at 720.

¹⁶ I.C.J. Reports 1980, 28.

Disputes arising out of the interpretation or application of the 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.

The Court reached the conclusion that the claims of the United States, by their very nature, concerned the interpretation or application of one or other of the Vienna Conventions, and thus were within Article 1 of the Protocols. It is clear that the claims relating to privileges and immunities of the personnel, inviolability of premises and archives, and the provision of facilities for the performance of the functions of the mission in Iran were so covered, but in the proceedings an issue arose as to the status of the two private individuals, on the Embassy grounds, involved in the seizure. However the Court reached the conclusion that their situation was within the scope of Article 1, due to the provisions of the 1961 Convention guaranteeing the inviolability of the premises of Embassies, and of Article 5 of the 1963 Convention concerning the Consular functions of assisting nationals, and protecting and safeguarding their interests.¹⁷ Articles 2 and 3 of the Protocols (*supra*) make provision for the parties to have recourse to arbitration and conciliation, rather than commence proceedings before the Court, but it was established that agreement was necessary for this and no such agreement had been reached, as Iran had refused to negotiate the matter with the United States, and so a dispute falling under Article 1 existed.¹⁸

Although the Court did not consider the effect of Article 21(2) of the 1955 Treaty of Amity when indicating provisional measures,¹⁹ it did eventually decide that jurisdiction was conferred on the Court by virtue of the Article:

In consequence there existed at that date not only a dispute but, beyond any doubt, a "dispute . . . not satisfactorily adjusted by diplomacy", within the meaning of Article XXI(2) of the 1955 Treaty; and this dispute comprised, inter alia, the matters that are the subject of the United States' claims under the Treaty.²⁰

The United States also invoked Article 13 of the 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons in their case against Iran. This Convention was sponsored by the United Nations in response to the increasing kid-

¹⁷ *Id.* at 24-25.

¹⁸ *Id.* at 26-27.

¹⁹ I.C.J. Reports 1979, 15-17.

²⁰ I.C.J. Reports 1980, 27. Article XXI(2) reads: "Any dispute between the High Contracting Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the High Contracting Parties agree to settlement by some other pacific means". *United Nations Treaty Series*, Vol. 284, 93 at 134.

napping of diplomats in modern times. At the time, however, it was thought by some states, including Australia, to be an unnecessary addition to the existing Vienna Conventions.²¹ The Court in this case did not find it necessary to consider the 1973 Convention, as the Vienna Conventions provided sufficient basis for jurisdiction.²² Thus while the importance of the Vienna Conventions has been stressed, the judgment has tended to lessen the value and scope of the 1973 Convention. It should be noted at this stage that the United States also relied on customary international law, in support of its claims.

The separate opinions of Judges Lachs (Poland), Morozov (U.S.S.R.) and Tarazi (Syria) do not differ in regard to the question of jurisdiction from the majority opinion.

Iran refused to take part in the proceedings, on the basis that the dispute was non-justiciable. It neither filed pleadings, nor was represented at the hearing, and consequently no submissions were presented on its behalf. The Court, although regretting the decision of the Iranian government, affirmed the principle that the absence of one party was not a bar to proceedings.²³ In ascertaining whether the allegations of the United States were well founded in fact and law, under Article 53, the Court considered two letters addressed to the President of the Court. In these letters of 9th December, 1979, and 16th March, 1980, the Iranian Foreign Minister denied the jurisdiction of the Court to entertain proceedings on three grounds. Firstly, on the basis that the question in dispute represented only a "marginal and secondary aspect of an overall problem" relating to twenty-five years of United States-Iranian relations. Secondly that the problem was not one of the interpretation or application of the treaties, but one that resulted from more fundamental and complex elements which could not be divorced from the whole political dossier of United States-Iranian relations. The final objection raised was that the whole dispute was "essentially and directly a matter within the national sovereignty of Iran".²⁴ The Court responded however in both the provisional measures order and the final judgment that on the contrary:

... a dispute which concerns diplomatic and consular premises and the detention of internationally protected persons and involves the interpretation or application of multilateral conventions codifying the international law governing diplomatic and consular relations is one which by its very nature falls within international jurisdiction.²⁵

In considering the three objections the Court decided, having regard

²¹ E. Denza, *Diplomatic Law* (1976) at 136.

