JUDICIALISM IN INTERNATIONAL LAW: THE PIVOTS, PROSPECTS AND CHALLENGES

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CERTIFICATION

This is to certify that this research is the original work of Alisigwe, Henry Chimezie, carried out under the guidance and supervision of Professor Greg C. Nwakoby and Professor Godwin N. Okeke. This research has neither been published nor presented elsewhere for the award of any other degree before any other institution.

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DEDICATION

This work is dedicated to Almighty God; Thou art the purveyor of all blessings and the sustainer of all aspirations. I bear testimony to your goodness and faithfulness. Let your mercy, grace and favour continue to reign supreme in my life – Amen.

And God's gift to us: Miss Bliss Chimdiya Alisigwe – may you be a blessing to us and to your generation.

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LIST OF ABBREVIATIONS

AJIL	American Journal of International Law
ASCIL	African Society of International and Comparative Law
AU	African Union
BYIL	British Year Book of International Law
CAT	Committee Against Torture
CCJLR	Community Court of Justice Law Report
CERD	Committee on the Elimination of Racial Discrimination
CJIL	Chinese Journal of International Law
CJLJ	Current Jos Law Journal
EBSUJ.I.L.J.R.	Ebonyi State University Journal of International Law and Jurisprudence Revision
ECHR	European Convention on Human Rights
ECJ	The European Court of Justice
ECSC	European Coal and Steel Community
ECR	European Community Report
EEC	European Economic Community
EEZ	Exclusive Economic Zone
ECOSOC	Economic and Social Council
ECOWAS	Economic Community of West African States
Eur. J. Int'l L.	European Journal of International Law
EU	European Union
EURATOM	European Atomic Energy
FAO	Food and Agricultural Organisation

FWLR	Federal Weekly Law Report
HRLJ	Human Rights Law Journal
IAEA	International Atomic Energy Agency
IBRD	International Bank for Reconstruction and Development
IACtHR	Inter-American Court of Human Rights
ICAO	International Civil Aviation Organisation
ICC	International Criminal Court
ICCPR	International Covenants on Civil and Political Rights
ICJ	International Court of Justice
ICL	International Criminal Law
ICLQ	International and Comparative Law Quarterly
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for Yugoslavia
IDA	International Development Association
IFC	International Finance Corporation
ILC	International Law Commission
ILO	International Labour Organisation
ILR	International Law Reports
ILM	International Legal Materials
IMF	International Monetary Fund
IMO	International Maritime Organisation
IMT	International Military Tribunal
IMTFE	International Military tribunal for the Far East
IMSUJIL	Imo State University Journal of International Law
Int'l LJ	International Law Journal

ITLOS	International Tribunal for the Law of the Sea
ITU	International Telecommunication Union
JICL	Journal of International and Comparative Law
LJ	Law Journal
LOSC	Law of the Sea Convention
NATO	North Atlantic Treaty Organisation
NJIA	Nigerian Journal of International Affairs
NJLS	Nigerian Journal of Legal Studies
NGO	Non Governmental Organisation
NYUJILP	New York University Journal of International Law and Politics
OAS	Organisation of American States
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
RADIC	African Journal of International and Comparative Law
SCNLR	Supreme Court of Nigerian Law Report
TFEU	Treaty on the Functioning of the European Union
TEU	Treaty of the European Union
UNTS	United Nations Treaty Series
UK	United Kingdom
UN	United Nations
UNCIO	Documents of the United Nations Conference on International Organisation
UNCLOS	United Nation Convention on the Law of the Sea
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNIDO	United Nations Industrial Development Organisation

UNGA	United Nations General Assembly
UNSC	United Nations Security Council
US	United States
USA	United States of America
USSR	Union of Soviet Socialist Republics
VCLT	Vienna Convention on the Law of Treaties
WTC	World Trade Centre
WHO	World Health Organisation
WIPO	World Intellectual Property Organisation
WTO	World Trade Organisation
WMO	World Meteorological Organisation
YBILC	Year Book of the International Law Commission

ABSTRACT

International relations since the mid-twentieth century have undergone some deepening and intensification. The worldwide ascendancy of the rights of the individual have made the veneration of these rights a subject of International Law Consequently, International Law has striven to engender resort to law and the adjudicatory process to settle disputes that are incidental to inter-state intercourse, as well as holding accountable, violators of the rights reposed in the individual as a subject of contemporary International Law. This is underscored by the exhortation in Article 33 of the U.N. Charter on the required means of inter-state dispute resolution. This research therefore discussed the adjudicatory processes of inter-state dispute resolution and the supra-national judicial institutions that play pivotal roles in the arduous task of engendering a more peaceful world, to wit: the International Court of Justice (ICJ), the International Criminal Court (ICC), the International Tribunal for the Law of the Sea (ITLOS), the European Court of Justice (ECJ),the Inter-American Court of Human Rights, the African Union Court of Justice and Human and Peoples Rights (ACJHPR) and the last but by no means the least, the ECOWAS Court of Justice. The prospects and challenges dogging these institutions were highlighted and x-rayed as we believe appreciation of these, hold the key to the spread of pacifism in inter-state dispute resolution through the judicial route. The methodology adopted in this research work is the doctrinal approach. Consequently, the resource materials consist of textbooks, journals, International Treaties, Local Statutes, judicial decisions and internet materials. The research finds that the adjudicatory procedure which underlines the concept of judicialism has gained more cognition and veneration among actors of the international system, given the plethora of international judicial institutions in existence that one can conveniently say that the practice of pacific settlement of international disputes is an *ergo ommes* obligation. It was also found out that the concept of judicialism is gradually being used to erode certain concept of International Law like sovereign immunity in favour of the individual who constitutes the main reason for the existence of the state. This shift as encapsulated by such judicial institutions like the ICC, ECJ, the Inter-American Court of Human Rights, the AU Court of Justice and Human and Peoples' Rights and the ECOWAS Court of Justice signposts the culmination of efforts at entrenching the culture of humanism even in the face of warfare or armed conflict. These in turn also help preserve the human rights of the individual thereby limiting the culture of impunity among state institutions and leaders. It is the belief that whilst judicialism alone given the power play of inter-state relations may not totally entrench an unrestrained aptitude for law and adjudicatory process at International Law, this work would have by the discourse herein aided in extending the frontiers of a peaceful world founded upon respect for International Law and the adjudicatory process.

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CHAPTER ONE

INTRODUCTION

1.1 Background to the Study

Law is one of the institutions which are central to the social nature of man and without which he would be a very different creature. This is underlined by the fact that at any given epoch in time, man has always desired peace, stability and orderliness in his quest for the maximization of the resources inherent in nature. This desire, it has been asserted was what pulled man out of his natural disposition as a selfish animal and integrated into a community where he associates with others, shares values and aspirations with his neighbours, develops common objects and ideals.[1]

Thus the maxim *ubi societas ibi jus* is not just a mere aphorism. Law is a stabilizing index of man's collective aspirations for achieving personal harmony within his society. This is against the backdrop that every society irrespective of its size or status has always created for itself a framework of principles within which to develop. Thus, permissible acts and forbidden acts have all been spelt out and ingrained in the consciousness of the particular society. A' fortiori, real progress for man in his quest to effectively exploit and maximize the resources inherent in nature can only be based upon a community of men and women combining to pursue commonly accepted goals. Law becomes that element that binds the members of the community together in their adherence to recognized

[1] C K Okorie, "Is Defection From One Political Party To Another By Elected Public Officials Justified Under The law," (2010/2011) *NJLS* Volume IX p. 45: See also D Lloyd, *The Idea of Law*, (London: Penguin Books Ltd, 1997) pp. 7-25: J Dozie, *Law and Society*, (Owerri: Kemano Publishers, 2011) pp. 1-29.

values and standards consisting in the main of a series of rules regulating behavior and mirroring to some extent the ideas and preoccupations of the society it seeks to regulate. However, Law, be it permissive as in what it allows for example, the freedoms accorded the individual; and punitive as in punishment it metes out for infringing of its precepts is not automatic and self-executing. Every society at every epoch in history has always assembled men and institutions whose primary aim has always been to interpret these laws with a view to settling disputes among those subjects to authority in their dealings with one another, as well as permissible limits and standards for governmental actions for those in authority. This proclivity for a body of men or institution charged with interpretation of laws and settlement of disputes underlines the whole concept of judicialism. If the welter of legal texts and opinions is to the effect that the *raison d'detre* of contemporary international law is to bring interstate power politics under law,[2] judicialism becomes the roadmap towards achieving that goal.

1.2 **Statement of the Problem**

The judiciary has always existed in every society in every epoch of time. Their nature and characteristics is often a function of the civilization and sophistication of the particular society. This role of the judiciary which is encapsulated in the expression "judicial power" which is aptly described as the power which the state exerts in the

[2] This desire to bring power under law it is to be noted underlined the concept of rule of law under domestic law. The International law recognition of this need is exemplified by UNGA Res 60/1 of October 24th 2005, UNGA Res – 63/128 of January 15th, 2009. UNSC presidential statement of June 22, 2006 – S/PRST/2006/28. See also J Crawfird, "International Law and Rule of Law," (2003) 24 Adel L. Rev 3; T Nardin, "The Rule of Law in International Relations" (1999) 5 International Legal Theory, 2.

administration of public justice[3] is to be contradistinguished from the power the state possesses to make laws and also to execute those laws so made.

The idea of law and the imperative of its functions in the life of man in his society has been transmitted into the international arena which is made up of a conglomeration of societies cum states. Thus, a body of rules and precepts which is aptly termed International Law[4] has emerged to regulate the various societal relations. It needs emphasizing at this juncture that most societies for purposes of their intercourse with other societies in the international arena are grouped into states.[5]

These states which are inhabited by racial types are sovereign and independent and straddle the five main geographical landmasses called continents into which our world is divided. Against the backdrop that states exist to aggregate the goals of their citizenry and enhance the benefits accruable to their citizens from the exploitation of nature's resources which are in limited supply; they thus set and pursue their economic goals, propagate their disparate brand of ideology as well as institutionalizing their own political system and government. These activities are carried on in the world environment. Thus the continents do not exist in complete isolation from each other nor do the states.

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3 B O Nwabueze, *Judicialism In Common Wealth Africa,* (London: C. Hurst And Company, 1977) P.1.

4 It needs stating at this juncture that International Law is bifurcated into two, namely; Public International Law (commonly referred to as International Law simpliciter) and Private International Law (usually termed conflict of laws). The former is the system of law which govern relations between states. The later deals with those cases within particular legal systems in which foreign elements obtrude, raising questions as to the application of foreign law or the role of foreign courts. See generally M N Shaw, *International law* (Fourth edn. Cambridge: Cambridge University Press, 1997) p. 1; M Akehurst, *A Modern Introduction To International Law,* (Second edn. London: George Allen and Unwin Ltd, 1971) P.1; Reference in this work to International Law is reference to Public International Law except where the context dictates otherwise.

5 In the political realm, society culminates into states. On the subtlety of the distinction between society and state, see A Appadorai, *The Substance of Politics,* (Oxford: Oxford University Press, 1975) P. 13.

Consequently not only do states come into contact with other states within their own continent, they also interact with states in other continents. This world-wide interaction according to Orwa takes place in what is called the "International system"[6] and underpins it. An international system is a decentralized political system dominated by competing, relatively autonomous territorially based political organization.[7] The driving force of the international system is the sovereign and independent nation-states and the international and regional organizations[8]. One major trait of the international system is competition over the human and material resources of the world environment. This desire for a greater share of the world's resources often times end in dispute as to who is entitled to what, over what area and to what extent, etc. Critical in this struggle is the fate of the individuals inhabiting the various states of the international system. Are their rights and humanism always factored in, in the course of the struggle or do they also constitute part of the booties of the inter-state competition? This competitiveness is also accentuated by the fact that the state actors in the international system are actuated by their diverse historical, cultural, economic, political and social background. Consequently, their values and goals have been, are and will continue to be dissimilar. This situation reflects the absence of easily achievable consensus among the various groups which participate in international relations. Therefore no state can expect only gains for its own position for all values, at all times and in all places. All states recognize that in the international system, losses, gains, compromises, conflicts, threats and ultimately force are inevitable concomitants if they are to enjoy some of the rights and privileges appurtenant to inter-

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6 D K Orwa, Theories of International Relations in O J Ojo *et. al***,** *African International Relations*, (London: Longman, 1985) P.1.

7 D W Coplin, *Introduction to International Politics: A Theoretical Overview*, (Chicago: Mackham Publishing Co, 1971) p.331.

8 D K Orwa, *loc. cit.*

state relations. A' fortiori, the relationship existing among states is one characterized by conflict and co-operation.

However, the deleterious and devastating effects of conflict and wars to the psyche of individuals and stated objectives of states have made resort to wars unattractive. Conscious efforts have always been made since the second half of the twentieth century to institutionalize the resort to law and legality as a veritable instrument for inter-state intercourse and *pro tanto* engender a peaceful inter-state relations. This resort to law and legalism in the conduct of inter-state relations will in turn entail the selection of a select body of men and women endowed with the requisite intellect and professionalism, given the complexities of present day international relations, to adjudicate on sundry and disparate issues as may be brought by interested state parties. It remains to be seen how far this resort to law and judicialism has engendered pacifism in inter-state intercourse.

1.3 **Purpose of Study**

In view of the foregone, this work shall be examining the adjudicatory institutions under international law for the purposes of pacific settlement of international disputes. It should be noted that pacific settlement of inter-state disputes underlines the contemporary international law to such an extent that we can safely argue that peaceful settlement of inter-state disputes is of an *erga ommes* character. This is predicated on the fact that over the last century, international law once reserved for arcane matters of diplomacy and trade has come to encompass a broad range of human experience and activity. Given these major historical developments, the nations of the world have created (and are still creating) new sets of legal institutions designed to resolve disputes between global actors, to settle disputes that might otherwise play out in the battlefield and to offer the promise

of justice to those who cannot find it within their own countries. Consequently as contemporary international law seeks to bring interstate power politics under a regime of international rule of law, this work aims at highlighting the potentialities and challenges international adjudicatory institutions (which are ineluctable concomitants to an international society founded on law) holds in entrenching a culture of pacifism in the midst of conflicting claims. This in turn it is hoped will stimulate deeper thoughts and fuller appreciation about the interplay that must take place between legal institutions and other international actors if justice is to be secured for all.

1.4 **Scope of Study**

Given the complexities of contemporary interstate intercourse and the increasing felt need of states that peace through law and the judicial process is better in resolving interstate disputes, efforts have always been made to establish judicial institutions through which various actors of the international system can ventilate their grievances. These judicial institutions keep burgeoning as the challenges faced by various actors keep increasing. However, in this work, we have limited ourselves to the more visible judicial institutions both at the international and regional levels as the list can never be foreclosed for even as we write more may be in the works while those already established may mutate into newer forms. Thus, the discourse herein is limited to the International Court of Justice, International Criminal Court, International Tribunal for the Law of Sea, European Court of Justice, Inter-American Court on Human Rights, AU Court of Justice and Human and peoples' Rights and the ECOWAS Court of Justice. While no work can be exhaustive of the knowledge it espouses given the fluidity of life itself, it is our hope that this work brings to fore the need to entrench judicialism and its values into the fabric

of international life without the limitations usually associated with interstate adjudicatory procedures.

This work consequently is divided into seven chapters. Chapter one which is the introductory aspect also includes an analysis of the concept of judicialism in definitional terms. In discussing this introductory chapter, great emphasis is laid and allusions drawn to municipal law rational for and attributes of the judicial function. For it was by so doing that the background, statement of the problem, significance and purpose of this study etc which constitute sub topics were brought to the front burner for a keener appreciation.

Chapter two is a discourse on international law. This is against the backdrop of the topic of this work. For except we understand the nature and subject matter of international law, applying the concept of judicialism which is essentially founded upon municipal law may lead to some obfuscation in appreciation of the overall work. Consequently, we begin the chapter by discussing the rationale for international law. Thereafter, we went into a historical exegesis of international law from its early origins to the twentieth century. We concluded the chapter by looking at international law in the twenty-first century and the prospects it holds for the international community.

Chapter three discusses international disputes and the resolution mechanisms. This, chapter becomes pertinent because the main function of law and the adjudicatory process is the settlement of disputes in such a way that the society does not lose its sense of orderliness and peaceful co-existence as conflict is inimical to societal harmony. A' priori, we begin the discussion by looking at the meaning of dispute albeit international dispute. We also discussed the types of disputes which in the main could be legal and justiciable; and political and non-justiciable disputes. We next looked at modules of

dispute settlement. By this we mean the choices available to disputing state parties to a conflict. They may chose to settle such disputes amicably or by force of arms. We conclude the chapter by looking at categories of pacific settlement of international disputes.

In chapter four, we commenced the subject matter of discourse proper by looking at the pivots of international adjudicatory system under the United Nations system. In this wise, we x-rayed such judicial institutions like the International Court of Justice, The International Criminal Court and The law of the Sea tribunal. Their history, structure and composition were all analyzed as well as their jurisdiction and jurisprudence.

Chapter five continues our discussion of the pivots of the international adjudicatory system but this time under the regional and sub-regional levels. For this purpose, we chose the more prominent of the regional and sub-regional judicial institutions; their history, structure, composition and jurisdiction and jurisprudence.

Chapter six is an enquiry into the prospects and challenges that underlines the international adjudicatory system. Top among the prospects is the deepening of man's resolve for a peaceful world even as they compete for the earth's resources; the expansion of the province of the law; the reining in of accountability and responsibility on the part of the world's leaders vis-à-vis their subjects and nationals of other countries; the political cum diplomatic roles resort to this supra-national judicial institutions play in the affairs of the states, as well as the therapeutic effect their decisions could engender on the psyche of the states. Top on the list of the challenges faced by these supra-national judicial institutions include the pristine and recurrent concept of sovereignty which

oftentimes is a veritable obstacle to most states efforts at integration whether it be political, economic and judicial; the fear of duplication of international legal norms given the need for certainty in the principles of law; the cost of litigating at these supra-national courts given the ravaging poverty levels across most parts of the world; the structure and composition of these supra-national judicial institutions given the fact that the bench of these supra-national judicial institutions are representative of various states of the world with different legal systems. Moreso, confidence in any adjudicatory process is intertwined with the confidence litigants placed on the composition of the bench.

Chapter seven is our conclusion wherein we hope to make our observations and recommendations (if any) for a deeper judicialization of inter-state dispute resolution system.

1.5 **Significance of Study**

It needs emphasizing at this juncture that every society irrespective of its civilization and sophistication at any given epoch in history has always devised means whereby disputes arising in the daily intercourse of such society's members could be settled. The need for the judiciary is underlined by the fact that dispute is an inevitable fact of man's socio-economic and politico-cultural existence. Moreover, given man's aptitude for absolutism when invested with power, the judiciary comes in handy as the institution invested with the power to hold the balance between the government and the governed. Thus, within Municipal Law and in the context of constitutionalism, the judiciary acts as the watchdog to ensure that both the government and the governed act in accordance with the provisions of the Supreme Law and other Laws of the land. Any good society (and the

international society is one) must have as its foundations Law, Justice, Peace and Security, as these values rank among the crucial needs of the people in any society[9]. Living in society creates rights and imposes duties. However, man is a social and rational being and is imbibed with a free-will. This enables him to obey or disobey the laws passed to govern and regulate different social relationship and interactions. However, the need for the law of the society to be enforced and their breaches redressed in turn necessitated the need for an arbiter and umpire which in turn led to the introduction of the court system designed to look after the interpretation of the society's laws, to adjudicate and to settle disputes in order to maintain social equilibrium by arriving at just equilibrium.[10] In the task of carrying out its adjudicatory functions, the judiciary is always confronted with the challenge of mediating between principle and practice; between constitutional idealism and naked and practical idealism; between the hopes of ordinary men and women and their despair.[11]

Thus, the judiciary as the guardian of the law is in the unique position to create among the people (both the rulers and the ruled) an attitude of respect for law and legality in the conduct of public affairs. A' fortiori, the attitude of the people towards the law and legality is conditioned to a large extent by the way in which its provisions are interpreted and applied by the courts. A liberal and purposive interpretation of the law coupled with courageous dynamism in its application attracts vitality and reality to its provisions and engenders on the consciousness of the rulers, the peremptoriness of its command and the

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9 I C Dakyen, "The Nigerian Judicial System: Problems, Challenges and Prospects," in Timothy A Oyeyipo *et.al* (Eds.) *Judicial Integrity, Independence And Reform,* (Enugu: Snaap Press Ltd, 2006) P. 331.

10 *Ibid.*

11 Umaru Eri, "The Role Of The Judiciary In Sustaining Democracy In Nigeria," in Timothy A Oyeyipo *et.al* (Eds.) *Ibid,* P. 174.

futility of disobeying its provisions. Consequently, it has been posited and we agree that "a government faced with such imminent risk of having its acts invalidated by an ever watchful judiciary might … make respect for the constitution a touchstone of all its actions".[12] For the governed, the impact of the afore-mentioned approach to statutory interpretation will be the engendering of a willingness to seek the intervention of the court against any breach of the provisions of the law by the government.

At the International system, the unwavering resolve by members of the International Community for resort to law and legality in the conduct of inter-state intercourse has engendered an aptitude for judicialism among actors of the international system. This is especially so when the horrors of the two World Wars, the impunity of political leaders in quelling agitations by their citizens and the status (political, economic and military) of the various states and the ever looming concept of state sovereignty are factored in. Judicialism comes in as an assurance that the world can be turned into a community of states governed by law and legality. This is if it is also realized that the growth of international courts has also stimulated deeper thoughts about the interplay that must take place between legal institutions and other actors (such as governments and civil society) if justice is to be secured. The significance of this study is further accentuated if we also consider the characteristics of the judicial function and the hope it holds in the ventilation of rights.

The judicial function is necessarily coterminous with the exercise of judicial power. Judicial power is the power which the state exerts in the administration of public justice.

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[12] Ben Nwabueze, *The Judiciary as the Third Estate of the Realm,* (Ibadan: Gold Press Ltd, 2007) P.3.

This is to be contradistinguished from the power of executing them. It necessarily encapsulates the power which every sovereign must necessarily have to decide controversies between itself and its subjects whether the right relates to life, liberty or property. However, against the backdrop that other processes exist for the amicable resolution of disputes, it becomes necessary at this juncture to highlight some of the attributes appurtenant to the exercise of the judicial function, to wit:

(a) Courts Decide Controversies or Disputes: For it to do this, such controversies or disputes must be justiciable disputes, ie one affecting the legal rights of a person and for which the laws of a country have invested the courts with power to decide upon.

(b) Courts typically decide whether legal rights exists in a particular case and by so doing finally disposes of the whole dispute.

(c) Courts Apply Pre-Existing Legal Rules: This is predicated on the fact that legal rights are dependent upon the existence of legal rules.

(d) Courts make determinations which are binding upon the parties.

(e) The judicial process affords the disputing parties the opportunity of arguing for a decision in their favour by presenting proofs and reasoned argument.

(f) The judicial power is not self-activating as it can only be exerted at the instance of a person asserting a legal right.

(g) The courts are invested with power to enforce compliance or obedience to the decision.

(h) The courts are often constituted in such a way that they remain independent

from popular or party pressure.

It needs emphasizing at this juncture and for purposes of our work herein, that at the level of International Law, all these attributes may not apply strictly given the concept of sovereignty. Thus, International Judicial Institutions lack the power to enforce their decisions. Sovereignty and power are perhaps the two most popular words in the lexicon of writers on international law and international relations. This may seem to suggest that states may do pretty much as they please; and that the nation-state system is not a system at all but instead a polite label for international anarchy. Nevertheless it is a truism that most states are on friendly terms with most other states most of the time. This condition implies that some restraints or controls must be in fairly continuous operations. Law albeit international law comes in handy as one of the institutionalized approaches to the control of interstate relations. This it does through the practice of pacifism in settlement of interstate disputes of which the adjudicatory process is but one route. Believers in international law as an approach to peace are far more patient with judicial settlement. Indeed judicial settlement is in a sense the basis of the international law prescription. Given the fact that international law can best be deepened via the judicial route, advocates of international law as an approach to a peaceful resolution of interstate conflict have consistently sought an expansion of the area in which judicial processes can be made to operate and a contraction of the area in which political processes must be resorted to. Judicialism which encapsulates the adjudicatory method of dispute resolution assures a larger measure of jurisdictional and procedural consistency, thereby engendering equally a somewhat more favourable climate for the progress of the law from precedent to precedent. In the process, it provides a framework for the resolution of

international conflicts or at least for keeping them from becoming major threats to the peace. While judicialism is concerned with disputes arising out of past and present tensions, the pronouncements of international courts also set agenda for future interstate conducts thus making it a key player that shapes patterns of international relations which ultimately it is hoped may lead to a world order based on justice under law. This fact re-emphasizes the need for a work of this nature so as to re-stimulate thoughts about the interplay that must take place between international adjudicatory institutions and other international actors in seeking justice and peace through law.

1.6 Literature Review

Any community which does not possess a mechanism for pacific resolution of disputes arising therefrom face the danger of resort to violent conflict resolution. The international community shares in this attribute. In veneration of this thesis, Murthy restates the functionalist political theory which is premised on the assumption that it is possible to establish a world government[13] on the model of national governments. It is to be realized that a major pillar of any national government is the adjudicatory function. While acknowledging the fact that a single government for the whole world is not feasible due to the consensual nature of interstate relations, he sees the various inter governmental organizations as a meaningful alternative in engendering a common purpose for all states. However it remains to be argued whether given the all embracive scope of contemporary international law, the argument against the existence of a world government can still hold sway. While no two models of governments even at the domestic level can ever be the same, it remains moot whether the United Nations with its armada of agencies and

[13] B.S. Murthy, *International Relations and Organization* (Lucknow: Eastern Book Company, 1991) p. 167.

responsibilities has not thereby transmuted into a world government. Antagonists of this view may cite the fact that membership of the UN is voluntary. However this view is demolished when it is realized that even non members of the UN are expected to abide by its precepts[14] whilst institutions established under its aegis have been known to extend their jurisdictional ambit to persons or parties that have not subscribed to such institutions' constituent document.[15]

Notwithstanding the amount of collaborative activities involving states and non-state groups i.e corporations and individuals, the fact remains that there is always a tendency on the part of states to give their respective national interest priority over the competing national interests of other states in circumstances impelling it to take decisions to protect its interest without looking to others for protection thereby ultimately sowing the seed for disputes. International law in recent times has always felt the need that if occurrence of violence is to be curtailed if not obliterated, there should exist practices, procedures and structures by which disputes and conflicts arising intermittently may be resolved. Thus much efforts has been put in establishing institutional structures and procedure for settling disputes using the instrumentality of law. This cut across both the adjudicative and diplomatic methods.

The adjudicative method which underpins the concept of judicialism has always fascinated the minds of leaders since the nineteenth century culminating in the establishment of the Permanent Court of International Justice (PCIJ) in 1920 as a corollary to the League Covenant. The turbulence of the League era also affected the

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14 Article 2(6) UN charter.

15 As exemplified by the International Criminal Court's issuance of an arrest warrant on Sudanese president, Omar Al Bashir even though Sudan is not a party to the International Criminal Court statute.

effectiveness of the PCIJ. Given the ineluctability of peace in man's quest for development, and the raison d'être for the League of Nations, the fact that the PCIJ statute was not part of the league covenant was a major shortcoming. Ditto to its nomenclature: "Justice" assumed a new hue to wit: "international justice" instead of "justice" *simpliciter.*

Judicialism as a concept and synonym for the adjudicatory procedure has gained ascendancy and acclaim among legal writers even as the word itself is yet to be formally adopted into everyday English usage.

Thus Nwabueze in trying to analyze the adjudicatory institution in the then emergent commonwealth African Nations aptly termed his work "Judicialism in Commonwealth Africa".[16] Though his work is expository of the essentials of the judicial function in its quintessence, its focus was mainly the national or domestic level. Ditto to his other work "Judicialism and Good Governance in Africa".[17] In these there was no attempt at discussing the concept even comparatively with similar institutions at the international level. The same trend continued in Ibrahim Tanko's "Judicialim and Judicial Process in Nigeria: What the Supreme Court Did, What the Supreme Court May Do"[18]. In this he tries to x-ray the expected role of the judiciary in a constitutional democracy, arriving at the thesis that the concept of judicialism underpins the concept of constitutionalism, it needs stating that this issue of constitutionalism when transposed to the international system calls into question, the appropriate relationship between the charter establishing an international organization and institutions created therein.

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16 B O Nwabueze, *Judicialism in Commonwealth Africa* (London: C. Hurst and company, 1977) p.1 *et seq*

17 B O Nwabueze, *Judicialism and Good Governance in Africa* (Lagos: NIALS, 2009) P.I. *et seq*

18 I Tanko, "Judicialism and Judicial Process in Nigeria: What the Supreme Court Did, what the Supreme Court May Do" <http://nials-nigeria.org/pdf?judicialism. Accessed on 28/10/2012

Udombana[19] in his work, "Shifting Institutional Paradigms to Advance Socio-Economic Rights in Africa" follows up by positing that judicialism is the legitimating force on governmental acts on occasions when courts hold challenged governmental measures valid or constitutional. It needs remembering that within the UN system, the argument of using the ICJ as a touchstone to measure the validity of the Security Council's action is a recurring decimal.

However internationally the international adjudicatory system has been variously discussed. Hardly, any book an international law or international relations does not have a chapter dedicated to international adjudication. However while some treat it as part of a generalist discourse,[20] few others discourse the judicial institutions in their distinctiveness.[21] None has however discussed these institutions in one fell swoop as the present writer has done with an inquisition into their prospects and challenges vis-à-vis peaceful resolution of international disputes and the maintenance of international peace and security. Thus while Shaw[22] treated some of these courts (especially the ones under the UN system) in great details little was done for the regional courts like the ECOWAS court of justice especially the challenges that dogs international adjudication. Ditto to Harris D J's "Cases and Materials on International law".[23]

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19 Unpublished LL.D Thesis, University of South Africa,2007

20 D J, *Harris Cases and Materials on International Law* (London: sweet & Maxwell, 2004), M N Shaw, *International Law, 6th edn.* (Cambridge: Cambridge University press, 2008.)

21 H Thirlway the Law and Practice of the International Court of justice 1960 – 1989 69BYL (1998); S Rosenne *The Law and Practice of the International Court: 1920 – 2005* (Leiden: Martinus Nijhoff Publishers, 2006). G Oduntan, *The Law and* P*ractice of the International Court of* justice (1445 – 1796*). A critique of the* cont*entious and advisory jurisdictions* (Enugu: Fourth Dimension Publishing Co Ltd 1999), T Elias, *United Nations charter ant the world* court (Lagos: NIALS 1989); F Falana *ECOWAS Court: Law and Practice* (Lagos: Legaltex publishing Company, 2010)

22 Shaw *Ibid.*

23 Harris, *op. cit.*

Elias work[24] though apt in title and rich in content ignored treatment of the salient issues that has dogged the International Court of Justice in its adjudicatory functions to wit: sovereignty and its expected role vis-à-vis other organs of the UN system.

The motivation for this work is owed in part to both Rosenne and Oduntan[25]who where masterful in their treatment of the law and practice of the ICJ and meager in treatment of other courts. Ladan's work[26] analyzed and discussed in coherent terms several aspects of the legal frameworks of the ECOWAS community especially on the issues of integration migration, human rights and access to justice peace and security. However its treatment of the ECOWAS Court of Justice is in the area of protection of human rights. Ditto to Falana's masterpiece on the ECOWAS Court of Justice.[27]

Avgerinopoulou[28] explored the role of the international judiciary in the settlement of environmental disputes, the potential for improvement of these existing bodies and proposals for the establishment of new institutions.

However, the fact that today's international system is buffeted by many challenges that goes beyond environmental issues calls into question his clamour for the establishment of more judicial institutions on environmental issues.

Oji's[29] work which serves as a perfect complement to other works on international criminal law was quite expository in its analysis of international criminal responsibility

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24 See note 8 supra

25 S Rosenne, *op.cit, G Oduntan, op.cit*

26 M T Ladan *Introduction to ECOWAS Community Law,Integration,Migration, Human Rights, Access to Justice, Peace and Security* (Zaria: ABU Press, 2009)

27 F Falana,*Op.Cit*

28 T D Avgerinopoulou "The Role of the International Judiciary in the Settlement of Environmental Disputes and Alternative Proposals for Strengthening International Environmental Adjudication". Available at www.yale.edu/../Avgerinopoulou.pdf accessed on 15/12/2015

29 E A Oji *Responsibility For Crimes Under International Law* (Lagos: Odade Publishers,2003)

and the workings of the international criminal court; however its occlusion of the AU initiative in international criminal law remains its drawback.

Whilst a vast body of literature might exist on the individual topics under this work, what the researcher has done is to synthesis this welter of literature to bring out a new body of knowledge that one can at a glance have a panoramic view of the major judicial institutions that drives inter-state dispute settlement as well as the prospect they hold and challenges they face in engendering a more peaceful world.

1.7 Definition of Concept

1.7.1 Definition and Meaning of Judicialism

In conventional English usage, the word "judicialism" has not yet attained a life of its own by way of being imputed with an ordinary meaning as per other words of the English language. However, etymologically speaking the term "judicialism" is a derivative of two words, to wit; "judicial" and "ism". Consequently, we shall construct our meaning and definition of the term from an appraisal of two terms "judicial" and "ism."

According to the Oxford Advanced Learners Dictionary the word "judicial" is defined as "… connected with a court, a court or legal judgment."[30] The same dictionary defined the word "ism" as "….referring to a set of ideas or system of beliefs or behavior."[31]

On its own part, The Webster Ninth New Collegiate Dictionary defined the word "judicial" as "… of or relating to a judgment; the function of judging, the administration

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30 Sally Wehmeier (ed), *Oxford Advanced Learners Dictionary***,** (7th Edn. Oxford: Oxford University Press, 2006) p. 803.

31 *Ibid,* P. 791.

of justice or the judiciary,[32] belonging or appropriate to a judge or the judiciary.

In the same vein, the word "ism" is defined in the dictionary as "a distinctive doctrine, cause or theory; act, practice, process; manner of action or behavior characteristics of a person or thing; adherence to a system or class of principles.[33]

The Blacks' Law Dictionary defines the word "judicial" as "… of relating to or by the court or a judge"[34] The Gilbert Law Dictionary, on its part defines the term "judicial" as "relating or pertaining to legal proceedings or the administration of justice."[35]

From the foregone definitions of the word "judicial" and "ism", it is apparent that the word "judicialism" connotes the idea, belief and practice of adjudication which is the legal process of resolving a dispute or the process of judicially deciding a case.[36]

1.8 **Research Methodology**

The research methodology adopted in this research work is the doctrinal approach. Consequently the resource materials consist of textbooks, journals, international treaties, local statutes, judicial decisions and internet materials.

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32 Fredrick C Mish (Ed.), *Webster Ninth New Collegiate Dictionary,* (Massachusetts: Merriam-Webster Inc, 1990) P. 653.

33 *Ibid*, P. 641.

34 Bryan A Garner (Ed), *Black's Law Dictionary,* (8th Edn. St. Paul Minnesota, West Publishing Co., 2004) P. 862.

35 *Gilbert Law Dictionary*, (Chicago: Gilbert Law Summaries, 1997) P. 176.

36 The term "judicialism" is also gaining currency and acceptance among jurists and legal text writers, in discussing the adjudicatory process and institutions. See Hon. Justice (Prof) Jackton B Ojwang, "Judicial Ethics and Judges Conduct: The Complaint Mechanism," at pp. 2-3 available at http://www.kenyalaw.org/.../4%20judical-ethics-and-judges-com…-kenya; accessed on 28/10/2012; Andrew E. Busch "Judicialisms Cost to the Republic" available on http://ashbrook.org/publications/onpriu-v//n2-busch; accessed on 28/10/2012. Ben Nwabueze, *Judicialism and Good Governance in Africa,* (Lagos: Nials, 2009); Justice Ibrahim Tanko "Judicialism and Judicial Process in Nigeria: What The Supreme Court Did; What The Supreme Court May Do," available at http://nials-nigeria.org/PDFs?judicialism; accessed on 28/10/2012. Ben Nwabueze, *Judicialism in Commonwealth Africa,* (London: C. Hurst And Company, 1977): N Udombana, *Shifting Institutional Paradigms to Advance Socio-Economic Rights in Africa,* (unpublished LL.D. Thesis, University of South Africa, 2007) p. 178.

CHAPTER TWO

INTERNATIONAL LAW: PAST AND PRESENT

2.1 Definition of International Law

In inter-state relations, among the institutionalized approaches[1] to the conduct and control of inter-state affairs, International Law is the most general and continuous and *pro tanto*, a more stabilizing factor in inter-state relations. It incorporates the experience of many centuries during which people across the continents have lived together and done business with each other. It represents the moral code of states as it contains the body of rules upon which they have agreed so that they may survive.[2]

In strict legalese, however ascribing a meaning to the term "International Law" is not without its own difficulties. Especially is this so when the nature and functioning of law in municipal setting is transposed to the international arena. The controversy centers on the real quality of law. In municipal setting, law reigns over the people whereas under the international system, the concept of sovereignty makes this quality of law difficult to imbibe. Thus, the antagonists of International Law reigning over states contend that in reality, International Law is a law among states; not over them. This characterization of International Law is not without its basis, moreso considering the basic nature of the state system which is of fundamental importance to the application of the function of law in inter-state relations.

This function of law in inter-state relations not only presumes the sovereignty of states but also seeks to preserve it. It is this balancing position of law vis-à-vis the concept of

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1 It needs emphasizing that the legitimacy of some of these approaches has come under the ambience of International Law such that it defines and limits their scope. Reference to International Law in this chapter in particular and work generally, mean, Public International Law.

2 Norman Palmer & Howard Perkins. *International Relations*, (Third Rev. Edn. India: AITBS Publishers, 2010) p. 266.

sovereignty in inter-state intercourse that has led to the controversy (albeit needless) as to whether International Law is Law.

In view of the foregone and within the general context of this work, we deem it necessary to highlight some of the definitions accorded International Law by text writers. Oppenheim spoke of it as "the name of the body of customary and conventional rules which are considered legally binding by civilized states in their intercourse with each other"[3] This definition it is to be noted has the aura of eurocentricism and the romanticism it evokes among Western writers wrapped in it. Pray, by what standards do you measure the term "civilized"?[4] Ellery Stowell defines International Law as follows: "International Law embodies certain rules relating to human relations throughout the world which are generally observed by mankind and enforced primarily through the agency of the governments of the independent communities into which humanity is divided".[5] Jessup defines it as "a law applicable to relations between states"[6] whilst Fenwick defines it as "the body of rules accepted by the general community of nations as defining their rights and the means of procedure by which those rights may be protected or violations of them redressed."[7] Umozurike defines it as "the rules and principles that govern states in their relations *inter se*".[8] Of significance also is the Soviet view of International Law as the sum total of the norms regulating relations between states in the process of their struggle and co-operation expressing the will of the ruling classes of these states and secured by coercion exercised by

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3 Oppenheim, *International Law,* (Longmans, Green & Co, London, 1905) pp 1&2.

4 For a critique of the use of the term "civilize" to denote only relations among European states, see Dakas C J Dakas, *International Law On Trial: Bakassi And The Eurocentricity Of International Law*, (Jos: St. Stephen Bookhouse Inc.2003) pp 8-46. Note that the term "civilize" was dropped in the 9th edition of Oppenheim's International Law wherein International Law was defined simpliciter as "that body of rules that governs relations between States." See also R Jennings and A Watts, *Oppenheim's International Law vol. 1,* 9th Edn. Cited by M T Ladan, *Materials and Cases on Public International Law,* (Zaria: A.B.U. Press Ltd, 2007) p. 10.

5 Ellery Stowell, *International Law,* (New York: Holt, 1931) p.10.

6 Phillip C Jessup, A Modern Law of Nations, cited by Palmer & Howard, *loc. Cit.*

7 Charles Fenwick, International Law, cited by Palmer & Howard, *Ibid.*

8 U O Umozurike *Introduction to International Law,* (Ibadan: Spectrum Law Publishing, 1993) p.1.

states individually or collectively.[9] A common thread running through all these definitions is the emphasis on the states. This is not unexpected as the state is the major pillar upon which International Law is founded. Be that as it may, the challenges of contemporary International Law has gone beyond being states-centric to accommodate the increasing number of other international actors.[10] In this wise Antonio A.C. Trindade has posited that "the purely inter-state dimension of International Law has been overcome and belongs to the past."[11]

M.T. Ladan[12] viewed International Law from the functional point of view when he posited that,

> International Law inter alia lays down rules concerning the territorial rights of States (relating to land, sea and space), the international protection of the environment, International Trade and Commercial Relations, the use of force by States, Human Rights and Humanitarian Law.

Beckman and Butte defines International Law as consisting of rules and principles of general application dealing with the conduct of states and of international organizations in their international relations with one another and with private individuals, minority groups and transnational companies.[13] Consequently, we would define International Law as the set of rules governing states in their relations *inter se* and with other actors of the international system where the subject is of international concern.

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9 Referred to by Palmer & Howard, *loc. cit*, quoting A Y Vyshinsky. See also Umozurike, *Ibid*, footnote 1.

10 Michael Akehurst**,** *A Modern Introduction to International Law*, (London: George Allen & Urwin Ltd, 1971) P. 9; G N Okeke, *Aspects of International Law*, (Enugu: Joen Printing and Publishing Co. 2007) p. xiv. See also "The Nature of International Law and the International System," Available at www.oup.com/uk/orc/bin/9780199208180/dixou6e_ch01pdf . Accessed 10/1/2013.

11 Antonio A C Trindade "The Humanization of Consular Law: The Impact of Advisory Opinion, No. 16 (1999) of the Inter-American Court of Human Rights On International Case Law and Practice, *CJIL* (2007) Vol. 6, No.1, P.2, Available at http://chinesejil.oxfordjournals.org/content/6/1/1.full.pdf.html accessed on 20/12/2012.

12 M T Ladan, *Materials and Cases on Public International Law*, (Zaria: A.B.U. Press Ltd, 2007) p. 1

13 Robert Beckman and Dagma Butte, "Introduction to International Law," available at http://www.ilsa.org/Jessup/intlawintro.pdf. accessed on 15/3/2013.

2.2 Rationale for International Law

Like we had earlier posited, the maxim *ubi societas ibi jus* is not just a mere legal aphorism. Just as Law applies to regulate the affairs of individuals massed together into a society, so also does it operate to smoothen inter-state conduct. The states of the world with their different political and economic background and ideologies comprise a community and/or society that requires standard rules for its orderly development. Against the backdrop of contemporary issues in inter-state relations like globalization, human rights issues, security and economic challenges facing most states, we cannot but agree with Prof. Umozurike when he posits as follows: "With the world getting figuratively smaller and with the increased contacts and intensified relations, mandatory rules become even more necessary for the promotion of international cooperation and development and the avoidance of conflicts and chaos."[14] States enjoy equality of status thus making the absence of rules an invitation to chaos and disorder; moreso, considering the fact that despite their claims of independence (in terms of sovereignty) states in real fact are naturally inter-dependent in many areas (for example, international trade). International Law thus facilitates international co-operation. It provides the criteria for the identification of states and the organization of states and of the nationality of individuals and legal entities. In the area of the environment, states have a common interest in the prevention of pollution but this requires detailed rules about such things as preserving the ecosystem and the discharge of oil from the sea vessels. The fundamental purpose of the state vis-à-vis the citizens make conflict inevitable in inter-state relations. International law aims for harmony and the regulation of disputes. This it does by creating a framework of rules which clarifies duties, thereby moderating claims.

The rational for International Law becomes imperative when viewed against the following paradigmatic approaches to inter-state relations, to wit:

[14] Umozurike *op. cit*. p. 1. See also John T Rourke & Mark A Boyer, *International Politics on the World Stage*, (New York: Mc Graw-Hill, 2004) p. 220.

(a) **International Law and the Community Approach:** Contemporary international relations has thrust the idea of integration into the front burner as most states have come to realize that the challenges facing them can only be overcome if their co-operative efforts is undergirded by a supporting community structure. Thus, at the heart of today's inter-state relations is the need to pool resources together with a view to ameliorating the condition of living of citizens of the affected states. The need for integration may arise due to a shared history of colonialism, economic underdevelopment, military might, etc. International Law becomes the instrument that assures unto the international system the stability and confidence it needed in the face of challenges posed by integration.

(b) **Conflict, Conflict Management and Conflict Resolution**: Against the backdrop that states exist to maximize the benefit accruable to her citizens, it becomes inevitable that conflict must necessarily arise among actors of the international system; moreso given the limited availability of resources for exploitation. International Law comes in handy to moderate tensions arising from conflict. It seeks to regulate ways and means by which states can harmoniously compete for resources without destroying the whole system and even where conflict arises, provides mechanism for its settlement and management.

(c) **War and Peace**: War has been a recurrent phenomenon throughout human history. Despite its acclaimed deleterious effects and the publicity, it has just been as frequent and much more virulent than before. While war sign-posts a breakdown of law, International Law has nevertheless not given up in attempts to constrain the waging of war and methods of warfare. In this regard therefore, International Humanitarian law since the dawn of the current century has assumed primacy in contemporary inter-state relations. In addition is the veneration accorded human rights by the world community as its denial remains the root

causes of wars. In this regard, a welter of international instruments exist which aim at preventing the waging of wars and the entrenching of a culture of peace.

(d) Ideologies: In the twentieth century, with aggressive totalitarianism and deep-seated conflicts between political and social systems, ideological issues became the burning realities of international life.[15] Even the demise of the cold-war era has sadly not laid the issue of ideologies to rest as the mantra of developed and underdeveloped, North-South, G-8, D-8 etc still dog today's international relations. At present, these issues complicate and obstruct efforts to emphasis long-range problems and needs. International Law becomes a common stabilizer of all ideological interests for a more beneficial world.

2.3 Historical Exegesis of International Law from Early Origins up to Twentieth Century:

The underlying basis for the existence of International Law is the existence of states and the willingness of such political units to interact among themselves for their own benefit. Consequently, whenever independent political communities have come into peaceful contact with one another, the need has always been felt for some sort of rules to govern their relations. Thus, minimum assurances were given and taken as in the expectation that promises when made should be honoured and the rule that envoys should not be harmed. If the above thesis is taken, it then means that the history of International Law goes back to antiquity.[16] Thus, by the fifteenth century BC, some states in the Middle East like Egypt, Babylon and the Assyrian Empire maintained contacts.[17] Around 2100 BC, the rulers of Lagash and Umma[18] signed a solemn Treaty which was inscribed on a stone and concerned the establishment of a defined boundary to be respected by both sides under pain of alienating

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15 Palmer & Howards *op. cit.* p. xxv.

16 Umozurike, *op.cit.* p.7.

17 *Ibid.* It would seem that the seed of International Law were contained in the womb of early diplomatic relations. See also M O U Gasiokwu, *International Law and Diplomacy*, (Enugu: Chenglo Ltd, 2004) pp.1, 5-22.

18 M N Shaw, *International Law,* **(**fifth edn. Cambridge University Press, Cambridge, 2004) p. 14.

a number of Sumarian gods.[19] Note also the agreement between Rameses 11 of Egypt and the King of Hititites for the establishment of eternal peace and brotherhood.[20] The code of Manu in ancient India contained chapters devoted to immunity and privileges. The ancient Greeks had rules on asylum, extradition, diplomatic agents, etc while the Romans developed a set of rules for dealing with foreigners[21] and distinguished between *jus civile* which applied only to Roman citizens and *jus gentium* which govern the relations between foreigners and between foreigners and citizens. The Kingdom of Ghana which lasted from 300 to 1087 AD conducted international trade with Morocco mainly in gold.[22] Mali had a flourishing trade with North Africa and the Middle East. Ethiopia enjoyed unbroken dynasty of rulers for centuries and conducted international relations. The King of Portugal exchanged ambassadors with the Kings of Benin and the Congo.[23]

2.3.1 The Middle Ages and the Renaissance:

Shaw posits that the Middle Ages were characterized by the authority of the organized church and the comprehensive structure of power that it commanded.[24] This was predicated on the fact that all Europe was of one religion and the ecclesiastical law applied to all irrespective of tribal or regional affiliations.[25]

Particularly important during this era was the authority of the Holy Roman Empire and the supranational character of Canon Law. Commercial and Maritime law nevertheless developed apace. English Law established *the law merchant*, a code of rules covering foreign traders. This was declared to be of universal application. In like manner, maritime customs began to be accepted throughout the continent. It was founded upon the Rhodian sea law, a

19 M N Shaw, *ibid.*
20 *Ibid.*
21 Umozurike, *op. cit.* p. 7.
22 *Ibid.*
23 *Ibid.* p. 8. Note also the historical epic novel Ovoramwen Nogbaisi by Ola Rotimi which depicted the international relations involving the old Benin Empire and the Europeans.
24 M N Shaw, *op. cit.* p. 18.
25 *Ibid.*

Byzantine work many of whose rules were enshrined in the Rolls of Oleron in the twelfth century. A series of commonly applied customs relating to the sea permeated the naval powers of Atlantic and Mediterranean Coasts.[26]

These commercial and maritime codes though being merely expressions of national legal systems constituted part of the forerunners of International Law. This is predicated on the fact that they were created and nurtured against the backdrop of cross-national contacts and *pro tanto* reflected the need for rules that takes care of international situations. These rules constituted the seeds from which International Law germinated. However, before these seeds could flourish, Europe was enveloped by an intellectual explosion known as the Renaissance. The complex of ideas appurtenant to this era altered the face of the European society and *pro tanto* opened the door to the era of scientific, humanistic and individualistic thought. Western Europe's cultural life was enlivened by Greek scholars who had fled to Italy following the collapse of the Byzantine Empire before Turkish armies in 1453. This also coincided with the rise of England, France and Spain as nation states. This creation of territorially consolidated independent units engendered a higher degree of interaction between sovereign entities, moreso with the drive overseas for wealth and luxury items. This in turn necessitated the need to regulate such activities in a generally accepted fashion.[27] From this struggles emerged many of the staples of modern international life, to wit: diplomacy, statesmanship, the theory of the balance of power and the idea of a community of states together with the rules associated with them. The renaissance bequeathed the prerequisites of independent critical thought and a humanistic, secular approach to life as well as the political framework for the future as aptly captured by Machiavelli's *The Prince* and other theorists of International Law. A necessity was felt for a new conception of human as well as state relationships.

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[26] *Ibid.* p. 19 See also Harold Houju Koli "Why Do Nations Obey International Law?" Available at http://www.digitalcommon.law.yale.edu/cgi/viewcontent.cgi?=2897. Accessed on 30/10/2012.

[27] *Ibid.* p. 20.

Consequently a distinct value system to underpin international relations was brought into being and the law of nations was heralded as part of the universal law of nature.[28]

The theorists of International Law during this era were deeply steeped in natural law ideas which they used as the basis of their philosophies. It is worth noting that among the theorists of International Law based on natural law, Hugo Grotius, a Dutch scholar became the most celebrated hence the appellation of "father of international law". His work *De jure Belli ac Pacis* excised theology from the natural law foundation of International Law. He argued that natural law would still be valid were it to be shorn of its religious underpinnings.[29] This reason was the substance of natural law. His work, it has been opined has four major characteristics,[30] to wit:

First Grotius would hold states to the same rules which regulate the lives of individuals and make the violation of them a crime subject to punishment. Second, and basing his judgment on scriptural researches, ancient history and the classics, he formulated "The Law of Peace" which became the pillar of his whole system. Third, he argued that states may properly punish other states which violated the law. Fourth, he accepted natural law as the primary basis for determining rules for the rightful conduct of states. It needs reiterating that the natural law to which Grotius appealed was made up of those rules of conduct which arose from the attempt to reason out the way by which men and states could best get along with each other. This he called "the dictates of right reason". The natural law philosophy was a theoretical approach which sought to emphasis what ought to be the law rather than list the rules to which men and states had actually committed themselves by custom or agreement. The term positive law is applied to the latter.

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28 *Ibid*. p. 21.

29 *Ibid.* p. 23. "History of Public International Law," available at www//en.wikipedia. Accessed on 30/10/2012.

30 Cornelius Van Vollenhoven, **"***Hugo Grotius" Encyclopaedia of the Social Sciences*, (New York: The Macmillian Company, 1973) vii, 177 cited by Palmer and Perkins, op. cit. p. 279.

The positivist scholars tried to distinguish between International Law and Natural Law. Their emphasis was on practical problems and current state practices. Prominent among these scholars was Richard Zouche. The positivist approach was not concerned with an edifice of theory structured upon deductions from absolute principles. Their preoccupation was with viewing events as they occurred and discussing actual problems that had arisen.[31] Thus in juxtaposition to natural law, International Law was reinterpreted not in terms of concepts derived from reason but rather in terms of the actual occurrence of events between states. *A'priori*, the key becomes what states actually do and not what they ought to do, given the basic rules of law of nature. *A'fortiori,* agreements and customs recognized by states were deemed essence of the law of nations. This positivist philosophy of International Law also coincided with theories of sovereignty which underlined the supreme power of the sovereign and hence the notion of the sovereignty of states which dovetailed into the nineteenth century.

2.3.2 The Nineteenth Century

Whilst the eighteenth century was a ferment of intellectual ideas and rationalist philosophies which contributed in no small measures to the evolution of the doctrines of International Law; the nineteenth century was a practical and positivist era.[32] This development it has been opined reflected the growing secularism of the times which emphasized the practical rather than the idealistic.[33] The congress of Vienna which signaled the end of the Napoleonic Wars enshrined a new international order which was to be based upon the European balance of power. Thus International Law became Eurocentric. Entry thereat was with the consent of and on the conditions laid down by the European cum Western powers. Consequent upon the territorial expansion of most European powers, International Law concomitantly became

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31 M N Shaw, *op. cit.* p. 25.
32 *Ibid*, p. 26.
33 Palmer and Perkins, *op. cit.* p. 280.

geographically internationalized even as it remained paradoxically less universalist in conception, as it remained to a large extent a reflection of European values. This century also marked the coming into independence of most countries in Latin America and the consequential forging of a distinctive approach to certain aspects of International Law by the emergent states of that region.[34] Democracy, nationalism and self-determination assumed robust relevance in inter-state intercourse which atimes borders on the negative. The Industrial Revolution which mechanized Europe created the economic dichotomy of capital and labour and propelled Western influence throughout the world.[35] These factors led to an enormous increase in the volume and variety of both public and private international institutions. International Law also grew albeit consequentially to accommodate them. International conferences proliferated and contributed greatly to the development of rules governing inter-state relations whether in peace time or during hostilities, moreso, with the development of trade and communications. For example, the 1815 Final Act of the Congress of Vienna established the principle of freedom of navigation with regard to international waterways. It set up a central commission of the Rhine to regulate its use. In 1856, a commission for the Danube was created and a number of other European rivers became the subject of international agreements and arrangements.[36] In the aspect of warfare, the International Committee of the Red Cross which was founded in 1863, helped promote the series of Geneva Conventions dealing with the humanization of conflict[37] while the Hague Conferences of 1899 and 1907 established the Permanent Court of Arbitration and dealt with the treatment of prisoners and the control of warfare.[38] It needs emphasizing that these and other conferences, conventions and congresses emphasized the expansion of the rules of

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34 Examples of this include the diplomatic asylum and the treatment of foreign enterprises and nationals

35 M N Shaw, *op. cit.* p. 27.

36 *Ibid.* p. 28.

37 This includes the 1864 Geneva Convention for the Amelioration of the Condition of the Wounded in the Armies in the Field.

38 M N Shaw, *op. cit*. p. 28.

International Law and the close network of international relations. Moreover, the academic study of International Law within higher education developed with the appointment of professors of the subject and the appearance of specialist textbooks emphasizing the practice of states.[39]

The nineteenth century represented the high-water mark of the positivist theory. Especially is this so when viewed against the backdrop of the powers of states and the increasing sophistication of municipal legislation, thus lending credence to the idea that laws were basically commands emanating from a determinate sovereign person or body. This approach was transmitted into the international scene and immediately came face to face with the stark reality of lack of a determinate supreme authority. The dilemma seem to be founded on the analogy that since law was ultimately dependent upon the will of the determinate sovereign in municipal systems, International Law then, depended upon the will of the sovereign states. The implication of this analogy will be the confusion of the supreme legislator within a state with the state itself. *A'fortiori*, the state was imputed with a life and will of its own and thus was able to dominate International Law.

2.3.3 The Twentieth Century

The twentieth century was a period of rapid and momentous global change when compared to the earlier pace of social, political and technological innovations. At its incipience, there was no airplanes or global organizations. The First World War which spanned the periods 1914-1919 undermined the foundation of European civilization. Law reflects the conditions and cultural traditions of the society within which it operates. Since nation states constitute the society of which law (albeit International Law) must operate, it then means that International Law must reflect the ethics and values of that era. Against the background that the old

[39] *Ibid.*

anarchic system had failed, it was felt that a new system and new institutions to preserve and secure world peace based on multi-lateral peace treaty was necessary. Thus, entered the 1919 Peace Treaty which established the League of Nations. However, the absence of U.S.A. and U.S.S.R. made the League of Nations an essentially European institution. Its impact in maintaining international peace was tasked when Japan invaded China in 1931 and Italy attacked Ethiopia in 1933. However, it recorded successes in certain aspects of International Law like the creation of the P.C.I.J. which became the forerunner to the present I.C.J. and other international institutions whose work have greatly impacted on the development of International Law. The minority protection guaranteed by the League it has been opined[40] paved the way for later concern to secure human rights.

The failure of the League to avert the Second World War (1939-1945) eventually led to the establishment of the United Nations in 1946 and with it the vibrancy of International Law in inter-state relations. This was an era where principles and ideologies seemingly clashed thus leaving International Law with the arduous task of distilling the appropriate legal approach to the various states ideological posturing. Thus, on one hand, we have states of the communists bent whose view of law (albeit International Law) differed from the Western concept. On the other hand, we have the Third World Countries which was made up of the colonized countries and who on gaining independence found out that they have to play by rules already set by their colonizers. Leveraging on these cleavages became the forte of International Law during this century. Against the backdrop of the foregone, it might be necessary to briefly discuss the impact or otherwise of these groups to the International Law of the twentieth century.

[40] *Ibid.* pp. 30-31.

(A) The Communist Approaches to International Law

The discussion on the communist approach to International Law during the twentieth century is basically a discussion on the defunct Soviet Union's attitude as exemplified by Soviet Writers. The underlying principle of the Soviet Union was the Marxist philosophy.

A major theme of the Marxist philosophy is that economics is the determining force in society whilst law and political institutions are merely the superstructure, reflecting the will of the ruling class.[41] If this thesis is followed to its logical conclusion, the imagination that readily comes to mind becomes that there could be no International Law of universal validity since there are different ruling classes in different states. Moreover, it was envisaged that law and the state would wither away in the ensuing revolution to usher in a new, non-exploitative form of society. *A'priori*, classical International Law, being founded upon the state would also wither.[42]

However, the realities of power and the existence of the capitalist countries led to the suggestion that there exist two systems of International Law, to wit: one applying to the capitalist states and the other applying between capitalist states and socialist states. However, as from the 1920s, this view was discarded in favour of only one system of International Law which reflects the coincidence or compromise of interests between different ruling classes in different states. This shift was also to affect Soviet view of International Law as the aggregate of norms which are created by agreement between states of different social systems, reflect the concordance wills of states and have a generally democratic character, regulate relations between them in the process of struggle and co-operation in the direction of ensuring peace and peaceful co-existence and freedom and independence of peoples and are secured when

41 M Akehurst, *op. cit*. p. 28.
42 M N Shaw, *op. cit.* p. 31.

necessary by coercion effectuated by states individually or collectively."[43] A striking characteristic of communist thinking about International Law is the stress on sovereignty and the pre-eminence of the state. The reliance on state sovereignty is a natural defensive reaction to protect the communist states in a predominantly capitalist environment. However, as Shaw opined, this concept together with that of territorial integrity became attractive to the developing nations of the third world, anxious to establish their own national identities and counteract Western financial and cultural influences.[44]

The decline of the cold war and the onset of *perestroika* in the Soviet Union led to a re-evaluation in the field of international legal theory.[45] Global interdependence and the necessity of international co-operation were emphasized. Ascendancy was given to the priority of universal human values and the resolution of global problems which was ineluctably linked to the growing importance of International Law.

(B) The Third World

Since after the Second World War, one of the major events that has impacted much on the evolution of international affairs has been the dismemberment of the colonial empires and the emergence of scores of new states in the so-called third world. They do not form a bloc in the real sense and is not bound by any common ideology.

During the cold war era, their governments vary from the far right to the extreme left of the political divide.[46] They carry with them a legacy of bitterness over their past status as well as a host of problems relating to their social, economic and political development.[47] Given the

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43 G I Tunkin, *Theory of International Law*, p. 251 cited by Shaw, *Ibid* at p. 33.
44 M N Shaw, *Ibid.* p. 35.
45 *Ibid.*
46 M Akehurst, *op. cit.*. p.32.
47 Shaw, *op. cit.* p. 38; R P Anand, "Attitude of the Afro-Asian states Towards Certain Problems of International Law," 15 *ICLQ*, 1966. P. 35.

aforementioned circumstances, it becomes inevitable that they will resent certain structures and doctrines of International Law.

International Law of the nineteenth century was basically Eurocentric and thus did not reflect the needs and interests of the newly independent states of the mid and late twentieth century. There was the general feeling that the International Law rules of the nineteenth century encouraged and also reflected their subjugation. It needs emphasizing at this juncture that it was not all rules of International Law existing before independence that is the subject of attack. It is only those rules that go against their interests. Thus certain underlying concepts of International Law like sovereignty and equality of states; the principles of non-aggression and non-intervention have not been done away with. To do so would mean rejecting many rules which operate to their advantage in their quest for security within the bounds of a commonly accepted legal framework. Against the backdrop of the rules relating to the composition of the International Court of Justice,[48] the security council,[49] the voting pattern at the U.N. General Assembly,[50] we cannot but agree with Shaw when he posits that "while this new internationalization of International Law that has occurred in the last fifty years has destroyed its European-based homogeneity, it has emphasized its universalist scope."[51] The impact of these groups of states in shaping the content of International Law of the twentieth century can be gleaned from the scope and contents of the various resolutions and declarations emanating from the U.N. General Assembly wherein they constitute the vast majority of the 198 member states.

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48 Article 9 of the Statutes of the ICJ provides that the main forms of civilization and the principal legal systems of the world must be represented within the court.

49 In furtherance of Article 23 of the U.N. Charter which deals with the composition of the membership of the Security Council, there is an arrangement that of the ten non-permanent seats in the council, five should go to the Afro-Asian states and two to the Latin American states while the remaining goes to Europe and other states..

50 Article 18(1) of the U.N. Charter provides that each member is entitled to one vote while Article 18(2) provides that decisions of the General Assembly on important questions shall be made by two thirds majority of members present and voting.

