THE WORLD COURT AND THE PEACEFUL SETTLEMENT OF DISPUTES

Cornelius F. Murphy, Jr.*

I. INTRODUCTION

The International Court of Justice, as the principal judicial organ of the United Nations, provides a forum for the binding settlement of international legal disputes. Its authority, however, is not limited to the formal adjudication of legal rights and obligations. As with the Permanent Court, the present tribunal can also exercise a quasi-conciliatory function. Where a conflict between states is intractable or touches their vital interests, the parties may not desire settlement through binding adjudication. They may agree that the Court should establish a juridical framework which provides the foundations of a new legal relationship whose detail will be determined in subsequent negotiations. For example, in the North Sea Continental Shelf Cases¹ the Federal Republic of Germany, Denmark, and the Netherlands submitted to the Court a dispute concerning the proper delimitation, as between them, of the Continental Shelf in the North Sea. In the submission, the parties requested the Court to decide what principles and rules of international law were applicable to the delimitation and undertook to delimit the shelf by subsequent agreement in pursuance of the requested decision. The Court enumerated legal and equitable principles relevant to the shelf regime and specified geographic and geological factors which the parties should take into account in the course of negotiations. Following the decision, the parties reached a negotiated settlement.²

The exercise of judicial authority as part of a broader process of

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¹ [1969] I.C.J. 3. Compare Case of the Free Zones of Upper Savory and the District of Gex, [1930] P.C.I.J., ser. A, No. 24. See generally H. LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY, pt. IV, ch. XVI, § 36 (1966). This procedure should be distinguished from the power of the Court under article 38, para. 2 of its Statute to decide a case ex aequo et bono if the parties should agree. This power is better described as quasi-legislative, since it empowers the Court to disregard existing positive law and establish a new legal relationship between the parties. The authorization makes possible a decision based upon what is fair and just. Sohn, Arbitration of International Disputes Ex aequo et bono, in INTERNATIONAL ARBITRATION LIBER AMICORUM FOR MARTIN DOMKE 330 (P. Sanders ed. 1967). In the North Sea Continental Shelf Case, the International Court held that it was not acting under article 38(2). [1969] I.C.J. 3, 48.

peaceful settlement is desirable as long as states are reluctant to submit vital disputes to plenary adjudication. Partial acceptance of the Court's authority is a welcome step towards the orderly resolution of serious controversies, particularly when the opinion of the Court forms an integral, although incomplete, aspect of the final settlement. Moreover, many modern controversies are not amenable to complete resolution by traditional forms of adjudication. While certain general principles may be applicable, the existing body of customary rules often will not encompass the entire controversy. The matters in contention can be so generally controversial that state practice has not crystallized or, given the novelty of the matters at issue, there have not been sufficient opportunities for new rules to develop.

Where the parties involved in a controversy call upon the Court to assist them in their efforts to resolve their differences, the Court's participation, although limited, constitutes an important contribution to the pacific objectives of the Charter. But where the consensual basis is absent, or doubtful, the proper coordination of judicial activity with other forms of peaceful settlement becomes more difficult. In a series of recent cases, the respondent state has challenged the Court's jurisdiction. Under these circumstances the Court has assumed a quasi-conciliatory posture. In exercising its authority in spite of such objections, the Court has viewed its role as that of a contributor to the peaceful settlement of disputes. Yet in so doing it may also have compromised some of its authority as a judicial organ. The paradigm case in this line of development is the fisheries controversy which arose out of the extension of the Icelandic fisheries zone.

By applications filed in April and June of 1972, the United Kingdom and the Federal Republic of Germany instituted proceedings in the International Court against the Republic of Iceland. Both Applicants asked the Court to declare that Iceland's claim to extend its exclusive fisheries jurisdiction to a zone of 50 nautical miles around Iceland was without foundation in international law. The Court's jurisdiction was based upon exchanges of notes between Iceland and Great Britain and Iceland and Germany which provided, with respect to disputes arising from the extension of Icelandic fishery jurisdiction, that "the matter shall, at the request of either party, be referred to the International Court of Justice."³

Iceland was promptly notified of the applications but refused to participate in the proceedings. It took the position that there was no basis for jurisdiction under the Statute of the Court, that the exchanges of notes were not of a permanent character, and that their purpose had been achieved. Unwilling to confer jurisdiction upon the Court because of the vital interests at stake, it notified the Registrar that it would not appoint an agent to represent it in the proceedings.

On August 17, 1972, the Court granted the Applicant’s requests for interim measures of protection. The interim orders provided, inter alia, that none of the parties should take any action which would aggravate the situation or which might prejudice rights which may be established by the Court’s decision on the merits. Iceland was specifically prohibited from enforcing regulations purporting to extend its fisheries jurisdiction beyond a 12 mile limit, and restrictions were placed upon the annual metric tonnage of fish taken from the disputed area by ships registered in the United Kingdom and the Federal Republic of Germany. By an order of August 18, 1972, the Court decided by a 9-6 vote that the first pleadings should address the Court’s jurisdiction to entertain the dispute. It set October 13 as the time limit for the Memorials of the Applicants, and December 8 as the time limit for the Counter-Memorials of Iceland.

On February 2, 1973, the Court entered its decision in both cases on its jurisdictional competence. Jurisdiction was founded upon the separate exchanges of notes between Iceland and the two Applicants. While Iceland remained unrepresented, the Court was careful to weigh its argument, based upon the principle of changed circumstances, that the consent expressed in the exchanges of notes was no longer operative. The Court then fixed time limits for the filing of written proceedings on the merits. At the request of the Applicants, the Court on July 12, 1973, confirmed the interim orders of protection. It took note of the fact that negotiations were taking place between the states concerned, with a view to reaching an interim arrangement pending final settlement of the dispute. Throughout the proceedings Iceland maintained its position that the Court did not possess competence to entertain the fisheries disputes. It filed no pleadings and did not appear before the Court at

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Counsel for the Applicants having invoked article 53 of the Statute, the Court proceeded to judgments on the merits. It was entered, in both cases, on July 25, 1974. Noting that it has acted "with particular circumspection" because of the nonappearance of the respondent state and taking note of interim agreements between the parties, the Court adjudged that the unilateral extension by Iceland of exclusive fishing rights to 50 nautical miles was unlawful under international law and not opposable by either of the Applicants. While acknowledging the concept of preferential rights of a coastal state, the Court held that they cannot extinguish concurrent rights of states, such as the Applicants, whose fishing industries have fished in the disputed area for a considerable period. In its judgment, the Court held that the parties are under mutual obligations to undertake negotiations, in good faith, for the equitable resolution of their differences and specified factors which the parties were obliged to take into account.

