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FRENCH NUCLEAR TESTING AND ARTICLE 41—ANOTHER BLOW TO THE AUTHORITY OF THE COURT?

*Jerome B. Elkind**

I. INTRODUCTION

On the 23rd of July 1973, at 9:00 a.m. New Zealand time, members of the crew of the New Zealand vessel, *Otago,* witnessed a nuclear explosion on one of the islands in the Mururoa atoll.[1] The blast, a small one in the low kiloton range, marked the beginning of the eighth series of French atmospheric nuclear tests, which have been conducted in the Pacific since July 1966 when France moved its nuclear test site from the Reggane Firing Ground in the Sahara. Since that time the French nuclear tests have been a perennial sore spot in the diplomatic relations between France and the nations of the Pacific. The matter has, in fact, been the subject of notes exchanged between New Zealand and France[2] and between Australia and France[3] since 1963 when press reports indicated France's intention to move its test sites to the Pacific.

In the period of twenty-seven years since nuclear tests have begun, atmospheric testing has been the subject of much diplomatic discussion.[4] Nuclear testing has been the subject of five multilateral treaties[5] and at least nineteen Resolutions of the

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1. The Times, July 23, 1973, at 1, col. 3.

2. *See* annex III of the application filed with the Registry of the International Court of Justice on 9 May 1973 by the Government of New Zealand instituting proceedings in the case concerning nuclear tests (*New Zealand v. France*) [hereinafter cited as New Zealand application].

3. *See* annexes 2-14 of the application filed with the Registry of the International Court of Justice on May 9, 1973 by the Government of Australia instituting proceedings in the case concerning nuclear tests (*Australia v. France*) [hereinafter the Australian application].

4. *Id.*

5. Multilateral Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water (Moscow Test Ban Treaty) Oct. 10, 1963, [1963]

United Nations General Assembly.[6] Atmospheric nuclear tests have also been condemned in international forums outside the United Nations.[7]

The French test of July 23rd, however, had a unique legal significance in that it was conducted in apparent defiance of two orders for interim measures of protection issued by the International Court of Justice[8] under article 41 of the Statute of the International

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2 U.S.T. 1313, T.I.A.S. No. 5433, 480 U.N.T.S. 43; Treaty for Prohibition of Nuclear Weapons in Latin America (Treaty of Tlatleloco) 14 February 1967, [1971] 1 U.S.T. 754, T.I.A.S. No. 7137, 634 U.N.T.S. 364 (effective May 12, 1971); Multilateral Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies (Outer Space Treaty), Oct. 10, 1967, [1967] 3 U.S.T. 2410, T.I.A.S. No. 6347, 610 U.N.T.S. 208; Multilateral Treaty on the Non-Proliferation of Nuclear Weapons (Non-Proliferation Treaty) March 5, 1970, [1970] 1 U.S.T. 483, T.I.A.S. No. 6839; Treaty on the Prohibition of the Employment of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea Bed or Ocean Floor (Seabed Treaty) [1972] 1 U.S.T. 701, T.I.A.S. No. 7337 (entered into force May 18, 1972). *See also* Multilateral Antarctic Treaty June 23, 1961, art. 5, [1961] 1 U.S.T. 794, T.I.A.S. No. 4780, 402 U.N.T.S. 71.

6. *See* G.A. Res. 1148, 12 U.N. GAOR Supp. 18, at 3, U.N. Doc. A/3729 (1957); G.A. Res. 1252, 13 U.N. GAOR Supp. 18, at 3, U.N. Doc A/4090 (1958); G.A. Res. 1379, 14 U.N. GAOR Supp. 16, at 3, U.N. Doc. A/4354 (1959); G.A. Res. 1402, 14 U.N. GAOR Supp. 16, at 4, U.N. Doc A/4354 (1959); G.A. Res. 1578, 15 U.N. GAOR Supp. 16, at 4, U.N. Doc A/4684 (1960); G.A. Res. 1632, 16 U.N. GAOR Supp. 17, at 3, U.N. Doc. A/5100 (1961); G.A. Res. 1762A, 17 U.N. GAOR Supp. 17, at 3-4, U.N. Doc. A/5217 (1962); G.A. Res. 1910, 18 U.N. GAOR Supp. 15, at 14, U.N. Doc. A/5515 (1963); G.A. Res. 2032, 20 U.N. GAOR Supp. 14, at 8-9, U.N. Doc. A/6014 (1965); G.A. Res. 2163, 21 U.N. GAOR Supp. 16, at 11, U.N. Doc. A/6316 (1966); G.A. Res. 2324, 22 U.N. GAOR Supp. 16, at 16, U.N. Doc. A/6716 (1967); G.A. Res. 2455, 23 U.N. GAOR Supp. 18, at 12, U.N. Doc. A/7218 (1968); G.A. Res. 2604B, 24 U.N. GAOR Supp. 30, at 18, U.N. Doc. A/7630 (1969); G.A. Res. 2661A, 25 U.N. GAOR Supp. 28, at 13, U.N. Doc. A/8028 (1970); G.A. Res. 2663B, 25 U.N. GAOR Supp. 28, at 15-16, U.N. Doc. A/8028 (1970); G.A. Res. 2828, 26 U.N. GAOR Supp. 29, at 33, U.N. Doc. A/8429 (1971); G.A. Res. 2934A-C, 27 U.N. GAOR Supp. 30, at 17, U.N. Doc. A/8730 (1972). *See* New Zealand application at 14.

7. Conclusion of the Asian-African Legal Consultative Committee concerning the Legality of Nuclear Tests, U.N. Doc. A/CN.4/172 at 2-4 (1964). 59 AM. J. INT'L L. 121-22 (1965); Resolution 3 (I) on Nuclear Weapons Tests Adopted by the Stockholm Conference on the Environment (1972); Resolution W.H.A. 26.57 of the 26th World Health Assembly, 23 May 1973.

8. New Zealand v. France, [1973] I.C.J. 135. *See also* Australia v. France, [1973] I.C.J. 99.

Court of Justice to the effect that:

> The Governments of New Zealand [Australia] and France should each of them ensure that no action of any kind is taken which might aggravate or extend the dispute submitted to the Court or prejudice the rights of the other Party in respect of the carrying out of whatever decision the Court may render in the case; and in particular, the French Government should avoid nuclear tests causing the deposit of radio-active fall-out on the territory of New Zealand, the Cook Islands, Niue or the Tokelau Islands [Australian territory].[9]

The applications of New Zealand and Australia mark the first attempt to raise the issue of the legality of nuclear testing before an international judicial tribunal. The orders of the Court constitute in no sense a final determination of the question of whether nuclear tests in the atmosphere are legal; they do not even constitute a determination as to whether the Court has jurisdiction in the case.[10]

The question of jurisdiction is very much in issue. Both New Zealand and Australia claim that there are two alternative bases for jurisdiction *ratione materiae*.[11] The first is article 36(1) of the Statute of the International Court of Justice. The provision of the treaty in force that is claimed as a basis for jurisdiction is article 17 of the General Act for the Pacific Settlement of Disputes (the General Act) of September 26, 1928,[12] which provides:

> All disputes with regard to which the parties are in conflict as to their respective rights shall, subject to any reservations which may be made under Article 39, be submitted for decision to the Permanent Court of International Justice, unless the parties agree, in the manner herinafter provided, to have resort to an arbitral tribunal. It is understood that the disputes referred to above include in particular those mentioned in Article 36 of the Statute of the Permanent Court of International Justice.

France, New Zealand and Australia all acceded to the General Act on May 21, 1931.[13] Therefore, article 36(1) is coupled with article

9. Australia v. France, [1973] I.C.J. at 106, 142.

10. Australia v. France, [1973] I.C.J. 99, 105, New Zealand v. France, [1973] I.C.J. 135, 142.

11. New Zealand application ¶ 11, at 8. Australian application ¶ 50, at 17.

12. Sept. 26, 1928, 93 L.N.T.S. 2123.

13. May 21, 1931, 107 L.N.T.S. 2123. The following is the text of the relevant

37 of the Court's Statute, which provides for continuity of jurisdiction in the International Court of Justice "[w]henever a treaty or convention in force provides for reference of a matter to . . . the Permanent Court of International Justice. . . ."

As an alternative basis for jurisdiction the applicants cited article 36(2), the compulsory jurisdiction clause of the Statute of the International Court of Justice:

> The States parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:
> (a) the interpretation of a treaty;
> (b) any question of international law;
> (c) the existence of any fact which, if established, would constitute a breach of an international obligation;
> (d) the nature or extent of the reparation to be made for the breach of an international obligation.

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portions of the French reservation: *"Ladite adhesion concernant tous les differends que s'eleveraient apres ladite adhesion au sujet de situations ou de faits posteriours a elle, autres que ceux que la cour permanent de justice internationale reconnaissait comme portant sur un question que le droit international laisse a la competence exclusive de L'Etat; etant entendu que, par application de l'article 39, dudit acte, les differends que les parties ou l'une d'entre elles aurient deferes au conseil de la Societe des Nations ne seraient soumis aux procedures decrites par cot acte que si le conseil n'etait parvenue a statuter dans les constitution prevue a l'article 15, alinea 6, du pacte."*
("The said accession concerning all disputes that may arise after the said accession with regard to situations or facts subsequent thereto other than those which the Permanent Court of International Justice may recognize as bearing on a question left by international law to the exclusive competence of the State, it being understood that in the application of Article 35 of the said Act the disputes which the parties or one of them may have referred to the Council of the League of Nations will not be submitted to the procedures described in this Act unless the Council has been unable to pronounce a decision under the conditions laid down in Article 15, paragraph 6 of the Covenant.")

The New Zealand reservations are: "i. Disputes arising prior to the accession of His Majesty to the said General Act or relating to situations or facts prior to the said accession; ii. Disputes between His Majesty's Government in New Zealand and the Government of any other member of the League which is a member of the British Commonwealth of Nations, all of which disputes shall be settled in such manner as the parties have agreed or shall agree . . . . iv. Disputes concerning questions which by international law are solely within the domestic jurisdictions of the States; and v. Disputes with any Part to the General Act who is not a Member of the League of Nations." (The Australian reservations are similar.)

Even before the case was commenced, France had accepted compulsory jurisdiction in a declaration dated May 16, 1966 filed on May 26, 1966.[14] New Zealand had accepted the compulsory clause a number of years earlier in a declaration filed April 8, 1940.[15] Australia had also previously filed its declaration accepting the compulsory clause on January 6, 1954.[16] Thus, all the parties had previous declarations on record. France has, however, subsequently renounced the compulsory jurisdiction of the Court[17] and withdrawn from the General Act "without prejudice."

The French Government was not represented at the proceedings before the Court. However, on May 16, 1972, the Ambassador of France to the Netherlands handed to the Registrar of the Court a letter informing the Court that it was "manifestly not competent" to deal with the dispute and urging the Court to drop the matter from its docket. In an eighteen-page annex to that letter,[18] the French Government set forth its position. Its argument was that the dispute concerned an activity "connected with the national defense" and thus was excluded from the jurisdiction of the Court by the third French reservation to the compulsory clause.[19] Sec-

14. [1971-1972] I.C.J.Y.B. 63.

15. *Id.* at 75.

16. *Id.* at 55.