51 Shaw, *op. cit*. at p.39.

For example, the 1960 General Assembly Resolution 1514 (xv) titled "The Declaration On The Granting Of Independence To Colonial Countries And Peoples" which was adopted by eighty-nine votes to none, with nine abstentions, enshrined the right of colonies to obtain their independence with the least possible delay as well as calling for the recognition of the principle of self-determination is generally regarded as a settled rule of International Law.[52]

Resolutions such as 1514 (xv) above symbolizes the rise of the post-colonial states and the continuing effect they have been having on the development of International Law since the second half of the twentieth century to the present.[53]

2.3.4 Twenty-First Century International Law

Against the backdrop of concepts like globalization, the gradual but steady acceptance of the self-determination principle within self-governing territories as exemplified by the agitations that engulfed the Arab spring, the new wave of terrorist activities and their innovations in achieving their targets, the economic challenges that has buffeted most parts of the world, etc, it cannot be gainsaid that International Law of the twenty-first century is still in a state of evolution and will continue to be so as long as law albeit International Law continues to play pivotal roles in the affairs of man whether as an individual or in his corporate existence as a state. It was in acknowledgment of this fact that Shaw posited that "International Law since the middle of the last century has been developing in many directions as the complexities of life in the modern era have multiplied."[54] This is predicated on the trite fact that since law reflects the conditions and cultural traditions as well as the ethos and values of the society within which it operates, International Law being a product of its environment must

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52 Though, its extent continues to be a source of intellectual polemic among jurist and text-writers. See generally H C Alisigwe and C Okolie "Right To Self-Determination And Territorial Integrity" *Current Jos Law Journal* (2014) Vol. 6, No. 1 pp 244-257.

53 It needs restating that most often, the interests of the new states of the third world conflicts with those of the industrialized nations as exemplified by the disputes over nationalizations and the disagreements that has dogged the subsidy regime for agricultural products under the WTO.

54 M N Shaw *op. cit.* p. 42.

necessarily develop in concordance with the values, ethos, precepts and practices that are in accordance with the prevailing notions of inter-state relations. *A'priori*, if it must survive, it must be in harmony with the realities of the times. Challenges encountered by the International community can be as momentous and impactful upon the International system as a whole. For example, the carnage upon human lives and property resulting from civil wars actuated by desires for internal self-determination by aggrieved groups within independent states has led to the reappraisal of the rules underpinning the doctrine to accommodate the exercise of the right of self-determination beyond the colonial context.[55] The barbarisms associated with the execution of such wars provided great impetus for the establishment of the International Criminal Court (ICC).[56] Consequently, there is always a continuing tension between those rules already existing and the evolving new rules that are being projected by forces that seek changes within the International system. *A'fortiori*, a major dilemma of International Law being a stabilizing index of states common aspirations for a more peaceful world in their socio-economic relations becomes when and how to incorporate new standards of inter-state behavior and generally of International life[57] into the already existing framework such that on the one hand, International Law maintains its relevance and on the other, the system's equilibrium is not seriously disrupted.

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55 H C Alisigwe and C. Okolie, "Right To Self-Determination And Territorial Integrity," *op. cit.* p.13. See also the Advisory Opinion of the ICJ in *Accordance With International Law Of Unilateral Declaration Of Independence By The Republic Of Kosovo*. Available on http://www.icj-cij.org/docket/files/141/15987.pdf. Visited on 20/11/2012. Most of the crises that engulfed the Arab Spring can also be analyzed within this context. Particularly of interest is the recognition accorded to the opposition coalition in the on-going Syrian crisis by Britain, France and U.S.A. and some other countries .Cf. the Malian crisis wherein the Islamist rebel group is being denied any form of recognition and support by the international community.

56 It needs reiterating that Articles 27 & 28 of the ICC Statute discountenances immunity arising from status as head of state as a defense to prosecutions under it. Consequently the concept of sovereign immunity under International Law is being further eroded. In consequence of this, some ex-heads of state like Charles Taylor of Liberia has been tried and convicted whilst an international arrest warrant has been issued against the current Sudanese President, Mr. Omar Al-Bashir.

57 This is in view of the fact that contemporary International Law is no longer state centric as the system accommodates other non-state actors as also subjects of International Law.

For example, the outburst that greeted the September 11, 2001 terrorist attacks on the World Trade Centre Complex, New York and the resurgent rise in terror attacks with International consequences[58] has engendered new challenges to the International system necessitating a concerted efforts to deal with the phenomenon even though the fight might necessarily impinge on certain fundamental principles of International Law like sovereignty, territorial integrity and human rights.[59] Thus, the scope of International Law today has grown in magnitude encompassing regulation of expeditions to outer space, issues pertaining to the division of the ocean floor, the protection of human rights whether in peace time or warfare, the management of the International financial system, the protection of the eco-system, etc.

Considering the foregone, we share the views expressed by Shaw when he opined that "… its (ie International Law[60]) involvement has spread out from the primary concern with the preservation of peace, to embrace all the interests of contemporary International Life".[61] The international political system provides the *raison d'etre* for International Law and a crucial factor in its composition. Since an international system is a decentralized political system dominated by competing relatively autonomous territorially based political organization[62] and against the backdrop that more than one entity exists within a system, it becomes a desideratum for a conception on how to deal with other such entities whether on the basis of hostility or peaceful co-existence. International Law at every epoch of time, moreso particularly the twenty-first century has encouraged a co-operative attitudes among states in

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58 As exemplified by the bombing of the U.N. building in Abuja in 2011.

59 Given the angst that greeted the September 11, 2001 terror attack on the WTC, not much thought was given to these principles when the U.S. in its avowed aim of annihilating all known terrorist groups and their sponsors went into Pakistan in search of Osama Bin Laden, the acclaimed mastermind of the 9/11 terror attacks without the consent of and notice to the Pakistani authorities. Even the summary manner of Osama Bin Laden's execution bespeaks a breach of human rights. It is for similar reasons that the concept of domestic jurisdiction is no longer held in high esteem among members of the International Community where gross violations of human rights are in issue.

60 Emphasis mine.

61 Shaw, *op. cit*. p. 43.

62 D W Coplin**,** *Introduction to International Politics: A Theoretical Overview*, (Chicago: Mackham, Publishing CO. 1971) p. 331.

providing solutions to the problems facing mankind and thus eschewing the idea of permanent hostility and enmity. The idea of an interdependent world despite being clothed with sovereignty is an acknowledgement of the right of others and an acceptance of the fact that in the modern world no state can stand alone, thus making it inevitable that some form of legal (albeit international) order is needed wherein the opinions, hopes and needs of all cultures and civilizations of all actors in the international system is reflected.[63] Contemporary International Law is reflective of the character of today's international life and the basic state-oriented character of world politics. Thus whilst maintaining such values that underpins the system of statehood like non-intervention in internal affairs, territorial integrity , non-use of force, etc, it has also expanded to include the activities of individuals, groups and international organizations within its sphere of influences as well as new fields covering issues like international trade, environmental issues and outer space exploration among others. States need law in order to achieve their objectives within the international system whether for themselves *per se* or for the benefit of their citizens across national boundaries. Consequently the system of International Law has to be certain enough for such objectives to be met and also flexible enough to allow for necessary changes whenever it becomes needful. In this wise, must be mentioned the growing visibility of individuals and international organizations in contemporary International Law. Thus whilst individuals have hitherto been acknowledged as being entitled to the benefits of International Law, it was only recently that they have been enabled to access those benefits directly instead of relying upon their national states.[64] Another distinguishing feature of today's International Law is the rise and vibrancy of international organizations of which the U.N. is at the apex. Considering the humanitarian

63 It needs to be noted that the eurocentricity of International Law has been on the decline moreso with the emergence of new states from the third world. See also Shaw, *op. cit.* p. 43; L C Green, "Is There a Universal International Law Today?" 23 Canadian *YBIL*, 1985, p. 3 *Cf.* C J Dakas, *Op.cit*, pp.8-46.

64 Hitherto the procedure was for an aggrieved individual to channel his complaint through his state of nationality. See also Shaw, op. cit. p. 45; Article 5 of the Optional Protocol 1 to the Civil and Political Rights Covenant.

and developmental challenges facing mankind since the turn of the twenty-first century, their visibility and vibrancy in inter-state relations has assumed momentous proportions. No doubt, their activities is being buoyed by the advisory opinion of the ICJ rendered in 1949[65] wherein it was stated that the United Nations was a subject of International Law and *pro tanto* could enforce its rights by bringing international claims. *A'fortiori*, they possess rights and duties of their own and a distinctive legal personality. Note should also be made of regional organizations like the AU, EU, etc which are nonetheless also clothed with international legal personality. Their major impact to the developing sophistication of International Law is the development of "regional-International Law sub-systems" within the universal framework and the consequent evolution of rules that binds only member states.[66] Issues covered by today's International Law have expanded in commensurate proportion as the difficulties faced and the proliferation of the number of participants within the system. Account is now being taken of the specialized and often times complex problems of the contemporary world.[67]

Today's International Law can better be appreciated against the backdrop of a deeper appreciation of contemporary international relations. International Law is clearly much more than a simple set of rules as it functions in a range of actors from states to international organizations, companies and individuals.[68] As a culture that constitutes a method of communicating claims, counter-claims, expectations and anticipations as well as providing a framework for assessing and prioritizing such demands, it needs to be responsive to the needs and aspirations of such participants as there are in the international system. Considering the mesh between contemporary International Law and international relations, we end our

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65 *Reparation for Injuries Suffered in the Service of the United Nations*, ICJ Reports, 1949, p. 174.

66 Shaw, *Ibid.* p. 44.

67 Such issues include concern with environmental protection, economic law covering financial and developmental matters, outer space exploration efforts and the exploitation of the resources of the oceans and deep sea-bed, international terrorism, etc.

68 Shaw, *op. cit.* p. 62.

discussion herein by re-echoing the words of Shaw when he posits albeit on a cautionary note that:

> Law is not the only way in which issues transcending borders are negotiated and settled or indeed fought over. It is one of a number of methods dealing with an existing complex and shifting system, but it is a way of some prestige and influence for it is of its very nature in the form of mutually accepted obligations. Law and politics cannot be divorced. They are not identical, but they do interact on several levels. They are engaged in a crucial symbiotic relationship. It does neither discipline a service to minimize the significance of the other.[69]

69 *Ibid.* p. 63

CHAPTER THREE

INTERNATIONAL DISPUTES AND RESOLUTION MECHANISMS

3.1 Meaning of Dispute:

The word "dispute" is easy to comprehend in its ordinary usage[1] probably due to the fact that it is a phenomenon that forms an important part of human existence and thus a natural part of our daily lives, given the limited resources vis-à-vis the earth's population. However, just like most legal terms, any attempt to bring out a doctrinaire legal definition meets with resistance moreso given its typologies. This difficulty notwithstanding, legal writers and jurists have never given up on the task of proffering a definition. In this wise, Blacks' Law Dictionary defines dispute as, "a conflict or controversy: a conflict of claims or rights; an assertion of a right, claim or demand on one side met by contrary claims or allegations on the other."[2] In *The Marvrommatis Palestine Concession Case*[3], dispute was defined as "a disagreement on a point of law or fact, a conflict of legal views or interests between two persons"

These definitional difficulties become accentuated when we seek to appraise the term "International Dispute". The problem centers on the content and context of the term. Do we define it with regard to the subject matter or the parties involved? The dilemma of this problem prompted Levi to comment that:"International disputes are no where defined in Conventions or Treaties yet Legal consequences for states arise from the existence of such disputes."[4]

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1 It means an argument or a disagreement. See Sally Wehmeier (ed.) *Oxford Advanced Learners Dictionary.* (7th edn. Oxford: Oxford University Press, 2006) P. 423; See also Fredrick C Mish (ed) *Webster's Ninth New Collegiate Dictionary,* (Massachusetts: Merriam-Webster Inc. 1990) p. 366 thereof which defines the word "dispute" to mean verbal controversy.

2 Henry Campbell *Blacks' Law Dictionary*, (Sixth edn. Minnesota: West Publishing Co. St. Paul, 1990) P. 472. Note also the definition of the term in the 8th edn. at P.505.

3 1926 PCIJ Series A, No 2 Series p. 11. This definition has been adopted by the ICJ in subsequent cases. See Cameroun V. Nigeria (No. 1) 2000 FWLR (pt. 132) r. 20, pp. 81-82.

4 Wermer Levi**,** *Contemporary International Law: A Concise Introduction*, (Boulder Colarado: Westview Press, 1979) p. 286.

Legal writers have not given up on proffering a definition. Consequently Oduntan has defined International dispute as "a contentious disenchantment between two or more states over points of law and/or fact the continuance of which can endanger international peace and security".[5] Andre Nollkaemper, opined that what makes a dispute international depends on the substance of that dispute; a dispute is international when the rivaling claims are based on International Law.[6] These definitions / descriptions while being apt, neglect the incidence of internal disputes within states and their impact on the international scene. For instance, at what point does a civil war or insurgency develop into an international conflict with dire consequences for the international community? This question becomes germane against the backdrop of the fact that during the cold war era, the super powers were known to have supported various factions of armed conflict within a country so as to propagate their various ideological leanings as well as showcase their military inventions. The prolongation of such scenarios could blossom into full scale war between the interested super powers.[7]

On our part, and considering the forgone, international dispute can be defined as any altercation whether founded on law or fact involving states *inter se* or between states and non state parties the continuance of which is likely to endanger international peace and security. This definition apart from looking at the term international disputes within the perspectives of Article 33 of the U.N. Charter also encapsulated the grim realities of contemporary

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5 G Oduntan, *The Law and Practice of the International Court of Justice (1945-1996),* (Enugu: Fourth Dimension Publishers, 1999) p. 11.

6 A Nollkaemper, *National Courts and the International Rule of Law,* (Oxford: Oxford University Press, 2011) p. 10. See also J G Merrills *International Dispute Settlement* (3rd Edn. Cambridge: Cambridge University Press, 1998) p. 1; A Peters, "International Dispute Settlement: A Network of Co-operational Duties" (2003) 14 *EJIL* 1, 3.

7 An example is the scenario created by the Cuban Crises of 1962 wherein on the invitation by the Cuban Government to strengthen its security against perceived American backed insurgents, the Soviet installed nuclear warheads that where targeted at American cities. The world held its breath while this debacle lasted. Note also NICAR V. U.S. ICJ Reports 1986, p. 30.

international relations wherein the activities of non state actors can also endanger world peace and security.[8]

Traditionally, international disputes have three basic elements. First, it is usually between states.[9] This is so notwithstanding the fact that an element in the dispute consists in a wrongful act done to a national of the state but until it is taken up by the government of the state of the injured national, the dispute is hardly an international dispute.

In some instances however, it may be possible to deal in advance with a potential dispute situation before it transforms into an international dispute by dealing with it at the lower private law level. This is so given the diminution of the pristine concept of sovereign immunity in the commercial arena and the emergence of the *acta jure gestionis* rule.[10] Consequently, when a state engages through any of its agencies in trade and economic activities, it may become possible to deal with any resulting dispute as a commercial dispute. The general trend in the face of expanding state trading activities is to try as much as possible to avoid allowing normal trading disputes to exacerbate general political interstate relations.[11] Secondly, the dispute must engender some reaction by the aggrieved state. This reaction may take the form of diplomatic protest, propaganda campaign, applications to any relevant international organization or any of the whole gamut of actions up to covert or overt hostilities.

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8 Notable instances of this include the Al Queda Terror Network and other terrorists organizations in the middle East whose activities most times had provided the fillip for interstate conflicts.

9 This is the conventional view and is to be balanced with the scope of activities and vibrancy of international organizations in present day international life. Especially is this so given the import of the ICJ decision in the Reparations Case.

10 For details on this rule and its effect on the concept of sovereign immunity, see Henry C Alisigwe, "An Appraisal of the Doctrine of Sovereign Immunity under Private International Law: The Nigerian Perspective" (2008/2009) *NJLS* Vol. viii, pp 32-42.

11 H G Darwin. "General Introduction" in David Davies Memorial Institute of International Studies, *International Disputes: The Legal Aspect*, (London: Europa Publications Ltd, 1992) p. 58.

A'priori, where a state does nothing whatsoever about its perceived grievances, there is no active dispute.[12]

Thirdly, the dispute must pertain to a reasonably well defined subject matter. The fact that the parties are in disagreement as to the scope of the dispute is of no moment. For instance, before a relevant international organization, a party may be seeking to extend the particular dispute to other matters against objections by the opposing side.

Thus a general political, historical or religious view manifested by a state even if these are adverse to another state does not amount to a dispute in the absence of an affirmative action underpinning such views such as claims to specific territory or specific rights. It has been opined that it is here that the distinction albeit of degree rather than kind, lies between settlement of disputes and peaceful change.[13]

The latter accommodates broad or general political and economic movements and trends whilst the former is concerned more with specific subjects in dispute between a more limited number of states.[14] A frustrated desire for peaceful change may however lead to a series of specific disputes.

3.2 Types of Disputes

Shorn of its strict legalisms, an international dispute can be divided into three broad categories to wit;

i. Those which lead to an armed conflict.

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12 South West Africa, Preliminary Objections Judgment, ICJ Reports 1962, p. 328. Note however that this positive opposition to a legal claim or conflict of legal views or interests need not be necessarily stated. An inference can where appropriate be drawn regarding the existence of a dispute from the position or attitude of a party notwithstanding the professed view of that party. See Cameroun V. Nigeria, Fn.3 supra; also available at http://www.icj-cij.org/icj/www/idocket/icu/icujudgment/icu-judgment980611-frame.htm .Accessed on 20/6/2004.

13 H G Darwin, *loc.cit.*

14 *Ibid.*

ii. Those which may lead to a breach of the international peace or serious tension between states and

iii. Those of greater or lesser importance which are not likely to endanger international peace.

It needs emphasizing at this stage that in substantive terms, a particular conduct can straddle the three categories. An example of this is the annexation of one country's territory by another. The importance of the above categorization lies however in the function of the dispute settlement procedures.

In category (i) for instance, the first step will be to bring about a cease fire with the aim of bringing the opposing parties to the conference table. Any outstanding issue in a sense is secondary even though the means for dealing with all the issues may underpin and prove the most important factor in the negotiations either during the continuation of the hostilities or after a cease fire. At this stage, states are reluctant to report to third party procedure given their military advantages if the third party procedure will prejudice the position already gained in the hostilities. However it is in cases like this that the imperative for a third party is mostly felt, moreso given the abhorrence to the use of force in settling interstate disputes. Ongoing military confrontation between the parties makes it very difficult for them to establish direct communication but a third party intermediary may be able to break the deadlock and open the channel for communication between the parties and which may ultimately make all the difference between peace and war. Thus if the conflict under category (i) is to be terminated otherwise than by outright military victory of one side over the other, some means of opening the door to negotiations has to be devised which meets the fears of the conflicting states.

Turning to disputes under category (ii) ie disputes which may lead to a breach of international peace or serious tension between states, it is obvious that the chances of settling a dispute are much higher before it leads to the outbreak of armed hostilities. These disputes often concerns what states regard as their vital interest. It is often called ‘’stalemate disputes’’ as neither party is prepared to accept the other’s view as to the form of an ultimate settlement. They will rather prefer to continue with the status quo in the hope that ultimately a solution acceptable to all will be found. Against the backdrop that such cases are often fraught with danger as a result of the fact that fear and miscalculation could easily break the stalemate thereby engendering resort to the use of armed force, Article 33 of the U.N charter has cast a positive obligation on member states to resolve their disputes by means therein stated. However whether there is a compulsory duty to settle only under the aforesaid Article is arguable.[15] In view of the fact that much latitude is given to states under this category it has been opined that this category of dispute is extremely difficult to deal with either by negotiation or third party procedures as the attitude of states show that they prefer to maintain an uneasy equilibrium rather than proceed to settlement.[16]

The third category of disputes that is those of greater or lesser importance which are not likely to endanger international peace constitute the majority of disputes at the international level.

The drawback noticeable in the first two categories is also applicable here. There is remarkable reluctance by states to resort to third party procedures. They will rather cling to their sovereign right of negotiation which in practice means no more than that each party simply persist in stating and re-stating its argument *ad nauseam*. Progress towards a solution may be delayed for years or even decades. The prolongation of disputes is wasteful of time

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15 T O Elias, *United Nations Charter and the World Court*, (Lagos: NIALS, 1989) p. 57.

16 Francis Vallat, “Forward” in David Davis Memorial Institute of International Studies, *op. cit*, p. xii *Cf.* the increasing docket of the ICJ and the multiplication of international dispute mechanism.

and energy and poisonous of international relations. In all the three broad categorizations considered herein, one essential factor that sways the states towards settlement is the will to so do. Once there is lack of will to settle, the opposition to settlement is dressed up in the garb of opposition to procedures.

Having looked at typologies of dispute in broad non-technical terms shorn of any legalism, we deem it appropriate at this juncture to consider the typologies of dispute in strict law and legalese, given the general context of this work which borders on judicialism under international law. With the proliferation, vibrancy and buoyancy of international courts and tribunals, it remains hardly arguable that international law is a complete legal system capable of settling disputes in accordance with its tenets. But among international lawyers much emphasis is often placed on the term "justiciability of disputes". This is with reference to the distinction between legal and political questions cum disputes and the fact that not all questions cum disputes are amenable to the adjudicatory process.

3.2.1 Legal and Justiciable Disputes

Legal disputes are disputes which could be settled by applying legal methods that is, methods which apply the law such as the judicial procedure. The classification of disputes as legal is one based on theory and against the backdrop of the contention by international lawyers that international law is a complete legal system capable of settling disputes in accordance with its tenets. Whilst it may be agreed that there may be uncertainties on many points of international law, such does not support any argument as to the existence of gaps in international law. It is argued that in principle, international law gives an answer to every question as to rights and duties as no tribunal has ever refused to make a finding on the ground that no rule of law relevant to the point before it exists. In the same vein, no state has ever justified a course of conduct on the ground that no rule of international law exists on the

point at issue. In situations where it is argued that a state is permitted to do something since no rule of international law exists which forbids that course of action, such does not represent a gap in international law but is merely an argument that the course of action in questions falls within the liberties of action allowed states by international law. Whilst it is accepted that most legal disputes are also justiciable; it is not in every circumstance that justiciability serves as synonym for legality. There may be cases of functional non-justiciability. This arises in situations where the parties have not properly presented issues to the international court or tribunal or where due to pre-existing treaty arrangements, other methods of settlement are to be explored before resort is had to the adjudicatory process.

3.2.2 Political and non Justiciable Disputes:

Political disputes are those disputes whose settlement procedure takes account of political considerations. Such procedure includes negotiation, good offices, mediation and conciliation. In adopting these procedures, the questions of rights and duties based on law is downplayed in favour of finding a meeting point for the parties' grievances.

It needs stating at this juncture that the above classification of disputes into legal and political notwithstanding, it is difficult to apply the distinction in practice to actual disputes as most disputes have both the legal and political element entwined. Thus there is relative agreement among international legal scholars[17] that the distinction between legal and political disputes is more illusory than real since at the end of the day, much is dependent on the attitude of the parties to a particular issue. Consequently if both parties are demanding what they conceive to be their existing legal rights and are willing to appear before an international judicial body – as was done in the *Corfu Channel Case,* [18] the dispute is evidently legal. Contra the

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17 N A Maryan Green**,** *International Law (Law of Peace), (*2nd edn. London: Macdonald & Evans, 1982) p. 227; O Shoyele, "Some Reflections on International Arbitration and the Development Effect on International Law," (1995) *CJLJ* Vol. 1, No. 1, p. 6 G Schewarzenberger, *International Law as Applied by International Courts and Tribunals vol. 111* (London: Stevens & Sons, 1976) p. 192.

18 ICJ Reports 1949. P.4.

situation where both are demanding the application of standards or factors not rooted in the existing rules of international law.[19] A good example was the clamour by African countries for reparations on account of the depredation wrought on their human and material resources by the slave trade; and also the demand by the third world countries for debt forgiveness by the richer countries of the West.[20]

A problem arises in the common case where one party is demanding a change in the legal situation by reference to extra legal standards or factors while the other party is refusing that demand on the basis of its existing rights; and in the converse case where one party is demanding the enjoyment of its existing rights while the other is refusing to accord them on the basis of extra-legal standards or factors. The import of these paradigms vis-à-vis the party espousing extra legal standards or factors is that it helps to appreciate the means of settlement most appropriate to be political rather than legal. This in no way denies access to a judicial tribunal (where such exists) for a party claiming an existing right, but only an acknowledgement that such an adjudication may only sharpen the legal dispute which in the absence of an international legislation is better resolved through conciliatory procedure involving both parties.[21] What thus appears from the above discourse is that intrinsically, every dispute is amenable to legal treatment if both parties are willing to bring it before a judicial tribunal for settlement.[22] But where such agreement is lacking, it then falls within the province of politics for such dispute to be settled; moreso against the sovereign status of states at the international arena and considering the fact that a particular dispute may at various stages of evolution pass from one mode of settlement to the other with no change of

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19 David Davies Memorial Institute of International Studies, *Op. cit*, p.7.

20 For seminal works on these later issues, see O Gye-Wado "African, Reparations and International Law," *NJIA* vol.19, No 1, 1993; pp. 115-135; O Gye-Wado. "The African Debt Crises and New Legal Initiative," *ASCIL Proc. 4* (1992) pp. 240-254.

21 David Davies Memorial Institute Of International Studies, *Loc. Cit.*

22 N Maryan Green, *Loc. Cit.*

its basic character.[23] Note too that the use of terms like "justiciable" and "non justiciable" as synonyms for the legal and political disputes respectively may not be apt in every circumstance. Thus, there may be cases of functional non justiciability.[24] This happened for example in cases where the parties have not properly presented issues to the international court or tribunal or where due to the pre-existing treaty arrangements, other methods of settlement are to be had before resort to the international court or tribunal. In the final analysis, it needs be stressed at this juncture that the above discourse of the legal and political character of dispute and *pro tanto* their justiciability or otherwise is an over simplification of the matter in two ways. First, a party may out of diffidence as to what it is actually seeking leave it somewhat ambiguous as to whether it is demanding a modification of the existing legal situation or whether it conceives its demand to be covered by its existing legal rights. Secondly, a dispute may have different aspects and be legal with one aspect but political with regard to another.[25] Given the fact that both legal and political disputes may consist in part of a conflict as to legal rights or political policies, a complex procedure may be needed to deal with all aspects of the dispute. Moreover, when it is realized that in contemporary international relations, dispute may arise out of almost any and every form of human activity, it becomes pertinent that the same procedure may not be apt for dealing with disputes bordering on political and those that border on economic and technical questions.

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23 O Shoyele *loc. cit.*

24 G Oduntan, *op. cit*. p.7.

25 It is for this reason that some judgments of the International Court of Justice are never executed as a matter of strict law but only executed after due cognition has been given to the political aspect of the judgment. Note also Article 18 of the European Convention for the Peaceful Settlement of Disputes which makes provision for disputes involving both legal questions and questions of conciliation.

3.3 Method of Dispute Settlement:

Once there is a dispute between two or more parties, there are only two methods by which it may be settled, namely: Force and Reason.[26] It is intended in this section to consider the two methods hereunder under international law..

3.3.1 Use of Force:

Force in conventional English usage means violent physical action used to obtain or achieve something.[27] In mechanics, a branch of physics, it is any action that tends to maintain or alter the position of a body or to distort it.[28] Blacks' Law Dictionary defines it as power, violence or pressure directed against a person or thing.[29] Thus, it is a physical relation between one body or the other; an essentially physical restraint or set of restraints.[30] It is conceived here in the mechanical sense of compulsion or pressure or the agency exerting such pressure.[31]. Force, when used by a state is emblematic of its authority and is used to assert and maintain its power and enforce the rules of society. The necessity of force in international relations arose out of the need for states to provide for the material needs and security of their citizens given the paucity of natural resources of the earth. It is also used as a political instrument in their quest for political relevance among the comity of nations. The rules pertaining to force form a central element within international law. In pre-U.N. Charter International Law, force was a means to the maintenance of right.[32] It is usually typified by the waging of war (resort to armed conflict) for purposes of self-help or self-determination which is seen as a natural

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26 "Force" and "Reason" are used in this context as synonyms for "war" and "peace".

27 Sally Wehmeier,(ed), *A S Hornby, Oxford Advanced Learners Dictionary,* **(**Sixth edn. Oxford: Oxford University Press, 2000) p. 462.

28 Robert P Gwinn *et. al, The New Encyclopedia Britannica vol. 4,* (The University of Chicago, 1993) p. 874.

29 Bryan Garner, *Blacks' Law Dictionary,* **(**7th edn. St. Paul Minnesota: West Publishers, 2004) p.

30 F S Northedge (ed) *The Use of Force In International Relations,* (London: Faber & Faber Ltd, 1974) pp. 12-13.

31 Fred Aja Agwu, *United Nations System, State Practice and the Jurisprudence of the Use of Force,* (Lagos: Malthouse Press Ltd, 2005) p.1

32 Arthur W Spencer, "The Organization of International Force," cited by Fred Aja Agwu, *Ibid,* p. 2.

law right available to states[33] under Customary International Law. The application of force in the conduct of international affairs is multi-dimensional and includes reprisal, retorsion, humanitarian intervention, war, etc[34] all of which may not necessarily lead to armed conflict.

Consequently, in contemporary international law, the controversy surrounding the word "force" has always centered on its amplitude. Does the use of the word "force" admit of other variants as for example, economic force or is it limited only to armed force? This is moreso when the word "force" is not defined in the Charter of the United Nations or in any other international legal instrument.[35] Against the backdrop of the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States which imposes an obligation on states to refrain from military, political, economic or any other form of coercion aimed against the political independence or territorial integrity of any state and the International Covenants on Human Rights adopted in 1966 which emphasized the right of all peoples freely to pursue their economic, social and cultural development, we share the view expressed by Elias[36] when he posits thus:

"What is most needed is an adequate definition of the notion of force and use of force, covering in addition to military force, subversive and economic coercion"

Having looked at the term "force", we shall now look at the use of force in settling international dispute under International Law. In customary International Law, the use of force was considered as normal in interstate practice and this without any assessment or stress being laid on any standard of rights and wrongs. The right to wage war was deemed an

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33 Fred Aja Agwu, *op. cit.* p. 4.

34 Godwin N Okeke, *Aspects of International Law*, (Enugu: Joen Printing & Publishing Company, 2007) pp. 94-98; M N Shaw, *International Law,* (6th edn. Cambridge: Cambridge University Press, 2008) pp. 1128-1158.

35 G N Okeke, *The Use of Force Outside the Aegis of the Security Council*, (Enugu: Joen Printing & Publishing Company, 2008) p. 5.

36 T O Elias, *United Nations Charter and The World Court,* (Lagos: NIALS, 1989) p.51; *Cf* D J Harris, *Cases and Materials On International Law*, (London: Sweet & Maxwell, 2004) p. 890; G N Okeke, *op. cit*. p. 6.

essential attribute of state sovereignty. Thus a state had the power to use force to obtain redress for wrongs done her whether as a corporate entity or her citizens as well as gaining political advantages over another. It was only constrained by the doctrine of the just war which was defined in terms of avenging of injuries suffered where the guilty party has refused to make amends.[37] War was to be embarked upon to punish wrongs and restore the peaceful status quo but no further.[38] Against the backdrop that the concept of the just war is subjective as the state remains the sole determinant of the justness of its cause vis-à-vis its vital interest and coupled with the rise of positivism, resort to war and its attendant validity was judged based on its legality which in turn depended on the formal processes of law. A series of legal rules and consequences became attached to the waging of war. The laws of neutrality and war became operative as between the combatant states and third states. Consequently, the fact that the war may have been regarded as unjust by any ethical standard did not constitute a factor in appraising the legality of force as an instrument of the sovereign state and neither did it alter the various rules of war and neutrality that came into operation sequel to the commencement of war. *A'fortiori*, the justness or otherwise of the causes of war was of no legal relevance to the international community.[39] Its relevance was only in the realms of politics. The expense, destructiveness, the long duration of wars and the risk of defeat meant that wars were not worth fighting. Incipient efforts at peace was restricted to the prevention of war not its total legal abolition. This effort at prevention was conceptualized based on a tripartite arrangement:- The first aimed directly at human nature with a view to modifying the heredity and environment of the individual as in the elimination of racial and national prejudices; de-emphasis on the exaltation of chivalry or military glory and the interest in national prestige; de-emphasis on the programs of eugenic immigration control, promotion of social welfare, reform and the modification of the educational processes, etc.

[37] G N Okeke, *Ibid.* p. 14.
[38] M N Shaw, *Op.cit.* p.1119.
[39] M N Shaw, *Ibid*. p. 1121.

The second aimed at the nature of the state such as modifying the conception of its objects and the mechanism through which it acts and the third aimed at reforming the international society by changing its conception and organization as well as the promotion of cosmopolitanism through labour, trade, science, arts and other forms of internationalism which grew through private non-governmental organization and public international associations.[40] This realization gave fillip to the idea of political conferences for the revision of treaties and laws, the willful resort to conciliation, inquiry and arbitration in the settlement of disputes. Thus, the earliest arrangements for abhorrence to the use of force in settling disputes were found in the Hague Conferences of 1899 and 1907.

Particularly important in this regard is Article 1 of the 1907 Convention which provides thus:

> The contracting parties agree not to have recourse to armed force for the recovery of contract debts claimed from the government of one country by the government of another country as being due to its nationals. This undertaking is however not applicable when the debtor state refuses or neglects to apply to an offer of arbitration or after accepting the offer, prevents any compromise from being agreed on, or after the arbitration fails to submit to the award.

It has been argued[41] that the above provision only aimed at the prevention by general agreement, of armed conflicts of a pecuniary origin arising from contract debts. States were thus only obliged not to have recourse to armed conflict or force for the recovery of contract debts until after failure of arbitral measures.[42] Notwithstanding the perceived shortcoming of the above provision, it needs emphasizing that the two Hague Conferences provided an

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40 Quincy Wright "The Outlawry of War, (1925) 19 *AJIL* p. 76.

41 George G Wilson "Use of Force and Declaration of War," (1938) 32 *AJIL* p. 100.

42 George G Wilson, Use of Force and War," (1932) 26 *AJIL*, p. 327 Shaw opines that the intendment was to provide a cooling-off period for passions to subside. See M N Shaw, *op.cit.* pp. 1121-1122.

opportunity to give vent to the then emergent atmosphere of undaunted optimism in the possibility of an end to the use of force as an instrument of public policy in interstate intercourse.[43] The outbreak of the First World War jolted man out of his optimism as to the end of the use of force as an instrument of state policy in international affairs. Thus, the supra-national League created after the First World War ie, the League of Nations reflected a different attitude to the problem of force in the international order.[44]

The League Covenant while seeking to protect and preserve the corporate right of states as in the right of territorial integrity, preservation of political independence of members, protection against acts of aggression etc all of which disputations over, harbours the seed of armed conflict, declares that members should submit disputes likely to lead to a rupture to arbitration or judicial settlement or inquiry by the council of the League. In no circumstances were members to resort to war until three months after the award by the arbitrators or judicial decision or the report by the council.[45] This resolve to prohibit war or resort to armed conflict/force was reinforced by Articles 11 and 16 of the Covenant respectively. Thus, while Article 11(1) declared that any war or threat of war whether immediately affecting the members or not was a matter of concern to the whole League; Article 16(1) on the other hand warned that any member of the League who resorts to war in disregard of its commitment obtained under Article 12 of the Covenant is *ipso facto* deemed to have committed an act of war against all members of the League with the attendant consequences and responsibility inherent in that resort to war. Despite the lofty provisions in the League Covenant vis-à-vis resort to war or armed force, the council of the League failed to rise to the occasion when Japan invaded Manchuria and Italy invaded Ethiopia all in expansionist quest for territory.

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43 Fred Aja Agwu, *op. cit.* at p. 97.

44 M N Shaw, *op. cit.* p. 1121.

45 Shaw opines that the intendment was to provide a cooling-off period for passions to subside. See M N Shaw, *loc. Cit.*

These inabilities among others led to the Second World War and with it the demise of the League System.

Against the backdrop of the failure of the League Covenant and other Treaties of the inter-war years in preventing the use of force or resort to war as an instrument of dispute resolution among states, a more vigorous prohibition against the use of force as an instrument of inter-state dispute resolution was demanded. Consequently, the victorious Allied nations immediately after the war in 1945 met in San Francisco and signed the United Nations Charter wherein they undertook to save succeeding generations from the scourges of war as well as ensuring that recourse to armed force shall not be used save in the common interest.[46] While committing themselves in Article 2(3) of the Charter to the settlement of their international disputes by peaceful means in such a manner that international peace and security, and justice are not endangered, the member states of the U.N. declare vide Article 2(4) of the Charter that:

> All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state or in any other manner inconsistent with the purposes of the United Nations.

The U.N. Charter is the pre-eminent treaty of the world to which every sovereign state of the world is a signatory.[47] As a legal instrument, it embodies in its provisions, articles putting restraint on the use of force between states to settle international disputes.[48] This provision which is regarded now as a principle of Customary International Law and *pro tanto* binding upon all states forbids the unilateral use of force as an instrument of national policy or in

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46 Fred Aja Agwu, *op. cit.* p. 119.
47 G N Okeke, *op. cit.* p. 17.
48 *Ibid.*

international relations for redress of grievances, for the settlement of controversies. A certain polemic exists among writers as to the ambit of Article 2(4) of the U.N. Charter. This centers around the following:

(i) Is the phrase "use of force" restricted only to armed force or threat thereat or does it admit for example of economic force as in when there is extreme economic duress and aggression. This may take the form of boycotts or embargoes against particular states or group of states.

(ii) The proper locus of peace, stability and justice vis-à-vis Article 2(4).

With respect to (i) above, it needs no gainsaying that ordinarily Article 2(4) of the U.N. Charter presents a more definite and firm prohibition on resort to use of force, to wit: armed force. However, against the backdrop that the said Article was forged amidst ideological rivalry engendered by the cold war and has inured through the emergence of new sovereign states in Asia, Africa and Latin America among other third world areas, has altered significantly the international situation under which Article 2(4) was crafted[49] and thus in need of clarification and amplification. This new imperative was engendered by the need to descend from the level of generality and abstraction in Article 2(4) to the specifics of its practical applications in particular problems situations to spell out concrete consequences of the principle that states should refrain from the use of force.[50]

Thus, the phrase "use of force" admits of both threat and the use of economic force. Any doubt as to the scope of Article 2(4) of the U.N. Charter evaporates when one appraises the provisions of the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operations among States and the 1974 U.N. Charter on Economic Rights.

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[49] Fred Aja Agwu, *op. cit.* P. 123.

[50] *Ibid.*

The 1970 Declaration enjoin states[51] to refrain from military, political, economic or any other form of coercion aimed against the political independence or territorial integrity of any state whilst the Charter of the Economic Rights specified that no state may use or encourage the use of economic, political or any other type of measures to coerce another state in order to obtain from it the subordination of the exercise of its sovereign rights.

Concerning (ii) above, the imperative of the discourse arose mainly due to the fact that the law of armed conflict lays much emphasis on international peace and stability and not necessarily justice even when it is recognized that perceived injustices are the root causes of most international armed conflict. Thus, Article 2(3) talks about justice. In this wise, Frank and Rodley has argued that Article 2(4) of the U.N. Charter is a law with a higher purpose designed to secure peace over justice.[52] Using the Bangladesh crisis wherein India waded into Pakistan's East-Bengal using large-scale military force as an instance, they argued that the injunction of Article 2(4) over-ruled India's action which was meant to restore human rights in the face of widespread abuse.[53]

From the foregone and considering contemporary interstate intercourse, the restrictions on the use of force as encapsulated in Article 2(4) of the U.N. Charter can be said to be an *erga omnes* obligation[54].

3.3.2 Pacific Settlement of Disputes:

Once a dispute has arisen, there are only two methods by which it may be settled, to wit: force and reason.[55] The progress of a legal system may be measured by the extent that reason

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51 M N Shaw, *op. cit.* P. 1019.

52 T M Frank & N S Rodley, "After Bangladeshi: The Law of Humanitarian Intervention By Military Force," 67 *AJIL*, 275 (1973).

53 *Ibid.*

54 Consists of the obligations owed by a State towards the international community as a whole. See Barcelona Traction, Light and power Company Case, 1970 ICJ Report p. 3, paras. 33-34. For further illumination on this concept; E Ama-Oji, *Responsibility for Crimes under International Law,* (Lagos: Odade Publishers, 2013) pp. 10-15.

is substituted for force in the settlement of disputes. Thus, ever since the end of the nineteenth century, the civilized world has been trying to find ways of eliminating resort to war and the use of armed force by states. The pacific settlement of international disputes has therefore been a constant and abiding preoccupation of the system of International Law and those required to work within its limitation.[56] Consequently, it is fair to assert that the maintenance of peace among members of the world community is one of the fundamental purposes of International Law.[57] *A'fortiori*, International Law remains a veritable instrument of the international community to ensure the establishment and preservation of world peace and security.

The United Nations Charter remains the pre-eminent international machinery for the peaceful settlement of international disputes and only complemented by other international instruments. In this wise, Article 1(1) of the U.N. Charter states that it is one of the purposes of the United Nations "to bring about by peaceful means and in conformity with the principle of justice and International Law, adjustments or settlement of international disputes or situations which might lead to a breach of the peace"

Article 2(3) of the U.N. Charter on the other hand obliges states to "settle their disputes by peaceful means in such a manner that international peace and security and justice are not endangered."

Thus, with the general aim of ensuring the maintenance of peace, the Charter makes it one of the express purposes of the United Nations to bring about the peaceful adjustment or settlement of disputes which may lead to a breach of the peace and that it is a primary function of the U.N. and its members collectively to seek to bring about and facilitate the

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55 "Force" and "Reason" are used in this context as synonyms for war and peace respectively.

56 N A Maryan Green, *International Law (Law of Peace),* (2nd edn**.** London: Macdonald & Evans, 1982) p. 225.

57 M N Shaw, *op. cit.* P. 1010.

settlement of international disputes. An interesting observation of the obligation cast upon members under Article 2(3) is that the obligation to settle their disputes amicably is linked not only to the maintenance of peace and security but also of "justice."

It needs emphasizing at this juncture that the obligation to settle amicably under Article 2(3) of the Charter is an independent obligation which is distinct from the obligation under Article 2(4) which enjoins states to refrain in their international relations from the threat or use of force. *A'fortiori,* the Charter provision enjoining members to settle their disputes by peaceful means is not a facet of their obligation to refrain from the threat or use of force. The obligation to settle disputes amicably is an autonomous and fundamental rule of the organization.

This much was recognized by the U.N. General Assembly in Resolution 1815(XVII) of 1966 when it designated this principle as one of the four basic principles for study by the Special Committee on Principles of International Law Concerning Friendly Relations and Co-operations among states. Thus, the obligation of peaceful settlement of disputes contained in Article 2(3) is not a passive one which can be regarded as having been fulfilled simply by refraining from the threat or use of force. On the contrary, it casts a positive duty on members to actively and in good faith seek amicable settlement of their disputes in such manner that international peace and security and justice are not endangered.

It needs stating also and given the preponderance of state practice that the obligation on states to settle disputes amicably can be regarded as an *erga ommes* obligation. *A'fortio*ri, it is not applicable to only members of the United Nations but to all states. Note also that the principle formulated in Article 2(3) of the U.N. Charter has been recognized and replicated in numerous regional and multilateral instruments such as the A.U. Act, the Pact of the Arab League, the Inter-American Treaties, the European Convention for the Peaceful settlement of Disputes, etc.

Finally and against the backdrop of the fact that the principles of International Law regarding friendly relations and co-operations among states is regarded as an elaboration of the Charter provisions, we deem it necessary to reproduce the principles as formulated by the 1966 Special Committee and agreed by the U.N. General Assembly. They are as follows:

1. Every state shall settle its international disputes with other states by peaceful means in such manner that international peace and security and justice are not endangered.
2. States shall accordingly seek early and just settlement of their international disputes by negotiations, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means of their choice. In seeking such a settlement, the parties shall agree upon such peaceful means as may be appropriate to the circumstances and nature of the dispute.
3. The parties to a dispute have the duty in the event of failure to reach a solution by any one of the above means to continue to seek a settlement of the dispute by other peaceful means agreed upon by them.
4. State parties to an international dispute as well as other states shall refrain from any action which may aggravate the situation so as to endanger the maintenance of international peace and security and shall act in accordance with the purposes and principles of the United Nations.

3.4 Categories of Pacific Settlement of Disputes

The resolution of disputes using peaceful, non-violent methods antedates modern history. The earliest existing Treaty dates back to about 3000 BC. The Treaty which was carved in stone records the successful arbitration of a boundary dispute between Egyptian Kings.[58] Among African societies, there was (and still is) a preference for the settlement of disputes along the

[58] Palmer & Perkins, *op. cit.* p. 255.

lines prescribed by the institutions and values of the community.[59] Thus, in all civilized societies across the world, there is growing resort to the peaceful settlement of disputes, which has in turn engendered an enormous amount of peaceful and non-violent settlement of disputes taking place at various levels and in many communities all over the world.

A wide range of non-violent and peaceful methods of settling disputes avail the international community. These methods are available at the individual, family, group, community and international levels. Pacific methods of settling disputes exist in two broad categories. The first which is proactive embodies methods that aim to prevent the occurrence of dispute in the first instance. These will include the use and establishment of diplomatic missions and consular offices, signing of Treaties wherein the respective duties, rights and privileges of parties are set out in clear terms vis-à-vis a particular subject matter, the institution of peer review mechanisms, etc. the second category is reactive and deals with responses to conflictive situations. It is this second category that will form the fulcrum of the discussion under this section.

Peaceful resolution of international disputes has evolved into Customary International Law given the preponderance of state practice espousing the ideals of peaceful co-existence among comity of nations. It remains unarguable that the idea of peaceful resolution of international disputes has assumed the nature of an *erga ommes* obligation[60] when considered against the backdrop of the volume of Treaties that make provision for pacific resolution of inter-state disputes and the limitations on the use of force by states in their international relations. In contemporary times, the U.N. has been at the vanguard of the principle of non-use of force by states in their respective inter-state intercourse. *A'priori*, provisions have been

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59 Shedrack Gaya Best, "The Methods of Conflict Resolution and Transformation" in Shedrack Gaya Best (ed.) *Introduction to Peace and Conflict Studies in West Africa,* (Ibadan: Spectrum Books, 2006) p. 93.

60 Ie, An obligation owed to all members of the international community. See also footnote 54 *supra.*

made in the U.N. Charter for various dispute resolution methods. In this wise, Article 33(1) of the U.N. Charter provides thus:

> The parties to any dispute the continuance of which is likely to endanger the maintenance of international peace and security shall first of all seek solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means of their own choice.

The above enumerations admit of three broad categorizations, to wit:

(a) Diplomatic (encompasses methods like negotiations, good offices, mediation, inquiry and conciliation).

(b) Arbitration and judicial

(c) Organizational (ie, regional efforts).

We shall now make a detailed inquest into the above starting with the methods contained in the diplomatic category.

3.4.1 Negotiation:

Black's Law Dictionary defines negotiation as a consensual bargaining process in which the parties attempt to reach agreement on a dispute or potentially disputed matter.[61] Mial *et al*, defined it as the process whereby the parties within the conflict seek to settle or resolve their conflicts.[62] It is a structured process of dialogue between conflicting parties about issues in which their opinions differ.[63] Miller sees it as communication usually governed by pre-

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61 Bryan A Garner (ed). *Black's Law Dictionary, (*St. Paul Minesota: Thomson & West, 1999) p. 1064.

62 Mial *et al, Contemporary Conflict Resolution: The Prevention, Management And Transformation Of Deadly Conflicts,* (Cambridge: Polity Press, 1999) p. 21.

63 Shedrack Gaya Best, *op. cit*. p. 105.

established procedures between representatives of parties involved in a conflict or dispute.[64] Negotiation usually involves complete autonomy of the parties involved without the intervention of third parties. It is the first and most universally accepted means of dispute resolution as its usage cut across legal systems whether international or municipal. It involves basically of discussions between the disputing parties with a view to reconciling divergent opinions or at least understanding the different positions maintained. Its usage is based on the realization by both parties that they have a problem whose solution can only be had by their ability to talk to each other. It is normally the precursor to other peaceful settlement procedures. Communication is very critical to the negotiating process as it can only take place when there is communication between the disputing parties. Where a dispute has escalated and communication is threatened or has stopped, negotiation becomes very difficult. Consequently, negotiation ordinarily takes place during the early stages of the dispute or conflict during which communication between the parties is possible, existent and good or at the de-escalation point when the communication has been restored, through the help of third parties. *A'priori*, it does not involve any third party even though it may be brought about by such a third party through the use of good offices. Negotiations need not be done directly by the parties involved themselves. Thus, it may be done through regular officials of the government like the ministers or ambassadors or through specially designated ad hoc officials.

There is a convergence of opinions among writers as to the efficacy of the use of negotiation in the resolution of international disputes.[65] In certain circumstance, there may exist a duty to

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64 Christopher A Miller, *A Glossary of Terms and Concepts In Peace and Conflict Studies,* (Geneva: University For Peace, 2003) p. 25.

65 M Akehurst, *A Modern Introduction to International Law*, (London: George Allen & Unwin Ltd, 1971) p. 290. Umozurike, *op. cit.* p. 185; Ian Brownlie, "The Peaceful Settlement of International Dispute" available at http://chinesevil.oxfordjournals.org accessed on 17/12/2012.

negotiate arising out of particular bilateral or multilateral agreements.[66] Where there is an obligation to negotiate, there is an implied duty to conduct a meaningful negotiation with the view to arriving at an agreement and not merely to go through a formal process of negotiation.[67]

A recent example of a negotiated settlement related to the NATO bombing campaign against Yugoslavia in 1999, during which NATO aircraft bombed the Chinese Embassy in Belgrade on May 7, 1999 killing three Chinese nationals and wounding approximately twenty others, in what American officials described as a tragic mistake. American and Chinese officials entered into negotiation as to remedial action for the loss of both human and material resources. Consequently, on 30th July, 1999, the United States agreed to pay China the sum of four and a half million dollars for the families of those killed or injured. On 16th December, 1999, agreement was also reached by both United States and Chinese officials as to the compensation for damages to the diplomatic properties of both states which for the Chinese arose from the NATO bombing of their embassy in Belgrade and for the United States, the damage to their diplomatic and consular properties in China by Chinese demonstrators.

There are two types of negotiation, to wit:

1. Positional Negotiation
2. Collaborative negotiation

1. Positional Negotiation: This is based on the aggressive pursuit of interest by parties. It is typically adversarial and competitive. Parties make demands that are selfish of others thereby making it impossible for the interests of both parties to meet. The desire is to win instead of working towards a mutually beneficially outcome as they consider themselves to

66 For example, Article 283 LOSC 1982; Fisheries Jurisdiction Case, ICJ Reports, 1974, p.3.

67 Legality of the Use of Threat or Use of Nuclear Weapons, 35 *ILM*, 1996, pp. 809, 830-1; North Sea Continental Shelf Case, ICJ Reports, 1969, pp. 3 and 47.

be in competition. Consequently, the demands of one party can only be met to the detriment of the other as parties tend to become fixated and stubbornly adhere to their positions especially when the stubborn party perceives himself to have a vantage position prior to the negotiations. Positional Negotiation breaks down easily.

2. Collaborative Negotiation: This is also called constructive negotiation. In this module, the disputing parties try to educate each other about their needs and concerns, and both explore for the best ways to solve their problems in such a way that the interests and fears of the disputing parties are met. The emphasis is on mutual understanding and feeling with the purpose of building a sustainable relationship. It has been posited[68] that since negotiation is about the interest of parties, this model looks at it from the simplistic point of view as issues may in practice be more complex than is assumed more so when it is further assumed that parties that come for negotiation are generally interested in finding a solution.

The advantage of negotiation given the above analysis is that it is very flexible and thus can be used for any dispute whether of legal or political nature. Its limitations include the fact that there is no element in the procedure other than the wills of the parties. Consequently, if there is a conflict, neither party may be prepared to forego her position because it conceives her duty to be to press her claims to the utmost or it fears the backlash incumbent upon her losing face before her citizens. Another drawback pertains to the absence of any third party influence in the negotiations. Thus, there is a greater risk that undue pressure may be applied by a state which is in a position to exert it. *A'fortiori*, negotiation unalloyed by any third party influence tends to favour the stronger against the weaker party. Thirdly, negotiations cannot justly solve a dispute where one party is facing the other with manifestly inequitable or

[68] Shedrack Gaya Best, *op. cit.* p. 106.

unreasonable demands which it persists in maintaining. Finally, there is no certainty that any solution will result.

Thus, even if the parties are negotiating in good faith, the negotiation will fail if neither party can find it possible to sacrifice its respective interests to the point where a compromise solution emerges.

3.4.2 Good Offices and Mediation:

(A) **Good Offices:** The Black Law Dictionary defines good offices as "the involvement of one or more countries or international organization in a dispute between other countries with the aim of contributing to its settlement or at least easing relations between the disputing countries.[69] As the definition above suggests, good offices entails the intercession of a third party (usually a state, international organization or even a private person) in dispute between parties who refuse to negotiate with the aim of bringing such parties into direct negotiations. Thus, once the parties are actively engaged in discussion, the third party drops out. The use of this procedure has been recognized even before the U.N. era. In this wise, Article 3 of the Hague Convention No 1 of 1899 is to the effect that signatories of the Treaty has a right to offer good offices or mediation to the parties to a dispute and that such an offer is never to be regarded as an unfriendly act. Instances abound of the use of good offices. In 1905, President Theodore Roosevelt of U.S.A. tendered his good offices to Japan and Russia to end the Russo-Japanese War.[70] The same procedure was followed in 1965 and 1966 by Premier Kosygin who expressed willingness to extend his good offices to India and Pakistan in an effort to assist these two countries to resolve some of the differences between them.[71] Note

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69 Bryan A Garner, *op. cit.* p. 714.
70 Palmer and Perkins, *op. cit.* p. 256.
71 *Ibid.*

should also be taken of the role of the U.S. in the Israel-Egypt War in 1973 and the current U.S. efforts in the Middle East Peace Process involving Israelis and the Palestinians.

(B) Mediation: Most writers use this term interchangeably with Good Offices[72] in the sense that Good Offices are a mediation of a limited scope. The dividing line between mediation and Good Offices is that whilst the use of Good Offices aims at bringing the parties together for purposes of negotiation, the mediator actually takes part in the discussion concerning the dispute. Thus, in Good Offices, the third party acts as a "go-between" whereas a mediator may make a suggestion of his own.

Mediation is the voluntary, informal, non-binding process undertaking by an external party that fosters the settlement of differences or demands between directly interested parties.[73] It is a special form of negotiation in which a neutral third party has a role. Such role is to help the parties in conflict achieve a mutually acceptable settlement.[74] It is had against the backdrop that the direct negotiation between disputants may not always be feasible given their divergent interests, needs and emotions. The mediator creates the enabling environment for the parties to carry out dialogue sessions leading to the resolution of a pending dispute. The mediator works on communication between parties, pollinates by working on common themes and drawing attention to neglected points. The mediator helps parties to identify and arrive at common grounds with a view to assuaging their fears and satisfying their real needs.

The mediator enjoys the confidence of the parties. Consequently, there is need for the mediator to be objective, neutral, balanced, supportive, non-judgmental and astute in questioning; and to try to drive the parties towards a win-win as opposed to win-lose

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72 P Malanczuk, *Akehurst Modern Introduction to International Law*, (7th Rev. edn. London: Routledge, 1997) p. 276; Ian Brownlie *op. cit.* Palmer and Perkins, *Ibid*, Sam Godongs "Mediations and the Mediation Process," in Shedrack Gaya Best, *op. cit.* p. 131.

73 Miller, *op. cit.* p. 23.

74 Sam Godongs, *op. cit.* p. 130.

outcomes.[75] Article 4 of the Hague Convention 1899 expresses the role of the mediator as reconciling the opposing claims and appeasing the feelings of resentment which may have arisen between feuding states. Generally, a mediator's knowledge of the facts is limited to what parties tell him and what he may gather from sources of news generally available to the public. In some circumstances however, the mediator may be authorized to enquire into the facts, as were the U.N. mediators for Palestine and Kashmir respectively.[76] Mediation begins when the states in disputes and the mediator agrees to it. The mediator may be one or more states or one or more individuals. The mediator presides over or participates in joint negotiations with the states in disputes or discusses the problem separately in the course of which he makes proposals or suggestions covering the questions of procedure or the whole or part of the subject matter. If the mediation is successful, a proposal emerges which is acceptable to all the parties involved in the dispute. Flowing from the above, the role of the mediator can be summarized as follows:[77]

1. **The Opener of Communication Channels:** The mediator either initiates or facilitates a continuing discussion between disputants.
2. **The Legitimizer**: The mediator legitimizes the rights and interests of all parties to the dispute and helps in facilitating negotiations.
3. **The Process Facilitator:** The mediator provides a framework and procedure for discussion and negotiations and should head the negotiation sessions.
4. **The Trainer:** By virtue of his active participation in finding a solution to the dispute, the mediator trains (albeit inadvertently) the unskilled unprepared negotiator in the bargaining process.

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75 Shedrack Gaya Best, "Methods of Conflict Resolution and Transformation," *op. cit*. p. 108.

76 H G Darwin, "Mediation and Good Offices," in David Davies Memorial Institute of International Studies, *International Disputes, The Legal Aspect*, (Europa Publications Ltd, 1972) p. 90.

77 Sam Godongs, *op. cit*. p. 136.

5. **The Resource Expander**: In the course of interaction and negotiation, the mediator links parties to lawyers, technical experts, decision-makers or additional goods for exchanges that may enable parties enlarge acceptable settlement options.
6. **The Problem Explorer:** The mediator assists peoples in defining basic issues and interests by analyzing each problem from a variety of ways with the aim of identifying mutually acceptable solutions.
7. **The Agent of Reality:** The mediator realistically helps parties to descend from their Olympian height of expectations in order to achieve results from workable, practical and acceptable options.
8. **The Leader**: In so many respects, the mediator is a leader that initiates procedural changes and suggests alternative ways or means of achieving results acceptable to all.
9. **The Scapegoat**: Sometimes, mediators share in the blame for unpopular decisions (mostly in short-run) though such decisions may in long run yield positive results. In such instances, parties use mediators as their scapegoats (face saving mechanisms) to achieve long term gains.

It needs stressing in conclusion of this section that five basic principles underline the mediation process, to wit[78]: impartiality, confidentiality, self-determination, voluntariness, empowerment and education.

The principle of impartiality seeks to promote the ideals of justice and fairness of the mediator on all issues brought to the negotiation table.

Confidentiality aims at boosting the confidence of the parties to discuss freely and truthfully amongst themselves without any fear that their positions, claims, defenses or remedies being sought would become known or available to other people who may not be directly involved in the conflict or at negotiations.

[78] *Ibid.* p. 137.

The principle of self-determination permits disputants to either include or exclude any important issue(s) in the course of negotiation. Thus, they determine what is or what is not discussed.

The principle of voluntariness gives disputants protection against compulsion by anyone in any stage of the process. They could even withdraw at whatever stage based on their judgments.

The principle of empowerment and education ensures that every mediation process should target the empowerment and education of disputants in such a way that they acquire an enhanced capacity to effectively deal with their problems and disputes.

3.4.3 Enquiry and Conciliation:

(A) Enquiry: Where differences of opinion on factual matters underlie a dispute between parties, the solution is often to institute a commission of enquiry to ascertain precisely the facts in contention. The functions of an enquiry may in a sense be regarded as a subsidiary one in the process of dispute resolution and often has a technical character. A commission of enquiry investigates the facts of a dispute but largely confines itself to a statement of the facts and a clarification of the issues. Even though it may also present conclusions and recommendations, these are in no sense binding on the disputants. Provisions for the use of enquiry as a method of dispute resolution were first elaborated in the 1899 Hague Peace Conference. Thus, Article 9 of the Convention provides as follows:

> In dispute of any international nature involving neither honour nor vital interests and arising from a difference of opinion on points of facts, the signatory powers deem it expedient that the parties who have not been able to come to an agreement by means of diplomacy should as far as circumstances allow, institute an international commission of enquiry to facilitate a solution of these disputes by elucidating the facts by means of an impartial and conscientious investigation.

From the above, it is evident that the usefulness of enquiry has always found favour among nations.[79] But in terms of Article 9 of the above, the technique is however limited in that it can only have relevance in cases of international disputes involving neither the honour nor the vital interests of the parties and the conflict centers around a genuine disagreement as to particular facts which can be resolved by recourse to an impartial and conscientious investigation. Note however that where the technique cannot solve the dispute, it may facilitate the collection of additional information which may elucidate the facts that gave rise to the dispute. A commission of enquiry is essentially an impartial third party fact-finding and investigation which albeit customary is not imperative.[80] The process may be initiated by mutual consent of parties or evolve from the terms of an applicable Treaty. The composition of any commission of enquiry depends on the technical nature of the dispute though legal expertise has always proved to be indispensable.[81] The task of the commission of enquiry is to find and report the facts of the situation without evaluating or drawing conclusions and recommendations, it is not binding and it is still left with the disputants to do with the report as they please. In this wise, Article 14 of the Hague Convention of 1899 is apt. it provides thus:

> The report of the international commission of enquiry is limited to a statement of facts and has in no way the character of an arbitral award. It leaves the conflicting powers entire freedom as to the facts to give this statement.

One of the earliest usages of this method under the 1899 Hague Convention occurred in the Dogger Bank case. In this case during the Russo Japanese war in October 1904, a Squadron of the Russian Fleet in transit from the Baltic to the theatre of war in the pacific while passing

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79 *Cf.* Edwin D Dickinson**,** *Law And Peace,* (Philadelphia: University of Pennsylvania Press, 1951) p. 71.
80 I A Akaraiwe, *Onyeama: Eagle On The Bench,* (Lagos: Touchstone Books, 1999) p. 203.
81 *Ibid.*

through the North Sea fired at British Fishing Vessels from Hulk believing that they were Japanese torpedo boats. One trawler was sunk and five damaged and two fishermen were killed and six wounded. A Commission of Enquiry was set up to investigate the circumstances surroundings the incidence and make its reports.[82] The Report which found the Russian action unwarranted led to the settlement of the dispute as the Russian government apologized and paid substantial indemnity. The U.N. General Assembly seems to have acknowledged the efficacy of this method via the adoption in 1949 of a resolution establishing a panel for enquiry and conciliation.[83]

This method has a prophylactic function in reducing tension as it combines the benefits of diplomacy and legal techniques to obtain an impartial report on the facts or suggestions for resolving the issue.[84]

Its drawback is that just like most commissions of enquiry in municipal settings, it may be a veritable instrument of time wasting bureaucracy affording a government, a cooling off mechanism.[85]

(B) Conciliation

There is lack of unanimity among writers on the proper locus to be accorded this method vis-à-vis inquiry, mediation and good offices. Thus, while Shaw[86], Akerhurst[87] and Levi[88] see conciliation as a combination of both inquiry and mediation: Gore-Booth[89] looks at it as an aspect of good offices and Hazel Fox[90] posits that it is distinguishable from all other methods of peaceful settlement of disputes. Conciliation involves a third party investigation of the

82 Red Crusader case, 35 ILR, p. 485.
83 Article 26 of ILO Treaty.
84 Akaraiwe, *loc cit.*
85 Oduntan, *op. cit*, pp. 23-24.
86 M N Shaw, *op. cit.* p. 1022.
87 M Akerhurst, *op. cit.* 291.
88 Levi, *op. cit*, p. 295.
89 Gore-Booth as cited by Oduntan, *op. cit*. p. 26.
90 Hazel Fox, "Conciliation" in David Davies Memorial Institute of International Studies, *op. cit.* p. 95.

basis of the dispute and based on the findings, the submission of a report embodying suggestions for a settlement. Conciliation reports are only proposals and do not constitute binding decisions. They are in the main advisory. In this wise, Article 15 of the 1957 European Convention for the Peaceful Settlement of Disputes describes the tasks of a conciliation commission as:

> To elucidate the question in dispute, to collect with that object all necessary information by means of enquiry or otherwise and to endeavour to bring the parties to the terms of settlement which seems suitable to it and lay down the period within which they are to make their decision.