The decisions of the International Court of Justice in the Fisheries Jurisdiction Cases are controversial. In spite of the respondent state's refusal to recognize its authority, the Court nevertheless assumed jurisdiction, issued interim orders of protection, confirmed those orders, and reached a decision on the merits of the underlying controversy. Further, it directed the parties to negotiate a final settlement of their differences. The decisions contrast markedly with the North Sea Continental Shelf Cases, where the Court's involvement in the dispute settlement process was sustained by the consent of the parties.

The Fisheries Jurisdiction Cases raise issues of institutional competence which can be best understood if these decisions are seen as part of a general tendency of the Court to increase its participation in the settlement of international disputes. By deciding that the

* Article 53 provides as follows:
  1. Whenever one of the parties does not appear before the Court, or fails to defend its case, the other party may call upon the Court to decide in favor of its claim.
  2. The Court must, before doing so, satisfy itself, not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well founded in fact and law.

I.C.J. Statute art. 53.


* (United Kingdom v. Iceland), [1974] I.C.J. 3, paras. 73-78 [further references to the Fisheries Jurisdiction Cases will be to this decision].
parties were under mutual obligations to undertake good faith negotiations, the Court was open to the general charge that by so doing it exceeded its institutional authority. In contentious cases the Court is bound to adjudge, a limited role which is underlined by the language of article 53 of its Statute. Where the respondent state does not consent to the Court’s jurisdiction, it is arguable that once it is satisfied of its jurisdiction the Court can do no more than address itself to the merits of the dispute. The validity of the challenged action must be determined on the basis of international law. The Court, according to this view, does not possess any general authority to promote the pacific settlement of disputes.

But while the Court does not have a general license to involve itself in international controversies, it does possess some authority, as a principal organ of the United Nations, to promote the peaceful settlement of disputes. It should seek to assure respect for the general principle that grave international controversies should be settled, and that their settlement should be by peaceful means. The extent to which the International Court should seek to influence the resolution of particular disputes in which one party resists its authority cannot be determined a priori according to an exact formula. It depends rather upon a careful evaluation of complex factors which, in combination, constitute its institutional authority. An examination of the Fisheries Jurisdiction Cases, and others of a similar genre of which the Court has recently been seized, reveal certain themes of competence. While not exhaustive, those themes include a consideration of the plausibility of the Court’s jurisdiction, its timing, and the possibility of the Court’s entering a judicious decision which actually contributes to a resolution of the underlying dispute. The extent to which other organs of the United Nations have a proper role to play in promoting a settlement of the controversy is also a relevant factor. The threshold consideration is that of jurisdiction.

II. JURISDICTION BASED UPON CONSENT

The jurisdiction of the International Court in contentious cases is based upon consent, and doubts concerning jurisdiction must be resolved with dispatch. Where the defendant state refuses to make
an appearance and contests the Court's competence, the need for an expeditious resolution of the jurisdictional question is imperative. Moreover, the Court must express its conviction that its authority has been properly engaged. This is particularly true when the applicant state requests interim measures of protection.

In the Anglo-Iranian Oil C. Case Judges Winiarski and Badawi Pasha, in a joint dissenting opinion, calibrated the delicate nuances of power and authority which are bound up with the problem of jurisdictional competence:

In international law it is the consent of the parties which confers jurisdiction on the Court; the Court has jurisdiction only in so far as that jurisdiction has been accepted by the parties. The power given to the Court by Article 41 is not unconditional; it is given for the purposes of the proceedings and is limited to those proceedings. If there is no jurisdiction as to the merits, there can be no jurisdiction to indicate interim measures of protection. Measures of this kind in international law are exceptional in character to an even greater extent than they are in municipal law; they may easily be considered a scarcely tolerable interference in the affairs of a sovereign State. For this reason, too, the Court ought not to indicate interim measures of protection unless its competence, in the event of this being challenged, appears to the Court to be nevertheless reasonably probable. Its opinion on this point should be reached after a summary consideration; it can only be provisional and cannot prejudice its final decision, after the detailed consideration to which the Court will proceed in the course of adjudicating on the question in conformity with all the Rules laid down for its procedure.

We find it difficult to accept the view that if prima facie the total lack of jurisdiction of the Court is not patent, that is, if there is a possibility, however remote, that the Court may be competent then it may indicate interim measures of protection. This approach, which also involves an element of judgment, and which does not reserve to any greater extent the right of the Court to give a final decision as to its jurisdiction, appears however to be based on a presumption in favour of the competence of the Court which is not in consonance with the principles of international law. In order to accord with these principles, the position should be reversed: if there exist weighty arguments in favour of the challenged jurisdiction, the Court may indicate interim measures of protection; if there exist serious doubts or weighty arguments against this jurisdiction such measures cannot be indicated.14

14 Anglo-Iranian Oil Co. Case, Interim Order (United Kingdom v. Iran), [1951] I.C.J. 89,
Since the Anglo-Iranian Case in 1951, the International Court has displayed a greater sensitivity to the degree of certitude required when its jurisdiction is challenged. In granting the requests for interim measures of protection in the Fisheries Jurisdiction Cases the Court stated that while it need not be finally satisfied that it has jurisdiction on the merits, it should not indicate provisional measures under article 41 of its Statute if the absence of jurisdiction is manifest. It then concluded that the exchanges of notes expressly providing for recourse to the Court provided, prima facie, "a possible basis on which the jurisdiction of the Court might be founded."^15

In the Nuclear Tests Cases this standard was repeated when the Court responded to a request of Australia and New Zealand for interim orders directed against atmospheric nuclear weapon testing by France in the Pacific Ocean. Jurisdiction was asserted by the Applicants under article 33 of the General Act of 1928 for the Pacific Settlement of International Disputes. In letters addressed to the Registrar of the Court, France took the position that the Court was manifestly not competent. It did not intend to appoint an agent, and requested the Court to remove the case from its list. In its decision granting the request for interim orders of protection, the Court observed that it should not indicate such measures unless "the provisions invoked by the Applicant appear, prima facie, to afford a basis on which the jurisdiction of the Court might be founded . . . ."^17 It then summarized the conflicting views of the parties with respect to the jurisdictional issue and decided that the provisions invoked by the Applicants provided an adequate basis upon which the jurisdiction of the Court might be founded.