17. The Times, Jan. 21, 1974, at 4, col. 6.

18. The text of the Letter is set out in a French Government White Paper on French Nuclear Tests, Annex BX at 91. The annex to the letter is also in the White Paper, Annex B XII at 95; both the Australian and New Zealand representatives argued that the fact that eighteen pages were needed to argue the French Government's position was proof in itself that the Court's lack of jurisdiction was not manifest. *See also* Verbatim Record of Australia's case, Year 1973 Public Sitting held on Monday 22 May 1973 [hereinafter cited as Public Sitting, 22 May] at 19; Verbatim Record of New Zealand's Case, Year 1973, Public Sitting of 24 May [hereinafter cited as Public Sitting, 24 May] at 15.

19. As translated by the Secretariat of the United Nations, the French reservation (sent from Paris on May 16, 1966 by Mr. Couve De Murville) reads as follows: "On behalf of the Government of the French Republic, I declare that I recognize as compulsory *ipso facto* and without special agreement, in relation to other members of the United Nations which accept the same obligations, that is to say on condition of reciprocity, the jurisdiction of the Court, in conformity with Article 36, paragraph 2, of the Statute, until such time as notice may be given of the termination of this acceptance, in all disputes which may arise concerning facts or situations subsequent to this declaration with the exception of: (1) disputes with regard to which the parties may have agreed or may agree to have

ondly, France argued that the "present status of the General Act and the attitude towards it of the interested parties, and in the first place of France, rendered it out of the question to consider that there existed on that basis, on the part of France, that clearly expressed will to accept the competence of the Court which the Court itself according to its own constant jurisprudence deems indispensable for the exercise of its jurisdiction."[20]

The Court, in rejecting the French contention that the absence of jurisdiction is manifest, cited statements in both New Zealand's and Australia's oral arguments designed to demonstrate that there was a genuine dispute over jurisdiction. It cited New Zealand representations as saying: "[s]ince 1946 France has more than once acknowledged that the General Act remains in force, ... [A]s far as the General Act is concerned, not only is there no manifest lack of jurisdiction to deal with this matter, but the Court's jurisdiction on the merits on that basis is reasonably probable, and there exist weighty arguments in favour of it."[21] In the Australian case, similar Australian representations were cited to indicate that a dispute as to the jurisdiction existed.[22] The Court concluded on the basis of these statements "that the provisions invoked by the applicant appear *prima facie* to afford a basis on which the juris-

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recourse to another mode of pacific settlement; (2) disputes concerning questions which, according to international law, are exclusively within domestic jurisdiction; (3) disputes arising out of a crisis affecting national security or out of any measure or action relating thereto, and disputes concerning activities connected with national defence; (4) disputes with a State which, at the time of occurrence of the facts or situation giving rise to the dispute, had not accepted the compulsory jurisdiction of the International Court of Justice.

The Government of the French Republic also reserves the right to supplement, amend or withdraw at any time the reservations made above, or any other reservation which it may make hereafter, by giving notice to the Secretary-General of the United Nations; the new reservations, amendments or withdrawals shall take effect on the date of the said notice."

Apparently the French Government did not press the applicability of the domestic jurisdiction reservation.

20. *See* Public Sitting, 21 May 1973, at 7; French White Paper, *supra* note 18, at 92.

21. New Zealand v. France, [1973] I.C.J. 135, 138, citing Public Sitting, 25 May 1973, at 35.

22. Australia v. France, [1973] I.C.J. 99, 102, citing Public Sitting 22 May 1973, at 37.

diction of the court might be founded."[23] In other words, the Court concluded that sufficient jurisdiction existed to ground an Interim Protection Order under article 41 of the Statute of the International Court of Justice "to preserve the respective rights of either party." Since the Interim Order of Protection was rendered without prejudice to any final decision on the merits,[24] these questions remain to be examined in depth in subsequent proceedings.

The *Nuclear Tests Cases* present some exceedingly interesting legal questions. The first one is the jurisdictional basis for the interim order itself. The second question involves the effects of France's failure to participate and to obey the order. Since France failed to appear, New Zealand and Australia may call upon the Court to decide in their favour under article 53(1). Article 53(2), however, requires the Court to first "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." In other words, the Court may not enter a default judgment based solely on the fact of nonappearance of one of the parties. Consequently the Court has directed that the next written proceedings shall be addressed to the question of jurisdiction.[25]

II. The Jurisdictional Basis for Interim Measures of Protection

The jurisdictional basis for interim measures of protection is contained in article 41(1), which provides: "The Court shall have power to indicate, if it considers that circumstances so require, any provisional [interim] measures which ought to be taken to preserve the respective rights of either party."

The International Court of Justice and its predecessors have indicated such interim measures on five occasions including the *Nuclear Tests Cases.* The Permanent Court of International Justice first granted an interim order in the *Sino-Belgian Treaty Case* "pending the final decision of the Court in this case . . . by which decision the Court will either declare that it has no jurisdiction or

23. New Zealand v. France, [1973] I.C.J. 135, 138; Australia v. France, [1973] I.C.J. 99, 102.

24. Australia v. France, [1973] I.C.J. 99, 105; New Zealand v. France, [1973] I.C.J. 135, 142.

25. New Zealand v. France, [1973] I.C.J. 135, 142; Australia v. France, [1973] I.C.J. 99, 106.

give judgment on the merits."[26] The second interim order was granted in the case of the *Electricity Company of Sofia and Bulgaria.*[27] This Order was granted after the Court had determined that it had jurisdiction.[28] In the *Anglo-Iranian Oil Co. Case,*[29] the International Court of Justice granted an Interim Order of Protection, ordering Iran to avoid taking such steps as would prejudice Britain's rights by nationalizing the oil industry before the Court had a chance to decide whether it had jurisdiction. Later, however, the Court determined that it was without jurisdiction to hear the merits of the case.[30]

The *Fisheries Jurisdiction Cases*[31] present a procedural situation that is almost identical with the *Nuclear Tests Cases.* In the *Fisheries Jurisdiction Cases,* Britain and the Federal Republic of Germany petitioned the Court for an order requiring Iceland to refrain from enforcing a statute purporting to extend its exclusive fisheries jurisdiction to a zone of 50 nautical miles around Iceland. Jurisdiction was presumably based on an exchange of notes between the Foreign Minister of Iceland and the British Ambassador to Iceland in 1961, which the Government of Iceland claimed to have terminated on August 31, 1971, in a note transmitted to the United Kingdom Government and subsequently ratified by the Icelandic Parliament.

Iceland did not appoint an agent to contest jurisdiction but informed the Court by letter dated May 29, 1972, that "[t]his agreement constituted by the Exchange of Notes of 11 March 1961 was not of a permanent nature, that its object and purpose had been fully achieved, and that it was no longer applicable and had terminated; that there was on 15 April 1972 no basis . . . to exercise jurisdiction in the case; and that the Government of Iceland . . . [was] not willing to confer jurisdiction on the Court."[32] The Court, nevertheless, indicated Interim Measures of Protection saying that the nonappearance of one of the parties cannot by itself

26. [1927] P.C.I.J., ser. A, No. 8, at 7.
27. [1939] P.C.I.J., ser. A/B, No. 79, at 194-200 (Interim Protection).
28. Electricity Company of Sofia and Bulgaria, [1939] P.C.I.J., ser. A/B, No. 77, at 65-87 (Preliminary Objections).
29. [1951] I.C.J. at 89 (Interim Protection).
30. Anglo-Iranian Oil Co. Case, [1952] I.C.J. at 93 (Preliminary Objections).
31. [1972] I.C.J. at 12, 30.
32. [1972] I.C.J. at 17.

constitute an obstacle to the indication of provisional measures.[33] The Court further said that "[o]n a request for provisional measures the Court need not . . . finally satisfy itself that it has jurisdiction on the merits of the case."[34] The Court later by 14 votes to 1 determined that it had jurisdiction to deal with the merits of the dispute.[35]

Thus it is well settled in the practice of the Court that it may grant an interim order before it has fully satisfied itself that it has jurisdiction and that such an order in no way prejudges the question of the jurisdiction on the merits of the case. Article 66(1) of the Rules of the Court provides "[a] request for the indication of interim measures of protection may be filed at any time during the proceedings in the case in connection with which it is made."

Under article 41, therefore, a most curious situation arises; the Court may or may not have jurisdiction to make the order. Yet requiring the Court first to decide that it has jurisdiction would seem inconsistent with the provisional nature of article 41 and the urgency that it anticipates. Furthermore, the basis on which the Court has consistently grounded these orders has just as surely dissipated the force of article 41. None of the three interim orders of the I.C.J. has been complied with. In this writer's opinion the reasoning of the Court in granting these orders has failed to provide States with any good reason for obeying them; in fact it has provided them with good reasons for not obeying them.

The doctrine that the Court relied on in the *Nuclear Tests Cases* is the doctrine of prima facie jurisdiction.[36] As discussed above, the Court was addressing itself to the French contention that lack of jurisdiction was manifest,[37] a contention derived from the *Fisheries Jurisdiction Cases* decision: "Whereas on a request for provisional measures the Court need not before indicating them, finally satisfy itself that it has jurisdiction on the merits of the case, yet it ought not to act under Article 41 of the Statute if the absence of jurisdiction is manifest."[38] The *Fisheries Jurisdiction Cases* were the first

33. [1972] I.C.J. at 15.
34. [1972] I.C.J. at 15.
35. [1973] I.C.J. at 4.
36. New Zealand v. France, [1973] I.C.J. 135, 138; Australia v. France, [1973] I.C.J. 99, 102.
37. *See* notes 18-20 and accompanying text *supra.*
38. [1972] I.C.J. at 15.

to mention prima facie jurisdiction,[39] however, in that case, the Court did not assert that a finding of jurisdiction was probable. Although the words "prima facie" were not used in the *Anglo-Irarian Oil Case*, the doctrine is implicit in the decision. In that case, Iran objected to the Request for the Indication of Interim Measures of Protection on the ground that the dispute pertained to the exercise of sovereign rights of Iran and was exclusively within its national jurisdiction.[40] In answer to the Iranian objection the Court said:

> Whereas it appears from the Application by which the Government of the United Kingdom instituted proceedings, that the Government has adopted the cause of a British company and is proceeding in virtue of the right of diplomatic protection: whereas the complaint made in the Application is one of an alleged violation of international law by the breach of the agreement for a concession of April 29th, 1933, and by a denial of justice which according to the Government of the United Kingdom, would follow from the refusal of the Iranian Government to accept arbitration in accordance with that agreement . . . it cannot be accepted *a priori* that a claim based on such a complaint fall completely outside the scope of international jurisdiction.[41]

The Court was in effect saying that the absence of jurisdiction was not manifest and that there was a prima facie basis for it.

New Zealand's contention in the *Nuclear Tests Cases (New Zealand v. France)* that "jurisdiction on the merits is reasonably probable and there exist weighty arguments in favour of it" and no doubt the Court's citation of this contention[42] constituted an attempt to deal with the criticism expressed by Judges Winiarski and Badawi Pasha in their dissent to the *Anglo-Iranian Oil Case*.[43] These judges felt that "the court has the power to indicate such measures only if it holds, should it be only provisionally, that it is

39. [1972] I.C.J. at 16.

40. [1951] I.C.J. at 92.

41. [1951] I.C.J. at 92-93.