²² I.C.J. Reports 1980, 28.

²³ This reaffirms the position in the *Nuclear Tests Case*, I.C.J. Reports 1974, 253.

²⁴ The letters are reproduced in I.C.J. Reports 1980, 8-9.

²⁵ I.C.J. Reports 1979, 16; I.C.J. Reports 1980, 18.

to the importance of the legal principles involved and the fundamental international character of diplomatic relations:

It follows that the considerations and arguments put forward in the Iranian Government's letters of 9 December, 1979 and 16 March, 1980, do not, in the opinion of the Court, disclose any ground on which it should conclude that it cannot or ought not take cognizance of the present case.²⁶

The Court had reached a similar conclusion as to the objections of the Iranian Government in its Order for Provisional Measures,²⁷ and one commentator remarked:

To sum up: the strongest evidence of the justiciability of the dispute may be seen in the fact that the order was adopted unanimously and without any individual opinion.²⁸

This did not mean that the considerations raised in the Iranian letter were irrelevant to the judgment, however, and in fact they were regarded as of major importance for deciding on the question of state responsibility in the dissenting judgments.

In taking account of these two letters, the Court acted within its settled jurisprudence to investigate any preliminary questions of jurisdiction and admissibility under Article 53 of its Statute. In this regard the Court found no incompatibility with the continuance of judicial proceedings before the Court, in the establishment by the Secretary-General of the United Nations, with the agreement of both states, of a Commission to conduct a fact-finding mission and hear the grievances of Iran, so as to facilitate a solution to the dispute. "As was pointed out in the *Aegean Sea Continental Shelf Case*", the Court said:

. . . the jurisprudence of the Court provides various examples of cases in which negotiations and recourse to judicial settlement by the Court have been pursued *pari passu*.²⁹

Thus once again the Court clearly affirmed that concurrent negotiations provide no legal obstacle to the exercise of its jurisdiction. Similarly the Court reached the conclusion that a Security Council Resolution on the dispute was not a bar to proceedings nor to the issue of an Order for Provisional Measures.

Diplomatic Privileges and State Responsibility

The most striking aspect of the Court's judgment was its unanimous and unequivocal support of the principle of inviolability of diplomatic and consular missions, and of the immunity enjoyed by their members

²⁶ I.C.J. Reports 1980, 20.

²⁷ I.C.J. Reports 1979, 15-16.

²⁸ L. Gross, "The Case Concerning United States Diplomatic and Consular Staff in Tehran: Phase of Provisional Measures" (1980) 74(2) *American Journal of International Law* 395 at 399.

²⁹ I.C.J. Reports 1980, 23.

under international law, as codified in the Vienna Conventions of 1961 and 1963. Even the dissenting judgments of Morozov (U.S.S.R.) and Tarazi (Syria) entirely concurred with the majority on this point.

Having determined that it had jurisdiction under these Conventions to hear the case, the Court chose to look at the facts from two points of view. First it had to determine whether the acts in question could be regarded as imputable to the Iranian State. Secondly it had to consider their relationship to the obligations of Iran under the relevant treaties or other rules of international law.³⁰ This raised the vexed question of state responsibility which has been defined as "the responsibility of States for internationally wrongful acts".³¹ The State may have to pay reparations for breach of such duty, which may consist of either an omission or an act.

The Court divided the question of imputability into these two areas. In the first phase there was omission. The Court found no evidence that the militants actually attacked the Embassy initially as agents of the Iranian government. However, under Article 22 of the 1961 Convention, the receiving State has a positive duty "to take all appropriate steps to protect the premises of the mission", and under Article 29, "to prevent any attack on (the) person" of the diplomat, and under Article 24, to protect the inviolability of the archives of the mission. The Court found that the Iranian authorities "made no apparent effort to deter or prevent the demonstrators from seizing the Embassy's premises and the personnel and archives".³²

In fact the Iranian security personnel seemed to have disappeared from the scene despite repeated requests from the Embassy for their assistance.³³ Similar events surrounded the seizure of the United States consulates the next day. After the invasion the Iranian government failed to compel the militants to withdraw and release the diplomats.³⁴ The Court found that the Iranian failure was not due to mere negligence or lack of appropriate means, contrasting their inaction with the successful protection of the premises on previous similar occurrences.³⁵ Thus the Court held that Iran was aware of its obligations under the Vienna Conventions and by its inaction had breached its obligation to take all appropriate steps to protect the diplomatic personnel and premises.