While there has been improvement upon the criteria for provisional jurisdiction used by a majority of the Court in the Anglo-Iranian Case, it is arguable that the present approach remains unsatisfactory. Because the contentious jurisdiction is founded upon state consent, a reasonable possibility that the Court may, in a particular case, have jurisdiction can be an unauthorized step towards compulsory jurisdiction. Where the vital interests of a state form the basis of its refusal to participate in judicial proceedings, it

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96. The majority in deciding upon interim measures had determined that the claim did not fall completely outside the scope of international jurisdiction.


is arguable that the Court must be clearly satisfied that it has jurisdiction to adjudge on the merits, and that such a determination must be made before the Court seriously exercises its authority. In such a view, article 41 has no independent significance.18

These considerations, although cogent, must be weighed against the urgency of the need for granting interim relief to the applicant state. In each particular case, countervailing factors must be carefully balanced. An awareness of these elements was expressed by Judge Jimenez DeArechaga in a separate declaration in the interim measures phase of the Nuclear Tests Cases:

I do not believe the Court should indicate interim measures without paying due regard to the basic question of its jurisdiction to entertain the merits of the Application. A request should not be granted if it is clear, even on a prima facie appreciation, that there is no possible basis on which the Court could be competent as to the merits. The question of jurisdiction is therefore one, and perhaps the most important, among all relevant circumstances to be taken into account by a Member of the Court when voting in favour of or against a request for interim measures.

On the other hand, in view of the urgent character of the decision on provisional measures, it is obvious that the Court cannot make its answer dependent on a previous collective determination by means of a judgment of the question of its jurisdiction on the merits.

This situation places upon each Member of the Court the duty to make, at this stage, an appreciation of whether—in the light of the grounds invoked and of the other materials before him—the Court will possess jurisdiction to entertain the merits of the dispute. . . . One must be satisfied that this basic question of the Court’s jurisdiction has received the fullest possible attention which one is able to give to it within the limits of time and of materials available for the purpose.

When, as in this case, the Court decides in favour of interim measures, and does not, as requested by the French Government, remove the case from the list, the parties will have the opportunity at a later stage to plead more fully on the jurisdictional question. It follows that that question cannot be prejudged now; it is not


Article 41 provides that “[t]he court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.” I.C.J. Statute art. 41, para. 1.
possible to exclude *a priori* that the further pleadings and other relevant information may change views or convictions presently held.¹⁸

There are also matters of timing which affect the question of jurisdictional competence. After making a provisional determination that it may have jurisdiction on the merits the Court can set a future date for the submission of Memorials and Counter-Memorials devoted to the jurisdictional issue. In so doing, the Court indicates its willingness to give the issue plenary consideration. It is somewhat difficult to reconcile this procedure with the provisions of article 53 of the Court’s Statute dealing with the consequences of default,²⁰ since by prolonging the resolution of the jurisdictional issue the Court is postponing its response to the nonappearance. The defendant state may be prejudiced if the Memorials do not address the merits, particularly if the Applicant state has the advantage of an appointment of an *ad hoc* judge.²¹

By deferring a final judgment on the question of jurisdictional competence, the Court also provides the nonappearing state with further opportunity to reverse its own decision and participate in the proceedings. These implied invitations have in fact not been accepted. This alone, however, does not invalidate the wisdom of the strategy, for in asserting its authority by retention of jurisdiction, the Court may be in a position to make a contribution to the orderly disposition of international disputes. Of course, the danger that retention of jurisdiction in spite of the persistent refusal of a party to appear can detract from the Court’s general authority does remain. In recent cases the Court has been willing to take the risk. Unfortunately the net results, in contentious cases, may have been detrimental to the institutional stature of the Court.

### III. RETENTION OF JURISDICTION UPON CONTEST

Retention of jurisdiction in spite of defiance by the respondent state can be advantageous if circumstances arise which allow the Court to terminate a tenuous involvement in a satisfactory manner.


²⁰ Note 8 supra.

The Case Concerning the Pakistani Prisoners of War is illustrative. On May 11, 1973, Pakistan instituted proceedings against India with respect to a dispute concerning Pakistani prisoners of war in Indian custody. The Applicant asked the Court to indicate interim measures of protection pending final decision. India declined to consent to jurisdiction and explained why it felt that there was no legal basis for the action. Hearings were scheduled but Pakistan then notified the Court that it expected negotiations to commence and asked the Court to postpone further consideration of its request for interim measures in order to facilitate the negotiations. By its decision of July 13, 1973, the Court explained that in view of the suggestion of a postponement, the element of urgency requisite for the issuance of interim orders was not present. It determined that the Court must be satisfied that it has jurisdiction to entertain the dispute. The Court further decided that written proceedings should be first addressed to the jurisdictional issue, and set a time limit of October 1 for the Memorial of Pakistan and December 15 for the Counter-Memorial of India on that issue. It reserved the subsequent procedure for further decision.

By its order of September 29, 1973, the Court granted an extension sought by Pakistan for the filing of Memorials and Counter-Memorials. Although notified of the request, India had made no reply. However, difficulties which might have arisen from India's nonappearance were avoided in December when Pakistan informed the Court that agreement had been reached on some phases of the dispute and requested that, in order to further negotiations, the Court officially discontinue the case. By its order of December 15, 1973, the Court removed the case from its list.

In the Prisoner of War Case, the Court assumed an authority over an international dispute in spite of the defiance of the respondent state. Postponing its final decision on the challenged jurisdiction, it was not ultimately embarrassed by the nonappearance because it had good reasons to strike the case from its lists. This established a congruence between its action and the general processes of peaceful settlement.


But see the criticism of Judge Petren, dissenting, [1973] I.C.J. 328, 334. Retention of a case may also be designed to allow for the development of jurisdiction forum prorogatum. See
But judgment can be too long deferred, especially if the Court issues orders which the recalcitrant state refuses to obey. In the *Fisheries Jurisdiction Cases*, Iceland sought to apply its fisheries zone regulations in spite of the Court's interim order, and violence occurred. Although the Court had decided the jurisdictional question, it had not reached the merits. The reaffirmation of the interim orders under these circumstances accentuated the impotence of the Court and probably demeaned its authority.

If the nonappearing state is adamant in its rejection of the Court's authority, the jurisdictional issue must be resolved and some decision reached on the underlying controversy. The simplest result, sanctioned by the Court's Statute, is a default judgment. While in the cases under review the Court has ostensibly been guided by article 53, it has not rigorously applied that provision. Aware that these types of cases call for more than the formal exercise of adjudicatory powers, it has sought to resolve the underlying controversies in a manner which will attract the assent of both the consenting and nonconsenting parties.

The Court's handling of the fisheries controversy, while otherwise subject to criticism, was, according to this measure, laudable. It tried to take the legitimate interests of Iceland as well as those of its antagonists into account, and it tailored its judgment to the practical needs of further negotiations. Iceland had refused the jurisdiction of the Court, but had begun (in spite of violent interludes) to reach a peaceful accommodation of its differences with Great Britain and the Federal Republic of Germany. The Court took pains to elaborate an equitable frame of reference for the negotiations which would contribute to a final resolution of the controversy.

