SHOULD THE WORLD COURT RESOLVE THE MANILA HOSTAGE CASE?

By Amy Lai

Nearly a year has passed since a Manila tour bus was taken hostage by an angry former policeman, leading to the deaths of eight Hong Kong tourists and injuries to nine others. Tensions resulting from that horrible event still cloud The Philippines’ relations with Hong Kong and China because so many questions remain unanswered; these include the guilt or innocence of Rolando Mendoza (the ex-cop who reasoned that seizing a tour bus somehow would help him regain his old job), the controversial conduct the Philippine police during the hostage situation, and whether and how the victims should be compensated.

Some people advocate taking the dispute to the International Court of Justice, also known as the World Court, which they consider the proper forum for resolution. This essay examines the hostage seizure from an international law viewpoint, a case that has deeply affected many Hong Kong citizens and been the focus of great media attention. It also seeks to explain, assuming that the ICJ could assume jurisdiction, why the court would have difficulty finding meaningful standards for adjudication. As a result, it concludes that the best policy for China and Hong Kong may be to make a direct claim to The Philippines via diplomatic channels, bypassing international adjudication.

The International Court of Justice has been the principal judicial organ of the United Nations since 1946. It fulfills that role by hearing international disputes which, if unresolved, might lead to breaches of the peace and, more often, deals with disputes that result from routine interactions among different nations. The Court’s founding statute gives it the power to render binding judgments in “contentious” cases initiated by one state against another.¹ Moreover, Article 96 of the UN Charter entitles the General Assembly and the Security Council to “request the International Court of Justice to give an advisory opinion on any legal question.”²

As with any court, the ICJ must have recognized jurisdiction over a dispute as a precondition for issuing a judgment, such as by consent of all parties concerned.
Such consent may be demonstrated in three ways: (1) by special agreement, or a formal document known as a compromis, in the context of a particular case; (2) by treaty, such as a multilateral agreement that specifies reference of disputes arising under it to the court; or (3) by advance consent to the so-called “compulsory” jurisdiction of the court on terms specified by the state concerned.³

Despite suggestions to the contrary, it is highly unlikely that the ICJ could hear this dispute, which concerns alleged negligence or recklessness by the police both in negotiating with the hostage-taker and in their eventual assault on the bus which caused seemingly avoidable deaths and injuries. For example, the ICJ does not have an agreement that gives it compulsory jurisdiction over China, although it does have one with the Philippines.⁴ It must be noted, though, that both China and the Philippines have signed the International Convention against the Taking of Hostages, which could provide an alternative if difficult avenue for referring the dispute to the ICJ.⁵ In addition, China and the Philippines could decide to submit the dispute by special agreement, although this would be highly unlikely given China’s sensitivity about anything that could impinge on its sovereignty.

That said, assume for discussion’s sake that the World Court could gain jurisdiction and then consider whether the case should be taken there or whether other methods of international dispute settlement should be used. Some alternatives are set forth in Article 33 of the UN Charter – negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement and resort to U.N. or other international dispute-settlement procedures.⁶ This list reflects a “spectrum or continuum of techniques” ranging from so-called “diplomatic means”, which give control of the outcome primarily to the parties themselves, to so-called “legal means”, which give control of the outcome primarily to a third party or parties.⁷

Third-Party Dispute Settlements versus Negotiations

The Philippine government should have been able to negotiate directly with Hong Kong on matters related to the hostage tragedy, but President Benigno Aquino’s conduct throughout the incident has pushed their relationship to an impasse and so far has prevented a productive outcome. He has shirked his responsibility by, first, defending the police actions and laying the blame on the media and, second, by later shifting blame to the mayor of Manila City and the Manila police chief, among others, rather than to his own bureaucrats. Unless the Philippine government now promises to investigate the questionable conduct of its negotiators and the police SWAT team it chose to use, it would be hard for Manila to regain the trust of Hong Kong, repair its own image or preserve the long-term cooperative
relationship between them. As a result, more complex and formal dispute settlement methods need to be considered, even if they would take more time and be less flexible.

The next step is to examine the pros and cons of formal ICJ adjudication and ask why this method appears preferable to other third-party settlement procedures such as mediation or arbitration. Adjudication, whether through the ICJ or other tribunals, is “impersonal” and allows concessions without any “loss of face.” In disputes where governments have, for various reasons, found it difficult to concede or even compromise when attempting negotiation or mediation, adjudication could be a politically useful way for settling problems without taking direct responsibility for any concessions. Among the types of disputes for which adjudication could be particularly useful are those involving difficult factual or technical questions in which the parties are prepared for compromise but cannot do so because of the situation’s complexity or other factors. In addition, the ICJ can be preferable to other tribunals because it wields great authority as the most senior and principal judicial organ of the UN.

