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International Non-Liquet: Recrudescence and Transformation

I.

A legal system, whose myths base it on rules stemming from specific authoritative sources distinct from the agencies applying them, is presented with the logical possibility of a gap or *lacuna* within that body of rules. It appears that only one municipal system—classical Roman law—permitted a judge in such a situation to abstain from granting a judgment, by delivering a holding of *non-liquet.*[1] Other legal systems, either expressly or impliedly, have arranged an ad hoc substitute jurisprudence for cases in which the law is either non-existent or unclear.[2] The common-law tradition, for example, has accommodated the extremes of both Blackstone and the institution of "judge-made" law. The Swiss Civil Code orders the judge in situations of rule-gaps to act as if he were legislator.[3] The French legislator showed his impatience with the *non-liquet* theory by providing in Article 4 of the French Civil Code that a judge who refused to pronounce judgment ". . . under pretext of the silence, obscurity or insufficiency of the law . . ." would be prosecuted for a denial of justice.[4]

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[1] For a classical discussion, see HUNTER, ROMAN LAW 59 (1903); SIORAT, LE PROBLÈME DES LACUNES EN DROIT INTERNATIONAL (Paris, 1958); STONE, LEGAL REGULATION OF INTERNATIONAL CONFLICT 153 (1954). Wholly aside from the fact of inevitable marginal prescriptive creativity in judicial application, there is some question as to whether *non liquet* was even more than theoretical formula in Roman law. The praetorial function, for example, merged legislative and judicial functions. For a recent, comprehensive symposium on *lacunae and non-liquet,* see PERELMAN (ed.) ETUDES DE LOGIQUE JURIDIQUE, Vol. 1 (1966) Vol. 2 (1967).

[2] For a comprehensive collection of national legislative directives for lacunae, see BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL TRIBUNALS 400-409 (1953).

[3] "A défaut d'une disposition légale applicable, le juge prononce selon le droit coutumier et a défaut d'une coutume selon les règles qu'il établirait s'il avait a faire acte de législateur."

[4] "Le juge qui refusera de juger sous prétexte du silence, de l'obscurité ou de l'insuffisance de la loi, pourra etre poursuivi comme coupable de déni de justice."

The majority of international doctrinal writers have taken a position against the possibility of a *non-liquet* judgment in international law despite the attendant inconsistency with their general jurisprudential views. Rule 40 of the *Fiore Plan* expressly forbids such a judgment.[5] Article 32 of the *Projet Corsi* was to the same effect.[6] Article 19 of the draft of the *Institut de Droit International* also rejected *non-liquet.*[7] Asser, deLapradelle and Politis,[8] all emphasizing the contractual nature of arbitration, allowed for a *non-liquet* judgment. These latter writers, it may be noted, were emphasizing the rules laid down in the *compromis* and were not specifically addressing themselves to a gap theory of international law.

Siorat, in contrast, in his rigorous study of the lacuna in international law, takes a broader positivistic position, compares the lacuna to a variety of other application problems facing judges and emphatically affirms the possibility of a legitimate *non-liquet* judgment.[9] Among those who tend to reject the legitimacy of a *non-liquet* response, Wittenberg argued for an implicit authority in the *compromis* to render a judgment: he maintained that submission of a question to arbitration implies bilateral agreement that there is an answer.[10] Lauterpacht also rejects the *non-liquet* judgment, but the logic of his argument is not compelling.[11] In an early presentation, Professor Stone offered a detailed analysis of the problem but reached no conclusion, convinced that the question remained theoretical so long as there is no compulsory international jurisdiction. In two subsequent publications, he has edged away from this position

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[5] DARBY, INTERNATIONAL TRIBUNALS 338 (1897).

[6] *Id.* at 314.

[7] *Id.* at 278.

[8] *Note Doctrinale* to the Alabama Claims in 1 LAPRADELLE-POLITIS, RECUEIL DES ARBITRAGES INTERNATIONAUX 398; 2 *id.* at 913.

[9] SIORAT, *supra* n.1. A detailed review and appraisal of Siorat and of Lauterpacht is found in Stone, *Non Liquet and the Function of Law in the International Community,* 35 B.Y.B.I.L. 124 (1959).

[10] WITTENBERG, L'ORGANISATION JUDICIARE, LA PROCÉDURE ET LA SENTENCE INTERNATIONALE 314-315 (1937).