Where the nonconsenting state is not actively pursuing a resolution of the controversy by means other than adjudication, the position of the Court is more precarious. It may provisionally resolve the jurisdictional issue in favor of its competence, but because of the prospect of certain defiance, it may be unwilling to render a judgment on the merits. The somewhat puzzling decisions in the

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H. Lauterpacht, *The Development of International Law by the International Court* ch. 6, § 34 (1958).


* Note 8 supra.

* See sec. IV infra.
Nuclear Tests Cases may be more comprehensible in light of these difficulties.

In its judgments of December 20, 1974, the Court by a 9-6 vote held that the claims of Australia and New Zealand no longer had any object and therefore the Court need not give decision. The Applicants needed an assurance or undertaking by France that it would not conduct further nuclear tests at its Pacific Center, and the public statements made by the President of France and other high French officials were interpreted as creating a binding obligation not to conduct further atmospheric tests. The rationale was ingenious, but not convincing. The provisional orders, blatantly violated by France, lapsed. Should France violate the undertaking, provision was made for the reappearance of the Applicants; yet if France should decide that its national interests required a resumption of atmospheric nuclear tests, the Court would be placed in a very awkward if not impossible position. The total impression was that the Court was groping for a means of exit and the decision lacked the sense of suitability which one could perceive in the termination of the Prisoner of War Case.

Did the circumstances call for a final determination of the jurisdictional issue and a decision on the merits? The Applicants had asked for a decision that the conduct of France was not consistent with international law, a request that could have been met with a Declaratory Judgment. Such a decision would have been more consistent with the judicial function. With the legal relations between the parties defined in a manner consonant with the genuine controversy, it would then have remained for the states to draw for them-

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31 The Court remarked:

It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding. In these circumstances, nothing in the nature of a quid pro quo nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect, since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement by the State was made. [1973] I.C.J. 253, 267.
selves whatever appropriate conclusions should be drawn from the
decision.32 But while this appears to be a preferable resolution, it
contains questionable assumptions about applicable law. The rele-
vant conventional norms, such as those in the Nuclear Test Ban
Treaty,33 were not applicable to France. And it would probably not
have been appropriate to extend the principle of the Trail Smelter
Arbitration34 to the testing of weapons which sovereign states feel
are necessary for their defense, at least in the absence of a broad
consensus concerning responsibility for the consequences.

In the Fisheries Cases, by contrast, the Court based the adjudica-
tory phase of its decision upon a general principle proscribing unil-
lateral state action, one which the Court has previously applied and
which was reflected in the 1958 Geneva Convention on the High
Seas. However, whether the Court's opinion in the Fisheries Cases
was in its entirety a judicious exercise of power is more difficult to
determine. There the Court was assuming an authority to enforce
the obligations of pacific settlement provided in article 33 of the
U.N. Charter.35 Moreover, in balancing the respective interests, it
refused to take account of developments in the law of the sea favora-
table to Iceland's position. To better understand the significance of
these factors it may be useful to examine more closely the phenome-
non of parallel competence.

IV. JUDICIAL COMPETENCE IN LIGHT OF EMERGING NORMS

In the general flow of decisions which we are examining, many of
the underlying controversies fall within the province of different

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32 See the joint dissenting opinion of Judges Onyeama, Dillard, Jimenez DeArechaga, and
33 Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under
34 Trail Smelter Arbitration (United States v. Canada), 3 R. Int'l Arb. Awards 1905 (1938,
1941): "[N]o state has the right to use or permit the use of its territory in such a manner as
to cause injury by fumes in or to the territory of another or the properties or persons therein,
when the case is of serious consequence and the injury is established by clear and convincing
evidence." Id. at 1965. Compare Hand, Territorial Sovereignty and the Problem of Transna-
tional Pollution, 69 AM. J. INT'L L. 50 (1975) with Elkind, Footnote to the Nuclear Test Cases:
For an analysis of the majority opinion in the Nuclear Test Cases, see Ed. Comment, 69 AM.
35 "The parties to any dispute, the continuance of which is likely to endanger the mainte-
nance of international peace and security, shall, first of all, seek a solution by negotiation,
enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies
or arrangements, or other peaceful means of their own choice." U.N. CHARTER art. 33, para.
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parts of the United Nations system. They involve some relationship between the Court as the principal judicial organ of the United Nations, and other organs or activities of the organization which perform dispute settlement and law-creating functions. Where a case before the Court involves matters of fundamental change, policies may be emerging in another forum which may conflict with the legal norms appropriate for judicial decision. In the Fisheries Jurisdiction Cases reference was made to proposals for the expansion of coastal state jurisdiction then under consideration by the Third United Nations Conference on the Law of the Sea. The Court characterized these proposals as the aspirations of states rather than as the expression of principles of existing law. As a court of law, the Court could not enter a judgment sub specie legis ferendae.

In the adjudicatory phase of the Fisheries decision, the Court's position was essentially correct. Passing judgment upon the compatibility of a state's action with existing law preserved the uniqueness of the judicial function. In periods when legal norms are being transformed, the Court retains its integrity by applying the law as it is, rather than engaging in judicial lawmaking. Nor was the Court unfair to the respondent state. The Court did not declare that the extension of fisheries jurisdiction was invalid erga omnes; it only sought to proscribe the unilateral assertion of coastal state competence. By having recourse to the Court, the Applicant states were insisting upon acquired rights, and this strategy was probably a source of friction. But an impartial decision based upon existing law can be conducive to final settlement, as it can be a starting point for accommodations. Conversely, a denial of an existing right, coupled with a refusal to submit the claim to impartial resolution, can freeze negotiation positions and preclude the spirit of accommodation.

These considerations tend to support the Court's judgment in the Fisheries Cases. But, as the full decision is taken into account, justifications for the Court's action tend to diminish because the Court also asserted an authority to dictate the general structure of subsequent negotiations between the parties. It reasoned that the preferential rights of the coastal state had to be reconciled with the

historical rights of the Applicants based upon traditional fishing, and that such an adjustment could only be achieved through good faith bargaining. Negotiations were integral to the proper solution of the controversy.

The Court's directive orders concerning the framework of negotiation was arguably within the adjudicatory authority considered as a general participation in the peaceful settlement of disputes. While noting that it could not preclude the parties from taking advantage of subsequent developments in the rules of international law, the Court imposed upon the parties the obligation to take into account the Court's determination, based upon existing law, of the respective rights of both the Applicants and the respondent state in the disputed area. Given the rapid changes now being experienced in the area of the law of the sea, it was probably unwise for the Court to so extend its authority.

