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ARTICLE 36 AND ICJ JURISDICTION: MAPPING THE TERRAIN OF INTERNATIONAL DISPUTE RESOLUTION

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Abstract

The International Court of Justice is the primary judicial authority of the United Nations (U.N.). The organization is trusted with a wide scope under Chapter XIV regarding this Charter in the U.N. or under the laws. However, Fundamental difficulty stems from Article 36(1) of the Act, which requires the court to hear only cases filed before it with the assent of both parties. This Court has no authority to require any citizen of the states to appear before it and it cannot even determine this case '*ex aequo et bono*' until these parties have agreed on this in their agreement.

This paper addresses incidents in which the court's authority and powers, as embodied in the declaration and laws, were curtailed since there is an absence of jurisdiction, making the judicial system appear insensitive. The paper analyzes the UN Court of Justice's role, or This study examines the UN Court of Justice's role or collaborations. Together with the U.N. bodies, particularly the U.N. Security Council or Assembly of Nations.

Lastly, the paper deals with the views of various international Jurists on the manner in which the UN Court of Justice might be more empowered to fulfill this obligation it is entrusted with.

Keywords: Jurisdiction, International Court of Justice, United Nations, U.N. Security Council, Parties Autonomy.

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Introduction: -

The UN has the International Court of Justice² as its primary judicial organization replacing the PCIJ (Permanent Court of International Justice) which has been in existence since the Covenant of League of Nations.³ In basic terms, it is an extension of the Permanent Court, with essentially the same regulations and powers, as well as an ongoing sequence of cases that do not distinguish among those decided by the ICJ and the PCIJ.⁴

This International Court of Justice, established according to Chapter XIV of the UN Charter⁵ is located at The Peace Palace in The Hague, Netherlands. Its elementary goal is to find a solution to legal disagreements amongst countries using rules of international law, while also delivering advisory opinions on topics raised by different organs of the UN and the specialized agencies under it.

The court's panel comprises 15 judges selected for 9-year tenures by the UN General Assembly as well as the Security Council.⁶ The selection is made from a list of qualified candidates provided by the International Court of Arbitration's national groups or national specially appointed in circumstances when UN members do not have representation on the PCA.⁷ The process of selecting ICJ judges has faced considerable criticism for its political nature, though finding a completely apolitical solution seems challenging given the current circumstances.⁸ The primary languages used in the judicial processes are French and English.⁹

The ICJ's jurisdiction is explained in Chapter II of the statute, with Articles 33-38 covering the different aspects associated with the competence of the court and its jurisdictions. According to the statutes, only nation-states may bring disputes before the court, which would be decided in line with recognized principles of public international laws. All state parties are granted equal stature at the court, extending even to nations that are not UN members but still have the right to approach this court.¹⁰

² <http://www.icj-cij.org/court/index.php?p1=1>, last visited on January 26th, 2024.

³ <http://www.icj-cij.org/pcij/>, last visited on January 26th, 2024.

⁴ Shahabudden, M. *Precedent in the World Court*, Cambridge, 1996, pp. 22

⁵ Chapter XIV, *Charter of United Nations*. 1945.

⁶ Art.3, *The Statute of International Court of Justice*. 1945.

⁷ Art. 4 & 5. *The Statute of International Court of Justice*. 1945.

⁸ Rosenne, 'The Composition of the Court' in Gross, *Future of the International Court of Justice*. Vol. 1. pp. 377.

⁹ Art. 39, *The Statute of International Court of Justice*. 1945.

¹⁰ Art. 34, *Statute of International Court of Justice*. 1945.

Competence of the International Court of Justice:-

The ICJ, as the principle judicial entity which resolves disputes between nations based on prevailing international law, lacks the capacity to enact new laws or participate in formal lawmaking, therefore it merely states existing laws and does not legislate on the topic at hand.¹¹ Even while applying the law, the court must state the legislation and identify the fundamental structure or tradition on which it is based.¹²

The ICJ is often recognized as the protector of humanity and the guardian of the legality of the international community, both within the ambit of the UN and beyond it.¹³

