The Anatomy of International Dispute Resolution

CHRISTINE CHINKIN*

ROMANA SADURSKA**

I. INTRODUCTION

The purpose of this Article is to construe the many layers and different ingredients which come together in an international dispute, by analyzing the various international dispute resolution processes that have been attempted in particular international disputes.[1] We examine international disputes in terms of the participants, claims, situations, strategies, goals, and outcomes.[2] For the sake of clarity and fuller analysis, we strip disputes down to these separate components although we are aware of their continual interlocking, intersecting, and mutual impact.

---

* LLB; LLM (LOND.); LLM (YALE); PHD (SYDNEY) SENIOR LECTURER SYDNEY UNIVERSITY LAW SCHOOL.

** LLM (YALE); PHD, POLISH ACADEMY OF SCIENCES; LLM (WARSAW); SENIOR LECTURER SYDNEY UNIVERSITY LAW SCHOOL. THE AUTHORS WOULD LIKE TO ACKNOWLEDGE THE ASSISTANCE AND SUPPORT OF THE STUDENTS WHO PARTICIPATED IN THE ELECTIVE COURSE ON INTERNATIONAL DISPUTE RESOLUTION, SYDNEY LAW SCHOOL, 1989. WE ARE INDEBTED TO THEM FOR DETAILS ABOUT A NUMBER OF DISPUTES AND FOUND THEIR ENTHUSIASM STIMULATING. WE WOULD ALSO LIKE TO THANK DR. HILARY CHARLESWORTH FOR HER HELPFUL COMMENTS AND SUGGESTIONS.

1. For this analysis we primarily use the following international disputes: The sinking of the *Rainbow Warrior* (1985); South African apartheid policies; the dispute between the United States and Libya about the latter's involvement in international terrorism, culminating in the bombing of Tripoli (1986); the detention of American hostages in Iran (November 1979-January 1981); the incursion of Soviet submarines into Swedish waters (1981-1982); the Falklands/Malvinas dispute; the Chernobyl nuclear accident (1986); the Venezuela/Guyana border dispute; the Soviet intervention in Afghanistan (1979); the United States' intervention in Grenada (1983); and the continuing conflict in Central America. These conflicts were chosen to demonstrate diversity in participation, situations, attempted processes, and outcomes, and thus allow for comparisons. Other disputes, such as the Iraqi invasion of Kuwait and the Gulf War conflict (1990-91), will be used for illustration of particular points. Our intention is not to discuss the legality of the claims of the respective participants, but to analyze the nature of the disputes and the mechanisms available for their resolution. For an often-used definition of an international dispute, see MAVROMATTIS PALESTINE CONCESSIONS (Greece v. United Kingdom) [1924 P.C.I.J. (ser. A) No. 2, at 11 Aug. 30, 1924).] where the P.C.I.J. defined it as "a disagreement on a point of law or fact, a conflict of legal views or interests between two persons." *See generally* Richard B. Bilder, *An Overview of International Dispute Settlement*, 1 EM. J. INT'L DIS. RES. 1 (1986) (a summary of other definitions).

2. We wish to acknowledge our intellectual debt to the jurisprudence of Professors Myres S. McDougal, Harold Lasswell and Michael Reisman. *See generally* Myres S. McDougal, Harold Lasswell & Michael Reisman, *Theories About International Law: Prologue to a Configurative Jurisprudence* 43; Myres S. McDougal, Harold Lasswell & Michael Reisman, *The World Constitutive Process of Authoritative Decision* 191, Myres S. McDougal & Michael Reisman, *The Prescribing Function in the World Constitutive Process: How International Law Is Made*, 355, *articles in* MYRES S. MCDOUGAL & MICHAEL REISMAN, INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE (1981).

Through this contextual analysis of international disputes, we hope to highlight some of the realities of the prescriptive process and the operation of international law. In particular, we hope to demonstrate that a continued statist bias exists amidst an increasing accommodation of non-state actors within the international legal system; and to demonstrate that this statist bias undermines both a comprehensive understanding of international disputes and all attempts to resolve such disputes.

II. PARTICIPANTS

The first task is the apparently easy one of defining the participants in an international dispute in order to determine who should be represented in any dispute resolution process and whose interests should be taken into account. If any participants' interests are ignored or underestimated, the dispute is not likely to be resolved. The statist bias entrenched in the international legal system focuses attention on nation states as participants. This statist perspective is overly narrow and selective; peoples, juristic and natural persons, national liberation organizations, aspirants to power,[3] individuals committing international offenses (and their victims), religious and spiritual organizations,[4] and governmental, non-governmental, global, and regional organizations can all be participants in a dispute. A distinction must be drawn between the direct protagonists, those with peripheral interests, and others who become involved through their role in attempting to manage, contain, resolve, or even inflame the dispute.

Even participation in a clear-cut international dispute, such as that arising out of the 1985 sinking of the *Rainbow Warrior* in Auckland Harbor,[5] can be wider than just nation states. Participants in that crisis were the main disputants, (France and New Zealand), other involved states (the United Kingdom,[6] Holland,[7] and Switzerland[8]), Greenpeace (a

3. For example, the Nicaraguan Contras, and the Revolutionary Military Council in Grenada.

4. For example, the Holy See, the Mullahs in Iran, and elsewhere in the Muslim world.

5. *See generally* RICHARD SHEARS & ISABELLE GIDLEY, THE RAINBOW WARRIOR AFFAIR (1985); JOHN DYSON, SINK THE RAINBOW! (1986); MICHAEL KING, DEATH OF THE RAINBOW WARRIOR (1986).

6. The United Kingdom was the flag state of the *Rainbow Warrior*.

7. Holland was the national state of the victim who died in the bombing.

8. The French agents carried false Swiss passports.

nongovernmental organization[9]), the individual victim, the offenders (state agents), members of the New Zealand investigatory bodies,[10] the Secretary General of the United Nations (as a third-party facilitator for settlement), and the members of the arbitral tribunal established in November 1989.[11] The labelling of various actors as participants in an international dispute is relevant to determining the appropriate arena and mechanisms for attempted settlement, the patterns of responsibility and attaching liability, and the types of reparation sought. With the settlement of a number of claims, and at least partial reparation received by some participants,[12] the continuing dispute was narrowed down, leaving just France, New Zealand, and the members of the arbitral tribunal as final participants.

By contrast, it may be problematic to define the situation caused by the international response to the apartheid policies of South Africa as an international dispute partly because of the character of the participants.[13] The main protagonists in the dispute are the South African government and the black populations of South Africa. However, because

9. Greenpeace is one of many groups whose operation crosses international boundaries and whose activities have transnational impact but which are not established by intergovernmental agreement.

10. The investigations were facilitated by women in "relief massage" parlors that were frequented by French male agents. These women are indicative of the invisible participants in an international dispute. *See* ROBIN MORGAN, THE DEMON LOVER, ON THE SEXUALITY OF TERRORISM 149 (1989).

11. The first arbitral proceedings were before the United Nations Secretary General. *See United Nations Secretary General: Ruling on the Rainbow Warrior Affair Between France and New Zealand*, 26 I.L.M. 1346 (1987). After the premature return of the French agents to France, a second tribunal was established. This three-person tribunal was comprised of Dr. Eduardo Jiminez de Arechaga (appointed jointly by New Zealand and France), Sir Kenneth Keith (appointed by New Zealand), and M. Jean-Denis Bredin (appointed by France). Oral hearing took place in camera in the first week of November 1989. Prime Minister of N.Z., Press Release (May 8, 1990).

12. For example, Greenpeace received approximately eight million U.S. dollars for a new vessel but received no recompense for the four years the vessel could not be used, SYDNEY MORNING HERALD, February 13, 1990, at 3. The family of the man killed received 2.3 million French francs. Michael Pugh, *Legal Aspects of the Rainbow Warrior Affair*, 36 INT'L & COMP. L.Q. 655 (1987).

13. This discussion is limited to apartheid in South Africa and excludes the situation in Namibia, which has been dealt with by the United Nations differently for a number of reasons - notably its international character as a former mandate territory.

the latter have no formal international standing,[14] the dispute has been construed as one between South Africa and the United Nations. Indeed, the United Nations had to proscribe apartheid in order to construct this dispute.[15] The range of participants is not, however, limited to these entities. Other actors include the organizations the people of South Africa have formed to represent them nationally and internationally, for example, the African National Congress, front-line African States, international nongovernmental human rights organizations, governmental organizations,[16] churches, international and national sport associations, business and banking communities, trade unions, and mobilized public opinion (as expressed through various media channels).

Even in the clearly internationalized situation of Namibia, the International Court of Justice found it hard, in its Advisory Opinion of 1971, to see South Africa as a party to a dispute.[17] The Court side-stepped the issue by noting that Namibia had been listed on the agenda of the Security Council as a "situation" (not a "dispute") and that South Africa had not challenged this categorization.[18] At least one judge found this to be a distortion of reality.[19] The Court also refused to allow other interested participants to make submissions to the Court.[20] This approach

---

14. Compare the position within the United Nations framework of the South West African Peoples Organization (SWAPO) and the Palestine Liberation Organization (PLO). "[The status of SWAPO] derives from the role of the U.N. in the context of a former mandated territory . . . and . . . recognition by the OAU of SWAPO as a liberation movement." MALCOLM SHAW, *The International Status of National Liberation Movements, in* THIRD WORLD ATTITUDES TOWARD INTERNATIONAL LAW, AN INTRODUCTION 141, 150 (1987) (F.E. Snyder & S. Sathirathoi eds. 1987). "The PLO has by virtue of U.N. practice attained the status of a national liberation movement through prior recognition by the Arab League." *Id.* at 151. The African National Congress (ANC) is different, because South Africa "is not as such a colonial territory"; nonetheless, apartheid has been denoted an international crime. The ANC has observer status in the United Nations Committee on Apartheid.

15. This process led to the International Convention on the Suppression and Punishment of the Crime of Apartheid and numerous, continuing General Assembly Resolutions. 13 I.L.M. 50 (1974). The Convention was put in force in 1976.

16. For example, the Commonwealth of Nations and the Organization of African Unity.

17. South Africa claimed that because it was a party to a dispute, the Security Council had acted illegally in depriving it of its right of audience under U.N. CHARTER art. 32. Further, South Africa wanted its interest in a dispute acknowledged before the Court in order to nominate an *ad hoc* judge - a request that was refused. Advisory Opinion, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council 276 (1970), 1971 I.C.J. 16, 19 (June 21).

18. *Id.* at 22-23.

19. Judge Gros thought that failing to recognize South Africa as a party to the dispute was "a purely formal view of the facts of the case which does not . . . correspond to realities." *Id.* at 26 (Gros, J., dissenting).

20. Individuals and groups that applied to make submissions to the Court under Article 66(2) of the Statute of the Court include the Organization for African Unity, the American Committee on Africa, the International League for the Rights of Man, and individual petitioners from Namibia. All the claims to make written or oral statements, with the exception of that of the Organization of African Unity, were rejected by the Court.

highlights the statist orientation of international law that the United Nations has sought to circumvent by assuming a participatory role in human rights disputes, despite the wording of Article 2(7) of the Charter.[21] The International Court, on the other hand, cannot ignore the explicit statist restrictions of Article 34 of its statute[22] and has given a narrow interpretation to Article 66(2).[23] Moreover, the Court has insisted that only states whose legal interests are threatened can appear before it; these interests are defined in terms of states' rights rather than human rights.[24] Taken together, these restrictions limit the Court's usefulness as a dispute resolution forum when participants are not exclusively states. Recognition of the realities of wider participation would inexorably lead to a broader spectrum of claims voiced in the international arena than the Court is equipped to handle.

The problem of participation in the international arena, which is already distorted by this statist bias, is compounded by the administrative and bureaucratic reality of the state apparatus for representation in dispute resolution. States' interests are represented by their governments; however, governmental representation of state interests inappropriately assumes a unity of interest signified by full and open communications among the different levels and branches of government. For example, the French Foreign Affairs Department appeared caught off guard by the activities of the French Secret Service agents in the sinking of the *Rainbow Warrior*.[25] Similarly, the State Department seemed unable to convince Congress that closing down the PLO United Nations Mission in

---

Permission was granted to the Organization of African Unity to make an oral statement. 1971 I.C.J. 16, 19. For rejection of the other claims, *see* Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council 276, 1970 I.C.J. Pleadings, 639, 649, 652, 672, 678-79. *See also* Clark, *The International League for Human Rights and South West Africa 1947-57: The Human Rights Non-Governmental Organization as Catalyst in the International Legal Process*, 3 HUM. RTS. Q. (No. 4) 101, 120-22 (1981).

21. Article 2(7) states that the United Nations is not authorized to intervene in matters which are essentially within a state's domestic jurisdiction.

22. Article 34(1) declares that only states may be parties in cases before the Court.

23. Article 66(2) allows states and international organizations to submit written and oral statements in advisory opinions. As seen above, the Court has limited this to public international organizations.

24. *See generally* South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.), 1966 I.C.J. 4 (July 18).

25. The bureaucracies involved were the Direction Générale de la Securité Extérieure and the Direction du Centre d'Experimentations Nucléaires.

New York would be incompatible with the United States' international obligations.[26]

Because international law requires participants to be nation states, federal realities are largely ignored in the international arena and are undermined even by domestic decision-makers in order to conform to the statist paradigm of international law. Although constitutive states may be the actual wrongdoers generating a dispute, international responsibility will be borne by the federal state, which may not even be constitutionally competent to prevent the action. For this reason, an authoritative domestic court may be inclined to erode constitutional limitations upon central government power to ensure the latter's full competence when there is a potential international dispute requiring participation in dispute resolution processes.[27]

Not all those involved in a dispute will necessarily be participants; conversely, some nation states may become participants despite apparently not being connected with a dispute. In fact, a claimant state may select its adversary, thereby narrowing or widening the dispute. For instance, the United States chose to target Libya as the sponsor of international terrorism although other states, such as Syria and Iran, were suspected of similar behavior.[28] Libya was an appropriate target because it appeared militarily weaker than, for example, Syria, and because an air attack posed minimal risk to the United States due to Libya's geographical position. Further, the United States and Libya had a long-standing territorial dispute over the Gulf of Sidra in which Libya had forcibly asserted its claimed rights.[29] In February 1991, Portugal commenced a case against Australia in the International Court of Jusha with respect to Australia's actions in East Timor. The action in question was the

---

26. *See* Advisory Opinion, Applicability of the Obligation to Arbitrate under section 21 of the United Nations Headquarters Agreement of June 26, 1947, 1988 I.C.J. 12, 15-21 (Apr. 26). The Secretary of State asserted that "the closing of that Mission would constitute a violation of United States obligations . . . and that the United States Government was strongly opposed to it." *Id.* at 17.

