JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE (ICJ) AND ITS OBLIGATIONS

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Abstract

The issue of jurisdiction is fundamental to the exercise of court's judicial powers. When a court lacks the jurisdiction to entertain a matter, any judgment given by the court becomes a nullity. Therefore, where jurisdiction is lacking, a judicial body cannot exercise its judicial power over a case. This article takes issue with that assessment of the performances of the ICJ in achieving International peace and security which is the issue of the moment globally. In the quest to for less destructive ways to resolve disputes / conflicts between States, one of the more lasting and realistic solutions ever proffered is the expansion of the adjudicatory jurisdiction of the International court of Justice and strict compliance by the actors.

Introduction

Jurisdiction can be defined as the authority by which courts and judicial officers take cognizance of and decide cases[1]. Thus, when a court or a judge lacks the authority to adjudicate upon a matter, any attempt to decide upon the case will be declared null and void. From the above explanation, it has been established that jurisdiction is a prerequisite for exercise of judicial power by a court or a judicial officer. At this point, it would be safe to ask a question. From where does the ICJ derive its jurisdiction or judicial powers?

The ICJ derives its judicial powers from the Statute of the ICJ.[2] This Statute is an integral part of the United Nations Charter as specified by Chapter XIV of the United Nations Charter which establishes the ICJ.

Under Article 38 (3) of the ICJ Statute, the ICJ is allowed to decide a case *ex acquoet bon.*[3] In 1984, the ICJ decided a case using equitable criteria in creating a boundary in the *Gulf of Maine Case* for Canada and the US.[4]

Types of Jurisdiction

It is pertinent to note that the ICJ exercises both original jurisdiction and limited appellate jurisdiction[5]. The original jurisdiction is of greater importance to this work. The original jurisdiction of the ICJ can be categorized into two main parts. These are:

i. Contentious jurisdiction
ii. Advisory jurisdiction

Richard K. Gardner opined that the ICJ in exercising its jurisdiction, only the ICJ's decisions in contentious cases are binding and only on the parties in each particular case. He went further to say that both the judgement of the court and the advisory opinions carry equal authority in the international law. Alternatively, an advisory opinion lacks the same binding force as the judgment

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1 *Case of Board of Trustees V. Brooks* 67 p. 2d4, (Owa 1937)

2 Statute of the ICJ

3 Ex acquo ex bono is a Latin maxim that refers to the powers of the arbitrators to dispense with consideration of law and consider solely what they consider to be fair and equitable in the case at hand.

4 *Case concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area* ICJ October 12, 1984.

5 The International Air Services Transit Agreement. December 7, 1944, Article 2, paragraphs 2 & 3, Berans 916, 84.

of the court. In other words, advisory opinion cannot create a res-judicata since parties are absent before the court.

Contentious Jurisdiction

The term contentious jurisdiction refers to jurisdiction of a court to deal with matters in controversy between states. This type of jurisdiction is mainly exercised by the ICJ to resolve disputes arising between member States and such States concerned must first give their consents. The jurisdiction arises where there exist a genuine legal international dispute that involves questions of law or fact. This is provided for under Article 34 (1) of the ICJ Statute which states that "only States may be parties in cases before the court".

For emphasis, the consent of the parties is considered as one of the fundamental basis for the exercise of the Court's jurisdiction in contention cases. Article 36 of the Statute of the ICJ provides that "the jurisdiction of the Court comprises all cases which the parties refer to it and all matters specifically provided for in the UN Charter or in Treaties and Conventions in force".

The consent of the parties may take a variety of forms ranging from unconditional consent to consent based upon reciprocity or consent limited in time. Irrespective of the form consent may take; it must serve as a prerequisite for the exercise of the Court's jurisdiction.

By whatever means, the decision of the ICJ is binding on the parties concerned.[6] By the provisions of the Charter and Statute, the Court has the jurisdiction to entertain contentions matters between member States. The Statute provides that "all members of the United Nations are ipso facto parties to the Statute of the ICJ"[7]. By these provisions, only States to a dispute before the ICJ will be represented by its government and any decision reached by the Court no matter the problem the State may be having will not be an excuse to compliance[8]. It then connotes that all the One hundred and ninety-three (193) United Nations members are automatically parties to the Court's Statute.

The second category are non-UN member States who desire a permanent association with the Court, and under Article 93(2) become parties to the Statute on conditions to be determined in each case by the General Assembly on the recommendations of the Security Council. These conditions imposed on Switzerland in 1947 and Liechtenstein in 1950 involved acceptance of the Statute, of the obligations of UN members Under Article 94 of the Charter, and of an undertaking to contribute an equitable amount to expenses of the Court. Thus, Switzerland became a member in 1948 using the procedure while Nauru also became a member in 1988 by the provision of the Article[9].

The third category includes non-UN members who wish to appear before the court as parties in a particular dispute or class of disputes but without becoming parties to the Statute. This is possible under Article 35(2) of the Statute and the Security Council by a *Resolution of October 15, 1946,* which impose the conditions that such States should undertake to comply with the decision of the Court and accept the obligations of Article 94 of the Charter; the court itself forces the amount due towards the expenses of the particular case.

The salient difference between the second and third categories is that, whilst the second category can participate fully in the scheme for compulsory jurisdiction under Article 36(2) i.e. the

6 Article 36(6) of the Statute
7 Article 93 (1) UN charter
8 La Grand Case (supra)
9 Charter of the United Nations and Statute of ICJ www.icj.cij.org accessed on 22nd February, 2020.

