

UN Organs and the Extent of Separation of their Powers

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Abstract

The international legal system, as presently constituted, has no real organs of positive constitutionalism. There exists no legislature which expressly generates instruments of general law. Of course, it has been argued that the UN Security Council (UNSC), and the General Assembly (UNGA) more broadly, could and potentially do serve just such a purpose.¹ Yet the resolutions of the UNGA are not generally regarded as legislation. At the highest, they may be said to evidence customary international law.² UNSC resolutions approximate legislation the most closely, not the least in light of Article 25 of the Charter of the UN conveying some sense of obligation, “The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.”

Yet UNSC resolutions obtain in situations of crisis, rather than as ordinances of general application.³ Moreover, they too are open to interpretation as simply evidence of customary international law. Nor, secondly—as is transparently clear—is there anything remotely resembling an executive branch as such. Third, there is the absence of a unified judicial branch. This however is less telling and problematic. In the first place, international law has always relied on the courts of national systems as its judicial arm.⁴ In the second place, prize courts (of long-standing practice), the ICJ.⁵

Obviously, peace is the emblem aim for the existence of United Nations System. For this avowed aim, it has made elaborate institutional arrangements. The principal organs of the UN are working on their fairly specialized spheres of functional duties. To checkmate abuse of power one tempts to employ principle of separation of powers in the constitutional scheme of an institution. Theoretically, such principle finds place in UN organs. But, practically, UN Security Council takes lion's share of powers. Too much concentration of power lies with the Great Powers. Despite all this concentration, there is a unique system of separation of powers when we notice that every permanent member of UNSC has a separate veto power. In this sense, we can say that separation of power has been applied in an unconventional style to the system of UN.

KEYWORDS: League of Nations, United Nations, Organs of the united nations, human rights, ICJ, cooperation, coercion, security, peace, legal order, separation of powers, ombudsman, supremacy and primacy of UNSC.

INTRODUCTION

The Aims of the United Nations:⁶

To keep peace throughout the world.

To develop friendly relations between nations.

To work together to help people live better lives, to eliminate poverty, disease and illiteracy in the world, to stop environmental destruction and to encourage respect for each other's rights and freedoms.

To be a centre for helping nations achieve these aims.

The Principles of the United Nations:⁶

All Member States have sovereign equality.

All Member States must obey the Charter.

Countries must try to settle their differences by peaceful means.

Countries must avoid using force or threatening to use force.

The UN may not interfere in the domestic affairs of any country.

Countries should try to assist the United Nations.

The United Nations Charter creates an international organization having six principal organs: a General Assembly, a Security Council, an Economic and Social Council, a Trusteeship Council, an International Court of Justice, and a Secretariat. Its stated principles are: "sovereign equality" of all "peace-loving States," bound to "fulfill ... the obligations assumed by them," to "settle their international disputes by peaceful means," and to "refrain... from the threat or use of force." Theoretically, it is established by "we the peoples," and seeks "international cooperation," respect for "human rights," and "fundamental freedoms."⁷

The United Nations (UN) has six principal organs:

1. the General Assembly : the main deliberative assembly
2. the Security Council : for deciding certain resolutions for peace and security
3. the Economic and Social Council (ECOSOC) : for promoting international economic and social co-operation and development
4. the Secretariat : for providing studies, information, and facilities needed by the UN
5. the International Court of Justice : the primary judicial organ , and
6. the United Nations Trusteeship Council (inactive since 1994)

Further, UN System agencies include the World Bank Group, the World Health Organization, the World Food Programme, UNESCO, and UNICEF. The UN's most prominent officer is the Secretary-General, an office held by South Korean Ban Ki-moon since 2007. Non-governmental organizations may be granted consultative status with ECOSOC and other agencies to participate in the UN's work.

Objective of the Research Work

To examine the bases for distribution of powers and functions of the principal organs of the UN. Whether there is any structural design respecting the principle of separation of powers to avert potential misuse of authority. Whether there are other equally potent safeguards to take care of temptation for riding roughshod over the peaceful world order. Whether the UN system and methods are effective to attain the objectives for which it was devised.

Hence, the present paper attempts to examine the effective and academic distribution of functions amongst the organs of UN while having regard for the principle of separation of powers.

Research Methodology

The research methodology adopted for the present study is doctrinal in nature. Sources of information are essentially secondary. The researcher has placed heavy reliance upon library sources, reports, journals, web journals, articles from newspapers and magazines and legal databases. Methods of analysis are critical and comparative.

The United Nations General Assembly⁸

It is one of the six principal organs of the United Nations and the only one in which all member nations have equal representation. Its powers are to oversee the budget of the United Nations, appoint the non-permanent members to the Security Council, receive reports from other parts of the United Nations and make recommendations in the form of General Assembly Resolutions. It has also established a wide number of subsidiary organs.

The General Assembly meets under its president or Secretary-General in regular yearly sessions the main part of which lasts from September to December and resumed part from January until all issues are addressed (which often is just before the next session's start). It can also reconvene for special and emergency special sessions. Its composition, functions, powers, voting, and procedures are set out in Chapter IV of the United Nations Charter.

