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All Justice, Too, Is Local
By Eric A. Posner, Op-Ed Contributor
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In its final decision of the year, the International Court of Justice in The Hague decided that it had no jurisdiction to determine whether Serbia and Montenegro had a valid legal claim against NATO countries that participated in the intervention in Kosovo in 1999. While few people outside of Belgrade probably paid much attention, the decision was symbolically very important: it demonstrated just how incapable the court is of resolving disputes, and what little hope the new International Criminal Court has to do much better.

First, there is no doubt that, in strictly legal terms, NATO's intervention violated international standards. What was unclear was whether the court had jurisdiction to act against it. In this, the court was in an unenviable position: if it had held against the NATO states, they would surely have ignored the judgment. By holding in favor of these states, the court showed its irrelevance.

The decision was a fitting end to a dismal year for the court, which is the United Nations' judicial organ. Earlier this year, Israel rejected an advisory opinion that held that its security wall in the West Bank was illegal. The United States reacted lethargically to its third loss in a row on the question of whether it is in violation of the Vienna Convention on Consular Relations because police often fail to inform foreign citizens they have arrested of their consular rights. Along with the Serbia case, these two decisions were the court's only major actions in 2004.

And the year was not anomalous. Throughout its 60-year history, the court has averaged only a few cases a year, and has rendered a decision in fewer than 100 all told. By contrast, the World Trade Organization's settlement system, in place for less than a decade, has already heard several hundred cases; and the European Court of Justice, which hears disputes between European Union members, has heard thousands of cases in its half-century existence.

Most disturbing for supporters of the court of justice is that it has been doing worse as it has aged. It hears cases at about the same rate today as it did 50 years ago, even though the number of countries in the world has tripled during that time; this means that the annual number of cases per nation has declined by two thirds even as global interaction has soared. Increasingly, major states avoid the court. In the last 30 years, the countries with the ten largest economies have brought only two contentious cases to The Hague.

Many major nations - China, Japan and Russia - have never been a party to an International Court of Justice case. Others, including France, Britain and America, have lost whatever enthusiasm for the court that they once had. In the court's first 20 years, these three states brought more than a dozen cases; in the last 20 years, they have brought only one.

A principal reason for the decline of the court is that many countries have restricted its jurisdiction over them. The main way that the court obtains power is by having states submit to "compulsory jurisdiction" - that is, file declarations in which they consent to be sued by any other state that has filed a similar declaration. The founders of the court of justice hoped that

eventually all nations would submit to compulsory jurisdiction.

But since the court's early years, the fraction of the world's nations subject to compulsory jurisdiction has declined from two-thirds to one-third. And many countries that technically remain subject to compulsory jurisdiction have used various tricks to ensure that it can be used against them only in the narrowest circumstances. For example, India excludes matters within its "domestic jurisdiction" and concerning its territorial boundaries. Further, the biggest powers have mostly opted out: at one time all permanent members of the Security Council other than the Soviet Union consented to compulsory jurisdiction, but China, France and the United States withdrew in the 1970's and 1980's, leaving only Great Britain.

The other main avenue for the court of justice to obtain jurisdiction is on a treaty-by-treaty basis. During its first two decades, nearly 200 treaties were forged in which the signers conferred jurisdiction of disputes to the court. Over the last 20 years, only about a dozen new treaties included International Court of Justice oversight.

Why have countries abandoned the court? The most plausible answer is that they do not trust the judges to rule impartially, but expect them to vote the interests of the states of which they are citizens. Statistics bear out this conjecture. When their home countries are parties to litigation, judges vote in favor of them about 90 percent of the time. When their states are not parties, judges tend to vote for states that are more like their home states. Judges from wealthy states tend to vote in favor of wealthy states, and judges from poor states tend to vote in favor of poor states. In addition, judges from democracies appear to favor democracies; judges from authoritarian states appear to favor authoritarian states. This is not to say that the judges pay no attention to the law. But there is no question that politics matter.

History bears out this argument. From the beginning of the cold war, the Soviet Union and its satellites refused to subject themselves to the jurisdiction of a court they felt was dominated by representatives of hostile countries. However, with decolonization, the composition of the International Court of Justice changed, and many more judges came from newly independent states that were unhappy with the Western-dominated international legal system. The watershed moment came when the court found the United States had violated international law by mining Nicaraguan harbors in 1984. America, which had long been the court's champion, rejected the judgment and withdrew from compulsory jurisdiction.

Today, many of those with faith in international adjudication have switched their allegiance from the International Court of Justice and the fledgling International Criminal Court, which was established by treaty in 1998 and has yet to begin operating. But the criminal court has all the defects of its older sibling. Its independent prosecutor and judges have every incentive to take account of the political interests of the states of which they are nationals. With its broad mandate to enforce ambiguous laws in a world that is overflowing with war criminals, the criminal court's prosecutor and judges have enormous discretion to pick defendants for maximum political effect.

The countries with the most to lose from politicized enforcement of international law have refused to submit to the International Criminal Court's jurisdiction, but they still must fear that their citizens, if indicted, will be arrested while traveling. In a sped-up version of the court of

justice's history, the United States has already expended considerable diplomatic effort to persuade parties to the criminal court not to hand over any Americans who are indicted. Thus even before it has had its first case, the International Criminal Court is losing its ability to exercise its jurisdiction.

It needn't have been this way. America could have been a supporter of the criminal court, if only the court's founders had agreed to make prosecutions turn on Security Council authorization, which would have given the major powers vetoes over prosecutions. Without such assurances of immunity, America will be reluctant to turn over war criminals to the court because doing so would legitimate an institution that Washington sees as hostile to its interests.

At one time people hoped that the criminal court would render unnecessary the cumbersome, ad hoc war-crimes tribunals like the one that has been trying Slobodan Milosevic. This hope has been shattered. It is hard to imagine a renegotiation of the International Criminal Court's treaty in the near future, but if the body fails to accomplish anything of value over the next several years, perhaps the issue of major power immunity will be revisited. Successful international organizations either adapt to great power politics or they wither on the vine; it is a choice that the supporters of global justice will soon face.

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