

APPENDIX 6

*SORTING OUT THE WORLD COURT'S ROLE IN COMPULSORY JURISDICTION**

by

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In the current debate over modification or termination by the United States of its declaration of acceptance of the compulsory jurisdiction of the International Court of Justice, considerable clarity may be fostered by distinguishing between two functionally different roles for international tribunals. Without intending an order of priority, these may be called the A-function of dispute resolution, and the B-function of law-application. For various reasons, we generally do not distinguish between the two in domestic legal systems. The result is an idealized concept of domestic courts that should not be projected onto the international system. Our "idealized concept of a national legal system," as Professor Richard Bilder put it in an important recent article, is "[an unrealistic] model for the optimal international legal system."¹ Instead, we should assess exactly what we think the International Court of Justice ought to do from a realistic perspective of international needs, and not as an idealized or confused projection from national courts.

The A-function has many domestic models, including arbitration, mediation, conciliation, and other types of agreed-upon third-party settlement procedures. These owe their existence and efficacy to the fact that both disputing parties have decided that their differences can best be resolved by an impartial third party. The A-function works because of the high degree of mutuality of interest in settlement compared to the

perceived lesser importance of the precise terms of the settlement.

On the other hand, domestic courts are models of the B-function. Their purpose is to apply the law, not to settle the dispute. Application of the law may leave one party extremely dissatisfied; indeed, we think of law as typically a zero-sum game. The dissatisfied loser may apply to the legislature for a future change in the content of the law, but he has no claim upon the court for a different substantive law solely because the law worked to his detriment. For instance, a taxpayer in a high bracket can hardly argue in Tax Court the justice of a progressive tax rate. Or, to take a different kind of example, there are many disputes of which courts will take no cognizance because they are perceived to be non-legal, such as a contractual dispute between teenagers that one of them failed to show up for a date. To be sure, courts in the aggregate keep an eye on the effectiveness of their decisions in preventing social unrest (consider the current debate on the legality of abortion), but in any given case the court is concerned with applying the law as it is irrespective of the negative impact upon the losing party or the possibility that the parties will never speak to each other again.

Part of our difficulty in perceiving that domestic courts fulfill the B-function is that we tend to look upon courts as the great instruments in society for resolving disputes. But analytically that is incorrect. It stems largely from the fact that domestic courts are able to enforce their judgments; the losing party has no choice but to accept the judicial verdict. A reasoned opinion may mitigate the pain, informing the losing party why neutral principles, neutrally applied, caused him to lose.² But if he believes the law is not neutral, that it reflects (for instance) the dominant interests of the bourgeoisie, he will hardly feel that his dispute has been "resolved" except in the sense of brute force. It is easy to mistake the court's ultimate power of enforcement for a settlement of the underlying controversy, but courts in fact only enforce the law.

Turning now to the International Court of Justice, we find that much of the controversy over its performance is due to a sense that it has an A-function which it has not satisfactorily fulfilled. Critics of *Nicaragua v. United States*, for example, feel that the dispute was judicially unmanageable and inappropriate for the Court and hence the United States should withdraw from the Court's compulsory jurisdiction.³ Or consider Professor Bilder's views on the *Hostages in Tehran* case:

Was the U.S.-Iranian dispute really about whether Iran had a right to seize the U.S. embassy and U.S. diplomats? Did the International Court's decision on this question have any chance at all of dealing with the deeper grievances and problems that were actually involved? What emerges as the "legal" dispute may be only the symptom or symbol of far more complex underlying differences which a particular judgment can do little to solve.⁴

Typically, critics of the Court's compulsory-jurisdiction calendar offer many suggestions for expanding the Court's role in dispute settlement, such as the "panel" device in the recent *Gulf of Maine* controversy. They may be offering such suggestions strategically to disarm their opponents who may accuse them of wanting to dismantle the Court. But the real problem is that both in their criticism of the Court's ineffectiveness in resolving disputes and in their enthusiasm for expanding the consensual basis for jurisdiction, these critics seem locked into the A-function mind set.

In fact, the International Court of Justice--apart from its readiness to stand as an arbitrator--exhibits the B-function, just like domestic courts. Its Statute makes abundantly clear its role to apply international law to the parties that come before it. In contrast, international dispute settlement is the role of the United Nations Security Council.

Good lawyers know that resort to litigation rarely settles a dispute. The legal dispute in a domestic context is "only the symptom or symbol of far more

complex underlying differences which a particular judgment can do little to solve," quoting Professor Bilder's words which he applied to international disputes. If we don't really expect domestic courts to solve disputes⁵--if we counsel clients to avoid litigation whenever possible--we should hardly consider it a failing of the International Court that it does not solve international disputes.