[11] LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY 127-138 (1933); *id. Non-Liquet and the Completeness of Law,* SYMBOLAE VERZISL 196 (1958). A number of writers have sought to assimilate *non-liquet* to the general equity power of a tribunal. While equity is certainly a prescriptive extension, its operation is rather severely limited in regard to the International Court by Article 58 (2): "This provision shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree thereto." For a restrictive discussion of the import of this provision, see Scheaner, *Decisions ex aequo et bono by International Courts and Arbitral Tribunals in* SANDERS (ed.), INTERNATIONAL ARBITRATION: LIBER AMICORUM FOR MARTIN DOMKE 275 (1967).

and now seems to believe that certain prescriptive challenges may face an international judge, for which the best response would be a holding of *non-liquet.*[12]

Simpson and Fox,[13] approaching the problem from the perspective of an arbitrator called upon to respond to a claim of *non-liquet,* attempt to compromise the positions of deLapradelle and Wittenberg. While Simpson and Fox accept the possibility of a *non-liquet,* they contend that certain compromissory formulations exclude, by implication, the possibility of such a conclusion. Since one of these formulations is "general principles of law," *non-liquet* can only arise when a *compromis* provides for one of two exclusive answers. Yet, even here, they cite with approval Huber's award in *Island of Palmas,*[14] in which he was faced with such an exclusive disjunction, yet held that the *compromis* ruled out, by implication, a possible *non-liquet* decision.

The claim of *non-liquet* has arisen in a variety of cases. In the *Portugese Colonies* case between Portugal and Germany the arbitrators noted the absence of relevant international rules, but held that

> . . . they must fill the gap by deciding according to the "principle of equity," in the sense of "international law" applied by analogy; and taking account of its evolution.[15]

In the *Island of Palmas* case, Judge Huber precluded the possibility of a *non-liquet* by reference to the implied intentions of the parties. But the *compromis* of the *Bulawa Island* case[16] and the *Delagoa Bay* case[17] permitted the arbitrator to refuse to decide, despite the fact that he was accorded a contingent power to decide equitably if neither of the respective claims could be established.

In a number of cases, an international judge refused to render a decision on the grounds of *non-liquet.* In the *Lizzie Thompson* case, between the United States and Peru, the King of Belgium was named as "arbitrator, umpire and friendly arbitrator." He declined to act on the ground that the arbitration would be "of a very delicate nature by

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[12] STONE, LEGAL REGULATION OF INTERNATIONAL CONFLICT 153 (1954); *id. Non-Liquet and the Function of Law in the International Community,* 35 B.Y.B.I.L. 124 (1959); *id., Non-Liquet and the International Judicial Function* in PERELMAN (ed.), LE PROBLEME DES LACUNES EN DROIT 305 (1968).

[13] SIMPSON & FOX, INTERNATIONAL ARBITRATION 143-144 (1959).

[14] 22 A.J.I.L. 867, 911 (1928); 2 U.N.R.I.A.A. 829.

[15] 8 RECUEIL DES DECISIONS DES TRIBUNAUX ARBITRAUX MIXTES 413.

[16] (Great Britain v. Portugal 1869); LAFONTAINE, PASICRISIE INTERNATIONALE 81, 82-83 (1902).

[17] (Great Britain v. Portugal 1872); LAFONTAINE, *supra* at 170,171.

reason of the exceptional circumstances of the case." It appears that the King had examined the case and felt that he would have been constrained to decide against the United States. He intimated this to the United States, and the claim against Peru was abandoned.[18] Though this case has been cited as an example of *non-liquet,* it might more appropriately be characterized as a decision not to decide. In the *Upper Silesia (Minority Schools)* case, the dissenting judge, Huber, found that the available rules did not support or govern the claims in question and indicated the need for a *non-liquet* judgment.[19] He was alone in this view.

Until recently, it was generally believed that the problem of *non-liquet* was of academic interest alone. The recent *Sabbatino* case[20] before the United States Supreme Court and the second phase of the *South West Africa* cases[21] demonstrate that the problem was quiescent but has by no means disappeared. In *Sabbatino,* the Supreme Court refused to decide a case on the merits because of, *inter alia,* the absence of a uniformly accepted rule of law applicable to the question at issue.[22] It is amusing to note that had a French court rendered the same opinion, its members would have been subject to prosecution for a denial of justice. In the second phase of the *South West Africa* cases, the International Court felt itself unable to decide a question due to the absence of an "objective rule." The Court argued that to undertake decision in this area would necessarily have required it to make subjective choices, which, it felt, exceeded its judicial mandate of applying rather than making law. Each of these cases raises serious *non-liquet* issues.