Voting in the General Assembly on important questions – recommendations on peace and security; election of members to organs; admission, suspension, and expulsion of members; budgetary matters – is by a two-thirds majority of those present and voting. Other questions are decided by majority vote. Each member country has one vote.

Apart from approval of budgetary matters, including adoption of a scale of assessment, Assembly resolutions are not binding on the members. The Assembly may make recommendations on any matters within the scope of the UN, except matters of peace and security under Security Council consideration. **The one state, one vote power structure theoretically allows states comprising just five percent of the world population to pass a resolution by a two-thirds vote.**

During the 1980s, the Assembly became a forum for the North-South dialogue – the discussion of issues between industrialized nations and developing countries. These issues came to the fore because of the phenomenal growth and changing makeup of the UN membership. In 1945, the UN had 51 members. It now has 193, of which more than two-thirds are developing countries. **Because of their numbers, developing countries are often able to determine the agenda of the Assembly (using coordinating groups like the G77), the character of its debates, and the nature of its decisions.** For many developing countries, the UN is the source of much of their diplomatic influence and the principal outlet for their foreign relations initiatives.

Although the resolutions passed by the General Assembly do not have the binding forces over the member nations (apart from budgetary measures), pursuant to its Uniting for Peace resolution of November 1950 (resolution 377 (V)), the **Assembly may also take action if the Security Council fails to act, owing to the negative vote of a permanent member, in a case where there appears to be a threat to the peace, breach of the peace or act of aggression.** The Assembly can consider the matter immediately with a view to making recommendations to Members for collective measures to maintain or restore international peace and security.

The United Nations Security Council⁹

It is charged with the maintenance of international peace and security. Its powers include the establishment of peacekeeping operations, the establishment of international sanctions, and the authorization of military action through Security Council resolutions; **it is the only UN body with the authority to issue binding resolutions to member states.**

Like the UN as a whole, the Security Council was created following World War II to address the failings of another international organization, the League of Nations, in

maintaining world peace. In its early decades, the body was largely paralyzed by the Cold War division between the US and USSR and their allies, though it authorized interventions in the Korean War and the Congo Crisis and peacekeeping missions in the Suez Crisis, Cyprus, and West New Guinea. With the collapse of the Soviet Union, UN peacekeeping efforts increased dramatically in scale, and the Security Council authorized major military and peacekeeping missions in Kuwait, Namibia, Cambodia, Bosnia, Rwanda, Somalia, Sudan, and the Democratic Republic of Congo with varying degrees of success.

The Security Council consists of fifteen members. The great powers that were the victors of World War II—China, France, Russia, the UK, and the US—serve as the body's five permanent members. These permanent members can veto any substantive Security Council resolution, including those on the admission of new member states or candidates for Secretary-General. The Security Council also has 10 non-permanent members, elected on a regional basis to serve two-year terms. The body's presidency rotates monthly between its members.

Security Council resolutions are typically enforced by UN peacekeepers, military forces voluntarily provided by member states and funded independently of the main UN budget. As of 2013, 116,837 peacekeeping soldiers and other personnel are deployed on 15 missions around the world. Evaluations of the Security Council's effectiveness are mixed, and calls for its reform pre-date the body's first meeting; however, little consensus exists on how its structure should be changed.

Role

The UN's role in international collective security is defined by the UN Charter, which authorizes the Security Council to investigate any situation threatening international peace; recommend procedures for peaceful resolution of a dispute; call upon other member nations to completely or partially interrupt economic relations as well as sea, air, postal, and radio communications, or to sever diplomatic relations; and enforce its decisions militarily, or by any means necessary. The Security Council also recommends the new Secretary-General to the General Assembly and recommends new states for admission as member states of the United Nations. The Security Council has traditionally interpreted its mandate as covering only military security, though US Ambassador Richard Holbrooke controversially persuaded the body to pass a resolution on HIV/AIDS in Africa in 2000.

Under Chapter VI of the Charter, "Pacific Settlement of Disputes", the Security Council "may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute". The Council may "recommend appropriate procedures or methods of adjustment" if it determines that the situation might endanger international peace and security. These recommendations are generally considered to not be binding, as they lack an enforcement mechanism. A minority of scholars, such as Stephen Zunes, have argued that resolutions made under Chapter VI are "still directives by the Security Council and differ only in that they do not have the same stringent enforcement options, such as the use of military force".

Under Chapter VII, the Council has broader power to decide what measures are to be taken in situations involving "threats to the peace, breaches of the peace, or acts of aggression". In such situations, the Council is not limited to recommendations but may take action, including the use of armed force "to maintain or restore international peace and security". This was the legal basis for UN armed action in Korea in 1950 during the Korean War and the use of coalition forces in Iraq and Kuwait in 1991 and Libya in 2011. Decisions taken under Chapter VII, such as economic sanctions, are

binding on UN members; **the Security Council is the only UN body with the authority to issue binding resolutions.**

The Rome Statute of the International Criminal Court recognizes that the Security Council has authority to refer cases to the Court in which the Court could not otherwise exercise jurisdiction. The Council exercised this power for the first time in March 2005, when it referred to the Court “the situation prevailing in Darfur since 1 July 2002”; since Sudan is not a party to the Rome Statute, the Court could not otherwise have exercised jurisdiction. The Security Council made its second such referral in February 2011 when it asked the ICC to investigate the Libyan government's violent response to the Libyan civil war.