27. *See* Commonwealth of Australia v. Tasmania, 46 A.L.R. 625 (1983), and Richardson v. Forestry Commission, 77 A.L.R. 237 (1988), in which the High Court of Australia upheld the power of the Commonwealth government to legislate under the external affairs power contained in § 51(xxix) of the Australian Constitution. These decisions lessened the vulnerability of the Australian government to becoming embroiled in disputes relating to its performance of treaty obligations. In Dames and Moore v. Regan, 453 U.S. 654 (1981), the United States Supreme Court denied individuals' claims of constitutional rights to preserve the authority of the President of the United States in making commitments in the process of dealing with international disputes.

28. The accusations and sanctions against Libya climaxed with the air raid on Tripoli on April 14, 1986. For sanctions imposed earlier, *see* 25 I.L.M. 173, 173-99 (1986). *See also Documents Showing the Evolution of Sanctions Against Libya*, 90 RÉVUE GÉNÈRALE DE DROIT INTERNATIONALE PUBLIC 652, 652-55 (1986) [hereinafter R.G.D.I.P.].

29. For a summary of Libya's actions with respect to the Gulf of Sidra and the United States response, *see* 90 R.G.D.I.P. 652-55 (1986).

negotiation and conclusion by Australia of the Timor Gap Zone of Cooperator Treaty with Indonesia. This was only possible because of Indonesia's occupation and annexation of East Timor in 1975, which has been claimed to violate the rights of the Timors to self-determination.[30] The real dispute is between Indonesia and the Timorese people but the latter have no standing in international law which provides another illustration of the statist bias. Portugal, as a former colonial power, has targeted Australia as its protagonist before the Court because of the latter's acceptance of the jurisdiction of the International Court under Article 36(2) of the statute.[31]

Participation may be widened by one party requesting assistance from other states. For example, the United States requested use of British airfields to launch its bomb attack on Tripoli and requested the governments of France and Spain to allow use of their airspace. It is also possible that one state will assume a leadership role and attempt to organize a collective response from either its allies or the wider international community. An example is the role played by the United States in mobilizing and maintaining the coalition response to the aggression of Iraq after its invasion of Kuwait in August 1990. In other situations, however, this can result in a reluctant participation through alliances with a key participant. On the other hand, refusal to become involved may create a separate dispute with the self-appointed leader, as exemplified by the European rejection of certain collective sanctions against the Soviet Union following the 1981 imposition of martial law in Poland.[32]

III. CLAIMS

International claims may be legal, factual, or both.[33] A dispute formally commences with the articulation of the claims by one protagonist

30. *See* Paul D. Elliott, *The East Timor Dispute*, 27 I.C.L.Q. 238 (1978).

31. Portugal filed its application on February 22, 1991. *See* United Nations Press Release, 1991 I.C.J. 495 (Mar. 6).

32. A collective response need not entail sanctions; it may be a prescriptive process to articulate the policy of a number of participants. For instance, the South Pacific Nuclear Free Zone Treaty, August 6, 1985, 1986 Austl. T.S. No. 32, can be seen as an expression of common interest against French nuclear testing in the Pacific, which had previously been formally articulated in terms of two bilateral disputes before the I.C.J. Nuclear Tests (Austl. v. Fr.; N. Z. v. Fr.), 1974 I.C.J. 253, 457 (Dec. 20).

33. Bilder distinguishes between disputes that involve claims as to fact, claims as to the applicable law, claims as to the appropriate law, claims as to apportionment, and procedural claims. Bilder, *supra* note 1, at 12-13.

and the rejection of those claims, or the formulation of an unacceptable counterclaim, by the other.[34] However, the articulation may itself inflate the claims out of proportion and focus attention in an exaggerated way that might prejudice resolution of the dispute. All claims need not be verbally communicated; flagrantly provocative behavior can be construed as a claim. Thus, it was inevitable that the 1979 seizure of American hostages in Tehran would lead to demands for their release. Had the Iranian government complied, there would not have been a dispute, even though there could have been a different dispute about Iran's failure to protect diplomats and consequent reparations.

Participants may have differing perceptions, both about when a dispute commences, and the substance of the respective claims. The United States timed the Tehran dispute from the taking of the hostages and focused upon that event, while Iran emphasized the long history of United States interference into the internal affairs of Iran.[35] Exactly the same pattern was repeated in the United States' dispute with Libya as to the substance of their dispute. The United States presented the dispute as if it concerned territorial sea limits, the right of overflight, and state support for international terrorism, while Libya resented what it perceived as imperialist politics and interference. In both examples, the participants concentrated attention upon what could be perceived as their strongest legal case. Needless to say, if there is no agreement on what the dispute is about, there can be little hope for its resolution. Indeed, with respect to differing allegations of facts, there arises a problem of veracity and verification of claims. Insistence on verification may in itself be a cause of a new dispute, as is the case with Iraq and the United Nations regarding Iraq's nuclear capability in the aftermath of the Gulf War. From the outset of a dispute, communication between the participants is essential for its resolution. Ironically, in many particularly dangerous disputes, one of the first reactions may be to break off diplomatic relations.[36]

---

34. In the context of a request to intervene under Article 62 of the Statute of the International Court, for example, Italy argued that there was no dispute between itself and the parties (Libya and Malta) and that it merely wished to preserve its rights. This position was ironically supported by Libya, which argued that since there had been no rejection of Italian claims there was no dispute and therefore, there could be no intervention. The Court held it was for itself to determine whether the request raised a new dispute and that the Court would have to resolve it. Continental Shelf (Libyan Arab Jamahiriya/Malta), 1984 I.C.J. 3 (Mar. 24).

35. *Cf.* Richard Falk, *The Iran Hostage Crisis: Easy Answers and Hard Questions*, 74 AM. J. INT'L L. 411 (1980).

36. For example, El Salvador broke off diplomatic relations with Nicaragua in November 1989 and accused Nicaragua of shipping arms to the rebels. Hence, a mediator (or other third-party facilitator) may first have to attempt to formulate the dispute in terms acceptable to all of the parties, before its resolution can even be considered.

A dispute may be about the interpretation of international law, with different perceptions of what international law allows or prohibits. In the 1983 downing of KAL Flight 007, the Soviet Union denied that the act constituted a violation of international law, preferring to focus its argument on the possible espionage activities of the airplane and the parameters of permissible action against an intruding civilian aircraft.[37] By way of contrast, in the dispute over the 1981-1982 Soviet submarine incursions into Swedish territorial waters, the Soviet Union denied the acts, but because its own domestic law is essentially the same did not contest the Swedish interpretation of the law.[38]

A dispute does not arise until the claims are addressed to a specific target. The Swedish-Soviet dispute did not occur until the Defense Committee Report named the Soviet Union as the perpetrator some months later.[39] Again, the perceptions of the substance of the dispute differed: Sweden claimed that there had been a violation of its territorial integrity and threat to its security, while the Soviet Union rejected this accusation as unjustifiable and designed to undermine Soviet-Swedish relations.

The refusal by an alleged participant to respond to the claims of the other may be frustrating for the claimant because the existence of the dispute is not acknowledged. This is particularly vexing when the claimant genuinely wants to bring the issue "into the open," motivated by, among other things, a desire to invoke a norm of international law. For instance, in the early 1980s, Mohmar Qaddafi neither denied, nor otherwise answered the United States' accusations that Libya was sponsoring terrorist activities, making it virtually impossible for the United States to commence any nonforcible method of dispute resolution, in the absence of compulsory jurisdiction. Qaddafi pursued the same strategy with respect to Chad's allegations of Libyan intervention and meddling in its civil war over the Azou strip, despite evidence to the contrary.[40] Such silence may even lead to doubts as to the existence of a

37. *See* 13 WORLD AFF. REP. 422, 422-28 (1983); Statement by Yuri Andropov, *in* 41 INT'L AFF. 3 (Sept. 28, 1983); Faroog Hassan, *The Shooting Down of Korean Airline Flight 007 by the USSR and the Future of Air Safety for Passengers*, 33 INT'L & COMP. L. Q. 712 (1984). Compare this with the *Rainbow Warrior* incident in which the French argued for the immunity of its state agents.

38. Union of Soviet Socialist Republics: Law on the State Boundary of the USSR (Entered into force March 1, 1983 art. 36), 22 I.L.M. 1055, 1074 (1983).

39. Romana Sadurska, *Foreign Submarines in Swedish Waters, The Erosion of an International Norm*, *in* INTERNATIONAL INCIDENTS: THE LAW THAT COURTS IN WORLD POLITICS, 40, 47 (W. M. Reisman & A. Willard eds. 1987); Ingrid Delupis, *Foreign Warships and Immunity for Espionage*, 78 AM. J. INT'L L. 53 (1984).

40. On the Chad-Libya dispute, *see infra* note 95.

dispute, and thus, may serve to make the claimant's behavior appear unduly provocative.

IV. SITUATIONS

Any international dispute arises and continues in a situation which is larger than its apparent causes. The context of an international dispute comprises a selection of the following situations: (1) religion and ideology, and sometimes the desire to export them; (2) the geopolitical theatre; (3) subjective perceptions of external threat; (4) long-standing third-party intervention into internal affairs; (5) superpower policies over a period of time; (6) economic policies, the allocation of vital resources, and the need to maintain access to them; (7) internal politics and, especially, the importance of domestic audiences; (8) security needs; (9) the interests of ethnic minorities; (10) violations of human rights; (11) personalities of members of the respective elites; (12) national pride and prestige; (13) perceptions of justice and equality in the international arena; and (14) the interests of non-participants and the wider international community in ending, containing, or prolonging the dispute. Some of these situations are within the participants' control, some clearly are not, and all are subject to continuous change. Of course, disputes are not static: they constantly evolve, mutate, and rearrange through the interactions of the participants and their changing situations. The same situations alone, or in combination, can impact on the escalation or diffusion of a dispute and affect the environment for resolution.

The causes of international disputes are often, if not invariably, complex. For instance, the *Rainbow Warrior* incident, which appeared to arise out of a single violent act, in fact had its origins in French colonial and post-colonial politics and the French government's insistence upon continued nuclear testing, despite widespread regional opposition and growing environmental concerns. The resulting French resentment was targeted upon a transnational activist organization, Greenpeace, while it was physically within a sovereign state.[41] In the Falklands-Malvinas

41. *Cf.* Charles Rousseau, *France et Nouvelle-Zélande. Affaire Greenpeace*, 90 R.G.D.I.P. 216 (1986); Charles Rousseau, *France et Nouvelle-Zélande. Règlement de l'affaire du Rainbow Warrior*, 90 R.G.D.I.P. 993 (1986); *France et Nouvelle-Zélande Echanges de Lettres Relatifs au Règlement des Problemes de l'incident du Rainbow Warrior, signés a Paris le 9 Juillet 1986*, 90 R.G.D.I.P. 1095 (1986); Charles Rousseau, *Le Réglement de l'Affaire du Rainbow Warrior*, 92 R.G.D.I.P. 395 (1988); Charles Rousseau, *France et Nouvelle - Zélande. Etat Actuel de l'Affaire du Rainbow Warrior*, 92 R.G.D.I.P. 993 (1988); Jodi Wexler, *The Rainbow Warrior Affair: State and Agent Responsibility for Authorized Violations of International Law*, 5 B.U. INT'L L.J. 389 (1987).

dispute, a long-standing territorial claim to the Islands was entangled with colonial occupation and use.[42] When the armed hostilities actually broke out in 1982, the situation encompassed both these long-term claims and new issues, including changed principles for the allocation of the resources of the sea, potential claims to Antarctica, the strategic importance of the South Atlantic, and the emergence of the right of self-determination of the islanders.

In both disputes, domestic policies played an important role, with government responses clearly being made with an eye toward the domestic electorate.[43] In the *Rainbow Warrior* affair, the French government regarded its nuclear policy as a matter of national security and regarded its colonial possessions as exclusively domestic concerns. In these matters, successive governments have traditionally received popular bipartisan support.[44] Greenpeace itself was viewed with paranoia and suspicion by the French military establishment due to the confrontational tactics it used in 1972 and 1973, and a widespread belief that Greenpeace was a front for other organizations which were hostile to French interests in the South Pacific.[45] After the sinking, the French Socialist government had to defer to the public impression that it had abandoned its agents, making them scapegoats for their government's incompetence. To make matters worse, the incident became an electoral issue. The repatriation of the agents to France,[46] in breach of the arbitration award, revived the dispute immediately prior to the French presidential elections. In direct contrast, the New Zealand Labour government, then headed by David Lange, came to power in 1984 largely on the anti-nuclear ticket. New Zealand's festering dispute with the United States and its Western allies

---

42. PETER CALVERT, THE FALKLANDS CRISIS: THE RIGHTS AND THE WRONGS (1982); JULIAS GOEBEL, THE STRUGGLE FOR THE FALKLAND ISLANDS: A STUDY IN LEGAL AND DIPLOMATIC HISTORY (rev. ed. 1982); Gerald W. Hopple, *Intelligence and Warning: Implications and Lessons of the Falkland Islands War*, 36 WORLD POL. 339; J.C.J. Metford, *Falklands or Malvinas? The Background to the Dispute*, 44 INT'L AFF. 463 (1968); F.S. Northedge, *The Falkland Islands: Origins of the British Involvement*, 7 INT'L REL. No. 4, 2167 (1982).