If the problem of *non-liquet* can be formulated only in terms of a conception of law as a body of rules created and sustained by a sovereign power, the fact remains that *non-liquet* is not a problem created by this theoretical formulation. In functional jurisprudential systems and decision-oriented jurisprudences, the essential problem of *non-liquet,* under a different rubric, does arise. Consider the not infrequent circumstance in which there are no uniform expectations shared by the litigants concerning the allocation of the disputed

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[18] 2 MOORE, INTERNATIONAL ARBITRATIONS 1611; RALSTON, INTERNATIONAL ARBITRATION FROM ATHENS TO LOCARNO 216 (1929).

[19] Series A. No. 15 at 54.

[20] Banco Nacional de Cuba v. Sabbatino, 376 US 398.

[21] [1966] I.C.J. Reports 6.

[22] 376 U.S. at 405.

matter or class of matters. In a situation such as this, the decision-maker draws upon overriding community policies in order to derive a solution. There is no question of *who* may or may not supplement, the core of the classical *non-liquet* doctrine, and the general reference to *non-liquet* in municipal discussions. This rather simple example exposes the fact that the problem underpinning the doctrine of *non-liquet* is often the key stimulus for litigation. Neither a statute nor a contractual agreement can prevision every detail of planned collaborative or imposed activity. The moment of agreement or legislative fiat may express a high degree of consensus, but this spirit of agreement may not continue thereafter to relatively *bona fide* contention over an unforeseen aspect of a continuing regime. It is, in short, precisely because of a "gap" that parties often turn to a process of organized decision.

A decision-oriented jurisprudence accepts, as normal feature of decision structures, the contingent prescriptive competence of judicial and quasi-judicial personnel in situations of imprecise, inapplicable or obsolete legislative directives. The critical question is less one of the location of prescriptive authority than of appropriate operational procedures: how much should the judge prescribe in the particular case? Despite ideological rancor, disciples of different jurisprudential schools would tend to converge in viewing the problem of *non-liquet* as an operational rather than as a politically theoretical problem.

Can the rather pragmatic national approach to *non-liquet* be applied in international adjudication and arbitration? Professor Stone has argued that there are serious doubts as to the automatic acceptance of municipal treatment of *non-liquet* in international law.[23] A fundamental difference between national and international arenas is the degree of stable correlation between authority and political control in each. While in the municipal arena there is a high probability of acceptance of a supplementing decision, this probability is a variable factor in the international arena. Even if one decision is accepted, anticipation of supplementation may retard subsequent resort to the largely consensual institution of international arbitration. The questions of whether to supplement and how much to supplement affect, then, both the acceptability and effective-

[23] STONE, *supra* n.1 at 154-156.

ness of the instant decision as well as the future viability of international arbitration.

In this respect, international *non-liquet* cannot be dismissed as a metaphysical conundrum with no practical legal consequences. Whether courts and arbitral tribunals "make law" is scarcely worthy of discussion. No one will seriously contend, at the present time, that Blackstone's classical view is an accurate descriptive or prescriptive statement. Courts can, do and often should "make law." On certain occasions, however, they refuse to perform the prescribing function. They do not, as tribunals in the past might have done, expressly invoke the doctrine of *non-liquet.* Yet these are *non-liquet* decisions.

The question of *non-liquet* can, then, be attacked more profitably in a different formulation: under what conditions and with what objectives do and should tribunals *refrain* from prescribing? If it is conceded that tribunals do have the contingent competence to make "judicial law," when and why have they refrained from doing so?[24]

II.

A reluctance to prescribe can spring from institutional characteristics or from special contextual features. Perceived institutional limitations of adjudication and arbitration might operate to deter a court or tribunal from delivering a judgment in a particular type of case. There are expectations regarding each of the phases of the judicial process which authorize certain practices but prohibit others. Furthermore, these expectations, held with varying degrees of intensity, are affected by context and will vary with the circumstances. Hence certain contextual features, such as a high crisis level or the unavailability of a more appropriate process, might modify or override them. This understanding of *non-liquet* would mean that a tribunal might refrain from decision not because of a gap in the rules (a contention which rejects the creative and supplemental function of judicial decision) but rather because of expected and demanded limitations of their decision process.

