

PUBLIC INTERNATIONAL LAW

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INTERNATIONAL COURTS

International Judicial Institutions.

Historically the jurisdiction of courts rests entirely on consent of the parties. Initially in the 19th century consent was led by G.B. which submitted the Alabama Claims to arbitration. The claims arose out of the actions of a ship, the Alabama which an English ship yard made and sold to the Confederates during the Confederates & Unionists conflict. The U.S. felt that the U.K. had breached the rules of neutrality and claimed compensation for losses suffered by US forces by Confederate use of The Alabama under the Three Rules of Washington. Under the terms of the indictment G.B. had to lose. Therefore the U.K. took a political decision to accept arbitration.

The benefit was that this submission to arbitration encouraged other countries to use arbitration as well.

1899 – 1907 Conventions

Hague Convention for specific settlement of International disputes : Hague Convention No 1 in 1907 Art 7 provided a definition of International arbitration. International Arbitration has as its object and on the basis of respect for law : Implies obligations to submit in good faith to the award.

THE PERMANENT COURT OF ARBITRATION

Each signatory appoints up to 4 members of the panel and agrees the composition of the judges of a panel. There may be just one arbiter. In the event of a failure to agree each party selects 2 members only, one of which may be a national. The 4 so selected appoint an umpire ie a 5 man panel. The System still exists. See The Amasque Case; The North Atlantic Coast Fisheries Case 1910; and The Lighthouse Case 1956. The Permanent Court of Arbitration has not dealt with a lot of cases up to date.

Many other ad hoc courts exist such as those which dealt with The Beagle Channel Dispute between Argentina v Chile which appointed a British Crown Arbiter in 1972 under the General Treaty of Arbitration. Argentina didn't like the award and refused to honour it in 1976. Eventually it was solved by mediation and arbitration and a Treaty overseen by the Pope.

INTERNATIONAL COURT

The Permanent Court of International Justice (P.C.I.J.) was established in 1918 : It constitutes a panel of 15 judges which are representative of the principal legal systems. It was hoped to set a permanent court with compulsory jurisdiction but this failed due to a lack of treaties and settled for an optional clause system instead.

The old Permanent Court of International Justice was provided for by Article 14 of the league covenant but was independent of the league.

The International Court of Justice . Article 92 of the U.N. charter . The Court is recognised as the principal judicial organisation of the U.N.

For the election of judges to the I.C.J. see Brownlie and compare with the P.C.(I.J.)A. Each panel of 4 nominates 4, not more than 2 of which are nationals. General Assembly and General Secretary of the Council choose 15 each. The majority voted for are elected. There are provisions under article 11 and 12 for deadlock. It is a political process and there is no guarantee of the best persons being chosen. Theoretically regard should be paid to a fair geographical distribution and the main legal systems should be represented.

5 judges are elected every 3 years for 9 years. A quorum of judges is 9. See the provisions for panels and for ad hoc judges under Article 31. Where one of the states is not represented on the bench the bench is

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supposed to be impartial. They nearly always vote for the nominee country. If there is more than one state without a judge there is still only provision for 1 ad hoc judge. There is a decision by majority and a casting vote by the chairman.

The Parties to the Court regarding Contentious Jurisdiction

- 34 The Court is open only to states. This rules out the natural person and international persons defining the contentious jurist.
- 35(1) The court is open as of right to parties to the statute i.e. members of the United Nations and non United Nations members admitted to the statute under Article 93 United Nations Charter Conditions to be settled by Security council on recommendation of General Assembly.
- 35(2) States not party to the statute on conditions laid down by the security council must not place them in a position of inequality before the court. See Year Book I.C.S. see 51 - 54 - 1984.

Advisory Jurisdiction

The Court is limited to advisory opinions . required by General Assembly, Security Council and other agencies of United Nations e.g. UNESCO etc. . in scope of their area - if authorised by the G.A. (in fact so authorised).

See the Charter Article 96 and the statute Article 65 as to who can be parties to advisory proceedings ? Only institutions not states can ask for advisory opinions. Under article 65 the request is permissive and the court may decline. Thus in the *Eastern Carerria Case* 1923 between Finland and Russia regarding the Treaty of Dortbat the court refused the request put to it by council of League of Nations to determine existence and effects of the treaty. P.C.I.J. Finland referred the matter to the council of the League. The League asked for an opinion. Russia not a member of League. The court held Russia was under no obligation to submit the dispute to a peaceful settlement. It was not within the competence of League Council which therefore had no jurisdiction. This is still the case today. Non members are not bound and have no right for an address. In giving an advice the court must not depart from essential rules of Article 68 by which the court shall be guided. On contentious issues both sides must be heard.