43. Similarly, an international dispute can be used to gain support for a domestic agenda. It has been argued that the American defense establishment pushed the confrontation with Libya as a means of promoting the Strategic Defense Initiative. John Pike, *Qaddafi Goes Ballistic: The Strained Logic Behind SDI Lite*, THE NEW REPUBLIC, Mar. 20, 1989 at 14.

44. At the time, there was no significant peace movement in France, unlike other parts of Western Europe. *Cf.* Dyson, *supra* note 5, at 160.

45. In fact, Greenpeace-New Zealand had strong links with the Nuclear Free Pacific and Independent Pacific Movements which were established in Hawaii in 1980 and enjoyed the support of a strongly anticolonial state, Vanuatu. *See* King, *supra* note 5, at 37.

46. The first, Major Alain Marfart was repatriated in December 1987 for supposed medical reasons and the second, Captain Dominique Prieur in May 1988 because of her pregnancy. Both had been sent to Hao Atoll for three years detention from July 1986 as part of the arbitration agreement.

over the access of nuclear powered vessels to New Zealand ports made the country especially sensitive to all nuclear issues.[47] The flagrant commission of a criminal act by foreign secret agents within New Zealand territory made recourse to the criminal justice system a matter of national prestige.[48] Both of these incidents illustrate the importance of national elections to the handling of international disputes by democratic governments. Many international disputes span more than one electoral term, thus becoming an issue for both the incumbent and opposition parties. The opposition parties face a dilemma in determining how best to exploit the government's handling of the dispute without prejudicing its own position in case of electoral victory.[49]

Even without forthcoming elections, a government might need the support it gains from taking a domestically popular stance in an international dispute. In 1982, the Galtieri government in Argentina needed a spectacular success to bolster its flagging popularity. Seizing the Malvinas seemed likely to rally the people around the government, as the continued colonial occupation of the islands had for generations been considered a slight on national pride. British Prime Minister Margaret Thatcher also had much to gain from a successful campaign, as her political popularity was at an all-time low. Public opinion, which had been previously uninformed about the Falklands, swung rapidly in her favor as the task force sailed towards the South Atlantic, making the attempted mediation efforts doomed to failure.[50] Similarly, the Gulf War in early 1991 saw George Bush achieve unprecedented levels of public approval.

By way of contrast, a domestic situation can combine with international elements to prevent a dispute from erupting, even where there is the potential for triggering a major international dispute. For instance, in the case of the Chernobyl nuclear disaster,[51] the elements of the situation included, *inter alia*: (1) the encouraging attitudes of the

---

47. *See* Christine M. Chinkin, *Suspension of Treaty Relationships: the ANZUS Alliance*, 7 UCLA PAC. BASIN L.J. 114, 157 (1990).

48. The agents pleaded guilty to criminal charges of manslaughter and willful damage to a vessel by means of explosives. They were each sentenced to ten years imprisonment in New Zealand. *See* United Nations Secretary General: Ruling on the *Rainbow Warrior Affair* between France and New Zealand, 26 I.L.M. 1346, 1351 (1987).

49. This can also be illustrated by the importance of the United States-Iran dispute in the presidential election in November 1980. Similarly, in 1972, the Australian Labour Party successfully used the French nuclear tests issue as a political platform.

50. United States Secretary of State, Alexander Haig, unsuccessfully attempted to mediate.

51. *See* AAEC TASK GROUP, THE CHERNOBYL NUCLEAR ACCIDENT AND ITS CONSEQUENCES, (1987); NUCLEAR ENERGY AGENCY OECD, THE RADIOLOGICAL IMPACT OF THE CHERNOBYL ACCIDENT IN OECD COUNTRIES (1987); MIKHAIL GORBACHEV, THE CHERNOBYL STATEMENT, MAY 15, 1986 (1987).

Western governments toward political reforms in the Soviet Union and their unwillingness to jeopardize the beginning of a new wave of détente and progress in arms reduction talks; (2) the skillful diplomacy of Soviet President Mikhail Gorbachev in directing attention to questions of specific and comprehensive methods of control of nuclear power, while stressing its overall beneficial character; (3) the congruence of Gorbachev's position with that of the Western governments, which were concerned with not fanning up environmental and anti-nuclear elements of public opinion; (4) increased trade with the Soviet Union; and (5) the submissiveness of Eastern European governments, which accepted the Soviet account that they would suffer no damage. These factors all militated against the making of claims which could have sparked an international dispute.

A changing domestic situation can alter the course of international disputes, or it can create an environment conducive or otherwise to certain dispute resolution processes.[52] For example, even though the Swedish policy of repelling intruding submarines by force was put in place in 1983, there was no immediate marked change in the number of violations of the policy. The decrease came only in 1985, which can be attributed to a number of extrinsic factors, one of them being Mikhail Gorbachev's coming to power in the Soviet Union.[53]

The stakes of each party in a dispute may be disparate. The absolute size and value of a disputed area are constant, but taken in proportion to each claimant's overall territory and resources, the stakes of the claimants may vary enormously. An example is the dispute between Venezuela and Guyana over the Essequibo area, which comprises about five-eighths of all Guyanan territory. It has been claimed that for Guyana (the poorer country), the future depends upon retaining the territory.[54] Relinquishing its claims would entail Guyana losing two-thirds of its timber and beef producing area, most of its established manganese and gold production works, its potential for hydroelectric development, and a territorial buffer.[55] In the dispute over extended exclusive fishing zones with other fishing nations, Iceland's entire economy depended upon the success of its fishing industry, while for the other claimants, fishing was

---

52. *See, e.g., infra.*, notes 108-12 and accompanying text.

53. Carl P. Salicath, *Alien Submarines in Swedish Waters: The Method of Counting as a Political Instrument*, 21 CO-OPERATION AND CONFLICT Vol. XXII, No. 1, 49-55 (1987).

54. *Venezuela's Claim to Most of Guyana is Alive Again as Moratorium Ends*, N.Y. TIMES, June 20, 1982 at A3. *See* JACQUELINE ANNE BRAVEBOY-WAGNER, THE VENEZUELA-GUYANA BORDER DISPUTE - BRITAIN'S COLONIAL LEGACY IN LATIN AMERICA (1984); J.G. WETTER, *The Venezuala-Guyana Boundary Dispute: An In-Depth Study of the Nullity of an Arbitral Award*, *in* 3 THE INTERNATIONAL ARBITRAL PROCESS (1979).

55. We owe this information to Ms. K. Katsoolis, who wrote an excellent paper on this dispute.

just one of many sectors of their economy.[56] The effect of such disparity for the process of dispute resolution is that the weaker party, with the proportionately higher stakes in the dispute, usually remains intransigent, for it has little room to compromise.[57]

The situation that arguably exercises the greatest impact upon the development and resolution of disputes is interdependence between involved nations, especially in economic relations. Private or public ties between States may be a factor for calming a dispute. Thus, in the *Rainbow Warrior* dispute, New Zealand presented its claims in terms of a breach of good faith between two essentially friendly nations and did not seize the opportunity for gratuitous insults to France over its South Pacific politics. New Zealand's need for continuing trade relationships with the European communities and the French threat of trade sanctions constituted major factors in its acceptance of arbitration by United Nations Secretary General Perez de Cuellar.[58]

Although the importance of oil is especially visible in contemporary disputes,[59] it is merely a continuation of a more general trend spanning the centuries. International actors have always required access to vital resources, and in a world of shrinking accessible natural wealth, disputes about their allocation and distribution will continue. This historical trend explains the importance of the attempted prescriptive processes for the allocation and conservation of such resources for preempting disputes, or providing some legal basis for their resolution.[60]

---

56. Fisheries Jurisdiction (U.K. v. Ice.), 1974 I.C.J. 3 (July 25).

57. But in the Venezuela-Guyana dispute, the parties did eventually come to a constructive compromise based on economic, scientific, technical, and cultural cooperation.

58. The ruling was handed down on July 6, 1986; Ruling Pertaining to the Differences between France and New Zealand Arising from the *Rainbow Warrior* Affair, 26 I.L.M. 1349 (1987); 74 I.L.R. 256 (1986).

59. The importance to participants of the continued flow of oil and of possible future exploitation is evident in the Iran-Iraq War, the United States' hostages dispute, the United States' dispute with Libya, the Falklands-Malvinas conflict, the Greece-Turkey dispute in the Aegean Sea, the international community response to Iraq's invasion of Kuwait and numerous others.

60. There have been numerous attempts to establish international legal regimes for the allocation and use of resources. *See, e.g.*, Antarctic Treaty December 1, 1959, 402 U.N.T.S. 71; UNITED NATIONS THE LAW OF THE SEA: UNITED NATIONS CONVENTION ON THE LAW OF THE SEA (U.N. Pub. Sales No.E. 83 v. 5 1982); (Agreement Governing the Activities of Statas on the Moon and other Celestial Bodies, adopted General Assembly, December 5, 1979 18 I.L.M. 1434 (1979)); (The instruments of the New International Economic Order, the Declaration on Establishment of a New International Economic Order, G.A. Res. 3201 (1974)); (The Programme of Action on the Establishment of a New International Economic Order, G.A. Res. 3202 (1974)); (the Charter of Economic Rights and Duties of States, G.A. Res. 3281 (1974)).

However, vague or imprecise prescription reflecting the lack of consensus may lead to further disputes.[61]

Another factor that cannot be ignored, but is difficult to weigh, is the sociological one. One aspect of this sociological factor is the type of people normally managing disputes on behalf of their state: bureaucrats, diplomats, politicians, and lawyers, most of whom tend to be male and relatively senior. Their behavior is molded by their training and social expectations of their roles. This steers them toward certain established patterns of conduct and arenas recognized by them. At this professional level, national decision-making tends to be collegial and depersonalized. However, the public decisions that bind the state to some course of action may also be influenced by the personalities of their national leaders.[62] The distinctive personalities of, for example, Qaddafi, Reagan, Khomeini, Carter, Lange, Gorbachev, Thatcher, Bush, and Saddam Hussein cannot be discounted. Each party's perceptions of its adversary may influence the course of a dispute. If the leader of the other side of a dispute is seen as a rational decision-maker, aiming at comprehensible objectives and operating in a predictable fashion, the response is likely to be made in a similar way. On the other hand, when an adversary is perceived as irrational, fanatical, or megalomaniac, the reactions are likely to be different.[63] There may also be situations in which acculturation leads to blindness, preventing an awareness of the adversary's true character and motives; one tends to interpret another's behavior through the lens of one's own cultural paradigm. In all these situations, a third-party facilitator, well-versed in cross-cultural perspectives, and sensitive to the importance of personality, may be able to assist the dispute resolution process.

---

61. Such is the case with the reliance upon equitable principles in the United Nations Convention on the Law of the Sea. *See, e.g.*, art. 59, 74 and 83. *Cf.* Arbitration between the United Kingdom of Great Britain and Northern Ireland and the French Republic on the Delimitation of the Continental Shelf (Tunisia-Libyan Arab Jamahiriya), 1982 I.C.J. 18 (Feb. 24); Channel Islands Arbitration (U.K. v. Fr.), 18 I.L.M. 397, 421, 426-27 (1979) (June 30, 1977).

62. *See generally* HAROLD D. LASSWELL, WORLD POLITICS AND PERSONAL INSECURITY (1965).

63. The subjective perception of both the adversary and the situation may weigh more heavily than the reality acquired through objective analysis of the dispute. *Cf.* ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 45-47 (1981) (continued detention of the United States hostages viewed from the perspective of an Iranian student). *See also* Romana Sadurska, *Threats of Force*, 82 AM. J. INT'L L. 239 n.30 (1988).

V. STRATEGIES

Litigation is only one dispute resolution process and, even in domestic arenas, is not the most frequently used, and certainly not the most economic and cost-effective form of managing and containing disputes. Other mechanisms are available for the settlement of international disputes[64] that are non adversarial, do not occur in a public judicial forum, and are not so clearly directed toward a win-lose outcome of adjudication. Instead, they are directed towards formulating a constructive, efficient, and lasting solution that addresses and targets the substratum of a dispute and is acceptable to all participants.[65] The parties assume responsibility for the process and its result, rather than channelling the dispute into impersonal judicial machinery. Their success is dependent upon the wide range of factors discussed in this Article.

Whichever strategies are pursued, every participant in an acknowledged international dispute will attempt to rally support for its position. This involves not only gathering the support of one's own government, other governments, and the institutionalized international community, but also the support of those who create and mold public opinion: the international media, religious organizations, and other influential bodies. To achieve this level of support, good communication through diplomatic networking, reporting, and the gathering and dissemination of intelligence is essential.[66] Such effective communication may have a number of consequences. On the one hand, it provides data about the dispute; on the other hand, it may distort this information through selective factual presentation, biased interpretation, and propaganda.[67] These distortions are particularly obvious when the mass media are state-controlled or biased in a particular dispute. The media may in fact aggravate a dispute through inflammatory, jingoistic reporting; it may even provoke an international dispute by reporting events the host

64. U.N. CHARTER art. 33 lists negotiation, enquiry, mediation, conciliation, arbitration and resort to regional arrangements, in addition to adjudication.

65. There is an enormous amount of literature on dispute resolution processes in both domestic and international law. For a useful summary, *see* STEVEN B. GOLDBERG, ERIC D. GREEN & FRANK E. A. SANDER, DISPUTE RESOLUTION (1985 & Supp. 1987).

66. *See* Myres S. McDougal, Harold D. Lasswell & W. Michael Reisman, *The Intelligence Function and World Public Order*, 46 TEMP. L.Q. 365 (1973).

67. *See generally* B. S. MURTY, PROPAGANDA AND WORLD PUBLIC ORDER: THE LEGAL REGULATION OF THE IDEOLOGICAL INSTRUMENT OF COERCION (1968).

country may have preferred to keep secret, or at least low profile.[68] This is, of course, a two-way process of continuous communication, its monitoring, and its assessment. Another consequence of wide publicity may be the loss of flexibility in handling the dispute. It may be hard for a participant to retract from a position taken once stakes and values have been publicly proclaimed to be basic and non-negotiable.

