JURISDICTIONAL INEFFECTIVENESS OF ICJ AND ITS LEGAL CONSEQUENCES

A thesis submitted in partial fulfillment
of the requirement for the degree of
LLM International Law
(Faculty of Shariah and Law)
International Islamic University, Islamabad
December 10, 2011

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It is certified that we have gone through the thesis titled, "Jurisdictional Ineffectiveness of ICJ and its Legal Consequences" submitted by ABDUL JALEEL, student of LLM (International Law) Registration No. 85-FSL/LLMIL/S08, and we have come to the conclusion that the research work is up-to the mark and fulfills all the requirements for the grant of Master Degree in Laws by the Faculty of Shariah and Law, International Islamic University, Islamabad.

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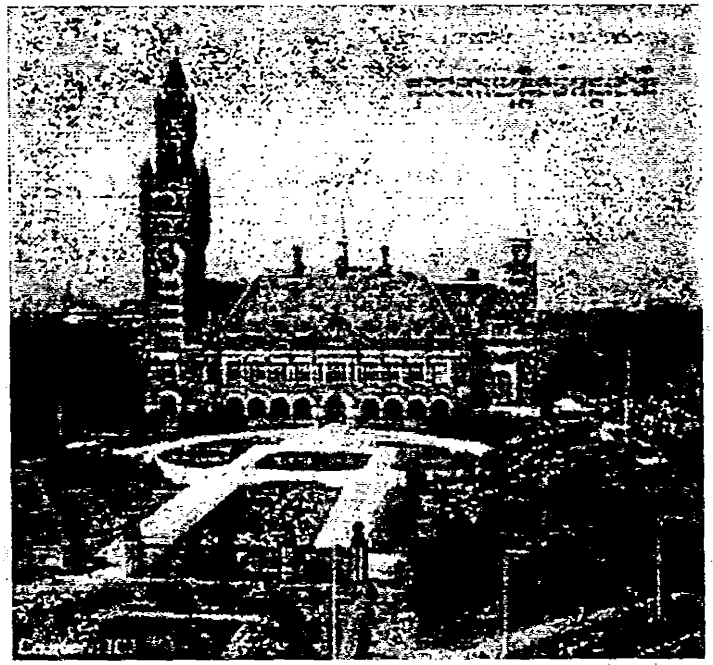
BUILDING OF INTERNATIONAL COURT OF JUSTICE (ICJ)



ICJ: The International Court of Justice is the main judicial organ of the United Nations, and is located in The Hague in the Netherlands. The Statute of the Court guides the jurisdiction and procedure of the court.

I. COURT FUNCTION

The court primarily will deal with two types of issues: cases submitted by states and advisory opinions referred by approved international organs and agencies.

II. COURT COMPOSITION

The court consists of 15 judges elected to nine-year terms. The judges are elected by the United Nations General Assembly and the Security Council. No two judges may be of the same nationality. The representative judges are supposed to reflect the wide cultural and political systems in the world.

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LIST OF ABBREVIATIONS/ACRONYMS

GATT	General Agreement on Tariffs and Trade
ICC	International Criminal Court
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
IMF	International Monetary Fund
IIUI	International Islamic University, Islamabad
MNCs	Multinational Corporations
NATO	North Atlantic Treaty Organization
NGO(s)	Non-Governmental Organization(s)
PCIJ	Permanent Court of International Justice
TNCs	Transnational Corporations
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNO	United Nations Organization
US	United States
USA	United States of America
USSR	Union of Soviet Socialist Republics
WHO	World Health Organization
WTO	World Trade Organization
WW II	World War Two

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DEDICATION

This effort is dedicated to those legal experts and intellectuals who have committed themselves for bringing a new world order through the development of new and equitable global legal system.

ACKNOWLEDGEMENT

All praise and glory be to Allah (SWT) by whose grace I am able to say thanks to all of my teachers, staff, and friends from department of law International Islamic University (IIU) who have created our insight in international law through their kind attentions, class room lectures, discussion and interactive sessions to arouse our taste in this complicated intellectual discipline.

International law is not much familiar subject in our society because of its non-commercial values and is treated only as mean to envisage the utopian world of impracticable idealists. Our experience and association with this subject have, however give us a new vision about it which offers several practical solutions, the politically unstable of world of today require so badly to confront the cascading effects of globalization. Once again my words of special Gratitude are presented to my learned teachers and my supervisor who had from time to time encouraged us and guided us through their inspiring ideas.

ABSTRACT

JURISDICTIONAL INEFFECTIVENESS OF ICJ AND ITS LEGAL CONSEQUENCES

by

Abdul Jalleel

The topic incorporates main issues of global legal order such as political inequity, economic disparity and social injustices all perpetuated by the international political system operating through the super-sovereign structure of UN security. The ICJ promises international justice but practically it has failed to arrest the arbitrariness of super power which is United States of America (USA) as a result of which many destabilizing factors have emerged. Such destabilizing factor also includes International Terrorism which is in fact movement of liberation with the oppressed nations for regaining control over their resources and land. Globalization has become fact of life due to fast paces of communication revolution in which boundaries restrictions have become irrelevant. Conflicts over the possessions of resources and land routes may trigger uncertain situation like what we have experienced before Second World War.

The only institution of International Justice, the International Court of Justice created by collective will of the Humanity to promote social and economic equity and find solution on legal ground had in fact failed in his designated Mission. The study however attempts to cover all the important aspects of International legal system and various concepts that prevailed in different phases of human history. It also refers some reforms in the jurisdiction of ICJ to enhance its effectiveness to meet the new challenges to maintain the peace in the world.

INTRODUCTION

Law is a need or an intellectual exercise of envising imaginary world of utopian? This is a question which has puzzled human being since the beginning of human civilization. Poets and Philosophers whose souls were inspired by the Romantic idealism never liked to submit themselves before the altar of legal authority on very strong ground of imprisonment that it offers with obvious intention of limiting human existence within prescribed boundaries of society. With them any legal framework is golden chain to enslave people so that dream of so called sovereign could be materialized. Even the poet of Indian Sub-continent, Dr. Muhammad Iqbal has pointed out his accusing finger at the restrictive model of Material Civilizations of the west that had tragically de-limited the scope of human freedom within the narrow circuits of time and place. Its manifestations in his views had emerged through the anti-human philosophies of Racism and Ethnicity with deep poisonous influence that has failed to check the fragmentations of human race into many warring nationhood and tribes who are not ready to live like members of one human family on planet earth which is only common abode created by God Almighty to share our lives through our shard destiny.

The renowned historian and political Philosopher, Arnold Toynbee in his Magnum Opus has admitted the self-conceited and self-centered vision of human being which has prevented us from becoming one Human Family. He says, "Within the last five hundred years, the whole face of the globe, together with its air space, has been knit together physically by the amazing advance of technology, but Mankind has not been united politically, and we are still strangers to each other in our local ways of life, which we have inherited from the times of before the recent 'annihilation of Distance'. This is terribly dangerous situation .The two World Wars and the present worldwide anxiety, frustrations, tensions, and violence tell the tale. Mankind is surely going to destroy itself unless it succeeds in growing together into something like a single family.

Threats to human existence has emanated from several quarters which includes the unjust legal and political quarters that exercise control over human destiny, the unfair distribution of economic resources, the super sovereign status of a few Big Powers that blocks all avenue of international justice and peace and above all the lethal technology whose mishandling can bring disaster to human race and its nourishing environment at any moment. The world wars should have opened our eyes to reality of living together as member of one human family but unfortunately the local biases and civilizational superiority complex has hindered our path to evolution of universal human brotherhood. Waves of Globalization have turned the national boundaries meaningless for us now. The various barriers erected to protect the so called sanctity of nation sovereignty to day stand in challenging positions. If there were ever any need for a just global legal and political order, it is now and now. The dream of international justice which guarantees fair distribution of economic resource and social rights on principles of equity cannot be realized without bringing effectiveness to the very mechanism which United Nations have invented in the name of International Court of Justice apart from United Nations Organization (UNO) itself which requires complete revamping through several bold measures.

UNO role in the creation of new and just legal and political order is predominant; however the pages of this research work has been kept confined only to those aspects which have got bearing on international legal system and applicable to ICJ. Going beyond would means trespassing the lines demarcated to cover the subject matter of the given topic which restricts it scope within the following statement, "Jurisdictional Ineffectiveness of ICJ and its legal Consequences". Therefore "global peace and stability can not be achieved without guaranteeing the mandatory jurisdiction to International Court of Justice."

Public international law carries a very wide scope and includes every thing that pertains to human civilization. It is based on custom, traditions, conventions, agreements and treatises formulated between two or more nations to regulate their conduct. Consensus is the basis of International law which must be drawn through adjustments and compromises of each other's interests and preferences. Unilateralism does not work in international legal system and must be avoided to maintain global security and stability through incorporation of all actors and concerned stakeholders.

This is called Multilateralism that protects its objectives through the language of international law.

Various definitions have been given to explain the complex subject of public international law. In fact it is a branch of law which is derived not from the will of any sovereign but from collective voice of humanity. It is contractual agreement between two or more nations to regulate their conduct in various domain of their public life. Sovereignty of nation is main subject of discussion with international law.

Greeks and Roman Civilizations have invented international legal system which was based on the protection of super sovereign status of their respective civilization. Equality concept did not matter within their legal structure. Institutionalized slavery culture was fully protected within their legal system. However, Islamic international law negated all the physical boundaries that narrow minded outlooks have invented for division of humanity. Instead, Islam has given new criteria which were based on moral and ethical values system drawn from article of faith instead of facts of biological features. Peace and stability between the Muslim and Non-Muslim world evolve from the agreement that determines the terms and conditions to regulate conduct between Muslim and Non-Muslim world. Its non-compliance is interpreted as invitation of active military conflict. Renaissance Period promoted intellectual movement of Rationalism and Secularism that altered most of the standards of state governance system from ecclesiastical basis to the principles of efficiency and Mercantilism. The Papacy driven system of political system was totally replaced by new spirit of humanism and utilitarianism.

Legal system starts growing too on the same fundamentals of Political Science. The age of colonialism that originated with the rise of Renaissance had brought about huge expansion of Empires for the new political powers of the European continent on various other continents of Earth. The empty lands of new found land of Americas and other continents was captured on ground of new legal doctrine of 'Terra Nullius' which means, empty lands that is devoid of any civilization carry legal justification for its occupations so that human civilization could be established for the benefits of humanity. The entire legal philosophy of Western colonialism drew its ruling spirit from this legal doctrine which does not reconcile with the principles of Legal Moralism and Naturalism.

The principles of Legal Positivism provides basis to all modern legalism but its scope is determined more by scientific principles of efficiency and responsiveness and other

market values of output than the Ethical values which in words of Aquinas are indispensable for the durability of legal system. Modern legal system is highly placed on strict principles of Scientific Functionalism that is expected to run its order in mechanical manner without showing any sensitivity for human feelings as are recommended in principles of equity. Legal equality in International law carry very restricted scope which is called Numerical Equality versus Sovereign equality which is measured in terms of Geographical Size protected through military and economic strength. This is called Hierarchical system of Sovereignty which has created lot impediments to limit the scope of international legal system.

ICJ is victim of these discriminatory legal doctrines which has become responsible for alienating the masses of developing world from its Legal Statutes and its practices. A new global vision is required to bring about drastic alternations in Legal System of ICJ for having to bring sense of participation among the masses of developing countries. Increased sense of global participation in such judicial institution would ultimately bring about increased sense of security and peace in the world. International Governance too would improve with the rise of participatory sense among developing countries. Trust and confidence in these international institutions would accelerate the movement of global system towards just legal and political order which is desperate need to confront the rising culture of international terrorism and global alienation in the disenfranchised masses of world.

The thesis which covers these aspects suggests several alternatives and solutions. They may sound as abstract thought today readers but tomorrow they are going to become stark reality for development of safer Planet for all members of human family.

It tries to cover all the important aspects of International legal system and various concepts that prevailed in different phases of human history. It also refers some reforms in the jurisdiction of ICJ to enhance its effectiveness to meet the new challenges to maintain the peace in the world.

The first chapter opens its debate with the definition of public international law followed by various schools of thought that emerged during golden period of Greek and Roman civilizations. The Islamic period of global rule was based on articles of faith that divided the world into Muslim and non-Muslim blocks living in peace through the agreed terms and conditions of peace. The Islamic period was

followed by the renaissance period which gave rise of intellectual movement of humanism and secularism. The domain of Church and Caesar became separated from each other on the secular principles of efficiency and governance. The new legal doctrines of "Terra Nullius" made its way to justify the movement of conquest of new lands in Americas, Asia and Africa, and other continents. Legal Positivism and Naturalism took its birth and tried to reconcile with new realities of Post-Renaissance Period through the Legal philosophy of Aquinas.

Second Chapter deals with the various institutional frameworks emerged during the modern era starting from eighteenth century to present day. It includes institutions like international arbitration tribunal and various specialized legal bodies to regulate relationships in field of trade and commerce, shipping and sea lanes rights among various states. The Two great Wars had shaken the world order of imperialism very seriously and need for human unity through the creation of just legal order was felt very bitterly. Permanent Court of International Justice (PCIJ) emerged through consensus of big powers after First World War, its statutes and legal frameworks that applied to its Jurisdiction carried jurisdiction with a lot of limitations. Hence, it failed, so with it collapsed the world order that sustained the global stability and peace. The world entered into new phase of International Conflict that soon engulfed the entire world with its disastrous consequences. Once again new Judicial Organ by the name of International Court of Justice (ICJ) was constituted as redressal mechanism for restoring peace and stability in world. This chapter focuses fully on the various statutes and framework that govern the administrative legal and financial structure of ICJ.

Chapter three covers all limitations and drawbacks our international legal systems suffer with their consequential effects on international Peace and stability. The super sovereign status of Security Council under big power that hold Veto Power ,the hierarchical system of sovereignty that denies equal status to small and weak nations and repeated failure of International court of Justice to implement its decisions had in fact added a lot ineffectiveness to it as chief judicial organ of United Nations. Even the sanctity of Legal doctrine of Jus Cogens that provides minimum threshold for the observance of human rights as obligatory moral duty could not be exercised by ICJ. In fact the international legal system has been denied free space for its growth without which the future of humanity cannot be guaranteed any security.

Fourth chapter deals with its various alternatives and solutions offered to amend the international legal system through new Legal framework of International Court of Justice. Several solutions have been offered such as induction of mechanism through the special statute for obligatory implementation of all decisions of ICJ, devolution of its legal authority through establishment of regional court system and also introduction of appellate functions by passing on the original jurisdiction to other sub-ordinate court system intended to provide legal guidance and assistance through their decisions in specially demarcated areas covered by law of sea or space or transfer of technology etc.

Final chapter is based on a brief conclusion in which the resultant objective of the thesis and its opening ways are discussed.

Methods of research included empirical literature survey, and sessions held with various legal personalities from time to time.

CHAPTER 1

THE INTERNATIONAL LAW AND ITS HISTORICAL BACKGROUND

1.1 INTRODUCTION

Human history over the various phases of its evolutionary stages has confronted the tragic averts of prolonged wars and battles with their devastating effects. Nations fought over for asserting their claims over men, resources, territories etc. continuation of hostilities and devastation it brought to many nations identified several gaps in their common order of national existence. Need was felt for the development of the legal code for enabling all concerned nations to live in peace and stability and led both legal experts and philosophers towards the creation of international law. Foundation was provided by custom, traditions and various treaties that prevailed among nations and regulate their political and social conduct.

This chapter includes the basic definitions of international law[1] as prescribed by various authorities that include encyclopedic references and other leading subject specialists of International law and jurists[2] who participated in the creation of international order in the different stages of history.

Human survival demands peaceful and stable environment which can accrue only through organized and regulated conduct and that requires some kind of mechanism which was provided by customs, traditions and agreements which over the period of times got matured into the subject of International law.

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[1] "International law can be defined as the body of rules that nations recognize as binding upon one another in their mutual relations. Sources of international law include treaties, customs, general principles of law, resolutions and declarations of international organizations, equity, and writings of judges and legal scholars", see, http://www.hg.org/international-law.html (accessed July 10, 2011).

[2] Jurist means; "One who professes the science of law; one versed in the law, especially in the civil law; a writer on civil and international law", http://thinkexist.com/dictionary/meaning/jurist/ (accessed July 10, 2011).

Apart from Definitions and brief backgrounds, a full review has been presented on various international legal systems that human race has experienced starting from Pre-Christ era to its evolution during the 'renaissance' era to modern period of twenty first century. The impacts of various religious and intellectual schools of thoughts that emerged during renaissance and after that have also been critically examined. Modern schools of international law are deeply inspired by various strands of jurisprudence such natural law, moral law and pragmatism and utilitarianism. All of them have been briefly dealt with in coming paragraphs.

1.2 DEFINITIONS OF INTERNATIONAL LAW

Encyclopedia Britannica[3] defines international law as public international law which is body of legal norms, rules, standards and procedures and customs applied between two or more sovereign nations or entities that are legally recognized as international actors. The terms were coined by Jeremy Bentham[4] who was learned political philosopher lived from 1748-1832.

According to him, public international law is a kind of legal instruments evolved from customs, treaties and agreements reached through consensus between two or more nations which represents quite independent political systems .these independent political systems must be recognized as sovereign entities.

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Another definition of public international law has appeared in Encyclopedia of Public International Law[5] (Volume 7, 1984):

> "Public International Law is the law of the political system of nation-states. It is a distinct and self-contained system of law, independent

[3] For details see, http://www.britannica.com/ (accessed July 11, 2011).

[4] "Jeremy Bentham is primarily known today for his moral philosophy, especially his principle of utilitarianism, which evaluates actions based upon their consequences. Although he never practiced law, Bentham did write a great deal of philosophy of law, spending most of his life critiquing the existing law and strongly advocating legal reform". "Throughout his work, he critiques various natural accounts of law which claim, for example, that liberty, rights, and so on exist independent of government. In this way, Bentham arguably developed an early form of what is now often called "legal positivism." Beyond such critiques, he ultimately maintained that putting his moral theory into consistent practice would yield results in legal theory by providing justification for social, political, and legal institutions", http://www.iep.utm.edu/bentham/ (accessed August 22, 2011).

[5] See, http://www.mpepil.com/ (accessed July 11, 2011).

> of the national systems with which it interacts, and dealing with relations which they do not effectively govern".

Since there is no overall legislature or law-creating body in the international political system, the rules, principles, and processes of international law must be identified through a variety of sources and mechanisms.

Students and scholars in the United States often use the Restatement of the Law (Third), the Foreign Relations of the United States[6] as a guide to identifying international law as applied in the US. Restatement 3rd, international law defined:

> "International law, as used in this Restatement, consists of rules and principles of general application dealing with the conduct of states and of international organizations and with their relations inter se, as well as with some of their relations with persons, whether natural or juridical."

From the Oxford English Dictionary[7]:

> "International law, the law of nations, under which nations are regarded as individual members of a common polity, bound by a common rule of agreement or custom; opposed to municipal law, the rules binding in local jurisdictions."

It is argued that the international law is not created through the will of sovereign like the Domestic Law and hence cannot be made obligatory unless sovereign states agree to it.

Article 37 of the statute[8] of international court of justice (ICJ) prescribes the sources of out of which international law is framed through customs, treaties and agreement. The court has been provided jurisdiction to bank upon these resources for solving mutual disputes of the nations.

Text of article says, "*the court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:*

> *International conventions, whether general or particular, establishing rules expressly recognized by the contesting states;*
>
> *International custom, as evidence of a general practice accepted as law;*
>
> *The general principles of law recognized by civilized nations; and;*
>
> *Subject to the provisions of article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law*".

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[6] See, Restatement of the Law (Third), the Foreign Relations of the United States, http://www.amazon.com/Restatement-Foreign-Relations-United-States/dp/0314500839 (accessed June 14, 2011).

[7] See, http://www.cs.vu.nl/~bvhoute/english/ (accessed June 14, 2011).

[8] See, http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0#CHAPTER_II (accessed June 14, 2011).

1.2.1 Ingredients of International law

International law can be better explained by its resources which are described as follows.

1.2.1.1 Agreement

Bringing two or more nations together for some common agenda will form agreement. Such agreements have to be based on principle of "*quid-pro-quo*"[9] that distributes economic benefit equally in our environment of good will and mutual trust.

1.2.1.2 Custom

Definition of custom has been elaborated by French Jurists, Francois Geny[10] 'as a psychological factor, the belief by a state that behaved in certain way as if it is under a legal obligation to act that way. It is known in legal terminology as "Opinion Paris". Customs are recognized by duration, repetition and generality of their use. Prolonged use over the period of time brings recognition to customs as a law. Hence it would under the legal system to obtain the status of law.

1.2.1.2.1 Instant Custom

This kind of custom has also emerged due to progress of some scientific development like movement of satellite in non sovereign area of space that fall into this category. In such circumstance political influence and power constitute the real strength and criteria for bringing recognition to custom.

1.2.1.2.2 State practice

State practice can be verified from substantive action of state from the formal statements and policy matters of state bureaucracy habitually pursued by it. In addition to it the state practice facts can be obtained from the documentary records preserved with international organization, United Nations (UN) General Assembly and Security Council[11].

1.2.1.2.3 Opinio Juris

It is a belief that certain state activity is obligatory that needs certainty and sanctity of a law. It provides sufficient grounds for its general reorganization and acceptance.

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9 Quid pro quo: something that is given or taken in return for something else; substitute.

10 Francois Geny, *the Concept of Law* (Paris: Oxford Press, 2001), 228-31.

11 For details see, http://www.un.org/en/mainbodies/ (accessed July 24, 2011).

1.3 INTERNATIONAL LEGAL SYSTEM UNDER GREEK & ROMAN EMPIRE

Greek philosophies[12] and Roman legal codes[13] contributed immensely towards the development of international legal system. Greek legal and political history began with the rise of state. States geographically and politically lived in close proximity and would depend upon a written code (legal system) for conducting their mutual business of relationships which included political social and military functions.

International humanitarian law defining the basic principle monitored the behavior of states during war and peace. Greek political philosophers have contributed with many ideas based on human nature and social realities. A Greek philosophy of Rationalism and Stoicism has expanded understanding about human nature, the social and political realities and their role in creation of human society.

Stoicism has brought into light universal realities of human life expressed through the language of rationalism that in Greek political philosophy should provide basis for creation of human society. It also provides for natural law that "constituted rules of universal relevance. Such rules were rational, logical and because the ideas and percepts of "Law of Nature were rooted in human intelligence, it followed that such could not be restricted to any nation or any group but were the world relevance. The element of universality is basic to modern doctrine of international law"[14].

Natural law provided basis for the Roman law which was codified to protect the privileges of Roman citizens and its subject races through further expansion.

There are two important doctrine of Roman law:

i) *Jus civilie* – it was applied to Roman citizens; and;

ii) *Jus gentium* – which simplified rules to govern relationship between foreigners and Roman citizens.

The instrument evolved for its implementation is known as 'Proctor'. *Jus-gentium* gradually developed into full fledged common code of social life through the replacement of *Jus Civilie* theological basis for international law.

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[12] For details see, "Ancient Greek philosophy arose in the 6th century BC and continued through the Hellenistic period, at which point Ancient Greece was incorporated in the Roman Empire", http://en.wikipedia.org/wiki/Ancient_Greek_philosophy (accessed July 24, 2011).

[13] See, "early Roman law was drawn from custom and statutes, but later during the times of the empire, the emperors asserted their authority as the ultimate source of law. Their edicts, judgments, administrative instructions, and responses to petitions were all collected with the comments of legal scholars", http://www.unrv.com/government/laws.php (accessed July 24, 2011).

[14] See, Jolowicz, *Historical Introduction to Roman Law* (3rd ed.) 17 November 1972, 68.

With the appearance of Jesus Christ the social and political movement in Roman Empire under went transformation due to his moral and ethical influence which further on went to express itself through legal regimes. Jesus Christ emphasized on upholding the pledges made by people in pursuit of their worldly affairs.

1.4 ISLAMIC CONCEPT OF INTERNATIONAL LAW

With the dawn of Islam international legal system underwent further alteration by diving the world into domain of Muslims which is always by virtue of its ideological commitment is always in war with Non-Muslim world. However 'Peace' or *Aman* must be preferred through instrument of negotiations and all terms and conditions approved must be upheld so long as other parties do not violate them.

The basis of international humanitarian law are well developed and used to be enforced in every war Muslim nations have fought as part of religious duties. "In fact international humanitarian law expanded the basic spirit of Islam through its generous and human treatment to non-Muslims".[15]

1.5 INTERNATIONAL LAW IN MEDIEVAL AGE

During Medieval Age, the international legal system in Europe was based on ecclesiastical principles as would be approved by the institution of Papacy[16]. The entire Europe had same Christian religion which would regulate the major social and political institution. Pope had supreme authority and his jurisdiction prevailed over the state authorities. The division of South American Continent into Portuguese and Spanish domains of influence was determined by Papal authority of Vatican.

However, Ecclesiastical basis of international law came under severe criticism and revision during Renaissance which inaugurated the new era of enlightenment of humanism and rationalism. All these streams of thoughts grew out of the revivalist movement of classical Greek learning. It was French political and legal philosopher, Gean Bodden who in his well known book "*Six livres de La Republique*" criticized the ecclesiastical law and Papal authority that exercised influence over the

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[15] Gerrit W. Gong, *the Standard of Civilization in International Society* (London: Oxford University Press, 1984), 130-63.

