

JURISDICTIONAL PROBLEMS OF THE INTERNATIONAL COURT OF JUSTICE: TOWARDS AN ALTERNATIVE FRAMEWORK?

Ridwanul Hoque*

The International Court of Justice (ICJ), with its seat at the Hague, was established as one of the principal organs of the United Nations (UN) to help materialise the fundamental objectives of the UN, i.e., maintenance of peace and a stable world order. One of the main purposes of the United Nations is to maintain international peace and security and, to that end, to bring about by peaceful means adjustment or settlement of international disputes which might lead to a breach of peace.¹ It was with this view that the UN Charter created the ICJ as one of its six major organs. Article 2(4) of the Charter categorically prohibits use or threat of force in international disputes. The natural corollary of this is the principle of pacific settlement of international disputes. Article 2(3) of the Charter obligates the states to settle their disputes peacefully. As an organ of the United Nations, the ICJ serves as one of the various methods of the peaceful settlement of disputes provided for in the Charter.² For judicial settlement of international disputes, ICJ is the single most important forum.

The recourse to arbitration or to the ICJ should be the 'only method' and the *sine qua non* for peace in the community.³

No doubt, the ICJ is the World Court to deal with the international relations among states in accordance with world law i.e., international law. But, international law itself has its own perplexities, vagueness and weaknesses; so has the ICJ – a creature of international law. International

* Ridwanul Hoque, LL.B. (Hons.), LL.M., Chittagong University, is a Lecturer at the Department of Law, University of Chittagong.

¹ The Charter of the United Nations, Article 1, Paragraph 1.

² Article 33 enumerates a variety of peaceful means of dispute resolution such as – negotiation, inquiry, mediation, conciliation, resort to regional agencies, arbitration and judicial settlement.

³ Singh, N, The Role and Record of the International Court of Justice, Nijhoff Publishers, The Netherlands, 1989, at p. 28.

adjudication has yet to reach a state of completion similar to that of municipal courts. In comparison to international courts, municipal courts play a much more important role in a state. If the ICJ has not been a success story, the reasons for this should be attributed to the fluidity of international relations, strict adherence by states to principle of sovereignty, and diverging socio-economic and cultural patterns of the world society: "The national states as political entities have attained a degree of political maturity which have converted the system of courts into one of the most effective ways of sustaining harmony and coherence of organisation of the states. World community, on the other hand, lacks certain fundamental elements characteristic of the state system."⁴ However, in spite of this inherent constraint of the ICJ, its role as an important agency in the development and growth of international law can not be underestimated.⁵

Having recognised this role of the ICJ, it is undeniable that its role in providing for rule of law is not as central as many would expect. To quote MN Shaw: "as far as the maintenance of international peace and security is concerned, the ICJ has indeed played a minor part."⁶

The above, however, does not mean that attainment of a universally organised court system to successfully provide for the rule of law at the international level is an impossible task, though an utterly difficult one. This difficulty is aggravated by states' reluctance to take recourse to international adjudication.

The world community has now become more inter-dependent than ever before. International community, like any other, is a community of continuing change. For this community one can legitimately hope a stronger world court which shall be instrumental in attaining new international legal order.

This paper examines the existing jurisdictional problems of the ICJ and fathom ways and means to enhance its effectiveness. This paper is divided into three sections. The following section offers a brief account of the ICJ and historical development of judicial method of dispute

⁴ Alam, S. "The Problems of Effectiveness of the International Court of Justice to Provide for the Rule of Law", 14 (1986), The Rajshahi University Studies, (part A), pp. 321-342 at pp. 321-22.

⁵ Anand, R. P., "The International Court as a 'Legislator'", 35 (1995) Indian Journal of International Law, pp. 119-126, at p. 123. R P Anand has shown that development of international law was a cogent reason for the establishment of International Court.

⁶ Shaw, M.N. International Law, 3rd edition, Cambridge, 1991, at p. 679.

resolution. Other sections deal with existing jurisdiction of the Court and its weaknesses, leading to certain tentative formulations of an alternative jurisdictional framework.

THE INTERNATIONAL COURT OF JUSTICE

Within the United Nations system, the ICJ occupies a unique position. Previous courts with somewhat similar aims, such as the Permanent Court of International Justice (PCIJ), was not an organ of the League of Nations under whose auspices it was formed; its statute was completely independent of the League Covenant and, as such, constituted a separate international agreement. By contrast, the ICJ is a principal organ of the UN and its Statute is an integral part of the UN Charter. The Charter has incorporated a distinct part (Chapter XIV) for the ICJ. Thus, the ICJ holds a very unique position within the UN system. There is an operational relationship between the ICJ and the Security Council which are two 'complementary organs' of the UN.

The United Nations General Assembly also has its constitutional role as regards the ICJ. Here words of J. G. Starke may be quoted:

In as much as the International Court of Justice is firmly anchored in the system of the United Nations, member states are just as bound to the Court as to any other principal organ of the United Nations, while reciprocal duties of co-operation with each other bind the court and the United Nations organs.⁷

The ICJ has been a permanently working forum that has adopted its own Rules. The trinity of the following documents form the legal basis for the world court: (a) The UN Charter, (b) the Statute of the Court, and (c) the Rules of the Court adopted on 14 April 1978 representing a major revision of prior Rules of 1946.⁸

It is of special interest to note that the position of the ICJ as one of the organs of the United Nations had in no way, as one might think, undermined the judicial character of the Court. Rather, this has multiplied the sanctity and status of the ICJ since all other UN members are by agreement bound to respect the Court. If the ICJ functioned outside the

⁷ Starke, J.G. Introduction to International Law, First Indian Reprint, 1994, Delhi, at p. 492.

⁸ The Rules are supplemented by different resolutions concerning the court's internal practice, for example, one of 12 April facilitating for exchange of views between the judges regarding particular points.

UN system, it would not have been the repository of trusts of such a great number of states as it does now.

COMPOSITION OF THE COURT

The International Court of Justice consists of 15 judges under a President and a Vice President elected by fellow judges for three years with the possibility of being re-elected. Other judges hold office for nine years, five of whom are elected every three years to serve a nine-year term — the Statute thus providing for continuity of experience in the Court (Article 13). No two judges may be national of the same state. The judges are elected by the General Assembly and the Security Council voting independently and simultaneously from a list of persons nominated by the ‘national groups’ of states in the Permanent Court of Arbitration who are themselves theoretically independent from governments, though not in practice since they are nominated by governments. Thus, the system of nomination may cautiously be called an ‘unsuccessful attempt’ to have independent judges nominated. Nevertheless, this indirect nomination is plausible. Further, members of the UN not represented in the Permanent Court of Arbitration can play a role in this process since they may create national groups for this purpose.

Two criteria have evolved for the judges’ election: (i) individual capacity criterion, and (ii) collective qualification criterion. The first one is personal to the judges. The judges are to be independent and elected regardless of their nationality from amongst persons of high moral character who possess the qualifications for appointment to the highest judicial offices of their respective countries or who are *juris consults* of recognised competence in international law. The second criterion is that the judges should come from the main forms of civilisations and principal legal systems of the world.⁹ This principle deals with the representativeness of the Court and therefore has an impact on the court’s popularity. Remarkably on this principle, Professor Brownlie maintains:

The principle stated is unimpeachable, but it is difficult to translate into practice, and in any case the system of election ensures that the composition of the court reflect voting strength and political alliances in the Security Council and General Assembly. The permanent members of the Security Council normally have judges on the court.¹⁰

⁹ The Charter of the United Nations, Articles 2 and 9, respectively.

¹⁰ Brownlie, I., Principles of Public International Law, Oxford (ELBS edition), 1985, at p. 715.

In fact, from the very inception of the ICJ, “issues concerning its composition have plagued it ... and have given rise to recurring concerns about the objectivity of judges and balance in the system as a whole.”¹¹ Some states have even objections to the words ‘the main forms of civilisation’ that figure in Article 9 of the Charter. Therefore, equity and ‘forms of civilisation’ could be the basis of distribution of judges.¹²

INDEPENDENCE OF THE COURT AND *AD HOC* JUDGES

If the ICJ is to serve its purposes effectively, then it is vital that the states have confidence in it. Therefore, the Statute of the Court reinforces the principle of judicial independence of the judges.¹³ The very fact that the judges are chosen on the basis of their qualification, not on the basis of their nationality, is one of the factors that ensure independence. The Statute of the Court goes far towards maintaining the independence of judges once appointed. Article 20 provides that before taking up their duties, the judges must make a solemn declaration in open court that they would exercise their powers impartially and conscientiously.

No judge may exercise any political or administrative function or engage in any other occupation of professional nature or act as agent, counsel or advocate in any case, in which he has previously taken part in any other capacity. The independence of the judges is further reinforced by the provisions regarding security of tenure; there is no retiring age, and a judge can be dismissed only by a unanimous decision of the fellow judges on the ground that he has ceased to fulfil the required conditions. Further, salaries of judges are free of all taxation. And, while engaged in business of the Court, the members enjoy diplomatic privileges.

However, ‘somewhat inconsistently’ with the intention to disregard nationality in the election, Article 31 of the Statute entitles either or both parties to choose *ad hoc* or ‘national judges’, who sit for a particular case. This provision, opines Professor Bowett, “is scarcely consistent with the

¹¹ Damrosch, L.F., “International Court of Justice and other International Tribunals,” Encyclopedia of Government and Politics, London, 1988, at p. 902

¹² Under a kind of ‘gentlemen’s agreement’ currently applicable, the geographical distribution of judges is; Africa 3, Latin America 2, Asia 3, Western Europe and other countries 5, and Europe 2.

¹³ See Articles 2, 16 to 20, and 32 of the ICJ Statute.

notion of the Court as an independent body.”¹⁴ Some observers justify this practice as being an incentive to states who may have more confidence in the Court if there is a judge of their own choice sitting on the bench. This is what Brownlie says: “a concession to the political conditions of the court’s existence”¹⁵ and M.N. Shaw advises us to find the reason for establishment of the provision “solely within the realm of international politics.”¹⁶

Whatever may be the justification,¹⁷ it is undeniable that the practice is incompatible with the notion of impartiality and independence of the judiciary.