The disparity between the emerging regime of coastal state jurisdiction and the Court's judgment has become so significant that the developments in the law have virtually displaced the Court's orders regarding negotiations. Several states, including Iceland, have now extended their fisheries jurisdiction to 200 miles. These changes reflect the concept of an exclusive economic zone which is under consideration by the Law of the Sea Conference. The legal relationship conceived by the Court has been substantially altered because the emerging norms upset the delicate balance of rights which was integral to its judgment. The working drafts under consideration by the Law of the Sea Conference would eliminate freedom of fishing within the economic zone and substitute therefor coastal state sovereign rights over the exploration, exploitation, conservation, and management of living resources. This not only extends coastal

See the separate opinion of Judge DeCastro in the Fisheries Jurisdiction Cases, Merits, Judgment, [1974] I.C.J. 3, 72, where it is argued that once the Court had declared that it had jurisdiction, it should not leave the dispute open, but rather actively seek a solution.


Article 45(1)(a) of the Law of the Sea Informal Single Negotiating Text, pt. II (Second Committee Text), reprinted in 14 INT'L LEGAL MAT'LS 710, 721-22 (1975), provides as follows:

In an area beyond and adjacent to its territorial sea, described as the exclusive economic zone, the coastal State has

(a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether renewable or non-renewable, of the bed and subsoil and the superjacent waters . . . .
state authority; it drastically alters the relationship between the coastal state and foreign fisheries. Coastal state sovereignty is substituted for freedom of fishing, and, while the emerging law recognizes some legitimate interests of foreign fishing, they are subject to the discretion of the coastal state. The reciprocities no longer fit into the Court’s framework. This affects a change in the bargaining position of the parties, which is reflected in agreements reached between the adversaries in the *Fisheries Cases.*

V. PARALLEL COMPETENCE OF OTHER U.N. FORA

The Court’s involvement in the processes of dispute settlement was ineffective in the *Fisheries Cases* not only because of changing patterns of state practice, but also because a different policy was being established within another United Nations arena. However, where another organ of the United Nations actively invokes the jurisdiction of the Court, it can provide an opportunity for the Court to contribute to the settlement of a serious dispute. In such an event, the Court may be able to assert its authority in spite of the objection of one of the parties to the underlying controversy. The controversy surrounding the decolonization of the Western Sahara provided such an opportunity for positive collaboration between different organs of the United Nations.

By its Resolution 3292 (XXIX) the General Assembly requested the International Court to give an advisory opinion as to whether the Western Sahara was *terra nullius* at the time of Spanish colonization and, if not, to determine the nature of the legal ties between

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that territory and the Kingdom of Morocco and the Mauritanian entity. As a judge of Spanish nationality was a member of the Court, Morocco requested the appointment of an *ad hoc* judge under article 31 of the Statute of the Court. Mauritania, referring to the recognition of its interest in the question by the General Assembly, informed the Court of its intention to choose a person to sit as judge, *ad hoc* in the proceedings.

In its initial order of May 22, 1975, the Court, by ten votes to five, found that Morocco was entitled under articles 31 and 68 of the Statute, and article 89 of the Rules of Court, to choose a person to sit as judge *ad hoc*. By a vote of 8-7, it held that the requirements of the relevant articles and rules were not satisfied as to Mauritania. The majority reasoned that at the time Resolution 3292 was adopted there appeared to be a legal dispute between Morocco and Spain regarding the Western Sahara territory. In the language of article 89 of the Court rules, the advisory opinion appears to be one "upon a legal question actually pending between two or more states." As for Mauritania, the majority held that these conditions were not met. The decision was without prejudice to the *locus standi* of any interested state in regard to any matters raised in the proceedings.

Following the General Assembly's request for an expeditious decision, the Court, after inviting Members of the United Nations to take part in the oral proceedings, held public hearings in June and July, and announced its advisory opinion on October 16, 1975. In its opinion it responded to Spain's observation that the advisory jurisdiction was being used to circumvent the principle of consent to adjudication.

Spanish counsel referred to statements made by King Hassan II of Morocco in September 1974 proposing the joint submission by Spain and Morocco to the International Court of the question as to whether the Western Sahara was *res nullius*. Spain argued that the

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11 "If 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 judge." I.C.J. *Statute* art. 31, para. 2.
18 *Id.* at 8. Article 68 provides that in the exercise of its advisory functions, "the Court shall further be guided by the provisions of the present Statute which apply in contentious cases to the extent to which it recognizes them to be applicable." I.C.J. *Statute* art. 68.
20 The Rules of the Court, as amended May 10, 1972, are found in I.C.J. *Acts and Documents*, No. 2 (1972).
21 Algeria and Zaire were also represented at the public hearings.
subject of the questions raised in the request for the advisory opinion were substantially identical with those which it had refused to submit to the Court for resolution in a contentious proceeding. Consequently, to give a reply to the request for an advisory opinion would

[b]e to allow the advisory procedure to be used as a means of bypassing the consent of a State, which constitutes the basis of the Court’s jurisdiction. If the Court were to countenance such a use of its advisory jurisdiction, the outcome would be to obliterate the distinction between the two spheres of the Court’s jurisdiction and the fundamental principle of the independence of states would be affected, for states would find their disputes with other states being submitted to the Court, by this indirect means, without their consent; this might result in compulsory jurisdiction being achieved by majority vote in a political organ. Such circumvention of the well-established principle of consent for the exercise of international jurisdiction would constitute . . . a compelling reason for declining to answer the request.\(^3\)

The Court acknowledged that the discretionary nature of its advisory jurisdiction would allow it to decline to give an opinion if, under the circumstances, the fundamental principle of state consent would be violated. But it held that this was not such a case. The Status of Eastern Carelia Case,\(^4\) which was favorable to the Spanish position, was distinguishable. There the Permanent Court had declined to give an advisory opinion requested by the Council of the League of Nations which concerned a dispute between Finland and Russia. As it was not then a member of the League, Russia was not bound by any of the methods of pacific settlement provided for in the Covenant to which it did not give express consent. In the present instance Spain, as a member of the United Nations, had accepted the Charter and Statute; it had given general consent to the exercise by the Court of its advisory jurisdiction. Moreover, the Court was not giving its opinion to the states, but to the organ which had requested it. The request involved a legal controversy, but one which arose within the General Assembly in relation to matters with which the Assembly was legitimately concerned. The objective was to guide that organ in the discharge of its responsibilities to the process of decolonization in the disputed territory.\(^5\) This assured

\(^3\) Id. at 22-23.  
\(^5\) [1975] I.C.J. 12, paras. 30-42. Reference was also made to the Peace Treaty Case,
that the Court, in giving its opinion, was not circumventing the principles of sovereignty by indirectly resolving a particular dispute to which one of the parties has not consented.

