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RESOLUTION OF INTERNATIONAL CONFLICTS

by

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RESOLUTION OF INTERNATIONAL CONFLICTS

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RESOLUTION OF INTERNATIONAL CONFLICTS

This year another area of international legal developments is added to our annual survey of international and comparative legal problems, namely, international dispute resolutions.

This task was to be divided equally among three contemporary publicists: David Caron, Stephen McCaffrey and myself. Owing to the intensity of the works in the field of international conflicts requiring immediate attention and timely resolution, one of the panelists, Professor McCaffrey is unavoidably detained in The Hague, performing his function as advocate and counsel on behalf of one of the Parties to a dispute before the International Court of Justice this very day. Thus, our collective task is now split two-ways between Professor Caron and myself, both currently serving as Commissioners of United Nations Compensation Commission (U.N.C.C.).

In the discharge of this function, I intend to pursue very much the same course as Professor Caron, namely, selecting certain aspects of the salient features of legal developments in the area of international dispute resolution. An endeavor will be made to present an overview of three dimensions of dispute resolution, viz., (i) inter-governmental disputes; (2) mixed governmental and private-sector disputes; and (3) transnational disputes of private nongovernmental character.

For most of us in our day-to-day law practice, it is the third category of international disputes between nationals and companies of different countries that has occupied our utmost attention. Nonetheless, a better appreciation of the overall legal developments in international dispute resolution could not be achieved without a thorough investigation of the inter-governmental dimension of dispute settlement which has recently branched off to englobe the settlement of disputes between States and nationals of other States.

An analytical approach is adopted which transcends the three dimensions of international conflict resolution. A number of significant developments in the field under observation which deserve our closest examination will cover the following aspects of dispute resolution.
I. ABSENCE OF COMPULSORY JURISDICTION

The consensual character of international conflicts resolution constitutes an outstanding characteristic of all methods of dispute resolution across national frontiers.

The International Court of Justice stands out as an unequal example of total absence of compulsory jurisdiction. While this year we congratulate the United States for having Judge Stephen Schwebel as President of the I.C.J., we cannot but echo the sentiment expressed by former President Mohamed Bedjaoui over a year ago lamenting the utter lack of competence on the part of the I.C.J. without the consent of the State Parties to the dispute. Consent could be given in writing in advance or on an ad hoc basis by a special agreement before or after the dispute has arisen. Without such consent, the Court is powerless and without jurisdiction to entertain any dispute between States unwilling to submit it for resolution by the Court.

Article 36(2) of the Statute of the I.C.J., or the so-called Optional Clause, which provides for acceptance by States of compulsory jurisdiction is purely optional, and the exercise of that option still depends on the volition of States. Other methods of submission to the jurisdiction through bilateral or multilateral conventions is also subject to the discretion of States. Submission by the Parties to the dispute remains absolutely voluntary. There is no court of law or of justice in the inter-governmental domain that can assume jurisdiction without the consent of the States. Adjudication or indeed any other form of dispute settlement can only be set in motion by the consent of the Parties to the dispute in all contentious cases.

The imperfection or deficiency of the highest judicial organ of the United Nations as described by its own President over one year ago in Lisbon remains virtually unaltered. The only encouraging sign that can be detected in the recent past is reflected in the positive phenomenon that the Court now has a number of disputes submitted to it for adjudication or settlement, if not indeed for advisory opinion.

This year, the Court is not idle with an empty docket but the order of the day seems to be "business as usual". While there is little or no increase but rather a general decline in the number of acceptance of compulsory jurisdiction under Article 36(2), the Court appears to have
inspired more confidence on the part of newly emerged nations of Africa and Asia without losing its attraction for developing nations in the Caribbean and the Central and South American regions.

For permanent members of the Security Council, however, there has been little sign of improvement in the record of acceptance of compulsory jurisdiction. Apart from the United Kingdom which has traditionally accepted the optional clause with some reservation, other big powers have been somewhat reluctant. France and the United States shared the same reluctance by making similar reservation regarding matters essentially within their domestic jurisdiction as determined respectively by France and the United States. Such reservation has been invoked by other parties to the disputes such as Norway in the Norwegian Loan Cases, or by the United States itself as in the Nicaragua Case. In both instances, the reservation appears to have been upheld by the Court which declined jurisdiction in the case against Norway and proceeded to exercise limited jurisdiction in the case against the United States, avoiding the application of any multilateral treaty obligation but applying rules of customary international law on non-use of force and other bilateral treaty obligations incumbent upon the United States. While on more than one occasion, France stayed out of the proceedings from the start as in the Nuclear Test Cases, the United States in the Nicaragua Case decided to withdraw from the proceedings, which ultimately the Parties have reached agreement to discontinue.