Security Council Resolution 1674, adopted on 28 April 2006, "reaffirms the provisions of paragraphs 138 and 139 of the 2005 World Summit Outcome Document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity". The Security Council reaffirmed this responsibility to protect in Resolution 1706 on 31 August of that year. These resolutions commit the Security Council to take action to protect civilians in an armed conflict, including taking action against genocide, war crimes, ethnic cleansing, and crimes against humanity.

The United Nations Economic and Social Council¹⁰

It is responsible for coordinating the economic, social and related work of 14 UN specialized agencies, their functional commissions and five regional commissions. ECOSOC has 54 members; it holds one four-week session each year in July. Since 1998, it has also held a meeting each April with finance ministers heading key committees of the World Bank and the International Monetary Fund (IMF). The ECOSOC serves as the central forum for discussing international economic and social issues, and for formulating policy recommendations addressed to member states and the United Nations system. A number of non-governmental organizations are granted Consultative Status to the Council in order to participate in the work of the United Nations.

Specialized agencies

These specialized agencies are autonomous organizations working with the United Nations and each other inter alia through the coordinating machinery of the Economic and Social Council.

International Labour Organization (ILO)

Food and Agriculture Organization (FAO)

United Nations Educational, Scientific and Cultural Organization (UNESCO)

World Health Organization (WHO)

World Bank Group

International Bank for Reconstruction and Development (IBRD)

International Development Association (IDA)

International Finance Corporation (IFC)

Multilateral Investment Guarantee Agency (MIGA)

International Centre for Settlement of Investment Disputes (ICSID)

International Monetary Fund (IMF)

International Civil Aviation Organization (ICAO)

International Maritime Organization (IMO)

International Telecommunication Union (ITU)

Universal Postal Union (UPU)

World Meteorological Organization (WMO)

World Intellectual Property Organization (WIPO)
International Fund for Agricultural Development (IFAD)
United Nations Children's Fund (UNICEF)
United Nations High Commissioner for Refugees (UNHCR)
United Nations Industrial Development Organization (UNIDO)
United Nations Development Programme (UNDP)
United Nations Office of Project Services (UNOPS)
International Narcotics Control Board (INCB)

The United Nations Secretariat¹¹

The Secretariat is composed of a Secretary General, assisted by a staff of international civil servants worldwide. The Secretary General is appointed by the General Assembly upon the recommendation of the Security Council. It services the other principal organs of the United Nations and administers the programs and policies laid down by them. The Secretariat carries out myriad duties ranging from the administration of peacekeeping operations to making surveys/studies about different countries' economic and social trends.

Offices

Executive Office of the Secretary-General (EOSG)
United Nations Office of Internal Oversight Services (OIOS)
United Nations Office of Legal Affairs (OLA)
United Nations Office for Disarmament Affairs (ODA)
United Nations Office for the Coordination of Humanitarian Affairs (OCHA)
United Nations Office of the United Nations High Commissioner for Human Rights (OHCHR)
United Nations High Commissioner for Refugees (UNHCR)
United Nations Office on Drugs and Crime (ODC)
United Nations Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States (OHRLLS)

The activities of the Secretariat are performed by a staff of 44,000 civil servants from around the world under the leadership of the Secretary-General. Eligibility for civil service is based on a UN-administered examination offered worldwide, in addition to a competitive application process. Qualifications for membership include "the highest standards of efficiency, competence, and integrity", according to the UN Charter. Staff-members are appointed by the Secretary-General alone and are assigned to the organs of the United Nations. Staff members are appointed on a temporary or permanent basis, under the discretion of the Secretary-General. During staff recruitment, geographical variety is an especially prominent selection factor in order to accurately reflect the scope of member states present in the UN.

While the Secretariat seeks to represent UN membership fairly through diverse geographical representation, staff members are foremost international officials. The charter states that staff members are responsible "only to the organization" and are prohibited from any action or influence that would suggest affiliation with a government or organization outside the UN.

Headquartered in New York, the Secretariat functions through duty stations in Addis Ababa, Bangkok, Beirut, Geneva, Nairobi, Santiago and Vienna, in addition to offices all over the world.