Interpretation of Peace Treaties

The Reservation Genocide Case 1950 seems to support the theory that a Court cannot deal with cases regarding a pending dispute. Distinguish that from the Eastern Carelia case and the advisory opinion which was not binding and compare with contentious cases. No state can prevent the giving of an opinion which the U.N. considers desirable and which provides enlightenment as to the appropriate courses of action they should take. this is not however a backdoor settlement of contentious case.

Regarding the Duties of General Secretary as Depository. US members of the UN Administration in 1956 involved in the I.M.O. during the McCarthy witch hunt. Asked by US to sign declarations or be fired. They refused and were fired as UNESCO officials by the Secretary General in collusion with McCarthy. this was a blatant interference by the US with the independant standing of the UN and deprived the UN of many talented administrators merely because the US was paranoid about Communist Infiltration into the UN and even today is evident in the way the UN panders to US opinion.

Article 30 General convention on Privileges and Immunities of U.N. 1946 Dispute U.N. and member states . p. 736 Harris . Binding

The Western Sahara Case involved a pending dispute. Two questions were put to the court. Was the Western Sahara at time of colonisation in territory belonging to no one? What was its legal ties with Morocco and Moravian territories ? The Court did not give judgment of sovereignty and merely provided guidance to General Assembly as to it's dealings.

The General Assembly while noticing a conflict had no desire to bring a dispute to court and sought advice on it's own dealings. Therefore the sovereignty of Spain not affected and no binding jurisdiction involved. No body can substitute itself for a party in a contentious judgement. See I.Y.B.K. 1975-76 p.112. and especially p113 regarding the propriety of giving a proprietary opinion in these circumstances.

PUBLIC INTERNATIONAL LAW

How does one give consent to contentious Jurisdiction?

There are a number of ways :

- 1) By an ad hoc special brief. It is a compromise used by states not prepared to give the court outright jurisdiction.
- 2) By Special application one party gives notice to the court and names other party and the issue. It is optional for the other party to consent and turn it into a Forum prorogatum.
- 3) Bilateral treaty and jurisdiction clause in a treaty. Year Book 1984/85 112 - 118 list of such treaties.
- 4) Optional clause system . No reference to the term . but discussed in article 36, paragraph 2 : court statute : See Brownlie

A state may make a declaration recognition as compulsory against any state recognising the same obligation thus providing jurisdiction where there is a reciprocal obligation. What jurisdiction results ? Based on a) the treaty ; b) Principles of International Law ; c) Existence of any fact which, if established, constitutes a B. of I. obligation ; d) Nature and extent of reparation for a B. of I. obligation. In order to be compulsory the parties must consent.

Reciprocal If the formulations are not identical then court jurisdiction is only in respect of matters in both formulations.

Anglo Iranian Oil Case . I.C.J. 1952 98 To have complete jurisdiction both must include the dispute in its scope. Any reservation made in a declaration has a boomerang effect.

Norwegian Loans Case. I.C.J. 159 France v. Norway. Norway raised preliminary objections to jurisdiction 1) that Norway could rely on the same reservation as France which was not included by Norway. The French reservation stated that this declaration does not apply to differences relating to matters essentially within National Jurisdiction as understood by the French Republic. This related to Subjective Domestic Jurisdiction. Compare an Objective Jurisdiction reservation

Not "understood by X an independent body" The Court upheld Norway's objection There was no jurisdiction.