There could be cases of binding conciliation as for example where a Treaty provides for compulsory conciliation for resolving a dispute. Conciliation is often regarded as an especially constructive approach to those disputes which are not justiciable in nature but also are not so exclusively political , that is involving delicate questions of national interest and prestige.[91] The conciliation procedure was used in the Iceland-Norway over the Continental Shelf delimitation between Iceland and Jan Mayen Island.[92] The agreement establishing the conciliation commission stressed that the question was the subject of continuing negotiation and that the commissions had to also take into account Iceland's strong economic interest in the area as well as other factors. The solution proposed by the commission was the establishment of a joint development zone (which would not have been possible from a judicial body deciding solely on the legal rights of the parties).[93]

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91 Palmer & Perkins, *op. cit.* p. 258.
92 21 ILM, 1982, p. 1222.
93 Shaw, *op. cit.* p. 1024.

Thus, flexibility of the conciliation process, seen in the context of continued negotiation between the parties was established. Within the United Nations system, this procedure is also in place. Instances include the conciliation commission for the Palestine under General Assembly Resolution 194 (iii) of 1948. Though, there have been only a small number of conciliation procedures in recent times[94] as the procedure is less attractive when juxtaposed to arbitration, many private organizations especially those which tend to regard the United Nations as either primarily or almost wholly an agency for peaceful settlement, have urged more general resort to conciliation.[95] Its advantages include the following:[96]

(a) It offers the parties to the dispute information and knowledge of the opponent's case which is invaluable.

(b) It affords an opportunity to the lawyers and politicians involved in the dispute at a national level to refer the matter to a small body of independent and qualified persons for their objective appraisal of the issues and for proposals for their settlement.

(c) It takes full account of the sensitivity, susceptibilities and prestige of governments in that it is easier to accept a third party's solution than that offered by the opponent.

(d) It leaves unchallenged the liberty and sovereignty of the parties. There is complete secrecy, no obligation to accept the commission's proposals, no loss of rights or abandonment of position. Thus a state retains its sovereign control to the last stage of the proceedings.

Ironically, in this last advantage lies the weakness of conciliation.

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94 *Ibid.* p. 926, Akerhurst, *loc. cit* Brownlie, *op. cit*. p. 272.
95 Palmer & Perkins, *loc. cit.*
96 Hazel Fox, *op. cit.* p. 100.

3.4.4 Arbitration and Judicial Settlement

(A) Arbitration: The International Law Commission defines arbitration as "a procedure for the settlement of disputes between states by a binding award on the basis of law and as a result of undertaking voluntarily accepted.[97] Thus, from the above definition, international arbitration *stricto sensu*, only takes place between states. In furtherance of this, Article 15 of the Hague Convention of 1899 states the purpose as follows: "International arbitration has for its object the settlement of differences between states by Judges of their own choice and on the basis of a respect for law"

The essence of this clarification is to distinguish international arbitration within the context of our discourse from another form of arbitration conducted within the purview of International Chamber of Commerce.[98] The submission of disputes to arbitration is a well known and time-honoured practice among states dating back to the medieval times and even among the Greek city states.[99] Its modern history dates back to the Treaty of Amity, Commerce and Navigation (also called the Jay Treaty) between Britain and U.S.A. of 1794 under which three mixed commissions were appointed in equal numbers by both parties with the power to refer to an umpire in the event of a disagreement. This was later consolidated into a multilateral Treaty instrument via the 1899 Hague Convention for the Pacific Settlement of Disputes. Thus, an agreement to arbitrate under Article XVII implied the legal obligation to accept the terms in good faith.

Two elements underline the arbitration process. The first element is the necessity for consent of the arbitrating parties to every stage in the arbitration. Consent given at the beginning of the arbitration proceedings and continuing throughout the proceedings until the tribunal

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97 1953 *YBILC* II p. 202.

98 For seminal discourse on International Commercial Arbitration, see Greg C Nwakoby: *The Law And Practice of Commercial Arbitration In Nigeria*, 2nd edn. (Enugu: Snaap Press Nig. Ltd, 2014) p.172 *et.seq.*

99 P E Jacob and A L Atherton, *The Dynamics of International Organization: The Making of World Order*, (Homewood: Dorsy Press, 1965) p. 271.

retires to make its award is an essential ingredient to the successful completion of any arbitration. Consent of parties to arbitration may be expressed prior to or after the occurrence of a dispute. This consent may be expressed in arbitration treaties in which the contracting parties agree to submit certain kinds of dispute that may arise between them to arbitration or in specific provisions of general treaties which provides for disputes with regard to the treaty itself to be submitted to arbitration. Consent to the reference of a dispute to arbitration with regard to matters that have already arisen is usually expressed by means of a *compromis* or special agreement. The *compromis* normally contains the mode of selection of Judges which will comprise the arbitration tribunal as well as the applicable law. Arbitration tribunals may be composed in different ways. There may be a single arbitrator or a collegiate body. In the later case, each party will appoint an equal number of arbitrators with the chairman or umpire being appointed by either parties or arbitrators already nominated. Arbitration tribunals are often ad hoc panels constituted to hear a particular case. They do not as a matter of principle determine their own jurisdiction.[100] The jurisdiction of the tribunal is defined in relation to the provisions of the *compromis*. Thus they make their awards in accordance with rules especially adopted for that purpose by parties' agreement. The decision of the arbitration tribunal is known as an Award. Without a *compromis*, there can be no arbitration and should any of the provisions of the *compromis* be breached in the course of the arbitration proceedings, the resultant award is null and void. In the absence of any provision to the contrary, the law to be applied is International Law.[101]

The second element that underlines the arbitral process going by the afore-mentioned definition is the settlement of the dispute "on the basis of respect for law." An arbitral award made in accordance with the *compromis* is final and binding. The legal character of the award

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100 *CF*. Shaw, *op. cit.* p. 1052.

101 Article 28 of the 1928 General Act for the Pacific Settlement of International Disputes as revised in 1949.

inheres in the obligation on parties to accept it as binding. This same character operates to provide limits within which the arbitrators must confine themselves in order to reach an award. Consequently, the arbitral tribunal must observe the rules of natural justice in hearing the parties and pronounce the award on the basis of a respect for the law.[102]

From the foregoing, it is obvious that arbitration as a method of dispute resolution combines both the diplomatic and judicial procedures.[103] Its success depends on a certain amount of goodwill between the parties in drawing up the *compromis* and constituting the tribunal as well as enforcement of the award. Its adjudicative nature is evidenced by the fact that the award is binding and final and the arbitrators are required to base their decisions on law. We thus agree with Shoyele that despite its criticisms, arbitration has been a veritable tool in quieting claims after great wars.[104]

(B) Judicial Settlement

This refers to the judicial methods for resolution of disputes. This resort to the judicial method is symptomatic of the concept of judicialism which we had earlier discussed.[105] Judicial settlement comprises the activities of all international and regional courts deciding disputes between subjects of International Law in accordance with the rules and principles of International Law.[106]

Given the interplay of politics and law in the categorization of a dispute as legal or political for purposes of determining the appropriate settlement mechanism, it needs clarifying at this

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102 Note that the phrase, "on the basis of respect for the law" is sometimes used interchangeably with the phrase "in strict accordance with the law."

103 Its main distinguishing features from the judicial procedure includes: (1) The nomination of the arbitrators by the parties concerned. (2) The selection by these parties of the principles upon which the tribunal should base its findings. (3) Its character of voluntary jurisdiction. (4) Its privacy. For more details on these distinguishing features; see I Brownlie, *op. cit.* pp. 273 and 277, Palmer & Perkins *op. cit.* p. 259

104 Shoyele, *op. cit.* p. 106.

105 Chapter 1 *supra* pp. 9-15.

106 M N Shaw, *International Law,* (5th Edn. Cambridge: Cambridge University Press, 2004) p. 959.

juncture that final resort to judicial settlement does not mean the occlusion of the political nature of the process of choosing the mechanism through which the decision is reached. Rather it represents a political decision that the technique by which the dispute is resolved is based upon the voluntary renunciation by the disputants, in the interest of a settlement of their right to solve the dispute directly in favour of binding third party judicial settlement, coupled with the requirement that the solution shall be based on articulated legal grounds reached through the application of judicial technique.[107] Resort to the judicial method of dispute settlement is epitomized by the establishment and operations of international courts which are permanent and pre-constituted institutions. Details as to their internal workings such as number and choice of the Judges, their agreement to act, the possibility of introducing the proceedings by unilateral application, the law they are to apply, the procedure to be followed, the publicity of proceedings, the competence of the courts both regarding the merits and regarding all pre-adjudicatory and other incidental matters are carefully regulated in the constituent instrument.[108] It is to be emphasized at this juncture that litigation which underpins the judicial process, is, given the plethora of other amicable means of dispute resolution, a last resort. Many factors conspire to make it so, top among which include the possibility of worsened relations by unilateral resort to law, the uncertainty of the outcome of legal proceedings, the embarrassment of a final adverse ruling by a body beyond one's control, etc.

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107 Shabtai Rosenne, *The Law And Practice Of The International Court:1920-2005,* (Leiden: Martinus Nijhoff Publishers, 2006) p. 5.

108 *Ibid.* p. 11.

CHAPTER FOUR

JUDICIALISM IN INTERNATIONAL LAW:

PIVOTS OF THE UNITED NATIONS SYSTEM

4.1 The International Court of Justice (ICJ)

Within recent history and against the backdrop of man's overriding desire for a peaceful inter-state intercourse based on respect for the rule of law, the United Nations Charter provides a major thrust for the pacific settlement of international disputes via the judicial process. Consequently, Article 33 (1) of the Charter which provides the various methods for the pacific resolution of disputes, provides thus:

> The parties to any dispute the continuance of which is likely to endanger the maintenance of international peace and security shall first of all seek solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangement or other peaceful means of their own choice.

Where the above enumerated means fail, and given the injunction in Article 2(4) of the UN Charter, an aggrieved party may have recourse to the UN Security Council vide Article 35(1) of the UN Charter.

To further rein in this aptitude for law and judicialism, the Charter provides via Article 92 for the establishment of the International Court of Justice (ICJ) as the principal judicial organ of the United Nations. The statute of the court is annexed to the Charter and forms an integral part of it. Thus, a member of the United Nations is automatically a party to the statute of the ICJ. The ICJ was cast in the shadows of the defunct Permanent Court of International Justice (PCIJ) and was meant to be its replacement. The PCIJ was part of efforts to provide for a

mechanism for settling disputes that might arise subsequent to the Peace Treaty which ultimately established the League of Nations. Britain and United States were the two proponents of an International Court and lobbied vigorously for the establishment of such a court as part of the League arrangement. The PCIJ was created in 1920 by the League of Nations after considering the draft statute prepared by jurists drawn from United States, Britain, Italy, Japan, The Netherlands, France, Norway, Spain, Brazil and Belgium. The PCIJ Protocol was ratified by many states and judges were elected in 1921 after which it was formally inaugurated. The PCIJ is the first International Tribunal having what can be described as a corporate character before which a state could bring a dispute by means of unilateral application calling upon another state to appear before it without any existing prior agreement to the composition of the tribunal or to questions to be submitted to it.[1] The outbreak of the Second World War heralded its demise. It held its last sitting in 1939 and was formally wound up in 1946.[2] The statute of the PCIJ was not an integral part of the League covenant. A' priori, membership of the league does not ipso facto result into automatic subscription to the statute of the court.

An International Court or resort thereto represents the culmination of a series of methods of amicable settlement of international disputes. Its importance lies in the fact that the idea of law has become natural to man in society even as International Law given the complexities of inter-state intercourse keeps developing. The behavior of states, given the complexities of contemporary inter-state intercourse paradoxically indicates their belief in the idea of

1 Note that the United States never ratified the Court's Protocol though it kept a Judge on the PCIJ Bench. See generally M W Janis, *An Introduction to International Law*, (2nd edn. London: Little Brown & Company Ltd, 1993) pp. 110 & 119.

2 There is no unanimity among writers on this. Oduntan and Janis agree with the above. See G Oduntan, *The Law and Practice of The International Court of Justice [1945-1996]*, (Enugu: Fourth Dimension Publishing Co. Ltd,1999). p. 16, Janis, *ibid*, p. 119. *Cf.* U O Umozurike, *Introduction to International Law*, (Ibadan: Spectrum Law Publishing,1993) P.189.

International Law and the judicial process.[3] Given the backdrop of states realization on the importance of law and the judicial process in inter-state inter course and the perceived (albeit presumed) gaps in International Law, International Courts take the matter a step further by weaving concepts together to form a complete system.

4.1.1 Histology

Against the backdrop that the United Nations is unarguably the most representative body politic of mankind and embodying an ideal that has held humanity spell bound for centuries; the ICJ is the highest Court on earth in so far as sovereign states which are obligated under the United Nations Charter to settle their disputes peacefully are willing to bring disputes before it. It serves as the principal judicial organ of the United Nations and in the words of Judge Lachs, "The guardian of legality for the International Community as a whole both within and without the United Nations."[4] The motivation for the existence of the court was laid in the failures that culminated in the First World War. Thus in the words of Akaraiwe, "The Court came into being when the nightmare of the First World War made the dreams of pacifists for a fleeting moment reach out and touch the utter despair of the pragmatists".[5] What had long been considered the ultimate panacea by some had now become the last resort for others.[6] As a pinnacle and man's symbol for peaceful resolution of disputes, the ICJ operated above all as an apt and practical mechanism to prevent and counteract the use of force. Hence, the inscription at the Peace Palace:[7] *Pacis tutela apud judism* (The Judge is the guardian of peace.)

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3 This is evidenced by the fact that virtually all nation states on planet earth are members of the United Nations which unarguably is at the epicenter of the international legal order and norm creation. Moreso most regional organizations make provisions for judicial institution for settling inter-state disputes.

4 The Lockerbie Case, ICJ Reports 1992, p. 3 at p. 26.

5 I A Akaraiwe, *Onyeama: Eagle on the Bench*, (Lagos: Touchstone Books, 1999) p. 119.

6 A Eyffinger, *The International Court of Justice, 1946-1996,* (Netherlands: Kluver Law International, 1996) p. 2.

7 The Peace Palace at The Hague is the headquarters of the Court.

Its history is inextricably woven in the early inter-allied discussions on the need for a future political organization of the world following the acclaimed failure of the League[8]. Centers of interests in the future of international judicial organ of the inchoate supra-world political organization, sprung to wit: in South America, in the United States and in the United Kingdom.

With regards to South America, the foreign ministers of the American Republics met in January 1942 and charged the Inter-American Judicial Committee to formulate specific recommendations concerning post-war international organization in the judicial and political spheres. The Judicial Committee submitted its recommendation on September 5, 1942. The Committee recommended that the PCIJ should be designated as the court for the new organization even as it was critical of the court's limited jurisdiction.[9]

In the United States, an Advisory Committee on Post-War Foreign Policy was set up in 1942 by the State Department. This Committee established a special sub-committee on legal problems and another special committee on international organization. This latter committee referred the preparation of a framework for an international court of justice to the sub-committee on legal problems.[10] The sub-committee contemplated the creation of a new International Court as an organ of the general international organization and not administratively independent as the Permanent Court had been. Moreover, since arrangements for the integration of this court with other organs of the international organization were viewed as a responsibility of the legal sub-committee on international organization, the legal sub-committee restricted itself to such questions as the composition,

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8 Shabtai Rosenne, *The Law and Practice of the International Court, 1920-2005*, 4th edn. Vol.1 (Leiden: Martinus Nijhoff Publishers, 2006) pp.46- 47.

9 *Ibid*.

10 The Committee was composed of Messrs Hackworth (Chairman), M F Armstrong, A Berle, Jr, B Colien Brooks Emeny, James T Shotwell and D V Sandifier. The last three were later additions even though D V Dandifier joined the group as specialist on the problems concerning the International Court of Justice.

internal organization, competence and procedure of the court. It was a remoulding of the draft of the Statute of the PCIJ.[11]

The seal of the United States for the support of an International Court was given vide the United States Secretary of State July 23, 1942 expression of United States Approval for the establishment or re-establishment of an International Court after the war.

Taking a cue from the United States pronouncements on the need for an International Court, the United Kingdom which had long established itself as an advocate of the Permanent Court[12] rekindled her interest towards the establishment or re-establishment of an International Court after the war. Thus, in early 1943, the initiative for an International Court was resumed. In addition, the governments of Belgium, Canada, Czechoslovakia, (now defunct) Greece, Luxemburg, the Netherlands, New Zealand, Norway and Poland and the French Committee of National Liberation nominated several of their experts to make up an informal committee to examine the question of the court on the assumption that "an International Court in some form would be needed in the future."

In formal terms, the birth of the ICJ can be said to have begun in February 1944 when the informal Inter-Allied Committee of Experts[13] under the chairmanship of Sir William Malkin published a stimulating report on the future of the International Court. The Committee whose sole objective was to make recommendations to the United Nations as a whole had a purely informal status and its members were appointed on the basis of personal capacity. The Committee recommended that the statute of the PCIJ which was the predecessor to the present ICJ was a highly workable instrument for any future court and should be retained as such. The report of the Committee was indeed a highly valuable contribution to the future

11 United States Department of State, Post War Foreign Policy Preparation, 1939-1945. Publication 3580 (1950) P. 116.

12 In fact, as early as 1941, the United Kingdom had approached the United States to join other allied governments in London on a study of the future of the Permanent Court, to no avail.

13 Other members include G Kaeckenbeeck, F Havlicek, R Cassin, A Gross, C Stavropolous, G Schommer, E Star Busman, R M Campbell, E Colban, B Winiarski, G Fitzmaurice.

thinking regarding the court and in the words of Rosenne, "a tribute to the ideals which the very notion of international justice inspires."[14] This was followed by the Dumbarton Oaks talks of August to September 1944. The Dumbarton Oaks talks was itself preceded by the publication of the Moscow Declaration of 30th October 1943 wherein the representatives of United States, the Soviet Union (now defunct) and the United Kingdom had agreed on the conduct of a preliminary but informal exchange of views on issues relating to the establishment of an international organization for the maintenance of international peace and security. The Dumbarton Oaks talks formally made proposals for the establishment of an international organization for the maintenance of peace and security. On the desirability of an International Court, Chapters 4, 5, 7 and 8 respectively of the proposal talked about the court as one of the principal organs of the new organization, election of Judges, functioning of the court (whether in accordance with a statute either of the PCIJ or a new statute based thereon which will be annexed to and form part of the Chapter of the new organization and competence of the court. The difference between the Dumbarton Oaks Conference and the Malkins Committee was that the former recognized the organic connection between the court and the organization. Note however that issues such as whether to establish a new court or retain the old one with some adaptations, the number of Judges, the method of election and finally the matter of compulsory jurisdiction remained outstanding.[15]

It has been opined that deferring discussions bordering on the outstanding issues was not really a coincidence as these were essentially the very problems which had for so long prevented the establishment of an International Court.[16] However, the full appreciation of these problems at this stage and the general desire to solve them, led to the establishment of a new committee on a broad footing, to examine these delicate issues.

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14 Rosenne, *op. cit* .p. 52.
15 *Ibid.* p. 55.
16 Akaraiwe, *op. cit*. p. 159.

Accordingly, in March 1945, the United States Government issued invitations to the members of the allied coalition to send delegates to a committee of jurists meeting in Washington in April and to prepare a draft of the statute of the proposed International Court. Fifty-four nations were represented in this committee. Green Hackwood, an official of the United States State Department and member of the PCA since 1937 chaired the Committee. The meetings of the Committee had a reconnoitering character only as it was not empowered to take any definite actions and its conclusions were to be considered as the recommendation of experts. In fact, the Committee was regarded as a continuation on a more formal footing of the work of the informal inter-allied Committee.[17] This Committee which was also known as the Washington Committee of Jurists concluded its work just in time for the opening of the constituent meeting of the inchoate organization at San Francisco. During its meetings, the Committee carefully scrutinized the statute of the PCIJ and proposed a number of amendments albeit of a technical nature. It however left open the question whether the planned court was to be considered a new institution or an extension of the PCIJ as well as the recurrent issues of election and compulsory jurisdiction. With regard to the latter, the question raised was whether the acceptance of the court's compulsory jurisdiction was to be a condition for membership of the organization itself.[18]

At the San Francisco Conference which was to prepare the Charter of the United Nations on the basis of the Dumbarton Oaks proposal, the drafting of the statute of the court was entrusted to a special technical committee. The Committee established four sub committees to deal with issues such as continuity, nominations, elections, and jurisdiction. The Committee's report after the necessary verifications by the advisory committee of jurists of the conference was incorporated into the Charter and adopted as its Chapter Fourteen

[17] Rosenne *op. cit*. p. 56.
[18] Akaraiwe, *op. cit*. p. 160.

(Articles 92-96) to which the statute of the court was then annexed.[19] The results of the conference were far-reaching. Amongst the decisions taken was that the new court should be a component part of the newly launched organization; the United Nations and constitute one of its principal judicial organs[20] and that the statute of the court was to be annexed to and form part of the Charter. Apparently, the reason for not integrating the two documents into one was mainly due to practical exigencies (ie, to avoid unbalancing the one hundred and eleven Articles of the Charter through the addition of the seventy Articles of the statute).[21] Besides, this procedure also facilitated access to the new court for states which were not members of the United Nations.

Despite all the above technicalities involved, the preference for a new court rather than for a continuance of the old one was a political decision arising primarily by the agreement between the United states and the USSR[22] (now defunct) both of which had emerged from the Second World War, as the world's leading powers. Moreover, they were not signatories to the statute of the PCIJ. A second consideration was that as the court was to form part of the United Nations system, it seemed inappropriate for this role to be filled by the PCIJ which was closely linked to the League of Nations which was on the verge of dissolution. A third factor which was important though it did not directly contribute to the outcome was the feeling in some quarters that the PCIJ represented the old world order wherein European States enjoyed both political and legal predominance in the international community.[23] As a fresh start, a new institution, it was felt would make it easier and more attractive for non-European powers to join and make their influence felt. Thus, within the sub-committee, out of ten votes, France, Great Britain and Brazil were the only nations to advocate for the

19 Akaraiwe, *op. cit.* p. 161.
20 On the same footing as the General Assembly, Security Council, Economic and Social Council, etc.
21 Akaraiwe, *loc. cit.*
22 Union of Soviet Socialist Republics (otherwise known as Soviet Union).
23 *Ibid.*

continued existence of the PCIJ. However, save for the change in nomenclature and technical motives of incorporating the statute into the United Nation Charter, it remains arguable whether in substance, the ICJ is not a continuation of the PCIJ.[24]

On June 26th 1945, the statute of the ICJ together with the Charter of the United Nations was adopted whilst both came into force on October 24th 1945. The PCIJ met for the last time in October 1945 and took all appropriate steps to ensure the transfer of its archives and effects to the new court. On February 6th 1946, the first Bench of the ICJ was elected and on April 18 1946, the Court held its inaugural sitting at the Peace Palace at the Hague, Netherlands.[25] The court commenced its judicial business proper on 22 May 1947 with the listing of the first case, the *Corfu Channel Case*[26] in the court's docket.

4.1.2 Structure and Composition of the International Court of Justice (ICJ)

The composition of the Bench is one element which cannot be dispensed with if adherence and credibility is to be given to decisions of the court over matters submitted to it for adjudication. The imperative of this factor is all the more relevant in the international system given the different ideological, social, political and economic tendencies of the states within the system.

The procedure for the appointment of Judges into the ICJ is amalgam of both the political and legal elements which at the same breath seeks to avoid as far as possible the influence of national states over the Judges. This is meant to correspond to the nature of the court's function as part of the general diplomatic machinery at the disposal of the states.[27] Thus,

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24 D J Harris, *Cases and Materials on International Law*, *(*5th edn. Sweet and Maxwell, 1998) p. 989; Oduntan, *op. cit.* p. 17; *Cf.* E Satow, *Satow's Guide to Diplomatic Practice*, 5th edn., (London: Longman Group,1959) p. 356.

25 This solemn moment was attended by the President of the General Assembly, representatives of the Security Council and the Economic and Social Council, The Secretary-General of the United Nations and other distinguished public figures.

26 ICJ Reports 1949.

27 S Rosenne, *op.cit.* p. 355.

whilst the system of nomination and election of the members of the court is structured to reflect political considerations, the depoliticized treatment which the court is required to give to the matters referred to it in the exercise of its judicial functions is reflected in the provisions regarding the qualifications required of Judges, incompatibilities, the removability of Judges and their unaccountability for their judicial actions, the stability of their remuneration and pensions and the completely independent character of the Court's Registrar and registry.[28] Consequently, whilst political considerations comes into play (albeit momentarily) at the time of elections of members of the court, the court is granted every facility to project and maintain its independence once membership has been constituted. This state of affairs is analogous to what is obtainable in municipal set-up wherein the appointment of Judges is a mesh of both political and legal factors whilst efforts are also made to entrench their judicial independence in the performance of their judicial functions.

The Statute of the ICJ lays down two requirements for the proper functioning of the court. The first concerns the personal qualification of the Judges in the moral and professional sphere. The second deals with the adequate representation on the court's Bench of the world's prevailing legal and cultural traditions. For purposes of lucidity, the relevant Articles of the Statute are set out herein. Article 2 of the Statute states thus:

> The Court shall be composed of a body of Independent Judges regardless of their nationality 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 jurisconsults of recognized competence in International Law.

[28] *Ibid.*

It has been opined that the above provision is declaratory of the principles to be observed in the nomination and election of candidates and thus neither imposes any enforceable bar or disqualification upon persons once elected nor imputes any intention to do so.[29]

However, against the backdrop of Article 18 of the Statute which provides for the dismissal of a Judge who has ceased to meet the conditions required for his appointment as a Judge of the court, we are of the firm view that deficiencies in the qualities listed in Article 2 above can be a ground for blocking the nomination and election of a candidate.

Note too that the two alternative requirements contained in Article Two, to wit: Qualification for appointment to the highest judicial office in the candidates own country and recognized competence in International Law are not complementary to each other and thus their order of placement is not logical. Rising to the highest judicial office in one's own country does not ipso facto equate with mastery and versatility in the field of International Law.[30] The international character of the court is derived not only from the fact that it is composed of members of different nationalities to settle disputes between states but also because it is a court that applies International Law to settle disputes between states. A' fortiori, we agree with Rosenne when he posits that[31] the value of its (ie the ICJ)[32] pronouncements and the weight of its authority stand in direct ratio to the recognized competence in International Law of the Judges constituting the majority for a given decision.

In furtherance of our discourse on the qualification of the Judges, it needs stating that virtually all the Judges from inception have had basic training in law wherein some of them attained lofty heights in the academia and other area of human endeavour. For example,

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29 *Ibid* .p. 358.

30 It could however be an indication of the mental ability and intellectual capacity to grapple with and gain mastery of any branch of law no matter how recondite it was to the candidate's previous legal experience.

31 Rosenne, *op. cit*. p. 359.

32 Emphasis mine.

Judge Taslim Elias was a one-time Dean of the Law Faculty of the University of Lagos, Attorney-General and Chief Justice of Nigeria respectively. Judges Bola Ajibola and Daddy Onyeama both participated in the drafting of their country's constitutions and rose to the pinnacle of their legal careers as the Chief Law Officer of Nigeria and a Justice of the Supreme Court of Nigeria, respectively. Judge Schewebel was an Editor-in-Chief of the reputable American Journal of International Law. Others have had experiences in the foreign missions either as ambassadors, legal advisers or Ministers of foreign affairs.[33]

As regards the use of the word "independence" as appeared in the Article, we deem it apt to adopt the explanation given by the San Francisco Conference which is to the effect that Judges "should not only be impartial but also be independent of control by their own countries or the United Nations Organization.[34] However, this interpretation should not in any manner preclude the nomination or election of a candidate who, at the time of nomination or election was in the service of the government or of an international governmental organization.[35] However, where there is no cooling off period between the nomination and the assumption of duty, it would become desirable for candidates in such situations to disengage or resign from their official activities once their candidatures are established with a proviso however that where disputes bordering on the activities of the organization are before the court, then such a member becomes automatically ineligible to sit on the court's bench in the particular case.

Article 9 which is addressed more particularly to the electors which comprises of the states represented in the General Assembly and the Security Council provides thus:

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33 Akaraiwe, *op. cit*. pp. 168-169; Elias *op. cit*. p.113.
34 UNCIO, p. 174.
35 Rosenne, *op. cit*. p. 359.

> At every election, the electors shall bear in mind not only that the person to be elected should individually possess the qualifications required but also that in the body as a whole, the representation of the main forms of civilization and of the principal legal systems of the world should be assured.

The above provision which is adopted from the Statute of the PCIJ is regarded as a statement of principle and thus reflects the political factor in the distribution of the places on the court.[36] It contains what is often called equitable geographical distribution. A closer scrutiny of Article 9 in juxtaposition to Article 2 reveals that the Statute of the ICJ establishes a double general criterion, to wit: Professional qualification (Article 2) and political qualification, which is encapsulated in the conception of the principal legal systems of the world (Article 9).[37] Against the backdrop of the potentials for contradiction latent in the construction of the two Articles and to protect and preserve the professional authority of the court, we agree with Rosenne when he posits as follows:[38]

> [T]he desideratum of Article 9 appears as the postulated primary objective which may in appropriate circumstances be attained by electing from the candidates, persons who are not necessarily jurisconsults of recognized competence in International Law provided, in that eventuality that they are qualified to hold the highest judicial appointments in their own countries.

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36 Rosenne, *Ibid.* p. 360.
37 *Ibid*. 361.
38 *Ibid.*

Going further, he posits that the emphasis of Article 9 upon the principal legal systems of the world indicates that the court is intended as a world court applying universal International Law.[39]

It needs emphasizing at this juncture however that effectuating the lofty provisions of Article 9 has been disappointing in practice. With regards to the "representation of the main forms of civilization", it is worth noting that in its sixty-eight years of existence, Europe has produced more number of Judges on the court's Bench when compared to other continents especially Africa. This has in turn engendered a feeling that the composition of the court has not kept pace with the increasingly universal character of the international community thus giving credence to the tag that International Law is still eurocentric and biased in favour of European cum colonialist interests. Our study reveals that in the sixty-eight years of the court's existence, only 15 Judges have been Africans. Out of these, only two (ie Taslim Elias of Nigeria and Bedjadui M. of Algeria) have ever served as elected Presidents of the court. Thus, as at 2013, only 15 Judges from nine states out of the fifty-two States in Africa have served on the court's Bench whereas for the same period under review, 32 Judges from 17 European States have sat on the court's bench. The lopsidedness of representation of the continents before the court is thus very glaring, moreso against the assertion that more than half the potential client states are based in Africa and Asia. Consequently much of the law expounded by the court lacks the benefit of input from Judges of African and Asian descent.[40]

Relatedly also, an enquiry into the requirement that the "principal legal systems of the world should be assured" on the court's Bench leaves much to be desired. A study of the qualification of all the Judges presently especially those from developing states attest to the fact that they were all trained and deeply steeped in the tradition of Western education.

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39 *Ibid*, p. 362.

40 Akaraiwe, *op. cit*. p.220.

In between these two Articles are those relating to quorum (which is put at 15 members) and procedure for elections.[41]

As regards quorum, Article 3(1) provides that the court shall consist of fifteen members, no two of whom may be nationals of the same state whilst Article 3(2) provides for the criterion for determining nationality in situations whereby a nominee for the court's Bench holds dual nationality. It provides thus, "a person who for the purposes of membership in the court' could be regarded as a national of more than one state shall be deemed to be a national of the one in which he ordinarily exercises civil and political rights".

It needs to be noted that the provisions of Article 3(2) of the statute is an improvement on the provisions contained in Article 10(2) of the Statute of the PCIJ which provides that if more than one national of the same member of the League was elected by the League's Assembly and Council, only the eldest is thereby deemed elected. Thus Article 3(2) of the ICJ establishes directly the rule derived indirectly (albeit deductively) from Article 10(2) of the PCIJ statute. Moreover, it also seeks to obviate the problems associated with dual nationality.
The procedure for nomination and election of candidates for the court are a bit more detailed and complicated than hitherto discussed. Setting the pace for this procedure is Article 4 which provides as follows:

1. The members of the court shall be elected by the General Assembly and by the Security Council from a list of persons nominated by the national groups in the Permanent Court of Arbitration in accordance with the following provisions.
2. In the case of members of the United Nations not represented in the Permanent Court of Arbitration, candidates shall be nominated by the national groups appointed for this purpose by their governments under the same conditions as those prescribed

[41] Articles 3-14.

for members of the Permanent Court of Arbitration by Article 44 of the Convention of the Hague of 1907 for the pacific settlement of international disputes.

3. The conditions under which a state which is a party to the present statute but is not a member of the United Nations may participate in electing the members of the court shall in the absence of a special agreement be laid down by the General Assembly upon recommendation of the Security Council.

With a view towards assuring on the professional qualification and competence of the court's members and also reducing political factors in the composition of members of the court, the statute of the ICJ adapted the provisions put in place for the PCIJ. The Statute of the PCIJ it should be noted had in lieu of direct nomination by the government of state parties to the Permanent Court of Arbitration (PCA) adopted a system of indirect nomination through the national groups in the PCA.[42] Under Article 44 of the Hague Convention No 1 of 1907 on the Pacific Settlement of Disputes, each contracting power selects four persons at the most of known competency in questions of International Law and of the highest moral reputation. Article 4(2) is an arrangement designed to cater for the nominations by a state that is a party to the Statute of the court but not to the Hague Convention.

Article 4(3) is an attempt to add flesh and content to the membership rights granted under Article 93(2) of the United Nations Charter. In furtherance of these objectives, the General Assembly in Resolution 264 of 8th October 1948 prescribed that a non United Nations member state who nevertheless is a party to the statute shall be placed on an equal footing with the United Nation member states as regards those provisions of the statute bordering on

[42] In practice however, governments exerts much influence on the nomination process of the national groups.

nominations of candidates for election by the General Assembly. Consequently, those states would in effect come under sub-paragraph (a) or (b) of paragraph 4.[43]

Article 5 provides the procedure on how to kick start the nomination process. It provides as follows:

1. At least three months before the date of the nomination, the Secretary-General of the United Nations shall address a written request to the members of the permanent Court of Arbitration belonging to the states which are parties to the present statute, and to the members of the national groups appointed under Article 4 Paragraph 2, inviting them to undertake within a given time, by national groups, the nomination of persons in a position to accept the duties of a member of the court.

2. No group may nominate more than four persons, not more than two of whom shall be of their own nationality. In no case may the number of candidate nominated by a group be more than double number of seats to be filled.

The requirement in Paragraph One above is usually fulfilled in actual practice by the Secretary-General of the United Nations sending the letters of request through the external affairs ministries of the state parties to the statute. Where the state parties to the statute acts pursuant to Article 5(1) by sending the names of their nominees, the Secretary-General is enjoined under Article 7 of the Statute to arrange the list of the nominees in alphabetical order and submit same to the Security Council and the General Assembly. It needs emphasizing at this juncture that any doubt as to the nature of professional qualification and competence required of members of the court is eroded by Article 6 which provides guidance

[43] Switzerland used to be the country that came within the provisions of Article 4(3) of the Statute.

on the institutions to consult for the purposes of picking candidates for the court. Article 6 provides thus:

> Before making these nominations, each national group is recommended to consult its highest court of justice, its legal faculties and schools of law and its national academies devoted to the study of law.

It is to be noted that whilst the exacting academic demands of Article 2 of the Statute are not always met, in almost all cases however, candidates for the court have always had a basic legal training or qualification and most of whom practiced actively at the bar either at their municipal courts or some international tribunals; or have garnered requisite cognate experience as a judicial officer in the highest courts under the municipal setting. Also to be included in the lists are members of the academia consisting of professors of international comparative or constitutional law as well as ex-ambassadors.[44]

Once the list of nominees has been arranged alphabetically by the Secretary-General, same shall also be forwarded to the General Assembly and the Security Council. Both organs shall in the wordings of Article 8 "proceed independently of one another to elect the members of the court." The word "independently of one another" is interpreted to mean concurrently.[45] Thus, the meeting starts at the same time with the balloting commencing simultaneously in the two organs. However against the backdrop that membership of the Security Council is lesser vis-à-vis the General Assembly and the inevitable conclusion that balloting in the Security Council takes less time to conclude in comparison to the general Assembly, the practice has evolved that counting of votes does not start in the Security Council until all the

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[44] T O Elias, *United Nations Charter and the World Court*, (NIALS, Lagos, 1989) p. 113.

[45] Rosenne, *op. cit.* p. 371.

votes in the General Assembly has been collated.[46] Article 10(1) provides guidance as to how a candidate emerges as being elected by stating that only those candidates who obtains absolute majority of votes in the General Assembly and in the Security Council shall be considered as elected. The word "absolute majority" has been interpreted as meaning "a majority of all electors whether or not they are allowed to vote."[47] For purposes of the election, Article 10(2) provides that the voting at the Security Council shall be without any distinction between permanent and non permanent members of the Security Council. Whatever egalitarian purpose this provision is meant to achieve is belied by the fact that since its inception, a national of each of the five permanent members has always sat on the court's bench. Save for the periods 1967-1985 when there was no Chinese Judge (nationalist or communist) as no nominee was put forward. Article 10(3) is to the effect that where more than one national of a state obtains the requisite majority, only the eldest among them is to be considered elected.[48]

Article 11 provides that if after the first meeting held for the purposes of the election, one or more seats remain to be filled, a second and if necessary a third meeting will take place. Article 12(1) provides that if one or more seats shall remain unfilled, a joint conference consisting of six members (three appointed by the General Assembly and three of the Security Council) may be formed at any time at the request of the two organs until the issue is

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46 This will necessarily entail the Security Council remaining in session. Note too that upon the collation and counting of votes by the two organs, it is the president of the General Assembly that normally makes the announcement of candidates who received the necessary majorities in the two organs and *pro tanto* elected members of the court.

47 Rosenne, *op. cit.* p. 372. The expression "whether or not they vote or are allowed to vote" is contemplative of Article 19 of the Charter which provides for the loss of voting rights of a member who is in default of his financial obligations to the United Nations for up to two years. It could also be for other causes as was the case with the Federal Republic of Yugoslavia (Serbia and Montenegro) wherein pursuant to a General Assembly Resolution 47/1 of 22/9/92, it was decided that the Federal Republic of Yugoslavia (Serbia and Montenegro) could not continue *vel non*, the membership of the former Socialist Federal Republic of Yugoslavia and should thus apply for membership of the United Nations. This was so even as "Yugoslavia" continued to be included in the total from which the absolute majority was determined in the occasional elections held during the 47th, 49th and 50th sessions of the General Assembly. See further Rosenne, *ibid*, p. 374.

48 As to the discourse on this rule; p. 96 *supra*.

resolved. Article 12(2) invests the joint conference, agreeing unanimously to include on the list any person having the requisite conditions even though he was not included in the list of the nominations referred to in Article 7. Where however, the joint conference is satisfied that it will be unable to procure a candidate for election, Article 12(3) shifts the duty of nomination upon members of the court already elected within a period to be fixed by the Security Council to fill the vacant seat by selection among those candidates who have obtained votes either in the General Assembly or in the Security Council. Where in furtherance of Article 12(3), there is equality of votes among the Judges then, the eldest Judge shall have a casting vote.[49]

Article 13 and 15 of the Statute makes provisions relating to the term of office of Judges of the court.

Under Article 13(1), members of the court are elected for a renewable nine year tenure under a system which requires an election every three years in respect of five of the Judges and another election at the end of six years in respect of another five of the Judges. This allows for continuity in the work of the court. Against the backdrop of the initial composition of the court at its inauguration and for purposes of effectuating Article 3(1), Paragraph 2 of Article 3 provides guidance on how to determine the inaugural members of the court whose terms are due for expiration. It provides that such Judges whose tenures are due to expire shall be determined by lot drawn by the Secretary-General immediately after the first election. Perhaps to bolster the confidence in the system of inter-state adjudication and to avoid the pitfalls usually associated with litigations in municipal court settings wherein upon the retirement, transfer or elevation of a Judge to another court, all cases pending before the retired, transferred, or elevated judge practically stops, only to start *de novo*. Article 13(3) provides that members of the court shall continue to discharge their duties until their places

[49] Article 12(4) of the statute.

have been filled. It further provides that even where they have been replaced, they shall finish any case(s) which they may have begun. This is a most salutary rule to guard against unnecessary delays associated with court hearings. Any member of the court wishing to resign shall address such notice of resignation to the president of the court who shall transmit same to the Secretary-General. Upon this notification to the Secretary-General, the place becomes vacant.[50] Under Article 15 of the Statute, a member of the court elected to replace a member whose term of office has not expired, shall hold office for the remainder of his predecessor's term.[51] The method for filling vacancies follows that prescribed for the first election save that in this instance, the Secretary-General shall within one month of the occurrence of the vacancy proceed to issue the invitations envisaged under Article 5 of the Statute whilst, the Security Council fixes the actual date for the elections.[52]

The terms of office of all members are renewable as all the Judges are eligible for election whether immediately after the expiration of their terms or after an interval and irrespective of the fact that they came in to fill a vacancy. Thus, a member of the court who has finished serving his one nine year term may be re-elected to serve a second nine year term whilst a Judge elected to fill an occasional vacancy can subsequently be elected to serve a full nine year term.

The Judges are shielded from any form of civil liability or criminal responsibility arising from the performance of their duties as they enjoy diplomatic privileges and immunities when on official duties.[53] They also enjoy security of tenure as none of them can be dismissed except when based upon the unanimous opinion of other members, a member has

50 Article 13(4) of the statute.

51 This was exactly the circumstances that regulated the tenure of Judge Bola Ajibola who was elected to replace Judge Taslim Elias in 1992 upon the latter's demise.

52 Article 14 of the statute.

53 Article 19 of the statute.

ceased to fulfill the required conditions. [54] In order to accord credence and credibility to the decisions of the court, Article 17(1) provides that no member shall hold any other professional occupation as counsel agent or advocate in a case and neither may they participate in any matter in which he has previously acted as agent, advocate or counsel for one of the parties.[55]

Pursuant to Article 16(2) and against the backdrop of the judicial nature of the activities involved, the court has interpreted the prohibition contained in Article 16(1) as not having the import of barring members from a limited participation in other judicial or quasi-judicial activities of an occasional character. Consequently, Article 16 has been interpreted as permitting members of the court to participate in scholarly pursuits in the sphere of International Law whether as members of learned societies or as occasional lecturers provided none of these is full time and members accepting such occasional additional responsibilities accord the fullest precedence to their supervising and overriding duties as members of the court.[56] For example, while a member of the court may not be permitted to continue lecturing at the university after his election to the court, they are allowed to deliver lectures concerning the court and other subjects of legal interest in different parts of the world. The rationale for this concession is the court's belief that its members' contribution to the work of learned societies and their lectures about the court in various public fora aids the court in promoting and sustaining the appreciation of its functions and contributions to the development of law in general and International Law in particular. It needs emphasizing at this juncture that the court does not pay the travel expenses of members engaged in any such lectures.

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54 Article 18 of the statute.

55 Article 17(2) of the statute. Note also the provisions of Article 16(1) of the statute which bars members from exercising any political or administrative functions.

56 Rosenne, *op. cit*. pp. 400-408 for fuller details.

The president of the court serves for a three year term which is renewable.[57] The fact that a party appearing before the court has one of its national as a Judge does not *ipso facto* disqualify such Judge from sitting over a matter involving his state. In the event that a party or none of the parties appearing before the court does not have any of its nationals on the bench in a matter involving it, provision is made allowing them to nominate judges.[58]

4.1.3 Jurisdiction of the International Court of Justice (ICJ)

In every adjudicatory process, the issue of jurisdiction is very fundamental to the validity of the whole proceedings. It is the pillar upon which other edifice of the judicial process is built. Consequently, it is the live-wire of the adjudicatory process as any decision arrived at by any adjudicatory institution or judicial body without the requisite jurisdiction amounts to a nullity.[59]

Within the context of this work, jurisdiction is the authority a court has to adjudicate over a matter and to make binding decisions.[60] Rosenne defines it as the power of the court to do justice between the litigating states, to decide the case before it with final and binding force on those states.[61] Considering the jurisprudential haze that the word "justice" usually attracts

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57 Article 21 of the statute. In practice, the court rotates the presidency among the principal legal systems represented on the court.

58 Article 31(2) and (3). This provision is also responsible for the concept of *ad hoc* Judges in the court's practice.

59 In municipal law, these postulations are regarded as trite law. See the case of Madukolu V. Nkemdilim (1962)2 SCNLR 341; Ohakim V. Agbaso [2011] ALL FWLR (PT 553) P. 1806 @ pp.1831-1832, Ratio 2.

60 This is to distinguish the term from its ordinary usage under general International Law as depicting the power of a state to regulate or otherwise impact upon people, property and circumstances and which concept is reflective of the basic principles of state sovereignty. For this latter use of the term, see generally M.N. Shaw, *International Law*, 4th edn., (Cambridge University Press, Cambridge, 2008) pp. 645-696.

61 Shabtai Rosenne, *The Law and Practice of The International Court, 1920-2005***,** vol. ii, 4th edn. (Leiden: Martinus Nijhoff Publishers, 2006) p. 524; Emmanuel Ibezim, "The Contribution of the International Court of Justice to International Humanitarian Law," *ABSU-PCJL* vol. 1 No. 1 2013, p. 59.

in legal writings, he advisedly went on to illustrate this process of "doing justice" as including:[62]

(a) Considering the arguments of parties;

(b) Appraising the evidence produced by them;

(c) Establishing the facts and;

(d) Declaring the law applicable to them which have a binding force.

Jurisdiction can be formal or procedural and substantive. Formal or procedural jurisdiction refers to the carrying out of the correct procedural steps for bringing a dispute before the court as prescribed by the court's statute and rules. Substantive jurisdiction on the other hand refers to the competence a court has to hear and determine a case on the merits. This distinction is very germane in the sense that a court may have the jurisdiction to look into the substantive issues in dispute and yet lack the competence to do so as the procedural steps which is the sesame to delving into the substantive issues has not been taken. Thus, for any court to have jurisdiction to delve into the substantive issues in dispute, it must be properly seized of the matter.

A' fortiori, jurisdiction in the formal or procedural sense is often termed "the seising of the court."[63] Seising gives the court the ability to determine if it possesses the competence to go into the merits of a matter in dispute. Commenting on this distinction, Fitzmaurice[64] posits and we agree that:

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62 *Ibid*.

63 Shabtai Rosenne, *The International Court of Justice: An Essay in Political and Legal Theory*, (Leyden: A W Sythoff, 1961) p. 257; E Ibezim, "The Contribution of the International Court of Justice to International Humanitarian Law," *ABSU-PCLJ* Vol. 1, No. 1, 2013, p. 59.

64 G Fitzmaurice, "The Law and Procedure of the International Court of Justice: 1951-1954. Questions of Jurisdiction, Competence and Procedure," *BYIL* (1958) p. 15.

> Seising might therefore be said to confer jurisdiction or competence on a tribunal in the procedural sense. But substantive jurisdiction or competence will necessarily depend on other factors. It is clear however that without the measure of procedural competence which such a seising when effected does of itself entail would the tribunal be able to determine its substantive jurisdiction if in question or otherwise uncertain; and the inherent power of international tribunals to determine their own jurisdiction (the competence de la competence) would be nullified.

Against the backdrop of the sub topic under discussion, the ICJ is a creation of a Treaty (that is, the United Nations Charter): its jurisdiction (both procedural and substantive) must necessarily be predicated upon or within the confines of the law establishing it and other instruments thereto. Consequently, we shall examine some of the Charter provisions relating to the jurisdiction of the ICJ. Its statute will also be examined vis-à-vis its jurisdictional competence.

(A) Sources of Law to be Applied

All judicial institutions whether under municipal or international law setting are invariably a creation of statute or legislation. These statutes also set out the applicable laws to be relied upon by the courts established under it, the parties, subject matter, etc. the essence being that every court operates within a certain legal milieu outside which its decision becomes subject of attack on jurisdictional basis.

It is in view of the foregone that we deem it apt to begin our discussion of the jurisdiction of the International Court of Justice (ICJ) with Article 38 of the Statute of the ICJ[65] which in general terms provides the source or fountain from which flows the jurisdiction of the ICJ.

Article 38 of the Statute of the International Court of Justice (ICJ) provides as follows:

1. The court whose function is to decide in accordance with International Law such disputes as are submitted to it shall apply:

(a) International Conventions whether general or particular establishing rules expressly recognized by contesting states.

(b) International customs as evidence of general practice accepted as law.

(c) The general principles of law recognized by civilized nations.

(d) Subject to the provisions of Article 59, judicial decisions and teachings of the most highly qualified publicists of the various nations as subsidiary means for the determination of the rules of law.

2. This provision shall not prejudice the power of the court to decide a case *ex aequo et bono* if the parties agree thereto.

Paragraphs (a)-(c) above are widely acclaimed as constituting the most authoritative source of International Law. In essence, they are the primary or law creating process. Paragraph (d) constitutes a subsidiary source or law determining agencies.

Considering the truism that judicial institutions always exist for purposes of settling disputes among parties, Article 38(1) of the statute sets the jurisdictional scope of the ICJ by the words "…. Whose function is to decide in accordance with International Law, such disputes as are submitted to it…." This provision which is preambular when juxtaposed with other paragraph and sub-paragraph of Article 38 evidences the fact that the term "dispute" is the

[65] Article 38(1) of the Statute of the ICJ is also acknowledged as the most authoritative and complete statement as to sources of International Law; M N Shaw, *op. cit*, p. 70; D J Harris, *Cases and Materials on International Law*, (London: Sweet & Maxwell, 2004) p. 18.

nucleus around which the jurisdiction of the court primarily revolves.[66] Thus, the existence of a dispute[67] is the primary condition for the court to exercise its judicial functions. However, whether a dispute measures up to the judicial qualification to merit the court's attention is a matter for objective determination by the court and not dependent upon the subjective view of the parties as to its existence or otherwise. Furthermore, the fact that proceedings before the court were actuated by political motives is irrelevant in the court's consideration of its jurisdiction. On the irrelevance of political motives in the consideration of jurisdiction, the court in the *Border and Transborder Armed Actions (jurisdiction and Admissibility) case* [68] stated thus:

> The court is aware that political aspects may be present in any legal dispute brought before it. The court as a judicial organ is however only concerned to establish first that dispute before it is a legal dispute in the sense of a dispute capable of being settled by the application of principles and rules of International Law and secondly that the court has jurisdiction to deal with it and that that jurisdiction is not fettered by any circumstance rendering the application inadmissible. The purpose of recourse to the court is the peaceful settlement of such disputes; the court's judgment is a legal pronouncement, and it cannot concern itself with the political motivation which may lead a state at a particular time or in particular circumstances to choose judicial settlement.

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66 Resolution of dispute is not however the only function of the court as the Statute also empowers it to give advisory opinions which though not a binding settlement of a dispute may go a long way in quelling a simmering situation that may inevitably erupt into a dispute.

67 On the meaning and types of disputes; see Chapter 3 *supra.*

68 ICJ Reports (1988) p. 69 at 91 para 52.

We shall now look at the other items under Article 38(1) which provides jurisdictional scope for the ICJ in the sense that the court is positively enjoined by the statute to apply them in the course of its judicial activities.

(i) **International Conventions:** International Law embodies the rules and principle created through international legislation. *A'priori*, the court applies these rules and principles so created, and in the process becomes a validating instrument for those instruments that measures up. The word "Convention" means a Treaty.[69] Traditionally, a Treaty is an agreement in writing between states whereby they bind themselves legally to act in a particular way or to set up particular relations between themselves.[70] Treaties are known by variety of names, to wit: conventions, agreements, pacts, accords, charter, covenants, statutes, etc. Whilst the conventional view of Treaties are basically one between states as the main actors of the international system remains true, it is also a truism that given the expanding frontiers of international relations wherein other actors other than the state are assuming dominant roles, this view of Treaties as being between states *inter se* are no longer sacrosanct. Especially is this so when viewed against the backdrop contemporary practice wherein international organizations enter into agreement with states.

Treaties are usually divided into two, to wit:

(a) law-making treaties which are intended to have universal or general relevance and

(b) Treaty-contracts which apply only as between two or small number of states.[71]

A contract Treaty regulates a specific relationship between two or more states as in for example, a loan agreement whilst a law-making Treaty lays down rules for a number of states. However, there is no hard and fast rule about this distinction as a single Treaty may

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69 M O U Gasiokwu, *International Law and Diplomacy (Selected Essays)*, (Enugu: Chenglo Ltd, 2004) p. 27; M T Ladan, *Materials and Cases on Public International Law*, (Zaria, ABU Press Ltd, 2007) p. 11.

70 M N Shaw, *op. cit* p. 93. See also Article 2(1) Vienna Convention on Law of Treaties, 1969.

71 M N Shaw, *Ibid* at p. 94.

contain provisions which are partly contractual and partly law-making.[72] Once a Treaty comes into operation among parties, they thereby create among themselves a *lex contractus* of a consistent nature. This obligatory character of Treaties is more commonly referred to with its Latin expression *pacta sunt servanda.* It connotes sanctity of Treaties. Only parties to a Treaty are bound by its provisions. This rules is solidified by Article 34 of the Vienna Convention on the Law of Treaties, 1969 which is to the effect that a Treaty does not create either obligations or rights for a third state without its consent. This principle is summed up by the maxim *pacta tertiis nec nocent nec prosunt*. However where Treaties are reflective of Customary International Law, then non-parties are bound by its provisions. This is predicated on the fact that the particular provision reaffirms a rule or rules of Customary International Law.

Given the complexities of modern life, the technological, scientific and communication revolutions coupled with the economic challenges buffeting most part of the world, the number of issues requiring some form of inter-governmental regulation has equally multiplied, thus necessitating increased governmental control which inevitably finds expression in the volumes of Treaties in force. Its vibrancy in driving contemporary inter-state intercourse in particular and international life in general has assured for it a prime place of importance when juxtaposed with other sources of International Law. Thus, whilst other sources more or less express the tacit agreement of the states, Treaties require the express consent of the contracting parties. This consent is often made express by the signing and/or ratification of the treaty instrument by the affected parties. Thus, save for Treaties that

[72] M Akehurst, *A Modern Introduction to International Law,* (London: George Allen & Unwin Ltd. 1971). p. 38.

reflects Customary International Law,[73] states which has not given their consent to a Treaty cannot be bound by such Treaties. A Treaty may however establish rules which extend to non-parties. The United Nations Charter is a veritable example of such a Treaty. In pursuance of its avowed aim of engendering a peaceful and secured world, it sought in Article 2(6) to provide a definite framework for the preservation of International Peace and security by providing as follows: "the organization shall ensure that states which are not members of the United Nations act in accordance with these principles so far as may be necessary for the maintenance of International Peace and Security." It needs be recalled that these principles were listed in Article 2.

In the same vein, Treaties can be constitutive in the sense that they create institutions and also define their powers and duties. A good example is the United Nations Charter and most regional Treaties.

(ii) **International Customary Law**

Customs are unarguably the oldest and in the words of Umozurike, the most important source of International Law applied by the International Court of Justice.[74] It has its roots in the habits, sentiments and interests of mankind.[75] Wherever a customary rule emerges, it is always a by-product of the we-feeling of the members of the particular society or group in the sense that all members sub-consciously participate in its development and sustenance by the application of various social pressures albeit on an unequal basis.

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73 However, the fact that a Treaty rule covers the same ground as a customary rule does not *ipso facto* mean that customary rule has been subsumed into that of the Treaty rule. Both will continue to maintain their separate existence for the rule. See *the Nicaragua Case*, ICJ Reports 1986, p. 14 where the court held at pp 94-95 that "even if a Treaty norm and a customary norm relevant to the present dispute were to have exactly the same content, this would not be a reason for the court to hold that the incorporation of the customary norm into treaty law must deprive the customary norm of its applicability as distinct from the Treaty norm" See further M.N. Shaw, op. cit. pp 96-97.

74 U O Umozurike, *Introduction to International Law*, (Ibadan: Spectrum Law Publishing,1993) p. 18 *cf.* R Mullerson, "Sources of International Law: New Tendencies in Soviet Thinking," 83 *AJIL*, 1989 pp 494, 501-509.

75 A F George, *The Sources of Modern International Law,* (New York: Johnson Reprint Corporation, 1971) p. 3.

If the above thesis is juxtaposed to the international scene, it thus emerges that custom as a rule is democratic in that all the states may share in the formulation of rules of customs albeit on an equal footing. The basis of International Customary law is the consent of states tacitly expressed by way of constant and consistent usage and practice as against consent explicitly expressed in Treaties. Thus, for rules to ripen into custom, there must be a constant and uniform[76] usage and general acquiescence in the normative content of such rules. Its elements as a rule of International Law comprise the following:

1. Concordant practice by a number of states with reference to a type of situation falling within the domain of international relations.
2. Continuation or repetition of the practice is required over a considerable period of time.
3. Conception or belief that the practice is required by or consistent with prevailing International Law; and
4. General acquiescence in the practice by other states.[77]

It is these elements that Article 38(1) (b) of the ICJ Statute encapsulated and summed up as "evidence of general practice accepted as law". The constant and uniform usage and/ or practice by states take many forms to wit:

(i) Acts taken by states in their diplomatic relations with one another.

(ii) Acts taken internally by states through their legislatures or courts.

(iii) Acts taken by states before international organizations.

(iv) And even inactions by states when confronted with a particular matter.[78]

Theoretically, the practice of all states ranks equally in the evolution of a customary rule. But against the backdrop of power dynamics in the international system, the practice of some

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[76] The Asylum Case (Colombia V. Peru) 1950 ICJ Reports, p. 266 at p. 267.
[77] Gasiokwu *op. cit.* p. 13.
[78] Sean D Murphy, *Principles of International Law*, (St. Paul, Minnesota: Thomson & West, 2006) p. 78.

states on certain topics might be accorded greater relevance than the practice of others. For example, the practice of states who has sent astronauts to the moon might be of greater relevance when the issue borders on the usage of the outer space than those states who only nurse the ambition.

Given the above discussions thus far, two basic elements poignantly stand out in the make-up of a custom namely:

(a) The material fact, which is the actual behavior of states and

(b) The psychological or subjective belief that such behavior is "Law".[79]

This mental belief about the obligatory and legal nature of a customary practice is the major distinguishing factor of Customary International Law from those rules of customs states indulge in out of courtesy or habit. For example, when a foreign head of state visits, the host country normally flies the visiting head of state's flag alongside that of the host country at major public events. Such a practice while relatively uniform and consistent world-wide, attracts no international liability or responsibility for a defaulting country as it is simply a matter of courtesy as no state regards itself as legally obligated to undertake the practice. At worst, if a state fails to fly a foreign head of state's flag, such would only be regarded as a *faux pax* and an insult but certainly not as a violation of Customary International Law. Thus for a customary practice to evolve as law, states must feel impelled by a legal obligation not habitual action.[80] In essence, every customary practice must be coupled with an *opinio juris.* One difficulty inherent in establishing *opinio juris* lies in the fact that states often engage in a practice without any conscious attempt at publicly stating that they are under a legal duty to do so. Especially is this so when the relevant practice consists of inactions, thus leaving no room for articulating the "law altitude". Consequently we share the view expressed by

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[79] This psychological element is often expressed by the maxim "*opinio juris sive necessitatis*" normally abbreviated to *opinio juris.*

[80] North Sea Continental Shelf Cases, 1969 ICJ Reports, p. 3.

Murphy when he opined that "whether *opinio juris* exists is often surmised from the context in which the practice took place". Note too that a custom does not necessarily have to be immemorial in order to constitute a rule of International Law, though such a long period may be evidence of consistency and acceptance.[81] All states need not be involved in custom formation as each customary practice is relative to the subject matter and the state involved. Thus, a regulation pertaining to the breadth of the territorial sea is unlikely to be treated as law if the great maritime nations do not agree to or acquiesce in it no matter how many landlocked states demand for it. Likewise if the matter concerns the treatment of representatives to international organizations; the practice of states who host major international organizations may be of particular relevance. *A'fortiori,* for a customary rule to become law, it needs the concurrence of those most directly interested in the subject matter. An occasional deviation from custom is not necessarily fatal so long as other states acquiesce in it.[82] A custom may be general or particular. In the former, the customary rule is global and more extensive while in the latter, it is regional and less extensive in application. Where it is contended that a customary rule is localized or regional, such must be proved even though a particular custom may be treated as general within a region. Thus in the *Asylum Case*,[83] the International Court of Justice recognized the fact that there could exist a customary rule of International Law operative within the states of Latin America and relating to the right of a state to issue a unilateral and definitive grant of political asylum,[84] whilst in *The Right of Passage Over Indian Territory Case*,[85] the ICJ while rejecting India's objection that no local custom could be established between only two states, upheld Portugal's claim that there

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81 In the North Sea Continental Shelf Case *supra*, the ICJ alluded to the fact that a 10-15 years state practice could be sufficient for the purpose of creating Customary International Law.

82 Anglo-Norwegian Fisheries Case (U.K. V. Norway) 1951 ICJ Reports p. 116. However instances of a state conduct inconsistent with a given rule should generally be treated as breaches of that rule. See Military and Paramilitary Activities Against Nicaragua (NICAR V. U.S.) 1986, ICJ Reports p. 14 at p. 98.

83 Foot note 76 *supra.*

84 In the specific circumstances however, the court refused to affirm the contention of Colombia as to the existence of such a regional custom on the ground that such was not proven.