Institutional limitations should not be pressed too far. An historical perspective of no more than two or three hundred years is

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[24] *Cf.* Friedmann; *The Limits of Judicial Lawmaking and Prospective Overruling,* 29 M.L.R. 593 (1966).

sufficient to demonstrate that there are few inherent characteristics of adjudication. The enormous changes from a court of the 18th century, procedurally and materially, to a court of the 20th century show that the institutional characteristics of adjudication are a function of the total social milieu. The more rapidly and radically the milieu changes, the more rapidly and radically the institutional characteristics of adjudication will modulate. Given the enormous multi-value revolutions of our era, adjudication will probably change drastically in the next century. This is not to say that at any given moment there are no institutional limitations, that judges, lawyers and observers do not operate with certain expectations about what a tribunal may and may not do. But contentions of "inherent limitations" or "essential nature" should be subjected to skeptical examination. Too often such arguments are the product of temporal parochialism if not an irrational desire to mortgage the distant future.

The existence of certain perceived institutional limitations might operate to deter a tribunal from supplementing in a certain case, or even of rejecting jurisdiction entirely. But the clarity and compulsiveness of such limitations requires careful examination. Before considering refusals to prescribe, it will be useful to survey a number of the more prominent institutional limitations and the responses which they have engendered in particular cases. It will be seen that responses have been governed as much by specific contextual features as by putative institutional limitations.

1. Litigant Consent

International tribunals have generally held that they would not act unless there was consent to jurisdiction or an appearance in Court and not infrequently both have been required.[25] The demand for a verbal and behavioral showing of consent to international judicial and arbitral decision is a unique institutional feature. International parliamentary arenas, in contrast, have not always deemed themselves so bound as a matter of law. The differences in approach are well illustrated in the *Eastern Carelia* case.[26] There, the Permanent Court

[25] See, for example, Mavromattis Concessions Cases, Series A, No. 2 at 60; Status of Eastern Carelia, Series B, No. 5 at 27-28; Corfu Channel case (Preliminary Objections) [1948] I.C.J. Reports 15. For an extensive discussion of the doctrine of *forum prorogatum* before the International Court of Justice, see 1 ROSENNE, THE LAW AND PROCEDURE OF THE INTERNATIONAL COURT OF JUSTICE 319 ff. (1965).

[26] Series B, No. 5 at 7.

held that it was beyond the judicial function to undertake decision directly affecting a state which was neither a member of the League and hence privy to the general injunction of peaceful resolution of international disputes,[27] nor willing to make a special submission to the Court. The League Council and Assembly indicated their disagreement with this decision and reasserted their competence in such matters.[28] But in the last phase of the *Corfu Channel* case,[29] the International Court construed a jurisdiction originally tenuously acquired by *forum prorogatum*,[30] to extend to the awarding of damages, despite the objection and withdrawal of the losing party. Albania has refused to comply with the *Corfu Channel* judgment. In later cases in which a denial of prior consent seemed likely to take the form of repudiation, the Court generally found grounds for relieving itself of the necessity of decision.[31]

At the highest level of generality, international adjudication pays lip-service to the consensual nature of its jurisdiction. Yet consent is a communication susceptible to varying degrees; its construction in a contested case may require finding consent despite the contrary statements of the "consenting party."[32] Thus, the consent argument, even in modest form, contains a certain fictitious element. Municipal *ex-parte* and *in-absentia* proceedings, as well as decisions undertaken in cases affecting third parties, are common enough to suggest that any inherent limitations of adjudication do not extend to the consent and appearance of litigating parties. The aggregate behavior of the Permanent Court and the International Court—the tribunals which have been faced most squarely with the problem of consent to jurisdiction—seems to be more appropriately explained as decision

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[27] See Articles 12 and 13 of the Covenant of the League of Nations.

[28] 1922 LNOJ, 1337, 1502.

[29] [1949] I.C.J. Reports 244.

[30] [1948] I.C.J. Reports 15.

[31] See, for example, The Anglo-Iranian Oil Company case (Preliminary Objections) [1952] I.C.J. Reports 93; Case Concerning the Aerial Incident of 27 July 1955 (Preliminary Objections) [1959] I.C.J. Reports 127.