The issue of the court's judicial function was addressed in *Serbia and Montenegro v. the UK*,¹⁴ where the three factors that guided the court were extensively considered. The 1st criterion is developing consistency with previously decided cases, i.e. this concept of *stare decisis*; there is 2nd certitude, in which the court is obligated to select the most protected grounds in existing laws; and lastly, as the significant and most crucial aspect of the judicial system of the UN, it must consider the implications and consequences of the decision on the other cases which are presently approaching the court or are to be brought before the court in the future.¹⁵

The court has clarified that the matter presented before it can also be brought before other governing bodies within the United Nations. However, the judiciary's Role is primarily administration of law and adjudicatory, distinct from the responsibilities of other organs. As a result, both the different organs and the court have separate duties to fulfill, allowing them to complement each other's functions simultaneously.¹⁶ In such cases, this court is authorized to issue conditional protective measures.¹⁷

Nature of Disputes: -

This issue that should be presented before the court must constitute a legal dispute, as stipulated in Article 36(2) of this Statute.¹⁸ The interpretation of the term "legal dispute" was addressed in

¹¹ *Fisheries Jurisdiction case*. ICJ Reports. 1974. pp. 3, 19; 55 ILR, pp. 238, 254.

¹² *Legality of the Threat or Use of Nuclear Weapons*. ICJ Reports. 1996, pp. 226-237.

¹³ *The Lockerbie case*. ICJ Reports. 1992. pp. 3, 26; 94 ILR, pp. 478, 509.

¹⁴ *ICJ Reports*. 2004. p. 1307.

¹⁵ *Ibid*.

¹⁶ *ICJ Reports*. 1984. p. 435.76 ILR p. 146.

¹⁷ *Cameroon v. Nigeria (Provisional Measures)*. ICJ Reports. 1996, pp. 13-22.

¹⁸ *Nuclear Tests case*. ICJ Reports. 1974, pp. 253, 270-1; 57 ILR, pp. 398, 415-16.

this *Mavrommatis Palestine Concessions (Jurisdiction)* case.¹⁹ In this case, the PCIJ concluded that any disagreement involving an issue of law or a divergence in legal interpretations or preferences amongst participants, falls within the scope of legal disputes, provided that such determination does not create international fiction or provoke new conflicts. Additionally, the court determined that questions regarding the existence of an international conflict are objective in nature and will vary considering the particulars of every instance.²⁰

A case is termed a legal conflict when the party responding to an applicant before the Court simply denies the claims stated, even if the Court's jurisdiction is questioned.²¹ It is essential for each party to offer their viewpoints, and particularly for the complainant to explain to the Justice the issue from which it wishes to seize the Court²² and the court has the exclusivity on deciding the subject matter or the issue of controversy before it.²³

Contentious Jurisdiction of the International Court of Justice: -

The ICJ's authority can be broadly classified into 2 distinct groups: first, its ability to resolve disputes amongst jurisdictions, and second, its rendering of advisory opinions to other agencies of the UN when asked or requested.

The Court has demonstrated that the determination of its authority falls within its own purview, and it is the sole authority in deciding the jurisdictional aspects. While a party must substantiate any alleged fact, the question of jurisdiction is a legal issue to be resolved by the court based on the pertinent facts.²⁴ It's crucial to note that the Court, when addressing jurisdictional issues, doesn't place as much emphasis on formalities as it will typically under domestic laws.²⁵

The court's intention when determining jurisdiction is exclusively to assess if the proceeding is on its own merits is entitled to continue "*and not to engage in a clarification of a controverted issue of a general nature,*" although a case is not going to be reduced solely on the basis of alleged motives of the parties or because the judgment may have consequences in another case.²⁶

¹⁹ *PCIJ. Series A. No. 2, 1924, p. 11*

²⁰ *Interpretation of Peace Treaties case. ICJ Reports. 1950, pp. 65, 74; 17 ILR, pp. 331, 336.*

²¹ *El Salvador/Honduras. ICJ Reports. 1992, pp. 351, 555; 97 ILR, p. 112.*

²² *Article 40(1). Statute of International Court of Justice. 1945.*

²³ *Spain v. Canada. ICJ Reports. 1998, pp. 432, 449; 123 ILR, pp. 189, 209–10.*

²⁴ *Armed Actions (Nicaragua v. Honduras) case. ICJ Reports. 1988, p. 76; 84 ILR, p. 231.*

²⁵ *Mavrommatis Palestine Concessions case. PCIJ. Series A, No. 2, p. 34; 2 AD, p. 27.*

²⁶ *Serbia and Montenegro v. UK. ICJ Reports. 2004, pp. 1307, 1323.*

It is crucial to note that after the court has delivered its judgment on the issue of jurisdiction, the judgment will assume the status of *res judicata*, making it definitive and binding on both parties,²⁷ but it can only be altered in light of Article 61 of the statute.

