The Ambiguity of Jurisdiction:

Dispute Processing in the Americas

Steve Hendrix
Prepared for Law 983
Latin American Social and Legal Problems
Professors Joseph Thome and Fernando Rojas
Autumn 1985
University of Wisconsin

Table of Contents

A. Introduction.

Recent conflicts between the Nicaraguan and the United States governments have once again brought to our attention the use of international forums as a means of resolving disputes. One potential tribunal to address these conflicts to is the one currently being used by Nicaragua--the United Nations (UN). Yet, because the disagreement involves two American nations, the Organization of American States (OAS) remains an alternative forum for dispute resolution. How, then, do we decide which organization has "competence" to hear the case? In other words, which of the two has jurisdiction and due legal authority to deal with the matter in question? This in turn will lead to further questions concerning which of the two organizations should have "priority" or legal preference when a matter arises that both organizations are qualified to hear.

In 1945, the UN was established in San Francisco to maintain international peace and security. The preamble of the UN Charter states that the purpose of the organization is to "...practice tolerance and live together in peace with one another as good neighbors, and to unite our strength to maintain international peace and security..." Article 111 then witnessed the event in San Francisco. The original charter incorporated regional organizations as major forces to obtain their goal. Yet, later disagreements over jurisdiction made attainment of the goals through regional organizations difficult.

The OAS application of several provisions of the UN

charter has stirred controversy. Conflicts over "competence" have continued to plague the two groups. Even now, four decades later, we are still uncertain as to these important matters. Just in the past several years, the Falklands War, the Grenada Invasion, and the "imminent U.S. attack" on Nicaragua have brought home the controversy once again. Further, these conflicts have caused OAS member states to wonder whether their organization is capable of "enforcement action" without the prior authorization of the UN Security Council and whether they exercise joint jurisdiction or sole jurisdiction (or none at all) in these matters.

It seems to me that we can best see how the jurisdictional ambiguities are resolved by looking both to the rules and to the practice. Thus, I will proceed with a case-by-case analysis looking at the application of the rules.

Selecting a proper forum is the first issue. This, in turn, leads us to question the "priority" of one forum over another, or in this instance, if the OAS is granted authority to settle disputes within their region. Yet another way of posing this very same issue is: Do UN members which also are members of the OAS have the right to demand UN action on their behalf or must the nation first present their dispute to the local authority for a resolution?

Several nations in the Western Hemisphere have tried on various occasions to claim that the OAS should have priority over the UN. In this situation, when member nations have a conflict, a state cannot take a claim to the UN until the regional

organization has attempted to resolve the conflict. To support this position, these countries cite Article 23 of the OAS Charter, Article 2 of the Rio Treaty and Article II from the Pact of Bogota.

After the OAS has begun to try to resolve a matter, some nations have taken their claim directly to the UN's Security Council. In these situations, the UN has generally held that the regional authority is the best tribunal for "local" conflicts.

On two occasions the OAS has attempted to hear a dispute after the UN had already begun its investigation into the matter. This occurred in 1982 during the Falklands War and again in 1983 during the Nicaraguan problem.

B. Who has Priority?

The question of jurisdiction can be resolved using several methods. The UN Charter does address the issue. Also, OAS agreements influence the outcome. Finally, political practice aids in the determination of the question.

1. The UN Charter

The UN Charter is ambiguous with respect to selection of proper forum. The Charter itself encourages regional dispute processing mechanisms and gives them power to resolve conflicts. However, the provisions do this in a complicated fashion. The following is an attempt to summarize the relevant provisions:

a. Article 52, paragraph 1 allows for the existance of international agencies whose purpose is to promote security and peace within a given region.

b. In paragraph 1 of Article 33, the UN Charter mentions that parties should first attempt to have their problems solved at the local level by regional authorities who can settle disputes peacefully. This provision comes into play when a problem is likely to be a threat to international security and peace.

c. Within Article 52, paragraph 2, the Charter specifically addresses regional conflicts. UN members who also are members of regional agencies should try to make every effort to reach a peaceful settlement through the regional authority before taking the matter to the Security Council of the UN.

d. In Article 52, paragraph 3, the Charter states that the Security Council of the UN shall promote peaceful regional settlement. This can be accomplished either by the states going straight to the regional authorities or by the Security Council itself recommending a regional agency.

e. Paragraph 2 of Article 33 commands the Security Council to tell parties to settle peacefully. This settlement may involve the use of regional agencies. This provision takes affect when the Security Council decides it is necessary to promote settlement.

f. Article 34 grants the UN Security Council broad "competence" or authority to investigate any dispute which is likely to be a threat to international security and peace.

g. Under paragraph 1 of Article 35, any member can bring any dispute which could threaten international security and peace to the UN Security Council.

h. Paragraph 2 of Article 35 allows non-UN member nations to bring conflicts to the Security Council so long as that nation accepts in advance the obligation of a peaceful resolution according to the UN Charter, at least for the purpose of a given dispute.