[16] "According to the "Catholic Encyclopedia." papal authority is the recognition that the pope is the spiritual leader of the Catholic Church and control's the church's doctrine, or teachings. Catholics believe the pope to have ultimate power granted by God and believe his decisions regarding faith and morality come from God". Read more: What Is Papal Authority? http://www.ehow.com/facts_7455011_papal-authority_.html#ixzz1eymLQ57Q (accessed July 17, 2011).

international legal system through its obsolete doctrines and suggested Natural Law be adopted for running international legal system.

Commercial law and international Trade bodies in Europe to regulate the commercial life on continental basis as well as on global base as colonies in Asia and Africa grew.

1.6 ROLE OF AQUINAS

Aquinas was a Christian monk who was deeply influenced by stoic philosophy and derived legal doctrine which combines both eternal law and positive law and on the basis of these fundamental evolved legal institutions for confronting the new situation in Europe during renaissance which had grown quite complex due to rapid movement of people and goods on continental basis.

According to Aquinas provides the path of morality and reason and offers method for implementation of doctrine. Hence reason must act in harmony with eternal law to provide us universal foundation for the creation of legal system. This legal system can be modified through adjustment with Positive Law.

1.7 THE FOUNDERS OF MODERN INTERNATIONAL LAW

The institution of modern international law have been founded during renaissance in which doctrine of natural law played very important role by defining relationship of states on laws derived from the knowledge of pure nature with their universal applications. Common sense and human reason provides mechanism for their implementation, the following school of thoughts emerged during renaissance.

1.7.1 Francisco Victoria (1480-1546)

He is known as the founding father of international law doctrine for dealing with situation arising out of new Spanish Colonies in South America wherein religious and political movement of Inquisition was met with great resistance from the local and indigenous Indian population. This triggered bloody conflict including genocide in response to which this legal philosopher propounded the new theory of 'legitimacy' by supporting the demands of original people.

However he added the concept of *just war* on ground of religious beliefs and declared any opposition to it must be responded with strong force. Furthermore it was added with the new legal doctrine of *Terra Nullious* which justified the occupation of land if it is not populated and regulated by any social and political order.

1.7.2 Suarez (1548-1617)

He was another Professor of theology who advanced the movement of Natural Law through his legal doctrines.

1.7.3 Hugo Grotius (1583-1645)

He is known as supreme man of renaissance who represents his entire school of thoughts of secularism divorced from theological foundation. He says nature is a system of "secular rules", and be sued to formulate political order. Reason must furnish explanation with respect to its use. His primary work includes, "de jure belli as paces. He says Justice is in nature of man and every social and political order must responds to its ruling spirit for assertion of legitimacy.

He pronounced that no single power has right to claim monopoly even on seas, and must not allow any nation to appropriate these seas for their national use (Funnies, Natural law and Natural Rights – 1980). He gave the concept of open sea that in later years promoted legal system of trade and commerce on global basis.

1.8 Debate between Natural Law and Positive Law

Doctrines of natural law played decisive role in the evolution of international legal system; however with the growth of enlightenment and humanism several schools of thoughts appeared to challenge the validity of "Natural Law". It would be helpful to understand the essence of Natural Law doctrine before discussion is pursued with respect to its countering theories.

Samuel Puferdorf (1632-1694), he founded legal system derived from the doctrines of Natural law as he believed that true and accurate models of legal system can be derived from knowledge of natural law.

His entire system is a theoretical concept of natural law which in his views has got innate mechanism for fulfilling the moral and ethical demand of society. However he completely ignored the validity of customs known since long to have played part in the evolution of legal system.

However, this school of thoughts was challenged by another legal school of thoughts founded by Richard Zouche (1590-1660) in the name of positivism. The following schools of political philosophies contributed towards positivism and cultivation of new legal system.

1.8.1 Social Contract Theory

Social Contract theory of Rousseau and John Locke defined "social contract" between the members of society that creates sovereign status for the state which in return is to provide security to all its members. Hence sovereign state system requires its own legal and political order which must be appropriated to meet its demands.

1.8.2 Rise of Nation State

After the peace of Westphalia in 1648 the concept of Nation State emerged that necessitated to establish its own state systems, which could reinforce its sovereignty. This political movement was based on practical realties of state and its preservations of sovereign status.

1.8.3 Movement of Utilitarianism

Renaissance was basically intellectual movement to promote human thoughts on reasons, rationalism and empiricism. It excluded all theories and concepts from its domain which were rooted in theological or any other transcendental system of life.
It defines all political and social system on human natural urges and values. Hence Moral doctrine was deleted from its purview. These intellectual schools of thoughts have created new social environment in which international law doctrine were evolved in new dimensions.
However, another school of thoughts developed in legal system which combines both positivisms with doctrines of Natural Law. The founder of this school of thoughts is a Swiss Lawyer of eighteen century. Mr. Vattel (1714 -67) who wrote '*droit des gens*' was based on integration of these two legal system. He has used the word of "law of actions" must be based on law of conscience.

1.9 Nineteenth Century and Development of International Legal System

During 19th century many epoch-making events happened that drove new legal movements in the international system' such Napoleonic wars and its consequential effects through Vienna congress that laid down certain principles for the establishment of peace on European Continent though series of treatises. During this century concept of national state had firmly established which was further advanced through national armies and bureaucratic institutions on European continent and its cascading influences started sweeping across the shores into the colonized world of

Asian and African continent. The new international system was Euro-centric that provided little voice or representation to the overseas colonies.

1.10 LEGAL'S CONCEPT OF STATE

German philosopher Hegel propounded theory of state that defines the collective will of its people that must prevail over the individual will of people. Hence, collective Will of state contributed towards the reinforcement of nation-state and its sovereign status alone is competent to create law either through treatise or through custom.

1.11 CONCLUSION

This chapter deals with the broad definitions of Public International law as were given by many legal experts and political philosophers on this subject. International law has evolved from customary relationship of sovereign states which is consisted of customs, agreements or treatises or other pacts from time to time finalized for determining international states relationship.

Definitions given by various authorities had been produced with some explanation and the history of public international law has also been given. Where as in coming chapter, the 'establishment of international legal systems' will be the point of discussion.

CHAPTER 2

ESTABLISHMENT OF INTERNATIONAL LEGAL SYSTEMS

2.1. INTRODUCTION

In previous chapter the historical development of international law discussed. Where as, this chapter is dealing with two important International legal systems or intuitions that were created for bringing peace and political stability in the world. The Permanent Court of International Justice emerged as a result of First World War while International Court of Justice replacing its predecessor was created as a result of Second World War. The background of events in their creation were very traumatic prolonged wars that consumed more than eight hundreds thousands human lives leaving behind unmentionable sufferings with complete destruction of infrastructure of human civilization.

The humanity was compelled to think for some kind of mechanism which could regulate the relationship among the nations on basis of some agreed legal criteria. Permanent court of international justice (PCIJ) was built with these aims and objectives were enforced through statutes approved by League of Nations. However, its missions failed due to its narrowed based jurisdiction which kept almost more than half of the world out of its scope. Very soon it turned into obedient legal instrument with Major European Powers only that brought about its end of its career as highest judicial institution of the world.

The ICJ succeeded the footsteps of PCIJ and inherited its legal structure and its judicial practices in order to maintain continuity in the international legal system. Its foundational existence is based on the principles of UN Charter and its statues incorporate the highest principles of Jurisprudence and higher civilization. All these concepts were treated critically and incorporated through various chapter forms in this thesis. Its administrative and financial structures were fully examined and its various contributions made have also been examined and discussed.

2.2. INTERNATIONAL LEGAL SYSTEM IN 20th CENTURY

With the rise of twenty century European nationals had fully entrenched in its foundation with lethal consequences of mutual conflicts that had plagued many European Nations with disastrous consequences as were experienced during first and second world wars. It may be argued that international legal system had many defeats within its structured and policy making institutions leading chaos in international politics.

In 1907, International Conference adopted connection for the limitation on the use of force for the recovery of contract debt. It emphasized on the use of judicial process rather than use of force as adopted by lending countries in their several disputes. Venezuela is one of countries that failed to settle its debt within stipulated time and had to face the coercive measure. The new law proposed arbitration as obligatory procedure and any liability so created as a result of decision will entail use of force if it is met by defaulting nation with refusal.

Peace of 1919 established League of Nations as international forum for solving political disputes among nations that were mostly known to be big imperial power. However League of Nations proved very ineffective in face of invasion and aggression committed by Italy and Japan. Russia lost its membership after it invaded Finland and America from the very outset refused to join League of Nations that rendered this international institution redundant and fake.

However, in 1921 the League of Nations established Permanent Court of International Justice for addressing mutual disputes on ground of international law. This institution was vested with little power for enforcement of its decision. However it could issue Advisory note for the guidance of other members in response to request made to it though the office of League of Nations.

2.3. PERMANENT COURT OF INTERNATIONAL JUSTICE, GROUND OF ESTABLISHMENT AND ITS SALIENT FEATURES

In 1920, when the League of Nations Council appointed an Advisory Committee of Jurists to submit a report on the establishment of the Permanent Court of International Justice (PCIJ). Later that year, the Third Committee completed a study which the League of Nations Assembly universally adopted into the Statute of the PCIJ. Within one year; a majority of the League signed and ratified the protocol on the permanent court's jurisdiction.

The Dutch Government made an offer for establishment of office of the PCIJ should have its permanent seat in the Peace Palace in The Hague which was donated by Andrew Carnegie. This is the same building which was shared between the Permanent Court of Arbitration and PCIJ.

The existence of PCIJ lasted for almost twenty two years and issued various judgments and advisory Notes (1922 – 1940), the PCIJ elected 30 judges, 4 deputy judges, 23 judges ad hoc and 2 registrars in 65 proceedings leading to 32 judgments, 27 advisory opinions and 137 orders. At the same time, several hundred treaties, conventions and declarations conferred (specific and general) jurisdiction upon the PCIJ[1].

Following were the salient features of PCIJ as international legal institution with defined scope of authority for execution of its Jurisdiction.

- The PCIJ was a permanently constituted body governed by its own Statute and Rules of Procedure, as determined by the League of Nations beforehand and were made obligatory upon all signatories or on parties having recourse to the Court; this was a major deviation from the practice of legal institutions that worked for specialized objectives for a certain period of time under the name of Tribunal.
- The office of Registry was an executive office to carry out the administrative functions for providing communication between the court and its various departments and others international legal organizations and its parent body which is League of Nations. This office was meant to supervise the financial management of the PCIJ.
- The PCIJ has framed procedures for issuance of notices to various parties ,submission of evidence and its recording of hearing during pleading which is open for public knowledge and monitoring for preserving transparency in legal system
- The existence of PCIJ is known to have played very important role in development of international through its legal system of hearing and exercise of its Jurisdiction. The customs and values of nations and their treatises came

[1] Crawford, *the International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (2001), 21.

under discussion in this forum for settlement of mutli-national issues providing basis for the growth and development of international law.

- According to the PCIJ was accessible to all States for the judicial settlement of their international disputes and. However the options were available to all parties to give recognition of compulsory Jurisdiction of PCIJ on case to case basis. the This system of optional acceptance of the jurisdiction of the Court was the most that it was then possible to obtain;
- PCIJ was empowered to give advisory opinions upon any dispute or question referred to it by the League of Nations Council or Assembly; the opinions could only be solicited with the approval of League of Nations.
- The Court's Statute specifically listed the sources of law (customs, treatises, and agreements and other international practices). They were meant to apply in adjudicating on "contentious cases and giving advisory opinions, without prejudice to the power of the court to decide a case *ex aequo et bono* if the parties so agreed.
- It was more representative of the international community and of the major legal systems of the world than any other international tribunal had ever been before it. It included the principles of several legal systems and political order of global society ,however in essence its dominant colors was European as it operated through European case law and European Principles of Jurisprudence. The colonized world of Asia and Africa remained totally alienated from this international legal system and remained locked within the imperial order without any expected legal remedies from PCIJ.

2.3.1. Review of PCIJ Performance and its Legal Handicaps

Permanent Court of International Justice was the first institutional experiment to adjudicate on issue of international law between various parties "basing its approach on a developed model of International legal argument that stresses the intimate relationships between international and national lawyers and between international and national law.[2]

PCIJ Judge Aka Hammarskjold said[3] "the *dicta* of the Court are almost always carefully limited to particular situations arising in concrete cases". This was the

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2 C. Albert, *the Rise and Fall of League of Nations* (New York: 1973), 20.
3 Ibid., 25.

indeed, World Court Judge Sir Ian Jennings saw those early decisions as being generally technical in nature.[4]

It was in the second stage of the PCIJ's history that it became increasingly accused of politicization, even by (then former) PCIJ President B. C. J. Loder: "I do not regret to be no more a member of what has become a political club".[5]

With the increased diversity of its bench in the third stage of its history – and well before the onslaught of World War (WW) II – the PCIJ had lost the confidence of the organs of the League of Nations.

There were many reasons for its losing legal and moral neutrality due to internal institutional weaknesses, increased pressures of big powers like Britain and France which tried to use it as instruments for advancing their political agenda. More over the United States of America which supported the idea of establishment of this international court practically remained aloof from its activities until the lapse of eight years.

The PCIJ came under dominating influence of three great European imperial powers as a result of which the whole of the colonized world of Asia and Africa became isolated and their problems remained unsolved. The colonial culture brought about huge miseries and sufferings in economic and social terms and sovereign status of states had stood usurped by these imperial nations through brutal use of military and economic means but the PCIJ could not offer any legal or political remedies. Czarist Russia occupied the entire Central Asia and went further to occupy the Muslim states of Caucasus Region like Chechnya or Dagestan and states of Astrakhan.

Finland to lose its independence before the military onslaught of Russian Imperialism but neither League of Nations nor PCIJ took any action to bring an end to these policies of colonization. Another big power Japan too followed the established pattern of Imperial Model started invasion of China and Korean Peninsula. Germany whose political and geographical power had been checked through the Versailles Treaty after 1st World War had now become economically bankrupt state due to unfair terms and conditions imposed upon it. Its entire reserved wealth and income had dried up due to drainage of its resources to victorious powers of allied powers and PCIJ could not offer any remedy to ensure justice and fair play in this respect.

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4 Ibid., 21.
5 Ibid., 314.

Customs Regime opinion of 1931, for example, was based on notoriously blurred legal reasoning in the motifs.[6] Seven judges dissented including Justice Hurst, Justice Kellogg, and Justice Rolin-Jaequemyns who thought this was a 'political question'.[7] Although the Permanent Court of International Justice was brought into being through, and by, the League of Nations, it was nevertheless Supreme Judicial organ of the League. "There was a close association between the two bodies, which found expression *inter alia* in the fact that the League Council and Assembly periodically elected the Members of the Court and that both Council and Assembly were entitled to seek advisory opinions from the Court, but the latter never formed an integral part of the League, just as the Statute never formed part of the Covenant".

In particular, a Member State of the League of Nations was not by this fact alone automatically becomes entitled Party to the Court's Statute. These legal handicaps in fact created a lot of jurisdictional difficulties and resultantly its inability to deal with important international legal disputes that only ended ultimately in the collapse of legal and political global order.

2.3.2. **Impacts of Performance of PCIJ**

Between 1922 and 1940 the PCIJ dealt with 29 contentious cases between States and delivered 27 advisory opinions. At the same time several hundred treaties, conventions and declarations conferred jurisdiction upon it over specified classes of disputes covering from Sea law to space and shipping and international trade law. "The Court's value to the international community was demonstrated in a number of different ways, in the first place by the development of a true judicial technique or precedence which the court has developed".[8]

This found expression in the Rules of Court, which the PCIJ originally drew up in 1922 and subsequently revised on three occasions, in 1926, 1931 and 1936. There was also the PCIJ's Resolution concerning the Judicial Practice of the Court, adopted in 1931 and revised in 1936, which laid down the internal procedure to be applied during the Court's deliberations on each case. These procedures and rules have become guiding light for the international legal bodies and which are now contributing in the development of international law.

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[6] Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Helsinki: 1989), 316.

[7] Ibid., 332.

[8] Ibid.

2.4. THE INTERNATIONAL COURT OF JUSTICE (ICJ) AND ITS HISTORY OF ESTABLISHMENT

The outbreak of war in September 1939 inevitably had serious consequences for the PCIJ which had lost its credibility due to its diminished role and functions. The pending international disputes between western nations remained unsolved and major powers had entered into bloody phase of their power struggle for seeking influence in the world. "After its last public sitting on 4 December 1939, the Permanent Court of International Justice did not in fact deal with any judicial business and no further elections of judges were held".[9]

In 1940 the PCIJ moved to Geneva, a single judge remaining at the Hague, together with a few Registry officials of Dutch nationality. The full scale war had started and almost all big and small nations had locked within its fold. The massive killing and destruction brought into limelight the need for setting up for setting up for international Judicial Institution for solving mutual disputes to enable the nations to build order of stability and Peace. The tragic results of war made people greatly worried about the absence of such legal institution without which anarchy that had set in seems to be difficult to bring it under control.

It was in "1942 the United States Secretary of State and the Foreign Secretary of the United Kingdom declared themselves in favor of the establishment or re-establishment of an international court after the war, and the Inter-American Juridical Committee recommended the extension of the PCIJ's jurisdiction".[10]

Early in 1943, the United Kingdom (UK) Government took the initiative of inviting a number of experts to London to constitute an informal Inter-Allied Committee to examine the matter. This Committee, under the chairmanship of Sir William Malkin (United Kingdom), held 19 meetings, which were attended by jurists from 11 countries. In its report, which was published on 10 February 1944, it recommended:

> "That the Statute of any new international court should be based on that of the Permanent Court of International Justice and would follow the same rules and procedure so far their legislation and implementation is concerned.

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[9] Stanley Hoffmann, *International Systems and International Law*, vol. 14 (London: Cambridge University Press, October 1961), 205-237, http://www.jstor.org/stable/2009562 (accessed July 13, 2011).

[10] Ibid.

That advisory jurisdiction should be retained in the case of the new Court;

That acceptance of the jurisdiction of the new Court should not be compulsory although there were some countries which opposed it but it was turned down by France and Russia;

That the Court should have no jurisdiction to deal with essentially political matters and as it would be better tackled through political process through some international institutional framework; and;

Contentious jurisdiction concept was also introduced with respect to those cases in which concerned parties are ready to accept the jurisdiction of the court."[11]

Meanwhile, on 30 October 1943, following a conference between China, the Union of Soviet Socialist Republics (USSR), the United Kingdom and the United States, a joint declaration was issued recognizing the necessity "of establishing at the earliest practicable date a general international organization, based on the principle of the sovereign equality of all peace-loving States, and open to membership by all such States, large and small, for the maintenance of international peace and security".[12]

This declaration led to exchanges between the Four Powers at Dumbarton Oaks, resulting in the publication on 9 October 1944 of proposals for the establishment of a general international organization (United Nations), which would include an International Court of Justice as the supreme legal organ of this new global system. The next step was the convening of a meeting in Washington, in April 1945, of a committee of jurists representing 44 States. This Committee, under the chairmanship of G. H. Hackworth (United States), was entrusted with the preparation of a draft Statute for the future International Court of justice, for submission to the San Francisco Conference, which during the months of April to June 1945 was to draw up the United Nations Charter. The draft Statute prepared by the Committee was based on the Statute of the PCIJ and was thus not a completely fresh text.

"The Committee nevertheless felt constrained to leave a number of questions open which it felt should be decided by the Conference:

Should a new court be created and with what principles?

In what form should the court's mission as the principal judicial organ of the United Nations be" stated?

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[11] Ibid.

[12] Ibid., 126.

Should the court's jurisdiction be compulsory, and, if so, to what extent?

How should the judges be elected?

How the legislation of this new legal institution be carried out?

How much internal autonomy is given to ICJ for determination of its procedures and rules?

The final decisions on these points, and on the definitive form of the Statute, were taken at the San Francisco Conference, in which 50 States participated. The Conference decided against compulsory jurisdiction and in favor of the creation of an entirely new court, which would be a principal organ of the United Nations, on the same footing as the General Assembly, the Security Council, the Economic and Social Council, the Trusteeship Council and the Secretariat, and with the Statute annexed to and forming part of the Charter.[13]

The chief reasons that led the Conference to decide to create a new court were the following:

> As the court was to be the principal judicial organ of the United Nations, it was felt inappropriate for this role to be filled by the Permanent Court of International Justice, which had so far had worked as attached organ of the League of Nations, then on the point of dissolution;
>
> The creation of a new court was more consistent with the provisions in the Charter of United Nations that all Member States of the United Nations would *ipso facto* be parties to the court's Statute;
>
> Several States that were parties to the Statute of the PCIJ were not represented at the San Francisco Conference, and, conversely, several States represented at the Conference were not parties to the Statute; and;
>
> There was a feeling in some quarters that the PCIJ formed part of an older order, in which European States had dominated the political and legal affairs of the international community, and that the creation of a new court would make it easier for States outside Europe to play a more influential role. This has in fact happened as the membership of the United Nations grew from 51 in 1945 to 192 in 2006.

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[13] David and Brierley, *Major Legal Systems in the World Today*, Second edition, (London: Oxford Printing Press, 1978), 145.

The San Francisco Conference nevertheless showed some concern that all continuity with the past should not be broken, particularly as "the Statute of the PCIJ had itself been drawn up on the basis of past experience, and it was felt better not to change something that had seemed to work well."[14] The Charter therefore plainly stated that the Statute of the International Court of Justice was based upon that of the PCIJ. At the same time, the necessary steps were taken for a transfer of the jurisdiction of the PCIJ so far as was possible to the International Court of Justice.

In any event, the decision to create a new court necessarily involved the dissolution of its predecessor. The PCIJ met for the last time in October 1945 when it was decided to take all appropriate measures to ensure the transfer of its archives and effects to the new International Court of Justice, which, like its predecessor, was to have its seat in the Peace Palace. The judges of the PCIJ all resigned on 31 January 1946, and the election of the first Members of the International Court of Justice took place on 6 February 1946, at the First Session of the United Nations General Assembly and Security Council. In April 1946, the PCIJ was formally dissolved, and the International Court of Justice, meeting for the first time, elected as its President Judge José Gustavo Guerrero (El Salvador), the last President of the PCIJ. The Court appointed the members of its Registry (largely from among former officials of the PCIJ) and held an inaugural public sitting, on the 18th of that month. The first case was submitted in May 1947. It concerned incidents in the Corfu Channel and was brought by the United Kingdom against Albania.

The statutes of ICJ and its various procedures to conduct its legal and judicial exercises have been drawn to facilitate the pursuance of peaceful solution of problems through the implementations of international law and its various treatises. All these statutes in fact are based upon the principles as enunciated by the provisions of Charter whose ruling spirit is demonstrated by the Preambles of UN charter which is briefly quoted below.

We the peoples of the united nations, determined "to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations

[14] Ibid.

arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom".[15]

2.5. THE REVIEW OF STATUTES OF ICJ

The scheme of Statute includes the following Tables of contents.

Chapter 1; Organization of the Court (Articles 2-33)
Chapter 2; Competence of the Court (34-38)
Chapter 3; Procedure the Court (Articles 39-64)
Chapter 4; Advisory Opinions (Articles 65-68)
Chapter 5; Amendments (Articles 69 & 70)

The amendments in statutes of ICJ can be brought about by United Nations only through articles 69 and 70. The procedure requires written communication be would be submitted for approval first in General Assembly to be followed through voting for final approval by Security Council.

2.5.1. Administrative Structure of ICJ

The International Court of Justice is composed of 15 judges elected for nine-year terms of office by the United Nations General Assembly and the Security Council. These organs vote simultaneously but separately. Absolute majority votes have to be won for ensuring success to candidates.

For ensuring a measure of continuity, one third of the Court is elected every three years. Judges are eligible for re-election. But if a judge dies or resigns, he is replaced immediately by the new one for the unexpired part.

The names of candidates must be communicated to the Secretary-General of the United Nations within a time-limit laid down by him.

2.5.2. Qualification of Judges

Judges elected by United Nations must possess strong moral and character qualities. His qualification level must meet the requirement necessary to hold the highest judicial posts in his country. The text of Provision says,

"Judges must be elected from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurist consults of recognized competence in international law. No member state can put up more than one candidate".[16]

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[15] Ibid.

[16] Lurad, *Evolution of International Organizations* (1966), 22.

The distribution of Judges and their appointment is made according on the principle of Geographical representation. Every major zone is represented and it is provided in the statute that every major civilization be given proper voice.

Today this distribution is as follows: Africa 3, Latin America and the Caribbean 2, Asia 3, Western Europe and other States 5, Eastern Europe 2, which corresponds to that of membership of the Security Council. Although the there is no entitlement for any country but each member of the permanent Security Council is given representation as per convention.

The judges of ICJ have to maintain strict neutrality and impartiality in their all proceeding and they are required to take oath in this respect that they do not represent any government. For maintaining impartiality and neutrality ,the job security and its tenure have been guaranteed according to the provision of the ICJ and they can not be dismissed through any executive order .Procedure prescribes unanimous decision on the part of entire court .However no such case of dismissal has ever happened.