[32] Consent, as a formal sign, is communicated at one point in time, with an implicit context in the mind of the communicator, and applied to a relatively new factual situation at a later point in time. Hence there is no artfulness in saying that an international tribunal is always faced with the problem of determining whether a past expression of consent still conveys consent. The MONETARY GOLD case is the most obvious example of this phenomenon. In that case, Italy submitted a special consent to jurisdiction and on the following day introduced a preliminary objection to jurisdiction. The International Court ultimately accepted the Italian contention and denied itself jurisdiction to decide the case to which Italy had submitted itself: [1954] I.C.J. Reports 19.

by reference to the specific power and authority it could muster for that case, rather than to the real scope and magnitude—if at all verifiable—of the consent of the litigants.[33]

It would be technically incorrect to contend that the demonstrable absence of consent calls for a *non-liquet* response. The total absence of consent, as in *Eastern Carelia,* is, indeed, perceived as an institutional limitation, which will inhibit the tribunal from seising the case. Where there is some communication upon which to peg a consent construction, however, the institutional inclination may be neutralized by a variety of other factors.

2. Litigant Objectives

The Permanent Court refused to be bound by constructions put forward by the parties. As a multipartite international organ whose decisions have prescriptive if not applicative effects on all parties to the Statute, this position is sound.[34] Yet its application has varied. Thus, in the interpretation phase of the *Chorzow Factory* case,[35] the Court simply recorded its unwillingness to be bound by interpretations put forward by the parties and proceeded to interpret as it saw fit. The International Court acted in a parallel manner in *Haya de la Torre.*[36] But in the *Free Zones* case, the Permanent Court stated that

> . . . the Court cannot as a general rule be compelled to choose between constructions (of a treaty) determined beforehand none of which may correspond to the opinion at which it may arrive.[37]

On this ground, the Court refrained from delivering a decision. Similar chiastic precedents can be found in international arbitration.[38]

3. Enforceability

In the *Northern Cameroons* case,[39] an elusive institutional limit was put forward for the first time by the International Court. The

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[33] For a sensitive examination of this nexus, see SCHECHTER, INTERPRETATION OF AMBIGUOUS DOCUMENTS BY INTERNATIONAL ADMINISTRATIVE TRIBUNALS 130 (1964); see also, LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 91, 243 (1958).

[34] For a detailed consideration, see Reisman, *Revision of the South West Africa Cases,* 7 VIRGINIA J. INT'L L. 1, 33, 34 (1966).

[35] Series A, No. 13 at 4, 15-16.

[36] [1950] I.C.J. Reports 395.

[37] Series A, No. 22 at 15.

[38] Chamizal, 11 U.N.R.I.A.A. 376; *Island of Palmas,* 2 U.N.R.I.A.A. 829.

[39] [1963] I.C.J. Reports 15.

Court seemed to be saying that a necessary element of justiciability was that the cause be susceptible to compliance or execution. "Normally" said the majority, "when the Court pronounces a judicial condemnation there is room for the application of Article 94 of the Charter:"

> . . . there is a difference between the Court's considering the manner of compliance with its judgment, or the likelihood of compliance, and, on the other hand, considering whether the judgment, if rendered, would be susceptible of any compliance or execution whatever at any time in the future.[40]

Certainly, the Court did not mean that declaratory judgments or mediant rather than terminal judgments concerning a phase of a particular dispute were beyond its institutional capacity. As a matter of policy, a declaratory power, a technique of preventive application is obviously crucial in a rapidly changing context.[41] In that particular case, the Court implied that no matter what decision it might render, there was absolutely nothing which could be done to ameliorate the situation. In effect, the Court ruled that nothing *should* be done. It is difficult to believe that it was operating on the basis of a perceived institutional limitation or enunciating a precedent for the future.[42]

4. Litigant Equality

In theory, litigants in the adjudicative arena meet as equals. In practice, there may be great inequalities in the aggregate values at the disposal of the litigants. A tribunal genuinely concerned with maintaining the equality of litigant parties has a number of devices open to it for narrowing power disparities,[43] but they have rarely been resorted to. International tribunals have generally construed equality in terms of procedural rights and nothing more.

In *Pelletier*,[44] the umpire felt incapable of acceding to Haiti's

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[40] *Id.* at 34.

[41] "That the Court may, in an appropriate case, make a declaratory judgment is indisputable." *Id.* at 37. See, generally, LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 250-252 (1958).

[42] But consider Judge Waterman's opinion in the second phase of the *Sabbatino* case: "We need not at present go into the question whether the granting of this type of remedy is a feature of international law or of domestic law. But we do suggest that the failure of an international tribunal to give a remedy of this type results from the inability of that kind of court to enforce its awards and is not a result of the dictates of substantive international law principles." Banco Nacional De Cuba v. Sabbatino, 307 F.2d 845, 868 (1962).

[43] For example, examinations *in loco* or *descentes sur les lieux*, rogatory commissions, change of siege and so on.