42. New Zealand v. France, [1973] I.C.J. 135, 138, citing Public Sitting, May 25, 1973, at 35. The court cannot have placed too great a reliance on the reasonable probability of jurisdiction. There is nothing like the sentence quoted above [*see* text accompanying note 21 in Australia's Oral arguments and consequently it does not appear in the Order in the case of *Australia v. France.*

43. Anglo-Iranian Oil Co. Case, [1952] I.C.J. at 96.

competent to hear the case on the merits."[44]

Judges Winiarski and Badawi Pasha did not go so far as to claim that the Court should make a final pronouncement on jurisdiction before indicating interim measures. But they felt that "the court must consider its competence reasonably probable."[45] After pointing out that in international law it is the consent of the parties that confers jurisdiction on the Court,[46] they then went on to say:

> 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 feasibility, however remote, that the Court may be competent, then it may indicate interim measures of protection. This approach . . . appears to be based on a presumption in favour of the Court which is not in consonance with the principles of international law. In order to accord with these principles the principle should be reversed: if there exist weighty arguments in favour of the challenged jurisdiction, the Court may indicate interim measures of protection; if there exists doubt or weighty arguments against this jurisdiction such measures cannot be indicated.[47]

This reasoning was adopted by Judge Padilla Nervo, the lone dissent in the *Fisheries Jurisdiction Cases* who felt that such doubts existed in that case.[48]

The Court's acceptance of the New Zealand argument constituted an attempt to answer these past dissents. Nevertheless it failed to quiet uneasiness about the doctrine of prima facie jurisdiction particularly when it involved a highly sensitive political issue like nuclear testing. The Court divided by a vote of 8 to 6 in both *Nuclear Test Cases*—a much narrower vote than the 14 to 1 decision in the *Fisheries Jurisdiction Cases.*

Judge Forster, even though he had voted with the majority in the *Fisheries Jurisdiction Cases,* urged the abandonment of the prima facie doctrine, in the light of the "exceptional" nature of the *Nuclear Tests Cases:*

> The Court should above all have *satisfied itself* that it really had jurisdiction and not contented itself with a *mere probability.*

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44. Anglo-Iranian Oil Co. Case, [1952] I.C.J. at 96.
45. Anglo-Iranian Oil Co. Case, [1952] I.C.J. at 96.
46. Anglo-Iranian Oil Co. Case, [1952] I.C.J. at 96.
47. Anglo-Iranian Oil Co. Case, [1952] I.C.J. at 97.
48. [1972] I.C.J. at 22.

> It is not a question of approving or condemning the French nuclear tests in the Pacific; the real problem is to find out whether we have jurisdiction to say or do anything whatever in this case.
>
> It was that problem of jurisdiction which it was necessary for us to solve as a matter of absolute priority, before pronouncing upon the interim measures.[49] (Emphasis added.)

In this extract, taken from the *New Zealand Case*, Judge Forster was referring to his dissenting opinion in the *Australia Case*[50] in which he examined the jurisdictional issues and found first that the General Act was "moribund if not well and truly dead,"[51] and secondly that the third French reservation "in terms that are crystal clear categorically excludes our jurisdiction when the dispute is concerned with national defence"[52] and that "French nuclear tests in the Pacific do concern French national defence."[53] Accordingly he concluded: "The Order made this day is an incursion into a French sector of activity placed strictly out of bounds by the third reservation of 16 May 1966. To cross the line into that sector, the Court required no mere probability but the absolute certainty of possessing jurisdiction. As I personally have been unable to attain that degree of certainty, I have declined to accompany the majority."[54]

One can only conclude, if this argument is not to be seen as completely circular, that Judge Forster viewed the applicability of the defense reservation as given and that the only possible jurisdictional basis for the *Nuclear Tests Cases* is the General Act—and he felt that it was not a very good basis. The opinion is perhaps just short of being a definitive finding that the Court did not have jurisdiction to hear the merits of the case.

None of the other judges went quite so far in examining the actual issue of jurisdiction to hear the merits. Judge Gros felt that article 53(2), which requires the Court to satisfy itself that it has jurisdiction in accordance with articles 36 and 37 in the event that a party fails to appear, is applicable to interim orders under article

49. New Zealand v. France, [1973] I.C.J. 135, 148.
50. Australia v. France, [1973] I.C.J. 99, 111.
51. Australia v. France, [1973] I.C.J. 99, 112.
52. Australia v. France, [1973] I.C.J. 99, 112.
53. Australia v. France, [1973] I.C.J. 99, 112.
54. Australia v. France, [1973] I.C.J. 99, 113.

41.[55] He, too, urged abandonment of the prima facie jurisdiction doctrine but on the ground that it was inconsistent with article 53(2). Judge Gros' reasoning involves a rather curious inconsistency: article 53(2) applies only when a party fails to appear. Thus, if the Court followed Judge Gros' reasoning to its logical conclusion, it would end up penalizing the party that *did appear* by applying the prima facie doctrine; whereas the party that *failed to appear* would thereby force the Court to apply a much stronger test in determining whether there was jurisdiction to ground an interim order.

Judge Petren[56] felt that the Court "would not have needed any further explanations from the New Zealand [Australian] government in order to resolve the question of jurisdiction."[57] He declined to indicate his assessment of the various factors entering into consideration of the jurisdiction question, but he did not find it probable that any of the propositions upon which New Zealand and Australia based their claim of jurisdiction would afford a basis in which to found the jurisdiction of the Court.[58]

Judge Ignacio-Pinto also dissented and devoted his opinion primarily to the task of distinguishing the *Nuclear Tests Cases* from the *Fisheries Jurisdiction Cases*.[59] From his reasoning, however, it seems that he too believed that the Court did not possess jurisdiction.[60] He also found it difficult to ascertain from the Australian and the New Zealand submissions the precise rules of international law that France is said to violate.[61]

The real problem with the prima facie jurisdiction doctrine is that most of the judges who have resorted to it have been extremely uneasy about the idea that the Court has the power to indicate measures of protection without first rendering a final decision to hear the merits of the case. Four of the judges who voted with the

55. Australia v. France, [1973] I.C.J. 99, 115; New Zealand v. France, [1973] I.C.J. 135, 149 (Gros).

56. New Zealand v. France, [1973] I.C.J. 135, 159; Australia v. France, [1973] I.C.J. 99, 124 (Petren).

57. Australia v. France, [1973] I.C.J. 99, 125; New Zealand v. France, [1973] I.C.J. 135, 160 (Petren).

58. Australia v. France, [1973] I.C.J. 99, 126; New Zealand v. France, [1973] I.C.J. 135, 161 (Petren).

59. Australia v. France, [1973] I.C.J. 99, 130 (Pinto).

60. Australia v. France, [1973] I.C.J. 99, 130 (Pinto).

61. Australia v. France, [1973] I.C.J. 99, 130 (Pinto).

majority appended Declarations[62] and the Declarations of Judges de Arechaga and Singh both expressed caveats as to the importance of jurisdiction.

The reasons for the judges' uneasiness is best illustrated by reference to the *Anglo-Iranian Oil Case* in which, after first indicating interim measures, the Court ultimately determined that it was without jurisdiction.[63] If the Court had viewed article 36 as the sole basis of jurisdiction to grant an interim order, then it would have had to admit that it had been wrong *ab initio* in issuing the order. It would then have followed that Iran had a strong case for disregarding the order. It is perhaps for this reason, among others, that Iceland and France, convinced as they still are that the absence of jurisdiction is "manifest," felt that they were within their legal rights in flouting the order of the Court. Yet article 41 is in the Statute, it subsists, and states resort to it.

It is a fallacy to assert that articles 36 and 37 of the Statute provide the sole juridical basis upon which orders under article 41 must be grounded. Nevertheless, the Court has consistently striven to find some nexus with either article 36 or 37, whether it was Iran's acceptance of compulsory jurisdiction under article 36(2) in the *Anglo-Iranian Oil Case*, an agreement between Britain and Iceland under article 36(1) in the *Fisheries Jurisdiction Cases*, or alternatively a "convention in force" or acceptance of compulsory jurisdiction in the *Nuclear Tests Cases*. In short, the Court has consistently ignored the possibility that other grounds exist. Only in the *Anglo-Iranian Oil Case* (Preliminary Objections) did the Court find that the jurisdiction to indicate interim measures of protection was grounded in something other than articles 36 and 37 of the I.C.J. Statute:

> While the Court derived its power to indicate these provisional measures from the special provisions . . . in Article 41 of the Statute, it must now derive its jurisdiction to deal with the merits of the case from the general rules laid down in Article 36 of the Statute. These general rules, which are entirely different from the special provisions of Article 41, are based on the principle that the jurisdiction of the

62. Judges Jiminez de Arechaga, Naghendra Singh, Sir Garfield Barwick and Sir Humphrey Waldock.

63. *See* note 30 and accompanying text *supra*.

> Court to deal with and decide a case on the merits depends on the will of the Parties.[64]

Thus the Court avoided the contention that its interim protection order was wrong *ab initio.* Although article 41 is not a jurisdiction provision, the Court did not state from what source jurisdictional authority for article 41 is derived.

If the Court in the *Anglo-Iranian Oil Case* (Preliminary Objections) departed from the fallacy that articles 36 and 37 were the sole grounds for jurisdiction to indicate interim orders, other judges were quick to return to it in subsequent cases. Judge Forster, for example, said in the *Nuclear Test Cases*: "In my view the Court does not have two distinct kinds of jurisdiction; one to be exercised in respect of provisional measures and another to deal with the merits of the case."[65]

It is indeed a generally acknowledged principle that the jurisdiction of the International Court of Justice is based on consent.[66] However, the idea that articles 36 and 37 provide the only grounds for manifesting consent is a misconception. The Court has jurisdiction to order interim measures of protection in the *Nuclear Test Cases.* This jurisdiction is based on consent, and it is submitted that this consent is not expressed through articles 36 and 37. It is a fundamental axiom in all legal systems[67] that a court may not hear and determine a dispute unless it has jurisdiction. To assume that jurisdiction is a simple matter that can be settled on an either/or basis is a semantic error as well as a legal error. This was the error that Judge Gros made when he said:

> A State either is or [. . .] is not subject to a tribunal. If it is not, it cannot be treated as a "party" to a dispute, which would be non-justiciable. The position which the Court has taken is that a State which regards itself as not concerned in a case, which fails to appear, and affirms its refusal to accept the jurisdiction of the Court, cannot obtain from the Court anything more than a postponement of the consideration of its rights.[68]

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64. United Kingdom v. Iran, [1952] I.C.J. 102-03.

65. Australia v. France [1973] I.C.J. 99, 111 (Forster).

66. *Supra* note 46. *See also* quotation of French note, note 20 and accompanying text *supra.*

67. CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS (1953). *Citing Mayromatis Palestine Concession Case* (Jurisdiction), [1924] P.C.I.J., ser. A, No. 2, at 6-93.

68. Australia v. France, [1973] I.C.J. 99, 118 (Gros).

III. CATEGORIES OF JURISDICTIONAL QUESTIONS

Questions of jurisdiction may be separated into four categories: *Ratione Personae, Ratione Materiae, Ratione Temporis,* and *Ratione Loci.* Three of these categories are applicable to the International Court of Justice; the fourth, *ratione loci,* is vital to municipal tribunals and some international tribunals,[69] but is not really relevant to the International Court of Justice. Problems of jurisdiction *ratione personae* and jurisdiction *ratione materiae* before the International Court of Justice are vital issues. Perhaps the controversy surrounding article 41 of the I.C.J. Statute might be resolved first by examining the distinction between these jurisdictional bases and then by examining the power that each type of jurisdiction confers upon the International Court of Justice.

