



Analysis of the International Horizontal Judicial System's Intervention in Sovereign Disputes: ratios without spine

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Abstract

This paper attempts to analyse the level of implementation and intervention of the International Horizontal Judicial System in sovereign disputes, mainly referring to the International Court of Justice as well as Permanent Court of Arbitration. The paper will analyse the binding and horizontal nature of the International Judicial System. With the help of three important international sovereign dispute cases, i.e. Nicaragua v. USA, Cambodia v. Thailand (Temple of Preah Vihear case) and the South China Sea Dispute, this paper will show how the judicial bodies in international law gives judgments and awards without any legal force or backing for its implementations making the judgments no more than strict guidelines. It will also try to bring out the importance of an enforceable International Judicial System in sovereign disputes and how the present system cannot fulfil this requirement.

Introduction

Sovereignty is an essential and inalienable legal and political property of any state. Although sovereignty stems from customary international law, it is best understood as a legally binding principle. According to B. L. Manelis, a Soviet scholar: 'Sovereignty should be considered as a social phenomenon, which is closely connected with the state, its role in international relations and the regularities of its development'¹ In international law, sovereignty means that the state has complete control over its own affairs within their own territory and has the right to stop any potential external control of their own territory. A sovereign state has the right against interference of any foreign power and control.

Territorial and maritime disputes are a common phenomenon in international law and one of the main arguments and points of contention to resolve this dispute, usually revolves around one question: who has the sovereign right over the disputed territory? The resolution of these disputes requires an international body to adjudicate, arbitrate and mediate between the states involved in the dispute in order to resolve the disagreement in a peaceful and secure manner. This is the function of the International Judicial System. It is a horizontal system of judiciary where every international body, court and tribunal are equal and there is no higher authority. This also means, no appeal is possible from the judgement of any court, tribunal or other international body. The International Justice System consists of several judicial bodies; however, this paper mainly focuses on the International Court of Justice² as well as the Permanent Court of Arbitration³. Both these international bodies' judgement and award are supposedly binding. This is where the question arises; are the judgments and awards given by the international horizontal judicial system truly enforceable and binding? This paper attempts to analyse and show how the decisions of the International Judicial System, though theoretically binding, have no practical implications, in other words 'ratios without spine', with special emphasis on sovereign disputes in international law.

¹ Manelis B.L. Problems of Sovereignty. Resume of Ph.D. Dissertation, Moscow, 1966, P. 9

² International Court of Justice was established in 1945 by the UN Charter

³ Permanent Court of Arbitration was established in 1899 authorized by the Hague Peace Conference and is located in The Hague, Netherlands.

Horizontal Character of the International Judicial System

The International Justice System is a horizontal justice system i.e. there is no higher power or right to appeal from any court. All judicial bodies are equal and there is no higher authority which can be called upon for any right to appeal or any grievance caused by the judgment of any international judicial body. The International Court of Justice can be approached directly without any question of exhausting other possibilities; this is due to the horizontal system of justice where every international judicial body is at the same level. This very phenomenon was brought out in *Nicaragua v. USA* where USA argued that Nicaragua did not exhaust all possibilities before approaching the ICJ and hence ICJ should not try the case. The ICJ explicitly stated that the International Judicial System is a horizontal system and any judicial body can be approached directly. However, this also means that there is no system of appeal in international law, as there is no higher power or higher authority.

Nicaragua Dispute

The Nicaragua Dispute⁴ was a dispute involving military and paramilitary activity in and against Nicaragua. This dispute involves USA and Nicaragua where the ICJ ruled in favour of Nicaragua. This case is the most vital example of how the jurisdiction of the most important international judicial system's court is merely theoretical and has no implications.