The statute of ICJ emphasizes strictly upon the neutrality and impartiality in the functioning of judges and strictly prohibited not to accept any other administrative or legal duty outside their official domain. The text of the provision says, "No Member of the Court may engage in any other occupation during his/her term. He/she is not allowed to exercise any political or administrative function, nor to act as agent, counsel or advocate in any case. Any doubts with regard to this question are settled by decision of the Court."[17]

The remuneration of judges is determined and given according to the salary packages and perquisites reserved for all members of diplomatic community in The Hague. The president of the ICJ who is chosen unanimously by all the judges' holds the position of doyen of entire diplomatic based in The Hague. All judges too are based in The Hague unless sent on official assignment by the order of the court.

2.5.2.1. **Election of President**

The President and the Vice-President are elected by the Members of the Court every three years by secret ballot and they can be re-elected well as there is no bar.

The President presides at all meetings of the Court; he/she directs its work and supervises its administration, with the assistance of a Budgetary and Administrative Committee and of various other committees, all composed of Members of the Court.

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[17] Ibid.

During judicial deliberations, the President has a casting vote in the event of votes being equally divided or in case of suspended situation known as tie.

2.5.3. Judges *ad hoc*

Under the Article 31, paragraph 2 and 3 of the ICJ, a state party which does not have judge of its own nationality is allowed for purpose of transparency and institutional trust to have the judge of its choice who would perform his duty as Ad-hoc Judge provided it meets the conditions as laid down in article 35 to 37 of the Rules of ICJ. It is not necessary to have *ad hoc* judge from the same nationality which is state party to the case. The *ad hoc* judge has to take oath and make solemn declaration as prescribed for judges of the ICJ.

The numbers of *ad hoc* Judges are likely to vary in their strength from 15 to 17 and their basic function is to assist courts in reaching out decision through better knowledge of facts of situation. The number of judges deputed for hearing case varies in strength depending upon the nature of case. In certain cases their strength may be 15-17 and once the bench is formed, it cannot be changed unless there is specially reason as provided by the provisions of Statute.

The composition of bench will remain unaltered through all phases of proceeding from oral hearing to the submission of documents to declaration of decision.

Question has risen about the neutrality and transparency of decision given the bench which includes the judge with state nationality having been party to the case. The legal history of ICJ has proved from the records that no decision of the Court has ever been compromised because of nationality of judges and there are several instances in which the judges of court had given decision against the submission of his own country.

The ICJ documentary records shows that a lot of debates in different forums have taken place on this issues of composition of judges and some kind of skepticism had been expressed about the scheme of nationality of judges *viza viz* cases but it has been declared "as novel character of the court should be maintained until the confidence in the jurisdiction of court is established through several Precedence".

The ICJ documents released by the court say, "The institution of the judge *ad hoc*, on the other hand, has not received unanimous support. Whilst the Inter-Allied Committee of 1943 argued that "countries will not in fact feel full confidence in the

decision of the Court in a case in which they are concerned if the Court includes no judge of their own nationality, particularly if it includes a judge of the nationality of the other party", 'certain members of the Sixth Committee of the General Assembly of the United Nations expressed the view, during the discussions between 1970 and 1974 on the role of the Court, "that the institution, which was a 'survival of the old arbitral procedures, was justified only by the novel character of the international judicial jurisdiction and would no doubt disappear as such jurisdiction became more firmly established".

Nevertheless, "numerous writers take the view that it is useful for the Court to have participating in its deliberations a person more familiar with the views of one of the parties than the elected judges may sometimes be."

Even the United Nations and its several sub-committees have studied these question of nationality of judges *viza viz* the case submitted for adjudication but expressed its satisfaction over the present practice of including judges of same nationality in view of better understanding of the situation of the case because of nationality background, however it said that this novel will have to be maintained until the confidence in the jurisdiction of the court becomes fully established.

2.5.4. **Jurisdictions of ICJ**

The ICJ jurisdiction says as written earlier is exercised through two different modes.

2.5.4.1. **Advisory Jurisdiction**

It is exercised only through the request of United Nations or its allied organization on such matters which needs legal explanation. The request for advisory opinion has to be routed through the office of UN secretary General Office.

Advisory opinion is in non –obligatory in nature and cannot be enforced unless it is provided in the instrument beforehand that advisory opinion given by Court would have the status of Binding status.

Otherwise advisory opinion only performs the role of extending the explanation about certain legal matter which can be differed with or can be interpreted in more than one way.

2.5.4.2. **Contentious Jurisdiction**

This kid of jurisdiction deals with the following maters:

Party to the disputes;

Accepted the Jurisdiction of the ICJ on the dispute as are applicable under the condition defined in the statutes of ICJ;

The Court Jurisdiction is approved by both parties through written agreement stating thereby the stating the acceptance of jurisdiction without any reservation;

The Court can also assume its authority over any issue on the basis of complaint lodged by aggrieved party with respect to implementation of any international treaty or conventions that supposedly contain the clear reference to acceptance of jurisdiction of ICJ through mandatory clauses in case of any dispute. Such declarations are submitted as per convention and provision of ICJ and UN with the office of UN Secretary General;

The private Parties are not allowed to appear or are authorized to agitate the court in respect of any case .It has been prohibited in explicit words; and;

However it is the Court authority to decide who is to be summoned and how many parties are involved in the disputed questions. Notice to parties is given by ICJ after the full list of such parties involved is framed.

2.5.5. The appointment of Agent

Every country is to appoint its own agent to present its case for submission of documents and other proof of evidence. The agent qualification is determined by the country himself, however it is expected that the subject agents possess deep understanding of the issue within the legal and factual background.

He is assisted by the sub-agents and several deputy agents and team of advocates who extends him technical or other support with relevant material as subject specialists.

There can be more than one agent as well. The ICJ provision says, 'an agent plays the same role, and has the same rights and obligations, as a solicitor or *avoué* with respect to a national court.'

2.5.6. Procedure of ICJ

The statute of ICJ highlights the following points in procedure[18] for ICJ:

1. The entire proceeding of the ICJ is conducted in only two languages i.e. French and English language.
2. The proceeding of the court has to notify by the Registrar of the ICJ.
3. The submission of oral evidence and discussion over it pursued through open court hearing.
4. The deliberation of judgment is pursued through camera and while the judgment is declared through public sitting.

[18] For details, see, Statutes of International Court of Justice, treaties.un.org/doc/Publication /CTC/uncharter.pdf (accessed July 15, 2011).

5. There is no court of Appeal however petition can be filed for revision of case on ground of availability of fresh evidence or on point of seeking further explanation with respect to certain part of judgment which is being interpreted in contentious manner by both disputant parties.
6. The provision of ICJ says, after the oral proceedings the Court deliberates in camera and then delivers its judgment at a public sitting. The judgment is final, binding on the parties to a case and without appeal (at most it may be subject to interpretation or revision). Any judge wishing to do so may append an opinion to the judgment.
7. The compliance of court decision is expected to be taken by both the parties as member of United Nations and secondly through the force of provisions of the agreement which is filed before the start of proceeding with respect to unconditional acceptance of court jurisdiction on the said contentious issues.
8. But if a state lodges complaint of violation and or non-compliance with the court order, the said complainant can move the case as per the provision of UN charter for appropriate action to Security Council which is empowered to take any measures including coercive one which include from Economic Boycott to Military Action as well.
9. If the court thinks that other party is not co-operating and is reluctant to furnish proper support or challenging the jurisdiction of the court with respect to its said disputes, the ICJ is empowered to take action unilaterally provided it has reason to believe that it has got proper jurisdiction over the disputed matter.
10. The court is also empowered to create *ad hoc* chamber of Judges for assistance or refer the case for its adjudication through proper hearing on the request of parties special Chamber of Judges can be formed for adjudication purpose.
11. The scope of Jurisdiction is determined by as per the provision of ICJ which states briefly, The sources of law that the Court must apply are: international treaties and conventions in force; international custom; the general principles of law; and judicial decisions and the teachings of the most highly qualified publicists. Moreover, if the parties agree, the Court can decide a case *ex aequo et bono*, i.e., without limiting itself to existing rules of international law.

2.5.7. Secretary General Trust Fund

It has been established in 1989 for extending financial assistance to all countries under special circumstance where the jurisdiction of the court is unanimous and admissibility of case is not disputed by any party. This fund provides resources from its own account to such countries for seeking solution through legal course in the greater interest of Peace.

2.5.8. Submission of Annual Report

The Court is an attached department of United Nations and its administrative and financial functions are supervised and monitored through the submission of Annual Report which contains all events and progress made with respect to recommendations made by UN offices or about legal decisions or other administrative and budgetary matters confronted by the ICJ.

The basic documents of the court the Manual says, "Every year the Court submits a report on its activities to the United Nations General Assembly. The Report covers the period from 1 August of one year to 31 July of the next. It generally includes an introductory summary and information relating to the organization, jurisdiction and judicial work of the Court, visits, events and lectures, the Court's publications and documents, and administrative and budgetary issues."[19]

2.5.9. The Office of Registrar and Registry

The office of Registry is both administrative as well judicial and diplomatic organ of the CIJ, has to extend its secretariat service to Court which act as commission for international body. It has various branches from its budgeting wing to administrative and legal and human resource wings to deal the various functions of courts. All important functionaries have to take the oath of loyalty to the court.

The registry has to perform the supporting function to facilitate the work of ICJ which includes maintenance and furnishing legal references and records, their availability to judges of the court , furnishing assistance in linguistic matter and administrative functions include budgetary matter, appointments and recruitments etc .the manual of the ICJ provides for the following offices for court.

The Registry consists of three Departments (Legal Matters; Linguistic Matters; Information), a number of technical Divisions (Personnel/Administration; Finance;

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[19] Ibid.

Publications; Library; IT; Archives, Indexing and Distribution; Shorthand, Typewriting and Reproduction; General Assistance) and the secretaries to Members of the Court. It currently comprises some 100 officials, either permanent or holding fixed-term contracts, appointed by the Court or the Registrar. Salary packages and allowances are determined according to UN Pay Scale System.

2.5.9.1. The Registrar Deputy Registrar

The post of registrar is statutory and is prescribed with sufficient legal and administrative qualifications .The Registrar is assisted by a deputy registrar who are assigned with specialized functions. The functions of Registrar provides supporting services to judges in all matter in legal and diplomatic field and also have statutory authority to issue all judgments and advisory opinions as per the direction of court under his signature .The manual describes following break up of functions.

The Court appoints its Registrar from among candidates proposed by Members of the Court. He is elected for a term of seven years and may be re-elected. The Court also appoints a Deputy-Registrar to assist him, under the same conditions and in the same way as the Registrar.

2.5.9.2. General Functions of Registrar

The general functions of the Registrar are defined by the Rules of Court (Art. 26) and the Instructions for the Registry (Art. I). He is the regular channel of communications to and from the Court and in particular effects all communications, notifications and transmissions of documents required by the Statute or by the Rules; he keeps a General List of all cases, entered and numbered in the order in which they are received in the Registry; he attends, in person or through his deputy, meetings of the Court, and of the Chambers, and is responsible for the preparation of minutes of such meetings; he makes arrangements for such provision or verification of translations and interpretation in the Court's official languages (English and French) as the Court may require; he signs all judgments, advisory opinions and orders of the Court as well as the minutes; he is responsible for the administration of the Registry, including the accounts and financial administration; he assists in maintaining the Court's external relations, both with international organizations and States and in the field of information and publications; finally, he has custody of the seals and stamps of the Court, of the archives of the Court and of such other archives as may be entrusted to the Court (including the archives of the Nuremberg Tribunal).

The Deputy-Registrar assists the Registrar and acts as Registrar in the latter's absence. He has recently been entrusted with wider administrative responsibilities, including direct supervision of the Archives and other I.T facilities.

2.6. THE JURISDICTIONAL SCOPE OF ICJ

The Jurisdiction of the court is mainly determined by the Article 36 of ICJ which says in its first part of Article 36 of the ICJ.

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 article provides jurisdiction to ICJ on the basis of concurrence of approval granted by member countries to UN charter and the treatises and conventions which are in force and accept through clear provision the role of ICJ in case of any disputes. This article has offered a wide scope of Jurisdiction to ICJ with respect to its right of exercising authority. In certain cases the ICJ has created its own jurisdiction on ground of this provision despite the denial of the same by opposing party. For example, the and Diplomatic Consular staff in Tehran case (the Iran case) the court founded jurisdiction on article 1 of Optional Protocols the compulsory settlement of disputes, which accompany both Vienna Convention on Diplomatic Relations 1961 and Vienna Convention on Consular Relations1963. Common article of 1 of the Protocol provides that disputes arising out of the interpretation or application of the Conventions lie within the compulsory jurisdiction of the International Court of Justice.[20]

Similarly the ICJ also founded jurisdiction in Nicaragua v. USA case inter alia upon a treaty provision article,24(2) of the US Nicaragua Treaty of Friendship, Commerce and Navigation providing for the admission of disputes for interpretation or application of treaty to the ICJ unless the parties agree to settlement by some other means.[21]

Similarly in another case Concerning Border and Transborder Armed Action (Nicaragua versus Honduras), the ICJ has declared that the jurisdiction of ICJ is a question of law which can be decided through the intention of parties expressed through the written instruments. In this case the court relied upon the Pact of Bogota 1948 (article 31) which declared, "in conformity with article 36 (2) of the ICJ

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20 ICJ Report 1980, pp. 3:61-111ILR, pp. 530, 5501.

21 Ibid.pp120-124.

....recognize, in relation to any other American state ,the jurisdiction of the court as compulsory as *Ipso facto*; in all disputes of juridical nature that arise among them." However the objection raised by Honduras regarding the Article 31 of the Bogota Pact that it does not carry the independent force of action and must be moved after all the conciliation efforts has been exhausted under the said statute and then parties concerned are required to approach ICJ for seeking jurisdiction was turned down by ICJ. It declared that the Jurisdiction of court can not be challenged on this ground due to over-riding authority available to it through its statute.[22]

Where the treaty provides for reference of matter to Permanent Court of Justice or to any tribunal set up by League of Nations article 37 of the statute, such matter shall be referred to ICJ provided the parties concerned are parties to the Statutes. This is basically bridging provision that provides mechanism for continuity between the old PCIJ and ICJ. Under Article 36 (2) of the statute, the ICJ is fully competent to decides and determine its jurisdiction in event of its dispute.[23]

2.6.1. **Article 36 (2)**

This is Optional Clause that extends jurisdiction of ICJ to any disputes which says, "the states parties to the present statute may at any time declare that they recognize as compulsory ipso facto and without special arrangement, in relation to any other state accepting the same obligations, the jurisdiction of the Court in all legal disputes concerning;

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

This Article provides space for extension in jurisdiction of ICJ however, the joint approval through agreement by both the parties is necessary for assuming legal authority over the cases. The court although can assume authority on its own but it is made conditional by the provision of 36 (2) which must receive approval from both the parties to dispute and state clearly their willingness to comply with the outcome of

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22 ICJ report, 1984, pp. 392, 426-29; 76ILR, pp. 104.

23 The Ambatielos (Preliminary objections) ICJ Reports, 1952, p. 28; 19ILR, p. 416.

decision. In other words, the doctrine of lowest common denominator operates, since the acceptance, by means of optional clauses by one state of jurisdiction of the Court of any other state accepting the same jurisdiction.[24]

Practically it has created a situation in which ICJ can experience a lot of legal and statutory difficulties in its legal pursuit of interpretation through the submission of condition, reservation or objection expressed in the declaration of other party. This situation has appeared in case of Norwegian loan Case in which France was party to it. The ICJ says, "Since two unilateral declarations are involved, such jurisdiction is conferred upon the country to extent the declaration coincides in conferring it. A comparison between the two declaration shows that French declaration accepts of the Jurisdiction of the court within the narrower limits than the Norwegian declaration; consequently the will of the parties which is the basis of court jurisdiction, exists within the narrower limits indicated by the French reservation.[25]

Similarly the Norway using her right of reply expressed her reservation over the French declaration for defeating the jurisdiction of court.

Bridging clauses we discussed above are meant to maintain continuity between PCIJ and ICJ in their legal working and are applicable to signatories' of parties but in the Aerial Incident case (between Israel and Bulgaria), the court refused to grant jurisdiction to Bulgaria on the plea that it became signatory much later to the statute of ICJ likewise joined UN also much later.[26]

Likewise there is another interesting case with respect to Nicaragua that it did declare in 1929 it would accept the compulsory jurisdiction of the Permanent Court of International Justice but never ratified it. This provided justification to contesting party US for raising objection against the legitimacy of claim with respect to her declaration as applicable through article 36(5) as the concerned country could not be deemed to be signatory to statute of PCIJ. The ICJ too ratified this claim by giving decision, "Nicaraguan declaration, unconditional and unlimited as to the time has certain potential effect and that phrase in article 36(5) still in force could not be interpreted as to cover declarations which had potential effect but not binding effect." Ratification of the Statutes of the ICJ in 1945 by Nicaragua had the effect, argued the court of transforming this potential commitment into an effective one. Since this was

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24 ICJ Reports, 1959 p. 127:27. ILR, p. 557.
25 Ibid, p. 23:24. ILR, p.786.
26 ICJ Reports, 1959, p. 128; 30ILR .p.557.

so, Nicaragua could rely on the US Declaration of 1946 accepting the court compulsory jurisdiction as the necessary reciprocal element.

The difference between International law and domestic law has been much debated through decisions given by ICJ and it has been emphasized in response to reservations expressed by many courts to the application of Article 36(6) for limiting the jurisdiction of court with respect to matter of vital interest and concerns. Domestic jurisdiction is one of the very important matters which have drawn a lot of debate because of its controversial interpretation the court had received from many litigating countries.

Henkin, the legal expert in international law in his report, 'The Connelly Reservation revisited 65 AJIL 1947, 374' One condition made by a number of states including US pertains to domestic jurisdiction which is totally immunes from the jurisdiction of ICJ. The validity of this type of reservation (known as Connolly Amendment from American initiator of this legislation) has been questioned by many on ground of contradiction it extends to article 36(6) with respect to scope of ICJ jurisdiction which is basically delimiting in nature.

2.6.2. *Ratione Temporis*

The international law as defined earlier provides mechanism for determining the boundaries of International law within which the international institutions operate. The sovereign status of country is defined by international law and domestic law which in certain cases do not reconcile with each other resulting in dispute or legal controversies ultimately needs intervention of ICJ for purpose of settlement.

The limitation period with respect to jurisdiction of ICJ upon the cases is derived from the Optional Clauses of the statutes which are obligatory and comprehensive but the approval to acceptance of ICJ jurisdiction by both the parties have to be available for pursuing further action as part of given procedure.

The reservation is expressed sometime by one party on ground of time limitations (*Ratione Temporis*) whose expiry date would automatically quash the jurisdiction of ICJ, if this action is supported by the provisions of treaty or agreement. British government for example, has declared that the cases of dispute falling between Septembers 1939 to October1945 would not be taken up by ICJ on ground of expiry of their terms. This expiry or limitation period is conveyed to Secretary General of

United Nations for his action and further processing as per the requirement of Statutes.[27]

The question with respect to modification of Jurisdiction on ground of expiry of time period is valid and hold the ground if this case is submitted before ICJ and constitutes a legal question for debate. The legal stand of ICJ is very clear and held it positively on ground of strength of statutes but there are certain examples in which other objected and withdrew from it on ground of expiry. Now the options left before the court are limited either it should go ahead by defining the jurisdiction once again in the light of statute or seeks withdrawal of cases by the parties on ground of lack of jurisdiction. United State relying on the Declaration of 1946 and its provisions, took the plea against Nicaragua for filing reference which in her words is barred by time and hence does not offer any ground for seeking jurisdiction. They referred to notice of termination served on the party through United Nations for seeking modification in Original Draft of 1946.

The ICJ did not agree with this proposal and declared to pursue matter according to original draft as invoked by Nicaragua. The provision in the original undertaking was very explicit and binds both parties through their clauses with jurisdiction of ICJ in case of any dispute.[28]

But so far success to achieve obligatory and comprehensive jurisdiction could not be achieved by ICJ due to contrasting interpretation of Optional Clauses.

2.6.3. **Propriety and Legal Interest**

The rules of International law as applied as per Article 38 are interpreted in the light of customs, agreements, conventions and general principles of law. The ICJ jurisdiction however is also applicable to law of Equity and Propriety if the matter under dispute carries strong reason for legal action and court deems it fit for solution through the application of Equity. However the case must be legal in nature whose decision causes practical impacts with its legal consequence on rights and obligation of the party. The court decision says, "the court may decide a case *ex aequo et bono ie*, on the justice and equity untrammeled by technical and legal rules. In the northern Cameroon case, the court declared, "it may pronounce judgment only in connection with concrete cases where there exists, at the time of adjudication, an actual

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27 Rosenne, *Law and Practice*, op. cit. vol. 1, 399-400.

28 85 Columbia Law Review, 1985, p. 1445.

controversy involving a conflict of legal interests between parties. The court's judgment must have some practical consequences in the sense that it can affect existing legal rights or obligations of the parties, thus removing uncertainty from their legal relations."[29]

Hence no jurisdiction of the court can be invoked on political ground or any other reason which does not bring about legal bearings through change of legal obligations.

2.6.4. Interim Measures

Under article 41 of the statute of ICJ, the stay order can be issued for maintaining status quo if sufficient legal ground is provided by the by applicant with respect to its rights involved in the dispute. The purpose of Article 41 is to provide special power for ensuring protection of rights of the applicants as well the integrity of the proceeding. It is the duty of the applicant to furnish with evidence its case that looks prima facie reasonable enough for taking action for interim measure.[30]

The purpose of exercising the power to "protect the rights which are subject of dispute in judicial proceeding and thus the measure must be such that once those dispute over those rights have been resolved by the court judgment on merits, they would no longer be required."[31] Such interim measures were granted by Fisheries Jurisdiction case, to protect British fishing rights in Icelandic –Claimed water and the nuclear test case.[32] These interim measures are only advisory in nature and are not considered as part of any judgment on merits. In Fisheries Jurisdiction it has been held that, "irreparable prejudices should not be caused to rights which are subject of dispute in judicial proceeding".[33]

Unfortunately the record of such interim orders is very low and only a few of the interim orders issued were received with compliance.

2.6.5. Enforcement

Article 60 of ICJ provides the status of judgment order passed by it as final and non-appealable unless some new facts are brought into the light through special submission before court which carries some legal weight in them. But the case record of compliance is highly unsatisfactorily. The aggrieved party can seek intervention of

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29 ICJ Reports, 1963 p.15; 35ILR, p. 243.
30 ICJ Reports, 1980, pp. Iran case.
31 Arbitral Award of 31st July 1989 case, ICJ Report 1996, pp. 64, 69.
32 ICJ Report 1973, p.99; 57 ILR.
33 ICJ Reports 1972, pp. 12, 16, 30, 65; ILR p. 155.

Security Council under article 94 of UN Charter which provides statutory compliance of all judgment orders of ICJ by all member of UNO under the said Article.

The Security under the said article can make special recommendations or issue binding order for their implementation in case of request made by any aggrieved party whose rights are being infringed upon due to non-compliance. The Article 59 of ICJ is applicable to those cases in which the special judgment are given with their status defined through their obligatory nature and normally considered as providing means for replacement of old provisions of international law.

As revealed earlier, the compliance record of ICJ judgments is very low. The Albania in Corfu case did not show any compliance, similarly Iceland in Fisheries judgment case. But this non-compliance does not curtail the importance of these judgments whose impacts upon diplomatic and political sphere is bound to occur.[34]

2.6.6. Application for Interpretation of Judgment

Under article 60 of statute of ICJ, any party which is contestant in the case enjoys the right of seeking clarification or interpretation of judgment order with respect to any part of it or to the contents obligatory in nature but its scope should not go beyond those points on which judgment is still awaited.

2.6.7. Application of Revision of judgment

Article 61 of the ICJ provides scope for revision and amendments of judgments issued by court provided new facts are bought into the light of court with evidence and the court is made to believe that such facts were discovered later after the issuance of judgment not due to some negligence or deliberate act of omission but on account of some new and sudden development. In other words court would like establish first *bona-fide* of the party intentions before taking action.

2.6.8. Non–Appearance of Parties

The difficulty for the court arises with respect to those cases in which some party or parties decides to boycott or show deliberate absence from its proceeding. The important cases such as Continental Shelf case, or Aegean Sea case, or Nuclear Test case or Iran–US hostage case, have to dispose off by ICJ without participation of defendant parties.[35]

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34 ICJ Reports, 1983, p.3.55; ILR, p. 228.

35 ICJ Report 1985, 1974, p.3:55ILR, p. 238.

Under these circumstances the provision 53 of International court of Justice does provide scope and power to adjudicate on disputed issues by seeking the representation of the absent party through its own arrangement but it does bring an additional responsibility upon the court which has establish the balance by following the thin line. The court act of pleading on behalf of absent party may cause withdrawal of appellant from the court as it has happened in case of Nicaragua case in which United States of America (USA) withdrew.[36]

In such cases the following conditions under this article must be fulfilled.

1. The jurisdiction of the court must be fully established on legal ground with respect to the dispute involved.
2. The legal ground for the claim of restitution of rights must be fully based on law and facts.
3. The legal consequence of issue involved must be fully known to all parties.