LAW APPLIED BY THE COURT

The ICJ adjudicates upon a dispute according to international law. For the determination of correct rules of international law, the ICJ has been mandated by the Statute to apply the following:

- a. International conventions, whether general or particular, establishing rules expressly recognised by the contesting states;
- b. International custom, as evidence of general practice accepted as law;
- c. The general principles of law recognised by civilised nations; and
- d. Judicial decisions and the teachings of the most qualified scholars of the various nations.¹⁸

If the parties do not object, the Court can decide a case on the basis of *ex aequo et bono*.¹⁹ Further, equity as a principle of law can also be applied. It was so decided by the Court in *North Sea Continental Shelf* case, 1969.²⁰

¹⁴ Bowett, D.W., The Law of International Institutions, London, 1982, at p. 660.

¹⁵ *Supra* note 10, at p. 716.

¹⁶ *Supra* note 6, at p. 660.

¹⁷ The ICJ itself seems to support the system and in an advisory case the court has permitted the use of the *ad hoc* judges. See-the *Western Sahara Case*, ICJ. Reports 1975, at pp. 12, 59.

¹⁸ The Statute of the International Court of Justice, Article 38, Paragraph 1.

¹⁹ *Ibid.*, Article 38, Paragraph 2.

²⁰ Equity as a principle of law has been applied also in the *Gulf of Maine Boundary* case (USA & Canada) 1984 and in the *Fisheries Case*, 1974.

FUNCTIONING OF THE COURT

The Court is open to states only. It decides contentious cases and gives advisory opinions. A case before the Court normally ends with a judgement, unless frustrated or withdrawn earlier. In deciding a case, the Court may, apart from deliberations and submissions by the states, invite assessors to sit with it for the consideration of that particular case. Unlike the judges *ad hoc* assessors are not entitled to vote. They are chosen by the Court itself and not by the parties. The Court normally sits in plenary sessions, but it may form smaller units called Chambers if the parties so request. The Court has now an Environmental Chamber and forms annually a Chamber of Procedures. In discharging functions, it is assisted by the Registry composed of a Registrar, a Deputy Registrar and other officials and secretaries. The administrative functions are entrusted to the Registrar. The decision of the Court is taken by a majority vote and, in case of tie, the President exercises a casting vote. Nine judges form a quorum.

Having considered the judicial method of disputes resolution and a brief account of the ICJ, we now proceed to examine the jurisdiction of the Court.

JURISDICTION AND PROCEDURE OF THE ICJ

Since this paper proposes to be one on the jurisdictional problems of the ICJ, it is necessary that we now take an explanatory and critical look at the existing jurisdiction and procedure of the ICJ.

BASIS AND NATURE OF JURISDICTION

The term “jurisdiction’ etymologically means the power and competence of any body or authority to do, order or to decide on some questions. Broadly speaking, in regard to the international court, “the expression ‘jurisdiction’ refers to the power of the Court to do justice between the litigating states, to decide the case before it with binding force.”²¹

The process of doing justice, i.e., exercise of jurisdiction, involves a complete judicial method (e.g., hearing of arguments, examination of facts and evidence, application of law and delivery of judgement) associated with other implied and necessary powers to ‘do justice.’ Thus, the Court may exercise inherent and incidental jurisdictions side by side with its principal jurisdiction. To take an example, if the Court has a jurisdiction as to reparation due, that jurisdiction extends to the forms and methods of

²¹ Rosenne, S. The Law and Practice of the International Court, vol. 1, Leyden, 1965, at p.302.

determining reparation.²² In this respect, Rosenne's observation may be referred to:

.... as concerns the court, 'jurisdiction' is a stricter concept than 'competence'. Jurisdiction relates to the capacity of the Court to decide a concrete case with the binding force. 'Competence', on the other hand, is more subjective, including both jurisdiction and element of the propriety of the court's exercising its jurisdiction."²³

BASIS OF JURISDICTION

Although the word 'jurisdiction' is used in different connotations, the concept of jurisdiction as regards ICJ is a unitary concept in the sense that ICJ's jurisdiction is wholly consensual. As we shall see below, the Statute is inadequate to deal with conditions to be met before jurisdiction can be exercised; these conditions remain within the domain of states' will. The Court has jurisdiction on contentious cases only between states on the basis of consent of the parties. This consent is the basis of the Court's jurisdiction. It is widely admitted that a state may not be compelled to submit its disputes to third party-settlement, 'the court' or 'the arbitration'. This principle which has a long standing and which is firmly rooted in the court's jurisdiction and reflected in Article 36, "rests on international practice in the settlement of disputes and is a corollary of the sovereign equality of states."²⁴ In the famous *Eastern Carelia* (Advisory Opinion) Case (1923, PCIJ), the predecessor of the present world Court had observed that it was well established in international law that no state can, without its consent, be compelled to submit its disputes with other states either for mediation or arbitration, or to any other kind of pacific settlement.

The ICJ has not departed from the principle, rather has accepted it by its own jurisprudence.²⁵ The principle of consent is so vital that sometimes the consent of a third state whose legal position is directly in issue in the proceeding before the Court is also required. In the absence of such a consent, the Court may decline its jurisdiction as it did in the *Monetary Gold* case,²⁶ although, from the formal point of view, all the parties to the case

²² Ibid., at p.303.

²³ Ibid., at p. 303.

²⁴ Supra note 10, at p. 717.

²⁵ See, for example, *Anglo-Iranian Oil Co.* case, ICJ Reports, 1950, p. 71.

²⁶ ICJ Reports, 1954, at p. 33. The Court said: "Where...the vital issue to be settled concerns the responsibility of a third state, the court can not, without

have consented to the court's jurisdiction. Happily enough, the rigidity of the principle of consensual basis of jurisdiction has come to be mitigated to some extent by a development, by the Court, in regard to manner in which that consent may be expressed. It has been made quite clear by the world Court that consent may either be express or tacit. Consent need not be expressed in a particular form; it may be deduced, as we shall presently see, from the conduct of the states. It is not necessary that consent should be given before the proceedings are lodged; consent may be given *post hoc*. This shall be discussed under the head *Forum Prorogatum*. Consent may also be *ad hoc* and *ante hoc*.

NATURE OF JURISDICTION: COMPULSORY?

International justice, as opposed to national justice, is still optional. The preceding survey on the consensual basis of the ICJ's jurisdiction leads us to a conclusion that it has no compulsory jurisdiction. "A necessary consequence of the dependence of the jurisdiction of the international courts on the consent of the states," R.P. Anand holds, "is that an international court is always a tribunal with special and limited powers."²⁷ Admittedly, the ICJ has no compulsory jurisdiction in the sense that it cannot, unlike a municipal court, ensure (just by issuing a summon to appear before it) the attendance of a state unless it wishes to attend or is bound to attend the Court under a treaty-clause or the so-called 'optional clause', i.e., Article 36(2) of the Statute.

The ICJ can be seized of its jurisdiction (i) through a special agreement between the parties, or (ii) through the invocation of any jurisdictional clause of a treaty or the 'optional clause' of the Statute. Jurisdictions ensued from the later two sources are called, by some authors,²⁸ 'compulsory jurisdiction,' in contrast to 'voluntary jurisdiction' ensued from the first source. This is inaccurate and, what Prof. Philips Jossep says 'misleading'.²⁹ In using the term compulsory "there is always a

the consent of the third state, give a decision on that issue binding upon any state, either the third state, or any one of the parties before it."

²⁷ Anand, R.P., International Court of Justice and Contemporary Conflicts, New Delhi, 1974, at p. 195.

²⁸ One of them is Prof. J.G. Starke, see *supra* note 7, at p. 497.

²⁹ See Anand, R.P., Compulsory Jurisdiction of the International Court of Justice, London, 1961, at p. 29.

danger that it will be deemed to refer to the possible use of compulsion to enforce the judgements of a tribunal.”³⁰

Though it is true that a state accepting the optional clause or a treaty’s jurisdictional clause can not escape its obligation to appear before the Court, the jurisdiction conferred thereby on ICJ can not be said to be ‘compulsory’, in as much as consents of the states concerned to jurisdiction have been given in this case beforehand, that means, when they adhered to the treaty or accepted the optional clause. Therefore, the jurisdiction under Article 36, paragraph 2, is not compulsory in the true sense of the word because, ‘for the creation of such Jurisdiction the prior consent of the party is necessary’.³¹ Thus, what Article 36(2) confers on the ICJ is a ‘limited jurisdiction’. Notwithstanding the fact that the very term ‘compulsory’ figures in Article 36(2), the jurisdiction still remains optional. Hence, such jurisdiction may be termed as ‘optional compulsory’. If the compulsory jurisdiction is defined to mean that “two states have not merely established the *ad hoc* jurisdiction of a court in one isolated case, but have done so with regard to an unspecified number of cases which may arise between them in future”³² it can be said that the ICJ lacks a genuine compulsory jurisdiction. It is important to note that there was an attempt, at the beginning, to invest the Court with compulsory jurisdiction. This attempt failed due to vehement protests by some states, notably big powers, e.g., the former USSR. Nonetheless, the Court’s jurisdiction under Article 36(2) or a treaty clause can conveniently, though not accurately, be called compulsory jurisdiction.

At this juncture, another point that requires attention is that since the Court’s jurisdiction is a limited one, the Court itself is very cautious in exercising it and in not exceeding its jurisdiction. The Court determines the question of jurisdiction *proprio motu*. It is submitted that the Court has a duty to examine, *ex officio*, whether its assumption of jurisdiction is compatible with the Statute. This duty guards itself ‘against stepping outside the bounds of its statutory competence.’³³

The court’s jurisdiction, broadly, is two fold: (a) to decide contentious cases, and (b) to give advisory opinions. As regards contentious cases the Court also enjoys some incidental powers.

³⁰ Id.

³¹ Prof. Kelson’s remark as referred to by Anand, *supra* note 29, at p.27.

³² *Supra* note 29, at p. 29.

³³ *Ibid.*, at p. 198.