A. International Law as a Guide to the Appropriate Arena

The international law applicable to a dispute may be a relevant factor in determining the appropriate arenas and processes available for a dispute's resolution. For instance, when there is a jurisdictional or arbitral clause, adjudication or arbitration are obvious possibilities.[69] A party may even make a Declaration under Article 36 of the Statute of the International Court with impending litigation in mind,[70] or attempt to retract or modify its declaration in order to avoid litigation.[71] When a dispute may be construed as a threat to international peace and security, the Security Council may become seized.[72] When regional security or stability are perceived as being jeopardized, a regional organization may be appropriate. When it appears certain to at least one protagonist that its claim is legally well-founded, that may create a powerful incentive to litigate rather than attempt another dispute resolution process which may require compromise. The win-lose scenario of litigation may appear attractive to the party who wishes to be vindicated. The American hostages dispute is a good example of an expedient recourse to adjudication. Because there was clear evidence of treaty violation and a jurisdictional clause, it seemed worthwhile to the United States to seek a favorable judicial ruling from the International Court, even though the chances of enforcing any ruling were dubious from the outset. Nonetheless, taking this step gave the United States greater legitimacy in

---

68. The wide international reporting of the prodemocracy movement in the People's Republic of China in 1989 and the aftermath of its crushing by the People's Army ensured response from other countries. The media have also ensured that the Intifadeh uprising against the treatment of Palestinians in the occupied areas remains in the public eye.

69. For example, the first agreement in the *Rainbow Warrior* dispute following the Secretary General's arbitration included an agreement to arbitrate any further dispute about the application of the agreement. The parties used this method to resolve the subsequent dispute over the premature return of the agents to metropolitan France.

70. For example, Nauru made a Declaration under article 36(2) on December 30, 1987 (1987-88) I.C.J.Y.B. 84 (1988) and filed an application against Australia in May 1989; Certain Phosphate Lands in Nauru (Nauru v. Aust.) 1989 I.C.J. 12 (July 18).

71. The United States so acted in April 1984, immediately before the filing of the application by Nicaragua. *See* Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U. S.), 1984 I.C.J. 392 (Nov. 26).

72. U.N. CHARTER, chs. 6 & 7.

resorting to other measures of self-help. Nicaragua pursued a similar strategy in commencing litigation against the United States and, encouraged by the outcome, continued this tactic against Honduras.[73] It is interesting that Costa Rica, which invested a lot of prestige in the peace plan for Central America, settled the similar case brought against it by Nicaragua.[74] At the other extreme, there were no apparent norms of international law applicable to the Chernobyl nuclear accident, and analogies could not easily be drawn from other areas of law. Further, even without the uncertainty in the substantive law, there was no obvious legal forum for the presentation of the dispute.

The applicable law in international disputes is frequently uncertain and a party that estimates the odds are in its favor may be tempted to risk adjudication because of the potential benefits of a favorable judgment. In the early 1970s, the law on nuclear testing on the high seas was equivocal, with strong arguments available for both sides. Australia and New Zealand took advantage of the jurisdictional clause in the General Act of 1928 and the existence of Declarations under Article 36(2) to commence proceedings, while France resisted the Court's jurisdiction because it could not afford to lose the case. The Court turned down a possibility of stating the applicable law, perhaps realizing that whatever it said would provoke further disputes.[75] This result casts doubt on the usefulness of the law for the resolution of certain disputes.

These examples suggest that the availability of an international judicial forum may not necessarily be effective for the resolution of disputes, and may even be instrumental in causing escalation. Conversely, lack of a judicial forum need not be disadvantageous for resolving a dispute. For example, even if there was substantive law on state liability for nuclear disaster, it is conceivable that a judicial finding of liability against the Soviet Union would have made that country less cooperative in taking active steps for the future international regulation of its nuclear industry.

---

73. Border and Transborder Armed Actions (Nicar. v. Hond.), 1988 I.C.J. 69 (Dec. 20).

74. *See* Border and Transborder Armed Actions (Nicar. v. Costa Rica) 1986 I.C.J. 548 (Oct. 21). The case was discontinued on August 19, 1987 after Nicaragua communicated to the Court that it "discontinues the judicial proceedings instituted against Costa Rica." This was a result of the peace agreement of August 7, 1987 between five Central American states. 1987-88 I.C.J.Y.B. 134 (1987). President Arias was awarded the Nobel Peace Prize for his role in gaining the agreement.

75. Nuclear Tests (Austl. v. Fr.; N. Z. v. Fr.), 1974 I.C.J. 253, 457 (Dec. 20).

B. Forcible and Non-Forcible Self-Help

Participants may attempt to resolve their disputes through legal or illegal methods, even if the latter violate the Charter, and thus bring the perpetrator into a new dispute with the international community.[76] Parties using force will normally try to justify their actions in terms of international law, claiming self-defense or other legitimate forms of the use of force. Accepted justification may engender support from other States and preempt sanctions against the perpetrator. On the other hand, self-help always presents the danger that, while it may lead to a final settlement of the dispute, it is just as likely to provoke its escalation. Force polarizes third parties, invites force in response, heightens the stakes in the dispute, and therefore, limits the use, and possibly the effectiveness, of other dispute resolution processes. It has been argued that the only possible role for violence in conflict resolution is when one party has such a monopoly of power and force that it can impose its desired settlement on the other.[77] While such a settlement may restore international peace and security, it may well not be just.

Self-help covers a wide spectrum of unilateral behavior (both forcible and nonforcible) and motivations,[78] not all of which are directed at dispute resolution. For instance, the objective of self-help may be to punish a perceived wrongdoer, to deter it from further wrongdoing or from behavior perceived as harmful,[79] or to retaliate for the wrongful act. It may also serve the purpose of showing strength, as a warning, or to bolster morale and satisfy domestic public opinion of the state resorting to self-help.[80] In the dispute between Libya and the United States, all these factors were present. The United States' air raid on Tripoli was ordered to retaliate for the bombing of a West Berlin night club in which there were American victims, to deter future terrorist activities, and to punish

---

76. In the present analysis, we are not concerned with the legality of self-help measures, but only their impact upon resolution of the dispute.

77. *See generally* KENNETH BOULDING, CONFLICT AND DEFENSE (1962).

78. For example, self-help can be collective in form, but in reality unilateral in that one State initiates the response. Some instances of self-help (individual or collective self-defense) can be legitimate under U.N. CHARTER art. 51.

79. The Organization of East Caribbean States' sanctions against Grenada in October 1983 were not aimed at dispute resolution but at deterrence, as shown by the immediately following intervention. On Grenada, *see generally* S. DAVIDSON, GRENADA: A STUDY IN POLITICS AND THE LIMITS OF INTERNATIONAL LAW (1987); WILLIAM C. GILMORE, THE GRENADA INTERVENTION: ANALYSIS AND DOCUMENTATION (1984); Christopher C. Joyner, *The United States Action in Grenada*, 78 AM. J. INT'L L. 131 (1984); John N. Moore, *Grenada and the International Double Standard*, 78 AM. J. INT'L L. 145 (1984); Joseph H. Weiler, *Armed Intervention in a Dichotomized World: The Case of Grenada*, *in* THE CURRENT LEGAL REGULATION OF THE USE OF FORCE 241 (A. Cassese ed. 1986).

80. Even in a state such as Sweden public opinion can push the government into the use of force particularly if it becomes an electoral issue.

Libyan sponsorship of international terrorism. It also satisfied American public opinion, which was demanding strong action, and signalled that the United States was prepared to strike against such wrongdoers. The Americans may have also hoped that Libyan domestic opposition would react against Qaddafi.[81]

In the Iran-Iraq war the prime objective of the use of force by both parties seemed to be not so much to resolve the territorial issue as to humiliate the adversary and to force its total capitulation. It developed into a war of attrition in which a cease fire did not represent a resolution of the dispute.[82]

Equally, any single instance of nonforcible self-help comprises many forms of behavior with multiple, and often ambiguous, motives. This was surely the case with the economic measures against the Soviet Union after its invasion of Afghanistan, against Poland following the imposition of martial law, and against Iran following the seizure of the American hostages.[83] In all these incidents, it appears the measures of self-help were punitive, invocative, and tactical in attempting to induce change. These goals may be convergent, but the means through which they are implemented can be counterproductive. Putting coercive economic pressure on the Soviet Union and Iran respectively did not immediately lead to any obvious positive changes in the behavior of these countries. Not only may economic sanctions be ineffective in resolving the dispute, they may even backfire and cause loss to the imposer.[84]

---

81. ROBIN MORGAN, THE DEMON LOVER, ON THE SEXUALITY OF TERRORISM 135 (1989). Morgan also cites Richard Falk, *Thinking about Terrorism*, NATION, June 28, 1986 at 886, as pointing out that the raid gave the Americans the opportunity "to test new weapon systems and interventionary tactics." *Id.*

82. This dispute is remarkable for a number of reasons which cannot be fully discussed in this paper: the situation in which the dispute developed; the initial international community response, and its evolution due, *inter alia*, to the use of chemical weapons and the escalation of the tanker war; the wide and various participants, including states, international organizations, and the Kurds (a transboundary national minority group); the roles of the United Nations and the International Committee of the Red Cross; and the problem of attrition as a form of dispute resolution. The onset of the Gulf War added another twist to the relations between Iran and Iraq with Hussein conceding to Iran's claims and Iran remaining formally neutral throughout the ensuing conflict.

83. *See* Higgins, *Legal Responses to the Iranian and Afghan Crises*, 74 AM. J. INT'L L. 248 (1980); Patrick J. DeSouza, *The Soviet Gas Pipeline Incident: Extension of Collective Security Responsibilities to Peacetime Commercial Trade*, 10 YALE J. INT'L L. 92 (1984); Gary H. Perlow, *Taking Peacetime Trade Sanctions to the Limit: the Soviet Pipeline Embargo*, 15 CASE W. RES. J. INT'L L. 253 n.4 (1983); Margaret Doxey, *International Sanctions in Theory and Practice*, 15 CASE W. RES. J. INT'L L. 273 (1983).

84. Former President Ronald Reagan refused to suspend grain sales or the sale of high technology items after the shooting of KAL 007; a suspension of grain sales would have been against the wishes of United States farmers and would have occurred with an election coming in 18 months; Bernard Gwertzman, *Reagan Avoids Dramatic in Response to Shooting*, N.Y. TIMES, September 6, 1983, at A15.

Self-help could also be restorative by aiming at returning to the *status quo ante*. Humanitarian intervention, as exemplified by the Israeli rescue of hijacked hostages at Entebbe airport in June of 1976[85] and the attempted United States military action in Iran, is an illustration of a special kind of self-help with the limited purpose of saving threatened lives. While these actions may finally lead to a resolution of the dispute, that is not their prime goal; indeed, these actions may be a factor in the eruption of a new dispute.

In other situations, self-help may be a direct factor in the causal chain leading towards dispute resolution. For example, self-help may be a coercive tactic designed either to put pressure on the adversary to negotiate a settlement on favorable terms, or to submit to some other recognized process of dispute resolution.[86] Resort to force may also be the expression of extreme frustration; for example, when one side realizes that over a sustained period it has had no success with other methods and perceives the adversary as unwilling either to take a constructive approach[87] or to acknowledge its claims. By using force, the participant attempts to make the opponent and the international community recognize the urgency of its demands, although it runs the risk of having its actions condemned as disproportionate and threatening to the maintenance of stability. This was the reaction of the international community to Hussein's use of armed force against Kuwait, which was the culmination of a dispute between Iraq and Kuwait concerning long-standing territorial claims, economic demands, and actions affecting the price of oil within OPEC.[88]

Measures of self-help may also be a signal that benefits will be restored in proportion to the target's willingness to cooperate and, thus, can foster a climate for settlement. Self-help may be invocative of the rule of international law that is threatened by the disputed behavior; its function in such a case is to prevent erosion of the rule, which may be an objective standard by which the claims can be appraised. This was a Swedish objective in its various reactions to the intrusions by Soviet submarines. Similarly, one of the purposes of the sanctions imposed by

---

85. *See, e.g.*, WILLIAM STEVENSON, 90 MINUTES AT ENTEBBE (1976); Francis S. Boyle, *The Entebbe Hostage Crisis*, 29 NETH. Y.B. INT'L L.R. 32 (1982); Ted L. Stein, *Contempt, Crisis, and the Court. The World Court and the Hostage Rescue Attempt*, 76 AM. J. INT'L L. 499 (1982); Anthea Jeffery, *The American Hostages in Tehran: The ICJ and the Legality of Rescue Missions*, 30 INT'L & COMP. L. Q. 717 (1981).

86. Compare the United States' coercive economic action designed to induce France to speed up the arbitration of an aviation dispute. Lori F. Damrosch, *Retaliation or Arbitration - or Both?* 74 AM. J. INT'L L. 785, 797-802 (1980).

87. There may have been a measure of such frustration in the outbreak of hostilities in both the Falklands-Malvinas and Iran-Iraq conflicts.

88. *See* M. BOOKES, BACKGROUND TO THE GULF WAR (1991).

members of the European communities against Argentina was to indicate their condemnation of Argentina's use of force to assert territorial claims.[89]

C. *Global and Regional Organizations*

Global and regional organizations provide forums and mechanisms for the resolution of disputes. The United Nations' dispute resolution role is formally limited by its primary purpose, which is the maintenance of international peace and security. Therefore, the United Nations is competent to step in when the Security Council, under Article 39, or the General Assembly, under the Uniting for Peace Resolution,[90] defines a dispute as a breach of the peace, a threat to the peace, or an act of aggression. States are not, however, precluded from referring a dispute likely to endanger the maintenance of international peace and security to the United Nations without such a determination. The combined effect of Chapters 6 and 7 and Article 27(3) of the U.N. Charter is two-fold: the United Nations might not become seized of a dispute that is not deemed likely to endanger international peace and security, and even serious disputes may be excluded for lack of consensus in the Security Council.[91] These limitations do not necessarily obstruct the United Nations' role when the political climate encourages the organization's active involvement in a particular dispute, as occurred in the months following Iraq's invasion of Kuwait. The Soviet Union was troubled by internal unrest and economic problems, China was seeking to restore its international reputation after the events of June 1989, which provided unanimity in the Security Council and enabled a collective response to the invasion.[92] For many participants, the use of the United Nations' resources and expertise will be the most economical way of handling a dispute.