Facts: Nicaragua was under President's Rule with the government of President Somoza up till July, 1979 when the Presidential Rule in Nicaragua collapsed which is attributed to the armed opposition led by *Frente Sandinista de Liberación Nacional* (FSLN). After the installation of FSLN's government in Nicaragua, there was immediate opposition from the supporters and followers of the former Somoza Government as well as the ex-members of the National Guard of Nicaragua. *Fuerza Democrática Nicaragüense* (FDN), operated along the border with Honduras, and *Alianza Revolucionaria Democrática* (ARDE), operated along the border with Costa Rica were the two main groups that carried out the armed opposition in Nicaragua against the government of FSLN. The United States of America intervened in Nicaragua; they initially rallied their troops in support of the new FSLN government. This however took a turn when, as stated by the US, they found out that Nicaragua's new government was providing weapons and logistical support in El Salvador. After this, USA withdrew and permanently terminated any aid to Nicaragua in April 1981. Nicaragua then, accused the US strategically planning and undertaking activities that were to be carried out against Nicaragua in September, 1981. *Contras*⁵ was initially covertly supported by USA. However, in 1983 the new budgetary legislation that were enacted by the United States Congress made specific provision for funds that were to be used by United States intelligence agencies for supporting "directly or indirectly military or paramilitary operations in Nicaragua" among other actions taken by the United States showed USA's official acknowledgment to its support for Contras.

Arguments: Nicaragua, in its case in front of the International Court of Justice, made certain allegations against the United States of America:

1. USA not only devised and directed the strategy, tactics and attacks of contras, but was effectively in control of contras and provided financial support for them violating the principle of sovereignty.
2. USA breached customary international law obligations when it trained, financed, armed and equipped the contra forces in Nicaragua.
3. Mining and attacks on the ports of Nicaragua by the US, violating the international law and principle against using force
4. Attacks on the oil installations and naval base of Nicaragua by the US, violating the international law and principle against using force

⁴ The Republic of Nicaragua v. The United States of America (1986) ICJ 1

⁵ Contras was the term for the groups fighting against Nicaragua's new FSLN government.

5. Incursions into Nicaragua's territorial waters by the US, infringing upon the freedom of the high seas of Nicaragua and interrupting peaceful maritime commerce as well as violating the principle of sovereignty.
6. Aircrafts were flown over Nicaragua by the US to gather intelligence and information that could be supplied to contras, which is against the principle of sovereignty.
7. Threatening and intimidating the people of Nicaragua to further the objectives of contras, which is against the international law and principle against using force as well as violating the principle of sovereignty.

These allegations were said to be violate of the sovereignty of Nicaragua as well as the international legislation against use of force specified under Article 2 (4) of the United Nation's Charter. The principle against use of force is also a customary international law.

The United States took two main lines of defence against the allegations of Nicaragua:

1. Collective Self-Defence as an exception to use of force under Article 51 of the United Nation's Charter.

The United States of America argued that under Article 51 of the UN Charter, self-defence is an exception against the prohibition of use of force and collective self-defence is included in Article 51 of the UN Charter. They stated that the United States intervened in an act of collective self-defence for El Salvador and Costa Rica from armed attack of Nicaragua.

Held: For this particular question, there were no questions before the Court i.e. (1) Is collective self-defence covered under the exception of self-defence? and (2) Did USA have a right to act in collective self-defence.

- (1) The Court held that the use of force can be further classified as: (i) the "most grave forms of the use of force"⁶ (i.e. those that constitute an armed attack) and (ii) the "less grave form" (when the acts referred to involve a threat or use of force not amounting to an armed attack). It was held that in order to claim self-defence the State must be under armed attack⁷. In order to claim collective-self defence, the Court laid down certain criteria that must be fulfilled in order to exercise the right of collective or individual self-defence:⁸

(i) A State must have been the victim of an armed attack;

(ii) This State must declare itself as a victim of an armed attack;

(iii) In the case of collective self-defence – the victim State must request for assistance ("there is no rule permitting the exercise of collective self-defence in the absence of a request by the State which regards itself as the victim of an armed attack").