We should not even assume that international tribunals necessarily contribute to the resolution of international disputes. In discharge of the B-function, these courts will only help resolve international disputes to the extent that the law they apply is itself fair and reasonable. The content of that law is not up to the Court; it is a matter of international custom and convention. To be sure, international customary law has evolved over the centuries to its present content because it has proven efficient in stabilizing international relations.⁶ On the whole--and perhaps to the same extent as domestic law--international law faithfully applied contributes to peace and stability. But in any particular case that is not necessarily so.

In the Iranian hostage situation, the International Court of Justice played at best a supporting role in the peaceful resolution of the dispute. Many options were open to the Carter administration--taking the case to the Security Council, diplomatic initiatives, calling on third parties and neutral states to help out, threats of military force, a rescue mission on Iranian territory, retaliation against Iranians in the United States, freezing of Iranian financial assets, and an application to the International Court of Justice. The latter was neither the most nor least important initiative; it was only part of a complex political process. The Court's efficacy should not be assessed on whether it solved the entire dispute when it was assigned only a minor role.

But viewed in B-functional terms, our assessment of the Court's role in the Iranian hostage situation might come out quite different from Professor Bilder's. Quite apart from the real-world dispute between Iran and the United States, a significant international law issue was involved in the case. The issue was different

from--one might say it was orthogonal to--the U.S.-Iranian dispute. It implicated the security of all diplomatic staffs in all countries and involved the historic function of ambassadorial representation. The enormity of *this* legal problem is attested by the near-unanimity by which the rest of the world reacted to the Iranian violation of the American embassy, and by the unanimous vote of the International Court of Justice that Iran committed a breach of international law in giving official support to the students who invaded the embassy. All of these countries and judges perceived that unless Iran's action was condemned under international law, their own fundamental interests in international stability and diplomatic interchange would be severely compromised.

In this sense, the application of the United States in the *Tehran* case was as a surrogate for the international community. The United States was officially the party in interest, but the beneficiaries were all countries including the United States. This sort of third-party legal benefit is of course generally true. In U.S. constitutional law, for example, a particular plaintiff must have "standing" to assert an unconstitutional deprivation of her rights, but once she proceeds with her case, the result thereof will define or clarify the constitutional rights of all persons similarly situated.

To be sure, what makes legal study difficult and profoundly challenging is that the legal question asserted by a party in a case is directly tied to that party's fact situation. The question in the *Tehran* case was not simply whether Iran had an international legal right to seize American diplomats and hold them hostage, because on that abstract legal question the obvious textbook answer is no. Rather, the real question was whether Iran's act could be justified as retaliation for prior illegal actions of the United States. The peculiar self-enforcing character of international law makes it occasionally justifiable for a state to violate another state's entitlement in retaliation for that other state's prior illegal act.⁷ The Court considered this point, and concluded that there was no basis for Iran's charge that the United

States had previously acted *illegally* even though its actions were politically offensive to Iran.

Hence, what the International Court accomplished in the *Tehran* case was a minor contribution to the settlement of the dispute (in A-functional terms) and a major contribution to the application of international law (in B-functional terms). The case would have been important had there been no A-function impact. What the Court did, and did well, was what it was charged to do--namely, to apply international law to the legal aspects of the case.

Finally, let us consider *Nicaragua v. United States*. It was a veritable parade of misperceptions. Nicaragua's complaint read more like a declaration of judicial war than an application for legal clarification. For instance, it asked the Court to adjudge and declare that the United States

is under a particular duty to cease and desist immediately: from all use of force--whether direct or indirect, overt or covert--against Nicaragua, and from all threats of force against Nicaragua; from all violations of the sovereignty, territorial integrity or political independence of Nicaragua, including all intervention, direct or indirect, in the internal affairs of Nicaragua; from all support of any kind--including the provision of training, arms, ammunition, finances, supplies, assistance, direction or any other form of support--to any nation, group, organization, movement or individual engaged or planning to engage in military or paramilitary actions in or against Nicaragua. . . .⁸

Such a broad complaint might well be expected to have the counterproductive effect of either dissuading the Court from ruling on the merits (as may have happened in *Ethiopia and Liberia v. South Africa*) or a stonewalling by the defendant (as happened when the United States walked out of the proceedings in the *Nicaragua* case itself). Nicaragua, deliberately or mistakenly, viewed the International Court in A-functional terms and fashioned its complaint

accordingly. Time will tell whether politically that was a wise or unwise decision.

The response of the United States was similarly misperceived. Instead of welcoming judicial ventilation of narrowly formulated legal issues, the United States sought to convince the Court that since so many issues in the case were political, the whole case was nonjusticiable. Did the attorneys for the United States forget that only a few years before they had successfully convinced the same Court of the opposite proposition, namely, that the presence of political issues in the *Tehran* case did not disenfranchise the Court from resolving the legal issues? In any event, the about-face was unsuccessful, and the Court found that the case was justiciable by a vote of 16 to 0.

