UNDERSTANDING THE EFFECTIVENESS OF INTERNATIONAL COURTS AND TRIBUNALS IN INTERNATIONAL DISPUTE SETTLEMENT

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ABSTRACT

International dispute settlement in an era of globalization and development is an area of international law which is always evolving. The mechanisms of international dispute settlement even though conceptually similar to domestic law has fundamental differences when it comes to its implementation. The International Court of Justice (ICJ) and Tribunals are the equivalent to Supreme and High Courts under domestic law which are considered to be tools for dispute settlement. The mechanism of International dispute settlement, unlike the domestic justice system is not centralized in nature which creates its own sets of challenges and hurdles. This paper seeks to analyze whether the International Courts and Tribunals are considered as effective tools for global governance and whether they have fulfilled their purpose and expectations? Various distinctions have been made between different tribunals and courts indicating the flaws in the existing mechanism. It also proposes certain mechanisms and suggestions which could have been adopted by the said court and tribunals ensuring efficacious settlement. The paper specifically looks into the workings of the ICJ and Permanent Court of Arbitration (PCA) drawing a comparison to reach its final conclusion.

Keywords: International dispute settlement, International Court of Justice, Permanent Court of Arbitration, international court, mechanism, effectiveness.

INTRODUCTION

"International Dispute" as stated by the Permanent Court of International Justice in Mavrommatis case[i] is "a disagreement on a point of point of law or fact, a conflict of legal views or of interests[ii]." And the term international settlement is used with reference to mechanisms to end disagreement at international level which do not involve the recourse to armed force.[iii] There is no single sets of rules and practices governing the international judicial process or dispute settlement, for there is no single such process. Instead there are many tribunals, each with its own procedures for settling disputes, often set out in the form of a statue supplemented by more specific Rules of Court. The basic principles and methods governing the settlement of international disputes today, particularly interstate disputes, are substantially the same as those that were identified and enshrined in the Charter of the United Nations in 1945.

Parties to a dispute are under a duty to settle it in a peaceful way.[iv] While barred from resorting to armed force, the parties remain however, at least in principle, in control of the procedure for dispute settlement, and of the outcome. According to the Article 33 of the UN Charter, in the absence of a precise treaty obligation, the parties are free to decide the particular means of dispute settlement they prefer, and the said article provides an exhaustive list of the same. It can also be said that, any settlement will inevitably depend, directly or indirectly, on the agreement of the parties. Thus, the whole edifice of dispute settlement at the international level is characterized by an inherent tension between a legal duty to settle disputes in a peaceful way and the absence of any real compulsory mechanism that may render such obligation effective. With the background given, this paper argues on the question whether international courts or tribunals provide for an effective means of dispute resolution. Given there cannot be one close ended answer to the given proposition, this paper primarily focuses on the compulsory jurisdiction and enforceability aspect (along with other) of international court and tribunals.

DISPUTE SETTLEMENT UNDER INTERNATIONAL LAW

Dispute settlement in international law is consensual by nature[v], in other words unlike Domestic/Municipal Judicial system a party's consent is necessary to bring a dispute before an

international court or tribunal. Unless otherwise agreed no party to an international dispute can be obliged to submit it to a specific dispute settlement mechanism without prior consent. Against this background, the notion of dispute settlement covers a great variety of different settlement devices including arbitration and other modes which are also mentioned in the Article 33 of the UN Charter. It should be noted that parties to dispute brought before international tribunals and courts are traditionally limited to States and international organizations. However, this assertion will only be true if we disregard regional human rights court which are international and involve individuals. "Only very rarely private entities are entitled to bring their cases to international tribunals. This is the consequence of the fact that private entities and individuals are generally not deemed to be full subjects of international law."[vi] Nevertheless, they may be conferred with internationals rights and obligations, making them subjects of International law. In such cases they might be considered as having stood before international tribunals. Article 33 of the UN Charter establishes that a State which is a part to a dispute which is likely to endanger the maintenance of internationals peace and security, shall first of all seek a solution by using one of the various means listed, namely negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice. The mechanisms given above can be divided into two groups. While the first group consists of the non-binding dispute settlement means, the second group consists of the binding third party dispute settlement mechanisms, namely arbitration and adjudication. The outcomes of the procedures in the first group is the adoption of a non- binding act which, consequently, the parties may decide to reject or not follow. Instead, the purpose of the procedures belonging in the second group is to arrive at a legally binding solution of an international dispute.

INTERNATIONAL COURT OF JUSTICE

The principal Judicial body at international level to settle disputes is International Court of Justice. The dispute settlement features of the ICJ are laid down in Articles 92-96 of the UN Charter. Although, it is the principal organ, the relevance of the court in this respect is undermined by two factors. First, the voluntary nature of the jurisdiction of the court. Compulsory jurisdiction is only possible in when parties so declare.[vii] Only a few states have

allowed for compulsory jurisdiction of the ICJ due to which it has limited cases to itself, and as a consequence, the importance of court for the effective settlement of disputes is largely reduced,[viii] thus invalidating the relevance of Article 94 of the UN charter,[ix] according to which UN member states shall ensure compliance with the adjudication of the ICJ. Second, the limited access to the ICJ restricts it scope of operation. Since, only states are allowed to the parties in cases before the ICJ, international organizations and private entities have no legal standing before the court. This further reduces the scope of ICJ's intervention in international disputes limiting its spectrum of cases.