When a court or tribunal has jurisdiction *ratione personae,* the court usually has jurisdiction over the person or over the parties to the dispute. There are two basic aspects of jurisdiction *ratione personae*: the first involves the access of the plaintiff or the applicant to the court; the second involves the authority of the court over the defendant or respondent. In municipal law, the access of the plaintiff to the court is generally treated as a question of standing to sue and involves the interest of the plaintiff in the subject matter of the dispute.[70] Authority over the defendant is usually linked with the jurisdiction *ratione loci,* which in France is called *competence ratione personae vel loci*[71] and is principally determined *par le domicile du defendeur.*[72] Under certain circumstances, however, jurisdiction may hinge solely on the presence of *le defendeur* in France. Article 14 of the *Code Civile* provides: *"L'étranger, méme non resident en France . . . pourra être traduit devant les Tribuneaux de France pour les obligations par lui contractée en pays étranges envers des Français."*[73] In the Anglo-American system jurisdiction may be had in civil cases over a defendant who is caught even fleetingly in the territorial jurisdic-

69. Such international tribunals include the European Court of Human Rights and the Courts of Justice of the European Communities.

70. *See, e.g.,* Attorney General v. Independent Broadcasting Authority, [1973] 2 W.L.R. 344 (C.A.).

71. 1 CARBONNIER, DROIT CIVILE 63 (5th ed. 1964).

72. *Id.* art. 59.

73. C. CIV. art. 14 (71e ed. Dalloz 1971-72).

tion of the court.[74] Chapter 19, section 1 of the Swedish Code of Judicial Procedure (*Rättegangbalk*)[75] provides: "The competent court in civil cases is the court for the place in which the defendant resides . . ." and the same holds true in German law.[76] In all these legal systems persons over whom the court does not otherwise have jurisdiction may voluntarily consent to the jurisdiction of a court.[77]

In criminal law, jurisdiction over the defendant may attach if the defendant is apprehended in the territory of the prosecuting state. In the *Lotus* case,[78] the Permanent Court of International Justice had before it a case in which a French citizen was tried under a provision of the Turkish Criminal Code which provided that "[a]ny foreigner who . . . commits an offence abroad to the prejudice of Turkey or of a Turkish subject, for which offence Turkish law prescribes a penalty involving a loss of freedom for a minimum period of not less than one year, shall be punished in accordance with the Turkish Penal Code provided he is arrested in Turkey."[79] The Court held that no principle of international law existed that could prevent Turkey from exercising jurisdiction over persons found within its territory for crimes committed outside its territory.[80]

Regarding the International Court of Justice, problems of jurisdiction *ratione personae* must be treated in a somewhat different manner. Problems that involve standing to sue are common and are expressed in such rules as the rule requiring the exhaustion of local remedies[81] and the rule of nationality of claims,[82] which have a bearing upon the access of the plaintiff to the Court.[83] Since

74. *See, e.g.*, Maharanee of Baroda v. Wildenstein, [1972] 2 Q.B. 283. *The Restatement (Second) of Conflict of Laws* § 28 (1971) states that "(Presence) A State has power to exercise juridical jurisdiction over an individual who is present within its territory, whether permanently or temporarily."

75. (A. Bruzelius, R. B. Ginzburg transl. 1968).

76. *See* ZPO §§ 12-37 (Wieczorek 1966).

77. For France see C. Civ. art. 111; C. Pro. Civ. art. 59 (11) (Dalloz 1971-72). For Germany see ZPO § 39. For Sweden see Rattegansbalk Ch. 19, § 16 (A. Bruzelius, R. B. Ginzburg Transl. 1968). *See also Restatement (Second) of Conflicts of Law, supra* note 74, ¶ 32.

78. [1927] P.C.I.J., ser. A, No. 10, at 4-108.

79. [1927] P.C.I.J., ser. A, No. 10, at 15.

80. [1927] P.C.I.J., ser. A, No. 10, at 19.

81. Interhandel Case, [1959] I.C.J. 21.

82. Nottebohm Case (Second Phase), [1958] I.C.J. 5.

83. Another rule relating to standing is expressed in article 34(1) of the Stat-

jurisdiction is always based on consent, the focal question is not about the Court's power over the parties but rather whether the party's consent to the jurisdiction of the Court is adequately expressed. The key provisions in this respect are article 93 of the United Nations Charter and article 35 of the Statute of the International Court of Justice. Article 93 of the United Nations Charter provides: "(1) All Members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice. (2) A state which is not a Member of the United Nations may become a party to the Statute of the International Court of Justice . . ."

Thus consent to the jurisdiction of the Court *ratione personae* is expressed either through adherence to the United Nations Charter or to the Statute of the International Court of Justice in accordance with the provisions of article 93(2). Article 94(1) then speaks of the obligations of members of the United Nations: "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." Consequently the duty of compliance with the Court's decisions is imposed by virtue of the Court's competence *ratione personae*. Article 35(1) of the Statute provides that the Court shall be open to the parties to the Statute, and article 35(2) provides for nonparties to accept the jurisdiction of the Court voluntarily.

Jurisdiction *ratione materiae* refers to the jurisdiction of a court over the subject matter of a dispute. In France it is called *competence d'attribution.* In other words, it refers to the types of cases the Court is authorized to decide. For instance, in France the *Tribuneaux Commercials* and in Austria the *Handelsgerichte* are authorized to apply only Commercial Law. The International Court of Justice is under similar limitations *ratione materiae.* Article 38 sets out the law that the Court is authorized to apply:

> (1) The Court, whose function is to decide *in accordance with international law* such disputes as are submitted to it, shall apply:
>
> (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> (b) international custom, as evidence of a general practice accepted as law;

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ute of the I.C.J., which provides that "only States may be parties in cases before the Court."

(c) the general principles of law recognized by civilized nations;

. . .

(2) This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto. (Emphasis added.)

Thus the law that the International Court of Justice must apply is international law; to decide a case on any other basis requires the consent of the parties. There are, however, other types of limitations on jurisdiction *ratione materiae*. For example, in Germany the jurisdiction of the *Amtgericht* in civil litigation comprises:

(a) all cases where the amounts involved are not more than DM 1500:
(b) most disputes between landlord and tenant:
(c) all disputes between travellers and innkeepers, coachmen and shippers, relating to charges arising out of the journey:
(d) all disputes regarding defects of cattle and damages done by animals *ferae naturae*:
(e) all disputes regarding statutory claims for maintenance:
(f) illegitimacy questions:
(g) all applications for the issue of orders of arrest and *einstweilige Verfungunt*[84] if the property to be arrested or in respect of which the *einstweilige Verfugung* is applied for, or if the person who is to be arrested is within the district of the *Amtgericht*, and provided the matter is of great urgency.[85]

In France *Juges de paix* handle all civil actions that are purely personal in their nature and relate to movables when the amount in controversy does not exceed fr. 150,000. In the United States the United States District Court has original jurisdiction of "all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs and arises under the Constitution, laws or treaties of the United States."[86] In essence, rules *ratione materiae* relate generally to the types of matters the court is authorized to adjudicate.

IV. The Legislative History of the Court's Jurisdiction

The *Travaux Préparatoires* of the Statute of the Permanent

84. *See* text Part VI *infra*.
85. 2 Cohen, Manual of German Law, 970 (1971), citing GVG § 23, 23a.
86. 28 U.S.C. § 1331 (1970).

Court of International Justice (P.C.I.J.), which is almost identical in substance to the Statute of the International Court of Justice, reveal that the distinction between provisions relating to jurisdiction *ratione personae* and those relating to jurisdiction *ratione materiae* came to be well understood among the drafters.[87]

Unlike the International Court of Justice, which is a principal organ of the United Nations under article 7 of the United Nations Charter, the Permanent Court of International Justice was not an organ of the League of Nations. Since the P.C.I.J. did not exist when the League Covenant was drawn up, the Covenant imposed upon the League Council the duty to establish the Court. Article 14 of the Covenant provided: "The Council shall formulate and submit to members of the League for adoption plans for the establishment of a Permanent Court of International Justice. The Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it. The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or the Assembly."

The Court, once established, was to play an important part in the League of Nations peace-keeping machinery enunciated in articles 12-14. Pursuant to article 12(1) members of the League agreed to submit any dispute that was likely to lead to a rupture either to arbitration, judicial settlement or inquiry by the Council. Article 12, paragraphs 2 and 3 provided:

> 2. Disputes as to the interpretation of a treaty, as to any question of international law, as to the existence of any fact which, if established, would constitute a breach of any international obligation, or as to the extent and nature of the reparation to be made for any such breach are declared to be among those which are generally suitable for submission to arbitration or judicial settlement.
> 3. For consideration of any such dispute, the court to which the

87. In fact in the first case to grant an interim order, the *Denunciation of the Treaty of November 2, 1865 Between China and Belgium*, the Court adhered to the distinction between the basis for jurisdiction *ratione personae* and *ratione materiae*, citing them separately. "Whereas . . . Belgium and China have signed and ratified the Protocol of signature of December 16, 1920, relating to the adoption of the Statute of the Court;

. . . as these two Powers have recognized as compulsory the Court's jurisdiction in accordance with Article 36, paragraph 2, of the Court's statute . . . ." [1972] P.C.I.J., ser. A, No. 8, at 7.

> case is referred shall be the Permanent Court of International Justice, established in accordance with Article 14, or any tribunal agreed on by the parties to the dispute or stipulated in any convention existing between them.

Article 13(4) may be regarded as the forerunner of article 94 of the United Nations Charter. It provided that: "The Members of the League agree that they will carry out in full good faith any award or decision that may be rendered and that they will not resort to war against a Member of the League which complies therewith. In the event of any failure to carry out such an award or decision, the Council shall propose what steps should be taken to give effect thereto."

Pursuant to article 14 of the Covenant, the Council of the League, at its second public meeting passed a resolution[88] establishing a Committee of distinguished jurists, representatives of the different civilizations and legal systems of the world, who would be responsible to the Council and would prepare plans for the Permanent Court. Discussion of the Court's jurisdiction began at the 9th Meeting of the Jurists' Committee[89] at which time they discussed whether individuals would have standing before the Court. The Committee[90] concluded that only states could be parties to the Court, thus establishing the first rule relating to jurisdiction *ratione personae.*

At the 10th Meeting[91] the Committee first discussed whether access to the Court should be limited to members of the League of Nations or whether other states should be given access. It was initially assumed on the basis of articles 12 to 14 of the Covenant that Members of the League would have access to the Court. The Committee agreed provisionally that the Statute of the Court ought to contain rules governing voluntary use of the Court by nonmembers subject to certain conditions that would impose upon the nonmember users financial obligations and a duty to accept the judgment of the Court.[92]

Dr. B.C.J. Loder, member of the *Cour de Cassation* of the Neth-

88. 1 LEAGUE OF NATIONS OFF. J., 36-37 (1920).

89. LEAGUE OF NATIONS, PROCES VERBAUX OF THE PROCEEDINGS OF THE COMMITTEE [hereinafter PROCES VERBAUX] 203-17 (1920).

90. *Id.* at 216-17.

91. *Id.* at 219-32.

92. *Id.* at 223.

erlands, then proposed that the jurisdiction of the Court be made compulsory, independent of any conventions.[93] Mr. Francis Hagerup, Norwegian Minister at Stockholm, former Premier of Norway, asked Dr. Loder if he held to this view even when plaintiff was not a member of the League of Nations.[94] Dr. Loder replied "No."[95] Mr. Elihu Root, former Secretary of State of the United States, supported Dr. Loder's proposal, pointing out that the principle of compulsory arbitration had been accepted in 1907 and had appeared in numerous treaties ratified between states since that time.[96] The only member of the Committee to dissent to the proposal for compulsory jurisdiction was Mr. Mineichiro Adatci, the Japanese Minister at Brussels, who objected that compulsory jurisdiction was contrary to the second sentence of article 14 of the Covenant, which he felt limited the competence of the Court to "disputes which the parties submitted to it."[97]

The members who supported compulsory jurisdiction were reluctant to retreat from the principle, which they felt was an idea whose time had come because of the unanimous support it had received at the Hague Convention of 1907. In a memorandum to the Committee Dr. Loder explained his position:

> [W]hy create this Court? In order to duplicate the Court of Arbitration? To continue a deplorable state of affairs and administer justice between two contending parties only after having obtained their mutual consent, and their agreement on the wording of the complaint, and on the choice of judges? That is not worth the trouble.
>
> The Covenant did not intend to abolish arbitration, but it wished to place beside it a Court of Justice. The latter must be permanent, *it must be open to all* who present themselves before it for a decision *in all cases* which come within the bounds of its competence.