Perhaps because both parties viewed the case in A-functional terms, the Court itself fell into the trap of thinking that its role was to resolve the dispute and not simply to pronounce upon the legal issues. How else to explain the unseemly haste in dismissing out-of-hand the intervention application by El Salvador? In this and several other instances, the Court seemed to act as a supreme tribunal blessed with enforcement powers that did not depend upon convincing either side of the reasonableness or correctness of its decision. Perhaps the Court secretly intended to be more discerning and careful in its eventual decision on the merits (in *Ethiopia and Liberia v. South Africa*, the Court in effect completely reversed its prior jurisdictional decision when it reached the "merits"). But if this was the Court's intention, it was poor strategy, given the painful decision by the United States to walk out. Clearly the United States found some of the Court's holdings and reasons to be singularly unpersuasive, and regardless of what one may think of the United States' position in general, one must admit that on some of these issues the United States was properly upset. A neutral observer would have to admit that the Court overstepped its judicial responsibilities in an apparent zeal to rule on the entire dispute.

There are cases, to be sure, where the legal issues constitute all the relevant issues between the parties. For example, cases involving title to territory and the

location of boundaries are, by their nature, fully determined when the legal issues in them are determined. There are other types of cases, such as *Nicaragua v. United States*, where the legal issues are only a fraction of the dispute. For instance, international law does not address the sale of weaponry by one government to another. Despite Nicaragua's complaint, it has no legal basis for arguing against the sale of weaponry by the United States to an unfriendly neighbor. But in all kinds of cases, the dispute is not necessarily resolved when the legal issues are determined. A legal all-or-nothing outcome can even increase the hostility of the losing party and exacerbate the dispute.

If courts do not resolve disputes, and if the exercise of the B-function may even escalate a dispute, what good is an international court? Why should the United States continue to adhere to the compulsory jurisdiction of the International Court of Justice if that Court's only proper function is to issue authoritative pronouncements on the content and application of international law?

Such a function is indeed the Court's most important role and constitutes the reason why the United States should continue to support its compulsory docket. Judicial opinions facilitate international law by clarifying it, updating it in light of recent state practice, and making it more accessible and authoritative. These are not minor values. The international community has a stake in clear and consistent rules of law.

A party that loses on the legal issues before the Court has not necessarily lost the dispute. What real harm would have befallen the United States had the International Court ruled that the laying of mines in Nicaragua's harbors was illegal? Nearly everyone who has looked at this question has concluded that the mining activities were illegal, and the United States ceased the practice as soon as the facts came to light. Very little would have changed if the International Court had said the same thing that all the commentators have said.

On the other hand, if the International Court were to accept Nicaragua's complaint--even just the part

previously quoted--that result would be sort of declaration of judicial war. It would be an attempt by the Court to discharge an A-function, and would be met with resistance. The Court would be foolish to attempt such a broad-based order to one of the parties to a case. Until the Court does some such thing, however, we should not assume that it will. The future of the International Court as a significant international institution lies in its acceptance and fulfillment of the law-determination function.

ENDNOTES

*This draft editorial is intended for the use of conference participants at the Workshop sponsored by the Center for Law and National Security, University of Virginia School of Law, Charlottesville, VA, August 16-17, 1985. The ideas herein may be used, and the language cited, by any interested person, with the understanding that the present draft will probably be revised by the author and may be submitted to the *American Journal of International Law* as an editorial.

¹Bilder, Some Limitations of Adjudication as an International Dispute Settlement Technique, 23 Va. J. Int'l L. 1, 10 (1982).

²The need for such an opinion, in turn, may help convince the judge to decide the case according to the neutral principles of law (as opposed to the way the "legal realists" say judges decide cases). For an expansion of this argument, see A. D'Amato, Jurisprudence: A Descriptive and Normative Analysis of Law 76-91 (1984).

³See, e.g., Reisman, Termination of the United States Declaration Under Article 26(2) of the Statute of the International Court (contained elsewhere in this volume).

⁴Bilder, *supra* n. 1, at 4.

⁵The fact that most cases are settled is merely a function of a discounted expectation of the probable

judicial result. *See, e.g.*, D'Amato, Legal Uncertainty, 71 Calif. L. Rev. 1, 12-18 (1983).

⁶For an expansion of this argument, *see* D'Amato, Is International Law Really "Law?" 80 Nw. L. Rev. 1293 (1985).

⁷For an expansion of this argument, *see* D'Amato, The Concept of Human Rights in International Law, 82 Colum. L. Rev. 1110, 1118-22 (1982).

⁸Application of the Republic of Nicaragua, I.C.J. 1984, at 16-18.