this House to reject the motion, which is ill-founded both as a matter of logic but also as a matter of customary international law.

Remarks by Tai-Heng Cheng*

doi:10.1017/amp.2017.45

In the first place, the motion cannot get off the ground because there is no objective way to tell what jurisdictional decisions are "expansive." In every contested jurisdictional proceeding, the respondent, at that phase of the case, will regard the court's decision as overly expansive if the court seizes jurisdiction. Whereas the claimant will not.

The motion does not give us an objective yardstick by which to measure whether an interpretation is expansive or not. Does it mean expansive compared to strictly textual interpretations, ignoring the VCLT's instruction to also consider object and purpose? Does it mean expansive compared to other prior judicial decisions, which the ICJ statute instructs are only secondary means of interpretation?

This concern draws from critical legal studies scholarship, pointing to the inherent ambiguity of international legal rules and thus of decisions interpreting those rules. If we cannot tell what jurisdictional interpretations are overexpansive, it is impossible to inquire whether such interpretations have an impact on the authority and effectiveness of international law.

Second, the motion should also fail because it fails to consider that restrictive interpretations of jurisdiction risk undermining the legitimacy and effectiveness of international law as much as expansive interpretations. As the New Haven school points out, the scholar undertaking an appraisal of an international problem is the ultimate instrument of inquiry. She must frame the inquiry appropriately to capture and weigh the competing considerations. Here, the true object of inquiry is how judges should decide contested jurisdictional proceedings. But as the motion only considers the risks of overly expansive interpretations of jurisdiction, and ignores the consequences of restrictive interpretations.

There is a third and equally dispositive reason. Even when a Respondent state regards a court's interpretation of jurisdiction as expansive, there is inconclusive evidence that it will generally reject the authority of the court. Louis Llamazon's study of the ICJ's practice in 2008 found that "the mode by which the ICJ is seized with jurisdiction appears to be a rather poor predictor of subsequent compliance."

The conclusions of Mr. Llamazon's study make sense. Whether or not a state complies with a merits decision turns on what the court decided on the merits as much as whether the state thought the court should have been seized with the merits in the first place. Thus, looking at compliance with merits decisions is not the most direct test for determining whether expansive interpretations of jurisdiction risk undermining the legitimacy and the effectiveness of international law.

The more appropriate inquiry is whether a respondent state continues to participate in ICJ proceedings after losing at the jurisdictional phase. Here we find a long track record from 1946 to the present of a Respondent state accepting their loss on jurisdiction. *Corfu Channel*, the territorial and maritime dispute between Nicaragua and Columbia, and the boundary and maritime dispute between Cameroon and Nigeria are all examples.

And lest there be any doubt as to the long-term impact on international law's legitimacy, states that have lost on jurisdiction have also continued to participate in future judicial proceedings in

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https://doi.org/10.1017/amp.2017.45 Published online by Cambridge University Press

other disputes both as Respondents and as Claimants. The United States lost in *Nicaragua*, but continued to participate in *LaGrand*, *Avena*, and *Breard*.

There is one glaring exception to this trend, concededly, and this was a point made by my colleagues across the aisle. States, like humans, are equal in rights but unequal in power. The three superpowers of the world, unlike other states, have all walked out of international court proceedings where they have objected to jurisdictional decisions. The United States refused to participate in the *Nicaragua* case, in which Judge Schwebel offered a dissent, that perhaps is today more influential than the majority decision. China walked out of the *South China Sea* case, and refused to participate at all. And in the *Arctic Sunrise* arbitration, Russia refused to participate after it objected to jurisdiction.

This is unsurprising. In every legal system, actors decide whether or not to comply with the law and weigh the costs and benefits of noncompliance. Roman Polanski opted to be a fugitive from U. S. law for decades rather than face up to his crimes for which the punishment was grave. Unlike many other sex offenders, he had the resources and the means to live elsewhere. Corporations subject to U.S. jurisdiction, but whose assets are beyond the reach of U.S. courts, can and do choose to ignore U.S. judgments against them.

We recognize the reality of this limitation of law, but we don't condone it, nor do we regard U.S. courts as less effective or legitimate when they nonetheless exercise jurisdiction over defendants for their crimes.

It is the same in international law. The states with the greatest power have the resources to incur the diplomatic and other costs of ignoring judicial decisions, and may perhaps choose to do so in certain cases. The problem is perhaps more acute in international law than domestic law, because the international legal system lacks a centralized global authority and power to enforce its legal decisions. As a result, the costs of noncompliance are lower and more easily incurred.

Like domestic law, we recognize the limits of international law, but we don't condone it. Nor should states or other actors regard the international legal system as less effective or legitimate when international courts exercise jurisdiction over states, provided the jurisdictional decisions are based on law. This is the essence of realistic idealism I explored in my book, *When International Law Works*.

In sum, the motion fails because there is no such thing as an expansive interpretation of jurisdiction in the abstract, the motion does not account for risks of overly narrow interpretations of jurisdiction, and there is no evidence that expansive jurisdictional decisions have in fact damaged the legitimacy and effectiveness of international law.

Observations by Members of the Tribunal

Remarks by Ina Popova*

doi:10.1017/amp.2017.46

The debate has prompted three reflections:

(1) The first relates to the distinction between enforceability, strictly speaking, and compliance. On a formal level, a questionable decision on jurisdiction is not any less enforceable than a questionable decision on the merits. Accordingly, should we not be looking at the record of voluntary compliance by states with decisions they find questionable, and the

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https://doi.org/10.1017/amp.2017.45 Published online by Cambridge University Press