85 1960 ICJ Reports p. 6 at p. 431.

existed a right of passage over Indian territory as between Portuguese enclaves. This case provides authority for the view that a custom could exist between two states. The dismissal of India's objection can only be rationalized on the ground of lack of evidence to substantiate their assertion. Where a regional custom is to be proved, the standard of proof required especially as regards the obligation accepted by the party against whom local custom is maintained is higher than in cases where an ordinary or general custom is alleged.[86]

A state may contract out of a customary rule at its incipience by refusing to be bound at the time of its formation. Thus even if there is consistent and uniform state practice coupled with the requisite *opinio juris* so as to establish a norm of customary International Law, an individual state is not bound if the state persistently objected to the norm as it emerged. This attitude is encapsulated in "the persistent objector" rule[87] which in itself validates the view about the centrality of state consent in rules of International Law. An instance of the application of this rule occurred in the *Anglo-Norwegian Fisheries Case*[88], wherein the United Kingdom argued that a customary rule of International Law existed which allows the state to draw a "baseline" along its coast in a manner that closes off bays having an opening of ten miles or less. The ICJ while finding that such a rule of Customary International Law is yet to crystallize however held that "in any event, the ten mile rule would appear to be inapplicable as against Norway in as much as she has always opposed any attempt to apply it to the Norwegian Coast" A custom may cease to exist through desuetude or the rise of a conflicting customary rule or convention or is contrary to a norm of *jus cogens*.

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86 Asylum Case *supra* at p. 276.

87 J Charney, "The Persistent Objector Rule and the Development of Customary International Law," 56 *BYIL* 1985 p. 1; Umozurike, *op. cit.* p. 19.

88 1951 ICJ Reports, p. 116.

The concept of *jus cogens* is based upon an acceptance of fundamental and superior values within a system.[89] It reflects a belief that certain important norms of International Law have a superior claim to authority and therefore trump other norms.[90] Its rational lies in the fact that mere agreement between states whether by treaty or in the creation of customs cannot have the highest value, but rather the need to maintain peace and protect all peoples require the veneration of certain basic values above any other. The concept of *jus cogens* seeks to bind states together in a fragmented world. These basic values which underlie the international system are usually tagged preemptory norms of International Law. Article 53 of the 1969 Vienna Convention on the Laws of Treaties defines a preemptory norm as "a norm accepted and recognized by the international community as a whole from which no derogation is permitted and which can only be modified by subsequent norms of general International Law having the same character." *A'fortiori*, compliance with a preemptory norm can be said to be an obligation *erga ommes.* This is against the backdrop that in appraising the concept of *jus cogens*, the emphasis is less on consensual state practice and more on notions of universal morality or justice.[91] Examples of such obligations include the outlawing of aggression, genocide, torture, slavery and racial discrimination. For a rule to emerge as a preemptory norm, there must be universal acceptance of the proposition as a legal rule and its recognition as such by an overwhelming majority of states. It is the touchstone on which the validity of any Treaty or local custom is tested.

(iii) General Principles of Law

Article 38(1) (c) of the Statutes of the ICJ mentions "general principles of law" recognized by civilized nations as a third source of International Law. Though, the word "civilized" is not defined it has been asserted that the provision is reminiscent of the exclusiveness of

89 Shaw, *op. cit.* p. 125.
90 Sean, *op. cit*. pp. 81-82.
91 *Ibid*. p.82.

International Law in the past to Christian nations.[92] The word is now used to refer to the states of the international community. Just like Customary International Law, "general principles of law" is not spelt out in any Treaty or other international instruments. The basis of Article 38 (1) (c) is founded on the acknowledgement that in every legal system, situation may occur wherein a court deciding a case comes to the realization that there is no law whether of parliament or judicial precedent directly covering the point. Thus, resort is often had to other existing rules by analogy or general principles of justice, equity or consideration of public policy that guides the particular legal system to close the gap.

These principles can be drawn from what exists in the national laws of states worldwide as in for instance the principle that "no one shall be a judge in his own cause." This principle is of worldwide acclaim and when transposed to the international setting operates to preclude a state from voting on a matter before an international organization sitting to decide the wrongfulness or otherwise of the states action. These principles can also be drawn from the unique nature of the international community. Inter-state relations has largely been oiled by such principles as *pacta sunt servanda*, the principle of non-intervention by one state in the affairs of another, the principle of sovereign equality of states.

Furthermore, it can mean principles intrinsic to the nature and idea of law. Examples of these include the *res judicata* principles.

Finally, it also means those principles having their basis in the notions of natural law or natural justice. Examples include the principle barring discrimination on ground of race, colour or gender. It should be noted that most principles under natural law are now captured in most human rights treaties and instruments.

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92 Umozurike, *op. cit*. p. 21.

There is divergence of opinion among writers as to the propriety of placing this concept as a separate source of law. This is against the backdrop of the age-long dichotomy between natural law and positive law. Thus, on one side are those who regard it as an affirmation of natural law concepts which are deemed to underpin the system of International Law and constitute the method for testing the validity of the positive rules; whilst on the other side are those particularly positivists who treat it as a subheading under treaty and customary law and thus incapable of adding anything new to International Law unless it reflects the consent of states.[93] But the preponderance of opinion is that it does constitute a separate source of law albeit of a limited scope. Consequently, if there is a relevant Treaty or custom governing a particular issue, general principles do not apply. General principles constitute a reservoir of principles from which the court may draw in appropriate cases and further accords cognition to the dynamic nature of International Law and the creative functions of the court in its administration. This borrowing, Umozurike opines[94] is not novel but merely declaratory of existing practice of international courts. Instances in which the ICJ[95] applied principles that run a common theme among many different legal orders abound. In *The Chorzow Factory Case* [96] in 1928 which followed the seizure of a nitrate factory in Upper Silesia by Poland, the PCIJ declared that "it is a general conception of law that every violation of an engagement involves an obligation to make reparations.' In the *Barcelona Transaction Case*,[97] the ICJ relied upon the "lifting the veil" principle, which it found "admitted by municipal law" generally when deciding that in exceptional circumstances, the national state of the shareholders of a company could act to protect them in place of the national state of the company. In the *Corfu Channel Case*,[98] the ICJ stated that Albania was obligated to notify

93 Harris, *op. cit*. at p. 44; Shaw, *op. cit*. p. 99.
94 Umozurike *loc. cit.*
95 And also *mutatis mutandi*, the PCIJ.
96 PCIJ Series A, No. 17.
97 ICJ Reports, 1970, p. 6 at p. 39.
98 1949 ICJ Reports, p. 4 at p. 22.

the shipping Community of the existence of a minefield in Albanian territorial waters due to "certain general and well recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of the maritime communications; and every state's obligation not to knowingly allow its territory to be used for acts contrary to the rights of other states.

Note also that the ICJ will in appropriate circumstance apply equitable principles like *estoppel* and good faith as a general principle of law.[99] However, not in all cases will the claims to the title of "general principles" be accepted. Thus, in *The South West Africa Cases (second phase*)[100] the ICJ found that the *actio popularis* was known only to certain legal systems and hence was not a general principle.

(iv) Judicial Decisions

The tenor of Article 38(1) (d) of the Statute of the ICJ constitutes judicial decisions as a subsidiary means for the determination of rules of law. In essence, they are not law creating. Rather, they are engaged in the reviewing of all the other sources and then reach a conclusion as to what the law is. Judicial decisions are extremely important in the clarification of the existence of an emergent rule of International Law such as whether a customary rule of International Law has emerged, is subsisting or has been supplanted. The better reasoned a judicial decision is and the more prestigious the court, the more persuasive it will be as a source. The application of judicial decisions as a subsidiary source of law is however subject to Article 59 of the Statute of the ICJ. Article 59 is to the effect that "decisions of the court has no binding force except between the parties and in respect of that particular case" the import of the above provisions is that the rule of *stare decisis* or judicial precedent which is a

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99 Cameroun V. Nigeria (No. 1*) (2000)FWLR(Pt.132)r.20*, Gulf of Main Case, ICJ Reports 1984, p. 246 at p. 305; Diversion of Water from the Meuse Case, PCIJ *Series A* (1937) No 70.

100 1966 ICJ Reports, p. 6.

fundamental pillar of the Common Law system of adjudication is inapplicable as a matter of strict law under International law. *A' fortiori,* previous decisions of the ICJ and by extension other international courts cannot be relied upon in subsequent cases with different parties.

However in practice, the ICJ has striven to follow its previous judgments and *pro tanto* insert a measure of certainty within the process. Thus, whilst only a subsidiary means of ascertaining the law, judicial decisions in some cases have proven to be the best means of developing International Law than theory might suggest. Given the enormous challenges and complexities of contemporary international life, states practice seldom points so clearly in one direction as to leave the court no discretion in its formulation of a custom. Thus often-repeated or frequently cited decision increasingly become not merely evidence but in fact create the law and form part of international practice.[101] This is more so against the backdrop that the prior court or tribunal reached a particular finding after a painstaking review of all other relevant sources. Consequently, rather than repeat the ritual of same analysis, a party can cite a prior decision in support of an analogous finding.

International courts and tribunal are wont to refer to and rely upon prior judicial decisions as doing so promotes their own authority and legitimacy and increases respect for and adherence to their decisions by states. It needs emphasizing that reference to "judicial decisions" encompasses decisions of other international tribunals, international arbitral awards and rulings of national courts[102] but their persuasiveness in the evolution of International law depends on their intrinsic merits.

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101 An outstanding instance of this occurred in the Anglo-Norwegian Fisheries Case, 1951 ICJ Reports, p. 116 wherein the statement of the ICJ, of the criteria for the recognition of baselines from which to measure the Territorial Sea was later enshrined in the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone.

102 Shaw, *op. cit*. at p. 111; Sean D Murphy, *op. cit*. at p. 88.

(v) Academic Writers or Publicists[103]

The second limb of Article 38(1) (d) talks about publicists or academic writers. Their contribution was much more important in the formative period of International Law as they were largely responsible for establishing the basic idea that there was such a thing as law governing the relations between states. Moreso, they exercised a much more creative role in the determination of particular rules of law than would be possible today.[104]

The importance attached to a text is a necessary corollary of the prestige of the author and the extent his opinion withstands the test of time. Thus, in the hey days of natural law thinking, the opinion of writers like Grotius, Pufendorf, Gidel were of high esteem but with the rise of positivism and the consequent emphasis upon state sovereignty, the influence of these writers waned.[105]

The above notwithstanding, books are still important as they serve as a means of discovering what the law is on any particular point. They help in arranging and putting into sharp focus the structure and forms of International Law and elucidating the history and practice of the rules of law. They also stimulate thoughts about the values and aims of International Law as well as pointing out the defects that is extant within the system with a view to future amendments.[106]

Also to be included in this discourse are groups of esteemed scholars whose works have been pivotal. An example is the United Nations Law Commission which comprises of thirty-four highly regarded individuals in the field of international law. They issue reports on various

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103 The first paragraph of the discussion on "judicial decisions" as a source apply *mutatis mutandi* to the discussion herein.

104 Harris, *op. cit*. p. 55.

105 Occasionally, a writer may still make an impact on state practice. For example, the idea of "the right to development" debuted first in an academic literature. See Harris, *ibid*, and at p. 772.

106 Pivotal in this respect are high quality, Peer-reviewed International Law Journals such as the International and Comparative Law Quarterly (*ICLQ*), the American Journal of International Law amongst others which has for years remained the flagship journals for issues bordering on International Law.

topics of International Law which have been found helpful and often relied upon by states and international courts. Thus in the *Gabcikovo-Nagyma-ros Case*,[107] the ICJ referred to the work of the ILC on the rules of state responsibility even before the conclusion of the work.

Finally on sources as a jurisdictional basis of the ICJ, Article 38(2) of the Statute provides that the court may give decisions *ex aequo et bono* if the parties so desire. A decision founded on this provision means that not only was equity applied but it was also allowed to override all other rules of International Law. This rule which constitute the court into a law creating agency is not self activating as it depends on the agreement of the parties to the dispute to become operative. Consequently, it can only come about through any of the three norm creating processes.

When viewed against the backdrop that the court decides only legal disputes, we agree with the views expressed by Oduntan[108] when he posits that the object of Article 38(2) of the Statute is to meet the eventuality of cases where the issues are unsuitable for decisions on strictly legal grounds, yet the parties desire to have recourse to the court and obtain from it a binding decision arrived at according to equity and good conscience.

The rule contained in Article 38 (2) of the Statute should not be construed as authorizing the court to depart from the essential rule governing its activity as a court. *A' priori,* where the application of this rules will lead to manifest abuse of the court's process, the court has inherent powers just like any other judicial bodies to decline jurisdiction and protect its process from being abused.

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107 (Hungary V. Slovak) 1997 ICJ Reports, p. 7.

108 Oduntan, *op. cit*. at p. 61.

(B) Contentious Jurisdiction

This means no more than the competence of the ICJ to decide disputes that may be brought before it by state parties to the statute in accordance with its provisions. This is to be contradistinguished with the court's advisory jurisdiction. The contentious jurisdiction of the ICJ is provided for under Article 36 (1), (2) and (3) of the ICJ statute. It needs emphasizing however that the provisions of Article 36 is underpinned by Article 34 of the statute which states that only states may be parties in cases before the court.[109] Consequently, private individuals and international organizations have no access to the court in its contentious jurisdiction.[110] The provisions of Article 34 of the ICJ statute is further underscored by Article 93 of the U.N. Charter which makes all U.N. members *eo ipso* parties to the statute of the court.

The jurisdiction of the ICJ as espoused above in contentious cases which can be termed an aspect of jurisdiction *ratione personae* is founded on the consent of the state parties.[111] This is in consonance with the doctrine of sovereignty and the principle of law which states that no sovereign can be impleaded in any court without its consent.[112] This provision for states consent before being impleaded at the ICJ represents a compromise between the desire for states on the one part for an impartial, permanent judicial forum and the desire for states on

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109 Considering the fact that proceedings before the court falls basically into two distinct parts i.e contentious and advisory, Article 34 of the statute can only be contemplative of the contentious proceedings which is centered on the states going by the tenor of Article 36; contra the provisions of Article 65 of the statute vis-à-vis the advisory jurisdiction of the court.

110 However, given the contemporary worldwide concern for human rights and humanitarian issues, most international legal instruments have provisions allowing individual access to its adjudicatory institutions. Examples include the treaties establishing the European court on human rights, the ECOWAS Court of Justice etc. in the realm of Diplomatic and Consular relations, the court held in *the La Grand Case* (2001) ICJ Reports 466 at 494 that a convention may create individual rights which may be invoked in the court by the national state of the person concerned.

111 Corfu Channel Case (preliminary objections) ICJ Reports (1948) p. 27; Peace Treaties Case, ICJ Reports (1950) p. 17; Monetary Gold Case, ICJ Reports (1954), Reparations Case, ICJ Reports (1950) p. 71; The Ambatielos Case (Obligation to Arbitration) ICJ Reports p. 19.*Cf* Article 25 of ICC Statute; pp.213-215 infra

112 Note that this principle of law in present day International Law has been greatly eroded as the sovereigns are now amenable to law suits even within their own jurisdiction. See H C Alisigwe "An Appraisal of the Doctrine of Sovereign Immunity under Private International law – The Nigerian Perspective,"(2008/2009), *NJLS* Vol.VIII, p. 36

their part to control their exposure to the solemnity of the ICJ decision making (and when exposed, to have their concerns heard fairly and understood[113]).[114]

The various forms within which this consent can be manifested as a jurisdictional basis are as provided by Article 36 (1), (2) and (3) of the statute of the ICJ. We shall discuss them anon.

Article 36 (1) of the ICJ statute provides:

"The jurisdiction of the court comprises all cases, which the parties refer to it and all matters specifically provided for in the Charter of the United Nations or in Treaties and Conventions in force."

The import of the above provision lies in the fact that all parties must be in agreement as to the referral of the case to the court. This is a reaffirmation of consent as a basis for the court's assumption of jurisdiction. Thus, under Article 36 (1) states can accept the court's jurisdiction on an ad hoc basis for purposes of adjudicating an existing dispute. An example was the dispute in 1981 between the U.S.A. and Canada wherein both parties agreed to bring their dispute over their maritime boundary in the Gulf of Maine[115] to the court. However, the classical method by which agreement for referral is normally made is through a bilateral or multilateral treaty that provides for such assumption of jurisdiction over cases relating to the interpretation or application of the Treaty. In essence, such Treaties will contain compromissory clause which will specify the terms of the dispute and framework within which the court is to operate. The drawback on this form of jurisdiction is that it is inherently limited as it only covers matters within the scope of the Treaty. *A' priori,* the narrower the scope of the Treaty, the narrower will be the scope of the court's jurisdiction. Furthermore, clauses may be included within the Treaty that delimits issues as being outside the court's jurisdiction. Instances of such delimitation will include issues that border on national security. Its distinguishing feature however as a title of jurisdiction is that jurisdiction is

113 This underlies the provisions on Judge *ad hoc*.
114 S Rosenne, *op. cit*, pp. 701-705.
115 Gulf of Maine Case, 1984 ICJ Reports p. 246.

conferred without much ado and the court become seised of the defined issues of concrete case by the mere notification to the court of the requisite provisions of the Treaty. This was applied in *The Minquiers and Ecrehos Case (France V. United Kingdom)*[116] wherein by Article 1 of the special agreement signed on December 29 1950, the court was requested to determine whether the sovereignty over the Islets and rocks (in so far as they are capable of appropriation) of the Minquiers and Ecrehos groups respectively belonged to the United Kingdom or the French Republic. *The North Sea-Continental Shelf Cases*[117] involving Denmark, Federal Republic of Germany and the Netherlands wherein by various special agreements respectively involving the countries inter se, and in the absence of agreement amongst them; the question to be determined by the court relates to the principles and rules of International Law applicable to the delimitation as between the parties of the areas of the continental shelf in the North Sea which appertain to each of them beyond the partial boundary (already) determined. The form by which consent to jurisdiction is made manifest is immaterial, so long as it can be deciphered. A' priori, consent to jurisdiction may be express or implied. Consequently, if a defendant who has not expressly consented to the jurisdiction of the court in terms of Article 36 of the ICJ statute, nevertheless enters an appearance on the merits without casting aspersion on the court's exercise of jurisdiction, its consent will thereby be presumed and the court seised with jurisdiction therefore. This is known as jurisdiction *forum prorogatum.* The concept *forum prorogatum* is derived from the principle, *allegans contraria non audiendus est* and is to the effect that a party is not permitted to benefit from its own inconsistencies. It is akin to the common law doctrine of *estoppel.* The propagated jurisdiction of the court is often triggered of by the unilateral act of the parties. The plaintiff state invokes the jurisdiction of the court against a respondent state and then waits. Technically, the respondent state is not yet a party at this stage and thus

116 ICJ Reports 1953, p. 47.
117 ICJ Reports 1969, p. 3.

cannot seise the court of jurisdiction. Consent to jurisdiction can only be inferred from the conduct of the respondent state. Thus, if it files a defense on the merit, that is suggestive of its submission to the court's jurisdiction. An instance of conduct as expressing consent can be gleaned from the decision in the *Asylum Case* [118] wherein the court said:

> The parties in the present case consented to the jurisdiction of the court. All questions submitted to it have been argued by them on the merits and objections have been made to the decision on the merits. This conduct of the parties is sufficient to confer jurisdiction to the court.

However, in determining consent to jurisdiction from the conduct of parties, the court considers the whole conduct of the parties and not to isolated incidents. A' priori, it will decline jurisdiction if a party's conduct manifests a consistent refusal to submit itself to the adjudicatory powers of the court.

A' fortiori, the fact that a state has entered appearance may not ipso facto signify its consent. To be deemed as one, consent in this sense must be reasonably clear and free from ambiguity. For example, in the *Anglo-Iranian Oil Case*[119], the Iranian government filed additional papers to fortify her defense but nevertheless maintained that the court lacked jurisdiction throughout the case. On the submission of the United Kingdom for the court to hold that the act of the Iranian government in filing additional papers constitutes submission to jurisdiction, the court held thus:

"The principle of *forum prorogatum* if it would have to be applied in the present case would have to be based on some conduct or statement of the government of Iran which involved the

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118 ICJ Reports, 1950, p. 266.

119 ICJ Reports, (1952) p. 93.

jurisdiction of the court having filed a preliminary objection, for the purpose of jurisdiction and having throughout maintained that objection … no element of consent can be deduced from such conduct".

From the above summation, it becomes clear that for the court to assume jurisdiction on the *forum prorogatum* rule, it has to be satisfied that there is no equivocation on the part of the respondent state and this may necessitate a more extended examination of its whole conduct and intentions.

To avoid giving the impression of a creeping extension of its own jurisdiction by means of fiction, the court is always cautious in applying this doctrine. Consequently, to avoid this kind of "fishing" for jurisdiction, Article 38 (5) of the Rules of the Court now provides:

> When the applicant state proposes to found jurisdiction of the court upon a consent thereto yet to be given or manifested by the state against which such application is made, the application shall be transmitted to that state. It shall not however be entered in the General List, nor any action be taken in the proceedings unless and until the state against which such application is made consents to the court's jurisdiction for the purposes of the case.

In *The Certain Criminal Proceedings in France Case,*[120] this was tested and the acceptance of such an invitation by the respondent state led to the case being entered in the General List and the proceedings continued in the normal way.[121]

Article 36 (1) also made the Charter of the United Nations a jurisdictional basis for the court when it provides that "the jurisdiction of the court comprises … all matters specially provided

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120 ICJ Reports, (2003)p. 102.

121 Rosenne, *op.cit* .p. 690.

for in the Charter of the United Nations."[122] Note however that save for the general provisions in Article 36 (3) of the Charter which is to the effect that "the Security Council in making recommendations pursuant to Article 36 (1) of the Charter, should bear in mind that legal disputes should as a general rule be referred by the parties to the ICJ within the terms of the statute;" there is nowhere therein where specific mention is made of matters to be referred to the court. Moreover, referrals pursuant to Article 36 (3) of the Charter do not constitute consent as to enable the court to assume jurisdiction *ratione personae*.[123]

Finally where a Treaty provides to the effect that all disputes as to the interpretation or application of the provision of the Treaty is to be referred to the ICJ, the court is automatically seised of jurisdiction whenever there is such referral.[124]

Where the Treaties antedates the United Nations and are still in force or makes reference for matters to be decided under the PCIJ or a tribunal under the League, such will be subsumed under the ICJ regime and the court clothed with jurisdiction.[125]

Article 36 (2) of the Statute provides the court with another title of jurisdiction. It reads thus:

> The state 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.

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122 The polemic has arisen as to whether the words "treaty" and "charter" are not unnecessary duplications given the fact that the charter is itself a treaty. However, this differentiation can be explained away on the ground that the charter though a treaty in the conventional sense is in a special class of its own as its provisions provides the yardstick for measuring the validity of other treaties in the international system. See Rosenne, *ibid*, at p. 669. Note also Article 103 of the Charter which provides that where there is a conflict between an obligation under the charter and an obligation under any other treaty, the charter obligations shall prevail.

123 Corfu Channel's case, ICJ Rep (1947).P.15,31-32.

124 Article IX of the Genocide Convention; The Genocide Case (Bosnia V. Yugoslavia) ICJ Reports(1993) pp. 3, 325

125 Articles 36(5) and 37 of the ICJ Statute.

(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 international obligation

(d) The nature or extent of the reparation to be made for the breach of an international obligation.

In the same vein, Article 36 (3) of the Statute provides: "The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain states or for a certain time"

These provisions which in legal euphemism is often tagged "the compulsory jurisdiction" of the court are of great importance in extending or extenuating the jurisdiction of the court. Article 36 (2) of the statute provides for the optional clause phenomenon whilst Article 36 (3) of the statute allows states to make reservations to the jurisdiction of the court. These provisions emerged as a compromise between the proponents and opponents of the court exercising compulsory jurisdiction over states. States which accept the jurisdiction of the court under the optional clause rule, do so only in relation to any other state accepting the same obligation. This is known as the principle of reciprocity. The gravamen of this principle is that state accepts the court's jurisdiction vis-à-vis any other states only in so far as that state has accepted it also. Thus, if state A makes a declaration subject to reservation X and state B makes one subject to reservation Y, the court will have jurisdiction to hear disputes between these two states only in so far as they are not covered by reservation X or Y. In other words, jurisdiction is conferred on the court only to the extent to which the two declarations coincide in conferring it.[126] The wordings of the declarations need not be in identical terms. It suffices that both declarations in substance grants jurisdiction to the court vis-à-vis the

[126] The Norwegian Loans Case, ICJ Reports, 1957 p. 9.

dispute in question. A' fortiori, a state cannot enjoy the benefits of the optional clause unless it is prepared to accept the obligations of the optional clause.

An acceptance sequel to Article 36 (2) of the statute is made by unilateral declaration which is deposited with the United Nations Secretary-General.[127] The declaration takes effect once it is deposited with the United Nations. Other parties need not have actual knowledge about it.[128] Thus, the principle of constructive notice applies. It is instructive to note that of the 198 member states of the United Nations, only 70 have accepted the jurisdiction of the court under the optional clause pursuant to Article 36 (2) as at August 2013.[129] These declarations are usually in the form of official notification signed by the president, the prime minister, the Minister for Foreign Affairs, the Ambassador or the Permanent Representative at the United Nations. Its scheme is usually in the following order.

i. Preamble.

ii. Clause withdrawing a previous declaration

iii. Reference to Article 36 (2) of the ICJ statute (directly or indirectly.)

Iv. Reference to the conditions of reciprocity..

v. Initial date of effectiveness of the new declaration.

vi. Reservations

vii. Formal conditions

viii. Date and signature.[130]

Institutions of proceedings and the deposit of the declarations can be done same day. There need not be interval of time between both.[131]

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127 Article 36 (4) of the ICJ Statute.

128 Cameroun V. Nigeria No 1, *supra* ratio 1, 3 and 4.

129 http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3. Visited on 14/8/2013.

130 R Szafarz, *The compulsory jurisdiction of the International Court of Justice* (The Hague: Martinus Nijhoff, 1993) pp. 64-65.

131 Cameroun V. Nigeria No 1 *supra* p. 63.

Article 36 (3) of the statute of the ICJ permits reservations relating to reciprocity and reservations relating to time.[132] The essence of this is that where a dispute falls within the realms of legal dispute, the court may still not be seised of the jurisdiction if a state while making its declaration under this provision creates conditions for accepting the court's jurisdiction. It needs emphasizing that Article 36 (2) and (3) of the statute aims at facilitating as much as possible the acceptance of the court's compulsory jurisdiction and at the same time preserve the sovereignty of states with regards to matters which many feel should not be entrusted to the court. Reciprocity enables a party to invoke a reservation which it has not expressed in its own declaration but which the other party has expressed in its declarations. Reservations that have been made by states vary a great deal and are often attempts by states to prevent the court becoming involved in a dispute which is felt to concern vital interests. This has often led to the distinction between the legality and propriety of reservation. Consequently a reservation may be legal but its propriety may be questionable especially when such a reservation seems superfluous when juxtaposed against the provisions of the United Nations Charter. For example, a reservation excluding non-legal disputes from the court's jurisdiction will seem ostensibly superfluous against the backdrop of the generally acknowledged view that the ICJ within the context of its contentious jurisdiction deals only with legal disputes.[133] A reservation may on the other hand lack both legality and propriety. An example of this type of reservation is the United States Declaration of August 14 1946 accepting the compulsory jurisdiction of the court under the optional clause.

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132 M A Akehurst, *A Modern Introduction to International Law*, (London: George Allen & Unwin Ltd, 1971) p. 299; M N Janis, *An Introduction to International Law*, 2nd Edn., (London, Little Brown & Company, 1993) p. 285.

133 Article 36(2) of the Statute. Note also *the Nuclear Tests Case*, ICJ Reports 1974 p. 253 at pp. 270-271 wherein the Court held that the existence of a dispute is the primary condition for the Court to exercise its judicial function.

It provides thus:[134]

> The United States of America recognizes as compulsory ipso facto and without special agreement in relation to any other state accepting the same declaration, the jurisdiction of the International Court of Justice in all legal disputes hereafter arising with the regard to matters which are essentially within the domestic jurisdiction of the United States of America as

The validity of this type of reservation (known as Conally reservation) is highly questionable as it purports to contradict the power of the court under Article 36 (6) of the Statute to determine its own jurisdiction. Moreover, it is now a principle of International Law that the definition of what constitutes domestic jurisdiction is a matter of international Law and not domestic law.[135]

It needs emphasizing that these reservations which are also known as "automatic" or "self judging" reservations have been justified on the basis that it would be reckless to proceed precipitately since the court has yet to win the confidence of the world community and that of International Law has not yet developed the scope and definiteness necessary to permit disputes generally to be resolved by judicial, rather than political tests.[136] Whilst the above rationalization may be legitimate in the early years of the ICJ, the currency of contemporary thought belies it. Especially is this so given the avalanche of international judicial institutions. Instructive but curiously, the court has never directly pronounced on the legality of the Connally type reservation clauses. Whatever illegality usually ascribed to these

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134 *UNTS* vol. 1, p. 9; Note also the French Declaration which though differently worded has the same effect. It states thus; "This Declaration does not apply to differences relating to matters which are essential within the national jurisdiction as understood by the French Republic." See ICJ Yearbook 1946-1947, p. 219.

135 Shaw *op. cit.* p. 648. This view is further emboldened by the global campaign for human rights protection which hitherto used to be regarded as an issue within the domestic jurisdiction of states.

136 Oduntan, *op. cit*. p. 75.

automatic or self judging reservations is as gleaned from the individual and separate opinion of the judges.[137] In view of the foregoing, it has been opined that the potency of the Connally reservation as a jurisdictional weapon is very weak.[138]

Reservations relating to time (i.e. reservation *ratione temporis)* are those according to which acceptance of jurisdiction are deemed to expire automatically after a certain period or within a particular time after notice of termination has been given to the United Nations Secretary-General. Some states exclude the jurisdiction of the court with respect to disputes arising before or after a certain date, in their declarations.[139] A state is free to withdraw or modify its declaration only to the extent that the court is not seised of any particular dispute.

Consequently, once the court become seised with jurisdiction over any matter, the subsequent expiry or termination of a party's declaration will not terminate or modify the court's jurisdiction over a case.

Disputes upon which reservations have been made include but are not limited to the following:

(a) Dispute in regard to which the parties to the dispute have agreed or shall agree to have recourse to some other method of settlement.

(b) Dispute with certain countries (e.g. other members of the international community i.e. commonwealth countries)

(c) Disputes with regards to matters which by International Law fall within the domestic jurisdiction of the declarant state.

(d) Disputes with regards to matters which are essentially within the domestic jurisdiction of the declarant state as determined by the state.

(e) Disputes arising out of war or international hostilities.

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137 The Norwegian Loans Case, ICJ Reports 1957, Inter Handel Case, ICJ Reports, 1959, p. 6.

138 C A Ogan, "Potency and Weakness of a Jurisdictional Weapon: The Odyssey of the Connally Reservation" *Justice*, 21 (1991) pp. 55-62.

139 Oduntan *op. cit*. p. 85.

(f) Disputes arising out of a crisis affecting national security.

(g) Disputes in respect of which any other party to a dispute has accepted the compulsory jurisdiction of the court exclusively in relation to such dispute or where the acceptance of the compulsory jurisdiction by another party to the dispute was made less than twelve (12) months prior to the institution of proceedings.

(h) Disputes arising under a multilateral treaty unless all the parties to the treaty are parties to the case before the court.

(I). Disputes in a category which the declarant state decides to exclude by notifications addressed to the Secretary-General of the United Nations.

States also can specify a "condition of reciprocity" or limit their acceptance to disputes with states accepting the same obligation; or limit the application of the acceptance to disputes arising after a certain date with regard to situations or facts subsequent to the same date.

They also retain the right to withdraw the acceptance (modify it) at any time with immediate effect; or even the right to terminate the acceptance by giving a certain period of notice.

The procedure adopted by the court in its contentious jurisdiction is as laid down in its statute and its rules of court which came into existence in 1978. Rules appearing in the statute particularly relevant in terms of procedure in contentious jurisdiction is Article 101 of the 1978 Rules of court which provides thus: "The parties to a case may jointly propose particular modifications or additions to the rules which may be applied by the court or a chamber of the court if the court or chamber considers them appropriate."

Among the mandatory procedural rules appearing in the statute is the provision contained in Article 43 (1) of the Statute that the procedure shall consist of two parts, written and oral. The written proceedings consist of the communication of memorials and counter memorials

including the replies, whilst the oral proceedings consists of the hearing by the court in public of the witnesses, experts, agents, counsels and advocates of the parties'.[140]

The proceedings of the court in the context of the contentious jurisdiction is geared towards the systematic and contradictory presentation of facts by agents of the parties upon which the decision of the court rest and upon which basis the decision of the court will be pronounced. English and French are the two official languages of the court and everything written or said in one is translated into the other.

Before delving into the merits of a case, the court often consider several preliminary objections pertaining to its jurisdiction whether generally or specifically. Preliminary objections are usually dealt with separately in a preliminary judgment but it is not unusual for the court to join them to the merits,[141] that is deal with them together with the merits in a single judgment.[142]

Within the context of its contentious jurisdiction, the ICJ is invested with powers pursuant to Article 41 of its statute to indicate provisional measures[143] in order to protect the parties respective rights and interests over the res. Provisional measures have become a common feature in both national and international judicial proceedings. The rationale for these measures is the belief that a party to a dispute before an adjudicatory body is entitled to a reasonable assurance that the subject matter of the dispute will not be so altered as to make it impossible for it to enjoy the right or interest it is claiming should such be eventually upheld. A variation of this rationale from the view point of the court or tribunal is that parties to a dispute should be prevented from taking actions in relation to the subject matter of the

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140 Article 46 of the Statute.

141 Malanczyk, *op.cit*, p.287.

142 Cameroon V Nigeria No.1,*supra*, r.27,pp.91-92.

143 This is also known as interim measures; T A Mensah, "Provisional Measures in the International Tribunal for the Law of the Sea (ITLOS) available on http://www.zaoerv.de/62_2002/62_2002_1_a_43_54.pdf. Accessed on 10/3/2013; J Arechaga "International Law in the Past Third of Century" 159 *HR*, 1978 p. 1 at p. 161.

dispute that could have the effect of making otiose the final decision to be rendered by the court or tribunal.

Conversely, the imposition of provisional measures on a party before the merits of the various claims (and mutatis mutandi preliminary objections to jurisdiction or admissibility) have been fully considered and decided will necessarily involve the risk that a party might be prevented from taking action that may eventually be found to be within its rights. Consequently the party that is restrained may in fact suffer some damage as a result of its inability to take the action that was the subject of the restraint. Thus, the difficulty encountered by the court has always centered on identifying the circumstances under which provisional measures can be indicated; especially is this so where the court's jurisdiction is being impugned by way of preliminary objection. The difficulty centers on how to find a rule that properly takes account both of the fact that the court may ultimately decide that it lacks jurisdiction to hear a case and of the fact that the parties' rights may be irreparably damaged before a decision on jurisdiction is taken. One way of obviating this difficulty and more so considering the court's unique position as the guardian of international legality is the assumption by the court of jurisdiction on a prima facie basis so as to preserve the res and prevent degeneration in inter-state relations. Consequently in determining a request for indication of provisional measures, the court need not satisfy itself that it has jurisdiction on the merits of the case. It suffices if the majority of the judges believe that there is a prima facie basis for the court's jurisdiction on the merits.[144] This is both necessary and logical when viewed against the backdrop that provisional measures are intended to regulate matters pending a decision on the merits of the disputes itself, it becomes reasonably pertinent that the court should not impose restraints on the parties unless there is some plausible likelihood that it will in fact be in a position to deal with the merits of the disputes. A'fortiori, the

144 Harris, *op. cit*, p.1075-1076; Shaw, *op. cit.* pp.1093-1094.

essence of the interim measure is to assist the court ensure the integrity of the proceedings and *pro tanto* prevent irreparable prejudice being caused to rights which constitute the subject of dispute in judicial proceedings.[145]

The overriding principle when considering a request for the indication of provisional measures is that the court "must be concerned to preserve … the rights which may subsequently be adjudged by the court to belong either to the applicant or to the respondent"[146] without being obliged at that stage of the proceedings to rule on those rights.[147] Thus, in establishing the court's prima facie jurisdiction to deal with the merits of the case, the question of the nature and extent of the rights for which protection is being sought in the request for the indication of provisional measures is of no moment, since such would form the fulcrum of the court's determination at the merit stage. Consequently, provisional measures must be such that once the disputes upon which they were based has been resolved by the court's judgment on the merits, they lose their desirability.[148] Where however the indication of a provisional measure would likely impair the rights which seem prima facie to be enjoyed sequel to a resolution of an organ of the U.N. in the exercise of its powers under the Charter, such request will be declined.[149]

The court will also indicate provisional measures where there is an urgent need to prevent irreparable harm being done to the res in dispute pending final decision by the court.[150] The court can also *suo motu* indicate provisional measures whenever it considers the circumstances desirable.[151] Consequently, the court may on its own indicate interim measures

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145 *Cameroun V. Nigeria*, ICJ Reports 1996, pp 13, 21-22. Where however there is insufficient danger to the applicant's rights, the court will refuse a request for an interim measure. See the *Inter-Handel case*, ICJ Reports (1957) p. 93.

146 *Cameroun V. Nigeria supra* at p. 22.

147 *The Avena (Mexico V. U.S.A.)* ICJ Reports, 2003, pp. 77 and 89.

148 Shaw, *op. cit*, p. 1094.

149 *The Lockerbie Case*, ICJ Reports, 1992, pp. 3 and 15.

150 *The Pulp Mills (Argentina V. Uruguay) Case*, ICJ Reports, 2007, para. 32; *Cameroun V. Nigeria supra* at p. 22. *Republic of Congo V. France, Provisiona*l *Measures*, ICJ Reports, 2003, p. 107, para. 22.

151 *Burkina Faso V. Mali*, ICJ Reports, …. pp. 3 and 9.

as to the relevant international obligation of the parties. Thus, in *Cameroun V. Nigeria*[152] (supra), the court while explicitly referring to the rights of the parties also called on them to observe an agreement reached for the cessation of the hostilities, to take necessary steps in preserving relevant evidence in the disputed area as well as co-operating with a proposed U.N. fact-finding mission.

From the above discussion, it can be surmised that the conditionalities appurtenant to the indication of provisional measures have become crystallized into a clear and well established body of jurisprudence, to wit:

(a) Provisional or interim measures constitute an exceptional form of relief in the sense that they are not to be ordered as a matter of course but only in those cases where such measures are considered necessary and appropriate.

(b) The granting of a request for provisional or interim measures is a discretionary decision. It is thus the prerogative of the court that is considering the request to determine whether on the facts of the case, such measures are needed to achieve results that cannot otherwise be achieved.

(c) A court should not order provisional measures in a case before it unless it is satisfied at least that prima facie, it would have jurisdiction to deal with the main dispute.

(d) Provisional measures should aim at preserving the respective rights of the parties. This means in essence that there should be a measure of equity and justice to all the parties in the dispute both in the nature of the measures ordered and in the effect of their application on the claims of the parties. In particular, care should be taken to ensure that in seeking to preserve the rights of one of the parties to the dispute, serious and avoidable prejudice is not done to the rights or interests of the other party.

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152 *Cameroun V. Nigeria supra* at pp. 13, 24-25.

(e) Provisional measures are appropriate only where there is a measure of urgency in the situation. Thus, a court may order provisional measures only in cases where there is a reasonable risk that rights of one or other of the parties are in danger of serious and irreversible prejudice, and the urgency of the situation is such that the risk cannot be averted otherwise than by ordering provisional measures.

Considering the high flow of national emotions and sentiments usually associated with most inter-state disputes, the requests for interim or provisional measures is usually accorded priority over all other cases by the court as the court practically accords them due deference. For instance during the judicial year 1993-1994 which is reputed to be among the busiest period of the court involving about eleven 11 cases at various stages of procedure, the court received two requests of a complicated and lengthy nature vis-à-vis the case brought by Bosnia and Herzegovina against Yugoslavia (Serbia and Montenegro) concerning the Genocide Convention. The court following its rules, abandoned all other competing business and quickly dealt with the request.[153]

It needs be stated here by way of analogy that the use of provisional measures as a protective instrument of the respective parties interest in a res is not exclusive to the ICJ system. It was also part of the PCIJ system. In fact, during the period of its existence, the PCIJ indicated provisional measures twice in the *Case Concerning the Denunciation of the Treaty of November 2, 1865 between China and Belgium* [154] and in *The Electricity Company of Sofia and Bulgaria Case*.[155]

It is instructive to note that despite the acclaimed necessity for and use of provisional measures, its major drawback remains the incidences of non-compliance with such orders.

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153 G Oduntan, *op. cit*, at p. 65.
154 PCIJ Series A No 8, 1927 (Order of 8 January 27).
155 PCIJ A/B No 79 (Order of 5 December 1939).

Especially is this so when viewed against the backdrop of the fact that there is no express provision in the statute regarding the binding or enforceable nature of provisional measures. For instance, in *The Anglo-Iranian Oil Company Case (U.K. V. Iran),*[156] the United Kingdom's request for provisional measure was granted but Iran refused to comply arguing that the court had no jurisdiction of the case on the merits.[157]

However, given the provisions of Article 41 (2) which provides as follows: "Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council," it remains arguable if the intendment was not to make such decisions binding. We are solidified in this view by Article 94 (2) of the statute of the ICJ which aims at giving effect to the decisions of the ICJ for that is the only construction that can be placed on the effect of notifying the Security Council about such a measure.

Whatever diffidence in a state practice or questions regarding the legal effects or bindingness of orders indicating provisional measures was positively cleared by the court in *The La Grand Case*[158] where the ICJ declared as follows:

156 ICJ Reports, (1952) p. 93.

157 It needs emphasizing that the provisional measures were however revoked when the court upheld the Iranian preliminary objection. This type of scenario usually puts the court in great dilemma. This is based on the following (a) Because of the precious time that hearing on preliminary objection may consume when juxtaposed with the urgency that necessitates requests for such measures, the court may indicate provisional measures only to discover later to its discomfiture that it lacks jurisdiction (b) The court may refrain from indicating such a measure at the incipient stage of proceedings only to discover later at the point of deciding on the merits; with the resultant effect being the erosion of the applicant's rights in the interim or rendering otiose whatever benefit that may be derived from the eventual judgment.

158 *La Grand (Germany V. United States of America*) *Case* (Merits) ICJ Reports, 2001 p. 446 at 506.

> The context in which Article 41 has to be seen within the statute is to prevent the court from being hampered in the exercise of its functions because the respective rights of parties to a dispute before the court are not preserved. It follows from the object and purpose of the statute as well as from the terms of Article 41 when read in this context that the power to indicate provisional measures entails that such measures should be binding, in as much as the powers in question is based on the necessity, when the circumstances call for it, to safeguard, and to avoid prejudice to, the right of the parties as determined by the final judgment of the court. The contention that provisional measures indicated under Article 41 might not be binding would be contrary to the object and purpose of that Article.

This decision represents the high-water mark of judicial imprimatur to the binding character of provisional measures and given the renascent but deepening aptitude among states for judicialism, can only gain wider currency and acceptability.

(c) Advisory Jurisdiction

A purpose of the court and within the context of the U.N. Charter must be to serve as foundation for the construction of an objective legal system between states inter se, between states and international organizations and agencies and between international organizations inter se; a system in which the field of arbitrary action by states and international organizations in pursuit of short term advantage is narrowed in the interests of the long term advantages of peace, orderly progress and legality. To achieve this purpose, the existence of the court must be felt by states and international organizations as a legal constraint on their behavior. Thus, its existence and the potentialities of resort to it and subsequent decision on

an issue must enter their plans as an ineluctable element in a particular situation. The advisory jurisdiction of the ICJ remains one of the constraints in the states/international organizations interface on the one hand and among the international organizations themselves.

The U.N. Charter provides the foundational framework for the advisory jurisdiction of the court. In this wise, Article 96 (1) and (2) of the U.N. Charter provides as follows:

1. The general Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.
2. 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.

The advisory jurisdiction of the ICJ is modeled after that of the PCIJ. In specific terms, Article 14 of the League Covenant states that the PCIJ may give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly. The advisory jurisdiction does not avail states but inures only for the benefits of the organs of the U.N. or any other specialized agency authorized to seek the court's opinion. Consequently, no state may initiate proceedings before the court with a view to getting its advisory opinion on any issue. *A' fortiori,* advisory proceedings before the court are open solely to the five principal organs of the U.N.and about sixteen (16) specialized agencies of the United Nations family.[159]

[159] The principal organs are as listed in Article 7 of the United Nations Charter and includes the General Assembly, the Security Council, The Economic and Social Council, the Secretariat and the Trusteeship Council. Among the specialized agencies include the International Labour Organization (ILO), Food and Agricultural Organization (FAO), World Health Organization (WHO), United Nations Educational, Scientific and Cultural Organization (UNESCO), International maritime Organization (IMO) International Bank for Reconstruction and Development (IBRD), International Finance Corporation (IFC), International Development Association (IDA), International Monetary Fund (IMF), International Civil Aviation Organization (ICAO), International Telecommunication Union (ITU), World Meteorological Organization (WMO), World Intellectual Property Organization (WIPO),l

The precise nature, scope and circumstances for the exercise of the court's advisory jurisdiction is explicitly set out in Article 65(1) and (2) of the statute and it provides thus:

1. 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.
2. Questions upon which the advisory opinion of the court is asked shall be laid before the court by means of a written request containing an exact statement of the question upon which an opinion is required and accompanied by all documents likely to throw light upon the question.

A close scrutiny of Article 65 (1) and (2) of the Statute will reveal the following:

(a) The court has a discretion and may in fact refuse to give advisory opinion where the circumstances are violative of any provisions of the Charter or Statute.[160]

(b) The subject matter of the request must be a legal question. Thus, political questions are excluded. However, the fact that legal questions involve factual or political elements does not ipso facto disable the court from rendering its opinion.[161]

(c) The request must emanate from duly authorized bodies. This is an innovation when considered against the conventional view and practice that only states can be parties to a case before the court. The practice under the League system was for a public international organization to bring disputes involving it through the relevant member states. Thus, on the whole, about twenty-two (22) organizations and agencies of the U.N. are entitled to request an advisory opinion on any legal question from the court.

United Nations Industrial Development Organization (UNIDO), International Atomic Energy Agency (IAEA); Oduntan, *op. cit.* pp. 118-119.

160 D Prataap, *The Advisory Jurisdiction of the International Court*, (Oxford: Clarendon Press, 1972) p. 230.

161 Legal Consequences for States of the Continued Presence of South Africa in Namibia South West Africa Notwithstanding Security Council Resolution 270 (1970) ICJ Reports, (1971) p. 27; Elias, *op. cit.* p. 80.

(d) Request must be written.

(e) The request must contain an exact statement of the question.

(f) The request must be accompanied by all documents likely to throw light upon the question.

The purpose of the court's advisory jurisdiction is not to settle (at least directly) but rather to offer legal advice to the organs and institutions requesting the opinion. However, in order for the court to have jurisdiction to give advisory opinion, at the request of an international organization, three conditions must be satisfied, to wit:

(a) The organization must be duly authorized by the General Assembly to request opinions from the court.

(b) The opinion requested must be on a legal question.

(c) The question must be one arising within the scope of the activities of the requesting agency.[162]

In a 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 *(WHO Nuclear Weapons Case),*[163] the question put to the court was:

"In view of the health and environmental effects, would the use of nuclear weapons by a state in war or armed conflict be a breach of its obligations under International law including the WHO constitution?"

The court in rendering its opinion construed Article 2 of the WHO Constitution as giving WHO the competence to deal with the effects on health of the use of nuclear weapons and to act preventively to protect people from these effects in contradistinction to the legality of the

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[162] Article 96 (2) of the United Nations Charter; L.U. Bingbin, "Reform of the International Court of Justice- A Jurisdictional Perspective," available at http://www.oycf.org/perspectives2/25_063004/3.pdf. P. 5, thereof. Accessed on 10/2/2013.

[163] ICJ Reports, 1996 p. 66; 35 ILM pp. 809 and 1343.

use of such. It thus declined to give its opinion. The court's decision is predicated upon its view that none of WHO's function 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. Bingbin has criticized the ICJ for not using the opportunity presented by this case to explain or even develop International Law.[164]

This criticism however can only be justified when viewed against the backdrop that advisory opinions carry political weight and are in most cases complied with.[165] It cannot be predicated on strict law as it is a legal truism that judges do not create law. They only declare it as enacted by the legislature. Activism is an accepted trait for the fecund judge in the exercise of his judicial powers, it is however never a license to act whimsically, moreso at the international system where the desire for judicialism keeps being assailed by states deep-seated love for their sovereignty. Consequently, the ICJ cannot render a judgment *sub specie legis ferendae* or anticipate a law before the legislature had laid it down.[166]

In examining the question posed by the requesting organ, the court will operate on the same basis as in contentious cases with regard to the nature of evidence as well as the burden and standard of proof.[167] Consequently, when it receives a request for an advisory opinion, the court is empowered to hold written and oral proceedings in order that it may give its opinion with full knowledge of the facts. Sequel to the filing of the request, the court draws up a list of those states and international organizations that are capable of furnishing information on the question before the court. Those states are however not in the same position as parties in contentious proceedings. Their representatives before the court are not known as agents and

164 Bingbin, *loc. cit.*

165 M N Janis, *An Introduction to International law, 2nd edn.* (London: Little Brown & Company, 1993) p. 289.

166 G Guillaume, "The Use of Precedents by International Judges and Arbitrators," available at http://jids.oxfordjournals.org. Accessed on 17/12/2012.

167 Shaw, *op. cit.* p. 1111.

their participation if any in the advisory proceedings do not render the court's opinion binding upon them.[168]

The advisory procedure is regulated basically by Articles 66, 67 and 68 of the Statute of the court. The composition of the court in advisory proceedings is the same as in contentious proceedings. The advisory opinions unlike judgments are not binding on the requesting bodies as they are only consultative. However, being judicial pronouncements, their persuasive character and substantive authority is never in doubt. Consequently, their moral weight and influence cannot be underestimated.[169]

The above notwithstanding, instances could however arise where advisory opinion could be binding. In such cases, the parties to the dispute are required to accept the opinion as binding. The basis for such compulsive opinion as it is sometimes called could be conventions, bilateral or multilateral Treaties or a constituent instrument drawn up to regulate relations between states and international bodies. Particularly worthy of mention in this regard is Article 30 of the 1946 General Convention on the Privileges and Immunities of United Nations. It provides thus:

> If a difference arises between the United Nations on the one hand and a member on the other hand, a request shall be made for an advisory opinion on any legal question involved in accordance with Article 96 of the Charter and Article 65 of the Statute of the court. The opinion given by the court shall be accepted as decisive by the parties.

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168 It was probably against this backdrop that Israel rejected the advisory opinion which in the Construction of Wall Case, ICJ Reports, 2004 p. 136, ruled against the Israeli decision to build security walls in the occupied territories.

169 It is also for this same reasoning that the Palestinians are relying on the persuasive and moral influence, the ruling has engendered among the world community, as a fillip to their resistance of the Israeli construction of walls in the occupied territories,sequel to the Israelis non observance of the decision in the Construction of Wall's Case, *supra.*

(D) Chamber Jurisdiction

For purposes of expeditious hearing of a matter and thus making the court more attractive for prospective litigants, provisions are made in Article 26 and 29 of the Statutes for the constitution of Chambers. In this wise, Article 26 of the Statute provides thus:

1. The court may from time to time form one or more Chambers composed of three or more Judges as the court may determine, for dealing with particular categories of cases, for example, labour cases and cases relating to transport and communications.
2. The court may at anytime form a Chamber for dealing with a particular case. The number of Judges to constitute such a Chamber shall be determined by the court with the approval of the parties.
3. Cases shall be heard and determined by the Chamber provided for in this Article if the parties so request.

On the other hand, Article 29 of the Statute provides thus:

> With a view to the speedy dispatch of business, the court shall form annually a Chamber composes of five Judges which at the request of the parties may hear and determine cases by summary procedure. In addition two Judges shall be selected for the purposes of replacing Judges who find it impossible to sit.

From the above, it becomes evident that though the court generally discharges its duties as a full court (i.e. a quorum of nine Judges, excluding Judges ad hoc), it may also form a permanent or temporary Chambers. In its Chamber Jurisdiction, the court has three types of Chamber, namely:

(a) The Chamber of summary procedure, comprising five Judges, including the president and vice-president and two substitutes which the court is required by Article 29 of the Statute to form annually with a view to the speedy dispatch of business.

(b) Any Chamber comprising at least three Judges that the court may form pursuant to Article 26 (1) of the statute to deal with certain categories of cases such as labour or communications.

(c) Any Chamber that the court may form pursuant to Article 26 (2) of the Statute to deal with a particular case, after formally consulting the parties regarding the number of its members and informally regarding their name – who will then sit in all phases of the case until its final conclusion, even if in the meantime they cease to be members of the court.

Considering the foregone, particularly the nature of duties they are called upon to undertake, it has been posited[170] that the Statutes envisages three types of chamber, to wit:

(a) A standing chamber with jurisdiction limited to a particular category of dispute which convenience is referred to as a special chamber.[171]

(b) A chamber formed to deal with a particular case referred to as ad hoc chamber,[172] and

(c) The chamber of summary procedure[173] which though a standing chamber is distinguished from a chamber constituted under (a) above in the sense that it is endowed with general jurisdiction.

Article 18 of the Rules establishes the procedure for the election of the members of all the chambers and some aspect of their jurisdiction. Among its provision is the stipulation that elections to all the chambers shall be by secret ballot while members who obtain the largest number of votes at the time of election shall be deemed elected. It further provides that where a chamber includes the president or the vice president or both of them, the president or vice president shall *mutatis mutandi* preside over the chamber. However should the contrary be

170 Rossenne, *op. cit.* Vol. iii, p. 1068.
171 Formed Sequel to Article 26 (1).
172 Formed pursuant to Article 26 (2).
173 Formed sequel to Article 29.

the case, the chamber shall elect its own president by secret ballot and by a majority of votes of its members. This rule is complemented by Article 31 (4) of the Statute which aims at making a judge of the nationality of the parties or their nominees a member of the chamber panel, thus importing the practice of judge ad hoc into the system given the expected use of it by the parties. Thus, there is always need for a consensus between the parties and the court if a chamber is to be viable in practical terms. This is anchored on the belief that since the chamber system gives the parties influence as regards the composition thereof, they will develop more confidence in the proceedings and *pro tanto* their final outcome than submitting to the uncertainties of the full court.

The actual use of the chamber procedure started in 1982 when the first ad hoc chamber was formed in *The Case Concerning the Delimitation of the Maritime Boundary in the Gulf of Maine Area* [174] between Canada and the United States. It was followed in 1985 in *The Case Concerning the Frontier Dispute* [175] between Burkina Faso and the Republic of Mali. The use of the chamber procedure has been assailed on the ground that it is irreconcilable with the judicial and independent nature of the court and tends to move the court more towards arbitration than adjudication. But when viewed against the need for the court's decision to be effective in terms of compliance[176] without resorting to the Security Council and the fact that it is constituted at the request of the parties who also participated in nominating judges thereto, we are of the view that the use of the chamber procedure is a salutary development. The advantage in the chamber procedure is that it may make for a more expeditious hearing

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174 It needs stating that while chambers pursuant to Articles 26(1) and 29 have always been constituted no use has been made of either. In fact, in 1993, the court created a chamber for environmental matters which was periodically reconstituted until 2006. However, as no state requested that a case be dealt by it, the court decided in 2006 to discontinue holding elections for a bench for the said chamber.

175 ICJ Reports, 1986, p. 554; other cases include the *Elettronica Sicula Case*, ICJ Reports, 1989, p. 15; the Land, Island and Maritime Frontier Dispute between El Salvador and Honduras (Nicaragua Intervening), ICJ Reports, 1987, p.10; The Application for Revision of the Judgment in El Salvador/Honduras (Nicaragua Intervening), ICJ Reports, 2003, p. 392; The Frontier Dispute (Benin/Niger) ICJ Reports, 2005, p. 90.

176 This is against the backdrop that a judgment of the chamber is deemed to be a judgment of the court; Article 27 of the Statute.

of a matter since the issues in dispute are already well defined in a compromise before the constitution of the chamber. Its major constraint however remains the likelihood of excessive workload on the judges. This is predicated on the fact that they also participate in the regular work of the court.

4.1.4 Eligibility to Appear before the ICJ

The question of eligibility to appear before the court means no more than the right of parties or prospective litigants to have access to the adjudicatory powers of the ICJ vis-à-vis any dispute they are involved in. This right to appear before the court as will be discussed herein can only pertain to the contentious jurisdiction of the court as the eligibility of non state entities to have access to the court is already encapsulated in the court's advisory jurisdiction which we have already discussed.

Unlike the currency of contemporary practice wherein many states have accepted and acceded to the establishment of international courts that allows individuals to sue their own governments; such as the European Court of Human Rights, the ECOWAS Court of Justice, etc; at the time the ICJ was established, the idea of individuals pursuing claims before an international tribunal by themselves was largely unknown. Consequently, both the United Nations Charter and the Statute of the ICJ permits only states to take part in contentious cases before the court. This is an important feature designed to provide states with a greater level of comfort vis-à-vis their exposure to the jurisdiction of the court and thus occlude voices that are not vested in the overall system of state sovereignty.

Article 93 (1) of the United Nations Charter kick-starts this states- only eligibility criterion by providing that, "All members of the United of the United Nations are ipso facto parties to the statute of the International Court of Justice."

The import of this provision is further driven home when it is realized that both Article 3 and 4 of the United Nations Charter provides that only states may be members of the United Nations.

The provision contained in Article 93(1) of the Charter is reinforced further by the provisions of Articles 34 (1) and 35 (1) of the Statute both of which states as follows:

Article 34 (1) "Only states may be parties in cases before the court"

Article 35 (1) "The court shall be open to the states parties to the present Statute"

However, to guard against interpretational difficulties that may arise wherein a state that is not a member of the United Nations but still desires to avail itself of the court's adjudicatory functions,[177] Articles 93 (2) of the charter and 35 (2) of the Statute comes to the rescue by providing respectively as follows:

Article 93 (2):

"A state which is not a member of the United Nations may become a party to the Statute of the International Court of Justice on conditions to be determined in each case by the General Assembly upon the recommendation of the Security Council."

Article 35 (2) :

"The conditions under which the court shall be open to other states shall subject to the special provisions contained in Treaties in force be laid down by the Security Council, but in no case shall such conditions place the parties in a position of inequality before the court".

In the application for membership by Switzerland pursuant to Article 93 (2) of the Charter, the following conditions were laid down by the Security Council, to wit:

(a) Acceptance of the provisions of the Statute of the ICJ.

(b) Acceptance of all obligations of a member of the United Nations under Article 94 of the Charter.

[177] For example, Switzerland was not a member of the United Nations until September 2002 but had subscribed to the Statute of the court since 1946.

(c) An undertaking to contribute to the expenses of the court such equitable amount as the General Assembly shall assess from time to time after consultation with the Swiss Government.[178]

The above conditions *mutatis mutandi* have been the prevailing ones in respect of other applications. However, the fact that only states are eligible to appear before the court does not prevent the court from requesting and receiving information relevant to the case before it from international organizations.[179]

It needs be restated herein that acceding to the statute of the court or being a member of the United Nations does not obviate the need for consent of a state, to be interpleaded before the court. The dominant structural feature controlling a states' exposure to the ICJ is that states cannot be sued before the ICJ without their consent. Consequently, consent to the jurisdiction of the court does not exist merely by virtue of a state being a party to the ICJ Statute.

The provision granting access only to states in the court's contentious jurisdiction has been greatly assailed as antiquated and constituted the weakest link in the chain constituting the International Court of Justice[180] and thus making it an important but not dominant player in the field of international dispute resolution.

The criticism remains unassailable. Especially is this so when viewed against the backdrop of some internecine civil wars which assume international dimension in view of the international crises they engender.[181] It is high time provisions are made both in the Charter and Statute granting access to individuals, national groups, non-governmental organizations

178 G A Resolution 9 (1) 1946.

179 Article 34 (2).

180 P Malanczuk, *Akehurst' Modern Introduction to International Law, 7th edn.* (London: Routledge, 1997) p. 283; S M Olokooba, "Between Law and Politics: An Overview of The Law, Practice and Machinery of The International Court of Justice," [2010]1 *EBSU J. Int'l L & Jur. Rev.(Ebsu J.I.L.J.R)* 82.

181 Instances include the Liberian and Sierra Leonean crises; the Darfur crisis in Sudan, the continual Middle East crises which had in its womb the seed of international terrorism ravaging various parts of the world which has resulted in the recent adoption by the U.N. Security Council of Resolution 2170 of (24/09/2014) condemning gross widespread abuse of human rights by the extremists groups in Iraq and Syria.

(NGOs) and public international organization to appear before the court and maintain suits against states for actions by such states which violates international humanitarian norms and practices. The moral and psychological boost a decision of the ICJ could engender will checkmate the inclination for armed conflict as none of the parties would want to court the international opprobrium that will be visited upon it for disobeying the judgment of the court. Moreover, such decisions could be the yardstick for measuring international morality and minimum standard of states responsibility to their citizens. The fact that it may lead to more pressure on the current workload of the court should not be a bar.

4.1.5 Third States Intervention

This is all about the right of a third state or states to intervene in an ongoing action for the purpose of being made a party or parties therein. It is akin to joinder application in domestic proceedings before national courts.

The essence of the court's adjudicatory function is steeped deep in bilateralism – two parties in contentious proceedings. Thus, for third parties in adversarial contentious proceedings, the rule is *res inter alios acta.* There is no formal procedure for joinder of new parties by the court itself nor does the court have any power to *suo motu* direct that third parties be made a party to the proceedings before it.

However given the truism that decisions upon legal matters most often have wider implication beyond the confines of the litigating parties, Article 62 (1) of the Statute provides a leeway for any state which considers that it has an interest of a legal nature which may be affected by the decision in the case to intervene vide the submission of a written request to that effect.

The said Article provides as follows: "Should a state consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the court to be permitted to intervene."

Thus, by the provision of the aforesaid Article, the right to intervene is restricted to matters over which a third state feels it has a legal interest in its determination one way or the other. However, by the provisions of Article 62 (2), the duty of determining what constitutes legal interest for purposes of Article 62 (1) is solely that of the court.[182] Construing interests that are of a legal nature is a matter of law and in fact which the court decides on after the adduction of proof that alleged legal interest is truly involved.

Considering the importance Treaties play in inter-state intercourse, Article 63 of the Statute provides that where the construction of a Convention to which states other than those concerned in the case are parties is in question, the registrar of the court shall notify all such states forthwith. The essence of the notification is to avail the states so notified of the right to intervene in the proceedings and canvas a view that may particularly protect her rights under the Convention or Treaty but which none of the parties directly involved have deemed fit to do so.

The procedural formalities required of a party seeking to intervene in a case before the courts are as provided in the rules of the court.