(iv) The State does not, under customary international law, have the same obligation as under Article 51 of the UN Charter to report to the Security Council that an armed attack happened – but "the absence of a report may be one of the factors indicating whether the State in question was itself convinced that it was acting in self-defence"

⁷ In the Nicaragua case, the ICJ defined the term armed attack as (1) action by regular armed forces across an international border; and (2) "the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to (inter alia) an actual armed attack conducted by regular forces, or its (the State's) substantial involvement therein"

⁸Ruwanthika Gunaratne and Public International Law: NICARAGUA VS UNITED STATES (SUMMARY) ON SELF DEFENCE AND USE OF FORCE, <https://ruwanthikagunaratne.wordpress.com>, 2008 – present

(2) It was found that neither El Salvador nor Costa Rica was under armed attack by Nicaragua, hence it was a complete violation of customary international law and international legislation by USA against Nicaragua to have:

- a. *trained, armed, equipped and financed the contra forces or encouraged, supported and aided the military and paramilitary activities against Nicaragua by contras*
- b. *when they directly attacked Nicaragua in 1983 – 1984*
- c. directed or authorized its aircrafts to fly over Nicaraguan territory and when it laid mines in the internal waters of Nicaragua and its territorial sea

2. Lack of jurisdiction of the International Court of Justice to decide the present case

Initially, Nicaragua approached ICJ to resolve the dispute between them and the United States. During the trial period of the case, USA expressed their refusal of ICJ's jurisdiction to try this case on the following grounds:

- (i) Nicaragua failed to bring the parties whose presence and participation was necessary before the court i.e. El Salvador and Costa Rica.

Held: According to Article 59 of the International Court of Justice Statute, states which may be affected by the decision of the ICJ are free to institute separate proceedings. Hence, this argument put forward by the US was rejected

- (ii) Nicaragua has approached to the wrong authority for the resolution of this dispute. The State went to ICJ when the United Nation's Security Council had the appropriate jurisdiction over this dispute. The UN Security Council has jurisdiction over matters

Held: As per Article 36(1) of the ICJ Statute: "The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force". By virtue of this provision, the ICJ has extensive jurisdiction over all matters pertaining to international law, disputes between States and armed conflict which has happened in the past. This contention of the US was rejected.

- (iii) The International Court of Justice is unable and technically incapable of adjudicating upon the matter as they are not aware of the integral material facts of the case.

Held: The ICJ stated that they are aware of the material facts of the case and capable of adjudicating upon the present matter in dispute.

- (iv) The United States of America alleged that as Nicaragua did not exhaust all its other possibilities before approaching the International Court of Justice, the case cannot be adjudicated upon in the ICJ

Held: The International Judicial System is a horizontal system where there is no higher authority and every judicial body is at the same level. Hence, there is no question of exhausting all possible remedies and the direct approach of Nicaragua to the ICJ was valid.

Held: ICJ held the United States of America responsible and liable for violating the customary international law of sovereignty and international law against use of force. Hence, USA is liable to pay the amount of compensation which shall be fixed by the court, to Nicaragua. The United States of America refused to comply with this judgement which was delivered in the absence of the United States as they rejected the jurisdiction of the ICJ. When USA refused to comply with the judgement given by the ICJ and there was no way to implement the same, Nicaragua went to the UN Security

Council⁹. Nicaragua was repeatedly rejected by the UN Security Council as USA was a permanent member of the UN Security Council.¹⁰ As an effort to put international pressure on the USA, Nicaragua went to the unenforceable, non-binding body of the United Nations i.e. the General Assembly. The international pressure caused by every member of the General Assembly, except El Salvador and Israel, voted in favour of Nicaragua. The USA then, though paying compensation to Nicaragua, stated that the money was not to comply with the order of the ICJ but was a donation to Nicaragua.

This case shows how a State went in contravention to the ICJ's judgement and questioned the ICJ's authority, however there were absolutely no repercussion or consequence of doing so. In fact, the binding international judicial body was unable to enforce its judgment but a unenforceable and non-binding body of the UN i.e. General Assembly was able to put enough pressure on the United States to make them pay Nicaragua.

South China Sea Dispute – Philippines v. China

Facts: The South China Seas dispute¹¹ involved several sovereign states, mainly The People's Republic of China¹², the Republic of China¹³, Nation of Brunei, Malaysia, Republic of Indonesia, Republic of the Philippines, the Abode of Peace and Socialist Republic of Vietnam for a maritime and island claim over the South China Sea. The dispute is regarding the sovereignty and territory over the ocean are as well as the Parces and the Spratly Islands¹⁴ USD 5 trillion worth of global trade is estimated to pass through the South China Sea and several non-claimant stated aim to ensure that the South China Sea remains international water. Claimant states are in dispute over the exploration and exploitation of the crude oil and natural gases that are potentially in various parts of the sea bed in the South China Sea (the sea is alleged to have 17. billion barrels of untapped oil and 190 trillion cubic feet of natural gases¹⁵). China survey's the republican era and mapped¹⁶ out 291 islands and reefs in the region.