In the second phase the Court found that by its later actions Iran had in fact endorsed the actions of the militants. On 5th November, 1979, the Foreign Minister had expressed his endorsement at a

³⁰ *Id.* at 29.

³¹ J. G. Starke *Introduction to International Law* (1977) at 319.

³² I.C.J. Reports 1980, 29-31.

³³ *Id.* at 12.

³⁴ *Id.* at 31.

³⁵ *Ibid.*

press conference.³⁶ Then the Ayatollah Khomeini had effectively forbidden the Revolutionary Council to negotiate with President Carter's envoys.³⁷ Finally, on 17th November, 1979, he had declared that the Iranian government would not allow the release of the hostages till the United States complied with its wishes.³⁸ By these acts the Court held:

The militants, authors of the invasion and jailers of the hostages had now become agents of the Iranian State for whose acts the State itself was internationally responsible.³⁹

The Iranian government also directly detained the United States Chargé d'Affaires and two members of his staff in the Ministry of Foreign Affairs. These actions gave rise to further breaches of their obligations under the 1961 Vienna Convention concerning freedom of movement, and facilitation of their functions and communications.⁴⁰

The Court then considered any possible defences of Iran to the charge of violation of its duties under the principles of State responsibility. One consideration that obviously weighed on the mind of the Court was the common criticism of the corpus of international law today that it is a Western invention, and thus cannot fairly be applied to Eastern and Third World nations. So far as diplomatic law is concerned, however, the Court was at pains to emphasize that this was not so. It said:

The principle of the inviolability of the persons of diplomatic agents and the premises of diplomatic missions is one of this long established regime (i.e. the rules of diplomatic law) to the evolution of which the traditions of Islam made a substantial contribution.⁴¹

In his dissenting judgment Judge Tarazi (Syria) specifically approved this observation and gave specific examples from Islamic tradition of the Prophet's respect for the inviolability of Ambassadors.⁴² Similarly Judge Lachs (Poland) remarked:

The principles and rules of diplomatic privileges and immunities are not — and this cannot be overstressed — the invention or device of one group of nations, of one continent or one circle of culture, but have been established for centuries and are shared by nations of all races and all civilizations.⁴³

Judge Morozov (U.S.S.R.), too, noted his strong support of the Vienna Conventions.

³⁶ *Id.* at 33.

³⁷ *Id.* at 33-34.

³⁸ *Ibid.*

³⁹ *Id.* at 35.

⁴⁰ *Id.* at 36-37.

⁴¹ *Id.* at 40.

⁴² *Id.* at 58-59.

⁴³ *Id.* at 48.

Iran, in a second letter to the Court, dated 16th March, 1980, implied that its actions were justified because of the "more than twenty-five years of continual interference by the United States in the internal affairs of Iran . . . and numerous crimes perpetrated against the Iranian people". In the press at the time, Iran made much of its alleged discovery of evidence of espionage by members of the United States Embassy to justify the attack and seizure of archives. The Court soundly rejected this contention, declaring that:

The rules of diplomatic law in short constitute a self-contained regime which, on the one hand, lays down the receiving State's obligations . . . and, on the other hand, . . . specifies the means at the disposal of the receiving State to counter any such abuse of the privileges.⁴⁴

Thus the only means are those stated in Article 9 of the 1961 Convention and Article 23 of the 1963 Convention declaring a person suspected of abusing diplomatic privileges *persona non grata* and having him recalled. Iran had not availed itself of these means and was not justified in using any other.