Optional clauses of member states are listed in the UN Year Book. As far as the UK is concerned it was initially open to full jurisdiction. In 1957 the UK revised this to avoid question of nuclear tests to be brought before the court and made a reservation regarding National Security. In U.K.'s opinion in 1958 the reservation was removed for future acts. In 1963 there was a UK removal of reserves except in respect of the commonwealth and World War II disputes where the other side accepts jurisdiction of court for only a particular case or has only joined in last 12 months. Now see 1969 Reservation in the 1984/85 Year Book

The U.S.A. and reservations Declaration 1946 see 1984/85 Year Book p. 99. Accepted courts jurisdiction subjective reservation. Disputes essential in Domestic jurisdiction U.S.A. as determined by U.S.A. In 1984 the US made an attempt to exclude 1946 declaration in respect of a dispute with certain S. American state for two years from April 1984 -see p.100 1984/85 Year Book. Declaration ".....1946...." six months notice of change "*Military & Paramilitary v. Nicaragua*" KJ 1984 392 at 421 In April 1986 the U.S.A terminated the I.C.J.'s jurisdiction.

Canada 1984/85 Year Book 69 - 70 : Laws regarding the protection of Seas Pollution provides for an extension of Canadian Jurisdiction to 100 miles. This is believed to be within International Law but amounts to unilateral measures to protect Arctic from oil pollution in cold Northern waters susceptible to oil spillage which does not break down and disperse as in warmer waters. Canada 1985/86 Year Book p64.

Inter Handel Case 1969. The court made no declaration on the legality of a sub clause. Article 36 (6) . In the event of a dispute as to whether the court has jurisdiction the matter shall be settled by the court.

Lauterback J suggested that subjective declarations go to the root of a treaty and make it void resulting in the unilateral withdrawal from the court. Withdrawal is not possible once jurisdiction is accepted. The court then has binding jurisdiction. Regarding compliance with court judgements parties are theoretically bound

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but in practice there are few cases where states do not comply. Mostly states only go to court if they expect to win or are prepared to lose. Threats not to abide by the court's ruling are normally therefore merely political weapons to satisfy opposition at home or perhaps to coerce the bench.

If there is a failure to comply under Article 94 of the Charter the Security Council shall make recommendations as to what measures are to be taken to give effect to judgment but these are subject to possibility of veto.

Chapter 7 UN Charter

If there is a threat to peace as a result of a failure to accept a judgement - a situation which is by enlarge theoretical there can be an indication and suggestion of Provisional Measures by the court with possible issue of Interim Injunction under Article 41 of the court statute. How binding is this? Not actually binding in reality and in law. See

The Fisheries Jurisdiction Case 1974 I.C.J. U. K. v. Iceland and The Federal Republic of Germany v. Iceland : Iceland 1959 Treaty. The U.K. recognized Iceland's jurisdiction and territorial limit but in 1972 Iceland refused to recognize the I.C.J.'s jurisdiction. The court gave a judgment.

The Nuclear Test Case . New Zealand . Australia France. France refused to recognize the I.C.J.'s jurisdiction.

Greece v. Turkey . Continental Shelf dispute jurisdiction. Turkey refused to accept I.C.J.'s

FURTHER READING

Schwarzenberger & Brown : Manual Ch9. Schwarzenberger : Power of Politics Ch22 Cheng : Scope & Limits of advisory jurisdiction of the ICJ 24 The Solicitor 1957 Cheng : 1st 24 years of the ICJ : 20 Year Book of World Affairs 1966

Gross : Review of the Role of the ICJ 66 AJIL 10972 p479 Harris : Cases & Materials Ch12

O'Connell : International Law for Students Ch 31 32 & 33 Merrills : The Optional Clause Today BYIL 1979 pp87-116 ICJ Reports 1950 p221 - Interpretation of Peace Treaties - green p567 Hague Convention for the Pacific Settlement 1907 UKTS No6 1971 Cmnd 4575 Brownlie Documents p387 : Charter of the UN & ICJ

Cases

Nationality Decrees in Tunis & Morocco PCIJ 1923 Green p102

Eastern Carelia PCIL 1923 Green p106

UN Administrative Tribunals ICJ Reports 1954 p47 & Green p803

Norwegian Loans Case : ICJ 1957 p9 & Green p746

UN Expenses Case : ICJ 1962 p150

Barcelona Transaction Case : ICJ 1970 p1 & Green p544

Beagle Channel Arbitration - Argentina & Chile 1976 HMSO 1977 & 17 ILM 1978 pp632

UK v Iceland Fisheries : ICJ 1973 p3 & 1974 p3 : Green p328

New Zealand & France : Nuclear Tests ICJ 1973 p135 & 1974 p457 : Green p289 US & Tehran ICJ 1979 p7 : 1980 p3 : 1981 p45.