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DESSERTATION

ON

"ENFORCEMENT OF INTERNATIONAL JUDICIAL DECISIONS AND THEIR ROLE IN THE DEVELOPMENT OF INTERNATIONAL LAW."

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CHAPTER 1

INTRODUCTION

With the advent of Globalization in its various forms like technology transfer, international trade and commerce, international diplomatic relations, aviation, space activities, FDI etc., the traditional dealing in form of contracts etc., between two or more individuals, group of individuals, corporations, companies, or towns or provinces within a state have been manifested into international dealings wherein either of the two parties is an independent state, a national or resident of another state, a corporation or company or group of people(INGOs, NGOs, IGOs) having its origin, establishment or area of business in an foreign country. Alike in the case of traditional dealings, in international dealings also the disputes of commercial or diplomatic nature among the parties are bound to arise.

International dispute give rise to tension between the disputing States and sometimes even cause outbreak of violence. Therefore the dispute settlement procedure occupies pivotal position in a study of international conflicts.

As is the fact and the basic principle of international law, the 'sovereignty' and 'political independence' of a state are not to subject to control by any other state, international organizations, the decisions made by the international judicial bodies such as ICJ, ICC, PCA, ITLOS etc. lack the binding force. Consequently they stand at the discretion of the municipal courts for getting effective implementation through enforcement. Also they face serious problem of non -compliance by the defaulting/ failing party, which is the very and the biggest challenge facing the International Judicial Bodies, today.

Although, the attitude of States today, is quite soft towards the international law that includes the international judicial decisions. The States today interpret their municipal law on the principle of 'harmonious construction' as to give effect to the international law and the decisions made by the international judicial institutions.

While it comes to enforcement of the international judicial decision, which are, as per Article 38 of the UN Charter, the secondary source of international law, unlike the municipal

legal system where their enforcement and execution are binding and mandatory, at international level these decisions lack such a binding force and are always depended on the will and wish of the parties. That means the international decision shall be enforced and the mandate contained in it shall be obeyed only if the parties to the dispute concerned accepts the decision. This is the important aspect of international law which due to lack of binding force somewhere is being a hurdle in the way of international law at its development stage.

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply, subject to the provisions of Article 59, **judicial decisions** and **the teachings of the most highly qualified publicists** of the various nations, as subsidiary means for the determination of rules of law.[1] The decisions of the International Court of Justice have "no binding force except between the parties and in respect of that particular case."[2] But the role of international judicial institutions in developing the international law cannot be ignored.

The present research is an effort by the researcher to put lights on the nature of the judgments and awards of the international judicial institutions; the enforcement and execution procedures and the challenges before them deciding the future of these international judicial institutions

[1] Art. 38(d), Statute of International Court of Justice
[2] Art. 59, Statute of International Court of Justice

CHAPTER 2

JUDICIAL SETTLEMENT OF INTERNATIONAL DISPUTES

I. International Adjudication

International adjudication is one of the important methods of dispute settlement arouse between the States and also includes the disputes between individuals (in arbitral proceedings). In this method the dispute is referred to an independent third party tribunal which is generally either an arbitral tribunal or an international court (ICJ). Approach to this tribunals or courts is because the award or judgment given by them are binding on the parties to the disputes. And, so, to seek a binding decision States and individuals apt to put their problem before these judicial institutions.

The features of the judicial settlement of international disputes that makes it most reliable for the disputing parties are summed as follows[3]-

1. International adjudication proceeding provides for readily available Courts.

2. The eligibility criteria for the selection, appointment of these judicial posts is as similar as to that of the municipal laws with respect to appointment to the highest post of judiciary.

3. The international adjudication alike municipal judicial proceedings are impartial, impersonal, serious, orderly based on principles of international law and also are authoritative.

4. The persons presiding over the office of Courts e.g., Judges and Arbitrators, are the eligible, well qualified, well versed and experts in law, in this context it is the international law.

[3] http://www.beyondintractability.org/artsum/bilder-adjudication

5. The adjudication is wholly based on the legal issues which do not include the diplomatic matters/issues.

6. The international adjudication in a way helps to promote the "Rule of Law", as the Court's decision are taken to as subsidiary source of international law.[4]

7. The judicial decisions by international Courts acts as a guidance for the States in there further dealings with other States, to the Municipal Court to bring more weightage to their decision wherein international element is present in a particular case, and also to the arbitral tribunals in reaching to a conclusion.

The concept of "International Adjudication" includes following three elements[5]-

a. An **impartial judge or judges,** who may without a change in the nature of their functions as arbitrators, commissioners or umpires;

b. A **procedure** that may or may not include oral hearings, enabling the parties to present fully and on principles of "audi altrem partem", "equality before law" etc; and

c. A **decision** on the basis of respect for law, which when given with all solemnity of judicial process after a full and fair hearing before impartial judges, is binding in substance , even though it may not be technically binding in form.

[4] Art. 38(d), The Statute of International Court of Justice
[5] http://encyclopedia.com/ topic/ Adjudication.aspx

II. International Judicial Institutions

The international adjudication refers to the settlement of international disputes by the international judicial bodies by following the proper, fair and just judicial procedure on the basis of principles of international law. Depending upon the nature of the disputes dealt with by and the composition and their purpose of constitution, the international judicial bodies/ institutions are categorized into three types namely;

1. International Courts,
2. International Arbitral Tribunals, and
3. the Quasi Judicial International Institutions/Bodies

The international judicial institutions that are grouped into these three categories as follows[6]-

1. **International Courts**
   a. International Court of Justice (ICJ)
   b. International Criminal Court (ICC)
   c. International Tribunal for Law of the Sea (ITLOS)
   d. International Criminal Tribunal for Former Yugoslavia
   e. International Criminal Tribunal for Rwanda

2. **International Arbitral Tribunal**
   a. Permanent Court of Arbitration
   b. WTO Appellate Body
   c. WTO Dispute Settlement Panel
   d. NAFTA Dispute Settlement Panel
   e. International Centre for Settlement of International Investment Disputes (ICSID)
   f. Court of Arbitration for Sports
   g. OSCE Court of Conciliation and Arbitration

[6] http://en.wikipedia.org/wiki/International_judicial_institution

3. Quasi-Judicial International Institutions

a. Human Rights Committee
b. Committee on Racial Discrimination
c. Committee on Elimination of Discrimination Against Women
d. Committee on Economic, Social and Cultural Rights
e. Committee on Rights of the Child
f. Committee Against Torture
g. Committee on Migrant Workers
h. Committee on the Rights of Persons with Disabilities

4. Regional Judicial Institutions

1) Africa

a. African Court on Human and Peoples' Rights
b. Court of Justice of the African Union (planned)
c. Court of Justice of the Common Market for Eastern and Southern Africa
d. Community Court of Justice of the Economic Community of West African States
e. East African Court of Justice
f. Southern African Development Community Tribunal

2) America

a. Inter-American Court of Human Rights
b. Central American Court of Justice
c. Court of Justice of the Andean Community
d. Caribbean Court of Justice
e. Eastern Caribbean Supreme Court

3) Europe

a. European Court of Justice
b. European General Court
c. European Court of Human Rights
d. Court of Justice of the European Free Trade Agreement States
e. Benelux Court of Justice
f. Economic Court of the Commonwealth of Independent States
g. European Nuclear Energy Tribunal (dormant)
h. Western European Union Tribunal (defunct)
i. European Tribunal in Matters of State Immunity (dormant)

Each of these judicial institutions has its statute and is governed by the parent Convention and their specific statute.

CHAPTER 3

ENFORCEMENT OF INTERNATIONAL JUDICIAL DECISIONS

1. THE INTERNATIONAL COURT OF JUSTICE (ICJ)

The International Court of Justice (ICJ) is the principal judicial organ of the United Nations established in 1945 by the Charter of United Nations[7] and began working since April 1946.[8] Been the successor of Permanent Court of International Justice (PCIJ) the thought of the establishment of the new and effective court was formally recognized in the "Judicial Conference" of 1944 held at San Francisco, USA, in which serious discussion and deliberation on the Statute of ICJ and the procedure of appointment of judges took place. It was attended by eminent jurists, lawmen and judges. The Statute of ICJ is the part and parcel of Charter of United Nations.[9] The Charter specifically speaks about the ICJ.[10]

The seat of the Court is at Peace Palace in The Hague (Netherland)[11]. It is consists of by fifteen judges elected regardless of their nationality from among the persons of high moral character, possessing the qualification that is required for the appointment to the highest judicial offices in their respective nation States or are the jurisconsults of recognized competence in international law.[12]

The main purpose behind the establishment of ICJ was to facilitate the international adjudication. Its main role is to settle the disputes submitted to it by the States and further also to give advisory opinion on the legal issues that are referred to it by the States party to UN Charter and/or the Statute or the as referred by the specialized agencies and authorized organs of the UN.[13]

[7] Articles 92 of U.N. Charter, Article 1 of The Statute of ICJ (Part XIV), respectively.
[8] www.icj-icj.org
[9] Art. 92, Charter of United Nations
[10] Part XIV, Articles 92-96
[11] www.icj-icj.org
[12] Art. 3 & 2 of Statue of ICJ
[13] www.icj-icj.org

The Permanent Court of International Justice (PCIJ) was replaced by the ICJ in 1946. And it is governed by-

a. United Nations Charter (Chapter XIV) under Articles 92-96.
b. Statute of International Court of Justice
c. The Rules of Procedure adopted by the Judges and as are amended from time to time; and
d. Useful Practices and Directions adopted since October 2001 with the aim of directing parties to good practices.

The Court is significantly contributing to the progressive development of International Law by way of its two-fold functions-

a. By assisting in the resolution of international disputes between States as international adjudication, and
b. Providing advisory opinion to the specified international institution/organizations on certain legal questions.

- **Jurisdiction of the Court**

There are three types of Jurisdiction that the Court enjoys namely-

i) Voluntary or Original Jurisdiction
ii) Compulsory Jurisdiction, and
iii) Advisory Jurisdiction

i) Voluntary or Original Jurisdiction

It covers such cases that the parties Members and Non-Members) voluntarily refers to the Court relating to the matters provided in the Charter or those matters contained in the Conventions that are in force. It depends upon the consent of the parties whether to go to the Court for the settlement of the dispute arose between them or not.[14] So this kind of jurisdiction is original one as here the Court deals with the matters contained in, related

[14] Article 36(1), The Statute of ICJ

to, and incidental with the Charter. And it is said to be voluntary because it is exercised only when the parties to disputes approach the Court.

a. Compulsory Jurisdiction

This jurisdiction is extended over the parties at the very moment when the States (Members to UN) also being the Members to the Statute of ICJ, agree and declare that they shall be abided by the decisions of the Court in the matters concerning;

i) Interpretation of Treaties,
ii) Any question of International Law,
iii) The existence of any fact which, if established, would constitute a breach of an international obligation. [15]

This declaration is also called as optional-compulsory jurisdiction as the Court will have this jurisdiction only when the parties (Members) opt for it.[16]

b. Advisory Jurisdiction

The General Assembly, Security Council, other organs of the United Nations and its Specialized Agencies may seek advice by requesting to it for its opinion on any legal question arising within the scope of the activities of these above mentioned entities of United Nations.[17]

Requesting for opinion can be made by means of written request containing detail facts of question on which opinion is to be sought and the written request be accompanied by all the relevant documents helpful in putting light upon the question.[18]

To study the enforcement of the decisions of the Court it is significantly important to know its jurisdiction and its types for it shall be helpful to know the effect of the decisions of the Court

[15] Article 36(2), Statute of ICJ
[16] Article 36(3), Statute of ICJ
[17] Article 96, UN Charter & Article 65(1), Statute of ICJ
[18] Article 34, Statute of ICJ

and also to know about its binding force. The decision of the Court has binding force on the parties to the dispute referred to it and is limited only to the case concerned.[19]

- **Enforcement of decision of ICJ**

The Statute of ICJ is an integral part of the Charter of United Nations. The Statute of ICJ provides for the following provisions-

i) Chapter I- Organization of the Court (Articles 2- 33)
ii) Chapter II- Competence of the Court (Articles 34- 38), specifically provides for the jurisdiction of the Court.
iii) Chapter III- Procedure (Articles 39- 64), providing for the procedure before the Court.
iv) Chapter IV- Advisory Opinions (Articles 65- 68)
v) Chapter V- Amendments (Articles 69-70)

Nowhere does the Statute provide for enforcement mechanism of its own. The execution and enforcement of the ICJ's decisions exclusively falls within the framework of the function of United Nations Organization. The only measures available to the successful party to get the final and non-appealable decision of the Court enforced and executed are[20]-

a. Self-help , which further is of two kinds,
   i) Use of Diplomatic and Economic Pressures, and
   ii) Use of armed-forces

b. Enforcement through international Organs.

The first one includes efforts by the successful party to the dispute to have the decision executed and complied with by the failing party whereas the second enforcement through international organs includes the role of General Assembly and mainly the Security Council in enforcing the Courts' decisions.

[19] Article 59, Statute of ICJ
[20] Chandan Bala, International Court of Justice, 1997, page. 157

a. Self-help enforcement and execution

In the present world such a practice is not acceptable and is not at all in existence where a supra-national entity is taken to be a supra-national sovereign who shall ensure compliance with the decisions given by it or on its behalf and therefore the party who has succeeded the case before the Court has to help itself in obtaining the execution and compliance with the judgment by the unsuccessful party. It can be done by following ways-

i) Use of Diplomatic and Economic Pressures

Oscar Schacter Comments,

"International law has traditionally sanctioned coercive measure by the successful party as 'self-help' to compel the recalcitrant party to carry out the judicial decision or arbitral award imposing obligation on it."[21]

The enforcement of the Court's decision through use of diplomatic and economic pressure can be of following forms[22]-

a. Withholding economic and financial rights and privileges
b. Attachment of the asset of the recalcitrant/ unsuccessful party which is located in the territory of the successful party
c. Withholding trade and commerce with recalcitrant party
d. Taking help of any other State in self-help execution.

This self execution of the Court's decision can be clearly understood as to how it is done by referring the ***Corfu Channel Case***[23], in which the dispute was between United Kingdom and Albania in relation to damage of loss of lives and property of warship suffered by the British Warship while passing through the Corfu Channel in 1946, because of the explosion work done by the Albania in its own territorial waters.

The Alabanian contention was that United Kingdom has violated the sovereignty of the Alabania by carrying out the mine sweeping operation in its territorial waters without prior

[21] Chandan Bala, International Court of Justice, 1997, page. 158
[22] ibid
[23] United Kingdom v. Alabania, ICJ Report, 1949, pp. 4, 244

permission from Albanian Government after the mine explosion conducted by the Albania. Although the Court found the United Kingdom's act to be very violative to Albanian sovereignty, in a latter judgment ordered Albania to pay 844,000 Pounds as amount of reparation.

The United Kingdom did not have any asset of Albania in its territory to satisfy its claim even after so many attempts for execution of the Court's order made by the United Kingdom. So, it took help of France and United States in obtaining certain monetary gold which was under claim by Albania from France and US, and thus satisfied the judgment's execution, partially.

ii) Use of armed-forces

The international law under the auspices the United Nations prohibits the unilateral use of armed force by any State against any other State(s). However the use of unilateral force in international law is permissible only in two situations-

a. in self defence and collective self defence, and
b. in pursuant to an enforcement action taken by a competent organ of the United Nations i.e., collective security[24]

a. in self defence

"Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace or security.

[24] Article 51, UN Charter

b. In pursuance to an enforcement action taken by a competent organ of the United Nations

But this measure of 'use of armed force 'for the enforcement of international judicial decisions cannot be taken or interpreted to mean- against the territorial integrity or political independence of the non-complying State. So if the interpretation is taken to mean in this direction then the 'use of armed force' in the present context is not violative to international law, but it might somewhere somehow does not serve the very purpose of the United Nations, which is ***"maintenance of international peace and security".*** To understand this we can take the example of what is happening in ***ISIS*** today**.** Whatever is happening in ISIS today is a gross violation of international law and order and is being a continuous threat to the world peace and security. Practically other means of dispute settlement are of no use in this particular case and the only option in the hands of the world community is to use armed force for the collective defence with a view to protect and preserve world peace and security. And in such a situation collective use of armed force is justified in international law. Although it is not relevant here to mention, but, the ISIS's have biochemical weapon with them which can destroy the whole mother Earth completely at a blink and so the world community is not taking initiatives against the ISISs.

Another case to quote here in the present context is ***Bangladesh Liberation War***[25], which was the independence war of Bangladesh against the Pakistan, the then West Pakistan, which was claiming Bangladesh, the then East Pakistan, to be its territory. It lasted for nine months. It later came to be known as Indo-Pak War 1971 after India joined the war from the side of Bangladesh. India joined it because West Pakistan launched pre-emptive air strikes on 11 Indian airbases on December 3, 1971. Later West Pakistan surrendered and the war resulted into birth of a new State- Bangladesh.

The world community recognized India's entry to war as a justified act of use of force and subsequently accepted, adopted and recognized Bangladesh as a new and independent State.[26]

[25] Bangladesh v. Pakistan (1971)
[26] https://www.youtube.com/watch?v=Xeod3_xIfe8

The Indo-Pakistani War of 1971 was the direct military conflict between India and Pakistan during the Bangladesh Liberation War. Indian, Bangladeshi and international sources consider the beginning of the war to have been Operation Chengiz Khan, when Pakistan launched pre-emptive air strikes on 11 Indian airbases on December 3, 1971, leading to India's entry into the war of independence in East Pakistan on the side of Bangladeshi nationalist forces, and the commencement of hostilities with West Pakistan. Lasting just 13 days, it is considered to be one of the shortest wars in history.

As is said by Schacter,

"The Charter gives priority to peace over justice and to permit a breach of international peace to compel execution of a judicial award (or to vindicate any specific legal right) would do both to the context and dominant intention of the draftsman and signers. It is moreover far from evident that the administration of international justice would be served by permitting armed force to be used to compel execution."[27]

In this context, there's many time a problem arises where it is very difficult to maintain balance between 'world peace and security without using armed forces' and 'justice i.e., enforcement and execution of Court's order' for preserving world order, peace and security. When taking into consideration the ISIS's activities use of armed force is the only solution to control the situation as mentioned earlier. And so the above statement by Schacter should be so interpreted as to establish a harmonious relation between world peace and security and the justice by use of armed forces when it is the only thing to do in the hands of the State(s) or world community.

The Tanzanian military intervention in Uganda during Amin Regime[28] was justified by the world community. It was a case when the Amin took the control of the Uganda as the ruler, the Ugandan President Milton Obote and some 20,000 refugees fled to Tanzania. These refugees started opposing the Amin regime from Tanzania. With a view to stop further refugees from entering into Tanzanian territory the Tanzanian government joined the war from refugees' side against the Amin's government.

[27] Chandan Bala, International Court of Justice (1997), page. 159
[28] 1979

2. Enforcement through International Organs

In the enforcement of international judicial decision of the Court the following international organs play significant role-

i) Security Council of United Nations
ii) General Assembly of the United Nations
iii) Specialized Agencies of United Nations , and
iv) The Regional Organizations

i) The Security Council

The Security Council is the enforcement organ of the United Nations entrusted with twofold responsibilities-

a. Maintenance of world peace and security, and
b. Enforcement of international judicial decisions.

The Security Council is entrusted with the responsibility of maintaining world peace and security under the auspices of United Nations in accordance with the principles mentioned in the Charter[29] and to act on behalf of the Member –States of the United Nations on the name of United Nations.[30] In carrying out these responsibilities the Council shall take every possible measure, with least diversion for armament of the world's human and economic resources.[31]

Chapter V, VI, VII and XII of the Charter grants specific powers to the Council for well discharge of its responsibility of maintaining world peace and security. Chapter XIV of the Charter provides in Articles 92-96 for ICJ, which is the principal judicial organ of the UN.[32]

Each Member of the UN has to comply with the decisions of the Court and to that effect it must give an undertaking that it shall respect the Court's decision in the matter to which it is a

[29] Article 2, UN Charter
[30] Article 24, UN Charter
[31] Article 26, UN Charter
[32] Article 92, UN Charter

party.[33]And if any of the party to a particular dispute before the Court, fails to comply with the mandate contained in the Decision of the Court then the aggrieved party may have a recourse to the Security Council, which may either give a recommendation to the parties or it may decide as to what necessary measures should be taken to give effect to the Court's decision.[34]

If any party refuses to obey the Court's decision then the dispute takes the form of a political nature and then the Council shall look into it as a political organ of the United Nations for the performance of its very function i.e. maintenance of world peace and security.

The Article 94(2) of the United Nations has widened the scope of the powers of the Council as to include in its ambit any question, dispute or matter of such a nature as to endanger or likely to do so with the world peace and security.

As a general rule the recommendation under Article 94(2) is not procedural and therefore requires majority of the nine members of the Council that must include the five permanent members of the Council. In a case where the unsuccessful party is one of the five permanent members of the Council having veto in its hand then the justice shall die the death of veto. And if the dispute is of political nature justice is blurred. So it is seen that properly the justice is done or the enforcement is made in the cases only which are politically unimportant.

There is another thing to be noted that even the parties are not bound to refer the matter to the Council for its proper enforcement.

ii) The General Assembly

Chapter IV of the Charter provides for the General Assembly and other provisions related to it.[35]The General Assembly may discuss any questions or matters within the scope of the present Charter or relating to the power and functions of any organs provided for in the present Charter, and except as provided in Article 12 (matters before the Council), may make

[33] Article 94(1), UN Charter
[34] Article 94(2), UN Charter
[35] Articles 9-22

recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters.[36]

The powers of the General Assembly as mentioned above are beyond doubt broad enough to deal with the problem of non-compliance with a judicial decision and to permit the General Assembly to make recommendations to both the recalcitrant party and to other Members States concerning measures to be taken to give effect to the mandate contained in the judgment of the Court.

The recommendation by the General Assembly may be of following nature-

a. Condemnation of defaulting State
b. Withholding of diplomatic relations
c. Withholding of trade and commerce i.e., economic relations/dealings
d. Collective sanctions.

The recommendations are never of a binding nature and so is the case of the recommendations by the General Assembly. But the General Assembly being the important and the principal organ of the United Nations has an effective say before the world community.

As is rightly said by Chandan Bala[37], in this context,

*" **Well informed and organized world opinion may not be less efficacious than the possibility of the use of force in assuring the execution of the judgment."***

iii) Specialized Agencies of the United Nations

The execution of the decisions of the Court or other judicial bodies at international level may be done also by the other international organizations or specialized agencies of the United Nations with respect to the matters falling within their jurisdiction or area of activities.

The International Labor Organizations (ILO), International Civil Aviation Organizations (ICAO), International Atomic Energy Agency (IAEA), International Monetary Fund (IMF),

[36] Article 10, UN Charter
[37] In his book 'International Court of Justice', page 163

International Bank for Reconstruction and Development (IRDA), International Finance Corporation (IFC) are some of the international organizations which have in their respective constituting instrument certain provisions dealing with the defaulting parties to bring about the execution of the Court's decision/judgment or of a competent international tribunal.[38]

iv) Regional Organizations

Naming few regional organizations the list prominently includes- the European Union, Organization of American States and the African Unity. These regional arrangements play very important role in the enforcement and execution of the Court's decisions. They are sometimes called by the world community to secure compliance with the Court's decisions. These regional organizations are the association of the States sharing common heritage of culture, language, politic etc. and are located in a specific region. And so have less politics in their working as a whole because they work for the common good i.e., unity and prosperity of the region.

The Charter also provides that any dispute of international nature be firstly solved by ADR techniques- negotiations, conciliation, mediation, arbitration, and may also refer the matter to the appropriate regional arrangements or other peaceful means of dispute settlement.[39] It shows that even the world community recognized the importance of regional arrangement for dispute settlement.

[38] Ibid
[39] Article 33, UN Charter

- **Some Landmark Judgments by ICJ**

NORTH SEA CONTINENTAL SHELF CASES(1969)[40]

1. **Parties**- Federal Republic of Germany/ Denmark, and
   Federal Republic of Germany/ Netherlands

2. **Date of Application-** 20 February 1967

3. **Date of Disposition-** 20 February 1969

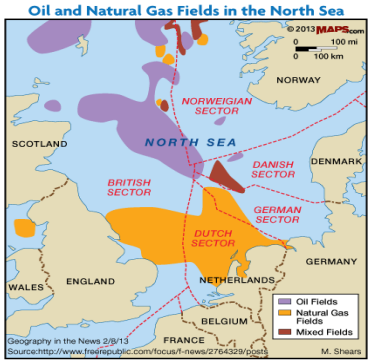
4. **Type of Disposition**- Judgment on Merits

5. **Facts**

Denmark, the Netherlands, and Germany all had a dispute over the boundaries of a shared continental shelf in north sea. Denmark and the Netherlands both argued that the dispute should be resolved according to principles of **Article 6 of the Geneva Convention of 1958 on the Continental Shelf, which provided that in the absence of agreement or special circumstances, a boundary line should be determined by application of the "principle of equidistance."** Germany was not a party to this Convention, but Denmark and the Netherlands argued that the principle of equidistance still applied because it was part of general international law, and particularly customary international law.[41] Germany was not ready for the method of delimitation as insisted by Netherland and Denmark, the very reason behind its opposition was that if the delimitation would be made on the basis of equidistance principle then it would get very less EEZ, which can be easily seen and understood from the following figure. And that is why Germany contended that the delimitation be made

[40] I.C.J. Reports 1969
[41] https://www.quimbee.com/cases/north-sea-continental-shelf-cases-federal-republic-of-germany-v-denmark-federal-republic-of-germany-v-netherlands

considering the coastlines.



42

4. Judgment of 20 February 1969[43]

1. The Court delivered judgment, by 11 votes to 6, in the North Sea Continental Shelf cases.

2. The dispute, which was submitted to the Court on 20 February 1967, related to the delimitation of the continental shelf between the Federal Republic of Germany and Denmark on the one hand, and between the Federal Republic of Germany and the Netherlands on the other. The Parties asked the Court to state the principles and rules of international law applicable, and undertook thereafter to carry out the delimitations on that basis.

3. The Court rejected the contention of Denmark and the Netherlands to the effect that the delimitations in question had to be carried out in accordance with the principle of equidistance as defined in Article 6 of the 1958 Geneva Convention on the Continental Shelf, holding:

a. that the Federal Republic, which had not ratified the Convention, was not legally bound by the provisions of Article 6;

[42] Forum.paradoxplaza.com
[43] http://www.icj-cij.org/docket/index.php?sum=295&code=cs2&p1=3&p2=3&case=52&k=cc&p3=5

b. That the equidistance principle was not a necessary consequence of the general concept of continental shelf rights, and was not a rule of customary international law.

4. The Court also rejected the contentions of the Federal Republic in so far as these sought acceptance of the principle of an apportionment of the continental shelf into just and equitable shares. It held that each Party had an original right to those areas of the continental shelf which constituted the natural prolongation of its land territory into and under the sea. It was not a question of apportioning or sharing out those areas, but of delimiting them.

5. The Court found that the boundary lines in question were to be drawn by agreement between the Parties and in accordance with equitable principles, and it indicated certain factors to be taken into consideration for that purpose. It was now for the Parties to negotiate on the basis of such principles, as they have agreed to do.

6. The proceedings, relating to the delimitation as between the Parties of the areas of the North Sea continental shelf appertaining to each of them, were instituted on 20 February 1967 by the communication to the Registry of the Court of two Special Agreements, between Denmark and the Federal Republic and the Federal Republic and the Netherlands respectively. By an Order of 26 April 1968, the Court joined the proceedings in the two cases.

7. The Court decided the two cases in a single Judgment, which it adopted by eleven votes to six. In its Judgment, the Court examined in the context of the delimitations concerned the problems relating to the legal regime of the continental shelf raised by the contentions of the Parties.

8. The Facts and the Contentions of the Parties (paras. 1-17 of the Judgment)

- The two Special Agreements had asked the Court to declare the principles and rules of international law applicable to the delimitation as between the Parties of the areas of the North Sea continental shelf appertaining to each of them beyond the partial boundaries in the immediate vicinity of the coast already determined between the Federal Republic and the Netherlands by an agreement of 1 December 1964 and between the Federal Republic and Denmark by an agreement of 9 June 1965.The Court was not asked actually to delimit the further boundaries involved, the Parties undertaking in their respective Special Agreements to effect such delimitation by agreement in pursuance of the Court's decision.

- The waters of the North Sea were shallow, the whole seabed, except for the Norwegian Trough, consisting of continental shelf at a depth of less than 200 meters. Most of it had already been delimited between the coastal States concerned. The Federal Republic and Denmark and the Netherlands, respectively, had, however, been unable to agree on the prolongation of the partial boundaries referred to above, mainly because Denmark and the Netherlands had wished this prolongation to be effected on the basis of the equidistance principle, whereas the Federal Republic had considered that it would unduly curtail what the Federal Republic believed should be its proper share of continental shelf area, on the basis of proportionality to the length of its North Sea coastline. Neither of the boundaries in question would by itself produce this effect, but only both of them together - an element regarded by Denmark and the Netherlands as irrelevant to what they viewed as being two separate delimitations, to be carried out without reference to the other.

- A boundary based on the equidistance principle, i.e., an "equidistance line", left to each of the Parties concerned all those portions of the continental shelf that were nearer to a point on its own coast than they were to any point on the coast of the other Party. In the case of a concave or recessing coast such as that of the Federal Republic on the North Sea, the effect of the equidistance method was to pull the line of the boundary inwards, in the direction of the concavity. Consequently, where two equidistance lines were drawn, they would, if the curvature were pronounced, inevitably meet at a relatively short distance from the coast, thus "cutting off" the coastal State from the area of the continental shelf outside. In contrast, the effect of convex or outwardly curving coasts, such as were, to a moderate extent, those of Denmark and the Netherlands, was to cause the equidistance lines to leave the coasts on divergent courses, thus having a widening tendency on the area of continental shelf off that coast.

- It had been contended on behalf of Denmark and the Netherlands that the whole matter was governed by a mandatory rule of law which, reflecting the language of Article 6 of the Geneva Convention on the Continental Shelf of 29 April 1958, was designated by them as the "equidistance-special circumstances" rule. That rule was to the effect that in the absence of agreement by the parties to employ another method, all continental shelf boundaries had to be drawn by means of an equidistance line unless "special circumstances" were recognized to exist. According to Denmark and the Netherlands, the configuration of the German North Sea coast did not of itself constitute, for either of the two boundary lines concerned, a special circumstance.

- The Federal Republic, for its part, had contended that the correct rule, at any rate in such circumstances as those of the North Sea, was one according to which each of the States concerned should have a "just and equitable share" of the available continental shelf, in proportion to the length of its sea-frontage. It had also contended that in a sea shaped as is the North Sea, each of the States concerned was entitled to a continental

shelf area extending up to the central point of that sea, or at least extending to its median line. Alternatively, the Federal Republic had claimed that if the equidistance method were held to bc applicable, the configuration of the German North Sea coast constituted a special circumstance such as to justify a departure from that method of delimitation in this particular case.

9. The Apportionment Theory Rejected (paras. 18-20 of the Judgment)

- The Court felt unable to accept, in the particular form it had taken, the first contention put forward on behalf of the Federal Republic. Its task was to delimit, not to apportion the areas concerned. The process of delimitation involved establishing the boundaries of an area already, in principle, appertaining to the coastal State and not the determination *de novo* of such an area. The doctrine of the just and equitable share was wholly at variance with the most fundamental of all the rules of law relating to the continental shelf, namely, that the rights of the coastal State in respect of the area of continental shelf constituting a natural prolongation of its land territory under the sea existed *ipso facto* and *ab initio,* by virtue of its sovereignty over the land. That right was inherent. In order to exercise it, no special legal acts had to be performed. It followed that the notion of apportioning an as yet undelimited area considered as a whole (which underlay the doctrine of the just and equitable share) was inconsistent with the basic concept of continental shelf entitlement.