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93. *Id.* at 229.

94. *Id.*

95. *Id.*

96. *Id.* at 229-30. At the second Hague Conference in 1907, an attempt was made to establish a "Court of Arbitral Justice." The project was enthusiastically supported by both the great and the small powers and the principle of compulsory arbitration was unanimously accepted. But the attempt failed because of disagreement over the appointment of judges. The great powers insisted on permanent representation. The small powers demanded equality. FACHIRI, PERMANENT COURT OF INTERNATIONAL JUSTICE 3 (2d ed. 1932).

97. PROCES VERBAUX, at 231.

> In 1907 a vain attempt was made to create a Court of Justice. It was still a Court of Arbitral Justice. How could it have been otherwise? The bond between the States was lacking.
>
> It was only the institution of the League of Nations that made possible a Court of Justice, a court where the plaintiff would no longer have to wait upon the good will of his opponent. It is such a court that is intended in the Covenant and not a useless duplication.[98] (Emphasis added.)

Thus, early discussion tended to be vague about the distinction between jurisdiction *ratione personae* and jurisdiction *ratione materiae*, but the distinction became clearer once draft articles were tabled for discussion. The first draft of an article dealing with jurisdiction *ratione materiae* was presented to the Committee by Baron Descamp, the Belgian Minister of State and the President of the Committee. Following the language of article 13(2) of the League Covenant quoted above, it provided:

> The Permanent Court of International Justice is competent to decide disputes concerning cases of a legal nature, that is to say those dealing with:
>
> a. the interpretation of a treaty;
>
> b. any question of international law;
>
> c. the existence of any fact which, if established, would constitute a breach of any international obligation;
>
> d. the extent and nature of any reparation to be made for the breach of an international obligation;
>
> e. the interpretation of a sentence rendered by the Court.[99]

Lord Phillimore, member of the Privy Council of Great Britain, has been quoted on this article as follows:

> He [Lord Phillimore] recalled that the Committee had already come to an agreement on the subject of the personal competence of the Court; all States, and not only a few should have the right to take action before the Court. The project submitted by the President [Baron Descamps] was intended to establish also an agreement concerning the material competence. The agreement concerning the personal competence had not yet been drafted; in order to make the text complete, Lord Phillimore said that he was prepared to draw up a formula on this subject also.[100]

98. PROCES VERBAUX, 12th mtg., Annex No. 1, at 250-51.

99. PROCES VERBAUX, 13th mtg., Annex No. 1, art. 1, at 272; subpara. (e) was later dropped.

100. PROCES VERBAUX, 13th mtg., at 290.

Accordingly Lord Phillimore submitted the following proposed article: "Any State subscribing to the present Act is considered as having agreed to submit to the Permanent Court any dispute between itself and another signatory as described in Article 1."[101]

Thus the distinction between jurisdiction *ratione personae* and jurisdiction *ratione materiae* clearly emerged. The former was expressed, through consent by adherence to the Act. The latter dealt with the types of cases that the Court was authorized to decide. At the same time this provision involved acceptance of Dr. Loder's plan for compulsory jurisdiction.

The primary modification that the Jurists' Committee made occurred in response to an objection to allowing states that were not members of the League the benefit of compulsory jurisdiction. The outcome of the discussion was that the Statute of the Court, which was subject to the approval of the Council and the Assembly of the League of Nations, could confer rights and privileges upon states that were not members of the League, but under article 13(4) of the Covenant could impose obligations only upon states that were members.

Therefore, the two primary jurisdiction provisions that emerged from the Committee were articles 32 and 34 of the Committee's draft. Article 32, relating to jurisdiction *ratione personae*, provided:

> The Court shall be open of right to the States mentioned in the annex to the Covenant, and to such others as shall subsequently enter the League of Nations.
>
> Other States may have access to it.
>
> The conditions under which the Court shall be open as of right or accessible to States which are not members of the League of Nations shall be determined by the Council, in accordance with Article 17 of the Covenant.

Article 32 was adopted by the League Council with paragraph 1 simplified to provide that the "Court shall be open to the members of the League and also to States mentioned in the Annex to the Covenant." Article 32 is not too different from article 35 of the Statute of the International Court of Justice.

Article 34 of the Committee's draft received much rougher treatment from the League Council. It read: "Between States which are

101. PROCES VERBAUX, 13th mtg., Annex No. 4, at 276.

members of the League of Nations the Court shall have jurisdiction [and this without any special convention giving it jurisdiction] to hear and determine cases of a legal nature . . . ."[102] (Emphasis added.) Lord Balfour, the representative of Great Britain, took the lead in urging the rejection of the obligatory jurisdiction provision. He felt, as did some members of the Committee, that the draft went beyond the authority granted by Article 14 of the Covenant.[103]

Article 36 of the Statute of the Permanent Court, as finally adopted by the League, is quite similar to article 36 of the Statute of the International Court of Justice. Article 36 of the Statute of the Permanent Court provided:

> The jurisdiction of the Court comprises all *cases* which the parties refer to it and all matters specifically provided for in Treaties and Conventions in force.
>
> The Members of the League of Nations and the States mentioned in the Annex to the Covenant may, either when signing or ratifying the protocol to which the present Statute is adjoined, or at a later moment, declare that they recognise as compulsory *ipso facto* and without special agreement, in relation to any other Member or State accepting the same obligation, the jurisdiction of the Court in all or any of the classes of legal disputes. . . .[104] (Emphasis added.)

The annex referred to in article 35 contained a list of signatures and ratifications of the Protocol of Signature of December 16, 1920.[105] The acceptances of the compulsory clause were listed separately from the protocol of signature in an annex to it.[106] Thus whereas under the jurists' scheme consent of states was needed only to obtain jurisdiction *ratione personae*, the Council's change had the effect of imposing upon jurisdiction *ratione materiae* an element of consent, which did not exist under the jurists' compulsory scheme.

It may be argued that "compulsory jurisdiction" is illusory when

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102. SCOTT, THE PROJECT OF A PERMANENT COURT OF INTERNATIONAL JUSTICE AND RESOLUTIONS OF THE ADVISORY COMMITTEE OF JURISTS (1920).

103. DOCUMENTS CONCERNING THE ACTION TAKEN BY THE COUNCIL OF THE LEAGUE OF NATIONS UNDER ARTICLE 14 OF THE COVENANT AND THE ADOPTION BY THE ASSEMBLY OF THE STATUTE OF THE PERMANENT COURT 38 (1921) [hereinafter cited as DOCUMENTS].

104. 1 M. HUDSON, WORLD COURT REPORTS 23 (1934).

105. *Id.*

106. *Id.* at 29-48.

applied to international courts and tribunals. A sovereign state can never, as a matter of practice, be arraigned before any tribunal by another state unless it has specifically agreed to accept the tribunal's jurisdiction. This axiom follows from the nature of sovereignty and the reality of practice. This observation may appear to render the whole of the above discussion futile; indeed, it appears to render articles 35 and 36(2) of the Court's Statute and articles 93 and 94 of the United Nations Charter meaningless. Meaningless, that is, unless one views these articles as establishing legal norms—norms which states may adhere to or violate—and accepts that legal consequences flow from adherence to or violation of these norms.

References in article 36 of the Court Statute to "cases which the parties refer to it" in paragraph 1 and "legal disputes" in paragraph 2 clearly indicate that jurisdiction *ratione materiae* is the type of jurisdiction contemplated by this provision. These references to jurisdiction *ratione materiae* may be distinguished from article 93 of the United Nations Charter and article 35 of the Court Statute, which provide a basis for acceptance of jurisdiction *ratione personae* by the Court.

Even after the Statute was changed, Dr. Loder, who became President of the Permanent Court of International Justice from 1922-24 had the following to say about the jurisdiction of the P.C.I.J.:

> It is evident that a Court which will have to adjudicate between sovereign, and, therefore independent, States, needs a title upon which its judicature is based, and that this title will be no other than agreement. This agreement is the League of Nations itself. It is the League that has proposed calling the Court into being, that has stipulated its threefold activity, and has commissioned its own organs to work out and adopt the necessary plans. To join the League is, therefore, at the same time to recognise the competency of the Court. . . . States not belonging to the League would be excluded from admittance to the Court, as the Court itself, for lack of jurisdiction over them, would not be able to give them hearing.[107]

107. Loder, *The Permanent Court of International Justice and Compulsory Jurisdiction*, 2 BRIT. Y.B. INT'L L. 6, 13 (1921-1922).

V. The Drafting History of Article 41

There are varying interpretations of the meaning of the interim order itself. One point of view[108] is that the authority of international tribunals to indicate interim measures of protection, when its jurisdiction as to the merits remains uncertain, is a "general principle of law recognized by civilized nations" and, therefore, comes within article 38(1)(c) of the Court's Statute. Professor Cheng in examining this provision said:

> [I]n adopting this provision, the members of the Advisory Committee did not intend to add to the armoury of the international judge a whole new adjunct to existing international law actuated by the belief that existing international law consisted in more than the sum total of positive rules, in adopting the formula "the general principles of law recognized by civilized nations", they were only giving a name to that part of existing international law which is not covered by conventions and customs, *sensu stricto.* It was said that the application of these principles had hitherto been a constant practice of international tribunals and although it might be said that the latter in applying them, brought *latent* rules of law to light, they did not *create* new rules . . . .[109] (Emphasis added.)

Professor Cheng's treatment of interim protection as a principle shared by a large number of international tribunals past and present[110] is an attempt to demonstrate its inclusion in the category of general principles. Professor Cheng explained that the principle of interim protection was inherent in the basic characteristics of international law: "This part of international law does not consist, therefore, in specific rules formulated for practical purposes, but in general propositions underlying the various rules of law which express the essential qualities of juridical truth itself, in short, Law."[111] The authority of international tribunals to indicate in-

108. *Supra* note 67 at 267-74.

109. *Id.* at 19.

110. *Id.* at 267-68.

111. *Id.* at 24. Also on page 25 he states that the word 'civilized' must be considered as merely redundant, "since any state which is a member of international society must be considered as civilized." *But see* North Sea Continental Shelf Case, [1969] I.C.J. 134 (Ammoun). Judge Ammoun at page 132 objected to the term "civilized nations" as a legacy of colonialism. Professor Cheng would no doubt question the statement at page 136: "the general principles of law are indisputably factors which bring morality into the law of nations inasmuch as they borrow from the law of the nations' principles of moral order."

terim orders of protection partakes of that characteristic, according to Professor Cheng, because of the "duty of the parties to the dispute to maintain the status quo,"[112] which, he claims, exists independently of any judicial intervention.