Though ambiguous in description, the **UN states that its daily activities are most often carried about the secretariat**. But its functions are difficult to define. The UN Charter is not specific about the Secretariat's powers. However it is clear that the Secretariat and the Secretary-General are vital parts to the UN. It is in charge of notifications and the arrangement of the meetings of the secretary-general. The Secretariat is also in charge of publishing all of the treaties and international agreements that the UN makes. The role of the Secretariat varies with the agenda of the UN. Sometimes it is required to act as a mediator and other times it is set to administer different peacekeeping operations. This body also has the important job of relating what the UN has accomplished to the different media outlets around the world. Often this can be done through the organizations of international conferences. Another notable job of the Secretariat is their duty of translating speeches and documents into the UN's official languages. The secretariat is also in charge of approving the salary and allowance for the general service as well as providing advice to different UN agencies. Due to these powers, all the members of the UN are supposed to be impartial. According to the UN, its **secretariat "services the other principal organs of the United Nations and administers the programmes and policies laid down by them", and "The duties carried out by the Secretariat are as varied as the problems dealt with by the United Nations."**

The International Court of Justice¹²

It is commonly referred to as the World Court or ICJ and is the primary judicial branch of the United Nations. It is based in the Peace Palace in The Hague, Netherlands. Its main functions are **to settle legal disputes submitted to it by states and to provide advisory opinions on legal questions submitted to it by duly authorized international branches, agencies, and the UN General Assembly**.

Activities

Established in 1945 by the UN Charter, the Court began work in 1946 as the successor to the Permanent Court of International Justice. The Statute of the International Court of Justice, similar to that of its predecessor, is the main constitutional document constituting and regulating the Court.

The Court's workload covers a wide range of judicial activity. To date, the ICJ has dealt with relatively few cases. However, since the 1980s there has been a clear increase in willingness to use the Court, especially among developing countries. After the court ruled that the U.S.'s covert war against Nicaragua was in violation of international law (*Nicaragua v. United States*), the United States withdrew from compulsory jurisdiction in 1986. The United States accepts the court's jurisdiction only on a case-by-case basis. Chapter XIV of the **United Nations Charter authorizes the UN Security Council to enforce World Court rulings. However, such enforcement is subject to the veto power of the five permanent members of the Council**, which the United States used in the Nicaragua case.

As stated in Article 93 of the UN Charter, **all 193 UN members are automatically parties to the Court's statute**. Non-UN members may also become parties to the Court's statute under the Article 93(2) procedure. For example, before becoming a UN member state, Switzerland used this procedure in 1948 to become a party, and Nauru became a party in 1988. Once a state is a party to the Court's statute, it is entitled to participate in cases before the Court. However, being a party to the statute does not automatically give the Court jurisdiction over disputes involving those parties. The

issue of jurisdiction is considered in the two types of ICJ cases: contentious issues and advisory opinions.

Contentious issues

In contentious cases (adversarial proceedings seeking to settle a dispute), the ICJ produces a binding ruling between states that agree to submit to the ruling of the court. Only states may be parties in contentious cases. Individuals, corporations, parts of a federal state, NGOs, UN organs and self-determination groups are excluded from direct participation in cases, although the Court may receive information from public international organizations. This does not preclude non-state interests from being the subject of proceedings if one state brings the case against another. For example, a state may, in case of "diplomatic protection", bring a case on behalf of one of its nationals or corporations.

Jurisdiction is often a crucial question for the Court in contentious cases. The key principle is that the ICJ has jurisdiction only on the basis of consent.

Four Bases

First, 36(1) provides that parties may refer cases to the Court (jurisdiction founded on "special agreement" or "compromise"). This method is based on explicit consent rather than true compulsory jurisdiction. It is, perhaps, the most effective basis for the Court's jurisdiction because the parties concerned have a desire for the dispute to be resolved by the Court and are thus more likely to comply with the Court's judgment.

Second, 36(1) also gives the Court jurisdiction over "matters specifically provided for ... in treaties and conventions in force". Most modern treaties will contain a compromissory clause, providing for dispute resolution by the ICJ. Cases founded on compromissory clauses have not been as effective as cases founded on special agreement, since a state may have no interest in having the matter examined by the Court and may refuse to comply with a judgment. For example, during the Iran hostage crisis, Iran refused to participate in a case brought by the US based on a compromissory clause contained in the Vienna Convention on Diplomatic Relations, nor did it comply with the judgment. Since the 1970s, the use of such clauses has declined. **Many modern treaties set out their own dispute resolution regime, often based on forms of arbitration.**

Third, Article 36(2) allows states to make optional clause declarations accepting the Court's jurisdiction. The label "compulsory" sometimes placed on Article 36(2) jurisdiction is misleading since declarations by states are voluntary. Furthermore, many declarations contain reservations, such as exclusion from jurisdiction certain types of disputes ("ratione materia"). The principle of reciprocity may further limit jurisdiction. As of February 2011, sixty-six states had a declaration in force. Of the permanent Security Council members, only the United Kingdom has a declaration. In the Court's early years, most declarations were made by industrialized countries. Since the Nicaragua Case, declarations made by developing countries have increased, reflecting a growing confidence in the Court since the 1980s. Industrialized countries however have sometimes increased exclusions or removed their declarations in recent years. Examples include the United States, as mentioned previously and Australia who modified their declaration in 2002 to exclude disputes on maritime boundaries (most likely to prevent an impending challenge from East Timor who gained their independence two months later).

Finally, 36(5) provides for jurisdiction on the basis of declarations made under the Permanent Court of International Justice's statute. Article 37 of the Statute similarly

transfers jurisdiction under any com-promissory clause in a treaty that gave jurisdiction to the PCIJ.