"Optional Clause" – the third category can sign the Optional Clause but cannot rely on it as against States who are parties to the Statute (i.e. in categories 1 or 2) unless they specifically agree.

There are several examples of Contentious cases that ICJ has handled among which are:

a) Complaint by United States in 1980 that Iran was detaining American Diplomats in Tehran in violation of International Law[10]
b) Dispute between Tunisia and Libya over the delimitation of the Continental Shelf between them[11]
c) Complaint by Iran after the shooting down of Iran Air Flight 655 by United States Navy guided missile cruiser[12]
d) Complain by Democratic Republic of Congo that her sovereignty had been violated by Uganda and that DRC had lost billions of dollars worth of resources[13] and was decided in favour of DRC[14]
e) Complaint by the Federal Republic of Yugoslavia (FRY) against member States of the North Atlantic Treaty Organisation regarding their actions in the Kosovo war. Their complaint was denied in 2004 for lack of jurisdiction of FRY not being a party to the ICJ Statute at the time of making the application[15].

Advisory Jurisdiction

The advisory jurisdiction of the ICJ is provided for under Article 68 of the Statute of the ICJ. It concerns questions referred to the Court by the General Assembly, the Security Council or other organs and specified agencies of the United Nations. Those questions can only refer to legal questions arising within the scope of their activities. Advisory opinions given by the ICJ are not binding but have the ability to strengthen peaceful relations between States.

The organs can directly seek the advisory opinion of the Court while the specialised agencies are subjected to derivative right. Such right must be expressly conferred by the General Assembly of the United Nations. The implication of this is that these specialised agencies of the United Nations lack direct access to the Court. The Court sometimes makes inferences to earlier opinions delivered by it. The Court may give an advisory opinion on any legal question at the request of whatever body may be authorised by or in accordance with the Charter of the United Nations to make such request[16]. It should be noted that States are excluded from the Court's advisory jurisdiction.

Mainline and Incidental Jurisdiction

A distinction can be made between incidental jurisdiction and mainline jurisdiction. Incidental jurisdiction relates to a series of miscellaneous and interlocutory matters. For example, the power of the court to decide a dispute as to its own jurisdiction in a given case; its general authority to control the proceedings, its ability to deal with interim measures of protection and the discontinuance of a case.

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10 Reports of Judgments, Advisory Opinions and Orders, ICJ 24th May, 1980

11 Application for Revision and Interpretation of the Judgment of 24th February, 1982 in the case concerning the continental Shelf (Tunisia/Libyan Arab Jamahiriya) ICJ of 10th December, 1985

12 Aerial Incident of 3rd July, 1988 (Islamic Republic of Iran v.USA) www.icj-cij.org Accessed on 22nd February, 2020

13 Armed activities on the territory of the Congo (DRC v. Uganda) www.icj-cij.org Accessed on 22nd February, 2020

14 Court orders Uganda to pay Congo damages. The Guardian of 20th December, 2005.

15 International Court of Justice www.icj-cij.org Accessed on 22nd February, 2020

16 Since 1946, the Court has given 24 Advisory opinions concerning inter alia, the admission to United Nations membership, *Reparation for Injuries Suffered in the Service of the United Nations* and others. See also the general information concerning the ICJ of 25th October 2002 (www.icj-cij.org)

Mainline jurisdiction on the other hand concerns the power of the court to render a binding decision on the substance and merits of a case placed before it.

Jurisdiction Rationale Personae

The Statute of the ICJ establishes that for contentious jurisdiction, only States can be parties before the court[17]. Individuals, Corporations, parts of a Federal State, NGOs, United Nations Organs and Self-determination groups are excluded from direct participation. However, States are entitled to sponsor the claims of their nationals against other states. This is generally done by way of diplomatic protection. Such protection under international law can be exercised by the State of nationality only after the person concerned has exhausted local judicial remedies available in the jurisdiction of the state in which the person has suffered the legal injury.

Exhaustion of local remedies is more than a procedural requirement. Without their exhaustion, no remedies for legal injury can be envisaged at the international level. On the other hand, for a foreign national to exhaust local remedies, such remedies should not only be available, but they should also be effective and not merely notional or illusory. However, these are matters for judgment in a given case.

It is understood that a State cannot sponsor the claims of its national against another State of which he or she or the entity is also national. Further, in the case of persons with dual or multiple nationalities, only the State with which the person enjoys a "genuine link" can exercise diplomatic protection.

Basis of Jurisdiction

Some writers refer to the basis of jurisdiction to depend on whether the jurisdiction is contentions or advisory which has been discussed above as types of jurisdiction but to most writers, the basis of jurisdiction is the consent of the State parties to a dispute which may take variety of forms as follows:[18]

Special Agreement

This arises when the parties conclude a special agreement to submit a legal dispute to the court. The conclusion of a special agreement (***compromis)*** to submit the dispute after it has arisen. For example, a ***compromis*** was concluded between Hungary and Slovakin on 7th April 1993 by which they submitted to the court the dispute concerning the *Gabcikovo-Nagumaros Project.*[19]

Jurisdiction Clause

Another way of conferring jurisdiction on the court is through the inclusion of a jurisdictional clause in a treaty. Generally, through this Compromisory Clause, the State parties agree inadvance to submit to the court any dispute concerning the implementation and interpretation of the treaty. "The jurisdiction of the court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in Treaties and Conventions in force".