CONTENTIOUS JURISDICTION

As noted above, the exercise of the Court's contentious jurisdiction is conditional on the consent of the parties. This consent may be given in one of the following ways:

- a. by a special agreement after a dispute has arisen,
- b. by a treaty clause,
- c. by acceptance of optional clause i.e., by making a unilateral declaration that a state submits to jurisdiction in any or all of the four defined categories of disputes under Article 36 (2), and
- d. by indicating consent implicitly generally after the proceeding has been instituted.³⁴

The first two means are envisaged in Article 36(1) and the third one in Article 36(2)(3) of the Statute. The last mentioned means of expressing consent or submission to jurisdiction has been a development made by the Court and contributed to by the states' action. Before elaborating on the above means, let us take a closer look at the Article 36 (1). It runs: '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.'

This provision, coupled with Article 38 (which says that the court's function is to decide disputes in accordance with international law), indicates that the ICJ has jurisdiction over a vast majority of subjects covering the whole range of international law. Thus, the Court had, and still has, an opportunity to rule on a wide variety of important international issues, albeit big powers have brought before it relatively minor issues. However, areas in which the Court has had great success include the delimitation of boundaries and the development of the Law of the Sea and disputes regarding conflicting claims to land territory (e.g. between France and UK, Belgium and the Netherlands, etc.).³⁵

JURISDICTION BY *COMPROMIS*

Article 36(1) of the Statute confers on the Court jurisdiction regarding "...all cases which the parties refer to it...". Such references would

³⁴ In addition to the first three means, 4th one, which is often referred to as *forum prorogatum*, is added by Damrosch, supra note 11, at p. 905.

³⁵ Ibid. at p. 906. The Court has also dealt with treaty- law-disputes, diplomatic and consular law, nuclear weapon disputes, state sovereignty, state responsibility, decolonisation, asylum problems, human rights violations and environmental disputes etc.

normally be made by bilateral agreements under which the parties agree to submit an already existing dispute to the ICJ and thus recognise its jurisdiction over that particular dispute. Such a special agreement conferring jurisdiction on the Court is often referred to as a *compromis*. Once such a special agreement has been lodged with the Court, the latter can entrain the case.³⁶ Examples of cases that have come before the Court via a special agreement are: (i) *The Asylum* case and (ii) *Continental shelf* case. Here it is exigent to note that the parties may also conclude special agreements to refer a defined or undefined future dispute to the court.

JURISDICTION UNDER TREATY CLAUSES

The second possibility envisaged in Article 36(1) of the Statute is where treaties or conventions in force confer jurisdiction on the Court. It has become an international practice for states to include in bipartite or multipartite treaties what are known as ‘compromissory clauses’ providing for referral of disputes arising thereunder to ICJ for settlement. Accordingly, the parties that are signatories to such agreements may institute proceedings against the other parties by filing with the ICJ an application or they may conclude another special agreement providing for the issue to be referred to the Court. The treaties or conventions that contain jurisdictional clauses are of two kinds:³⁷

- a. Treaty for the general settlement of disputes. e.g., European Convention for Pacific Settlement of Disputes, 1955, and
- b. Treaties primarily dealing with other matter that contain a provision for recourse to the ICJ, e.g., UNCLOS.³⁸

³⁶ Supra note 4, at p.331.

³⁷ Maclean, R. (ed.), Public International Law Text Book, 16th edition, London, 1994, at p. 331.

³⁸ As further examples, a few conventions on human rights such as Racial Discrimination Convention and Genocide Convention can be cited. For instance, Article 9 of the Genocide Convention provides that the disputes between the parties relating to the interpretation, application or fulfilment of that convention “shall be submitted to the international court of justice at the request of any of the parties to the disputes.” In the celebrated *Fisheries Jurisdiction* case, 1974, (UK v. Iceland), the Court founded its jurisdiction on an agreement concluded by the parties on 11 March, 1961. And, in the *US Diplomatic and Consular Staff in Tebran* case (1980), the Court relied on Article 1 of the optional protocols concerning the compulsory settlement of disputes which accompany both the Vienna Conventions on Diplomatic Relations (1961) and on Consular Relations (1963).

JURISDICTION UNDER OPTIONAL CLAUSE

A third means of expressing consent to ICJ's jurisdiction is to be found in Article 36, paragraphs 2 and 3. Of great importance in extending the jurisdiction of the ICJ is Article 36(2), which is generally, but not accurately, known as the 'optional clause'. This stipulates:

The state parties to the present statute may at any time declare that they recognise as compulsory *ipso facto* and without special agreement in relation to any other state accepting the same obligation, 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, if established, would constitute a breach of an international obligation;
- (d) the nature or extent of the reparation to be made for the breach of international obligation.

The declaration³⁹ may be made conditionally or on the condition of reciprocity on the part of several or certain states, or for a certain time.⁴⁰ Apart from the conditions of reciprocity or duration of time as outlined in Article 36(3), declarations are often accompanied by many unexpected conditions relating, for example, to nature of the disputes.

This provision of optional clause is a compromise between the views of the 1920 Committee of Jurists and those of the Council of League of Nations, i.e. between the advocates and opponents of compulsory jurisdiction. This compromise was made with the hope that it would operate as a method of increasing the jurisdiction of the Court by increasing acceptance by states of this clause. However, for reasons to be elaborated below, it has not led to desired results. At present 59 states⁴¹ have made declaration accepting the 'compulsory jurisdiction' of the Court under Article 36(2).

Acceptance of the compulsory jurisdiction under optional clause is what S. Rosenne says- "a *sui generis* assumption of legal obligation under

³⁹ Acceptance of optional clause is made by a unilateral declaration deposited with the Secretary- General of the UN.

⁴⁰ The Statute of the International Court of Justice, Article 36(3).

⁴¹ According to latest UN web site information: www.un.org/www.unsyst.org. The number is less than one third of the number of UN member-states.

particular rules of law.⁴² Thus, some special features of this system should be noted:

- i. Jurisdiction of the Court is operative upon disputes on which the two declarations of both applicant and respondent states coincide;
- ii. A state has the right to make reservations to its acceptance and withdraw therefrom at any time. In absence of such a reservation, the optional clause is irrevocable; and
- iii. Once the Court is seized of a case on the basis of such a declaration, a subsequent withdrawal can not affect the Court's propriety.

However, the states accepting the optional clause system have themselves formed a group of states who, says Prof. Shah Alam, "stand as if were in the same position towards Court as the inhabitants of a country stand towards the Court of that country."⁴³ Each such state has the right to bring another state belonging to the group before the Court by filing an application instituting a proceeding. And when a case is instituted on the basis of this optional clause two possibilities arise: if the jurisdiction is not disputed, the consensual basis of jurisdiction will "come to rest on the successive steps in the proceedings" and shall further be perfected, if need be, by the doctrine of *forum prorogatum*. But if the jurisdiction is disputed, the Court, by applying its inherent power under Article 36(6), will either decline the jurisdiction or dismiss the case. Thus, once the case is referred to the ICJ under Article 36(2), it is within the power of the Court under Article 36(6) to decide whether a particular dispute is or is not one of the kind mentioned in the optional clause, even on the face of the respondent's objection as to jurisdiction. In this connection it would not be out of place to refer to one case where optional clause has been successfully invoked.

In the case concerning *US Diplomatic and Consular Staff in Tehran* 1980,⁴⁴ (USA v. Iran), the United States sought release of her diplomats who were held hostage in Iran in violation of several international treaties in force between the two states, both accepting the optional clause. Iran refused to participate in the case arguing that the hostage matter could not be divorced from a large political context and hence the Court could not and should not entertain the case. The Court rejected the arguments put forward by Iran and gave judgement notwithstanding the absence of the

⁴² For the essential elements of the system, see Rosenne, *supra* note 21, at pp. 441-43

⁴³ *Supra* note 4, at p. 332.

⁴⁴ ICJ Reports, 1997, at p. 7, 1980, at p.3. Other successful instances are *Nicaragua v. US*, 1984, and *Nuclear Tests* case (Australia v. France), 1973.

Iranian Government. This judgement added a strong current to the world public opinion demanding the release of the hostages, which led ultimately to their release under bilateral negotiations.

However, optional clause is sometimes misused by states, for example, by withdrawal, to prevent a case from reaching the court. Unfortunately, successful dealing by the ICJ with optional-clause-jurisdiction has resulted in withdrawal of declarations as in the case of USA (in 1986 in pursuance of judgement in *Nicaragua V USA* case) and of France (in 1974 in pursuance of judgement in *Nuclear Tests* case).

Further, the operation of optional clause has been seriously retarded by the condition of reciprocity under Article 36(3), and by the attachment of restrictive limitations and reservations made by the states. "On the principle of reciprocity, the lowest common factor in the two declarations is the basis for jurisdiction and thus a respondent state can take advantage of a reservation or condition in the declaration of the applicant state."⁴⁵

This occurred in *Norwegian Loans* case⁴⁶ where Norway successfully invoked the French reservation to defeat the jurisdiction of the Court. Interestingly enough, "this successful application of the condition of reciprocity led several states that previously inserted such reservations in their declarations of acceptance to abandon them."⁴⁷

Moreover, most of the acceptances are subject to reservations excluding certain disputes from compulsory jurisdiction; most of them being arbitrary in extent and ambiguous in form. The states use their right of reservation as a tactic of staying out of the system of compulsory jurisdiction. Here, we may mention certain types of frequently used reservations the form of stating which has become more or less standardised⁴⁸

- a. reservations as to domestic jurisdiction;
- b. reservations regarding dispute under multilateral treaties;
- c. reservations excluding previous disputes;
- d. reservations concerning other means of pacific settlement; and
- e. reservations regarding disputes pending before the Security Council;

These reservations are taken up for scrutiny in the next section.

⁴⁵ Supra note 10, at p.723.

⁴⁶ *France v. Norway*, ICJ Reports, 1957, at p.9.

⁴⁷ Supra note 37, at p. 338.

⁴⁸ See for details, Anand, supra note 29, at pp. 189-237.