In addition, the Court may have jurisdiction on the basis of tacit consent (forum prorogatum). In the absence of clear jurisdiction under Article 36, jurisdiction will be established if the respondent accepts ICJ jurisdiction explicitly or simply pleads on the merits. The notion arose in the Corfu Channel Case (UK v Albania) (1949) in which the Court held that a letter from Albania stating that it submitted to the jurisdiction of the ICJ was sufficient to grant the court jurisdiction.

Advisory opinion

An advisory opinion is a function of the Court open only to specified United Nations bodies and agencies. On receiving a request, the Court decides which States and organizations might provide useful information and gives them an opportunity to present written or oral statements. Advisory Opinions were intended as a means by which UN agencies could seek the Court's help in deciding complex legal issues that might fall under their respective mandates.

In principle, the Court's advisory opinions are only consultative in character but are influential and widely respected. Whilst certain instruments or regulations can provide in advance that the advisory opinion shall be specifically binding on particular agencies or states, they are inherently non-binding under the Statute of the Court. This non-binding character does not mean that advisory opinions are without legal effect, because the legal reasoning embodied in them reflects the Court's authoritative views on important issues of international law and, in arriving at them, the Court follows essentially the same rules and procedures that govern its binding judgments delivered in contentious cases submitted to it by sovereign states.

An advisory opinion derives its status and authority from the fact that it is the official pronouncement of the principal judicial organ of the United Nations.

Advisory Opinions have often been controversial because the questions asked are controversial or the case was pursued as an indirect way of bringing what is really a contentious case before the Court. Examples of advisory opinions can be found in the section advisory opinions in the List of International Court of Justice cases article. One such well-known advisory opinion is the Nuclear Weapons Case.

ICJ and the Security Council

Article 94 establishes the duty of all UN members to comply with decisions of the Court involving them. If parties do not comply, the issue may be taken before the Security Council for enforcement action. There are obvious problems with such a method of enforcement. If the judgment is against one of the permanent five members of the Security Council or its allies, any resolution on enforcement would then be vetoed. This occurred, for example, after the Nicaragua case, when Nicaragua brought the issue of the U.S.'s non-compliance with the Court's decision before the Security Council. Furthermore, **if the Security Council refuses to enforce a judgment against any other state, there is no method of forcing the state to comply. Furthermore, the most effective form to take action for the Security Council, coercive action under Chapter VII of the United Nations Charter, can be justified only if international peace and security are at stake.** The Security Council has never done this so far.

The relationship between the ICJ and the Security Council, and the separation of their powers:

This issue was considered by the Court in 1992 in the Pan Am case. The Court had to consider an application from Libya for the order of provisional measures to protect its rights, which, it alleged, were being infringed by the threat of economic sanctions by the United Kingdom and United States. The problem was that these sanctions had been authorized by the Security Council, which resulted in a potential conflict between the Chapter VII functions of the Security Council and the judicial function of the Court. The Court decided, by eleven votes to five, that it could not order the requested provisional measures because the rights claimed by Libya, even if legitimate under the Montreal Convention, *prima facie* could not be regarded as appropriate since the action was ordered by the Security Council. In accordance with Article 103 of the UN Charter, **obligations under the Charter took precedence over other treaty obligations**. Nevertheless the Court declared the application admissible in 1998. A decision on the merits has not been given since the parties (United Kingdom, United States and Libya) settled the case out of court in 2003.

There was a marked reluctance on the part of a majority of the Court to become involved in a dispute in such a way as to bring it potentially into conflict with the Council. The Court stated in the Nicaragua case that there is no necessary inconsistency between action by the Security Council and adjudication by the ICJ. However, **where there is room for conflict, the balance appears to be in favor of the Security Council**.

Should either party fail "to perform the obligations incumbent upon it under a judgment rendered by the Court", the Security Council may be called upon to "make recommendations or decide upon measures" if the Security Council deems such actions necessary. **In practice, the Court's powers have been limited by the unwillingness of the losing party to abide by the Court's ruling, and by the Security Council's unwillingness to impose consequences. However, in theory, "so far as the parties to the case are concerned, a judgment of the Court is binding, final and without appeal," and "by signing the Charter, a State Member of the United Nations undertakes to comply with any decision of the International Court of Justice in a case to which it is a party."**

For example, the United States had previously accepted the Court's compulsory jurisdiction upon its creation in 1946, but in Nicaragua v. United States withdrew its acceptance following the Court's judgment in 1984 that called on the US to "cease and to refrain" from the "unlawful use of force" against the government of Nicaragua. The Court ruled (with only the American judge dissenting) that the United States was "in breach of its obligation under the Treaty of Friendship with Nicaragua not to use force against Nicaragua" and ordered the United States to pay war reparations.

Examples of contentious cases

A complaint by the United States in 1980 that Iran was detaining American diplomats in Tehran in violation of international law.

A dispute between Tunisia and Libya over the delimitation of the continental shelf between them.

A dispute over the course of the maritime boundary dividing the U.S. and Canada in the Gulf of Maine area.