The United States of America raised its contention that the South China Sea is international waters and its sovereignty should be determined in accordance with the United National Convention on Law of Seas where it specifies that any landmass that has been submerged by high tide or was previously submerged but have been raised above high tide by construction cannot have sovereign rights claimed by another country.

The PRC named the South China Sea as the 'second Persian Sea' and the state had a 20-year plan, where they aimed to spend approximately 30 billion USD to have an estimated production of 25 million metric tons of crude oil and natural gases per year by the China Offshore Exploration Corp (state owned). It was predicted to be at a depth of 2000 meters within five years of its commencement. However, in 1970 the Philippines started exploring area to the west of Palawan for oil in 1970 and in 1976 gas was discovered in that region following the drilling of a well but the PRC stopped the exploration of oil and gases.

⁹ The UN Security Council has 15 members, out of which 5 are permanent member i.e. China, France, Russia, United Kingdom and United States of America. For any judgement to pass by the UN Security Council, all permanent members must agree. A negative vote or 'veto' by a permanent member prevents the adoption of a proposal.

¹¹ PCA case number 2013-19

¹² Hereinafter referred to as PRC

¹³ Hereinafter referred to as ROC

¹⁴ The Pacels and the Spratys are two island chains claimed in whole or in part by several countries involved in the dispute. The territorial and sovereignty dispute also included several fully fledged islands, rocky outcrops, sandbanks, reefs and atolls.

¹⁵ Council on Foreign Relations: Territorial Disputes in the South China Sea, <http://www.cfr.org/global/global-conflict-tracker/p32137#!/conflict/territorial-disputes-in-the-south-china-sea> (last visited)

¹⁶ The Republic of Nicaragua v. The United States of America (1986) [ICJ 1](#)

A Philippines oil company discovered an oil field off Palwan on 27th March, 1984 which could potentially supply 15% of the annual oil consumption in Philippines. However, PRC maintained their sovereignty and territorial rights over the nine-dotted line¹⁷.

The main contention between China and Philippines are mainly Spratly Islands, Paracel Islands and Scarborough Shoal. There are also a couple hundred small islands in the South China Sea which is a part of the disputed territory. China claims right over most of this area by virtue of the nine-dotted line. China believed that the legacy of the nine-dotted line provided historical significance and support to their claim over the South China Sea.

However, in 1970s several countries including Philippines and Malaysia began staking their claim over the Spratly Islands as their own territory. Philippines went as far as to have a Presidential decree issued on 11 June 1978 by President Ferdinand Marcos (Presidential decree No. 1596), declaring the north-western part of the Spratly Islands as Philippine territory.

Claims:

1. China who claims the largest portion of territory - area defined by the "nine-dash line". This area stretches hundreds of miles south and east from its most southerly province of Hainan.
2. Vietnam - Vietnam says it has actively ruled over both the Paracels and the Spratlys since the 17th Century with documented proof and Vietnam vehemently denies the sovereignty claim of China over this area.
3. Philippines – invoking geographical proximity to Spratly, it claims Spratly Islands, Scarborough Shoal (approximately 100 miles from the Philippines and 500 miles from China.) and several other small islands.
4. Malaysia – claims a small number of islands in the Spratlys as well as the territory in the South China Sea that falls in its exclusive economic zone guaranteed by UNCLOS¹⁸.
5. Brunei claims the territory in the South China Sea that falls in its exclusive economic zone guaranteed by UNCLOS.