FORUM PROROGATUM

The fourth means of assuming jurisdiction on the basis of consent of the parties is through application of doctrine of *Forum Prorogatum*. Sir Lauterpacht writes:

exercise of jurisdiction by virtue of principle of forum prorogatum takes place whenever, after the initiation of the proceedings, by joint or unilateral application, jurisdiction is exercised with regard either to the entire dispute or some aspect of it as the result of an agreement, express or implied.⁴⁹

As for reasons of such a principle, Brownlie maintained: “The principle operates because the Statute and rules of the Court ... contain no mandatory rules as to specification of formal basis on which the applicant found jurisdiction, nor as to the form in which consent is to be expressed.”⁵⁰ Consent can be express, i.e., by formal agreement or tacit, i.e., by informal agreement deduced from conduct or successive acts of the parties. Thus in the *Corfu Channel* case,⁵¹ the United Kingdom had brought the case against Albania by a unilateral application. A letter to the Registrar of the Court written by Albanian Deputy Minister for Foreign Affairs was considered to be a sufficient expression of consent by Albania. The Court will not, however, assume jurisdiction unless there is a real not merely an apparent consent. The Court must base its decision on some conduct or statement of the respondent, which involves ‘an element of consent’ regarding the jurisdiction of the Court.⁵² Successful application of the doctrine may pave the way for a broader jurisdiction of the Court.

MATTERS SPECIALLY PROVIDED FOR IN UN CHARTER

According to Article 36(1) of the Statute, the Court has also jurisdiction regarding “ ... all matters specially provided for in the charter....” These words were inserted during the drafting of the Statute in the expectation that the Charter would contain some provisions for compulsory jurisdiction. The Charter does not in fact contain any provisions for such jurisdiction apart from the controversial provision of Article 36(3) which virtually enjoins the Security Council, while dealing with legal disputes, to recommend submission thereof to the Court. “In the *Corfu Channel* case, however, the ICJ did not consider a recommendation by the Security

⁴⁹ Lauterpacht, H., *The Development of International Law by the International Court*, London, 1958, at p. 103.

⁵⁰ *Supra* note 10, at p. 727.

⁵¹ ICJ Reports, 1948, at p. 27.

⁵² *Anglo Iranian Oil Company* case, ICJ Reports, 1952, at p. 4.

Council to this effect sufficient to confer jurisdiction on the court independently of the wishes of the parties to the dispute.”⁵³

OTHER JURISDICTIONS

By virtue of Articles 36(5) and 37 of the ICJ Statute, the optional clauses that were applicable to the PCIJ and the treaties and conventions that conferred jurisdiction on the PCIJ have been saved so as to cause the jurisdiction of PCIJ under these instruments to be transferred to the International Court of Justice.

One of the outstanding features of a judicial body is that it enjoys an inherent power to decide the question of its competence. It is a widely recognised and established principle of law that international tribunal has jurisdiction to determine its own jurisdiction. The history of this principle dates back to the Jay Treaty (Article 7) of 1794 and is repeated in Article 36(6) of the Statute which provides that in the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court. This provision is unique and can play an instrumental role in furthering the Court’s power. S. Rossene has rightly commented:

... the *Lex Specialis* of the jurisdiction of the Court provides for a measure of compulsory judicial control ... not merely over the question whether the concrete dispute comes within the terms of declaration (accepting optional clause), but also over the preliminary question of the validity of the reservations to declaration”⁵⁴

Apart from the jurisdiction over the main issues, the Court has an incidental jurisdiction to deal with three matters: preliminary objections, interventions and interim measures.

As in the municipal courts, a party to a case before the ICJ may raise a preliminary objection to the Court’s jurisdiction or to the admissibility of a claim on a number of grounds, e.g., that the matter is non justiciable, or that the dispute has yet to arise or that the same belongs to domestic jurisdiction, etc. Usually, preliminary objections are dealt with in a separate preliminary judgement, but the Court in some cases may join certain types of preliminary objections to the merits. In the latter instance the matter is dealt together with the merits of the case in a single judgement; this occurs where it is not possible to decide the jurisdictional issue without hearing the parties’ evidence in full. However, under Article 79 of the Rules of the

⁵³ Supra note 4, at p. 311.

⁵⁴ Supra note 21, at p. 390; see also Anand, supra note 27, at pp. 206-08.

Court of 1978, it has now become a practice that the Court decides the preliminary objections in the first instance without joining them to merit, unless there be an agreement between the parties that the matter be decided on merit.

The second possibility of the interlocutory proceedings is an application to intervene. Under Article 63 of the Statute a party to a treaty, the construction of which is an issue in a case or will be binding upon her, is entitled to intervene. All other applications to intervene are granted or refused at the discretion of the Court under Article 62. The Court must be satisfied that the state has an interest of a legal nature, which may be effected by the decision. The Court appears to have set a fairly high threshold of permitted intervention, remarks Professor M N Shaw. Malta's application to intervene in the *Continental Shelf* case was refused on the ground that it lacked an interest of a 'legal nature'. The permitted right of intervention is perhaps a corollary to the fact that the Court can not decide on the merits of a case in the absence of a materially interested state. Therefore, it is deemed necessary that there should be established a jurisdictional link between the actual parties and the would-be intervener.⁵⁵

The third type of interlocutory proceeding is the application for an order of interim or provisional measures under Article 41 of the Statute.⁵⁶ To indicate interim measures is the Court's discretion. The purpose of interim protection is to 'preserve the rights of either party'⁵⁷ pending the Court's decision on merit. Professor J G Merrills observed: "interim measures are intended to make States act or more usually refrain from acting, in certain ways for a period of months or possibly years, until the

⁵⁵ This is a question which is yet to be answered to. However, the Court had, for the first time, granted permission to a third state to intervene under Article 62 of the Statute, in which Nicaragua was permitted to intervene in the case concerning the *Land, Island and Maritime Frontier* dispute, (El Salvador v. Honduras) on the ground that it had an interest of a legal nature which might be affected by the part of the judgement. See, ICJ Reports, 1990. See also, supra note 6, at p.675.

⁵⁶ For an elaborate treatment, see Merrills, J.G., "Interim Measures of Protection in the Recent Jurisprudence of the International Court of Justice", 44 (1995) International and Comparative Law Quarterly, pp. 90 - 146.

⁵⁷ Article 41 of the Statute provides: "The Court shall have power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the rights of either party."

case is finally disposed of.”⁵⁸ However, the Court’s decision to grant such a measure depends on two interrelated factors: one is the likelihood that the Court has jurisdiction on the merit, the other is the degree of urgency and risk of irreparable damage if an order of protection is not made.⁵⁹ Thus, it was held by the Court in *Agean Sea Continental Shelf* case that interim measures will not be indicated where there is no risk of irreparable prejudice to the rights of the state requesting such measures.⁶⁰

JUDGEMENT OF THE COURT

A case may be brought to conclusion in one of the three ways, namely (i) by order of removal, (ii) by withdrawal by a state, and (iii) by delivery of a judgement on merit. Once given, the judgement of the Court is, under Article 60, final and without appeal. However, in the event of dispute as to meaning or scope of the judgement, the Court may give an interpretation to it upon the request of any party provided that the object of request is solely to obtain clarification of what is decided and not to obtain an answer to questions undecided. Under Article 61, an application for revision of a judgement may be made only on the ground of discovery of new decisive facts that remained unknown, not due to party’s negligence, at the time of judgement. This application must be made within 6 months of discovery of new facts and before 10 years from the date of judgement. Effect and enforcement of the judgement will be discussed at a later stage.

ADVISORY JURISDICTION

Apart from its jurisdiction to deal with contentious cases where international organisations have no *locus standi* to appear before the Court as a party, the ICJ has jurisdiction to give advisory opinions 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 a request.⁶¹ The right to request an advisory opinion is an original right,

⁵⁸ Supra note 56, at p. 91

⁵⁹ Supra note 14, at p. 273.

⁶⁰ However, interim order was successfully granted in *Fisheries Jurisdiction* case 1972 to protect British fishing rights in Icelandic-claimed waters and also in *Nuclear Tests* case, 1973. Rules and Statute of the Court are inadequate as regards interim measures particularly in respect of its effect. From the operational point of view, Article 41 is of great significance to the court. Unfortunately, record of compliance with interim orders is very poor.

⁶¹ Article 65(1) of the Statute.

under Article 96(1) of the Charter, of the General Assembly and the Security Council. Other organs of the United Nations or specialised agencies may request for advice if they are authorised to do so by the General Assembly. So their right to request an advisory opinion may be called a derivative right. Almost all the specialised agencies except Universal Postal Union have now had this right.

It is of special significance to note that the ICJ has an institutional and constitutional role to play within the UN system. It is through the advisory opinions that the Court can make its contribution to the United Nations. Shabtai Rosenne has made it clear that “the court has played a major role in assisting the two principal organs of the UN to meet demands made on them.”⁶² Through this function, the Court can play the role of a legislator in the field of international law.⁶³ By giving advisory opinions judges can make the law, though they hesitate to recognise this role. And, since inadequacy of international law is a contributing factor in the Court’s under-utilisation, successful use of advisory competence of the Court may improve the situation.

Of the various purposes that the advisory competence serve, the most important one is that it offers operational guidance to various political organs of the UN or organisations composed of states. Here lies perhaps the reasons why the Secretary General has not been authorised to request the ICJ for an opinion. It is believed that he can obtain legal guidance for the organisation as a whole through General Assembly or Security Council. It is to be noted that the advisory competence, like the contentious one, has some limitations as to subject matters or as to consent of necessary party. Advisory opinion can only be sought on concrete legal questions: “The Court would seem not give an advisory opinion on a purely academic question.”⁶⁴ But in international relations, political and legal questions are intertwined. Thus, the Court’s jurisprudence shows that the Court is competent to opine on political questions inextricably linked with legal ones. In the *Membership in the United Nations* case, 1948, the Court rejected the argument that the question before the Court was a political one and thus fell outside its jurisdiction. Furthermore, the fact that a

⁶² Rosenne, S. “The Contribution of the International Court of Justice to the United Nations” 35 (1995), Indian Journal of International Law pp. 67-90, at p.67.

⁶³ See for details Anand, R.P., “The International Court as a Legislator,” 35 (1995) Indian Journal of International Law, pp. 119-126.

⁶⁴ *Supra* note 7, at p. 507.

question is a matter of contentious jurisdiction does not bar the Court from exercising its advisory competence.