Despite these provision, the UN Charter indicates that regional authorities like the OAS are to be subordinant to the UN authority. Like paragraphs 2 and 4 of Article 52 (examined above in "a" and "c" respectively), Article 53 also promotes UN superiority. In paragraph 1, the Charter states that the "Security Council shall, where appropriate, utilize such regional... agencies for enforcement of its authority." It continues to say "But no enforcement action shall be taken under regional... agencies without the authorization of the Security Council..."

This concept is reinforced again in the next Article. In Article 54, the Charter provides that the "Security Council shall at all times be kept informed of activities undertaken or in contemplation under... regional agencies for the maintenance of international peace and security."

It would appear that the UN could hear just about any case, even if it were appropriate for "local" authority. Articles 10, 11, and 14 and Chapter VI claim that the UN General Assembly and the Security Council are not barred from hearing any case brought to their attention or already being processed towards a peaceful settlement by a regional agency such as the OAS.

2. Provisions of the OAS

If the UN Charter proves complicated, so does the OAS Charter along with the related treaties. As with the analysis of the UN Charter, learning the provisions of the OAS Charter is aided by breaking down the various relevant provisions and looking for them separately.

a. Article 23 of the OAS Charter affirms that "All international disputes that may arise between American States shall be submitted to the peaceful procedures set forth in this Charter, before being referred to the Security Council..." (emphasis added).

b. Under Article 2 of the Rio Treaty, members that signed that treaty agreed to take claims first to the OAS before going either to the UN General Assembly or to the Security Council.

c. In Article II of the American Treaty on Pacific Settlement, more commonly referred to as the "Pact of Bogota," the parties are once again obliged to take claims first to the OAS before "...referring them to the Security Council of the United Nations." Thus, the parties bound themselves to use the OAS whenever normal diplomatic channels fail; and not to resort to the UN.

3. Application of Authority: practical experience.

By examining actual cases we may be able to see how the process works in actual fact. This, of course, is more important than the words of treaties since words have little value unless put into practice. Thus I will just mention very briefly a

number of conflicts between 1954 and 1965. Then I will examine in greater detail the more recent cases.

A. CASES BETWEEN 1954 AND 1965:

1) The situation in Guatamala in 1954

The very first time the issue of "priority" arose was on June 19, 1954. At that time Guatamala requested that the Security Council intervene because of alleged aggression by Nicaragua, Honduras and foreign monopolies.

Guatemala's request invoked Articles 34,35 and 39 of the UN Charter. According to the UN Yearbook for 1954:

> The representative of Guatemala charged that his country had been invaded by expeditionary forces which, claiming to be exiles, were tools of a vast international conspiracy to subjucate Guatemala. His Government had two requests to make: first, the Security Council should warn the Governments of Honduras and Nicaragua and call upon them to apprehend the exiles and the mercenaries who were invading Guatemala from bases in those countries; secondly, an observation commission of the Security Council should be set up in Guatemala, and in other countries if necessary, to varify through examination of documentary evidence the charge that the countries accused by Guatemala had connived at the invasion.(1)

Honduras and Nicaragua both stated that the OAS should be the preferred forum. Under UN Article 52, Brazil and Colombia introduced a draft resolusion to refer the case to the OAS. The joint draft resolution passed by a majority of the Security Council members. The UN Yearbook reports that:

> The United States representative referred to Article 52, paragraph 2, of the Charter and said that his Government considered that this was precisely the kind of problem which in the first instance should be dealt with by the Organization of American States.(2)

Interestingly, the Soviet Union had opposed the referral.

On July 9, before the matter could be resolved one way or the other, the Minister for External Relations of the new Guatemalan government stated that peace and order had been restored and that Guatemala was thus taking the matter off the agenda of the Security Council. (3)

2) Cuba's complaint in 1960 and 1961.

On July 11, 1960, Cuba, like Guatemala before it , charged a foreign country with aggressive acts. In this situation, Cuba claimed that the United States was making threats against their nation. In a letter to the President of the Council, Cuba claimed that:

> With the object of promoting plans for intervention, a campaign had been launched to obscure the national, anti-feudal and democratic character of the Cuban revolution. The letter charged that the United States had offered protection to Cuban war criminals and had provided facilities to counter-revolutionary elements, that aircraft proceeding from the United States had violated Cuban airspace, and that threats of economic strangulation had been carried out by the United States Government.(4)

To avoid being referred back to the OAS, Cuba used paragraph 4 of Article 52 and Article 103 from the UN Charter.(5) In turn the US government denied the charges(6) and asserted that the Inter-American Peace Committee was already looking into the matter.(7) Peru suggested that, according to the Pact of Bogota, in Article 29, the matter should be left to the regional authority, arguing for regional solidarity.

