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STUDENT ANALYSIS

CAPACITY OF INTERNATIONAL ORGANIZATIONS TO EXERCISE JURISDICTION AND CONTROL OVER AN INTERNATIONAL FIGHTING FORCE

With the rise to prominence of world organizations, and the corresponding emphasis on international solutions to international problems, the question of the capacity of an international organization, such as the United Nations, to control national components of its "fighting force" becomes relevant. Indeed, a rather novel, albeit unsuccessful, argument on the part of a soldier petitioning for a writ of habeas corpus in a recent case has brought the problem squarely to the fore.¹ However, the question of "jurisdiction" and "control," not the result of that decision, is the point under discussion here.

"Control," in this context, must include the concept of jurisdiction; indeed, the two may well be co-extensive in connotation. The term "jurisdiction" admits of various definitions, usually being defined in terms of power,² or authority.³ It may be objected here that there is only a semantic difference between these terms, or that authority is but one kind of power. However, if the term "de facto jurisdiction" be taken as power to control, and the term "de jure jurisdiction" as a legally recognized authority to control, the distinction becomes real and significant. The difference can be illustrated by consideration of a military unit in which the commanding officer, vested with de jure jurisdiction, is unable to exercise control, while some enlisted man exercises the de facto control because of his inherent leadership ability. Thus, as to any object, each may exist apart from the other. Further, it is clear that in the instance of conflict, the de facto power will predominate.

Also subject to the same dichotomy is the term "sovereignty." Webster defines sovereign thus: "Supreme in power . . . possessing, or entitled to, original and independent authority. . . ." This accurately portrays modern usage, and, with the disjunctive in the second phrase, conveys the two aspects.⁵ This disparity is

1 *Jennings v. Markley*, 186 Fed. Supp. 611 (S.D. Ind. 1960). Petitioner, while serving in the armed forces of the United States in the Korean Conflict, was convicted by a general court-martial of one offense of unpremeditated murder of a Korean boy, and one offense of assault upon a child under the age of 16 years. In support of the contention that he was being illegally restrained, petitioner alleged, among other matters, (1) that he was serving with the United Nations Forces at the time of the incident, and (2) that he should have been tried by the United Nations Military Staff Committee or the International Court of Justice for a Capital Crime. The court denied the petition, holding, inter alia, that:

. . . the United States in supporting the United Nations in its effort to restore peace and security in Korea was acting as a nation through the use of its armed forces. There is nothing in the Charter of the United Nations from which to conclude that a member of the armed forces of a member nation does not retain his status as a soldier in the army of the respective member nation. As a member of the United States Army, the petitioner, whether being led under the flag of the United States, or the United Nations, nevertheless remained subject to the immediate control and jurisdiction of the United States Army.

2 50 C.J.S., *Jurisdiction* 1091 (1947).

3 Falk, *International Jurisdiction: Horizontal and Vertical Conceptions of Legal Order*, 32 *TEMPLE L.Q.* 295 (1959).

4 WEBSTER, *NEW COLLEGIATE DICTIONARY* 810 (1956).

5 IN MARITAIN, *MAN AND THE STATE* 28-53 (1952), the author discusses the concept of sovereignty. It is his position that the use of this term in relation to government has been, from the beginning, both confusing and wrong; that the true meaning of sovereignty involves "supreme power *separate and transcendent* . . . ruling the entire body politic *from above*." This extent of power simply does not exist in the natural political order. Thus, as states claim the consequences that follow from a true sovereignty without truly possessing it, the problems treated herein arise. If what is claimed as sovereignty were this true sovereignty, or if states refrained from claiming the full consequences of true sovereignty, these problems would not arise, or would at least be more easily solved.

illustrated when one state, claiming sovereignty, is subjected to the will of another, or a monarch, claiming to be the sovereign, is overthrown. Here, not only does the de facto power predominate, but it also has the capacity to invest itself with de jure authority, and succeed the displaced government in its claim to sovereignty.⁶ Hence, with the frequency of revolutions in this millenium, the de facto power of government rests ultimately in the people. Further, it is claimed for them de jure by those expounding the natural law.⁷

Consequently, as to both jurisdiction and sovereignty, the stable state is reached only when de facto power and de jure authority are vested in the same body and are identical in scope.