A complaint by the Federal Republic of Yugoslavia against the member states of the North Atlantic Treaty Organization regarding their actions in the Kosovo War. This was denied on 15 December 2004 due to lack of jurisdiction, because the FRY was not a party to the ICJ statute at the time it made the application.

A complaint by the Republic of Macedonia (former Yugoslav Republic of Macedonia) that Greece is, by vetoing their accession to NATO, in violation of the Interim Accord of 13 September 1995 between the two countries, was decided in favor of Macedonia on 5 December 2011.

Criticisms

The International Court has been criticized with respect to its rulings, its procedures, and its authority. As with United Nations criticisms as a whole, many of these criticisms refer more to the general authority assigned to the body by member states through its charter than to specific problems with the composition of judges or their rulings. Major criticisms include:

"Compulsory" jurisdiction is limited to cases where both parties have agreed to submit to its decision, and, as such, instances of aggression tend to be automatically escalated to and adjudicated by the Security Council. According to the sovereignty principle of international law, no nation is superior nor inferior against another. Therefore there is no entity that could force the states into practice of the law or punish the states in case any violation of international law occurs. Therefore, due to the absence of binding force, although there are 193 member states of the ICJ, the members do not necessarily have to accept the jurisdiction. Moreover, the membership of the UN and ICJ does not give the automatic jurisdiction over the member states, but it is the consent of each state to follow the jurisdiction that matters.

Organizations, private enterprises, and individuals cannot have their cases taken to the International Court, such as to appeal a national supreme court's ruling. U.N. agencies likewise cannot bring up a case except in advisory opinions (a process initiated by the court and non-binding). Only the states can bring the cases and become the defendants of the cases. This also means that the potential victims of crimes against humanity, such as minor ethnic groups or indigenous peoples, may not have appropriate backing by a state.

Other existing international thematic courts, such as the ICC, are not under the umbrella of the International Court. Unlike ICJ, international thematic courts like ICC work independently from United Nations. Such dualistic structure between various international courts sometimes makes it hard for the courts to engage in effective and collective jurisdiction.

The International Court does not enjoy a full separation of powers, with permanent members of the Security Council being able to veto enforcement of even cases to which they consented in advance to be bound. **Because the jurisdiction does not have binding force itself, in many cases the instances of aggression are adjudicated by Security Council by adopting a resolution, etc.** Therefore, it is very likely for the permanent member states of Security Council to avoid the responsibility brought up by International Court of Justice, as shown in the example of Nicaragua v. United States.

The United Nations Trusteeship Council¹³

It was established to help ensure that trust territories were administered in the best interests of their inhabitants and of international peace and security. The trust territories—most of them former mandates of the League of Nations or territories taken from nations defeated at the end of World War II—have all now attained self-government or independence, either as separate nations or by joining neighbouring

independent countries. The last was Palau, formerly part of the Trust Territory of the Pacific Islands, which became a member state of the United Nations in December 1994.

Separation of Powers¹⁴

It is a division of the legislative, executive, and judicial functions of government among separate and independent bodies. Such a separation, it has been argued, limits the possibility of arbitrary excesses by government, since the sanction of all three branches is required for the making, executing, and administering of laws.

Modern constitutional systems show a great variety of arrangements of the legislative, executive, and judicial processes, and the doctrine has consequently lost much of its rigidity and dogmatic purity. In the 20th century, and especially since World War II, governmental involvement in numerous aspects of social and economic life has resulted in an enlargement of the scope of executive power. Some who fear the consequences of this for individual liberty have favoured establishing means of appeal against executive and administrative decisions (for example, through an ombudsman), rather than attempting to reassert the doctrine of the separation of powers.

The Judicial Function¹⁵

International law and international organization are required to fulfill three salient functions: judicial, executive, and legislative. These correspond to the three methods of approaching the interpersonal relationships which constitute society: (a) assisting or carrying out accepted rules (executive), (b) changing or creating new interrelations (legislative), (c) adjudging or interpreting existing ones (judicial). The lawyer is properly most interested in judicial instrumentalities. He knows that in the history of society the judicial office preceded all others; that parliament was originally a court; that "natural legal evolution tends first toward an international judiciary, and not toward international government or legislation" that "**law is woven into the habit of society** as its warp and woof, while political governments are relatively superficial."

Instrumentalities with Compulsory Jurisdiction for Conciliation, Arbitration, and Adjudication

Although until 1921 no international court existed, national tribunals followed regular judicial procedure and decided cases under international law, yet the need for international adjudicatory forum always existed. Since 1922 the Permanent Court of International Justice has considered sixty disputes, given thirty-two judgments, twenty-seven advisory opinions, and two hundred orders. Its decisions have been applauded by the Bar and accepted by the nations. Fifty-nine countries, out of approximately seventy-five in the society of nations, adhered to the protocol setting up the Court and fifty-six, either under the "optional clause," or by multipartite and bipartite agreements, conferred compulsory jurisdiction. More than five hundred treaties have related to the Court.

Though neither universal nor mandatory jurisdiction under the old Permanent Court existed; but most of the basic judicial and quasi-judicial machinery needed was available, and sufficiently great strides have been made to demonstrate that the time has come to make international jurisdiction compulsory and universal.