Professor Guggenheim, however, points out that if interim protection were a general principle of law, then it might follow that international tribunals will have the power to order interim protection even without specific rules. Article 41 would be superfluous.[113] The drafters felt that it was necessary to introduce article 41 as a treaty provision capable of direct application. Although Professor Guggenheim does not deny that interim protection is a general principle of law, he cites authority to the effect that despite interim protection being a general principle of law, specific rules are required before a tribunal can exercise the authority to order interim protection.[114] One of the authorities cited, Professor Dumbauld, treats interim protection specifically as a general principle of law recognized by civilized nations.[115] While he considers that protection of rights endangered *pendente lite* is a logical consequence of modern civil procedure,[116] he does not rest there, but devotes an entire chapter to a comparative analysis of provisional remedies at Roman Law, German Law, Austrian Law, French Law and Hungarian Law[117] to demonstrate that provisional remedies exist or existed in all these legal systems. With regard to the International Court of Justice, Professor Dumbauld feels that jurisdiction to grant interim protection is separate and independent from jurisdiction over the action in chief in view of the need for rapidity and the provisional nature of that order.[118]

The member of the Jurists' Committee most concerned with interim orders of protection was Mr. Raoul Fernandes, Brazilian member of the Reparations Commission established under the Treaty of Versailles. His learned memorandum to the Committee

112. *Id.* at 273.

113. Guggenheim, *Les Mesures Conservatoires dans la Procedure Arbitrale et Judicaire* 40 RECUEIL DES COURS 649,651n.1 (1932).

114. E. DUMBAULD, INTERIM MEASURES OF PROTECTION FOR INTERNATIONAL CONTROVERSIES 181 (1932); NIEMEYER, EINSTWEILIGE VERGUNGEN DES WELTGERICHTSHOFES, IHR WESON AND IHRE GRENZE 27 (1932).

115. *Id.* at 177-78.

116. *Id.* at 2, 20.

117. *Id.* at ch. II.

118. *Id.* at 161-65.

outlined the nature of the interim order of protection and its relation to municipal law:

> In their relation with things, States, whether as subjects of private or public property, or in the sphere of territorial sovereignty, exercise *de jure* or *de facto* possession, sometimes over things, sometimes over servitudes and often—outside any conception of property—with regard to the complex of political powers which constitute sovereignty.
>
> In international law, these legal relations are based on principles borrowed from Roman Law.
>
> In Roman Law, possessory protection including the possession of things and the quasi-possession of servitudes was assured by interdicts and the interdict procedure was adopted by the laws of modern nations as a *sine qua non* of an economic system based on property, such as we have inherited from the Romans.[119]

Accordingly Mr. Fernandes proposed the following draft article: "In case the cause of the dispute should consist of certain acts already committed, or about to be committed, the Court may, provisionally and with the least possible delay, order [*Ordonne* adequate protective measures to be taken, pending the final judgment of the Court."[120] He also proposed that the Court attach certain penalties for noncompliance with the order.

The Jurists' Committee rejected the proposal for penalties[121] but retained the interim order in the following form:

> If the dispute arises out of an act which has already taken place or which is imminent, the Court shall have the power to *suggest*, if it considers that circumstances so require, the provisional measures that *should* be taken to preserve the respective rights of either party.
>
> Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and the Council.[122] (Emphasis added.)

One additional change occurred in the drafting of article 41 that should have a bearing on this discussion. The Jurists' Committee referred its draft report to the First Assembly of the League of

119. PROCES VERBAUX, 29th mtg., Annex No. 3, at 608.
120. *Id.*
121. *Id.* at 735.
122. *Id.*

Nations,[123] which established a Committee consisting of representatives of 36 states to review the draft. To consider various problems in detail, that Committee appointed a subcommittee which consisted of ten members—five former members of the Jurists' Committee and five other legal experts.[124] At the fifth meeting of that subcommittee, a discussion arose concerning the binding effect of the interim order that had been accepted by the Jurists' Committee.[125]

Mr. Huber of Switzerland felt that the word "suggest" in the English text of article 41 was less strong than the word "*indique*" in the French text. He insisted that the stronger term should be considered authentic. Mr. Fernandes recalled that at The Hague he had proposed the word "*ordonne*," and he felt that the question was not merely one of drafting but one of principle. The Chairman of the Subcommittee pointed out that Mr. Fernandes' proposal had been rejected by the Jurists' Committee because the Court lacked the means of execution. Yet after a short discussion it was agreed to take the French text as authentic. The English word "suggest" was replaced by "indicate" and the word "should" by "ought to." Thus the drafters opted for the strongest language that would realistically reflect the Court's powers.

VI. INTERDICT AND ITS SUCCESSORS

Perhaps Mr. Fernandes' analysis of interim orders of protection may be criticized for overemphasizing the relationship between interdict and property. Interdicts are widely believed to have originated as a remedy for injuries to something of a public character[126] such as the prevention of a possible interference with a public roadway; nonpossessory interdicts, for instance, one requiring a defendant to produce a freeman who had allegedly been wrongfully detained, were also available.[127]

Nonetheless, Mr. Fernandes' memorandum to the Jurists' Com-

123. LEAGUE OF NATIONS ASSEMBLY, RECORDS OF FIRST ASSEMBLY, PLENARY MEETINGS, TEXT OF DEBATES 48, 52 (1920).

124. LEAGUE OF NATIONS ASSEMBLY, RECORDS OF FIRST ASSEMBLY, MEETINGS OF COMMITTEES, MINUTES 282-84 (1920).

125. DOCUMENTS, PROCES VERBAUX OF THE MEETINGS OF THE SUB-COMMITTEE OF THE THIRD COMMITTEE, 5th mtg., 29 November 1920, at 134.

126. SANDARS, THE INSTITUTES OF JUSTINIAN lxiii (1910).

127. *See* Buckland, *supra* note 119, at 731.

mittee provides an insight into the nature of interim protection which might be quite useful in examining its jurisdictional basis. Interim protection, like the Roman Law possessory interdict, may be viewed as a provisional possessory remedy designed to protect the rights of the subjects of the legal system with respect to its objects. In municipal law, the subjects are natural and juristic persons while the objects fall into one of the numerous classes of property. In international law, the subjects are generally states and the objects are generally people, territory, servitudes and the incidents of sovereignty.[128] In this respect the institution of sovereignty may be viewed as similar to the institution of property.

There are, however, "civilized" societies that do not have economic systems based on property. Thus it cannot be asserted that principles of law involving possessory remedies designed to protect property rights are generally valid for all legal systems. Nevertheless, when the legal system regulates the rights and duties of subjects with respect to objects of law, the provisional possessory remedy may be viewed as an essential element of "judicial truth" in that system. The power of a court to adjudicate these rights and the duty of a court and the parties to protect the *status quo* pending adjudication follow as a corollary of that principle.[129] In other words, the power of a court to indicate interim orders of protection is a general principle of law, recognized in many legal systems, which is valid in international law. A general principle need not be shared by all legal systems to be acceptable under the heading of article 38(1)(c).[130]

If, on the other hand, it is undesirable to designate the power to indicate interim orders as a "general principle" of law, the power is nonetheless justified as a matter of treaty interpretation when the remedy is analyzed both as it operates in the legal system from which the drafters purported to derive it and as it operates in other legal systems derived from that system and sharing the same characteristics on which it is based.

At Roman law, actions were distinguished according to their judicial origin. Those actions that were established by enactment or founded on the civil law were called civil actions. Praetorian

128. *See generally* Nationality Decrees in Tunis and Morocco, [1923] P.C.I.J., ser. B, No. 4, at 7-32.

129. *See supra* note 112.

130. *See supra* note 67, at 1-26.

actions, on the other hand, were granted by the *Praetor* in virtue of his jurisdiction over the person.[131] The remedy of interdict was a praetorian remedy. Interdicts were decrees or edicts, injunctive in nature, by which the *Praetor* directed one or both of the parties to take or refrain from taking certain actions. For example, the *Praetor* might have ordered the restoration of land taken by force, noninterference with the continued peaceful possession of land, the production of a concealed slave, or one party to allow another to collect acorns, which had fallen from his trees onto the former's land.[132] In some cases the *Praetor* issued provisional or conditional judgments or provisional commands on an *ex parte* statement by the plaintiff.[133]

The interdict has been compared to the Anglo-American remedy of *ex parte* injunction.[134] This remedy is available if the plaintiff fears that irreparable damage will be done to him if the defendant is not immediately prevented from doing the act that he finds objectionable. The defendant's counsel can be heard if he wishes, but neither side will be heard fully and the judge does not form more than a general impression as to the merits of the case. Of course this kind of injunction is not final because it is not meant to settle the position of the parties.[135] The similarity of this remedy and the procedure surrounding it to the interim order of protection is readily apparent. The purpose of both is to prevent irreparable damage to the interest of the parties before the court has had a chance to decide on jurisdiction. Neither is intended to settle with finality the question of merits or the question of jurisdiction, and both amount to an order to one or both of the parties to perform or refrain from performing acts that will prejudice the parties' rights.

It is significant to this discussion that the Anglo-American remedy of injunction is historically derived from courts of equity, which were said to act in personam.[136] In other words, equity courts

131. J. CAMPBELL, A. COMPENDIUM OF ROMAN LAW 149 (2d ed. 1892).

132. Thomas, *Roman Law* in AN INTRODUCTION TO LEGAL SYSTEMS, 24-25 (Derrett ed. 1968).

133. *Supra* note 131 at 160.

134. J. AUSTIN, LECTURE ON JURISPRUDENCE 298-99 (Students' Edition 1899).

135. H. HANBURY, MODERN EQUITY, 564 (8th ed. 1962).

136. F. MAITLAND, EQUITY, 322 (2d ed. Reprinted 1949).

acted on the person to compel him to do or cease doing certain acts, to compel him to hold property for the benefit of another, or to compel him to perform obligations. It is also interesting that in Anglo-American law another power involving jurisdiction solely over the person, that of subpoena, which can be exercised over nonlitigants, had its roots in equity.[137]

Like the Roman *Praetor*, the Anglo-American court of equity did not have immediate jurisdiction over property.[138] Its decrees took the form of personal decrees. Therefore, persons were the objects and property the subject matter of its jurisdiction.[139] The court had no jurisdiction unless the *persons* to whom its orders were addressed were within reach of the court or otherwise amenable to its jurisdiction.[140] Although courts of equity and courts of law have merged in most jurisdictions, the remedy of injunction subsists and is still based on jurisdiction *ratione personae.*[141]

The provisional remedy in Anglo-American law is called an "interlocutory injunction." A man who comes to the court for an interlocutory injunction is not required to make out a case that will entitle him to relief at all events. If he shows that he has a fair question to raise as to the existence of the right that he alleges and he can satisfy the court that the status quo ought to be preserved until the question can be disposed of, he will succeed.[142]

The relationship between injunction and jurisdiction *ratione personae* is recognized as well in the United States:

> If a state has personal jurisdiction over the defendant, it may likewise render a judgment through its courts which directs him either to do an act or then pay money to the plaintiff or to refrain from doing an act. Judgments of this sort are commonly rendered in equitable proceedings . . . .
>
> Where such a basis [for the exercise of personal jurisdiction] exists, the state is said to have jurisdiction *in personam* and the proceeding is said to be a proceeding *in personam.*[143]

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137. *Id.* at 5.

138. W. KERR, A TREATISE ON THE LAW AND PRACTICE OF INJUNCTIONS (1878).

139. *Id.*

140. *Id.* at 8.

141. Hospital for Sick Children v. Walt Disney Productions Inc., [1964] Ch. 52, 69 (C.A.); [1967] 1 ALL E.R. 1005, 1016 (Ch.)

142. *Supra* note 138 at 12.

143. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 79 at 103 (1971).