As a corollary to its claim of sovereignty, each nation claims exclusive jurisdiction within its territory.⁸ Yet in many instances jurisdiction is asserted over those committing certain classes of crimes, wherever they may be.⁹ This assertion is apparently inconsistent with the claim of sovereignty of the nation within which the wrongdoer is found. The sovereign's claim of exclusive jurisdiction can be substantiated since the de facto power of any nation is usually exclusive within its territory; the claim of a foreign country to exterior jurisdiction raises a greater problem. In cases where the laws of a state are given extra-territorial application, they are given effect either within the law making state itself,¹⁰ or by the state in which the wrong-doer is found.¹¹ In addition, the power of the law-making state may actually be exercised within the territory of the other state.¹²

When the question becomes one of control over a supposed sovereign itself, a problem arises, for external control is inconsistent with its claim of sovereignty. This has resulted in the doctrine that jurisdiction is gained over a sovereign *only* when it consents to such jurisdiction.¹³ This alone, however, can at best be but a de jure jurisdiction in the absence of some de facto power to enforce the consequences of jurisdiction.¹⁴ In recent years, provisions have been considered — and adopted — to give the World Court compulsory jurisdiction in some matters.¹⁵

6 A revolution is the classic example of this conversion. So, too, a new government established by a conqueror. Though made under duress, the validity of treaties so imposed is not affected. Some writers object that the victory of an "illegal belligerent" should not be accorded this effect. Wright, *The Outlawry of War and the Laws of War*, 47 AM. J. INT'L L. 365, 376 (1953); 2 OPPENHEIM-LAUTERPACHT, INTERNATIONAL LAW 217-23 (7th ed. 1952). But the obvious question of who is to decide and enforce the doctrine of the "illegal belligerent," as well as its inconsistency with the past history of man, make it of doubtful practical value.. In addition, there is the logical consideration that the doctrine is not enforceable as long as the de facto power of the belligerent persists. See Kunz, *The Laws of War*, 50 AM. J. INT'L L. 313, 317-19 (1950).

7 See, e.g., II CLASSICS OF INTERNATIONAL LAW, *Selections From Three Works of Francisco Suárez, S.J.*, at 377 (1944).

8 This is the territorial jurisdiction theory which has predominated in Common Law history. See the opinion of Chief Justice Marshall in *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812).

9 *United States v. Bowman*, 260 U.S. 94 (1922); *Strassheim v. Daily*, 221 U.S. 280 (1910). See also the numerous examples in 41 CORNELL L.Q. 276-82 (1956) and 41 CORNELL L.Q. 662-68 (1956).

10 Here the power of the offended state is not exercised de facto outside its territory. *Strassheim v. Daily*, 221 U.S. 280 (1910).

11 This situation is not a true example of extra-territorial jurisdiction, since it is not the power of the law-giving territory that is exercised. It is a common doctrine of Conflicts of Laws. See STORY, *CONFLICTS OF LAWS* 28-48 (4th ed. 1852).

12 To the extent that this may occur, it is a de facto infringement on the sovereignty of the second state. The extension of power may be by agreement between the sovereigns, in which case an aspect of enforcement by the power of the second state is present.

13 See SVARLEIN, *INTRODUCTION TO THE LAW OF NATIONS* 59 (1955), for application of this doctrine to the jurisdiction of the International Court of Justice.

14 Some venture that there is a moral force of world opinion to enforce such international law. But to depend on this in crucial matters is clearly folly, as illustrated by Russia's indifference to world opinion in suppressing the Hungarian Revolt.

15 Statute of the International Court of Justice, Art. 36, 59 Stat. 1060 (1945).

It is questionable, however, whether the distinction between the former consent jurisdiction and the new compulsory jurisdiction is actually one of kind, rather than one of degree only, for compulsory jurisdiction is achieved only by the "sovereign's" consent; further, submission even then may be conditioned on a determination by the "sovereign" that the particular matter at hand is of such a nature that compulsory jurisdiction should apply.¹⁶

Another problem arising when there is a conflict of jurisdictions is that of pre-emption — the proposition that one jurisdiction may supersede another. Exclusive internal jurisdiction, for instance, would seem to be a necessary incident of a de facto sovereign. Pre-emption can not subsist on de jure jurisdiction without de facto jurisdiction — *i.e.*, power; and within a given territory, de facto power belongs to the de facto sovereign.¹⁷ Hence, because of the absence of an *international "sovereign"* at the present time, the jurisdiction of international courts cannot, per se, preempt the jurisdiction of the courts of nations.¹⁸