The Court was able to assert its authority over a legal controversy in spite of the objection of one of the parties, because it was able to justify its jurisdiction in terms of its responsibility to another organ of the United Nations system. This coordination also enabled the Court to place contentions between the parties which were highly political in character into a broader legal perspective. In the controversy between Spain and Morocco, no issue was raised as to the legitimacy of Spain's original occupation of Western Sahara. Thus, the first question presented in the request for the advisory opinion—whether the territory was res nullius at the time of the occupation—appeared to be a matter of historical interest with no apparent relation to contemporary legal relations. This created an initial difficulty because judicial power, even in advisory proceedings, can only be exercised with reference to the existence of rights and obligations in international law.

The differences between Spain and Morocco related to procedures for implementing decolonization in the disputed area. It was the position of Morocco that at the time of colonization it was exercising sovereign authority in the area. Mauritania was contending that during the period in question ties of allegiance existed between the nomadic tribes in the Western Sahara and the Mauritanian entity. These conflicting positions, reflected in the second question submitted by the General Assembly, had a contemporary juridical significance.

Both Morocco and Mauritania claimed that the Western Sahara was part of their territory. Such assertions had to be reconciled with the principle of self-determination of peoples. Thus principles of decolonization, as articulated in prior General Assembly resolutions, were an indispensable source of law:

\[\text{[T]he applicable principles of decolonization call for examination by the Court in that they are an essential part of the framework of the questions contained in the request. The reference in those questions to a historical period cannot be understood to fetter or hamper the Court in the discharge of its judicial functions. That} \]

would not be consistent with the Court's judicial character; for in
the exercise of its functions it is necessarily called upon to take into
account existing rules of international law which are directly con-
nected with the terms of the request and indispensable for the
proper interpretation and understanding of its opinion."

By placing the diverse contentions within the total context of deco-
lonization, the Court was able to affirm the normative status of
United Nations resolutions on the self-determination of non-self-
governing peoples and related these principles to the substance of
the controversy. While it found that both Morocco and the Mauri-
tanian entity had legal ties in the disputed area at the time of
Spanish occupation, they were not ties of territorial sovereignty. It
further determined that the interests of these states cannot be op-
posed to the principle of self-determination through the free and
genuine expression of the will of the peoples in the territory.

By viewing the dispute as part of the decolonization process, and
in subordinating the interests of states to the values of self-
determination, the Court made an admirable use of its judicial au-
thority. But some doubts can be raised as to whether the Court
acted with complete consistency. The Court determined that con-
sent to jurisdiction was unnecessary because the matter submitted
to it was not a territorial dispute between Spain and Morocco. Since
the proceeding was not of an adversarial character, it decided that
normal rules on burdens of proof would be inapplicable. Yet the
parties argued their positions strenuously, as they were compelled
to do if their interests were to be adequately represented. And the
Court, rather than pursuing an independent investigation, relied
upon the proofs presented and made choices between competing

56 Western Sahara, Advisory Opinion, [1975] I.C.J. 12, para. 52. But see the separate
opinion of Judge Petren, [1975] I.C.J. 104, which asserts that the issues are only historical.
57 Reliance was placed upon the Declaration on the Granting of Independence to Colonial
Countries and Peoples, G.A. Res. 1514(XV) and Res. 1541(XV), providing for the choices
available to non-self-governing territories upon the achievement of independence. [1975]
A/4684 (1961); G.A. Res. 1541, id. at 29.
58 [1975] I.C.J. 12, para. 162. G.A. Res. 1514, para. 6 provides:
Any attempt aimed at the partial or total disruption of the national unity and the
territorial integrity of a country is incompatible with the purposes and principles
of the Charter of the United Nations.
ties advanced by Morocco and Mauritania bear upon this standard. The underlying problem
was to reconcile the right of self-determination with the principle of national unity. [1975]
I.C.J. 104,110 (Judge Petren, separate opinion); [1975] I.C.J. 78 (Judge Ignacio-Pinto). See
also Emerson, Self Determination, 65 AM. J. INT'L L. 459 (1971).
The advisory opinion was also incongruous with the earlier judgment concerning the appointment of ad hoc judges. In its advisory opinion, the Court addressed itself to the arguments of both Morocco and Mauritania concerning their interests in the disputed area. These interests were, at least partially, adverse. In its preliminary order the Court, by an 8-7 vote, had refused Mauritania's request for an ad hoc judge on the grounds that there was not an adversarial relation between it and Spain. That judgment was technically correct, but was not responsive to the actual tenor of the underlying controversy as later revealed by the advisory opinion.

More serious questions can be raised concerning the limited nature of the advisory opinion. Having given its opinion upon the basis of the supremacy of the principle of self-determination over claims based upon territorial integrity, the Court determined that the rights flowing from these principles have a bearing upon the scope and quality of the General Assembly's supervisory power. Yet the Court was careful not to limit the options available to the General Assembly as it fulfilled its responsibilities in the decolonization process. It was sufficient for the Court to give its opinion to the Assembly based upon the law, without deciding what effect the opinion might have upon its future actions. Here the Court's position might be criticized on the grounds that it was an insufficient contribution to the effective and lawful settlement of the decolonization dispute.

The Court, under the present circumstances of international relations, is in a difficult position, given the general resistance of states to its authority. Its ability to contribute to the peaceful settlement of disputes is precarious; in cases of which it is seized, it must make a careful judgment about the practical limits of its competence. We have already noted how judicial activism can detract from the Court's authority. But while the Court must be circumspect, there are circumstances which call for it to be bold. It is submitted that in the Western Sahara Case the Court should have taken a stronger

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9 [1975] I.C.J. 12, paras. 89, 102. There was division within the Court concerning whether such interests were capable of legal determination, since they were based upon forms of allegiance unfamiliar to Western societies. See the discussion in Judge Dillard's separate opinion, [1975] I.C.J. 116, 125-126. Tension between advisory competence and the judicial function can also be seen in Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, [1973] I.C.J. 166.

position with respect to the ultimate disposition of the decolonization controversy.