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17 Article 34(1) of the Statute of the ICJ

18 Even though the engagement of jurisdiction of the court is essentially based on the concerning wills or consent expressed through declarations submitted by States, such an agreement is not treated in the practice of the Court as a Treaty arrangement. (Rosenne S. 1997 p.812)

19 The dispute concerned the construction and operation of the Gabcikovo-Nagyamaros, Bariage system. See *Gabcikovo-Nigymaros Project (Hungary V. Slovakia),* ICJ Reports, 1997. p.7.

Several treaties contain such Compromisory Clause conferring jurisdiction upon the Court in respect of the parties to these treaties.

Declarations made under Article 36(2) of the Statute

The jurisdiction of the ICJ also exists by virtue of declarations made by States that they recognize as compulsory its jurisdiction in relation to any other State accepting the same obligation in all legal disputes concerning the matters specified in Article 36(2) of the ICJ Statute

This method of conferring jurisdiction on the ICJ is also known as the *Optional Clause.*[20] Article 36(2) of the ICJ Statute provides that State parties to the present Statute may at any time declare that they recognise as compulsory ipso facto and without any special agreement in relation to any of the States accepting the same obligations, the jurisdiction of the Court in all legal disputes concerning:

a. the interpretation of a treaty;
b. any question of international law;
c. the existence of any fact which, it established, would constitute a breach of an international obligation;
d. the nature or extent of the reparation to be made for the breach of an international obligation.

The Doctrine of Forum Prorogation

In accordance with the *Forum Prorogation Doctrine,* the Court infers the consent of the State, expressed in an informal and implied manner after the case has been brought before it. The Court has upheld its jurisdiction even where consent has been given after the initiation of proceedings, in an implied or informal way or by a succession of acts.

In the *Mavromattes Case*[21], the Court regarded as immaterial that the ratification of the *Treaty of Lausanne* (on the basis of which Greece, in part, invoked the Court's jurisdiction) took place after the initiation of the proceedings. Similarly, in the *Rights of Minorities of Upper Silesia*[22], the Court inferred consent from the failure of the Polish Government to raise the question of jurisdiction in its counter-memorial, its pleading on merits and its statements subsequent to the filing of the counter-memorial before the League Council.

Conditional and Unconditional Jurisdiction of the Court

Under Article 36(3) of the ICJ Statute, declarations may be made "unconditionally or on condition of reciprocity on the part of several or certain States, or for a certain time". This provision seems to contemplate "not a limitation of the jurisdiction accepted but a condition as to the operation of the declaration itself".[23]

In other words, it is possible for a State making a declaration under Article 36(6) to specify the time limits and the State irrespective of which it would operate. In that sense, the provision contemplates a principle of reciprocity in the form of a choice of partners.[24]

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20 States enjoy wide liberty in formulating, modifying and terminating their declaration under Article 36(2), *Fisheries Jurisdiction Case (Spain V. Canada)* ICJ Reports 1998, Paras. 44, 52 & 54.

21 (1924) PCIJ Series A. No. 2 p.34

22 (1924) PCIJ Series A/B. No. 15 p.24 - 26

23 See Hudson Mo (1943), pp.66 – 467

24 Thirlway H. (1984) pp. 103 – 107

Reservations of Jurisdiction

Declaration under article 36(2) can be made with reservations as the author State may deem fit to specify.[25] It is understood that the jurisdiction of the court exists only to the extent when there is a common ground between the declarations of each of the parties on the given subject matter. Reciprocity is therefore an important feature of the Optional Clause System.

Types of Reservations

Reservations can exclude disputes for which a solution is not reached through diplomatic means, or for which the parties had agreed on some other methods of settlement or disputes relating to events occurring in time of war or conflict. A common form of reservation excludes disputes that come within the domestic jurisdiction of a State.

This type of reservation is also known as the *"Automatic Reservation".* For example, the United States submitted such an amendment to its declaration in 1946 (referred to as the "Connelly Amendment"). The validity of this reservation was questioned by *Judge Lauterpacht* as, in his view; the automatic reservation was repugnant to Article 36 (6) of the ICJ Statute, which gave the Court the power to determine its own jurisdiction.

Jurisdiction Rationae Tempories

There is no time limit for submission of a dispute to the Court. However, as mentioned previously, several States while submitting their declarations under Article 36(2) prescribe time qualifications for a dispute to come within the scope of the declaration. Such as arising before or after a specified date, some declarations exclude situations or disputes arising prior to the date from which they came into force. However, the expiry or revocation of a declaration after initiation of proceedings will not affect the jurisdiction.[26]

The time factor is also important in determining whether, in a given case, the ICJ has inherited the jurisdiction of the PCIJ.[27]

Applicable Laws

This is set out in Article 38 of the ICJ Statute and constitutes a statement of the primary sources of International law. According to the Statute, the Court is required to apply;

- International Convention, whether general or particular, establishing rules expressly recognised by the contesting State;
- International Custom, as evidence of a general practice accepted as Law;
- The general principles of law recognised by civilised nations;
- Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidising means for the determination of rules of law arising from the decision of the court, the other party can have recourse to the Security Council for the enforcement of the decision. The Security Council may, at its own discretion, make recommendations or decide on other measures which can be taken to give effect to the judgment. The measures can be indicated by the Security Council in this regard only under Chapter VI of the United Nations Charter, meaning that they amount to a recommendation.

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25 *fisheries Jurisdiction Case (Spain V. Canada),* ICJ Reports 1991, para. 44.

26 *Nottebohm case,* ICJ Reports 1933, pp. 111, 122 and 123.

27 Rosenne S. *The Law and The Practice of the International Court,* (MartinusNijihoff, 1965); and *Barcelona Traction Preliminary Objections,* Judgment ICJ Reports, 1964.