10. Non-Applicability of Article 6 of the 1958 Continental Shelf Convention (paras. 21-36 of the Judgment)

- The Court then turned to the question whether in delimiting those areas the Federal Republic was under a legal obligation to accept the application of the equidistance principle. While it was probably true that no other method of delimitation had the same combination of practical convenience and certainty of application, those factors did not suffice of themselves to convert what was a method into a rule of law. Such a

method would have to draw its legal force from other factors than the existence of those advantages.

- The first question to be considered was whether the 1958 Geneva Convention on the Continental Shelf was binding for all the Parties in the case. Under the formal provisions of the Convention, it was in force for any individual State that had signed it within the time-limit provided, only if that State had also subsequently ratified it. Denmark and the Netherlands had both signed and ratified the Convention and were parties to it, but the Federal Republic, although one of the signatories of the Convention, had never ratified it, and was consequently not a party. It was admitted on behalf of Denmark and the Netherlands that in the circumstances the Convention could not, as such, be binding on the Federal Republic. But it was contended that the regime of Article 6 of the Convention had become binding on the Federal Republic, because, by conduct, by public statements and proclamations, and in other ways, the Republic had assumed the obligations of the Convention.

- It was clear that only a very definite, very consistent course of conduct on the part of a State in the situation of the Federal Republic could justify upholding those contentions. When a number of States drew up a convention specifically providing for a particular method by which the intention to become bound by the regime of the convention was to be manifested, it was not lightly to be presumed that a State which had not carried out those formalities had nevertheless somehow become bound in another way. Furthermore, had the Federal Republic ratified the Geneva Convention, it could have entered a reservation to Article 6, by reason of the faculty to do so conferred by Article 12 of the Convention.

- Only the existence of a situation of estoppel could lend substance to the contention of Denmark and the Netherlands - i.e., if the Federal Republic were now precluded from denying the applicability of the conventional regime, by reason of past conduct, declarations, etc., which not only clearly and consistently evinced acceptance of that

regime, but also had caused Denmark or the Netherlands, in reliance on such conduct, detrimentally to change position or suffer some prejudice. Of this there was no evidence. Accordingly, Article 6 of the Geneva Convention was not, as such, applicable to the delimitations involved in the present proceedings.

11. The Equidistance Principle Not Inherent in the Basic Doctrine of the Continental Shelf (paras. 37-59 of the Judgment)

- It had been maintained by Denmark and the Netherlands that the Federal Republic was in any event, and quite apart from the Geneva Convention, bound to accept delimitation on an equidistance basis, since the use of that method was a rule of general or customary international law, automatically binding on the Federal Republic.

- One argument advanced by them in support of this contention, which might be termed the *a priori* argument, started from the position that the rights of the coastal State to its continental shelf areas were based on its sovereignty over the land domain, of which the shelf area was the natural prolongation under the sea. From this notion of appurtenance was derived the view, which the Court accepted, that the coastal State's rights existed *ipso facto* and *ab initio*. Denmark and the Netherlands claimed that the test of appurtenance must be "proximity": all those parts of the shelf being considered as appurtenant to a particular coastal State which were closer to it than they were to any point on the coast of another State. Hence, delimitation had to be effected by a method which would leave to each one of the States concerned all those areas that were nearest to its own coast. As only an equidistance line would do this, only such a line could be valid, it was contended.

- This view had much force; the greater part of a State's continental shelf areas would normally in fact be nearer to its coasts than to any other. But the real issue was whether it followed that every part of the area concerned must be placed in that way.

The Court did not consider this to follow from the notion of proximity, which was a somewhat fluid one. More fundamental was the concept of the continental shelf as being the natural prolongation of the land domain. Even if proximity might afford one of the tests to be applied, and an important one in the right conditions, it might not necessarily be the only, nor in all circumstances the most appropriate, one. Submarine areas did not appertain to the coastal State merely because they were near it, nor did their appurtenance depend on any certainty of delimitation as to their boundaries. What conferred the *ipso jure* title was the fact that the submarine areas concerned might be deemed to be actually part of its territory in the sense that they were a prolongation of its land territory under the sea. Equidistance clearly could not be identified with the notion of natural prolongation, since the use of the equidistance method would frequently cause areas which were the natural prolongation of the territory of one State to be attributed to another. Hence, the notion of equidistance was not an inescapable a *priori* accompaniment of basic continental shelf doctrine.

- A review of the genesis of the equidistance method of delimitation confirmed the foregoing conclusion. The "Truman Proclamation" issued by the Government of the United States on 28 September 1945 could be regarded as a starting point of the positive law on the subject, and the chief doctrine it enunciated, that the coastal State had an original, natural and exclusive right to the continental shelf off its shores, had come to prevail over all others and was now reflected in the1958 Geneva Convention. With regard to the delimitation of boundaries between the continental shelves of adjacent States, the Truman Proclamation had stated that such boundaries "shall be determined by the United States and the State concerned in accordance with equitable principles". These two concepts, of delimitation by mutual agreement and delimitation in accordance with equitable principles, had underlain all the subsequent history of the subject. It had been largely on the recommendation of a committee of experts that the principle of equidistance for the delimitation of continental shelf boundaries had been accepted by the United Nations International Law Commission in the text it had laid before the Geneva Conference of 1958 on the Law of the Sea

which had adopted the Continental Shelf Convention. It could legitimately be assumed that the experts had been actuated by considerations not of legal theory but of practical convenience and cartography. Moreover, the article adopted by the Commission had given priority to delimitation by agreement and had contained an exception in favor of "special circumstances".

- The Court consequently considered that Denmark and the Netherlands inverted the true order of things and that, far from an equidistance rule having been generated by an antecedent principle of proximity inherent in the whole concept of continental shelf appurtenance, the latter was rather a rationalization of the former.

12. The Equidistance Principle Not a Rule of Customary International Law (paras. 60-82 of the Judgment)

- The question remained whether through positive law processes the equidistance principle must now be regarded as a rule of customary international law.

- Rejecting the contentions of Denmark and the Netherlands, the Court considered that the principle of equidistance, as it figured in Article 6 of the Geneva Convention, had not been proposed by the International Law Commission as an emerging rule of customary international law. This Article could not be said to have reflected or crystallized such a rule. This was confirmed by the fact that any State might make reservations in respect of Article 6, unlike Articles 1, 2 and 3, on signing, ratifying or acceding to the Convention. While certain other provisions of the Convention, although relating to matters that lay within the field of received customary law, were also not excluded from the faculty of reservation, they all related to rules of general maritime law very considerably antedating the Convention which were only incidental to continental shelf rights as such, and had been mentioned in the Convention simply to ensure that they were not prejudiced by the exercise of continental shelf rights. Article 6, however, related directly to continental shelf rights as such, and since it was

not excluded from the faculty of reservation, it was a legitimate inference that it was not considered to reflect emergent customary law.

- It had been argued on behalf of Denmark and the Netherlands that even if at the date of the Geneva Convention no rule of customary international law existed in favor of the equidistance principle, such a rule had nevertheless come into being since the Convention, partly because of its own impact, and partly on the basis of subsequent State practice. In order for this process to occur it was necessary that Article 6 of the Convention should, at all events potentially, be of a norm-creating character. Article 6 was so framed, however, as to put the obligation to make use of the equidistance method after a primary obligation to effect delimitation by agreement. Furthermore, the part played by the notion of special circumstances in relation to the principle of equidistance, the controversies as to the exact meaning and scope of that notion, and the faculty of making reservations to Article 6 must all raise doubts as to the potentially norm-creating character of that Article.

- Furthermore, while a very widespread and representative participation in a convention might show that a conventional rule had become a general rule of international law; in the present case the number of ratifications and accessions so far was hardly sufficient. As regards the time element, although the passage of only a short period of time was not necessarily a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, it was indispensable that State practice during that period, including that of States whose interests were specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked and should have occurred in such a way as to show a general recognition that a rule of law was involved. Some 15 cases had been cited in which the States concerned had agreed to draw or had drawn the boundaries concerned according to the principle of equidistance, but there was no evidence that they had so acted because they had felt legally compelled to draw them in that way by reason of a rule of customary law. The cases cited were inconclusive

and insufficient evidence of a settled practice.

- The Court consequently concluded that the Geneva Convention was not in its origins or inception declaratory of a mandatory rule of customary international law enjoining the use of the equidistance principle, its subsequent effect had not been constitutive of such a rule, and State practice up to date had equally been insufficient for the purpose.

13. The Principles and Rules of Law Applicable (paras. 83-101 of the Judgment)

- The legal situation was that the Parties were under no obligation to apply the equidistance principle either under the 1958 Convention or as a rule of general or customary international law. It consequently became unnecessary for the Court to consider whether or not the configuration of the German North Sea coast constituted a "special circumstance". It remained for the Court, however, to indicate to the Parties the principles and rules of law in the light of which delimitation was to be effected.

- The basic principles in the matter of delimitation, deriving from the Truman Proclamation, were that it must be the object of agreement between the States concerned and that such agreement must be arrived at in accordance with equitable principles. The Parties were under an obligation to enter into negotiations with a view to arriving at an agreement and not merely to go through a formal process of negotiation as a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreement; they were so to conduct themselves that the negotiations were meaningful, which would not be the case when one of them insisted upon its own position without contemplating any modification of it. This obligation was merely a special application of a principle underlying all international relations, which was moreover recognized in Article 33 of the Charter of the United Nations as one of the methods for the peaceful settlement of international disputes.

- The Parties were under an obligation to act in such a way that in the particular case, and taking all the circumstances into account, equitable principles were applied. There was no question of the Court's decision being *ex aequo et bono*. It was precisely a rule of law that called for the application of equitable principles, and in such cases as the present ones the equidistance method could unquestionably lead to inequity. Other methods existed and might be employed, alone or in combination, according to the areas involved. Although the Parties intended themselves to apply the principles and rules as laid down by the Court some indication was called for of the possible ways in which they might apply them.

- For all the foregoing reasons, the Court found in each case that the use of the equidistance method of delimitation was not obligatory as between the Parties; that no other single method of delimitation was in all circumstances obligatory; that delimitation was to be effected by agreement in accordance with equitable principles and taking account of all relevant circumstances, in such a way as to leave as much as possible to each Party all those parts of the continental shelf that constituted a natural prolongation of its land territory, without encroachment on the natural prolongation of the land territory of the other; and that, if such delimitation produced overlapping areas, they were to be divided between the Parties in agreed proportions, or, failing agreement, equally, unless they decided on a regime of joint jurisdiction, user, or exploitation.

- In the course of negotiations, the factors to be taken into account were to include: the general configuration of the coasts of the Parties, as well as the presence of any special or unusual features; so far as known or readily ascertainable, the physical and geological structure and natural resources of the continental shelf areas involved, the element of a reasonable degree of proportionality between the extent of the continental shelf areas appertaining to each State and the length of its coast measured in the general direction of the coastline, taking into account the effects, actual or

prospective, of any other continental shelf delimitations in the same region.

Finding of Researcher

In this series of cases the court found that ‘since Germany is not a party/signatory to the Geneva Convention 1958, so applying the principle of “equidistance” in the present would amount to injustice to the Germany. These cases are viewed as an example of "equity **praeter legem**"- that is, equity "beyond the law".

SOUTH WEST AFRICA CASE[44]

1. **Parties**- Ethiopia and Liberia v. South Africa
2. **Date of Application-** 5 August 1970
3. **Date of Disposition**- 21 June 1971
4. **Facts**

The present case is a dispute arising out of the fact that after World War II, the German conquered South-West Africa was declared as the League of Nations territory under the Treaty of Versailles. And the Union of South Africa was entrusted the responsibility of administration of South-West Africa, regarding the looking after to the devastated colonies by proving them all assistance for their recovery and until they are able to get their needs fulfilled by their own and until they get politically independent. . So the South West Africa remained a League of Nations Mandate until World War II. This mandate was supposed to continue i.e., the League as a United Nations Trust Territory when League of Nations Mandates were transferred to the United Nations following the Second World War. The Union of South Africa objected to South West Africa coming under UN control and refused to allow the territory's transition to independence, regarding it as a fifth province (even though it was never formally incorporated into South Africa).

International Court of Justice, which in 1950 ruled that South Africa was not obliged to convert South West Africa into a UN trust territory, but was still bound by the League of Nations Mandate with the United Nations General Assembly assuming the supervisory role. The ICJ also clarified that the General Assembly was empowered to receive petitions from the inhabitants of South West Africa and to call for reports from the mandatory nation, South Africa. The General Assembly constituted the Committee on South-West Africa to perform the supervisory functions. In 1960, Ethiopia and Liberia filed a case in the International Court of Justice against South Africa alleging that South Africa had not fulfilled its mandatory

[44] I.C.J. Reports 1966, p. 6. ; I.C. J. Report; 1962, p. 319

duties. This case did not succeed, with the Court ruling in 1966 that they were not the proper parties to bring the case.

UN mandate terminated

- There was a protracted struggle between South Africa and forces fighting for independence, particularly after the formation of the South West Africa People's Organization (SWAPO) in 1960.
- In 1966, the General Assembly passed resolution 2145 (XXI) which declared the Mandate terminated and that the Republic of South Africa had no further right to administer South West Africa.
- In 1971, acting on a request for an advisory opinion from the United Nations Security Council, the ICJ ruled that the continued presence of South Africa in Namibia was illegal and that South Africa was under an obligation to withdraw from Namibia immediately.
- It also ruled that all member states of the United Nations were under an obligation not to recognize as valid any act performed by South Africa on behalf of Namibia.
- The General Assembly changed the territory's (South-West Africa) name by Resolution 2372 (XXII) of 12 June 1968, to Namibia which is still in prevalence. SWAPO was recognized as representative of the Namibian people and gained UN observer status when the territory of South West Africa was already removed from the list of Non-Self-Governing Territories.
- The territory became the independent Republic of Namibia on 21 March 1990.

5. Judgment [45]

phase one- 21 december 1962

- The South West Africa cases (Ethiopia v. South Africa; Liberia v. South Africa), which relate to the ,continued existence of the Mandate for South West Africa and the duties and performance of South Africa as Mandatory there under, were instituted by Applications of the Governments of Ethiopia and Liberia filed in the Registry on 4 November 1960. The Government of South Africa raised preliminary objections to the jurisdiction of the Court to hear the cases. By eight votes to seven the: Court found that it had jurisdiction to adjudicate upon the merits of the dispute.

- In its Judgment, the Court noted that to found the jurisdiction of the Court, the Applicants, having regard to Article 80, paragraph 1, of the Charter of the United Nations, relied on Article 7 of the Mandate of 17 December 1920 for South West Africa and Article 37 of the Statute of .the Court. Before undertaking an examination of the Preliminary Objections raised by South Africa, the COUI-t found it necessary to decide a preliminary question relating to tire existence of the dispute which is the subject of the Applications. On this point it found that it was not sufficient for one party to a contentious case to assert that a dispute existed with the other party. It must be shown that the claim of one party was positively opposed by the other. Tested by this criterion, there could be no doubt about the existence of a dispute between the parties before the Court, since it was clearly constituted by their opposing attitudes relating to the performance of the obligations of the Mandate by the Respondent as Mandatory.

- The Court then briefly recalled the origin, nature and characteristics of the Mandates System established by the Covenant of the League of Nations. The essential principles

[45] http://www.icj-cij.org/docket/index.php?sum=295&code=cs2&p1=3&p2=3&case=52&k=cc&p3=5

of this system consisted chiefly in the recognition of certain rights of the peoples of the underdeveloped territories; the establishment o a P regime of tutelage for each of such peoples to be exercised by an advanced nation as a "Mandatory" "on behalf of the League of Nations; and the ~recognition of "a sacred trust of civilization" 'laid upon the League as an organized international community and upon its Members. The rights of the Mandatory in relation to the mandated territory and the inhabitants had their foundation in the obligations of the Mandatory and were, so to speak, mere tools given to enable it to fulfill its obligations. The first of the Respondent's preliminary objections maintained that the Mandate for South West Africa had never been, or at any rate was since the dissolution of the League of Nations no longer, a treaty or convention in force within the meaning of Article 37 of the Statute of the Court. In presenting this preliminary objection in this form, the Respondent stated that it had always considered or assumed that the Mandate for South West Africa had been a "treaty or convention in itself, that is, an international agreement between the Mandatory on the one hand, and, on the other, the Council representing the League and/or its Members" but "that the alternative view might well be taken that in defining the terms of the Mandate, the Council was taking executive action in pursuance of the Covenant (which of course was a convention) and was not entering into an agreement which would itself be a treaty or convention". At the same time the Respondent added "this view . . . would regard the Council's Declaration as setting forth a resolution . . . which would, like any other valid resolution of the Council, owe its legal force to the fact of having been duly resolved by the Council in the exercise of powers conferred upon it by the Covenant". In the Court's opinion, this view was not well- founded.

- While the Mandate for South West Africa took the form of a resolution, it was obviously of a different character. It could not be regarded as embodying only an executive action in pursuance of the Covenant. In fact and in law it was an international agreement having the character of a treaty or convention. It had been argued that the Mandate in question had not been registered in accordance with Article 18 of the Covenant, which provided: "No such treaty or international

engagement shall be binding until so registered". If the Mandate had been ab initio null and void on the ground of non-registration, it would follow that the Respondent had not and had never had a legal title for its administration of the territory of South West Africa; it would therefore be impossible for it to maintain that it had had such a title up to the discovery of this ground of nullity. Article 18, designed to secure publicity and avoid secret treaties, could not apply in the same way in respect to treaties to which the League of Nations was one of the parties as in respect of treaties concluded among individual Member States. Since the Mandate in question had the character of a treaty or convention at its start, the next relevant question to be considered was whether, as such, it was still in force either as a whole including Article 7, or with respect to Article 7 itself. The Respondent contended that it was not in force, and this contention-constituted the essence of the first preliminary objection. It was argued that the rights and obligations under the Mandate in relation to the administration of the territory being of an objective character still existed, while those rights and obligations relating to administrative supervision by the League and submission to the Permanent Court of International Justice, being of a contractual character, had necessarily become extinct on the dissolution of the League of Nations. The Respondent further argued that the casualties arising from the demise of the League of Nations included Article 7 of the Mandate by which the Respondent had agreed to submit to the jurisdiction of the Permanent Court of International Justice in any dispute whatever between it as Mandatory and another Member of the League of Nations relating to the interpretation or the application of the Mandate.

- On this point the Court, recalling the Advisory Opinion which it had given in 1950 concerning the Intentional Status of South West Africa, stated that its findings on the obligation of the Union Government to submit to international supervision were crystal clear. To exclude the obligations connected with the Mandate would be to exclude the very essence of the Mandate. The Court also recalled that it had been divided in 1950 on other points; it had been unanimous that Article 7 of the Mandate relating to the obligation of the Union of South Africa to submit to the compulsory

jurisdiction of the Court was still "in force". Nothing had since occurred which would warrant the Court reconsidering its conclusions. All important facts had been for this all-important purpose that the provision had been stated or referred to in the proceedings in 1950.

- The court found that though the League of Nations and the Permanent court of International Justice has ceased to exist, the obligation of the Respondent to submit to compulsory jurisdiction had been effectively transferred to the present Court before the dissolution of the League of Nations. The League had ceased to exist from April 1946; the Charter of the United Nations had entered into force in October 1945; the three parties to the present proceedings had deposited their ratifications in November 1945 and had become Members of the United Nations from the dates of those ratifications. They had since been subjected to the obligations, and entitled to the rights, under the Charter. By the effect of the provisions of Article 92 and 93 of the Charter and Article 37 of the Statute of the Court, the Respondent had bound itself, by ratifying the Charter at a time when the League of Nations and the Permanent Court were still in existence and when therefore Article 7 of the Mandate was also in full force, to accept the compulsory jurisdiction of the present Court in lieu of that of the Permanent Court.

- This transferred obligation had been voluntarily assumed by the Respondent when joining the United Nations. The validity of Article 7, in the court's view, had not been affected by the dissolution of the League, just as the Mandate as a whole was still in force for the reasons stated above.

- The second preliminary objection centered on the term "another Member of the League of Nations" in Article 7, the second paragraph of which reads "the if any whatever should arise between Mandatory and another members of League of Nations relating to the interpretation and application of the provisions of the Mandate such

dispute shall be submitted to the Permanent Court of International Justice . . ."

- It was contended that since all Members of League lost their membership and its accompanying rights when the League itself ceased to exist on 19 April 1946, there could no longer be another Member of League of Nations" today. According to this contention, no State had "locus standi' or was qualified to invoke the jurisdiction of the court with the respondent as Mandatory.

- The Court pointed out that interpretation according to the ordinary meaning of the words employed was not an absolute rule, and that no reliance could be placed on it where it resulted in a meaning incompatible with the spirit, purpose and context of the provision to be interpreted.

- Judicial protection of the sacred trust in each Mandate was an essential feature of the Mandates System. The administrative supervision by the League constituted a normal security to ensure full performance by the Mandatory of the sacred trust toward the inhabitants of the territory, but the specially assigned role of the Court was even more essential, since It was to serve as the final bulwark of protection by recourse to the Court against possible abuse or breaches of the Mandate.

- After so many trial and discussions on the various objections the Court finally came to the conclusion that Article 7 of Mandate was a treaty or convention still in force within the meaning of Article 37 of the Statute of the Court and the dispute was one which envisaged in Article 7 and could not be settled by negotiation. And hence the court was competent to hear the dispute on merits.

18 July 1966 (second phase)[46]

- The South West Africa cases (Ethiopia *v.* South Africa; Liberia *v.* South Africa), which relate to the continued existence of the Mandate for South West Africa and the duties and performance of South Africa as Mandatory there under, were instituted by Applications of the Governments of Ethiopia and Liberia filed in the Registry on 4 November 1960. By an Order of 20 May 1961 the Court joined the proceedings in the two cases. The Government of South Africa raised preliminary objections to the Court's proceeding to hear the merits of the case, but these were dismissed by the Court on 21 December 1962, the Court finding that it had jurisdiction to adjudicate upon the merits of the dispute.

- In its Judgment on the second phase of the cases the Court, by the President's casting vote, the votes being equally divided (seven-seven), found that the Applicant States could not be considered to have established any legal right or interest in the subject matter of their claims and accordingly decided to reject them.

- The Applicants, acting in the capacity of States which were members of the former League of Nations, put forward various allegations of contraventions of the League of Nations Mandate for South West Africa by the Republic of South Africa.

- **The contentions of the Parties covered, *inter alia*, the following issues:**

  whether the Mandate for South West Africa was still in force and, if so, whether the Mandatory's obligation to furnish annual reports on its administration to the Council of the League of Nations had become transformed into an obligation so to report to the General Assembly of the United Nations; whether the Respondent had, in accordance with the Mandate, promoted to the utmost the material and moral well-

[46] http://www.icj-cij.org/docket/index.php?sum=295&code=cs2&p1=3&p2=3&case=52&k=cc&p3=5

being and the social progress of the inhabitants of the territory, whether the Mandatory had contravened the prohibition in the Mandate of the "military training of the natives" and the establishment of military or naval bases or the erection of fortifications in the territory; and whether South Africa had contravened the provision in the Mandate that it (the Mandate) can only be modified with the consent of the Council of the League of Nations, by attempting to modify the Mandate without the consent of the United Nations General Assembly, which, it was contended by the Applicants, had replaced the Council of the League for this and other purposes.

- Before dealing with these questions, however, the Court considered that there were two questions of an antecedent character, appertaining to the merits of the case, which might render an enquiry into other aspects of the case unnecessary. One was whether the Mandate skill subsisted at all and the other was the question of the Applicants' standing in this phase of the proceedings - i.e. their legal right or interest regarding the subject matter of their claims. As the Court based its Judgment on a finding that the Applicants did not possess such a legal right or interest, it did not pronounce upon the question of whether the Mandate was still in force. Moreover, the Court emphasized that its 1962 decision on the question of competence was given without prejudice to the question of the survival of the Mandate - a question appertaining to the merits of the case, and not in issue in 1962 except in the sense that survival had to be assumed for the purpose of determining the purely jurisdictional issue which was all that was then before the Court.

- Turning to the basis of its decision in the present proceedings, the Court recalled that the mandates system was instituted by Article 22 of the Covenant of the League of Nations. There were three categories of mandates, 'A', 'B' and 'C' mandates, which had, however, various features in common as regards their structure. The principal element of each instrument of mandate consisted of the articles defining the mandatory's powers and its obligations in respect of the inhabitants of the territory and towards the League and its organs. The Court referred to these as the "conduct"

provisions. In addition, each instrument of mandate contained articles conferring certain rights relative to the mandated territory directly upon the members of the League as individual States, or in favor of their nationals. The Court referred to rights of this kind as "special interests", embodied in the "special interests" provisions of the mandates.

- In addition, every mandate contained a jurisdictional clause, which, with a single exception, was in identical terms, providing for a reference of disputes to the Permanent Court of International Justice, which, the Court had found in the first phase of the proceedings, was now, by virtue of Article 37 of the Court's Statute, to be construed as a reference to the present Court.

- The Court drew a distinction between the "conduct" and the "special interests" provisions of the mandates, the present dispute relating exclusively to the former. The question to be decided was whether any legal right or interest was vested in members of the League of Nations individually as regards the "conduct" clauses of the mandates - i.e., whether the various mandatories had any direct obligation towards the other members of the League individually, as regards the carrying out of the "conduct" provisions of the mandates. If the answer were that the Applicants could not be regarded as possessing the legal right or interest claimed, then even if the various allegations of contraventions of the Mandate for South West Africa were established, the Applicants would still not be entitled to the pronouncements and declarations which, in their final submissions, they asked the Court to make.
- It was in their capacity as former members of the League of Nations that the Applicants appeared before the Court, and the rights they claimed were those that the members of the League were said to have been invested with in the time of the League. Accordingly, in order to determine the rights and obligations of the Parties relative to the Mandate, the Court had to place itself at the point in time when the mandates system was instituted. Any enquiry into the rights and obligations of the Parties must proceed principally on the basis of considering the texts of the

instruments and provisions in the setting of their period.

- Similarly, attention must be paid to the juridical character and structure of the institution, the League of Nations, within the framework of which the mandates system was organized. A fundamental element was that Article 2 of the Covenant provided that the "action of the League under this Covenant shall be effected through the instrumentality of an Assembly and of a Council, with a permanent Secretariat". Individual member States could not themselves act differently relative to League matters unless it was otherwise specially so provided by some article of the Covenant.

- It was specified in Article 22 of the Covenant that the "best method of giving practical effect to [the] principle" that the "well-being and development" of those peoples in former enemy colonies "not yet able to stand by themselves" formed "a sacred trust of civilization" was that "the tutelage of such peoples should be entrusted to advanced nations who are willing to accept it" and it specifically added that it was "on behalf of the League" that "this tutelage should be exercised by those nations as Mandatories". The mandatories were to be the agents of the League and not of each and every member of it individually.

- Article 22 of the Covenant provided that "securities for the performance" of the sacred trust were to be "embodied in this Covenant". By paragraphs 7 and 9 of Article 22, every mandatory was to "render to the Council an annual report in reference to the territory"; and a Permanent Mandates Commission was to be constituted "to receive and examine" these annual reports and "to advise the Council on all matters relating to the observance of the mandates". In addition, it was provided, in the instruments of mandate themselves that the annual reports were to be rendered "to the satisfaction of the Council".

- Individual member States of the League could take part in the administrative process only through their participation in the activities of the organs by means of which the League was entitled to function. They had no right of direct intervention relative to the mandatories this was the prerogative of the League organs.

- The manner in which the mandate instruments were drafted only lends emphasis to the view that the members of the League generally were not considered as having any direct concern with the setting up of the various mandates. Furthermore, while the consent of the Council of the League was required for any modification of the terms of the mandate, it was not stated that the consent of individual members of the League was additionally required. Individual members of the League were not parties to the various instruments of mandate, though they did, to a limited extent, and in certain respects only, derive rights from them. They could draw from the instruments only such rights as these unequivocally conferred.

- Had individual members of the League possessed the rights which the Applicants claimed them to have had, the position of a mandatory caught between the different expressions of view of some 40 or 50 States would have been untenable. Furthermore, the normal League voting rule was unanimity, and as the mandatory was a member of the Council on questions affecting its mandate, such questions could not be decided against the mandatory's contrary vote. This system was inconsistent with the position claimed for individual League members by the Applicants, and if, as members of the League, they did not possess the rights contended for, they did not possess them now.

- It had been attempted to derive a legal right or interest in the conduct of the Mandate from the simple existence, or principle, of the "sacred trust". The sacred trust, it was said was a "sacred trust of civilization" and hence all civilized nations had an interest in seeing that it was carried out. But in order that this interest might take on a specifically legal character the sacred trust itself must be or become something more than a moral or humanitarian ideal. In order to generate legal rights and obligations, it

must be given juridical expression and be clothed in legal form. The moral ideal must not be confused with the legal rules intended to give it effect. The principle of the "sacred trust" had no residual juridical content which could, so far as any particular mandate is concerned, operate *per se* to give rise to legal rights and obligations outside the system as a whole.

- Nor could the Court accept the suggestion that even if the legal position of the Applicants and of other individual members of the League were as the Court held it to be, this was so only during the lifetime of the League, and that on the latter's dissolution the rights previously resident in the League itself, or in its competent organs, devolved upon the individual States which were members of it at the date of its dissolution. Although the Court held in 1962 that the members of a dissolved international organization can be deemed, though no longer members of it, to retain rights which, as members, they individually possessed when the organization was in being, this could not extend to ascribing to them, upon and by reason of the dissolution, rights which, even previously as members, they never did individually possess. Nor could anything that occurred subsequent to the dissolution of the League operate to invest its members with rights they did not previously have as members of the League. The Court could not read the unilateral declarations, or statements of intention, made by the various mandatories on the occasion of the dissolution of the League, expressing their willingness to continue to be guided by the mandates in their administration of the territories concerned, as conferring on the members of the League individually any new legal rights or interests of a kind they did not previously possess.

- It might be said that in so far as the Court's view led to the conclusion that there was now no entity entitled to claim the due performance of the Mandate, it must be unacceptable, but if a correct legal reading of a given situation showed certain alleged rights to be non-existent, the consequences of this must be accepted. To postulate the existence of such rights in order to avert those consequences would be to engage in an

essentially legislative task, in the service of political ends.

- Turning to the contention that the Applicants' legal right or interest had been settled by the 1962 Judgment and could not now be reopened, the Court pointed out that a decision on a preliminary objection could never be preclusive of a matter appertaining to the merits, whether or not it had in fact been dealt with in connection with the preliminary objection. When preliminary objections were entered by the defendant party in a case, the proceedings on the merits were suspended, by virtue of Article 62, paragraph 3, of the Court's Rules. Thereafter, and until the proceedings on the merits were resumed, there could be no decision finally determining or prejudging any issue of merits. A judgment on a preliminary objection might touch on a point of merits, but this it could do only in a provisional way, to the extent necessary for deciding the question raised by the preliminary objection. It could not rank as a final decision on the point of merits involved.

- While the 1962 Judgment decided that the Applicants were entitled to invoke the jurisdictional clause of the Mandate, it remained for them, on the merits, to establish that they had such a right or interest in the carrying out of the provisions which they invoked as to entitle them to the pronouncements and declarations they were seeking from the Court. There was no contradiction between a decision that the Applicants had the capacity to invoke the jurisdictional clause and a decision that the Applicants had not established the legal basis of their claim on the merits.