Formal resolutions of both the Security Council and the General Assembly characteristically stress the need to cool the dispute and to diffuse the crisis without addressing the grievances of the parties.

---

89. *June 1982: The Falkland Islands and European Community Solidarity*, 7 EUR. L.R. 1, 45 (1982). All members of the European Communities imposed an arms embargo on Argentina, and all, except Italy and Eire, agreed on economic sanctions.

90. G.A. Res. 377 (1950).

91. There is a possibility of the escalation of a dispute within the United Nations when a dispute over its jurisdiction or the jurisdiction of its organs arises.

92. *See, e.g.*, Security Council Res. 660, Aug. 2, 1990; Security Council Res. 661, Aug. 6, 1990 (introducing economic sanctions); Security Council Res. 678, Nov. 28, 1990 (authorizing Member States to use "all necessary means" to uphold and implement the earlier Resolutions).

Therefore, they call for such measures as a cease fire, the withdrawal of foreign troops, the restoration of taken territory, or the return of hostages, and for the parties to enter into negotiations, while other members of the international community are urged to refrain from aggravating the situation. In extreme cases, the United Nations can establish peacekeeping forces to, for example, oversee a cease-fire,[93] to interpose between belligerents, or to maintain law and order in disputed areas.[94]

Not only do U.N. resolutions tend not to address the real disputed issues, but they also refrain from labelling either party as a wrongdoer. Such a label may prejudge the legality of the actions and may be counterproductive to dispute resolution.[95] However, when there is no adverse political obstacle to denoting a State as being in violation of international law, the institutional decisions may go further and impose sanctions upon the wrongdoer, as is the case with South Africa and Iraq.[96] The objectives of the sanctions imposed in the case of South Africa are: (1) to invoke the illegality of apartheid under international law; (2) to force the South African government to comply with international norms; (3) to subvert the existing socio-political system in South Africa; (4) to prevent further repression of the black population in South Africa; and (5) to provide support for the front-line African nations. While some of these objectives could be realized by a mere call for sanctions, many assert that the wider goals can only be achieved through a universally accepted embargo on trade and finance. Collective sanctions may, however, prolong a dispute by entrenching and strengthening the target's resolve; thus, the limitations of collective sanctions as a dispute resolution process may occasionally be similar to those discussed in the context of self-help.[97] Failure by Iraq to comply with the demands of the Security

---

93. For the United Nations' treatment of the Iran-Iraq war, *see* 24 U.N. CHRONICLE No. 4, 1g (1987); 25 U.N. CHRONICLE No. 4, 21 (1988).

94. Such a situation existed in Cyprus after the 1974 invasion by Turkey. UNFICYP was originally established by the Security Council in 1964 when fighting between Greek and Turkish Cypriots broke out.

95. It had just the opposite consequence in the Iran-Iraq conflict: Iran refused to accept Security Council Resolution 598 because Iraq was not labelled an aggressor. Iran called the Resolution "an unjust and partial resolution" because it favored Iraq despite the latter's aggression against Iran. Iran claimed that Security Council Resolution 479 calls upon Iran "to practically submit to aggression." 26 I.L.M. 1479 (1980).

96. In Security Council Res. 660, Aug. 2, 1990, the Security Council condemned the Iraqi invasion of Kuwait as an action which constituted a breach of international peace and security under U.N. Charter Art. 39 and which justified the initiation of sanctions by Security Council Res. 661, Aug. 6, 1990.

97. Collective sanctions authorized by the United Nations could conceivably even widen the dispute. Imagine that certain members of the United Nations proposed to extend sanctions to Israel for its involvement in providing arms to South Africa. Such a proposal would almost certainly engender a dispute within the United Nations due to objections from the United States and others.

Council Resolutions 660 and 661 provides an example of the limited effectiveness of economic sanctions. Even when the Security Council avoids taking a stance on a dispute and refuses to apportion blame, it may still provide a forum for debate and may be used to embarrass a perpetrator and its sponsors in the Security Council.[98] In some cases, the General Assembly may not be so reluctant to take up the issue as the Security Council, thus keeping it on the international agenda and reminding the international community of the unresolved disputes.[99] Article 99 of the U.N. Charter gives the Secretary General only a very limited dispute resolution role, yet the Secretariat has proved to be the most active and creative body within the United Nations for this function. The Secretary General typically pursues missions of good offices and initiates diplomatic efforts for the promotion of the peaceful settlement of disputes. Admittedly, recourse to these services and their subsequent efficacy depends, as always, on a favorable political climate. In the disputes examined, the Secretary General performed a range of functions: fact-finding in the hostage crisis and in the Iran-Iraq war; engaging in diplomatic processes throughout the Afghanistan dispute, and eventually acting as an intermediary in the Geneva Conferences leading to the peace agreements; acting as a mediator and arbitrator in the *Rainbow Warrior* incident; and pursuing diplomatic exchanges between the United Kingdom and Argentina in attempts to persuade them to resume negotiations after the end of the Falklands War.

Chapter 8 of the Charter encourages regional organizations to supplement its dispute resolution procedures. The participation of regional organizations in a dispute can allow member States to take sides and act collectively, without becoming so vulnerable to adverse consequences that might follow individual responses.[100] Disputing states may resort to regional organizations either because a dispute is regional in

98. For example, the Western powers attempted to exploit the issue of the shooting down of KAL 007 and to embarrass the Soviet Union. Japan and the Republic of Korea requested a meeting of the Security Council which took place in September 1983. It had been hoped that there would be strong condemnation of the Soviet Union, but only a weaker resolution was accepted when Malta decided to vote in favor. While the debate may have embarrassed the Soviet Union it also put the United States in an unfavorable light for its actions in encouraging condemnation when the facts were still unclear. *See* U.N. CHRONICLE, 20-31 (1983); DAVID E. PEARSON, KAL 007: THE COVER UP (1987).

99. For the resolutions concerning Afghanistan, *see* G.A. Res. ES-6/2 (XXXV), January 14, 1980 (adopted 104-18 with 18 abstentions); G.A. Res. 38/7 (XXXVIII), November 2, 1983.

100. For example, the European Communities made a collective statement against Libya on January 28, 1986, 25 I.L.M. 207 (1986). This may reflect lessons learned from the 1973 oil embargo, during which individual states that had made unilateral statements were targeted by terrorists.

character,[101] or because a member of the region is in dispute with an outsider and desires an expression of regional support.[102] Alternatively, the members may bring the dispute before the organization even against the wishes of the involved states.[103] States in the region might fear that involvement of the United Nations with invocation of universal law and principles might be detrimental to their regional interests.[104] This may be a considerable cost to regional states and may even thwart the resolution process, as poorer organizations may not be able to provide the necessary infrastructure.[105]

The existence of a regional organization may provoke a regional dispute when it intervenes in the internal affairs of a member State.[106] Outside the established institutional frameworks, specific disputes may give rise to *ad hoc* regional responses based on a regional, cultural, or religious solidarity and members' shared interests in the resolution of the dispute.[107] Special interest organizations may also take an active role in the resolution of a dispute that touches on their concerns. The interest may be economic, religious, ethnic, or ideological. For example, a number of such organizations debated the Iran-Iraq war and offered their good offices and economic incentives to end the conflict.[108] Similarly,

---

101. The Organization of African Unity played an active role in the Libya-Chad conflict by organizing negotiations, by forming *ad hoc* committees to assist the parties, and by supplying peace-keeping forces. Such services are costly for many African states. *See* 1980 INTERNATIONAL POLITICAL DEVELOPMENTS IN AFRICA: OAU 5759-60, 5822-23; 1981 INTERNATIONAL POLITICAL DEVELOPMENTS IN AFRICA: OAU 6066-67, 6274-76. For the situation in Chad, *see* 88 R.G.D.I.P. 288 (1984); 89 R.G.D.I.P. 477 (1985). On August 31, 1990 the two countries submitted their territorial dispute to the International Court of Justice; Press Communiqué, 1990 I.C.J. 14 (Sept. 4); Press Communique, 1990 I.C.J. 17 (Nov. 7).

102. For example, Argentina rallied the support of the Organization of American States in the Falklands-Malvinas conflict. *See* Tina A. Lamoreaux, *United States Obligations Under the OAS Charter and the Rio Treaty: An Analysis of the Falkland Islands Crisis*, 13 CAL. WEST INT'L L.J. 493 (1983); Domingo E. Acevedo, *The U.S. Measures against Argentina Resulting from the Malvinas Conflict*, 78 AM. J. INT'L L. 323 (1984).

103. Such was the case in the meetings of the Organization of East Caribbean States over the invasion of Grenada.

104. Although the Chad-Libya dispute was brought before the Security Council on two occasions at the request of Chad, the United Nations had little to do with the resolution of the dispute, which was kept primarily within Africa through the OAU and within the Non-Aligned Movement. On the OAU as a dispute resolution body, *see* T.O. Elias, *The Commission of Mediation, Conciliation and Arbitration of the Organisation of African Unity*, 40 Y.B.B.I.L. 336 (1964).

105. For example, in the Chad-Libya dispute, Sudan attempted to act as a mediator under the auspices of the OAU, but limited resources made it ineffective.

106. For example, in Grenada there was no international dispute until the intervention. The consequent removal of the Revolutionary Military Council meant there was subsequently no one to express the claims of the state. This again illustrates the statist bias of international law and the gaps created by the identification of a state through its government.

107. For example, the Contadora process in disputes in Central America.

108. Such organizations included the Islamic Conferences, the Non-Aligned Movement, the Arab League, and the Gulf Corporation Council.

organizations and individuals within the Arab world attempted to facilitate the resolution of the dispute between Iraq and Kuwait both before and after the invasion of Kuwait.

D. Negotiation and Third-Party Intermediaries

There are various models of international negotiations. Although it is not necessary for the purpose of this Article to identify all of them, it may be useful to single out the main patterns.[109] An international negotiation is a process aimed at mutual problem-solving and reaching a joint settlement acceptable to all parties. Determining the appropriate parties for the negotiations out of all the participants in a dispute is itself important for the outcome. For instance, in the early 1970s, Iceland refused to participate in multi-party negotiations with the various claimants to fishing rights in its declared zones. It preferred to deal with each State separately in order to avoid the pressure of numbers against it, and to forestall any possibility of contributing to a prescriptive process likely to prejudice its claims.[110]

Through negotiations, parties may achieve a convergence through gradual identification of interests and a process of concession-making to reach a compromise. Whether a settlement is achieved depends on the elements discussed previously, and in particular, the eventual willingness of the parties to balance their claims in a package agreement. The term "package deal" is usually applied to treaty negotiation rather than dispute settlement;[111] however, the similarity of this particular form of outcome is not surprising considering the interlocking of prescriptive and dispute resolution processes.

While a process of negotiations can be entered into and conducted formally, the prevailing reality of international negotiation is the constant sending of public and private messages and the testing of positions in a process of verbal and nonverbal communications. The purposes of such communications are multiple and are not always consciously formulated, let alone conducive, to dispute resolution. They may be preparatory to more defined resolution processes and may define claims and bargaining

---

109. *See generally* ORAN R. YOUNG, THE INTERMEDIARIES: THIRD PARTIES IN INTERNATIONAL CRISES (1967).

110. The same tactic was followed in the International Court of Justice, where Iceland did not consent to joinder of the applications by the United Kingdom and West Germany. Fisheries Jurisdiction Case (U.K. v. Ice.) 1974 I.C.J. 3, 5-6; Fisheries Jurisdiction Case (W. Ger. v. Iceland), 1974 I.C.J. 175, 177. Similarly, Nicaragua preferred to commence separate proceedings in the International Court of Justice against the United States, Honduras, and Costa Rica.

111. For example, the negotiations leading to the conclusion of the United Nations Convention on the Law of the Sea.

positions. They may also be used to try to force the adversary to respond, a pressure it may resist. Communications of this sort form a backdrop to all negotiatory processes.[112]

When the parties refuse to meet to negotiate, or they cannot find a common ground for negotiations for whatever reason, use of a third-party intermediary may be helpful.[113] Their willingness to involve a third party may not be indicative of the chances of a successful outcome, but at the very least, signifies that their positions are not necessarily intransigent. From the perspective of dispute resolution, the three crucial aspects of third-party intervention are the choice of the third party, the timing of the mediation, and the functions ascribed to that third party.

Trust and a willingness to listen are essential for successful negotiations and can be fostered by skillful mediators. When a mediator is considered or perceived as biased, or having a personal or private agenda, mediation is unlikely to work. The role of Algeria, in achieving the release of the United States hostages in January of 1981, illustrates all three factors. When Algeria offered its services, there were good reasons for both sides to accept. From the Iranian point of view, Algeria was an Islamic nation with a history of anti-colonial struggle that had previously assisted Iran in resolving a dispute.[114] The United States had strong trade links with Algeria and trusted the familiarity of the Algerian elite with Western legal and political culture. To both states, Algeria must have appeared an impartial and reliable third party which was willing and able to commit sizeable resources and remarkable expertise to the task.[115] The lack of a political and economic infrastructure practically eliminates small,

---

112. The international negotiation process has been widely analyzed. *See* OTOMAR J. BARTOS, SIMPLE MODEL OF NEGOTIATIONS: A SOCIOLOGICAL POINT OF VIEW IN THE NEGOTIATION PROCESS, 13-27 (I.W. Zartman ed. 1978); FREDERICK C. IKLE, HOW NATIONS NEGOTIATE (1981); ARTHUR S. LALL, MODERN INTERNATIONAL NEGOTIATION: PRINCIPLES AND PRACTICE (1966); MULTILATERAL NEGOTIATION AND MEDIATION 183 (Arthus S. Lall ed. 1985); PAUL R. PILLAR, NEGOTIATING PEACE: WAR TERMINATION AS A BARGAINING PROCESS (1983); Lloyd Jensen, *Soviet-American Bargaining Behavior in Post-War Disarmament Negotiations*, 7 J. CONFLICT RES. No. 3, 522 (1963).