The parties to the dispute and their agreement establish the court's jurisdictional authority, but at the same time, the application must be admitted by the court.²⁸ Specifically, the claims must be relevant to the broad basic concepts of international laws.

Jurisdiction of Court under Article 36(1) and 36(2):-

The ICJs have authority under Article 36(1) of its statute to hear cases brought to it by the nation-state parties,²⁹ as well as on issues specifically stated in the UN Charter, or the agreements, conventions, and treaties applicable as of date.³⁰ In the case of *Minquiers and Ecrehos*³¹ the issue of jurisdiction of the court was addressed. It was held that the parties may refer a particular dispute to the court for its jurisdiction via a special agreement that defines the conditions of the contention and the laws and framework under which the court is anticipated to operate.

The Court's authority is established through the party's consent to the dispute,³² which does not necessarily require a specific form, or in convinced situations, the Court may deduce it from the actions of the parties.³³ However, for jurisdictional purposes, consent must be unequivocally evident or not merely a formal construct.³⁴ The Court has stressed that this approval must be both independent or beyond dispute.³⁵

The court is not able to rule on the legal rights of a third state that is not a party before the court in the proceedings and can only exercise jurisdiction with express and implied consent. It cannot accept actions between states that actually involve a 3rd state without its permission; thus, if legal interests for this 3rd party 'would constitute the very subject matter of the decision,' the Court could not consider proceeding in the absence of those states,³⁶ limiting this capacity for the court to utilize authority over the matter.

²⁷ *Genocide Convention (Bosnia v. Serbia) case*. ICJ Reports. 2007, paras. 117.

²⁸ *Serbia and Montenegro v. UK*. ICJ Reports. 2004, pp. 1307, 1322.

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ *ICJ Reports*. 1953. p.47; 20 ILR, p. 94.

³² *Nicaragua case*. ICJ Reports, 1986, pp. 3, 32; 76 ILR, pp. 349, 366.

³³ *Djibouti v. France*. ICL Reports. 2008, para. 48.

³⁴ *The Monetary Gold case*. ICJ Reports. 1954, pp. 19, 31; 21 ILR, pp. 399, 406.

³⁵ *Corfu Channel (Preliminary Objections)*. ICJ Reports, 1948, p. 27.

³⁶ *ICJ Reports*. 1954. pp. 19, 54; 21 ILR, pp. 399, 406.

In this East Timor case,³⁷ this Court determined that it lacked the authority to assess the legality of actions by a non-party state in the case, regardless of the nature of the obligations involved, including *erga omnes* obligations including the important issue of right to self-determination.

Furthermore, this Court can take jurisdiction around disputes arising from international treaties that include a '*compromissory clause*' allowing for this.³⁸ Consequently, many international treaties, whether bilateral or multilateral, include provisions granting the ICJ jurisdiction over issues arising from the interpretation and implementation of such treaties and agreements.

Objections to jurisdiction, based on this argument Article 31 was not designed to function as an independent power but rather served as a constraint for the parties to submit unilateral statements accepting its mandatory jurisdiction. Thus, Article 31 would only be applicable during this completion of the conciliation process outlined in Article 32, which was dismissed through interpretation.³⁹

Article 37 of the statute stipulates that any matter involving the PCIJ or any other international judicial body developed by the League of Nations will fall under the jurisdiction of the International Court of Justice if the disputing parties are parties to the statute. This provision acts as a link between the PCIJs and the ICJs, ensuring continuity of jurisdiction between the two institutions.⁴⁰

Article 36(2) of this Statute can be referred to as this court's optional jurisdiction clause. The clause's main aim was to increase the extent of this court's jurisdiction by progressively strengthening its acceptance among member nations. This court analyzed the context of these declarations in its *Cameroon versus Nigeria (Preliminary Objections)* judgment and noted that,

“Any state party to the Statute, in adhering to the jurisdiction of the Court in accordance with article 36, clause 2, accepts jurisdiction in its relations with states previously having adhered to that clause. At the same time, it makes a standing offer to the other states parties to the Statute which have not yet deposited a declaration of acceptance. The day one of those states accepts that offer by depositing in its turn its declaration of acceptance, the consensual bond is established and no further

³⁷ *ICJ Reports*. 1995. pp. 90, 101.