Argentina and Ecuador proposed a draft to the UN Security Council which backed the OAS as the forum of preference. The

majority of the Security Council backed the proposal. It noted that the OAS was already "seized" of the dispute. Article 33 also was cited as support. Further, the UN could not react to a regional decision until the matter had been addressed and the conclusions of the OAS known. Interestingly, Poland and the Soviet Union expressed dissatisfaction with the arrangement.

On April 17, the Cuban representative revealed that the CIA backed forces had attacked Cuba that morning. The US denied the charges. Guatemala and Nicaragua also denied involvement.

On April 18, Argentina, Chile, Colombia, Honduras, Panama, Uraguay and Venezuela all supported a draft calling on UN member states which also belonged to the OAS to contribute toward the peaceful resolution of the conflict. These same nations also stressed the important interest that Latin American states themselves had in resolving the conflict. While acknowledging UN competence, the OAS remained the preferred forum. In a separate draft, Mexico and others argued these same points. With some ammendments in language, the seven nation proposal was approved on April 21 by a plenary meeting of the UN General Assembly.

3. The "Cuban Missile Crisis" of 1962.

The United States attempted to have this matter dealt with by the OAS. On October 22, 1962, the US invoked Article 6 of the Rio Treaty and requested that the Organ of Consultation be opened.(8) In this instance both the UN and the OAS dealt with the situation, upon the request of the US.

The Council of the OAS adopted a resolution on October 23,

1962 authorized the use of armed force under articles 6 and 8 of the Inter-American Treaty of Reciprocal Assistance.(9) The effect of this statement was to legitimize the US quarantine of the island and gave a basis for symbolic multinational solidarity.

Interestingly, the US also requested the UN to deal with the issue. The US presented a draft resolution to send a UN observer group to insure that Cuba withdrew its missiles, and that the governments of the Soviet Union and the US immediately get together to resolve the threat to the peace.

In this particular issue, both organs, the OAS and the UN, used their jurisdiction to make a judgment on the case. According to Leland M. Goodrich and others, this move by the US seems to acknowledge that the regional organization was not the appropriate authority, but at the same time, the regional forum could be utilized to give authority to the US sanctions, which would otherwise require justification under Article 51.(10)

Similarly, the UN actions politically aided settlement. One publication stated that:

> In this situation the UN role could only be secondary (to that of politics). None the less the acting Secretary-General, U Thant, was able, as mediator between the two Powers, to make an important contribution to their negotiations..."(11)

4. Situations in Haiti and Panama in 1963-64

In May of 1963 Haiti brought a complaint to the UN against the Dominican Republic. Similarily, Panama also brought a claim to the UN against the US in January of 1964. Here the increasing debate over forum surfaced. Increasingly, OAS member states

began to assert their right to take claims directly to the UN. In this case however, both Panama and Haiti agreed in the end to voluntarily take their claims to the OAS. During the debate on the Haitian dispute, Venezuela's representative to the UN claimed that regional solutions should be exhausted before cases are brought to the UN for consideration. Yet he also said that nations should be able to retain the right to have their claim heard before the Security Council.(12) In the Panamanian case, the representative from Brazil expressed his view that, although the OAS was capable of handling the matter, the Security Council in his view would be the preferable forum.

5. The Dominican Republic (1965)

There was a meeting of consultation of the OAS on April 30, 1965, according to articles 39 and 40 of the Pact of Bogota, at the request of the Chilean government.(13) This meeting was called to deal with the landing of US forces on the Carribean island. The US justified its action as protection of US citizens and citizens of other nations. Meanwhile, the Soviet Union requested that the Security Council of the UN meet to discuss the US intervention in the Dominican Republic.(14)

On May 14, the Security Council called for an immediate cease-fire. It also set up means to investigate the situation and requested that the Dominican Republic aid the UN in their investigation. The time lag between the time when discussion was opened and the time when the Security Council finally took action is interesting.

The situation in the Dominican Republic is revealing in several respects. First, there was little resistance to an investigation by the UN, eventhough the OAS was already actively involved in promoting a peaceful settlement to the conflict. Second, the Security Council did not limit itself to its usual "...formal discussion and the adoption of hortatory resolutions," according to Levin.(15) Third, both organizations were dealing with the matter at the exact same instant.

This "concurrent jurisdiction" has often been criticized. Then director of the Department of Legal Affairs of the General Secretariate of the OAS, Professor F. V. Garcia-Amador felt that intervention by the UN was unjustified.(16) Instead he advocated that the UN should have waited for the OAS to complete its work, noting that some progress had already been made. Yet the UN Secretary General disagreed. He expressed his doubts about the OAS involvement with the issue.

THE MORE RECENT CASES:

1. The Falklands War of 1982

The debate over forum in the dispute in the Dominican Republic gave way to a new form of parallel action by the UN and the OAS in the Falklands War (sometimes referred to as the Malvinas War). Thus the debate over "competence" was altered. In this particular instance, the UN had already begun to address the matter before the Meeting of Consultation of the OAS. In these respects, the dual action of the two organs is distinct from prior cases in the hemisphere.

The Security Council first met for informal consultation