The “impersonal”, “dispositive” and “authoritative” nature of settlement through the ICJ would seem to have great advantages in this case. President Aquino, when confronted with questions about the conduct of the negotiation team and the SWAT team, how the victims were killed and how a particular young boy was seriously injured, has been unresponsive and evasive. The Hong Kong and Chinese Governments, attempting to preserve their relationships with the Philippines, have vacillated between low-key diplomacy and expressions of anger and dissatisfaction. Therefore, adjudication by the ICJ could help both sides save face: The Philippines could avoid the embarrassment of having to admit to any additional wrongdoing by its officials, while the Hong Kong and Chinese governments could avoid the diplomatic risks of blaming Manila directly for obstruction. In addition, the ICJ might resolve arguments about the SWAT team’s assault, which involve complex technical issues concerning its poor equipment, how the victims were killed and whether the young boy was injured by the gunman’s bullets or by police sledgehammers.

**Re-examining the Impasse**

Adversarial adjudicatory processes remain very much the exception, not the norm, in international relations. First, adjudication can be openly judgmental by labeling one party a lawbreaker rather than providing for shared responsibility. Second, such a judgment could be detrimental to both nations by jeopardizing their ongoing
relationship. Third, the law may not be clear and could lead to an uncertain result. This is particularly true when disputes involve the application of customary international law, especially if there is uncertainty about the existence of binding legal obligations governing the dispute. To illustrate why China should not take this case to the Court and why it probably would not agree hear it—even assuming the ICJ could assume jurisdiction—it is necessary to study three factors relating to the incident.

First, the fact that intermediate, non-adjudicatory dispute-settlement approaches might be open is not a strong reason for China and the Philippines to avoid bringing the dispute to the ICJ. The bus hijacking was no secret; it drew worldwide attention. Mendoza aimed to publicize what he deemed actions of a corrupt government that unfairly took away his job and benefits, and the local media seemed to help his case by describing questionable conduct by several Philippine government officials. Because these alleged misdeeds were aired, the Manila government should be willing to deal with them openly and let a third party determine if it was as culpable as claimed by many people in Hong Kong and mainland China. Further evasion would reflect badly on the Manila government and seem to confirm suspicions that it is incompetent and corrupt.

Second, rather than jeopardize relations between Hong Kong and China and The Philippines, adjudication might well improve them by breaking a chain of human rights abuses. The tragedy was arguably fueled by the Philippine government’s refusal to provide Mendoza a fair hearing, regardless of whether he and his colleagues did in fact commit the alleged crimes which cost him his job in the first place. This denial subsequently led to his abuse of the rights of the bus passengers and to the police force’s alleged inhumane treatment of them as it attempted to capture Mendoza. Taking the dispute to the ICJ could end the Hong Kong public’s current animosity toward Filipino citizens. Hence, adjudicating the dispute should not damage this relationship further but, on the contrary, could produce a “win-win” solution.

Filipino Maids Get the Blame

Likewise, formal adjudication could minimize a Hong Kong public anger that sometimes has been directed against the many Filipino domestic workers in Hong Kong—who had nothing to do with the case. Not long after the tragedy, unions representing Filipino maids announced they had received reports of angry employers firing their domestic helpers in retaliation against the Philippine government. One union spokesperson expressed the wish that the Hong Kong
administration would explain to local people that the tragedy was not the maids’ fault,\textsuperscript{16} though a more effective method of neutralizing these hard feelings could be a public apology from Manila. Ending this misdirected anger seems especially urgent because the forced repatriation turn of newly-fired Filipino domestic workers would create an additional economic burden there and perhaps aggravate human rights problems. Violence against women has long been a Philippine issue\textsuperscript{17} and forcing unemployed Filipinas to return home might even lead to more trafficking of women, perhaps pushing some into prostitution. By investigating the questionable conduct of Filipino negotiators and the SWAT team, and by rendering a decision that properly compensates victims and their families, adjudication by the ICJ could produce a decision helpful to all concerned. At present, for example, Hong Kong has The Philippines on its travel blacklist, causing that country a loss of tourism revenue.\textsuperscript{18} In view of such damaging consequences, and the possibility of breaking this chain of causation, taking the dispute to the ICJ for third-party resolution would seem both reasonable and imperative.

Although the first two factors seem to weigh in favor of doing so, the law’s uncertainty—or, to be more precise, the lack of detailed, robust international legal norms—is a strong factor weighing against trying to use the ICJ. Apparently, if the court has compulsory jurisdiction over a case, the dispute can be adjudicated on the basis of human rights norms specified in the Universal Declaration of Human Rights. Drafters of the UN Charter declared its purpose to be not only maintaining peace and security, but also promoting respect for human rights and fundamental freedoms.\textsuperscript{19} On December 10, 1948, the General Assembly adopted and proclaimed the Universal Declaration of Human Rights (Declaration) urging every member state to strive “by progressive measures, national and international, to secure their universal and effective recognition and observance.”\textsuperscript{20} Article 3 of the declaration states that “everyone has the right to life, liberty and security of person,” while Article 5 states that “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”\textsuperscript{21} The Philippine government’s handling of the crisis raises questions about whether Articles 3 and 5 were violated because, as several experts have noted, poor negotiation skills and the poorly-equipped SWAT team subjected the hostages to unnecessary trauma which led to the eight deaths.