The Philippines desired to resolve the dispute with international arbitration in 2013. The State announced that it would be taking China to the arbitration tribunal established under UNCLOS to challenge their claim over the South China Sea. Finally in July, 2016 the Arbitral Tribunal constituted by the Permanent Court of Arbitration under Annex VII of the 1982 pronounced their ruling and stated that China's historical claim and rights over the South China Sea has absolutely no legal basis. China has refused to acknowledge this Award pronounced by the tribunal and has dismissed the decision. China continues to lay claim to the nine-dash line territory. Since 2013, Beijing has constructed three large air bases and four smaller islands on top of coral reefs in the South China Sea. Beijing has also started to place its military personnel and weapons systems on the air bases and islands. The total area reclaimed by China is far larger than the area that has been reclaimed by Vietnam, the Philippines and Malaysia.¹⁹ There continues a territorial and sovereignty struggle for the South China Sea.

¹⁷ The 'nine-dash line' stretches hundreds of kilometers south and east of its southerly Hainan Island, covering the strategic Paracel and Spratly island chains.

¹⁸ United Nations Convention on the Law of the Sea.

¹⁹ Aaron L. Connelly, Indonesia must lead for sake of its interests in South China Sea
<http://www.thejakartapost.com/academia/2017/04/05/indonesia-must-lead-for-sake-of-its-interests-in-south-china-sea.html>

Temple of Preah Vihear Case

Temple of Preah Vihear²⁰ is an extremely important and unique architectural masterpiece. It is located at the Thai-Cambodian border and became a source of never-ending dispute between Thailand and Cambodia.

Facts: In 1902, the border of Cambodia and Thailand remained unresolved. Both the States sought a clear division in the territorial boundary of the State. Hence, a boundary commission i.e. the first Franco-Siamese Mixed Commission was appointed under the Convention of 1904, to properly bifurcate the boundary of Cambodia and Thailand, which was decided on the basis of the water flow in 1904. In 1907 a second Franco-Siamese Mixed Commission, consisting of both French and Siamese officers, demarcated the shared border again and a Treaty was signed on 23rd March, 1907. Approximately four years later, a technical team made the map showing the new resolved boundary of the Government.

However, approximately 4-5 decades later, it was found that a mistake was made in the map. Temple of Preah Vihear, though given to Thailand by the commission, was shown to be a part of Cambodia in the map. During this time, Thailand had recognised Cambodia's sovereignty over the Temple of Preah Vihear through its actions which includes visits to the Temple as diplomats and ambassadors.

Thailand argued that the maps were not legally binding as they were not accepted by the first French-Siamese Mixed Commission (which was dissolved when maps were released) and also because Thailand had never officially accepted them. Thailand also argued that as it was given the Temple by the commission, officially the Temple comes in the territory of Thailand.

The Court, in its judgement in 1962, held that due to the past actions and behaviour of Thailand, accepting the sovereignty of Cambodia over Temple of Preah Vihear, Cambodia maintains sovereignty over Temple of Preah Vihear. The Court therefore, concluded in favour of Cambodia.

Thailand refused to accept this judgement and was angered by the judgment of the ICJ. Thailand began to fire shots at the border which was retaliated by Cambodia. When Preah Vihear was inscribed in the World Heritage list by the UNESCO²¹, which though initially supported by Thailand was strongly contested by them. The increased violence between Thai and Cambodian armies focused mainly on the territorial sovereignty of the area that surrounds the Temple. The Temple was not disputed but the surrounding area of the Temple was disputed.

In this situation and under these circumstances, Cambodia formally complained on February 2011 with a letter to the UN Security Council claiming violation of 1991 Paris Peace Agreement, the U.N charter, and the 1962 ruling of the ICJ. The UN called for a permanent ceasefire. The UN also expressed its full support to the Association of Southeast Asia Nations (ASEAN) to find a solution, however they were unable to mediate the conflict. Hence, Cambodia decided to file a request at the ICJ for the interpretation of its 1962 ruling.

The International Court of Justice confirmed Cambodia's sovereignty over the Temple of Preah Vihear and the territory in the vicinity of the Temple. Both Cambodia and Thailand agreed to respect the latest ICJ ruling and ordered their respective armed forces to remain calm.