Since the time of the advisory opinion, the General Assembly has not exercised an effective authority over the process of self-determination. Following the so-called "Green March" into the Saharan territory, Spain, Morocco, and Mauritania, on November 14, 1975, concluded a tripartite agreement providing for the termination of Spanish presence and the establishment of a temporary tripartite administration to which Spain would transfer its authority as administering power. The new administration, consisting of Spain, Morocco, and Mauritania would collaborate with an assembly which would ostensibly represent the views of the Saharan population. By its resolutions of December 10, 1975, the General Assembly sought to balance its responsibility to assure respect for the principle of self-determination with a recognition of the tripartite agreement and its consequences. Spain, as the administering power, was requested to assure that "all Saharans . . . may exercise fully and freely, under United Nations supervision, their inalienable right to self-determination," while the interim administration was requested to assure the same objective, "through free consultations organized with the assistance of a representative of the United Nations appointed by the Secretary General." 63

While the ultimate political status of Western Sahara remains undetermined, it clear that political events have been manipulated by Morocco and Mauritania so as to thwart United Nations supervision over the process of self-determination and to divide the area in a manner consistent with their interests. On February 26, 1976, Spain withdrew from the Western Sahara, to avoid responsibility for a pending vote by the National Assembly which Spain charged was being controlled by Morocco and Mauritania. These states invited the Secretary General to send an observer, which he declined to do on the grounds that the proceedings were not in conformity with General Assembly resolutions. 65 On February 27, the Assembly

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63 G.A. Res. 3458(B), id. at 117. See U.N. MONTHLY CHRON., Jan. 1976, at 38.
64 N.Y. Times, Feb. 27, 1976, at 5, col. 1.
65 At a press conference on Feb. 26, Secretary General Waldheim referred to his refusal to send an observer:

There was no way of acting differently if I want to stick to the existing resolutions adopted by the General Assembly, even taking into account that we had two resolutions and that those two resolutions were contradictory in a number of aspects. But
voted to ratify the annexation of the territory by Morocco and Mauritania.66

The Court could not have prevented these results, but if it had been more explicit about the rights of the inhabitants, the contempo-
tuous parties might have felt a greater restraint. If it is "for the
people to determine the destiny of the territory and not the territory
the destiny of the people,"67 the Court should have shown a greater
solicitude for that ideal. It would have been appropriate for the
Court to affirm fully the rights of the inhabitants, and to have made
the options open to the people of the territory an explicit part of its
opinion.68

VI. CONCLUSION - THE NEED FOR INSTITUTIONAL COOPERATION

The effective exercise of judicial authority by the International
Court of Justice is dependent upon the good will, restraint, and
cooperation of states whose international actions are subject to the
jurisdiction of the Court. It is important that member states feel
bound by the methods and procedures provided by the Charter for
the peaceful settlement of disputes. But it is equally important that
the nonjudicial organs of the United Nations encourage and imple-
ment those pacific objectives. The Western Sahara situation dimin-
ished the Court's authority, not because of its incompetence, but
because its advisory opinion was not followed with appropriate ac-
tion by the General Assembly.

The inaction of United Nations organs can be significant in other
cases where the Court’s jurisdiction over a particular dispute is
challenged and its authority is defied. In the Fisheries Jurisdiction
Cases, Iceland, the respondent state, had denied the Court’s compe-
tence to deal with disputes arising from the extension of its fisheries
zone. Nevertheless, the Court issued interim orders of protection
which provided, inter alia, that none of the parties should take an
action that would aggravate the dispute, and that Iceland should
refrain from attempting to enforce its new fisheries regulations

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they had one element in common: the right of the people of Western Sahara to self-
determination.


66 N.Y. Times, Feb. 28, 1976, at 6, col. 2. At the same time, a popular front movement,
aided by Algeria, proclaimed the establishment of a Saharan Arab Democratic Republic. A
guerilla war followed. See N.Y. Times, June 11, 1976, at 4, col. 3.


68 See [1975] I.C.J. 78, 80, in which Judge Nagendra Singh advocated this position in his
separate declaration.
against vessels registered in the applicant states. Notice of these measures was given to the parties and to the Security Council as required by article 41 of the Court’s Statute.66

In May of 1973, violent clashes occurred in the disputed waters. In letters to the President of the Security Council, formal complaints were made by the representatives of Great Britain and Iceland: the former charging a violation of the Interim Order, the latter charging an act of aggression in violation of article 39 of the Charter.67 No action was taken by the Council. Great Britain then requested the International Court to confirm its interim measures of protection. Although Iceland repeated its protest against the Court’s jurisdiction, the Court, on July 12, 1973, confirmed the interim orders68 and decided that, subject to provisions for amendment, they should remain in effect until final judgment.

In the Fisheries Jurisdiction Cases, the Court had decided that it had jurisdiction to entertain the applications69 and deal with the merits before complaints of violations of the interim orders were made to the Security Council.70 Moreover, the changing character of relevant norms undoubtedly had a bearing upon the Council’s silence. Yet the circumstances clearly called for some institutional coordination. The Court could not have threatened the respondent state with the sanction of default.71 And support from the Council was needed to assist the fulfillment of the judicial function.

It is arguable that member states have an obligation to comply with provisional orders of the Court so long as they are not based upon a manifestly erroneous jurisdiction. Such compliance, which is a general principle of civilized legal systems,72 may be included

66 “Pending the final decision, notice of the [interim] measures suggested shall forthwith be given to the parties and to the Security Council.” I.C.J. Statute art. 41, para. 2.
71 Article 61 of the Rules of the Court, as amended May 10, 1972, does not contain any provision for judicial sanction in case of noncompliance of a party with an interim measure of protection. I.C.J. Acts and Documents, No. 2 (1972). Rule 57 of the Rules of March 24, 1922, provided that “any refusal by the parties to conform to the suggestions of the Court or of the President with regard to [interim] measures shall be placed on record.” See also S. Rosenne, The International Court of Justice ch. IV, §29 (1957). The Corfu Channel Case (Great Britain v. Albania), Assessment of Compensation, [1949] I.C.J. 244, involved a default for failure of appearance and failure to submit Counter-Memorials.
72 The classic United States case is Howat v. Kansas, 258 U.S. 181 (1922). See also Walker v. City of Birmingham, 388 U.S. 307 (1967). The municipal analogy is distinguishable in that
within the scope of article 94 of the Charter. Moreover, as Lauterpacht observed, it should not be assumed that the Statute of the Court, which is a legal instrument, refers only to moral obligations.

As article 41(2) of the Court's Statute provides that notice of interim orders be given to the Security Council, it would be unreasonable to assume that that organ could not take cognizance of violent disobedience of such orders. While the imposition of sanctions may not have been appropriate, some corporate expression of disapproval would have been within the Council's power. As it is authorized by chapter VI of the Charter to promote the peaceful settlement of disputes, the Council could have admonished both parties to refrain from further confrontation. It might also have reminded them of the Charter principle that reference to the International Court of Justice is the preferred means of resolving legal disputes.

