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SYMPOSIUM ON INCIDENTAL JURISDICTION

INCIDENTAL JURISDICTION IN INTERNATIONAL ADJUDICATION AND INCIDENTAL DETERMINATIONS BY INTERNATIONAL ORGANIZATIONS

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International courts and tribunals have developed two criteria for the exercise of incidental jurisdiction: necessity and ancillarity. Yet the question of whether to make an incidental determination is not unique to the adjudicatory context. International organizations sometimes confront it as well. And their practice in dealing with this question suggests that the criteria of necessity and ancillarity alone are insufficient for assessing whether an incidental determination should be made.

Incidental Jurisdiction in International Adjudication

The question of incidental jurisdiction arises when an adjudicatory body has jurisdiction over an issue (the inside issue), but exercising that jurisdiction would implicate the exercise of jurisdiction over another issue not ordinarily within the body's jurisdiction (the implicated issue). If the body exercises jurisdiction over the implicated issue, then such jurisdiction may be called "incidental jurisdiction" and the issue may be referred to as an "incidental issue." If, however, the body refuses to exercise such jurisdiction, and if this refusal prevents it from exercising jurisdiction over the inside issue as well, then the implicated issue may be referred to as an "indispensable issue."[1]

There is no consensus over the conditions under which an international adjudicatory body may exercise incidental jurisdiction. The *Enrica Lexie* tribunal suggested that as long as determining the implicated issue is *necessary* for resolving the dispute, then incidental jurisdiction may be exercised.[2] The *Coastal State Rights* tribunal, however, observed that incidental jurisdiction may not be exercised unless the implicated issue is *ancillary* to the dispute.[3] These two criteria—necessity and ancillarity—appear to be the most frequently cited criteria for the exercise of incidental jurisdiction.[4] As perhaps best summarized by the *Chagos Marine Protected Area* tribunal, an adjudicatory body's "jurisdiction . . . extends to making . . . ancillary determinations of law as are necessary to resolve the dispute presented to it."[5]

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[1] *See* Peter Tzeng, *Incidental Jurisdiction*, *in* MAX PLANCK ENCYCLOPEDIA INT'L PROCEDURAL L., paras. 1, 6–8 (forthcoming 2022); Peter Tzeng, *The Implicated Issue Problem: Indispensable Issues and Incidental Jurisdiction*, 50 N.Y.U. J. INT'L L. & POL. 447, 471–72 (2018).

[2] The "Enrica Lexie" Incident (It. v. India), PCA Case No. 2015-28, Award, paras. 808–11 (May 21, 2020); *see also* Certain German Interests in Polish Upper Silesia (Ger. v. Pol.), PCIJ (ser. A.) No. 6, Judgment, at 18 (Aug. 25, 1925).

[3] Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukr. v. Russ.), PCA Case No. 2017-06, Award Concerning the Preliminary Objections of the Russian Federation, para. 194 (Feb. 21, 2020).

[4] *See "Enrica Lexie" Incident*, diss. op., Robinson, *supra* note 2, paras. 52–53.

[5] Chagos Marine Protected Area (Mauritius v. UK), PCA Case No. 2011-03, Award, para. 220 (Mar. 18, 2015); *see also* South China Sea (Phil. v. China), PCA Case No. 2013-19, Award on Jurisdiction and Admissibility, para. 153 (Oct. 29, 2015).

Incidental Determinations by International Organizations

The question of whether to make an incidental determination is not unique to the adjudicatory context. International organizations sometimes confront it as well, particularly with respect to issues of territorial sovereignty, government recognition, and statehood. There is not enough space in this essay for a comprehensive assessment of the practice of international organizations in this regard. But one example is particularly illuminating: the question of whether the UN secretary-general should make an incidental determination on statehood when acting in his or her capacity as treaty depositary.

A number of multilateral treaties designate the secretary-general as their depositary, thereby empowering him or her to accept instruments of ratification and accession. But many of these treaties also stipulate that he or she may accept such instruments only from "states." Where the entity depositing such an instrument is universally recognized as a state or recognized by the United Nations as a state, there is no difficulty. But where the entity does not enjoy such recognition, the question arises whether the secretary-general may make an incidental determination on whether the entity is a state. The parallels with the question of incidental jurisdiction in international adjudication are evident. The secretary-general might have the power to decide whether to accept the instrument in question (the inside issue), but exercising that power would implicate a determination on whether the entity constitutes a state (the implicated issue).