2.6.9. Third Party Intervention

Under article 62 of ICJ, third party has legal reason to believe that its national interest would be affected by the action of the court, it may therefore submit request for seeking intervention as Third Party. This intervention has to fulfill certain legal conditions which include submission of definite evidence with respect to its legal rights affected by supposed actions and establishment of *bona-fide* that such action of intervention does not meant to filibuster the proceeding in favor one or second party. Hence the threshold of intervention is very high.

The request of intervention and its acceptance is made through the list issued from the office of Registrar after the approval is given by the judges of ICJ. There are a number of cases in which request was turned down such as, Malta sought to intervene in Libya–Tunisia Continental Shelf Case but was rejected on ground that Malta has no clear case and can not prove legally how its rights are affected.[37]

However there are number of cases in recent history of ICJ which shows increasing number of request for intervention filed under article 62 of ICJ were accepted such as Nicaragua was permitted to intervene in case concerning the land, Island, Maritime Fisheries disputes (Elsavador V Hondurous).[38]

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36 ICJ Report 1995.p, 34-35 ILR, p. 369.

37 ICJ Report, 1982, p. 18; 67 ILR, p. 4.

38 ICJ Report, 1985, p.13; 17 ILR, p.9.

The court held that Nicaragua stand under article 62 is quite valid and makes a strong case with respect to its legal rights to be affected as a result of court judgment.
The scope admittance with respect to intervention rights is quite circumscribed and has to be carefully on legal ground alone. The opposition of other parties can not prejudice the power of court available to ICJ under article 62 and there are many cases in which rights of intervention was granted despite objection of appellant or defendant parties.

2.6.10. The Advisory Jurisdiction of the International Court of Justice

Article 65 of ICJ provides extensive power for issuance of Advisory Opinion at the request of United Nations or Security Council or General Assembly or any other organization or department attached with it. The advisory opinion is meant to seek clarification or interpretation of certain statute or legal position with position take on any international events. Article 65 says, "the court may give an Advisory Opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request", while the article 96 further widens the scope of this jurisdiction by giving power to organs of United Nations like Security Council or General Assembly on question of seeking legal opinion in form of Advisory Opinion from ICJ. It also all those agencies which were established by United Nations through its legal order and are financially run with the resources provided through UN budget.
In case law, the Eastern Carelia case[39], the court could not exercise itself fully due to objection raised by one party against the jurisdiction of the court on ground of refusal to grant consent with respect to its dispute which ultimately prevented court from giving any Advisory Opinion on the issue. However, gradually case LAW developed to extend the purview of jurisdiction of the ICJ on ground of inherent authority lay within the statute that makes it answerable to United Nations. In the International Peace Treatise Case for example, the ICJ declared that core issue in not the administering power of Spanish government over the Sahara desert and rights she enjoyed as a colonial power rather the rights of Morocco and Mauritania at the time of Colonization. The ICJ declared it is basically assisting UN general Assembly for in its efforts of decolonizing the territories.[40]

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39 PCIJ, Series B, no.5, 1923: ILR, p.395.
40 Ibid., p.27; 59 ILR, p.44.

Apart from that the ICJ has delivered a number of Advisory opinions which have become as precedents in international law such as Reparation case, the Admission case, Certain Expenses Cases.[41]

2.7. CONCLUSION

This chapter provides historical background to cover the brief history of International legal systems that emerged during late eighteenth and nineteenth centuries. The legal doctrines of international legal systems have developed some foundations to facilitate relationship among various European states with their colonies and also within their own continent.

Movement of ships and use of sea routes and shipping rights came under discussion and new understanding was developed through the development of legal institutional frameworks. Similarly in domain of trade and commerce new global mechanism was developed for the facilitation of mutual relationship among European countries.

War and mutual conflict became quite frequent and legal minds focused its attention on some kind of mechanism that could alleviate human sufferings among non-combatants and combatants segments of society so Red Cross as a humanitarian organization was emerged to regulate humanitarian laws among warring nations. Brief description has been given in this chapter.

Some remarks of leading minds have been given to reveal hopes and expectations attached with this organization. Role of UNO that it plays through General Assembly and Security Council for implementing the legal agenda of ICJ have also been mentioned with some examples for giving insight into the legal system of global society. As a prelude to this, the next chapter is about failure of international legal system and tries to elaborate some remedies for its betterment & effectiveness.

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[41] ICJ Reports 1962, p.151; 34 ILR, p. 281.

CHAPTER 3

FAILURE OF INTERNATIONAL LEGAL SYSTEM AND ITS REMEDIES

3.1. INTRODUCTION

The previous chapter is discussing about the establishment of international legal system through historical development and current international law perspective. Where as this chapter of the study deals with its failure and tries to elaborate some recommendations to enhance its effectiveness.

The ICJ represents highest legal system in the world which has been invested with legal jurisdiction to carry out justice and determines legal solutions among disputant parties through legal and transparent mannerist statutes promised a wide scope of jurisdiction but practically it has failed in its designated mission to uphold its justice and peace in the world due to several legal constraints placed upon it. Biggest hurdle come from the super sovereign status of Security Council resolutions which is dominated by western countries and normally veto the decision of ICJ if it is in conflict with their interest such as the ICJ order of demolition of Separating Wall in Palestine so far could not be materialized due to opposition of western countries. This is big challenge to international legal system that defines the sovereignty of nations on hierarchical basis not on equality basis.

In International Politics the concept of National Sovereignty is never treated with equality of status as several factors like geographical size, military and economic strength and its population density are considered as vital for determination of international status. This concept of hierarchical sovereignty versus Numeric Equality has give rise to strong paradoxes in the Inter legal system which was exhibited several times through its decisions several times. Reference has been made to such cases as well. The statutes also suffers a lot of disconnects between them that handicapped the

judicial authority of ICJ and hinder it from passing judgments on several legal issues. Such issues have been dealt in detail here through different chapter discussions. The Jurisdictional difficulties is a major cause of ICJ that make it ineffective in the discharge of its statutory duties and secondly the lack of proper impartial mechanism of enforceability of its decisions which is hindering the natural growth of international legal system. These paradoxes have been discussed and placed into various chapters along with some of their legal solutions.

3.2. The Legal Impediments in International Legal System and its Impacts upon ICJ

International Courts also create new law, the International Court of Justice is particularly important in this respect. This Court as any other international court or tribunal is by no means the mechanical recorder of what law is supposed to be. Many of its decisions have introduced innovations in international law, which subsequently have obtained general acceptance. But it seems also true that 'dispensing justice and declaring the law' is its primary duty by making use of jurisdiction within its wider scope where it is required.

Pakistani case of complaint against India in which she has not only transgressed its international boundaries but also its border guards entered Pakistani territories to hit Pakistani naval plane which was flying on training Mission within its own national territories causing its crash along with the death of all its inmates within plane. Their number is about to be sixteen in number including the pilots and navigators.

The matter went up to the ICJ but the no decision was given to fix the responsibilities despite the submission of all documents. It was a kind of failure of the ICJ and its inability to deliver justice in cases where the evidence of interference and aerial attack on Pakistani are available on global scale through the satellites system which monitors the movement of every plane in sky. It was an act of political adjustment sought by ICJ for having safe relationship with India as well as with major powers that held close friendly relationship with accuse country i.e. India.

3.3. Problems of International Law

"In 1825, Chief Justice Marshall of the Supreme Court of the United States, in the antelope, asserted that "No principle of general law is more universally acknowledged than the perfect equality of nations." The Charter of the United Nations Organization,

120 years later, stated that it was based "on the principle of the sovereign equality of all its Members."[1]

National Sovereignty is a fictionalized reality of Political Science which grants equal status to all those units of nationhood which meets the essential demands of independent state by having its areas, government, its constitution and strong government for guarding its right of Self-determinism. Practically, on the contrary, the economic strength and wealth, its technology, its areas, and its powerful military and its governance structure are very important and key factors in the determination of status of country and cannot be squared up with the fictionalized status of equality. This is biggest handicap or limitation with the international law which seeks to treat every unit of nationhood on basis of equality of law and fairness but prevented by the size, strength and clout of country but submit itself before the institutionalized dictates of big power. There is a big question before jurists whether the equality of status should be observed in all matter or it should be excluded from human rights or matter of *jus cogens*.

The text says, "At a normative level, scholars puzzle over whether the doctrine applies in all contexts, or whether it is and should be constrained by subject matter, excluding it from application when the issue is protection of "fundamental human rights," or some other notion of jus cogens. And cutting across both is whether the concept is applicable only in the context of the horizontal relationships of states to each other, or just as well to vertical relations between states and international institutions."[2]

3.3.1. Sovereignty Under International Law

The Concept of equal sovereignty proves only legal fiction when examined in the light of legal events took place since the emergence of Westphalia State. Napoleonic war precipitated in the creation of New World Order but found its legitimacy through the legal order of supremacy by big power. The concept of Equal Sovereignty has been treated by leading jurist Simpson in his book "Great Power and Outlaw States"[3] in detailed wherein he says, that legal sovereignty has hierarchical existence which defines itself through various factors of physical strength and political clouts.

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1 Julius Stone, *Legal System and Lawyers Reasoning* (Sydney: Cambridge Printing Press, 1968), 188-194.

2 Ibid.

3 Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* (Princeton, N.J.: Princeton University Press, 1999), 53.

Sovereign Equality, legislative equality, and existential equality form part of juridical Sovereignty. According to him the sovereign equality and hierarchy must co-exit with each other for creation of stable world order. The text as quoted above says "Sovereign equality," Simpson contends, should be disaggregated into three distinguishable concepts: "formal equality," "legislative equality," and "existential equality."

While formal equality has always operated as a background norm of international relations – at least since the Treaty of Westphalia – it has never fully represented international society's conception of the juridical basis for formal relations among states. To the contrary, it has operated in tandem with, and has been qualified by, its coexistence with two other conceptions of "equality": the existential and the legislative.

Embedded in these two latter conceptions is the hierarchical ordering of international society. Integral to any conception of existential equality[4] is what Simpson terms "anti-pluralism," while legislative equality is conditioned by "legalized hegemony."Hence this formulates the basis of the world order in which five permanent members were given unchecked power vested through Veto Power Status in Security Council.

3.3.2. **Equality under International Law**

Similarly the concept of equality of legislation has been contested on the basis of ground reality of size and physical strength and economic and political clouts and has been questioned that equality if allowed to observe would ultimately bring about anarchy in the world. "As a normative proposition, legislative equality embodies the notion that international law confers equal recognition and dignity upon the acts of states in the international arena. Simpson distinguishes between two possible statements of this norm. In its weak form, it recognizes that states are bound by only those legal norms to which they have assented."[5]

"In a stronger form, it would "mandate an equally weighted vote and equal representation in the decision-making processes within international bodies, and an equal role in the formation and application of customary law and treaty law. More

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4 Kofi Annan, "Courage to Fulfill Our Responsibilities." *The Economist*, (December 4, 2004), 48.

5 Ibid., 47.

particularly, a strong commitment to legislative equality would deprive the Great Powers of any special role within the international legal order".[6]

Concept of equality of legislative power in International law never existed and nor ever it would be .In fact he gives reference to several historical events in which the big Power brought about new legal order by replacing the old one through the imposition of their terms and conceptual framework. Denial of status of big power would bring about insecurity and constant state of war in the world.

Simpson has little difficulty demonstrating that the stronger form of legislative equality has never been recognized by international law, certainly not since 1815. Beginning with the Congress of Vienna, and running through Versailles and San Francisco, he conclusively shows how the diplomats who met to reconstruct their world orders in each case privileged the roles that great powers were to play in their refashioned worlds. The unequal legal position given to the five Permanent Members of the Security Council in the post-World War II International legal order, far from being aberrational, was consonant with prior practices.

Nor, Simpson exhaustively demonstrates, were these decisions merely expedient or secretively imposed. Rather, they were the clear-eyed products of extended discussions and debates among diplomats and jurists as well as state practice at the various conferences and in the intervening years. The norm of legislative equality, Simpson thus persuasively argues, generates within the international legal order, an equally powerful antithesis, that of legalized hegemony. International law has not been able to (and more controversially cannot) embody the one without the other."[7]

The division of the human race on artificial basis of features of physique to provide social and political distinction to particular pedigree has actually being protected by the legal order based upon the legal hegemony. The derogatory labels of terrorists and of pariah's state and Rogue state has been invented through legalism paradigm for to oust the some nations from the privileged Club of Nations which are united through the similar cultural and social conditions.

Existential equality, Simpson asserts, "Arises out of recognition by the international community that an entity is entitled to sovereign statehood and that equality is the immediate product of fully recognized sovereignty." Its corollary is the principle of

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[6] Ibid., 48.

[7] Case Concerning Legality of Use of Force (SERBIA AND MONTENEGRO v. BELGIUM), International Court of Justice (2004), Judgment of Dec. 15, 2004.

nonintervention by others in the internal affairs of the state, including its choice of government.[8]

This norm, which probably was at the core of Justice Marshall's statement in **the antelope,**[9] has come under sustained attack in recent years. Indeed, it has become commonplace to treat the claim, when interposed as a limitation on crusades for "democracy" and for "international human rights," as a canard. As with the treatment of legislative equality, Simpson sets out to demonstrate that our contemporary debunking of the primacy of existential equality – what he terms anti-pluralism – is by no means a singularly postmodern phenomenon.

Again relying on contemporaneous historical sources, he demonstrates that international law has always distinguished between the right of those within the family to equal treatment and respect, and the absence of such rights to outsider societies. And cultural homogeneity has always factored significantly in deciding which states belong and which do not. Contemporary classifications between so-called "pariah" or "rogue" states, on the one hand, and "liberal democratic" states on the other, and the prescriptive consequences that are to be attached to these distinctions, he cogently shows, have a rich pedigree. Anti-pluralism's claim for a distinctive legal position for "liberal democracies" is in fact heir to a familiar nomenclature: that of the "Christian," or "European," or "civilized" family of states and nations.

3.3.3. Bush Doctrine and International Law

George Bush has used the term of Just war[10] to justify his acts of aggression against poor and defenseless nation by mixing the principle of Justice with its strategic objectives of global domination. He said, "What is really being addressed is the moral justifiability of the use of force? Also it is not really a theory of just war.

It provides more of a moral calculus for the determination of the moral justifiability of force than a theory of war. "The gravest danger to freedom lies at the perilous crossroads of Radicalism and technology. When the spread of chemical and biological and nuclear weapons, along with ballistic missile technology -- when that occurs, even weak states and small groups could attain a catastrophic Power to strike great

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8 Ibid., 53.

9 THE ANTELOPE Case, 23 U.S. 66 (1825).

10 George W Bush, *Remarks by the President in Photo Opportunity with the National Security Team* (The White House, September 12, 2001).

nations. Our enemies have declared this very Intention, and have been caught seeking these terrible weapons. They want the capability to blackmail us, or to harm us, or to harm our friends".[11] This is part of speech which unveils the hidden agenda by targeting those nations.

President Bush Doctrine of war on global terrorism was morally driven apparently; in fact its evidence were built through self-fabricated events for providing moral basis to the world community for reasserting its hegemony of global domination. A just war concept was brought into discussion through world media and ground was prepared for the invasion of Afghanistan without any proof whether it was involved or not.

In fact Bush Doctrine[12] of War on Global Terrorism has damaged the Moral credibility of Just War and hence damaged the moral Credibility of USA itself. Even UN Security itself could not verify the contents of allegations of US and accepted her plea of launching war against global terrorism without any resistance. It only shows the political compromise among the big nations of the world over agenda of global domination through the use of military power against the smaller nations whose fainted voice of protest do not carry any weight in this Uni-Polar World.

After Afghanistan, Iraq became second target of victimization of American hegemonic designs despite refusal of any Mandate by United Nations Security Council for the military invasion of Iraq.

The so called American War on Terrorism has actually eroded the just and legal basis of international order and also the integrity of those international institutions which are responsible for maintaining the global security system with agreed principles of sovereign equality among the nations. "In a number of ways the Bush Doctrine as a response to international terrorism is, tragically, undermining the international moral and legal order, thereby undermining the very order necessary for sustainable security against terrorism".[13] The independent world press has condemned the George Bush Doctrine in the following manner.

3.4. THE NEW WORLD ECONOMIC AND LEGAL ORDER

It is governed by corporate culture through global commercial and economic entities which are like act Non-State Actors wield enormous political and social influence on

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11 Ibid.

12 The Bush Doctrine and Just War Theory 133, *OJPCR: The Online Journal of Peace and Conflict Resolution* 6.1 (Fall: 2004) 121-135.

13 Ibid.

the developing countries for manipulating their policies in their selfish monetary and commercial interest. They manipulate the price structure of commodities and opportunities of investment through their several coercive regulatory frameworks that enjoys the protection of leading financial and commercial organizations. These multi-national houses are influencing the international legal systems that have promoted social and economic inequity and social injustices through their instrumental mechanisms like W.T.O and Intellectual property rights etc.

The sovereignty of the most the developing countries has many threats due to bulging influence and control of these Multi-nationals and their economic resources have fallen hostage to these Commercial Giants. The independence status of these countries has been liquidated and their governments are losing legitimacy of rule due to fast growing culture of anarchy and economic deprivations.[14] Joblessness, environmental degradations, lack of community interest and ruthless exploitation of poor masses has engendered a new class of broke societies with poor governance structure. Such collapsing economies present serious threat to international security and stability system. It is argued that the international regulatory and legal system needs complete renewal and amendments for evolution of just and equitable economic order.

"The increasingly important role of multinational corporations as economic and political actors on the international scene results in chances for, but especially also risks to, the promotion of community interests, also known as global public goods, such as, for example, the protection[15] of human rights" and the environment, as well as the enforcement of core labor and social standards.

On the one side, "these non-state actors, because of their potential influence on the home as well as the host countries, could in the course of their economic and political activities effectively contribute to the enforcement of the above mentioned international community interests. On the other side, however, multinational corporations also have the potential to frustrate the universal promotion and protection of the environment", as well as human and labor.[16]

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[14] See, Tietje Nowrot, 'Forming the Centre of a Transnational Economic Legal Order? Thoughts on the Current and Future Position of Non-State Actors in WTO Law', 5 *European Business Organization Law Review* (2004) 321, 334.

[15] Reinisch Irgel, 'The Participation of Non-Governmental Organizations (NGOs) in the WTO Dispute Settlement System', 1 *Non-State Actors and International Law* (2001), 127.

[16] Ibid.

The Economic discrimination, growing poverty and unjust social order that receives full legitimacy from the New Global legal system presents a great challenge to the question of human survival. Hence this question must be addressed by bringing alteration through new legal decisions[17] at least from the good office of International Court of Justice. Such concerns are being expressed by some jurists and scholars as quoted below.

"In view of this seemingly quite ambivalent potential of multinational corporations (MNCs) regarding the protection and promotion of global public goods,12 the question arises whether these non-state actors, in addition to their de facto influential position in the current international system, are also in a normative sense integrated in the international legal order, and thus under an obligation to contribute, *inter alia*, to the protection of human rights, core labor and social standards as well as the environment" or whether the multinational corporation – as has recently been reiterated – "remains 'outside the tent' in terms of international law.[18]

3.4.1. **International Legal Person**

Can multinational corporations (MNCs) be treated as international legal person due to their influence on international relations from many angles?

They possess several features of international legal person with their legitimacy drawn from the community law and legal system[19] with rights and obligations; however some amendments are required to make them answerable to the host country for their performance by bringing changes through international legal system for achieving the aims of global public goods.

"International legal personality requires some form of community acceptance through the granting by states of rights and/or obligations under international law to the entity in question. There are in general no systematic reasons why non-state entities may not participate in the international legal system as legally recognized actors, and thus no *numerous clauses* of subjects of international law exist."[20]

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[17] Clapham Jerbi, 'Categories of Corporate Complicity in Human Rights Abuses', 24 *Hastings International and Comparative Law Review* (2001) 339.

[18] Human Rights Responsibilities of Private Corporations, "*Vanderbilt Journal of Transnational Law*" (35, 2002) 801, 817.

[19] Jägers, The Legal Status of the Multinational Corporation, "International Law: A Broadening of the Traditional Doctrine"*Journal of Transnational Law and Policy* (1992) 151, 152.

[20] Ibid.

3.4.2. Accountability of International Legal Persons

Question is how we can make these MNCs as accountable entities in the light of international law .Such legal entities have within their own sphere are vested with tremendous power beyond recognition and do not meet the needs as per Normative standards of legal system. In fact legal theory has to be integrated with normative theory within the international legal system.

"As mentioned above, in the apparent absence of a sufficient degree of recognition by the international community through the imposition of international legal obligations by states on multinational corporations, it is under the currently still predominant subjects doctrine not possible to regard these influential entities as being normatively integrated in the international legal order in the sense of being legally required to contribute to the promotion of global public goods."[21] However, an approach to international legal personality that is incapable of making all of the important actors in the international system subject to the international rule of law creates intolerable gaps in the structure of the international normative and legal theory.[22]

Transnational corporations (TNCs) are the most powerful actors in the world today and to not recognize that power would be unrealistic". Rather, this traditional subject doctrine also forestalls the realization of community interests being at the centre of the current international legal order, and – as a kind of still "living" but nevertheless not worth protecting "fossil" originating from the so-called "Westphalian system"55 – thus contravenes the above mentioned evolving perception of international law as a "comprehensive blueprint of social life".

"No accumulation of power should remain unchecked under a system of 'rule of law'" – as has been rightly pointed out by Daniel Thürer – "this is a requirement dictated by the *raison du système international* as opposed to the *raison d'état* dominating the traditional world of international law".56 The severe consequences of an international legal methodology that for the implementation of its underlying normative values does not adequately take into account the sociological realities in the international system have already been quite explicitly emphasized in 1924 by James L. Brierly: emphasized in 1924 by James L. Brierly:

The normative standard of legal system is not fully entrenched in the existing international legal order. The various structural instruments available with us today do

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21 S. Anderes, 19 *Melbourne University Law Review* (1994) 893, 894.

22 Ibid.

not meet its ends of justice like this Supra –national bodies or global enterprises in from of NGOs or other Multi-Nationals known to have committed to shown a lot of deviations but could not be held accountable due to absence of safeguards in International legal system.

There is disconnecting between the doctrinal elements promoted by the instrumental structure and normative standards which is expected to be protected under Legal Moralism. Again this dichotomy can better be solved through grant of status of international legal Personality to such organization through international legal system. "To do that means that we are consenting to a divorce between the law and the ideas of justice prevailing in the society for which the law exists; and it is certain that as long as that divorce, the current predominant view concerning the pre requisites of international legal personality is neither compatible with the central aim of the current" "international legal order, nor it is reflective of the resulting necessity for international law to be in sufficient conformity with the changing realities in the international system. Rather, this traditional approach ignores to a disconcerting extent the vital connection between the above mentioned endures, it is the law which will be discredited."[23]

Same legal discrepancies have been projected many a time before ICJ through several examples but response so far however week and fainted in voice failed to become actual part of working practice of international legal system.[24] "This discrepancy between theory and practice is for example reflected in the argumentation of the International Court of Justice and an increasing number of legal scholars on the issue of whether international organizations[25] are bound by general rules of international law such as the protection of human rights. In the absence of a sufficient degree of normative recognition by the international community with regard to the imposition of respective obligations, recourse has frequently been taken to the purposes pursued by the international law"[26]

Institutions that include World Bank, IMF and W.T.O although constitute part of United Nations but are not answerable as international legal personality to any Court

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23 Bleckmann, *supra* note 41, 117; see also Kamminga, *supra* note 20, 425.

24 Thürer, *supra* note 44, at 5; Teubner, 'Societal Constitutionalism: Bretton Wood.

25 B. R. Roth, *Governmental Illegitimacy in International Law* (1999), 173.

26 Tomuschat, *supra* note 21, 575; see also Fleck, 'Humanitarian Protection Against Non-State Actors', in J. Abr. Frowein (eds), *Verhandeln für den Frieden/Negotiating for Peace –Liber Amicorum Tono Eitel* (2003) 69, 78.

of Law including ICJ. Their policies have engendered several questions with respect to public good but questioned be pursued due to normative gap within their structure. "The IMF strongly rejects any claim to be directly bound by International human rights norms. Mr. Gianviti, General Counsel to the IMF argues: 'First, at the most general level, the Fund and the Bank saw themselves (and continue to see themselves) as international organizations separate from their members, governed by their respective constitutions."[27]

Terrorist's acts committed by Non-State Actors do not constitute the responsibility of state and fall within the purview currently probably still predominant view that a terrorist act committed solely by non-state actors does not amount to an[28] "armed attack" in the sense of Article 51 UN Charter.

The legal personality of these international enterprises with their jurisdiction derived from recognized legal system entails several legal liabilities having its own repercussionary effects on global level have to be dealt with on Normative ground of international legal system. In fact this is the role which must be interpreted in terms of De-facto regime which needs global recognition and acceptance for its legitimacy. "It is necessary to take recourse to the somewhat vague construction of 'implied mandate' to determine the functions of *de facto* regimes – and thus the extent of limited personality 'opposable' to international legal obligations. However, if one is willing to accept that *de facto* regimes come into legal 'being' as a matter of fact and that they fulfill specific functions to accommodate" "the needs of the international community, consisting of the necessity to maintain some kind of structure responsibility for day-to-day order as well as the capacity of meeting the interest of the international society (other States), it appears inevitable to simultaneously acknowledge their limited international legal personality and thus their legal capacity to be correspondingly bound to international law."[29]

The individual and armed opposition group if are subjected to international law and can be held accountable, then why the incorporated bodies are spared from the law of accountability from international institutions including ICJ etc. "It would be an anomaly if it continued to be accepted that companies, unlike other non-state actors,

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[27] Ibid.