- In respect of the contention that the jurisdictional clause of the Mandate conferred a substantive right to claim from the Mandatory the carrying out of the "conduct of the Mandate" provisions, it was to be observed that it would be remarkable if so important a right had been created in so casual and almost incidental a fashion. There was nothing about this particular jurisdictional clause, in fact, to differentiate it from many others, and it was an almost elementary principle of procedural law that a distinction had to be made between, on the one hand, the right to activate a court and

the right of a court to examine the merits of a claim and, on the other, the plaintiff's legal right in respect of the subject matter of its claim, which it would have to establish to the satisfaction of the Court. Jurisdictional clauses were adjectival not substantive in their nature and effect: they did not determine whether parties had substantive rights, but only whether, if they had them, they could vindicate them by recourse to a tribunal.

- The Court then considered the rights of members of the League Council under the jurisdictional clauses of the minorities treaties signed after the First World War, and distinguished these clauses from the jurisdictional clauses of the instruments of mandate. In the case of the mandates the jurisdictional clause was intended to give the individual members of the League the means of protecting their "special interests" relative to the mandated territories; in the case of the minorities treaties, the right of action of the Members of the Council under the jurisdictional clause was only intended for the protection of minority populations. Furthermore, any "difference of opinion" was characterized in advance in the minorities' treaties as being justifiable, because it was to be "held to be a dispute of an international character". Hence no question of any lack of legal right or interest could arise. The jurisdictional clause of the mandates on the other hand had none of the special characteristics or effects of those of the minorities' treaties.

- The Court next dealt with what had been called the broad and unambiguous language of the jurisdictional clause - the literal meaning of its reference to "any dispute whatever" coupled with the words "between the Mandatory and another Member of the League of Nations" and the phrase "relating to the provisions of the Mandate", which, it was said, permitted a reference to the Court of a dispute about any provision of the Mandate. The Court was not of the opinion that the word "whatever" in Article 7, paragraph 2, of the Mandate did anything more than lend emphasis to a phrase that would have meant exactly the same without it. The phrase "any dispute" (whatever) did not mean anything intrinsically different from "a dispute"; nor did the reference to

the "provisions" of the Mandate, in the plural, have any different effect from what would have resulted from saying "a provision". A considerable proportion of the acceptances of the Court's compulsory jurisdiction under paragraph 2 of Article 36 of its Statute were couched in language similarly broad and unambiguous and even wider. It could never be supposed that on the basis of this wide language the accepting State was absolved from establishing a legal right or interest in the subject matter of its claim. The Court could not entertain the proposition that a jurisdictional clause by conferring competence on the Court thereby and of itself conferred a substantive right.

- The Court next adverted to the question of admissibility. It observed that the 1962 Judgment had simply found that it had "jurisdiction to adjudicate upon the merits" and that if any question of admissibility were involved it would fall to be decided now, as occurred in the merits phase of the *Nottebohm* case; if this were so the Court would determine the question in exactly the same way, i.e., looking at the matter from the point of view of the capacity of the Applicants to advance their present claim, the Court would hold that they had not got such capacity, and hence that the claim was inadmissible.

- Finally, the Court dealt with what had been called the argument of "necessity". The gist of this was that since the Council of the League had no means of imposing its views on the Mandatory, and since no advisory opinion it might obtain from the Court would be binding on the latter, the Mandate could have been flouted at will. Hence, it was contended, it was essential, as an ultimate safeguard or security for the sacred trust, that each Member of the League should be deemed to have a legal right or interest in that matter and be able to take direct action relative to it. But in the functioning of the mandates system in practice, much trouble was taken to arrive, by argument, discussion, negotiation and cooperative effort, at generally acceptable conclusions and to avoid situations in which the Mandatory would be forced to acquiesce in the views of the rest of the Council short of casting an adverse vote. In

this context, the existence of substantive rights for individual members of the League in the conduct of the mandates exercisable independently of the Council would have been out of place. Furthermore, leaving aside the improbability that, had the framers of the mandates system intended that it should be possible to impose a given policy on a mandatory, they would have left this to be haphazard and uncertain action of individual members of the League, it was scarcely likely that a system which deliberately made it possible for mandatories to block Council decisions by using their veto (though, so far as the Court was aware, this had never been done) should simultaneously invest individual members of the League with a legal right of complaint if the mandatory made use of this veto. In the international field, the existence of obligations that could not be enforced by any legal process had always been the rule rather than the exception-and this was even more the case in 1920 than today.

- Moreover, the argument of "necessity" amounted to a plea that the Court should allow the equivalent of an *actio popularis*, or right resident in any member of a community to take legal action in vindication of a public interest. But such a right was not known to international law as it stood at present: and the Court was unable to regard it as imported by "the general principles of law" referred to in Article 38, paragraph 1 (c), of its Statute.

- In the final analysis, the whole "necessity" argument appeared to be based on considerations of an extra-legal character, the product of a process of after-knowledge. It was events subsequent to the period of the League, not anything inherent in the mandates system as it was originally conceived, that gave rise to the alleged "necessity", which, if it existed, lay in the political field and did not constitute necessity in the eyes of the law. The Court was not a legislative body. Parties to a dispute could always ask the Court to give a decision *ex aequo et bono*, in terms of paragraph 2 of Article 38. Failing that, the duty of the Court was plain: its duty was to apply the law as it found it, not to make it.

- It might be urged that the Court was entitled to "fill in the gaps", in the application of a teleological principle of interpretation, according to which instruments must be given their maximum effect in order to ensure the achievement of their underlying purposes. This principle was a highly controversial one and it could, in any event, have no application to circumstances in which the Court would have to go beyond what could reasonably be regarded as being a process of interpretation and would have to engage in a process of rectification or revision. Rights could not be presumed to exist merely because it might seem desirable that they should. The Court could not remedy a deficiency if, in order to do so, it had to exceed the bounds of normal judicial action.

- It might also be urged that the Court would be entitled to make good an omission resulting from the failure of those concerned to foresee what might happen and to have regard to what it might be presumed the framers of the mandate would have wished, or would even have made express provision for, had they had advance knowledge of what was to occur. The Court could not, however, presume what the wishes and intentions of those concerned would have been in anticipation of events that were neither foreseen nor foreseeable; and even if it could, it would certainly not be possible to make the assumptions contended for by the Applicants as to what those intentions were.

- For the foregoing reasons, the Court decided to reject the claims of the Empire of Ethiopia and the Republic of Liberia.

Researcher's Finding

The Court held that the Ethiopia and Liberia had no standing before the court in this particular matter regarding South Africa's policy in the South-West Africa. The Court in the present case opined on the 'action popularis" principle which says that if a public wrong is committed in a community action can be taken by anyone in the community. But the Court here held that as this principle is not a part of international law so the parties have no stand to seek remedy before an international court unless and until it suffered from an illegal action by any other state or states.

Nuclear Tests Case (New Zealand v. France)[47]

1. **Parties**- New Zealand v. France

   And

   Australia v. France

2. **Date of Application**- 9 May 1973

3. **Date of Dissolution**- 20 December 1974

4. **Type of Disposition-** Judgment on jurisdiction

5. **Facts**

On 9 May, 1973 Australia and New Zealand each instituted proceedings against France concerning test of nuclear weapons which France proposed to carry out in the atmosphere in the South Pacific Region. At the request of Australia and New Zealand, the Court indicated interim measures of protection to the effect, inter alia, that pending judgment France should avoid nuclear tests causing nuclear fall-out in the New Zealand and Australian Territory. In its judgment the Court found that the application of Australia and New Zealand no longer had any object and that it was therefore not called upon to give any decision.

[47] interim Protection-Order of22 June 1973. I.C.J. Reports 1973, p. 135) and of a Judgment delivered on 20 December; 1974 (Nuclear Tests (New Zealand/ v. France), Judgment, I.C.J. Report 1974, page. 457

During the currency of the case announcement by French President abandoning nuclear testing in the atmosphere, provided the Court an opportunity to declare the case moot and this brought the conflict between France and Australia and New Zealand to resolution without further incidents.

6. Judgment

Order of 22 June 1973

- The Court, by 8 votes to 6, made an Order indicating, pending its final decision in the case concerning Nuclear Tests (New Zealand v. France), the following provisional measures of protection:

- The Governments of New Zealand and France should each of them ensure that no action of any kind is taken which might aggravate or extend the dispute submitted to the Court or prejudice the rights of the other Party in respect of the carrying out of whatever decision the Court may render in the case; and, in particular, the French Government should avoid nuclear tests causing the deposit of radio-active fall-out on the territory of New Zealand, the Cook Islands, Niue or the Tokelau Islands.

- In its Order, the C:ourt recalls that on 9 May 1973 New Zealand instituted proceedings against France in respect of a dispute as to the legality of atmospheric nuclear tests in the South Pacific region. The New Zealand Government asked the Court to adjudge and declare that the conduct by the French Government of nuclear tests in the South Pacific region that give rise to radio-active fall-out constitutes a violation of New Zealand's rights under international law, and that these rights will t~ violated by any further such tests. On 14 May the New Zealand Government asked the Court to indicate interim measures of protection. In a letter from the Ambassador of France to the Netherlands, handed by him to the Registrar on 16 May 1973, the French Government stated that it considered that the Court was manifestly not competent in the case and that it could not

accept the Court's jurisdiction, and that accordingly the French Government did not intend to appoint an agent, and requested the Court to remove the case from its list. A statement of the reasons which had led the French Government to these conclusions was annexed to the letter.

- The Court has indicated interim measures on the basis of Article 41 of its Statute and taking into account the following considerations inter alia:

  a. the material submitted to the Court leads it to the conclusion, at the present stage of the proceedings, that the provisions invoked by the Applicant with regard to the Court's jurisdiction appear, prima facie, to afford a basis on which that jurisdiction might be founded;

  b. it cannot be assumed a priori that the claims of the New Zealand Government fall completely outside the purview of the Court's jurisdiction or that the government may not be able to establish a legal interest in respect d these claims entitling the Court to admit the Application;

  c. For the purpose of the present proceedings, it suffices to observe that the information submitted to the Court does not exclude the possibility that damage to New Zealand might be shown to be caused by the deposit on New Zealand territory of radio-active fall-out resulting from such tests and to be irreparable.

- The Court then says that it is unable to accede at the present stage of the proceedings to the request made by the French Government that the case be removed from the list. However, the decision given today in no way prejudges the question of the jurisdiction of the Court to deal with the merits of the case, or any question relating to the admissibility of the Application, or relating to the merits themselves, and leaves unaffected the right of the French Government to submit arguments in respect of those questions.

- The Court further decides that the written pleadings shall first be addressed to the question of the jurisdiction of the Court to entertain the dispute, and of the admissibility of the Application, and fixes 21 September 1973 as the time-limit for the Memorial of the Government of New Zealand and 21 December 1973 as the time-limit for the Counter-Memorial of the French Government.

Judgment of 20 December 1974

- In its judgment in the case concerning Nuclear Tests (New Zealand v. France), the Court, by 9 votes to1 6, has found that the claim of New Zealand 110 longer had any object and that the Court was therefore had called upon to give a decision thereon.

- In the reasoning of its Judgment, the Court adduces inter alia the following consideri8,tions: Even before turning to the questions of jurisdiction and admissibility, the Court has first to consider the essentially preliminary question ZIS to whether a dispute exists and to analyze the claim submitted to it (paras. 22-24 of Judgment); the proceedings instituted before the Court on 9 May 1973 concerned the legality of atmospheric nuclear tests conducted by France in the South Pacific (para. 16 of Judgment); the original rind ultimate objective of New Zealand i:; to obtain a termination of those tests (paras. 25-31 of Judgment); France, by various public statements made in 1974, has announced its intention, following the completion of the 1974 series of atmospheric tests, to cease the conduct of such tests (paras. 33-44 of Judgment); the Court finds :that the objective of New Zealand has in effect been accomplished, inasmuch as France has undertaken the obligation to hold no further nuclear tests in the atmosphere in the South Pacific (paras. 50-55 of Judgment); the dispute having thus disappeared, the claim no longer has my object and there is nothing on which to give judgment (paras. 58-62 of Judgment).

- Under the delivery of the Judgment, the Order of 22 June 197 P" indicating interim measures of protection cease to be operative and the measures in question lapse (para. 64 of Judgment).

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- The Court faces a situation in which the objective of the Applicant has in effect been accomplished, inasmuch as the Court finds that France has undertaken the obligation to hold no further nuclear tests in the atmosphere in the South pacific. The Applicant has sought an assurance from France that the tests would cease and France, on its own initiative, has made a series of statements to the effect that they will cease. The Court concludes that France has assumed an obligation as to conduct, concerning the effective cessation of the tests, and the fact that the Applicant has not exercised its right to discontinue the proceedings does not prevent the Court from making its own independent finding on the subject. As a court of law, it is called upon to resolve existing disputes between States: these disputes must continue to exist at the time when the Court makes its decision. In the present case, the dispute having disappeared, the claim no longer has any object and there is nothing on which to give judgment.

- Once the Court has found that a State has entered into a commitment concerning its future conduct, it is not the Court's function to contemplate that it will not comply with it. However, if the basis of the Judgment were to be affected, the Applicant could request an examination of the situation in accordance with the provisions of the Statute.

- For these reasons, the Court finds that the claim no longer has any object and that it is therefore not called upon to give a decision thereon (para. 62 of the Judgment in the Australian case, and para. 65 of the Judgment in the New Zealand case).

Finding of Researcher

It has been clearly a case of amicable settlement the moment the President of France declared that its nuclear test operation is abandoned and that it won't be carried out anymore. With this declaration the ICJ announced the dispute to be settled by the parties amongst themselves amicably.

Case concerning the appeal relating to the jurisdiction of the ICAO Council[48]

1. **Parties-** Pakistan v**.** India

2. **Date of Application-** 30 August 1971

3. **Date of Dissolution-** 18 August 1972

4. **Type of Disposition-** Judgment on Jurisdiction**.**

5. **Facts**

The Facts and the Main Contentions of the Parties (paras. 1-12 of the Judgment)[49]

The Court has emphasized in its Judgment that it had nothing whatever to do with the facts and contentions of the Parties relative to the substance of the dispute between them, except in so far as those elements might relate to the purely jurisdictional issue which alone had been referred to it.

Under the International Civil Aviation Convention and the International Air Services Transit Agreement, both signed in Chicago in 1944, the civil aircraft of Pakistan had the right to overfly Indian Territory. Hostilities interrupting over flights broke out between the two countries in August 1965, but in February 1966 they came to an agreement that there should be an immediate resumption of over flights on the same basis as before 1 August 1965. Pakistan interpreted that undertaking as meaning that over flights would be resumed on the basis of the Convention and Transit Agreement, but India maintained that those two Treaties had been suspended during the hostilities and were never as such revived, and that over flights were resumed on the basis of a special regime according to which they could take place only after

[48] I.C.J. Reports 1972, p. 46)
[49] http://www.icj-cij.org/docket/index.php?sum=295&code=cs2&p1=3&p2=3&case=52&k=cc&p3=5

permission had been granted by India. Pakistan denied that any such regime ever came into existence and maintained that the Treaties had never ceased to be applicable since 1966.

On 4 February 1971, following a hijacking incident involving the diversion of an Indian aircraft to Pakistan, India suspended over flights of its territory by Pakistan civil aircraft. On 3 March 1971 Pakistan, alleging that India was in breach of the two Treaties, submitted to the ICAO Council *(a)* an Application under Article 84 of the Chicago Convention and Article II, Section 2, of the Transit Agreement, *(b)* a Complaint under Article II, Section I, of the Transit Agreement. India having raised preliminary objections to its jurisdiction, the Council declared itself competent by decisions given on 29 July 1971. On 30 August 1971 India appealed from those decisions, founding its right to do so and the Court's jurisdiction to entertain the appeal on Article 84 of the Chicago Convention and Article II, Section 2, of the Transit Agreement (hereinafter called "the jurisdictional clauses of the Treaties".

6. Issues[50]

1. Whether the Court had jurisdiction to hear Pakistan's claim that the decision by the Council of the International Civil Aviation Organization ('ICAO') regarding Indian civilian aircraft overflying Pakistan and Pakistani civilian aircraft overflying India, was illegal, null, and void, or erroneous?

2. Whether the ICAO was competent to entertain the merits of the complaint brought by Pakistan regarding use of Indian and Pakistani airspace, and whether it had competence to reject India's appeal regarding its affirmative jurisdictional decision in this matter?

3. Whether the ICAO itself had jurisdiction to hear India's appeal regarding its decision in the original case concerning use of airspace over Pakistan and India?

[50] http://courses.kvasaheim.com/ps376/briefs/bmvazquezbrief4.pdf

7. Judgment[51]

a. Jurisdiction of the Court to entertain the Appeal (paras. 13-26 of the Judgment)

- Pakistan advanced certain objections to the jurisdiction of the Court to entertain the appeal. India pointed out that Pakistan had not raised those objections as *preliminary* objections under Article 62 of the Rules but the Court observes that it must always satisfy itself that it has jurisdiction and, if necessary, go into that *matter proprio motu*. Pakistan had argued in the first place that India was precluded from affirming the competence of the Court by its contention, on the merits of the dispute that the Treaties were not in force, which if correct, would entail the inapplicability of their jurisdictional clauses. The Court, however, has held that Pakistan's argument here on was not well founded, for the following reasons: *(a)* India had not said that these multilateral Treaties were not in force in the definitive sense, but that they had been suspended or were not as a matter of fact being applied as between India and Pakistan; *(b)* a merely unilateral suspension of a treaty could not *per se* render its jurisdictional clause inoperative; *(c)* the question of the Court's jurisdiction could not be governed by preclusive considerations; *(d)* parties must be free to invoke jurisdictional clauses without being made to run the risk of destroying their case on the merits.

- Pakistan had further asserted that the jurisdictional clauses of the Treaties made provision solely for an appeal to the Court against a final decision of the Council on the merits of disputes, and not for an appeal against decisions of an interim or preliminary nature. The Court considers that a decision of the Council on its jurisdiction does not come within the same category as procedural or interlocutory decisions concerning time-limits, the production of documents etc., for *(a)* although a decision on jurisdiction does not decide the ultimate merits, it is nevertheless a decision of a substantive character, inasmuch as it might decide the whole case by bringing it to an end; *(b)* an objection to jurisdiction has the significance *inter alia* of affording one of the parties the possibility of avoiding a

[51] http://www.icj-cij.org/docket/index.php?sum=295&code=cs2&p1=3&p2=3&case=52&k=cc&p3=5

hearing on the merits; (c) a jurisdictional decision may often involve some consideration of the merits; *(d)* issues of jurisdiction can be as important and complicated as any that might arise on the merits; *(e)* to allow an international organ to examine the merits of a dispute when its competence to do so has not been established would be contrary to accepted standards of the good administration of justice.

- With regard more particularly to its Complaint to the ICAO Council, Pakistan had submitted that it was relying on Article II, Section 1, of the Transit Agreement (whereas the Application relied on Article 84 of the Chicago Convention and on Article II of Section 2 of the Transit Agreement). The point here was that decisions taken by the Council on the basis of Article II, Section 1, are not appealable, because, unlike decisions taken under the other two provisions mentioned above, they do not concern illegal action or breaches of treaty but action lawful, yet prejudicial. The Court found that the actual Complaint of Pakistan did not, at least for the most part, relate to the kind of situation for which Section 1 of Article II was primarily intended, inasmuch as the injustice and hardship alleged therein were such as resulted from action said to be illegal because in breach of the Treaties. As the Complaint made exactly the same charges of breach of the Treaties as the Application, it could be assimilated to the latter for the purposes of appealiability unless that were so, paradoxical situations might arise.

- To sum up, the objections to the Court's jurisdiction based on the alleged inapplicability of the Treaties as such or of their jurisdictional clauses could not be sustained. The Court was therefore invested with jurisdiction under those clauses and it became irrelevant to consider objections to other possible bases of the Court's jurisdiction.

- Furthermore, since it was the first time any matter had come to the Court on appeal, the Court observed that in thus providing for an appeal to the Court from the decisions of the ICAO Council, the Treaties had enabled a certain measure of supervision by the Court of the validity of the Council's acts and that, from that standpoint, there was no ground for distinguishing between supervision as to jurisdiction and supervision as to merits.

b. Jurisdiction of the ICAO Council to entertain the merits of the case (paras. 27-45 of the Judgment)

- With regard to the correctness of the decisions given by the Council on 29 July 1971, the question was whether Pakistan's case before the Council disclosed, within the meaning of the jurisdictional clauses of the Treaties, a disagreement relating to the interpretation or application of one or more provisions of those instruments. If so, the Council was prima facie competent, whether considerations claimed to lie outside the Treaties might be involved or not.

- India had sought to maintain that the dispute could be resolved without any reference to the Treaties and therefore lay outside the competence of the Council. It had contended that the Treaties had never been revived since 1965 and that India had in any case been entitled to terminate or suspend them as from 1971 by reason of a material breach of them for which Pakistan was responsible, arising out of the hijacking incident. India had further argued that the jurisdictional clauses of the Treaties allowed the Council to entertain only disagreements relating to the interpretation and application of those instruments, whereas the present case concerned their termination or suspension. The Court found that, although those contentions clearly belonged to the merits of the dispute, *(a)* such notices or communications as there had been on the part of India from 1965 to 1971 appeared to have related to over flights rather than to the Treaties as such; *(b)* India did not appear ever to have indicated which particular provisions of the Treaties were alleged to have been breached; *(c)* the justification given by India for the suspension of the Treaties in 1971 was said to lie not in the provisions of the Treaties themselves but in a principle of general international law, or of international treaty law. Furthermore, mere unilateral affirmation of those contentions, contested by the other party, could not be utilized so as to negative the Council's jurisdiction.

- Turning to the positive aspects of the question, the Court found that Pakistan's claim disclosed the existence of a disagreement relating to the interpretation or application of the Treaties and that India's defenses likewise involved questions of their interpretation or

application. In the first place Pakistan had cited specific provisions of the Treaties as having been infringed by India's denial of over flight rights, while India had made charges of a material breach of the Convention by Pakistan: in order to determine the validity of those charges and counter-charges, the Council would inevitably be obliged to interpret or apply the Treaties. In the second place, India had claimed that the Treaties had been replaced by a special regime, but it seemed clear that Articles 82 and 83 of the Chicago Convention (relating to the abrogation of inconsistent arrangements and the registration of new agreements) must be involved whenever certain parties purported to replace the Convention or some part of it by other arrangements made between themselves; it followed that any special regime, or any disagreement concerning its existence, would raise issues concerning the interpretation or application of those articles. Finally Pakistan had argued that, if India maintained the contention which formed the substratum of its entire position, namely that the Treaties were terminated or suspended between the Parties, then such matters were regulated by Articles 89 and 95 of the Chicago Convention and Articles I and III of the Transit Agreement but the two Parties had given divergent interpretations of those provisions, which related to war and emergency conditions and to the denunciation of the Treaties.

- The Court concluded that the Council was invested with jurisdiction in the case and that the Court was not called upon to define further the exact extent of that jurisdiction, beyond what it had already indicated.

- It had further been argued on behalf of India, though denied by Pakistan, that the Council's decisions assuming jurisdiction in the case had been vitiated by various procedural irregularities and that the Court should accordingly declare them null and void and send the case back to the Council for re-decision. The Court considered that the alleged irregularities, even supposing they were proved, did not prejudice in any fundamental way the requirements of a just procedure, and that whether the Council had jurisdiction was an objective question of law, the answer to which could not depend on what had occurred before the Council.

c. Judgment of 18 August 1972

- In its judgment in the case concerning the Appeal relating to the Jurisdiction of the ICAO Council (India *v.* Pakistan), the Court, by 13 votes to 3, rejected the Government of Pakistan's objections on the question of its competence and found that it had jurisdiction to entertain India's appeal.

- By 14 votes to 2, it held the Council of the International Civil Aviation Organization to be competent to entertain the Application and Complaint laid before it by the Government of Pakistan on 3 March 1971, and in consequence rejected the appeal made to the Court by the Government of India against the decision of the Council assuming jurisdiction in those respects.

Researcher's Finding

It has been found from the study of above facts, issues and judgment of the present case that the ICJ considered both the issues

a. the application with an appeal to try whether the ICAO has jurisdiction to try the application placed by Pakistan; and
b. To try the objection whether ICJ has jurisdiction to try the application of ICAO's jurisdiction.

The Court found the answer to both the question, affirmative, and directed the case to ICAO for trial. And ultimately the dispute was settled amicably by the parties and the Organization i.e., ICAO.

Fisheries Jurisdiction Case[52]

1. **Parties-** Federal Republic of Germany v. Iceland

   And

   United Kingdom of Great Britain and Northern Ireland v. Iceland)

2. **Date of Application-** 5 June 1972/ 14 April 1972

3. **Date of Disposition-** 25 July 1974

4. **Type of Disposition-** Judgment on Merit

5. **Facts**[53]

   a. In 1948, the Parliament of Iceland passed a law that established conservation zones within the continental shelf of Iceland. Originally, the law was only implemented within the existing 3 mile fisheries jurisdiction limit.

   b. In 1958, Iceland announced that it reserved the right of fishing within an area of 12 miles from the baseline exclusively to Icelandic fisherman.

   c. Germany did not accept the validity of the new regulations, and in 1959, Germany and Iceland began negotiations.

   d. Iceland argued that "where a nation is overwhelmingly dependent upon fisheries it should be lawful to take special measures, and decide a further extension of the fishing zone for meeting the needs of such a nation."

[52] I.C.J. Reports 1972, p. 34

[53] http://courses.kvasaheim.com/ps376/briefs/bmvazquezbrief4.pdf

e. In 1961, an agreement in the form of an Exchange of Notes was concluded. Germany would no longer object to a 12 mile fishery zone around Iceland and that Iceland would give Germany six months notice of any extension of the fishery jurisdiction.

f. In July 1971, the Government of Iceland issued a policy statement that the agreement with the Germans was terminated and extended the fisheries jurisdiction to 50 nautical miles.

g. In 1972, the Ambassador of Germany informed the Prime Minister of Iceland of his Government's decision to bring the question before the court. Germany asks the Court to declare that:

a) Iceland's unilateral extension of its exclusive fisheries jurisdiction to 50 nautical miles could not be applied to the Federal Republic of Germany and its fishing vessels

b) That if Iceland established a need for conservation measures, the measures could not be the product of a unilateral extensions by Iceland of its fisheries jurisdiction, and

c) The acts of interference by Icelandic coastal patrol boats with fishing vessels registered in the Germany were unlawful and that Iceland is obligated to make compensation to Germany.

6. Questions[54]

a. Did Iceland violate international law by unilaterally extending its exclusive fishing jurisdiction to 50 nautical miles?

b. Was Iceland entitled to preferential rights in the exploitation of resources off its coast?

c. Does Germany have rights to the resources within the 50 nautical mile zone set out by Iceland?

[54] http://courses.kvasaheim.com/ps376/briefs/bmvazquezbrief4.pdf

d. Was Germany entitled to compensation from Iceland?

7. Principles[55]

a. The extension of a fishery zone up to a 12 mile limit from the baselines is generally accepted. The fishery zone is an area in which a state may claim exclusive fishery jurisdiction independently of its territorial sea.

b. The concept of preferential rights of fishing in adjacent waters in favor of the coastal state in a situation where the coastal state has special dependence on its coastal fisheries. The preferential rights of the coastal states in a special situation are to be implemented by agreement between the states concerned, either bilaterally or multilaterally, and, in case of disagreement, through the means for the peaceful settlement of disputes provided for in Article 33 of the UN Charter.

c. The preferential rights of the coastal State come into play when intensification in the exploitation of fishery resources makes it imperative to introduce some system of catch limitation and sharing of those resources to preserve the fish stocks in the interests of their rational and economic exploitation.

8. Decisions[56]

a. Germany is not entitled to damages.

b. Iceland cannot unilaterally exclude, or impose restrictions on, fishing vessels of Germany from the fishery limits agreed to in the Exchange of Notes of July 1961.

[55] Ibid
[56] http://courses.kvasaheim.com/ps376/briefs/bmvazquezbrief4.pdf

c. Iceland and Germany are under mutual obligation to undertake negotiations for the solution of their differences concerning their respective fishery rights in the area specified.

d. Iceland is entitled to a preferential share to the extent of the special dependence of her people upon the fisheries in the seas around her coast for their livelihood and economic development.

e. Germany also has established rights in the fishery resources of said areas.

f. Both states have the obligation to pay due regard to the interests of other States in the conservation and equitable exploitation of these resources.

9. Judgments of the Court[57]

Order of 17 August 1972

- In two separate Orders, issued on 17 August 1972, each adopted by fourteen votes to one, the Court indicated interim measures of protection in the Fisheries Jurisdiction cases (United Kingdom v. Iceland; Federal Republic of Germany v. Iceland). In the first of the two Orders, the Court indicated, pending its final decision in the proceedings instituted on 14 April 1972 by the Government of the United Kingdom against the Government of Iceland, the following provisional measures:
  a. the United Kingdom and the Republic of Iceland should each of them ensure that no action of any kind is taken which might aggravate or extend the dispute submitted to the Court;

[57] http://www.icj-cij.org/docket/index.php?sum=295&code=cs2&p1=3&p2=3&case=52&k=cc&p3=5

b. the United Kingdom and the Republic of Iceland should each of them ensure that no action is taken which might prejudice the rights of the other Party in respect of the carrying out of whatever decision on the merits the Court may render;

c. the Republic of Iceland should refrain from taking any measures to enforce the Regulations of 14 July 1972 against vessels registered in the United Kingdom and engaged in fishing activities in the waters around Iceland outside the twelve-mile fishery zone;

d. the Republic of Iceland should refrain from applying administrative, judicial or other measures against ships registered in the United Kingdom, their crews or other related persons, because of their having engaged in fishing activities in the waters around Iceland outside the twelve-mile fishery zone;

e. the United Kingdom should ensure that vessels registered in the United Kingdom do not take an annual catch of more than 170,000 metric tons of fish from the "Sea Area of Iceland" as defined by the International Council for the Exploration of the Sea as area Va;

f. the United Kingdom Government should furnish the Government of Iceland and the Registry of the Court with all relevant information, orders issued and arrangements made concerning the control and regulation of fish catches in the area.

- The Court also indicated that unless if. had meanwhile delivered its final judgment in the case, it would, at an appropriate time before 15 August 1973, review the matter at the request of either party in order to decide whether the foregoing measures should continue or needed to be modified or revoked.

- In the second Order, the Court indicated, pending its final decision in the proceedings instituted on 5 June 1972 by the Federal Republic of Germany against the Republic of Iceland, the following provisional measures:

[Paragraphs (a), (b), (c), (d) and (f) of the second Order are in the same form, mutatis mutandis, as in the first; paragraph reads as follows

(e) the Federal Republic should ensure that vessels registered in the Federal Republic do not take an annual catch of more than 119,000 metric tons of fish from the "Sea Area of Iceland" as defined by the International Council for the Exploration of the Sea as area Va;

The Court also indicated that unless it had meanwhile delivered its final judgment in the case, it would, at an appropriate time before 1.5 August 1973, review the matter at the request of either party in order to decide whether the foregoing measures should continue or needed to be modified or revoked.

Judgment of 2 February 1973

- In its Judgment on the question of its jurisdiction in the case concerning Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), the Court found by 14 votes to 1 that it had jurisdiction to entertain the Application filed by the Federal Republic on 5 June 1972 and to deal with the merits of the dispute.

- In its Judgment the Court recalls that on 5 June 1972 the Government of the Federal Republic of Germany instituted proceedings against Iceland in respect of a dispute concerning the proposed extension by the Icelandic (government of its exclusive fisheries jurisdiction to a distance of 50 nautical miles from the baselines round its coasts. By a letter of 27 June 1972 the Minister for Foreign Affairs of Iceland informed the Court that his Government was not willing to confer jurisdiction on it and would not appoint an Agent. By Orders of 17 and 18 August 1972 the Court indicated certain interim measures of protection at the request of the Federal Republic and decided that the first written p1e:adings should be addressed to the question of its jurisdiction to deal with the case. The Government of the Federal Repub1i.c of Germany filed a Memorial, whereas the Government of Iceland filed no pleadings.