Article 94 of the UN Charter provides as follows:

- 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.
- 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 94(2) of the UN Charter provides no exclusive authority for the Security Council to be the ultimate and sole enforcer of the judicial decisions of the ICJ nor is there a straight forward and independent enforcement measures of international obligations especially those derived from international judicial decisions.

It should be noted although the court is not formally bound by its previous decisions under the doctrine of *stare decisis* but its previous judicial decisions can help interpret the law. The court's decision only binds the parties to that particular controversy.[28]

Also, if the parties agree, they may also grant the court the liberty to decide "ex aequo et bono" meaning "in justice and fairness" (that is, based on what is fair under the circumstances.[29]

The next Chapter of this work shows the various players and means to establish a network of enforcement mechanisms available to all States regardless of their position in the International Community. Judicial enforcement could be through the ICJ itself, domestic courts, United Nations and its organs, specialised agencies and regional organisations.

The Obligation of Compliance with and Enforcement of the Judicial Decisions of the ICJ.
The Obligation of compliance with international judicial decisions in general and those of the ICJ in particular, as well as faithful application of the principles of *Pacta Sunt Servanda* and good faith have been affirmed in a number of judicial pronouncements.

For instance in the *Continental Shelf (Tunisia V. Libya) case*[30], *Judge Gross* put forward three questions to both parties during the oral proceedings in order to explain their government's position concerning the binding force of the judgment to be given by the Court with regard to:

- The principles and rules of international law which might be indicated by the Court.
- The circumstances which characterised the area, regarded by the Court as pertinent and;
- Any equitable principles which the Court might take into account.

The agent of Tunisia responded that the judgment of the court on all those concerned was to be binding on the parties in accordance with Article 94(1) of the Charter and other relevant provisions of the Statute and Rules of Court.

The basis for mandatory compliance with decisions of the ICJ was first located in Article 13(4) of the League of National Covenant.[31] Tracing the history of how Australia and Cuba took the original language of Article 13(4) of the League of Nations Covenant[32] and fashioned it into Article 94 of

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28 Article 59 of ICJ Statute
29 Article 38(2) of ICJ Statute
30 *Continental Shelf case, (Tunisia v. Libyan Arab Jamahiriya), Application for Permission to Intervene*, ICJ Rep. (1981), p.73
31 Ibid
32 Ibid

the Current UN Charter mandating that parties, both member States as well non-member States of the UN under Article 93(2) if the latter wish are to comply with orders of the ICJ.

The Principle of *Pacta Sunt Servanda*

One of the basic rules safeguarding the performance of existing international legal obligations is the principle of *Pacta Sunt Savanda*[33], a principle which is an integral part of the principle of good faith (bonafide)[34]. The principle is enshrined in Article 26, headed *Pacta Sunt Sevanda the Vienna Convention on the Law of Treaties of 6th May, 1969.* It provides "Every Treaty in force is binding upon the parties to it and must be performed by them in food faith[35]. These legal principles which seem to have existed from the very beginning of human society[36] are rooted in the natural and logical necessity constraining nations to live up to their promises[37].

However, the first universal affirmation of this proposition in modern history was in Article 2(2) of the United Nations Charter[38]. It reads, "All members, in order to ensure to all of them the rights annd benefits resulting from membership shall fulfill in good faith the obligations assumed by them in accordance with the present Charter".

This obligation is equally applicable to rights and duties[39] and to the creation and performance of international obligations whatever their source may be[40]. One of these fundamental obligations is the obligation to carry out the judgments of the ICJ under Article 94(1) of the UN Charter, which stipulates that "Each member of the United Nations undertakes to comply with the decisions of the International Court of Justice in any case to which it is party".

In any event, there is no absolute principle of *Pacta Sunt Sevanda.* States general invoke certain doctrines against the operation *Pacta Sunt Sevanda* to preclude wrongfulness, namely the doctrines of necessity, force majeure and rebus sic stantibus[41]. To what extent are these doctrines validly applicable to a post adjudicative phase of the ICJ> an affirmative answer or an allegation of the self-evidence of the principle of *Pacta Sunt Sevanda* in the post adjudicative phase without an examination of these doctrines is inadequate.

The Exception to the Principle of *Pacta Sunt Sevanda*

There is no absolute rule of *Pacta Sunt Sevanda.* Therefore, the doctrines of necessity, *force majeure* and *rebus suc stantibus* have generally been invoked by States to preclude wrongfulness arising from the breach of an obligation including the obligation of compliance with and

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33 *Nuclear Test Cases (Australia v. France)* ICJ Reports. (1974) 473 and 357, para 46 and 49, *land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria),* judgment of 11th June 1999, ICJ Rep. (1998) para. 38, O' Conner J.F., *Good Faith in International Law* (Dartmouth, p.108.

34 Fitzmaurice M., 2003, *The Practical Working of the Law of Treaties,* in Evans M, *International Law* (Oxford University Press), pp.173 – 201 at p. 183.

35 Ibid

36 Ibid pg. 108

37 Suganami H. 1979. *Why Ought Treaties to be kept?* 33 YBWA, pp. 243 – 256 at p.243.

38 Rosenne S. 1986. *Developments in the Law of Treaties.* 1945 – 1986 (Cambridge University Press) p.150

39 Lukashuk I. 1988. The Principle of PactaSuntServanda and the Nature of Obligation under International Law, 83 AJIL, pp. 513 – 518 at 514 – 515.