[28] Paw Shan, *National and International Law: Security versus Liberty?* (2004) 827, 848.

[29] See the judgment of the United .States Court of Appeals (Second Circuit) in *Kadic v. Karadzic; Doe I and Doe II v. Karadzic* of 13 October 1995, reprinted in: 104 *I.L.R.* (1997) 149.

should have only minimal obligations under international law. Why should individuals and armed opposition groups have fundamental international legal obligations while companies that may be much more powerful having practically none?"[30]

3.4.3. ICJ and its International Legal Precedents

International legal system is represented by ICJ whose authority or jurisdiction has always challenged by state's municipal laws as a result of which its effectiveness had suffered. Judge Hersh Lauterpacht was of the view that the "primary purpose of the International Court ... lies in its function as one of the instruments for securing peace in so far as this aim can be achieved through law' and that 'the very existence of the Court, in particular when coupled with the substantial measure of obligatory jurisdiction already conferred upon it, must tend to be a factor of importance in maintaining the rule of law.' If the ICJ was unable to contribute more towards overall peace and security, it was because, by not adhering to its compulsory jurisdiction, governments have not availed themselves of these potentialities of international justice."[31]

The United Nations has been the primary exponent of a robust ICJ. In 1974, the General Assembly expressed the desirability of having states submit to the compulsory jurisdiction of the ICJ, and of providing in treaties for the submission of future disputes to the Court. In 1992, former UN Secretary-General Boutros-Ghali described the ICJ as an 'under-used resource for the peaceful adjudication of disputes'[32] and rather quixotically recommended that 'all Member States should accept the general jurisdiction of the International Court under Article 36 of its Statute, without any reservation, before the end of the United Nations Decade of International Law in the year 2000'[33]. Most recently, at the 60th anniversary celebration of the ICJ in 2006, Secretary-General Kofi Annan made a renewed call for

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30 Ibid.

31 Hersh Lauterpacht, the Development of International Law by International Court (1959).

32 UN Res No. 3232, Review of the Role of the International Court of Justice, 12 Nov. 1974, UN Doc. A/RES/3232 (XXIX). Para, 1 state: 'The General Assembly ... (1) Recognizes the desirability that States study the possibility of accepting, with as few reservations as possible, the compulsory jurisdiction of the International Court of Justice in accordance with Article 36 of its Statute.

33 On 60th Anniversary of World Court, Secretary-General Calls on Governments to Consider Recognizing Court's CoUN Doc. No. A/47/277, Report of the Secretary-General Pursuant to the Statement adopted by the Summit Meeting of the Security Council on 31 Jan 1992 , 17 June 1992, para. 38. mpulsory Jurisdiction ', UN Doc No. SG/SM/10414, 12 Apr. 2006

'all states that have not yet done so to consider recognizing the compulsory jurisdiction of the Court'[34] .

The jurisdiction of ICJ has always been debated upon in intellectual circles with reservations shown by adherent of state laws and tendency of big power to prevail upon the jurisdiction of ICJ for using it a tool to advance their own agenda. On that ground the one scholar has gone on to declare the ICJ as legal institution which is in constant state of decline.

Among the supposed indicators of decline is the reduced usage of the Court by the 'major powers', evidenced by: (a) the withdrawal by most Security Council members from the ICJ's compulsory jurisdiction, (b) the fact that only 13 of the top 30 states (measured by current GDP) have submitted to compulsory jurisdiction, (c) 'in 1950, 60 percent of the states were subject to compulsory jurisdiction; today, this fraction has declined to 34 percent. And of these states, few have been involved in ICJ litigation', and (d) 'states have showed less and less enthusiasm for treaty-based jurisdiction From 1946 to 1965, states entered (on an annual basis) 9.7 multilateral or bilateral treaties that contained clauses that granted jurisdiction to the ICJ. This number dropped to 2.8 per year from 1966 to 1985, and to 1.3 per year from 1986 to 2004.[35]

Nature of Compulsory Jurisdiction Municipal law provides framework for implementation of its mandate through obligatory provisions but in International Legal System, so far very little scope has been provided except in extreme cases in which the desired implementation of ICJ judicial orders are given approval by Security Council which is dominated by five big powers and always pursue policies on political expediencies. This the list of cases instituted on the basis of compulsory jurisdiction.

In the docket of the Court as of Oct. 2006, there are currently 13 cases and, of these, nine were instituted through compulsory jurisdiction. These are: Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro); Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo); Armed activities on the territory of the Congo (Democratic Republic of Congo v. Uganda); Application of the Convention on the

[34] UN Doc. No. A/47/277, Report of the Secretary-General Pursuant to the Statement adopted by the Summit Meeting of the Security Council on 31 Jan 1992 , 17 June 1992, para. 38.

[35] Posner, 'The Decline of the International Court of Justice' in International Conflict Resolution (2006), page111, at 131.

Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia and Montenegro); Maritime Delimitation between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras); Territorial and Maritime Dispute (Nicaragua v. Colombia); Maritime Delimitation in the Black Sea (Romania v. Ukraine); Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua); and Pulp Mills on the River Uruguay (Argentina v. Uruguay).[36]

In 2006 Judge Shigeru Oda, as a member of ICJ, has questioned the efficacy of compulsory Jurisdiction and expressed his doubt whether it would help achieving any concrete results. He maintains such cases do not carry much genuine will on part of both parties and always lead to intense difficult situation in matter of compliance.

"I am of the view that not a great deal can be expected in terms of meaningful development of the international judiciary from such an appeal ... unless the parties in dispute in each individual case are genuinely willing to obtain a settlement from the Court. I wonder whether it is likely, or even possible, that States will one day be able to bring their disputes to the Court in a spirit of true willingness to settle them."[37]

In one of the example of Armed Activities on the Territory of the Congo (DRC v. Uganda), Judge Oda warned that 'the repeated disregard of the judgments or orders of the Court by the parties will inevitably impair the dignity of the Court and raise doubts as to the judicial role to be played by the Court in the international community'.[38]

Final judgment of ICJ that was refused by US to comply with versus Nicaragua has set up a new legal paradigm based on the factor of military and economic power marked a paradigm shift as the last in a series of instances of open defiance and non-appearance'.[39] This is very complicated development in field of international legal system that has reduced the efficacy of ICJ in the eyes of developing countries which they see increased hostility to render by virtue of compulsory jurisdiction.

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[36] For details see, w.w.w.icj-cij.org/icjwww/idocket.ht

[37] Oda, 'The Compulsory Jurisdiction of the International Court of Justice: A Myth?, 49 Int'l & Comp LQ (2000) 251, at 264.

[38] Armed Activities on the Territory of the Congo (Congo v. Uganda), Provisional Measures, 39 ILM (2000) 1100, at 1113 (Declaration of Oda J).

[39] Judge Oda's study (as with virtually all other studies of compliance with ICJ judgments) does not deal with Advisory Opinions. Compliance with ICJ Advisory Opinions is still an area in which very little scholarship currently exists: Romano,' General Editors' Preface' , in Schulte, supra note 15, at p. viii.

3.4.4. The Political System of Compliance by UN

UN has envisaged theoretical system for enforcement of ICJ decisions through its institutional provision as is provided in Article 94(1) of UN Charter. "Each member of the United Nations undertakes to comply with the decisions of the International Court in any case to which it is a party." These provisions appear in UN charter but not part of statutes of ICJ and highlight the difference between the Adjudicative and Post-Adjudicative phases in International relations.

According to Professor Rosenne, non-compliance may give rise to new political tensions, and the efficacy of the post-adjudicative phase is not determined by another judicial examination, but rather by immediate political action.[40]

Hence responsibility for ensuring complying does not lie with the ICJ but with Security Council which is main political organ for maintaining peace and stability. Article 94(2) says, "if any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, effect to it. This clearly manifests the strong link between the ICJ and the Security Council as institutions with related but decidedly different competencies in the settlement of international disputes – the ICJ is tasked with allocating rights and responsibilities and assessing competing legal claims among states party, and the Security Council is tasked, upon judgment, to give effect to that decision, should the debtor state refuse to comply.

A number of subtle points are discernible from the text: first, only 'judgments' of the ICJ are subject to Article 94 enforcement. Secondly, only the judgment creditor state has the right to seek recourse from the Security Council; this was not the case with the League of Nations and Permanent Court.

Thirdly, the Security Council appears to retain discretion both as to whether it shall act to enforce at all and, if so, what concrete measures it decides to take. Clearly, therefore, the enforcement of ICJ judgments involves quintessentially political acts by both parties and the Security Council, in which the Court itself has little involvement and over which it has no power of judgment."[41]

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[40] Saint Rosenne , The Law and Practice of the International Court 1920 – 1996 (1997), 249.

[41] Thomas Frank, one important indicator of the legitimacy of a purported international rule is its determinacy: 'textual determinacy is the ability of a text to convey a clear message, to appear

3.4.5. The concept of Compliance and Defiance

It is very important to understand the concept of compliance which indicates many things. Compliance connotes many things, but to be meaningful it should consist of acceptance of the judgment as final and reasonable performance in good faith of any binding obligation. Good faith, in turn, has been defined by the ICJ in one context as a duty 'to give effect to the Judgment of the Court 'which undoubtedly precludes superficial implementation or attempts at circumvention.[42]

Debtor conception of judgment and its compliance may differ with Creditor conception of compliance on ground of actual political realities and also on the interpretation of statutes.

Defiance, on the other hand, involves wholesale rejection of the judgment as invalid coupled with a refusal to comply. As discussed previously, the last instance of open defiance was Nicaragua. While initial verbal rejections or disapproval of particular ICJ judgments have occurred in subsequent instances, these statements are of little relevance if the debtor state subsequently acts inconformity with the decision.[43]

3.4.6. Cases of Non-Compliance in the light of Latest Precedents

These are important cases of non-compliance which reveals the weakness of legal system, the dominating control of domestic politics that precludes compliance and also the reluctance on the part of big powers to give compliance to Obligatory Jurisdiction.

3.4.6.1. Land, Island, and Maritime Frontier Dispute (El Salvador/Honduras; Nicaragua (Intervening)

Basis for Jurisdiction: With OAS assistance in the negotiations, Honduras and El - Salvador submitted the dispute, by special agreement, to a Chamber of the ICJ in 1986. The ICJ handed down final judgment in 1992, resulting in about two thirds of the disputed area (about 300 sq. km) being held to belong to Honduras and 140 sq. km

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transparent in the sense that one case see through the language of law to its essential meaning. Rules which have a readily accessible meaning and which say what they expect of those who are addressed are more likely to have a real impact on conduct': T. Franck, Fairness in International Law and Institutions (1995).

[42] Paulson, supra note 23, at 435 – 436, citing A. Chayes and A.H. Chayes, the New Sovereignty: Compliance with International Regulatory Agreements (1995), at 17 – 22.

[43] As long as the decision is properly executed, there will be no need to investigate the state's motives in order to assess the lawfulness of its behavior with Article 94(1)': ibid. citing Weckel, 'Les Suites des Decisions de la Court Internationale de Justice' Annuaire Français de Droit International (1996) 428.

given to El Salvador. As for the maritime boundary, the judgment ensured Honduran access to the Pacific while giving El Salvador two of the three disputed islands.

3.4.6.2. **Territorial Dispute (Libya/Chad)**

Jurisdictional Basis: When both states sought peace in 1989, a framework agreement on the peaceful settlement of the territorial dispute was concluded. The parties undertook to submit the dispute to the ICJ in the absence of political settlement within a period of approximately one year. That understanding, coupled with diplomatic efforts by the Organization of African Unity, led to a special agreement that the ICJ was notified of on 31 August (Libya) and 3 September 1989 (Chad).

Judgment: The ICJ handed down judgment in February 1994, awarding the entire Aouzou Strip to Chad.[44]

3.4.6.3. **Gabcíkovo-Nagymaros Project (Hungary/Slovakia)**

Jurisdictional Basis: Hungary and Slovakia (successor to Czechoslovakia) submitted the dispute to the ICJ by special agreement in 1993.

Judgment: The ICJ's 1997 judgment upheld Slovakia's contention that the 1977 treaty remained valid and binding, notwithstanding the *rebus sic stantibus* and state of necessity arguments propounded by Hungary concerning the environmental damage that would purportedly occur due to the Project. The Court refrained from making any specific orders, and imposed instead a duty on the parties to negotiate the 'modalities' of implementing the judgment in good faith, noting that the environmental consequences brought up by Hungary may affect treaty compliance.

3.4.6.4. **Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria; Equatorial Guinea Intervening)**

Jurisdictional Basis: Cameroon submitted the case unilaterally, and invoked the ICJ's jurisdiction pursuant to both states' declarations adhering to Article 36(2) of the ICJ Statute. Upon commencement of the case, Nigeria initially contested jurisdiction, arguing that both states had already agreed to settle the dispute through existing

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[44] Paulson cites Arnold, supra note 86, at 78 (reporting that Qaddafi had 'accepted the ruling of the ICJ without any attempt to reverse it', and that 'one of Africa's longest and most costly confrontations had come to an end'). Qaddafi himself had reiterated, in 1998, that 'the ICJ verdict has been respected': Delali, 'Libya-Chad: Kadhafi's Appeal to his Compatriots' , Africa News Service, 11 May 998,

bilateral channels. Despite its initial resentment, Nigeria later participated fully throughout the ICJ proceedings. On the ground, armed conflict continued while the case was pending. [45]

Judgment: The ICJ's October 2002 judgment awarded Cameroon the Lake Chad boundary it sought, and allocated around 30 villages to Cameroon and a few to Nigeria. The Court also awarded Cameroon the Bakassi Peninsula. Nigeria won the maritime-related rulings contained in the Judgment and much of the boundary between Lake Chad and Bakassi. The Court explicitly obligated both parties to withdraw their military, police, and administration from the affected areas 'expeditiously and without condition'. As for Equatorial Guinea, the intervener, the ICJ drew the maritime boundary in a manner favorable to it.

3.4.6.5. Avena and Other Mexican Nationals (Mexico v. US); LaGrand (FRG v. US) Common Antecedents

Jurisdictional Basis: Both cases were instituted unilaterally by Germany and Mexico through the Vienna Convention's Optional Protocol on Compulsory Settlement of Disputes, which the United States ratified. Article 1 of the Optional Protocol provides for compulsory jurisdiction in the ICJ over 'disputes arising from the interpretation or application of the Convention'. In both cases, the United States never contested the Optional Protocol's applicability.

Judgment: The execution of Walter LaGrand in 1999 despite the ICJ's order of provisional measures, coupled with lingering uncertainty about their obligatory character, may have prompted the ICJ to declare (for the first time) in the 2001 final judgment that its orders on provisional measures are binding. The ICJ also ruled that by failing to inform the LaGrand brothers of their right to consular notification following their arrest, and by not permitting 'review and reconsideration' [46] of their convictions and sentences in light of the treaty violation, the United States had breached its obligations under the Vienna Convention.

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[45] Paulson, supra note 23, citing 'International Court Poised to Rule on Nigeria – Cameroon Border Dispute', Agence France-Presse , Doc. FBIS-AFR-2002-1009 (9 Oct. 2002).

[46] The case concerned Angel Francisco Breard, a death penalty convict and national of Paraguay who was similarly not afforded Vienna Convention protection by the US. In that incident, the Governor of Virginia refused to consider an ICJ preliminary order calling upon the US to 'take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings': Vienna Convention on Consular Relations (Paraguay v. US), Provisional Measures Order, at para. 41 [1998] ICJ Rep 248, and executed Breard. Because of this, no fi nal judgment was reached. See ibid., at 426 (Discontinuance Order).

The ICJ then prescribed two explicit obligations for the United States: (1) to give Germany a general assurance of non-repetition of US treaty obligations under the Vienna Convention; and (2) to review and reconsider, by taking into account any violation of rights under the Vienna Convention, the convictions and sentences of German nationals sentenced to severe penalties.

Similarly, the ICJ's 2004 final judgment in Avena held that the Mexican death row prisoners in the US were entitled to a determination of whether failure to notify the Mexican consul had resulted in prejudice. The judgment affirmed that the Vienna Convention prescribed judicially enforceable rights and that the US was in breach thereof; in the process, the ICJ disregarded the US argument that the procedural default rule barred such reconsideration. Likewise rejected, however, Mexico's claim was that a violation of the Vienna Convention automatically annuls a criminal judgment.

The Court ultimately ordered reconsideration of the sentences of the Mexican nationals, and that that reviews should be done by judicial, instead of executive officials, independent of any US constitutional claim, on an individual basis. [47]

3.4.7. Evaluation and Assessment and its Impacts upon Jurisdiction and Compliance

The real implication is involved in the implementation of judicial order and level of compliance shown by various countries specially those which fall into category of debtor state versus creditor countries. The 'ideal' form of consent, under this theory, is given in special agreements wherein states manifest consent to take a specific dispute before the ICJ, as 'the Court's judgments in such cases have been duly complied with'. At the other end of the spectrum are those unilateral applications in which the respondent state consented in advance, either through the Optional Clause of the ICJ Statute or dispute settlement ('compromissory') clauses in treaties to which it is party, to ICJ jurisdiction over future disputes. According to Judge Oda, the compliance record for these two forms of compulsory jurisdiction is much more problematic than that of cases instituted by special agreement. [48]

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[47] Vienna Convention on Consular Relations, 24 Apr. 1963, 596 UNTS 261.

[48] Objections to jurisdiction are common when compulsory jurisdiction is employed, and this is seen as the basic problem. In Judge Oda's scorecard, there were, as of the end of 1999, only 13 cases in which the ICJ 'handed down a judgment on the merits after rejecting preliminary objections regarding jurisdiction', and 'of these 13 cases, there have been only two during the last quarter of a century that achieved a concrete result'. Professors Ginsburg and McAdams make a more nuanced but similar

Nicaragua legal paradigm has given new understanding about the judicial decisions and jurisdiction matter exercised by ICJ unilaterally on ground of compulsory provision. Decisions given by ICJ was resisted by US on ground of its military and economic size and Professor Charney says, "ICJ should avoid cases where a judgment was likely to be resisted, as in Nicaragua, and instead establish a record of success in cases where the parties would probably live up to their obligations. Professor Gross was more direct, stating that cases initiated by special agreement held more promise of being effective than those brought under the compulsory jurisdiction of the ICJ".[49] More recently, Professors Posner and Yoo (pointing to statistics generated by the 'first-ever review of the entire docket of the International Court of Justice' of Professors Ginsburg and McAdams) stated that the compliance rate of cases instituted by special agreement was 85.7 per cent, while treaty and optional clause jurisdiction achieved only 60 per cent and 40 per cent compliance rates, respectively.[50]

In fact the matter solved through mutual agreements has stood the test of time and were solved step by step both through the intervention of ICJ and also regional forum like OAU or OAS etc. The statistical results too showed the same trends and pointed out compulsory jurisdiction exercise sometimes brought a huge embarrassment for ICJ.

3.4.8. The Enforcement of ICJ Decisions and Security Council Response

Article 94(2) of UN Charter has outlined role UN Security Council play in implementing the decisions of ICJ in favor of creditor state but so far Security Council has failed to do so which shows political considerations attached with the big power vested interest has tried to render the ICJ as an ineffective legal organization.

In its entire history, the Security Council has never employed its Article 94 powers even on occasions of clear non-compliance. It is understandable, given the discretionary nature of Article 92(4), for the Council to be inert in situations wherein the debtor state is a Permanent Member. More puzzling is the fact that creditor states

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claim: 'the strongest predictor of compliance, and the only variable to reach statistical significance, is a lack of preliminary objections ... Cases in which preliminary objections were overruled were those least likely to result in compliance ... compliance is most likely to occur when both sides want adjudication': Ginsburg and McAdams, supra note 14, at 1313.

[49] Reisman and Arsanjani, 'No Exit? A Preliminary Examination of the Legal Consequences of United States' Withdrawal from the Optional Protocol to the Vienna Convention on Consular Relations', in M.G. Kohen, Promoting Justice, Human Rights and Conflict Resolution Through International Law: Liber Amicorum Lucius Caflisch (2007), at 897.

[50] Posner and Yoo, 'Judicial Independence in International Tribunals', 93 Cal L Rev (2005) 1, at 37, citing Ginsburg and McAdams, supra note 14, at appendix.

themselves very rarely seek the Security Council's assistance in this capacity, even in the face of continued non-compliance.[51]

Similarly two noted legal scholars have noted down that the subject provision of UN Charter has never been applied, hence does not constitute any importance.[52]

Judging from past experience, this paragraph is not likely to have great importance in practice. It has happened very rarely that states have refused to carry out the decisions of international tribunals. The difficulty has always been in getting states to submit their disputes to a tribunal. Once they have done so, they have usually been willing to accept even an adverse Judgment. "Similarly there is also view that relationship between the Article 94(2) and Security Council is very vague and unclear.

"Judging from past experience, this paragraph is not likely to have great importance in practice. It has happened very rarely that states have refused to carry out the decisions of international tribunals. The difficulty has always been in getting states to submit their disputes to a tribunal. Once they have done so, they have usually been willing to accept even an adverse judgment" Professor Riesman has noted.[53]

3.4.9. **Institutional Implication of ICJ**

The objectives of ICJ are defined in its statutes that are intended to bring peace and stability in the world by upholding international legal system. It provides Ad hoc relief as well as provides permanent solutions of problems through its legal precedents and decisions by interpreting the international law within its justified background.

Sir Robert Jennings, former President of the World Court, forcefully took the latter view, based largely on the central role given to the Court by the UN Charter in matters of law and the dispensation of justice: "ad hoc tribunals can settle particular disputes; but the function of the established ' principal judicial organ of the United Nations' must include not only the settlement of disputes but also the scientific

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[51] Indeed, the Council is almost never asked to exercise its Art. 94(2), See Tanzi, 'Problems of Enforcement of Decisions of the ICJ and the Law of the United Nations', 6 EJIL (1995) 539. One of the few instances where direct invocation of Art. 94(2) was made was in the UK's application in relation to the Anglo-Iranian Oil Case [1951] ICJ Rep 59. The Security Council did not take decisive action. See ibid. at 15 n. 46.

[52] Reisman, 'The Enforcement of International Judgments', 63 AJIL (1969) 1, at 13 – 14.

[53] Ibid.

development of general international law... there is therefore nothing strange in the ICJ fulfilling a similar function for the international community."[54]

The decline of the Court's compulsory jurisdiction should not be taken as an indication that the ICJ is in irreversible decline. Indeed, the approach of states towards its jurisdiction over the years suggests that the world community has matured in its understanding of the potential and limits of the ICJ, and is moving closer to an equilibrium situation where, based on rational choice, most states have decided both to comply with the Court's judgments and further restrict its compulsory jurisdiction due to the uncertainties inherent in being unable to control outcomes.

The Court's docket is increasingly being left open only for cases in which: (a) states that actually wish to settle present disputes through special agreement (because they have already discounted and are prepared to accept the consequences of an adverse decision); or (b) are undaunted at the prospect of resolving future disputes through international adjudication (those who remain committed to the optional clause or have signed treaties with commissary clauses.[55]

Overall, pessimism regarding the future of the Court is entirely unwarranted, so long as expectations are managed realistically. The original intention at the founding of the UN was for the ICJ to be 'at the very heart of the general system for the maintenance of peace and security'.

One need only glance at current news, however, to know that this objective has not, nor is it ever likely to, comes into complete fruition[56]. Indeed, most disputes in the international community will continue to be settled, not though determinations of rights and pathological or personal conduct, by judges applying international law, but through diplomacy and negotiation.

The 'principal judicial organ of the United Nations' will continue to function as it always has: as a limited, but important, forum for resolving international disputes.

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[54] Jennings, 'The Role of the International Court of Justice in the Development of International Environmental Protection Law' 1 Rev Eur Community & Int'l Envt'l L (1992) 3, at 240, cited in East Timor (Portugal v. Australia) [1995] ICJ Rep 90 (Ranjeva J, separate opinion).

[55] As pointed out by more critical scholars: 'only 64 of the 191 members of the UN currently accept the compulsory jurisdiction of the ICJ. This is a participation rate of about 34 percent. By contrast, 34 of 57 UN members (60 percent) accepted compulsory jurisdiction in 1947. Today, of the five permanent members of the Security Council, only Great Britain has accepted compulsory jurisdiction: France, China, the U.S., and Russia have not (nor has Germany). Among the states that do accept compulsory jurisdiction, they almost always hedge their consent with numerous conditions. That is a sign that state parties to the U.N. Charter has chosen not to make use of the Court because they cannot control its outcomes': Posner and Yoo, supra note 221, at 33.

[56] Posner and Yoo, supra note 221, with Helfer and Slaughter, 'Towards a Theory of Effective Supranational Adjudication' 107 Yale LJ (1997) 387

3.4.10. Summary of Discussion

The state centric policy towards international legal system will have to change to bring it in line with true principle of justice on global basis with its normative principles.

To summarize, it is submitted that this new concept concerning the establishment of international legal personality – which would in the realm of non-state actors currently apply especially to multinational organizations, but also to a number of NGOs – is clearly more inconformity with the evolving image of an international legal community which has as its central aim the civilization of international relations and the promotion of global public goods to the benefit of all.