113. There is no single definition of the terms mediation, conciliation, good offices, and other forms of third-party intervention. They are fluid processes that depend upon the tasks entrusted to the third party and that third party's implementation of them. Their strength as dispute resolution processes is that they can be adapted to the needs of the particular participants. For discussion of the processes, *see* STEVEN B. GOLDBERG, ERIC D. GREEN & FRANK E. A. SANDER, DISPUTE RESOLUTION (1985 & Supp. 1987).

114. Algeria was instrumental in achieving the 1975 Algeria Accord. Rule 20.4.5(b) June 13, 1975, Iran-Iraq, 1017 U.N.T.S. 54, *State Frontier and Neighboring Relations between Iran and Iraq*. Iran was more satisfied with the outcome than Iraq, which felt the Treaty had, to some extent, been imposed upon it.

115. Algeria followed the rest of the world in condemning the taking of hostages but recognized its place in the wider situation. Algeria provided, for several months, the personal services of its top diplomatic and financial experts, who travelled between the parties and requested no recompense. Reportedly, they seemed to be poorly thanked for their travails.

poor countries from performing those functions. Thus, negotiation favors the use of better developed countries and promotes their influence as intermediaries in dispute resolution. It may also mean that the resolution of various disputes best suits their interests.

Earlier attempts at negotiated settlement between Iran and the United States had failed, but changes in the situation made the intervention of a third-party intermediary possible in the autumn of 1980 and eventually successful in securing the release of the hostages in January of 1981. The commencement of the Iran-Iraq war in September of 1980 had brought home to Iran how vulnerable its diplomatic isolation had made it; the forthcoming American elections raised the possibility of a new, tougher administration; and, the Khomeini regime had sufficiently consolidated its domestic power not to have to use the detention of the hostages as a popular rallying point. Furthermore, the earlier efforts of a third-party intermediary (the West German government) had prepared the ground by eliminating non-negotiable issues from the agenda.

Algeria's role went beyond the traditional functions of an intermediary. It apparently established full and effective communications between the parties by transmitting proposals and counterproposals, by refusing to transmit ultimatums, and by explaining the respective legal and political cultures and institutions. In effect, its representatives acted as "cultural interpreters," and by reality-testing proposed solutions, offered their own suggestions. They used confidence-building techniques such as independently verifying processes for the transfer of assets,[116] arranging medical examinations of the hostages, and organizing security forces in Tehran. Their position as intermediary created a face-saving process for both parties, the culmination of which was the settlement in the form of a Declaration of the Government of Algeria.[117]

Another example highlights the potential benefits of mediation. Argentina and Chile, in their territorial dispute over the Beagle Channel, found recourse to mediation under the auspices of the Vatican[118] more

116. Taken alone, a fact-finding mission does not constitute a dispute resolution process, but an objective fact-finding mission may facilitate the progress of other processes, such as negotiation or mediation. The functions of objective fact-finding as a dispute resolution process can be illustrated further through an examination of the United Nations Mission in Kampuchea in 1989 and its investigations of the use of chemical weapons in the Iran-Iraq war. *See* 25 U.N. CHRONICLE No. 2, p. 57; 25 U.N. CHRONICLE No. 3, p. 40 (1988).

117. Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, 20 I.L.M. 224 (1981).

118. Charles Rousseau, *Argentine et Chili. Etat Actuel de la Question du Canal de Beagle*, 85 R.G.D.I.P. 538 (1981). The process was mediation, but the outcome was a package proposed by the third party which had to be accepted or rejected in total. In this sense, it was more like an arbitration. However, the proposals included demilitarization of

satisfactory than their earlier arbitration with judges of the International Court acting as arbitrators.[119] Although Argentina initially accepted neither decision, changes in the background situation by 1984[120] made Argentina amenable to signing the Treaty of Peace and Friendship, which resolved the question of sovereignty of the islands.[121] Argentina had finally agreed to accept a very similar solution to that contained in the arbitral award. What elements of mediation had made that process more acceptable? Argentina may have felt that the mediation process had allowed its geopolitical arguments to be fully expressed and its interests to be fully considered by the mediator, unlike the arbitration, which relied on narrow legal reasoning and left little room for extralegal realities. Perhaps this is not surprising given the judicial background of the arbitrators and mediation's unique emphasis on the choice of the third party. The fact that the mediator was the Holy See gave its proposals special authority with the two Catholic countries. Further, the representative chosen by the Pope was well qualified to deal with this dispute; he had been papal ambassador to Colombia and was highly regarded as the Vatican expert on South American affairs.

E. International Arbitration

International arbitration takes place in interstate *ad hoc* tribunals and international commercial arbitral tribunals. Despite the conclusion of many treaties providing for arbitration in the event of a dispute,[122] arbitration is seldom used and seems ineffective for resolving disputes. One reason may be a certain degree of confusion about the proper role of arbitration: is it negotiatory or adjudicative?[123] Moreover, arbitration is perceived as unpredictable because the parties have no control over the process or outcome once they have submitted their dispute to the

---

the disputed zone, and that the parties conclude a Treaty of Perpetual Friendship, requirements making the mediation package very different from a legalistic arbitral award. This illustrates the flexibility of these processes and the importance of determining what third party role the parties are prepared to accept.

119. 17 I.L.M. 738 (1978); David M. Himmelreich, *The Beagle Channel Affair: A Failure in Judicial Persuasion*, 12 VAND. J. TRANSNAT'L L. 971 (1979).

120. For example, the defeat in the Falkland Island war, the ensuing fall of the military junta, and the return to civilian government.

121. 24 I.L.M. 1 (1985).

122. *See* United Nations Systematic Survey for the Pacific Settlement of International Disputes 1928-1948 (U.N. Pub. Sales No. 1949).

123. *Cf.* J.L. SIMPSON & HAZEL FOX, INTERNATIONAL ARBITRATION 3 (1959), which asserts that arbitrators in mixed arbitral commissions "act to some extent as negotiators rather than as judges, to temper justice with diplomacy, to give a measure of satisfaction to both sides, for example, in a territorial dispute." Argentina, in the Beagle Channel dispute, appears to have seen the first arbitration as too judicial.

arbitrators. The outcome may also be perceived as biased; the common practice of each party appointing one arbitrator highlights the suspicion with which the other will be regarded.[124] When the adjudication model is preferred, parties appear more inclined to submit a case by special agreement to the International Court and take advantage of the full judicial process, more recently through constitution of a Special Chamber of the Court.[125] The decision of the Court in the *Gulf of Maine* case, that parties may select judges from the full bench, encourages the resort to the International Court rather than to *ad hoc* arbitration.[126] On the other hand, various statistics confirm that international commercial arbitration is thriving.[127] The inclusion of various model arbitral rules[128] and their incorporation into domestic law,[129] the wide participation in the New York Convention on the Enforcement and Recognition of Foreign Arbitral Awards,[130] and the enormous increase in the number and complexities of international transactions are several reasons supporting the growth of arbitration. Another indication of this trend is the growing number of arbitrations under the auspices of the International Center for the Settlement of Investment Disputes.[131] The finality of an arbitral award is especially significant from the perspective of dispute resolution, as it is

---

124. There have been notorious disagreements between the Iranian and American arbitrators on the Iran-United States Claims Tribunal at The Hague.

125. Statute of the International Court, art. 26. The Court has acceded to the request for a special Chamber in Land, Island and Maritime Frontier Dispute (El Sal./Hon.), 1987 I.C.J. 10 (May 8); Elettronica Sicula S.p.A. (ELSI) (U.S. v. Italy), 1987 I.C.J. 185 (Nov. 17); Frontier Dispute (Burkina Faso/Mali), 1985 I.C.J. 6 (Apr. 3).

126. Delimitation of the Maritime Boundary in the Gulf of Maine Area, (Can.-U.S.) 1982 I.C.J. 3 (Jan. 20).

127. The number of international commercial arbitrations heard under the ICC rules in the decade 1976-1986 virtually equalled the number of cases for the preceding 53 years. International Chamber of Commerce: New Rules of Conciliation and Arbitration, 28 I.L.M. 231, 233 (1989). In 1988, there were 11 cases pending before the ICSID, more than at any time before. Ibrahim F.I. Shinata, Introduction by the Secretary-General, ICSID Ann. Rep., 4 (1988).

128. *See, e.g.*, United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, June 21, 1985, 24 I.L.M. 1302 (1985).

129. On June 17, 1986, Canada became the first common law State to implement the UNCITRAL Model Law into domestic law. Canada: Legislation to Implement the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards and Legislation on International Commercial Arbitration, 26 I.L.M. 714 (1987). Other States have done likewise. *See, e.g.*, Republic of Djibouti Code of International Arbitration, Feb. 13, 1984, 25 I.L.M. 1 (1986); Netherlands: New Statute on Arbitration, July 2, 1986, 26 I.L.M. 921 (1987); The International Arbitration Amendment Act (Cth) 1989, No. 25 of 1989, incorporates the UNCITRAL Model Law into Australian law. The Law Reform Commission of Hong Kong recommended in August 1987 that Hong Kong follow suit and New Zealand is considering similar action.

130. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, June 10, 1958.

131. *See generally* Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, 575 U.N.T.S. 159; 4 I.L.M. 532 (1965).

clear that when awards are challenged, for whatever reason, the effectiveness of the process is subverted and the usefulness of arbitration becomes questionable.[132]

The United States-Iran Tribunal forms a bridge between these two types of arbitration. Its adoption was part of the resolution of an inter State dispute while its jurisdiction includes commercial disputes between individuals of different states.[133] To this end, it incorporates and adopts the UNCITRAL Model Rules. In the United States-Iran dispute, arbitration was the politically acceptable means of managing the numerous individual commercial claims arising out of the Iranian Revolution's disruption of contractual relationships. One may speculate as to why a lump sum settlement was not preferred over arbitration of individual claims, given the widespread practice.[134]

A lump sum settlement would probably have been favored by American claimants, as it would have been administered by their own government. One possibility is that, in a dispute that raised such strong emotions of national pride and impacted upon national prestige and internal politics, neither party wished to be seen publicly as admitting wrong through the payment of a large sum of money to the other. Further, in this dispute, the release of assets had become central to the resolution in almost the same way as the freeing of the hostages. Payment of compensation in satisfaction of an impartial tribunal's award tends to diffuse the stigma of state responsibility. The claim changes its flavor from the highly emotive allegation of national wrongdoing, causing damage to aliens, to a commercial breach of contract. The awards are handed down long after the initial glare of publicity has passed and domestic awareness of the Tribunal's findings is lessened.

If this analysis has any validity, it was probably more conducive to the Iranians to accept arbitration. Moreover, the exclusion from the Tribunal's jurisdiction of claims arising out of revolutionary acts, which is contrary to the usual principles of state responsibility, was a further

---

132. This is becoming an increasing problem within ICSID. *E.g.*, Jurisdiction of Tribunal, 27 I.L.M. 1281 (1988); Application for Annulment Submitted by the Republic of Indonesia, 25 I.L.M. 1441 (1986); Amco v. Republic of Indon. (Arb/81/1) 24 I.L.M. 1023 (1985). *Cf.* Switzerland: Decisions of the Court of Justice of Geneva and the Federal Tribunal (Excerpts) Concerning Award in Westland Helicopters Arbitration (Annulment of Award with respect to Egypt), 28 I.L.M. 687 (1989). The same is true with inter-State arbitration, as exemplified by the Beagle Channel and Guyana-Venezuela arbitral awards. In 1989, The Republic of Guinea-Bissau initiated proceedings against The Republic of Senegal with respect to the validity of an arbitral award of July 31, 1989 on maritime boundary delimitation, 1989 I.C.J. 4.

133. *See* CHRISTINE D. GRAY, JUDICIAL REMEDIES IN INTERNATIONAL LAW 178-85 (1987).

134. *See generally* RICHARD B. LILLICH & BURNS H. WESTON, INTERNATIONAL CLAIMS: THEIR SETTLEMENT BY LUMP SUM AGREEMENTS, pts. 1 & 2 (1975).

advantage for them. However, the Tribunal must have appeared less attractive to American claimants who had already commenced actions in the United States courts and, consequently, claimed the settlement to be unconstitutional. This raised the question of the impact of domestic law upon international dispute resolution.[135] Even if claims adjudicated in American courts could have been satisfied from a fund in a foreign bank (as is the case with the United States-Iran Tribunal), they would have been politically unacceptable to the Iranians. The need for the American government to secure the release of the hostages ensured its compromise on this matter. The establishment and operation of the United States-Iran Tribunal illustrates the polycentric nature of international disputes, with the presenting issue being only the tip. The detention of the hostages was the focal point of the dispute, but many other issues were also disputed by the countries and needed to be taken into account in the settlement. Further, the agreement between the states reduced the freedom of action of individuals,[136] even those individuals who were the most immediate participants in the dispute.

F. Adjudication of International Disputes

Adjudication is also inherently limited as a method of international dispute resolution. Its main preoccupation is with the allocation of existing legal rights and duties between the parties, but a dispute articulated in this fashion may be part of a wider situation with which the International Court is not equipped to deal. In this sense, a judicial ruling cannot effectively resolve the dispute. It is the importance of the distinction between a dispute and a situation that makes necessary the analysis of the origins, causes, and participants of international disputes. The prime illustration of a dispute in which one participant attempted to reduce a wider situation to legal concepts, and to make claims in the first instance against just one other participant, is the litigation between Nicaragua and the United States.[137] The case also exemplifies the need for

---

135. *See, e.g.*, Dames v. Regan, 453 U.S. 654 (1981). The claimants were unsuccessful.