In this context, UN secretaries-general have effectively considered the statehood issue to be an indispensable rather than an incidental one. That is, they have consistently refused to take any decision on accepting instruments of ratification or accession from entities whose statehood is in question. The secretaries-general have taken this position because they have considered that they do not have the power to make determinations on statehood, a matter usually left for the General Assembly. As early as 1962, the UN legal counsel stated that if an entity whose statehood is disputed were to deposit an instrument of ratification or accession to a treaty that is open only to states, then the secretary-general "would have no alternative but to seek explicit directives from . . . the General Assembly as to the complete list of States to which the Convention would be open."[6] The next year, Secretary-General Thant stated:

> There are certain areas in the world the status of which is not clear. If I were to invite or to receive an instrument of accession from any such area, I would be in a position of considerable difficulty, unless the Assembly gave me explicit directives on the areas coming within the "any State" formula. I would not wish to determine on my own initiative the highly political and controversial question whether or not the areas, the status of which was unclear, were States . . . . Such a determination, I believe, falls outside my competence.[7]

This policy has been reiterated by secretaries-general and the Secretariat on multiple occasions over the past sixty years.[8] The statehood issue has thus effectively been treated as an indispensable issue with respect to the secretary-general's activities as the depositary of multilateral treaties.

[6] UN General Assembly, Statement Made by the Legal Counsel at the 1142nd Meeting of the Third Committee of the General Assembly on 4 October 1962, UN Doc. A/C.3/L.985, *reproduced in* United Nations Juridical Yearbook 1962, at 262.

[7] UN General Assembly, Official Records, Eighteenth Session, 1258th Plenary Meeting, at 9, UN Doc. A/PV.1258 (Nov. 18, 1963).

[8] United Nations Juridical Yearbook 1964, at 238; UN Office of Legal Affairs, Treaty Section, Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties, at 23 n. 49, UN Doc. ST/LEG/7/Rev.1 (1994); Statement made by the Legal Counsel at the 1409th meeting of the Third Committee of the General Assembly on 1 November 1966, *partially reproduced in* United Nations Juridical Yearbook 1966, at 239–40; UN General Assembly, Official Records, Twenty-Eighth Session, 2202nd Plenary Meeting, at 21, UN Doc. A/PV.2202 (Dec. 14, 1973); UN General Assembly, Draft Convention on the Prevention and Punishment of Crimes Against

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One cannot, of course, assume that this one example is representative of how all international organizations deal with all implicated issues. But it does show how, at least in this one case, the head of an international organization might refuse to exercise expressly conferred powers because of the need to make an incidental determination that falls outside his or her "competence."

Comparative Analysis of Statehood as an Implicated Issue

Interestingly, the International Court of Justice does not appear to follow the same approach as the UN secretary-general on the statehood issue. In cases brought under compromissory clauses in treaties, the Court's jurisdiction is normally limited only to disputes concerning the interpretation or application of the treaty in question. But in such cases the Court might also be required to determine the statehood of an entity in view of Article 34(1) of its Statute, which provides that "[o]nly states may be parties in cases before the Court."[9] In these situations, the Court must determine whether to exercise incidental jurisdiction over the statehood issue, and indeed it usually does so.

In some of the *Legality of Use of Force* cases, for example, the Court's jurisdiction was limited only to disputes falling within the compromissory clause of the Genocide Convention[10]—"[d]isputes . . . relating to the interpretation, application or fulfilment of the present Convention."[11] But the Court held that it was "incumbent upon it to examine first of all the question whether the Applicant meets the conditions laid down in Articles 34 and 35 of the Statute," and thus proceeded to determine that "Serbia and Montenegro is a State for the purpose of Article 34, paragraph 1, of the Statute."[12] Similarly, in the *Croatian Genocide* case, the Court's jurisdiction was identically circumscribed,[13] and yet the Court did not hesitate to proclaim that "both Parties satisfy the condition laid down in Article 34 of the Statute: Croatia and Serbia are States for purposes of Article 34, paragraph 1."[14] It therefore appears that the Court considers the issue of statehood to be an incidental rather than indispensable one.

Why do the Court and the UN secretary-general treat the statehood issue differently? The necessity criterion does not provide a satisfactory explanation. Of course, in disputes before the Court, it is necessary for the Court to first determine the statehood of the parties, in light of Article 34(1) of the Statute. But the same can be said about the UN secretary-general when accepting instruments of ratification and accession for treaties limiting membership to states. He or she too must necessarily first determine the statehood of the entity seeking to ratify or accede to the treaty. The necessity criterion therefore cannot fully explain why the statehood issue is an incidental one before the International Court of Justice, but an indispensable one before the UN secretary-general when acting as the depositary of a treaty.

Diplomatic Agents and other Internationally Protected Persons: Report of the Sixth Committee, para. 158, UN Doc. A/9407 (Dec. 10, 1973), *reproduced in* United Nations Juridical Yearbook 1973, at 79 n. 9; UN, Memorandum from the UN Office of Legal Affairs to the Under-Secretary-General for Political and Security Council Affairs (Feb. 8, 1974), *reproduced in* United Nations Juridical Yearbook 1974, at 158; UN Office of Legal Affairs, Treaty Section, Final Clauses of Multilateral Treaties, at 15 (2003).

[9] Statute of the International Court of Justice, Art. 34(1), June 26, 1945, 59 Stat. 1055, 3 Bevans 1179.