Civil Law countries make no distinction between law and equity; they do, however, have provisional remedies, similar to the remedy of interdict, which are generally brought in the court that has jurisdiction *ratione personae* over the defendant. The German remedy is the *Einstweilige Verfügung*,[144] which is a form of interim order used to prevent a threatened change of existing conditions, which "may render impossible or substantially more difficult the realization of one of the parties."[145] The order can only be made by the court where the principal proceedings should be filed,[146] and this is the court which has jurisdiction over the defendant.[147]

Chapter 15, section 3 of the Swedish Code of Civil Procedure provides:

> If a party to a pending action has shown good ground to support his claim and it can reasonably be expected that the adverse party by carrying on a certain activity, or performing or refraining from performing a certain act, or by any other conduct, will prevent or render difficult execution of an anticipated judgment, or diminish substantially its value for the claimant the court may direct the adverse party on penalty of a fine, to perform or refrain from performing an act . . .[148]

Again the remedy is described in terms of an order to the party and is dependent on the court's power over him.

The French possessory remedy for the prevention of interference with or disturbance of possession is called *complainte*.[149] It is not specifically mentioned in the *Code Civile*, which does not distinguish among the various possessory remedies, but it is generally recognized to be identical with the Roman interdict.[150] Provisional remedies are called *mésures provisoires*.[151] The procedure most re-

144. ZPO § 936 *et seq.*

145. *Supra* note 85, Vol. 1, at 273.

146. *Id.* at 277. In cases of urgency, however, a departure is allowed from this rule to the extent of permitting the proceedings to be brought at the situs of the asset under dispute.

147. *See* discussion in text *supra* at 12.

148. *See* note 77 *supra*, Rattengangsbalk ch. 15, § 3.

149. A. ENGELMANN, HISTORY OF CONTINENTAL CIVIL PROCEDURE 772 (1928).

150. *Id.* at 740.

151. 2 M. DAVID, LE DROIT FRANCAIS 259 (1960). The provisional remedy has spread beyond Western Europe. In Japan it is called Provisional Disposition and it has existed since 1929. A. VON MEHREN, LAW IN JAPAN 49, 465 (1963).

sembling a request for an interlocutory injunction is the *référé* procedure[152] in which parties may, in all urgent matters, make application to a single judge sitting *en référé*. This application may be made independently of any pending action, and the relief granted is made without prejudice to the final decision. This action must be brought in the court of the defendant's domicile and is based on jurisdiction *ratione personae*.[153] Thus, in municipal legal systems, which have provisional possessory remedies similar to the interim measure of protection with the international legal system, the remedies are normally based on jurisdiction *ratione personae*.

In the case of the jurisdiction of the International Court of Justice, where jurisdiction is based on consent, such consent is expressed by means of membership in the United Nations and the duties expressed in article 94 of the Charter or by means of adherence to the Statute of the International Court of Justice. The underlying principle in the minds of those who drafted the Court's Statute was that a state, in order to have access to the Court, must have undertaken an obligation toward other parties to the Statute to respect and carry out the Court's decisions. In other words, states parties to the Statute have agreed to endow the Court with some basic judicial authority over them, and the power to indicate interim measures of protection is inherent in this authority regardless of whether the Court has finally determined that it has jurisdiction *ratione materiae* under article 36.

Judge Gros, in his dissent in the *Nuclear Tests Cases* objects that:

> [t]he Court, by putting off the decision on the effects of non-appearance, embraced the proposition that a request for provisional measures is utterly independent in relation to the case which is the subject of the application.
>
> It is no use referring to certain domestic systems of law which feature such independence, because the Court has its own rules of procedure and must apply them in its jurisdictional system, which as a corollary of a certain kind of international society has been established on the basis of the voluntary acceptance of jurisdiction.[154]

152. C. Pro. Civ. arts. 806-11.

153. *Supra*, note 71, at 65.

154. Australia v. France, [1973] I.C.J. 99, 119-20.

As mentioned above, however, the opinion of Judge Gros does not appear to manifest an awareness of the difference between jurisdiction *ratione personae* and jurisdiction *ratione materiae.*

The I.C.J. rules of procedure[155] seem to indicate, contrary to the assertion of Judge Gros, that interim protection is quite distinct from preliminary objections to jurisdiction. They are dealt with in two separate articles: article 66 deals with interim protection and article 67 deals with preliminary objections. Article 66(1) provides: "A request for the indication of interim measures of protection may be filed at any time during the proceedings in the case in connection with which it is made. The request shall specify the case to which it relates, the rights to be protected and the measures of which indication is proposed." There is no provision in the rules to the effect that the request shall specify the grounds for jurisdiction *ratione materiae* or even that the Court shall first satisfy itself that it has jurisdiction. Furthermore article 66(2) specifies: "A request for the indication of interim measures of protection shall have priority over all other cases. The decision thereon shall be treated as a matter of urgency." That priority and urgency are referred to in article 66 and that it is placed before the article on preliminary objections—article 67—indicates that interim protection is to be decided upon before a full determination by the Court of the issue of jurisdiction.

The courts of the various legal systems, discussed above, do not totally exclude subject matter from consideration in granting provisional orders. Certainly when an order *en référé* is sought before a *Tribunal Commercial* regarding a matrimonial dispute, the application will be dismissed. The same would apply when the application before the *Amtgericht* is clearly outside the class of disputes enumerated in Part III *supra.* Nevertheless, the jurisdiction of the International Court of Justice is not as different from jurisdiction in these municipal systems as Judge Gros suggests. As in these systems, the jurisdictional system of the International Court of Justice permits the granting of interim orders of protection, except when the claim of jurisdiction under article 36 is manifestly ill-founded.[156]

155. Published in 67 AM. J. INT'L L. 195, 215-16 (1973).

156. Such a situation might occur in a case in which the Respondent had not accepted the compulsory clause *and* the Applicant can point to no special agree-

VII. The Effect of France's Failure to Comply with the Court's Order

If article 36 is the only basis for the jurisdiction of the Court to indicate interim orders of protection, then an order founded only on the prima facie applicability of that article may be said to be only provisionally valid and would appear to raise a duty of compliance only retroactively once the Court has finally and definitively declared itself to have jurisdiction. As argued above, however, the jurisdictional basis for an interim order is article 93 of the United Nations Charter. Therefore, the order raises an immediate duty of compliance under article 94(1) of the Charter.

Admittedly, nuclear tests are a very sensitive issue although the tests are not nearly as vital to France as the fisheries are to the Icelanders. Moreover, it is doubtful that either the French or the Icelanders will, upon discovering that they have a duty under article 94 of the Charter, be impelled to enter their respective cases to contest the jurisdiction of the Court (although this writer commends this course of action to them). In the first place it is not beyond the realm of possibility that they will fail to concur with this writer's analysis. In the second place article 94(2) is the only section of the Charter dealing with failure to comply with an order of the Court. It provides: "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, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment." It is doubtful that recourse to the Security Council is likely to concern France very greatly, since its status as a permanent member of the Security Council and its consequent veto power renders it immune to any initiative in that direction.

France's recent renunciation of compulsory jurisdiction under article 36(2) of the Court's Statute is to be regretted, but it need not concern us here because it is settled law that renunciation of compulsory jurisdiction does not affect any proceedings before the Court at the time of the renunciation.[157] Nevertheless, the refusal

ment or treaty upon which it could possibly found a claim of jurisdiction *ratione materiae.*

157. *See,* The Right of Passage over Indian Territory Case (Preliminary Objections), [1957] I.C.J. 125, 151, 152. *See also* article 45(5) of the General Act for the Pacific Settlement of International Disputes.

of France to participate in the proceedings on the ground that lack of jurisdiction is manifest is part of a growing trend among States to autointerpret the question of jurisdiction in violation of article 36(6) of the Statute of the Court, which provides: "In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court." This trend is further evidenced by the refusal of Iceland to participate in the *Fisheries Jurisdiction Cases* on the same ground and the refusal of India to participate in the case of the *Trial of Pakistani Prisoners of War.*[158]

Attempts to autointerpret the jurisdiction of the Court are not unprecedented. Previously attempts to evade the spirit of article 36(6) have come in the form of self-judging reservations to the acceptance of compulsory jurisdiction under article 36(2). Generally these take the form of being explicitly self-judging. The International Court of Justice dealt with just such an explicitly self-judging reservation in the *Norwegian Loans Case.*[159] In that case, France filed an application instituting proceedings against Norway to require that Government to discharge its obligations to the purchasers of certain bonds issued by it, by payment in gold value as required on the face of the bonds, *i.e.* the gold value of the coupons on the date of payment and the gold value of the redeemed bonds on the date of repayment. The obligation of the Bank of Norway to convert notes to gold was suspended in 1931 by a statute still in force at the time of the action.

Both France and Norway had accepted the compulsory jurisdiction of the International Court of Justice. The declaration filed by Norway, the defendant, on November 16, 1946, accepted the compulsory jurisdiction of the Court in relation to any other state accepting the same obligation, that is to say on the basis of reciprocity. The declaration filed by the plaintiff, France, on March 1, 1946, contained an explicitly self-judging reservation: "This declaration does not apply to differences relating to matters which are essentially within the national jurisdiction as understood by the Government of the French Republic."[160]

The Norwegian Government filed four preliminary objections.

158. *See,* I.C.J. Communique No. 73/35 (15 December 1973) (dropping that case from the list of cases before the Court).

159. [1957] I.C.J. 9.

160. [1957] I.C.J. 9, 21.

The first was to the effect that "[t]he subject of the dispute as defined in the application of the French Government of July 6th 1955 is within the domain of municipal law and not of international law, whereas the compulsory jurisdiction of the Court in relation to the parties involved is restricted by their Declarations of November 16, 1946 and March 1st 1946, to disputes concerning international law."[161] Other objections related to jurisdiction *ratione temporis*, legal personality, and nonexhaustion of local remedies.

The Court saw the first objection as consisting of two parts: the first maintaining that the subject of the dispute was within the exclusive domain of the municipal law of Norway, the second part relying upon the French reservations quoted above. Confining its decisions to an examination of the first Norwegian objection, the Court held that the two declarations were made on the condition of reciprocity and that "[s]ince two unilateral declarations are involved, such jurisdiction is conferred upon the Court only to the extent to which the [two] Declarations coincide in conferring it."[162] Moreover, since the French declaration is the narrower one, the Court felt that it was the French declaration that must control even though France was the plaintiff in the case.

Since the first part of the Norwegian preliminary objections asserted that the matter was within the Norwegian domestic jurisdiction, it was a matter essentially within the national jurisdiction as understood by the Norwegian Government. Accordingly, the Court declined to hear the merits of the case on the ground that it lacked jurisdiction. Having accepted the first preliminary objection of Norway, the Court did not feel it was necessary to examine the other three. What is more important, however, the Court declined to review the validity of the reservation on the ground that neither party had raised the question of validity. It was a French reservation, and the French Government did not see fit to abandon its own reservation. (Perhaps France might have been estopped from raising the question of validity.) The Norwegian Government, however, relied upon it.[163]

161. [1957] I.C.J. 9, 21.

162. [1957] I.C.J. 9, 23.