The cold war balance has been replaced by uni-polar world led by USA which has its own economic and political agenda .Its systematic expansion into the erstwhile sphere of Influence enjoyed by former USSR both in Middle East and East Europe has put US in unchallengeable position of political and military strength.

United Nation that kept balance between two major powers in their relationship in the Post Cold Period has diminished, turning UN just another instruments of sub-ordination to political will of USA.[57] "The Cold War's power structures are no longer in place. Inevitably, this process – abruptly set in motion by the events in 1989 – is accompanied by the gradual erosion of the very *legitimacy* of the United Nations as the Guarantor of a just international order of peace and mutual respect among all nations" on the basis of the legal notion of "sovereign equality." These methods have been well documented by Erskine Childers.[58]

3.5. The Concept of Super Sovereign

The US has bulldozed the neutral position of Security Council and General Assembly and other allied institution through its arbitrary steps of Declaration of War under the doctrine of Pre-Emptive attack that ravished Afghanistan, Iraq and many other Arab and Muslim countries that showed reservation with American New World Order.

"So-called "collective enforcement actions" on the basis of Chapter VII of the Charter (that are *de facto* unilateral military actions exclusively directed by the United States) have become the preferred tool of global hegemony in a self-declared "New World

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[57] Ibid.

[58] See, The Demand for Equity and Equality: The North-South Divide in the United Nations, in Hans Köchler (ed.), *The United Nations and International Democracy*. Vienna: Jamahir Society for Culture and Philosophy, 1995, pp. 17-36, esp. pp. 32.

Order." Comprehensive economic sanctions are an essential part of this new form of hegemonic policy. Formally *multilateral* action in the legal framework of the United Nations Charter[59] is degenerating into "coalition wars" against those who challenge the unipolar power structure. All relevant decisions on the conduct of such actions are, in reality, *imposed* upon the United Nations member states, in the disguise of "humanitarian action," by means of Machiavellian power politics. The tactics of blackmail and coercion vis-à-vis the rest of Security Council member states has become the general method of superpower "diplomacy "in the present unipolar era. This process started with the action of the self-declared "International community" or better: "Gulf War Coalition," against Iraq in 1990-1991.

It means gradual return to old system that existed before First World War when power structure of global order rested with the sovereign will of a few nations that constituted the ruling Club for the entire Planet. The concept of Peaceful settlement of dispute that emerged and accepted after huge sacrifices of human lives has once being surrendered in favor of will of One Super power. The semantic of Coalition power and collective security action in fact are being used only to camouflage the true identity of unjust and aggressive act of war for having One World Government under the Rule of One Sovereign.[60]

The evolution of International Law that took over the two hundred year of its experiences for having to bring Concept of Pacifism and Sovereign Equality is gradually diminishing. The World Security System was never more in danger than what we experience today. Under these circumstances the role of International Court of Justice has become very urgent and important not only for ensuring the concept of sovereign equality but also Safety and security of international legal system that took so many huge sacrifices over the span of two hundreds of its bloody history to emerge. "According to the traditional doctrine of international law – which was considered outdated since the banning of the use of force in international relations in the Briand-Kellogg Pact –, the *jus ad bellum* constituted a generally accepted element of a system of basic norms governing the relations among sovereign states. Seen in this perspective, what we witness today in the field of international law is not

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[59] See resolution 2625 (XXV) of the United Nations General Assembly (24 October 1970): *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*.

[60] Ibid.

progress but, in terms of humanity and of an awareness of the legal implications of transnational action, *Regression* in the direction of the anarchy of power politics."[61]

In fact the use of weapons of mass destruction and causing death and destruction of human lives through the systematic genocidal operations under the cover of Humanitarian War Operations has made this world very insecure today for everybody. "The actual conduct of warfare – being euphemistically portrayed as "collective enforcement action" – contradicts the basic norms of international humanitarian law and, in many instances, even constitutes war crimes (cynically being committed in the Name of "humanity"). The use of banned weapons such as depleted uranium missiles and fragmentation bombs, the deliberate targeting of civilians and civilian installations, the systematic destruction of the civilian infrastructure,[62] the starving of the entire population of a country through the combined measures of hitting the infrastructure and enforcing comprehensive economic sanctions, etc. are ample proof of the hypocritical nature of those modern "humanitarian wars" as they are called by the propagandists of superpower rule in this era of global unipolarity."[63]

Rights" (or rights of humanity) by which the Western powers authoritatively defined and claimed their own moral and civilizational superiority.[64] The new concept of the "clash of Civilizations" seems to revive these traditional enemy stereotypes and hegemonial discourses in favor of a right – or even duty – to intervene. The term "Holy Alliance" underlined the intolerant religious – or ideological – nature of the self-declared messengers of Christianity and guardians of the world. All the incursions into the territory of the Ottoman Empire during the 19th century were described as "humanitarian intervention".

The present Power Structure of Uni-polar World is systematically demolishing the principles of just international legal System and replacing them with new Paradigms of global Politics. "The revival of the concept under the circumstances of power politics in the present unipolar order is not progress but regression in terms of the very ideals of humanity. This implies a retrogressive process in regard to the nature of international law which again seems to become a tool of Machiavellian politics in

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[61] For the case of Iraq see Ramsey Clark, *The Fire this Time. U.S. War Crimes in the Gulf.* New York and Emeryville/CA: Thunder's Mouth, Press, 1992. For the case of Yugoslavia see: *NATO Crimes in Yugoslavia.*

[62] Ibid.

[63] Ibid.

[64] See Samuel P. Huntington, ""The Clash of Civilizations?" in: *Foreign Affairs*, vol. 72, n. 3 (1993), pp. 22-49.

favor of the actual holder(s) of power." Norms centered International Order emerged in international legal system with the equality of sovereign and the Rules that became part of Jus Cogens of International law from which no deviation or derogation was possible.

The UN Charter Article "Article 2 (4) of the United Nations Charter defines the principle of non-interference as follows: "All Members [member states] shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state ..."Different from what is being proclaimed in the UN Charter, and in sharp distinction to the idealistic rhetoric of the Western powers' foreign policy proclamations, a *new reality of Power politics* has taken hold of relations between states phasing out "modern" international law by a kind of "post-modern" system: an "imperial" interpretation of international norms according to NATO Summit in Washington DC (23-24 April 1999) *de facto* declared NATO's *supremacy* over the Security Council of the United Nations by reserving to itself the right to conduct so-called "non-Article 5 crisis response operations" outside the framework of the right of self-defense ordering to the interests of the actual hegemonial power."

The Security Council has become instruments of furtherance of US foreign Policy and Military Alliance of NATO has obtained supremacy over United Nations. "NATO Summit in Washington DC (23-24 April 1999) *de facto* declared NATO's *supremacy* over the Security Council of the United Nations by reserving to itself the right to conduct so-called "non-Article crisis response operations" outside the framework of the right of self-defense. NATO has replaced this doctrine by the *realist dogma* according to which the more powerful has the right to create norms on the basis of his factual superiority that is usually veiled in the clothes of a noble".[65]

The Article carefully formulates the right to use armed force "in exercise of the right of individual or collective Self-defense recognized by Article 51 of the Charter of the United Nations." The Article particularly states:"Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintains

[65] See the "The Alliance's Strategic Concept" as approved by the Heads of State and Government at the meeting of the North Atlantic Council (Washington, DC, 23-24 April 1999), esp. Part II: Strategic Perspectives, e.g. Art.31.

international peace and security." In legal terms, in the context of the North Atlantic Treaty of 1949, the Legal basis of NATO, there is no doubt about the supremacy of the UN Security Council.

In this sense, the neo-colonial ideology of the "new" NATO is not much different from the religious-imperial ideology of last century's Holy Alliance. Against this background, it is regrettable to note a certain complacency of international civil servants such as the Secretary-General of the United Nations vis-à-vis this Process of erosion of international legitimacy as it was represented, since 1945, by the United Nations Organization. In his statement to the 1999 UN General Assembly, Mr. Kofi Annan propagated a "new concept" of state sovereignty that is supposed to be compatible with the concept of (humanitarian) intervention."

Similarly the International Court of Justice too has failed in its assigned Mission to protect the provisions of UN Charter that promises protection of fundamental rights, equality of sovereign status of all nations and settlement of international disputes through the peaceful means. The NATO in its very Charter has pledged to operate within the Charter of United Nations but today it has assumed the position of sovereign over the Security Council and has manipulated its jurisdiction to forward its agenda of global domination.

NATO has started exercising its discretion without approval of United Nations in a number of countries of the world eliminating the jurisdictional division between three organs of the United Nations.

"Even the vague traces of a "division of powers" in the
United Nations system – between the Security Council, the General Assembly and the International Court of Justice – has now disappeared in face of a doctrine that claims the right of military intervention exclusively for the members of the Western military alliance, overriding even the competence of the UN Security Council."[66]

The **role of ICJ** has lost its moral authority and several decisions given by it has failed to meet its target of implementation due to non-compliance by some countries known to be affiliated with the Powerful Club of western Nations. "The International

[66] See the analysis by the author: *The Voting Procedure in the United Nations Security Council*. Studies in International Relations, XVII. Vienna: International Progress Organization, 1991.

Court of Justice, under the present Charter, cannot play this role of international "constitutional court." Its statute obliges it more to act on the level of "moral" appeals than of legal rulings.

As a result of the developments of the last decade of the twentieth century, we have to try to reconcile original idealistic expectations in regard to as of power politics in a unipolar constellation." universal legal order based on human rights with the realities. *Jus ad Bellum* is being abrogated and new concept of humanitarian intervention is being introduced through back door. Judicial body created in the name of ICJ impartially judges the action of these super powers.

The use of semantic like Democracy or human rights or Terrorism has been monopolized by the Western Societies for establishing their ideological and political supremacy on the developing world. These words convey the sense of higher political ethic but in fact they are meant only to camouflage their design of global domination. "Contrary to the aspirations of the "idealists" and because of the crude realities of power politics the concept remains a *Fata Morgana*.

The Western power establishment, claiming moral and ideological supremacy, has effectively imposed its monopoly in regard to the definition of such key concepts as "human rights," "democracy," "rule of law," etc., using them as tools to justify whatever intervention may be deemed appropriate to further Western interests.[67] The so called concept of humanitarian intervention has weakened the UN by compromising its neutrality.

The principle of "sovereign equality" as enshrined in Art. 2(1) of the UN Charter must not be weakened or abrogated in favor of a dubious "right" – or "duty" as some would like to portray it – to intervene.[68] Tsar too back in 19th century has declared the creation of new world through Holy Alliance by interpreting the Universal Morality in his own favor that provided justification for conquest of entire Central Asia.

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[67] Susan George, *A Short History of Neo-liberalism: twenty years of elite economics and structural change*. Summary of a paper presented at the conference "Economic Sovereignty in a Globalizing World," (Bangkok: March 1999), 24-26.

[68] On the general implications for international order see Hans Köchler (ed.), *Globality versus Democracy? The Changing Nature of International Relations in the Era of Globalization*. Studies in International Relations, XXV, (Vienna: International Progress Organization, 2000).

Holy Alliance[69] was carved out with sworn words of loyalty to the creation of global Christian World Order for bringing values system that would promote the virtues of Christianity everywhere in world. "They solemnly declare that the present Act has no other object than to publish, in the face of the whole world, their fixed resolution, both in the administration of their respective States and in their political relations with every other Government, to take for their sole guide the *precepts of that Holy Religion, namely, the precepts of Justice, Christian Charity, and Peace*, which, far from being applicable only to private concerns, must have an immediate influence on the councils of princes, and guide all their steps, as being *the only means of Consolidating human institutions* and remedying their imperfections."

3.6. THE STANDARD OF INTERNATIONAL LEGAL SYSTEM

The Pre-amble of the UN charter begins with the words, "we the people ....."assures the entire humanity peaceful place on this planet through the creation of global society based on the principle of sovereign equality. The deviation from UN charter and development of new paradigm of international law through the theory of Humanitarian Intervention would bring about the creation of alter on the need for a structural reform of the UN system see the analysis by the author: international order bringing an end to legal system that has earned the trust and transparency through the principles of universal brotherhood and universalism of United Nations.[70]

3.6.1. *Lex Specialis* Rule

It is a rule which provides priority in its legal status on account of its specialization in nature over the General Rule. Likewise the rule of ICJ certainly holds preferential status over the resolutions of United Nations because special rule takes better care of situation than General Rule. They are harder and more binding and are better equipped with remedies than general rule and they must be made to stay background for guidance purpose.[71]

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[69] Text of the Holy Alliance, Paris, 14-26 September 1815, published in J. H. Robinson and C. Beard [eds.], *Readings in Modern European History*. Vol.2. Boston: Ginn and Company, 1908, 354.

[70] The United Nations and International Democracy. *The Quest for UN Reform*. Studies in International Relations, XXII, (Vienna: International Progress Organization, 1997).

[71] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, Advisory Opinion [2004] ICJ REP 200. *See also* Bianchi, *Dismantling the Wall: the ICJ's Advisory Opinion and its Likely Impact on International Law*, [2004] GERMAN YBK. INT'L L. 343.

The acceptance and rationale of the *lex specialis* rule the idea that special overrides general have a long pedigree in international jurisprudence. Its rationale is well expressed already by Grotius:

> "What rules ought to be observed in such cases [i.e. where parts of a document are in conflict]. Among agreements which are equal...that should be given preference which is most specific and approaches most nearly to the subject in hand, for special provisions are ordinarily more effective than those that are general."[72]

Most of general international is *jus dispositivum* so that parties are entitled to establish specific rights or obligations to govern their behavior: "it is well understood that, in practice, rules of [general] international law can, by agreement, be derogated from in particular cases or as between particular parties". This was the situation in the Right of Passage case. After having determined that the relevant practice had been accepted by both States (India and Britain/Portugal), established a limited right of transit passage, it concluded that it did not need to investigate what the content of general principles of law or custom on this matter was: "Such a particular practice must prevail over any general rules".[73]

Restrictions to sovereignty should not be presumed.. it has to be decided by Judge or court. Some times it overstretched to limit which may violate the sovereignty of other nations. This is called Lotus Principle. American has used only Meta Norm or single principle or Sovereignty. It has to deal by the doctrine of Self-contained Regime. A self-contained Regime is a special case of *Lux Specialis* and it takes precedence over the General Law.

3.6.2. **Legal Principles**

The *Jus Congens* and *Erga Omnes* are two over lapping concepts carrying the motivation for establishment of peace and security in the world on global basis in absolute sense. However the international legal system would may derogate them from conventions or treaty and the ICJ is a forum which has provided legitimacy to them through its various precedents. "It is worth clarifying that *jus cogens* "cases" do not always involve resort to the concept of *jus cogens*. Domestic or international tribunals may have recourse to similar notions such as fundamental rules,

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[72] Neumann, ECHR 1974 A No. 17 (1974) p. 13 (para 29). Hugo Grotius, De Jure belli ac pacis. Libri Tres, Book II Sect. XXIX. 5.

[73] ICJ, Legality of the Threat or Use of Nuclear Weapons, Reports 1996 p. 13-14 (mimeo) para 25.

international public order or obligations *erga omnes*. This latter category of norms was established by the ICJ in its 1970 decision in *Barcelona Traction* in which the Court defined obligations *erga omnes* as those that are owed "towards the international community as a whole". In light of the fundamental nature of such obligations, the alleged consequences flowing from their *erga omnes* quality, and the examples provided by the Court, it is safe to conclude that the concepts of *jus cogens* norms and *erga omnes* obligations are related and overlapping; a recent decision of the ICJ even suggests that they are identical.

Also, the ICJ may deliberately avoid using the controversial term *jus cogens*, as it did in its Advisory Opinion in the *Nuclear Weapons* case, where it referred to "intransgressible principles of humanitarian law". One author recently suggested that all *jus cogens* norms are necessarily also *erga omnes* obligations, while the opposite is not true. See Michael Byers, Conceptualizing the Relationship between *Jus Cogens* and *Erga Omnes*.

The Permanent Court of International Justice (PCIJ) has already declared through its various precedents the inevitability of Jus Cogens in matter of sovereignty of state and fundamentals of human rights and any deviation made in International Treaty or conventions through imposition of force is considered unlawful and quite contrary to it. A few of examples are quoted below here.

"As early as 1923, a judge of the PCIJ, in his dissenting opinion in the *S.S. Wimbledon* case, took the view that a provision of the Peace Treaty of Versailles of 1919 was not valid since it violated the right of third parties – those rights being arguably of *jus cogens* nature."

"The second dispute, which did not give rise to a judicial ruling, consisted of allegations made by Cyprus that certain provisions of a treaty it had concluded with Greece, Turkey and the United Kingdom, insofar as they established a right of unilateral, possibly armed, intervention in Cyprus, violated the *jus cogens* norm prohibiting the use of force."

Similarly there is another example in which the Jus Cogens violations have been declared as breach of judicial principle of international legal system.

In the post-Vienna Convention era, apparently only one decision of the ICJ addresses the invalidity of a treaty provision on the grounds of an alleged *jus cogens* violation. In *Armed Activities in the Territory of the Congo between the Democratic Republic of the Congo and Rwanda*, 56 the ICJ had to rule on the Congo's argument that

Rwanda's reservation to Article IX of the Genocide Convention – which provides for jurisdiction of the ICJ – was invalid since it violated the prohibition of genocide, allegedly a *jus cogens* norm.

Jus Cogens entails certain inviolable rights and obligation. It is based on (i) Legal Moralism (ii) It is applicable to entire world in absolute sense (iii) it is meant to preserve International Peace and Stability. However its application has been hindered because of uncertainty and unpredictability it would bring about through its implementation as being apprehended in some quarters of International System. "On the other hand, the uncertainties regarding the sources and content of *jus cogens*, which create a risk of unpredictable, incoherent and arbitrary decisions, explain the reluctance of international tribunals to apply this concept."

There are certain crimes like Piracy, Genocide, use of weapons of Mass destruction, denial of basic right of existence or using inhuman practices renders any perpetrating state from the privileged status of a civilized state and must be considered if it is war against entire humanity. "Piracy is a criminal act that takes place in a space where there is no overall territorial sovereignty. According to a generally accepted view, the commission of such crimes renders their offenders "enemies of all humankind".[74]

The identification of those acts or crimes that give rise to universal jurisdiction under customary international law is a matter of some debate. While most authors agree that piracy, slave trading, genocide, war crimes, and crimes against humanity fall within the scope of this doctrine, the applicability of the universal jurisdiction principle to acts such as terrorism and drug-trafficking is not uncontroversial.[75]

The big power has earned sovereign immunity for themselves from the liabilities of Jus Cogens. However the American court has dismissed this provision for seeking violation of international human rights laws through the application of public international law.[76]

Jus Congens have recognized the fundamental facts about the nature of human being which is universal and carries same value of sanctity everywhere and must be guarded

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[74] See, Bartram S. Brown, *The Evolving Concept of Universal Jurisdiction*, 35 NEW ENG. L. REV. 383 (2000-2001), at 383.

[75] See, Bassiouni, *supra* note...; Mitchell, *supra* note...; Rubin, *supra* note... *See also* Malcolm N. Shaw.

[76] "*See, e.g.*, Zimmermann, *supra* note..., at 433 (stating that the "denial of immunity through amendment to U.S. Statutes eliminating the granting of sovereign immunity in cases of purported violations of international human rights would be... illegal under current public international law", internal footnote omitted)."

as part of obligatory duty by every sovereign and must not be restricted through the derogation of Domestic law. "*Jus cogens* as an affirmation of the existence of fundamental values of the international community."

3.6.2.1. UN Charter and *Jus Cogens*

The UN Charter specifies that all provisions of its charter have got precedence over the ordinary norms of International law. There is hierarchical existence of Normative System subject to contractual conditions attached with the membership of United Nations. However the highest part of this hierarchical system is constituted by Jus Cogens and lower part of hierarchy is constituted by Soft laws which are non-binding. They also fall in the lower scale of Normative Order.

"The UN Charter specified that its provisions prevail over incompatible "ordinary" norms of international law. While one could take issue with the fact that such a hierarchy is merely "contractual" (i.e. only binding upon signatories of the Charter), it cannot be doubted that the Charter does, indeed, establish a valid normative hierarchy. Second, the emergence of so-called "soft law" arguably suggests the existence of a hierarchy of international law norms. Soft law refers to a variety of legal instruments which, due to their particular wording and in light of their drafters' intent, are non-binding. According to a number of writers, soft law, insofar as it contains normative statements, must be regarded as law. However, since it is not, strictly speaking, legally binding, it is hierarchically inferior to other norms of international law.[77]

3.6.2.2. International legal system and *Jus Cogens*

International legal system has been mutilated through the induction of certain provisions and norms that does not reconcile with the normative basis of *Jus Cogens*. The doctrine of pre-emptive strike and political labeling of certain countries for putting into the category of International Pariah has only added further distortion in the legal system by making it more subjective. "stating that "consent lies at the heart of the making of customary international law, just as it does with respect to treaty-based law") and (criticizing the fact that the "indeterminacy [of *jus cogens*] invites

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[77] Pierre-Marie Dupuy, Droit International Public 14-16 (1995). *See also* Prosper Weil, *Towards Normative Relativity in International Law?* 77 AM. J. INT'L L. 413 (1983).

development and expansion that ignores the basic principle that a *jus cogens* norm must be based on authentic systemic consensus".[78]

The distortion brought about in the international legal system by integrating the values of Natural law or Jus Cogens with values derived from parochial and narrow based theories of nationalism has done on pretext of Positivism has in fact done a lot of damage to international justice system.

3.6.3. Consensusualist Approach

Consensus is very important to evolve through the symmetry of views and its expression through a durable legal instrument which carries the prospects of applicability for every party without the use of external force. The procedure and values of Consensus have been fully realized both by ICJ and PCIJ.

"Article 38 of the ICJ Statute and the PCIJ's observation in the *Lotus* case both provide support for the consensualist approach, a number of developments in the second half of the 20th century – both doctrinal and practical – have altered the terms of the debate and called into question the preeminence of consent as the source of international law."

However the consensus does not mean it has to be approved hundred percent by all parties otherwise it would become redundant. In fact the will of majority of states is sufficient to give effect to principles of *Jus Cogens*. They are non-derogatory and can not be compromised through any legal doctrines. "In fact, the (un) declared purpose of the concept of *jus cogens* lies precisely in its ability to impose specific duties on States without the need to have those States accept the duties concerned. As some authors have observed, if States are only bound by what they have consented to, then one can hardly speak of "law" regime of non-derogability is a *consequence* of a norm's *jus cogens* character and not an explanation of its *source*."

Jus Cogens reality as part of international law has been accepted as a matter of basic right of every individual and have been fully implemented through every legal system no matter it operates through Municipal law or International law. Any deviation from it constitutes more sufferings for people than for state which according to political Science Concept is only 'Artificial Legal Entity'. However Universal jurisdiction has

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[78] *The Evolving International Law of Development*, 15 COLUM. J. TRANSNAT'L L. 1 (1976). *See* José A. Cabranes, *International Law by Consent of the* Governed, 42 VAL. U. L. REV. 119 (2007-2008).

earned its status from the principles of Jus Cogens and provides authority to every court with sufficient power for taking punitive action against defaulters.[79]

"The *jus cogens* debate has generated increased awareness of the fact that those who are ultimately affected by international law and the conduct of international relations are individuals. This awareness is closely linked with the realization of the largely fictitious character of the State as an entity independent of its population. Wars, international disputes or economic sanctions between States ultimately affect not the State as an abstract entity, but the people.

In a sense, this understanding has allowed to lift the "veil" of Statehood in international law. The idea of *jus cogens* has at least contributed to the growing acceptance of and recourse to, as a matter of International law-making, the notion of universal jurisdiction".[80]

Jus Cogens gives Universal Jurisdiction through its binding provisions to International Court of Justice (ICJ) that over rides over the jurisdiction of every other court.

The International Court of Justice have universal jurisdiction and likewise be authorized through the amendments for transfer of universal jurisdiction to state court for prosecution on ground of violations of Jus Cogens.

3.6.4. Judicial Protection of Individual Rights

The punishment of international "crimes have taken place without, and even against, the will of the States concerned enhanced judicial protection of individual rights under international law comprises two aspects. First of all, it is based on the possibility for domestic courts to exercise universal or *quasi*-universal jurisdiction over certain crimes." As I have shown, although it is inappropriate directly to apply the theory (and customary international law rule) of universal jurisdiction to *jus cogens* violations, the principle of universal jurisdiction is useful as such. "In fact, it ensures that particularly serious violations of individual rights will be punished whenever the acts at stake are not captured by the traditional jurisdictional rules based on territory and nationality or when the courts asserting jurisdiction unduly acquit the alleged offender/s." If the quasi universal jurisdiction can be enforced by the state court under

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[79] Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens and General Principles*, 12 AUST. YBIL 82 (1988-1989); Karen Parker & Lyn Beth Neylon, Jus Cogens: *Compelling the Law of Human Rights*, 12 HASTINGS INT'L & COMP. L. REV. 411 (1988-1989).

[80] Ibid.

the domestic law or state constitution will have to protect the quasi universal jurisdiction which in case of failure would be transferred to ICJ.