Lauterpacht has rightly observed:

at least in relation to the members of the United Nations, the Charter has created a species of quasi- compulsory jurisdiction of the court by way of Advisory Opinions the request of which may be made... in disregard of the adverse vote of the State or States affected.⁶⁵

It is the Court's discretion to give or refuse to give an opinion. Nevertheless, such a refusal would only be used where there are compelling reasons. Usually, the Court does not refuse opinions, rather it feels 'bound to render within the limits of its judicial function.' Regrettably, the Court has departed from its established jurisprudence in rejecting the WHO's request on legality of use of nuclear weapons.⁶⁶

In contrast to a judgement in a contentious case, an advisory opinion has of itself no binding force; it can not create *res judicata*. And there is no parties in the proceeding in the strict sense. The Court had held: "the court's reply is only of an advisory character; as such it has no binding force."⁶⁷ But such opinions have tremendous international impact and importance which the states or the requesting body do not dare to defy. Advisory opinions have strong moral and persuasive authority. Usually, the requesting organs accept them by adopting resolutions to that effect. And, so far states are concerned, they may, by agreement, undertake in advance to be bound by advisory opinions on certain questions. Up to the end of 1998, 22 advisory opinions had been requested by international organisations, as against 75 contentious cases.⁶⁸ The Court's opinions include a number of important questions of international law.⁶⁹

PROCEDURE AND JURISDICTION OVER PROCEDURE

Procedural rules are to be found both in the Statute and the Rules of 1978. While the Statute is important for the Court, the Rules are guidelines for the parties. Cases are brought before the Court either by the notification of the special agreement or by a written application addressed to the

⁶⁵ Supra note 49, at p. 357

⁶⁶ See dissenting opinion of Judge Koroma, ICJ Reports, 1996, at p. 221.

⁶⁷ Interpretation of *Peace Treaties* case, ICJ Reports, p. 71

⁶⁸ Basic Facts about the United Nations, UN, 1998, at. p. 259.

⁶⁹ The Court's advisory opinion has dealt with admissions to UN, reparation for injuries suffered in the service of the UN, the territorial status of Western Sahara, and question of legality of use or threat of nuclear weapons, etc.

Registrar.⁷⁰ The Registrar there upon intimates the application to other party or parties or any other states entitled to appear before the Court. The procedure in contentious cases is partly written and partly oral. The hearings in the ICJ are held in public unless the Court decides otherwise or the parties agree that the hearing be not held in public.

As regards the advisory opinions the procedures are same. It starts with the filing of a written request setting out question on which advice is sought. It has to be accompanied by all necessary documents likely to be relevant to the issues. Advisory case is considered in full court and delivered in open court. In both cases dissenting opinions are allowed. Rules and procedures have, however, been criticised for their tardiness.

However, under Article 48 of the Statute, the Court has a jurisdiction over its procedures.

Under this Article it can make orders for the conduct of the case, can decide form and time within which a party must conclude its arguments, and make all arrangements connected with taking of evidence. Apart from these, the Article is interpreted as giving the Court complete jurisdiction to decide upon the validity of “actions taken by the parties in relation to the case, and to make any other decision ... *proprio motu* ...”⁷¹

EXPANSION OF JURISDICTION: VISION AND REALITY

The above discussion indicates that existing scope and procedure to invoke the Court’s jurisdiction is restricted. Here it is appropriate to refer to some relevant words of the 1st Committee of 4th Commission at the San Francisco Conference that dealt with the formation of the world court on the basis of the draft-statute submitted by the Committee of Jurists:

... an adequate tribunal will exist for the exercise of the judicial function, and it will rank as a principal organ of the organisation. It is confidently anticipated that the jurisdiction of this tribunal will be extended as the time goes on...⁷²

Time has gone on and indeed a long time. But the jurisdiction of the Court has not been extended as it was anticipated. Ramifications of this anticipation is dealt with in detail in this section.

⁷⁰ Article 40 of the Statute.

⁷¹ *Supra* note 21, at p. 436.

⁷² U.N.C.I.O. Docs. 381, at p. 393.

JURISDICTION OF THE ICJ: IN QUEST OF EXPANSION

The ICJ has not, it is generally recognised, fully succeeded in the mission of peaceful settlement of international disputes. However, within its limited capacity, the Court has, one must admit, functioned well. As judge Hudson pointed out, if the Court had not been available and if the dispute submitted to it had been allowed to fester, they might have led to serious complications.⁷³ And, while there is no scope to undermine whatever the Court has achieved in the past few decades, it is undeniable that the vision of a powerful Court to provide for the rule of law is far from reality. To quote RP Anand, an untiring supporter of a stronger Court,

.... in spite of the best efforts of the greatest jurists over a long period of time, ideal of a powerful court which might serve to fulfil the greatest desire of all mankind – the establishment of peace – has not come to be realised. Despite the great amount of enthusiasm that has been shown, the weaknesses of the existing international community have blocked the way towards the goal.⁷⁴

This section of the paper now proceeds from the premise that a powerful court with extended or expanded jurisdiction may facilitate the world community's quest for peaceful resolution of disputes and conflicts. Adherence to use of force or threat thereof has been unequivocally proclaimed as illegal and such proclamation can be meaningful only if there are forums for resolving disputes which would otherwise may occasion use of force. The preceding section has indicated the jurisdictional and other limitations of the ICJ and it is only through overcoming these limitations that the Court may become more effective.

STATES' RELUCTANCE TOWARDS RECOURSE TO COURT

"If the past records are any guide, the fundamental problem with the Court is not non compliance with its judgements, but the states' reluctance to seek judgement."⁷⁵ States have, it is argued, been evasive towards compulsory adjudication of their disputes. This attitude can be evidenced by a reference to the number of states that have accepted the Court's compulsory jurisdiction, i.e.; Article 36(2), and also by a reference to sweeping and shattering reservations they have made thereto.

In many years there has been only one case in average on the Court's dock. Prior to 1949, only one contentious case, the *Corfu Channel case*, was

⁷³ Hudson as referred to by Anand, R.P. supra note 27, at p. 239.

⁷⁴ Ibid., at p. 285

⁷⁵ Supra note 4, at p. 335.

submitted to the ICJ. Due to this indifference shown by states towards the Court the General Assembly, on November 14, 1947, adopted a resolution in the following terms:

The General Assembly...

3. Recommends as a general rule that states should submit their legal disputes to the International Court of Justice.

But this was of no avail, the ultimate results being very disappointing. The continuing reluctance of states led the Assembly to adopt on November 12, 1974, another Special Resolution [No. 3232 (xxix)] which says, partly:

The General Assembly.....

3. Calls upon states to keep under review the possibility of identifying cases in which use can be made of the International Court of Justice.

On the background of manifestations of world opinion towards more frequent use of the ICJ, the situation improved somewhat from the 1970s. During a twenty-year period ending on January 1, 1983, the ICJ's had only 11 cases before it; the total number of contentious cases till that date was 48. As on December 31, 1998 the ICJ has dealt with 75 contentious cases. This shows that the ICJ's work load has increased to some extent.

This slow progress in availing of the judicial process reveals the states' apathy towards the third-party settlement, i.e., the Court. Why are states so reluctant to entrust their disputes to the world Court?

Factors responsible for states' reluctance to have recourse to the ICJ are many and these are both apparent and latent, and may be either internal (e.g., imperfection of the judicial method) and external (e.g., apathy of some states to allow a third party to intervene in solving their disputes). Of these factors, most responsible ones are the external factors of a strictly political nature which undermine the role of international law in international relations. Professor Shah Alam remarks:

External political tensions to-day weigh heavily upon the attitude of government which are already naturally little inclined to divest themselves of the settlement of there disputes in favour of international tribunals. They fear both the effect of the process and they repercussions, however distant, of the judgement.⁷⁶

Professor Brownlie mentions some factors that explain the states' reluctance:

⁷⁶ Ibid., at p. 326.

- i. the political fact that bringing another state before the Court is often regarded as an unfriendly act;
- ii. the greater suitability of other tribunals and other methods of review for both regional and technical matters;
- iii. the general conditions of international relations ;
- iv. preference for the flexibility of arbitration in comparison with a compulsory jurisdiction;
- v. the lack of representation of Afro-Asian countries on the court; and
- vi. distrust of the court on the part of communist and other states.⁷⁷

Damrosch has dealt with the same question. To him one of the reasons is :

Litigation of any sort entails risks for the parties to the dispute not only that they might lose the particular case, but also that a judicial opinion could enunciate unwelcome legal principles, or that the very process of litigating the case could exacerbate rather than mitigate the tensions underlying the lawsuits. These risks are especially acute as regards litigation before the ICJ.⁷⁸

In the same vein, R.P. Anand has traced out some 'general objections that are raised against the compulsory jurisdiction.' Most important ones are: (i) gaps in international law; (ii) absence of execution machinery; and (iii) impartiality of the Court.⁷⁹

If we take a combined look at what these jurists have said, we see that these are, indeed, problems that are linked to the ICJ's jurisdictional inefficiency. So, any enhancement of the Court's effectiveness depends upon the resolution of these problems. First, however, some reasons as noted above need a little elaboration.

Conditions of International Relations

The degree of achievement of its objectives by an international, as indeed by any other court is dependent upon the state of political integration of the society whose law it administers. But due to fluidity of international relations, an orderly international community is yet to emerge. Here politics is a vital element that sets or upsets everything. This is why only less than a third of UN members have accepted the ICJ's compulsory jurisdiction. Even those who have accepted this have done so with so many and so far-reaching reservations that the ICJ has been rendered virtually inoperative.

⁷⁷ *Supra* note 10, at p. 731.

⁷⁸ *Supra* note 11, at p. 905.

⁷⁹ *Supra* note 29, at p. 57.

This tendency can be attributed to various factors, e.g., international tensions, sovereignty, habitual behaviour, etc. Here, it requires to be noted that some states assume that any submission to ICJ is a curtailment of their sovereignty. This is a misconception and sovereignty need not be understood in that manner only. Rather, the states' willingness to take recourse to ICJ can be interpreted as being another mode of manifesting sovereignty.

Distrust Towards Court

Due to their own political and legal philosophy, some states e.g., Afro-Asian states, had demonstrated general apathy towards international adjudication. Former Soviet Union and other communist countries of the recent past have likewise consistently refused to submit inter-state disputes to ICJ. The Soviet position derived from the Marxist theory that law is based on the will of the ruling classes. It opposed the ICJ's jurisdiction because, it thought, there was no third world (except a Soviet world and a non-Soviet world) to arbitrate and that 'only an angel could be unbiased in judging Russian affairs.' This attitude had cast a negative impact on the ICJ's development.