The People's Republic of China has shown encouraging sign of willingness to accept in limited spheres the compulsory jurisdiction of the Court. The Russian Federation has likewise challenged the United States to submit disputes regarding human rights to the Court, knowing that the challenge is not acceptable to the United States. While the United States is reluctant to accept the Russian challenge, it stands ever ready to cast many a first stone on China, Indonesia and Myanmar, having itself ratified for the first time the Civil and Political Rights Covenant of the United Nations.

States have different ways of showing their respect for the highest judicial instance. It will be recalled that the current President of the Court, a U.S. national serving as United States' agent in the Iran Hostages Case, was granted an indication of provisional measures within a very short time of its application in December 1979. But when it came to implementation of the provisional measures indicated by the Court for both Parties to refrain from measures that
would tend to deteriorate the already tense situation, the Court through Vice President Nagendra Singh could not help remark that the Rescue Party sent by the United States to Iran under the Carter Administration was disrespectful of the Court indication of provisional measures. The United States' return to the Court after the Nicaragua Case was much welcome since the case involving Elettronica Sicural S.p.A. (E.L.S.I.) (United States v. Italy, 1989, I.C.J. 15).

Whatever the disenchantment felt by the United States after the decision in the Nicaragua Case which has since been settled, the United States has the responsibility as a leading nation of the world to show its abiding respect for international justice.

II. WIDENING JURISDICTION OF INTERNATIONAL INSTANCES

In spite of the absence of compulsory jurisdiction on the global scale, the International Court of Justice has developed more acceptable procedures to inspire greater confidence of the Parties through Special Chamber of Judges acceptable to the Parties to the disputes as in the Gulf of Maine Case (United States v. Canada, 1984, I.C.J. 246). Special Chambers have been created for maritime delimitation and for environmental protection. In time other specialized chambers could be created to deal with other types of disputes such as human rights and trade. Although other world-wide mechanisms are available through GATT/WTO and the Human Rights Commission, Sub-Commission and Committees with varying power and functions.

Further use of the International Court of Justice has been in the advisory jurisdiction. Although hard cases may have made bad law in common law jurisdictions, the absence of the rule of law or the unsettled character of the law on a particular issue which is highly charged with political and military controversies may split the Court right down the middle. The Court when confronted with such a challenge will have to come up with ambivalent dicta that to laymen may sound "sloppy", although each proposition has been carefully worded and is capable of exactly opposite construction and interpretation with the result that no matter on which side of the split the President of the Court may find himself, the results on the whole will be invariably identical, as in the most recent advisory opinion on the legality or illegality of the use or threat of nuclear weapon.
It should not be forgotten that in its continuing evolution, the International Court of Justice has grown in its exercise of jurisdiction to act as a Court of Appeal to hear appeals or to review decisions of United Nations Administrative Tribunal, the function at times exercised by the Chairman of the Sixth (Legal) Committee of the General Assembly. Thus, an appeal could be made against the ruling or recommendation of the Council of ICAO regarding the right of over-flight passage of Pakistan Airlines over Indian territory could be entertained by the Court.

In this particular connection, it may be stated that advisory opinions of the Court are more binding that its decisions in contentious cases which are only binding as between the Parties (Article 59 of the Statute). The advisory opinion of the Court exercising its power of judicial review are absolutely binding upon the United Nations and the particular organ or specialized agencies thereof seeking its advisory opinions.

III. GROWING FACILITIES FOR IMPLEMENTATION OF DISPUTE SETTLEMENT

Taking note of the lamentation of United Nations Secretary General Boutros Boutros-Ghali over the inefficacy and helplessness of the World Organization to cope with countless major global crises, we should also place on record one affirmative element. Although in theory an international organization is only as strong as its members allow it to be, it is true that since the disintegration of the Soviet Union, the use of veto to paralyze the work of the Security Council has abated, albeit not altogether stopped. As a direct consequence, many decisions of the United Nations can be implemented with relative efficiency and rapidity, provided that there is sufficient fund to cover the expenses incurred in their implementation. Chapter VII of the Charter can be invoked and facilities made available to execute and enforce judicial decisions of the Court in a situation likely to endanger international peace and security.