³⁸ *Ibid.*

³⁹ *Case Concerning Border and Trans-Border Armed Actions (Honduras v. Nicaragua)*. 8 *ICJ Reports*. 1988. pp. 78–90.

⁴⁰ *Barcelona Traction case (Preliminary Objections)*. *ICJ Reports*. 1964. p. 6.

condition needs to be met."⁴¹

The court, as per Article 36(2), is contended to exercise its jurisdiction only on the reciprocity of operational functioning, i.e., to the level that both pronouncements of the 2 parties in the disputes cover the same matter or concern.

The member nations have made different reservations under the optional clause, limiting the court's jurisdiction, which may differ from state to state, in order to prohibit this court from becoming involved in the contention, which is considered to be of vital importance and importance to the member state. The reservations relate to the requirement of time i.e. *ratione temporis* or related to issues involving personal conflict among the different member states of the international community i.e. *ratione personae* or restricting the dispute to reach the court where other methods for the conflict resolution was agreed upon i.e. *ratione materiae*.

This article allows member states to withdraw or alter existing declarations, which may take precedence over the initial declaration. The declarations made under the aforementioned article are unilaterally acted upon and the court will interpret the interests of the parties to ascertain the extent to which collective consent has been granted the judicial jurisdiction and during an appropriate or reasonable manner, after taking into account the purpose of the nation states that was associated at the moment when it accepted the compulsory jurisdiction.⁴²

Concluding Remarks: -

Even though ICJs serves as the United Nations' chief judicial branch, its jurisdiction is severely limited by the authorization clause in Article 36(1) and any reservations that may be raised exercising Article 36(2) of the statute.

The ICJs are impeded when either party declines to recognize its jurisdiction, and the court is thus unable to act against the state or decide the dispute. The ICJs have been given such a significant task, but its legitimacy will be determined by the intentions and desires of the member nations, relegating the International Court to the role of a toothless tiger.

The namesake jurisdiction of the ICJ, allows a state to essentially relinquish its oversight and accountability. In such cases, the state cannot be forced to seem or make submissions before the

⁴¹ *ICJ Reports*. 1998. pp. 275, 291.

⁴² *Spain v. Canada*. *ICJ Reports*. 1998. pp. 432, 454. 123 ILR, pp. 189, 214.

court, disregarding the enforcement of any judgment.

The ICJ's scope and ambit to deal with disputes is extremely limited because it can only deal with legal issues emerging between member nations, and the precise meaning of these legal conflicts varies from case to case. If it appears to the court that the issue is unrelated to the legal dispute, the court may refuse to entertain the case, leaving the state with no choice except to bear the losses caused by the other state. Thus, the ambiguity of the word "legal disputes" makes the admissibility of cases before the ICJ uncertain of chance.

The ICJ is only empowered to divulge the law and not to make laws, the ICJ will be bound by the principles of *stare decisis* which compels it to follow the already established precedent. The ICJ cannot, in any case, deviate from its previous precedent, even if the situation has changed dramatically over time and no legislative progress in the subject matter of the dispute has occurred since the precedent.

The ICJ's competence to deal with the existing laws is frequently surpassed by the functional jurisdictions of the other organs, which are primarily political. The concurrent jurisdiction of the ICJ with other United Nations organs frequently causes substantial limitations in the ICJ's ability to exercise jurisdiction and deliver its functions.

The significant political authority wielded by the UN General Assembly or Security Council over the ICJs often raises concerns about the institution's reliability, as it places this court's independence or impartiality in the hands of an influential nation.

The appointment of justices to the ICJ is also a subject of intense debate, as is the extent to which the court can operate independently of political pressure.

Therefore, there is a crucial need to expand this court's jurisdiction and amend its consent clauses, specifically Article 36(1) for this statute, to enhance the public's trust in the court and empower it to assert its authority effectively. This would help address concerns about the court's perceived lack of teeth in enforcing its judgments.