One might wonder whether the forcefulness of the Court's judgment can partly be attributed to the fact that Iran had been an original signatory, and had assisted to draft the Vienna Conventions. It would seem, however, that its defence of diplomatic immunities went further than the Treaty law for the court said in both the Provisional Measures Order and the final Judgment:

There is no more fundamental prerequisite for the conduct of relations between States than the inviolability of diplomatic envoys and embassies so that throughout history nations of all creeds and cultures have observed reciprocal obligations for that purpose.⁴⁵

It went on to state that as regards both diplomatic and consular relations these privileges were "essential for effective co-operation in the international community and for enabling States, irrespective of their differing constitutional and social systems, to achieve mutual understanding", and these principles were deep-rooted in international law.⁴⁶ Thus Iran's obligations were not "merely contractual obligations established by the Vienna Conventions of 1961 and 1963, but also obligations under general international law".⁴⁷ Hence it would appear following the Court's judgment that even a State which was not a party to the Vienna Conventions would be obliged to respect the relevant principles of diplomatic law which it codifies.

⁴⁴ *Id.* at 40.

⁴⁵ I.C.J. Reports 1979, 19; 1980, 42.

⁴⁶ *Ibid.*

⁴⁷ I.C.J. Reports 1980, 31.

The Two United States Civilians

Not only did the Court engage in a vigorous defence of the principles of diplomatic law, but as regards the two United States civilians on the Embassy premises, who had neither diplomatic nor consular status, it appears to have extended them. The Court held in the provisional Order that these private individuals fell within the Vienna Conventions in respect of the inviolability of Embassy premises (Article 22, 1961 Convention), and Article 5 of the 1963 Convention, which provides that Consuls are to assist and protect their nationals.⁴⁸ One United States commentator saw this as a "failure to distinguish the non-diplomatic nationals" and argued that if it could be

. . . read as an assertion that they are entitled to the same immunity from criminal jurisdiction and the same right to leave Iran, then the Court has gone beyond the literal text of the Vienna Conventions, which only confer rights upon diplomatic persons.⁴⁹

He interpreted it as a "strong, activist defence of human rights against an assertion of state sovereignty".⁵⁰

In its judgment the Court reiterated its view in the Order for Provisional Measures, as well as holding this time that it had jurisdiction under the 1955 Treaty of Amity, which provided that:

. . . nationals of either High Contracting Party shall receive the most constant protection and security within the territories of the other High Contracting Party.⁵¹

Thus in the Judgment the Court did face the problem of the Treaty of Amity which it had 'elegantly' side-stepped in the Order for Provisional Measures,⁵² and appears to have based its judgment as regards the two private civilians on it.⁵³

Even so the Court has made a wide interpretation of the two Articles concerned, and it appears to have held that in appropriate circumstances the Vienna Conventions can operate not only to protect diplomatic and consular agents, but private nationals of the sending state as well. Given that there was a distinct possibility that Iran might submit the hostages to criminal trial, and that the Court did not distinguish the two individuals in its warning in the judgment that such an action would further violate the Vienna Conventions,⁵⁴ Paul's comments have a renewed force. It appears that in some circumstances foreign civilians may gain quasi-diplomatic status. It would be helpful

⁴⁸ I.C.J. Reports 1979, 14.

⁴⁹ J. R. Paul, "International Adjudication: Embassy Seizure — United States v. Iran (1979) I.C.J." (1980) 12(1) *Harvard International Law Journal* 268-74 at 273.

⁵⁰ *Ibid.*

⁵¹ I.C.J. Reports 1980, 25-27.

⁵² *Supra* n. 28, at 41.

⁵³ I.C.J. Reports 1980, 36.

⁵⁴ *Id.* at 37.

if the Court were to spell out exactly what those circumstances, and what the extent of the immunities, might be.

Reparation

Where a State is found responsible for a breach of international duty it must satisfy the injured state, and this may be by reparation.⁵⁵ The majority of the Court found that Iran had incurred responsibility to the United States and was under an obligation to make reparation to the United States for the injury. However, since the breaches were still continuing at the judgment date, it was unable to determine the form and amount of the reparation. The majority had found that the alleged previous actions of the United States in Iran, while not irrelevant, did not alter the existence of Iran's responsibility.⁵⁶ Judges Morozov (U.S.S.R.) and Tarazi (Syria) dissented on this point, feeling that no finding could be made on Iran's responsibility till the history of United States interference in Iran had been examined.⁵⁷ They were joined by Judge Lachs (Poland) in their view that the United States by its activities had forfeited any right to reparation from Iran. It would seem that United States action in 'freezing' Iranian assets within its control, contributed to the dissent on this point, Tarazi claiming it was an "encroachment on the functions of the Court", and Morozov that it was "unlawful".⁵⁸ Nevertheless the majority of the Court obviously disagreed, and economic actions thus remain a permissible sanction in international law which do not affect a State's right to reparation.