- Taking into account the proceedings instituted against Iceland by the United Kingdom on 14 April 19'72 in the case concerning Fisheries Jurisdiction and the composition of the Court in this case, which includes a judge of United Kingdom nationality, the Court decided by eight votes to five that there was in the present phase, concerning the jurisdiction of the Court, a common interest in the sense of Article 3 1, paragraph 5, of the Statute which justified the :refusal of the request of the Federal Republic of Germany for the appointment of a judge ad hoc.

- On 8 January 1973 a public hearing was held in the course of which the Court heard oral argument on the question of its jurisdiction on behalf of the Federal Republic: of Germany, but Iceland was not represented at the hearing.

- In order to found the jurisdiction of the Court, the Government of the Federal Republic of Germany relies-

    a. on an Exchange of Notes between the Government d the Federal Republic and the Government of Iceland dated 19 July 1961, and

    b. on a declaration for the purpose of securing access to the Court, in accordance with a Security Council resolution of 15 October 1946, which it made on 29 October 1971 and deposited with the Registrar of the Court on 22 November1971. On 28 July 1972 the Minister for Foreign Affairs of Iceland pointed out in a telegram that the Federal Republic had thus accepted the jurisdiction of the Court only "after it had been notified by the Government of Iceland, in its aidememoire of 3 1 August 197 1, that the object and purpose of the provision for recourse to judicial settlement of certain matters had been fully achieved". The Court observes that the binding force of' the 1961 Exchange of Notes bears no relation to the date of deposit of the declaration required by the Security Council resolution and that the Government of the Federal Repub1ic complied with the terms both of the resolution i question and of Article 36 of the Rules of Couru.

- It is, the Court observes, to be regretted that the Government of Iceland has failed to appear to plead the objections to the Court's jurisdiction which it is understood to entertain.

- Nevertheless the Court, in accordance with its Statute and its settled jurisprudence, must examine the question on its own initiative, a duty reinforced by Article 53 of the Statute whereby, whenever one of the parties does not appear, the Cow: must satisfy itself that it has jurisdiction before finding on the merits. Although the Government of Iceland has not set out the facts and 1.aw on which its objection is based, or adduced any evidence:, the Court proceeds to consider those objections which might, in its view, be raised against its jurisdiction. In so doing, it avoids not only all expressions of opinion on matters of substance, but also any pronouncement which might prejudge or appear to prejudge any eventual decision on the merits. Compromissory clause of the 1961 Exchange of Notes (paras. 14-23 of the Judgment)

- By the 1961 Exchange of Notes the Federal Republic of Germany undertook tc, recognize an exclusive Icelandic fishery zone up to a limit 13f 12 miles and to withdraw its fishing vessels from that zone over a period of less than 3 years. The Exchange of Notes featured a compromissory clause in the following terms:

- "The Government of the Republic of Iceland shall continue to work for the implementation of the Althing Resolution of 5 May, 1999, regarding the extension of the fishery jurisdiction of Iceland. However, it shall give the Government of the Federal Republic of Germany six months' notice of any such extension; in case of a dispute relating to such art extension, the matter shall, at the request of either party, be referred to the International Court of Justice!'

- The Court observes that there is no doubt as to the fulfilment by the Government of the Federal Republic of its part of this agreement and that the Government of Iceland, in

1971, gave the notice provided for in the event of a further extension of its fisheries jurisdiction. Nor is there any doubt that a dispute has arisen, that it has been submitted to the Court by the Federal Republic of Germany and that, on the face of it, the dispute thus falls exactly within the terms of the com- promissory clause.

- Although, strictly speaking, the text of this clause is sufficiently clear for there to be no need to investigate the preparatory work, the Court as views the history of the negotiations which led to the Exchange of Notes, finding confirmation therein of the parties' intention to provide the Federal Republic, in exchange for its recognition of the 12-mile limit and the withdrawal of its vessels, with the same assume as that given a few weeks previously to the United Kingdom, including the right of challenging before the: Court the validity of any further extension of Icelandic fisheries jurisdiction beyond the 1 2-mile limit.

- It is thus apparent that the Court has jurisdiction. Validity and duration of the 1961 Exchange of Notes (paras. 24-25 of the Judgment) The Court next considers whether, as has been contended, the agreement embodied in the 1961 Exchange of Notes either was initially void or has since ceased .to operate. In the above-mentioned letter of 27 June 1972 the Minister for Foreign Affairs of Iceland said that the 1961 Exchange of Notes "took place under extremely difficult circumstances" and the Federal Republic of Germany has interpreted this statement as appearing "to intimate that the conclusion of the 1961 Agreement had taken place, on the part of the Government of Iceland, under some kind of pressure and not by its own free will". The Court, however, notes that the agreement appears to have been likely negotiated on the basis of perfect equality and freedom of decision on both sides.

- In the same letter the Minister for Foreign Affairs of Iceland expressed the view that "an undertaking for judicial settlement cannot be considered to be of a permanent nature" and, as indicated above, the Government of Iceland had indeed, in an aide-mkmoire of 3 1 August 1971, asserted that the object and purpose of the provision for recourse to judicial settlement had been fully achieved. The Court notes that the compromissory

clause contains no express provision regarding duration. In fact, the right of the Federal Republic of Germany to challenge before the Court any claim by Iceland to extend its fisheries zone was subject to the assertion of such a claim and would last so long as Iceland might seek to implement the 1959 Althing resolution.

- In a statement to the Althing (the Parliament of Iceland) on 9 November 1971, the Prime Minister of Iceland alluded to changes regarding "legal opinion on fisheries jurisdiction".

- His argument appeared to be that as the compromissory clause was the price that Iceland had paid at the time for the recognition by the Federal Republic of Germany of the 12-mile limit, the present general recognition of such a limit constituted a change of legal circumstances that relieved Iceland of its commitment. The Court observes that, on the contrary, since Iceland has received benefits from those parts of the agreement already executed, it behoves it to comply with its side of the bargain.

- The letter and statement just mentioned also drew attention to "the changed circumstances resulting from the ever increasing exploitation of the fishery resources in the seas surrounding Iceland". It is, notes the Court, admitted in international law that if a fundamental change of the circumstances which induced parties to accept a1 treaty radically transforms the extent of the obligations undertaken, this may, under certain conditions, afford the party affected a ground for invoking the termination or suspension of the treaty. It would appear that in the present case there is a divergence of views between the Parties as to whether there have been any fundamental changes in fishing techniques in the waters around Iceland. Such changes would, however, be relevant only for any eventual decision on the merits. It cannot be said that the change of circumstances alleged by Iceland has modified the scope of the jurisdictional obligation agreed to in the 1961 Exchange of Notes. Moreover, any question as to the jurisdiction of the Court, deriving from an alleged lapse of the obligation through changed circumstances, is for the Court to decide by virtue of Article 36, paragraph 6, of its Statute.

Order of 12 July 1973

- By Orders made on 12 July 1973 in each of the two Fisheries Jurisdiction cases (United Kingdom v. Iceland and Federal Republic of Germany v. Iceland) the Corn, by 11 votes to 3, confirmed that the provisional measures indicated in operative paragraph 1 of the Orders of 17 August 1972 should, subject to the power d revocation cr modification conferred on the Court by paragraph 7 of Article: 61 of its 1946 Rules, remain operative until the Court has given final judgment in each case.

- **In the considerations the court mentions in each Order, it recalls:**

  a. that negotiations have taken place or are taking place between the States concerned with a view to reaching an interim arrangement pending final settlement of the disputes;

  b. that the provisional measures indicated by the Court do not exclude an interim arrangement which may be agreed upon by the Governments concerned, based on catch limitation figures different from those indicated as maxima by the Court and on related restrictions concerning areas closed to fishing, number and type of vessels allowed and forms of control of the agreed provisions;

  c. that the Court, pending the final decision, and in the absence of such interim arrangement, must remain concerned to preserve, by the indication of provisional measures, that rights which may subsequently be adjudged by the Court to belong respectively to the Parties.

- It may be recalled that, in its Orders of 17 August 1972, made by 14 votes to 1, the Court, in operative paragraph 1, had indicated interim measures of protection to the effect, inter alia, that the Parties should each of them ensure that no action of any kind was taken which might aggravate or extend the disputes, that Iceland should rein from taking any measures to enforce the new regulations promulgated on the subject of the

limits of its exclusive fishery zone against vessels registered in the United Kingdom or in the Federal Republic of Germany, and that the vessels in question should not take annual catches of more than 170,000 or 1 19,000 metric tons respectively. The two Orders in question also contained an operative paragraph 2 in the following terms:

- "Unless the Court has meanwhile delivered its final judgment in the case, it shall, at an appropriate time before15 August 1973, review the matter at the request of either Party in order to decide whether the foregoing measures shall continue or need to be modified or n:voked.*' On 2 February 1973 the Court delivered two Judgments finding that it possessed jurisdiction to deal with each of the two cases and, on 15 February 1973, it made two Orders fixing the time-limits for the written proceedings on the merits in each case. On 22 June 1973 the Agent for the United Kingdom requested the Court to confirm that the interim measures of protection indicated by the Court would continue until the Court had given final judgment in the case or until further order, and the Agent for the Federal Republic requested the Court to confirm the opinion of his Government that the Order of 17 August 1972 would continue to be operative after 15 August 1973. By a telegram of 2 July 1973 the Government of Iceland (which has not appointed an agent or recognized the competence of the Court) submitted observations on these requests, protested against the continuation of the measures indicated, maintained that highly mobile fishing fleets should not be allowed to inflict a constant threat of deterioration of the fish stocks and endanger the viability of a one-source economy, and concluded that I:O freeze the present dangerous situation might cause irreparable harm to the interests of the Icelandic nation.

Judgment of 25 July 1974

- In its Judgment on the merits in the case concerning Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), the Court, by ten votes to four:

    1. Found that the Icelandic Regulations of 1972 constituting a unilateral extension of the exclusive fishing rights of Iceland to 50 nautical miles from the baselines are not opposable to the Federal Republic of Germany;

    2. Found that Iceland is not entitled unilaterally to exclude fishing vessels of the Federal Republic of Germany from areas between the 12-mile and 50-mile limits or unilaterally to impose restrictions on their activities in such areas;

    3. Held that Iceland and the Federal Republic of Germany are under mutual obligations to undertake negotiations in good faith for an equitable solution of their differences;

    4. Indicated certain factors which are to be taken into account in these negotiations (preferential rights of Iceland, established rights of the Federal Republic of Germany, interests of other States, conservation of fishery resources, joint examination of measures required

    5. Found that it is unable to accede to the submission of the Federal Republic concerning a claim to be entitled to compensation.

Procedure-Failure of Party to Appear (paras. 1-1 8 of the Judgment)

- In its Judgment, the Court recalled that proceedings were instituted by the Federal Republic of Germany against Iceland on 26 May 1972. At the ~request of the Federal Republic of Germany, the Court indicated interim measures of protection by an Order dated 17 August 1972 and confirmed them by a further Order dated 12 July 1973. By a

Judgment of 2 February 1973 the Court found that it had jurisdiction to deal with the merits of the dispute.

- The Court did not include upon the bench any judge of the nationality of either of the Parties. In a letter dated 25 September 1973 the Federal Republic informed the Court that, as Iceland was declining to take part in the proceedings and to avail itself of the right to have a judge ad hot, the Federal Republic did not feel it necessary to insist on the appointment of one. On 17 January 1974 the Court decided by 9 votes to 5 not to join the proceedings tc3 those instituted by the United Kingdom against Iceland. In leaching this decision the Court took into account the fact that, while the basic legal issues in each case appeared to be identical, there were differences between the positions of the two Applicants, and between their respective submissions, and that joinder would be contrary to their wishes.

- In its final submissions the Federal Republic asked the Court to adjudge and declare:

  a. That the unilateral extension by Iceland of its zone of exclusive fisheries jurisdiction to 50 nautical miles from the baselines has, as against the Federal Republic of' Germany, no basis in international law;

  b. That the Icelandic Regulations issued for this purpose shall not be enforced against the Federal Republic of Ger- many or vessels registered therein;

  c. That if Iceland establishes a need for conservation measures in respect to fish stocks beyond the limit of 12 miles agreed to in an Exchange of' Notes in 1961, such measures may be taken only on the basis of an agreement between the Parties, concluded either bilaterally or within a multilateral framework, with due regard to the special dependence of Iceland on its fisheries and to the traditional fisheries of the Federal Republic in the waters concerned; that the acts of interference by Icelandic coastal patrol boats with fishing vessels registered in the Federal Republic are

unlawful under international law and that Iceland is under an obligation to, make compensation therefore to the Federal Republic.

- Iceland did not take part in any phase of the proceedings. By a letter of 27 June 1972 Iceland informed the Court that it regarded the Exchange of Notes of 1961 as terminated; that in its view there was no basis under the Statute for the Court to exercise jurisdiction; and that, as it considered its vital interests to be involved, it wits not willing to confer jurisdiction on the Court in any cast: involving the extent of its fishery limits. In a letter dated 11 January 1974, Iceland stated that it did not accept any of the statements of fact or any of the allegations or contentions of law submitted on behalf of the Federal Republic
- In those circumstances the Court, under the terms of Article 53 of the Statute of the legal position of each party and acted with particular circumspection in view of the absence of the respondent State, the Court considered that it had before it the elements necessary to enable it to deliver judgment.

History of the Dispute- Jurisdiction of the Court (paras. 20-40 of the Judgment)

- The Court recalled that in 1948 the Althing (the Parliament of Iceland) passed a law concerning the Scientific Conservation of the Continental Shelf Fisheries which empowered the Government to establish conservation zones wherein all fisheries should be subject to Icelandic rules and control, to the extent compatible with agreements with other countries. In 1958 Iceland issued regulations extending the limits of its exclusive right of fishery round its coasts to 12 nautical miles, and in 1959 the Althing declared by a resolution "that recognition should be obtained of Iceland's right to the entire continental shelf area in conformity with the policy adopted by the IAW of 1948". After refusing to recognize the validity of the new Regulations, the Federal Republic: negotiated with Iceland and, on 19 July 1961, concluded with it an Exchange of Notes which specified inter alia that the Federal Republic would 110 longer object to a 12-mile fishery zone, that Iceland would continue to work for the implementation of the 1959 Resolution regarding the extension of fisheries jurisdiction but would give the Federal Republic six months' notice of such extension and that "in case of a dispute in relation to

such an extension, the matter shall, at the request of either Party, be referred to the International Court of Justice".

- In 1971 the Icelandic Government announced that the agreement on fisheries jurisdiction with the Federal Republic would be terminated and that the limit of Iceland's exclusive fisheries jurisdiction would be extended to 50 miles. By an aide-memoire of 24 February 1972 the Federal Republic was formally notified of that intention and replied that, in its view, the measures contemplated would be "incompatible with the general rules of international law" and that the Exchange of Notes could not be denounced unilaterally. On 14 July 1972 new Regulations were introduced whereby Iceland's fishery limits would be extended to 50 miles as from. 1 September 1972 and all fishing activities by foreign vessels inside those limits be prohibited. Their enforcement gave rise, while proceedings before the Court were continuing and Iceland was refusing to recognize the Court's decisions, to incidents, and to negotiations which did not lead to any agreement.

- The Court, having in its Judgment of 1973 held the Exchange of Notes of 1961 to be a treaty in force, emphasized that it would be too narrow an interpretation of its compromissory clause (quoted above) to conclude that it limited the Court's jurisdiction to giving an affirmative or a negative answer to the question of whether the Icelandic Regulations of 1972 were in conformity with international law. It seemed evident that the dispute between the Parties included disagreements as to their respective rights in Fishery resources and the adequacy of measures to conserve them. It was within the power of the Court to take into consideration all relevant elements.

Applicable Rules of International Law (paras 47-70 of the judgment)

- The first United Nations Conference on the Law of the Sea, no reason to doubt, had adopted a Convention on the High Seas (Geneva, 1958, Article: 2 of which declared the principle of the freedom of high seas, that is to say, freedom of navigation, freedom of fishing, etc., to "be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas".

- The question of the breadth of the territorial sea and that of' the extent of the coastal State's fishery jurisdiction had been left unsettled at the 1958 Conference and were not settled at a second Conference held in Geneva in 1960. However, arising out of the general consensus at that second Conference, two concepts had since crystallized as customary law: that of a fishery zone, between the territorial sea and the high seas, within which the coastal State could claim exclusive fisheries jurisdiction-it now being generally accepted that that zone could extend to the 12-mile limit-and the concept, in respect of waters adjacent to the zone of exclusive fishing rights, of preferential fishing rights in favour of the coastal State in a situation of special dependence on its fisheries. The Court was aware that in recent years a number of States had asserted an extension of their exclusive fishery limits. The Court was likewise aware of present endeavours, pursued under the auspices of the United Nations, to achieve in a third Conference on the Law of the Sea the further codification and progressive development of that branch of the law, as it was also of various proposals and preparatory documents produced in that framework. But, as a court of law, it could not render judgment sub s*pecie legis ferendae* or anticipate the law before the legislator had laid it down. It must take into account the existing rules of international law and the Exchange of Notes of 1961.

- The concept of preferential fishing rights had originated in proposals submitted by Iceland at the Geneva Conference of 1958, which had confined itself to recommending that: ". . . where, for the purpose of conservation, it becomes necessary to limit the total catch of a stock or stocks of fish in an area of the high seas adjacent to the territorial sea of a coastal State, any other States fishing in that area should collaborate with the coastal State to secure just treatment of such situation, by establishing agreed measures which shall recognize any preferential requirements of .the coastal State resulting from its dependence upon the fishery concerned while having regard to the interests of the other States".

- At the 1960 Conference the same concept had been embodied in an amendment incorporated by a substantial vote into one of the proposals concerning the fishing zone. The contemporary practice of States showed that this concept, in addition to its

increasing and widespread acceptance, was being implemented by agreements, either bilateral or multilateral. In the present case, in which the exclusive fishery zone within the limit of 12 miles was not in dispute, the Federal Republic of Germany had expressly recognized the preferential rights of the other Party in the disputed waters situated beyond that limit. There could be no doubt of the exceptional dependence of Iceland on its fisheries and the situation appeared to have been reached when it was imperative to preserve fish stocks in the interests of rational and economic exploitation.

- However, the very notion of preferential fishery rights for the coastal State in a situation of special dependence, though it implied a certain priority, could not imply the extinction of the concurrent rights of other States. The fact that Iceland was entitled to claim preferential rights did not suffice to justify its claim unilaterally to exclude fishing vessels of the Federal Republic from all fishing beyond the limit of 12 miles agreed to in 196 1.

- The Federal Republic of Germany had pointed out that its vessels started fishing in the Icelandic area as long ago as the end of the nineteenth century, and had further stated that the loss of the fishing grounds concerned would have an appreciable impact on its economy. There too the economic dependence and livelihood of whole communities were affected, and the Federal Republic of Germany shared the same interest in the conservation of fish stocks as Iceland, which had for its part admitted the existence of the Applicant's historic and special interests in fishing in the disputed waters. Iceland's 1972 Regulations were therefore not opposable to the Federal Republic 01' Germany: they disregarded the established rights of that State and also the Exchange of Notes of 1961, and they constituted an infringement of the principle (1958 Convention on the High Seas, Art. 2) of reasonable regard for the interests of other States, including the Federal Republic.

- In order to reach an equitable solution of the present dispute it was necessary that the preferential fishing rights of Iceland should be reconciled with the traditional fishing rights of the Federal Republic of Germany through the appraisal at any given moment of

the relative dependence of either State on the fisheries in question, while taking into account the rights of other States and the needs of conservation. Thus Iceland was not in law entitled unilaterally to exclude fishing vessels of the Federal Republic from areas to seaward of the limit of 12 miles agreed to in 1961 or unilaterally to impose restrictions on their activities. But that did not mean that the Federal Republic of Germany was under no obligation to Iceland with respect to fishing in the disputed waters in the 12-mile: to 50-mile zone. Both Parties had the obligation to keep unchecked review the fishery resources in those water and to examine together, in the light of the information available, the measures required for the conservation and development, and equitable exploitation, of those resources, taking into account any international agreement that might at present be in force or might be reached after negotiation.

- The most appropriate method for the solution of the dispute was clearly that of negotiation with a view to delimiting the rights and interests of the Parties and regulating equitably such questions as those of catch-limitation, share allocations and related restrictions. 'The obligation to negotiate flowed from the very nature of the respective rights of the Parties and corresponded to the provisions of the United Nations Charter concerning peaceful settlement of disputes. The task before ' the Parties would be to conduct their negotiations on the basis that each must in good faith pay reasonable regard to the legal rights of the other, to the facts of the particular situation and to the interests of other States with established fishing rights in the area.

- The interim measures indicated in the Order of 17 August 1972 would cease to have effect as from the date of the Judgment, but the Parties would not therefore be at liberty to conduct their fishing activities in the disputed waters without limitation. They would be under the obligation to pay reasonable regard to each other's rights and to conservation requirements pending the conclusion of the negotiations.

Claim to Be Entitled to Compensation (paras. 7 1-76 of the Judgment)

- The fourth submission of the Federal Republic of Germany (see above) raised the question of compensation for alleged acts of harassment of its fishing vessels by

Icelandic coastal patrol boats. Arising directly out of the question which was the subject-matter of the Application that the submission fell within the scope of the Court's jurisdiction.

- However, it was presented in an abstract form and the Court was prevented from making an all embracing finding of liability which would cover matter as to which it had only limited information and slender evidence. For those reasons, the Court gave (Judgment. para. 77) the decision indicated above.

Researcher's Finding

- In the present case it has been found that the Court has given greater emphasis on the "Rights of the States over High Seas" which includes the right to fishery and also the duty of every coastal or sea side State not to put obstacles or hurdles in the exercise of these rights by any other State which also include the land-locked States. And hence held the right of Germany and United Kingdom and Northern Ireland to be preserved and respected. But this right while exercising, if, in any way violates any of the legal right of the country in the territorial sea of which it is being exercised, any state which is involved in such activities shall be held liable for wrong done to the properties of the sea side State and it shall not be eligible for claiming compensation from the sea side State for any damage to its property if the rights exercising State does not follow a legal and proper way for its benefit.

Trial of Pakistani Prisoners of War[58]

1. **Parties**- Pakistan v. India
2. **Date of Application**- 11 May 1973
3. **Date of Disposition**- 15 December 1973
4. **Type of Disposition**- Discontinued
5. **Facts**

In May 1973, Pakistan instituted proceedings against India concerning 195 Pakistani Prisoners of war whom, according to Pakistan, India proposed to hand over to Bangladesh, which was said to intend trying them for acts of genocide and crimes against humanity. India stated that there was no legal basis for the Court's jurisdiction in the matter, and the Pakistan's application was without legal effect. Pakistan also filed application for the interim measures of protection the Court held it to be public sittings to hear observations on this subject. India didn't attend the hearing.

Later in July 1973 Pakistan requested the Court to discontinue the hearing as there was a decision taken by both the parties to solve the issue through negotiation. And hence the case was discontinued.

6. **Disposition**

Order 13 July 1973[59]

Having regard to Articles 41 and 48 of the Statute of the Court,

Having regard to Article 66 of the Rules of Court,

Having regard to the Application by Pakistan filed in the Registry of the Court on 11 May 1973, instituting proceedings against India in respect of a dispute concerning charges of genocide against 195 Pakistani nationals, prisoners of war or civilian internees, in Indian custody,

[58] I.C.J. Reports 1973, p. 347

[59] ICJ Reports 1973. p. 328

Makes the following Order:

1. Having regard to the request dated 11 May 1973 and filed in the Registry the same day, whereby the Government of Pakistan, relying on Article 41 of the Statute and Article 66 of the Rules of Court, asks the Court to indicate, pending the final decision in the case brought before it by the Application of the same date, the following interim measures of protection:

"(1) That the process of repatriation of prisoners of war and civilian internees in accordance with international law, which lias already begun, should not be interrupted by virtue of charges of genocide against a certain number of individuals detained in India.

(2) That such individuals, as are in the custody of India and are charged with alleged acts of genocide, should not be transferred to 'Bangladesh' for trial till such time as Pakistan's claim to exclusive jurisdiction and the lack of jurisdiction of any other Government or authority in this respect has been adjudged by the Court;"

2. Whereas the Government of India was notified by telegram the same day of the filing of the Application and request for indication of interim measures of protection, and of the precise measures requested, and copies of the Application and the request were at the same time transmitted to it by air mail;

3. Whereas, pursuant to Article 40, paragraph 3, of the Statute and Article 37, paragraph 2, of the Rules of Court, copies of the Application were transmitted to Members of the United Nations through the Secretary-General and to other States entitled to appear before the Court:

4. Whereas, pursuant to Article 31, paragraph 2, of the Statute, the Government of Pakistan chose Sir Muhammad Zafrulla Khan to sit as judge ad hoc, and he sat in the case until2 July 1973 ;

5. Whereas the Governments of Pakistan and India were informed by communications of 14 May 1973 that the Court would in due course hold public hearings to afford the parties the opportunity of presenting their observations on the request by Pakistan for the indication of interim measures of protection, and the opening of such hearings was subsequently fixed for 29 May 197 ;

6. Whereas on 28 May 1973, as a result of communications received from the Governments of Pakistan and India, the Court decided to postpone the opening of the public hearings, and subsequently fixed 4 June 1973 as the date for such opening;

7. Whereas by a letter dated 23 May 1973 from the Ambassador of India to the Netherlands, received in the Registry on 24 May 1973, the Government of India declined to consent to the jurisdiction of the Court in the case, and claimed that without such consent the Court could not properly be seized of the case and could not proceed with it, and that there was no legal basis whatever for the jurisdiction of the Court in the case; and whereas in two statements transmitted to the Court with letters from the Ambassador of India to the Netherlands dated 28 May and 4 June 1973 the Government of India presented a further reasoned statement that the Court had no jurisdiction in the case;

8. Whereas at the opening of the public hearings, which were held on 4, 5 and 26 June 1973, there were present in Court the Agent, Deputy- Agent and counsel of the Government of Pakistan;

9. Having heard the observations on the request for interim measures on behalf of the Government of Pakistan, and the replies on behalf of that Government to questions put by Members of the Court, submitted by His Excellency Mr. J. G. Kharas and Mr. Yahya Bakhtiar, Attorney- General of Pakistan;

10. Whereas in a letter of 11 July 1973 the Agent for Pakistan informed the Court of its expectation that negotiations will take place between Pakistan and India in the near future in which the issues which are the subject of its Application will be under discussion; and whereas in that letter the Government of Pakistan asks the Court to postpone further consideration of its request for interim measures in order to facilitate those negotiations;

11. Whereas in the same letter the Government of Pakistan further asks the Court to fix time-limits for the filing of written pleadings in the case ;

12. Considering that it is Pakistan which requested the Court to indicate interim measures of protection on the basis that the circumstances of the case so required;

13. Whereas it is of the essence of a request for interim measures of protection that it asks for a decision by the Court as a matter of urgency, as it is expressly recognized by the Court in Article 66, paragraph 2, of the Rules of Court;

14. Whereas the fact that the Government of Pakistan now asks the Court to postpone further consideration of its request for the indication of interim measures signifies that the Court no longer has before it a request for interim measures which is to be treated as a matter of urgency; and whereas the Court is not therefore called upon to pronounce upon the said request;

15. Having regard to Article 66, paragraph 1, of the Rules of Court which provides that a request for the indication of interim measures of protection may be made at any time during the proceedings in the case in connection with which it is made;

16. Whereas in the circumstances of the present case the Court must first of al1 satisfy itself that it has jurisdiction to entertain the dispute; accordingly, by 8 votes to 4, decides that the written proceedings shall first be addressed to the question of the jurisdiction of the Court to entertain the dispute fixes as follow the time limit for the proceedings

a. 1 October 1973 for the Memorial of the Government of the Pakistan

b. 15 December 1973 for the counter-Memorial of the Government of India.

ORDER 29 September 1973[60]

The President of the International Court of Justice,

Having regard to Article 48 of the Statute of the Court and to Article 40 of the Rules of Court,

Having regard to the Order of 13 July 1973 by which the Court (inter alia) fixed 1 October 1973 as the time-limit for the Memorial of the Government of Pakistan and 15 December 1973 as the time-limit for the Counter-Memorial of the Government of India on the question of the jurisdiction of the Court to entertain the dispute,

[60] I.C.J. Reports 1973, p. 344.

Whereas, by a letter dated 24 September 1973, received in the Registry the same day, the Agent of Pakistan, for the reasons therein set out, requested the extension of the time-limit for the filing of the Memorial to 15 December 1973 ;

Whereas a copy of the said letter was immediately transmitted to the Government of India, which was invited to communicate its views to the Court not later than 28 September 1973;

Whereas no observations have been received from the Government of India; extends to 15 December 1973 the time-limit for the filing of the Memorial of the Government of Pakistan;

Extends to 17 May 1974 the time-limit for the filing of the Counter- Memorial of the Government of India;

ORDER 15 December 1973[61]

The President of the International Court of Justice, Having regard to Article 48 of the Statute of the Court and to Article 74 of the Rules of Court,

Having regard to the Application by Pakistan filed in the Registry of the Court on 11 May 1973, instituting proceedings against India in respect of a dispute concerning charges of genocide against 195 Pakistani nationals, prisoners of war or civilian internees in Indian custody,

Whereas this Application was, in accordance with Article 40, paragraph 2, of the Statute of the Court, communicated to the Government of India, and was, in accordance with Article 40, paragraph 3, of the Statute, notified to Members of the United Nations and to the other States entitled to appear before the Court;

Whereas the notification provided for in Article 63, paragraph 1, of the Statute was addressed to the States parties to the Convention for the Prevention and Punishment of the Crime of Genocide adopted by the General Assembly of the United Nations on 9 December 1948, which was invoked in the Application;

[61] I.C.J. Reports 1973, p. 347

Whereas by an Order dated 13 July 1973 the Court decided that the written proceedings should first be addressed to the question of the jurisdiction of the Court to entertain the dispute, and fixed 1 October 1973 as the time-limit for the Memorial of the Government of Pakistan and 15 December 1973 as the time-limit for the Counter-Memorial of the Government of India, and whereas by an Order of 29 September 1973 the President of the Court extended to 15 December 1973, at the request of the Agent of Pakistan, the time-limit for the filing of the Memorial and extended to 17 May 1974 the time-limit for the filing of the Counter- Memorial ;

Whereas by a letter dated 14 December 1973 and received in the Registry the same day, the Agent of Pakistan referred to negotiations between the Government of Pakistan and the Government of India which had resulted in an agreement signed at New Delhi on 28 August 1973, and, with a view to facilitating further negotiations, requested the Court to make an Order officially recording discontinuance of the proceedings in this case;

Whereas the Government of Pakistan has thus informed the Court in writing that it is not going on with the proceedings;

Whereas the Government of India, while it has addressed certain communications to the Court through its Ambassador in The Hague, has not yet taken any step in the proceedings;

Places on record the discontinuance by the Government of Pakistan of the proceedings instituted by the Application filed on 11 May 1973; Orders that the case be removed from the list.

The case was discontinued by Pakistan because both the Indian and Pakistani Government mutually decided to settle matter through negotiation.

Western Sahara Case[62]

1. **Submitted by-** United Nations General Assembly

2. **Date of Application-** 21 December 1974

3. **Date of Disposition**- 16 October 1975

4. **Type of Disposition**- Opinion on merit

5. **Facts-**

In 1884 Spain seized control over Western Sahara and declared it a Spanish protectorate (Protectorates and Protected States). In the late 1950s Morocco and then also Mauritania claimed the territory (Claims, International; Spanish Zone of Morocco Claims ; Territory, Acquisition). In the course of the decolonization efforts of the United Nations (UN), Spain agreed to decolonize the territory by way of a referendum(Colonialism; Decolonization: Spanish Territories). When Morocco still claimed the territory and Spain refused to submit the dispute to the ICJ, the issue was dealt with by the UN General Assembly ('UNGA'; United Nations, General Assembly).[63]

6. **Questions before the Court**

UN General Assembly Resolution 3292 requested that the International Court give an advisory opinion on the following questions:

I. Was Western Sahara (Río de Oro and Sakiet El Hamra) at the time of colonization by Spain a territory belonging to no one (terra nullius)?