136. No claims (including those of the hostages themselves) could be brought in any court other than the Tribunal. Declaration of the Government of the Democratic and Popular Republic of Algeria, Nullification of Sanctions and Claims, ¶ 11; Declaration of the Government of the Democratic and Popular Republic of Algeria, Concerning the Settlement of Claims by the Government of the United States and the Government of the Islamic Republic of Iran, art. 2 ¶ 1.

137. Military and Paramilitary Activities in and against Nicaragua, (Nicar. v. U.S.), Request for provisional measures, these must be in to distinguish two judgments. 1984 I.C.J. 169 (May 10); Military and Paramilitary Activities in and against Nicaragua, (Nicar. v. U.S.), Merits, 1986 I.C.J. 14 (June 27).

the identification of participants in a multilateral dispute, in order to determine who are the appropriate parties before the Court and the characterization of the situation in which the claims arise, for the purpose of deciding their admissibility.

The factual context of Nicaragua's claims against the United States, and subsequently Honduras,[138] provides an eloquent contrast to the American hostages dispute. The American hostages dispute was a clear-cut bilateral dispute presenting no state party problem before the Court.[139] The Nicaraguan claim was far more complex. Central America was the stage for various allegations of military intervention and counter-intervention between the states of the region, with the United States actively supporting forces hostile to the Nicaraguan government. The conflict evidently was not a bilateral dispute, as presented by Nicaragua and accepted by the Court. The United States fought this characterization,[140] supporting El Salvador's request to intervene and, after the rejection of that request,[141] arguing that the latter was an indispensable party without which proceedings could not continue.[142] El Salvador's evidence was essential to the United States' claim of collective self-defense. The Court had the power to allow El Salvador access to the proceedings[143] but refused to do so, possibly being apprehensive about the transformation of a bilateral dispute into multi-party proceedings of which it had little experience. Yet, in reality, this refusal by the Court transformed the multi-party dispute into a formal bilateral framework. The Court also had power to refuse to hear the case in the absence of El Salvador.[144] Nevertheless, the Court went ahead in adjudicating only a part of the overall dispute and, thus, jeopardized the effectiveness of its judgment as a dispute resolution tool. This was further exposed by

---

138. *See* Border and Transborder Armed Actions (Nicar. v. Hond.), 1988 I.C.J. 69 (Dec. 20).

139. United States Diplomatic and Consular Staff in Tehran, (U.S. v. Iran), 1980 I.C.J. 3 (May 24).

140. The United States argued that the Court had no jurisdiction. When the Court rejected this argument in Military and Paramilitary Activities in and against Nicaragua, (Nicar. v. U.S.), 1984 I.C.J. Rep. 392 (Judgment of Nov. 26), the United States refused to participate in the hearing on the merits. United States Dep't of State, Statement on the U.S. Withdrawal from the Proceedings initiated by Nicaragua in the International Court of Justice, January 18, 1985 24 I.L.M. 246 (1985).

141. Declaration of Intervention, 1984 I.C.J. 215 (Order of Oct. 4).

142. *See* LORI F. DAMROSCH, Multilateral Disputes in the International Court of Justice, THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS 376 (1987).

143. El Salvador sought access as an intervenor under art. 62 or 63 of the Statute of the International Court of Justice or to give evidence before it. The Court asserted that the intervention was premature, and that another request at the merits stage would be accepted.

144. *See* Monetary Gold Removed from Rome in 1943 (Italy v. Fr., U.K. of Gr. Brit. and N. Ir. and U.S.), Preliminary Question, 1954 I.C.J. 19 (June 15) (possible application of indispensable party concept).

Nicaragua's subsequent case against Honduras, which amounts to a second round of the same dispute.

The same predilection to distill the narrow legal dispute from the wider situation led the International Court to reject claims of inadmissibility based on the alleged political character of the dispute.[145] In the hostages case, Iran claimed in a letter that the Court "cannot and should not take cognizance of the case" as submitted by the United States government and confined to the detention of the hostages. "For this question only represents a marginal and secondary aspect of an overall problem, one such that it cannot be studied separately. . . ."[146] Ironically, in its dispute with Nicaragua, the United States argued, *inter alia*, that ongoing disputes concerning the use of force are not appropriate for adjudication, but rather should be dealt with by political processes.

Both Iran and the United States refused to defend their actions before the Court.[147] The nonappearing defendant creates another problem for the effectiveness of adjudication as a method of dispute resolution, except where there is a special agreement to submit a clearly defined dispute to it.[148] By concluding a special agreement defining the parameters of the dispute and accepting their role as parties, the participants go a fair way towards settling the dispute. It is significant that by the time a dispute is ready for adjudication, the parties have assessed the possible outcomes and decided that they can afford the risk of an adverse decision.[149] This emphasizes that the Court offers major assistance in dispute resolution by making authoritative legal decisions concerning the parties' rights and duties.

Submission to the judicial forum may serve a useful purpose even when jurisdiction is contested. Going to the International Court shows that a party is serious about the dispute and is taking substantial active steps to satisfy its own public. When the Court decides that it has

---

145. *See* Edward Gordon, *Discretion to Decline to Exercise Jurisdiction* (Harold G. Maier ed.), 81 AM. J. INT'L L. 129 (1987).

146. United States Diplomatic and Consular Staff in Tehran, (U.S. v. Iran), Merits, 1980 I.C.J. 3, 8 (May 24).

147. Iran participated in no phase of the proceedings, except for communicating with the Court by letter. *See* JEROME B. ELKIND, NON-APPEARANCE BEFORE THE INTERNATIONAL COURT OF JUSTICE (1985).

148. *Id.* at 73-77; *See generally* H.W.A. THIRLWAY, NON-APPEARANCE BEFORE THE INTERNATIONAL COURT OF JUSTICE (1985).

149. The classic scenario for submission by special agreement is maritime boundary delimitation; *see e.g.*, Continental Shelf (Tunis./Libyan Arab Jamahiriya), 1982 I.C.J. 18 (Feb. 24); Continental Shelf (Libyan/Arab Jamahiriya/Malta), 1985 I.C.J. 13 (June 3); North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3 (Feb. 20). Fisheries Jurisdiction (U.K. v. Ice.); 1974 I.C.J. 3, 31-32 (July 25), constitutes a striking refusal to accept jurisdiction by a special agreement in a hope to settle such matters. Iceland could not afford the risk of adverse judgement and refused to appear before the Court. *Cf.* Aegean Sea Continental Shelf (Greece v. Turk.) 1978 I.C.J. 3 (Dec. 19).

jurisdiction (as in the disputes the United States had with Nicaragua and Iran), it can clarify some aspects of the dispute by judging the legitimacy of the claims. This may help to rally the international community behind the aggrieved party, which in turn can put pressure on the other party to resolve the dispute by other means. Without the Court's condemnation of the seizure of the hostages, the United States might have found it more difficult to gain widespread international support. By contrast, Iran found itself internationally isolated until it released the hostages. This isolation was particularly harmful to its interests at the commencement of the Iran-Iraq war, which added a new dimension to the dispute with the United States. However, when the Court refuses to give this help, either by calling on the parties to negotiate[150] or finding that there is no dispute between these particular parties,[151] it plays no practical role in dispute resolution. In the context of a dispute, this refusal to accept jurisdiction may be detrimental or absurd; however, from the point of view of the Court, it may be defensible as a means of preserving its authority.

To a certain degree, use of the domestic judicial forum for international dispute resolution, when it is available, presents similar problems. In the *Rainbow Warrior* affair, recourse to the New Zealand judicial system against the French agents may have exacerbated the dispute by presenting and adjudging the French criminal actions in a public forum. However, adjudication was not completely counter-productive. Because, in New Zealand, the ruling of the criminal court could not be challenged as subservient to the executive will, the ruling served as an additional legitimation of New Zealand's claim. It was also politically necessary for the New Zealand public to see the government deal firmly with the matter.

Exclusionary doctrines, however, such as the act of state doctrine, which are applied by domestic courts in, *inter alia* the United States, the United Kingdom, Australia, and New Zealand, may result in international disputes not being addressed in domestic judicial forums.[152] One of the justifications for this judicial restraint is that such matters are inherently outside judicial knowledge, and that the judiciary should not interfere with the executive function. It might be that the judiciary apprehends the

150. *E.g.*, Fisheries Jurisdiction (U.K. of Gr. Br. and N. Ir. v. Ice.), 1974 I.C.J. 3, 31-32 (July 25).

151. *C.f.* Nuclear Tests (Austl. v. Fr.; N.Z. v. Fr.) 1974 I.C.J. 253, 457 (Dec. 20) (disappearance of dispute resulting in claim no longer having any object); South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.), 1966 I.C.J. 6 (July 18).

152. *E.g.*, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964); Att'y Gen. (U.K.) v. Heinemann Publishers Australia Pty 78 A.L.R. 449 (Austl. 1988); Buttes Gas and Oil Co. v. Hammer (Nos. 2 & 3) [1982] A.C. 888; Att'y Gen. (New Zealand) v. Ortiz 3 W.L.R. 570 (C.A. 1982), aff'd [1984] A.C. 1.

escalation of an international dispute through its decisions, but the consequence is that no objective judicial decision is given. The denial of access to the court for the plaintiff is yet another example of the subsuming of the individual to the needs of the State and the statist bias of international law being accepted by the domestic courts.

G. *Request for Advisory Opinion*

Requesting an advisory opinion may perform dispute resolution functions.[153] By bringing in international organizations and involving the international community, an advisory opinion may prevent intensification of a dispute by clarifying legal rights and duties.[154] Advisory opinions have been used by organizations to bolster their own authority and autonomy, and to widen their participation in dispute resolution processes. The fact that advisory jurisdiction does not directly depend on the consent of states may facilitate authoritative clarification of law and, thus, may contribute to the resolution of the dispute. But the opposite may also be true. Precisely because the states most closely concerned have not consented to the request, the effectiveness of the advisory opinion may be weakened and the articulation and publicity of the request may exacerbate the dispute, work against its solution, or at the very least, do little to resolve it.[155] Furthermore, the need to frame the question to the Court in legal terms may once again reduce the situation to bare formulas susceptible to judicial management, and consequently, the relevant context of the question may be ignored.

The use of the advisory jurisdiction as a dispute resolution process is predicated and contingent upon the respect for the authority of international law and the Court. It also depends upon being able to present the questions to the Court in a meaningful form that will reflect the reality of the situation. The limited use of this method of dispute

---

153. On the advisory jurisdiction of the International Court, *see generally* KENNETH J. KEITH, THE ADVISORY JURISDICTION OF THE INTERNATIONAL COURT (1972); MICHLA POMERANCE, THE ADVISORY FUNCTION OF THE INTERNATIONAL COURT IN THE LEAGUE AND U. N. ERAS (1973); DHARMA PRATAP, THE ADVISORY JURISDICTION OF THE INTERNATIONAL COURT (1972).

154. *E.g.*, Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, 1980 I.C.J. 73 (Dec. 20).

155. *E.g.*, Western Sahara, 1975 I.C.J. 12 (Oct. 16); Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16 (June 21); Certain Expenses of the United Nations 1962 I.C.J. 151 (July 20). For a discussion as to whether a State is in reality a participant in the dispute without whose consent the opinion should not be given, *see* Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, 1950 I.C.J. 65 (Mar. 30); Status of Eastern Carelia, 1923 P.C.I.J. (ser.B), No. 5 (July 23).

resolution suggests that neither of these elements is often sufficiently present.

VI. OUTCOMES

Outcomes must be assessed both in terms of individual participant's goals and international community goals, the two of which may not coincide. There may be a reluctance in the international community to condemn an important or influential State, and thus, an international dispute may be allowed to dissipate. Only if some member is prepared to keep the dispute at the forefront of international attention, or to resurrect it, will the dispute once again become active in the same or some altered form.[156] The interest of the international community in the maintenance of peace and security may be to press for a solution, even if that solution is not satisfying to some of the participants. For example, in the dispute over the Soviet invasion of Afghanistan, the United Nations seemed to focus on the withdrawal of the Soviet troops from Afghanistan and the provision for repatriation of refugees, as if these were sufficient to resolve the dispute. The Geneva Agreements[157] did not and could not settle the civil war in Afghanistan and, in fact, caused further refugee flow. This demonstrates that even a complex peace package may not

156. An example is the response of the international community to the events in East Timor since 1975. Although claims of the denial of self-determination should be addressed by the international community as a whole and despite condemnation by the Security Council and General Assembly Indonesia's annexation has been widely accepted. The claims of Portugal (the previous colonial power) that Indonesia acted illegally have kept the dispute alive as a bilateral one between Indonesia and Portugal. This has now been extended to a dispute between Portugal and Australia by Portugal's claims against the legality of the Timor Gap Zone of Co-operation Treaty between Australia and Indonesia. Portugal claims that Indonesia has no legal right to the potentially enormous oil resources of the Timor Gap, except by virtue of its illegal annexation of East Timor and that Australia is giving effect to that illegality, a claim Australia strongly refutes. Portugal has referred its dispute with Australia to the International Court. Ironically, the Timor Gap Treaty, which has activated this dispute with Portugal, was seen as removing a "potential source of bilateral and regional friction" and "as an imaginative approach to breaking the diplomatic deadlock in delimitation negotiations" between Australia and Indonesia, *Australia Rejects Criticism of Timor Gap Treaty*, BACKGROUNDER, vol. 1, No. 8, 7-8, February 23, 1990. (Australia Department of Foreign Affairs and Trade. On the Treaty, *see* Joint Ministerial Statement by Senator Gareth Evans, Australia Minister of Foreign Affairs and Trade and Mr. Ali Alatas Minister of Foreign Affairs of the Republic of Indonesia, October 27, (THE MONTHLY RECORD, Oct. 1989, vol. 60, No. 10 at 615-16 (Australian Foreign Affairs and Trade).