[44] 2 MOORE 1757.

request for interrogatory commissions to be sent to Port au Prince, assuming that such an act would have been in excess of jurisdiction. Partly as a result, Haiti was unable to establish its case, the arbitrator ruled incorrectly and the award had to be nullified. In the *ILO* case[45] the International Court came close to exercising its discretion under Article 65 of the Statute, not to render an advisory opinion, since the relevant constituent documents put one of the parties at a serious disadvantage. In this case, the Statute of the Administrative Tribunal of the International Labor Organization allowed an appeal of sorts from the Tribunal's decisions to the International Court. However, the right of appeal, through the modality of a request for an advisory opinion, was permitted only to the Executive Board of UNESCO; an employee of UNESCO, the other party to the original case before the Administrative Tribunal, had no right of appeal. Moreover, since Article 34 of the Statute of the Court accords no *locus standi* to individuals, only UNESCO could have appeared in oral hearings before the Court. There were, as a result, serious procedural inequalities between the parties to the case.

The Court did, in fact, decide the case. While emphasizing the crucial character of equality in judicial proceedings, primary stress was put on the features of the case. Since the employees had succeeded in the first instance before the Administrative Tribunal, said the Court, they would not have exercised an appeal right even if they had had it; hence, the Court continued, no inequality was to be found in the case at bar, in the exclusive appeal privilege of the Executive Board of UNESCO. As regards the employees' lack of *locus standi* for oral pleadings, the Court felt that this was equalized by UNESCO limiting itself to written submissions and communicating in this form the comments of the respondents.[46]

The Court's reasoning is not thoroughly persuasive. The fact that the winning party might not have appealed in no sense equalizes the parties; the availability and exercise of an appeal privilege deprives one party of a post-decisional recourse, while it indulges the other party in this option. The presence or absence of an appeal option can influence litigants in the formulation of first-instance objectives and the choice of litigative strategies. Appearance before the administra-

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[45] [1956] I.C.J. Reports 77.

[46] On the disposition of oral pleadings in international adjudication. See, in particular, *The Canada*, 2 MOORE 1733, 1742; Eastern Carelia B/5 at 28; Corfu Channel (Compensation) [1949] I.C.J. Reports 244, 248.

tive tribunal was "final" for employees, but only the first step for the Board. Finally, abandoning oral pleadings by both parties may have equalized the parties, but it deprived the Court of a normal channel of judicial intelligence.

The Court held that "any seeming or nominal absence of equality ought not to be allowed to obscure or to defeat that primary object."[47] The majority evidently felt that the actual absences in the case before it were nominal and would not have had a material effect. The attitude of the Court in the *ILO* case, in short, indicates a flexibility in regard to the doctrine of equality.

5. Material Finality

Judicial statements regarding material finality indicate a concern with two institutional features. The first is the necessary finality of a decision. The second is the political aspects of a decision. An examination of the dicta themselves, and the cases and contexts in which they were delivered, leaves the student with the hardly exceptional feeling that express verbal statements often conceal rather than reveal the actual motivations of tribunals. In the *Free Zones* case, for example, the Permanent Court stated that

> . . . it would be imcompatible with the Statute, and with its position as a Court of of Justice, to give a judgment which would be dependent for its validity on the subsequent approval of the parties.[48]

On the other hand, the International Court stated as a fundamental matter, in the *Northern Cameroons* case, that the Court was not concerned with the post-judicial exploitation of its decision.[49] Yet it is difficult to escape the conclusion that it was precisely this consideration which led the Court to render a non-decision. In the *ILO* case, the Court stated that it was of no moment to it that, by private arrangement, the parties had undertaken to accept an advisory opinion as a binding decision.[50] Yet the Court indicated in other places that this consideration was, indeed, a matter of significance to it.[51] Moreover, in *Eastern Carelia,* the Permanent Court refused to render an Advisory Opinion which it felt was in fact contentious.[52]

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[47] [1956] I.C.J. Reports 77, 86.
[48] Series AB, No. 46 at 96, 138.
[49] [1963] I.C.J. Reports 15.
[50] [1956] I.C.J. Reports 77, 84.
[51] *See, e.g., id.* at 99.
[52] Series B, No. 5 at 7.