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[62] Western Sahara, Advisory Opinion, 1.C.J. Reports 1975, p. 12.

[63] http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e233?prd=EPIL

And, should the majority opinion be "no", the following would be addressed:

II. What were the legal ties between this territory and the Kingdom of Morocco and the Mauritanian entity?[64]

7. Advisory opinion[65]

Advisory Opinion of 16 October 1975

- In its Advisory Opinion which the General Assembly of the United Nations had requested on two questions concerning Western Sahara, the Court, With regard to Question I, "Was Western Sahara (Rio de Oro and Sakiet El Hamra) at the time of colonization by Spain a territory belonging to no one (*terra nullius*)?",
  a. decided by 13 votes to 3 to comply with the request for an advisory opinion;

  b. was unanimously of opinion that Western Sahara (Rio de Oro and Sakiet El Hamra) at the time of colonization by Spain was not a territory belonging to no one *(terra nullius)*.

- With regard to Question II, "What were the legal ties between this territory and the Kingdom of Morocco and the Mauritanian entity?", the Court

  a. Decided by 14 votes to 2 to comply with the request for an advisory opinion;

  b. Was of opinion, by 14 votes to 2, that there were legal ties between this territory and the Kingdom of Morocco of the kinds indicated in the penultimate paragraph of the Advisory Opinion;

[64] Ibid
[65] http://www.icj-cij.org/docket/index.php?sum=323&p1=3&p2=4&case=61&p3=5

c. Was of opinion, by 15 votes to 1, that there were legal ties between this territory and the Mauritanian entity of the kinds indicated in the penultimate paragraph of the Advisory Opinion.

- **The penultimate paragraph of the Advisory Opinion was to the effect that:**

The materials and information presented to the Court show the existence, at the time of Spanish colonization, of legal ties of allegiance between the Sultan of Morocco and some of the tribes living in the territory of Western Sahara. They equally show the existence of rights, including some rights relating to the land, which constituted legal ties between the Mauritanian entities, as understood by the Court, and the territory of Western Sahara. On the other hand, the Court's conclusion is that the materials and information presented to it do not establish any tie of territorial sovereignty between the territory of Western Sahara and the Kingdom of Morocco or the Mauritanian entity. Thus the Court has not found legal ties of such a nature as might affect the application of General Assembly resolution 1514 (XV) in the decolonization of Western Sahara and, in particular, of the principle of self-determination through the free and genuine expression of the will of the peoples of the Territory.

Course of the Proceedings
(paras. 1-13 of Advisory Opinion)

- The Court first recalls that the General Assembly of the United Nations decided to submit two questions for the Court's advisory opinion by resolution 3292 (XXIX) adopted on 13 December 1974 and received in the Registry on 21 December. It retraces the subsequent steps in the proceedings, including the transmission of a dossier of documents by the Secretary-General of the United Nations (Statute, Art. 65, para. 2) and the presentation of written statements or letters and/or oral statements by 14 States, including Algeria, Mauritania, Morocco, Spain and Zaire (Statute, Art. 66).

- Mauritania and Morocco each asked to be authorized to choose a judge *ad hoc* to sit in the proceedings. By an Order of 22 May 1975[66] the Court found that Morocco was entitled under Articles 31 and 68 of the Statute and Article 89 of the Rules of Court to choose a person to sit as judge *ad hoc*, but that, in the case of Mauritania, the conditions for the application of those Articles had not been satisfied. At the same time the Court stated that those conclusions in no way pre judged its views with regard to the questions referred to it or any other question which might fall to be decided, including those of its competence to give an advisory opinion and the propriety of exercising that competence.

Competence of the Court

(paras. 14-22 of Advisory Opinion)

- Under Article 65, paragraph 1, of the Statute, the Court may give an advisory opinion on any legal question at the request of any duly authorized body. The Court notes that the General Assembly of the United Nations is suitably authorized by Article 96, paragraph 1, of the Charter and that the two questions submitted are framed in terms of law and raise problems of international law. They are in principle questions of a legal character, even if they also embody questions of fact, and even if they do not call upon the Court to pronounce on existing rights and obligations. The Court is accordingly competent to entertain the request.

Propriety of Giving an Advisory Opinion

(paras. 23-74 of Advisory Opinion)

- Spain put forward objections which in its view would render the giving of an opinion incompatible with the Court's judicial character. It referred in the first place to the fact that it had not given its consent to the Court's adjudicating upon the questions submitted. It maintained *(a)* that the subject of the questions was substantially identical to that of a dispute concerning Western Sahara which Morocco, in September 1974, had invited it to submit jointly to the Court, a proposal which it had refused: the advisory jurisdiction was

[66] I.C.J. Reports 1975, p. 6

therefore being used to circumvent the principle that the Court has no jurisdiction to settle a dispute without the consent of the parties; *(b)* that the case involved a dispute concerning the attribution of territorial sovereignty over Western Sahara and that the consent of States was always necessary for the adjudication of such disputes; *(c)* that in the circumstances of the case the Court could not fulfil the requirements of good administration of justice with regard to the determination of the facts. The Court considers *(a)* that the General Assembly, while noting that a legal controversy over the status of Western Sahara had arisen during its discussions, did not have the object of bringing before the Court a dispute or legal controversy with a view to its subsequent peaceful settlement, but sought an advisory opinion which would be of assistance in the exercise of its functions concerning the decolonization of the territory, hence the legal position of Spain could not be compromised by the Court's answers to the questions submitted; *(b)* that those questions do not call upon the Court to adjudicate on existing territorial rights; *(c)* that it has been placed in possession of sufficient information and evidence.

- Spain suggested in the second place that the questions submitted to the Court were academic and devoid of purpose or practical effect, in that the United Nations had already settled the method to be followed for the decolonization of Western Sahara, namely a consultation of the indigenous population by means of a referendum to be conducted by Spain under United Nations auspices. The Court examines the resolutions adopted by the General Assembly on the subject, from resolution 1514 (XV) of 14 December 1960, the Declaration on the Granting of Independence to Colonial Countries and Peoples, to resolution 3292 (XXIX) on Western Sahara, embodying the request for advisory opinion. It concludes that the decolonization process envisaged by the General Assembly is one which will respect the right of the population of Western Sahara to determine their future political status by their own freely expressed will. This right to self-determination, which is not affected by the request for advisory opinion and constitutes a basic assumption of the questions, put to the Court, leaves the General Assembly a measure of discretion with respect to the forms and procedures by which it is to be realized. The Advisory Opinion

will thus furnish the Assembly with elements of a legal character relevant to that further discussion of the problem to which resolution 3292 (XXIX) alludes.

- Consequently the Court finds no compelling reason for refusing to give a reply to the two questions submitted to it in the request for advisory opinion.

Question 1: "Was Western Sahara (Rio de Oro and Sakiet El Hamra) at the Time of Colonization by Spain a Territory Belonging to No One (terra nullius)?"
(paras. 75-83 of Advisory Opinion)

- For the purposes of the Advisory Opinion, the "time of colonization by Spain" may be considered as the period beginning in 1884, when Spain proclaimed its protectorate over the Rio de Oro. It is therefore by reference to the law in force at that period that the legal concept of *terra nullius* must be interpreted. In law, "occupation" was a means of peaceably acquiring sovereignty over territory otherwise than by cession or succession; it was a cardinal condition of a valid "occupation" that the territory should be *terra nullius.* According to the State practice of that period, territories inhabited by tribes or peoples having a social and political organization were not regarded as *terrae nullius:* in their case sovereignty was not generally considered as effected through occupation, but through agreements concluded with local rulers. The information furnished to the Court shows *(a)* that at the time of colonization Western Sahara was inhabited by peoples which, if nomadic, were socially and politically organized in tribes and under chiefs competent to represent them; *(b)* that Spain did not proceed upon the basis that it was establishing its sovereignty over*terrae nullius:* thus in his Order of 26 December 1884 the King of Spain proclaimed that he was taking the Rio de Oro under his protection on the basis of agreements entered into with the chiefs of local tribes.

- The Court therefore gives a negative answer to Question I. In accordance with the terms of the request for advisory opinion, "if the answer to the first question is in the negative", the Court is to reply to Question II.

Question 11: "What Were the Legal Ties of This Territory with the Kingdom of Morocco and the Mauritanian Entity?"

(paras. 84-161 of Advisory Opinion)

- The meaning of the words "legal ties" has to be sought in the object and purpose of resolution 3292 (XXIX) of the United Nations General Assembly. It appears to the Court that they must be understood as referring to such legal ties as may affect the policy to be followed in the decolonization of Western Sahara. The Court cannot accept the view that the ties in question could be limited to ties established directly with the territory and without reference to the people who may be found in it. At the time of its colonization the territory had a sparse population that for the most part consisted of nomadic tribes the members of which traversed the desert on more or less regular routes, sometimes reaching as far as southern Morocco or regions of present-day Mauritania Algeria or other States. These tribes were of the Islamic faith.

- Morocco (paragraphs 90-129 of the Advisory Opinion) presented its claim to legal ties with Western Sahara as a claim to ties of sovereignty on the ground of an alleged immemorial possession of the territory and an uninterrupted exercise of authority. In the view of the Court, however, what must be of decisive importance in determining its answer to Question II must be evidence directly relating to effective display of authority in Western Sahara at the time of its colonization by Spain and in the period immediately preceding. Morocco requests that the Court should take account of the special structure of the Moroccan State. That State was founded on the common religious bond of Islam and on the allegiance of various tribes to the Sultan, through their caids or sheiks, rather than on the notion of territory. It consisted partly of what was called the Bled Makhzen, areas actually subject to the Sultan, and partly of what was called the Bled Siba, areas in which the tribes were not submissive to him; at the relevant period, the areas immediately to the north of Western Sahara lay within the Bled Siba.

- As evidence of its display of sovereignty in Western Sahara, Morocco invoked alleged acts of internal display of Moroccan authority, consisting principally of evidence said to

show the allegiance of Saharan caids to the Sultan, including dahirs and other documents concerning the appointment of caids, the alleged imposition of Koranic and other taxes, and acts of military resistance to foreign penetration of the territory. Morocco also relied on certain international acts said to constitute recognition by other States of its sovereignty over the whole or part of Western Sahara, including *(a)*certain treaties concluded with Spain, the United States and Great Britain and Spain between 1767 and 1861, provisions of which dealt *inter alia*with the safety of persons shipwrecked on the coast of Wad Noun or its vicinity, (b) certain bilateral treaties of the late nineteenth and early twentieth centuries whereby Great Britain, Spain, France and Germany were said to have recognized that Moroccan sovereignty extended as far south as Cape Bojador or the boundary of the Rio de Oro.

- Having considered this evidence and the observations of the other States which took part in the proceedings, the Court finds that neither the internal nor the international acts relied upon by Morocco indicate the existence at the relevant period of either the existence or the international recognition of legal ties of territorial sovereignty between Western Sahara and the Moroccan State. Even taking account of the specific structure of that State, they do not show that Morocco displayed any effective and exclusive State activity in Western Sahara. They do, however, provide indications that a legal tie of allegiance existed at the relevant period between the Sultan and some, but only some, of the nomadic peoples of the territory, through Tekna caids of the Noun region, and they show that the Sultan displayed, and was recognized by other States to possess, some authority or influence with respect to those tribes.

- The term "Mauritanian entity" (paragraphs 139-152 of the Advisory Opinion) was first employed during the session of the General Assembly in 1974 at which resolution 3292 (XXIX), requesting an advisory opinion of the Court, was adopted. It denotes the cultural, geographical and social entity within which the Islamic Republic of Mauritania was to be created. According to Mauritania, that entity, at the relevant period, was the Bilad Shinguitti or Shinguitti country, a distinct human unit, characterized by a common

language, way of life, religion and system of laws, featuring two types of political authority: emirates and tribal groups.

- Expressly recognizing that these emirates and tribes did not constitute a State, Mauritania suggested that the concepts of "nation" and of "people" would be the most appropriate to explain the position of the Shinguitti people at the time of colonization. At that period, according to Mauritania, the Mauritanian entity extended from the Senegal River to the Wad Sakiet El Hamra. The territory at present under Spanish administration and the present territory of the Islamic Republic of Mauritania thus together constituted in dissociable parts of a single entity and had legal ties with one another.

- The information before the Court discloses that, while there existed among them many ties of a racial, linguistic, religious, cultural and economic nature, the emirates and many of the tribes in the entity were independent in relation to one another; they had no common institutions or organs. The Mauritanian entity therefore did not have the character of a personality or corporate entity distinct from the several emirates or tribes which comprised it. The Court concludes that at the time of colonization by Spain there did not exist between the territory of Western Sahara and the Mauritanian entity any tie of sovereignty or of allegiance of tribes, or of simple inclusion in the same legal entity. Nevertheless, the General Assembly does not appear to have so framed Question II as to confine the question exclusively to those legal ties which imply territorial sovereignty, which would be to disregard the possible relevance of other legal ties to the decolonization process. The Court considers that, in the relevant period, the nomadic peoples of the Shinguitti country possessed rights, including some rights relating to the lands through which they migrated. These rights constituted legal ties between Western Sahara and the Mauritanian entity. They were ties which knew no frontier between the territories and were vital to the very maintenance of life in the region.

- Morocco and Mauritania both laid stress on the overlapping character of the respective legal ties which they claimed Western Sahara to have had with them at the time of colonization (paragraphs 153-160 of the Advisory Opinion). Although their views

appeared to have evolved considerably in that respect, the two States both stated at the end of the proceedings that there was a north appertaining to Morocco and a south appertaining to Mauritania without any geographical void in between, but with some overlapping as a result of the intersection of nomadic routes. The Court confines itself to noting that this geographical overlapping indicates the difficulty of disentangling the various relationships existing in the Western Sahara region at the time of colonization.

Researcher's finding

It has been found from the above opinion by the Court that this been the first case seeking advisory opinion of the ICJ wherein the Court has insisted the states to respect the right to self-determination and also that there had been serious and long discussion on this right. This advisory opinion of the Court to respect the right to self determination has played vital role in the latter coming cases relating to decolonization and that it was found that even many of the states after the Sahara advisory opinion have submitted their support to the campaign of decolonization.

These are the cases where the ICJ has pronounced land mark judgments recognizing many rules and principles of customary international laws and has assisted the States to settle the disputes between them peacefully and contributed a lion's part in preserving and protecting world peace and security and thereby promoted the principle of rule of law.

The ICJ is the international judicial institution playing very important role in the international disputes resolution through adjudication. The successor of Permanent Court of International Justice, the ICJ today is playing vital role in the development of international law.

The UN Charter provides that the decisions of the ICJ are the secondary sources of international law and although these decisions and judgment and also its advisory opinion are not universally binding but are in normative form.[67] However, in many circumstances where the parties to the disputes before the ICJ have duly respected the decisions of the court on the

[67] Article 38 and 94, UN Charter 1945 ; Article 59, Statute of ICJ, 1945

principle o good faith and executed its decisions properly. The court is obliged to consider and follow the rules and principle of international law and the customary rules and principles prevailing in international sphere.[68] But where there are n rules and principles available in international law on any particular issue/topic e.g., maritime laws before the United Nations Convention for Law of the Seas (UNCLOS), the court have through its decision given recognition to the customary rules and practices and it is clearly evident from many of the above cases adjudicated by the court.[69]

So the ICJ is playing the role of guardian and protector of the rules and principles of international laws.

[68] Article 36 UN Charter, 1945
[69] I.C.J. Reports 1969

2. INTERNATIONAL CRIMINAL COURT (ICC)

The International Criminal Court (ICC), which is governed by the Rome Statute, is the first permanent, treaty based, international criminal court established to help end impunity for the perpetrators of the most serious crimes of concern to the international community.[70] It is the very first international Court that exercises jurisdiction over individuals who have committed offences of such a heinous and serous nature as to or likely to endanger the world peace and security.[71]

The ICC is an independent international organization, and is not part of the United Nations system. It is located in The Hague in the Netherlands. Although the Court's expenses are funded primarily by States Parties, it also receives voluntary contributions from governments, international organizations, individuals, corporations and other entities.[72]

The international community has long aspired to the creation of a permanent international court, and, in the 20th century, it reached consensus on definitions of genocide, crimes against humanity and war crimes. The Nuremberg and Tokyo trials addressed war crimes, crimes against peace, and crimes against humanity committed during the Second World War.[73] In the 1990s after the end of the Cold War, tribunals like the International Criminal Tribunal for the former Yugoslavia and for Rwanda were established to try the individual criminals of the war in Rawanda and Yugoslavia. Since these Courts were established to try crimes committed only within a specific time-frame and during a specific conflict, there was general agreement that an independent, permanent criminal court was needed. On 17 July 1998, the international community reached an historic milestone when 120 States adopted the Rome Statute, the legal basis for establishing the permanent International Criminal Court. The Rome Statute entered into force on 1 July 2002 after ratification by 60 countries.[74]As of now (April 2015) the Rome Statute has been ratified by 123 countries.[75] In all of its activities, the ICC observes the highest standards of fairness and due process.[76]

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[70] http://www.icc-cpi.int/en_menus/icc/about%20the%20court/Pages/about%20the%20court.aspx
[71] Article 1, ICC Statute, 1998
[72] Ibid
[73] Ibid
[74] Ibid
[75]http://www.icc.cpi.int/en_menus/icc/about%20the%20court/icc%20at%20a%20glance/Pages/icc%20at%20a%20glance.aspx
[76] Ibid

The ICC is a court of last resort. It will not act if a case is investigated or prosecuted by a national judicial system unless the national proceedings are not genuine, for example if formal proceedings were undertaken solely to shield a person from criminal responsibility. In addition, the ICC only tries those accused of the gravest crimes.

- **Rome Statute of the International Criminal Court, 1998**

The jurisdiction and functioning of the ICC are governed by the Rome Statute.[77] The Statute is consists of by a Preamble and 128 Articles grouped into thirteen parts namely;

a. Part 1- Establishment of the Court (Articles 1-4)

b. Part 2- Jurisdiction, Admissibility and Applicable Law (Articles 5- 21)

c. Part 3- General Principles of Criminal Law (Articles 22-33

d. Part 4- Composition and Administration of the Court (Articles 34-52)

e. Part 5- Investigation and Prosecution (Articles 53-61)

f. Part 6- The Trial (Articles 62-76)

g. Part 7- Penalties (Articles 77-80)

h. Part 8- Appeal and Revision (Articles 81-85)

i. Part 9- International Cooperation and Judicial Assistance (Articles 86-102)

j. Part 10- Enforcement (Articles 103- 111)

k. Part 11- Assembly of States Parties (Article 112)

l. Part 12- Financing (Articles 113-118)

m. Part 13- Final Clause (Articles 119-128)[78]

[77] Article 1, ICC Statute, 1998
[78] ICC Statute, 1998

- **Crimes within the jurisdiction of the Court**

It is for the first time that an international court having jurisdiction over individuals was established named as International Criminal Court. But this jurisdiction extends over those individuals who are guilty of serious crimes having concern with the international community as a whole. Such crimes includes-

a. Crime of genocide
b. Crimes against humanity
c. War crimes
d. Crimes of aggression[79]

- **Defences to escape/avoid criminal liability under Rome Statute**

The Statute also provided for the defences against the criminal liability of the person as follow-

a. Metal diseases as to incapacitated him at the time of commission of the crime to recognize the consequences and unlawfulness of his acts
b. Self-defence
c. Intoxication, that he was been intoxicated involuntarily, as to incapacitated him to understand the nature of his acts and its consequences and unlawfulness
d. Duress, either situational of by any other person against him or any of the other person in whose life he is interested.[80]

- **Jurisdiction of the Court**

The Court may exercise its jurisdiction on the individuals of the States Parties who are party to the present Statute.[81] It may also exercise its jurisdiction on a State-

a. whose national is the person accused of the alleged crime[82],or

[79] Article 5, ICC Statute, 1998
[80] Article 31, ICC Statute
[81] Article 12(1), ICC Statute
[82] Article 12(2)(b), ICC Statute

b. In whose territory the alleged offence or the conduct in question occurred or committed on board a vessel or aircraft,[83] or

c. The State of registration of the aircraft or vessels provided at least one of the above States is a party to the Rome Statute.[84]

d. And that even if both the party to the question in matter before the Court, concerns with the States of which only one is the party to the Rome Statute then also the Court shall have jurisdiction to try the matter.

e. Even if the State not a party to the present Statute but is in any way concerned with the alleged act in question then such a State may by a declaration lodged with the Registrar accept the jurisdiction of the Court in the particular matter in question and shall provide every possible assistance to the Court in the adjudication of the question before it.[85]

f. All the cases to the ICC are brought by the Prosecutor, at his discretion[86] A situation in which one or more crimes have been committed will be referred to the attention of the Prosecutor by a State party to the ICC Statute or by the Security Council, acting under Ch. VII of the UN Charter.[87] The Prosecutor may initiate a case *proprio motu*, on the basis of information he or she receives on crimes within the jurisdiction of the Court.[88]

- **Organization of the Court**

The ICC is consists of 18 judges nominated and elected by the State parties for the term of nine years, who shall be the chosen from among the persons of high moral character, impartiality and integrity who possess the qualification required in their respective States for the appointment to the highest judicial office.[89] And they shall be elected at the meeting of the Assembly of States parties convened for the purpose, by the secret ballot.[90]

[83] Article 12(2)(a), ICC Statute
[84] Ibid
[85] Article 12(3), ICC Statute
[86] Article 53, ICC Statute
[87] Article 53, ICC Statute
[88] Articles 13(c), 15(1)
[89] Article 36(1), (3)(a) & (9),ICC Statute, 1998
[90] Article 36(6)(a), ICC Statute, 1998

The Court is composed of the three divisions for the purposes of adjudication, namely-

a. Pre-trial Division
b. Trial Division, and
c. Appeal Division[91]

The Court hears cases in Chambers. The pre-trial chamber hears cases by single of three judges. The trial chamber hears cases by three judges. And both from pre-trial and trial chamber cases can be appealed to appellate chamber which consists of a single chamber.[92] Here in appeal chamber the Prosecutor, defendant, representative of victim(s) or the State investigating into the matter may institute the appeal. The appeal chamber may affirm, amend or reverse the original decision, order a new trial or send the case back on remand to the trial chamber.[93]

- **Enforcement of sentences**

Articles from 103-111 of the ICC Statute, 1998 provides for various provisions relating to the enforcement of the decision of the ICC. Any sentence of imprisonment pronounced by the ICC shall be served in the territory of the State designated by the Court from the list of the States willing to accept the sentenced person and the Court may also impose certain conditions to the acceptance to be followed the accepting State. [94]

And the designated State shall inform the Court whether it accepts the Court's designation or not.[95] If no State is designated by the Court then the sentence shall be served in The Netherland.

The State in which the sentence of imprisonment is to be carried out is to be bound by the decision of the Court and cannot modify the sentence, nor extradite the convict to a third State that wishes to prosecute or punish him or her, but it can be done only with the approval of the

[91] Article 34(b), ICC Statute, 1998
[92] Article 39(2), ICC Statute, 1998
[93] Articles 83(1)-(3), ICC Statute
[94] Article 103(a) & (b), ICC Statute
[95] Article 103(1)(c), ICC Statute

Court.[96] The conditions of imprisonment must conform to the relevant international standards and will be supervised by the Court.

Fines and forfeitures ordered by the Court will be recognized and enforced in the territory of the States parties in accordance with their laws, and without prejudice to the right of bona fide third parties.[97] If the State party is unable to give effect to an order for forfeiture, it shall take measures to recover the value of the proceeds, property or assets ordered by the Court to be forfeited, without prejudice to the right of the bona fide third parties.[98] The property of the proceeds of the sale of real property or, where appropriate, the sale of other party, which is obtained by a State party as a result of the enforcement of the judgment of the Court shall be transferred to the Court.[99]

The principle of *res judicata* shall be applicable here.[100]

If the convicted person escapes from the custody and flees the State of enforcement, that State may, after consultation with the Court, request the person's surrender from the State in which the person is located pursuant to existing bilateral or multilateral arrangements, or may request that the Court seek the person's surrender, and the Court may direct that the person be delivered to the State in which he or she was serving the sentence or to another State then designated by the Court.[101]

- **Cases before ICC**

1. The Prosecutor v. Thomas Lubanga Dyilo[102]

The Union des Patriotes Congolais ("UPC") was created on 15 September 2000; Thomas Lubanga was one of the UPC's founding members and its President from the outset. The UPC and its military wing, the Force Patriotique pour la Libération du Congo ("FPLC"), took power in Ituri in September 2002. The UPC/FPLC, as an organised armed group, was involved in an internal armed conflict against the Armée Populaire Congolaise ("APC") and other Lendu

[96] Article 109, ICC Statute
[97] Article 109 (1), ICC Statute
[98] Article 109(2), ICC Statute
[99] Article 109(3), ICC Statute
[100] Article 20(1)-(2), ICC Statute
[101] Article 111, ICC Statute
[102] ICC-01/04-01/06/ http://www.icc-cpi.int/iccdocs/PIDS/publications/LubangaENG.pdf

militias, including the Force de Résistance Patriotique en Ituri ("FRPI"), between September 2002 and 13 August 2003. Between 1 September 2002 and 13 August 2003, the armed wing of the UPC/FPLC was responsible for the widespread recruitment of young people, including children under the age of 15, on an enforced as well as a "voluntary" basis. Multiple witnesses testified credibly and reliably that children under 15 were "voluntarily" or forcibly recruited into the UPC/FPLC and sent to either the headquarters of the UPC/FPLC in Bunia or its military training camps, including at Rwampara, Mandro, and Mongbwalu. Video evidence clearly shows recruits under the age of 15 in the Rwampara camp. The evidence demonstrates that children in the military camps endured harsh training regimes and were subjected to a variety of severe punishments.Children were deployed as soldiers in Bunia, Tchomia, Kasenyi, Bogoro and elsewhere, and they took part in fighting, including at Kobu, Songolo and Mongbwalu. It has been established that the UPC/FPLC used children under the age of 15 as military guards. The evidence reveals that a special "Kadogo Unit" was formed, which was comprised principally of children under the age of 15. The accused and his co-perpetrators agreed to, and participated in, a common plan to build an army for the purpose of establishing and maintaining political and military control over Ituri. As a result of the implementation of this common plan, boys and girls under the age of 15 were conscripted and enlisted into the UPC/FPLC between 1 September 2002 and 13 August 2003. The UPC/FPLC used children under the age of 15 to participate actively in hostilities including during battles. They were used, during the relevant period, as soldiers and as bodyguards for senior officials including the accused. Thomas Lubanga was the President of the UPC/FPLC, and the evidence demonstrates that he was simultaneously the Commander-in-Chief of the army and its political leader. He exercised an overall coordinating role as regards the activities of the UPC/FPLC. He was informed, on a substantive and continuous basis, of the operations of the FPLC. He was involved in the planning of military operations, and he played a critical role in providing logistical support, including providing weapons, ammunition, food, uniforms, military rations and other general supplies to the FPLC troops. He was closely involved in making decisions on recruitment policy and he actively supported recruitment initiatives, for instance by giving speeches to the local population and the recruits. In his speech at the Rwampara military camp, he encouraged children including those under the age of 15 years, to join the army and to provide security for the populace once deployed in the field after their military training. Furthermore, he personally used children below

the age of 15 amongst his bodyguards and he regularly saw guards of other UPC/FPLC staff members who were below the age of 15. The Chamber has concluded that these contributions by Thomas Lubanga, taken together, were essential to a common plan that resulted in the conscription and enlistment of girls and boys below the age of 15 into the UPC/FPLC and their use to actively participate in hostilities. And so Lubanga was held guilty and on 10 July 2012, Trial Chamber I sentenced Thomas Lubanga Dyilo to a total period of 14 years of imprisonment. The time he spent in the ICC's custody will be deducted from this total sentence. The verdict and the sentence were confirmed by the Appeals Chamber on 1 December 2014.
Currently Lubanga is in the ICC custody and shall be released between 16 July 2015(two-third of his sentence) and 16 March 2020.

2. The Prosecutor v. Bosco Ntananda[103]

The accused is the former alleged Deputy Chief of the Staff and commander of operations of the Patriotic Forces for the Liberation of Congo (FPLC).

On 9 June 2014, Pre-Trial Chamber II unanimously confirmed charges consisting in 13 counts of war crimes (murder and attempted murder; attacking civilians; rape; sexual slavery of civilians; pillaging; displacement of civilians; attacking protected objects; destroying the enemy's property; and rape, sexual slavery, enlistment and conscription of child soldiers under the age of fifteen years and using them to participate actively in hostilities) and 5 counts of crimes against humanity (murder and attempted murder; rape; sexual slavery; persecution; forcible transfer of population) against Bosco Ntaganda allegedly committed in 2002-2003 in the Ituri Province, Democratic Republic of the Congo (DRC).

Bosco Ntaganda bears individual criminal responsibility pursuant to different modes of liability, namely: direct perpetration, indirect co-perpetration (article 25(3)(a) of the Statute); ordering, inducing (article 25(3)(b) of the Statute); any other contribution to the commission or attempted commission of crimes (article 25(3)(d) of the Statute); or as a military commander for crimes committed by his subordinates (article 28(a) of the Statute).

Current status: In ICC custody and trial opening is scheduled in July 2015, the date is yet to announced by the Court.[104]

[103] ICC-01/04-02/06

3. INTERNATIONAL TRIBUNAL ON LAW OF THE SEA (ITLOS)[105]

The International Tribunal for the Law of the Sea is an inter-governmental organization established by the **United Nations Convention on the Law of the Sea** in the III United Nations Conference on Law of the Sea held in New York from December 3 to 15 1973. It is an independent judicial body for adjudicating the disputes arising out of the interpretation and application of the Convention. The Tribunal is composed of 21 independent **members**, elected from among persons enjoying the highest reputation for fairness and integrity and of recognized competence in the field of the law of the sea[106].

The United Nations Convention on the Law of the Sea was opened for signature at Montego Bay, Jamaica, on 10 December 1982. It entered into force 12 years later, on 16 November 1994. A subsequent **Agreement relating to the implementation of Part XI of the Convention** was adopted on 28 July 1994 and entered into force on 28 July 1996.[107]

- **Evolution of the Law of Sea**

The ancient belief was that the high seas and air space are the common heritage of mankind and they cannot be appropriated by any state. All States are free to use these natural heritages for their peaceful benefits without harming the nature, earth and the interests of other nations. In the ancient time when the people were unaware of the science and technological developments the sea roots were prominently used by them for travelling and transportations. In these practices there started by the States the occupancy of various parts of the sea, in the sixteenth and seventeenth centuries. In this context it is very essential to mention the reply of Queen Elizabeth which she had send to the Ambassador of Spain in 1580, wherein she had made it clear that "seas and air are the property of all mankind and no State can claim occupation over them", which was in 1609 supported by Hugo Grotius.[108]

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[104]http://www.icc.cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200206/Pages/icc%200104%200206.aspx
[105] https://www.itlos.org/en/the-tribunal/
[106] https://www.itlos.org/en/the-tribunal/ Dr. T.Padma & K.P.I.Rao, The Principles of Public International Law, Renewed in 2011/http://en.wikipedia.org/wiki/International_Tribunal_for_the_Law_of_the_Sea
[107] https://www.itlos.org/en/the-tribunal/
[108] Dr. T.Padma & K.P.I.Rao, The Principles of Public International Law, Renewed in 2011

It was in the 19th century that the law of seas got formally recognized. The first UN Conference on law of seas was held in 1958 at Geneva. In this 1958 Conference four conventions were adopted-

1) Convention on Territorial Sea and Contiguous Zone;
2) Convention on the High Seas;
3) Convention on Fishing and Conservation of Living Resources; and
4) Convention on the Continental Shelf.