157. Agreement between Afghanistan and Pakistan on the Principle of Mutual Relations in Particular of Non-Interference and Non-Intervention, Geneva; Bilateral Agreement between Afghanistan and Pakistan on the Voluntary Return of Refugees; Afghanistan-Pakistan-Union of Soviet Socialist Republics - United States: International Guarantees; Accords on the Peaceful Resolution of the Situation in Afghanistan, Geneva, April 14, 1988, 27 I.L.M. 577 (1988).

resolve the following essential problems: sharing of power, refugees, religious fundamentalism, physical and economic destruction within the country and across the borders, and continuing superpower meddling.[158] Even an apparently unequivocal outcome, such as a treaty or a court decision, may in fact simply gloss over the layers of the dispute and provide a cause of future dispute.[159]

The outcome of the Afghanistan dispute raises yet again the perennial problem of participation. While Pakistan (as a receiving country of refugees and a channel for the external assistance to the Mudjahdin) was included in the peace process, Iran, which also received a large number of Afghan refugees, was not. Moreover, any realistic settlement should have allowed for the representation of the Afghan resistance, and perhaps, even for the millions of people that fled Afghanistan. Such a proposal, however, could not be readily accommodated within the statist paradigm of international law.

The establishment of the United States-Iran Tribunal shows how, in a dispute between States, important individual interests are subjugated to the overriding concerns of the government and individual claims are subsumed by the State. This subjugation of individual interests was true both for the commercial claimants and the hostages themselves, who were barred from presenting their claims to any jurisdiction.[160] While individuals may be participants in an international dispute, they are typically excluded from the dispute resolution process and may find their interests ignored when they are not consonant with those of the State.[161]

---

158. When the presence of some participants is never acknowledged, their interests will be silenced and the outcome will not assist them. *Cf.* ROBIN MORGAN, THE DEMON LOVER, ON THE SEXUALITY OF TERRORISM 91-92 (1989) in which the author analyzes the killing of hundreds of people at Mecca in 1987 in riots triggered by an Iranian demonstration. The dispute can be seen as one between Iran and Saudi Arabia and concerns the struggle between Sunni and Shiite Muslims and is about "identity, about visibility, legitimacy, ethnic animosity - and about geopolitical power, about economics, about oil." Most of the victims were women placed at the front of the demonstration; their participation and interests do not rank highly in most analyses of the dispute.

159. For example, while the 1975 Treaty on Neighbouring Relations between Iran and Iraq appeared to settle the territorial dispute between Iran and Iraq, it did not prevent the outbreak of the Iran-Iraq war and may have been a cause of it. The decision of the Court in the United States-Nicaragua dispute has not brought peace in Central America, and the arbitral decision of Perez de Cuellar did not finally resolve the dispute over the sinking of the *Rainbow Warrior*.

160. Declaration of the Government of the Democratic and Popular Republic of Algeria, Nullification of Sanctions and Claims, ¶ 11; Declaration of the Government of the Democratic and Popular Republic of Algeria, Concerning the Settlement of Claims by the Government of the United States and the Government of the Islamic Republic of Iran, art. 2 ¶ 1.

161. Other examples are the disputes involving *Rainbow Warrior*, South Africa, Grenada, and Chernobyl.

Some disputes lead to other disputes in a chain of action and reaction. The presenting issue may be resolved, but the situation may remain unchanged so that the dispute's resolution is only apparent. The parties' goals in referring a dispute to a dispute resolution process may not coincide, causing disparate perceptions of when, or if, the dispute is terminated. The agreement apparently settling a dispute may not be durable, causing a continuation of the dispute when it breaks down.[162] Such an agreement may have been accepted out of expediency, out of duress, or out of a lack of viable alternatives; when the situation changes, a participant may feel it appropriate to revive the dispute or an adaptation of it. Termination of a dispute itself covers a range of situations. It may comprise, *inter alia*, the resolution of the core issue without resolution of the situation;[163] an overall and lasting resolution; the diffusion of crisis and ongoing attempts at the definitive settlement of dispute;[164] a state of attrition in which nobody is capable of winning at an acceptable cost;[165] or, a stand-off period.[166] The dispute may appear terminated because of a change in the background situation such as a change in technology,[167] law,[168] or government. In these cases, the dispute is likely to remain diffused, but not settled. Consequently, a new conflict may emerge when the situation changes again.[169] When it is possible for it to do so, one

---

162. This occurred in the *Rainbow Warrior* dispute.

163. Through legal settlement, negotiated compromise, or capitulation, the dispute may dissipate because its propaganda value or the desire to capitalize on it are exhausted. For example, Sweden did not want to continue adverse propaganda in the new climate following Gorbachev's accession to power.

164. While the hostilities in the Falklands might have ended, the dispute clearly has not. The resumption of diplomatic relations in February 1990 might indicate the beginning of a new attempt to resolve it. *See U.K., Argentina Restore Links*, THE SYDNEY MORNING HERALD, Feb. 17, 1990, at 20.

165. Such was the case with the Iran-Iraq conflict. A period of attrition can be used to attempt to find a more permanent resolution but may also be a time of recuperating and regrouping for the continuation of the struggle in the future. This can only be judged with hindsight.

166. This occurred in the Beagle Channel affair in the period between the mediation and agreement. In a period of stand-off, neither side is prepared or able to escalate the dispute to the point in which a resolution must be found, but neither is prepared nor able to forget the dispute, nor make the concessions necessary for it to dissipate.

167. For example, in the dispute about French nuclear tests in the South Pacific, the facts have changed through technological advances, but the fundamental attitudes of the parties remain the same.

168. In the Icelandic Fisheries dispute, a change of law allowing for an exclusive economic zone of 200 miles, which was incorporated into the United Nations Convention on the Law of the Sea, Art. 57, made it difficult for the United Kingdom to continue to contest the 50-mile Icelandic fisheries zone, especially because it wished to claim such a zone itself.

169. Australian and New Zealand policies with respect to nuclear matters tend to fluctuate with the change of government; however, the flexibility of each new government is limited by the actions of its predecessors. The conclusion and ratification of the South Pacific Nuclear Free Zone Treaty will make it harder for future governments to change dramatically the country's policy.

party may pretend that a dispute is over if it finds that none of its measures are working. For instance, a party may manipulate numbers or facts to show that the object of the dispute no longer exists or has been achieved.[170] A dispute may effectively be terminated in a domestic arena; yet, the methods by which this outcome was achieved may provoke a wider international dispute.[171]

VII. CONCLUSIONS

The overwhelming impression from the examination of these disputes is that while the prescriptive process of international law increasingly caters to individuals, its operation does not. Individuals, even when their rights are protected by international law and when they are intimately implicated in a dispute, disappear from the stage of the dispute resolution process. Participants in international disputes are not limited to states. In fact, the spectrum of participation grows as new areas of international concern emerge; the international regulation of human rights, terrorism, international crimes, the exploitation of natural resources through private companies, telecommunications, the protection of the environment, and international business transactions are all likely to engender non-state participation. Yet dispute resolution processes, in their goals, participants, procedures, and outcomes, remain geared towards excluding individuals and downgrading their claims as against those of the relevant states. Therefore, state interests are ultimately served by these processes.

The structure for the presentation of international claims requires that those of individuals be channelled through states. The statist bias in international dispute resolution is particularly emphasized in cases involving state responsibility; the international wrongdoing must be attributable to a state[172] and is defined in terms of injury to states. Even when disputes do not involve any wrongdoing giving rise to international responsibility, as with disputes about the allocation of resources (including

170. For example, Sweden was able to claim (thanks to the changed recording policy from "possible" to "probable" incursions) that there had been a decrease in incursions by Soviet submarines and that they had therefore succeeded in their aims. This is also a face-saving device for the resolution of a dispute.

171. Take, for example, the restoration of internal peace and order in Grenada as a consequence of the invasion and the Soviet intervention in Afghanistan, which put an end to the power struggle there.

172. Examples include the United States-Iran hostage dispute, the *Rainbow Warrior* incident, and the Chernobyl incident.

territory), individual participants such as mining companies must be sponsored, and their claims espoused, by their states.[173] They may even find their claims overtaken and obliterated by the state, which may use or disregard them for its own purposes. The act of state doctrine, as formulated by the United States, British, Australian, and New Zealand courts, operates to this effect.[174] The retreat from the absolute doctrine of state immunity[175] allows for the presentation of commercial claims by individuals against states, but in matters *iure imperii*, their interests remain subordinated to those of the state. Considering that individuals are generally barred from formal international arenas, it leaves them without an effective judicial remedy whenever they are participants in an international dispute unless they are backed by their states. Either way, individual claimants have no control over the process of dispute resolution or its outcome.[176]

Even when international prescription recognizes the right of a group of people that might become a participant, as in self-determination, that right is defined by states, and claims for performance are likely to be unsuccessful unless espoused by the international community as a whole. This support depends, of course, on the prevailing configuration of strategic, political, and economic interests rather than overriding legal or moral principles.[177]

---

173. Nottebohm is an example of the misfortunes of an individual participant that lacks standing in the international forum, there being no accepted state willing to espouse the claim, Nottebohm (Liech. v. Guat.), 1955 I.C.J. 4 (Apr. 6). *Cf. Barcelona Traction* illustrates the same for multinational organizations. Barcelona Traction, Light and Power Co. (Belg. v. Spain), 1970 I.C.J. 3 (Feb. 5).

174. *See supra*, note 152 and accompanying text.

175. *E.g.*, Foreign States Immunities Act (Cth), No. 196 (1985); State Immunity Act (U.K.), c. 19 (1979); State Immunity Act (1979), ch. 313 (Sing.); Foreign Sovereign Immunities Act (US), rep. 15 I.L.M. 1388 (1976); European Convention on State Immunity 1972, Europe T.S. No. 74, 11 I.L.M. 470 (1972).

176. A recent example of this in domestic courts is the litigation arising out of the collapse of the International Tin Council, a situation in which creditors have been unable to receive a judgment in their favor in domestic courts nor the European Court of Justice (settlement was reached before the European Court handed down judgment). While states entered into commercial contracts with the creditors through the operation of the International Tin Council, they were able to deny liability for the debts of the organization they had created and, thus, succeeded in their claims before domestic courts. *See* International Tin Council v. Amalgamet Inc., 524 N.Y.S. 2d 971 (1988); J.H. Rayner Ltd. v. Dept. of Trade 3 W.L.R. 969 (H.L.(E.) 1989). *See also* ROMANA SADURSKA & CHRISTINE M. CHINKIN, *The Collapse of the International Tin Council: A Case of State Responsibility*; 30 V.J.I.L. 845 (1990).

177. Such factors influenced the international disputes about the status of Namibia, East Timor and the Western Sahara. Namibia and Western Sahara also demonstrate that recourse to the advisory jurisdiction of the Court may not be conducive to resolution of the dispute. The advisory opinion may be simply ignored or misinterpreted by a participant State. *See* Western Sahara, 1975 I.C.J. 12 (Oct. 16); Legal Consequences for State of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council 276 (1970), 1971 I.C.J. 16 (June 21).

The different way in which claims are treated by states may indicate their hierarchy of values. For instance, important claims of individuals may be discarded because they are considered by the State as of lesser importance to it than other foreign policy considerations, or as intruding into wider state affairs.[178] In disputes about violations of international law, claimant states want the alleged wrongdoer to stop its actions, and possibly to make reparations, including an apology. At the very least they wish to cause it embarrassment, international ostracism, and isolation.[179] When the violation of international law is considered particularly harmful to an individual state interest or wider community interests, there may be recourse to measures of self-help. Such self-help is rarely forcible, except for isolated instances of humanitarian intervention, and even in these cases there are usually other motivations for the use of force.[180] In situations in which national pride and prestige or national security are not at stake, strictly humanitarian motives are not seen by states as warranting the use of force, particularly if the victims are not their own nationals.[181] On the other hand, states in territorial disputes, are more inclined to resort to extensive self-help, including use of force, and are unwilling to give up their claims. Territory has a psychological value independent of its intrinsic value, which itself may be great in terms of resources and strategic significance. Territorial disputes tend to be long-term[182] because states refuse to give up a claim of sovereignty, which goes to the very essence of statehood and may involve national pride. This is magnified when there is potential, or actual, resource or strategic wealth.

The direct outcome of an international dispute should also be evaluated in terms of its impact on the prescriptive process, that is, the formation, confirmation, change, or obliteration of norms of international law. For instance, the Chernobyl accident provided a stimulus for the development of international regulation of the nuclear industry; the *Rainbow Warrior* incident confirmed state liability for the illegal acts of its agents; the invasion of Grenada has seemed to erode further the prohibition of intervention; the tanker war in the Gulf has apparently

178. *See supra* note 136 and accompanying text.

179. These desires are apparent in various allegations of violations of human rights, the shooting down of KAL 007, and the *Rainbow Warrior* incident.

180. Examples include the attempted rescue of the hostages in Iran and the rescue at Entebbe airport.

181. Compare the intervention in Grenada in which it was claimed that United States nationals were in danger with the lack of response to events in East Timor and Kampuchea in 1975-79.

182. For example, the Falklands/Malvinas dispute, Venezuela/Guyana; Iran/Iraq; the Beagle Channel.

undermined duties of neutrality; and, the acceptance of the Indonesian invasion of East Timor has challenged the universality of the norm of self-determination and the collective response through the Security Council to Iraq's invasion of Kuwait has strengthened the role and effectiveness of the U.N.

Finally, disputes may be used and claims made in a deliberate attempt to generate sufficient state practice to create a new norm of international law, or to reinforce one that is eroding. For instance, the United States wished to establish that a state sponsoring acts of international terrorism is liable for those activities along with, or even separately from, the individual terrorists, and that attack on the sponsor's territory and assets is a legitimate response.[183] Such tactics are especially attractive when there is frustration with the traditional prescriptive processes, or with the suitability of other responses to specific types of activity. Perpetrators of terrorist acts are elusive and they may not have an identifiable territory, assets, or even nationality; the only tangible target is the sponsoring state. This again, is symptomatic of the statist bias of international law: this time with good effect.

Much of what we have said is too tentative and speculative to formulate any definite conclusions about the nature of international law and the operation of the international legal system. We have analyzed certain disputes in order to ask proper questions rather than to provide answers. We believe that international disputes and dispute resolution processes constitute a fruitful area of further studies on the development and functioning of the international order.

183. *See supra* note 85 and accompanying text.