A slight variation from the above analysis occurs when fighting forces are considered. The traditional approach appears to be that of making a national fighting force immune from the jurisdiction of the territory in which it is located when outside the home land.¹⁹ It would seem, therefore, that fighting forces carry the sovereign immunity of their country with them. This proposition has a rational basis since the fighting force of any nation is the prime repository of its de facto power. This would appear to be an instance, therefore, of two de facto sovereigns co-existing in the same place.

Since the more-or-less permanent stationing of forces in another friendly country for protective purposes is a relatively recent innovation, there is little history in point.²⁰ In earlier times, the presence of a "sovereign's" soldiers in another country was usually explained as an occupation of conquered land, as a temporary sojourn during transition to another place, or as members present without formal orders to that effect. In the first case, the occupied country was in no position to assert its sovereignty; in the second, conflict could be avoided by prior informal agreement permitting the crossing; and in the third, the territory of presence could exercise its jurisdiction over those within its borders without slighting the sovereignty of the forces' homeland.

In this post World War II era, however, the exigencies of the times demand that the forces of one nation be stationed on a somewhat permanent basis within

16 Declaration on the part of the United States of America, 61 Stat. 1218 (1946), The "Connally Reservation."

17 It may here be objected that there are instances where the jurisdiction of an inferior power is recognized as pre-empting that of a superior power. It cannot be disputed that superior powers do refrain from exercising their powers and allow inferior powers to exist as sovereigns, either because of (1) national altruism, (2) a feeling that the cost of asserting their will is greater than the benefit, or (3) fear of reprisal from another source of power possibly superior to their own. But the validity of the de facto-de jure distinction can be preserved by distinguishing potential control from actual control, and limiting the application of de facto power to its existence as exercised in such a borderline situation. However, the dynamic character of de facto power must be borne in mind.

18 If a controversy should arise involving matters which were within the supposedly pre-empted area, and the courts of some nation should, on the motion of the complaining party, ignore this pre-emption while possessing the capability of enforcing their decision, (such as property of the defendant within their reach), there is no power, short of war, to overturn such a judgment.

19 See *Coleman v. Tennessee*, 96 U.S. 509 (1879). *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 139 (1812). Should the forces invade a foreign state, the law of the invaded territory clearly cannot apply. *Dow v. Johnson*, 100 U.S. 158, 165 (1880). It could be asserted that there is an intermediate situation when forces are present in a friendly country *without* permission. But if the sending state acknowledges the order sending the troops, and the troops are of sufficient force, the friendly status may cease, there being, in fact, an invasion. If not, the power of the offended state may prevail. A case in point may be the U-2 incident.

20 See 52 PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 185 (1958).

the territory of another friendly state for protective purposes. Thus, the problem of control over the members of the forces must be resolved; indeed, the times further demand a precise formal agreement.

The agreement reached among the North Atlantic Treaty nations can be taken as representative. Rather than assign full jurisdiction over troops to one country, a compromise was made creating an area of exclusive jurisdiction for the courts of the host country over certain activity, an area of exclusive jurisdiction for the military over other activity, and an area of concurrent jurisdiction.²¹ These treaties, however, do not amount to an admission by either the sending state or the receiving state that de facto power resided in the other; either can claim it by attributing all concessions to the necessity of friendly relations.

As to the internal control of a fighting force, jurisdiction over members must follow as a corollary of command, for discipline is the *sine qua non* of the military organization, and presupposes the power to enforce commands. Thus, jurisdiction is vested ultimately in the commander-in-chief. But in the home land, such jurisdiction does not pre-empt the jurisdiction of the territory over the members of the force.²²

The evolution of the United States Armed Services offers a basis for analyzing both the actual and possible projected control of the United Nations over a fighting force. In the first attempt to raise a national army in this country, the colonies, through the Continental Congress reluctantly authorized the creation of a national United Colonies' army to fight the Revolutionary War.²³ However, the authority to raise an army was not surrendered by the colonies, and there was no taxing authority in the Continental Congress to support the United Colonies' army.²⁴ This situation produced a relatively ineffective organization, since each colony retained its own militia and competed with the national force for volunteers. The fact that the colonies were the real seats of de facto power hamstrung the national efforts, despite the de jure authority which was granted.