Happily enough, the Soviet Union had reversed its long-standing position of rejecting virtually all forms of ICJ dispute settlement. Mikhail Gorbachev, in a major speech in 1987, encouraged recourse to the Court, and in 1989 the Soviet Union accepted the Court's jurisdiction under several human rights treaties including the Convention Against Torture.⁸⁰ The USA and the Soviet Union formulated a joint proposal for increasing the use of the Court in resolving treaty based disputes.

International law and the ICJ

It is pessimistically said international law is the vanishing point of jurisprudence. This bears some import even today if we relate this cliché to the fact that remedial jurisprudence is still a Cinderella in international law. Another reason is the fragmentary and uncertain character of much of international law as it now exists. The uncertainty of international law has led to lack of confidence in the Court which applies it. In one of his articles Professor Anand has remarked:

The lack of clarity and precision in the principles of international law not only makes the task of the international court much more difficult, but

⁸⁰ Supra note 37, at p.354.

leaves the already hesitant states all the more sceptical about submission of their disputes to judicial process.⁸¹

To get rid of this impasse, codification is, therefore, an imperative need of international society⁸² and the ICJ may be called upon to play its role as a 'legislator' in the field of international law.

Unfriendly Act?

It is one of the important diplomatic principles that a state should not do something that would be interpreted by its counterpart as being unfriendly or bearing ill will. To be dragged to the Court is considered by the respondent state as an unfriendly act. This response is unfortunate and should not be seen as a reason for not accepting the Court's jurisdiction. To obviate this misunderstanding, the General Assembly reaffirmed in its Resolution of November 12, 1974 that "recourse to judicial settlement of disputes, particularly ... to the International Court of Justice, should not be considered as an unfriendly act between states".

JURISDICTIONAL PROBLEMS

Apart from the reasons cited above, the Court has its own limitations. The primary function of the Court is to decide issues referred to it by states. The subject of the controversy must fall within the competence of the Court. Thus, two fundamental limitations can be pointed out that have moulded the development of the ICJ. These are: (a) only states are competent to be parties to a suit in the Court, and (b) no states can be brought to jurisdiction of the Court except with its consent. The crux of the problem, however, lies in the reluctance of states to take recourse to the Court and in how to expand and extend jurisdiction of the Court as to involve other subjects of international law as well.⁸³

Problems of Accessibility

One of the foremost problems relating to the Court's jurisdiction is that only states may be parties in cases before it. The Court is open to all the members of the UN who are *ipso facto* parties to the Court's Statute or to states who are not UN members but have become parties to the Statute. Thus, individual, international organisations and companies may not bring cases directly before the Court in contrast to some other international

⁸¹ Supra note 5, at p. 119.

⁸² Ibid., at p. 120.

⁸³ Supra note 4, at p. 335.

tribunals. Suggestions have been offered from time to time for altering the position under the Court's Statute so as to provide access for private individuals, corporations and non governmental organisations.⁸⁴ One such proposal that seemed not be 'unreasonable' to Professor Starke was that the Court should have jurisdiction to deal with disputes concerning the interpretation of trans-national contracts between governments on one hand and multilateral corporations on the other hand.⁸⁵ Professor Shah Alam's observation in this respect is worth recalling:

In the contemporary world, the public international organisations play a vital role in the harmonious development of international relation and co-operation of the states. In discharging their functions and duties these bodies enjoy the status of an international legal person. Resolution of problems involving defence of their rights and performance of obligations often require legal proceedings. Since these organisations are created by international treaties and the question of their interest essentially lead to the interpretation of the treaties, the ICJ should be given full authority in the matter.⁸⁶

This venture, he thinks, will attribute to the ICJ a role of guardianship of the treaties creating organisations. The author goes on to say: "attribution of this quality to the ICJ will strengthen the international legal order."⁸⁷ The exclusion of organisations from the contentious jurisdiction has resulted in reference of disputes (of international nature) to arbitration by virtue of agreement between organisations. This has a facilitative influence on states who seek to avoid the compulsory adjudication.

However, there are some opponents who plead non feasibility of the inclusion of organisations within the Court's jurisdiction. They are of opinion that such inclusion will extend the Court's jurisdiction too far and will widen organisations' freedom to initiate legal actions too much.

Similarly, though private individuals are now considered persons of at least some branches of international law (e.g., Human Rights Law), suggestions regarding their *locus standi* would be difficult to implement. Nevertheless, this remains to be considered in future.

We now turn to problems of accessibility to the Court as regards advisory opinions. Under the present provision, only the UN organs and some authorised organisation have the right to seek the ICJ's advice. The

⁸⁴ Supra note 7, at p. 497.

⁸⁵ Id.

⁸⁶ Supra note 4, at p. 340.

⁸⁷ Supra note 4, at p. 341.

question of conferring upon organs and organisations not composed of states the right to request advisory opinions has been mooted in the past, particularly in connection with Secretariat of the United Nations.⁸⁸ But this question should not be confused with the question of 'liberalising' the principles governing access to the Court. Shabtai Rosenne believes that the present system limiting the right to invoke the advisory competence only to organs of the UN system is unnecessarily restrictive.⁸⁹

So, it may be desirable that the advisory competence should be made available to more inter-governmental organisations including regional organisations, and states could be permitted to have the option of seeking an advisory opinion. If states are given this right, one state could test the legality of any action by other state or the UN that concern its rights (e.g., Iraq could question the legality of recent air raid on it). A state could also examine the compatibility of its national laws with international instruments. Some might argue that since the state can invoke the Court's contentious jurisdiction, the above suggestion is not feasible in as much as judicial advice is given, as in the case of municipal court,⁹⁰ to entities legally not able to seek court's contentious jurisdiction. But this is not true in international law, e.g., the Inter-American Court of Human Rights can give advice to member states of the OAS as well as to any organ of the OAS or other organisations authorised by OAS.⁹¹

ABSENCE OF GENUINE COMPULSORY JURISDICTION

One of the deficiencies of international legal system is the lack of compulsory jurisdiction of the ICJ. As we know, "a valiant fight for compulsory jurisdiction of international court, in spite of forceful and ingenious arguments in its favour, was lost, to a great extent due to the intransigent attitude of some of the big powers."⁹² The prospect of compulsory jurisdiction dreamt in 1920 is still to be realised. Following Lauterpacht, it may be submitted that all the parties to the Statute of the

⁸⁸ *Supra* note 21, vol. 2, at p. 757.

⁸⁹ *Id.*

⁹⁰ For example, see Article 106 of the Constitution of Bangladesh.

⁹¹ See, American Convention on Human Rights, Article 64. The question of allowing a state to seek advisory opinion was raised and examined in the General Assembly, pursuant to Resolution 2723 (xxv) of 15 December, 1970. Though the question was not settled, it still offers a scope for liberal approach.

⁹² *Supra* note 29, at p. 57.

ICJ can be and should be brought under the compulsory jurisdiction of the Court so far as disputes of the parties would concern legal matters.

Voluntarism in international adjudication has its own perils. This voluntarism is inconsistent, Judge Nagendra Singh opines, with the accepted principle of eradication of the threat or use of force in international law (Article 2, UN Charter). Learned Judge continues: “To ban the use of force and not to provide for obligatory settlement preferably judicial settlement is virtually *to put the cart before the horse*” (italic is mine), and “once it is established at law that use of force is illegal it stands to the reason that there has to be a compulsory settlement.”⁹³

Therefore compulsory jurisdiction at least on a limited scale can be introduced by amending Article 36(2) so as to make compulsory jurisdiction possible on some defined matters, e.g. interpretation of treaties, boarder disputes, environmental disputes, etc., regardless of whether or not states have accepted the optional clause.

Another possible way of enhancing the scope of jurisdiction is to curtail the dichotomy between justifiable and non-justifiable disputes. It is believed that the Court has jurisdiction only to deal with legal disputes. The terms ‘legal disputes or question’ figure in Article 33 of the Charter and Articles 36(2) and 65(1) of the Statute. Given this importance attached to the matter, it is difficult to draw any hard and fast lines between law and politics. Although, as is acknowledged by the ICJ, there are jurisdictional limitations yet no dispute has ever been rejected because it involved non-legal issues.⁹⁴ The Court maintained that to dismiss a case because the legal aspect is only one element of a political dispute, would be to impose a far reaching and unwarranted restriction upon the role of the Court. Taking into consideration the Court’s limitations, it is self-evident that the Court can not assume functions not related to adjudication. On the other hand, ‘legal disputes’ should be liberally interpreted to mean those which are capable of judicial settlement by the application of existing and ascertainable rules of international law. The determination as to whether an issue is a legal or political one could rest with the ICJ, instead of the state concerned and this may go a long way in expanding the jurisdiction of the Court.

A more systematic policy of including jurisdictional clauses in a wide range of bilateral agreements which do not at present normally include

⁹³ Supra note 3, at pp. 27-8.

⁹⁴ Wallace, Rebecca M M, International Law, 2nd edition, London, 1992, at p. 287.

such a clause would represent a valuable, though limited, contribution to the widening of the scope of compulsory jurisdiction.⁹⁵

In 1974, the General Assembly, informed the states about the advantage of inserting in treaties such jurisdictional clauses.⁹⁶

DEFECTS OF OPTIONAL CLAUSE

Though optional clause conferring compulsory jurisdiction is not the only method of invoking court's jurisdiction, sufficient use of this clause is the single most important factor capable of raising jurisdictional effectiveness of the Court.⁹⁷ Notwithstanding the fact that problem of compulsory jurisdiction is linked to complex international politics and despite scepticism about the possibility of compulsory jurisdiction ever being established in the foreseeable future,⁹⁸ one can assume that progress is possible. We may, however, point out that optional clause has been proved inoperative in many cases due to the condition of reciprocity, operation of sweeping reservations made by states, its confinement to legal disputes and classification of justifiable subject matters into only four classes.

Reservations

As indicated, even the states that have accepted Article 36(2) have shown their cautious approach through reservations. The most sweeping of this reservations¹⁰⁷ was made by the United States in the so called Conally Amendment, which specified that the jurisdiction of the Court would not apply to dispute with regard to matters which are essentially within the domestic jurisdiction of the United States *as determined by the United States of America*. This is subjective reservation of domestic jurisdiction, and is called automatic or self judging or peremptory reservation the scope of which is left to be determined by the reserving states. In principle, this form of reservation is incompatible with the Statute of the Court since it contradicts the court's power to determine its own jurisdiction and since only two reservations are legally permissible within the scope of Article 36(3).⁹⁹ The question is, therefore: to what an extent are these reservations are valid? Unfortunately, the Court took very traditional view in some

⁹⁵ Supra note 4, at p. 337.