Article 81 (1) of the Rules of the Court provides the procedural formalities required of a party seeking to intervene in a case before the court. It states as follows:
"An application for permission to intervene under the terms of Article 62 of the Statute signed in the manner provided for in Article 38 paragraph 3 of these Rules shall be filed as

[182] T O Elias**,** *The International Court of Justice* and *Some Contemporary Problems*, (Dordrecht: Martinus Nijhoff, 1983) pp. 84-99.

soon as possible and not later than the closure of the written proceedings. In exceptional circumstances, an application submitted at a later stage may however be admitted".

Paragraph 2 of the said Article 81 states that every application apart from stating the name of an agent shall set out:

(a) The interest of a legal nature, which the state applying to intervene considers may be affected by the decision in that case;

(b) The precise object of the intervention;

(c) Any basis of jurisdiction, which is claimed to exist as between the state applying to intervene and the parties to the case.

The court have had course to determine the actual scope and contents of Article 81 of the Statute. With regards to the words "as soon as possible and not later than the closure of the written proceedings," as provided for in Article 81 (1) of the Statute, the court ruled in *The Libya/Malta Continental Shell (Application of Italy to Intervene) Case* [183] that the application by Italy which had been filed before the time limit fixed for the filing of the parties' counter memorials was within the stipulations of Article 81 (1) and was thus not out of time nor have any formal defects which would render it inadmissible. Consequently, where a special agreement envisaged the possibility of a further exchange or pleadings, even when the replies of the parties had been filed, the date of the closure of the written proceedings within the meaning of paragraph 1 would remain open-ended and finally to be determined.[184]

With regards to Article 81 (2) (a) of the Rules of the Court, the indication of legal interests which may be affected by the decision in the case, the court has held severally in the cases of application for permission to intervene, that once the application sets out such an indication,

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183 ICJ Reports, (1984) 3 and 8.

184 Land, Island and Maritime Frontier Dispute (Application of Nicaragua to Intervene) Case, (1990) ICJ Rep. 92 and 134; Rosenne, Vol. 111, *op. cit.* p. 1467.

the formal requirements are met and whether the indication does show a legal interest which might be affected by the decision or is otherwise adequate is a matter of substance.[185] In *The Land, Island and Maritime Frontier Dispute (Application of Nicaragua to intervene) Case*,[186] the Chamber of the court emphasized that the word "may" as appearing in Article 62 of the Statute and in Article 81 (2) (a) of the Rules means that the applicant state has only to show that its interest "may" be affected, not that it will or must be affected. The requirement of Article 81 Paragraph 2(b) which requires the party seeking to intervene to state the precise object of the intervention, is met if the application to intervene itself contain an appropriate Paragraph. The question of whether the object is indeed sufficient to support an intervention is one of substance which is to be determined on the application for permission to intervene.

Questions arising from third party intervention before the court revolve around the following:

(a) What would be the status of an intervener in the main proceedings? Would he by virtue of such intervention become a full party, such that decisions given in the case would be binding upon it? Or would it be only a participant, without committing itself to be bound by the eventual decision of the court in the principal case.

(b) Whether or not it Is necessary for the intervening state to establish that it has a jurisdictional link with the original litigating state.[187]

Answers to the above questions were provided by a Chamber of the Court in *The Case Concerning the Land, Island and Maritime Frontier Dispute (El Salvador V. Honduras).*[188] The dispute revolves around mainly on the interpretation involving both parties with respect to the waters in the Gulf of Fonseca.

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185 Rosenne, *Ibid.*

186 Land, Island and Maritime Frontier Dispute (Application of Nicaragua to Intervene) Case, *supra* at 117.

187 J Macdonald and J Hughes," *Intervention before the International Court of Justice*," 5 *RADIC* (1993).p.4.

188 ICJ Reports, (1990) p. 92. As far as the interpretation of Articles 62 and 63 of the Statute is concerned, this case represents a watershed as it was the first successful case of third state intervention.

Honduras contended that the court has jurisdiction to delimit the waters in the Gulf of Fonseca and to delimit the territorial sea, economic zone and Continental Shelf of the parties outside the Gulf. El Salvador argued in *contrario*, denying that the court had jurisdiction to delimit those maritime areas. Nicaragua brought an application pursuant to Article 62 of the Statute and Article 81 of the Rules to intervene since it feels that it (ie Nicaragua) had an interest of a legal nature which might be adversely affected by the Chambers decision on the status of the waters of the Gulf.

With respect to the first question (ie status of an intervener), the Chamber stated that a state which is allowed to intervene in a case does not by reason only of being an intervener become also a party to the case.[189] For to hold otherwise would indeed breach the fundamental principle of consensual jurisdiction, as the purpose of intervention is not to enable third states tack on a new case to become a party and to have its own claims adjudicated. Flowing from the above postulation, it is to be noted too that Article 59 of the Statute of the ICJ is inapplicable as to make a judgment of the court binding on the third state intervener. This is so irrespective of the fact that the third state intervener has given undertaking to subject itself to the binding effect of the court's decision. In the words of the Chamber during the merit stage of *The Case Concerning the Land, Island and Maritime Frontier Dispute (El Salvador V. Honduras):*[190]

> A non party whether or not permitted to intervene cannot by its own unilateral act place itself in the position of a party, and claim to be entitled to rely on the judgment against the original parties … the Chamber therefore concludes that this judgment is not res judicata for Nicaragua.

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189 *Ibid*. at p. 134.

190 ICJ Reports, (1992) p. 276; Macdonald and Hughes, *op. cit.* p. 9.

While the above reasoning might seem apt given the fact that the Chamber's decision was based on the procedure under Article 62 of the Statute and the court's veneration of the consensual element, it is our view that such a rule need not apply if the application for intervention was brought pursuant to Article 63 of the Statute. It is hereby contended that in such application, every state party to the interpretation of the treaty should be bound by the court's interpretation of the treaty provisions. Especially is this so when the essence of intervention is to afford a third party an interest which may be affected by a decision of the court.

The second question concerns the jurisdictional link between the original parties and the intervener. It seeks to determine whether the establishment of such a link pursuant to Article 36 (1) and (2) of the Statute is a condition precedent to the court being seised or do Articles 62 and 63 of the Statute suffice in conferring jurisdiction? This issue it is to be noted had long plagued the concept of intervention. The substance of the age-old debate was as follows:

The proponents of the view that a jurisdictional link is required premised their argument upon Article 36(1) and (2) of the Statute and emphasized the consensual element among states before the court can assume jurisdiction over states. Consequently to permit a state to intervene against one or both of the original parties would offend the principle of consent which forms the basis of the court's jurisdiction.

Opponents of Article 36(1) and (2) of the Statute as being a condition precedent to seising of jurisdiction were however of the view that Article 62 of the Statute was of itself sufficient to create a basis for jurisdiction, since all state parties to the Statute of the court are ipso facto subject to the jurisdiction established by the Statute, including the jurisdiction to grant permission to intervene. It was argued further that Article 36(1) of the Statute which states that the jurisdiction of the court "comprises all … matters specially provided for in Treaties

or Conventions in force" was creative of jurisdiction since the Statute of the court was itself a Treaty.

Finally, they contended that Article 62 of the Statute did not impose a requirement for a jurisdictional link, and that the requirement in Article 81 (2) (c) of the Rules of the Court which provides that would-be interveners shall set out "any basis of jurisdiction which is claimed to exist" should not be interpreted as modifying Article 62 of the Statute. Rather, the import of the rule was aimed at third states providing the court with all available information concerning application to intervene.[191] Against the backdrop of the above polemics as to the actual scope of Article 62 of the Statute vis-à-vis the principle of consent as enshrined in Article 36(1) and (2) of the Statute, the court vide its Chamber in *The Case Concerning the Land, Island and Maritime Dispute (El Salvador V. Honduras*)[192] laid to rest the uncertainties as to the jurisdictional basis for third state intervention. While conceding to the consensual element of states as a basis for the court's jurisdiction, it threw more light on the scope of Article 62 and 63 when it held thus:[193]

> Nevertheless, procedures for a third state to intervene in a case are provided in Articles 62 and 63 of the Court's Statute. The competence of the court in this matter of intervention is not like its competence to hear and determine the dispute referred to it, derived from the consent of the parties to the case but from the consent given by them in becoming parties to the Court's Statute, to the court's exercise of its powers conferred by the Statute.

191 Macdonald and Hughes, *Ibid.* p. 20.
192 *Supra.*
193 *Ibid.*

Flowing from the above passage, it thus follows that the existence of a valid jurisdictional link between the would-be intervener and the parties is not a requirement for the success of the application. Rather the procedure for intervention is to ensure that a state with possibly affected interests may be permitted to intervene even though there is no jurisdictional link.[194]

The onus of proof in intervention cases lie on the applicant to demonstrate what it asserts.[195] However, this burden of proof is just prima facie burden. The practice of intervention is closely defined and carefully circumscribed in terms of the protection of a states interest of a legal nature which may be affected by a decision in an existing case. A' priori, it cannot be used as a substitute for contentious proceedings.

4.1.6 The Judgment of the Court

It needs reiterating that every decision of the court requires a minimum of nine elected members who constitute the quorum[196] and a simple majority of Judges present suffices to accord validity to any deliberation arrived at thereon.

Articles 54-58 of the Statute together with Articles 94, 95 (Judgment and Orders) and 107 (Advisory Opinions) of the rules provides for how the formal aspects of the preparation of judgments, advisory opinions and other decisions are to be regulated, whilst Article 19 and 21 of the Rules governs the modus operandi of the court's deliberations on judgments and advisory opinions.[197] The court's deliberations represent a crucial phase in the process of adjudication of a case referred to the court.[198] It can be summarized as follows:

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194 The court has confirmed this principle in the Sovereignty Over Palau Litigation and Palau Sipadan (Application by the Philippines for Permission to Intervene) Case, ICJ Reports (2001) 575 at 589.

195 The Case Concerning the Land, Island and Maritime Dispute (El Salvador V. Honduras), *supra* pp. 117-118.

196 Article 25(3); The exception to this provision seems to be Article 26 dealing with the Chamber jurisdiction of the court wherein the minimum is three Judges.

197 It forms Section D of the rules with an apt title "Internal functioning of the court"

198 Oduntan, *op. cit.* p. 95, Rosenne, *op. cit*. p. 1518.

After the conclusion of the written phase but just before the commencement of the oral pleadings, the Judges of the court hearing the case exchange views, usually during a private meeting of the court. The aim of this is to bring out any issue raised in this first phase which may necessitate calling on the parties to provide further insight during the oral hearing. This is repeated at the end of the first phase of the oral pleadings. By the time the oral proceedings are completed and the Judges have had sufficient period of time to study the case, a formal deliberation is then held. The purpose of this is to examine the case as it presents itself after the hearing and to bring out questions that need to be resolved. It is the duty of the president of the court to outline the issues which in his opinion will require subsequent discussion and decision by the court. Other Judges of the court have the right to comment or to call attention to any other issue or question which they may in their individual capacities consider relevant.

After the completion of this deliberation, each Judge prepares a draft which contains the Judge's views on the numerous questions or issues raised including his tentative answers and conclusions which is then circulated to all the Judges. This procedure enables members of the court to have a first inkling of where the majority opinion may lie and strictly for the use of members only as the draft notes are destroyed by the Registry at the end of the case. After this stage, another deliberation takes place wherein the Judges express their views orally and usually in inverse order of precedence or seniority ie, beginning with any Judge ad hoc as there are and ending with the vice president and president. They answer such questions as their colleagues may put to them. This practice it is to be noted has the effect of making more discernible the make-up of the future majority. At the end of this deliberation, a drafting committee of three members is constituted. Two of the Judges are elected by secret ballot from among members whose personal views most closely and effectively reflect the apparent majority. The third member is the president who sits therein ex-officio except where his views conflict with the majority opinion. In the latter instance, he yields the position to the

vice-president. Where however the vice-president's opinion does not tally with the apparent view of the majority, then the third member of the drafting committee is chosen by election.

The committee's preliminary draft of the decision is prepared in both languages of the court and circulated to members of the court. The Judges may also make amendments. After these have been considered, a draft decision is submitted by the drafting committee for discussion in the court. This takes the form of first reading. After the first reading, the texts of separate or dissenting opinions are circulated after which an amended draft is submitted for second reading. Upon conclusion of the second reading, a final vote is taken on the answers that have been proposed in the final draft judgment of the court on points raised by the parties in their submissions. Members of the court vote "yes" or "no" orally in inverse order of seniority. No abstentions are allowed on any point voted upon as decisions are taken by absolute majority of Judges present.

Should the votes be equally divided, as in where there is a judge ad hoc, the president or the acting president where there is one has a casting vote. By Article 56(1) of the Statute, it is mandatory for the court to state the reasons on which it bases its decision. When the final decision of the court is ready following the procedures highlighted above, notifications are sent to the parties as to the date of the public meeting at which the judgment will be delivered. This procedure it is to be noted is in keeping with the provisions of Article 58 of the Statute. The court's decisions are published in both English and French with the authoritative text appearing on the verso whilst the other appears on the recto.[199] The judgment is sealed and handed over to the Agents of the parties. A copy is sent to the

[199] Note also the import of Article 96 of the Rules which is to the effect that when by reason of an agreement between the parties, the written and oral proceedings have been conducted in one of the court's two official languages and judgment is to be delivered in that language pursuant to Article 39 Paragraph 1 of the Statute, the text of the judgment in that language shall be the authoritative text.

archives of the court whilst the Registrar of the court sends officially one copy each to every member of the United Nations.

4.1.7 Consequences of the Court's Judgment

Article 60 of the Statute of the ICJ provides that the judgment of the court once given is final and without appeal[200]. In the event of a dispute as to the meaning and scope of the judgment, the court shall construe it upon the request of any party.[201] This power is exercised solely for the purposes of seeking clarification on the scope and meaning of a judgment and a dispute must have arisen concerning the scope and meaning of the court's judgment.[202] Interpretation or construction of a judgment cannot go beyond the limits of the judgment. Thus, if the original case was instituted vide the notification of a special agreement then, the limit of the judgment will be determined by the special agreement. Note too that there is no distinction as to the type of judgment that is amenable to the court's interpretative jurisdiction. Consequently, a judgment on preliminary objections as well as a judgment on the merits can be the object of a request for interpretation.[203] However, invoking the interpretative jurisdiction of the court should not be used as a subterfuge for impairing the finality and expeditious implementation of the court's judgment.[204] By Article 59 of the Statute, the decisions of the court bind only the parties to it and in respect of that particular matter. Thus, the doctrine of judicial precedence and *stare decisis* have a narrower application in the International Legal System. However, previous decisions of the court are seldom jettisoned in practice as such decisions are often very influential in the evolution of new rules on International Law. Moreover, where a multilateral Treaty is in issue between two states, it

200 This may entail a review of the court's statute to allow the use of appellate chamber system in the court procedure

201 Article 98 of the Rules of the court.

202 Request for the interpretation of the judgment of 20th November 1950 in the Asylum Case, ICJ Reports 1950, p. 402.

203 Land and Maritime Boundary between Cameroun and Nigeria (preliminary objections) (Interpretation) Case,ICJ Reports (1991) 31 and 36.

204 *Ibid.*

would seem proper to expect an interpretation of such a Treaty to apply generally among parties to the Treaty even as the specific application of the interpretation remains a bilateral matter between the parties to the litigation. This is predicated on the view that Article 59 relates to the issues arising out of the judgment and binding on the parties to that case. It does not affect the quality of the judgment as a judicial decision stating what the law is on that date, moreso as the standing and weight of a judgment is a matter of general International Law.[205]

The fact that a party to the dispute before the court declines to enter appearance or to defend its case does not stop the court from delivering its judgment solely on the basis of the claim before it. However, before doing so, the court must satisfy itself that it has jurisdiction and that the claim is well founded in law and in fact. A' priori, the court tries as much as possible to consider all legal defenses available to the defendant before passing its judgment. Whether this conduct is worthy of the court remains controversial in International Law. Moreso, considering the time hallowed concept of state sovereignty.[206]

Article 61 of the Statute gives an aggrieved party the opportunity to apply for a revision of the judgment of the court.[207] This power can only be exercised if the following conditions are met, to wit:

(a) The application is based upon the discovery of some facts.

(b) The fact, discovering of which is relied on, must be of such nature as to be a decisive factor.

(c) The fact should have been unknown to the court and to the party claiming revision when the judgment was delivered.

(d) Ignorance of this fact must not be due to negligence.

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205 Rosenne, *op. cit.* 1576.

206 Elias, *op. cit.* pp. 122-123.

207 Article 99 of the Rules of Court which expatiated on Article 61.

(e) The application for revision must be made at the latest within six months of the discovery of the new fact.

(f) The application must be made before ten years have elapsed from the date of the judgment.

The rationale for these stringent conditions is predicated on the principle that there should be an end to litigation *(ut sit finis litium*) and that judgments should not be freely expected to be modified except for good cause. All the above listed conditions must be present in an application for revision which will form the basis of the court's judgment on the admissibility of the request for revision. Thus, where any one of the conditions are not met, the court will reject the application without any further need of considering other conditions.[208]

Article 94 of the United Nations Charter makes it obligatory on state parties to comply with the judgment of the court. However, in cases of non compliance, the successful party may have recourse to the UN Security Council which may make recommendations or take binding decisions. However, considering the dynamics of the power politics within the U.N. Security Council, it remains arguable whether the U.N. Security Council has or is living up to its expectations under this provision. This view becomes germane given the use of the veto power among the permanent members of the Security Council. Thus, if a judgment goes against the interest of any permanent member of the Security Council or their allies, resort by the victorious party to Article 94 (2) of the Charter may be ineffective in assuring compliance with the judgment of the court. This is because any of the affected permanent members can

[208] The Application for the Revision of the Judgment of 11th July 1996 in the Case Concerning the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina V. Yugoslavia) Preliminary objections, ICJ Reports (2003) 7; Application for Revision and Interpretation of the Judgment of 1982 in the Libya/Tunisia Continental Shelf Case, (1985) 192; It was probably for reasons of the above stated conditions that Nigeria refused (and correctly too) to institute revision proceedings of the court's judgment in The Land And Maritime Boundary Dispute Between Cameroun and Nigeria, within the ten year rule despite the groundswell of public opinion to that effect.

exercise their veto power to stifle any resolution emanating from the Security Council.[209] An instance of this negative use of the veto instrument by a permanent member of the Security Council occurred in *The Nicaragua Case (Nicaragua V. United States)*[210] wherein consequent upon the judgment of the court against her, the U.S. vetoed a draft UN Security Council resolution calling for full and immediate compliance with the court's judgment.[211]

4.1.8 Relationship of the ICJ with Other Organs of the United Nations:

The system founded by the United Nations for the maintenance of international Peace and Security was (and still is) intended to be comprehensive in its applications. The United Nations system is structured in constitutional terms upon a relatively clear theoretical distinction between the functions of the principal organs of the organization – all geared towards replicating the separation of powers doctrine and the rule of law principle known under domestic law unto the international scene.[212]

The United Nations General Assembly which is indeed representative of the International Community with each state having one vote functions as the Parliamentary organ whilst the Security Council consisting of fifteen (15) members, five of whom are permanent members having the veto power functions as the executive. The International Court of Justice (ICJ) is to be the principal judicial organ. All activities in the socio-economic sphere was entrusted to the economic and social council. The Trusteeship Council was established to supervise the Trust territories created after the end of the Second World War.[213] The Secretariat co-

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209 The hegemonic domination of the Security Council in the contemporary world intercourse, especially the use of veto has continued to elicit criticism. L O Taiwo, "The Imperatives of Reforming the United Nations Security Council in the Post Cold War Era," *J.P.C.L.* Vol. 1, 2006, 112-137.

210 ICJ Reports, (1986) p. 14.

211 Harris, *op. cit.* p.1028.

212 For a discourse on the Rule of Law vis-à-vis the ICJ and the United Nations system;see R Higgins, "The ICJ, The United Nations and the Rule of Law," available on http://www.?se.ac-uk/publicEvents/pdf/2006113_higgins.pdf. Accessed on 14/07/2013.

213 Presently, there exists no such trust territories. Consequently, the Trustee Council exists only in name.

ordinates the administrative duties of the United Nations. All these organs aim at actualizing the objectives underpinning the United Nations system.[214]

Among these organs, the Security Council, General Assembly and the Secretariat play crucial roles in the appointment of the Judges to the ICJ and could also ask for an advisory opinion of the court on any issue pertaining to their areas of competence.[215]

Within the context of this work however, we intend to look at the relationship between the ICJ and the Security Council in bringing about peaceful resolution to any dispute with potential of rupturing International Peace and Security. This is more so given the fact that they are the only organs whose determinations are expected to be complied with by the affected parties.[216]

A community reading of Articles 1 (1), 2 (3), 2(4) and 33(1) of the United nations Charter will show that pacific settlement of dispute is the preferred option for the resolution of conflicting interests among states. The relationship between the International Court of Justice and the political organs of the United Nations raises a great many legal as well as political problems and generally borders on the relations between law on the one hand and the maintenance of International peace and Security. It has been opined that this problem also dogged the League of Nations, though in a different hue.[217]

As an organ of the United Nations, the court clearly constitutes part of the mechanism for the maintenance of peace and international security moreso when it is a principal organ. However the fact that there is no hierarchical relation between any of the other principal organs of the

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214 These objectives are encapsulated in Articles 1 and 2 of the Charter.

215 In practice, only the General Assembly and the Security Council have powers to request for advisory opinion on any issue of concern. Other organs and agencies must circumscribe their request within the limits of their functions.

216 Article 25 and 94 of the Charter respectively.

217 Alain Pellet, "The International Court of Justice and the Political Organs of the United Nations," Available at http://www.alainpellet.eu/documents/pellets-1995-the ICJ and the political organs of the United Nations pdf. Accessed on 07/07/2013.

United Nations confers primacy on a given organ within the spheres of its functions as granted by the Charter. Thus, as the principal judicial organ of the United Nations, its primacy in that arena places its legal determination high over those of the political organs just as the primacy of the Security Council in determining threats to international Peace and Security is guaranteed. However, whatever the actions the political organs take, such is expected to conform to the Charter provisions and if it is accepted that the Charter is a legal document, then the ICJ's position becomes ever more relevant in complementing the political organs and guiding them into not extending their authority into judicial matters so as to avoid creating legal norms through non legal processes. Herein lies the dilemma of the relationship between the ICJ and the political organs of the United Nations, to wit; the General Assembly and the Security Council. Moreso when it is realized that the Charter contains no formal provisions for judicial review of the political organs' actions.[218] Consequently, the legal effects of the resolutions of these organs must be interpreted through the structural principles within the Charter, the authority and competencies of the organs and the case law of the ICJ.[219] To avoid the loss of institutional legitimacy and co-operation of member states, they must engage in auto interpretation of the validity of their actions as allowed under the Charter.[220] The onus is therefore on the political organs to police their behavior. This could be herculean when considered against the fact that the political bodies make determinations most times according to the national interest o f their members.[221]

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218 G R Watson, "Constitutionalism, Judicial Review and the World Court," 34 *Harv. Int'l L.J.* (1993) p.1 at 4.

219 M Angelir, "The International Court of Justice's Advisory Jurisdiction and the Review of Security Council and General Assembly Resolutions," Available at http://www.law.northwestern.edu/lawreview/v/03/n2/1007/LR103n2Angelir.pdf. Accessed on 20/07/2013.

220 Keith Harper, "Does the UN Security Council have the Competence to Act as Court and Legislature?" 27 *N.Y.U.J. Int'l & Pol,* (1994) p. 103 & 106.

221 T Voon, "Closing the Gap between Legitimacy and Legality of Humanitarian Intervention: Lessons from East Timor and Kosovo," 7 *UCLA J. Int'l L. & Foreign Affairs* (2002) p. 31 & 38.

The political organs' relations to International Law in carrying out their duties under the Charter are different from that of the ICJ. In contrast to the political process, the law is primarily based on considerations of fairness and normative application of rules. Because, the court uses legal concepts and legal methods of proof, its tests of validity and the bases of its decisions are naturally not the same as they would be before a political or executive organ of the United Nations. The political organs examine questions in their political aspect and thus are legally entitled to base their arguments and their vote upon political considerations. Characterizing this process, Higgins opined that the political organs' decision making process is one made not "according to law" but "within the law".[222]

The peaceful settlement of disputes and maintenance of international peace and security are two different but inter connected issues. As can be gleaned from a community reading of Articles 2(3)[223] and 2(4)[224] of the Charter, a peaceful settlement of disputes is instrumental to the maintenance of International Peace and Security.[225] In this wise, Chapter VI of the Charter is very relevant as it suggests that a situation might arise out of a dispute the continuance of which is likely to endanger the maintenance of International Peace and Security.[226] Similarly, the situation also may lead to international friction.[227] In view of the foregone, the judicial autonomy and legitimacy of the ICJ is of high moment and very fundamental to the healthy functioning of the United Nations system. The structural principles embedded in the United Nations Charter makes it imperative that the ICJ do not cede control over judicial determination to political organs guided by the national interests of

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222 R Higgins," The Place of International Law in the Settlement of Disputes by Security Council," 64 *AM. J. Int'l.* (1970) 1, 16.

223 It provides thus: All members shall settle their international disputes by peaceful means in such a manner that International Peace and Security and justice are not endangered.

224 It is to the effect that all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state or in any manner inconsistent with the purposes of the United Nations.

225 N Ronzitti, "Juridical Institutions and Security," Available at http://www.uu-globalsecurity.org/pdf/rouzitti.pdf. Accessed on 20/07/2013.

226 Article 33(1) and 34 of the United Nations Charter.

227 *Ibid.*

member states. Thus, the ICJ it has been argued must bring to bear on international disputes the inherent advantage of the judicial process – an adversarial process that finds true facts and ensures the correct application of International law.[228]

Within the context of this work and against the backdrop of the fact that only the Security Council and the ICJ seem to enjoy concurrence of jurisdiction in respect of disputes involving two or more countries,[229] we intend to focus more closely on the relationship between the ICJ and the Security Council in bringing about peaceful resolution to any dispute with potentials of rupturing International Peace and Security.

Chapter 6 of the United Nations Charter (i.e. Articles 34-38) invest the Security Council with the powers to settle disputes amicably whilst Chapter 14 of the Charter (i.e. Article 92-96) and Article 38 of the Statute also invest the ICJ with the powers of amicable settlement of disputes. A grey area here is whether the ICJ as the principal judicial organ of the United Nations have powers to judicially review the actions of the Security Council especially where the seising of the Security Council seem to be in neglect of Article 36(2)[230] of the Charter and the roles expected of the Security Council under Article 94(2)[231] of the Charter. Relatively also can the court review the Security Council action taken under Chapter 7 of the Charter.

These questions become germane given the increased range and nature of the Security Council activities in recent times and rising visibility of the ICJ. A political organ's relation

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228 M Angelir, *op. cit.* p. 1008. It is possibly in furtherance of this that the Charter and Statute provides for the advisory jurisdiction wherein the organs can seek advisory opinion from the court on legal issues. The Security Council is specifically enjoined in Article 36(3) to refer disputes of a legal nature to the ICJ.

229 Article 12 of the Charter specifically prohibits the General Assembly from making any recommendation with regard to any dispute or situation while that dispute or situation is being considered by the council.

230 It provides as follows: [T]he Security Council shall take into consideration any procedure for the settlement of the dispute which have already been adopted by the parties.

231 It states thus: [i]f any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security council which may if it deems it necessary make recommendations or decide upon measures to be taken to give effect to the judgment.

to International Law in carrying out their Charter-related duties is fundamentally different from that of the ICJ. Unlike the political process, the law is primarily based on considerations of fairness and normative application of rules. However, the political character of an organ cannot release it from the observance of the Treaty provisions established by the Charter when they constitute limitations on its powers or criteria for its judgment.[232] Article 24(2) of the Charter enjoins the Security Council in carrying out its functions to act in accordance with the purposes and principles of the Charter. In consideration of this specific grant of power and the increasing roles, vibrancy and visibility of the Security Council in inter-state conflict prevention and management, the question has arisen as to whether there exists a body capable of ensuring that the Council does act in accordance with the United Nations Charter and International Law. Poignantly put, who would be the ultimate guardian to decide the legality of the Security Council actions? If the dictum of Judge Lachs is to be considered, then the ICJ as the principal judicial organ of the United Nations seems to be the natural choice.[233]

It needs stating at this juncture that much of the confusion about the relationship between Council and Court stems from the Council's seemingly judicial powers under Chapter VI which some writers have argued do no relate coherently to the rest of the Council's powers which focus on enforcement capabilities.[234] A closer appraisal of Articles 37 and 38 of the

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232 *Condition For Admission Of A State To Membership In The United Nations*, ICJ Reports (1948) 57; also available at http://www.Isa.org/jessup/jessup07/basicmats/icj_advisory_opinion.pdf. Accessed on 11/9/2013.

233 In the *Lockerbie Case*, ICJ Reports (1992) p. 3 at 26, he posits that the ICJ is the guardian of legality for the international community as a whole both within and without the U.N. See also K Roberts, "Second-Guessing the Security Council: The International Court of Justice and its powers of Judicial Review," Pace Int'l Rev (1995) available at http:www.globalpolicy.org/worldcourt/Roberts.htm. Accessed on 23/7/2013; A. Constantinides, "An Overview Of The Legal Restraint On Security Council Chapter VII Action With A Focus On Post-conflict Iraq," Available at http://www.esil-sedi.eu/sites/default/files/constantinides_0.pdf.Visited on 11/9/2013.

234 N D White, "The United Nations and Maintenance of International Peace and Security," cited in Kathleen R Cronin-Furman, "The International Court of Justice and the United Nations Security Council: Rethinking A Complicated Relationship," Available at http://ejournal.narotama.ac.id/files/THE INTERNATIONAL COURT OF JUSTICE AND THE.pdf. accessed on 11/09/2013.

Charter wherein the Security Council is invested with power to recommend terms of dispute settlement would seem to overlap with the ICJ's role as a judicial organ. This is moreso when it is realized that a binding decision which is of a judicial nature could be taken in the course of dealing with a case before the Security Council as for instance the adjudication of a contested territory to one of the disputing parties.[235] The tension between the roles of the ICJ and the Security Council also becomes apparent when juxtaposed with the Security Council's jurisdiction over international peace and security. Especially is this so when it is realized that the end of the cold war era has evidenced to a great extent a lack of checks on the Security Council's action in framing a threat to or breach of the peace within the meaning of Chapter VII of the Charter.[236] This has in turn engendered questions on the court's ability to decide legal matters relating to the Security Council's Chapter VII competence. Thus, is the Security Council to be left absolutely uncontrolled? Should the ICJ exercise judicial review over the Council's actions?

Neither the Charter nor the Statute contains any specific provision on independent judicial review by the court, of a decision of the Security Council or of any other organ. Proponents of the court assuming some powers of judicial review anchor their arguments on the provisions of Article 25 of the Charter which states that the member states agree to accept and carry out the decisions of the Security Council that are "in accordance with the present Charter". Thus, the Security Council as a body created by an International treaty, The United Nations Charter must first and foremost act in accordance with the purposes and principles of that Treaty. The purposes and principles of the Charter embrace the whole corpus of International Law including existing customary norms as general International Law.

235 Cronin-Furman, *cf.* O Schachter, "The Quasi-Judicial Role of the Security Council and the general Assembly," 58 *AM J. Int'l L* (1964) p. 960; R Higgins, " The place of International Law in the Settlement of Disputes by the Security Council," 64 *Am. J. Int'l L* (1970) p.1 at p. 17. The latter writers are of the view that Articles 37 and 38 were not intended to grant an adjudicative role to the Council.

236 On the effect of the cold war era in holding the checks and balances in the Security Council, see A Husain, "The United States and the Failure of the U.N. Collective Security: Palestine, Kashmir, and Indonesia 1947-1948, 101 *AM.J. Int'l L* (2007) p. 581 at 582.

Consequently, any action of the Security Council contrary to the basic purpose and principles of the United Nations is contrary to International Law. A' fortiori, the court has the power to decide whether or not a decision of the Security Council is *ultra vires* or *intra vires* the Charter provisions. It needs emphasizing at this juncture that at the San Francisco Conference, a specific proposal to confer the power on the court to determine the legality of each organs resolution was rejected.[237]

4.1.9 Judicial Review Questions through the Case Law of the ICJ

In the course of exercising contentious and advisory jurisdiction, the ICJ has had opportunity to consider its relationship with the Security Council on a member of occasions. Two issues have dogged this relationship, to wit:

(a) Whether the two organs may consider a matter concurrently, and

(b) Whether there are areas over which the Security Council has exclusive jurisdiction.[238]

(A) Concurrent Consideration of an Issue by both Organs:- There is no provision in the Charter barring the court from taking up any matter already before the Security Council. This is unlike the provisions of Article 12 of the Charter which prohibits the General Assembly from deliberating upon any matter already before the Security Council. Consequently, the ICJ has never considered itself to be similarly constrained. In *The United States Diplomatic and Consular Staff in Tehran (U.S. V. Iran) Case*,[239] the ICJ rejected Iran's contention that it should not consider the hostage situation because it constitutes part of an overall political conflict between both nations which was then under consideration by the

237 H Hossain, *op. cit.* pp. 147-148; M Angelir, *op cit.* p. 1025.

238 It needs stating herein that a particular case may have two issues implicated in it.

239 ICJ Reports (1980) 3 at 20; R A Akande, "Methodological Problems Faced by the International Court of Justice in the Application of International Law," [2010] 1 *EBSU J .Int'l L,* 86.

Security Council. It reasoned that resolving the legal question could be useful in bringing about a peaceful resolution of the dispute.

However, the concurrent determination of an issue by both organs could create an absurd scenario whereby a final determination of one organ could preempt and render ineffective the decision to be rendered by the other organ. Especially is this so when it is realized that judicial deliberations are much slower when compared to political deliberation. This scenario played out in *The Lockerbie Case* [240] wherein the ICJ's refusal to grant provisional measures to Libya was based on the fact that the Security Council had already issued a binding resolution requiring Libya to comply with requests for extradition of her nationals by United States and Britain. A brief illustration of the facts is deemed necessary here.

In that case, the United States and United Kingdom accused two Libyan Security Operatives Abdelbaset Ali Mohammed, Al-Mayrahl and Al Amin Khalifa Flimah of having placed a destructive device aboard a Panam Flight 103 which device exploded and led to the crash at Lockerbie, Scotland on 21st December 1988 with resultant loss of 270 lives. The U.S. and U.K. sought the extradition of the Libyan officials to either U.S. or U.K. for trial. They also got the U.N. Security Council to pass a resolution condemning the killings.[241]

Fearing reprisal attacks from U.S. and U.K. Libya instituted two parallel proceedings before the ICJ against the U.S and U.K. respectively, alleging a violation of its rights under the Montreal Convention[242] especially article 7 thereof which grants Libya a choice between extradition and prosecution of the alleged offenders. Libya also pursuant to Article 41 of the Statute requested that Pendent Lite, the court should grant its provisional measures restraining both U.S. and U.K. from taking any action prejudicial to her rights as a state.

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240 ICJ Reports (1992) p. 3; G A Sarpong "The Lockerbie Incident and The International Court of Justice: Reality in The New World Order," *ASCIL Proc*. 5 (1993) pp. 64-74.

241 Resolution 731 of 1992.

242 Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation 1971

On 31st March 1992, three days after the close of hearing on the request for indication of provisional measures but before the court has reached a decision, the Security Council acting under Chapter VII of the Charter passed Resolution 748 of 1992 directing Libya to handover the two suspects for trial by U.S. or U.K. failing which sanctions would be invoked against her. This resolution turned out to be the basis of the court's ruling.[243] The court held by eleven votes to five that the parties as members of the U.N. were obliged to accept and carry out the decisions of the Security Council in accordance with Article 25 of the Charter and that this obligation extends to the decision contained in Resolution 748. They also ruled that the Montreal Convention is inapplicable as under Article 103 of the Charter, the obligations of the parties under the Charter prevails over any other international agreement including the Montreal Convention.

It might be argued that the Security Council was already seised of the matter by virtue of Resolution 731 when Libya made its application to the court and thus the court was right in avoiding the jurisdictional conflict. This argument is easily debunked by the fact that Resolution 731 was adopted under Chapter VI of the Charter and thus could be considered a legal dispute concerning the interpretation of the Montreal Convention. This is how far it goes. The adoption of the second Resolution engendered a different direction upon the nature of the dispute[244] and forms the trust of the variegated views among legal scholars on the need for judicial control over the actions of the Security Council. While the reasoning of the court on the primacy of the Charter over other Treaty provisions remains unassailable, the problem however with Resolution 748 which was passed after the oral hearing and the respective roles of the ICJ and the Security Council in the maintenance of international peace and security

243 Sarpong, *op. cit.* p. 69.

244 Resolution 748 of 1992 implied that non compliance by Libya with the request made by Resolution 731 of 1992 constitute a threat to International Peace and Security within the meaning of the Charter. See also K Hossain, *op. cit.* at 153.

under the U.N. Charter. While it is agreed that the Security Council enjoys absolute discretion under the Chapter VII, such discretion is however constrained by the Charter provisions. This is against the backdrop that in taking steps to counter threats to international peace and security, the Security Council as a political organ also creates a legal obligations and interpret International Law in the process of passing Resolutions. These resolutions deal with questions of law that ought to be resolved through the normative application of rules. This normative application requires procedural safeguards that will ensure that the Law is applied correctly and that due process rights of affected parties are upheld. These procedural safeguards are lacking in the political organs of which the Security Council is one. This can be contrasted vis-à-vis the ICJ which has twenty-six Articles in its Statute dealing with the procedural safeguards necessary to ensure due process rights of the parties. Consequently, these political organs disregarded the due process rights of affected parties when they pass Resolutions that create legal obligations and forecloses possible legal defense. A' fortiori, when the Security Council adjudicates issues of law and fact without these procedural safeguards, it is far more likely to decide the issues in an arbitrary and capricious manner. A' priori, when the ICJ is confronted with the political organs' creation of legal obligations and clarification of International Treaties, it should exercise its Charter derived jurisdiction and not defer to the factual and legal determinations in the Resolution.[245] Ditto to a situation where the Security Council encroaches upon the functions of other organs in a manner contrary to the provisions of the Charter.

(b) Whether there are Areas over which the Security Council has Exclusive Jurisdiction

The Security Council's jurisdiction over international peace and security has heightened the tension between the roles of the ICJ and the Security Council. Especially is this so given the

[245] Angelir, *op. cit.* p. 1025.

increased numbers of enforcement actions under Chapter VII of the Charter by the Security Council since 1990's and onwards. This has in turn engendered the question whether the Security Council's Chapter VII powers are exclusive or whether they are subject to legal limitations.

The issue of whether there is a limit to the Security Council's Chapter VII powers first arose in the *Nicaragua Case*[246] wherein the U.S. argued that the ICJ should not be permitted to decide on the application of Article 51 to the U.S. claim that its actions in Nicaragua constituted the exercise of "a right of collective self-defense"[247] as that power was reserved to the Security Council. The ICJ while responding to that contention held that while Article 51 indeed requires that actions taken in self-defense should be reported to the Security Council, that requirement does not suffice to grant the Security Council exclusive jurisdiction over the legality of such actions. It might seem attractive to argue that the ICJ has not been granted any specific authority to play a role in the actions prescribed in Chapter VII of the Charter, moreso given the need for a quick and effective response to threats to international peace and security, determination of which include a consideration of a number of social, political and circumstantial factors which cannot be weighed and balanced objectively by a judicial body as the ICJ.[248] Given the fecundity of the Security Council in the area of collective security and determining threats to international peace and security since the end of the cold war, there is a welter of opinion on the need for some guardian of legality for the U.N. system. True achievement of the U.N. Charter's purposes and principles make it imperative that the ICJ performs its Charter imposed duty to rule on claims well founded in fact and law.

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246 Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua V United States of America) ICJ Report (1984) 392. Also available at http://www.icj-cij.org/docket/files/70/9627.pdf. Accessed on 12/9/2013.

247 Under Article 51 of the ICJ Statute.

248 Not because of any supposed inherent limitations of the international judicial function but because they are not questions to which International Law which the court is charged to apply by Article 38 of its Statute, provides an answer.

Asserting its roles as principal judicial organ is necessary to ensure the rights of litigants and the normative application of law to factual disputes.

4.2 The International Criminal Court: History and Rationale

The International Criminal Court[249] represents the culmination of efforts[250] at institutionalizing and entrenching on the conscience of the international community the ethos and values latent in a burgeoning area of public International Law to wit: International Criminal Law (ICL). International Criminal Law shares a considerable relationship with International Human Rights Law[251] and both represent overlapping and inter-related branches of Public International Law. The inter-dependency of both genre of Public International Law is mirrored by the fact that impetus for the creation of either national or international tribunals on issues bordering on International Human Rights violations and/or its criminalization has always been anchored on the demand for justice and the concomitant felt need for accountability in cases of gross human rights infractions.

Consequently, the development of International Criminal Law matched *pari-pasu*, the progress made in the field of the international standard-setting of human rights[252] and thus has gone beyond concerning itself with traditional issues like piracy, terrorism and drug trafficking to embrace crimes which directly offend International Human Rights norms. This interface is easily gleaned through Conventions on the non-applicability of statutory limitations to war crimes and crimes against peace and security of mankind prepared by the

249 Hereinafter referred to as ICC.

250 C C Nweze "Definition of Crimes in the Rome Statute of the International Criminal Court: Implications for the Protection of Human Rights Norms" *(UNIZIK) LJ* Vol. 6 No. 1 p. 135; Nelson Ojukwu Ogba "Implication of the Jurisdiction of the International Criminal Court for African States," Human Rights Review Vol. 1, No. 1 October 2010, 406-415.

251 J Rehman, *International Human Rights Law*, 2nd edn. (London: Pearson Education Ltd, 2010) p. 715.

252 C Bassiouni, "International Criminal Law and Human Rights," 9 *Yale Journal of World Public Order* (1982) 193; see also Shaw M. *op. cit.* p. 397; K Kittichaisaree, *International Law*, (Oxford: Oxford University Press, 2001) p. 56.

International law Commission, the International Convention on the Suppression and Punishment of the Crime of Apartheid, the Convention Against Torture, etc.[253]

Definition wise, International Criminal Law can be defined as a set of international legal rules which seeks to proscribe international crimes and to impose upon states the obligation to prosecute and punish those crimes. An international crime in the words of Dr. Ama-Oji refer to those international wrongful acts which result from the breaches of those international obligations that are so essential for the protection of the fundamental interest of the international community that its breach is recognized as a crime by the international community as a whole.[254] Professor Bassiouni defines International Criminal Law as a complex legal discipline consisting of overlapping and concurrent sources of law and emanating from international legal systems and from national legal systems.[255] M.T. Ladan defined it from the dichotomization point of view as the branch of Public International Law that aims at helping victims of international crimes against humanity, genocide and war crimes to achieve justice and truth by ensuring that perpetrators of such crimes with impunity does not go unpunished in accordance with the due criminal process.[256]

The major goals of International Criminal Law are:

1. The reaffirmation of international legal order.
2. The realization of the purposes of punishment especially individual and general deterrence.[257]

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253 For greater details on these interface; see Rehman *op. cit.* p. 716.

254 E Ama-Oji, *Responsibility for Crimes Under International Law*, {Lagos: Odade Publishers, 2013) pp. 4-7; D F Atidoga, "From Impunity to Accountability; Individual Criminal Responsibility Under International Law: A Historical Survey," *Human Rights Review*, vol. 1. No. 1 October 2010 at 202; C C Nweze, *op. cit* 157; B B Ferenez, "An International Criminal Court: A Step Towards World Peace" Available at http://www.benferenez.org/sohu2.htm. Accessed on 13/08/2013.

255 C Bassiouni "The Sources and Content of International Criminal Law: A Theoretical Framework," in C Bassiouni (ed*) International Criminal Law*, *Crimes*, (New York: Transnational Publishers, 1998) Vol. 1-3-126.

256 M T Ladan, *Materials and Cases on Public International law,* (Zaria, ABU Press Ltd, 2007) p. 219.

257 *Ibid.*

Its sources of law remain the same as that of Public International Law. For instance, among Treaty Law, the substantive and procedural laws of the International Tribunal of Nuremberg,[258] the 1998 Statute of the International Criminal Court, the four Geneva Conventions and the three additional protocols play pivotal roles in shaping the content and context of its precepts. Ditto to Customary International Law which is drawn from analyzing state practices, case-law and the practical implementation of Treaties. General principles of International Criminal Law also play an instrumental role. For example, the presumption of innocence, the rule against the retroactivity of criminal legislation, etc.[259]

The institutional framework for actualizing the precepts of International Criminal Law has its roots in the aftermath of the First World War in 1919 wherein the Commission on the Responsibility of Authors of the War and the Enforcement of Penalties advanced the idea for the establishment of a high tribunal made up of Judges drawn from many nations.[260]

However, the first real and substantial effort at the concretization of International Criminal Law occurred in the aftermath of the Second World War wherein the felt need to punish and bring to justice those involved in acts of genocide and crimes against humanity spurred efforts aimed at the establishment of a Permanent International Criminal Tribunal. In the summer of 1945, representatives of the victorious allied powers involved in the Second World War gathered in London, where a decision was taken to prosecute with the aim of punishing high-ranking Nazi war criminals. Subsequently, on August 8th, 1945, the London Agreement for the Prosecution and Punishment of Major War Criminals of AXIS Powers was concluded. It had attached to it the Nuremberg Charter on the establishment of the

258 For the text of the Charter of the IMT, See http://avalon.law.yale.edu/imt/imtcourt.asp visited on 13/01/2013.

259 J Rehmam, *op. cit.* p. 717.

260 Report presented to the Preliminary Peace Conference by the Commission on the Responsibilities of the Authors of War and on Enforcement of Penalties, cited by J Rehman, *ibid;* also available at http://en.wikipaedia.org/wiki/commission_of_responsibilities visited on 13/08/2013.

International Military Tribunal. Article 6 of the International Military Tribunal listed the offences for which trial is to be had and punishment meted out to include;

(a) Crimes against peace[261]

(b) War crimes[262]

(c) Crimes against humanity[263]

While the end of the Second World War hostilities ignited appreciable level of activity in the advancement of International Criminal Law mainly due to the hope placed on the Nuremberg (and later Tokyo) trials[264] being a veritable source of jurisprudence upon which will form the fulcrum for consolidating the emergent principles of crimes against humanity and genocide,[265] the post Second World War power politics shattered this hope, the chief culprit being the cold war politics wherein power blocs led by the United States and the defunct USSR could not agree on the establishment of a common Permanent International Criminal Tribunal.

The collapse of the cold war in the early nineties and the demise of the Soviet Union led to a thaw in the relationship between former adversaries of Western and Eastern Europe. This era witnessed greater collaboration and agreement within the Security Council thereby rekindling hope for the prosecution of international crimes such as crimes against humanity and

261 Involves the planning, preparation, initiation or waging of war of aggression or a war in violation of International Treaties, agreements or assurances or participation in a common plan or conspiracy for the accomplishment of any of the forgoing.

262 This embraces the violation of the laws or customs of war. Such violations shall include but not be limited to murder, ill-treatment or deportation to slave labour or for any other purposes of civilian population of or in occupation of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas killing of hostages, plunder of public or private property destruction of cities, towns or villages or devastation of cities, town or villages or devastation not justified by military necessity.

263 Includes murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population before or during the war or persecution on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the tribunal whether or not in violation of the domestic law of the country where perpetrated.

264 E A Oji and C T Nwangene, "The International Criminal Court and Its Impact on International Peace and Security," (2010) 1 *EBSU J. Int'l & Jur. Rev. (EBSU J.I.L.J.R.*) p. 149.

265 Genocide within this period evolved as an independent crime within International Law against the backdrop of the coming into existence of the Genocide Convention.

genocide. This era ironically coincided with terrible human rights violations across many parts of the world. Speaking of this era, Rehman[266] posits thus:

> The super power rivalry which during the cold war period had managed to sustain a modicum of international political order and stability dissipated with the collapse of the Soviet Empire. The demise of communism in Eastern Europe unleashed forces of chaos and anarchy accompanied by, as was witnessed in the break-up of the former Yugoslavia, considerable bloodshed and human rights abuses. The hundred days of genocide in Rwanda was one of the worst atrocities witnessed in the twentieth century.

Despite the sense of revulsion of the International Community coupled with calls for due process and accountability, neither domestic courts nor international institutions had appropriate judicial mechanisms for providing requisite remedies and criminal sanctions.

Efforts were made to redress this lacuna in the judicial machinery as the Security Council acting under its Chapter VII powers under the United Nations Charter established ad hoc tribunals for the former Yugoslavia[267] and Rwanda.[268] Despite their modest efforts at bringing justice to perpetrators of International Crimes, these ad hoc tribunals could not assuage the desire by many, of a Permanent International Court with criminal jurisdiction only.[269] Thus was sown the seed that ultimately gave birth to the International Criminal Court.

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266 J Rehman *op. cit.* p. 723.
267 Established vide Resolution 827 of 1993.
268 Established vide Resolution 955 of 1994.
269 For criticism of the work of these tribunals; J Rehman *op. cit.* pp. 723-725.

The tumults of the twentieth century inter-state relationship which bore witness to incredible amount of international and regional conflicts resulting arguably in the commission of the worst atrocities in human history wherein more than eighty-six million deaths were recorded in over two hundred and fifty conflicts[270] provided a veritable impetus for the establishment of a supra-national Permanent International Criminal Court. However, the idea of such a court had earlier been nursed in 1948 when the United Nations General Assembly assigned the task on the propriety and feasibility of establishing such a court to the International Law Commission. The Commission concluded its first session in 1949 with a recommendation that the establishment of such a court was both desirable and possible.[271] In furtherance of this recommendation, the General Assembly assigned the task of preparing the draft statute to another committee established by it which subsequently went ahead to produce the draft statute. However, the definitional haze surrounding the crime of aggression led to a deferment in considering the draft statute. However, despite the difficulties associated with the crime of aggression in 1974[272], political considerations conduced to stultify the consideration of the draft statute.[273] A renaissance towards the establishment of a Permanent International Criminal Court was held in 1989 vide the suggestion of A.N.R. Robinson, the then Prime Minister of Trinidad & Tobago at the Forty-fourth Session of the General Assembly. Appalled by the plague of illicit drug trafficking across national boundaries and

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270 M T Ladan, "An Overview of the Rome Statute of the International Criminal Court: Obligations of State Parties and Issues in Domestic Implication in Nigeria," in M O Unegbu and I Okoronye (ed) *Legal Developments In The New World Order,* (Port-Harcourt: Jite Books, 2009) p. 178; J Rehman *ibid*. p. 725.

271 E A Oji & C T Nwangene p. 149.

272 Vide G A Res. 3314 (XXIX) of 14 December, 1974. *Cf.* S N Anya, "From U.N. Charter to the ICC: Getting Nowhere with Global Peace and Security Without Sanction on Aggression," *J.I.C.L.* Vol. 11 (2012) p. 23; in accordance with Articles 121 and 122 of the Statute, an amendment was adopted at the Review Conference of the Rome Statute in Kampala, Uganda, which defined the crime of aggression in terms of Resolution 3314 of 1974 but its operative date was deferred till January 1, 2017. For details on this amendment; http://en.wikipaedia.org/wiki/Amendments_to_the_Rome_Statute_of_the_International_Criminal_Court. Visited on 13/08/2013.

273 Shaw *op. cit.* p. 140.

other transnational criminal activities, he advocated for the creation of a Permanent International Criminal Court to deal with the offence of drug trafficking.

The General Assembly took up the proposals from Trinidad & Tobago and directed the International Law Commission (ILC) to "address the question of establishing an International Criminal Court"[274] The ILC's report which turned out to be more comprehensive as it was not entirely focused on the subject of drug trafficking was submitted in 1990 and favourably received by the General Assembly. The ILC was encouraged to develop further the draft of the International Criminal Court. This they successfully did and turned in their report in 1994 with a recommendation that a conference of plenipotentiaries be convened in order to conclude a Convention on the establishment of an International Criminal Court.[275] Upon the receipt of the ILC draft Statute, states wished to have an opportunity to examine the draft as the commission's work was considered to be that of an expert body.[276] In consequence thereof, the Assembly established an Ad Hoc committee on the establishment of an international criminal court to review the major substantive issues in the draft Statute. In 1995, vide Resolution 50/46 of 11th December, the General Assembly established a Preparatory committee for the establishment of an International Criminal Court (Prepcom). The Committee prepared a consolidated text using the ILC Draft Statute as a basis while taking into account the proposals and amendment submitted by states.[277] It needs stating at this juncture that there exist significant differences in the nature of the assignment of the Ad Hoc and Preparatory committees. While the Ad Hoc Committee's role was of a more general

274 G A Res. 44/39 of 4 December 1989.
275 E.A Oji and C T Nwangene , *loc. cit.*
276 *Ibid*.
277 *Ibid*; Lee S Roy, *The International Criminal Court: The Making of the Rome Statute-Issues, Negotiation and Results,* (The Hague: Kluwer Law International, 1999) p. 26.

nature as regards the proposition of having a viable court, the focus of the preparatory committee was squarely upon the text of the court's statute.[278]

The Prepcom consisted of representatives of states as well as that of non-governmental organizations and international organizations. It thus had the unenviable task of drafting a comprehensive instrument which was practicable and yet acceptable to all relevant parties. The Prepcom had two to three weeks sessions in 1996 and presented the General Assembly with substantial revisions to the draft ILC Statute. In December 1996, the General Assembly decided that the Prepcom should convene in two three week sessions and in its first session 1997-1998 "complete the drafting of a widely acceptable consolidated text of a Convention and that a diplomatic conference of plenipotentiaries shall be held in 1998 with a view to finalizing and adopting a convention on the establishment of an International Criminal Court.[279]

After a series of sessions during 1997-1998, the Prepcom succeeded in submitting to a Diplomatic Conference held in Rome in July 1998, a draft statute and a draft final Act comprising of 116 Articles spanning 173 pages of text but with some 1300 words in "square brackets."[280] The "square brackets" indicated those issues of disagreement yet unresolved.

The diplomatic conference also known as the United Nations Conference on plenipotentiaries on the establishment of an International Criminal Court took place between 15-17 July 1998 in Rome, Italy. It had participants from 160 states and over 200 non-governmental organizations. The political groups highlighted the complexities facing the future of the

278 J Rehman, *op. cit.* p. 276; Arsanji M.H. The Rome Statute of the International Criminal Court" 93 *AJIL* (1999) 22.

279 G A Resolution 51/207 of 17 December 1996.

280 Rehman *loc. cit.*

court.[281] The first political group comprising like-minded states numbering about 60 was made up of European and Commonwealth states.[282] The like-minded states favoured the establishment of strong court with automatic jurisdiction over core crimes of genocide, crimes against humanity, war crimes and aggression, removal of the use of veto powers in the Security Council and an independent prosecutor with the authority to institute proceedings *proprio motu*.[283]

The second political grouping, the so-called "P-5" was led by the United States. This group opposed the automatic jurisdiction status for the court and to the prosecutor being granted the power to initiate proceedings. They were also vociferous in efforts to ensure that extensive powers were granted to the Security Council both in its ability to refer matters to the International Criminal Court and also to prevent cases being brought before the court. In essence they were of the view that the International Criminal Court prosecutions be restricted to cases referred to it by the Security Council.[284] Other caucuses also emerged to champion other areas of interest.[285] After series of horse trading and compromises,[286] the Statute of the International Criminal Court was finally adopted on 17th July 1998 at the headquarters of the Food and Agricultural Organisations by a vote of 120 to 7 with 21 abstentions. The International Criminal Court Statute entered into force on July 1 2002 following its

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281 For further and useful information on the conference; htt://untreaty.un.org/cod/icc/statute/finalfra.htm visited on 13/08/2013.

282 W A Schabas, *An Introduction to International Criminal Court*, (Cambridge: Cambridge University Press, 2001) p. 15.

283 J Rehman, *loc. cit.*

284 *Ibid;* Goldsmith, "The Self-Defeating International Criminal Court," University of Chicago Law Review (2003) p. 89.

285 This include the Non-Aligned Movement which wanted the court to have jurisdiction over crimes of aggression and drug trafficking; the Arab and Islamic group campaigned for the prohibition of nuclear weapons and the retention of capital punishment in the Statute while others like India, Sri Lanka, Algeria and Turkey wanted the inclusion of Terrorism to be part of the court's jurisdiction. See also J Rehman *op. cit.* p. 727.

286 Having not had its way, the U.S. has maintained a hostile attitude towards the Treaty and the court. This is evidenced by the withdrawal of her signature in May 2002 after having initially signed the text of the Statute on 31st December 2000.

ratification by 60 countries. The first Panel of Judges was elected in February 2003.[287] It issued its first warrants on 8th July 2005 whilst the first pre-trial hearings were held in 2006. As at August 2013, 122 countries had ratified or acceded to the International Criminal Court Statutes.[288]

Thus, despite the felt desire by states for the establishment of an International Criminal Court, it took 50 tortuous years for it to be actualized. This delay has been attributed to two major factors, namely:

(a) The subject matter of the court and

(b) The imputation of individual criminal responsibility for the crimes covered by the Statute.[289]

4.2.1 Structure and Composition

The International Criminal Court is conceived to be a permanent judicial institution. As a product of an internationally binding instrument, it is endowed with a separate and distinct international legal personality. It seeks to achieve two main objectives, to wit:

(a) Safeguarding higher values such as the protection of human rights, an obligation that transcends state borders

(b) Accountability for those responsible for the commission of these crimes, so as to put an end to the impunity that is often associated with these violations.[290]

In terms of structure, the International Criminal Court Statute contains a Preamble and 128 Articles grouped into 13 Sections. It is a comprehensive text that establishes the International Criminal Court, determines its composition and function; delineates its subject matter as well as its jurisdiction both temporally and substantively; codifies the crimes as well as indicate

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287 http://en.wikipaedia.org/wiki/International_Criminal_Court. visited on 13/08/2013.

288 Nigeria ratified it on 27 September 2001.

289 For details on these factors; E A Oji and C T Nwangene *op. cit.* p. 152.

290 M T Ladan, *op. cit.* p. 179.

the corresponding sentences and the procedural rules; and develops the procedural norms and the general principles of criminal law that will be reflected in the operation of the International Criminal Court. Article 34 of the Statute establishes the following four organs of the court, to wit:

(a) The Presidency

(b) An Appeal Division, a Trial Division and a Pre-Trial Division

(c) The Office of the Prosecutor, and

(d) The registry

The court comprises of eighteen full-time Judges elected for a fixed term of nine years by the Assembly of State Parties (ASP).[291]

The eighteen Judges elected must be independent minded and have competence in criminal law or in relevant areas of International law and must represent the principal legal systems in the world as well as reflect equitable geographical representation and the need for a fair representation of male and female Judges. No two Judges can be nationals of the same state.[292] The Presidency consists of the president and first and second vice-presidents and are responsible for the proper administration of the court.[293] They each serve a term of three years or until the end of their respective terms of office as Judges whichever expires earlier. The first and second vice-presidents are elected by an absolute majority of the Judges. Upon the expiration of their terms of office, they are eligible for re-election once. The Judges elect the Registrar and may elect a deputy registrar whose office is re-electable for a further term.[294] The registry is responsible for the non-judicial aspects of the administration and servicing of the court.

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291 Article 36(1) and 9(a) of the Statute.
292 Article 36(7).
293 Article 38.
294 Article 43(4) and (5).

The Office of the Prosecutor is a separate and independent organ of the court. It is thrust with the responsibility of receiving referrals and any substantiated information attached to such referrals and bordering on crimes within the jurisdiction of the court. The office of the prosecutor is headed by a prosecutor who is invested with full authority to manage the office.[295] The Prosecutor is elected by secret ballot by members of the Assembly of States Parties and is assisted by one or more Deputy Prosecutors who are entitled to carry out any of the acts required of the Prosecutor as stated in the Statute.[296] The Prosecutor and his Deputies must not be of the same nationality. They serve on full-time basis and hold office for a nine year term[297] after which they become ineligible for re-election.[298]

The court consists of a number of Chambers, namely; the Pre-trial Chamber, the Trial Chamber and Appeals Chamber. The Pre-trial Chamber is made up of Judges having cognate criminal trial experience. They serve for a period of three years. The Pre-trial Chamber is composed of a single Judge or of a Panel of three Judges[299] and confirms or rejects the authorization to commence an investigation and makes preliminary determination that the case falls within the jurisdiction of the court. This is without prejudice to subsequent determinations by the court as regards the jurisdiction and admissibility of a case.[300] It may also review a decision of the prosecutor not to proceed with an investigation. This it does either *suo motu* or at the request of the state making a referral pursuant to Article 14, or the United Nations Security Council pursuant to Article 13 (b).[301] The Pre-trial chamber can at the request of the prosecutor issue warrants of arrests and summons to appear before the court. It can also issue orders to protect the rights of the parties in the proceedings and where necessary, provide for the protection and privacy of victims and witnesses, the preservation

295 Article 42(2).
296 Article 42(2).
297 *Ibid*.
298 *Ibid.* Article 42(4).
299 Article 39(2) (b)(iii).
300 Shaw, *op. cit*. p. 416.
301 Article 53.

of evidence, the protection of persons who have been arrested or appeared in response to a summons as well as the protection of national security information.[302] Upon the arrest or voluntary surrender or appearance of a person alleged to have committed an offence, the chamber within a reasonable time holds a hearing in the presence of the prosecutor for the person charged and his counsel to confirm or reject the charge. Once the Pre-Trial Chamber has confirmed the charges and person committed for trial by the Trial Chamber, the Presidency will establish a Trial Chamber to conduct subsequent proceedings.

The Trial Chamber is composed predominantly of Judges having criminal trial experiences who serve for a three years duration. The judicial functions of the Chamber is entrusted to three Judges.[303] The primary function of the Trial Chamber is to ensure that a trial is fair and expeditious and is conducted with full respects for the rights of the accused with regard for the protection of victims and witnesses.[304] The Trial Chamber determines the guilt or innocence of the accused. In the case of a guilty verdict, imprisonment of up to 30 years maximum or life imprisonment may be imposed. In deserving circumstances, financial penalties may also be imposed.[305] A convicted person can also be ordered to pay money for the victims compensation, restitution or rehabilitation.[306] The trials are held in the open save for where circumstances dictate that particular proceedings be conducted under closed session to protect confidential or sensitive information that will be given in evidence or protect victims and witnesses.[307]

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302 Shaw *loc. cit*.

303 Article 39(2) (b) (ii).

304 Article 64.

305 Article 77.

306 Article 75 (2). It needs stating that this provision mirrors contemporary thoughts on the objects of the criminal law as including compensation, restitution and rehabilitation of the victims of crime and not just punishing the offender to assuage the feeling of public outrage against his actions.