What is more, it was clear that in the view of the majority, that merely giving offence to another State, as the United States did to Iran by admitting the Shah, in no way affected Iran's legal obligations to the United States,⁵⁹ suggesting there is no defence of provocation in international law.

Self Defence

In making its preliminary Order of 15th December, 1979, the Court ordered that both parties:

should not take any action and should ensure that no action is taken which may aggravate the tensions between the two countries or render the existing dispute more difficult of solution.⁶⁰

While the judgment was being prepared, the United States made a military incursion into Iran, on 24th-25th April, 1980, in an unsuccessful attempt to rescue the hostages. It claimed that this was pursuant to Article 51 of the United Nations Charter which gives a member a

⁵⁵ *Op. cit. supra* n. 31 at 317.

⁵⁶ I.C.J. Reports, 1980, 41-42.

⁵⁷ *Id.* at 60 (Tarazi); at 53 (Morozov).

⁵⁸ *Id.* at 64 (Tarazi); at 55 (Morozov).

⁵⁹ *Id.* at 41.

⁶⁰ I.C.J. Reports 1979, at 21.

right of self defence against an armed attack on itself.⁶¹ The majority of the Court, while expressing regret at this action as possibly aggravating tensions and undermining respect for the judicial process in international law in its blatant disregard of the previous Order, felt that it had no direct bearing on the present case which related solely to the Iranian seizure of the Embassy, consulates and hostages.⁶²

However Judges Morozov (U.S.S.R.) and Tarazi (Syria) made some interesting observations on this point. Judge Tarazi said:

One can only wonder therefore whether an armed attack attributable to the Iranian government has been committed against the *territory* of the United States, apart from its Embassy and Consulates in Iran.⁶³

Judge Morozov also asserted there was no evidence that an armed attack had occurred against the United States.⁶⁴ Although Article 51 only states that the attack must occur against the member of the United Nations, it appears that both these judges are interpreting it to mean that the attack must occur against the territory of the member.

It was once thought that Embassy premises were in international law the territory of the sending power, but this has now been replaced by the theory that they gain their immunity by "functional necessity", and this was the guiding theory in the drafting of the Vienna Conventions.⁶⁵ Thus, if an Embassy is not part of the territory of the sending power, and if to justify self defence in tenure of Article 51 an attack has to occur against the territory of a member, then an attack on a State's Embassy does not allow it to invoke Article 51. Unfortunately, and not surprisingly, Iran took no action against the United States in the Court on this point, thus depriving the world of an opportunity for an interpretation of Article 51 on the right of self defence.

Conclusions

As this is the first time in thirty-five years that the leading world power, the United States, has seriously turned to the Court,⁶⁶ and in the judgment the Court engaged in one of its most vigorous assertions of jurisdiction and the appropriate rule of international law to date, one would think that the prestige of the Court should have been enhanced. Ironically however, because of Iran's refusal to obey the Orders of the Court to release the hostages, return the Embassy, consulates,

⁶¹ I.C.J. Reports 1980, at 17-18.

⁶² *Id.* at 43.

⁶³ *Id.* at 65.

⁶⁴ *Id.* at 57.

⁶⁵ D. J. Harris, *Cases and Materials in International Law* (1979) at 301.

⁶⁶ *Supra* n. 28 at 410. Gross points out that although the United States did bring several cases before the Court from 1954 to 1958 against Hungary, Czechoslovakia and USSR over aerial incidents, it knew full well that there was no basis for the Court's jurisdiction and they were removed from the list. I.C.J. Reports 1956, 6 and 9. The U.S. also withdrew its application against Bulgaria, arising out of an aerial incident. I.C.J. Reports 1960, 146.

archives and other property to the United States, and to pay reparation to the United States, the case has tended to raise questions as to the value of the Court as a guardian of international law.