Although the Court has refused to act in its capacity to review the legality or constitutionality of the decisions of another principal organ of the United Nations without its own request for advisory opinion, the Court has received encouraging support from the Security
Council in cases such as the territorial dispute between Chad and Libya (1994, I.C.J. 4). Thus, in the Lockerbie Case, the Court denied Libyan request for provisional measures to suspend operation of United Nations Security Council Resolution seeking extradition of terrorists in Libya. The matter remains sub judice the International Court of Justice on the merits of the dispute. (Libya v. United States, 1992, I.C.J. 114, Libya v. U.K., I.C.J. 3).

Today it can no longer be said that the Court is without means of enforcement. With the few exceptions such as the case of Albania's failing to satisfy the judgement debt in the Corfu Channel (merits-measure of damages) Case, other decisions have been favorably implemented. The most difficult and unlikely decision in the Temple Case was complied with by Thailand under protest to reaffirm its abiding faith in the United Nations system. The Iran Hostages Case was settled out of Court through the process of good offices and mediation by former President of the International Court of Justice and the creation of another alternative method of dispute resolution, the Iran-U.S. Claims Tribunal, established by the Algiers Accord, following non-execution of the judicial decision against Iran.

IV. JURISDICTION TO SET ASIDE INTERNATIONAL AWARDS

This is a new area that deserves careful consideration. While in principle the International Court of Justice is not a Court of International Appeal nor an appellate or review Court to hear and decide appeals from other international instances, Parties to the Statute of the Court can always submit their legal disputes for adjudication or settlement by it. Thus, Guinea-Bissau and Senegal jointly submitted their dispute regarding the existence or non-existence of an arbitral award on the maritime delimitation between the two coastal African States (Guinea-Bissau v. Senegal, 1991, I.C.J. 53, the Award of July 31, 1989).

An award of an arbitral tribunal, ad hoc or institutionalized, is in theory final and binding, not subject to review by any judicial authority, national or international. However, the Parties to the dispute could submit the question of existence or non-existence, or legality of the award for determination by the Court. In this instance, the Court found the award to be valid and binding and that Senegal was justified in seeking implementation of the arbitral award.
The possibility of annulment proceedings has been extensively debated in regard to arbitral awards in general. In two other dimensions, namely, international commercial arbitration and the mixed governmental and private-sector arbitration, there is a concern that there are too many grounds readily available for annulment proceedings or proceedings before national courts to set aside an international or foreign arbitral award, apart from the possibility of denial of execution for contravening or incompatibility with the mandatory rules of the State of the FORUM, or its distinctive public policies.

Thus, the latest English Arbitration Act of June 17, 1996, which entered into force on January 31, 1997, contains several features designed to limit the power of English Courts to intervene except to support and not to interfere with arbitration proceedings, international and to a lesser degree also domestic [35 I.L.M. 155 (1996)].

Even with new provisions clearly delimiting the role of the Courts and cutting back their power so as to encourage the London Arbitral Tribunal as an autonomous arbitration system not subject to English judicial interference. Nonetheless, the latest Arbitration Act of 1996 still leaves much to be desired to ensure the independence, autonomy and finality of arbitral proceedings. Section 67 still retains extensive power on the part of the Court with substantive jurisdiction to confirm, vary or set aside the award.

Section 68 permits a challenge against an award on ground of serious irregularity, including, inter alia,

(a) Failure to comply with Section 33 (general duty of tribunal);
(b) Excess of power other than exceeding substantive jurisdiction;
(c) Failure to conduct the proceedings in accordance with agreed procedures;
(d) Failure to deal with all issues put to it;
(e) Ultra petita;
(f) Uncertainty or ambiguity, etc.

Section 69 allows appeal on points of law and the Court is empowered to confirm, vary, remit to the tribunal or set aside the award in whole or in part.

Whatever the merits or demerits of the new English Arbitration Act, it appears radical with unusual genesis and the style uncharacteristic of English statutes. Its implementation may or may not yield the desired results. Only time could tell whether it really facilitates or further
complicates arbitral proceedings within the United Kingdom, where judicial supremacy appears to have been jealously maintained.