In two other contentious cases which we have reviewed, the Nuclear Tests Cases and the Case Concerning Pakistani Prisoners of War, the Council was notified of the interim measures of protection indicated by the Court. The Western Sahara controversy came

it assumes that an erroneous jurisdiction can be corrected on appeal. The distinction should not, however, be considered decisive, since it states a principle of general order.

"Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party." U.N. CHARTER art. 94, para. 1. See S. Rosenne, THE INTERNATIONAL COURT OF JUSTICE ch. IV, § 29 (1957).

Lauterpacht concedes that the language of article 41 of the Statute "precludes any confident affirmation of the binding force of the measures issued ... under that Article." Kelsen states that the wording of that article "makes it difficult to interpret Article 41 to mean that the Court may impose upon the contesting parties the obligation to comply with provisional measures ordered by the Court ... ." H. Kelsen, THE LAW OF THE UNITED NATIONS 538 (1964). This however, would not preclude the obligation from arising from another source, such as art. 94 of the Charter, or from a general duty of membership in the United Nations. Cf. Western Sahara, Advisory Opinion, [1975] I.C.J. 12, para. 30, where the Court observes that Spain as a member of the United Nations has given in general its consent to the exercise by the Court of its advisory jurisdiction.

Note 69 supra.

Viewing the Council's authority from this source is compatible with the understanding that interim orders do not come within the powers conferred upon the Security Council by article 94(2) of the Charter, which expressly refers to judgments of the Court:

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

U.N. CHARTER art. 94, para. 2; Compare the discussion of the Anglo-Iranian Case before the Council in S. Rosenne, THE INTERNATIONAL COURT OF JUSTICE ch. IV, § 37 (1957).

U.N. CHARTER art. 36, para. 3. The utility of this procedure might be challenged because the subject matter was under discussion by the Law of the Sea Conference.
before the Council because of the so-called "Green March" into the Western Sahara by Morocco following the announcement of the Court's advisory opinion in October 1975. By its Resolution 380 (1975) of November 6, 1975, the Council called upon Morocco to withdraw all the participants from that territory. It also called upon all parties concerned, without prejudice to any action which the General Assembly might take, to cooperate with the Secretary General in trying to find a peaceful solution.

The authority of the Court was only indirectly involved in this incident. The Court had not adjudicated an international dispute between Morocco and Spain, the administering power. Nor was Morocco disobeying an order of the Court. The advisory opinion did not legally bind anyone. But the Moroccan action was plainly contrary to the Court's finding that it had not established sovereign authority in the disputed area prior to colonization. The ultimate outcome of the Western Sahara affair was marked by contempt for both the Court and the General Assembly. It was an outcome which the Security Council should have foreseen and used its authority to prevent. By failing to insist upon principles of self-determination articulated by the Assembly and confirmed by the Court, the Council compromised its position and failed to fully meet its responsibilities.

In the recent Aegean Sea Continental Shelf Case the failure of coordination between the Court and the Security Council was compounded by the actions of the parties. On August 10, 1976, Greece filed proceedings in the Registry of the Court against Turkey in respect of a dispute concerning the continental shelf appertaining to those two states in the Aegean Sea. The application included a request for interim measures of protection. On the same day, the Permanent Representative of Greece to the United Nations requested an urgent meeting of the Security Council to consider the alleged violations by Turkey of the sovereign rights of Greece on its continental shelf in the Aegean. With the participation of the representatives of both Greece and Turkey, the Council discussed the question at meetings held on the 12th, 13th and 25th of August. On August 25, the Council adopted Resolution 395 which appealed to

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the two governments to exercise restraint and to do all in their power
to reduce tensions in the area and resume direct negotiations.

In the meantime the Court had notified both parties of its inten-
tion to hold public hearings, commencing on August 25, which
would afford them the opportunity of presenting their observations
on the Greek request for interim measures. By letter dated August
25, received by the Court on the 26th, the Turkish Government
submitted its observation that the application of Greece was prema-
ture and that the Court lacked jurisdiction. It requested that the
Court remove the case from the list and it refused to appoint an
agent to represent it before the Court.

After holding hearings at which only Greece was represented, the
Court, on September 11, 1976, entered its order denying the request
for interim measures of protection. It held that there was insuffi-
cient risk of irremediable prejudice to the Applicant’s rights to jus-
tify the exercise of its power under article 41 of the Statute. With
reference to the claim of Greece that interim measures were neces-
sary to prevent the aggravation of the dispute, the Court took notice
of the parallel proceedings before the Security Council. Referring to
Resolution 395 and its call for the peaceful settlement of the dis-
pute, and assuming the parties’ compliance with its terms, the
Court found it unnecessary to consider whether it had an indepen-
dent power under article 41 of the Statute to indicate interim mea-
sures of protection solely to prevent aggravation.

The Court, in deferring to the Council, underscored the authority
of that United Nations organ; but the support was not mutual. The
Council had, in its resolution, made reference to the pending judi-
cial proceedings, but in terms so vague and unsubstantial as to be
practically meaningless. The Council members may not have been
aware of the intentions of the Turkish Government to defy the
Court, but they could have encouraged a more responsible posture
if, in their resolution, they had expressly recognized the Court’s
right to determine its own jurisdiction. After its decision of Septem-
ber 11, the Court followed its usual practice of entering a subsequent

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55 Aegean Sea Continental Shelf Case, Order (Sept. 11, 1976), [1976] I.C.J. 3. For the
text of article 41, see notes 18, 69 supra.

54 In the final paragraph of Resolution 395, the Council
Invites the Governments of Greece and Turkey . . . to take into account the contri-
bution that appropriate judicial means, in particular the International Court of
Justice, are qualified to make to the settlement of any remaining legal differences
which they may identify in connection with their present dispute.

order on the question of jurisdiction. The order, while logical and necessary, simply exaggerates the Court’s embarrassment as it proceeds to determine its jurisdiction where one party to the conflict has denounced that jurisdiction in advance.

If major international disputes are to be settled upon the basis of law and orderly procedure, greater account must be taken of the interdependence which exists between the various principal organs of the United Nations. Should present trends continue, the Court’s competence to deal with serious controversies will be continually challenged by states whose interests are affected by the assumption of judicial authority. On its own behalf, the Court must exercise a creative and judicious wisdom comparable to the challenge. But the Court is especially vulnerable to the arbitrariness of state sovereignty. It can fulfill its mission only when its actions gain support from other components of the United Nations which have related responsibilities. Without such mutual support, the possibilities for the Court to make a constructive and effective contribution to the peaceful settlement of disputes will go into a deeper and more serious decline.

87 Aegean Sea Continental Shelf Case, Order (Oct. 14, 1976), [1976] I.C.J. 42. (Fixing time limits for submission of Memorials and Counter-Memorials.)