40 *Nuclear Tests (New Zealand v. France)* ICJ Rep. (1974) p. 73 para 49 41Lachs M. 1984. PactaSuntServanda, Ed. Bernhardt p.7 EPIL, (North-Holland Elsevier Science Publishers) pp.364 – 371 at p.369

41 Lachs M. 1984. PactaSuntServanda, Ed. Bernhardt p.7 EPIL, (North-Holland Elsevier Science Publishers) pp.364 – 371 at p.369

enforcement of judicial decision and arbitral awards and subsequently against the application of *Pacta Sunt Sevanda.*[42]

State of Necessity

Under Article 25(1)(a) of the International Law Commission's Articles on the Responsibility of States of International Wrongful Act (2001), a State may not invoke the state of necessity as a ground for precluding the wrongfulness of an act not conforming with an international obligation of that State unless the act "is the only means for the state to safeguard the essential interest against a grave and imminent peril"[43]. In the commentary, the International Law Commission defines the extent of this provision to include "particular interest of the State and its people as well as of the international community as a whole".[44]

In the affirmation of the Court's judgment of 10th October 2002 in*Land and Maritime Boundary case (Cameroon v. Nigeria: Equatorial Guinea Intervening),* (supra) Nigeria in an official statement issued on October 23, 2002, refused to comply with the court's judgment in order to maintain the status quo in Bakassi Peninsula where inhabitants are predominantly Nigerians, but which was decided by the Court to fall under the sovereignty of Cameroon. The statement reads "being a nation ruled by law, we are bound to continue to exercise jurisdiction over these areas in accordance with the constitution" and "on no account will Nigeria abandon her people and their interest".

For Nigeria, it is not a matter of oil or natural resources and or in coastal waters, it is a matter of the welfare and the wellbeing of her people on the land.[45] This statement seems to amount to an argument invoking the state of necessity to refuse compliance with the Court's judgment.

However, it is implausible to argue after consenting to the jurisdiction of the Court and undertaking to comply with the decision under Article 94 of the Charter, that compliance with the Court's judgment is or constitutes "a grave" or even an "imminent peril". It is difficult to apply this notion to the international obligation of compliance with and enforcement of the Court's judicial decisions even if a state of necessity is found to exist since this notion does not terminate the treaty obligation stipulated in Article 94 of the Charter and Articles 19 and 60 of the Statute.

Force Majeure

Under, 23(1) of the ILC's Articles, wrongfulness is precluded "if the act is due to force majeure, that is the occurrence of an irresistible force of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligations". Similarly, under Article 61(1) of the Vienna Convention on the Law of Treaties, a party may do so "if the impossibility results from permanent disappearance or destruction of the object indispensable for the execution of the treaty".

So let us assume that a judgment rendered by the court requires the judgment debtor to "restore any sculptures, stele, fragments or monuments, and stone model and ancient pottery" to the judgment creditor as the Court did in its judgment of 15th June 1962 in the *Temple of Preach Vinear*[46] but that these sculptures and ancient pottery had been destroyed by an act beyond the

42 Lash M. Supra p.369

43 Article 2591)(a) in Grawford J. 2002. *The International Law Commission's Articles in State Responsibility: Introduction, Text and Commentaries*. (Cambridge University Press) p.178

44 Ibid p.183 para. 15.

45 Reuters/Washington Post, Thursday, October 24,2002 at p.A30

46 ICJ Rep. (1962)6

control of the judgment debtor, and thus, due to the destruction of these objects, the judgment of the Court is rendered non-executable.

Assuming also that a judgment debtor claims that it cannot comply with a monetary judgment because of the serious financial difficulties, it is alleged to face, as Greece asserted in *Societe Commerciale De Belgique case*[47], can a judgment debtor under these circumstances invoke the doctrines of force majeure or impossible of performance to avoid compliance with and enforcement of the judgment of the Court? These in fact, present two different scenarios.

To start with the second scenario, it would be difficult to invoke Article 23 or 61 (1) as a ground for non-compliance with a monetary judgment. In the Vienna Confernce on the Law of Treaties, a proposal was made to extend the scope of the Article by including in its case such as the impossibility to make certain payments because of serious financial difficulties. The participating States did not consider such situations to be a ground for terminating or suspending a treaty and preferred to limit themselves to a narrow concept.[48]

While the situation in the first scenario is more problematic, let us assume again that Thailand was unable, for unforeseeable circumstances beyond its control like an earthquake, to restore the sculptures, stele, fragment of monuments, sandstone models and ancient pottery to Cambodia as the judgment in *Temple of Preach Vihear* called for.

It would therefore be impossible to enforce the judgment of the Court in that part. Here, Articles 23(1) and 61(1) would come into operation as the act of non-compliance with the judgment is due to force majeure, likewise, if the judgment creditor prevented the judgment debtor from fulfilling its obligations as required by the Court's decisions, then the former by its own conduct would have prejudiced its rights under the judgement. As the court in the *Chorzow Factory case*[49] stated:

> It is moreover, a principle generally accepted in the jurisprudence of international arbitration, as well as by municipal courts, that one party cannot avail himself of the fact that the other has not fulfilled some obligations or has not had recourse to some means of redress, if the former party has, by some illegal act, prevented the later from fulfilling the obligation in question, or from having recourse to the tribunal which would have been opened to him.

Rebus Sic Stantibus

Under Article 62 of the Vienna Convention of the Law of Treaties, a State may invoke a fundamental change of circumstances such as a ground for terminating or withdrawing from a treaty. The provision of the Article states as follows:

> 1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:
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> a) The existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

47 (1939) PCIJ Ser. AIB 78, 174

48 UNCLT, Official Records, First Session, Vienna, 26th March – 24th May 1968, Doc. A/CONF 39/11 Summary Records of the plenary meetings and of the meetings of the committee of the whole, 62nd meeting of the committee of the whole, pp.361 – 365.