INTERNATIONAL TRIBUNALS

Arbitration, as a binding means of dispute settlement is less formal and more famous than judicial settlement. It consists of person or parties chosen by the parties, and the dispute or settlement so entered into may remain confidential if the parties so desire. In addition, in the commercial field, arbitration is accessible not only to states but also to private organizations and private entities. An example of arbitration, which plays an important role at the international level is the Permanent Court of Arbitration (PCA). The PCA is an institution where not only states but also the international organization, individual or private organizations can participate in dispute settlement. However, the major problem with the judgements and decisions of the such adjudication even though they are binding is that, there is no 'body' to enforce the judgements in most cases. Unlike domestic law, International law lacks a centralized system of dispute settlement, where the power to enforce laws has not been given to one authority, called the executives. In other words, the judgement may be binding, but the losing party in a dispute may choose to ignore it since it cannot be enforced upon it. A great example of such was witnessed in the case of Nicaragua v. US[x] in 1986, wherein the US did not comply with rather was in defiance of the judgment passed by the ICJ against it, which reflected towards the poor compliance of states in case of judgements passed by the ICJ. However, after *Nicaragua*, 'there is no sufficient evidence suggesting non-compliance with subsequent judgments'[xi], as stated by Dr. Schulte's in her examination of the compliance record for all ICJ judgments from 1946 to 2003.

It may, however, also be argued that a state not following the judgement given by a particular court or tribunal jeopardizes its reputation in the international arena which might affect their future international relations with other countries, which may or may not be true if the country not following the judgement is a powerful one like USA (drawing example from the case of Nicaragua). The party may take some counter measures against the state not complying to the judgement by cutting down the trade between them and other source of exchange which might be beneficial of the other party. Tribunals like the PCA might be effective in cases where the dispute is in relation to human rights or environment but it remains largely ineffective when it comes to enforcing the judgements given.[xii] Going by a liberalist view, one can argue that even though the there is no international authority to enforce judgement passed by different international courts or tribunals, it gives the states an opportunity to voice their concerns at an international legal platform through such institutions. The effectiveness of the tribunals and courts reduces because of their voluntary feature,[xiii] where only parties who have consented can only be taken to court, in other words international judicial process are treated as 'add-ons' extra which the states might or might chose to adopt.

SUGESSTIONS – A NEW WAY FORWARD

The effectiveness can be improved if the states give in to the compulsory jurisdiction of one court or tribunal for that matter. Even though it will still lack a centralized enforcement agency, this way the states will have the right to take contesting party to the court without its consent, to adjudicate on the case, making the court's jurisdiction stronger. "The best way to achieve this is probably by incorporating compulsory dispute settlement procedures in institutional structures which deal with non-judicial matter and in which states feel it essential to participate, in pursuit of their own national interests."[xiv] A good example of the same, is the dispute settlement system of the World Trade Organization. Most states cannot afford to be left outside that trading system, but when they join it, they have to accept also the dispute settlement system which goes with it. However, it should also be noted that membership to WTO is still consensual not compulsory. Another example can be, the Council of Europe, wherein a state wanting to join the said organization must become a party to the European Convention for the

Protection of Human Rights and Fundamental Freedoms, along with its judicial structures in the human rights field.

The idea may seem far-fetched but, another one way to improve the effectiveness of these judicial bodies can be setting up a mechanism or authority responsible for enforcing the judgements passed by the said institutions. Even if for once we imagine that the concept of a central enforcement agency is not far-fetched, however, to reach such a stage would require the modification of the UN Charter for the ICJ and other primary documents for other tribunals which has hardly (or never) happened since their inception. Much like the Security Council or the General Assembly itself where every state can contribute and be a member of to ensure that every judgement passed by the international bodies are adhered to. Judicial delays, which is delay in the final judgements passed by the international courts or tribunals which can be ranging from 10 or more years depending on the nature of the case, should be reduced by reducing the time given to the parties to prepare their pleadings (usually 9 months); increase in no of judges to try more than one case at the same time and so. Such changes would make the said institutions more effective. For all the deficiencies of the international judicial process, they are not the only ones at fault. The problem also lies in the attitude of the states, which are generally remarkably unwilling to refer their disputes with each other to impartial third-party adjudication and remain reluctant to any third-party interference with their sovereignty.[xv]

CONCLUSION

In conclusion, there might be many problems faced by the international court and tribunals affecting its effectiveness, however, that doesn't make it any less important in maintaining international peace and order. They might be more effective in bilateral treaties and not effective when it comes to complying to the compulsory jurisdiction to the ICJ, nevertheless, "they do serve a purpose and will continue to function as it always has: as a limited, but important, forum for resolving international disputes."[xvi]

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