Under the Articles of Confederation, the Continental Command was given the power to call upon the states to raise forces in the form of complete regiments for the national army. But the power to tax was still absent, and below the top command level, the officer structure, as well as military supplies, continued to be under state control. Thus, while the units were under the Continental Command, effective control remained in the states.²⁵

With the adoption of the Constitution, it was possible for the United States Armed Services to acquire new stature. The authority to raise an army was now backed by the power to tax, and a generally wide scope of power befitting a sovereign. However, the granted power not being fully utilized, effective functioning remained hampered by state control.²⁶ As a result, in the War of 1812 the force proved little more effective than it had been during the Revolution.²⁷

21 See AGREEMENT CONCERNING QUESTIONS CONNECTED WITH THE PRESENCE OF SOVIET FORCES ON EAST GERMAN TERRITORY, Art 5, 6, 7 (1957) 52 AM. J. INT'L L. 210 (1958); AGREEMENT ON THE LEGAL STATUS OF THE SOVIET FORCES TEMPORARILY PRESENT ON THE TERRITORY OF THE HUNGARIAN PEOPLES REPUBLIC, Art 5 (1957) 52 AM. J. INT'L L. 215 (1958); AGREEMENT ON THE LEGAL STATUS OF SOVIET TROOPS TEMPORARILY STATIONED IN POLAND, Art. 9 (1956) 52 AM. J. INT'L L. 221 (1958); AGREEMENT BETWEEN THE PARTIES TO THE NORTH ATLANTIC TREATY REGARDING THE STATUS OF THEIR FORCES, 4 TREATIES AND OTHER INT'L AGREEMENTS 1792, Art VII, June 19, 1951.

22 The civil authorities have power over members of armed forces, at least to the extent that the exercise of this power will not interfere with the operation of the military. See 10 U.S.C. § 814. Also, as in the Jennings v. Markley case, imprisonments under courts-martial proceedings may be reviewed by civil courts through the writ of habeas corpus.

23 BERNARDO AND BACON, AMERICAN MILITARY POLICY 5, (1955).

24 *Id.* at 7-8.

25 *Id.* at 18-19.

26 *Id.* at 130.

27 *Id.* at 131.

This situation continued throughout the "War Between the States"; even at that late date a soldier's loyalty was more often to his State unit than to his "nation." It was not until the late 19th century that State competition finally succumbed to a powerful military machine firmly under Federal control.

In Chapter VII of the United Nations Charter, the Security Council is given authority to establish and direct a fighting force.²⁸ It may call for forces from the member nations, but the latter are not committed to a definite number of troops; further, they can impose their own terms in the consignment of those they do choose to send.²⁹ Also, the United Nations does not have the power to tax directly. It may only set dues for each member, the penalty for failure to pay being an eventual loss of voting power in the General Assembly.³⁰

Because the responsibility of the United Nations is not vested exclusively in the Security Council,³¹ the General Assembly, through the Uniting for Peace Resolution,³² has provided an additional method of establishing an armed force. This Resolution circumvents the veto of the Security Council which previously prevented the forces provided for in Chapter VII from becoming a reality. It has a weakness, however, since the General Assembly does not have the authority to call on the member nations to supply troops, but only to "recommend."³³

It further appears that the Secretary General could establish an armed force in the Secretariat, with budgetary approval of the General Assembly.³⁴ In addition, the United Nations is not limited to assembling a force from the national armies of member nations; volunteers could also be recruited.³⁵

The position of the United Nations is thus comparable to that of national forces in early American history. While the Security Council has the authority to call for forces from the nations — similar to the situation in America under the Articles of Confederation — the authority of the General Assembly is more akin to that of the Continental Congress before the adoption of the Articles of Confederation, since it cannot call for troops from the member nations. There is an additional similarity in that there is no power to levy a tax for the support of the United Nations forces.