The irony of the judicial demand for an *a priori* assurance of finality rather than conditional validity, is the necessarily conditional quality of any judgment between sovereign states. It was perfectly lawful under classical doctrines for the litigants to agree, after judgment, either to disregard the decision or to resubmit it to another tribunal as a new question.[53] As a matter of naked power, one state may be capable of rendering a purportedly binding decision into one conditional in respect to a number of factors. The Court's concern with the finality of its decisions appears to be anxiety for a number of shifting contextual features. They may be generalized as concerns for the *effectiveness* of its judgment, understood in a broad sense. It refers neither to the complete value realization of a judicial statement nor to its total rejection. Effectiveness is, in its most basic sense, a high degree of conformity to the specific objectives as well as to the more general goals of the tribunal. A projected unenforceable decision would hence not necessarily be an ineffective one. The dicta in the *Northern Cameroons* case can only be understood in this sense. Despite the fact that the Court characterized the requested declaratory judgment as a *brutum fulmen,* the Court appears to have been aware of the probable effects of the decision it was petitioned to render. A declaratory judgment would indeed have been effective in the conventional sense of the term. In a more comprehensive sense, it would have been highly ineffective, since it appeared likely to disrupt a local border régime with no probable gains for long-range world order.

6. Political Questions

The concern with "political questions" is related to the problem of finality and is part of the more general interest in effectiveness. A political question is understood here as one for which a tribunal has a formally adequate jurisdiction, but which it refuses to decide on the ground that another process is a more appropriate arena of decision.[54] When the other process is the legislative branch or its

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[53] See the *Acosta* claim. 3 MOORE 2187. It is probable that a judgment, though initiated by private litigants, but dealing with a matter of *inclusive* concern (VIII/38 *supra*) could not be vacated solely by bilateral agreement.

[54] It is useful to distinguish the declaration of an "inappropriate" type of forum for a particular case of class of cases, for example, courts or legislatures or administrative agencies, from the declaration of an "inconvenient" forum. A holding by a court of *forum non conveniens* does not mean that the matter at bar is inappropriate for all courts, but only that it is, most commonly for geographical reasons, inappropriate for that particular court.

functional equivalent, the invocation by a court or tribunal of the doctrine of political question is essentially a finding of *non-liquet.* The implication is that though the tribunal is generally competent to prescribe interstitially, it refuses to do so in the case before it. A finding of political question, then, presents, in refined form, the perceived institutional limits of adjudicative prescription.

Despite a voluminous doctrinal literature on the problem of political questions, there are relatively few international precedents for this type of decision. In the *South West Africa* case,[55] cited earlier in this regard, the majority spoke of a legal situation which might be unsatisfactory but which, nevertheless, could not be remedied by a court conscious of the limitations of the judicial process. Explicit reference was made to the international legislator.[56] In this case, the problem was to construe a constitutive agreement made in an era in which the structural features of international relations as well as the general goal values of the international community were quite different from those prevailing at the time of judgment.

Taken out of context, this appears to be a simple operation of treaty interpretation. That such an operation might have "political" repercussions has long been recognized by the International Court but never deemed, of itself, to be a bar to adjudication. In the *Expenses* case, for example, the Court noted that any construction of the Charter would perforce have political consequences, but this, in itself, was not enough to prevent the Court from seising the case.[57] The Court went further in the *IMCO* case, stating that if a question were legal, but had some political aspects, the "requirements of its judicial character" demanded, nevertheless, that the Court decide the case.[58]

Seen in context, *South West Africa* was an exceptional case of treaty interpretation. The matter at bar was one of purported constitutive prescription reshaping the world-power process. In certain other cases in which this had been presented, there were probabilities of effective decision. In *South West Africa,* in contrast, the Court may have felt that any decision would be ineffective. Hence, it avoided the case in part by finding of *non-liquet.*

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[55] [1966] I.C.J. Reports 7.
[56] *Id.* at 36.
[57] [1962] I.C.J. Reports 151, 155-156.
[58] [1960] I.C.J. Reports 150, 153.

7. Technical Problems

It has been held that matters of technical detail are beyond the institutional capacity of adjudication. In the *Free Zones* case, the Permanent Court stated that "the interplay of economic interests" posed questions

> . . . outside the sphere in which a Court of Justice, conerned with the application of rules of law, can help in the solution of disputes between two states.[59]

In *Haya de la Torre* the Court refused to indicate how its prior judgment ought to be enforced—the major point at issue—because, it said, methods of execution turned on factors of political and administrative detail with which only the parties were familiar.[60] Thus, on two occasions, the Court manifested unwillingness to enter into details of the power-and-wealth process, seeking to distinguish between them and legal problems about them. Yet, in the *Fisheries* case, the Court encountered problems of wealth and well-being, but did not hold that these details were beyond its institutional capacity.[61] On the other hand, a subdued strain in the complex decision in the second phase of the *South West Africa* cases played on the necessarily subjective choices involved in decisions concerning the well-being of individuals.[62] In the *Infants* case, the Court managed to skirt the problem of the well-being of the minor in question, which was certainly fundamental to the case.[63]

III.