49 *Chorzow Factory Case (Jurisdiction, Judgment No)(1927) PCIJ, Ser A. No. 9. P.31, Gabcikovo-Nagymaros project Case, ICJ Rep.* (1997) paras. 103 & 110.

b) The effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:
   a) If the treaty establishes a boundary; or
   b) If the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.
3. If, under the foregoing paragraphs, a party may invoking a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty.

In the *Fisheries Jurisdiction case,*[50] the United Kingdom instituted proceedings on14th April 1972 against Iceland contesting its extension of the fishery jurisdiction form 12 to 50 miles around its shores.

The United Kingdom founded jurisdiction of the Court on Article 36 of the Statute and an exchange of notes of 11th March 1961 between the two countries under which the United Kingdom recognised Iceland's claim to a 12-mile fisheries limit in return for Iceland's agreement that any limit as to extension Iceland's fisheries jurisdiction beyond that limit was to be referred to the ICJ at the request for either party. However, Iceland on 29th May 1972 notified the court that it was unwilling to confer jurisdiction on the court, and it also referred to "the changed circumstances resulting from the ever increasing exploitation of the fishery resources in the social surrounding Iceland"[51].

Iceland also brought to the attention of the Court a resolution adopted by its parliament on 15th February 1972, which claimed that "owing to change circumstances, the notes concerning fishery limits exchanged in 1961 are no longer applicable and that their provisions do not constitute an obligation for Iceland.[52] Thus, the Government of Iceland based its contention on the doctrine of *Rebus Sic Stantibus.* Notwithstanding, the non-appearance of Iceland in the proceedings, the Court on 2nd February 1973 found by 14 to 1 that it had jurisdiction.[53]

Indeed, it can hardly be envisaged that a fundamental change of circumstances to compromisory clauses in treaties or conventions or even in declarations under Article 36 of the Statute could affect the obligation to submit a dispute to the Court. A State cannot invoke the doctrine of *Rebus Sic Stantibus* against the jurisdiction of the Court and subsequently the judgment to be given without contradicting itself.

In addition to the strict application of the doctrine, paragraph 2(a) and (b) of Article 62 makes also two exceptions. It denies the applicability of the principle when it is invoked to terminate or withdraw from a treaty establishing a boundary and when the fundamental change is the result of a breach by the party invoking it "either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty".

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50 ICJ Rep. (1973)3. A parallel case was brought before the court by the Federal Republic of Germany against Iceland.

51 Ibid pp.17 – 18 para. 35.

52 Ibid para. 37

53 Ibid

Thus, if the judgment of the Court decides or delimit a territorial boundary, the doctrine will not be applicable. Moreover, even if a recalcitrant State's status has been changed fundamentally by being suspended or withdrawn from the United Nations and the Charter, it will remain bound by the Court's judgment and by the application of Article 2(2) and 94 of the Charter.[54]

In Gabcukovo-Nagymaros Project Case, the contentious procedure arose out of a bilateral treaty, signed by Hungary and Slovakia in 1977, *'Concerning the Construction and Operation of the Gabcikovo-Nagymaros System of Locks'* (at Gabcikovo in Slovakia and Nagymaros in Hungary), a 'joint investment' intended to produce hydroelectricity, improve navigation on the Danube River and protect against flooding. Additionally, Hungary and Slovakia undertook to ensure that the quality of water in the Danube was not impaired as a result of the Project and that compliance with the obligations for the protection of nature would be observed. Work on the Project began in 1978. In May 1989, as a result of the criticism that the project received in Hungary (relating to economic and environmental considerations in particular), the Hungarian government suspended the works at Nagumaros, finally abandoning the works in October 1989. Following that, Czechoslovkia took unilateral measures, intending to put Gabcikovo into operation, by creating a diversion of the Danube, in its 'Variant C'.

Hungary claimed that a state of ecological necessity existed in 1989, which precluded the wrongfulness of its decision to suspend and terminate work on the Project in contravention of the 1977 Treaty. The Court noted that Hungary's concern for its natural environment amounted to an 'essential interest' within the meaning of the Statute[55] on the Responsibility of States for Internationally Wrongful Acts. It noted that Hungary had expressed uncertainties about the ecological impact of the project and had insisted on new scientific studies to be carried out. Nevertheless, the Court concluded that Hungary had neither established that these uncertainties amounted to 'perils' to the environment, nor that they were imminent, so that the condition of 'grave and imminent peril' for the establishment of necessity as a ground for precluding wrongfulness had not been satisfied. Having declined the plea of necessity, ICJ held that Hungary not been entitled to suspend and subsequently abandon works on the Project.

The ICJ went on to find that because Czechoslovakia had taken a unilateral measure to put Gabcikovo into operation in its 'Variant C', it had also violated its obligations under the 1977 Treaty. It noted moreover that, while Hungary had violated its obligations under the 1977 Treaty, it had not forfeited its basic right to an equitable and reasonable sharing of the resources of an international watercourse. It quoted an excerpt from the Permanent Court of International Justice's (PCIJ) Judgment in the River Order, which had defined the principle of 'community of interest', 'the essential features of which are the perfect equality of all riparian States in the user of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others'[56], and extended that principle to non-navigational uses of international watercourses, referring also to the Convention on the Law of the Non-Navigational Uses of International Watercourses.