In case of Davis Ramind who was found to be sponsoring crimes of terrorism through the surreptitious system of weapons and money distribution was transferred from the jurisdiction of the local Pakistani court to USA on the ground of special plea of the US government. The local court in fact failed to capture the crimes of these terrorists due to favorable attitude of local court and he had been set free. Universal Jurisdiction is not ideal but a rule of Necessity which is transferred when the local court based on national territories failed to capture the criminals.

The establishment of Nuremberg and Tokyo Tribunals to prosecute the war criminals following Second World War was never questioned on legal basis neither by German or Japanese perhaps due to defeat and surrender before Allied Powers. The Victor Justice prevailed and senior military and civilian leadership of both of these countries were punished .However their silence on the validity of LAW under which their national heroes were punished itself became cause of acceptance of universal jurisdiction of the International Tribunals.

"Historically, as is well known, the first examples of international criminal tribunals are the Tokyo and Nuremberg Tribunals set up in the aftermath of World War II. Having had as principal task the prosecution and punishment of genocide, war crimes and crimes against humanity perpetrated by the German Nazi regime and the Japanese armed forces during World War II, those pioneer tribunals have sometimes been criticized for representing an illegitimate exercise of "victor's justice".

In fact, not only were the authority and jurisdiction of these tribunals doubtful, but also, and more importantly, the very acts which they set out to punish did not, at that time, constitute established norms of international law. Thus, the basic mission of those tribunals implied a violation of the cardinal criminal law principle of *nullum crimen, nulla poena sine lege.*

However, interestingly, no one (neither the authors of the crimes concerned, nor Germanor Japanese officials at that time or more recently) seriously challenged the legitimacy of the Tokyo and Nuremberg Tribunals, even though they had been set up without, and most probably against, the consent of the defeated nations. This lack of opposition reflects the quasi-universal acceptance of the atrociousness of the crimes perpetrated by the German and Japanese military as being contrary to basic *jus cogens* norms of international law."

3.6.5. Establishment of International Criminal Court (ICC)

The establishment of ICC has taken place under Rome Treaty after notorious Yugoslavian and Rwandan Genocide events in millions of people were massacred on ethnic and religious ground. The ICC was created with the consents of 146 member nations who are known as Signatory to its resolutions and it's Charter.

USA has so far had not become its signatory and the War Crimes committed by its forces in Iraq and Afghanistan cannot be captured through its universal jurisdiction.[81] Hence the principles of Jus Cogens have been exempted for USA on account of its status of solitary Super Power in the world which is a great legal anomaly and leave a very big question with respect to the legal sanctity of international legal system. Secondly the Security Council under Chapter (V11) can authorize ICC for taking action for the prosecution of any individual for committing an act of terrorism or violation of Principles of *Jus Cogens*.

3.7. CONCLUSION

This chapter explains problems that have handicapped the international legal systems through its statutory limitations and weakness such as over-riding rule by Security Council and its discretion to veto the decision for its own narrow political ends. The ICJ has got role to play being the chief judicial organ of UNO but has so far failed to discharge its statutory duties. These facts have been discussed in detail in this chapter with some examples as well.

The significant of this chapter highlights basic defects that have emerged in international legal system and failure of UNO and its chief legal organ, ICJ to provide any institutional alternative as part of some solution. In fact Westphalia system of state is under serious threat of extinction under the new wave of globalization. Dangers that arise from it constitute big challenges to the Jurisdiction of ICJ. They find adequate explanation in chapter. In this regard the coming chapter shall present some reforms of international court of justice.

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[81] Karen, *General Principles*, 12 AUST. YBIL 82 (1988-1989).

CHAPTER 4

REFORMS FOR INTERNATIONAL COURT OF JUSTICE

4.1. INTRODUCTION

This chapter will describe some recommendations to enhance the performance of ICJ. ICJ is highest Judicial Organ of the United Nations and by its statutory provision is, it is under legal and moral obligation to determine Rights and Duties of every member state according to united charter which has defined basic human rights and duties and declare its pledge to uphold the dignity and freedom of every individual through its institutional framework. State sovereignty has also been declared as sacred which according to UN Charter must be maintained and every means of war should be avoided for peaceful settlement of disputes between nations. The UN Charter pledges human equality, dignity, right of safe his existence in his homeland.

4.2. INTERNATIONAL JUDICIAL ORGENS

There are number of judicial organs working at regional and international level such as the International Criminal Court, the International Tribunal for the Law of the Sea, the European Court of Human Rights, and the European Court of Justice, the Caribbean Regional Court to name a few.

All these judicial organs have been vested with limited jurisdiction on specialized basis of field to deliver guidance and adjudicate on matters of disputes for bringing harmony and institutional stability in its particularly demarcated areas. Such judicial institutions have played very important role in promoting efficiency and utility through its networked judicial system at regional level. This local and regional judicial institution can be made effective if the jurisdiction is made between them rationalized through the establishment of legal mechanism that divide the jurisdiction on the basis of facts and law between these regional judicial organs and ICJ.

The mutual disputes arising out on regional level with respect to specialized subject such as distribution of water or demarcation of boundaries or exploration of mines on sea bed or aerial sovereignty and its invasion by superior technological means or lethal waste disposal in the jurisdiction of other countries can be solved and adjudicated upon with better efficiency and knowledge with intimate knowledge available to judges on account their close relation with immediate site.

4.3. INTERNATIONAL COURT OF JUSTICE

ICJ in capacity of highest Judicial Organ of the state has been invested with statutory power to safeguard the basic values of humanity as enshrined in United Nations Charter. It has its own legal system and is authorized by UN to determine its Rules and Procedure for carrying out its legal operations. The Judges assume their charge by carrying out their oath in the name of saving the honor, dignity and respect of humanity as has been pledged in UN charter. The Judge's oath pledge them with their Judicial Mission to be carried out without any let or fear or submitting to any act of blackmailing or temptation.

However the ICJ has got only a very small number of achievements to its credit. The international Judicial Order has been deeply tainted by the illegal and immoral manipulative behavior of Big Powers which has denied the justice and equality of status and sovereignty through their dominating political and Economic Order.

The International Court of Justice has failed to provide any relief to victim nations and correct the imbalances caused by the induction of arbitrary practices in International legal system by big Western Powers; those exercise complete control over the world politics through instrument of Veto Power. Changes required in statutes of ICJ to strengthen its jurisdiction are many and may well take time as very little case law has been developed by ICJ itself out of given international legal order.

4.4. ICJ AND THE NON-STATE ENTITIES

Non-state organizations which are working for human rights and justice, peace and political stability and other renowned legal bodies are can play very effective role as partner of United Nations if they are given some rights of representation both in ICJ as well as United Nations.

There are number of international bodies which are well equipped with intellectual resources and skill and known to played very important role as pressure groups in the

world in winning the support of masses with respect to international peace, stability and economic stability through their anti-globalization movements. Like Amnesty International, Global 2000, Human Rights Watch, The World without Borders or Swedish Based anti weapons organizations, or Nobel Foundation, or Bill Gate Foundation etc. These organizations carry a lot of experiences in their field by virtue of their specialized role but are confronted with several problems in the performance of their duties due to intervention of big political power.

For example, Red Cross (ICRC) has issued a detailed report how it was prevented from accessing the War Prisoners who had been captured by American Forces but being denied their rights under Geneva Conventions. Similarly Amnesty International has issued report about the use of banned weapons by US in its War against Iraq and Afghanistan which include Depleted Uranium but have been prevented from its publication and circulation by UK and USA on ground of severe popular reaction against them .These international bodies have generated a lot interest in the world through their professional achievements and earned credibility through their devoted and politically neutral attitudes. The ICJ must move it case for bringing amendments in their statutes to add new jurisdiction mandate.

Some of the No-state entities possess very important global function by virtue of their authority vested by United Nations through its Charter but are little accountable under international law by stakeholders or those who are affected by them by virtue of their actions. Secondly there are some professional bodies created by United Nations for rendering services in particular areas and they are sufficiently empowered to take action with long range impacts but little jurisdiction existed with ICJ for monitoring their progress or quality of performance. Secondly the jurisdiction of these institutions is better if shared on the basis of law and facts. Some of the references are produced here.

For example, "Non-State entities such as the International Sea Bed Authority and the enterprise and the deep-sea-bed mining companies are admitted to the Sea Bed Disputes Chamber of the International Tribunal for the Law of the Sea".[1]

Also, "the Rome Statute of the International Criminal Court (ICC) was created to facilitate the prosecution of individuals responsible for the most serious crimes of global concern, such as genocide, war crimes, and crimes against humanity".[2]

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[1] See, United Nations Convention on the Law of the Sea, U.N. Doc. A/CONF.62/122, U.N. Sales No. E.83.V.5 (1983), part XI and art. 285.

Similarly important institutions of economic and financial developments like Bre-tton Wood institutions which are consisted of IMF, World Bank and W.T.O are gained a lot of controversy in the world due to their investment and loaning policies that has allegedly mortgaged the sovereignty of developing nations due to arbitrary imposition of their conditionalities. The Regulatory laws of these institutions need review in the light of principles of Jurisprudence but it is not possible unless these institutions are made accountable before some world legal body. ICJ jurisdiction must be extended to include these Bretton Wood institutions to make them more responsive, accountable and transparent.

4.5. THE JURISDICTION OF ICJ

Jurisdiction has to be examined in the light of principles of Jus Cogence which makes human right violations as uncompromising evil and defines human rights on the basis of universal needs which include his freedom and protection of his national identity as well. All those provisions pertaining to Jus Cogence are binding and their violation is serious crime in light of international law. However the International legal system has failed to absorb the spirit of Jus Cogence due to constant intervention and manipulation of the system by big power for their political ends. The jurisdiction of ICJ in certain matters those fall within the purview of *jus cogens* and should be made obligatory while in certain other matters pertaining to economic and social justice, the interpretations of statutes will need to exercise broader scope for regaining true jurisdiction to ICJ. In any cases such changes can be brought through step by step.

As earlier written, the UN charter defines the aims and objectives ICJ and it was created as the highest judicial organ of UN with two assignments.

(1) Advisory Jurisdiction

(2) Contentious Jurisdiction

The creation of ICJ brought a great relief and hope to people of the world specially who suffered for centuries under western Imperialism. The first ICJ president declared in his famous quotation the future manifesto of ICJ as under.

"The ICJ is by virtue of Article 92 of the United Nations Charter "the principal judicial organ of the United Nations." It is also, as Judge Lachs put it, "the guardian

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[2] See, United Nations, *Setting The Record Straight: The International Criminal Court 1*, U.N. Doc. DPI/2012 (1998); Perspectives, Volume 5, No. 2, Wednesday June 30, 2004, 2-9.

of legality for the international community as a whole, both within and without the United Nations".[3]

However it is sad to see that ICJ has not acted up to its full capacity due to lack of its jurisdiction. "As provided in Article 34, paragraph 1, of the Statute of the International Court of Justice (Statute), only States may be parties in cases before the Court. This is of far reaching importance since it prohibits recourse before the Court by individuals or international organizations. It reflects the traditional theory that an inter-State dispute resolution forum can be open to States only".[4]

4.5.1. Special Agreements (Compromise)

Jurisdiction of ICJ is earned through the cases referred to it by Parties and mutual agreements of parties to the contents of complaints are very essential for initiating legal proceeding. This special agreement is called "Compromise" which is very essential to submit for seeking jurisdiction of ICJ under the Article 36, paragraph 1 of the Statutes. Those parties who refuse to submit Compromise or agreement would be meant as denial to accept the Jurisdiction of ICJ.

This would deny the ICJ from its right of hearing the case and hence the act of injustice committed against aggrieved party would remain untreated and unsolved which over the period of time has more often than not contributed towards to the instability of global situation.

The denial of jurisdiction and restricting its authority by placing some curbs on its statutes has in fact has made this Highest Judicial Institutions of the world very ineffective. Even important legal and political disputes have been rejected by ICJ on ground of lack of jurisdiction that later on contributed towards the escalation of hostilities leading to Destructive war and violence. Some examples are quoted below as such.

1. Kashmir Problems. This issue has been recognized by United Nations through its resolutions in 1948 and India accepted the UN demand for holding referendum for determining the Right of Self-determinism but so far it could not be materialized due to denial of India to comply with the UN resolution. The ICJ has in fact failed to deliver any decision in this respect showing its utter inability to act in face of any crisis.

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[3] M. Shahabuddeen, Precedent in the World Court 22 (1996); M. N. Shaw, International Law 746 (4th ed., Cambridge 1997).

[4] U.N. Doc. DPI/2012 (1998), Perspectives, Volume 5, No. 2, Wednesday June 30, 2004 Page 2 of 9.

2. Palestinian Problems since the Partition of Palestine remained unsolved with many millions of refugees driven out of their home and birth place forcibly by the occupied forces of Israel. Even the basic resolution of UN which calls for Rehabilitation of Palestinian refugees could not be implemented and still lying pending due to biased attitude of Big Western Powers.ICJ simply failed to exercise its jurisdiction in face of this great Humanitarian Crisis.

   The construction of wall by Israel within the living localities of Palestinian has been condemned world over as an "Act of Social Apartheid". This wall has on the one hand has wrecked the economy of Poor Palestinians and on the other hand has caused much hindrances in the free movement of Palestinian people. These restrictions have made the lives of Palestinian People very miserable and nearly impossible within their own homeland. ICJ not only condemned the construction of this wall but also declare a serious violation of international and Article 33 of Fourth Geneva Conference. It was declared as Collective Punishment on People of Palestine which is war crime. As it has been noted by Renowned Scholar, Av John B. Quigley in his book "The Case for Palestine: an international law Perspective, page 324, New York".

In its 2004 "advisory opinion on the legality of the Israeli West Bank Barrier and it was concluded by International Court of Justice that the lands captured by Israel in the 1967 war, including East Jerusalem, are occupied territory." "However none of this decision could be implemented due to intransigence of Israel which refused to accept the Jurisdiction of ICJ on the said issue. This inability of ICJ only exhibits the Jurisdictional deficiency of the court for seeking enforcement of its own decisions which are very vital in nature and pertains to Non-binding Principles" of *Jus Cogens*.

4.5.2. **Jurisdiction Provided for Treaties and Conventions**

Article 36, "paragraph 1, of the Statute provides that the jurisdiction of the Court also comprises all matters specially provided for in treaties and conventions in force." The Lockerbie cases were brought by Libya against the United Kingdom (UK) and the United States (the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation. The defendants had claimed that there was no dispute between the parties concerning the interpretation or application of the Montreal

Convention as demanded by Article 14, but, if at all, only between the applicant and the Security Council on the effects of the Security Council resolutions 748 (1992) and 883 (1993) (SC Resolutions) Security was moved by these big western countries like UK and USA both of them holding Veto Power. In the opinion of the International Court of Justice, however, several disputes existed between the parties concerning the Montreal Convention: first, on the Convention's applicability to the present case (a jurisdiction which the Court calls "general"); second, on the alleged right of Libya itself, to prosecute its nationals under article 7 of the Convention.

According to ICJ jurisprudence, "a dispute is defined as disagreement on a point of law or fact, a conflict of legal views or of interests between two parties". There on the same ground the dispute was taken by the ICJ on the submission of Libya which was being subjected to unlawful pressure on payment of compensation as well prosecution of those who were responsible allegedly for this incident. So this dispute was According to a broad interpretation of the judgment, the relationship between the Montreal Convention and the subsequent SC Resolutions is a matter within the jurisdiction of the Court.

Another narrower reading is provided by Judges Fleischauer and Guillaume in their joint declaration: it states that ICJ jurisdiction extends only to the interpretation and application of the Montreal Convention and not to the SC Resolutions. The latter view seems more in line with the treaty-based jurisdiction of the Court in the present case; it would, however, considerably limit judicial review of resolutions of the Security Council by the Court. It has become "apparent that there is no agreement within the Court as to whether its jurisdiction is limited to a pronouncement on the rights and duties of the parties pursuant to the Montreal Convention itself, or whether it also enables the Court to decide on the relationship between the Convention and subsequent Security Council resolutions. By a narrow margin, the Court seems to favor the second option."[5]

4.5.3. **Legal Review**

The jurisdiction of ICJ to take legal Review of the decisions of UN Security Council became questionable through such decisions which only show the deficiencies in legal structure of ICJ which defines its jurisdiction. The victim's right of seeking justice

[5] See Statute of the International Court of Justice, supra note 7, Art. 36(1), Perspectives, Volume 5, No. 2, Wednesday June 30, 2004 Page 3.

was denied and victor imposed upon their own justice upon the victim. This is great flaw in global legal system which needs to be corrected through proper amendments.

4.5.4. Mandatory Jurisdiction

These cases as given under were submitted by some countries for seeking justice under the Montreal Conventions but could not succeed due to refusal of other parties to accept the jurisdiction of ICJ. The ICJ could not take any action on its own except it expressed its regret over its inability.

There is another great flaw in the jurisdictional structure of ICJ. In the following eight cases, the Court found that it could take no further steps upon an Application in which it was admitted that the opposing party did not accept its jurisdiction: Treatment in Hungary of Aircraft and Crew of United States of America (United States of America v. Hungary) (United States of America v. USSR); Aerial Incident of 10 March 1953 (United States of America v. Czechoslovakia); Antarctica (United Kingdom v. Argentina); (United Kingdom v. Chile); Aerial Incident of 7 October 1952 (United States of America v. USSR); Aerial Incident of 4 September 1954 (United States of America v. USSR); Aerial Incident of 7 November 1954 (United States of America v. USSR).

4.5.5. Permanent Jurisdiction of ICJ

A third means of consent to the Court's jurisdiction is described in paragraphs 2 and 3 of Article 36 of the Statute. Paragraph 2 provides that "The States parties to the present Statute may at any time declare that they recognize 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 an international obligation." Spain brought case of complaint against Canada over the fishing Rights in Atlantics but could not succeed due to inability to give decision on ground of absence of jurisdiction so the matter remained unsolved to date.

Paragraph 3 of Article 36 of the Statute provides that the declarations referred to in paragraph 2 above may be made unconditionally or on condition of reciprocity on the part of several or certain States, or for a certain time and is the Fisheries Jurisdiction

Case.[6] On December 4, 1998, the ICJ ruled 12-5 that it lacked jurisdiction to adjudicate the dispute brought by the Kingdom of Spain against Canada in 1995. To claim the Court's jurisdiction, Spain relied on 15 October 1946; the Security Council adopted Resolution 9 (1946), which resolved that: The International Court of Justice shall be open to a State which is not a party to the Statute of the International Court of Justice.

4.5.6. Advisory Jurisdiction (Advisory Opinion) and Recommendations for Amendments

The Court is authorized by Article 65 of the Statute to give advisory opinions on any legal questions at the request of whatever body may be authorized by the UN Charter to make such a request. According to U.N. Charter Article 96, the General Assembly or the Security Council may request the ICJ to give an advisory opinion on any legal question.

Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities.[7]

In one case involving the request for an advisory opinion by the World Health Organization (WHO) on the legality of the use of nuclear weapons by a State during armed conflict (the WHO Opinion Case), the court held that three conditions must be satisfied in order to find that the Court has advisory jurisdiction: "First, the agency requesting the opinion must be duly authorized under the Charter to request opinions from the Court; second, the opinion requested must be on a legal question; and third, this question must be one arising within the scope of the activities of the requesting agency. This three-prong test is a further explanation of the Article 96 of the UN Charter".

In the view of the Court, "none of WHO's functions, as provided for in Article 2 of the WHO Constitution, had a sufficient connection with the question before it for that question to be capable of being considered as arising "within the scope of the activities" of the WHO.

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[6] See Fisheries Jurisdiction (Spain v. Can.) 1998 I.C.J. 432 (Judgment of Dec. 4); Perspectives, Volume 5, No. 2, Wednesday June 30, 2004, 4-9.

[7] Legality of the Use by a State of Nuclear Weapons in Armed Conflict 1996 I.C.J. 66 (Advisory Opinion of July 8), Perspectives, Volume 5, No. 2, Wednesday June 30, 2004, 5-9.

The ICJ again lost an opportunity to explain or even develop international law. The legality and suitability of question no doubt is arisen from the consequences of use of Nuclear Weapons, the very act which would have bearing on the mission of WHO, the number of casualties and break out of diseases through lethal radiations over a large part of area along with the destruction of healthy environment would bring about huge disaster for humanity.

The ICJ in fact brushed aside the issue on the basis of Non-availability of jurisdiction only indicate ineffectiveness and its failure to interpret the statute on broader line. Such approach had only added more legal morbidities and distortions in international legal system of the world.

4.6. IS THE ICJ BIASED?

International Court of Justice is known to be biased in favor of those nations with whom the judges happen to share culture and economic status or political system or social background. Critics of ICJ are not satisfied with the performance of ICJ and say that its decisions are politically motivated. In words of Jeane Kirkpatrick, the ICJ is a "semi –legal semi-juridical, semi-political body which nations sometimes accept and sometimes do not."[8]

The statute book of the ICJ is a very vague document that has evolved through several internal court decisions based on agreements or treatises and customs. Jurisdiction of the ICJ is based on more than three sources which includes; one y special agreement; second by treaty; and; third by unilateral declaration under Optional law.

The history of ICJ is marked by clash between the internationalist ambitions to uphold the requirement of international legal system and nationalist ambition to prevail over it through the enforcement of domestic laws. This tension is quite enduring which ICJ has tackled through establishment of Arbitration Council.

Next is treaty based Jurisdiction which incorporates the provision of intervention by ICJ in case of any disputes and always interpreted on reciprocal basis. Third one relates to compulsory jurisdiction which every state has to accept under UN charter, however some states have withdrawn from its jurisdiction on the plea of national security by refusing to co-operate with ICJ.As written earlier the jurisdiction of the court can be invoked only on the basis of mutual consent provided other state agree.

[8] Nicaragua v. US, http//en.freepedia.org.

The United States only agree to the jurisdiction of ICJ if it does not reconcile with the national interest of country. Similarly France too in early 1970s withdrew from its compulsory jurisdiction on the ground of its national security matter. The ICJ dealt with several disputes which can be broken down as such.[9]

TYPE OF CASES	FREQUENCY
AERIAL INCIDENTS	13
BORDER DISPUTES	29
DIPLOMATIC RELATIONS	8
DIPLOMATIC RELATION/PROPERTY	1
USE OF FORCE	23
PROPERTY	13
TRUSTEESHIP AND DECOLONISATION	4
OTHER	9
TOTAL	100

4.1 Table of cases presented before ICJ

A few examples are given as under.

4.6.1. Corfu Channel (1947-1949)

This case was the ICJ's first contentious case in which 1946 British warships struck mines in Albanian waters and were damaged. The United Kingdom filed an application with the ICJ, charging that Albania was responsible either for laying mines or not clearing them. The ICJ held Albania violated international law, and awarded Britain damages of £844,000. The Albanian government refused to pay and a settlement was not reached until 1992.

4.6.2. Treatment in Hungary of Aircraft and Crew of the United States of America (1954)

This case is the first between the two superpowers; it also disappeared because the Soviet Union refused to participate. A few other cases in which USA and other western powers filed applications against the Soviet Union or its satellites also never advanced beyond preliminary stages. The Soviet Union and its satellites have never filed applications. For the most part, the ICJ was used during the cold war (and after) only by western powers and developing countries.

[9] For details see, Ginsberg and McAdams.

4.6.3. The Temple of Preah Vihear (1962)

The case was one of many border disputes arising from decolonization. Cambodia filed an application against Thailand, complaining that Thailand illegally occupied Cambodian territory around the Temple of Preah Vihear. The ICJ ruled in favor of Cambodia. Thailand accepted the judgment and relinquished its claim.

4.6.4. South West Africa (1966)

South Africa controlled neighboring territory (now Namibia), claiming the right under a League of Nations Mandate. Ethiopia, Liberia, and many other African countries objected to South Africa's control and its policies, and, after political efforts failed, filed an application with the ICJ which later on withdrew from the case on the ground that it does not have proper jurisdiction on it.

4.6.5. United States Diplomatic and Consular Staff in Tehran (1979-1981)

The U.S. filed an application against Iran after Iranian government permitted angry students to seize the American Embassy by taking Embassy staff as hostage. The ICJ ruled in favor of the USA but the ruling did not appear to have any influence on Iran, which refused to participate in proceedings.

4.6.6. Nicaraguan Crisis

The South West African experience and big western powers decisions to scuttle the IC J decisions brought grave disappointment by shaking their trust in International Legal System. USA had been consistently supporting insurgency in Nicaragua against Soviet backed Sandinista government and taking strong subversive measures she tried to mine the Nicaraguan's ports and sea lanes through secret operations.

The government of Nicaragua filed an application in ICJ on ground of violations of treaties and several agreements that US had committed by mining its harbors .The US refused to accept jurisdiction of ICJ and also added the question of compulsory jurisdiction does not apply to ICJ.

The ICJ held US responsible for the action but the same ruling was rejected by US by withdrawing its consent to compulsory jurisdiction. That is how the whole action of aggressive act was prevented from receiving condemnation.

4.6.7. Breard Case

Paraguay was another country that took action against US for arresting its national in complete violation of rights available to him under Vienna Convention on Consular Relations. The ICJ tried to stop the action through its ruling but US refused to accept the decisions.

4.6.8. Legality of Use of Force (1999)

Yugoslavia filed ten applications against the ten NATO states that participated in the military intervention in Kosovo. Two of these applications were dismissed; the others are pending.