These cases seem to indicate a certain perceived institutional limitation of the international judicial process; it appears that a number of judges feel capable of drawing a fine line between "legal" questions and "value" questions. This is assuredly not an inherent limitation of adjudication; municipal courts in a number of polities are daily engaged in deciding such matters. Furthermore, the Statute, in providing for assessors,[64] clearly envisaged cases in which detailed

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[59] Series AB, No. 46 at 162.
[60] [1951] I.C.J. Reports 78-79.
[61] [1951] I.C.J. Reports 116.
[62] [1966] I.C.J. Reports 7.
[63] [1958] I.C.J. Reports 55.
[64] Statute Article 30 (2); Article 7 of the Rules of Court.

technical knowledge would be necessary for national decision. Viewed in context, it would appear that these cases were motivated by a variety of features of which the alleged institutional limitation was of minimal significance. In the *Fisheries* case, the Court dealt with complex economic questions which did not, however, touch on major constitutional problems. In the *Anglo-Iranian Oil Co.*[65] case, in contrast, the Court would have been required to reorganize a legacy of the discredited, yet still operative colonial period of world history; this was a matter of major constitutional importance and would have had far-reaching effects throughout the globe. A disinclination to become involved in such a matter may have been a factor in the Court's thoroughly unpersuasive judgment disseising jurisdiction. The United States Supreme Court's 1965 decision in the controversial *Sabbatino* case[66] is comprehensible in these terms. The suggestion that the Supreme Court was incapable of dealing with an expropriation case is absurd in the light of that tribunal's rich history of eminent-domain decisions. It was not the complexities of the wealth problem in these cases, but rather the enormous political ramifications which probably motivated these courts to refuse decision.

The Court's reticence in regard to controversies over well-being is not explicable in these terms. A municipal court presented with a conflicts case dealing with an infant or with a prodigal, would unhesitatingly direct itself to the essential question of the ward's welfare and would apply the minimum standards of its own public policy to the putative foreign arrangement. This divergence from the principles of comity is justified by the community's concern for individuals who are, as yet, deemed unable to exercise the plenum of civil choices in a manner comporting with their own interests. The parallel with the *Infants* case[67] applied equally to the international supervision of mandates and trusteeships.

In the light of general and accepted municipal judicial practice, and the relatively amiable milieu of the *Infants* case, the reluctance of the Court to pierce to the heart of the problem is perplexing. In view of the comparatively large majority, the express judgment may have represented a compounded compromise of decision from which the

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[65] [1952] I.C.J. Reports 93.
[66] 376 U.S. 398.
[67] [1958] I.C.J. Reports 55.

more controversial motives were removed. Whatever the cause, it is to be hoped that this phenomenon was an exceptional occurrence not to be repeated. The judgment in the second phase of the *South West Africa* case was probably motivated by the control problem facing any positive decision.

If there is an institutional limitation regarding cases of intricate technical detail, it should operate on the principle of economy rather than on the principle of difficulty. It is startling to imagine a tribunal shirking a case because it is too difficult. On the other hand, cogentive tribunals operating under a rather inflexible statutory régime may perceive that certain matters would impose a heavy burden upon it and that other processes, better tooled for the instant matter, are available. In a situation such as this, it is a simple matter of economy to direct the litigants to the alternate process. In the absence of an alternate, a refusal to seise the matter on the grounds of difficulty is an act of injustice.

One point to be drawn from these cases is that in an evolving decision process perceived institutional limitations, no matter what the degree of intensity with which they are held, are essentially derivations of past practice. A decision to apply the limitations to future decision, though possibly presented in the form of institutional constraint should be viewed as a matter of choice, conditioned by perspectives and environmental features one of which will be the problem of political control. Accurate analysis of past decisions and appraisal of alternate options must go beyond tests of simple conformity to the past and consider current and future world community needs as well. *Non-liquet* examined as an aspect of perceived limitations of the judicial process in its prescriptive and applicative functions, is no exception. The available decisions indicate that past practice, as the expression of institutional limitations, has been only one, not always decisive, factor in express and implicit *non-liquet* decisions.