This case is an example of how the ICJ's decision was both rejected and accepted. Initially, Thailand refused to accept the decision of the ICJ which cases armed conflict to arise between both countries, however later both countries agreed to abide by the interpretation of the 1962 judgement. However, this case puts the binding nature of the ICJ into question; can States agree and reject the

²⁰ Cambodia v. Thailand, Merits, Judgment, [1962] ICJ Rep 6

²¹ United Nations Educational, Scientific and Cultural Organization

decisions of ICJ when it suits them? This case shows precisely that; Thailand initially rejected the decision of ICJ. However, Thailand and Cambodia later agreed to abide by the decision of ICJ. If any party to a dispute has the option to agree or disagree with a decision, is that judicial body legally binding?

Binding Nature of the International Judicial System – Emphasis on the International Court of Justice

Article 94 of the United Nations Charter lays down that "each Member of the United Nations undertakes to comply with the decision of [the Court] in any case to which it is a party". This very article makes the decisions of the court legally binding. The limitations and binding nature of the decisions of the ICJ stems primarily from the willingness of the States to engage the court and comply with the decisions. There are several cases where the judgement of the ICJ has been adhered to like North Sea Continental Shelf case²², Island of Palmas case where the court interpreted the judgment of 1962, and several others. However, these are cases where the parties agreed to adhere to the ICJ's judgment. The term 'agreed to comply/adhere/apply' depicts an option, an option to agree or disagree and an option to follow the judgment or to reject it. Though there are cases where the States have agreed to follow the judgment of the Court, there are those cases where the State(s) reject the judgment. This rejection has not been followed by any repercussion or consequences of not complying with the judgment of the court. The prime example of this phenomenon is the Nicaragua case, where the binding judicial body was unable to force USA to comply with the judgment of the ICJ. However, the General Assembly was able to put enough international pressure forcing the US to pay Nicaragua, though they called it a donation and made it clear that they did not comply with the judgment of the ICJ.

Conclusion

The paper attempted to analyse the level of implementation and intervention of the International Horizontal Judicial System in sovereign disputes, mainly referring to the International Court of Justice as well as Permanent Court of Arbitration. The above cases show a variation of implementation and rejection of judgments and decisions of the International Court of Justice and the Permanent Arbitration Tribunal. The cases shown and the binding nature of the ICJ shows how implementation the International Judicial System's jurisdiction is merely theoretical and not practically applicable. Cases at the ICJ, Permanent Court of Arbitration and other international judicial bodies, which rules on disputes between states over international treaties, can last many years. Its rulings are binding, though the court has no enforcement powers and the States have been known to ignore its verdicts.

The term "legally-binding" means compulsory, enforceable, has legal effect and legal force. These terms should only be applied to a judgement or decision, where the parties can be forced to comply with the judgment. In international judicial system, there is no such legal force of the decision. As shown in the cases above, States can ignore and reject the decisions of the ICJ without any penalty and the ICJ has no means to enforce their own decisions.

This is where the International judiciary's decisions become rations without spines. They make decisions and pass judgement without any legal force to back up the same. A judiciary without

²² The Dispute in this case was for the bifurcation of the North Sea Continental Shelf between Denmark, Germany and the Netherlands. The Court in this case stated that to 'abate the effects of an incidental special feature i.e. Germany's concave coast from which an unjustifiable difference of treatment could result'. Germany was granted most of the additional shelf sought in negotiations and this case is viewed as an example of "equity praeter legem" (equity "beyond the law")—where a judge supplements the law with equitable rules required by the case and circumstances.

any means of enforcement is merely a forum of debate where the two parties come, put up their arguments and the judge sees whose argument makes the most sense and that party wins. The International Judiciary is the same, there is absolutely no implication of not following the orders passed by the ICJ, Permanent Court of Arbitration, ICC, etc. Nicaragua v. USA is the biggest, most important example of the failure of so-called 'binding' international judicial system where neither the ICJ nor the UN Security Council worked. In the end, international pressure that was brought with the help of the General Assembly, a non-binding and unenforceable body of the United Nations, was effective in making USA pay Nicaragua.

Sovereign disputes are among the most integral and serious issues of international law. The sovereignty of a territory has the potential and probability to cause never-ending violent and dangerous disputes which results in loss of life, armed attack and mass destruction. Sovereign disputes cannot have judgments which are not enforceable as it leaves the States to the mercy of one another and when there is a fight for sovereignty, State's rarely show any mercy.

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