In another dimension, that of disputes between State and nationals of other States, as provided by the Washington Convention of 1965, ICSID annulment proceedings have abound in the past two decades, or more precisely from 1981 to 1992, especially the two second annulment proceedings in Klöckner v. Cameroon (Case No. ARB/81/2) and in AMCO v. Indonesia (Case No. ARB/81/1) and the annulment proceedings in MINE v. Republic of Guinea (Case No. ARB/84/4).

Article 52(1) of the ICSID Convention specifies five grounds upon which an ICSID award may be annulled by an ICSID ad hoc committee, namely,

(a) Improper constitution of the Tribunal;
(b) Manifest excess of power;
(c) Corruption on the part of a member of the Tribunal;
(d) A serious departure from a fundamental rule of procedure; and
(e) Failure to state the reasons on which the award is based.

In practice, only three grounds have been invoked, excess of power, including failure to apply the applicable law, failure to state reasons and departure from a fundamental rule of procedure, notably the need for both Parties to be given an opportunity to be heard and to present their respective case.

ICSID as an institution has strived to maintain an appropriate balance between the need for finality and certainty of the award to be binding on the Parties and the need to allow annulment proceedings where the proceedings contravene certain fundamental procedural norms, especially when the Parties are represented by counsel from a legal system which may liberally allow vexatious litigation and even malicious prosecution at the expense of finality.

Since 1992, the concern that ICSID proceedings, autonomous as they are, may be endlessly prolonged through a series of annulment proceedings appears to have been unwarranted. At any rate, the practice of instituting annulment proceedings appears to have subsided. Nevertheless, the alarming situation in the eighties has afforded sufficient warning to guard against abuse of the right to request annulment of an ICSID award.
V. SWIFTNESS IN DISPUTE RESOLUTION

Justice must not only be done but must also appear to be done in relative swiftness, lest justice delayed may amount to a denial of justice.

With this thought in mind, it will be observed that contemporary dispute resolution mechanisms have developed some types of expeditious proceedings to accelerate the process and achieve at least preliminary or provisional results to prevent further losses or detriment to one or both parties to the dispute, whether it be adjudication, arbitration, conciliation, mediation or enquiry. Speed is the essence of justice.

Before the International Court of Justice, provisional measures have frequently been indicated by the Court, with or without the request by a party.

All commercial arbitration proceedings must take into account the temporal element as their prime concern if not a measure of success. Thus, WTO has cut short and streamlined its procedures for settlement of international inter-governmental trade disputes, while the private sectors such as Chamber of Commerce, AAA and UNCITRAL rules and model laws have invariably competed to achieve results in better, shorter time.

Thus, the arbitral facilities in Hong Kong have set aside a special chamber with a standby arbitration panel to hear and settle disputes relating to the construction of Hong Kong second air port.

WIPO independently of TRIP has proposed Supplementary Emergency Relief Rules, stressing the need for interim relief in intellectual property disputes (see WIPO/ARB/AR/5). An emergency interim arbitral procedure has been adopted for WIPO Arbitration and Mediation Center, World Intellectual Property Organization (WIPO).

The UNCC has completed examination of claims in categories A., B. and C. and is now processing claims in categories D., E. and F. With over 2.5 million claims presented by or through Member States of the United Nations and other International Organizations, nearly one million claims have been disposed of within five years of its inception.
CONCLUSION

These then are but some of the cursory observations made in a survey from a global perspective of the current trends in international conflict resolution, which may warrant the conclusion that this Society, the American Society of International Law, during its pre-dawn days of the twilight of the nineteenth century has initiated a movement of peace, using arbitration as a means to avoid war and the use of force. It has taken approximately a hundred years since the first Hague Peace Conference of 1899 to achieve a near perfect conglomeration of mechanisms for international dispute settlement, the Society being ever supportive of efforts in this direction. Jurisdiction is never compulsory without the consent of the parties to the dispute. Adjudicative and arbitral procedures have grown more sophisticated while striving and continuing to maintain a better balanced position in the administration of the kind of international justice that is acceptable to the parties and likely to ensure an accelerated process of conflict resolution in the three dimensions of international disputes.

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