Hence, while the de jure authority of the United Nations to control an armed force is unquestioned,³⁶ the American experience leaves little doubt that its de facto power to do so is severely limited. A further attestation to the limitations of the United Nations control is the Korean Action. There, while forces were formally under the United Nations Command, the member nations continued to consider the forces as part of their own armed services.³⁷ Thus, it could not be expected that the characteristics of strong de facto jurisdiction would be found in United Nations control over its forces. So long as the contributing members can successfully assert continuing jurisdiction over the forces sent to fight for the United Nations Command, primary jurisdiction over the troops will remain in the sending nation, and the control of the United Nations will be limited to high level policy.

28 59 Stat. 1043-45 (1945).

29 Art. 43, 59 Stat. 1043 (1945).

30 Art. 19, 59 Stat. 1040 (1945).

31 Sohn, *The Authority of the United Nations to Establish and Maintain a Permanent United Nations Force*, 52 AM. J. INT'L L. 229, 231 (1958).

32 Res. 377A (V) of Nov. 3, 1950, General Assembly, 5th Sess., Official Records Supp. No. 20, pp. 10-12 (Doc. A/1775).

33 Sohn, *supra* note 31, at 231.

34 *Op. cit. supra* note 24, Art. 97. See also Sohn, *supra* note 31, at 235.

35 Sohn, *supra* note 31, at 235, 237.

36 *Ibid.*

37 President Truman's Report, 1950 U.S. CODE CONG. SERV. 1380-88. See also Jennings v. Markley, 186 F. Supp. 611 (S. D. Ind. 1960).

The North Atlantic Treaty Organization agreement,³⁸ in contrast, does not vest the authority to request or command troops in one body, but rather commits the member nations to take measures, individually and collectively, to contribute to the defense of the North Atlantic Area.³⁹ As a result, it would appear that, even though a unified command is established, the de jure authority to command is weak; de facto power may well be totally absent.

The abortive European Defense Community proposal, had it been adopted, would have established, in effect, a supranation with limited areas of sovereignty.⁴⁰ One such area was to be the creation of the European Defense forces, whose members were to contribute to the Community in order to form a fused force; the Community, on the other hand, was to bear the same relationship to the force as a state to its armed forces.⁴¹ Here, in theory at least, the elements necessary for actual control over a force are more nearly met; and had the Defense Community been established, it may well have been free of state control to such a degree as to give rise to a truly autonomous force.

The *advisability* of establishing an autonomous international force is not the subject of discussion here, however. Rather, we are concerned with the necessary prerequisites to such a force. It would seem inconceivable that an autonomous force could be brought into existence without an autonomous international government, bearing a relationship to the nations of the world at least as "relatively sovereign" as the United States Federal government is to the states. In turn, for such a government to possess the de facto power necessary for effective functioning, there must pre-exist an international community; that is, a common bond of feeling on the part of a large portion of the peoples of the world that they are politically one people, so that their loyalties can transcend those which they feel toward their own states.⁴²

With the rise of nationalism in various parts of the world in recent years, it would appear, though perhaps superficially, that the tendency would be away from international government. However, this may be a necessary stage prior to the emergence of an international community. Further, some see the beginnings of a tendency toward strong international government in recent international agreements.⁴³

It is clear that a period of transition must precede this final stage of world political thought. The more immediate problem, then, is what type of organizations should be attempted during this transition period, and what to expect of them. Great minds have diverted their energies to this problem.⁴⁴ For present purposes, it will suffice to use the words of de Visscher in cautioning against excessive trust in international law unsupported by sufficient power to curb the Great Powers in the assertion of their claim of sovereignty:

No legal construction must mask this political face of sovereignty. Law can progress only if it does not deceive itself as to the realities that it seeks to order.⁴⁵

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38 North Atlantic Treaty, 63 Stat. 2241 (1949).

39 *Id.*, art. 3, 5, 9. See also Smith, *Legal Aspects of the North Atlantic Treaty*, 20 GEO. WASH. L. REV. 497, 511 (1952).

40 Nanes, *The Emerging Concept of Supranationality In Recent International Agreements*, 44 KY. L.J. 201, 202 (1955-56).

41 *Id.* at 203, 204.

42 See MARITAIN, *MAN AND THE STATE* 206 (1952).

43 Nanes, *supra* note 40.

44 See MARITAIN, *supra* note 42, at 188-216; DE VISSCHER, *THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW* (1957).

45 DE VISSCHER, *supra* note 44, at 102.