307 Article 68.

The Appeals Chamber comprises of Judges having established competence in relevant areas of International Law.[308] It is made up of all the Judges assigned to the Appeals Chamber.[309] The Prosecutor or the convicted person can appeal against the decisions of the Pre-Trial and Trial Chambers to the Appeals Chamber. Grounds upon which an appeal against a sentence may be lodged include procedural error, error of fact, error of law, or any other ground that affects the fairness or reliability of the proceedings or decision. A sentence may also be appealed against where there is a disconnect between the crime and the sentence.[310] Upon the conclusion of Appeal proceedings, the Appeals Chamber may decide to reverse or amend the decision, judgment or sentence or order a new trial before a different Trial Chamber.[311]

Proceedings in the International Criminal Court is triggered off by any of the following three ways:

(a) A state party

(b) The Security Council

(c) The Prosecutor

(a) **State Parties:** Article 13(a) vests the court with powers to exercise jurisdiction in respect of situations in which one or more of such crimes which appears to have been committed is referred to the Prosecutor by a state party. It has been opined that the use of the word "situation" rather than "cases" is a deliberate attempt aimed at giving room for the prosecutor to decide on the basis of his investigation, which individuals to charge.[312] However cases referred to the Prosecutor by a state party and for which he is to commence an investigation is made conditional upon the notification and deferral requirements of Article 18(1) & (2).

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308 Shaw *op. cit.* p. 417.
309 Article 39(2) (b) (i).
310 Article 81.
311 Article 83.
312 M T Ladan, *op. cit.* p. 190.

(b) **The Security Council:** The power of referral by the Security Council is provided for by Article 13(b) of the Statute. This power is however restricted to the Security Council's enforcement powers under Chapter VII of the United Nations Charter. Consequently, the referral power of the Security Council is anchored on the United Nations Charter and not that of the ICC Statute. Thus, the Security Council can, relying on this provision refer situa tions involving non-state parties to the court. It was under this scenario that the situation in Dafur, Sudan was referred to the court leading to the indictment of the Sudanese President Al Bashir by the ICC even though Sudan is not yet a party to the ICC Statute. Article 16 further provides the Security Council with powers vide a Resolution adopted under Chapter VII of the United Nations Charter to request the court to suspend an investigation or prosecution howsoever triggered for a period of up to twelve months. Such requests are made obligatory upon the court and may be renewed under the same conditions.

(c) **The Prosecutor:** Article 13 (c) invests the court with jurisdiction where the Prosecutor initiated an investigation pursuant to Article 15 of the Statute. Article 15 on its part is to the effect that the Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the court. This power ensures that the court remains alive to its *raison d' tre* where political or other considerations combine to prevent states or the Security Council from exercising their powers of referrals under Article 13(a) & (b).

Against the backdrop of the carefully circumscribed crimes within the court's jurisdiction, the admissibility procedures, the jurisdictional requirements and the procedural safeguards surrounding the Prosecutor's actions, it has been opined that this power promotes an effective but balanced interplay between national and international jurisdictions.[313]

[313] M T Ladan, *Ibid* p. 191.

An overview of the International Criminal Court Statute's provision for investigation,[314] trial[315] and appeal[316] reveal a closely integrated system of norms. These bring the procedures of the court into conformity with the highest international standards of due process.[317] In the words of Professor Ladan, "They safeguard the interests of the defense, are sensitive to the state concerns and protect the court's ability to perform its functions."[318]

4.2.2 Jurisdiction/Jurisprudence

The International Criminal Court Statute makes provision for three jurisdictional heads namely jurisdiction *ratione temporis*,[319] jurisdiction *ratione materia*[320] and jurisdiction *ratione personae*.[321]

Generally and irrespective of the jurisdictional head under which proceedings are commenced before the court, the court uses the territoriality and active personality principles as the bases for being seised of a matter. Consequently, the ICC has jurisdiction only where the state on whose territory the conduct in question occurred (or the state of registration of a vessel or aircraft) is a party to the Statute or where a national of a state party to the Statute is being accused of a crime under the Statute.[322] The implication of the above postulation which is founded on Article 12(2) of the Statute is that the jurisdiction of the ICC is not universal (as in applying to all *wily- nily)* but territorial or personal in nature.[323] Another implication is that a national of a non-state party to the Statute may be prosecuted where he is accused of committing a crime covered by the Statute in the territory of a state party to the Statute. Moreover the court will become seised of a matter where a situation in which one or more of

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314 Encapsulated in Part 5, covering Articles 53-61.
315 Encapsulated in part 6, covering Articles 62-72.
316 Encapsulated in Part 8, covering Articles 81-85.
317 M T Ladan, *op. cit* p. 192 .
318 *Ibid.* at pp.192-193.
319 Article 11.
320 Article 5.
321 Article 25.
322 Article 12 (2); K M Omoragbon, "Light in the Midst of Obscurity: Birth of the International Criminal Court and the United State Opposition," *Unib Law Journal* Vol. 2 No. 2, November 2012, p. 483.
323 Shaw, *op. cit.* p. 412.

such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the United Nations Charter.[324]

It needs stating that the territoriality and active personality principles as jurisdictional bases was the outcome of a compromise between those whose who wanted a universal court with plenitude of freedom to act and those who opposed it; moreso, considering the consensual element in inter-state adjudicatory process.[325]

(A) Jurisdiction *Ratione Temporis*

Article 11(1) of the Rome Statute provides that the jurisdiction of the court only commences from the entry into force of the Statute and in respect of the crimes committed after the entry into force of the Statute of the court and with respect to states that have ratified the statute.[326] However, Article 124 of the Statute allows a state party the possibility of exempting itself from the jurisdiction of the court for a period of seven years for war crimes committed in its territory or by one of its nationals from the date of ratification by that state.[327] Article 11(1) seems a codification of one of the fundamental principles of criminal justice administration, to wit: the non-retroactivity of crimes. It is usually expressed by the Latin maxim *nullum crimen nulla poena sine lege* which means no one may be tried for an act which does not constitute an offence at the time it was committed. It has been opined and we agree that the issue of jurisdiction *ratione temporis* (temporal jurisdiction) should not be confused with the question of retroactive crimes.[328] The concept of retroactivity relates to an act not been criminal at the time of perpetration but subsequently becoming criminalized with its

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324 Article 13(b). This makes it unnecessary for a state party whose national is been proceeded against to be a party to the Statute as the Security Council decisions under Chapter VII of the United Nations Charter are binding. See in particular Articles 25 and 48 of the United Nations Charter; M O Unegbu "International Criminal Court Takes Off With African Cases," in M O Unegbu and I Okoronye (eds.) *Legal Developments In The New World Order*, *op. cit.* pp. 226-227.

325 Rehman, *op. cit.* p. 30.

326 Article 12(3) allows states to make a declaration permitting the court to exercise jurisdiction in the particular case as from July 1, 2002.

327 This exemption is only restricted to war crimes; C De Than and E Shorts, *International Criminal Law and Human Rights*, (London: Sweet & Maxwell, 2004) p. 324; Rehman, *op. cit.* p. 729.

328 Schabas *op. cit*. pp. 68-69.

effectuation date being backdated. Under the International Criminal Court Statute however, most of the crimes listed therein had already been outlawed by other International Treaties and prosecution had for them in some instances.[329] Thus, at the commencement of the International Criminal Court Statute, no serious student of International Law would be in doubt as to their criminal qualities. What the International Criminal Court Statute did simpliciter was to outlaw the prosecution of such offences under it until it (i.e. the Statute) has become operational as a Treaty with full legal force among members of the International Community. This is one of the unique features of the International Criminal Court vis-à-vis other international criminal tribunals most of whom were created to deal mainly with atrocities that were perpetrated prior to their establishment.[330]

(B) Jurisdiction *Ratione Materia*

The subject matter jurisdiction of the International Criminal Court is restricted to the most serious crimes of concern to the International Community as a whole. These crimes are of international concern not so much because of the international co-operation needed to curb or suppress their perpetration (even though it is also true) but because their heinous nature elevates them to a level where their commission strikes at the conscience of the International Community and fills them with revulsion. They deserve prosecution because humanity as a whole is the victim.[331] Consequently, prosecuting any of these crimes is an *erga ommes* obligation. Their prohibition is equally seen as a peremptory norm of general international law and admits of no statutory limitation period.[332]

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329 For instance, the crime of genocide which had already being codified as far back as 1949 vide the Genocide Convention of 1949.

330 Examples include the International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).

331 E A Oji. And G T Nwangene, *op. cit.* p. 151.

332 See D C J Dakas, "Nigeria's Obligations Concerning International Cooperation to bring to Justice Perpetrators of Grave Breaches of International Humanitarian Norms," Human Rights Review, Vol. 1, No. 1 October, 2010 at 119-120; E Ama-Oji, *op. cit.* pp. 4-10. On the non applicability of statutory time limitations to these crimes; Article 29 of the Rome Statutes of the International Criminal Court and The Convention on the Non-Applicability of statutory limitations to war crimes 1968 which came into force in November 11, 1970.

Article 5 of the International Criminal Court Statute which is entitled "crimes within the jurisdiction of the court" lists the crimes as follows:

(a) The crime of genocide

(b) Crime against humanity

(c) War crimes

(d) The crime of aggression

Article 6-8 of the Statute defined these crimes in details save for the crime of aggression whose prosecution under the Statute was postponed until such a time as the state parties agree on a definition of the crime and set out the conditions under which it may be prosecuted.

Before delving into the definitional details of the aforementioned crimes, it is needful to state that the Statute accords cognition to the primary obligation incumbent on state parties to punish persons guilty of the aforementioned crimes. Consequently, it makes provisions for the entrenchment of the principles of complementarity. As made clear by the Third Preambular Paragraph of the Statute, the court is "intended to be complementary to national criminal justice systems in cases where such trial procedures may or may not be available or may be ineffective." *A' fortiori*, the intention was to make the court a court of last resort, investigating and prosecuting only where and when the national or municipal courts failed to do so.

To rein in this intention, Article 17(1) (a)-(b) which deals with the power of the court to decide whether to proceed to trial provides that the court shall determine that a case is inadmissible where:

(a) The case is being investigated or prosecuted by a state which has jurisdiction over it, unless the state is unwilling or unable genuinely to carry out the investigation or prosecution

(b) The case has been investigated by a state which has jurisdiction over it and the state has decided to prosecute the person concerned, unless the decision resulted from unwillingness or inability of the state genuinely to prosecute

(c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the court is not permitted under Article 20, Paragraph 3.[333]

(d) The case is not of sufficient gravity to justify further actions by the court.

The court's jurisdiction may be re-established in circumstances where the national court has been unwilling or unable to prosecute an individual, namely shielding the individual through, for example internal political pressure not to prosecute or granting amnesty to the individual from any further prosecution, the proceedings being conducted inconsistently with an intent to prosecute or due to an unjustified delay, a total or substantial collapse of the national judicial system, absence of independence or impartiality or another circumstance affecting the state's ability to carry out its proceedings.[334]

Factors to be considered by the court in determining a state's inability to prosecute under article 17(3) will include a state's inability to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings. Where there are disagreement between the International Criminal Court and a state party as to the quality of the prosecution or as to the propriety of a sentence given to an accused vis-à-vis the nature of the offence committed, the disagreement is resolved in favour of the International Criminal Court.[335] It needs be emphasized that the concept of complementarily is one of the major distinguishing

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333 This imports the principles of *Ne bis in idem* (no person shall be tried for same crime twice) Paragraph 3 of Article 20 is to the effect that if a person has been tried by another court, the ICC cannot try him again for the same conduct unless the proceedings in the other court:
(a) were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the court, or
(b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by International Law and were conducted in a manner which in the circumstance was inconsistent with an intent to bring the person concerned to justice.

334 Article 17 (2).

335 Rehman, *op. cit.* p.734.

factor of the court vis-à-vis the two *Ad hoc* international criminal tribunals, to wit: the ICTY and the ICTR. In keeping with most legal traditions, the crimes within the purview of the court's jurisdiction are not subject to any limitation period.[336] The provisions of Article 19 invest the court with the powers to determine its own jurisdiction and the admissibility of a case under Article 17. The court's decision on jurisdiction can be challenged by the accused or a state.[337]

At this juncture, it becomes necessary to discuss in details the conducts which form the subject matter of the court's jurisdiction. As stated earlier, the jurisdiction of the court is limited in terms of subject matter to the most serious crimes of concern to the International Community as a whole and which said offences have been listed by Article 5 as:

(a) Genocide

(b) Crimes against humanity

(c) War crimes

(d) The crime of aggression

The definition of these crimes mirrored existing international norms as their definitions reflected existing relevant Treaties and Customary International Law. The most relevant of these were the four Geneva Conventions of 1949[338] and their additional Protocols of 1977,[339] the Torture Convention, the Genocide Convention, the Statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda and other Conventions dealing with specific crimes such as enslavement and apartheid. In view of the foregone, Ladan opines that the

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336 Article 29.

337 Article 9(2).

338 These are (1) The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; (2) The Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; (3) Geneva Convention Relative to the Treatment of the Prisoners of War; (4) Geneva Convention Relative to the Protection of Civilians in Times of War.

339 These Protocol I. Relating to the Protection of Victims of International Armed Conflict; Protocol II. Relating to the Protection of Victims of Non-International Armed Conflict; Protocol III. Relating to the Adoption of an Additional Distinctive Emblem.

definition of crimes adopted by the ICC Statute in some cases reflect a conservative interpretation of the law established by these Conventions and forming part of Customary International Law whilst in other cases, they reflect a more expansive interpretation of International Law in 1998 when the ICC Statute was being negotiated.[340]

(a) Genocide: This word is derived from the Greek word "*genos*" meaning "race" "tribe" or "nation" and the Latin word "*caedere"* which denotes the act of killing. Its coinage is traceable to Raphael Lemkin, a polish jurist of Jewish origin.[341] It denotes the intentional killing and physical extermination of a race, ethnic group or nation or activity geared towards producing such effect. Thus, the act of genocide need not result in the immediate destruction of a group but any activity programmed to have such ultimate effect suffices. The ICTR in *Prosecutor V. Jean Kambanda* [342] described it as the "crime of crimes" in order to underline its revulsion under International Law. The ICJ[343] in order to underscore its gravity had defined it as:

> A crime under International Law involving a denial of right of existence of entire human groups, a denial which shocks the conscience of mankind and results in general losses to humanity and which is contrary to moral law and to the spirit and aims of the United Nations.

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340 M T Ladan, *op. cit.* p. 230. There is some validity in this given the haze that surrounded the definition of the crime of aggression and whose operative date has to be postponed till 2017.

341 R Lemkin , *Axis Rule in Occupied Europe* (Washington: Carnegie Endowment for World Peace, 1944) p. 79 cited by Rehman, *op. cit.* p. 745.

342 Available at http://www.reworld.org/doccid/3deba9142.htm and http://www.ICTR.org visited on 13/08/2013.See also Case No.ICTR-97-23-8

343 Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua V United States of America) ICJ Report (1984)392; Advisory Opinion in Reservation to the Convention on Prevention and Punishment of the Crime of Genocide. ICJ Reports (1951) 15; See also Garba Abubakar, "The Crime of Genocide Under the ICC Statute and the Genocide Charges Against President Omar Al-Bashir of Sudan," *Unib Law Journal* Vol. 2, No. 2, November 2012, p. 343.

The ICC Statutes[344] defines genocide as meaning any of the following acts committed with the intent to destroy in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group

(b) Causing serious bodily or mental harm to members of the group

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part

(d) Imposing measures intended to prevent births within the group

(e) Forcibly transferring children of the group to another group

Critical to the definition of genocide is the mental element which is stated to be "an intent to destroy the group in question in whole or in part."[345] Thus the crime of genocide goes beyond the mere act of killing. There must be a specific intent or *dolus specialis*. A' fortiori, in the absence of specific intent of committing genocide, the offence would not have been committed irrespective of the ruthlessness of the act and the barbarity of its consequences, though the particular conduct may constitute the offence of war crimes and crimes against humanity. In view of the fact that establishing genocidal intent in the absence of confessions may be fraught with difficulties, such inferences could be drawn from the facts of a given case.[346] For instance, a person who incites others to commit genocide must be imputed with a genocidal intention.[347]

Against the backdrop of the dynamism inherent in human conduct and the expected role of law in society coupled with the ever increasing complexities of contemporary international

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344 Article 6 thereof: This definition is in substance an affirmation of the definition of genocide under Article 11 of the Genocide Convention, 1948. Note also Article 4 of the ICTY.

345 Prosecutor V. Goram Jelisic, available at http://www.reworld.org/docid/4147fe474.html; accessed on 13/08/2013.See also Case No.IT-95-10-T

346 Prosecutor V. Akayesu available at http://www.reworld.org/docid/40278fbb4.html accessed on 13/08/2013. See also Case No.ICTR-96-4-1

347 Prosecutor V. Ruggiu available at http://www.i.umn.edu/humanrts/nstree/ICTR/RUGGIU_ICTR_97_32/RUGGIU_ICTR_97_32_1htm accessed on 13/08/2013; See also Case No.ICTR-97-32-1; Article 25(3) (b) and 25 (3) (e).

life, case-law has significantly widened the definition of genocide as contained in most international instruments. Thus, in the *Akayesu Case*,[348] the trial Chamber of the ICTR held with respect to rape and sexual violence as follows:

> [t]hey constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group targeted as such. Indeed rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims and are even … one of the worst ways of inflicting harm on the victim as he or she suffers both bodily and mental harm.

(b) Crime against Humanity: It is said that crime against humanity shares the closest link with human rights law as they consist principally of the most serious offences against human dignity.[349] From their nature and history, crimes against humanity are primarily aimed at protecting fundamental human rights as these category of crimes represent a serious attack on human dignity and humanity and ultimately result in the degradation and humiliation of one or more human beings. Against these backdrop therefore, the ICC Statute defines it in terms more expansive than is usually the case with other international criminal tribunals.

Thus, Article 7 of the Statute provides as follows:

"… crimes against humanity means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(a) Murder

(b) Extermination

(c) Enslavement

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348 Prosecutor V. Akayesu, *supra* .

349 Rehman, *op. cit.* p. 740.

(d) Deportation or forcible transfer of population

(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of International Law

(f) Torture

(g) Rape, sexual slavery. Enforced prostitution, forced pregnancy, enforced sterilization or any form of sexual violence of comparable gravity

(h) Persecution against any identifiable group or collectivity or political, racial, national, ethnic, cultural, religious, gender as defined in Paragraph 3 or other grounds that are universally recognized as impermissible under International Law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the court

(i) Enforced disappearance of persons

(j) The crime of apartheid

(k) Other inhumane act of a similar character intentionally causing great suffering or serious injury to body or to mental or physical health[350].

The catalogue of crimes against humanity underlines their close relationship with human rights norms, moreso as their occurrence is not tied to the conduct of international or national armed conflict. While the jurisprudence of the ICC has not defined the phrase "widespread or systematic", case law of other international criminal tribunals have thrown more light on this phrase. Thus, in the *Akayesu Case*,[351] the Trial Chamber declared that the concept of widespread could be defined as "massive, frequent, large-scale carried out collectively with considerable seriousness and directed against a multiplicity of victims". A single conduct may constitute both war crime and crime against humanity, the distinction being that crimes against humanity need not occur during an armed conflict and the acts in question must have

350 This is meant to capture other ingenious inhuman conducts that may yet be devised which causes great suffering to the human condition

351 *Supra.*

been committed as part of a widespread or systematic activity and against any civilian population. Any reference to nationality is irrelevant. Thus the perpetrator needs not have a discriminatory intent when committing a crime against humanity. A' fortiori, an attack against civilian population in order to constitute a crime against humanity need not be committed against a particular group bounded by certain characteristics like nationality or religion. In the *Martic Case*,[352] the Trial Chamber explained that the term "civilian" for the purposes of a crime against humanity as appeared in the ICTY Statute does not include those who were *hors de combat* at the time of the crime so as not to blur the distinction between combatants and non-combatants. Thus, to convict an accused of crimes against humanity, it has to be shown that the crimes were related to an attack on a civilian population and further that the accused knew that his crimes were so related.[353]

(c) War Crimes: These are serious violations of International Humanitarian Law whether arising from custom or treaty. They are the oldest form of international crimes as well as being the first to be prosecuted as crimes in International Law.[354] Though not explicitly stated in the ICC Statute, the jurisdiction of other international criminal tribunals has established the principles that there must be a nexus between the armed conflict and the crime itself in order for the latter to constitute a war crime. The nature of the armed conflict could be international or internal.

Article 8 of the ICC Statute provides for a definition as well as compendium of list of offences that constitute war crimes. Paragraph 1 provides the ICC with the jurisdictional link over the crime. Paragraph 2 (a) defines the crime. It provides as follows:

"War Crimes" means

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352 IT-95_11_T, 2007 para. 55-6. Also available on http://www.icty.org/.../070612.pdf. accessed on 30/04/2014. See also Shaw, *op. cit.* p. 438.

353 See Prosecutor V. Tadic IT-94-1-A; also available at http://www.icrc.org/.../57jqqc.htm. accessed on 30/04/2014.

354 Rehman, *op.cit.* at p. 737.

Grave breaches of the Geneva Conventions of 12 August 1949, namely any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(i) Willful killing

(ii) Torture or inhumane treatment, including biological experiments

(ii) Willfully causing great suffering or serious injury to body or health

(iv) Extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly

(v) Compelling a prisoner of war or other protected person to serve in forces of a hostile power

(vi) Willfully depriving a prisoner of war or other protected person of the rights of fair and regular trial

(vii) Unlawful deportation or transfer or unlawful confinement

(viii) Taking of hostages

It has been opined that the phrase referring to persons or property protected under the provisions of the relevant Geneva Convention is an acknowledgement of the fact that the list of grave breaches in each of the four Conventions is not identical and the different categories of protected persons or property fall under different schemes of protection.[355] Accordingly, the Four Geneva Conventions of 1949 each contain a definition of what constitutes grave beaches. Thus, Article 50 of the Geneva Convention for the Amelioration of the Condition of the Wounded and the Sick in the Armed Forces in the Field [356] defines "Grave breaches" as referring to acts involving any of the following acts when committed against persons or property protected by the Convention, to wit: willful killing, torture or inhumane treatment, including biological experiments, willfully causing great suffering or serious injury to body

[355] Oji & Nwangene, *op. cit.* p. 153; see also E Ama-Oji, *op. cit.* p, 218; M T Ladan, *op.cit.* pp 232-234

[356] I.e. Convention 1.

or health and extensive destruction and appropriation of property, not justified by military necessity.[357]

Article 130 of the Geneva Convention Relative to the Treatment of Prisoners of War on its part provides thus:[358]

> "Grave breaches" refer to acts involving any of the following acts if committed against persons or property protected by the Convention namely: willful killing, torture or inhumane treatment including biological experiments; willfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile power; or willfully depriving a prisoner of war of the rights of fair and regular trial prescribed in the Convention.

Under Article 147 of the Fourth Convention,[359] "Grave breaches" refer to acts involving any of the following acts if committed against persons or property protected by the present Convention: willful killing, torture or inhumane treatment including biological experiments, willfully causing great suffering or serious injury to the body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile power, or willfully depriving a protected person of the rights of fair and regular trial prescribed in the Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

Given the ever increasing scope of international life and the dynamism, the innovations in amassing or constructing weaponry and the dynamism in execution of war, Article 8(2) (b)

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357 This is also the tenor of Convention 2, Article 51 thereof (i.e. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces at Sea.

358 I.e. Convention 3.

359 I.e. Geneva Convention Relative to the Protection of Civilian Persons in Time of War. For a full text of the Geneva Conventions of 12 August 1949; http:// www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/index.jsp. Visited on 13/8/2013.

moves beyond the "grave breaches" provisions of the Geneva Conventions to encapsulate norms derived from existing international customs, existing Treaties and principles of law recognized by civilized nations. These are tagged serious violations of the laws and customs applicable in international armed conflict within the established framework of International law. They include:

(i) Intentionally directing attacks against civilian population as such or against individual civilians not taking direct part in hostilities.

(ii) Intentional directing attacks against civilian objects, that is objects which are not military objectives.

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peace keeping-mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under International Law of armed conflict.

(iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damages to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.

(v) Attacking or bombarding by whatever means towns, villages, dwellings or buildings which are undefended and which are not military objectives.

(vi) Killing or wounding a combatant who having laid down his arms or having no means of defense any longer, has surrendered at his discretion.

(vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury.

(viii) The transfer, directly or indirectly, by the occupying power of parts of its own civilian population into the territory it occupies or the deportation or transfer of all or parts of the population of the occupied territory within or outside their territory.

(ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives.

(x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endangered the health of such person or persons.

(xi) Killing or wounding treacherously individuals belonging to the hostile nation or army

(xii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war.

(xiii) Declaring abolished, suspended or inadmissible in a court of law, the rights and actions of the nationals of the hostile party.

(xiv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war.

(xv) Pillaging a town or place, even when taken by assault.

(xvi) Employing poison or poisoned weapons

(xvii) Employing asphyxiating, poisonous or other gases and all analogous liquids, materials or devices.

(xviii) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelop which does not entirely cover the core or is pierced with incisions.

(xix) Employing weapon, projectiles and materials and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the International law of armed conflict, provided that such weapons, projectiles and materials and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in Article 121 and 123.

(xx) Committing outrages upon personal dignity, in particular humiliating and degrading treatment.

(xxi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy as defined in Article 7, Paragraph 2(f), enforced sterilization or any other form of sexual violation also constituting grave breach of the Geneva Convention.

(xxii) Utilizing the presence of a civilian or other protected persons to render certain points, areas or military forces immune from military operations.

(xxiii) Intentionally directing attacks against buildings materials, medical units and transport and personnel using the distinctive starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including willfully impeding relief supplies as provided for under the Geneva Conventions.

(xxv) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

A critical look at Article 8 (2) (b) will show that it is prolix and all embracive of the provisions of both Articles 6 and 7 of the ICC Statute. Its prolixity only goes to underscore the importance attached to human life and dignity by the international community. While the provisions of Article 8(a) might be construed as being limited to combatants engaged actively in armed conflict, given the profuse reliance on the Geneva conventions of 1949, the crimes under article 8(b) are not so restricted. Such can be committed by civilians against enemy soldiers or civilians.

Given the nature of internal conflicts ravaging most states since the mid twentieth century to the present day and the resulting brutality in the prosecution of such conflicts by the disputing parties which often assails the conscience of mankind, sub-paragraphs c, d, e and f of Article 8(2) provides for war crimes committed during prosecution of internal armed conflict. Accordingly, Article 8(2) (c) provides that in the case of an armed conflict not of an international character, it is a war crime to commit serious violations of Article 3 common to Geneva Conventions of 12 August 1949, namely any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:

(i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(ii) Committing outrages upon person dignity, in particular humiliating and degrading treatment;

(iii) Taking of hostages;

(iv) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regular constituted court, affording all judicial guarantees which are generally recognized as indispensable.

Sub-paragraph (d) of Article 8(2) limits the application of sub-paragraph (c) only to internal armed conflict *stricto sensu* and excludes situations of internal disturbances and tensions such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

Sub-paragraph (e) of Article 8(2) provides a list of acts which when conducted during an internal armed conflict constitutes a crime. The list is in *pari materia* with those under Article 8(2) (b) of the Statute.

Sub-paragraph (f) of Article 8(2) gives us a clue of what is meant by armed conflicts not of an international character vis-à-vis Article 8(2) (e). It provides that a non-international armed conflict is one that takes place in the territory of a state when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups. It does not include situations of internal disturbances and tensions such as riots, isolated and sporadic acts of violence or other acts of a similar nature. Thus, it would be apt to construe the term "armed conflict" for purposes of Article 8(2) (d) and (e) as one involving government and rebel forces or between two or more rebel forces that are carried out within the confines of a single country.[360] Thus a handful of individuals attacking a military convoy or police station would not qualify as an armed conflict within the contemplation of the ICC Statute. Such will be dealt with by the internal laws of the state involved.[361]

In order not to unduly fetter the powers of a state's governmental authority to quell any insurgency, Article 8(3) of the ICC Statute provides that nothing in Paragraph 2(c) and (e) shall affect the responsibility of a government to maintain or re-establish law and order in the state or to defend the unity and territorial integrity of the state by legislative means.

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360 See also Oji Nwangene, *op. cit.* p. 156.

361 *Ibid.*

(d) Aggression: Aggression is a violent attack or threat by one state against another state; an unprovoked attack; a hostile action or behavior.[362] Though, it is recognized as a crime under International Law, its content and scope remains a considerable source of ambiguity among international legal scholars[363] until recently. Its relevance as a crime under International Criminal Law is traceable to the Pact of Paris but attained visibility and vibrancy in the aftermath of the Second World War. The post World War Tribunals[364] established to try war criminals provided for the crime of aggression. For instance, the IMT Charter provided in Article 6(a) that crimes against peace involved "planning, preparation initiation or waging of a war of aggression or a war in violation of International Treaties, agreements or assurances or participation in a common plan or conspiracy for the accomplishment of any of the foregoing" At Nuremberg, the IMT tried and convicted Hermann Goring, Rudolph Hess, Wilhelm Keitel and other German leaders for the crime of aggression.

On December 11, 1949, the U.N. General Assembly vide Resolution 95(1) affirmed the principles of law set forth in the IMT Charter as it relates to the crime of aggression. Efforts to define "aggression" however proved problematic as any definition has to be squared up against the rights of states not to use force or threat of force in their international relations pursuant to Articles 2(4) and 51 of the United Nations Charter.

In 1974, the U.N. General Assembly adopted Resolution 3314 (XXIV) which defines aggression in part as the use of armed force by a state against the sovereignty, territorial integrity or political independence of another country, or in a manner inconsistent with the Charter of the United Nations. This definition is restrictive to the extent that it defines

362 Webster's Universal Dictionary and Thesaurus (New Lamark Scotland: Geddes & Grosser, 2007) p. 22 cited by S N Anya *op. cit.* p. 23.

363 J Rehman, *op. cit*. p. 753; S N Anya, *Ibid;* S D Murphy, *op. cit.* p. 418.

364 i.e. The International Military tribunal (IMT) at Nuremberg and the International Military Tribunal for the Far East (IMTFE) at Tokyo.

aggression in terms only of the use of armed force. There are other measures that in certain circumstance might constitute aggression for example, applying economic force against a country. Moreover, it does not recognize exceptional circumstance that would make the enumerated acts defensive rather than offensive.[365] It is worth noting that since 1946 to the present, no international or national tribunal has conducted a trial for the crime of aggression.[366] Thus, greater content and specificity of the norm has not been achieved. The difficulty in finding a generally accepted definition of aggression stems from the influence of international politics on International Law, moreso, when Article 2(4), 51 and Chapter VII of the UN Charter provisions are appraised. Consequently, it remains a highly politically charged offence. It is in recognition of its definitional difficulties that the ICC Statute provides in Article 5(2) that the court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with Articles 121 and 123 defining the crime and setting out the conditions under which the court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.[367]

Against the backdrop of the widely known view that it is within the domain of the United Nations Security Council to determine what constitutes a threat to the peace, breach of the peace or act of aggression, this provision is capable of engendering a debate as to the relationship between the ICC and the Security Council. Can the ICC act independently or in opposition to the position adopted by the Security Council? Note that as the countdown towards its prosecution as a distinct crime under the ICC begins, its actual content and scope will continue to elicit debate when juxtapositioned to concepts such as use of force and self-

365 S N Anya, *loc. cit.*

366 S D Murphy, *op. cit.* at p. 419.

367 Note that in accordance with Articles 121 and 122 of the ICC Statute, an amendment was adopted at the Review Conference in 2010 of the Rome Statute in Kampala, Uganda which defined the crime of aggression in terms of Resolution 3314 of 1974 but its operative date was deferred till January 1, 2017. For details on this amendment,; http://enwikipedia.org/wiki/Amendments_to_the_Rome_Statute_of_the_International_Criminal_Court. visited on 13/08/2013.

defense and the need to cloth the ICJ with a robust review jurisdiction over the U.N. Security Council and other supra-national judicial bodies.[368] Its inclusion in the ICC's jurisdiction has been rationalized as being borne out of the desire to ensure that this crime be punished as it was punished under the rubric of "crime against peace" under the Nuremberg Charter and the Tokyo Charter at the end of the Second World War.[369] In fact, to initiate a war of aggression is not only an international crime, it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.

(C) Jurisdiction *Ratione Personae*

Article 25 of the ICC Statute invests the court with jurisdiction over natural persons. Consequently and subject to the exclusion contained in Article 26, a person who commits any of the crimes mentioned in Article 5 shall bear individual responsibility for same and thus liable for punishment under the Statute. It is immaterial that the person committed the crime jointly with another person or that the other person is not criminally responsible. The ascription of individual responsibility is predicated on the fact that International Criminal law operates on the basis of individual criminal responsibility.[370] Thus, a person cannot be held accountable for an act he or she did not participate in or perform. In this context however, direct participation or performance is unnecessary as the corpus of the law encompasses incitement, planning, attempt and conspiracy to commit a crime. The concept of individual criminal responsibility is an ancient phenomenon and is historically linked in the enforcement of crimes of piracy, slave trading and trafficking.[371] Its rationale is underscored by the dictum from the Nuremberg Tribunal which states as follows:

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368 See E Ama-Oji *op. cit.* pp 267-270.
369 S N Anya, *loc. cit.*
370 S D Murphy, *op. cit.* p. 417.
371 J Rehman, *op. cit.* p. 755.

"Crimes against International Law are committed by individuals not by abstract entities and only by punishing individuals who commit such crimes can the provision of International Law be enforced."[372]

Consequently, the practice that emerged from international criminal tribunals was that of holding individuals regardless of rank or position criminally responsible for their conducts. This practice renders ineffective the tendency in times of conflict to blame an entire people for crimes committed by certain individuals purporting to be fighting in its name.[373]

This rule which was enshrined in Article 7 of the Charter of the IMT and Article 7(2) of the Statute of ICTY has been consecrated under the ICC Statute. In particular Article 27 of the Statute provides as follows:

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular official capacity as a head of state or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it in and of itself under this Statute, constitute a ground for reduction of sentence.

2. Immunities or special procedural rules which may attach to the official capacity of a person whether under national or International Law, shall not bar the court from exercising its jurisdiction over such person.

Significantly, Article 28 provides for commands or superior responsibility. It is to the effect that military commanders and superior officers shall be criminally responsible for crimes

372 Trial of the Major War Criminals Before the Nuremberg Military Tribunals 14 November 1945-1 October 1946 (official Documents 1947), p. 223 cited by J Rehman, *ibid* at p. 756.

373 C O Ndifon "Contributions of International Tribunals to the Developments of International Humanitarian Law Against Impunity, in M O Unegbu and I Okoronye (ed) *op. cit.* p 264.

within the jurisdiction committed by subordinates under their effective authority and control arising from their failure to exercise proper control over such subordinates.

Furthermore, Article 33 does away with the defense of superior orders.[374] Thus, the fact that a crime was committed pursuant to an order of a government or a superior, whether military or civilian shall not relieve that person of criminal responsibility unless:

(a) The person was under a legal obligation to obey orders of the government or the superior in question.

(b) The person did not know that the order was unlawful, and

(c) The order was not manifestly unlawful.

Paragraph 2 of Article 33 expressly declares orders to commit genocide and crimes against humanity as being manifestly unlawful. The exempting circumstances are to be construed conjunctively which in essence means that they are to be applied jointly. Thus, even after establishing a legal duty to obey the order, the order must not be manifestly unlawful or unlawful to the knowledge of the accused.[375] A' fortiori,if the order is unlawful, it *pro tanto,* obviates any duty to obey.

A major fallout of these provisions is that under contemporary international Law, the doctrine of sovereign immunity[376] is no longer applicable where the conduct borders on acts covered by the ICC Statute. It is for these reasons that leaders like former President Charles Taylor of Liberia have been tried and convicted whilst an arrest warrant has been placed on the head of President Omar Al Bashir of Sudan.

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374 *Cf.* B Abegunde and A O E Filani "Military Acculturation and War Crimes: Superior Responsibility and the Defense of Superior Orders in International Law," (2010) 1 *EBSU J. Int'l and Jour. Rev (Ebsu JIJR)* p. 206 wherein they posit that there exists a controversy under International Law whether or not the defense of superior order still exists.

375 E A Oji and C T Nwangene, *op. cit,* p. 158.

376 It is worth noting that the amplitude of this doctrine has progressively shrinked under contemporary International Law. For further details on this shrinkage; H C Alisigwe "An Appraisal of the Doctrine of Sovereign Immunity under Private International Law: The Nigerian Perspective," (2008/2009) *NJLS* Vol. VIII, 36; C T Emejuru and J O Okpara, "The Fundamental Doctrine of Immunity of Heads of Foreign States: An Appraisal," (2010)1 *EBSU J. Int'l & Jur. Rev (Ebsu JIJR)* pp. 106-118.

4.3 The International Tribunal for Law of the Sea (ITLOS)

The ITLOS is one of the dispute settlement mechanisms provided for by the 1982 Law of the Sea Convention.[377] The United Nations Convention on the Law of the Sea 1982, collates in a single instrument all the rules relating to the legal regime of oceans and their uses and resources as it contains inter alia, provisions relating to: the exercise of rights in, and the delimitation of different maritime zones; the protection and preservation of the maritime environment; fisheries and maritime scientific research. It effects a comprehensive allocation of powers and responsibilities for the governance of all uses of over two-thirds of the planet.[378] Its substantive range is arguably broader than that of any other lawmaking Treaty as it contains provisions pertaining defense and international security, trade and communications, management of living and non living resources, scientific research, preservation of cultural heritage, and human rights.[379] The 1982 LOSC is at the heart of the public order of the oceans. A' fortiori, reservations during ratification or accession are not allowed,[380] as it aims to lay down basic substantive principles and rules pertaining to the rights and duties of states vis-à-vis the sea.

Considering the above and moreso the fact that ocean affairs and law of the seas cover variety of activities and obligations of the states around the world which are bound to conflict at one point or the other, the International Tribunal for the Law of the Sea comes in handy to assure on both the authoritative articulation of the meaning of the public order established by the Convention and compliance with its substantive principle and rules. To this extent, it plays a pivotal role in maintaining peace at sea among the states of the world.

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377 Hereinafter referred to as LOSC. The LOSC replaced the 1958 Law of the Sea Convention and came into force on November 16 , 1994.

378 B H Oxman, "Complementary Agreements And Compulsory Jurisdiction," *AJIL* Vol. 95 (2001) 277.

379 *Ibid*. Former U.N. Secretary-General, Mr Perez de Cuellar described it as "possibly the most significant legal instrument in this century" Quoted in ITLOS Handbook available at www.itlos.org accessed on 20/4/2012

380 Article 309 of the LOSC 1982.

Drawing inspiration from Article 2(3) of the U.N. Charter which enjoins members to settle their international disputes by peaceful means using any of the means indicated in Article 33 of the U.N. Charter, Article 279 of the LOSC 1982 reaffirms this fundamental obligation on all members of the international community to amicably resolve their disputes.

The Convention gives cognition to all consensual element in inter-state dispute resolution by providing that parties to a dispute are to firstly resort to negotiation[381] or other peaceful means and may also resort to conciliation procedures.[382] The gravamen of these provisions is that they are parties-driven and their recommendations or resolutions are not binding on the parties. However, where the parties fail to resolve the issues in dispute by means freely chosen by them, resort will then be had to the compulsory procedures laid down in Part XV, Section 2 thereof. Consequently, Article 287 of the LOSC 1982 makes it obligatory for a party when signing, ratifying or acceding to the Convention to also indicate by means of a written declaration which one or more of the following mechanisms it has chosen for the settlement of disputes concerning the interpretation or application of the Convention, to wit:

(a) The International Tribunal for the Law of the Sea established in accordance with Annex VI

(b) The International Court of Justice

(c) An arbitral tribunal constituted in accordance with Annex VII.

(d) A special tribunal constituted in accordance with Annex VIII.

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381 Article 283 of LOSC.

382 As in where there is allegation that a Coastal State has acted in disregard to the freedoms and rights of Navigation, over-flight or the laying of submarine cables and pipelines, or in disregard to other internationally lawful uses of the sea specified in Article 58; or when it is alleged that a state in exercising these freedoms, rights or uses has acted in contravention of the Convention or of laws of regulation adopted by the Coastal State in conformity with the Convention and other rules of International Law not incompatible with the Convention, or when it is alleged that a Coastal State has acted in contravention of specified international rules and standards for the protection and preservation of the marine environment which are applicable to the Coastal State and which have been established by the Convention or through a competent International Organization or diplomatic conference in accordance with the Convention.

As of September 2013, forty-one states have made a declaration stating their choice of procedures. Out of this number, twenty-six states have chosen the International Tribunal for Law of the Sea as the preferred means for settlement of sea disputes. Where however the parties have not accepted the same procedure or have not made declaration, for example, one for ITLOS and the other for ICJ or have not made any declaration, arbitration will then be applied to their disputes.[383]

In practice however, states parties have included in their declarations:[384]

1. A choice of procedure made in two ways: first, the states can choose one, more procedures or all procedures with or without order of preference. Second, a particular procedure is defined in relation to the specific issues such as fisheries, protection and preservation of maritime environment, marine scientific research or navigation including pollution from vessels and by dumping.
2. Indicating that they wish to exclude issues referred to in Article 297(2) and (3) from the application of Section 2 binding procedures.
3. Indicating that they wish to exclude issues referred to in Article 298 from the application of Section 2 binding procedure; and
4. A choice of procedure to deal with disputes over the prompt release of detained vessels and crews under Article 292
5. Indicating that they reject jurisdiction of one or more of the four means for any type of dispute.

383 Article 287 of LOSC.

384 M O M Ravin, "ITLOS and Dispute Settlement Mechanisms of the United Nations Convention on the Law of the Sea" Available at http://www.un.org/depts/Cos/nippon/unnff_programme_home/fellows_pages_papers/MOM_506_cambodia_ITLOS.pdf. visited on 20/6/2013.

With regard to some kinds of disputes,[385] Article 297(1) of the LOSC excludes the application of the above compulsory mechanisms. Article 297(2) and (3) excludes from the compulsory procedures practically all disputes having its origin in the exercise of sovereign rights or jurisdiction by a coastal state in its Exclusive Economic Zone (EEZ) concerning marine scientific research and fisheries. Article 298(1) grants a state the power to declare in writing when signing, ratifying or acceding to the Convention that it does not accept the compulsory settlement procedures with respect to disputes concerning sea boundary delimitations, military and law enforcement activities as well as disputes in which the UN Security Council is seised of in accordance with the U.N. Charter.

These wide ranges of exceptions would seem to have watered down the effect of the compulsory procedure as initially conceptualized. However this may not be unconnected with the attitude of states to the awesomeness, solemnity and finality of the judicial process and other third party binding settlement procedures wherein they exercise little or no authority in determining the final outcome. However given the complexities of modern inter-state relations, the variegated uses of the sea, the fact that stability in the law required authoritative uniform articulation of the basic rights and duties of states in a manner flexible enough to accommodate different and changing circumstances and moreso the context of our discourse herein, we shall now discuss in specific terms, one of the aforementioned compulsory dispute settlement mechanisms, to wit: the International Tribunal for the Law of the Sea (ITLOS).

Save for some minor differences,[386] the ITLOS is patterned after the ICJ as its Statutes is annexed to the Law of the Sea Convention and forms part of it. It was meant to bring the system of dispute settlement under the LOSC into full operation. It was established sequel to

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385 T A T Yagba, "Dispute Settlement Under the 1982 law of the Sea Convention," in I A Ayua *et al*, *The New Law of the Sea and the Nigerian Maritime Sector,* (Lagos: NIALS, 1998) p. 180.

386 This includes the fact that non state entities have access to the tribunal especially within the context of Part XI of the Convention which deals with the International Seabed Area.

the entry into force in November 16, 1994 of the LOSC 1982. It has its headquarters in Hamburg, Germany on an expanse of land measuring 30, 000 square meters and operates therefrom. It convened its first session at Hamburg on 1st October, 1996. It has a specialized Library which contains a comprehensive collection on the law of the sea and related subjects such as Maritime law, Environmental Law, ocean affairs, coastal management, international organisations, dispute settlement, arbitration and general issues of Public International Law. Even though it was established by a United Nations Convention, the tribunal is not an organ of the United Nations. However, it maintains close links with the United Nations and in 1997 concluded an agreement on cooperation and relationship with the United Nations. It maintains an observer status with the General Assembly which enables it to participate in meetings and the work of the United Nations General Assembly when issues of relevance to the Tribunal are being discussed. The President of the Tribunal addresses the United Nations General Assembly every year when Law of the Sea is discussed.[387] By virtue of an agreement with the United Nations, its staff members have recourse to the United Nations Appeals Tribunals in administrative matters. Twenty-two cases has so far been submitted to the tribunal

4.3.1 Structure and Composition

The Tribunal is composed of twenty-one independent members of recognized competence in the field of the Law of the Sea and having the highest reputation for fairness and integrity.[388] The composition of members of the tribunal is vide election by states parties to the Convention. Article 2 of the Statute enjoins the composition of the Tribunal to reflect and be representative of the principal legal systems of the world while assuring on the geographical and equitable distribution on the bench, of the continents of the world. In furtherance of the

387 At the 68th Session of the UN General Assembly on 9th December 2013, its president addressed the UN on Agenda Item 75(a) titled Oceans and the Law of the Sea.

388 Article 2 of the Tribunal's Statute.

geographical stipulation in Article 2 of the Statute, Article 3(2) of the Statute provides that there shall be no fewer than three members from each group as established by the United Nations General Assembly.

The groups are:

(a) The African Group

(b) Asian Group

(c) Latin American and Caribbean Group

(d) Western European and other States Group

(e) The Eastern European Group

Sequel to the above provisions and as determined by the meeting of states parties at its fifth meeting on 31st July, 1996, 21 members of the Tribunal have been elected as follows:

(a) Five Judges from African Group

(b) Five Judges from the Asian Group

(c) Four Judges from Latin American and Caribbean Group

(d) Four Judges from the Western European and other States Group

(e) Three Judges from the Eastern European Group.

It needs emphasizing that no two Judges may be nationals of the same state. The first election of Judges for the Tribunal took place in August 1st, 1996.[389] The Judges are elected for a renewable term of nine years with the election of one third of the Judges taking place every three years. To ensure continuity amidst the future triennial elections, seven elected judges were to serve for a nine year term, seven for a term of six years and seven for a term of three

389 In strict law and going by the provisions of Article 4(3) of the Statute, the election of the Judges ought to have taken place within six months of the entry into force of the LOSC, that means 16th May, 1995 but this was not to be as the meeting of state parties to the LOSC on November 22nd 1994 decided to shift the date for the first election of Judges to 1st August 1996.

years.[390] For purposes of the Tribunal's business, eleven Judges are required to form a quorum.[391] Newly elected Judges are required to make the solemn declaration to exercise their powers as Judges impartially and conscientiously.

The Tribunal has a President and Vice-President both of whom are elected by secret ballot by a majority of the members of the tribunal from among the 21 elected Judges.[392] They serve for a renewable three year term.[393] Their terms of office begin to run from the date on which the terms of office of the members elected at a regular election begins.[394] The outgoing President continues to exercise the functions of the President of the Tribunal until the election of the next President has taken place if he is still a member of the Tribunal at the date of the election.[395]

The President of the Tribunal presides at the meetings of the Tribunal. He directs the work and supervises the administration f the Tribunal as well as representing the tribunal in its relation with states and other entities. In the event of an equality of votes, the President has a casting vote.[396] The President is an ex officio member of the Chamber of summary procedure and presides over any special chamber of which he is a member.

The Vice President exercises the function of the Presidency in the event of a vacancy in the Presidency or on the inability of the President of the Tribunal.[397] He is also an ex officio member of the Chamber of summary procedure.[398] Should the President or Vice President be

390 Article 13 of the Statute.

391 Article 5 of the Statute. The term of office of the members elected at the first election commenced on October 1st, 1996. In accordance with the triennial rule, the tenure of seven members expired on 30th September, 2005, another seven expired on 30th September, 2002 while yet another seven expired on 30th September, 1999. Virtually all those eligible for re-election were re-elected in accordance with the Statute.

392 Article 11 of the Rules of the Tribunal.

393 *Ibid*. Article 12.

394 *Ibid.* Article 10.

395 *Ibid.*

396 *Ibid.* Article 12.

397 *Ibid* Article 13.

398 *Ibid.* Article 28.

unable to act for whatever reason, then their duty devolves upon the senior member of the Tribunal who ranks next after the President and Vice-President in the order of precedent.[399]

Under Article 17 of the LOSC Tribunal's Statute, where the Tribunal includes a member of the nationality of one of the parties to the dispute, any other party may choose a person to participate as a member of the Tribunal. Ditto to where neither of the parties have a Judge of the same nationality. This provision of Article 17 is an importation of the ad hoc Judge phenomenon[400] with all its attendant implications. The person(s) chosen as Judge(s) ad hoc are however required to fulfill the same conditions pertaining to the qualifications for election to the tribunal and the participation in a particular case. The Judge ad hoc need not be of the same nationality with the party that chooses him.[401] The rule allows parties with a common interest to jointly choose one Judge ad hoc. Consequently, Article 20 of the Rules provides that if the Tribunal finds that two or more parties to the dispute have the same interests, the tribunal shall fix the time limit within which they may jointly choose one Judge ad hoc.[402]

Generally, all disputes are dealt with by the Tribunal as a full court in accordance with Article 13(3) of the Statute of the Tribunal. The only exception is the Seabed Dispute Chamber which is mandatory according to Annex VI, Section 4 of the Statute. However, a dispute may be referred to a Chamber if both parties so agree. Consequently, the following Chambers have been established, to wit:

(a) Seabed Disputes Chamber: It is established as an expert body of the ITLOS and plays a vital role in settling disputes concerning exploration and exploitation activities in the

399 *Ibid.* Article 4.
400 See page 104 *supra.*
401 Article 19 of the Rules of the Tribunal.
402 This was the scenario in the Southern Bluefine Tuna Case between Japan, New Zealand and Australia wherein New Zealand and Australia jointly chose a Judge ad hoc.

Area[403] over which it has exclusive jurisdiction.[404] It is composed of eleven members selected by a majority of the members of the Tribunal from among themselves for a renewable three years tenure.[405] The members shall be representative of the principal legal systems of the world while assuring on the equitable geographical distribution.[406] The distribution of seats adopted by the Tribunal at the first election of members are as follows[407]:

(i) Three Judges are nationals of the African Group;

(ii) Three Judges are nationals of Asian Group;

(iii) Two Judges are nationals of Latin American and Caribbean Group;

(iv) Two Judges are nationals of Western Europe and other States Group; and

(v) One Judge is a national of a state member of Eastern Europe Group.

The Chamber has its president who is selected from among its members.[408] However, in the event of vacancy, a successor is selected by the Tribunal from among its elected members who will hold office for the remainder of his predecessor's term.[409] The parties to the dispute may also request the Seabed Disputes Chamber to establish an ad hoc Chamber to have jurisdiction over their dispute.[410] The ad hoc Chamber constituted herein is composed of three members of the Seabed Dispute Chamber. Its composition is determined by the Seabed Dispute Chamber with the approval of the parties to the dispute and must not be in the service or nationals of any parties to the dispute.[411] If the parties disagree on the composition of an ad hoc Chamber then each party to the dispute shall appoint one member and the third member

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403 Article 1(1) of the LOSC 1982 defines the "area" as the "Seabed and ocean floor and subsoil thereof beyond national jurisdiction." It starts at the outer edge of the continental margin or at least a distance of 200 nautical miles from the baselines.

404 Articles 186-189 LOSC.

405 Article 35(3) of the Statute.

406 *Ibid.* Article 35(2).

407 M O M Ravin, *loc. cit.*

408 Article 35.

409 *Ibid.*

410 Article 188 of the LOSC 1982. This is different from the ad hoc Chamber constituted under Article 15 of the Statute.

411 Article 36(3) of the Statute.

shall be appointed by their agreement. If they still disagree or if any party fails to make an appointment, the president of the Seabed Dispute Chamber shall promptly make an appointment or appointments from its members after consultation with the parties.[412]

(b) Chamber of Summary Procedure: With a view to the speedy dispatch of business, the tribunal is required pursuant to Article 15 of the Statute to form annually a Chamber of five members and two alternate members to hear and determine disputes by summary procedure. The president and the vice president of the Tribunal act as ex officio members of the Chamber and presides *mutatis mutandi* over the Chamber.

(c) Other Special Chambers: In addition to the afore-mentioned Chambers, the Statutes of the Tribunal also envisages the establishment by the Tribunal of other categories of Chambers for dealing with particular kinds of disputes namely; The Chamber for Fisheries Disputes, The Chamber for Maritime Environment Disputes and The Chamber for Maritime Delimitation Disputes. In addition, there is also a Chamber for dealing with particular disputes at the request of the parties. The judgment of any of the Chambers is considered as rendered by the Tribunal.

The Chamber for Fisheries Disputes is available to deal with disputes relating to the interpretation or application of

(a) Any provision of the Convention concerning the conservation and management of marine living resources; and

(b) Any provision of any other agreement relating to the conservation and management of Marine living resources which confers jurisdiction on the Tribunal.

The Chamber for maritime Environment Disputes exists to settle disputes concerning the interpretation of:

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412 *Ibid.* Article 39(2).

(i) Any provision of the Convention concerning the protection and preservation of the maritime environment.

(ii) Any provision of special conservation and agreement relating to the protection and preservation of the marine environment referred to in Article 237 of the Convention; and

(iii) Any provision of any agreement relating to the protection and preservation of the maritime environment which confers jurisdiction on the Tribunal.

The Chamber for Maritime Delimitation Disputes is to deal with any provision of the Convention relating to the delimitation of the various maritime zones.

Finally, the Chamber for dealing with particular disputes at the request of the parties. It exists pursuant to Article 15(2) of the Statute and is the more popular of the ad hoc Chambers.[413] The composition of this Chamber is determined by the tribunal with the approval of the parties. A request to form this particular Chamber must be made within two months after the institution of proceedings. If the request emanates from one party only and not by the parties jointly, the president ascertains whether the other party assents.[414] Where upon the agreement of the parties on the formation of the Chambers, the president makes the further step of ascertaining their views on its composition and reports to the Tribunal accordingly.[415]

Considering the technical nature of most of the subject matter covered by the Convention and the dispute that normally arises, the Tribunal is invested with the power under Article 289 of the LOSC to upon the request of a party or *proprio motu* select at least two scientific or technical experts to sit with it. The selection is made in consultation with the parties. The selected experts sit with the Judge and provide illumination upon issues of technical or scientific import, thereby assisting the Judges in their appreciation of issues. They however

413 Pages 218-221 *supra.*
414 Article 30(1) of the Statute.
415 *Ibid.* Article 30(2).

have no voting rights. The experts are expected to be independent and enjoy the highest reputation for fairness, competence and integrity and are required to make solemn declaration at a public sitting for their job.

The law to be applied by the Tribunal are the provisions of the Convention and other rules of International Law that is not incompatible with the provisions of the Convention.

4.3.2 Jurisdiction / Jurisprudence

The ITLOS is a specialist judicial institution and thus its jurisdiction must necessarily follow its specialist purpose. Jurisdiction in this context refers to the competence or power of the Tribunal to decide cases. If it is realized that oceanic matters and law of the seas cover a wide range of activities and states' obligations around the world, the ITLOS is the international judicial institution established solely for the purpose of amicably resolving all sea disputes and assuring the non abuse by states of other states rights and privileges. Its jurisdiction is based on the LOSC[416] and on any international agreement related to the purposes of the Convention.[417] Another determining factor on its jurisdiction is the agreement of the parties to the dispute and the effect of the declaration of choice of means for settlement of disputes made when signing, ratifying or acceding to the Convention or at anytime thereafter.[418] The essence being that both parties to the dispute had accepted the Tribunal to have jurisdiction and actually agreed to bring the case before the Tribunal. The Tribunal is not only open to states but also includes non state entities like international organizations.[419] The Tribunal also has both compulsory[420] and advisory[421] jurisdiction and may indicate provisional measures

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416 Article 288(1) LOSC, Article 21 of the Statute.

417 Article 288(2) LOSC; Article 21 of the Statute. Pursuant to Article 22 of the Statute, any dispute concerning the interpretation or application of a Treaty or Convention already in force and relating to the subject matter covered by the Convention may if all the parties to such agreement so agree be submitted to the Tribunal in accordance with the agreement.

418 *Ibid.* Article 287(1).

419 *Ibid.* Articles 1, 20 and 305 respectively. Currently 166 states and other entities are parties to the Convention. See http://www.itlos.org/index.phd?id=41αL=1 visited on 04/10/2013.

420 By this is meant procedures entailing binding decisions.

421 Article 138 of the Rules.

where the circumstances demand. The Tribunal decides questions as to its jurisdiction.[422] The Statute makes provisions for a third party intervention. Thus, where state party considers that it has an interest of a legal nature which may be affected by the decision in any dispute, it may bring an application to intervene before the Tribunal which will decide whether to grant the request or not. Where the request is granted, the decision in so far as it relates to matters in respect of which the state party intervened is binding on that state.[423] Since its inception, twenty-one cases have been submitted to the Tribunal of which nineteen have been disposed. The two cases currently pending before the Tribunal are *The M/V Virginia Case (Panama/Guinea-Bissau)* and *The Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission.*[424]

The rules of the Tribunal which was adopted on 28th October 1997 and established as Annex VI of the Convention provides the procedural guidelines on the operations of the Tribunal. The proceedings before the Tribunal are instituted either by written application or by notification of a special agreement. Thus, where a case is brought by one of the parties to the Convention on matters covered by Section 288(1) of the LOSC, it is done by an application. Conversely, where a case is instituted under an agreement between the parties, it is done by notification. Where the case is brought by an application, it normally indicates the party which bring the claim and the party against which the claim is brought, the subject of the dispute and the legal ground upon which the jurisdiction of the tribunal is to be based as well as the precise nature of the claim with the fact and the grounds on which the claim is based.[425] Where the case is brought by notification, it is accompanied by an original or certified copy of the special agreement. The notification also indicates the precise subject of

422 Article 288(4) LOSC; Article 58 Rules of the Tribunal.
423 This is markedly different from the ICJ where such decisions are not binding.
424 For details on these cases, see http://www.itlos.org/index.phd?id=35 accessed on 04/10/2013.
425 Article 54 of the Rules of the ITLOS.

the dispute and identifies the parties to the dispute.[426] Where a party against which an application or notification has not consented to the jurisdiction of the court, the registrar will not put the application in the list of cases nor will any action be taken in the proceeding unless and until the party against which such application or notification is made consents to the jurisdiction of the Tribunal for the purpose of the case.[427]

The proceeding has both a written and oral phase. The written phase consists of a memorial made by the applicant which contains a statement of the relevant facts; a statement of law and the submission and a counter memorial made by the respondent in which contains an admission or denial of the facts stated in the memorial; any additional facts; observation concerning the statement of law in the memorial, a statement of law in answer thereto and the submissions.[428] There may also be a second round of written proceeding for the exchange of reply and rejoinder.

The oral proceeding is the hearing stage of the case and comes within six months after the closure of the written proceedings.[429] The hearing is conducted in public unless otherwise decided by the Tribunal or the parties demand that the public be disallowed.[430] The parties to the dispute are expected to be present during the hearing but where one of the parties does not appear before the Tribunal or fail to defend its case, the other party may request the Tribunal to continue with the proceedings and make its decision.[431]

After the closure of oral proceeding, the Judges retires to consider the argument of the parties. This is done within four working days and during which every Judge prepares his tentative opinion on the issues in the form of briefing notes. The Tribunal makes an initial

426 *Ibid.* Article 55.
427 *Ibid.* Article 54. Note that the Registrar is expected to bring such applications to the knowledge of the respondent state pursuant to Article 24 of the Statute.
428 Article 62 of the Rules.
429 Article 69 of the Rules.
430 *Ibid.* Article 74.
431 Article 28 of the Statute.

deliberation in order to seek a conclusion on what are the issues to be decided. During this period, the Tribunal also sets up a drafting committee consisting of five Judges chosen on the proposal of the president by an absolute majority of Judges present.[432] The committee meets immediately to prepare a first draft. The experts appointed under Article 289 of the Convention may participate in the deliberation process. The first draft of the judgment is circulated to the Judges in the case for amendments or comments and is to be returned within three weeks from the date of circulation.[433] Upon receipt, the Registrar will circulate copies to all the Judges for a second deliberation. The deliberations on the second draft of the judgment are held as soon as possible but not later than three months after the end of oral proceedings. The Tribunal examines the second draft in first and second reading in which Judges are allowed to modify or make new amendments. Separate or dissenting opinions will be submitted within a time limit fixed by the Tribunal.[434] After the Tribunal has completed its second reading of the draft judgment, the President takes the vote in order to adopt a judgment. Pursuant to Article 29 of the Statute, all questions shall be decided by a majority of the members of the tribunal present. Where there is an equality of votes, the President or a member acting in his seat have a casting vote. Upon its delivery, the judgment is final and binding upon the parties.[435]

Since *The Saiga (No. 2) (Saint Vincent and the Grenadines V. Guinea) Case* [436] in 1997 which happened to be the first case of the tribunal, the tribunal has heard about twelve other cases. Most of these cases dealt with Article 292 of the Convention which provides that where a state party has detained a vessel flying the flag of another state party and has not

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[432] Article 62 of the Resolution on the Internal Judicial Practice of the Tribunal.
[433] *Ibid.* Article 7.
[434] *Ibid.* Article 8.
[435] Article 32 of the Statute.
[436] Available in http://www.itlos.org/index.php%3Fid%3D64 accessed on 20/03/2014.

complied with the prompt release requirement upon payment of a reasonable bond or other financial security, the question of release from detention may be submitted to the tribunal.

In the *Saiga Case (supra),* Saint Vincent and Grenadines had filed an application on November 13th, 1997 against Guinea for the prompt release of the oil tanker M/V SAIGA, its cargo and crew. The ship flying the flag of Saint Vincent and Grenadines had been arrested for bunkering fishing vessels off the coast of Guinea. On December 4th 1997, the tribunal delivered its judgment in the prompt release proceedings wherein it ordered the release of the vessel and crew upon the posting of a security consisting of the value of its gas oil cargo and a bond of $400, 000.

On February 20th, 1998, the Governments of Saint Vincent and the Grenadines and Guinea agreed to submit the merits of their dispute concerning the M/V SAIGA to the Tribunal.

Issues addressed at the merit stage include inter alia, the jurisdiction of the coastal state in its exclusive economic zone, freedom of navigation, enforcement of customs laws, bunkering of vessels and the right of hot pursuit. In its judgment delivered on July 1st, 1999, the tribunal decided that Guinea had violated the rights of Saint Vincent and the Grenadines under the UNCLOS by arresting and detaining the M/V SAIGA and its crew. Guinea was asked to pay $2, 123, 357 compensation to Saint Vincent and the Grenadines.

The scope of Article 292 came into focus in the *Camouco Case (Panama V. France)*[437] where the Tribunal held that it is neither necessary nor logical to read into Article 292 the exhaustion of local remedies as the Article provided for an independent remedy and as such, no limitation should be read into it that would have the effect of defeating its object and purpose.