The first conference failed because of its failure to unanimously decide upon the breadth of the territorial sea. And thus was held the second UN Conference on laws of seas in 1960 at Geneva again but it also failed ultimately and so was the third conference taken in New York in 1973which ultimately paved the way for the UNCLOS to come to exists.[109]

- **UNCLOS**

The Convention establishes a comprehensive legal framework to regulate all ocean space, its uses and resources. It contains, among other things, provisions relating to the territorial sea, the contiguous zone, the continental shelf, the exclusive economic zone and the high seas. It also provides for the protection and preservation of the marine environment, for marine scientific research and for the development and transfer of marine technology. One of the most important parts of the Convention concerns the exploration for and exploitation of the resources of the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction (the Area). The Convention declares the Area and its resources to be "the common heritage of mankind". The **International Seabed Authority**, established by the Convention, administers the resources of the Area. The Convention is consist of a Preamble and 320 Articles grouped in XVII Parts, and has IX Annexure.[110] The integration of the Articles is as follow-

a. Part I- Introduction (Article 1)
b. Part II- Territorial Sea and Contiguous Zone (Articles 2-33)
c. Part III- Straits used for International Navigation (Articles 34- 45)

[109] Dr. T.Padma & K.P.I.Rao, The Principles of Public International Law, Renewed in 2011, page. 144-147
[110] UNCLOS

d. Part IV- Archipelagic States (Articles 46- 54)
e. Part V- Exclusive Economic Zone (Articles 55-75)
f. Part VI- Continental Shelf (Articles 76-85)
g. Part VII- High Seas (Articles 86- 120)
h. Part VIII- Regime of Island (Article 121)
i. Part IX- Enclosed or Semi-enclosed Sea (Articles 122-123)
j. Part X- Rights of access of Land-locked States To and From Sea and Freedom of Transit (Articles 124- 132)
k. Part XI- The Area (Articles 133- 191)
l. Part XII- Protection and Preservation of Marine Environment (Articles 192- 237)
m. Part XIII- Marine Scientific Research (Articles 238- 265)
n. Part XIV- Development and Transfer of Marine Technology (Articles 266- 278)
o. Part XV- Settlement of Disputes (Articles 279- 299)
p. Part XVI- General Provision (Article 300- 304)
q. Part XVII- Final Provision (Articles 305- 320)

- **Annexure**

    a. Annexure I- Highly Migratory Species
    b. Annexure II- Commission on the Limits of Continental Shelf
    c. Annexure III- Basic Condition for Prospecting, Exploration and Exploitation
    d. Annexure IV- Statute of the Enterprise
    e. Annexure V- Conciliation
    f. Annexure VI- Statute of International Tribunal For Law of the Sea
    g. Annexure VII- Arbitration
    h. Annexure VIII- Special Arbitration
    i. Annexure IX- Participation by International Organizations

- **Disputes Settlement Mechanism**

Part XV of the UNCLOS, from Articles 279- 299 provides for various provisions for the settlement of disputes by peaceful means. The parties to the present convention are bound to settle the dispute arising between them relating to the application and interpretation of the present convention of any of its provisions, by peaceful means as to serve the purpose of United Nations Charter.[111] It further states that the means as are mentioned in the UN Charter shall be availed of by the parties for such a settlement of disputes, namely negotiation, conciliation, mediation, arbitration, judicial settlement, regional arrangements or any other means of pacific settlement of international disputes.[112]

However, if parties to a dispute fail to reach a settlement by peaceful means of their own choice, they are obliged to resort to the compulsory dispute settlement procedures under the tribunal or courts provided for in the present Convention, either entailing binding decisions, subject to limitations and exceptions contained in the Convention.[113]

The mechanism established by the Convention provides for four alternative means for the settlement of disputes:

a. The International Tribunal for the Law of the Sea,
b. The International Court of Justice,
c. Arbitral tribunal constituted in accordance with Annex VII to the Convention, and
d. A special arbitral tribunal constituted in accordance with Annex VIII to the Convention. [114]

A State Party is free to choose one or more of these means by a written declaration to be made and deposit it with the Secretary-General of the United Nations.[115] If the parties to a dispute have accepted the same procedure for the settlement of the dispute, it may be submitted

[111] Article 279, UNCLOS
[112] Article 33 , UN Charter
[113] Article 286, UNCLOS
[114] Article 287, UNCLOS
[115] Ibid

only to that procedure, unless the parties otherwise agree.[116]If the parties to a dispute have not accepted the same procedure for the settlement of the dispute, it may be submitted only to arbitration in accordance with Annex VII, unless the parties otherwise agree.[117]

- **International Tribunal for the Law of Seas**

The seat of the Tribunal shall be in the Free and Hanseatic City of Hamburg in the Federal Republic of Germany.[118] The Tribunal may sit and exercise its functions elsewhere whenever it considers this desirable.[119] The Annexure VI of the UNCLOS provides for various provisions relating to the International Tribunal for the Law of Sea.[120]

The Tribunal shall be composed of a body of 21 independent members, elected from among persons enjoying the highest reputation for fairness and integrity and of recognized competence in the field of the law of the sea and in the Tribunal as a whole the representation of the principal legal systems of the world and equitable geographical distribution shall be assured.[121]

Pursuant to the provisions of its Statute, the Tribunal has formed the following **Chambers**:

a. The Chamber of Summary Procedure;
b. The Chamber for Fisheries Disputes;
c. The Chamber for Marine Environment Disputes; and
d. The Chamber for Maritime Delimitation Disputes. [122]

At the request of the parties, the Tribunal has also formed special chambers to deal with the Case concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/European Community) and the Dispute Concerning

[116] Article 287(4), UNCLOS
[117] Article 287(5), UNCLOS
[118] Article 1(1), see Annexure VI
[119] Article 1(2), see Annexure VI
[120] See Annexure III
[121] Article 2, Annexure VI, ITLOS of UNCLOS
[122] https://www.itlos.org/the-tribunal/

Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire).[123]

Disputes relating to activities in the International Seabed Area are submitted to the **Seabed Disputes Chamber** of the Tribunal, consisting of 11 judges. Any party to a dispute over which the Seabed Disputes Chamber has jurisdiction may request the Seabed Disputes Chamber to form an ad hoc chamber composed of three members of the Seabed Disputes Chamber. [124]

Disputes before the Tribunal are instituted either by written application or by notification of a special agreement. [125]

- **Jurisdiction**

The Tribunal has two kinds of jurisdictions namely, Contentious and Advisory jurisdiction

i) The contentious jurisdiction of the tribunal extends to -

a. Any dispute concerning the interpretation or application of the Convention,[126]
b. All matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal.[127]
c. The interpretation and application of the provisions of any international agreement related to the purpose of the present convention provided the dispute is referred to the tribunal.[128]
d. Jurisdiction of the tribunal shall be dealt with by the tribunal itself.[129]

[123] Ibid
[124] Ibid
[125] ibid
[126] Article 288(1), UNCLOS, Article 21, Statute for ITLOS
[127] Article 288(1), UNCLOS, Article 22, Statute for ITLOS
[128] Article 288(2), UNCLOS
[129] Article 288(4), UNCLOS

The advisory jurisdiction of the tribunal may extend to following-

i) The Seabed Disputes Chamber is competent to give an advisory opinion on legal questions arising within the scope of the activities of the Assembly or Council of the International Seabed Authority[130]

ii) The Tribunal may also give an advisory opinion on a legal question if this is provided for by "an international agreement related to the purposes of the Convention.[131]

The Tribunal is also open to entities other than States Parties to the Convention in any case expressly provided for in Part XI of the Convention or in any case submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to that case. In Part XI provision is made, for example, for private companies or individuals to bring cases to the Seabed Disputes Chamber in connection with activities in the Area.[132]

- **Enforcement of decisions of ITLOS**

The ITLOS in its statute nowhere has provided for the enforcement mechanism for its decisions neither the UNCLOS does provided for such a mechanism. The decisions of the ITLOS alike the decisions of the ICJ are binding on the parties to the dispute concerned before the ITLOS.[133]

The UNLOS does not compel the national courts to enforce its decisions; the only exception is the decisions on deep sea bed where the decisions of the ITLOS are bound to be followed.[134]

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[130] Article 191, ITLOS

[131] Rules of the Tribunal, article 138

[132] https://www.itlos.org/general-information

[133] Article 296, UNCLOS; ITLOS Statute Article 33

[134]https://books.google.co.in/books?id=SklYAgAAQBAJ&pg=PA191&lpg=PA191&dq=enforcement+of+decisions+of+itlos&source=bl&ots=jOV4B2xJTq&sig=bkQnEsPEP2JHuP0kWGaFWhBvsTw&hl=en&sa=X&ei=SpdHVZT4HcSdugSE-IGgAg&ved=0CFwQ6AEwCQ#v=onepage&q=enforcement%20of%20decisions%20of%20itlos&f=false

The seabed dispute chamber of the ITLOS has a binding effect for its decisions and that the decisions by this chamber are to be followed, enforced and executed in such a manner as the states do deal with the decisions/judgments of their highest judicial body, the Supreme Court.[135]

Unlike a resolution passed by the U.N. General Assembly or a recommendation made by a human rights treaty committee, judgments issued by UNCLOS dispute resolution tribunals are legally enforceable upon members of the convention.[136] Any decision rendered by a court or tribunal having jurisdiction under this section shall be final and shall be complied with by all the parties to the dispute."[137]

Judgments made by UNCLOS tribunals are enforceable in the same manner that a judgment from a domestic court would be. The decisions of the [Seabed Disputes] Chamber shall be enforceable in the territories of the States Parties in the same manner as judgments or orders of the highest court of the State Party in whose territory the enforcement is sought.[138]"In other words taking an example for a simple understanding, if the United States accedes/ratified to the convention, the U.S. government will be required to enforce and comply with SDC judgments in the same manner as it would enforce and comply with a judgment of the concerned state's Supreme Court. The national court system will serve not as an avenue for appeal from UNCLOS tribunals, but rather as an enforcement mechanism for their judgments.[139]

i) The M/V Saig[140]a (No. 2) Case

Saiga was an oil tanker owned by a Cypriot company, managed by a Scottish company, and chartered to a Swiss company. Having formerly been registered as a Maltese ship, its six month certificate of provisional registration as a St Vincentia and Grenadine ship expired on 12 September, 1997; a permanent Vincentian certificate was issued on November 28, 1997.

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[135] Article 39, ITLOS Statute
[136] http://unclosdebate.org/evidence/488/decisions-made-itlos-would-be-legally-binding-and-enforceable-within-united-states
[137] Article 296, UNCLOS
[138] Article 39 of Annex VI, UNCLOS
[139] http://unclosdebate.org/evidence/488/decisions-made-itlos-would-be-legally-binding-and-enforceable-within-united-states
[140] ITLOS (1999) 120 I.L.R. 143

The Saiga's work was to sell gas oil as bunker to fishing vessels of the West African Coast. On October 27, 1997, the Saiga supplied gas oil to Senegalese and Greek flag fishing vessels in the Gunian EEZ, 22miles from the nearest point of land, a Guinean Island.[141]

On October 28, Saiga was boarded and arrested by Guinean patrol boats and taken to Conraky, Guinea where the tanker and its crew were detained. On December 4, 1997, at the request of St Vicent and Grenadine, the Tribunal gave judgment under Article 292 of the UNCLOS, ordering the prompt release of Saiga and its crew on the posting of a reasonable bond. The Saiga and most of its crew were not released on 17 December, 1997, when its master, a Ukrainian national, was convicted by the Guinean court of the offence of illegal import, buying and selling of fuel in the Republic of Guinea, resulting from the Saiga's activities in the Guinean EEZ. The master was given a suspended prison sentence and a large fine. Saiga, which had not been released, was confiscated as security for the fine, but released on 4 March 1998.[142]

In this case, St Vincent and Grenadines claimed that, by its arrest of the Saiga and its subsequent actions, Guinea has violated the1982 Convention, to which both states were parties. Although neither state had made declarations under Article 286(1), they referred the case to the tribunal by agreement.[143]

Judgment[144]

The tribunal decided as follows-

i) Guinea by arresting and detaining the Saiga and its crew, has violated the rights of St Vincent and Grenadines based on Guinea's contention that there was no genuine link between these two states and the Saiga.

ii) And also that by arresting Saiga has acted in contravention of the provisions of the UNCLOS on right of hot pursuit and thus violated rights of St Vincent and Grenadines.

[141] D.J. Harris, Cases and Materials on International law, page.441
[142] Ibid
[143] Ibid
[144] [144] D.J. Harris, Cases and Materials on International law, page.451-452

iii) While stopping and arresting Saiga has used extra and excessive force contrary to the international law.

iv) And therefore the Guinea shall pay compensation to St Vincent and Grenadines in sum of 2,123,357 US Dollar.

This Saiga's case has touched a number of law of the related issues like-

a. Nationality of ships
b. The genuine link requirement
c. The hot pursuit principle, and
d. The EEZ regime.

As to nationality of the ship, the tribunal confirms that the state of which the ship carries flag shall be the state of ship's nationality, although it lacks any or much connection with the ship still in international law this nationality shall be recognized for the purpose of protecting the ship under the UNCLOS 1982.

The tribunal further held that as to genuine link issue the state may only offer diplomatic protection for a national who is an individual where there is a genuine connection between the two, the genuine link requirement in this case does not affect the same limiting effects. But the very purpose of this requirement is to secure more effective implementation of the duties of the flag state. And the decision was taken on merit of the case as the applicant case also failed to justify its act of arrest and detention.[145]

ii) The Volga Case[146]

The Volga was a long-line fishing vessel flying the flag of the Russian Federation. Its owner was Olbers Co. Limited, a company incorporated in Russia. On 7 February 2002, the Volga was boarded by Australian military personnel from an Australian military helicopter. The respondent stated that indicates that the Volga was in the Australian EEZ when spotted by the Australian military. After being apprehended, the Volga was escorted to the western Australian

[145] D.J. Harris, Cases and Materials on International law, page.452
[146] Russian Federation v. Australia, ITLOS Reports 2002, p. 10

port of Fremantle. The master and crew of the Volga were detained. On 6 March 2002, the three crew members charged in the court of Petty Session of West Australia with the offence of using a foreign fishing boat for commercial fishing without there being in force a foreign fishing license authorizing the use of the boat at the place, contrary to section 100(2) of the Fishing Management Act, 1991. A bail was set by the court. As part of the security for obtaining the release of the Volga and its crew, payment by the owner of one million Australian dollars was required.

The applicant filed an application with the ITLOS and sought a declaration that he respondent had contravened article 73(2) of the UNCLOS in that the conditions set by the respondent for the release of the Volga and three of its officers were not permitted under article 73(2) or were not reasonable in terms of article 73(2).

Apart from that, the applicant sought an order that the respondent release the Volga, its officers and the crew if a bond or security was provided by the owner of the vessel in an amount not exceeding AUS 500,000 or in such other amount as the tribunal in all the circumstances consider reasonable.

Australia requested the tribunal to reject the application made by the applicant. The tribunal analyzed the question of non-compliance with article 73(2), paragraph 2, of the Convention.

Referring to another judgment, the tribunal considered that a number of factors were relevant in assessment of the reasonableness of bonds or other financial security.. They included the gravity of the alleged offence, the penalties imposed or imposable by under the laws of the detaining state, the value of the detained vessel and cost of cargo seized the amount of the bond imposed by the detaining state and its form.

The object of article 292 of the convention was to reconcile the interest of the flag state to have its vessel and crew released promptly with the interest of the detaining state to secure appearance

According to the respondent, the purpose of the payment by the owner of one billion Australian dollars was to ensure that the ship did not enter Australian territorial waters other than

with permission or for the purpose of innocent passage prior to the conclusion of the forfeiture proceedings, and further to ensure that the vessel would not be used to commit further criminal offences.

The tribunal examined whether such a good behavior bond was a bond or security within the meaning of these terms in article 73(2), Para 2, and 292 of the UNCLOS. The tribunal noted that article 73, Para 2, of UNCLOS envisaged enforcement measures in respect of violations of the coastal state's laws and regulations alleged to have been committed. In the view of the tribunal, a good behavior bond to prevent future violations pf the laws of a coastal state could not be considered as a bond or security within the meaning of article 73, Para 2, UNCLOS, with article 292.

Therefore the tribunal considered that the bond as sought by Australia was not reasonable within meaning of article 292, UNCLOS.

The tribunal found the application was well-founded and that, consequently, Australia had to release promptly the Volga upon the posting of a bond or other financial security to be determined by the tribunal.[147]

iii) Bay of Bengal Case[148]

On 13 December 2009 through a letter, Ministry of Foreign Affairs informed the President of the ITLOS that arbitral proceedings have been instituted against the Union of Myanmar under Annex VII of the UNCLOS. Due to disagreement between both the countries no agreement for equitable delimitation of maritime zones between them was ever reached. This disagreement resulted into a deadlock in the negotiations which eventually obstructed the exploration of natural resources in the Bay by both the countries. Having failed to resolve the dispute, on 08 October 2009, the Government of the People' Republic of Bangladesh instituted arbitral proceedings against both the Union of Myanmar and the Republic of India pursuant to Annex VII of the UN Convention on the Law of the Sea (UNCLOS) by submitting Notifications and

[147]http://www.ecolex.org/ecolex/ledge/view/RecordDetails;jsessionid=B4013169CA4544C9CEBCC8C27B4EA6C9?id=COU-143753&index=courtdecisions
[148] ITLOS/ 14 March, 2012

Statements of Claim to the diplomatic representatives of both States in Dhaka. The purpose stated by the Bangladesh in its notification was to secure the full and satisfactory delimitation of Bangladesh's maritime boundaries with India and Myanmar in the territorial sea, the exclusive economic zone and the continental shelf in accordance with international law.

Both parties thereafter accepted the jurisdiction of ITLOS for resolution of the dispute and transferred the case to the ITLOS. On 14 December 2009, the case entered the docket of the Tribunal as the 16th case. In addition to 21 members of the Tribunal, two ad-hoc judges were also appointed by the parties, Judge Thomas Mensah by Bangladesh and Judge Bernard Oxman by Myanmar.

The decision is very significant for future cases. Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar is the latest judgment in this field and first of its kind, delivered by ITLOS. This case is important in various aspects but in particular, for three reasons

i) Firstly this is the first instance where the ITLOS has decided a case concerning the maritime delimitation on merit. Therefore it is going to indicate its approach towards maritime boundary delimitation as compared to International Court of Justice and other international tribunals.

ii) Secondly one of the important issues in this dispute relates to the legal rights and interests of third States/parties. This decision will also be an important point of reference on the on-going dispute between the Bangladesh and India concerning their maritime boundaries on the other side of the Bay of Bengal. As evident from the map in figure 1, the relevant area, which was the subject matter of the dispute, is in a highly complicated geographical position.

iii) Thirdly, it is the first ever judgment of ITLOS which directly addresses the delimitation of the continental shelf beyond 200 nautical miles which evidently lead to some novel legal issues in the judgment. [149]

[149] http://humandignityinternational.weebly.com/significance-of-itlos-success-or-failure.html

The dispute settlement under the ITLOS and particularly in ITLOS may be viewed as a conflict manager and "watchdog" of international maritime peace and security. Alike the national supreme courts of states which are the guardian of the supreme law of the land i.e. Constitutions, the ITLOS indeed is the guardian of the provisions enshrined in the UNCLOS. It not only adjudicates the legal issues relating to the UNCLOS and its provisions but also it does prevent their violation and facilitate their obedience by providing advisory opinions.

It is important here to quote its former President Jesus who describes the true nature of ITLOS. He said that the Tribunal may assist the parties in more than one way. Adjudication is of course, the main function of the Tribunal but it has the authority or jurisdiction to assist the parties, where appropriate, in reaching direct settlement of the dispute between them.[150]

Since its establishment it has received some 20 case on issues relating to laws of the seas. It is although a young international judicial institution but as compared to the other international judicial institutions its gaining great success and also gaining reliable status from the parties. So definitely it has a bright future.

[150] http://humandignityinternational.weebly.com/significance-of-itlos-success-or-failure.html

4. PERMANENT COURT OF ARBITRATION (PCA)

The Permanent Court of Arbitration (PCA) is an intergovernmental organization facilitating the settlement of international disputes that are submitted to it by the parties for the settlement through arbitral procedures. The Court provides for a platform and helps parties settle their dispute by assisting it in appointing the arbitrator(s) of by proving an arbitral panel. The Conferences of Hague 1899 and 1907 paved the way for the development of the international arbitration and by the establishment of the PCA, has formally given recognition to the international arbitral awards.

PCA has developed into a modern, multi-faceted arbitral institution that is now perfectly situated at the juncture between public and private international law to meet the rapidly evolving dispute resolution needs of the international community. Today the PCA provides services for the resolution of disputes involving various combinations of states, state entities, intergovernmental organizations, and private parties.[151] It has widened the scope of subjects under arbitration.

- **Evolution and historical background**

The first evidence of historical development of international arbitration could be traced back from the early fourteenth century, about 1306, when Pierre Dubois, a royal advocate of Normandy, advocated the concept of arbitration to settle the quarrels of international concern. The court of arbitration of that time was consisted of three ecclesiastical judges and six "others", three of which should from each of the two parties to the dispute. And these people should have had good character above doubts. An appeal provision was also laid down by Dubois and the Pope was the only and the final appellate authority.[152]

This concept, then spreaded some 200 years later to Europe, and was promoted in Europe by Desiderius Erasmus, who was a little known French theorists. He urged the nations to accept 'arbitration' for small princely disputes for promotion of the world peace.[153]

[151] http://www.pca-cpa.org/showpage.asp?pag_id=1027
[152] Scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1236&content=clr
[153] Ibid

Hugo Grotious, the "Father of International Law", published his greatest work, *De Jure Belli et Pacis,* in 1625. In later period when he wrote and published more of his books he wrote on history and evolution of arbitration. He selected some earlier historical evidences of the success of arbitration method and promoted that arbitration is a reasonable method of disputes settlement.[154]

On this scale further in eighteenth century names like Rousseau, Emanual Kant and Jeremy Bentham came to scene who contributed in the promotion of importance of concept of arbitration.[155]

The modern day arbitration has its actual origin into following landmark events-

i) Formation of Quasi-diplomatic and impartial tribunal to resolve the Alabama claims in 1794;
ii) Establishment of an independent and impartial tribunal to resolve Alabama claim in 1871;
iii) Harmonization of procedural rules following inauguration of the Permanent Court of Arbitration by the Hague Peace Conference of 1899 and 1907; and
iv) The consistent development of substantive international law following establishment of a truly Permanent Court of International Justice (PCIJ) and an International Court of Justice (ICJ) after the World War II.[156]

In 19th century, in a book by Elkouri and Elkouri, "*How Arbitration Works (1960),* the author stated that ***Salmond*** was an arbitrator and that the procedure that he used to follow for arbitral settlements of disputes at that time seemed to be similar to modern day arbitration.[157]

Today the Arbitration is one of the most reliable means of dispute settlement which are of international concern and with the establishment of the PCA the world community has given its acceptance to the importance of this method of dispute resolution.

[154] Ibid
[155] Ibid
[156] Ibid
[157] Ibid

- **Permanent Court of Arbitration**

The PCA has been established by the state parties to the Hague Conference through the Hague Convention to facilitate the settlement of international differences through arbitration, which cannot be settled by diplomacy. This court is accessible at all times and is operating, and the court functions in accordance with the rules of procedures contained in the present convention.[158]

The court is competent to deal with all the cases of arbitral nature. But the parties may request for setting up of a special tribunal.[159]The court is located at Hague.[160]As of November 2014 it has 177 states parties.[161]

- **Jurisdiction**

It is a fundamental concept in law that jurisdiction must exist if a valid judgment or award is to be rendered by an adjudicative body. Because jurisdiction can be challenged at any stage of the proceedings, it is essential that jurisdiction be determined as one of the first orders of business in any dispute resolution forum. That is particularly important in arbitrations, whether domestic or international. Arbitration, and particularly international arbitration, involves jurisdictional issues beyond those normally encountered in traditional judicial proceedings. The first and most obvious applicable to both domestic and international arbitration is whether there is an operable agreement to arbitrate. "Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."[162]

In other words, there must be an agreement by the parties to arbitrate disputes arising between them.

It follows then that an initial, threefold questions to be determined are:

(1) Is there a valid contract between the parties?

(2) If so, does it contain a valid, enforceable arbitration provision? And

[158] Article 20, 41, Hague Convention, 1899 &1907 respectively.
[159] Article 21, 42, Hague convention, 1899 & 1907 respectively.
[160]Article 22, 43, Hague Convention, 1899 & 1907, respectively
[161] http://en.wikipedia.org/wiki/Permanent_Court_of_Arbitration
[162] http://www.globalbusinesslawreview.org/wp-content/uploads/2011/12/gLathrop.pdf

(3) Are the issues in dispute referable to arbitration? [163]

- **The PCA's jurisdiction extents to the issues -**

i) Arising out of international treaties (including bilateral and multilateral investment treaties), and

ii) Other agreements to arbitrate.[164]

iii) The PCA's jurisdiction extends to the disputes between-

a) Non-contracting powers, or

b) Contracting powers, or

c) Contracting and non-contracting powers provided that they have agreed on recourse to this tribunal.[165]

iv) The cases conducted by the PCA span a wide range of legal issues, including disputes over territorial and maritime boundaries, sovereignty, human rights, international investment (investor-state arbitrations), and matters concerning international and regional trade.[166]

- **Composition of the tribunal**

When the Contracting Powers wish to have recourse to the Permanent Court for the settlement of a difference which has arisen between them, the Arbitrators called upon to form the Tribunal with jurisdiction to decide this difference must be chosen from the general list of Members of the Court. Failing the direct agreement of the parties on the composition of the Arbitration Tribunal, the following course shall be pursued:

Each party appoints two Arbitrators, of whom one only can be its national or chosen from among the persons selected by it as Members of the Permanent Court. These Arbitrators together choose an Umpire. If the votes are equally divided, the choice of the Umpire is entrusted to a third Power, selected by the parties by common accord.

If an agreement is not arrived at on this subject each party selects a different Power, and the choice of the Umpire is made in concert by the Powers thus selected. If, within two months'

[163] http://www.globalbusinesslawreview.org/wp-content/uploads/2011/12/gLathrop.pdf
[164] http://en.wikipedia.org/wiki/Permanent_Court_of_Arbitration
[165] Article 26, para 2, 47 para 2, Hague convention 1899 & 1907 respectively.
[166] http://en.wikipedia.org/wiki/Permanent_Court_of_Arbitration

time, these two Powers cannot come to an agreement, each of them presents two candidates taken from the list of Members of the Permanent Court, exclusive of the members selected by the parties and not being nationals of either of them. Drawing lots determines which of the candidates thus presented shall be Umpire.[167]

- **Arbitration procedure**

The PCA shall apply the laws that the parties to the disputes have agreed upon. The parties enjoy choice of law in international arbitration also. And if the parties do not already have agreed to such an applicable law the arbitral tribunal or the PCA shall with the consent of the parties apply such other international laws as are available to assists the arbitrator(s) and the tribunal to proceed with the arbitrations. Such available international laws is a vast lists includes following important laws/rules-

i) Various Rules of arbitral procedures to be followed by the PCI[168]-

a. Permanent Court of Arbitration (PCA) Arbitration Rules 2012.
b. Explanatory Note of the International Bureau of the PCA Regarding Time Periods Under the PCA Arbitration Rules 2012.
c. Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States.
d. Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two Parties of Which Only One Is a State.
e. Permanent Court of Arbitration Optional Rules for Arbitration Involving International Organizations and States.
f. Permanent Court of Arbitration Optional Rules for Arbitration between International Organizations and Private Parties.
g. Permanent Court of Arbitration Optional Conciliation Rules.
h. Permanent Court of Arbitration Optional Rules for Fact-finding Commissions of Inquiry.
i. Permanent Court of Arbitration Optional Rules for Arbitration of Disputes Relating to Natural Resources and the Environment.

[167] Article 24 & 45, Hague Convention, 1899, 1907 respectively.
[168] http://www.pca-cpa.org/showpage.asp?pag_id=1188

j. Permanent Court of Arbitration Optional Rules for Conciliation of Disputes Relating to Natural Resources and the Environment.
k. Guidelines for Adapting the Permanent Court of Arbitration Rules to Disputes Arising Under Multilateral Agreements and Multiparty Contracts.
l. Permanent Court of Arbitration Optional Rules for Arbitration of Disputes Relating to Outer Space Activities.

ii) UNCITRAL Model Law on International Commercial Arbitration, 1985
iii) Arbitration Rules, 1976
iv) Hague Convention, 1899
v) Hague Convention, 1907
vi) Such of the rules of International law relating to the conflicts of law rules.

- **Awards and their Enforcement**

It is the universally accepted principle now that the arbitral awards have binding force upon the parties to the particular dispute. And the enforcement of the award is wholly in the hands of the parties alike that of ICJ & ITLOS.

This is a well-known rule of international customary law that awards are binding on the losing party and it shall be carried out immediately unless a time-limit has been fixed by the tribunal within which it must be carried out in its entirety or partly.[169]

Arbitral awards are not binding except on the parties and with respect to that particular case.[170] The object of this principle that awards are not binding except on the parties in dispute, is simply to prevent decisions accepted by the arbitrator (s) or arbitral tribunal in a particular case from being binding upon other States or in other disputes.

As is rightly said by Oppenheim in this context that, "It is plain that arbitral awards are only binding when the arbitrator(s) or arbitral tribunal has in every way executed their functions and their awards have been rendered in complete independence. If their awards have been

[169] /Article 30 of the Model Rules on Arbitral Procedure adopted in 1958 by the International Law Commission at its Tenth Session/ www.bhu.ac.in/lawfaculty/.../Cyrollah%20Moradi%20Nodeh_FINAL.do
[170] Article 38 of the Hague Convention 1907

rendered under the influence of coercion of any kind, or if the awards have been given beyond jurisdiction of arbitrator(s) or arbitral tribunals, or if they have been bribed by any of the parties to the dispute or if the arbitrators have been defrauded by any of the disputing parties, which led into a material error in their award or if the arbitrator(s) or arbitral tribunal did not follow the procedure of arbitration which has been provided by parties, the award would have no binding force and can be set aside."

In the case of the ***Societe Commercial de Belgique***[171], the Greek Government concluded an agreement with a Belgian Company, the Societe Commerciale de Belgique, on 27 August 1925, for the construction of certain railway lines and the supply of railway equipment. Upon a default by the Greek Government on the bonds delivered to company, arbitration was resorted to as provided for in the contract. An arbitral award of 3 January 1936, provided for the cancellation of the contract, and an award of 25 July 1936, fixed a sum to be paid by Greece. That sum not having been paid, in 1937 the Belgian Government espoused the cause of the Company, and on 5 May 1938, this proceeding was instituted by an application filed with the Registry of the Court by the Belgian Government. On 15 July 1939, the Court gave judgment and stated that, "the recognition of an award as *res judicata* means nothing else than recognition of the fact that the terms of award are definite and obligatory" on the parties.[172]

In the ***Maritime Delimitation between Guinea-Bissau and Senegal case,***[173] the Arbitral Award of 31 July 1989, was not implemented because Guinea-Bissau alleged that one of the arbitrators' remarks were contradictory. On 23 August 1989, Guinea-Bissau instituted proceedings against Senegal, before the ICJ, in respect of a dispute concerning the existence and the validity of the Award delivered by an Arbitration Tribunal consisting of three arbitrators established pursuant to Arbitration Agreement of 12 March 1985.[174]

The ICJ made it clear in this case that its functions in such circumstances is not to hear the appeal from the arbitral award unless it is specifically agreed upon by the parties to the dispute to refer the matter to ICJ, but rather it acted in exercise of its supervisory function to ensure that matters of procedure and propriety etc were complied with. If the ICJ considers the legitimacy of

[171] *1Societe Commercial de Belgique, ,* 1939, PCIJ Rep., Series A/B, No. 78 (1939), p. 175.
[172] www.bhu.ac.in/lawfaculty/.../Cyrollah%20Moradi%20Nodeh_FINAL.do
[173] 19 RIAA 149 (1985); see ICJ Rep. (1991), at p. 53, and 31 *ILM* (1992) 32
[174] www.bhu.ac.in/lawfaculty/.../Cyrollah%20Moradi%20Nodeh_FINAL.do

the arbitral award, it is not commingling on the merits of the dispute but on the legality of the award made. The court in this case ordered the refund to Guinea-Bissau's application for interim measures of protection.