4.7. HYPOTHESIS FOR ICJ

Scholars have proposed a range of motives for judges of domestic courts: they may seek to maximize their wealth, their status, their leisure, attainment of their political goals or probability of their elevation or other future position. They may also seek to rule sincerely according to dictates of law.

Psychologically, if judges identify with their countries, they may find it difficult to maintain impartiality. ICJ judges are not only nationals who would normally have strong emotional ties with their country; they also have spent their careers in national service as diplomats, legal advisors, administrators, and politicians.

Even with the best intentions, they may have trouble seeing the dispute from the perspective of any country but that of their native land. National and linguistic differences may also interfere with the establishment of collegiality on the court.

Economically, judges may be motivated by material incentives. Judges who defy the will of their government by holding against it may be penalized. The government may refuse to support them for reappointment, and also refuse to give them any other desirable government position after the expiration of their term. These considerations are likely to weigh even more heavily in the calculations of judges from authoritarian states, as these judges do not necessarily have the option to take refuge in the private sector if the governments choose the judges, which they can ensure that their judges are not too independent-minded by drawing from the goals, or the probability of elevation or other future position.

The simplest hypothesis is that these judges vote in favor of country that appointed them when that country is a party to the case. Thus, if the applicant is the U.S., and the judge is an American, then the judge will vote in favor of the applicant. If the respondent is Nigeria, and the judge is an ad hoc appointee of Nigeria (whether he or she is Nigerian or not), then the judge will vote in favor of the respondent.

Several examples have been examined and found on the basis of these criteria and opinions have been obtained both from important stake holders as well as important legal personalities.[10]

1. Region. UN General Assembly voting often divides along regional lines, and the ICJ has region-based representation. Accordingly, we predict regional alignments. We will focus on continental alignments (North America, South America, Africa, Europe and Asia).
2. Military. That NATO states and states within the Soviet sphere of influence voted as blocs during the cold war (before 1989).
3. Wealth. Wealthier and poorer countries often form blocs in international conflict over trades. Judges from the wealthier countries will favor the wealthier parties, and that judges from poor countries will favor poorer parties. States may also support members of trade alliances or organizations such as the EU and the OECD.
4. Democracy. Many scholars argue that democracies share political interests and more likely to likely to cooperate in international relations. We thus test the hypothesis that judges from democracies are more likely to favor democracies; we also look at whether judges from non-democracies are more likely to favor non-democracies.
5. Culture. Judges might be biased in favor of states for which they have a cultural affinity. As proxies for culture, we use majority language and religion: judges are more likely to favor their own culture and religion through legal support by voting procedures.
6. UN Organization. Similarly the judges from permanent members from Security Council are biased and vote in favor of permanent members.

[10] Ibid.

Various tests and interviews conducted gave some revealing results which are explained briefly as under.

4.8. FINDINGS

The data is suggesting that national bias play very important role in decision making of ICJ. Judges vote for their home state for most of the time. When their home state is not involved then they would give vote for state which is similar to their home states in wealth and political and economic system from 70 to 80% judges also favor the strategic partner of their home country.

As the democracy variable increases from its minimum to its maximum, the likelihood of a judge favoring the applicant increases by 25 percentage points. Therefore it increases one standard deviation around the median the likelihood of favoring the applicant increases by 7 percentage points. As the GDP per capita variable increases from its minimum to its maximum, the probability that the judge favors the applicant increases by 32 percentage points.

The probability of a judge voting in favor of the applicant increases by 24 percentages on the basis of language factor. But the probability is virtually unchanged when the language match is with the respondent. The bottom line on the regressions is clear. Judges are biased in favor of their own countries and in favor of countries that match the economy likely) and also cultural attributes of their own.

Another conclusion drawn from this study does not prove that ICJ has become dysfunctional organization. The judges may favor their own nation or their national strategic partner but become dispassionate when both the applicants and respondents are different from their own state. Hence is such cases they need not to be biased and normally known to have to outvoted those judges who are biased. Similarly there are a small fraction of cases in which the judges have voted in favor of those cases in which in their own state or their strategic partner were respondent or appellant and got adverse judgments. There is impression in such cases, judges by sincere voting in fact tried to maintain semblance of the legal impartiality.

Whether this level of bias matter depends upon how ICJ accomplishes its procedure to bring its rulings. The compliance rate of such rulings of ICJ varies from 60% or slightly more or less. It is a matter of experience that judges are likely to comply with judgments when they know they are not biased. The sincere voting no matter the

judgment goes against the interest of judge own state certainly bring about greater compliance and raise the prestige of ICJ as a credible international legal system.

4.9. LEGAL FLAWS AND THEIR RECOMMENDED REMEDIES

The ineffectiveness of ICJ has been fully established by the series of decisions given by the court failed to meet the objectives of international peace and justice. The weak and small nations looked up to ICJ with hopes and much optimism but that did not materialize due to lack of initiative on the part of ICJ judges to bring necessary reforms in the jurisdictional framework of the court.

World political and "economic problems have grown much complicated, among many reasons is included the iniquitous Global Economic Order that cannot deliver justice and equitable treatment to developing countries on account of its built in discriminatory features in the international legal that favors policies of developed world alone. As noted by international law expert, Ernst-Ulrich Petersmann, in his book ' Constitutionalism and International Organizations" (17 NW. J. INT'L L. & BUS. 398 (1996); Ernst-Ulrich Petersmann: "Even though the ICJ was expected to become the "principal judicial organ" for the settlement of disputes among States, this hope never materialized. The "Court has been criticized for its limited effectiveness and the many failures it has experienced. The ICJ has not lived up to the hopes of many of its early supporters; that hope being the ICJ, along with the United Nations, would evolve into an international government".

Still the compulsory jurisdiction of the court has been accepted with great reservation by a only a few nations because of its lack of ineffectiveness of its legal mechanism and secondly in contentious cases, majority of countries refused to recognize the mandate of the ICJ.

To begin with, only a total of 63 States have recognized the compulsory jurisdiction of the Court (with or without reservations) through the "optional Clause" system. Less than 100 cases in more than 50 years is not a heavy caseload.

"Moreover, many of the cases have not been of great international importance. In more than 20 contentious cases, the ICJ's jurisdiction or the admissibility of an application (i.e., the complaint) was challenged, with the ICJ dismissing almost half

of these cases. Although States have complied with the ICJ's judgments in many of the cases, recalcitrant States have on occasion refused to comply."

There is a long serial of violation of cases in which the ICJ decisions were given but not complied with. For example, the ICJ's first decision in a contentious case was against Albania for mining the Corfu Channel and damaging British warships. Although the ICJ ruled in 1949 that Albania should pay monetary damages, Albania has yet to do so. In 1980, Iran refused to comply with the ICJ's judgment to release the U.S. hostages. Even the United States continued to support the Nicaraguan Contras in spite of the ICJ's 1986 decision saying that this support violated international law.[11]

The reasons for the ICJ's limited influence vary from case to case basis depending upon the political clout and economic strength of countries. Main reasons as pointed out by One International legal expert, "These include the limits on the ICJ's jurisdiction, its relatively rigid procedure, and the enforceability of its decrees. But its jurisdiction is the biggest systematic problem".[12]

The Court adopted the non-compulsory jurisdictional or consent-based jurisdictional principle, not compulsory jurisdiction, which is the usual principle of jurisdiction in a developed society. In theory, the jurisprudence of the jurisdiction of the ICJ is the result of considering both the principles of State responsibility and the doctrines of state sovereignty and equality of states.

This principle of jurisdiction is based on the highest principle of civilization that every state is expected to observe under all circumstances. Any deviation from the lawful course is expected to be solved according the laid down procedure of international legal system by using Pacifist means instead of using the violence which ultimately leads to greater violence through its chain reactions.

The mechanism of ICJ has been provided with the same intentions but it could not succeed due to its ineffectiveness and weak jurisdictional structure; it is consent based jurisdiction which failed to provide justice to poor and weaker countries as been indicated before.

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[11] See, Barry E. Carter & Phillip R. Trimble, International Law 301 (1995).

[12] Edith B. Weiss, Judicial Independence and Impartiality: A Preliminary Inquiry, in the International Court Of Justice at a Crossr'oads 135-139 (L. Damrosch ed., 1987).

Currently "the ICJ, along with the UN, can act only in the role of a third party rather than as a superpower. In other words, the ICJ provides an option for States to settle their disputes peacefully through third party intervention. The USA and the former Soviet Union, the top two superpowers after the Second World War, blocked compulsory jurisdiction. Beyond the doctrines of state sovereignty and equality of states, we can see the role and impact of the most powerful states. Additionally, major issues of peace and security between the more powerful States have rarely been submitted to the ICJ, as most governments tend to consider the recognition of the jurisdiction of the court as infringing on their sovereignty. This is one cause of the limited effectiveness of the ICJ."[13]

International society is still developing, as is the jurisdiction of international tribunals has been made compulsory to punish the guilty of war crimes. The entire procedure of arrest and detention and punishment has to be carried out with the prior approval of Security Council. The strength of enforcement lies with the will of sovereign which in this case is Security Council.

In Certain matters specially falling within the category of Jus Cogens ,the introduction of compulsory jurisdiction can provide very effective mechanism for controlling the state sponsored crimes of human genocide or massacres against weak and smaller nations of the world like Israeli aggression against Palestinians or American state sponsored genocidal campaign of Indigenous people of Central America. Kashmiri Muslims are another example which as community is being targeted on racial and religious ground and has claimed huge casualties nearly amounting to 90,000 now. So some degree of compulsory jurisdiction if given to ICJ would help in restoration of some features of just global legal order.

There is another example which pertains to the World Trade Organization (WTO) Dispute Settlement Mechanism. An examination of compulsory jurisdiction in WTO dispute settlement reveals some important features which have been introduced to preserve balance in the world trade system.

It is also meant to bring equity and just distributive economic order in the world. Some experts have questioned the obligatory jurisdiction of W.T.O on ground of

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[13] Ernst-Ulrich Petersmann, Constitutionalism and International Adjudication: How to Consititutionalize the UN Dispute Settlement System? 31 N.Y.U. J. INT'L L. & POL. 753, 781-2 (1999).

agreements reached between various members of international community with respect to various protocols of international trade and form part of economic urgency. This is ground of Economic emergency which has been adopted but similarly the war crimes committed or serious political disputes between various nations too cause potential source of serious threat to global Order of Stability and Peace as well.

The basic idea behind the jurisprudence of WTO jurisdiction is that: "The authors of these agreements are the member governments themselves — the agreements are the outcome of negotiations among members. Ultimate responsibility for settling disputes also lies with member governments, through the Dispute Settlement Body"[14] The decision given by ICJ within the proposed compulsory Jurisdiction must get some sanctity through its approval from General Assembly and UN Security Council for further reinforcement so that the efficacy of the institution is not compromised with.

The incentives for States to assume responsibility and submit their consent to the jurisdiction of ICJ seem to be less what we can gather from the existing evidence.[15] Some scholars advocate that, following the model of the replacement of "GATT 1947" by the WTO Agreement with compulsory jurisdiction and appellate review, the 1945 UN Charter may need to be supplemented among constitutional democracies by a new U.N. Constitution based on U.N. human rights covenants, "democratic peace," and compulsory ICJ jurisdiction.

The amendments of Statute of ICJ is subject to the approval of United Nations, hence the General Assembly has a special role to play in views of its representation available to every big or small nation. The international legal bodies and legal institutions will have to extend their special support in this respect. The founders of UN system and its allied legal systems during middle of previous century had spurned the idea of independent existence of ICJ on ground of specific socio-political and economic conditions then prevailing but now the situation has altered a lot due to total alteration in global situation specifically after the introduction of Information Technology Revolution.

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[14] Dapo Akande, The Competence of International Organizations and the Advisory Jurisdiction of the International Court of Justice, 9 E.J.I.L. 437 (1998).

[15] James Bacchus, Table Talk: Around the Table of the Appellate Body of the World Trade Organization, 35 VAND. J. TRANSNAT'L L. 1021, 1026 (2002). Perspectives, Volume 5, No. 2, Wednesday June 30, 2004.

The ground existed then had been analyzed as such. "Since Worldwide compulsory adjudication by the UN system of international disputes among states is utopian. The Court's jurisdiction was intentionally limited at its outset. This prevented the ICJ from being totally ineffectual (as the Military Staff Committee of the UN) or from becoming a tool of either or both superpowers and losing its neutrality."[16]

As discussed earlier, the ICJ can take several measures to bring about the alterations in its Jurisdictional structure through the introduction of first Appellate Board on the basis W.T.O dispute Settlement Mechanism that has proved a great success in adjudicative functions. The same legal expert has recommended alterations in the Jurisdiction of ICJ by means of introduction of proliferation of tribunals and appellate boards on the basis of specialized subjects for bringing effectiveness in the ICJ which would only require procedural changes in the existing system.

Some have suggested the WTO dispute settlement system as a good example for introducing compulsory adjudication and appellate review on a worldwide level Instead of focusing on substantial reforms to the ICJ, there is a different trend of reconstructing the international judicial system; namely, the proliferation of international Courts and Tribunals, especially the establishment of the International Tribunal for the Law of the Sea and the International Criminal Court. These specialized judicial organs may cure some systematic problems of the ICJ. It also seems more likely that, on balance, the availability of multiple floras will increase the chances that States could find a forum with a composition and procedure they like the current ICJ jurisdictional design is "a necessary condition of the proper functioning of international courts."[17]

Similarly the scope of Advisory Jurisdiction which at present is very narrow can be widened by extending this right to renowned global bodies and national courts and states as well by bringing amendments in statutes to bring about harmony in international legal system.

"The ICJ's absolute power to rule on the scope of its own jurisdiction may lead to "undesired" results. Of course, some specific amendments could be some have argued that the power to request advisory opinions should be opened up to the U.N. Secretary

[16] Ibid.
[17] Ibid.

General and to State and national courts." "So as to extend the advisory jurisdiction of the Court considered for incorporation into the Statute of the ICJ some commentators have also explored the possibility of permitting international organizations to become parties to contentious proceedings, as international organizations play a more and more important role in the international society."[18] All of these sound reasonable and would certainly improve the jurisdiction and effectiveness of the Court, but they all require amendments to the Statue of the ICJ.

4.10. CONCLUSION

This is the last chapter, before a comprehensive conclusion, which focuses on the legal steps that may help in removing the ineffectiveness of ICJ such as making its decisions obligatory upon the parties concerned through statutory amendments that obliges Security Council on its implementation. Similarly the Jus Cogens requirements must be fulfilled as it pertains to basic Human Rights which are inviolable according to UN Charter. There are a lot of examples in which rights defined under JUS Cogens were ignored and were given some mention in this chapter. Likewise some basic flaws have been identified in the statutory system of ICJ that makes it ineffective and would require amendments on priority basis for restoring its true status as chief legal organ of UN.

This chapter also recommends delegation of some power to regional court system which must be created for reinforcing the legal system of the world. Already there are so many regional court systems working on European Continent as well in the confederate system of Caribbean Islands. Suggestion has also made for introduction of appellate bench in ICJ which brings a lot of relief to the world on issues that remained unsolvable due to deep controversies and disputed litigations. Similarly the new tier of court system should be created to deal with issues specialized subjects who involve deep technical and professional knowledge as are covered by law of sea or space law or cyber law or intellectual property rights. Some examples have been offered to explain the matter in detail in this chapter as well.

Purpose of all amendments suggested here are in fact meant to bring some effectiveness in jurisdiction of ICJ for restoring the trust of developing nations

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[18] Ernst-Ulrich Peterman, Constitutionalism and International Organizations, 17 NW. J. INT'L L. & BUS. 398 (1996); Ernst-Ulrich Peterman, How to Reform the UN System? Constitutionalism, and International Organizations, 17 NW. J. INT'L L. & BUS. 398, (1996).

through the creation of new legal order. The role of ICJ in the existing circumstances needs extension to reinforce its jurisdiction by including these new categories of cases within its scope.

CHAPTER 5

CONCLUSION

World today is confronted with several political and social challenges that have divided the world into many camps, each one fully mobilized to defeat other for its strategic ends. Both materials and non –materials resources are pushed into this struggle to bring success to this Romantic dream of Global Rule. Science and Technology is a major means being applied through its various inventions and discoveries including lethal one to turn camp of opposite ideology into subservient position. This is driven world powers into unfortunate situation of perpetual conflicts which may escalate with serious consequences if it was allowed to go ahead unchecked. Political instruments of economic leverages are being applied to manipulate the behavior of other nations by those nations which are powerful one. If this instrument fails, then the extreme action of military invasion is started as the world has witnessed in case of invasion of Iraq and Afghanistan. United Nations had failed in its objectives of bringing peace and stability through its weak representations. The chief judicial organ of UN, i.e. the International Court of Justice has proved to be very ineffective in implementing its own decisions that it has delivered from time to time.

International legal system is very discriminatory and does not offer any space to principles of legal Moralism or Naturalism which bring authenticity in system by treating all human being as the member of single human family. Division of human beings on lines of racial and ethnicity factors have added huge liabilities upon human lives and its intellectual heritage. Superiority Complex of Civilization has proved fatal for human beings, for it only militates feelings from its given source for deriving pleasure and false thrills which in ultimate sense in words of learned existentialist philosopher; Jean Paul Sartre "constitutes theatre of Absurdist. Absurdity carries no meaning at all and may prove very dangerous and suicidal unless brought under control through the cultivation of human relationship through love and understanding.

That is what is missing in today's world i.e., the meaningful contacts and relationship between various members of human family. Fratricidal passions rules over us because of lack of understandings and sense of close relationship. International law is one subject which among other factors can successfully lead us to cherished destination of human unity provided honesty and transparency is allowed to play its role and improve the international legal system on its high moral ground.

The one institution which can help us in the fulfillment of our aims of global security, peace and stability is ICJ which in my views lack statutory strength, self-determinism, and structural flaws that have in turn have made this vital Judicial Organ as ineffective and to some extent redundant as well. The cherished ideal of human progress and prosperity and peace will not be materialized unless human beings are provided safe and reliable mechanism for redressal of their grievances through the Just Principles of Equity and Jurisprudence in line with the demands of Globalization.

That is the background in which I have decided to work on this topic which basically pertains to as the name indicate, "the Jurisdictional deficiencies of International Court of Justice and its consequences". The first chapter covers all important concepts of International law and various authorities have been quoted to define them. Some people call it Public International law as the "Intellectual discipline of American law to Americanize the world". In fact it is wrong to assume International LAW has originated with the rise of American federation but its history goes back to many centuries when human civilization has taken its birth. International law is a branch of Jurisprudence which is based on customs, treatises, traditions and agreements reached between two or more nations for regulating the mutual conduct. The first chapter fully counts all those features which contribute towards to evolution of International law. Greek and Roman civilizations have also contributed in their own way towards its intellectual developments. Epicureanism and Ascetic movements that originated on Greek soil spearheaded the movements of International law that gained further momentum through the intellectual discipline of Rationalism. Muslim thinkers also contributed with ideas mainly inspired by Quranic Vision that treats all human beings as the equal members of same human family.

Ethical system provides basis for construction of architecture of international law. First chapter also presents all important stages of history through which this evolution of this intellectual and legal discipline had passed through. Middle ages in the West were dominated by the Ecclesiastical school of thoughts that provide main motivation

for running state policies through Papacy dominated system. It was Pope who distributed new found territories of the LATINO AMERICAS between Portugal and Spain through his official pronouncements that became part of official policy of these Roman Catholic countries.

Renaissance inaugurated new era of intellectual awakening that gave rise to movement of secular thinking based on Rationalism and humanism. Renowned legal philosophers and thinkers developed the architecture of Public International LAW on these new schools of thoughts. Renaissance Period is followed by the expeditions of expansion through various ocean lanes and Big Western Powers which include Britain, France, Spain and Dutch had successfully established their colonies on Asian, African and new found continents of Americas. International law became necessity to regulate the state affairs and solve mutual disputes through mediations, consultation and intra-national debates through the intervention of Legal instruments. Commerce, trade and movement of ships in International oceans, and other political and economic issues between various western nations received new treatment in the light of international law which has already developed new dimension in its discipline as was discussed in first chapter. Brief ideas of learned authorities of Post-Renaissance ear have also been reproduced for convenience of readers. The movement of modernity that deeply influenced the legal discipline of International Law had turned this system into very scientific and rational and discriminatory to some extent through the suppression of legal moralism and principles of Naturalism.

Second Chapter provides coverage to all those legal instruments which were developed from time to time in Post Renaissance Period especially during eighteenth century onward to confront various challenges in international relations and world of Diplomacy. During nineteenth century International Tribunal for Arbitration was created in Geneva to deal with mutual disputes of various nations. It was a first formal breakthrough so far as development of any global legal institution is concerned. During twentieth centuries the political events moved at a much faster speed and instruments of war became more lethal and destructive due to rise of rise of science and technology. Two Great World Wars brought incalculable devastation to humanity. First world ended with the appearance of two global institutions i.e,League of Nations and Permanent of International Justice(PCIJ).Both failed in their assigned missions due to non-compliance with their with their given systems which major nations of the west had pledged to uphold. Second World War brought catastrophe

which was never seen by historians before. Hard lessons learnt from devastations of human civilizations led to development of United Nations Organization (UNO) and its Chief legal organ i.e., International Court of Justice (ICJ). The Second Chapter provides full coverage to all the administrative, legal and financial features of these two global judicial organs and various disconnects and gaps that have affected the efficiency and self-determinism of these institutions. Institutional flaws existing in ICJ have also been pointed out and its inability to go beyond certain limited scope in search of solutions. A brief description has also been provided to unravel the scope the jurisdiction as defined through the Statutes. Important statutory provisions have also been explained to give insight about the legal working of ICJ.

Third Chapter have been devoted to critically examine the scope of jurisdiction ,the legal operation and structural flaws that have been noticed by the legal experts pointing out to the main causes that have made this global institution very ineffective. The UNO veto system has also curbed its freedom of action. The decisions so far given by ICJ have failed to take off because of Non-Compliance by the second party resulting in the maintenance of status quo in international situations. The US has imposed its super sovereign status on United Nations and its key Organs which include General Assembly and Security Council that have gone on to curtail the scope of Jurisdiction of ICJ.

It is very paradoxical situation for ICJ to seek recognition of its juridical status and also compliance of its decisions from global institutions which are instrumented to advance the strategic objectives of big powers in the world. International Power structure does not offer much space to ICJ to play its role independently on just legal ground. Such problems have been identified with examples in this chapter.

The fourth and final Chapter surveys all legal options available before us. Scope of Jurisdiction is very narrow and it needs amendments to bring greater freedom of action for ICJ. United Nations have got primary responsibility to take notice of this issue but the developing world will have to exert themselves with one voice if they want to see ICJ grow stronger and effective. Various options have been presented in research work. Structural flaws have been identified but their removal is not possible unless some broader strategic vision is carried out for the revamping of ICJ.

It is very important to introduce new tiers of regional court system or those which are already through some regional instruments must be linked with ICJ through statutory relationship. Technical and Scientific subjects have proliferated and expanded with

their influences that are now affecting the rights and duties of individuals as well as sovereign status of countries. Human communication systems both on land, sea and space have started experiencing radical alterations along with of deep complexities. Natural resources like oil, gas and metal and now water are become scarce and very precious commodities with the growth and expansion of industrial sectors. It has already triggered a lot of conflicts which must be solved through globally acceptable mechanism. Such as new court system must be discovered to provide assistance to ICJ through its statutory relationships.

This paper has expounded this concept with examples. There are many other steps which have been suggested to make this Judicial Institutions very effective through the legislation of new statutes. World is shrinking day by day due to fast growing system of electronic networking and globalization. The conflict in one region cannot contain its repercussionary effects within the boundaries of its regions. Its spill over impact has got every potential to envelope the entire world within destabilizing influence. Such flash points in history have always proved a major cause of war and active military conflicts. The future of humanity now cannot afford to have more flash points which have always ended ultimately in major conflagration which means another Great War with its catastrophic and devastating consequences. Hence it is very significant to do all what can be done to restore prestige, sovereign status and full jurisdiction to International Court of Justice in the larger interest of humanity and its well-being. Survival of humanity as one family of human being must be guarded by all legal and other physical means.

The following steps are suggested as part of reforming the jurisdiction of ICJ. These steps would not only rationalize the basis but would make them more effective through their responsive treatment.

1. Ineffectiveness of the Present ICJ.

   There is no solution with states that refuse to carry or implement the decision of ICJ on account of its limited nature of jurisdictional power. The other demerits include rigid procedure and enforceability of its decrees.

2. In Principle, the jurisdiction of ICJ is not a compulsory which needs to be evolved into mandatory in certain cases which threatens human existence as a community or natural environment or human civilization.

3. Reforming a world court is not an easy matter .The goal should be achieved step by step. The relevant provision of or Optional Clauses declaration must be interpreted in natural and reasonable way, as in the Fisheries Jurisdiction case.

Increased jurisdiction and capacity to take action *suo moto* would not bring a sense of justice among the nations falling victims to aggression but would restore their confidence in international legal system which is quite essential for bringing stability and peace in the world. This is the best legal response to growing challenge of International Terrorism.

Still there are many debates pending to open the process of refinement of international legal system. Like, whether the power holders states will share their power to provide adequate justice for those who are in miserable situation?

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