Hungary additionally advanced a number of reasons to support its claim that it had been entitled to terminate the 1977 Treaty by its notification of termination in 1992, one reason being that 'new requirements of international law for the protection of the environment precluded performance of the Treaty'. Under the 1977 Treaty[57], Hungary and Slovakia were required to take such new

54 Rosenne S. *The Law and Practice.* Supra note 7. P.25.
55 Article 33
56 PCIJ 1929, Series A, No. 23, p.27
57 Articles 15, 19 and 20

requirements into account in order to ensure that the quality of water in the Danube was not impaired and that nature was protected. The ICJ recognised this, and noted that 'both Parties agree on the need to take environmental concerns seriously and to take the required precautionary measures' but expressed that they would also have to agree on the implications of their findings about new environmental norms and risks for the Project.

Before pronouncing on the legal consequences of its judgment, the ICJ noted that the Project's impact upon, and implications for, the environment is considerable and that 'in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment'.

The Court went on to pronounce for the first time, on the 'concept' of sustainable development, giving moreover an indication of what that concept entails (Note that Judge Weeramantry, in his separate opinion, argues that sustainable development is a principle of customary international law having an ergaomnes character). The Court expressed that the concept entails reconciling economic development (such as the Project at issue with protection of the environment (i.e. the principle of integration). Moreover, it noted that the concept of sustainable development involves assessing the impact of certain projects on the environment prior to initiating a project (i.e. carrying out an environmental impact assessment) and that, because environmental norms and standards must be taken into consideration and given proper weight also during the operational stage of a project, the duty to assess environmental impacts is a continuous monitoring obligation. Finally, it stated that the parties involved in a project are under an obligation to negotiate and to reach a solution that is to their mutual satisfaction, taking into account relevant sources of international environmental law, including the law of international watercourse. Notably, the Court was aloof in its use of terminology and it was only possible to deduce these procedural conditions from the manner in which the Court applied the 'concept' of sustainable development to the case at hand. The Court, in summing up the legal consequences of its judgment, noted that re-establishing the joining regime would also ensure that the concept of common utilisation of shared resources is satisfied.[58]

The Principle of *Res Judicata*

The second legal basis inducing States to comply with and enforce international judicial decisions is the principles of *Res Judicata.* There is no doubt that the principle of *Res Judicata* is a principle of international law and a fundamental legal principle recognised by all legal systems within the meaning of Article 38(1)(c) of the Statute of the ICJ.

Thus in the course of discussing Article 38 of the Statute of the PCIJ in 1920, *Lord Phillomore* (UK) explained the wording of that Article to include "the general principles which were accepted by all nations in *fovo domestic* such as the principle of *Res Judicata"*.[59] The principle is attached to final judicial decisions, duly rendered by a competent judicial body when the parties, cause of action and subject matter of the dispute are the same. These requirements of *Res Judicata* were easily indicated by the British-American Claims Arbitral Tribunal in the *New change case.*[60] It held that "it is a well-established rule of law that the doctrine of *Res Judicata* applies only where there is identity of parties at issue".

58 Article 5(2) Convention on the Law of the Non-Navigational Uses of International Watercourses.

59 Permanent Court of International Justice M. Advisory Committee of Jurists, ProssVerbax of the Proceedings of the Committee. June 16th – July 24th 1920 (The Hague 1920)

60 Newchange S.S., *Claim No. 21,* UNRIAA, at p. 65

The complexity of the phenomenon of intervention before the ICJ, has created some obstacles to States which wish to intervene in the proceedings pending before the ICJ and caused disagreement among international Scholars and the judges of the Court as to the identity and the status of a would-be intervening States to pending proceedings and subsequently as to the effect of *Res Judicata* upon as potential party.[61] This controversy might be due to the modest judicial experience of the court in this matter. [62]

Third States may claim to be necessary or indispensable parties to contentious cases brought before the court by invoking the so called "right of intervention either under Article 62 or Article 63 of the Court's Statute".[63] On this complexity and its implication of the post adjudicative phase *Miller* suggests:

> It is not clear what binding effect a decision might have on an Article 62 intervener. The Court's action is not likely to result in a direct judgment for or against the intervener, in the sense of the grant of a right of the imposition of an obligation. This is not likely to serve as the basis of a request for Security Council enforcement against an intervener failing 'to perform the obligations incumbent upon it under a judgment rendered by the court.[64]

On the other hand, *Judge Odain Land, Island and Maritime Frontier Dispute (EL Salvador v. Honduras; Application to Intervene by Nicaragua)*[65] asserted in his dissenting opinion that 'Nicaragua, as a non-party intervener, will certainly be bound by this judgment in so far as it relates to the legal situation of the maritime spaces of the Gulf. However, similar to the principles of *PactaSuntServanda*, there is no absolute rule of *Res Judicata.* Hence, some exceptions to the finality of the judicial decisions of the ICJ.

Exceptions to the Principles of *Res Judicata*

There is no absolute rule of *Res Judicata.* In principle, a final decision can be nullified and reopened under certain circumstances by the same body or other competent judicial body on the grounds of inter alia; lack of competence, excess of jurisdiction, violation of the right to be heard, fraud, corruption, and essential or manifest error and absence of reasoned award or legally valid reasoning.[66] So the main question to be answered is to what extent are these grounds applicable to judicial decisions of the ICJ?

This question at the outset is misleading. These grounds of nullification are only applicable to arbitral awards as opposed to international judicial decisions of the ICJ. The applicability of these grounds presumes the existence of a court of law to consider their applicability. In the case of the ICJ, it is completely different. Given the absence of a higher court and international appellate and supervisory procedures, the legal validity of the judgments of the ICJ cannot be judicially challenged.