**Negligence is Not Enough**

Nevertheless, the declaration’s standards are not robust and detailed enough to allow the ICJ to adjudicate the dispute. The Philippine government’s actions might be construed as ordinary negligence or gross negligence, but not necessarily as
human rights violations. Although negligence and human rights violations are by no means mutually exclusive, the lack of detailed international legal standards likely would pose tremendous difficulties for the court. It must rely upon detailed and undisputed facts, and therefore would need to conduct a fact-finding inquiry of its own to determine whether Manila did deny hostages their “right to life, liberty and security of person,” and whether the police subjected them to “torture or to cruel, inhuman or degrading treatment or punishment.” Rather than an accepted resolution, such an inquiry might produce only greater uncertainty and further disputes.

Alternatively, the International Convention against the Taking of Hostages, to which both China and the Philippines are signatories, could let China to take the dispute to the ICJ if it wished. Article 16, paragraph 1, to which China has reserved, states that if the parties have failed to settle on the interpretation or application of the convention by negotiation, then one party can ask that the case be submitted to arbitration; if they are unable to agree on how to organize arbitration within six months, either party may then refer the dispute to the ICJ in conformity with the Statute of the Court. A key article which would then apply is Article 3, which states that the government of the territory where a hostage is held “shall take all measures it considers appropriate to ease the situation of the hostage, in particular, to secure his release and, after his release, to facilitate, when relevant, his departure.”

While the Philippine police made the right decision when they attempted to negotiate with Mendoza, they acted inappropriately by arresting his brother, whom they first used as a negotiator and later suspected of being his accomplice. To be sure, the Philippine government did nothing wrong by refusing to yield to Mendoza’s demands. Scholars and negotiation specialists argue that rather than yield to terrorist demands in order to free hostages, a government should instead safeguard its fundamental obligation to retain public faith and avoid creating incentives for additional hostage-taking in the future. For example, if Manila had offered Mendoza money as the price of freeing the hostages but then reneged once they were safe, the public might well have lost faith in the government; if it did pay the money, then its actions could lead to more hostage-taking.

**Appealing Options Are Needed**

Nevertheless, a government must seek options that it considers politically acceptable and which a terrorist would find more appealing than the use of force. The Aquino administration failed to do so when Mendoza rejected its promise that
his case would be reviewed. Nevertheless, the fatal act was not the government’s failure to settle with Mendoza, but its failure to establish what scholars describe as a “true working relationship with him,” one that is “forward-looking and problem-solving” and not condemnatory.”25 Handcuffing Mendoza’s brother as a suspected accomplice might seem reasonable in normal circumstances. However, the police should have known that handcuffing the brother and forcing him into a car would be shown on the television set on the bus. Mendoza was watching the TV coverage, and this action appeared to openly condemn his conduct. Based on the government’s official report, this action was the turning point that led Mendoza, who until then had seemed calm and understanding, to open fire on his victims.

The convention provides another possibility that could let China take the dispute to the ICJ. The Philippine government seemingly violated Article 3 by failing to take “all measures it considers appropriate” to secure release of the hostages. The Philippine government itself accused the Manila chief of police of failing to use a better equipped (and available) police commando unit to storm the bus and rescue the victims. Moreover, the government has not explained its reasons for arresting Mendoza’s brother, the move that triggered the shooting. This suggests it did not agree with Hong Kong and China on a definition of “appropriate measures”, further indicating it does not agree with them on the interpretation and application of Article 3 in this case. Therefore, Beijing could act under Article 16 and request that the case be submitted to arbitration; if an agreement about arbitration procedures is not reached within six months, China could then refer the case to the ICJ. This method might seem workable but is quite indirect and, as in the alleged violations of human rights, would not necessarily provide the ICJ with clear guidelines for resolving the dispute.

Many commentators continue to show support for survivors of the hostage tragedy, but it remains to be seen how the case will be resolved. In the end, it appears that—despite the instinctive appeal of using the International Court of Justice—it might be more effective if the Chinese and Hong Kong governments pursue their claims via diplomatic channels and avoid legally complex international tribunals.

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Ibid.
6 THE UN CHARTER, Art. 33.
8 Ibid, 486, 489.
9 Ibid, 489.
10 Ibid, 492.
11 Ibid, 492-93.
12 Ibid.
13 Ibid.
14 Ibid.
17 See, e.g., Meredith Ralston & Edna Keeble, RELUCTANT BEDFELLOWS: FEMINISM, ACTIVISM AND PROSTITUTION IN THE PHILIPPINES 89, 94-95 (Kumarian P. 2009).
19 The UN Charter, preamble.
20 The Universal Declaration of Human Rights, preamble.
21 Ibid, Arts. 3 & 5.
23 Ibid, Art. 3.