It is obvious in the international level that States, which willingly submit their difference to arbitral proceedings, will consent to the awards of the tribunal. Therefore, if they had not accepted to run the risk of an opposite award, they would not have had submitted the disputes for arbitral settlement in the first place.

As has been said by Carlston, by entering into an arbitration agreement and participating in the proceedings before the tribunal, the parties implicitly engage to execute the award when rendered.[175]

Hague Convention of 1907 on the Pacific Settlement of International Disputes states, "Recourse to arbitration implies an engagement to submit in good faith to the award"[176]. Also the Covenant of the League of Nations provides in this regard, "the members of the League agree that they will carry out in full good faith any award or decision that may be rendered. In the event of any failure to carry out such an award or decision, the Council shall propose what steps should be taken to give effect thereto." [177]The main features of these international documents were recognition and enforcement of international arbitral awards.

- **Methods for Securing the Enforcement of Awards**

There are some coercive measures that may be taken by the successful party, directly or in conjunction with other States, to compel the recalcitrant party to carry out the arbitral award imposing obligations on it, if the loser party refuses to accept the award and enforces it. The measures that could be taken unilaterally by the successful party are called "self-help" and classified under the heading of diplomatic, economic and military pressures against the losing party. The term of "self-help" is well known in law, and arises from the nature of international law as a legal norm for regulating the inter-state activities of sovereign States.

(i) Diplomatic and Economic measures

[175] www.bhu.ac.in/lawfaculty/.../Cyrollah%20Moradi%20Nodeh_FINAL.do
[176] Article 37
[177] Article 13

One of the methods for enforcement of arbitral awards through successful party is diplomatic and economic measures that includes-

a. Negotiations;
b. Diplomatic protests;
c. Rupture of diplomatic relations
d. Stoppage of trade and commerce, and
e. Removal of subsidies or other help
f. Confiscation, seizure of property in the successful State's territory etc.

These measures are commonly used weapons for compelling the recalcitrant State to fulfill the mandate contained in the arbitral award.

The mentioned measures will have the positive effect if the recalcitrant party has considerable economic interests in the territory of successful State, because it is imaginable that a threat to break diplomatic relations could have a decisive effect on the enforcement of the related award.[178] As in the ***Lena Goldfields case*** (1933)[179], in which an arbitral award had been rendered against the USSR in favor of the Government of the United Kingdom, the latter apparently linked its negotiation for implementation of the award to the discussion of a trade agreement between the two countries, a measure earlier which resulted in a settlement shortly thereafter.

As method of self-help use of such methods does not appear to have been prohibited in international law since they do not involve the use of force which has been prohibited under the Charter of the United Nations.[180] The effectiveness of such measure depends first on the availability of property belonging to the recalcitrant State in the territory of the successful party, and second on the extent of such available property.

(ii) Retorsion and Reprisals (Self help)

[178] www.bhu.ac.in/lawfaculty/.../Cyrollah%20Moradi%20Nodeh_FINAL.do
[179] See, Nussbaum, "The Arbitration between the Lena Goldfields, Ltd. And the Soviet Government", 36 Cornell Law Review (1950) 31. See also, Oscar Schachter, "The Enforcement of International Judicial and Arbitral Decisions", 54 AJIL (1960) 6.
[180] Article 2(4), United Nations Charter.

Another steps regarding enforcement of awards by successful party will be "retorsion" and "reprisals". Under customary international law, retorsion and reprisals are two separate categories of self-help, which have been recognized and accepted by States.

According to Verma, 'retorsion is a retaliatory measure, resorted by a State against unfriendly, discourteous or inequitable acts of another State. These acts are of the similar nature as those taken by the offending State'. 'Reprisals are retributive or punitive in nature. They are accepted by a State to seek redress from another State for its illegal or unjustified acts. The act of reprisals is to compel the delinquent State to prevent and discontinue the wrongful act and to compensate the State wronged. Reprisals are just like tit for tat and so are always illegal in international law but are exceptionally permitted for the purpose of compelling the latter to consent to a satisfactory settlement of a difference created by its own international delinquency.[181]

The difference between the two (Retorsion and Reprisal) is-

a. Whereas retorsion consists in relation for discourteous, unfriendly, unfair, and inequitable acts by acts of the same or a similar kind, and has nothing to do with international delinquencies,
b. reprisals are acts, otherwise illegal, performed by a State for the purpose of obtaining justice for an international delinquency by taking the law into its own hands.
c. It is, of course, possible for a State to retaliate for an illegal act committed against itself by an act of a similar kind.
d. Such retaliation would be retorsion in the ordinary sense of the term but not in the technical meaning of the term as used by those writers on international law so correctly distinguish between retorsion and reprisals".[182]

In the ***case of Naulilaa***[183] between Portugal and Germany, the arbitral tribunal which was established under the Treaty of Versailles in 1928, defined "reprisals" as following:

[181] www.bhu.ac.in/lawfaculty/.../Cyrollah%20Moradi%20Nodeh_FINAL.do
[182] Oppenheim, www.bhu.ac.in/lawfaculty/.../Cyrollah%20Moradi%20Nodeh_FINAL.do

"Reprisals are acts of self-help by the injured State, acts in retaliation for acts contrary to international law on the part of the offending States, which have remained unredressed after a demand for amends…"

Because the non-comply with an award of an international arbitral tribunal is a breach of international law, therefore to resort to measures of self-help by means of reprisals for enforcement of arbitral awards has been recognised and accepted, as the right of States in international law especially in customary international law. Resorting to the use or threatened use of armed force by successful party to compel the losing party for enforcement of an award is one of the measures of self-help in the form of retorsion or reprisals, against the breach of international law for implementing the award.[184]

In the ***Case of Cerruti,***[185] between Colombia and Italy, Colombia refused to accept the arbitral award. Italy resorted to threatened use of force and sent an Italian fleet to Colombia waters in 1818 and an ultimatum was sent by the Commander of the fleet to the Colombian Government for enforcement of the award and claimed that according to the award the indemnities awarded to Mr. Cerruti be paid to the Government of Italy.[186] So it was the use of force and a self help method of having the award enforced. And as in many cases other means prove to be of really no use such a use of force in certain situations is accepted by the world community.

Most of the writers have denied the use of forcible measures for enforcement of awards. They say it is a threat to world peace and such an armed force not to be used for enforcement of the awards. They insisted upon prevention to use such a force saying these are like war.

Waldock states that the principle of "resorting to forcible self-help" was gravely weakened by the fact that conversion of forcible measures into war puts the case outside any legal principles. Oppenheim also states that the institution of "reprisals" would give occasion for abuse in case of a difference between a powerful and a weak State.[187]

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[183] Naulilaa case (Portugal v. Germany), 2 RIAA 1012 (1928). See also Hackworth, Digest of International law (Washington: 1943), p. 155
[184] Ibid
[185] 6 AJI (1912) 965.
[186] www.bhu.ac.in/lawfaculty/.../Cyrollah%20Moradi%20Nodeh_FINAL.do
[187] Ibid

As Verma says, these measures (retorsion and reprisals) differ from war as follows:

1. In retorsion and reprisals the relations of peace are maintained, but in war they may come to an end.
2. These compulsive means are confined to certain harmful measures only, but in war any amount and any kind of force can be used subject to humanitarian law.
3. As soon as the other State is willing to settle the difference, the compulsive measures must cease, but it is not so in war, which comes to an end with the defeat of one of them.[188]

The first step to put limitations on the doctrine of forcible self-help as a legitimate measure of reprisals in positive international law was taken by the second Hague Peace Conference of 1907. Hague Convention of 1899 with respect to the limitation of recourse to armed force for the enforcement of arbitral awards provides:

> "The contracting powers agree not to have recourse to armed force for the recovery of contract debts claimed from the government of a country by the government of another country as being due to its nationals. This undertaking is however, not applicable when the Debtor State refuses or neglects an offer of arbitration, or after accepting the offer, prevents any compromise from being agreed on, or, after the arbitration fails to submit to the award".[189]

Although, this Article and provisions of the Convention did not prohibit the use of force and, did not resolve the problem in general, it prepared the way for its successors, the League of Nations and the United Nations. The Covenant of the League of Nations designed to create a system of collective responsibility in matters relating to the use of force or the threatened use of force. Specially, with regard to the enforcement of arbitral awards,[190]

Further the Covenant provides:

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[188] Ibid

[189] Article 1, www.bhu.ac.in/lawfaculty/.../Cyrollah%20Moradi%20Nodeh_FINAL.do

[190] Articles 10-13

> "The members of the League agree that they will carry out in full good faith any award... that may be rendered, and that they will not resort to war against a member... in the event of any failure to carry out such an award... the Council shall propose what steps should be taken to give effect thereto."[191]

However, the use of force by a member of the United Nations has been prohibited expressly in Article 2 (4) of the Charter of the United Nations as follows:

> "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any manner inconsistent with the purposes of the United Nations".

Therefore, under the Charter of the United Nations, enforcement of awards by successful party by use of force is not legal. The Charter obligates States to settle their disputes by peaceful means so as to preserve international peace and security, and justice.[192] Similarly, the Declaration of the General Assembly on Principles of International Law concerning Friendly Relations and Co-operation among States of 24 October 1970, declares that, "States have a duty to refrain from acts of reprisal involving the use of force".[193] Nevertheless, "Due to the weaknesses of the present international law without any centralized machinery to settle international disputes, these measures continue to have their relevance in international relations".[194] In other words, so long as under international law there is no agency enforcing international awards, reprisals remain relevant as a means of enforcing international law as a customary practice.

(iii) Regional Organizations

Enforcement of arbitral awards may be requested through a regional organization by a successful State in its attempt to secure such enforcement because the recalcitrant party may be more likely to respond to opinion or pressure within a related region to which it belongs. And

[191] Article 13(4)
[192] Aricle 2, Para 3
[193] GA Res. 2625 (XXV), Oct. 24, 1970.
[194] S.K.Verma

that the regional community being the association of countries sharing common heritage of culture, language, polity etc the can better influence the recalcitrant party if -

a. The recalcitrant party is one of the regional group countries, or
b. Is a country with whom most of the regional community countries have trade of other economic and diplomatic relation or
c. In any way the regional community is at concern with the award and its enforcement and compliance.

It could make it more susceptible to enforcement measures, because, sometimes the regional organization provides specific provisions for enforcement of awards. Like for say, American Treaty on Pacific Settlement (the Pact of Bogota, April 30, 1948) provides that if one of the contracting parties should fail to carry out the obligation imposed upon it by an arbitral award, the other party or parties concerned shall propose a meeting of Ministers of Foreign Affairs to agree upon the appropriate measures to ensure the fulfillment of arbitral award.[195]

European Convention for the Peaceful Settlement of Disputes, 1959, provides that if one of the parties to a dispute fails to carry out its obligations under an award of the arbitral tribunal, the other party to the dispute may appeal to the Committee of Ministers of the Council of Europe, the Committee may make recommendations with a view to securing compliance with the said award. [196]

[195] Article 50
[196] Article 39

- **Some Important Decisions of the Permanent Court of Arbitration**

North Atlantic Fisheries Cases[197]

A special agreement was drawn up on January 27, 1909 whereby the American and British Governments agreed to refer certain questions to an arbitral tribunal chosen from the members of PCA at The Hague. The U.S. claimed that the right to take fish at certain parts of Newfoundland and further claimed that the regulation with respect to fisheries must be made jointly by U.S., Great Britain and Canada and not by Great Britain and Canada alone. The Tribunal held that the liberty granted to the U.S. did not constitute an international servitude in their favor. It further held that the exercise of the right by the Great Britain to make the regulations without the consent of the U.S.A. was limited in that such regulation must be bona fide and not violate any of the provision of the treaty of 1818.[198]

- **Savarkar's Case[199]**

Savarkar, an Indian leader being a prisoner in British mail steamer ship, Morea, escaped while the ship was transporting him to India from Britsin, when the ship touched Marseilles. He was captured by the French Police and was handed over to the captain of the ship without any extradition proceedings. The French's demand asking for the custody of the fugitive was refused by the British government. Question before PCA was whether in conformity with the rules of international law the fugitive should be restored to the French government. Answering negative the tribunal held, there was no rule of international law which imposed in any such circumstances an obligation on the power/state having the custody of a prisoner to restore him because a mistake had been committed by the foreign agent who delivered him up to that power/ state.[200]

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[197] (1961) XI RIAA 167 (Official Citation); (1910) 4 AJIL 948 (Other Reference); ICGJ 403 (PCA 1910) (OUP reference);

[198] M.P.Tandon, Public International Law, 2005, page 437

[199] 1911) XI RIAA 243 (Official Citation)ICGJ 401 (PCA 1911) (OUP reference)

[200] M.P.Tandon, Public International Law, 2005, page 437

5. REGIONAL COURTS

The regional arrangements for the settlement of international disputes or the disputes having international concern is actually the courts system established for the settlement of the disputes between the two or more countries that are located in the same region and have been agreed to the membership of such a regional organization and also that the countries consent to the extension of the jurisdiction of the courts that are established in the particular region as the regional court for a specific purpose. We can take example of following three important regional organizations and their human rights court-

i) European Union (EU)

It is the association of 22 countries in the Europe have common in them heritage of culture, language, polity, interest, economy etc.[201]

The EU has established a regional court for human rights namely, **European Court for Human Rights** under the European Convention on Human Rights, 1958**,** which has vast jurisdiction to check and adjudicate the human rights violation acts within the EU.

ii) Organization of American States (OAS)

It is an association of 35 independent states of America formed on 30 April 1948, for the purposes of regional solidarity and cooperation among its member states. The Organization was established mainly in order to achieve among its member states—as stipulated in Article 1 of the Charter "an order of peace and justice, to promote their solidarity, to strengthen their collaboration, and to defend their sovereignty, their territorial integrity, and their independence."[202]

For the protection and promotion of human rights in the American region the OAS has established the **Inter-American Court of Human Rights** by virtue of the American Convention on Human Rights, 1969.[203]

[201] Dr. S.K.Kapoor, International law and Human Rights, 2009, page. 852
[202] http://www.oas.org/en/about/who_we_are.asp
[203] H.O.Aggarwal, Intrnational law and Human Rights, 2014, page 884

iii) African Unity

The African Unity is the association of 32 governments of the African region having following aims-[204]

a. Promotion of the unity and solidarity of the African states.
b. C-ordination and co-operation of African states in order to achieve a better life for the people of Africa.
c. To defend the sovereignty, territorial integrity and independence of African states.
d. Eradication of all forms of colonialism and white minority rule as its most important aim.

The African Court on Human and Peoples' Rights (the Court) is a regional/ continental court established by African countries to ensure protection of human and peoples' rights and prevention of human rights violation in Africa by virtue of the African Charter on Human and People's Rights, 1981.

The Regional Courts

i) European Court

- **European Convention on Human Rights, 1953**

It is the document of the EU that provides certain human rights- civil, political, economic and cultural rights to the people and individuals in the European region. It is actually the European Convention for the Protection of Human Rights and Fundamental Freedoms but is commonly known as European Convention on Human Rights. . Up till 2013 it has 47 member countries. There were 66 Articles in the original text of the convention but with the adoption of 11th Protocol in 1994 and its coming into force in 1998 the enforcement machinery under the convention has been restructured.

So now the present amended convention is with following integration-

[204] http://www.dfa.gov.za/foreign/Multilateral/africa/oau.htm

Section I – Articles 2- 18 providing for the rights and freedoms under the convention listed below-

a. Right to life
b. Freedom from torture
c. Right against cruelty
d. Right to effective remedy
e. Right to marry
f. Right to association
g. Right to movement
h. Right to freedom of speech and expression and religion
i. Right to privacy
j. Right against retroactive application of laws
k. Right to liberty and security
l. Right to fair trial
m. Right against discrimination

Section II – Articles 19- 51 European Court on Human Rights

Earlier there were following three enforcement machineries in the EU under the convention namely-

a. The European Commission on Human rights
b. The European Court on Human Rights, and the
c. Committee of Ministers.

But with the 11th Protocol the commission has been dissolved and the scope of the committee of minister's powers is much lessened. So now the New European Court on human rights is the only enforcing machinery under the convention since 1 November, 1998.

The amended convention under section II provides for composition, appointment, term of office, election of judges, jurisdiction of the court, its advisory opinions judgment form and contents etc.

Section III Articles 52- 59 Miscellaneous Provisions

So now the European Convention on Human Rights is a document of 59 Articles divided into three sections and has 15 Protocols.

- **European Court of Human Rights**

The European Court of Human Rights (ECHR) is the judicial organ of the EU responsible for the protection and promotion of human rights. It is created under the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, came into force on 3 September 1953, commonly known as the European Convention on Human Rights which was drawn up by the Council of Europe which is an organization of the EU promoting co-operation between European countries in the areas of legal standards, human rights, democratic development, the rule of law and cultural co-operation.

Section II of the Convention from Articles 19- 51 provides for various provisions relating to the European Court of Human Rights.

The court is established under section II of the Convention and is composed of as many judges as there are total number of high contracting parties to the Convention, and the judges shall be the person of high moral character and possess such a qualification as is required for the appointment at the highest judicial seat in the country to which they belong or are national of, and are elected for nine years.[205]

For the purpose of hearing and adjudication the court shall sit in the following form-

a. Single judge formation- committee of three judges, specifically for individual applications
b. Chambers of seven judges, for the inter-state applications, and
c. Grand chamber of seventeen judges having appellate and advisory authority.[206]

[205]Article 19- 23, ECHR, 1950

[206] Article 26(1), ECHR, 1950

- **Jurisdiction of the Court**

The jurisdiction of the court extends to the following matters[207]-

a. All matters concerning the interpretation and application of the convention;
b. All matters concerning the interpretation and application of the Protocols;
c. Any application brought by any high contracting party relating to the breach of any of the provision of the convention or of the Protocols by any other high contracting party;
d. Individual applications for the gross violations of human rights, and
e. Giving advisory opinion to the contracting states of the committee of ministers at their requests.

- **Admissibility criteria**

The court shall admit or accept the application only when all the domestic remedies have been exhausted and that within six months period of the date of the last domestic judgment of awards.[208]

- **Judgment of the Court**

The court's decision/ judgment i.e. of the grand chamber which is the highest appellate body, is always final-

a. if the grand chamber has rejected request for referral
b. If the parties have declared that they won't go to grand chamber against chambers' decision, or
c. Even till three months from the chambers' decisions no party to a particular dispute came to grand chamber then chamber's decision becomes final and binding on the parties. And once the decision is final it is then published.[209]

[207] Articles 32-34, 47-48, ECHR,1950
[208] Article 35, ECHR, 1950
[209] Article 44, ECHR, 1950

- **Enforcement of the decision of judgment of the European Court**

It is a well known fact in international law that if a party does not wish to be abided by any decision why shall it then have recourse to any means of dispute settlement which has a binding result? And therefore developed the principle of "good faith" in international law that every treaty, convention etc must/ shall be respected in good faith and it has also one of the important purposes that by following and obliging to the mandates contained in the treaty, convention, arbitral awards or/and judgments the states maintains good relation with the other states and with the world community as a whole and if it does not do so then its name shall be recorded in the bad book of the world community. And so although the international law in the form of treaty, awards, convention, judgments etc is not at all binding but to continue being part of world community and out of the fact of inter-dependence of states in today's world, the states apt to follow this very principle of international law.

And so is the case at regional level so far as enforcement and execution of regional court's judgment is concerned.

The European countries that are parties to the ECHR have pledged to respect the decisions of the Court in a matter before the court to which they are party.[210]

Under the EU regarding the enforcement of decisions or judgments of the European Court on Human Rights, the Convention has provided for the enforcement organ namely, the committee of ministers. The final judgment of the court is transmitted to the committee and the committee then supervises its execution. For that purpose the committee shall go in detail to the judgment and if it finds the judgment facing problem of interpretation then it shall refer the decision to the court itself with a request to clear its confusion. Such a referral requires majority of the committee then only reference shall be made. [211]

On getting the ruling by the court on the interpretation of the judgment the committee shall notify the concerned state that is to follow the decision of the court at the notice of the committee and if the party refuses to follow the decision the committee shall refer the matter

[210] Article 46(1), ECHR, 1950
[211] Article 46(2)- (4), ECHR. 1950

again to the court to check whether the act of refusal constitutes violation of the ECHR and has failed to fulfill its obligation. Again at this stage committee requires majority for referral.[212]

If the court finds it to be a violation then it shall refer the case to committee for consideration as to what action to be taken for the enforcement and execution of the judgment. And if no violation is found out then the committee shall close its examination on the case. [213]

ii) The America Court

- **Inter-American Convention on Human Rights**

The Ninth Pan-American Conference in 1948 adopted America Declaration on Rights and Duties of Man, laying down the rights and duties of the individual citizens. Later in 1959 Inter-American Commission on Human Rights was adopted by the OAS through a meeting of consultation for American Ministers for foreign affairs. It proved to be great initiative by the OAS towards investigation into human rights field of the violations of the human rights. The American Convention was finally adopted in November, 1969, in a specialized conference held at San Jose, Costa Rica, and it came into force on July 11, 1978 and so it is called as "Pact of San Jose Costa Rica" ratified by 21 of the 32 OAS members.[214]

The Convention is a document of 82 Articles grouped into 11 Chapters besides a Preamble. And it provides for the following **civil and political rights**-[215]

a. Right to judicial personality
b. Right to life
c. Right to humane treatment
d. Right to personal freedom to nationality
e. Right to participate in government
f. Right to equality
g. Right to fair trial
h. Right to privacy
i. Freedom of thought and expression

[212] Article 46(4), ECHR,1950
[213] Article 46(5), ECHR, 1950
[214] H.O.Aggarwal, International law and Human Rights, 2010, page 884
[215] Article 3- 25, American Convention on Human Rights, 1969

j. Freedom of conscience and religion
k. Right to assembly and association
l. Right to family
m. Right to name
n. Rights of the child
o. Right to movement and residence
p. Right to judicial protection
q. Right to property

Economic and cultural rights[216]

r. Right to education
s. Right to social security
t. Right to work and just condition at work
u. Right to participate in cultural events of society, etc.

The members of the OAS who have ratified the Convention have pledged that at time of ratification that they shall respect above mentioned rights to all the persons in their territory and that they shall ensure that the persons enjoy these rights to the fullest without any kind of discrimination on part of the state on any ground like race, colour, religion, language, nationality of social origin, economic status, birth or any other conditions.[217]

- **The Inter-American Court of Human Rights**

The Convention in chapter VIII (Articles 52- 69) provides for various provisions relating to the Inter-American Court of Human Rights. The court was established composing of seven judges having personality of high moral character and possessing qualification required for his

[216] Article 26, American Convention on Human Rights, 1969

[217] Article 1, American Convention on Human Rights, 196

appointment to the highest judicial office of his concerned state/country, he must be impartial and a person of high integrity.[218]

The court is an autonomous judicial institution of the OAS established with the purpose of application and interpretation of the provisions of the convention and it works and functions according to the provisions and rules as laid down in the present Convention (Articles 52- 69) and the **Statute of Inter-American Court of Human Rights**, which it has adopted by virtue of Article 60 of the Convention which says that the Court shall draw up its Statute which it shall submit to the General Assembly for approval and that it shall adopt its own Rules of Procedure.[219]

The Statute is consists of by 32 Articles providing for nature, composition, seat, jurisdiction of the court, election of the judges etc.[220]

- **Jurisdiction of the Court**

The jurisdiction of the court extends to following-[221]

a. All cases concerning the application and interpretation of the present convention, that are submitted to it by the state parties to the convention;
b. All cases concerning the application and interpretation of the Protocols, that are submitted to it by the state parties to the convention;
c. To give advisory opinion to the contracting states/ state parties and the commission on human rights
d. All cases brought to it by the parties concerning violation of any of the provision of the convention by another state party
e. To deal with the individual applications for the violation of his human rights.

[218] Article 52, American Convention on Human Rights, 1969
[219] Article 60,Inter-American Convention on Human Rights, Article 1, Statute of the Inter-American Court of Human Rights
[220]Statute of the Inter-American Court of Human Rights
[221]Article 61-63 of the Convention, Article2 of the Statute of Inter-American Court of Human Rights

- **Judgment of the Court and its enforcement**

The judgment of the court is final and is not subject to appeal. If there is any disagreement as to the interpretation of the judgment of the court the case may be referred to the court at the request of any of the party to the dispute or case concerned, and then the court shall then rule over the interpretation of the case. But the request is made within ninety days from the date of notification of the judgment. [222]

As the parities need to give pledge of their acceptance to respect the court's decision so the enforcement and execution is always with the parties concerned. The court in has to give the OAS in its annual report, in particular the cases informing the OAS of the countries/ members that do not obey the court's decision and refused to execute the order given by the court. Then the OAS decides what measures to be taken to compel the failing party to do good the wrong done by it or its individual. [223]

iii) African Court

- **African Charter on Human and People's Rights**

The formation of a regional agency for protection and promotion of human rights in Arica was proposed in a Conference held in Africa on 'Rule of Law' at Lagos (Nigeria) in 1961. The Conference was sponsored by the ICJ, under the auspices of an international organization (an INGO) where a resolution named 'Law of Lagos' was adopted wherein the governments of various African countries were invited to think and study the importance of such an agency and the possibilities of its formation. And later also several efforts were made like UN Seminar on 'Human Rights in Developing Countries' held in Dakar (Senegal) 1966. And thus was adopted in 1981, 27 June the African Charter on Human and People's Rights. It came into force on 21 October, 1986 and ratified by 53 member states of African Unity.[224]

The African Charter is consists of by a Preamble besides 68 Article providing for the Rights and Duties-

[222] Article 67, Convention, 1969.
[223] H.O. Aggarwal, International law and Human Rights, 2010, page 889- 890
[224] H.O.Aggarwal, International law and Human Rights, 2010, page. 891

Rights under the Charter[225]-

a. Right to life
b. Right to equality
c. Right to respect for dignity
d. Right to be heard
e. Right to information
f. Right to liberty and security
g. Right to existence
h. Freedom of conscience, thought, speech, religion
i. Right to association
j. Right to assembly
k. Right to enjoy state of mental and physical health
l. Right to property
m. Right to dispose wealth and natural resources
n. Right to family
o. Right to freedom of movement and residence
p. Right to education
q. Right to participate in government of his country
r. Right to national and international peace and security
s. Right to social, economic and cultural development
t. Right to a general satisfactory environment
u. Right to recognition

Duties[226]

a. Duties toward family, society, state, and other legally recognized communities and world communities
b. Duty towards fellow being
c. Duty not to discriminate
d. Duty to serve the national community

[225] Article 2- 24, African Charter, 1981
[226] Article 27- 29, African Charter, 1981

e. Duty to preserve and strengthen the national security
f. Duty to work, pay taxes
g. Duty not compromise the national security to which he belong
h. Duty to do all good efforts to achieve the aim and purposes of AU

The member state of the present Charter have undertaken that they shall in every situation respect these rights of its people and persons in their territory and shall ensure their full enjoyment by all the persons without any kind of discrimination on part of state on any ground like race, religion, language, colour etc.[227]

- **African Court on Human and People's Rights**

In 1998, a Protocol was adopted to the African Charter by virtue of Article 1 of which the African Court on Human and People's Rights was established by the AU. The court came into force very recently on January 24, 2004. It has its seat in Arusha, the United Republic of Tanzania.[228]

- **Jurisdiction of the Court**

The Court has jurisdiction over following matters-

a. all cases and disputes submitted to it concerning the interpretation and application of the African Charter on Human and Peoples' Right, and
b. All cases concerning the application and interpretation of the Protocol and any other relevant human rights instrument ratified by the States concerned.[229]
c. To give advice to the member states or other organizations recognized by the AU at their request concerning to the Charter or any other instrument on human rights which is in force in Africa.[230]
d. Individual petitions against a state which has recognized to this kind of court's jurisdiction.[231]

[227] Article 1, African Charter, 1981
[228] H.O.Aggarwal, International Law and Human Rights, 2010, page. 891/ http://www.au.int/en/organs/cj
[229] http://www.au.int/en/organs/cj, Article 5(2), Protocol
[230] Article 4, Protocol

- **Composition**

The Court is composed of eleven Judges, nationals of Member States of the African Union. The first Judges of the Court were elected in January 2006, in Khartoum, Sudan. They were sworn in before the Assembly of Heads of State and Government of the African Union on 2 July 2006, in Banjul, the Gambia.[232]

The Judges of the Court are elected, after nomination by their respective States, in their individual capacities from among African jurists of proven integrity and of recognized practical, judicial or academic competence and experience in the field of human rights. The judges are elected for a six year or four year term renewable once. [233]

- **Access**

Court may receive complaints and/or applications submitted to it by[234]-

a. The African Commission of Human and Peoples' Rights or State parties to the Protocol,
b. African Intergovernmental Organizations,
c. Non-Governmental Organizations with observer status before the African Commission on Human and Peoples' Rights, and
d. Individuals from States which have made a Declaration accepting the jurisdiction of the Court can also institute cases directly before the Court.
e. As of October 2012, only five countries had made such a Declaration. Those countries are Burkina Faso, Ghana, Malawi, Mali, and Tanzania.[235]

- **Judgment of the Court**

The decision of the Court is final and not subject to appeal but it reserves right with itself of interpretation and review of its own decisions. The execution of the court's decision is voluntary i.e. at the wish and will of the parties.

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[231] Aticle 5(3), Protocol
[232] http://www.au.int/en/organs/cj
[233] Ibid
[234] (Article 5) and the Rules (Rule 33), Protocol
[235] http://www.au.int/en/organs/cj

In accordance with the Protocol to the Charter, the state parties to the present Charter and Protocol undertakes to comply with judgment in any case to which they are party and to ensure its execution within the time that is stipulated/ fixed by the court.[236] The Council of Ministers of the AU is the body responsible for the supervision of execution of the court's decisions.[237]

The Court has to submit of all its working in a report to the Assembly of Heads of States and Governments, it is an annual report wherein it also has to inform the Assembly the cases wherein the specific country/ State has refused to comply with its judgment. And then it is in the assembly that is decided as to what action is to be taken against the state that failed to comply with the decision of the court or what other action be taken to compel it to comply with the mandate contained in the court's judgment.[238]

[236] Article 30
[237] Article 29, para 2, Protocol
[238] H.O.Aggarwal, International Law and Human Rights, 2010, page. 896

CHAPTER 4

CHALLENGES AND FUTURE OF INTERNATIONAL ADJUDICATION

1. INTERNATIONAL COURT OF JUSTICE

With respect to international dispute- its adjudication, enforcement and the execution of the judicial decisions of the ICJ, recourse to it, certainly is not as popular as it is to the Security Council and the General Assembly of the United Nations, among the States Member to UNO or not. Although the ICJ is the principal judicial organ of the UN but as compared to the above mentioned two organs its "say" has very less wattage. Alike national legal systems, at international level also the judicial function is to adjudicate and the enforcement of the judgment lies with the Executive wing of the Government and in international law this enforcement function is in the hands of Security Council.