[437] Available at Http://www.itlos.org/index.php%3Fid%3D65 Accessed on 20/03/2014.

In *The Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in The Area* [438], the Seabed Disputes Chamber, sequel to an application of the Council of the International Seabed Authority rendered an advisory opinion on the responsibilities and obligations of states sponsoring persons and entities with respect to activities in the Area. The advisory opinion which was unanimously adopted by the members of the Seabed Dispute Chamber and delivered on February 1st, 2011 distinguished two kinds of obligations incumbent on sponsoring states, to wit:

(a) A direct obligation such as the duty to apply the precautionary approach and

(b) A duty of due diligence to ensure compliance by sponsored contractors with the terms of the contract and the obligation set out in the Convention.

According to the opinion, a failure by the sponsored contractor to comply with its obligations does not in itself give rise to liability on the part of the sponsoring state. The liability of a sponsoring state arises if the state fails to carry out its responsibilities under the Convention and if damage occurs. A causal link must be established between such a failure and the damage. The Chamber also held that the Convention requires the sponsoring state to adopt laws and regulations within its legal system and to take administrative measures to ensure compliance by the contractor with its obligations and exempt the sponsoring state from liability.

In conclusion, it needs emphasizing that the LOSC 1982 while making general provisions for dispute settlement by consensual procedures also made specific provisions dealing with compulsory procedures to dispute settlement by recourse to third party binding procedure of which the tribunal is one. However, disputes under the LOSC will be construed in accordance with the relevant Treaty provisions. This is where the jurisdiction of the ITLOS becomes

[438] Available at www.itlos.org/index.php%3Fid%3D87. Accessed on 30/04/2014.

poignant when juxtaposed with the ICJ which enjoys a prime position as the principal judicial organ of the United Nation system and for which much intellectual ink has been spilled trying to discuss. However, given the complexity of modern international life, the ITLOS remains a very vital institution in the world's quest for pacifism in interstate relations.

CHAPTER FIVE

JUDICIALSM IN INTERNATIONAL LAW-

PIVOTS OUTSIDE THE UNITED NATIONS SYSTEM

5.1. The European Court of Justice[1]

The founding Treaties[2] of the European Union laid down an extensive set of legal rules, principles and procedures for the functioning of the institutions established therein. Thus, the legal acts of the respective institutions vis-à-vis the member states and vice-versa, moreso considering the pristine concept of state sovereignty must necessarily entail a judicial body clothed with the power of judicial review over the actions of the treaty-based institutions vis-à-vis the member states and vice-versa so that at the one end, the aims and objectives of the international institutions will be achieved without riding roughshod over the special interests of the member states of the Treaty-based international institutions and at the other end the genuine aspiration of the citizenry as to their lawful expectation from their nation-state and supra national institutions are met.

The European Court of Justice (E.C.J.) was originally established as an organ of the European Coal and Steel Community in 1952. Upon the merger of the ECSC with the two other Communities[3] that existed simultaneously, in 1986, the ECJ became the judicial organ of the new emergent institution known as The European Community.

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1 Herein after referred to as ECJ. Under the Lisborn Treaty which came into force in 2009, it is also called the Court of justice.

2 These are the Treaties establishing: (1) The European Coal and Steel Community (hereinafter called ECSC) 1951; (2) The European Economic Community (hereinafter called EEC) (3)The European Atomic Energy (hereinafter called Euratom) 1957.

3 Ie, the EEC and Euratom. On the history of these communities and rationale for their merger vide the Single European Act 1986; J Fairhurst, *Law of the European Union,* (Essex: Pearson Education Ltd, 2010) p. 3 *et seq.*

With the transmutation of the E.C. into the European Union vide the Maastrich Treaty of 1993 as further amended by the Treaty of Amsterdam,1997, the ECJ continued to become the main judicial organ of the union. Recently and upon the entry into force of the Treaty of Lisborn in 2009, the ECJ became restyled the Court of Justice of the European Union under a consolidated Treaty text, to wit: the Treaty of the European Union (T.E.U.) and the Treaty on the Functioning of the European Union (T.F.E.U.).Added to this was the Statute of the Court which remained substantially the same as it was under the E.U. Treaty. Three layers of the Court of Justice of the European Union was also established, namely; the Court of Justice, the General Court and the Tribunal. It needs emphasizing that despite the textual changes in nomenclature in the Treaty establishing the Court of Justice, its jurisprudence remains that of the ECJ as there is no discernible differences of both Courts.[4] This informed our retention of the nomenclature, ECJ. Reference to the statutory provisions will be to the TEU and TFEU where appropriate while the corresponding provision in the E.C. Treaty will be in brackets with the prefix "ex".

5.1.1 Structure and Composition:

Any system will endure only if its rules are supervised by an independent authority. Especially is this so in a union of states where the common rules may be subjected to variegated interpretation and application if they are left to the control of national courts of member states. Consequently uniform application of Union Law in all member states will thus be jeopardized. These considerations led to the establishment of the European Court of Justice in 1952.

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[4] In fact, recent Articles have continued to discuss the Court of Justice under the ECJ acronym notwithstanding the coming into effect of the Lisborn Treaty; R Flamini, "Judicial Reach: The Ever-Expanding European Court of Justice," available at http://www.worldaffairsjournal.org/article//judicial_reach_ever_expanding_European_court_of_justice" visited on 17/10/2013; See also "European Court of Justice," available athttp://en.wikipedia.org/wiki/european_court_of_justice. visited on 17/10/2013.

The Court comprise of twenty-eight Judges which corresponds to one judge per member state. They are unanimously appointed by the governments of the member states and hold office for a renewable term of six years.[5] Partial replacement of half of the Judges takes place every three years at the beginning of the judicial year.[6] The judges are chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are *jurisconsults* of recognised competence.[7] Thus, the Judges are selected on the basis of their independence and legal stature. In practice, the bench has been made up of a mixture of Professors of Law, Judges, lawyers in private practice and Government Legal Advisers who have had outstanding academic or professional record.[8] The fact that all the member states are represented on the court's bench imputes the Court with direct access to and authoritative guidance on the law of the individual member states.[9] This is predicated on the fact that a large number of the cases referred to the Court concern questions of Community Law which arise in national legal proceedings. Consequently, the presence of a Judge from each member state assists the court in understanding the different legal contexts and national sensibilities attached to such disputes. Moreover, when faced with novel legal questions of principle, the Court can and does draw inspiration from solutions already adopted at the national level.[10] A Judge may resign

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5 Article 253 TFEU (ex Article 223 TEC); See also Article 19 TEU. In practice, each member state nominates a judge whose nomination is ratified by all the other member states. With regards to individual appointments by national states to the Court, national practice varies. The members may all be elected by the legislature or some members elected by the judiciary, the government and the legislature. See further, J Peterson & M Shackleton, *The Institutions of the European Union*, (Oxford University Press, 2000) p. 121.

6 This is to ensure a degree of continuity on the Court's bench. .See also Article 9 of the Statute of the Court.

7 Article 253 TFEU.

8 K P E Lasok, *Law and Institutions of the European Union*, (London: Butterworths, 2001) p. 289.

9 J Peterson & M Shackleton, *op. cit.* p. 120.

10 *Ibid.*

or be removed from office. In case of resignation, a Judge must notify the President of the Court who in turn informs the President of the Council, this latter act creates the vacancy. Similarly, a Judge may be removed from office if in the unanimous opinion of his fellow Judges; he has become deficient in the conditions required or fails to meet the obligation arising from his office. The Court's decision on the removal of a Judge must be communicated to the President of the European parliament and the President of the Commission and also notified to the President of the Council[11].

Article 253 TFEU[12] provides for the office of the President of the Court. He is elected by the Judges from among their own number by an absolute majority vote in a secret ballot[13] and holds office for a renewable three year tenure. The President presides over hearings and deliberations directing both judicial business and administration. He also assigns cases to the chambers for examination and appoints Judge as rapporteurs.

Sequel to an amendment to the Statute of the Court of Justice in 2012,[14] the office of Vice-President was created to assist the President in the performance of his duties and to take the President's place when the latter is prevented from attending or when the office of the President is vacant.

The Judges are assisted by nine Advocates-General who are responsible for presenting a legal opinion on the cases assigned to them. The qualifications for office and appointment procedure of the Advocates-General are identical to those of the Judges. Six of the nine Advocates-General are nominated as of right by the six big

11 Articles 5-9 of the Statute.
12 Ex. Article 223 TEC.
13 K P E Lasok, *op. cit.* p. 294.
14 The particular provision is now Article 9(a) of the Statute of the Court; http://en .wikipedia.org/wiki/European_court_of_Justice visited on 17/10/2013 .

member states[15] of the European Union while the other three positions rotate in alphabetical order between the other smaller member states. Vis-à-vis the national legal systems, the office of the Advocate-General is a *sui generis* legal contraption as it has no equivalence in the national legal systems. As a member of the court, the Advocate-general takes part in the process by which the Court decides the case by delivering a first opinion on the issues. They are required to act with complete impartiality and independence and to make in open Court reasoned submissions on cases before the Court.[16] Essentially, their task is a threefold one:

(a) To propose a solution to the case before the Court.

(b) To relate that proposed solution to the general pattern of existing case law; and

(c) If possible to outline the probable future development of the case law.

Thus, they represent neither the institutions of the Union nor the public (as in the Attorney-General's office). They function only as the spokesmen of the law and justice in the context of the Treaties.

The opinions of the Advocates-General are advisory and do not bind the Court. However, in the majority of cases, such opinions are very influential and hence followed. As their submissions are invariably published with the judgment of the Court, their full consideration of the wider aspects of the case not only throws valuable insight into the Court's judgment but also acts as an indicator of the direction the jurisprudence of the court is likely to take in the future. Especially is this so where the Court agrees with the opinion of the Advocate-General. Thus, a more extensive treatment of the issues in the opinion, provides a useful complement to the understanding of the terser pronouncement of the ECJ.[17] And where the opinion is not

15 These are Germany, France, The U.K. Italy, Spain and Poland.
16 Article 252 TFEU (Ex. Article 222 TEC).
17 Peterson & Shackleton, *op. cit.* p. 121.

followed, it compensates for the absence of dissenting judgments by demonstrating potential shortcomings in the court's reasoning. *A' fortiori,* the very few judgments in which the ECJ has squarely overturned its previous case-law have always all been preceded by an Advocate-General's opinion recommending that it do so.[18] In conclusion, it can be said that the role of the Advocate-General is a hybrid cutting across both advocatory and judicial characteristics. As an independent advocate of the legal interests of the Union, he may be regarded as a sort of institutionalized *amicus curia*. As a person whose appointment shares the same qualifications and conditions as the Judges and whose views have a formative influence on the law, he may be regarded almost as a first instance Judge whose opinions are never decisive but always considered by the Court.[19]

The Judges[20] of the Court enjoy the usual guarantees of independence and impartiality. Relatedly, they also enjoy immunity from suits and legal process during their tenure and retain the same status even after ceasing to hold office in respect of acts done in the performance of their duties.[21] This immunity may however be suspended by the Court itself sitting as a full Court. Under Article 6 of the Statute of the Court, the Judges are precluded from holding any political or administrative office. Nor may they engage in any occupation whether gainful or not save where an exemption to that effect has been exceptionally granted them by the Council acting by a simple majority.

Article 16 of the Statute provides for the conduct of the Court's business through chambers. Thus, the Court can sit in plenary session as a full Court (which normally

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18 *Ibid.* p. 122.

19 K P E Lasok, *op. cit.* p. 291-292.

20 Reference to Judges here include the Advocates-General; The heading to TITLE 1 of the Statute of the Court which is captioned Judges and Advocates-General and which said TITLE 1 encompasses Articles 2-8 of the Statute.

21 Article 3 of the Statutes.

consists of all the Judges or not less than fifteen Judges) or in chambers comprising a grand chamber of 13 Judges and not less than 9 Judges and a chamber of three or five Judges. Each Chamber elects its own President who is elected for a term of three years in the case of the five judge chambers or one year in the case of three-judge chambers.

The Court sits as a full Court in cases brought pursuant to Articles 228(2), 245(2), 247 or 286(6) of the TFEU and in other cases where issues are considered to be of exceptional importance. Where however a member state or an institution of the union that is a party to the proceedings so requests, the Court shall sit as a grand chamber. The Court renders a single collegiate judgment; separate or dissenting opinions are not permitted. Thus, even if the judgment is based on a majority decision, that fact let alone the nature of the majority is not disclosed.

The Court has a registry which is headed by the Registrar. He is the Court's chief administrator and works under the Court's president. He is appointed by the Court for a renewable term of six years. The Court may also appoint one or more Assistant Registrars. The Registrar together with the Assistant Registrars help the Court, the Chambers, the President and the Judges in all their official functions and are responsible for the receipt, transmission and custody of documents and pleadings that have been entered in a register initialled by the President.

The seat of the Court is in Luxembourg and subject to public holidays and the usual vacations, is in permanent session.

5.1.2 Jurisdiction / Jurisprudence

The Court of Justice is the highest judicial authority in matters of union law. Its jurisdiction derives exclusively from the Treaties of the union which also

circumscribes it. It plays a central role within the institutional structure of the European Union. Generally, its task is to ensure that in the interpretation of the Treaty, the law is observed. Thus, its judgments designed to ensure that the law is observed form an essential part of the rules and practice that influence and constitute behaviour. Like most judicial bodies, it is exclusively reactive and had no right of political initiative and can only take decisions on the matters that are brought before it in accordance with the applicable procedures.[22]

(1) Contentious Jurisdiction

The jurisdiction of the Court encompasses two broad categories, namely:

(a) Actions against member states.

(b) Actions against community institutions.

(a) Actions Against Member States: This takes two forms, to wit:

(i) Action by member states against member states.

(ii) Actions by community institutions against member states.

(i) Actions By Member States Against Member States: The Treaties invest the Court with compulsory jurisdiction to decide disputes between member states concerning the application of the terms of the treaties and a permissive jurisdiction based on the consent of the parties, over disputes between states related to the object and purpose of the communities in general.

Thus, Article 259 of TFEU[23] provides that a member state which considers that another member state has failed to fulfil an obligation under the Treaties may bring the matter before the Court of Justice. Relatedly, Article 273 of TFEU[24] is to the effect that the Court shall have jurisdiction in any dispute between member states

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22 Peterson and Shackleton. *op. cit.* p. 122

23 Ex. Article 227 of TEC.

24 Ex. Article 239 of TEC.

which relates to the subject matter of the Treaties if the dispute is submitted to it under a special agreement between the parties. The Court's jurisdiction in these two instances are exclusive as recourse by member states to other means of settlement is expressly forbidden by the Treaties.[25] This insistence on referring interstates disputes to the Court is predicated on the felt need of guaranteeing uniformity of interpretation and application of the law of the communities which in itself is a cardinal purpose for the Court's existence. In *France V. United Kingdom*[26]**,** France alleged that the United Kingdom's fishery conservation measures were contrary to community law. The Court upheld France contention and ruled against United Kingdom.

(ii) Actions by Community Institutions Against Member States: Primary consideration under this heading is given to the commission as the Court's jurisdiction is made conditional to the outcome of the commission's dispute resolution mechanism.

Thus, Article 258[27] of TFEU set the tone by providing that if the Commission considers that a member has failed to fulfil any of its obligations under the Treaties, then it shall issue a seasoned opinion after giving the state concerned the opportunity to submit its comments. Where the state fails to comply with the terms of the opinion, the Commission may then formally bring the matter before the Court. The Commission's pre-eminent position herein is predicated on the fact that under the European Union Treaties, the Commission is vested with the primary responsibility for ensuring that the member states comply with both the applicable Treaty provisions and Union's legislations. Proceedings will lie against member states not only for any acts on the part of a member state but also for omissions, including administrative

25 Article 344 TFEU (Ex. Article 292 of TEC).
26 (1964) ECR 625.
27 Ex. Article 226 of TEC.

failures to implement Union's Law. This underlines the infringement action rule which is a procedure available to the Commission to compel compliance of member states Treaty obligations. Consequently, the Commission may pursue a member state before the Court for any breach of European Union Law such as failure to apply a Treaty rule, a regulation or decision or failure to transpose, implement or apply a directive. These actions while serving the narrow purpose of enforcing the obligations of member states in specific cases, also provide the Court with a means to elaborate more broadly the nature of the Treaty obligations of member states.[28] In *Commission V. Luxembourg and Belgium,*[29] the Commission alleged that a tax imposed by the defendants on licenses for dairy products were contrary to E.C. Treaty. The defendants argued that a Council Resolution of 1962 which was yet to be implemented would have justified the tax. They maintained that the Commission had no authority to require the abolition of a tax which would be part of community policy. The Court rejected this argument and held that except for cases expressly authorised by the Treaty, member states are prohibited from taking justice into their own hands. Consequently, a failure by the Council to carry out its obligations could not excuse the defendant member states from carrying out theirs.

(b) Actions against Community Institutions:

(i) Annulment Actions*:* The jurisdiction of the Court also encompasses the exercise of control over the acts of the European Union institutions. This usually takes the form of Annulment Proceedings. It is a form of direct judicial proceeding wherein the member states and political institutions are allowed to challenge the validity of a legal act adopted by one or more political institutions. This power which is

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28 K P E Lasok, *op. cit.* p. 299.

29 (1964) ECR 264.

synonymous with the power of judicial review is provided for in Article 263 TFEU. The first Paragraph provides thus:

> The Court of Justice of the European Union shall review the legality of Legislative Acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties.

Thus, from the above provisions, the Court of Justice has exclusive jurisdiction over actions brought by a member state against the European Union institutions. Against the backdrop of contemporary International Law which accords recognition to natural persons as subjects of International Law, the fourth paragraph of Article 263 TFEU provides for individual right of action against union institutions. It provides thus:

> Any natural or legal person may under the conditions laid down in the first and second paragraphs institute proceedings against an act addressed to that person or which is of direct and individual concern to them and against a regulatory act which is of direct concern to them and does not entail implementing measures.

The *locus standi* of a private party bringing annulment proceedings is predicated upon such individual having a sufficient legal interest in the issue[30]. Thus, annulment proceedings must be against a decision addressed to them or that has a similar effect. Consequently, there is no room for the *actio popularis* in the Treaty provisions or in the jurisprudence of the court. Proceedings must be instituted within two months of the publication of the measure or its notification to the plaintiff. The annulment proceeding is a veritable instrument in the hands of states to ensure that the institutions do not encroach on their legislative powers.

Where the action is well founded, the court shall declare the act concerned to be void.[31] However, an order of annulment may not affect the whole of the act against which an action has been brought. The second paragraph of Article 264 enables the Court to confirm particular parts of a regulation which it has otherwise annulled. Thus, in *Ireland V. Council***,** where a regulation concerning the price of fruit and vegetables was challenged, the Court declared void that part of the regulation which related to tomatoes.[32] The declaration of nullity takes effect *erga ommes* and *ex tunc.*

Where the Court declared a contested action as void, the defendant institution must take the necessary measures to comply with the Court's judgment.[33]

ii. Action against Inactivity: Where the Treaties impose a duty to act on a particular institution and it fails to act, an action may arise therefrom which will then be predicated upon a violation of the Treaty through inactivity (ie, action for illegal failure to act). This is the converse of the annulment proceedings. Proceedings under

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30 Government of Gibralter V. Council (1993) ECR 1-3005.

31 Article 264 TFEU (Ex. Article 231 TEC).

32 (1974) ECR 285; Consten & Grundig V. EC Commission (1966) ECR 299, Council V. European Parliament (1986) 3 CMLR 94.

33 Tobacco Advertising Case, C-376/98. available on www.simmons-law.com/library/pdf/e/44.pdf. accessed on 4/12/2013.

this head allows the member states the political institutions, the Court of Auditors and the European Central Bank (ECB) to complain that another political institution or the ECB has failed to adopt an act which it is legally bound to adopt. This power to institute an action for failure to act is provided for in Article 265[34] of the TFEU. However, for an action under Article 265 TFEU to be admissible, the institution, body, office or agency to be proceeded against must have been first asked to act and which request it has failed to meet within a period of two months. Moreover, where an action is brought by private parties, then the failure to act must be for an action addressed to that person. Thus an action under Article 264 TFEU will fail if the act sought is one which cannot be properly addressed to the plaintiff or where an applicant requests a measure addressed to third parties rather than to himself.[35] In *Firma C. Mackprang JR. V. Commission*[36] a complaint that the Commission had failed to issue a decision amending the rules concerning intra-community trade was dismissed since the proper addressee of such a decision would have been the member states.

Note that in construing the provisions of Article 265 TFEU, the Court normally distinguishes between failure to act and refusal to act. While the former is admissible as it prima facie comes within the scope of Article 265 TFEU, the latter is not as it is regarded as a negative decision. Thus, a refusal by the Commission to revoke an allegedly illegal act has been held not to be actionable.[37] Similarly, if when called upon to act, the commission adopts a measure other than that sought by the plaintiff,

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34 Ex. Article 232 TEC.

35 Lord Bethell V. Commission (1982) ECR 2277.

36 (1971) ECR 797; Granaria BV V. Council & Commission (1979) ECAR where a plaintiff's claim which could only be met by a regulation was dismissed since a regulation cannot be described by reason either of its form or of its nature as an act which could be addressed to the Plaintiff.

37 Societa "Eridania" Zuccherifici Nazionali V. Commission (1969) ECR 459.

the action will fail.[38] In all such cases as above, the appropriate remedy to seek will be the annulment of action under Article 263 TFEU. Where sequel to the commencement of an action but before judgment thereof, the Council, Commission or any other relevant institution adopts the measures requested, the Court will discontinue the matter as it normally takes the view that the action no longer has any substance, thus making a decision thereon unnecessary.[39]

Under Article 266 TFEU,[40] the institution whose act has been declared void or whose failure to act has been declared contrary to the Treaties shall be required to take the necessary measures to comply with the judgment of the Court. However the obligation implied in Article 266 shall not affect any obligation arising from the provisions of Article 340 TFEU[41] governing non-contractual liability of the EU. What this means is that the institution may still be liable in damages for the consequences of its inaction even if it complies with the judgment.[42]

iii. Action for Damages: Article 268 TFEU provides that the Court of Justice shall have jurisdiction in disputes relating to compensation for damages provided for in the 2nd and 3rd paragraphs of Article 340. Thus, where the action or inaction of any of the European Union institutions or officials has caused damage to an individual, such a person may be able to claim compensation before the Court by means of an action in damages. In essence, the institutions may be liable for non-contractual liability. However, the non-contractual liability of the European Union institutions is

38 Deutscher Komponistenverb and e V V. Commission (1971) ECR 705.
39 European Parliament V. Council (1988) ECR 4017.
40 Ex. Article 233.
41 Ex. Article 288(2).
42 K P E Lasok, *op. cit.* p. 316.

that of a public authority.[43] It is not liable for ordinary torts committed in the course of European Union activities but only in respect of wrongs arising out of activities which form a necessary part of its official activities as defined in the Treaties, ie, the legislative and administrative acts of the institutions and their officials. Thus, in *Sayang V. Leduc*,[44] the community was held not liable for injuries resulting from a road accident caused by a *Euratom* engineer who was driving his own car in the course of his work. In the words of the Court, "the community is only liable for those acts which are the necessary extension of the tasks entrusted to the institutions."[45] Within these limits, actual liability under the TEU is in accordance with the general principles common to the laws of the member states. This involves the Court in a comparative study of the relevant national laws with the aim of picking out the decisive elements which may reflect a trend.[46] Note that national law is not analysed here in order to produce a principle acknowledged uniformly by all the member states as such an exercise may not produce a workable legal principle. The aim in the words of A-G Grand[47] is to identify trends generally, but not necessarily universally recognised and to use them as the judicial basis for the development of particular rules of community liability.

2. Advisory Jurisdiction: The Court also has an advisory jurisdiction which normally comes under the following headings:

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43 Note that for purposes of ascribing tortuous liability to a public authority, a distinction is always drawn in English law between a servant acting in the course of his employment and a servant on a frolic of his own. In the former, the public authority is liable while in the latter, he is not. The equivalent in French Law which equates more with the intendment of the Treaty provision is the distinction usually made between *faute de service* and *faute personnelle.* A *faute de service* occurs where damage results from the malfunctioning of community institutions or community servants. In *faute personnelle*, damage results from some personal wrongdoing on the part of community official which is in no way linked with his official position. In the case of *faute de service*, the community is liable while in *faute personnelle*, the individual torfeasor alone is liable.

44 (1969) ECR 329.

45 *Ibid*. p. 336.

46 K P E Lasok *op. cit*, p. 320.

47 *Ibid.*

(a) Reference for preliminary ruling

(b) Opinions for international agreement

(a) **Reference for Preliminary Ruling:** Matters under this category usually arise within the context of national court's exercise of their contentious jurisdiction on matters bordering on the Union law. Against the backdrop that Union law are expected to be executed by member states and their institutions, the task of interpreting Union law also falls on national courts in as much as they retain jurisdiction to review the administrative implementation of union law for which the authorities of the member states are essentially responsible. This is predicated on the fact that many provisions of the Treaties and of secondary legislations, regulations, directives and decisions directly confer individual rights on nationals of member states which national courts have a bounden duty to uphold.

Thus, whilst the Court of Justice is by its very nature the supreme guardian of union law and legality, it is not the only judicial body empowered to apply EU Law. To the extent that individual rights and obligations are involved, the national courts thus ipso facto become the first guarantors of union law.[48] To avoid contradictory and divergent interpretation and application of union law, national courts are empowered under Article 267[49] TFEU to request clarification from the Court of Justice on a point concerning the interpretation of union law, so as to for example, determine whether a legislative or executive act is in conformity with an extant union law. While the

[48] On the complementary role of national courts in protecting international legal norms;see A Nollkaemper, National Courts and the International Rule of Law, (Oxford: Oxford University Press, 2011) p. 6, *et seq;* Y Shany , *Regulating Jurisdictional Relations Between National And International Courts,* (Oxford: Oxford University Press,2009) p.1 *et.seq.*

[49] Ex. Article 234 TEC.

reference is that of the national court[50] where it deems it appropriate, all the parties involved that is to say, the member states, the parties in the proceedings before national courts and in particular the Commission may take part in the proceedings. The Court only answers the union law in question and does not decide the case. A' priori, a number of important principles of union law may be laid down through this route. Additionally, a request for a preliminary ruling may also seek review of the legality of an act of union law.

The reply of the Court of Justice is not merely an opinion, but has all the form and solemnity of a judgment or a reasoned order. It is binding not only on the referring Court but on all the Courts of all member states faced with the same issue.[51] Note that whenever there is a referral under Article 267 TFEU, the substantive proceeding before the national court of a member state is suspended until the preliminary ruling has been obtained.[52] This is a salutary rule as the interpretation of the Court of Justice may prove decisive in determining the merit or otherwise of proceedings at the national court. It is also the law that any of such referrals pursuant to Article 267 TFEU shall be notified to all member states and the relevant parties and / or institutions which adopted the disrupted act, by the Registrar.[53] Within two months, the parties so notified are expected to submit written statements of their case or observation.[54] By giving the national Judge access to the Court of Justice and also enabling all the European Union organs to make representations, the Treaty sets the

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50 The Reference to national courts or tribunal under Article 267 TFEU (Ex. Article 234 TEC) need not be to the Supreme Courts of the member states. References can be made from any court whose decisions are final. In Costa V. Enel (1964) ECR 585, the community court considered that an Italian magistrate was a court against whose decision there was no remedy on the ground that the subject matter of the claim was so small and under Italian Law, the magistrate had sole jurisdiction to decide such claims.

51 On the polemic among writers on this, see K P E Lasok *op. cit.* p. 357.

52 Article 23 of the Statute of the Court.

53 *Ibid.*

54 *Ibid.*

stage for an understanding between the municipal courts and the Court of Justice and ultimately the development of a common law for the Union.[55]

(b) Opinions on International Agreement: The European Union is invested with power to conclude international agreements with third countries and other international organisations. The Court plays no role in the European Union Treaty making power. However, within its overall mission of ensuring that the law is observed, it has the power of judicial review of European Union Acts. Judicial review ex post of an agreement through the annulment proceedings is always a possibility. Annulment however exposes the union to some difficulties as it will still remain bound by the agreement under International Law.

In order to obviate this, the TFEU established a procedure which would allow a political institution or member state to obtain a preventive order from the court as to the compatibility of an agreement with the Treaty before such binds itself on the international plane with all its attendant obligations.

Consequently, Article 218(11) TFEU[56] is to effect that the commission or a member state may obtain an opinion of the Court of Justice as to whether an agreement to be negotiated on behalf of the union is compatible with the provisions of the Treaty. Such opinions whenever rendered are binding. Consequently, if the opinion is in the negative, then either the international agreement or the Treaty must be amended to remove the incompatibility. The Court's jurisdiction is wide and covers all substantive and procedural issues which could affect the validity of the agreement and on which it

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55 K P E Lasok *op.cit.* p. 358; on the unifying role of decisions of courts in developing a common international legal norm; A Nollkaemper, *op. cit.* pp 235-245.

56 Ex Article 300 (6) TEC.

has sufficient information to come to a decision.[57] Among the opinions it has given include opinion 1/94 on the conclusion of the 1994 World Trade Organisation[58] and opinion 2/91 on accession to the European Convention for the protection of Human rights.[59]

3. Appellate Jurisdiction:

The Court of Justice has appellate jurisdiction over decision of the General Court on both substantive and procedural issues.[60] The appeal which must be on points of law must be brought within two months of the notification of the General Court's decision. In view of the foregone, it thus becomes incumbent upon the General Court's to establish the facts of the case. The grounds of appeal are as follows:

(a) Lack of competence of the General Court,

(b) Breach of procedure which adversely affects the interest of the applicant; and

(c) An infringement of community law by the General Court.[61]

If the appeal is admissible and well founded, the Court of Justice sets aside the judgment of the General Court. In appropriate cases and where the state of proceedings so permit, the court may itself decide the case by given final judgment. Alternatively, the Court may refer the case back to the General Court, especially where complex issues of facts need to be taken into consideration. Where a reference is made back to the General Court, the General Court is bound by the judgment of the

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57 Peterson & Shackleton, *op.cit.* p. 125.

58 Re Agreement Establishing World Trade Organisation (1994) ECR 1-5267 wherein it turned in a positive opinion.

59 Re Accession of the communities to the Convention for the Protection of Human Rights and Fundamental Freedoms wherein its opinion was in the negative.

60 Article 49 of the Statute of the court.

61 Article 58 of the Statute of the Court.

Court on points of law.[62] It can thus be presumed that the General Court is under a general obligation to follow and apply the case law of the Court of Justice and that a failure to do so would constitute a ground of appeal, to wit; infringement of union law.

5.1.3 Judgment of the Court

There seems a difference in the procedure to be adopted in the enforcement of the Court's judgment. This difference factors in the status of the judgment debtor, that is, whether it is a state or private person. This dichotomy it must be stated is a direct corollary of sovereign status of states. Thus against the backdrop of the fact that there can be no physical enforcement of judgments against states, Article 260 TFEU casts a positive duty on member states to take all necessary measures to comply with the judgment. This is based on the ethical belief that the states making up the union are governed by the law and the ultimate sanction of the law and has as a corollary transposed this ethos unto the union.[63] Significantly, it is a trite fact that the union would atrophy if the member states decide to flout at will the judicial authority which they established and submitted themselves to, without reservation.

Where however, the judgment is against individuals or corporations, Articles 280 and 299 impose a direct obligation upon the member states to enforce the judgment of the Court. Enforcement is governed by the Rules of Civil Procedure in force in the state in whose territory the judgment or decision is to be carried out. Each state designates the national authority for this purpose and communicates its decision to the commission and the Court of Justice.[64] The authority so designated will thus execute the decisions and judgments of the Court automatically without any formality except

62 *Ibid.* Article 61.
63 K P E Lasok, *op. cit.* p. 327.
64 *Ibid.*

verification of their identity. No right of appeal is allowed in national courts against the execution orders. The execution orders can only be suspended by a decision of the Court of Justice. However, national courts can entertain complaints as to the irregular manner in which execution has been levied, ie, in breach of national procedures.[65]

The European Union Court of Justice as the highest judicial authority in matters of union law is entrusted with the task of ensuring that the law is observed in the interpretation of the treaty. In this context, its responsibilities encompass three main areas, namely;

(a) Monitoring the application of union law, both by the European Union institutions when implementing the Treaties and by the member states and individuals in relation to their obligations under union law.

(b) Interpretation of union law.

(c) Further shaping of union law.

In carrying out its tasks, the Court's work involves both legal advice and adjudication. Legal advice as we had earlier seen is provided in the form of binding opinions on agreements which the European Union wishes to conclude with non-member countries or international organisations or when it has to give a preliminary ruling pursuant to a reference from a national court of a member state. Its adjudicatory function which is of more importance to the existence of the union combines a variety of judicial functions extending over a number of specialist fields; which in member states would be assigned to different types of courts depending on their national systems.

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65 *Ibid.*

Thus, it acts as a federal court when adjudicating upon the relations between the member states and the community; as a constitutional court when disputes between union institutions are before it or legislative instruments are up for review for legality; as an administrative court when reviewing the administrative acts of the commission or of national authorities applying union legislation; as a labour court or industrial tribunal when dealing with the freedom of movement, social security and equal opportunities; as a fiscal court when dealing with matters concerning the validity and interpretation of directives in the field of taxation and custom law; as a criminal court when reviewing commission's decisions imposing fines and as a civil court when hearing claims for damages or interpreting the provisions on the enforcement of judgments in civil and commercial matters and in disputes over European intellectual property rights based on the provisions of Article 262 TFEU.

In the course of effectuating its mandate, the Court of Justice has succeeded in creating a niche for a new legal system within the union. This it did by establishing two essential rules on which the union's legal order rests, to wit: direct effect and supremacy.

As regards the direct effect principle, the court ruled in *Van Gend En Loos V. Netherlands Administratie Der Belastingen*,[66] that the community constitutes a new legal order, the subjects of which consist of not only the member states but also their nationals. In that case, a Dutch transport firm brought a complaint against Dutch Customs for increasing the duty on a product imported from Germany contrary to

[66] (1963) E.C.R 1.

Article 12 (now repealed)[67] of the E.C. Treaty. The court in further exposition of the relationship between community law and national law held that the said Article 12 was applicable to the member state and citizen alike and that it created rights which the citizen could rely on and which his national courts were bound to uphold even against national legislation. Thus, the court interpreted the new legal order in the light of a federalist concept.[68] The supremacy of union (community) law was firmly established in *Costa V. Enel*[69] wherein inter alia, the question of compatibility of the Italian decree nationalising the electricity industry with the community (now union) legal order was raised. The court ruled that member states had definitely transferred sovereign rights to the community and union law could not be overridden by domestic law. In specific terms, the court held that, "the transfer by the states from their domestic legal system to the community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights against which a subsequent unilateral act incompatible with the concept of the community cannot prevail.[70]

5.2 The Inter-American Court of Human Rights (IACtHR)

The Inter-American Court of Human Rights[71] was established in 1979 by the Organisation of American States[72] (OAS) sequel to the adoption in 1969 by OAS members of the American Convention on Human Rights. The Convention itself did

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67 It prohibited member states from increasing the rate of import duties applicable to trade with other member states. In the particular case under review, the importer had claimed that in implementing an international agreement which had entered into force after the Treaty, the Dutch authorities had reclassified a particular product so that the duty payable was 8% instead of 3% which was the applicable rate at the time the Treaty came into force.

68 In a federal system, Federal Law bears directly upon the citizens of the component states.

69 (1964) E.C.R. 585.

70 *Ibid.* at 594; R Flamini, *op.cit.* p. 3; K P E Lasok, *op. cit.* pp. 175-177.

71 Herein after referred to as IACtHR. Its establishment in 1979 is only a logical corollary to the coming into effect of the Convention in 1978 as a result of the delay in obtaining the necessary eleven states ratification needed.

72 Hereinafter referred to OAS.

not come into force until July 18th, 1978 when it garnered the eleventh state ratification needed to bring it into force. The IACtHR is an autonomous judicial institution and have its purpose as the application and interpretation of the provisions of the American Convention.[73] Its headquarters is in the city of San Jose, Costa Rica, though it may convene in any member state of the OAS if a majority of the court so desires for purposes of its deliberations.[74] The headquarters of the IACtHR can only be changed by a two-third majority vote of states parties to the Convention in the OAS General Assembly.[75] The import of the two provisions is that Article 3(1) recognises the fact that the IACtHR may relocate its sitting to a member state if the circumstances make it imperative, without any effect on the usual seat of the court. Article 3(2) has the effect of changing on a permanent basis the seat of the court.

Together with the Inter-American Commission on Human Rights,[76] they make up the human rights protection system of the OAS which serves to uphold and promote basic rights and freedoms in the Americas.[77] It needs stating by way of further elucidation that the Inter-American System for Human Rights constitutes one of the world's three major regional human rights systems. The others are the European Council System based on the Convention for the Protection of Human Rights and Fundamental Freedoms and the African System based on the African Charter on Human and People's Rights.[78] Within the Inter-American System, human rights protection rests

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73 Article 1 of the Statute of the IACtHR available at http://.www./umn.edu/humanrts/oasinstr/zoas6cts.htm. Accessed on 09/11/2013.

74 *Ibid.* Article 3(1).

75 *Ibid.* Article 3(2).

76 Hereinafter referred to as the Commission.

77 For a detailed study of the Inter-American Human Rights System; L Sheaver, "The Inter-American Human Rights System: An Effective institution for Regional Rights Protection?" Available at http://ssrn.com/abstract=1437633, accessed on 09/11/2013; R. David, "Comparative Study of Three International Human Rights System and their enforcement mechanisms, available at http://ssrn.com/abstract=1566495. Accessed on 09/11/2013

78 R David, *Ibid;* A Huneeus, "Courts resisting Courts: Lessons from the Inter-American Courts Struggle to enforce Human Rights," *Cornell Int'l L.J.* 44 (2011) p. 479.

primarily on the commission and the IACtHR both of which are special organs constituted to have jurisdiction over matters pertaining to the fulfilment of the commitments made by the states parties.[79] However, within the system itself, both organs play distinct yet complimentary roles. Thus, whilst the court settles contentious disputes and issues advisory opinions on specific questions of law: the commission operates on a broader footing. It acts as the first step in the admissibility process for contentious cases, promotes friendly settlements between parties and investigates and presents reports on human rights condition in American States, even where no legal claims has been filed.[80]

5.2.1 Structure And Composition

It needs stating herein that the IACtHR does not expressly owe its existence to the principal legislation of the OAS, ie, the OAS Charter which established the organisation and provided for its organs and functions. However, its Article 2(e) relating to the nature and purposes of the OAS it seems anticipated it when it lists one of its purposes as "to seek the solution of … judicial problems that may arise among them."[81] The setting up of the court sequel to the coming into force of the Inter-American Convention on Human Rights can be said to be in furtherance of the stated objective of Article 2(e) of the OAS Charter. In concrete terms, the court owes its existence to the Inter-American Convention on Human Rights which fully established the organisation of the IACtHR.[82]

The IACtHR comprises of seven Judges who must be national members of the OAS and elected in their individual capacity from among jurists of the highest moral

79 Article 33 of the Inter-American Convention on Human Rights.
80 L Sheaver, *op. cit.* p. 641.
81 M P Okon & P O Ebiala, "Comparative Analysis of the Organisation of the American States (OAS) and the African Union (AU)," *NBA Journal* Vol. 8 No 1 August 2012 p. 148.
82 Chapter VIII thereof, Spanning Article 52-59.

authority and of recognised competence in the field of human rights who possesses the qualifications required for the exercise of the highest judicial functions in conformity with the law of the state of which they are nationals or of the state proposing them as candidates.[83] The candidates are elected by secret ballot and by an absolute majority vote of the states parties to the Convention in the OAS General Assembly from a panel of candidates proposed by those states.[84] Each of the states parties may propose up to three candidates who must be nationals of either the proposing state or of any other OAS member state. When a slate of three candidates is proposed, at least one must be a national of a state other than the proposing state.[85] No two Judges may be national of the same state. An interesting deduction from the provisions of the Convention and the Statute is that while the Judges can come from any member state of the OAS, the electing states must be parties to the Convention.[86] Consequently, only states parties to the Charter who are also state parties to the Convention are eligible to take part in the election process.[87]

As part of the transitional measures to fill the court's bench upon inception, Article 81 provides that upon the entry into force of the Convention, the OAS Secretary General will request in writing from each state party within ninety days, its candidates for the Judgeship of the Court. The Secretary General will prepare a list in alphabetical order of the candidates presented and transmit it to the state parties at least thirty days prior

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83 Article 53 of the Convention; Article 4 of the IACtHR Statute Founding members of the court, it has been opined met this criterion but as regards later appointments, political considerations have conduced to make uncertain compliance with these standards; J M Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights,* (Cambridge: Cambridge University Press, 2003) pp. 348-349.

84 Article 53(1); Article 4(1) of the Statute.

85 Article 53(2); Article 7 of the Statute.

86 For instance, Article 52(1) of the Convention which is *in pari materia* with Article 4(1) of the Statute opens with the following sentence, "The Court shall consist of seven Judges, nationals of the member states of the OAS…" Whilst Article 53(1) which is *in pari materia* with Article 7(1) of the Statute begins with the following words; " The Judges of the Court shall be elected by secret ballot by an absolute majority vote of the state parties to the Convention …"

87 *Cf* L Sheaver, *op. cit.* p. 645.

to the next session of the OAS General Assembly. By the provisions of Article 82, the election of the first judges will be made from the candidates whose names appeared on the Secretary-General list, by a secret ballot of the votes of states parties to the Convention. The candidate who obtained the largest number of votes, including an absolute majority of the representatives of the states parties, will be declared elected. Should it become necessary to have several ballots in order to elect all the judges of the court, the candidates who receive the smallest number of votes shall be eliminated successively in the manner determined by the state parties.[88] In furtherance of these provisions and within the time limit mentioned in Article 81, only seven judges (which incidentally correspond with the total number required under Article 52 of the Convention) were presented by the states parties for election as judges, thus making the requirement for election superfluous in this first instance.[89]

Outside of this temporary arrangements for the appointment of the court's first set of judges, Article 54 of the Convention provides for a more permanent and seamless procedure for the appointment and tenure of the judges sequel to the first appointments under Articles 81 and 82 of the Convention. By the tenor of Article 54[90] of the Convention, the Judges of the court serve for terms of six years each and may be re-elected only once. The terms are staggered by having the terms of three of the judges chosen in the first election expire at the end of the three years. The names of these three judges are to be determined at the OAS General Assembly by the casting of lots immediately after the first election. A judge elected to replace a judge whose

88 Article 82 of the Convention, Article 9 of the Statute.

89 On the inelegance of sticking to this procedure when only seven judges were nominated, thus, making the process a selection rather than election, see the view of Prof. Hecto Gros Espiel quoted in C A D De Abranches, "The Inter-American Court of Human Rights," footnote 51 at pp. 90-91. Available at http://www.wcc.american.edu/journal/lawrev/30/abranches.pdf. Accessed on 13/11/2013.

90 Article 6 of the Statute.

term has not expired shall complete the term of the latter. Where at the expiration of their terms, there are still pending cases which they have commenced hearing on, the judges shall continue to serve with regard to those cases and shall not be replaced by the newly elected judges. Apparently, this provision is to obviate the needless delays which the rule of trial *de novo* usually engenders in such trials.

Article 55[91] of the Convention provides for the incidence of *ad hoc* judges. The gravamen of the provision is to the effect that if among the judges called upon to hear a case, none is a national of any of the states parties to the case, each of the latter may appoint an *ad hoc* judge. Should several states have the same interest in the case, they shall be regarded as a single party for the purposes of having an *ad hoc* judge. Against the backdrop that exhaustion of local remedies is a condition precedent for admissibility of any petition before the court,[92] the provision on *ad hoc* judges ensures that at least one member of the deliberating panel understands the domestic legal system which is often relevant for the purposes of exhaustion of local remedies analysis.[93] This practice was however abused by some countries notably Peru and Guatemela in particular whose *ad hoc* judges consistently formed the habit of dissenting from an otherwise unanimous bench decision,to render a judgment more favourable to their states.[94] To nip this practice, the court issued an advisory opinion in 2009 wherein it interpreted Article 55 of the Convention to apply only in cases brought by one state against another.[95] This also led to the revision of the court's rules

91 Article 10 of the Statute.
92 Article 46(1) of the Convention.
93 L Sheaver, *op. cit.* p. 645.
94 *Ibid.*
95 Advisory Opinion OC-20/09 of September 29 2009, requested by the Republic of Argentina.

of procedure wherein regular judges were prohibited from sitting in any case bordering on alleged human rights violation against their own state.[96]

The court elects from among its members a president and vice president who shall serve for a renewable two year term.[97] The president represents and directs the work of the court. He also regulates the disposition of matters brought before the court as well as presiding over its sessions.[98] In his absence for whatever reason, the vice president takes charge of his responsibilities.[99] Where the office of the president becomes vacant on a permanent basis, necessitating the elevation of the vice president, the court shall correspondingly elect a new vice president.[100] In the absence of both the president and the vice president, their duties shall be assumed by other judges in the order of seniority.[101]

For the purposes of establishing precedence during official proceedings, elected judges take precedence after the president and vice president according to their seniority in office.[102] Where judges have the same seniority, then their age shall be reckoned with to determine precedence. Ad hoc and interim[103] judges shall take precedence after the elected judges according to their age. However, where there exists an ad hoc or interim judge who has previously served as an elected judge, such a person shall have precedence over any other ad hoc or interim judge.[104]

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96 Article 19 of the Revised Rules of procedure, available at http://www.corteidh.or.cr/docs/informes/eng_2009.pdf. visited on 15/11/2013.

97 Article 12(1) of the Statute.

98 *Ibid.* Article 12(2).

99 *Ibid.* Article 12(3).

100 *Ibid.*

101 *Ibid.* Article 12(4).

102 *Ibid.* Article 13(1).

103 Appointed pursuant to Article 19(4) of the Statute in cases of disqualification.

104 *Ibid.* Article 13(2).

Members of the court serve part time except the president whose services are on a permanent basis. However this status as a judge is made subject to certain incompatibilities provided for in Article 71 of the Convention and enunciated upon in Article 18 of the Statute. They include membership of the executive branch of the government, except for those who hold positions that do not place them under the direct control of the executive branch and those of diplomatic agents who are not chiefs of mission to OAS or to any of its member states; officials of international organisations; any others that might prevent the judges from discharging their duties, or that might affect their independence or impartiality or the dignity and prestige of the office. In determining an incompatible vocation or activities, reliance is often placed on the precedents established by the statute of the ICJ. However, it is generally accepted that members of the court can serve alongside holding academic appointments in their home countries.[105]

Article 56[106] provides for a quorum of five judges for the deliberations of the court whilst a decision of the court is determined by a majority vote of the judges present with the president having casting vote in the event of a tie. The court does not have a chamber jurisdiction. In relation to the court's quorum of five and the rendering of decisions thereat, the thought that three judges, a simple majority of the five-judge quorum could make decisions and render opinions of far reaching significance and magnitude without the support of the four other judges rankles the judicial mind. Especially is this so when it is realised that the other four judges can in a similar case decide differently. Such a scenario could be a source of continuous instability in the decisions of the court, creating uncertainty in its jurisprudence and ultimately

105 L Sheaver, *op. cit.* p. 645. It is generally accepted that service in the academia or occasional delivery of academic lectures or seminars by international judges rather than being incompatible with their duties help in creating awareness on the functioning of these court.

106 Article 23 of the Statute.

weakening the prestige of the system. Against this backdrop, it has been opined[107] and we agree that the decisions of the court must be made by an absolute majority especially on issues of fundamental importance to the inter-American system.

The judges of the court upon election and throughout the duration of their term of office enjoy the immunities usually accorded to diplomatic agents[108] in accordance with International Law. They also enjoy diplomatic privileges in the performance of their official functions. This is in tandem with the practice in other international judicial institutions of which a notable example is the International Court of justice.[109] These immunities and privileges inure to the judge even in his own state as well as any other that may be established by the state seat of the court to ensure to himself, his staff, archives, correspondence and other means of transit and communication, the protection and inviolability as well as the legal and fiscal exemption, needed for the performance of his duties.[110] They are also exempted from civil, criminal or administrative liability or any other liability of a judicial nature arising from their votes and opinions in the cause of performing their duties.[111]

In the performance of their duties, the judges are expected to conduct themselves in a manner that befits their office as officers of an international judicial institution.[112] Consequently, they may not enjoy immunity for any crime they commit that is not related to the performance of their judicial functions. Such conducts may trigger off the disciplinary provisions of Article 73 of the Convention which vests in the OAS General Assembly upon the request of the court, the responsibility to determine the

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107 C A D de Abranches, *op. cit.* p. 97.

108 Article 70(1) of the Convention; Article 15(1) of the Statute. These are as contained in Articles 29-42 of the Vienna Convention on Diplomatic Immunities and Privileges 1961.

109 Article 19 of the Statute of the ICJ.

110 C A D de Abranches, *op. cit.* p. 94

111 Article 70(2) of the Convention, Article 15(2) of the Statute.

112 Article 20 of the Statute.

appropriate sanctions to apply against an errant judge. Application of a sanction requires a two-thirds majority vote of states parties to the Convention and of the OAS. Article 72 of the Convention provides for the remuneration of the judges. The court draws up its budget and submits to the OAS General Assembly for approval through the General Secretariat. The terms and conditions for the payment of the judges' emoluments are set out by the Statute of the court, which factors in the importance and the need for independence in the exercise of their duties.[113] The importance of the court and the need for its independence makes it imperative that its judges receive remuneration commensurate with their required qualifications and appropriate in view of the conflict of interest requirements imposed on them.[114] The Statute of the court probably due to the part time nature of the judges does not expressly provides for the payment of salaries to the judges but rather makes provision for a per diem system of remuneration which is based on the number of days the court is in session. The question that comes to mind easily is whether this system compensates for the time devoted to the study of the cases and preparation of the decision, which often times involves bibliographical research on precedents and the writing of dissenting or individual opinions pursuant to Article 66(2) of the Convention?[115] We think not. This is predicated on the fact that per diem compensation might entail financial detriment to the judge who will be absent from his office. Thus, he may recuse himself from the court's sessions to avoid any detriment to himself. This might concomitantly delay or obstruct the activities of the court by lack of quorum of five judges as required by Article 56 and 23 of the Convention and Statute respectively. The preferred option would be to adopt the module of the International Court of Justice wherein the judges of the court work full time and are placed on annual salary as well as other perks of

113 Article 17(1) of the Statute.
114 As in those proved for in Article 18(1) of the Statute.
115 Article 24(3) of the Statute.

office. This view is underscored by the fact of the great responsibility of their decisions and opinions and the extensive functions attributed to the Inter-American System and the need to obviate a situation whereby it will be more difficult to obtain the number of qualified candidates necessary for the election of a court that will be representative of the high moral trustworthiness of a jurist of the Americas in matters of human rights vis-à-vis the number of cases and consultations which is brought before the court.[116]

5.2.2 Jurisdiction / Jurisprudence

The effectiveness of any legal system depends essentially upon the existence of judicial institutions for the ventilation of grievances and propagation of rights. Access to these judicial institutions and the subject matter of the disputes brought before them are also provided by the instruments establishing them. These elements define to a great extent the jurisdictional scope of any judicial institutions if its deliberations must remain valid.

Both the Convention and the court's Statute has invested the IACtHR with jurisdiction vis-à-vis the parties and subject matter. Geographically, the jurisdiction of the court is limited to the states that make up the Organisation of American States (OAS).

(a) Jurisdiction Ratione Personae: This has to do with the appropriate parties that can appear before the court. Article 61 of the Convention provides that only states parties and the commission shall have the right to submit a case to the court. Thus, individuals have no direct access to the court and where such a petition comes before the court, the court must decline for want of jurisdiction. The individual can only appear before the court through the commission. In this wise, Article 44 of the

[116] *Cp*. C A D De Abranches, *op.cit.* pp. 95-96.

Convention provides that any person or group of persons or any non governmental entity legally recognised in one or more member states of the organisation may lodge petitions with the commission containing denunciations or complaints of violation of the Convention by a state party. Articles 48-50 contain provisions allowing for the right of fair hearing and diplomatic resolution[117] of the matter. Where the matter has not been settled by any of the aforementioned means, the matter may then be submitted to the court by the Commission.[118] It is this latter act that triggers off the individuals right of access to the court and the court's assumption of jurisdiction over an individual petition. Thus, when the Commission appears before the court, the Commission acts in defence of the right of a person recognised as victim of a violation. It acts not on its own right but on behalf of that individual.[119] The parties in the case submitted to the court are complainant (ie the injured person or his relatives) and the defendant (ie the government) which must defend the authority of the state.

A state party to the Convention can also appear before the court as a complainant especially if it has subscribed to the conditions stated in Article 62[120] of the Convention. In such situations the state party acts in its own right and name. It needs stating that the Convention does not provide a private petitioner before the Commission, a cart blanche to do so. Such petitions must pass the admissibility tests provided for in Article 46 of the Convention.

The said Article provides as follows:

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117 By diplomatic resolution is meant the following means, to wit; negotiation, mediation, conciliation and arbitration.

118 Article 51 of the Convention.

119 C A D De Abranches, *op. cit.* p. 101.

120 This has to do with the compulsory jurisdiction of the court within its contentious jurisdiction. *Cp* Article 45.

1. Admission by the Commission of a petition or communication lodged in accordance with Article 44 or 45 shall be subject to the following requirements:

(a) That the remedies under domestic law have been pursued and exhausted in accordance with generally recognised principles of International Law;

(b) That the petition or communication is lodged within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment;

(c) That the subject of the petition or communication is not pending in another international proceeding for settlements; and

(d) That in the case of Article 44, the petition contains the name, nationality, profession, domicile and signature of the person or persons or of the legal representative of the entity lodging the petition.

In order to guard against abuse of governmental institutions by repressive regimes, Paragraph 2 of Article 46 provides that the conditions stated in Article 46(1) (a) and (b) shall not be applicable when

(a) The domestic legislation of the state does not afford due process of law for the protection of the right or rights that have allegedly being violated;

(b) The party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or

(c) There has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

In processing the private person's petitions, the secretariat of the Commission scrutinises the petition to make sure it is complete and properly submitted.[121] It then forwards the relevant portions of the petition to the state involved for comments on the petition's admissibility.[122] The identity of the individual or organisation lodging the petition will be withheld from the state unless the petitioner expressly authorises its disclosure.[123] The state has three months to file its observation on admissibility which may be extended.[124] Upon receiving the state's observation or if the state fails to reply within the stipulated time, the Commission will then proceed to make a determination on admissibility.[125] A working group on admissibility is constituted. They study each petition and make an initial recommendation on admissibility.[126] The final decision on admissibility is made by the members of the Commission.[127] Factors to be considered by the Commission include those listed under Articles 46(1) (a)-(d) and 47 of the Convention.

Article 47 of the Convention is to the effect that the Commission shall consider inadmissible any petition or communication submitted to it under Articles 44 or 45 if;

(a) Any of the requirements indicated in Article 46 has not been met.[128]

(b) The petition or communication does not state facts that tend to establish a violation of the rights guaranteed by this Convention

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121 Article 26-29 of the Commission's Rules of procedure (hereinafter called Commission's procedure), available at http://www.cidh.org/basicos/English/Basic 18/ rules of Procedure/ACHR.htm. accessed on 13/11/2013. See also L Sheaver, op. cit, pp. 652-655.

122 *Ibid.* Article 30(2).

123 *Ibid.*

124 *Ibid.* Article 30 (3-4).

125 *Ibid.* Article 30 (6).

126 *Ibid.* Article 35.

127 *Ibid.* Article 36.

128 It needs stating that in practice, the exhaustion of local remedies rule is interpreted liberally and applied flexibly in the interest of equitable justice. Thus, Article 33(3) of the Commission's Rule of Procedure cast the burden of proving the non-exhaustion of local remedies on the respondent government if that is the gravamen of its objection to the admissibility of the petition. See also A A C Trindade, "Current State and Perspectives of the Inter-American System of Human Rights Protection at the dawn of a New Century," 6 *TUL.J Int'l and Comp. L* 5, 13 (2000).

(c) The statements of the petitioner or of the state indicate that the petition or communication is manifestly groundless or obviously out of order; or

(d) The petition or communication is substantially the same as one previously studied by the Commission or by another international organisation.

Where a petition is deemed admissible by the Commission, a case is opened and proceedings on the merits initiated. Petitioners and states have four months each to file their observations on the merit with the petitioner taking the first turn while the state replies thereafter.[129] If a state refuses to cooperate with the Commission and files no reply, the facts alleged in the petition may be presumed true[130] in the absence of any other evidence. As part of the process of investigating the facts, the Commission may hold hearings in which both the government and petitioners take part,[131] or embark on on-site investigation to establish facts in the dispute.[132] If friendly settlement is obtained pursuant to the Commission's role in Article 48(1) (f) of the Convention,[133] the Commission prepares a report that describes the facts of the case and settlement reached.

Where no friendly settlement is reached, the Commission deliberates on the merits of the case, examining the arguments and evidence adduced by both parties as well as evidence obtained from any on-site investigation. The Commission then draws up a report setting out the facts and the conclusions it has reached about the case. Where the Commission is of the conclusion that a violation of human rights has taken place, it sends its report together with its recommendation on how the state should redress

129 Commission's Rule of Procedure, Article 37(1).

130 *Ibid.* Article 38.

131 *Ibid.* Article 64.

132 *Ibid.* Article 39.

133 This is to the effect that the Commission shall place itself at the disposal of the parties concerned with a view to reaching a friendly settlement of the matter on the basis of respect for the human rights recognised in this Convention. See also Article 40(1) of the Commissions Rule of Procedure.

the violation and transmits it to the state. The affected state has three months within which to comply with or react to the recommendation of the Commission. Pending the determination of the petition but subsequent to its lodging, the Commission may where it deems it necessary, request a state to take precautionary measures to prevent irreparable harm.[134] It may also order temporary protective measures based on the facts alleged without the necessity of having those fact proved beforehand.

A ruling by the Commission that a petition is inadmissible is a quasi-judicial decision which given the jurisdictional outlay of the Convention would seem to be final and not subject to appeal, moreso when the commission is considered as an autonomous entity of the organisation and *pro tanto* not subordinate to the court. However, since it is within the primary control of the court's contentious jurisdiction to interpret and apply the Convention, the court is not bound by the commission's decision on admissibility and may in appropriate cases reverse or even modify the decisions so taken by the commission.[135] However, the legal effect of an opinion attributing responsibility for an alleged violation under the Convention and proffering remedial recommendations remain moot. This is against the backdrop that such a report is not formally binding as a judgment of the court. However, considering the fact that such an opinion and recommendation constitute an authoritative legal determination by a body which has been invested with competence relating to the states fulfilment of their obligation under the Convention, we hold that such an opinion should be binding upon states with a right of appeal to the IACtHR, by any of the aggrieved state.

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134 Article 25, Commission's Rules of Procedure.

135 C A D De Abranches *op. cit*. p. 138; Gros-Espiel, "Contentious proceedings before the Inter-American Court of Human Rights," (1987) 1 Emory Journal of International dispute Resolution 175; T Buergenthal, "Judicial Fact-Finding: the Inter-American Human Right Court," in R Lillich (ed), *Fact-Finding Before International Tribunals*, (New York: Transnational Publishers, 1991) pp. 261, 263-264.

(b) Jurisdiction Ratione Materia

The jurisdiction *ratione materia* or subject matter jurisdiction of the court is provided by its Statute. In this wise, Article 1 of the Statute provides that "the Inter-American Court of Human Rights is an autonomous judicial institution whose purpose is the application and interpretation of the American Convention on Human Rights…"

In furtherance of its purpose of applying and interpreting the American Convention on Human Rights, the court's jurisdiction is bifurcated into two, namely:[136]

(i) The contentious or litigation jurisdiction.

(ii) The advisory or consultative jurisdiction.

The scope legal nature and effects of these types of jurisdiction differs.

(i) Contentious Jurisdiction

The court's contentious jurisdiction equips the court with the capacity to hear cases, render binding judgments and adopt provisional and remedial measures on matters related to the application and interpretation of the provisions of the Convention

Consequently, Article 62 which acts as a beacon delimiting the court's contentious jurisdiction provided as follows:

(1) A state party may, upon depositing its instrument of ratification or adherence to this Convention, or at any subsequent time, declare that it recognises as binding, ipso facto and not requiring special agreement, the jurisdiction of the court on all matters relating to the interpretation or application of this Convention.

2. Such declaration may be made unconditionally, on the condition of reciprocity, for a specified period, or for specific cases. It shall be presented to

136 Article 2 of the Statute.

the Secretary General of the organisation, who shall transmit copies thereof to the other member states of the organisation and to the secretary of the court.

3. The jurisdiction of the court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the state parties to the case recognise or have recognised such jurisdiction whether by special declaration pursuant to the preceding paragraphs, or by a special agreement.

From these provisions, it can be seen that a state party does not ipso facto subscribe to the court's contentious jurisdiction merely by ratifying the Convention. In order to be deemed as having so subscribed, the affected state party must have filed the declarations referred to in paragraphs 1 and 2 of the Article 62 or have concluded the special agreement mentioned in paragraph 3 thereof. It needs stating that the above provision is similar to the model established by the International Court of Justice.[137] Moreover, the exercise by the court of its contentious jurisdiction is preconditioned by the requirements of Article 46 (1) and 61(2) of the Convention.[138] In the *Gallando Case*, [139] which was the court's first contentious case, the government of Costa Rica sought to waive the proceedings before the Commission and take the matter directly to the tribunal. The court held that until the Commission had dealt with it, it had no jurisdiction.

The court emphasised that the proceedings before the Commission have not been created for the sole benefit of the states but also in order to allow for the exercise of important individual rights especially those of the victims. It remains moot however

137 Chapter 4 pp. 123-134 supra for details.
138 For the provisions of Article 46(1) of the Convention : See pp.267-268 for verbatim quotation.
139 Available at http://www1umn.edu/humanrts/iachr/b_11_11a.htm accessed on 12/3/2014.

whether in intestate disputes, the states parties can waive the Commission's proceedings.

Proceedings before the court are divided into written and oral phases.[140] In the written phases, the case is filed. The application indicates the facts of the case, the plaintiffs', the evidence and witnesses the applicant plans to present at the trial as well as the claims for redress and costs. If the application passes the admissibility test as may be determined by the court's secretary, notice thereof is served on the judges, the state or the Commission (depending on who lodged the application), the victims or their next-of-kin, the other member states and OAS headquarters. Within 30 days of notification, any of the parties in the case may submit a brief containing preliminary objections to the application. If the court feels it is necessary, it can convene a hearing wherein issues pertaining to the preliminary objections are dealt with. On the contrary, issues bordering on the parties preliminary objections and the merits of the case can be treated together at the same hearing. Within 60 days[141] following notification, the respondent must supply a written answer to the application stating whether it accepts or disputes the facts and claims it contains. Once the parties have submitted their written briefs, they still reserve the right upon an application to the court's President to lodge additional pleadings prior to the commencement of the oral phase.