All primitive legal orders, including international law, are primarily static ;and revolution at the internal level and war on the international plane have been a means of effectuating change. If this use of war is to be eliminated, a way of revising existing rules must be found. No legal order is stable until it provides, *by peaceful*

means within the order, not only the security demanded by the static tendencies but also the change required by dynamic forces. Although the power of revision or "peaceful change" belongs primarily to legislative instrumentalities, no judicial agency is wholly without it. The very process of judicial interpretation, the definition of "justice," and the development of equity show the judge as law "changer" as well as law "applier." "The life of the law has not been logic: it has been experience." "The best and most rational portion of English law is in the main judge made law."

Many proposals for separate international equity tribunals have been made.

"Most jurists are opposed to this idea," and the tendency intra-nationally is to amalgamate law and equity.

Jurisdiction to Give Advisory Opinions and Declaratory Judgments

Although in a mature legal order with a considerable constitutional legacy from the past it may be desirable to free the judges from political pressures by relieving them from granting advisory opinions, in the early stages of a legal system advisory opinions are often necessary. The method has been found serviceable in international law. Articles 65-68 of the Permanent Court of International Justice Statute expressly authorize the practice, and the Court has successfully employed it in twenty-seven cases. Most lawyers recommend its continuance.

The proposal for declaratory judgments is more novel, but equally logical. In municipal courts this procedure has allayed strife and settled rights before the controversy became bitter with each disputant defending his claim as a matter of "principle." It is a remedy functionally fitted to international law wherein it is essential that claims be settled before they become matters of "national honor." Particularly is this true, since the history of conciliation and arbitration shows that states will carry out their obligations once these have been determined.

Jurisdiction Over, and in Favor of, Individuals

A state or nation apart from the individuals who compose it is meaningless. Its acts are the acts of individuals. It may insulate the "official" individual from the consequences of his acts by drawing the curtains of "national entity" and "sovereignty." Whole nations may be held responsible for a wrong and punished by war. Yet the fact remains that it is the acts of individuals which produce the results, which constitute the wrongs; and it is men, not states, who die in battle.

We are much closer to a functional international judiciary than we were in 1919. The time is ripe to take the next step-to give international courts compulsory, universal jurisdiction of all disputes with power to equitably decide cases in accordance with their social context.

The question may have to be faced, whether a citizen of one nation may sue another nation. It may even prove desirable to bring a portion of private international law (conflicts of laws) under international court jurisdiction.

In addition to this attention to rights of peoples, the Charter seems to be a major improvement over the League and even the original Dumbarton Oaks proposals, and to fairly closely parallel the normative forces and desired plan outlined above in several particulars. In spite of the organizational superstructure, the United Nations Organization also emphasizes "function." The "powers" of the Assembly are extremely limited .but its "functions" are almost infinite. It may discuss "the general principles of cooperation" and "any questions relating to the maintenance of

international peace and security." It "shall initiate studies and make recommendations" for "promoting international cooperation development of international law and its codification," "promoting international cooperation in the economic, social, cultural, educational, and health fields," and to accomplish these purposes the Economic and Social Council is made one of the six coordinate branches. The former specialized functioning international agencies, like International Labor Organization, Telecommunication -Union, United Nations Relief and Rehabilitation Administration, are to be brought into relationship with the United Nations Organization and new commissions are authorized. The United Nations Organization is required to promote these cooperative functions' and "all members pledge themselves to take joint and separate action" to these ends.

Not only does the organization seek to create cooperative conditions to prevent frictions from arising, but the Charter gives attention to frictions at a much earlier stage than did the League. Chapter I uses the words "disputes or situations which might lead to a breach of the peace" (similar to the League language). Later articles take cognizance of situations "likely to endanger international peace and security," "likely to impair the general welfare or friendly relations among nations," "which might lead to international friction or give rise to dispute," or "any dispute."

Reasonably adequate provision is made for the judicial function. Parties to disputes are first to "seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, . . . other peaceful means of their own choice," or "other tribunals.". All members "are *ipso facto* parties to the Statute of the International Court of Justice and "undertake to comply with [its] decision."

The Court is empowered "to give advisory opinion on any legal question" and "to decide a case *ex aequo et bono*, if the parties agree thereto." "Although jurisdiction is not compulsory, unless the parties agree in advance to make it so, and although it extends only to "legal" disputes, the power to interpret the Charter and any international laws in the light thereof is recognized. The Court's procedure is simple and adequate and takes a long forward step in employing expert advisory commissions. The sources of international law include only-the "classical" listing yet it is interesting to see the extent to which the Nuremberg trials are functionally setting aside such "classical" concepts as sovereign immunity and protection of subordinates acting pursuant to command. The judges are chosen so as to represent "the main forms of civilization and of the principal legal systems of the world," and they decide cases by a majority of those present.