⁹⁶ GA Resolution 3232 (xxix), 12 December, 1974.

⁹⁷ Supra note 4, at p. 335.

⁹⁸ Supra note 14, at p.272.

⁹⁹ Bennette, W., International Organisations: Principles and Issues, 4th edition, Prentice Hall, at p.97.

cases, e.g., the *Norwegian Loans* cases. However, several judges held them invalid. Judge Lauterpacht believed these to be so fundamentally invalid that they render the entire acceptance of the optional clause invalid. In the *Nicaragua Case*, Judge Schwebel articulated in his dissenting opinion that the effect that automatic reservations, would invalidate the entire declaration.

To gauge the damaging effect of reservations we may refer to the *Aegean Sea Continental Shelf* case (Greece v. Turkey) 1978. In this case the ICJ could not continue the proceeding instituted by Greece against Turkey as the Court found that acceptance by Turkey of the compulsory jurisdiction was accompanied by such reservation as to exclude its competence to consider the matter on the basis of the unilateral application of Greece.¹⁰⁰ In order, therefore, to check this trend, it is essential that acceptance of optional clause should be unconditional, except on the condition of reciprocity which is inherent in Article 36(2) and which must not be made separately in declaration. It needs to be pointed out that notions of reservation to the declaration accepting the optional clause are entirely different from the concept and functions of reservation to multilateral treaties.¹⁰¹ The Rome Statute of the International Criminal Court may be an ideal example, Article 120 of which provides: “No reservations may be made to this statute.”

Duration of Declaration

Like state system, the acceptance of optional clause is perpetual and withdrawal may be allowed only on certain special circumstances. As analysed above, one of the defects of the present system is, according to Professor Waldock,¹⁰² the absurdity that permits a right of immediate termination of obligation by an unilateral act. “The remedy”, as Professor Anand says, “would be to tighten up the time-limit provision in Article 33(3),” and “to require declarations to be made for not less than a specified minimum period, say 5 or 10 years, and even after that they should be terminable only after a year’s or at least 6 month’s notice.”¹⁰³

PROBLEMS OF ENFORCEMENT OF JUDGEMENT

Absence of Execution machinery

¹⁰⁰ Supra note 4, at p. 336.

¹⁰¹ Supra note 21, vol. 1, at p.257.

¹⁰² Quoted in Anand, supra note 29, at p. 257

¹⁰³ Id.

RP Anand writes: “Another reason, militating against the acceptance of compulsory jurisdiction of the Court, is the absence of any machinery for the execution of the court’s judgement.”¹⁰⁴ After the final award of decision, the Court’s authority is exhausted and it has no power to enforce its judgement. This position, says Professor Starke, represents a serious weakness.¹⁰⁵ However, let us take a look at the existing provisions.

Under Article 59 of the Statute, “the court’s decision has no binding force except between the parties and in respect of that particular case.” This provision, therefore, bars the application of principle of *stare decisis*, but the Court has always taken recourse to its past jurisprudence for persuasive purpose. However, what this Article reveals is that a judgement is binding for the parties *inter se*. On the other hand, under Article 94 of the Charter, each UN member undertakes to comply with the decision of the Court in any case to which it is a party. This provision provides for self-enforceability of the judgement as the parties are bound to abide by and comply with the ICJ judgement. Non-compliance with the ICJ judgement is an *ipso facto* breach of international obligation and no state in reality would breach international obligation with the risk of standing against the world opinion. A state is further barred by doctrine of estoppel to disrespect a judgement.¹⁰⁶ More importantly, under Article 94(2), in case of non-compliance, the plaintiff state may have recourse to Security Council which may, ‘if it deems necessary,’ make recommendations and decide upon measures to be taken to give effect to the judgement. The Security Council has power to determine any existence of ‘threat to peace’ and to take measures to maintain and restore international peace and security.¹⁰⁷ Non compliance with the ICJ judgement is verily a threat to peace and therefore the Security Council may have the power to enforce a judgement of the Court. Furthermore, under Article 25 of the Charter, all members of the UN agree to accept and carry out the decisions of the Security Council.

Taking all these provisions into consideration, it can be submitted that there are ample provisions for enforcement of judgement. But these do not constitute grounds for complacency because this enforcement is not obligatory and is problematic. Further, Article 94(2) applies only to

¹⁰⁴ Supra note 29, at p. 94 and p. 287.

¹⁰⁵ Supra note 7, at p. 502.

¹⁰⁶ In spite of this, there are instances of non-compliance. The actions of Iran in Tehran hostages case and the USA in Nicaragua case are but two of number of instances of non-participation or non-compliance that could be cited.

¹⁰⁷ The Charter of the United Nations, Articles 39, 41 and 42.

judgements, not to orders. There is no provision as regards enforcement of interlocutory orders, e.g.; interim measures. Another important limitation is that the Security Council is believed to have discretionary power to refuse enforcement and even if it decides to enforce a judgement that can be frustrated by the exercise of veto. Articles 94(2) and 27(3) contains no provision for abstention from voting by a member of the Security Council whose alleged non-performance may be in question. Thus, notwithstanding Article 94(2), jurists are sceptical whether the Security Council will be able to exercise this power effectively if the losing party is one of its permanent members or even a member of the UN which has the support of any such permanent member.

The case of *Nicaragua v US* (1986) is a good example of this.¹⁰⁸ Since the question of enforcement of judgement is considered by the Security Council as a substantial question, veto is possible here under Article 27(3). One way of scuttling this problem of ‘enforcement of judgement’ would be to regard it a procedural item to be decided on any 9 votes of the Council. Alternatively, another means could be the requirement of a second veto in order to prevent the decision on enforcement, i.e., one veto shall have to be seconded by another veto.¹⁰⁹

Responsibility of Security Council

Another important aspect of judicial effectiveness has to be examined by a reference to the degree of responsibility that the enforcing body (Security Council) bears. There is no provision in the Charter mandating that the Security Council “shall supervise” the execution of judgement of the ICJ. This, along with the liberal expression of words of Article 94(2) — “may, if it deems necessary” — may well lead to a conclusion that the Security Council is not bound to execute the judgements. However, under Article 24 of the Charter, the Security Council has the ‘primary responsibility’ for the maintenance of peace and security. Thus, it is clear that Security

¹⁰⁸ Kapoor, S. K., International Law in Nutshell, 8th edition, Calcutta, 1994, at p. 223. The United States vetoed a Security Council Resolution to enforce the Nicaragua judgement. Security Council (SC) enforcement can also be blocked not only by formal veto but also by the threat of its use or other less formal means. Thus, for instance, the SC failed to exercise its enforcement power in the *Tehran Hostages* case because of US-Soviet tension in the wake of the Soviet invasion of Afghanistan. See, Damrosch, supra note 11, at p.908.

¹⁰⁹ By a Resolution in 1949, the General Assembly made a list of 36 procedural items. This is still unimplemented. See in this regard, Alam, S., “Veto Power in the Security Council: An Evaluation,” 6 (1985) Journal of Bangladesh Institute of International and Strategic Studies, pp. 413-439.

Council does not have the exclusive responsibility for peace; other organs like General Assembly and the ICJ have secondary (or related) responsibility in this regard. ICJ discharges its responsibility by delivering judgements. And obviously, Security Council's primary responsibility includes the responsibility to help other organs (e.g., ICJ) discharge their responsibilities for peace. Therefore, refusal to enforce ICJ judgements may be deemed to be a failure on part of Security Council to comply with 'primary responsibility' provision of Article 24.

PROBLEMS OF REPRESENTATION AND COMPOSITION

The question of representation in the Court is directly related to the jurisdictional problems of the ICJ. Unless states have confidence in the impartiality of the Court, ICJ will lack the authority required for effective adjudication. Hence, the system of *ad hoc* judges which is contrary to the notion of an impartial judiciary need to be revisited. To fill their places, number of regular judges may be increased, particularly from developing Afro-Asian countries including the Middle-East countries. A more representative court will be able to play an effective role in the mission of pacific settlement of disputes. Furthermore, representation of all parts of the world is also essential for a balanced system of international law in the Court.

Moreover, a single permanent World Court, situated in the Hague, however impartial and efficient, may not be sufficient for the whole globe.¹¹⁰ Until the judicial procedure is expanded, an expansion of number of chambers and more importantly for the establishment of regional benches of the World Court, under Article 26 of the Statue, may be feasible and this can make the Court easily accessible to the developing countries of Asia, Africa and Latin America with minimum of expenditure.¹¹¹

The usefulness of the Court in fact depends upon the parties' ability to make the best use of all available facilities that now exist. Though the Statue provides for establishment of Chambers to deal with a definite or a particular category of cases, the parties had never used this special provision until the 1980s.¹¹² In addition, creation of special chamber (may

¹¹⁰ Supra note 27, at p. 437.

¹¹¹ Id.

¹¹² Articles 26 to 29 of the Statue. A Chamber was created for the first time in January 1982 to deal with a case between Canada and USA over the half of Maine area.

be named as Grand-Chamber in line with the European Court of Human Rights)¹¹³ in order to render only advisory opinions could be seriously considered. In 1974 the General Assembly drew, by a resolution, the attention of states to the possibility of making use of Chambers.

Also, delay in disposal of cases is another issue of concern. Sometimes, a case consumes years.¹¹⁴ Dilatory procedure slows down the Court's motions. Hence, attention to innovative procedures and various means to overcome procedural hazards standing in the way of recourse to the Court may also be necessary.

Recently the Court has changed its rules, rationalised the Registry, installed information technology and adopted an important series of measures including a request to states to shorten the gap between the ending of written phase and start of the oral phase in a proceeding. These will enhance the operational efficacy of the court.

THE ICJ AND OTHER INSTITUTIONS

A review of rules and practices of other international adjudicatory institutions may also be a useful exercise towards innovative expansion of the role and effectiveness of the ICJ and this section attempts such a comparative review.