The judgment appears to clarify several important aspects of the jurisprudence of the Court. It now seems that the *prima facie* test for provisional measures is the correct test, and it is submitted that Article 41 of the Statute is viewed as conferring a separate jurisdiction provided that eventual jurisdiction on the merits is highly likely or probable. This ambit of Article 41 goes beyond the first categories of Mendelson's scale, which require consent of the parties.⁶⁷ The court also affirmed once again that there is no need for both parties to appear before the Court for its jurisdiction to arise. It also affirmed that negotiations may proceed concurrently with an appearance before the Court, and the discussion of a matter and the adoption of a resolution in the Security Council were equally no bar to jurisdiction. The case also showed that the court has a tendency to follow and refer to past decisions of itself, despite there being no requirement of precedent. However this tendency does have the beneficial effect of making the procedure and jurisprudence of the Court more certain.

The Court further indicated a willingness to play an activist role in international law. It strongly asserted the international nature of the principles of diplomatic law and their application to all nations, engaging in vigorous defence of the Vienna Conventions as a codification of customary international law, to the point of possibly extending their protection to non-diplomatic nationals, especially when on Embassy premises. It was prepared to find it had jurisdiction to grant provisional measures, in contrast with a tendency in recent years to decline such jurisdiction.⁶⁸ It also made a useful contribution to the law of state responsibility which has preoccupied the proceedings of the International Law Commission for some time.

However the fact that the Court was unable to ensure either the enforcement of the judgment, or compliance with the Order for the indication of provisional measures, raises questions as to whether the protection it seeks to give in international law amounts to anything more than pious platitudes. Not only did Iran ignore the Court's Order and Judgment, but even the United States ignored the Order when it decided on military action in flagrant disregard of the Order's clause against either party exacerbating the situation. The Court itself was aware of its limitations, and the problems this created, when it stated the following passage towards the end of the judgment:

The Court considers it to be its duty to draw the attention of the entire international community, of which Iran itself has been a

⁶⁷ *Supra* n. 13 *cf.* Diplock *supra* n. 6 at 490.

⁶⁸ D. H. N. Johnson "The International Court of Justice Declines Jurisdiction Again (The Aegean Sea Continental Shelf Case)" 7 *Australian Year Book of International Law* 309.

member since time immemorial, to the irreparable harm that may be caused by events of the kind now before the Court. Such events cannot fail to undermine the edifice of law carefully constructed by mankind over a period of centuries, the maintenance of which is vital for the security and well being of the complex international community of the present day.⁶⁹

Similarly Judge Lachs (Poland) stressed the need for negotiation or some third party initiative, especially where the two parties were, as here, not on speaking terms, and felt the Court should encourage such developments.⁷⁰

Thus the failure of the Court to perform its primary function and settle the dispute, raises serious questions as to the value and role of this expensive institution. Perhaps some form of arbitration may be better. In fact the release of the hostages, and the ultimate settlement of the dispute, were secured by other diplomatic means, including negotiation and arbitration.⁷¹

Nevertheless the Court still has a value. The Order for the indication of provisional measures of 15th December, 1979, was used as a basis for the Security Council's resolution of 31st December, 1979.⁷² It remains a means of indicating the international legal order and focusing international legal opinion.⁷³ International law is still important in most nations' state practice, and Iran's attitude over the United States hostages was to some extent an aberration explicable in terms of the special circumstances of the revolution in that country. Finally, the International Court of Justice, like domestic courts, is not responsible for the enforcement of its judgments. The Security Council is supposed to be the policeman of the Court,⁷⁴ so to that extent the failure to enforce the judgment is the fault of the Security Council, rather than of the Court itself. Thus criticisms as to the effectiveness of the Court are in fact part of the ongoing debate on the role and the effectiveness of the United Nations itself, and proposals for reform should probably be best directed to that source.

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⁶⁹ I.C.J. Reports 1980, 43.

⁷⁰ *Id.* at 49.

⁷¹ The series of agreements settling the dispute may be found in 20 *International Legal Materials* (1981) 223-240.

⁷² I.C.J. Reports 1980, 21.

⁷³ *Supra* n. 49 at 274.

⁷⁴ *Charter of the United Nations*, Article 94.