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61 See generally, Al-Qahtani, M. 2003, The Status of Would-be Intercening States before the International Court of Justice and the Application of Res. Judicata, 2LPICJ; PJ pp.269 – 294.

62 Mani V.S. 1980. *International Adjudication; Procedural Aspects. 9* MartinusNijihoff, p.250.

63 See generally, Bernadez S.T. 1998. *The new Theory of "Indispensable Parties" under the Statute of the International Law: Theory and Practice* (Wolver International) pp.737 – 750.

64 Miller, J.T. 1976. *Intervention in proceedings before the International Court of Justice.* Ed. Gross, L. *The Future of the International Court of Justice.* (Oceana Publication) pp.550 – 671 at pp.536 – 556.

65 ICJ Rep.(1992) p.608, para. 421

66 see e.g. Cheng, B. 1953. General Principles of Law as applied by International Courts and Tribunals, (Stens & Sons) pp.357 – 372

Thus, States and their judiciaries must execute its judgment without examining their legal validity. The Statute of the ICJ reiterates the assumption of the finality and the non-nullity of the judgment of the ICJ. Article 60 of the Statute stipulates unequivocally that "The judgment is finally and without appeal". It thus follows that judgments of the ICJ are not subject to nullification or any other judicial review or scrutiny otherwise it would render Article 60 out of context.

Nevertheless, Justice always requires judicial decisions to be valid. Hence, there should be an exception to this rule under Article 61 of its Statute which is the only exception to the finality of the principle of *Res Judicata* that the ICJ's decisions may require.

Revision under Article 61 of The ICJ Statute

The origin of Article 61 of the ICJ Statute was derived from Article 55 of the Hague Convention of 1899 and Article 83 of the Hague Convention of 1907. Under these Articles, a revision can only be made on the ground of the discovery of some new facts calculated to exercise a decisive influence on the award, and which was unknown to the tribunal and to the party which demanded the revision at the time the discussion was closed.

Article 61(1) of the Statute echoes this fundamental requirement of new facts and its decisiveness. It provides "An application of revision of a judgment may be made only when it is based upon the discovery of some facts of such a nature as to be a decisive factor, which fact was, the judgment was given, unknown to the Court and also to the party claiming revision".

Thus, the discovery of new facts is the strictest pre-requisite on the availability of revision. However, the Statute went further to stipulate equally that "always provided that such ignorance was not due to negligence" of the party requesting revision. Hence, revision proceedings before the ICJ should be distinguished from various proceedings of review within municipal legal systems.

Revision under Article 61 arises only from error of fact but definitely not from error of law. This was noted by the *Trail Smelter Arbitration*[67] which held that "no error of law is considered as a possible International Justice" nor there is an intermediate or mixed category of error[68] might be subject for a revision before the ICJ.

Since its inception, the Court has dealt only with handful of applications for revisions, namely: *Application for Revision and Interpretation of the Judgment of 24th February 1982 in the case concerning the Continental Shelf case (Tunisia v. Libya)*[69] and *Application for Revision of the Judgement of 11th July 1996 in the case concerning Application of the Convention on the Prevention Objection*[70] and EI Salvador's requests of 12th September 1992 by the Chamber of the Court in the *case concerning the Land, Island, and Maritime Frontier Dispute (EI Salvador v. Honduras) Nicaragua Intervening* (*supra*). Whereas the latter is still pending, the first two requests were eventually unsuccessful.

67 3. UNRIAA, P. 1955.

68 Argentina/Chile Request for Revision and Subsidiary Request for Interpretation of Judgment of 21st October 1994 lodged by Chile (Judgment of 13th October 1995 133 ILR.P

69 ICJ Rep. (1985)

70 ICJ Rep. (2003)

In any case, it is noteworthy that for Article 61 of the ICJ Statute as the only exception to the finality of the principle of *Res Judicata,* that the judgment of the Court may acquire, to be applicable, the discovery of new facts must fall within the scope of *Res Judicata*.[71]

Procedure in International Court Of Justice (ICJ)

ICJ is vested with power to make its own rules.[72] The standard pattern that cases before the ICJ follows is:

a. The case is lodged by the applicant that files a written Memorial setting out the basis of the court's jurisdiction and the merits of its claim.
b. The respondent may accept the court's jurisdiction and file its own memorial on the merits of the case.
c. A respondent that does not wish to submit to the court's jurisdiction may raise Preliminary Objections. Such objection must be ruled upon before the court can address the merits of the applicant's claim. It should be noted that respondents normally file Preliminary Objections to the court's jurisdiction and/or admissibility of the case. For example, arguments about the fact that the issue brought before the court is not justifiable or that it is not a legal dispute or that all necessary parties are not before the court are most usually the grounds of objections.
d. Where the court decides that it has jurisdiction and that the case is admissible, the respondent is required to file a Memorial addressing the merit of the applicant's claim.
e. The court holds a public hearing on the merits once all written arguments are filed.
f. Any party (usually the applicant) may seek the court's order for maintenance of status quo pending the hearing of the case.[73]

Appeal from International Court of Justice's (ICJ) Judgment

No appeal is possible once the court gives judgment based on majority vote but any party in the case may ask the court to clarify if there is any dispute as to the meaning or scope of the court's judgment.[74]

71 Geib, R. 2003. *Revision Proceedings before the International Court of Justice* 63 Zaoro. Pp.161 – 194.
72 Rules of Court of ICJ 1978 (As amended on 29th September, 2005).
73 Article 41 of ICJ Statute
74 Article 60 of ICJ Statute