ICJ and European Courts

With a view to increasing effectiveness, the old European Court of Human Rights (ECHR) has recently been reorganised by Protocol No 11 (of 1998) to the 'Convention for the Protection of Human Rights and Fundamental Freedoms 1950'. The ECHR is now composed of Committees, Chambers and a Grand Chamber. Grand Chamber considers requests for advisory opinions and determines a contentious case when a Chamber has relinquished its jurisdiction to the former. Usually, it is a Chamber that deals with cases. From the judgement of a Chamber a referral to the Grand Chamber is possible within a stipulated time on the request of the parties. Acceptance of this request is subject to the condition that the case raises a serious question, or involves a serious issue of general importance (Article 43).

¹¹³ See Articles 27, 31, & 47 of the 'Convention for the Protection of the Human Rights and Fundamental Freedoms', as amended by Protocol No. 11, Council of Europe, ETS No. 155.

¹¹⁴ For example, in *Barcelona Traction* case, ICJ Report, 1970, 2789 days were consumed.

Further, there is a provision regarding admissibility procedure. Admissibility of a case is decided by a committee of three judges or, in case of their failure, by a Chamber (Articles 29 and 30). There are clear provisions under which ECHR can award just satisfaction to the injured parties and Committee of Ministers of the Council of Europe is mandated to supervise the enforcement of the judgements. The above is the latest development in the international field and may be a model for the ICJ to consider. Particularly, the provision of Grand Chamber to act as a quasi appellate body within the system also deserves attention.

On the other hand, the European Court of Justice that acts under the auspices of European Community has the power to test the legality of any action of any of the organs of the Community. With this experience in view, the ICJ may, conceivably, be conferred 'judicial review' power to examine whether any UN organ including any international organisation has acted *ultra vires*. Some states (e.g., France) may oppose this, as they are against *locus standi* of organisations before the Court in contentious cases. However, such a position may not be tenable, for the ICJ is not a general organ but the principal judicial organ whose function is to establish the rule of law.

ICJ AND INTERNATIONAL CRIMINAL COURT

The establishment of the International Criminal Court (ICC) has been provided for by the Rome Statute which has not come into force as yet.¹¹⁵ Though ICC has to deal with entirely different subject, (i.e., international crimes) some of its features may be of relevance for evolution of the ICJ. The Rome Statute of International Criminal Court, as the formal document is called, provides for automatic or compulsory jurisdiction of the ICC. A state which becomes a party to the Statute also comes under the jurisdiction of the Court (Article 12). Apart from the President and Registry, the ICC is composed of an Appeals Division, a Trial Division and a Pre-Trial Division (Article 34). Further, judicial function in each division is carried by chambers composed of 3, or in some cases, 1 judge and the whole Appeals Division acts as an Appeal Chamber (Article 39). Of all the provisions most striking ones are: (i) The President of the ICC himself may propose an increase in the number of the judges and (ii) the Court can

¹¹⁵ See Pereira, F, "Establishment of the International Criminal Court and its Implication for Bangladesh" in this issue of the Bangladesh Journal of Law. (Editor)

decide admissibility of a case, the order of admissibility being restorable on the basis of new decisive facts (Articles 39 and 19).

Further, state parties are bound, under Article 86, to ‘co-operate fully with the court’, and though enforcement of sentence is effectuated by a state, the enforcement is ‘subject to the supervision of the court’ (Articles 103 and 106).

It needs to be conceded that genocide, crime against humanity and war crimes — the subject matter of the ICC — are more amenable to precise rules and norms, unlike many disputes brought before the ICJ in which the very norm governing the dispute itself may be a subject of dispute. Secondly, these sweeping powers of the ICC may themselves delay the required number of ratification to enable the ICC to be operational. Nevertheless, with coming into operation of the ICC in near future, it is expected that there would be strong arguments in favour of incorporating some of the powers of ICC into an amended Statute of the ICJ.

ICJ AND TRIBUNAL UNDER UNCLOS

The United Nations Convention on the Law of the Sea (UNCLOS) is one of the most important international treaties. The UNCLOS provides for a comprehensive system for settlement of maritime disputes. The Convention obliges the parties to settle their disputes peacefully and provides a selection of compulsory methods for doing so in the event that they are otherwise unable to reach agreement between themselves or they have not used the self-chosen means.¹¹⁶ At the time of signing or at a later date, states may make a prior determination of which of the following fora they would be amenable to: (i) ICJ, (ii) Arbitration, or (iii) the International Tribunal for the Law of the Sea.¹¹⁷ The International Tribunal for the Law of the Sea is a new, autonomous specialised tribunal. It has a specialised Chamber to deal exclusively with the sea-bed disputes. Private and juridical persons have access to the tribunal. Mr. Bernardo Zuleta, the then Under-Secretary of the UN remarked:

the creation of the International Tribunal for the Law of the Sea marks an advance in the evolution of the international institutions of its kind not only because of the structural autonomy of the sea-bed disputes

¹¹⁶ UNCLOS, Articles 280 and 281.

¹¹⁷ “Introduction” to the Text of the Law of the Sea, UN, New York, 1983, at p. xxvii. See, Article 287 of UNCLOS.

Chamber...but also because private and juridical persons will have direct access to the chamber on an equal footing with states.¹¹⁸

This is another interesting development in terms of mechanism for resolution of international disputes and the future functioning of sea-bed disputes Chamber may become significant for future evolution of the ICJ.

CONCLUSION

First, as a further move towards a more effective world court, the judges themselves can help grow a strong world public opinion in favour of the usefulness of the compulsory adjudication. Judges can help create public opinion through maximum use of advisory opinions. Judge Nagendra Singh's words may be referred to: "the formulation of world public opinion is a potent factor to be reckoned within inter-state relations."¹¹⁹ His Judge had further observed that public opinion could backup not only the binding judgements, but also the advisory opinions of the Court, and thus create such a powerful sanction as to rouse sense of responsibility in favour of the judgement or advisory opinion so that it would more often than not be respected. For this, judges should be more cautious so that they do not repeat a decision like that of *South West Africa case*¹²⁰ where after 4 years of initial decision as to existence of applicant's *locus standi*, the Court reserved it.

Secondly, in addition to revisional and interpretational power as discussed earlier, the Court could have a power to review its own judgement. Review is different from revision in the sense that the Court examines, in the former case, a judgement from legal, factual and procedural aspect whereas, in the later case, it does so only from legal aspect, i.e., it sees whether there are errors of law or not.

Thirdly, before the decision of *Corfu Channel* case, it was thought that the Security Council's recommendation under Article 36(3) of the UN Charter created a basis of compulsory jurisdiction. In this case, two British destroyers, while passing through the *Corfu Channel* adjacent to Albania, struck mines and forty-four naval personnel lost their lives. Albania was charged with laying mines. The dispute came before the Security Council, which adopted a resolution recommending that the parties refer the dispute to the ICJ for settlement. Albania accepted the resolution but, when UK

¹¹⁸ Ibid., at. p. xxviii.

¹¹⁹ Supra note 3, at p. 33.

¹²⁰ This case is often taken to mark the beginning of the disillusionment of 3rd world countries with the Court.

brought the case to ICJ, denied that the Security Council's recommendation is enough to invoke the court's jurisdiction. Though Albania ultimately submitted to the court, 7 judges expressed the view, as we have seen above, that Article 36(3) did not create a new class of jurisdiction and this decision applies apparently to Article 33(2) under which the Security Council may call upon the parties to adjust their differences by judicial settlement (when disputes are actually not before the Security Council). Thus, the very judgement of 7 judges opened an avenue of liberal interpretation of Article 36(3), different from Article 33(2). Article 36(3) applies when disputes are actually before the Security Council. Therefore, one could be justified in concluding that a Security Council resolution that a legal dispute be referred to the ICJ should be enough to entitle either party to take its opponent to the Court. This is possible because states undertake to abide by Security Council decisions. The Security Council's recommendations under Article 36 (3) may be interpreted as a decision and to this effect an interpretation clause may be inserted to Article 36 of the Charter.

Fourthly, as we have seen, expensive ICJ litigation is a cause for states' dismay towards the court. Adequate legal aid could thus be a remedy. Former UN Secretary General Mr. Boutros Boutros Ghaly, suggested a fund for developing countries' litigants to promote international adjudication. In 1989, the UN General Assembly constituted a trust fund to encourage states, particularly developing ones, to seek a solution of their legal disputes through ICJ. But this fund provides very limited financial assistance and is available to only two categories of cases: (i) the cases submitted by joint agreement of the parties, and (ii) the cases implementation of which is likely to be frustrated due to either party's lack of funds or expertise.¹²¹ The ambit and resource of this trust may be usefully expanded to assist resource-constrained countries.

One expects that in the near future the World Court will exercise, to a lesser or greater extent, a genuine compulsory jurisdiction. The fact that 10 states at present have accepted 'optional clause' unconditionally is a positive sign. However, as regards compulsory adjudication, the option of making an impossibility into a possibility depends on states for whose benefit the ICJ stands.

Proposal for general compulsory jurisdiction and some other proposals will require an amendment to the Statute, which is possible only on the consent of the two-third of the members of the United Nations

¹²¹ *Supra* note 96, at pp. 272-88.

including all permanent members of the Security Council. However, suggestions for devising ways and means to improve effectiveness of the Court would be meaningful if, and only when, those are based on a proper consideration of the constraints of the international legal system, a product of international politics itself.

It needs to be reiterated that the future role of the Court does not lie with it but with states. The real usefulness of the ICJ depends on how it is used. In his very first speech the first President of the ICJ remarked: “We hope that business of the Court will continually increase; but that will depend on the readiness of the governments to refer to international jurisdiction disputes capable of judicial settlement, and on the readiness of the Security Council and General Assembly to ask for advisory opinions.”¹²² This observation is relevant today as it was on 18 April 1946.

The very existence of the Court is a constant reminder to the states that judicial channels do exist through which peaceful settlement of disputes may be sought. Therefore, a highly relevant conclusion in relation to states that needs to be drawn is that to the extent the states submit or refuse to submit their disputes to the ICJ they, as UN members, discharge or fail to discharge the obligation to ‘settle their international disputes by peaceful means.

¹²² Quoted by Singh, *supra* note 3, at p. 63.