[10] *See, e.g.*, Legality of Use of Force (Serb. and Montenegro v. Fr.), Preliminary Objections, Judgment, 2004 ICJ Rep. 575, para. 1 (Dec. 15); Legality of Use of Force (Serb. and Montenegro v. Ger.), Preliminary Objections, Judgment, 2004 ICJ Rep. 720, para. 1 (Dec. 15).

[11] Convention on the Prevention and Punishment of the Crime of Genocide, Art. IX, Dec. 9, 1948, 78 UNTS 277.

[12] *Serbia and Montenegro v. France*, *supra* note 10, para. 45; *Serbia and Montenegro v. Germany*, *supra* note 10, para. 44.

[13] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serb.), Preliminary Objections, Judgment, 2008 ICJ Rep. 412, para. 1 (Nov. 18).

[14] *Id.*, para. 59.

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The ancillarity criterion is also not a satisfactory explanation. One can certainly argue that the statehood issue in disputes before the Court is almost always ancillary to the core of the dispute. For example, in the *Legality of Use of Force* and *Croatian Genocide* cases cited above, the central subject-matter of the disputes between the parties did not concern statehood. But one can also argue that, at least in most cases, the statehood issue in the context of depositing instruments of ratification and accession is ancillary to the actual ratification or accession. Indeed, when the secretary-general receives such an instrument, the intention behind it is almost always —unsurprisingly —to ratify or accede to the treaty in question, not to obtain some incidental determination on statehood. As a result, the ancillarity criterion too cannot explain why the Court treats the statehood issue as an incidental one but the UN secretary-general does not.

A better explanation appears to lie in the difference between the nature of the Court and the UN secretary-general. The Court was established for the very purpose of resolving legal disputes, and the question of statehood is—or at least can be considered to be—a legal question. The same cannot be said of the secretary-general, who is the head of a primarily administrative body , the UN Secretariat. One might therefore consider it sensible that the Court makes incidental determinations on statehood, but the secretary-general does not.

Beyond Necessity and Ancillarity

The conclusion above might not be controversial. But the key takeaway from this comparative analysis is that the criteria of necessity and ancillarity alone appear to be insufficient for determining whether a decision-making body should make an incidental determination. The identity of the decision-making body in question, and its relationship with the implicated issue in question, should also be taken into account.

The analysis above suggests that this should be the case when comparing adjudicatory bodies with international organizations. But it is also arguably the case when comparing adjudicatory bodies with one another. It might not be controversial to say that the International Court of Justice should be able to determine incidental issues of statehood. But what about the International Tribunal for the Law of the Sea? Or what about interstate arbitral tribunals, or even investor-state and commercial tribunals? Just because these are all adjudicatory bodies does not necessarily mean that they should all follow the same rules and principles regarding incidental jurisdiction. In fact, arguably, they should not.

One might thus take the view that the International Court of Justice should have the greatest latitude in making incidental determinations on issues of public international law, given its role as the principal judicial organ of the United Nations. Along the same lines, one might also opine that an arbitral tribunal hearing a commercial dispute should generally refrain from exercising incidental jurisdiction over matters of territorial sovereignty and the like. After all, the Court was established for the very purpose of settling disputes between states, whereas commercial tribunals are typically constituted in order to resolve the specific commercial disputes before them.

In addition, in determining the propriety of the exercise of incidental jurisdiction by specialist adjudicatory bodies like the International Tribunal for the Law of the Sea, the European Court of Human Rights, and the Appellate Body and panels of the World Trade Organization, one might also take into account the subject-matter expertise of the adjudicators in question. If an implicated issue falls well outside the adjudicators' expertise, then it arguably makes less sense for them to exercise incidental jurisdiction over it, even if the issue is both necessary and ancillary.

The bottom line is that merely examining the criteria of necessity and ancillarity is insufficient to resolve the question of incidental jurisdiction. That is the key takeaway from looking at the practice of the UN secretary-general on the statehood issue. Past secretaries-general have consistently refused to make incidental determinations on statehood *not* because of the absence of necessity or ancillarity. Rather, they have refused to do so because they recognize that the matter is for the General Assembly to decide instead of them.

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International adjudicatory bodies might have something to learn from this practice. Of course, they should not discard the criteria of necessity and ancillarity, which are undoubtedly important factors to consider when deciding whether to exercise incidental jurisdiction. But some self-reflection might be advisable to ensure that any exercise of incidental jurisdiction they undertake would be consistent with their intended role in the international system.

Conclusion

The observations above on the criteria of necessity and ancillarity derive from an analysis of just one case study where an international organization has confronted the question of whether to make an incidental determination. A more comprehensive examination of how international organizations deal with implicated issues might bring more helpful lessons. Of course, there are inherent differences between international adjudicatory bodies and international organizations. But, as this piece has hopefully shown, anyone seeking to answer the question of incidental jurisdiction for the former should be mindful of how the question of incidental determinations has been answered by the latter.

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