163. The better view is that the condition of reciprocity is explicitly laid down and necessarily involved in the system by virtue of article 36(2), which provides

It was precisely this failure of the Court to examine the validity of the French declaration that Judge Sir Hersch Lauterpacht objected to in his separate opinion.[164] He felt that the French declaration was invalid because it was contrary to article 36(6) of the Statute of the Court:

> [w]hat would be the position if in accepting—or purporting to accept—the obligations of Article 36 of the Statute, a state were to exclude the operation of paragraph 6 of that Article not only with regard to one reservation but with regard to all reservations or, generally, with regard to any disputed question of the jurisdiction of the Court? What would be the position if the Declarations were to make it a condition that oral proceedings of the Court shall be secret; or that its Judgment shall not be binding unless given by unanimity or that it should contain no reasons; or that no Dissenting Opinion shall be attached; or that Judges of certain nationality shall be excluded; or that contrary to what is said in Article 38 of its Statute, the Court shall apply only treaties and custom . . . .
>
> It might be said that some of these examples are hypothetical and farfetched. In fact they are far less farfetched than the particular instance here discussed, the instance of a reservation according to which a Government claims . . . the right to determine for itself whether the Court has jurisdiction . . . . [W]hile the Statute as interpreted in practice permits reservations to its jurisdiction it does not permit reservations as to the functioning and organization of the Court.
>
> Clearly the Court cannot act otherwise than in accordance with its own statute.[165]

According to Judge Lauterpacht, since the French declaration was invalid it was incapable of producing legal consequences. The Court in upholding the Norwegian objection based upon that reservation was endowing the reservation with legal consequences that it did not possess and, thereby, implicitly upholding it.

Judge Lauterpacht also discussed the possible ways of handling

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that the acceptance of compulsory jurisdiction extends only "in relation to any other state accepting the same obligation . . . ."

It would appear that the statement "on condition of reciprocity" in declarations accepting the optional clause is superfluous. A. FACHIRI, PERMANENT COURT OF INTERNATIONAL JUSTICE 96-97 (2d ed. 1932).

164. [1957] I.C.J. 9, 34-66 (Lauterpacht).

165. [1957] I.C.J. 9, 44-45.

such a reservation. The first possibility was that the Court could either sever the words "as understood by the French Government" from the reservation or it could sever the reservation from the rest of the declaration. Both of these courses Judge Lauterpacht rejected, saying that the reservation, as qualified, was the "essence of the undertaking."[166] The possibility that the Court might invalidate the particular reservation which is deemed objectionable was rejected by Judge Lauterpacht almost out of hand. The reservation, he claimed, was the essence of the undertaking, and to treat it as invalid would mean that the entire reservation of matters of national jurisdiction would be treated as invalid while the declaration of acceptance would be treated as fully in force. This would also result in a ruling that the Court *has* jurisdiction since Norway could not rely on the invalid declaration in its objection.[167] Hence, the only course that the Court should have taken, according to Judge Lauterpacht, was to consider the entire acceptance tainted with invalidity and decline jurisdiction on the ground that there was no valid declaration of acceptance on the part of the French Government.[168]

One is not bound to accept Judge Lauterpacht's view that the Court had implicitly recognized the validity of the French self-judging reservation. Had Judge Lauterpacht arrived at a result different from that of the Court it might perhaps be assumed that the Court had rejected the contention that the declaration was invalid. As it is, it can only be said that Judge Lauterpacht and the Court reached the same result albeit by different routes. In the *Interhandel* case both Judge Sir Hersch Lauterpacht[169] and Judge Sir Percy Spender[170] objected to the validity of a United States self-judging reservation. In this case the United States, as defendant, actually raised the reservation in objecting to jurisdiction. However, the Court evaded the issue by deciding on other grounds that it had no jurisdiction. Judge Read argued in the *Norwegian Loans* case that the French reservation could be construed as leaving the Court the power to determine whether the French view on domes-

166. [1957] I.C.J. 9, 57.
167. [1957] I.C.J. 9, 57.
168. [1957] I.C.J. 9, 36.
169. [1959] I.C.J. 95 (Lauterpacht).
170. [1959] I.C.J. 54 (Spender).

tic jurisdiction is reasonable.[171] Judge Spender, in *Interhandel*,[172] complained that this view would constitute an unwarranted amendment of the reservation. But Judge Read's argument can be used to demonstrate the weakness of Judge Lauterpacht's position.

So long as there exists a verbal provision capable of an interpretation that leaves a residuum of decision making authority to the Court, it would not be proper to say that it *ipso facto* has the effect of excluding article 36(6). Until it is established that it does have that effect it cannot be said that the reservation, much less the whole declaration, is invalid. What can be done is what the Court did—hold that a State that accepts compulsory jurisdiction on the basis of reciprocity is equally entitled to rely on that reservation.

The French "self-defense" reservation is a reservation that is not self-judging by its own terms. However, there appears to be an issue whether it is implicitly self-judging. The French Government claimed that it is self-evident that the defense reservation excludes from the jurisdiction of the Court the question of whether atmospheric nuclear tests were illegal.[173] Mr. Ellicott, the Solicitor-General of Australia, argued for Australia that "in any event the mere existence of the French reservation, upon the assumption that it has an objectively definable content, cannot be taken as creating a situation in which the court is now manifestly without jurisdiction under Article 36(2). . . ."[174] If, however, the self-defense reservation was to be regarded as self-judging, Mr. Ellicott contended that it was void as being contrary to the fundamental policy of the Statute of the Court. For authority on this point he relied on the separate opinion of Judge Lauterpacht in the *Norwegian Loans* case and the opinions of Judges Lauterpacht, Spender, Klaestad and Armand Ugon in the *Interhandel* case.[175]

The Court accepted Mr. Ellicott's view as indicating that a dispute over jurisdiction existed:

> Whereas in its oral observations the Government of Australia maintains *inter alia* . . . that if the reservation in paragraph 3 of the

171. [1957] I.C.J. 9, 93.

172. [1959] I.C.J. 54, 58.

173. *See* Verbatim Record of Australian Case, Public Sitting 21 May 1973, at 35.

174. *Id.* at 37.

175. *Id.*

> French declaration of 20 May 1966 relating to "disputes concerning activities connected with the national defence" is to be regarded as one having an objective content, it is questionable whether nuclear weapon development falls within the concept of national defence; that if this reservation is to be regarded as a self-judging reservation, it is invalid, and in consequence France is bound by the terms of that declaration unqualified by the reservation in question; . . .[176]

Mr. Ellicott further pointed out that the judges divided equally on the question of severability of one invalid reservation from the declaration. He might have added that, in determining whether the self-defense reservation is severable, the Court need not be bound by the opinions of Judges Lauterpacht and Spender on the severability of the "domestic jurisdiction" reservation since the "self-defense reservation" appears to be far less the "essence" of the overall undertaking.

But is the argument necessary at all? The defense reservation, as pointed out above, is not self-judging by its own terms. It is self-judging only if the Court accepts the view that France is thereby endowed with such an unlimited margin of appreciation as to what its defense needs are that the matter is incapable of subjective assessment by anyone else. This is basically what the French Government is claiming by its assertion that the Court is manifestly without jurisdiction. This view appears to have the concurrence of Judge Forster,[177] and Judge Ignacio-Pinto.[178] Other judges in the minority, as previously noted,[179] have refrained from addressing themselves to the validity or meaning of the defense reservation, being more concerned with the extent to which jurisdiction needs to be proved in order to ground an interim order. The majority do not appear to agree that France has an unlimited margin of appreciation.

Nevertheless, the power to determine the extent of the margin of appreciation that France has under the defense reservation, resides with the Court and to this extent the self-defense reservation is wholly consonant with article 36(6) of the Statute. Thus there is a fundamental distinction between explicitly self-judging reser-

176. Australia v. France, [1973] I.C.J. 99, 102.
177. Australia v. France, [1973] I.C.J. 99, 112-13 (Forster).
178. Australia v. France, [1973] I.C.J. 99, 129-30 (Pinto).
179. *See* notes 166-72 and accompanying text, *supra.*

vations and reservations that may be implicitly self-judging. Consequently, the better argument seems to be that the contents of the self-defense reservation are capable of objective determination and that the reservation does not leave France with the margin of appreciation that it claims for itself.

What is more serious, however, is the *conduct* of France in ignoring the order of the Court. This conduct may be designated as self-judging conduct. Although the words of a reservation, even one that appears to be explicitly self-judging,[180] may be read and interpreted in a manner consistent with article 36(6), one cannot, however, read down conduct. The Court issued an order; France appears to have ignored it, asserting as the basis for its action the Court's lack of jurisdiction. The Court has thus been deprived unilaterally by France of the power to determine whether it has jurisdiction. There are no words that the Court can look at to determine whether a residuum of decision making power is left to it, as this writer has suggested is the case with the "domestic jurisdiction" reservation.[181] Thus, there is nothing more unequivocally self-judging than self-judging conduct. It is clearly a violation of article 36(6). Since there is no possibility that any residuum of decision making authority is being left to the Court, the weakness of Judge Lauterpacht's argument, which has been previously discussed, does not apply.

France's self-judging conduct constituted a *de facto* renunciation of the compulsory jurisdiction of the Court. The formal renunciation merely ratified an existing position. In ignoring the interim order, however, France has gone even further than that. It has also attempted to unilaterally abrogate article 36(6) of the Court's Statute as it relates to article 36(1) of the Statute and article 93 of the United Nations Charter. It would seem that France has totally excluded itself from access to the International Court of Justice. This would, to this writer, be a viable defense to any suit that France seeks to bring before the International Court of Justice in the future and, indeed, against any state, which by its conduct, attempts a unilateral renunciation of article 36(6). The success of such a defense would, it is submitted, be consistent

180. *See* discussion in text of Judge Read's views in the Norwegian Loans Case, *supra* at Part VII.

181. *See* text *supra* at Part VII.

with the drafters' intention that the only states to have access to the Court are those that undertake a duty to abide by its decisions.

VIII. Conclusion

This article has attempted to demonstrate that the drafters of the Statute on which the International Court of Justice is based intended the Court to be something more than an arbitral tribunal to which consenting parties submit disputes on an *ad hoc* basis. To this end, they endowed the Court with a general jurisdiction *ratione personae* over the parties to the Statute and the power to determine for itself whether it had jurisdiction in each case. In their scheme the drafters anticipated that those states that agreed to become parties to the Statute thereby agreed to give the Court certain basic judicial authority over them. This authority comprehends primarily that the parties to the Court's Statute will undertake to comply with the decision of the Court.

This article has also attempted to demonstrate that in legal systems, derived from Roman law, the power of courts to indicate provisional measures to preserve the *status quo* between parties is based primarily on jurisdiction *ratione personae* and that the drafters of the Court's Statute recognized the similarity between interim protection and Roman interdict and intended that jurisdiction to order interim protection should also be based on jurisdiction *ratione personae*. Lately, the Court in dealing with applications for interim protection has placed too much emphasis on articles 36 and 37, which relate largely to jurisdiction *ratione materiae*. In doing so it has undermined the legal authority upon which the duty to comply with such an order is based. As a consequence, the Court's authority has been severely shaken by the refusal of states to comply with its last three interim orders. Furthermore, France's renunciation of compulsory jurisdiction may have finally squashed any impulse that the Court may have had toward judicial valor.

The extent of the Court's power to determine its own jurisdiction may be further clarified in the jurisdiction phase of the *Nuclear Tests Cases* by the extent of the margin of appreciation that the Court is willing to grant to France to determine whether nuclear warfare is connected with self-defense. However, it certainly seems that at this time article 36(2) notwithstanding, the Court has no power to adjudicate any case that the parties have not consented,

on an *ad hoc* basis, to submit to it. This is a far cry from the confidence expressed by the drafters in 1920 that compulsory jurisdiction was an idea whose time had come. It may be that in a world of sovereign, independent states, compulsory jurisdiction is simply not feasible; yet it is not amiss for scholars to point out the nature of the legal norms to which states purport to subscribe.