1) Justice S. Oda, in his dissenting opinion in the ***Nicaragua Case***[239]**,** expressed that:

"Looking back at the history of the settlement of international disputes by arbitration or adjudication one may clearly see that the legal dispute subject to such settlement were limited in scope and more basically that there referral to such settlement was always to depend ultimately on the assent of the States in dispute."

It is clear that for the exercise of its original or voluntary jurisdiction, the Court relies on the consent of the parties to refer to it the dispute or disagreements between them for seeking the resolution of the dispute.[240] And the Court to exercise its compulsory jurisdiction over the legal issue between the parties the prior consented declaration by the parties to that effect is a must condition.[241] And so it is this area where the effective implementation of the judgment of international adjudication is seen to be a contingency at the hands of disputing parties.

It is therefore strongly suggested that the power to "suo moto "cognizance into matters of international necessity be given to the Court.

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[239] I.C.J. Reports 1986, p. 14
[240] Art. 36 Statute of International Court of Justice
[241] Article 36(1), UN Charter

2) **Refusal** by the respondent State to appear before the ICJ and to defend its position is another biggest challenge to international adjudication. Because as is the case of municipal courts which are empowered to compel presence or appearance of the party to dispute, before them, the ICJ do not have such a compelling authority which actually is a must requirement to give effect to the international adjudication.

3) **Lack of enforcement machinery,** is again a big challenge to the ICJ. At national level legislation is the function of Parliament, Adjudication is with Judiciary and the enforcement and execution of the court's decision is with the Executive organ of the State. But at international level there is no single supra national authority which has such three organs work in collaboration with each other's and be called a government as a whole. The ICJ's decisions and judgments are although final but not binding on all rather only on the parties to the particular dispute but this is also the problem that mere adjudication is done but the decisions is not enforced and executed then its shall destroy the very purpose of having the adjudicating bodies.

   Article 94(1) of the UN Charter provides that the state parties have undertaken to respect and comply with the court's decision, but it is based on 'good faith' principle that even if they do not oblige by it the court could not do anything to enforce it. Because the UN Charter under Article 94(2) has bestowed the power of enforcement of the ICJ's decision to the Security Council. So even after adjudication of any case the court has to sit mum waiting for the decision to be enforced and executed if the recalcitrant party refused or failed to do it.

4) **Justice at International level is in the hands of PFives (The Five Permanent Members of the Security Council).** Chapter V, VI & VII of the UN Charter provides for the powers of the Security Council and the exercise of its functions. So these chapters has a common requirement that whatever the Security Council decides to do with the failing party who has refused to comply with the ICJ's decision and judgments, it shall require the vote of at least nine of its permanent members and that even among those nine vote of five permanent members is a must condition. So even if all the ten members have decided

to go against any state with which any of the permanent members of the Council has good relation or have some interest with then a single non-vote or the veto of that permanent member alters the majority decision. So only when the PFives are "ok" with the decision of other ten members then and only then strict action can be taken against the recalcitrant state party. And if the recalcitrant party is any one or more of the PFives then justice by way of enforcement and execution of the ICJ's judgment is beyond impossibility.

5) Again the time taken by the Court to decide the matter and even to decide minute but important facts is much more as is evident from the ***Barcilona Traction Case***[242]**,** in regard to which a criticism was pointed to the time taken i.e. ten years for the proceedings and fifteen thousand pages of document, ultimately to find out that Belgium lacked locus standi, in spite of the fact that the court had jurisdiction.

6) The cases before ICJ are state brought ones so even if the party refuse to comply with the court's ruling sanctions is just in the form of economic acts or fines that is not unaffordable for a state. A state cannot be imprisoned and so the hands of ICJ are tied.

7) The compulsory jurisdiction of the court is an optional provision[243] and so most of the developed nations- USA have not ratified it. And as developed nations have a say in international level so justice always dies at the cost of their interests.

Suggestions

1. The ICJ must be given wide range of jurisdictional powers. The compulsory jurisdiction must be made a mandate.

2. The requirement of the compulsory vote of PFives for any action to be taken by the Security Council must be dissolved and that place 'majority vote' must be placed as a condition.

[242] Barcelona Traction (Belg. v. Spain), 1970 I.C.J. 3 (Judgment of Feb. 5)
[243] Article 36(1), UN Charter

3. The ICJ should be given wide powers to suo moto cognizance into any matter where the world security and peace is or is likely to be at threat.

2. INTERNATIONAL TRIBUNAL FOR LAWS OF THE SEA

Alike the ICJ the ITLOS also faces all the above mentioned challenges concerning-

a. No enforcement machinery of its own,
b. Jurisdiction is exercised at the consent and will of the parties Contentious cases),
c. Judgment/ decisions do not have binding force,
d. Important one is that many of the maritime disputes are brought to ICJ so there both the Courts face challenge of multiple jurisdictions and overlapping jurisdiction.
e. Enforcement of tribunal's decision is in the hands of the parties.

Suggestions

1. That the disputes relating to maritime laws be brought only to the ITLOS.
2. Contracting States must accept the compulsory jurisdiction of the ITLOS in matters having great international concern.
3. List of subjects must be made which are of international concern and it should mandatorily accepted that the ITLOS is to be accessed for the settlement of disputes relating to those matters, e.g., piracy, mining activities etc which are of so serious nature as to bring the world peace and security at threat.

3. INTERNATIONAL CRIMINAL COURT (ICC)

It is the only court exercising jurisdiction over and individual person and is the one of its kind. No doubt the court is doing its best for we have examples of ICTY & ICTR. But only problem lies with the fact that if the convict flees to another jurisdiction from the court where he is to be punished and has taken asylum/ shelter in another state which is an enemy state to the one that is to enforce the order of the Tribunal or that the state where he ha flew is a state

involved in activities like what today ISIS is doing then getting back that person is at the will of such a state. And there the justice may fail.

4. PARMANENT COURT OF ARBITRATION (PCA)

Challenges

1. The PCA is not a court at all in real sense but it is a panel of arbitrators or experts who at the request of the parties do constitute themselves into tribunal.
2. Manely O. Hudson observed that, "the name of PCA is merely a misnomer, and by creating exceptions which could not be fulfilled, it may have been responsible for deception of popular opinions"[244]
3. It is permanent only in the sense that a panel is permanently available from which arbitrators may be chosen, that a Administrative Council is constituted as a continuing body, and that a permanent International Bureau exists to facilitate the creation of tribunal.[245]

4. REGIONAL COURTS

The UN Charter also has recognized the importance of regional arrangements for the resolution of international disputes.[246] The regional agencies like, European Court of Human Rights, Inter-American Court of Human Rights and the African Court of Human Rights, play very important role in settlement and resolution of international disputes relating to human rights, in the respective region. Even in many cases the ICJ invited the EU to look into the particular case and facilitate the enforcement and execution of the decision of the ICJ, for example the ***Nicaragua Honduras Case***[247] **,** where in the ICJ had invited the EU to assist the enforcement and execution of the judgment.

[244] M.P.Tandon, Public Internation Law, 2005, page. 437
[245] Ibid
[246] Article 33
[247] I.C.J. Reports 2007, p. 659

The major challenge that the regional courts face is again while enforcing and executing its decision or judgment. Although the regional courts are doing well but due to frequent internal conflicts between the members of the organizations it is clear that there is lack of political unity which is the very pre-condition necessary for the development in the field of human rights and that it is also the big hurdle on the way of proper enforcement and execution of the decisions of the Court of regional organizations.

CHAPTER 5

ROLE OF THE INTERNATIONAL JUDICIAL INSTITUTIONS IN THE DEVELOPMENT OF THE INTERNATIONAL LAW

It is the central theme of the American Realism chiefly propounded by Jerome Frank and Karl Lewellyn that the law remains just a bundle of words in the document drafted by the legislature unless it is given meaning by the judiciary through the act of interpretation of the Statute. The realists strongly believe that it is the judiciary who gives life to the words of legislature and then only it becomes law. This ideology put light on the importance of the "act/function of interpretation of the laws/ statute and adjudication" which is the very essential function and the very responsibility of the judicial organ, world over.

The Charter of UN also recognizes the importance of decisions and judgments of the international judicial institutions by codifying it to be one of the sources of international law.[248] But unlike the decisions and judgments of the highest judiciary of a state i.e. the Supreme Court of the state, the decisions of the international judicial institutions has no binding force, except between the parties to the disputes concerned.[249]

The Courts while dealing with any dispute of international concern are bound to follow the rules of international law and also to consider the provisions of treaty(s), conventions that are related to the dispute before it.

The ICJ while deciding any case before it is bound to do so in accordance with –

a. International conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
b. International custom, as evidence of a general practice accepted as law'
c. The general principles of law recognized by civilized nations;

[248] Article 33 & 38(d), UN Charter.
[249] Article 94, UN Charter; 46 of the ECHR, 1950; 62-64, American Convention, 1969; Article 296, UNCLOS; ITLOS Statute Article 33; 59 Statute of ICJ.

d. And the judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.[250]

Although the international judicial decisions are not binding but by interpretation of the conventions, treaties and other international instruments, they give a direction towards a clear understanding of what exactly the words of these instruments intend to mean. The international adjudication by the international judicial institutions greatly contributes to the promotion of "Rule of Law" in following two ways-

i) In dealing with the cases before it the international judicial institution applies the existing rules in such a way as to resolve the issues affecting the lives of nations and affecting the world at large;
For example, The ICJ through its various judgments- North Sea Continental Shelf Case etc. have developed the maritime zones laws/ regime.

ii) And where no rules of international laws are in existence on a particular case, the court does evolve certain rules on such cases. For example, in Reparation Case the ICJ stated that UNO is an international person, further recognized, the UNO's General Assembly can seek advice of court through resolution, UNO can bring claim for injuries to its officers and agents, etc.

In ***Corfu Channel Case***[251] the court clarified the laws relating to self-defence, intervention and right to innocent passage.

In ***North Sea Continental Case***[252]**,** the court held that the principle of equidistance was not obligatory in all cases of delimitation of continental shelf.

In ***Libya v. Malta***[253], the court held that as the UNCLOS is yet to come to existence but it is very important instrument as it contains certain customary rules of international maritime regime. And so the states have to decide to what extent those rules are to taken as binding.

[250] Article 38, Statute of ICJ; Applicable in general to all the international judicial institutions.
[251] , I.C.J. Reports 1949, p. 244
[252] I.C.J. Reports 1969, p.3
[253] [1985] ICJ Rep 13

Although it's not operative but great majority of states have signed it and hence it is proved to be an important instrument.

From the above discussion of the current as well as previous chapters it is crystal clear now that the international judicial institutions has contributed a lion's part in the development of the international law in spite of the fact that none of the decision of these institutions have a binding force except on the parties to the dispute before the particular institution.

CHAPTER 6

CONCLUSION

The international judicial institutions namely, the International Court of Justice, International Criminal Court, Permanent Court of Arbitration, International Tribunal for Law of the Sea and the various regional courts on human rights- European Court of Human Rights, Inter-American Court on Human Rights and the African Court of Human Rights, have established the world judicial system. These institutions play very vital role in the development of international adjudication and thereby contribute towards the development, growth and promotion of international law through various landmark judgments and awards in spite of the fact that their decisions are binding only on the parties to the particular dispute before it.

These institutions face a common challenge or problem and that is of enforcement and execution of the decision, judgments and awards pronounced by them, which is at all in the hands of other international and independent of these institutions, body, for example, decisions of the ICJ are enforced by the Security Council, that of the regional human rights courts, the enforcement and execution of decisions is done by the committee of ministers, in EU; by the Commission of Human Rights in Organizations of American States and African Unity. And so the court's decision looses the zest of its own due its passing by to the other hands.

In almost all the cases whether they are before International Court of Justice, International Tribunal for Laws of the Seas, International Criminal Court, Permanent Court of Arbitration or Regional Courts, the enforcements of the decisions, judgments of the awards is done generally in two forms namely,

- Self help
    i) Economic or Diplomatic measures, i.e., use of economic of diplomatic sanctions-
        a. Stretching back the trade and commerce related deals,
        b. Disturbances in diplomatic relations
        c. Taking out subsidies

d. Help from other states in above doings
e. Confiscation of property or assets of the recalcitrant state situated in the successful state part's territory, etc.

ii) Use of armed force
a. Intervention - unilateral
b. Collective defence, etc.

- With the help of international organizations like General Assembly, Security Council. Other UNO's organs and specialized agencies and the regional organizations.

This is elaborately discussed under the III Chapter in ICJ's enforcement part.

In spite of all the lacunae/ loopholes in the international law instrument on international judicial institutions like- limited binding force, optional compulsory jurisdiction, enforcement and execution in hands of other independent organs, lack of power to take sue moto cognizance, recourse to these institution at the will and wish of the parties etc, the international judicial institutions are playing vital role in strengthening the international legal system and also in the development of international laws.

APPENDICE

CHARTER OF UNITED NATIONS, 1945

PREAMBLE TO THE CHARTER OF THE UNITED NATIONS

WE THE PEOPLES OF THE UNITED NATIONS, DETERMINED

To save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and

To reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and

To establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and

To promote social progress and better standards of life in larger freedom,

AND FOR THESE ENDS

To practice tolerance and live together in peace with one another as good neighbours, and

To unite our strength to maintain international peace and security, and

To ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and

To employ international machinery for the promotion of the economic and social advancement of all peoples,

HAVE RESOLVED TO COMBINE OUR EFFORTS TO ACCOMPLISH THESE AIMS

Accordingly, our respective Governments, through representatives assembled in the city of San Francisco, who have exhibited their full powers found to be in good and due form, have agreed to the present Charter of the United Nations and do hereby establish an international organization to be known as the United Nations.

CHAPTER I

PURPOSES AND PRINCIPLES

Article 1

The Purposes of the United Nations are: 1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;

2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;

3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and

4. To be a centre for harmonizing the actions of nations in the attainment of these common ends.

Article 2

The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.

1. The Organization is based on the principle of the sovereign equality of all its Members.

2. All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter.

3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

5. All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.

6. The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.

7. Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

CHAPTER II

MEMBERSHIP

Article 3

The original Members of the United Nations shall be the states which, having participated in the United Nations Conference on International Organization at San Francisco, or having previously signed the Declaration by United Nations of 1 January 1942, sign the present Charter and ratify it in accordance with Article 110.

Article 4

1. Membership in the United Nations is open to a other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.

2. The admission of any such state to membership in the Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council.

Article 5

A Member of the United Nations against which preventive or enforcement action has been taken by the Security Council may be suspended from the exercise of the rights and privileges of membership by the General Assembly upon the recommendation of the Security Council. The exercise of these rights and privileges may be restored by the Security Council.

Article 6

A Member of the United Nations which has persistently violated the Principles contained in the present Charter may be expelled from the Organization by the General Assembly upon the recommendation of the Security Council.

CHAPTER III

ORGANS

Article 7

1. There are established as the principal organs of the United Nations: a General Assembly, a Security Council, an Economic and Social Council, a Trusteeship Council, an International Court of Justice, and a Secretariat.

2. Such subsidiary organs as may be found necessary may be established in accordance with the present Charter.

Article 8

The United Nations shall place no restrictions on the eligibility of men and women to participate in any capacity and under conditions of equality in its principal and subsidiary organs.

CHAPTER IV

THE GENERAL ASSEMBLY

Composition

Article 9

1. The General Assembly shall consist of all the Members of the United Nations. 2. Each Member shall have not more than five representatives in the General Assembly.

Functions and Powers

Article 10

The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters.

Article 11

1. The General Assembly may consider the general principles of co-operation in the maintenance of international peace and security, including the principles governing disarmament and the regulation of armaments, and may make recommendations with regard to such principles to the Members or to the Security Council or to both.

2. The General Assembly may discuss any questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations, or by the Security Council, or by a state which is not a Member of the United Nations in accordance with Article 35, paragraph 2, and, except as provided in Article 12, may make recommendations with regard to any such questions to the state or states concerned or to the Security Council or to both. Any such question on which action is necessary shall be referred to the Security Council by the General Assembly either before or after discussion.

3. The General Assembly may call the attention of the Security Council to situations which are likely to endanger international peace and security.

4. The powers of the General Assembly set forth in this Article shall not limit the general scope of Article 10.

Article 12

1. While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests.

2. The Secretary-General, with the consent of the Security Council, shall notify the General Assembly at each session of any matters relative to the maintenance of international peace and

security which are being dealt with by the Security Council and similarly notify the General Assembly, or the Members of the United Nations if the General Assembly is not in session, immediately the Security Council ceases to deal with such matters.

Article 13

1. The General Assembly shall initiate studies and make recommendations for the purpose of:

a. promoting international co-operation in the political field and encouraging the progressive development of international law and its codification;

b. promoting international co-operation in the economic, social, cultural, educational, and health fields, an assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

2. The further responsibilities, functions and powers of the General with respect to matters mentioned in paragraph) above are set forth in Chapters IX and X.

Article 14

Subject to the provisions of Article 12, the General Assembly may recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations, including situations resulting from a violation of the provisions of the present Charter setting forth the Purposes and Principles of the United Nations.

Article 15

1. The General Assembly shall receive and consider annual and special reports from the Security Council; these reports shall include an account of the measures that the Security Council has decided upon or taken to maintain international peace and security.

2. The General Assembly shall receive and consider reports from the other organs of the United Nations.

Article 16

The General Assembly shall perform such functions with respect to the international trusteeship system as are assigned to it under Chapters XII and XIII, including the approval of the trusteeship agreements for areas not designated as strategic.

Article 17

1. The General Assembly shall consider and approve the budget of the Organization.

2. The expenses of the Organization shall be borne by the Members as apportioned by the General Assembly.

3. The Assembly shall consider and approve any financial and budgetary arrangements with specialize agencies referred to in Article 57 and shall examine the administrative budgets of such specialized agencies with a view to making recommendations to the agencies concerned.

Voting

Article 18

1. Each member of the General Assembly shall have one vote.

2. Decisions of the General Assembly on important questions shall be made by a two- thirds majority of the members present and voting. These questions shall include: recommendations with respect to the maintenance of international peace and security, the election of the non-permanent members of the Security Council, the election of the members of the Economic and Social Council, the election of members of the Trusteeship Council in accordance with paragraph 1 of Article 86, the admission of new Members to the United Nations, the suspension of the rights and privileges of membership, the expulsion of Members, questions relating to the operation of the trusteeship system, and budgetary questions.

3. Decisions on other questions, including the determination of additional categories of questions to be decided by a two-thirds majority, shall be made by a majority of the members present and voting.

Article 19

A Member of the United Nations which is in arrears in the payment of its financial contributions to the Organization shall have no vote in the General Assembly if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years. The General Assembly may, nevertheless, permit such a Member to vote if it is satisfied that the failure to pay is due to conditions beyond the control of the Member.

Procedure

Article 20

The General Assembly shall meet in regular annual sessions and in such special sessions as occasion may require. Special sessions shall be convoked by the Secretary-General at the request of the Security Council or of a majority of the Members of the United Nations.

Article 21

The General Assembly shall adopt its own rules of procedure. It shall elect its President for each session.

Article 22

The General Assembly may establish such subsidiary organs as it deems necessary for the performance of its functions.

CHAPTER V

THE SECURITY COUNCIL

Composition

Article 23

1. The Security Council shall consist of fifteen Members of the United Nations. The Republic of China, France, the Union of Soviet Socialist , the United Kingdom of Great Britain and Northern Ireland, and the United States of America shall be permanent members of the Security Council. The General Assembly shall elect ten other Members of the United Nations to be non-permanent members of the Security Council, due regard being specially paid, in the first in- stance to the contribution of Members of the United Nations to the maintenance of international peace and

security and to the other purposes of the Organization, and also to equitable geographical distribution.

2. The non-permanent members of the Security Council shall be elected for a term of two years. In the first election of the non- permanent members after the increase of the membership of the Security Council from eleven to fifteen, two of the four additional members shall be chosen for a term of one year. A retiring member shall not be eligible for immediate re-election.

3. Each member of the Security Council shall have one representative.

Functions and Powers

Article 24

1. In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.

2. In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII.

3. The Security Council shall submit annual and, when necessary, special reports to the General Assembly for its consideration.

Article 25

The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.

Article 26

In order to promote the establishment and maintenance of international peace and security with the least diversion for armaments of the world's human and economic resources, the Security Council shall be responsible for formulating, with the assistance of the Military Staff Committee referred to in Article 47, plans to be submitted to the Members of the United-Nations for the establishment of a system for the regulation of armaments.

Voting

Article 27

1. Each member of the Security Council shall have one vote.

2. Decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members.

3. Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.

Procedure

Article 28

1. The Security Council shall be so organized as to be able to function continuously. Each member of the Security Council shall for this purpose be represented at times at the seat of the Organization.

2. The Security Council shall hold meetings at which each of its members may, if it so desires, be represented by a member of the government or by some other specially designated representative.

3. The Security Council may hold meetings at such places other than the seat of the Organization as in its judgment will best facilitate its work.

Article 29

The Security Council may establish such subsidiary organs as it deems necessary for the performance of its functions.

Article 30

The Security Council shall adopt its own rules of procedure, including the method of selecting its President.

Article 31

Any Member of the United Nations which is not a member of the Security Council may participate, without vote, in the discussion of any question brought before the Security Council whenever the latter considers that the interests of that Member are specially affected.

Article 32

Any Member of the United Nations which is not a member of the Security Council or any state which is not a Member of the United Nations, if it is a party to a dispute under consideration by the Security Council, shall be invited to participate, without vote, in the discussion relating to the dispute. The Security Council shall any down such conditions as it deems just for the participation of a state which is not a Member of the United Nations.

CHAPTER VI

PACIFIC SETTLEMENT OF DISPUTES

Article 33

1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

2. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.

Article 34

The Security Council may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security.

Article 35

1. Any Member of the United Nations may bring any dispute, or any situation of the nature referred to in Article 34, to the attention of the Security Council or of the General Assembly.

2. A state which is not a Member of the United Nations may bring to the attention of the Security Council or of the General Assembly any dispute to which it is a party if it accepts in advance, for the purposes of the dispute, the obligations of pacific settlement provided in the present Charter.

3. The proceedings of the General Assembly in respect of matters brought to its attention under this Article will be subject to the provisions of Articles 11 and 12.

Article 36

1. The Security Council may, at any stage of a dispute of the nature referred to in Article 33 or of a situation of like nature, recommend appropriate procedures or methods of adjustment.

2. The Security Council should take into consideration any procedures for the settlement of the dispute which have already been adopted by the parties.

3. In making recommendations under this Article the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court.

Article 37

1. Should the parties to a dispute of the nature referred to in Article 33 fail to settle it by the means indicated in that Article, they shall refer it to the Security Council.

2. If the Security Council deems that the continuance of the dispute is in fact likely to endanger the maintenance of international peace and security, it shall decide whether to take action under Article 36 or to recommend such terms of settlement as it may consider appropriate.

Article 38

Without prejudice to the provisions of Articles 33 to 37, the Security Council may, if all the parties to any dispute so request, make recommendations to the parties with a view to a pacific settlement of the dispute.

CHAPTER VII

ACTION WITH RESPECT TO THREATS TO THE PEACE, BREACHES OF THE PEACE, AND ACTS OF AGGRESSION

Article 39

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

Article 40

In order to prevent an aggravation of the situation, the Security Council may, before making the recommendations or deciding upon the measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable. Such provisional measures shall be without prejudice to the rights, claims, or position of the parties concerned. The Security Council shall duly take account of failure to comply with such provisional measures.

Article 41

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

Article 42

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

Article 43

1. All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.

2. Such agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided.

3. The agreement or agreements shall be negotiated as soon as possible on the initiative of the Security Council. They shall be concluded between the Security Council and Members or between the Security Council and groups of Members and shall be subject to ratification by the signatory states in accordance with their respective constitutional processes.

Article 44

When Security Council has decided to use force it shall, before calling upon a Member not represented on it to provide armed forces in fulfillment of the obligations assumed under Article 43, invite that Member, if the Member so desires, to participate in the decisions of the Security Council concerning the employment of contingents of that Member's armed forces.

Article 45

In order to enable the Nations to take urgent military measures, Members shall hold immediately available national air-force contingents for combined international enforcement action. The strength and degree of readiness of these contingents and plans for their combined action shall be determined, within the limits laid down in the special agreement or agreements referred to in Article 43, by the Security Council with the assistance of the Military Committee.

Article 46

Plans for the application of armed force shall be made by the Security Council with the assistance of the Military Staff Committee.

Article 47

1. There shall be established a Military Staff Committee to advise and assist the Security Council on questions relating to the Security Council's military requirements for the maintenance of international peace and security, the employment and command of forces placed at its disposal, the regulation of armaments, and possible disarmament.

2. The Military Staff Committee consists of the Chiefs of Staff of the permanent members of the Security Council or their representatives. Any Member of the United Nations not permanently represented on the Committee shall be invited by the Committee to be associated with it when the efficient discharge of the Committee's responsibilities re- quires the participation of that Member its work.

3. The Military Staff Committee be responsible under the Security Council for the strategic direction of any armed forces paced at the disposal of the Security Council. Questions relating to the command of such forces shall be worked out subsequently.

4. The Military Staff Committee, with the authorization of the Security Council and after consultation with appropriate regional agencies, may establish sub-commit- tees.

Article 48

1. The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine.

2. Such decisions shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members.

Article 49

The Members of the United Nations shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council.

Article 50

If preventive or enforcement measures against any state are taken by the Security Council, any other state, whether a Member of the United Nations or not, which finds itself confronted with

special economic problems arising from the carrying out of those measures shall have the right to consult the Security Council with regard to a solution of those problems.

Article 51

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

CHAPTER VIII

REGIONAL ARRANGEMENTS

Article 52

1. Nothing in the present Charter the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.

2. The Members of the United Nations entering into such arrangements or constituting such agencies shall make every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council.

3. The Security Council shall encourage the development of pacific settlement of local disputes through such regional arrangements or by such regional agencies either on the initiative of the states concerned or by reference from the Security Council.

4. This Article in no way the application of Articles 34 and 35.

Article 53

1. The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council, with the exception of measures against any enemy state, as defined in paragraph 2 of this Article, provided for pursuant to Article 107 or in regional arrangements directed against renewal of aggressive policy on the part of any such state, until such time as the Organization may, on request of the Governments concerned, be charged with the responsibility for preventing further aggression by such a state.

2. The term enemy state as used in para- graph 1 of this Article applies to any state which during the Second World War has been an enemy of any signatory of the present Charter.

Article 54

The Security Council shall at all times be kept fully informed of activities undertaken or in contemplation under regional arrangements or by regional agencies for the maintenance of international peace and security.

CHAPTER IX

INTERNATIONAL ECONOMIC AND SOCIAL CO-OPERATION

Article 55

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

a. higher standards of living, full employment, and conditions of economic and social progress and development;

b. solutions of international economic, social, health, and related problems; and international cultural and educational co- operation; and

c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Article 56

All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.

Article 57

1. The various specialized agencies, established by intergovernmental agreement and having wide international responsibilities, as defined in their basic instruments, in economic, social, cultural, educational, health, and related fields, shall be brought into relationship with the United Nations in accordance with the provisions of Article 63.

2. Such agencies thus brought into relationship with the United Nations are hereinafter referred to as specialized agencies.

Article 58

The Organization shall make recommendations for the co-ordination of the policies and activities of the specialized agencies.

Article 59

The Organization shall, where appropriate, initiate negotiations among the states concerned for the creation of any new specialized agencies required for the accomplishment of the purposes set forth in Article 55.

Article 60

Responsibility for the discharge of the functions of the Organization set forth in this Chapter shall be vested in the General Assembly and, under the authority of the General Assembly, in the Economic and Social Council, which shall have for this purpose the powers set forth in Chapter X.

CHAPTER X

THE ECONOMIC AND SOCIAL COUNCIL

Composition

Article 61

1. The Economic and Social Council shall consist of fifty-four Members of the United Nations elected by the General Assembly.

2. Subject to the provisions of paragraph 3, eighteen members of the Economic and Social Council shall be elected each year for a term of three years. A retiring member shall be eligible for immediate re-election.

3. At the first election after the increase in the membership of the Economic and Social Council from twenty-seven to fifty-four members, in addition to the members elected in place of the nine members whose term of office expires at the end of that year, twenty-seven additional members shall be elected. Of these twenty-seven additional members, the term of office of nine members so elected shall expire at the end of one year, and of nine other members at the end of two years, in accordance with arrangements made by the General Assembly.

4. Each member of the Economic and Social Council shall have one representative.

Functions and Powers

Article 62

1. The Economic and Social Council may make or initiate studies and reports with respect to international economic, social, cultural, educational, health, and related matters and may make recommendations with respect to any such matters to the General Assembly, to the Members of the United Nations, and to the specialized agencies concerned.

2. It may make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all.

3. It may prepare draft conventions for submission to the General Assembly, with respect to matters falling within its competence.

4. It may call, in accordance with the rules prescribed by the United Nations, international conferences on matters falling within its competence.

Article 63

1. The Economic and Social Council may enter into agreements with any of the agencies referred to in Article 57, defining the terms on which the agency concerned shall be brought into relationship with the United Nations. Such agreements shall be subject to approval by the General Assembly.

2. It may co-ordinate the activities of the specialized agencies through consultation with and recommendations to such agencies and through recommendations to the General Assembly and to the Members of the United Nations.

Article 64

1. The Economic and Social Council may take appropriate steps to obtain regular reports from the specialized agencies. may make arrangements with the Members of the United Nations and with the specialized agencies to obtain reports on the steps taken to give effect to its own recommendations and to recommendations on matters falling within its competence made by the General Assembly.

2. It may communicate its observations on these reports to the General Assembly.

Article 65

The Economic and Social Council may furnish information to the Security Council and shall assist the Security Council upon its request.

Article 66

1. The Economic and Social Council shall perform such functions as fall within its competence in connection with the carrying out of the recommendations of the General Assembly.

2. It may, with the approval of the General Assembly, perform services at the request of Members of the United Nations and at the request of specialized agencies.

3. It shall perform such other functions as are specified elsewhere in the present Charter or as may be assigned to it by the General Assembly.

Voting

Article 67

1. Each member of the Economic and Social Council shall have one vote.

2. Decisions of the Economic and Social Council shall be made by a majority of the members present and voting.

Procedure

Article 68

The Economic and Social Council shall set up commissions in economic and social fields and for the promotion of human rights, and such other commissions as may for the performance of its functions.

Article 69

The Economic and Social Council shall invite any Member of the United Nations to participate, without vote, in its deliberations on any matter of particular concern to that Member.

Article 70

The Economic and Social Council may make arrangements for representatives of the specialized agencies to participate, without vote, in its deliberations and in those of the commissions established by it, and for its representatives to participate in the deliberations of the specialized agencies.

Article 71

The Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence. Such arrangements may be made with international organizations and, where appropriate, with national organizations after consultation with the Member of the United Nations concerned.

Article 72

1. The Economic and Social Council shall adopt its own rules of procedure, including the method of selecting its President.

2. The Economic and Social Council shall meet as required in accordance with its rules, which shall include provision for the convening of meetings on the request of a majority of its members.

CHAPTER XIV

THE INTERNATIONAL COURT OF JUSTICE

Article 92

The International Court of Justice shall be the principal judicial organ of the United Nations. It shall function in accordance with the annexed Statute, which is based upon the Statute of the Permanent Court of International Justice and forms an integral part of the present Charter.

Article 93

1. All Members of the United Nations are facto parties to the Statute of the International Court of Justice.

2. A state which is not a Member of the United Nations may become a party to the Statute of the International Court of Justice on to be determined in each case by the General Assembly upon the recommendation of the Security Council.

Article 94

1. Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.

2. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

Article 95

Nothing in the present Charter shall prevent Members of the United Nations from entrusting the solution of their differences to other tribunals by virtue of agreements already in existence or which may be concluded in the future.

Article 96

1. The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.

2. Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities.

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