Only in lack of universal compulsory jurisdiction, in limitation to "legal" disputes, in providing that "only states may be parties in cases before the Court," in restrictions upon advisory and equity jurisdiction, does the Court statute fail to come up to expectations. Even the machinery of the United Nations Organization is more realistic than that of the League. It is not "to intervene in matters which are essentially within the domestic jurisdiction of any state." An international trusteeship- a slight improvement on mandates-is created. The need to obtain special agreements from the member states for the use of their armed forces is recognized. The General Assembly acts in a limited group of cases by a two-thirds majority and in all other cases by a simple majority. It has control of the purse. The affirmative vote of seven members of the Security Council (including the five permanent members) assures council action.

The Secretary-General and Secretariat are formed into an effective administrative agency and recording of treaties and diplomatic immunity are arranged.

Overall assessment of the plan of UNO

1. The thrust of the plan is a reliance on **force** to be used against nations which remain "sovereign," as a means of guaranteeing peace. The opening sentence of Chapter I equates "security" to "peace." The provisions authorizing and effectuating the use of force bulk larger than any others. A new organization, the Military Staff Committee, composed of the chiefs of staff of Great Britain, Russia, China, France, and the United States appears and is expected to formulate plans for "regulation of armaments." Reliance for international "policing" is placed upon the armed forces of the separate nations, and particularly upon their air forces. There could be no less proper "policing" agency.
2. **The organization is controlled by the Great Powers. On the Security Council they are given five permanent seats, compared to ten non - permanent two-year seats shared by all other nations, none of which is eligible for immediate re-election. The Security Council has extensive, if not complete and controlling, powers in all legislative, executive and even judicial functions and its decisions are obligatory on all organization members. The General Assembly, the only body in which all member nations are represented, may "consider," "make studies," and "recommendations" on specified questions but "any such questions on which action is necessary should be referred to the Security Council."**
3. **There is no true legislative function.** The method of creating or changing international law, as it was in the League, is by **treaty**.
4. The Charter gives free hand to the victorious nations to make and maintain such settlements of the war as they see fit, whether in harmony with the Charter or not. If this contemplates that the treaties of peace, the settlements made, the punishments and reparations imposed, are not to be governed by the purposes and principles of the charter and are not to be revised under the Charter, then the **security system is largely a freezing of whatever justice or injustice is contained in such settlements.**
5. **The amending process is cumbered by the same insistence, seen elsewhere, by the Great Powers to permit no action without their unanimous consent.** Even the appearance of less than unanimous consent in the Security Council is largely negated by the ability of any of the five major powers to eliminate a question from discussion.

It is generally recognized that the League failed because, both within and without the League, the nations were placing more emphasis on "security" than on "cooperative functioning."

So also, in the United Nations Organization we have these two emphases:

1. Security against war, and
2. Cooperation to render resort to war unlikely.

The success of the United Nations Organization and International Law depends to a large extent on the paramountcy of cooperation instead of coercion.

Conclusion

Though the UNO and its subsidiary system is trying hard to harmonize the interrelations amongst the sovereign nations, yet it is also a hard fact that power remains concentrated in the nucleus of security council. This small nucleus is comprised of the great powers of US, GB, France, Russia and China. Nothing can happen under the aegis of UN if it appears unpalatable to any member of this centre of gravity of the UN system. Theoretically, proposals for new rules, treaties, laws, policies, actions can emerge from any organ but practically, final say on all material issues rests with UNSC. It combines all final functions and powers whether legislative, executive or judicial. It is the body supreme in the scheme of things of UN.

It seems today that the main limit on Security Council action is the Council itself. We generally agree with Wood's assertion that the Council has shown "self-restraint"¹⁶ as it has only acted to the extent necessary in responding to threats to international peace and security. However, while the SC may be kept in check by its own political safeguards and mechanisms, 'self-restraint' is far from an adequate legal safeguard. As the Council's powers continue to widen and have an ever-growing impact on domestic law, it is important to bear in mind where the outer limits of Security Council's lawmaking powers lie.

However, it must not be ignored that despite such much concentration, as against separation, of power in the Security Council the other organs leave their mark on the international relational environment by creating space and dynamics for diplomacy and developmental agenda.

Again, notwithstanding all this concentration, there is a unique system of separation of powers when we notice that every permanent member of UNSC has a separate veto power. In this sense, we can say that separation of power has been applied in an unconventional style to the system of UN.

All said and done, it can safely be concluded that principle of conventional separation of power is still a mirage in the milieu of UN system. UNSC looms large as ever.

What matters is not whether the international system has legislative, judicial or executive branches corresponding to those we have become accustomed to seek in a domestic society; what matters is whether international law is reflected in the policies of nations and in the relations between nations.... Most important, the question is not whether law is enforceable or even effectively enforced; rather, whether law is observed, whether it governs or influences behaviour, whether international behaviour reflects stability and order.¹⁸

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2. Shaw 2008, p. 114 (and works cited at n. 193); at p. 115 he refers to a suggestion found in *Paramilitary Activities in Nicaragua* ICJ Reps 1986 14. See also Brownlie 2008, p 15.
3. And Murphy 2010, p. 104ff suggests that they have not been effective.

4. As a leading proponent, Benvenisti 2008¹ and Benvenisti and Downs 2009; also Conforti 1993, p. 8 and Kumm 2003.
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