Upon conclusion of the written phase, the president of the court sets the date for the start of the oral proceedings.[142] During the oral phase, the judges may ask any question they deem necessary from any of the persons appearing before them.[143] All witnesses including expert witnesses and other persons admitted to the proceedings

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140 Article 28 Rules of Procedure of IACtHR; Inter-American Court of Human Rights, available at http://en.wikipedia.org/wiki/Inter-American_Court_of_Human_Rights. Accessed on 12/2/2014.

141 Article 42, *ibid.*

142 Article 29 and 32, *ibid.*

143 Article 51, *ibid.*

may at the president's discretion be questioned by the representatives of the commission or the state or *mutatis mutandi* by the victims, their next-of-kin or their agents. The president is permitted to rule on the relevancy of the questions asked and to excuse the person asked the question from replying unless overruled by the court.

After hearing the witnesses and experts and analysing the evidence presented, the court issues its judgment. It needs stating here that the deliberations of the judges are conducted in private[144] and once judgment has been adopted, it is notified to all the parties involved. The court can grant both monetary and non monetary reliefs. However, the most direct form of redress are cash compensation payments made to the victims or their next-of-kin. The court can also make orders requiring the state to do any or all of the following, to wit: grant benefits in kind, offer public recognition of its responsibility; take steps to prevent reoccurrence of similar violations in the future and any other forms of non-monetary compensation. Note that the above non-monetary forms of compensation can be in addition to monetary benefits.

For example, in the *Barrios Altos Case* [145] which involves the massacre of 15 persons in Lima, Peru at the hands of the state sponsored Colina Group Death Squad in November 1991, the court in its 2001 judgment ordered payment of $175 000 for the four survivors and for the next-of-kin of the murdered victims and a payment of $250 000 for the family of one of the victims. Furthermore, it required Peru to:

(i) Grant the victims' families free healthcare and various forms of educational support including scholarships and supplies of school uniforms, equipment and books;

(ii) Repeal two controversial amnesty laws;

(iii) Establish the crime of extrajudicial killing in its domestic law;

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144 Article 15, *Ibid*; Article 24(2) of the Statute.

145 Available at http://en.wikipedia.org/wiki/inter-American_Court_of_Human_Rights *supra*. see also http://www1.edu/humanrts/iachr/c/87-ing.htm. Accessed on 12/2/2014.

(iv) Ratify the International Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes against Humanity;

(v) Publish the court's judgment in the national media;

(vi) Publicly apologise for the incident and to undertake to prevent similar events from recurring in the future;

(vii) Erect a memorial monument to the victims of the massacre.

5.2.3 Judgment

Any judgment given by the court is final and unappealable.[146] However, where there is a disagreement as to its meaning or scope, Article 67 of the Convention authorises the court to interpret its judgment at the request of any of the parties, provided the request is made within ninety days from the date of the notification of the judgment.[147]

By Article 68 of the Convention, state parties to the Convention bind themselves into complying with the judgment of the court in any case to which they are parties. As earlier noted, the court is empowered to grant both monetary and non monetary damages. Where it renders non monetary reliefs as in declaratory judgments, it may state not only what rights have been violated but also how the state should remedy the violation.[148] In case of monetary damages, Article 68(2) stipulates on how such is to be executed. It provides as follows:

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146 Article 67 of the Convention.

147 Neira Alegra Case (Request for Revision and Interpretation of Judgment of December 11, 1991 on the preliminary objections) available at http://opil.ouplaw.com/view/10,1093/law:ihrl/1394iachr91.case.1/law-ihrl-1394iachr91.Accessed on 12/2/2014. See also The Velasquez Rodriguez Case (Interpretation of the Compensatory Damages Judgment), Available at http://www.umn.edu/humanrts/iachr/b_11_12d.htm. Accessed on 12/2/2014.

148 Article 63(1) of the Convention.

"That part of a judgment that stipulates compensatory damages may be executed in the country concerned in accordance with domestic procedures governing the execution of judgments against the state."

The import of this provision is that state parties are not required to establish a mechanism for the domestic execution of the court's monetary judgements. Thus once there is a money judgement, the mechanism existing under municipal law for enforcement of court orders can be activated for purposes of execution thereof.

Given the fact that most case before the court involves states whose adherence to Treaty obligations is often dependent on what is their best national interest, Article 65 of the Convention provides for what may be termed a supervisory mechanism on the enforcement of the court's judgment. It states as follows:

"To each regular session of the General Assembly of the Organisation of American States, the court shall submit for the Assembly's consideration, a report on its work during the previous year. It shall specify in particular the cases in which a state has not complied with its judgments, making any pertinent recommendations."

By virtue of this provision, the court is required to inform the OAS General Assembly of situations wherein its judgments are not complied with. This allows the Assembly to discuss the matter and adopt whatever political measures that it deems appropriate. While such Assembly Resolutions may not be legally binding on the member states, sight should not be lost of the fact that a condemnatory OAS Resolution carries considerable political weight which can ultimately translate into public opinion pressure.

5.2.4 Provisional Measures

The logical consequences of a court's jurisdiction is its power to determine measures for the protection of the parties rights before or during the proceedings if the

circumstances so dictates. This is predicated on the fact that the power or capacity to solve a dispute is rendered otiose if there remains the possibility of abrogating the rights from whose struggle for protection the dispute arose in the first instance. This is all the more poignant in the case of a human rights court which certainly needs such power if it is to avoid irreparable injury to persons.

In virtue of the above postulations, Article 63(2) of the Convention provides that in cases of extreme gravity and urgency and when necessary to avoid irreparable damage to persons, the court shall adopt such provisional measures as it deems pertinent in matters it has under consideration. With respect to a case not yet submitted to the court, it may act at the request of the Commission.

Thus, by the above provisions, the court can grant temporary restraining orders in cases pending before it and in cases that have been lodged with the Commission but not yet referred to the court. Under the first category of cases, the court may act on its own motion or at the request of one of the parties[149] while under the second category, it acts only on the request of the Commission.

(ii) Advisory Opinion

The court's advisory or consultative jurisdiction is as provided for in Article 64 of the Convention. It provides thus;

1. The member states of the organisation may consult the court regarding the interpretation of this Convention or other Treaties concerning the protection of human rights in the American states. Within their sphere of competence, the organs listed in Chapter X of the Charter of the Organisation of American States, as amended by the Protocol of the Buenos Aires may in like manner consult the court.

[149] Article 24(1) Court Rules of Procedure.

2. The court at the request of a member state of the organisation may provide that state with opinions regarding the compatibility of any of its domestic laws with the aforementioned international instruments.

The court's advisory jurisdiction enables it to respond to consultations submitted by OAS agencies and member states regarding the interpretation of the Convention or other human rights instruments in the Americas. It also encapsulates the power to give advice on domestic laws as well as proposed legislation and to clarify whether or not they are compatible with the Convention's provisions.[150] This advisory function is available to all OAS member states and not restricted to only those that have ratified the Convention or accepted the court's adjudicatory function. Against the background that there need not be any specific case or controversy in order to activate this jurisdiction, there is no requirement for exhaustion of domestic or commission procedures. The procedures for advisory opinions vis-à-vis the contentious disputes are less formalised.[151] The same procedures for written and oral briefs are applied *mutatis mutandi* as the court feels appropriate. Proceedings are faster as requests are answered in less than one year.[152] Since its establishment in 1979, the court has had cause to interpret the scope of the advisory jurisdiction of the court. Thus, with regards to requests by organs of the OAS, the court has held that to satisfy the requirement that an advisory opinion request fall "within their spheres of competence," the affected OAS organ must demonstrate a "legitimate institutional

150 Inter-American Court of Human Rights, available at http://enwikipedia.org/wiki/Inter-American_court_of_Human_Rights accessed on 09/11/2013.The provisions of Article 64(1) & (2) constitute the admissibility requirement for a request for an opinion.

151 Lea Sheaver, *op. cit.* p. 658; Article 73(2) Court Rules of Procedure.

152 A A C Trinidade, *"*Current State and *Perspec*tives of the Inter-American System of Human Rights Protection at the Dawn of a New Century,*"* 8 *Tul. J. Int'l & Comp. Law* (2000) pp. 27-28; Lea Sheaver, *Ibid.*

interest in the subject matter of the request."[153] Similarly, the court has also ruled that the phrase "Other Treaties concerning the protection of human rights in the American States" as referred to by Article 64 (1) applies not only to OAS or Inter-American Treaties, but to any Treaty bearing on the enjoyment or enforcement of human rights in a state belonging to the Inter-American system.[154] With regards to Article 64(2), the court has interpreted the reference to "domestic laws" as applying in certain circumstances to proposed or pending legislation and not only to laws that are already in force.[155]

The mere fact that a request for an advisory opinion relates to a matter that is or once was the subject of a contentious proceeding before the commission will not ipso facto necessarily result in its rejection by the court.[156] But where it seems that the request by a state for an advisory opinion is actuated by a desire to delay pending contentious proceedings before the commission or otherwise to gain an undue and unfair

153 The Effect Of Reservations On The Entry Into Force Of The American Convention On Human Rights, Advisory Opinion OC-2/82 of September 24 1982, 1.-A Court H.R. Series A; Judgments and Opinions, No. 2 (1982) para.14.

154 "Other Treaties" Subject To The Consultative Jurisdiction Of The Court, Advisory Opinion OC-1/82, 1.-A Court H.R. Series A: Judgments and Opinions, No 4 (1984).

155 Proposed Amendments to the Naturalization provisions of the Constitution of the Costa Rica. Requested by Costa Rica. Advisory Opinion OC-4/84, 1.-A Court H.R. Series A: Judgments and Opinions, No. 4 (1984). Available at http//www./umn.edu/humanrts/iachr/b_11_4d.htm.Accessed on 10/01/2014.

156 Restriction to the Death Penalty (Articles 4(2) and 4(4) of the American Convention on Human Rights. Requested by the Commission. Advisory opinion OC-3/83, 1.-A. Court H.R. Series A: Judgments and Opinions, No. 3 (1983). Available at http//www./umn.edu/humanrts/iachr/b_11_4chtm. Accessed on 10/01/2014; Compulsory membership in an association prescribed by law for the practice of Journalism (Articles 13 and 29 of the American Convention on Human Rights) Requested by Costa Rica. Advisory Opinions OC-5/85, 1.-A. Court H.R. Series A: Judgments and Opinions, No 5 (1985). Available at http//www./umn.edu/humanrts/iachr/b_11_4d.htm. Accessed on 10/01/2014; International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Articles 1 and 2 of the American Convention on Human Rights) Requested by the Commission. Advisory Opinion OC-14/94, 1.-A Court H.R. Series A: judgments and Opinions No 14 (1995). Available at http//www./umn.edu/humanrts/iachr/b_11_4n.htm.Accessed on 10/01/2014.

advantage over the private parties in such proceedings, the court will decline to render the requested advisory opinion.[157]

When the court exercises its advisory or consultative jurisdiction, its opinions in such circumstances are not legally binding *stricto sensu.* This conclusion is inherent from the legal nature of advisory opinions which in contradistinction to the contentious jurisdiction[158] may be sought without limiting the sovereignty of the consulting states.[159]

Consequently, the strength of every advisory opinion rests on the moral and scientific authority of the court.[160] This authority in turn is predicated on the fact that the court is a "judicial institution whose purpose is the application and interpretation of the American Convention on Human Rights"[161] and is an organ having "competence with respect to matters relating to the fulfilment of the commitments by the states parties to this Convention.[162] A' fortiori, the court's pronouncements howbeit (contentious or advisory) derive their potency and value as legal authority from its intrinsic character as a judicial institution endowed with power to interpret and apply that instrument. Thus, the fact that a legal principle was enunciated in the course of the court's advisory jurisdiction does not *ipso facto* diminish the legitimacy or authoritative character of the legal principle so enunciated. A' priori, if a state engages in activities

157 Buergenttal, "The Advisory Practice of the Inter-American Human Rights Court," 79 *AM. J. Int'l. L* (1985) pp. 9-12; Compatibility of Draft Legislation with Article 8(2) (h) of the American Convention on Human Rights. Requested by Costa Rica. Advisory opinion OC-12/91, 1.-A Court H.R., Series A: Judgments and opinions, No. 12 (1992). Available at http//www./umn.edu/humanrts/iachr/b_11_4l.htm. Accessed on 10/01/2014. See also A S Dwyer, "The Inter-American Court of Human Rights: Towards establishing an Effective Regional Contentious Jurisdiction" 13 B.C. *Int'l & Comp. L. Rev.* (1990) pp. 156-161.

158 It needs stating that contentious jurisdiction of an international court most often requires a formal instrument of prior acceptance of the obligation to abide by the decision of the adjudicatory body which also entails the problems of sovereignty of the state. See further C A D Abranches, *op. cit.* p. 106.

159 *Ibid.*

160 *Ibid*. at 104.

161 Article 1, Statute of the court.

162 Article 33 of the Convention.

determined by the court in an advisory opinion to be violative of the Convention, such state is thereby put on notice that its conduct is a breach of its Treaty obligation vis-à-vis the Convention. The fact of this breach suffices to seriously undermine the legitimacy of whatever legal arguments in conflict with the court's opinion which the offending state might adduce in justification. It is worth noting that in its first three decades (1979-2009), the court has rendered twenty advisory opinions[163] of which the majority of requests were by the member states while the commission's requests constitute a small portion.[164]

The recognition and application of legal principles underpinning any legal milieu depends to a large extent upon the judicial institutions entrusted with the application and interpretations of norms. Especially is this so where the regime of norms borders on human rights. The coming into force of the Convention and the inauguration of the Inter-American Court of Human Rights signposts the complete but gradual and prudent evolution of the regional system for the protection of human rights within the Americas. Given the historical, political, economic and social factors that are unique to the American continent vis-à-vis other climes. The creation of the court was initially a way for advocates of human rights within the Americas at different points in history to advance their human rights goals in the region. Though, it remains arguable whether in the course of its existence and work over the years, it has not thereby assumed a life of its own independent of its initial supporters and in the process assuming more powers than originally intended and probably expanding the

163 2009 Report of the Inter-Am.CHR, available at http://www.corteidh.or.cr/docs/informes/eng.2009.pdf at 4. Accessed on 2/4/2011.

164 2008 Report of the Inter-Am.CHR at 78, available at http://www.corteidh.or.cr/docs/informes/eng.2008.pdf accessed on 2/4/2011. The Commission is recognised as having an absolute right to request advisory opinions within the framework of Article 64(1).See also The Effect of Reservation on the into force of the American Convention On Human Rights.

content of rights beyond what its creators had intended.[165] It has continued to advance the cause of human rights in the Americas and in the process performed an important function in the region as a sustained source of moral leadership for human rights even as individual states commitment to these norms changed with passing regimes and administration and original proponents were out of power and those in power does not particularly care about human rights.[166]

Even as its annual case load had increased significantly over the years,[167] its jurisprudence reflects a certain emphasis on the classic civil rights, though it has recently asserted its competence to hear cases alleging violations of socio-economic rights.[168] It has made important contributions to the evolution of the law of the Convention and international human rights law in general, thus helping to clarify the specific duties of states parties to the Convention as well as what practices constitute a violation of its terms. A few instances will suffice herein. The court has interpreted Article 1 of the Convention (obligation to respect rights) to impose upon states, the four fold duty to prevent, investigate, punish and redress violations of the other substantive rights provisions of the Convention.[169] Similarly, the court has interpreted Article 2 (domestic legal effects) to require states to harmonise their domestic laws to

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165 L Lixinski, "Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law," 21 *Eur. J. Int'l L.* (2010) 585.

166 L Sheaver, *op. cit.* p. 668.

167 Ostensibly due to the fact that increased human rights awareness raised the level of political agitations necessitating governments to react by assuming exceptional powers in defence of the so-called national security of states.

168 Against the backdrop that the Convention contains a sole Article 26 committing states to adopt measures to pursue the progressive achievement economic, social and cultural rights, Sheaver opines that the right is deemphasised in the Convention in favour of the civil and political rights; Sheaver, *op.cit.* footnote 172 p. 660

169 Velasquez Rodriquez V. Honduras 1988 Inter-Am C.HR (Ser. C) No. 4 (July 29, 1988); Godinez Cruz V. Honduras, 1989 Inter-Am C. HR (Ser. C) No. 8 (July 21, 1989).

be in accordance with the Convention.[170] In Advisory Opinion OC-2/82, 1-A Court H.R. Series A: Judgements and Opinions, No 2, para. 29 (1982),[171] the court declared that modern human rights Treaties in general and the American Convention in particular are not unilateral Treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting states since the object and purpose of these Treaties is the protection of the basic rights of individual human beings, irrespective of their nationality, both against the state of their nationality and all other contracting states, the concept of reciprocity which plays an important role in the application of traditional Treaties, loses much relevance in the application of human rights Treaties. Consequently, the court determined that a state which had included a reservation in its instrument of ratification did not have to wait upon the acceptance of the reservation by other contracting states before considering itself a party to the Convention.[172]

In its interpretative role as a *judex* vis-à-vis the American Convention, the court considers itself responsible to the principles of human rights that underpines the regional Treaties rather than to strict principles of interpretation based on the intent of the sovereign actors that created them. This is anchored on the understanding of human rights as having a natural law origin, existing prior to and independent of state recognition. The content of the legal duties to respect rights can thus evolve as international human rights norms are clarified and expanded, subjecting states to increasing obligations without specific authorisation.[173]

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170 Loayza-Tamayo V. Peru (1998) Inter-Am. C.HR (Ser. C) No. 47 (March, 1998) where the court held that Peru's prosecution of her citizens under terrorism and treason statutes in secret courts was not compatible with the right to a fair trial under Article 8.

171 The Effect of Reservations on the Entry Into Force Of The American Convention On Human Rights.

172 *Ibid*. at para. 40.

173 L Sheaver, op. cit. at p. 663.

Despite the drawbacks inherent in its enforcement mechanism,[174] the importance of the court's function and the necessity of its establishment cannot be overemphasised. Especially is this so when it is realised that issues bordering on law, democracy and human rights have assumed certain vibrancy that is difficult to ignore in contemporary inter-state intercourse.

5.3 African Union Court of Justice on Human and Peoples' Rights

It needs stating at the onset that the creation of Permanent International Courts for dispute settlement in a collective Africa is a novelty[175] which is traceable to the last decade of the twentieth century. The reason for this lethargy for institutional court system is basically two-fold, namely: the nature of African Customary Law and long-time dispute settlement practice; and the fact that African leaders have always favoured the use of quasi-judicial commissions rather than a court with full judicial powers.[176]

With respect to African Customary Law, it remains a truism that African traditional dispute settlement places a premium on improving relations between the parties on the basis of equity, good conscience and fair play rather than on strict legality.[177] The African system of dispute resolution favours forgiveness, conciliation and open truth over legal friction and technicality. Thus, the African watchword is consensus and amicable dispute resolution in contradistinction to the adversarial and adjudicative procedures associated with western legal systems.[178]

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174 For details on these, see L Sheaver, *op. cit.* at pp. 663-664; J Rehman, *International Human Rights Law* 2nd edn. (London: Pearson Education Ltd, 2010) p. 303.

175 N Udombana, "An African Human Rights Court and An African Union Court: A Needful Duality or A Needless Duplication," *BJIL* Vol. 28. No 3 (2003) p. 817.

176 *Ibid.* at 818.

177 A L Ciroma, "Time for Soul Searching" Daily Times (Nig), August 23, 1979 at p. 3 cited by Udombana, *Ibid.*

178 N Udombana, "Towards The African Court on Human and Peoples' Rights: Better Late than Never," *Yale Hum.Rts and Dev. L.J.* (2000) p. 74.

As regards the preference for use of quasi-judicial commissions instead of full - fledged judicial institutions, the fact remains that the emergent African States and leadership at the dawn of independence were reluctant to relinquish their hard won independence and sovereignty to any form of supra-national entity. This explains why the defunct OAU Charter laid much emphasis on state sovereignty. Consequently, the principles of sovereignty and non-interference became the mantra of the Organisation. A' fortiori, at the founding conference of the OAU in 1963, the OAU rejected the draft Charter provision that provided for a court of mediation, conciliation and arbitration which was to be set up by means of a separate Treaty[179] and opted instead for an ad hoc body, the Commission of Mediation, Conciliation and Arbitration as a mechanism for the peaceful settlement of disputes among member states to accomplish the purposes of the Charter.[180]

5.3.1 Historical Antecedent to the Establishment of the Court

The African Court of Justice and Human and Peoples' Rights is an amalgam of two courts, to wit; the African Court on Human and Peoples Rights [181] and the A.U Court of Justice.[182] The AFCtHPR represents the culmination of attempts to give teeth to the Human Rights regime established for Africa by the African Charter on Human and Peoples' Rights. The African Charter which is also known as the Banjul Charter[183] came into operation in 1986 sequel to its adoption in 1981. It originally did not make provision for a court. These lacunae undermined public confidence in the African Human Rights regime as it has become a trite fact that an effective court system is the bedrock upon which to compel violating states to conform to international human

179 Udombana *op. cit.* p. 819.
180 *Ibid.*
181 Hereinafter called the AFCtHPR.
182 Hereinafter called the AUCtJ.
183 Named after Banjul, Gambia's capital city where the Charter was adopted.

rights norms as well as providing remedies to victims. Moreso as such judicial institutions impact positively on the development of Human Rights Jurisprudence as well as creating the necessary awareness. Consequently and in order to obviate the perceived problems that will be engendered by the non-establishment of a court, the member states adopted a protocol in 1998 to give content and verve to the Banjul Charter via the establishment of the AFCHPR. The Protocol came into effect in 2004 even as events within the AU system overtook its effective operationalization. It complements the functions of the African Commission on Human and Peoples' Rights. The court is composed of eleven Judges elected on their individual capacity by secret ballot who hold office for a six year term. Its seat is at Arusha, Tanzania. It has competence to decide all cases and disputes submitted to it concerning the interpretation and application of the Charter, the Protocol and any other relevant Human Rights Instrument ratified by the states concerned[184] and to provide an opinion on any legal matter relating to the Charter or any other relevant Human Rights Instrument.[185] Thus, the court has both a contentious and advisory jurisdiction. Access to the court is open to the African Commission, a state party which has lodged a complaint with the Commission, a state party against whom a complaint has been lodged, a state party whose citizen is a victim of human rights violations and African Inter-governmental organisations,[186] individuals and non-governmental organisations have their access made conditional upon the provisions of Article 34 (6) of the Protocol.[187] The said Article 34 (6) provides as follows:

184 Article 3 of the AFCtHPR Protocol.
185 *Ibid.* Article 4.
186 *Ibid.* Article 5(1).
187 *Ibid.* Article 5(3).

> At the time of ratification of this Protocol or any time thereafter, the state shall make a declaration accepting the competence of the court to receive cases under Article 5 (3) of this Protocol. The court shall not receive any petition under Article 5 (3) involving a state party which has not made such a declaration.

Given the poor leadership and impunity associated with most African countries, the provision of Article 34 (6) is rather unfortunate. This is predicated on the fact that countless African victims of human rights violations will be unable to directly access the court until a declaration in terms of Article 34 (6) has been made by their state. Harrington[188] summarized this despair thus:

> One need not to be extensively versed in African politics to gauge the likelihood of African States making an extra effort to provide their citizens and civil society groups with avenues through which to hold them accountable.

Its proceedings are in public and oral hearings are envisaged.[189] Free legal representation are accorded parties where the interest of justice so dictates.[190] Where the court finds a violation of a protected right, it shall make an appropriate remedial order to redress the wrong.[191] This may include compensation and the prescription of provisional measures.[192] Its judgment is final and without appeal[193] even as state

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188 Harrington, "The African Court on Human and Peoples' Rights," in M D Evans and R Murray (eds.) *The African Charter on Human and Peoples' Rights: The System in Practice, 1986-2000*, (Cambridge: Cambridge University Press, 2002) p. 319.

189 Article 10 AFCtHPR Protocol.

190 *Ibid.* Article 10(2).

191 *Ibid.* Article 27.

192 *Ibid.* Articles 27(1) and 27(2).

193 *Ibid.* Article 28.

parties are under an obligation to comply with the judgment of the court.[194] Implementation of the court's decision will be monitored by the political bodies of the AU. In this wise, Article 29 (2) of the court's Protocol provides that the Council of Ministers shall be notified of the judgment and shall monitor its execution on behalf of the Assembly of the AU.

In summary, the Protocol provides the anatomy of a Human Right Court for Africa. Its complaints mechanism allows an aggrieved person whether state or non state to bring complaints before the court for violations of the Banjul Charter. The complaint procedures of International Human Rights Tribunals it has been observed serve important functions, to wit:

First, as a result of considering such a complaint, an individual whose rights have been violated may have a remedy against the wrong suffered by him and the violation could be stopped and / or compensation paid, etc,; second, consideration of a complaint may result not only in a remedy for the victim of the violation whose complaints has been considered but also in changes to internal legislation and practice; and third, an individual complaint (or more often, a series of complaints) may serve as evidence of systematic and / or massive violations of certain rights in a given country.[195]

The AFCHPR was only able to deliver two judgments before the fluidity of events within the AU system caught up with it, to wit; (1) *Yogogombaye V. The Republic of Senegal*[196] delivered on 15/12/2009 and *African Commission on Human and Peoples'*

194 *Ibid.* Article 30.

195 R Mullerson, The Efficiency of the Individual Complaint Procedures: The Experience of CCPR, CERD, CAT and ECHR, cited by Udombana, *op. cit.* p. 827.

196 Unreported, Suit No: ECW/CCJ/APP/001/2008 of 15/12/2009

Rights V. Great Socialist People's Libyan Arab Jamaliviya delivered on March 25, 2011.[197]

With respect to the AU Court of Justice, its establishment is traceable to the re-awakening within the African continent of the need for a more vibrant continental body that can drive the continent interface with other regions of the world in terms of the major index for developments, to wit; justice, human rights, the rule of law and good governance. Against this backdrop, African leaders met in Sirte, Libya in 1999 wherein they discussed the future of the OAU in meeting the developmental challenges facing Africa. At the end of their meeting, they adopted the Sirte Declaration which sought inter-alia to address in an effective manner the new social, political and economic realities in Africa as well as revitalizing the Pan-African Organisation so as to enhance its role in meeting the needs of the peoples of the Continent. It was also recognised that the above lofty aims were not to be realised within the framework of the then existing supra-continental body, the Organisation of African Unity (OAU). Consequently, a decision was also taken to establish a new organisation to replace the OAU. This organisation, it was thought, will be more dynamic, capable on the one hand in safeguarding the achievement of the OAU and on the other hand promoting Africa's role in the twenty-first century. Thus, it was that at the 36th Ordinary Assembly Session of the OAU meeting in Lome, Togo in July 2000, the Constitutive Act of the African Union was adopted whilst the organisation itself was declared by the 5th Extraordinary Assembly Session of the OAU meeting in Sirte, Libya once again on March 2, 2001. The Constitutive Act itself became

197 M Du Plessis, "Implications of the AU Decision to Expand the African Court's Jurisdiction," Available on http://www.issafrica.org/uploads/paper235. Visited on 03/05/2014.

operative on 26th May 2001[198] whilst the AU was officially launched into existence on July 2002 in Durban, South Africa.

One major feature that distinguished the AU from its predecessor, the OAU lies in the fact that the AU Act makes provisions for a Court of Justice for the adjudication of Inter-African disputes.[199] This court which is to serve as the principal judicial organ of the AU was a welcome departure from the OAU which never made provisions for such a court. However, save for Article 26 of the Constitutive Act which states that the court shall be seised of matters of interpretation arising from the Constitutive Act's interpretation and implementation, details as to the composition and functioning of the court were left to be determined by a future Protocol which was eventually adopted on 11 July 2003 by the 2nd Assembly Ordinary Session of the AU. The substantive provisions of the Protocol were heavily influenced by the Statute of the ICJ. Given the stabilizing functions of law, it would seem that the Constitutive Act of the AU was a major turning point in the quest for development, justice, human rights, the rule of law and good governance.

Just like the AFCtHPR, the AUCtJ consists of eleven Judges[200] who are required to be impartial and independent.[201] They serve for a six year term which may be renewed for a further one term.[202] Though, the court can sit as a full court, a quorum of seven is also specified. The Protocol provides for a president and vice-president who are

198 This is sequel to the stipulation in Article 28 of the Constitutive Act to the effect that the Act would enter into force 30 days following the deposit of the instrument of ratification by at least two-thirds of the OAU members (ie, by 36 states). Nigeria deposited its instrument of ratification on 26 April 2001, becoming the 36th member state to do so, thus, bringing the Act into effect automatically 30 days thereafter (ie, 26th May 2001); K D Magliveras & G J Naldi, "The African Court of Justice," Available at http://www.zaoerv.de//66_2006/66_2006_1_b_1, visited on 20/12/13.

199 Article 5 and 18 of the Constitutive Act.

200 Article 3(1) of the Protocol.

201 *Ibid.* Article 4.

202 *Ibid.* Article 8(1).

elected for a three year period subject to a re-election for another term.[203] Eligibility for election is restricted to individuals who are nationals of state parties provided no two Judges may be nationals of the same country.[204] Appointment of Judges must reflect the principal legal systems as well as the regions in Africa. The candidates must possess the qualification required for appointment to the highest judicial offices or be jurists of recognised competence in International Law. In furtherance of the AU's commitment to the promotion of gender equality,[205] Article 5 of the Protocol provides that due consideration must be given to adequate gender representation in the nomination process. This requirement of affirmative action is aimed at increasing the representation and participation of women in an area seen as the exclusive preserve of men. The judges are elected in a secret ballot by the Assembly by a two-thirds majority of members eligible to vote.[206] While adequate gender representation is necessary in the nomination process, Article 7 (3) of the Protocol goes further in compelling the Assembly to ensure that there is equal gender representation in the election of Judges. Thus, it has been opined and we agree that the use of the adjective "equal" in Article 7(3) rather than that of "adequate" suggests a policy of positive discrimination and taken literally appears to set a minimum numbers, rule or quota, that is, it requires that at least five of the eleven Judges must be women, thereby predetermining in this particular area the outcome of the nomination process.[207] However, this argument on gender representation could equally attract the criticism that the selection process is discriminatory between candidates on grounds of sex.

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203 *Ibid.* Article 10(1).
204 *Ibid.* Article 3(4).
205 Article 4(L) of the Constitutive Act.
206 Article 7(1) of the Protocol.
207 M Du Plessis, *op. cit.* p. 195.

Article 18 of the Protocol provides for parties that are eligible to submit cases to the court. Four categories are envisaged, to wit; all contracting parties to the Protocol, the Assembly, the Commission or Commission's employees within the context of a labour dispute between them and in accordance with the relevant stipulations in the staff Rules and Regulations, and the third parties under conditions to be determined by the Assembly and with the consent of the contracting party concerned.

Article 19 provides for the subject matter jurisdiction of the court and stipulates that it covers all disputes and applications which are envisaged in the Act and in the Protocol relating to the following categories of cases:

(a) The interpretation, application of the Act.

(b) The interpretation, application or validity of the AU Treaties and all subsidiary legal instruments adopted within the framework of the AU.

(c) Any question of International Law.

(d) All acts, decisions, regulations and directives of the organs of the union.

(e) All matters specifically provided for in any other agreement(s) that contracting parties may conclude among themselves or with the union and which confer jurisdiction on the AU court.

(f) The existence of any fact which if established would constitute a breach of an obligation owed to a contracting party or to the union itself.

(g) The nature or extent of the reparation to be made for the breach of an obligation.

In determining cases before it, Article 20(1) of the Protocol enjoins the court to resort to the following sources of law, namely:

(a) The Constitutive Act.

(b) International Treaties establishing rules that are expressly recognised by the litigant states.

(c) International Custom as evidence of general practice having the force of law.

(d) General principles of law which are recognised either universally or by African States; and

(e) Solely as subsidiary means for the determination of the rules of law, judicial decisions and the writings of the most highly qualified publicists of various nations as well as the regulations, directives and decisions of the AU.

The court can also indicate provisional measures of protection on its own motion or on application by the parties if it deems the circumstances expedient in order to preserve the respective rights of the parties.[208]

Any member state having a legal interest in a case pending before the court and which interest could be affected by the judgment may seek permission to intervene in the case.[209] Where one of the parties fail to appear before the AU court or fail to defend the case brought against it, the other party may get a default judgment in its favour upon an application for same.[210] The judgments of the court are final[211] and binding on the parties[212] who by Article 51 guarantee its execution. Article 41 of the protocol permits the revision of judgments subject to certain conditions.[213]

An overview of the provisions of the AU court's Protocol will reveal a heavy inspiration derived from the Statutes of the ICJ. However, before the court could

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208 Article 22(1) of the Protocol.

209 *Ibid.* Article 42.

210 *Ibid.* Article 32(1) of the Protocol.

211 *Ibid.* Article 35(3).

212 *Ibid.* Article 37.

213 These include; (a) The application for revision is based on the discovery of a new fact, which if it were known at the time would have influenced considerably the outcome of the case. (b) That the application was lodged not later than 6 months from the discovery of the new facts and not later than 10 years from the date of the judgment. (c) That the ignorance of the discovered fact was not due to negligence. (d)That the party in question had already complied with the terms of the judgment, if the court exercising its discretion has so required.

become operational in terms of getting the requisite number of ratifications, events within the AU overtook it, thus rendering it a still-birth. These events which borders on the suitability of having two continental courts existing simultaneously have been the subject of discussion among African intellectuals and leadership. Especially is this so given the paucity of resources in the AU. Thus, to any keen follower of African politics, the eventual merger of the two continental courts into one was not totally surprising.

5.3.2 Establishment and Organisation of the African Union Court of Justice and Human and Peoples' Rights

Having discussed the desirability of a single continental based court at different *fora* and being convinced of its suitability given the African context, the AU shrugged off all criticism and went on to produce the Protocol and Statute establishing the merged court, to wit; The AU Court of Justice and Human and Peoples' Rights.[214] Consequently, references made to the Court of Justice in the Constitutive Act of the African Union shall be construed as referring to the African Court of Justice and Human and Peoples' Rights. The African Court of Justice and Human and Peoples' Rights is quite innovative in the sense that it is probably the first time in the international community that states have deemed it fit to establish a court with a two-pronged objective to provide for justice and human rights under one roof. The common practice in the international justice system is to have two courts operating the two concepts separately.

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[214] M Hansungule, "African Courts and the African Commission on Human and Peoples' Rights," Available on www.kas.de/upload/auslandshomepages/namibia/Human_Rights_in_Africa/8_Hansungule.pdf. Accessed on 2/3/2013. For a full text of the Merger Protocol and Statute of the African Court of Justice and Human and Peoples' Rights, seehttp://www.issafrica.org/anicj/uploads/protocol_on_the_dtatute_of_the_ACJHPR.pdf. Accessed on 09/01/2014. Note that the Merger Protocol has been further amended vide a draft amended Protocol adopted on 15/5/2012 which changed the courts nomenclature by adding the word "Peoples" and also creating a criminal jurisdiction for the court among others.

Article 3 of the Statute of the court provides that the court shall be constituted by sixteen Judges who are nationals of state parties, this number may however be reviewed by the Assembly upon the recommendation of the court. A member state shall not have more than one Judge represented on the bench.[215] Article 3(3) of the Statute provides for the division of the Judges among the geographical regions of the continent which it pegged at three per region save for the Western region which shall have four Judges. Sequel to the amendment to the merger protocol, a new paragraph 4 was included which enjoins the Assembly to ensure equitable gender representation on the Court's bench.[216] A look at this provision will reveal a marked difference vis-à-vis the structure of the Judges representation in the former two courts which was pegged at eleven. Going by the tenor of the second limb of Article 3(1) there is even the possibility of increasing the number beyond the 16 stated therein. Each region of the continent is equally assured of fair representation on the bench. However, the yardstick used in allocating four Judges to the West African region remains unclear. However, the equality of the state parties is maintained by the fact that not more than one Judge can come from a single state party. Paragraph 4 is an attempt to redress the agitation of women rights movement which has for long championed the crusade for women empowerment. Moreover, it will seem to reflect the AU's commitment to the promotion of gender equality as enshrined in Article 4(L) of the Constitutive Act. Practicalizing Article 3(4) of the Statute as amended will thus mean that of the sixteen Judges, at least eight of the slot will be reserved for the women. This could be predeterminative of the nomination process and thereby attract criticism on the

215 Article 3(2) of the Merger Statute as amended.

216 Article 2 of the Annex to the Draft Protocol on Amendment to the Protocol on the Statute of the African Court of Justice and Human Rights.

ground that the selection process could give rise to discrimination between candidates on the basis of the particular sex they belong to.

In *Guido Jacobs v. Belgium*,[217] the UN Human Rights Committee held that gender requirements for the appointment to the High Court of Justice, designed to encourage women to apply for public service posts where they were underrepresented was not discriminatory. It went further to state that:

> Given the responsibilities of the judiciary, the promotion of an awareness of gender-relevant issues relating to the application of law, could well be understood as requiring that perspective to be included in a body involved in judicial appoints.

Given the fact that until recently, women were unrepresented on the benches of international tribunals and remain substantially underrepresented today, the AU is therefore seeking a more balanced judiciary in keeping with its worthy objective of promoting gender equality. However, this must be predicated on the fact that they meet the qualification requirements of Article 4 of the Statute as amended.

The essence of all these when considered against the backdrop of the observation made by the Human Rights Committee of the importance of developing an awareness of gender-relevant issues is that the AU Court will ultimately be confronted with having to interpret and decide upon gender issues at some stage, for example concerning the Protocol on the Rights of women[218]and which group will better help in this regard than the women themselves. The need for equitable gender representation on the court's bench is not meant to be a diminution in the quality and

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217 Communication No.943/2000, U.N. Doc. CCPR/C/81/D/943/2000. Available on http://www.refworld.org/pdfid/42d170404.pdf. Accessed on 12/6/2014 .

218 Maghveras and Naldi, *op. cit.* p. 196.

qualification of the Judges as the same rules govern both sexes. Thus Article 4 of the Statute as amended states that the court shall be composed of impartial and independent Judges selected 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 juris-consults of recognised competence in International Law, International Human Rights law, International Humanitarian law or International Criminal Law.[219]

The addition of international humanitarian and criminal law is an amendment to the original text as a result of the expansion of the court's jurisdiction to include issues bordering on International Criminal Law.[220] Article 4 when properly interpreted and applied enables the court to be filled with persons with experience from both African judiciaries as well as from among the finest academic experts on International Law, international human rights, international humanitarian law and international criminal law. Article 5 and 6 of the Statute as amended states the procedure for the election of Judges. The Chairperson of the Commission invites each state party to submit in writing within a period of ninety days, candidatures to the post of Judges of the court. For this purpose, the Chairperson of the commission shall establish three alphabetical lists of candidates as follows;

1. List A containing the names of candidates having recognised competence and experience in International Law.
2. List B containing the names of candidates having recognised competence and experience in International human rights law and international humanitarian law.

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219 Article 3 of the Amendment to the Statute.
220 Article 14 of the Amendment to the Statute.

3. List C containing the names of candidates having recognised competence and experience in international criminal law.[221]

Originally, the competence and experience required were only of International Law and human rights. The addition of International Humanitarian Law and International Criminal Law arose due to the international criminal law jurisdiction vested upon the court by Article 14 of the Amendment to the Statute. The state parties nominating candidates possessing the competencies required are to choose the list on which their candidates may be placed.[222] Five Judges shall be elected at the first election from among the candidates on List A and B while six Judges are to be elected from candidates on List C. A duty is cast upon the chairperson of the commission to communicate the three lists to member states at least thirty (30) days before the ordinary session of the Assembly or of the council during which the elections shall take place.[223] Article 7(1) of the Protocol on the Statute of the court as amended vests the election of the Judges on the executive council. This is an improvement on the provisions of the two replaced courts wherein the election of Judges was entrusted to the Summit of Heads of State and Government.[224] The duties of the Heads of States and Governments as exemplified by the Assembly as an organ of the AU is to execute the appointments of the successful parties as submitted to them by the Executive Council.[225] The Judges are elected through secret ballot by two-thirds majority of votes of member states. However, such a member state must have voting rights at the time of the election. The provision on voting rights is a derivative of Article 23 of the Constitutive Act which provides instances for which a state may lose its voting rights

221 Article 4 of the Amendment to the Statute.

222 Article 6 of the Protocol on the Statute of the African Court of Justice.

223 Article 4 of the Amendment to the Statute.

224 This is against the backdrop that though past Treaties provided for the Heads of State and Government to conduct elections, in practice, this task has always been performed by their Ministers in the executive council. See also M Hansungule, *op. cit.* p. 242.

225 Article 9(H) of the Constitutive Act.

to include default in payment of subscription or failure to comply with the decision of the AU and its organs. The Assembly is enjoined by Article 7(4) and (5) of the Protocol on the Statute of the court to ensure equitable representation of the regions, the principal legal systems of the continent as well as gender. In the performance of its judicial functions and duties, the court and its Judges shall not be subject to the direction or control of any person or body.[226] This provision is meant to insulate the judicial function from any form of interference from any other organ. This injunction is very pertinent given the African history and experience.

The Judges of the court are elected for a single, non renewable term of nine (9) years. The term of five of the Judges elected at the first election shall end after three years and the terms of another five Judges shall end after six years.[227] The Judges whose terms of office are to end after the initial periods of three and six years shall be determined by lot drawn by the chairperson of the Assembly or the Executive Council immediately after the first election.[228] A Judge elected to replace another whose term of office has not expired shall complete the term of office of his or her predecessor. It stands to reason that such a Judge if still nominated by his state party, subsequently can stand election in his own capacity and serve his full terms accordingly.

The Judges save for the president and the vice-president perform their functions on part-time basis.[229] However, the Assembly shall upon the recommendation of the court decide the time when all the Judges of the court shall perform their functions on a full time basis.[230]

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226 Article 12(3).

227 Article 5 of the Amendment to the Statute.

228 *Ibid.*

229 *Ibid.*

230 *Ibid.* This provision was not originally there. Its inclusion is very apposite as it solidifies the *provisio* An of Article 13 of the Protocol on the Statute of the African Court of Justice,

The provision on part-time service for the Judges is in our view incongruous with the independence and impartiality required of the judicial function. Especially is this so when the stipulation of Article 13 of the Protocol on the Statute of the African court of Justice and Human Rights is considered. The said Article bars a Judge from exercising any other functions which might impinge on their independence or impartiality. Given the African environment of pervasive poverty and need to strengthen the judiciary to properly play its role of protecting the citizens and entrenching the rule of law, nothing short of a full time role for the Judges can be more fulfilling. Thankfully, the draft amended Protocol on the Statute of the court has addressed this lacunae by providing that the Judges of the court shall perform their functions on a full time basis at a time to be decided by the Assembly on the recommendation of the court.[231]

5.3.3 Structure and Composition of the Court

The Court is divided into three sections, to wit:

(a) A General Affairs Section.

(b) A Human and Peoples' Rights Section.

(c) An International Criminal law Section.[232]

The inclusion of an International Criminal Law Section is as a result of the court's expanded jurisdiction pursuant to the amendment of Article 28. The allocation of Judges to the respective Sections shall be determined by the court in its rules. As regards the matters to be handled by the Sections, the amended Article 17 provides that the general Affairs Section shall be competent to hear all cases submitted under

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dealing with conflict of interest. The duties of the *judex* should not admit of any part-time role.

231 Article 5 of the Amendment to the Statute of African Court of Justice and Human and Peoples' Rights; It amended Article 8 of the Protocol by adding a subparagraph 5.

232 *Ibid.* Article 6 thereof; it amended Article 16 of the Protocol.

Article 28 of the Statute save for those assigned to the Human and Peoples' Rights Section and the International Criminal law Section. The Human and Peoples' Rights Section shall be competent to hear all cases relating to human and peoples' rights whilst the International Criminal Law Section is competent to hear all cases relating to the crimes specified in the Statute.

Any of the Sections may at anytime constitute one or more Chamber[233] in accordance with the rules of the court and a judgment given by any Chamber is deemed as being rendered by the Court.

Against the backdrop of the express establishment of the three Chambers for the International Criminal Court, a new Article was included in the draft amendment enumerating the functions and powers of the Chambers of the International Criminal law Section.

These powers and functions as encapsulated in Article 19 BIS are as follows:

1. The Pre-Trial Chamber shall exercise the functions provided for in Article 46F[234] of this statute.
2. In addition, the Pre-trial chamber may also at the request of the prosecutor issue such orders and warrants as may be required for an investigation or prosecution.
3. The Pre-Trial Chamber may issue such orders as may be required to provide for the protection and privacy of witnesses and victims, the presentation of evidence and the protection of arrested persons.

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233 *Ibid.* Article 9 thereof; it amended Article 19. Note however the stipulation in Article 6 which made it mandatory for three Chambers to be created for the International Criminal Law Section of the court.

234 This is an innovation created by the amendment to the Statute wherein the court became vested with criminal jurisdiction. It contains provisions mainly on referrals for crimes committed under the Statute.

4. The trial chamber shall conduct trials of accused persons in accordance with is this Statute and the Rules of the Court.
5. The Trial Chamber shall receive and conduct appeals from Pre-trial Chamber in accordance with Article 18[235] of the Statute.
6. The Appeals Chamber shall receive and conduct appeals from the Trial Chamber in accordance with Article 18 of this Statute.

The quorum of the court is spread among the Section.[236] Thus, the General Affairs Section of the court is duly constituted by three Judges whilst the Human and Peoples' Rights Section is also duly constituted by three Judges. With respect to International Criminal Law Section, the quorum is dependent upon the Chambers. Thus, the Pre-Trial Chamber is duly constituted by one Judge; the Trial Chamber by three Judges and the Appellate Chambers by five Judges.

The President and Vice-president of the court are elected by the full court at its first ordinary session and they serve for a two year renewable period. They both in consultation with the members of the court and the Rules of the Court assign Judges to the Sections. The President presides over all sessions of the full court and in his absence for whatever reason, the Vice-president presides.

Both the President and the Vice-President are to reside at the seat of the court. This is a fallout of their full time status. The Statute is silent on the residence of the Judges when they become full time. The fact of full time Judges being resident within the jurisdiction of the court is taken as given. However, it would have been better if it is clearly stated on what should be their residence in such instances.

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235 Article 8 of the Draft Amendment to the Statute; it amended Article 18 of the Statute of the court. It contains provisions on grounds for appealing against the decisions of the Pre-Trial Chamber.

236 Article 10 of the Draft Amendment to the Statute.

Consequent upon the new International Criminal law jurisdiction of the court, Article 12 of the Draft Amendment to the statute created the office of the Prosecutor. It shall consist of a Prosecutor and two Deputy Prosecutors all of whom shall be elected by the Assembly from among candidates who are nationals of state parties and nominated by such state parties. The Prosecutor serves for a single non-renewable term of seven years while the Deputy Prosecutors serve for a four year renewable term. The Prosecutor and Deputy prosecutors are required to be persons of high moral character and competence, with extensive practical experience in the conduct of investigations, trial and prosecution of the criminal cases. The office of the Prosecutor is responsible for the investigation and prosecution of crimes specified in the Statute for which purpose they act independently as a separate organ of the court. Thus, they neither seek nor receive instructions from any state party or any other source. The office of the Prosecutor has powers to question suspects, victims and witnesses and collect evidence including the power to conduct on-site investigations.

The remuneration and condition of service of both Judges and Prosecutor are determined by the Assembly on the recommendation of the Executive Council. A closer scrutiny of the provisions however reveals that the conditions of service of the Judges and their remuneration are firmer vis-à-vis that of the prosecutor. Thus, whilst the remunerations of the Judges are tax free and are not to be decreased during their term of office, nothing of such is made for the Prosecutors. This should not be so considering the enormous pressure the prosecutor is likely to face in the discharge of his functions. This is moreso considering the fact that the crimes they are to prosecute constitute the most heinous within the International Community and their perpetrators the most influential comprising of heads of state and government who within the

African context personifies their countries or whose persona looms larger than their states apparatus.

5.3.4 Jurisdiction

Article 3(1) of the Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights sets the tone for the jurisdictional reach of the court when it provides that the court is "vested with an original and appellate jurisdiction." This is further widened by Article 3(2) which provides that the court has jurisdiction to hear such other matters or appeals as may be referred to it in any other agreements that the member states or Regional Economic Communities or other international organisations recognised by African Union may conclude among themselves or with the union. The provision on appellate jurisdiction seems an innovation as it seems anticipatory of appeals from national and sub-regional courts.[237] Especially is this so when the specific provision of Article 28 of the Statute as amended by the draft protocol is appraised. The said Article 28 vests the court with jurisdiction to determine legal disputes relating to;

(a) The interpretation and application of the Constitutive Act;

(b) The interpretation, application or validity of other union Treaties and all subsidiary legal instruments adopted within the framework of the union or the organisation of African Unity;

(c) The interpretation and application of the African Charter, the Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa; or any other legal instrument relating to human rights ratified by the states parties concerned;

[237] Ironically however, there is no specific provision dealing with appellate matters.

(d) The crimes contained in this Statute[238]

(e) Any question of International Law;[239]

(f) All acts, decisions, regulations and directives of the organs of the union;

(g) All matters specifically provided for in any other agreements that states parties may conclude among themselves or with the union and which confer jurisdiction on the court:

(h) The existence of any fact which if established would constitute a breach of an obligation owed to a state party or to the union;

(i) The nature or extent of the reparation to be made for the breach of an international obligation.

The Draft Protocol added a new Article 28A which defines the criminal law jurisdiction of the court to include;

1. Genocide.
2. Crimes against humanity.
3. War crimes.
4. The crime of unconstitutional change of government.
5. Piracy.
6. Terrorism.
7. Mercenarism.
8. Corruption.
9. Money laundering.
10. Trafficking in persons.
11. Trafficking in hazardous wastes.

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238 Article 13 of the Draft Amendment.

239 It has been contended that this provision ought not to have been included given the prime position of the ICJ as the principal judicial organ of the UN and thus uniquely positioned as an authoritative expositor of questions on International Law; K D Maghveras and G J Naldi, *op. cit.* p. 1999.

12. Trafficking in drugs.

13. Illicit exploitation of natural resources.

14. The crime of aggression.

Given the provisions on Sections, these items of jurisdiction are divided accordingly. Thus, while the Human and Peoples' Rights Section is competent to hear all cases relating to human and peoples' rights; the General Affairs Section will hear all manner of cases submitted to it under Article 28 of the Protocol save those assigned to the Human and Peoples Rights Section and the International Criminal Law Section. The International and Criminal Law Section is vested with competence to hear all cases relating to the crimes specified in the Statute.

Much of the hubris that has come the way of the court relates to its International Criminal Law jurisdiction.[240] This is because given the long list of crimes in Article 28 A, questions have arisen as to the capacity of the court to deal with its general and human rights obligations. While some of these crimes are already established under International Law, others are not yet fixed and contain a *pot-pouri* of other social ills plaguing the continent, for example, the crime of unconstitutional change of government. Laudable as the long list of crimes is, given the African environment and the need to curb impunity; it is jarring to recall that it took the ICC almost a decade to complete its first trial in the *Lubanga Matter*.[241] While the ICC may not totally be exonerated for how that trial progressed, the fact that need to be emphasised is that international criminal trial with its guarantees on fair trials are slow and labourious at the best of times. Consequently, the process of doing justice to these prosecutions run

240 M Du Plessis, "Implications of the AU Decision To Give the African Court Jurisdiction over international crimes, available on http://www.issafrica.org/uploads/paper235. Visited on 03/05/2014.

241 Prosecutor V Thomas Lubanga Dyilo Case, No.ICC-01/04-01/06-803.

the risk of being severely compromised when a court is expected to do too much by way of the crimes on its docket.[242]

This ineluctably leads to the question of judicial capacity to deal with the range of issues in criminal prosecutions involving such crimes. The court as stipulated in its Statute is to have a full complement of sixteen Judges spread across the three sections. Thus, it is assumed that not all the Judges will have the expertise to try International Criminal Law matters. Indeed, going by the amendment Protocol, there is no determinate number that is dedicated to the International Criminal law Section as all it says is that the court shall be composed inter alia of Judges who possesses the qualifications in "International Humanitarian Law or International Criminal Law"[243] The closest the Protocol came in this regard is the provision that "at the first election of Judges, six Judges shall be elected from among the candidates of List C.[244] Ostensibly, it is assumed that those Judges will be in charge of the International Criminal Law Section, thus leaving no room for candidates in the other Sections to sit on the ICL Section. This questions on judicial capacity becomes very poignant when the details on the working of the ICL Section is analysed. According to the draft Protocol, the ICL Section is divided into three Chambers, to wit;

1. A Pre-Trial Chamber,
2. Trial Chamber and
3. Appellate Chamber.[245]

The six ICL Judges obviously will have to be allocated to these three Chambers whose quorum has already being stipulated by the draft Protocol, as follows:

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242 *Ibid.*
243 Article 3.
244 Article 4(3).
245 Article 16(2).

1. Pre-Trial Chamber – one Judge.[246]

2. Trial Chamber – three Judges.[247]

3. Appellate Chamber – Five Judges.[248]

A' priori, it is evidently clear that the six Judges will find themselves so thinly spread across these three Chambers as to render illusory any thought of speedy justice. Another thorny issue is the mathematical problem of the number of Judges actually necessary for a single criminal trial vis-à-vis the statutory number assigned to the ICL Section. A single criminal trial will take up the entire complement of ICL Judges. One Judge presides at the Pre-Trial Chamber, another three preside at the Trial Chamber and another five will sit at the appellate Chamber.[249] Thus, a full criminal trial and appeal involving each of the designated Chambers will require nine judges which is three times more than the total allotment of ICL Judges appointed to the ICL Section. Consequently, we agree with the view that there are not enough Judges necessary to do anything close to the justice that this expansive criminal jurisdiction presages.[250]

The ambitious jurisdictional reach in criminal matters possesses its own challenge. The court is vested with jurisdiction over a medley of crimes such as genocide, crimes against humanity, war crimes, the crime of unconstitutional change of government, piracy, terrorism, mercenarism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes, illicit exploitation of natural resources, the crime of aggression and inchoate offences. It is interesting to note that

246 Article 10(4).

247 Article 10(4).

248 Article 10(5).

249 This is a fallout of the generally established and acknowledged principle according to which a Judge who has already expressed his opinion in a phase of the proceedings cannot participate in a subsequent phase. This is in line with the basic condition of fair trial. Article 39(4) of the Rome Statute entrenched this rule when it provided that under no circumstances shall a Judge who has participated in the Pre-Trial phase of a case be eligible to sit on the Trial Chamber hearing that case. See further M Du Plessis, *op. cit.* Cassese *et al*, *The Rome Statute of the International Criminal Court: Vol. 11,* (Oxford: Oxford University Press, 2002) p. 1237.

250 M Du Plessis, *Ibid.*

some of these crimes give rise to certain definitional problems while certain others are yet to be fixed in the International Criminal Law firmament.[251] This view becomes apt when it is realised that the predicate for according an international court criminal jurisdiction in respect of crimes is that the substantive elements of the crimes are generally agreed upon.[252] Thus, at the very least, there should be consensus among African States regarding these crimes and their elements. Analogies can be drawn from other international courts with International Criminal law jurisdiction. When the international community wanted to invest the International Criminal Tribunal for the former Yugoslavia (ICTY) with jurisdiction over international crimes, it was felt such needed to be done only in respect of crimes that were universally accepted as international. Consequently, in his report pursuant to the UN Security Council Resolution establishing the ICTY, the UN Secretary-General stated that the application of the legal principle *nullem crimen sine lege* requires that the international tribunal should apply rules of International Humanitarian Law which are beyond any doubt part of customary law so that the problem of adherence of some but not all states to specific Convention does not arise.[253] Accordingly, the ICTY in the *Tadic Case*[254] subsequently confirmed the customary nature of the grave breaches regimes.[255] Similar scenario played out when the ICC Statute was being drafted vis-à-vis the crimes to place under the ICC's jurisdiction. There was a general agreement

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251 M Du Plessis, *loc. cit.*

252 For example, lack of unanimity on what constitutes the crime of aggression delayed the assumption of jurisdiction over it by the ICC. Ditto to the crime of unconstitutional change of government which was referred to the Assembly for further consideration.

253 U.N Secretary-General, Report submitted pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc S/25704, 3 May 1993 at 34.

254 Prosecutor V Tadic Case, No.IT-94-1-AR72.

255 Decision on the Defence Motion on Jurisdiction, *ibid.*

that the definitions of crimes in the ICC Statute were to reflect existing Customary International Law and to create new law.[256]

Given the above and against the backdrop that some of the crimes in the Draft Protocol are not yet internationally acclaimed, what then is the legal basis of the court's expansive cum extraordinary jurisdiction? This can only be the AU Constitutive Act, Article 4(h) thereof which sets out the right of the Union to intervene in a member state pursuant to a decision of the Assembly in respect of grave circumstances namely war crimes, genocide and crimes against humanity.[257] It needs stating herein that the AU is an international organisation of limited membership with a regional scope. It came into being in 2002 and replaced the OAU whose functions and structure were becoming ineffective following the attainment of independence by all African states. The Union is accordingly governed by the "common law of international organisation" which has developed largely through the practice of the UN and its organs but has not been unaffected by the rise to prominence of regional bodies in recent times.[258] All these bodies are often the product of Treaties and thus subject to the general rules of interpretation set out in the 1969 Vienna Convention on the Law of Treaties [259] even though the nature of a particular organisation may inform the interpretation of its internal acts and functions.[260] Thus, Article 31(1) of the VCLT provides that a Treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the Treaty in their context and in the

256 Kirsch; "Forward" in K. Dorman, *Elements of war crimes under the Rome Statutes of the International Criminal Court: Sources and Commentary*, (Cambridge: Cambridge University Press, 2003) p. 11.

257 M DU Plessis, *op. cit.* p. 8.

258 D Akande, "International Organisations" in M. Evans (ed) *International Law*, (Oxford: Oxford University Press) p. 271.

259 Hereinafter after called VCLT.

260 D Akande *loc. cit.*

light of its object and purpose. In furtherance of this attitude, the ICJ in the *Nuclear Weapon Advisory Opinion Case*[261] stated as follows:

> The constituent instruments of international organisation are also Treaties of a particular type; their object is to create new subjects of law endowed with a certain autonomy to which the parties entrust the task of realising common goals. Such Treaties can raise specific problems of interpretation owing inter alia to their character which is conventional and at the same time institutional; the very nature of the organisation created, the objectives which have been assigned to it by its founders, the imperatives associated with the effective performance of its functions as well as its own practice are all elements which may deserve special attention when the time comes to interpret these constituent Treaties.

Consequently, the jurisdiction vested in the court over crimes which are yet to be fixed in the firmament of International law of Crimes may have its roots in the stated objectives and principles of the AU.

Another challenge arising from the court's expansive jurisdiction relates to finance. This is so given fact that the increase in jurisdictional reach of the court will entail a full complement of staff and institutional resources to ensure that justice can be done. With the under developed nature of the African economy, can the resources sustain these when it is known that prosecuting international crimes can be very costly. For

[261] Available at http://www.icj-cij.org/../7497.pdf. Visited on 13/05/2014.

example, the AU budget for 2011 financial year was $256 754 444. This figure is inclusive of $9 389 615 allocated to the African Court on Human and Peoples' Rights. Compare this with the budget of ICC in the same year which amounted to $134 000 000.[262] This observation is heightened when it is realised that the ICC investigates only about three crimes namely; genocide, war crimes and crimes against humanity and the fact that African countries routinely default in meeting their financial obligations to the continental body and even find it difficult to guarantee the financial independence of their own domestic judicial institutions.

5.3.5 Entities Eligible to Submit Cases to the Court

This is provided for by Article 29 and 30 of the Statute as amended by Articles 15 and 16 of the Draft Amendment to the Statute. They are as follows:

(a) State parties to the present Protocol.

(b) The Assembly, the Peace and Security Council, the Parliament and other organs of the union authorised by the Assembly.

(c) A staff member of the African Union on appeal, in a dispute and within the limits and under the terms and conditions laid down in the Staff Rule and Regulations of the Union.

(d) The office of the Prosecutor.

Article 30 in addition to entitling state parties to the Protocol expanded the eligibility of parties to include the African Commission on Human and Peoples' Rights; the African Committee of Experts on the Rights and Welfare of the Child; African inter-governmental organisations accredited to the union or its organs; African national Human Rights Institutions; African individuals or African Non-Governmental

[262] M Du Plessis Op. cit. p. 9

Organisations with observer status with the African Union or its organs or institutions but only with regard to a state that has made a Declaration accepting the competence of the court to receive cases or applications submitted to it directly. The aforesaid Declaration is to be made pursuant to Article 9(3) of the Protocol.[263] Consequently, the court shall not receive any case or application involving a state party which has not made a Declaration in accordance with Article 9(3) of the Protocol.

It is interesting to note that eligibility under Article 30 is for the sole purpose of espousing a human rights claim or ventilating a human rights grievance. This accord with the high veneration accorded human rights issues in contemporary world discourse. In respect of criminal trials, cases are brought before the International Criminal law Section of the court by or in the name of the Prosecutor.[264]

5.3.6 Advisory Jurisdiction

The AU Court of Justice and Human and Peoples' Rights is fitted with advisory functions on any legal questions. The persons entitled to request for an advisory opinion include: the Assembly, the parliament, the Executive Council, the Peace and Security Council, the Economic, Social and Cultural Council, the Financial Institutions or any other organ of the Union as may be authorised by the Assembly[265] It needs emphasising that the phrase "any legal question" can only mean legal question whether concrete or abstract arising out of or connected with the subject matter jurisdiction of the court pursuant to Article 28 and 28A of the Statute. However, the giving of such opinion cannot be faulted solely on the ground that it

263 Article 9(3) states thus: Any member state may at the time of signature or when depositing its instrument of ratification or accession or at anytime thereafter make a declaration accepting the competence of the court to receive cases under Article 30 (F).

264 Article 34A of the Draft Protocol.

265 Article 53 of the Protocol.

involves issues of fact, provided that the questions remain nevertheless essentially legal. Article 53(2) of the court's Statute provides the procedure for the request for an advisory opinion. Such request shall be in writing and shall contain an exact statement of the question upon which the opinion is required and shall be accompanied by all relevant documents. However, where the request for an advisory opinion relates to a matter pending before the African Commission or the African Committee of Experts, the court must decline such application.[266] Where a request is deemed admissible, the registrar then notifies the member states entitled to appear before the court or any appropriate inter-governmental organisation that the court shall be prepared to accept within a time limit fixed by the President, written submission or to hear oral submissions relating to the question.[267] Consequent upon the conclusion of all written and oral submissions, the court shall deliver its advisory opinion in open court, notice having been given to the member states and the chairperson of the Commission.[268]

The advisory opinions of the AU court apart from being a source of benefit to the advisee, also provides guidance to the national courts of member states and other sub-regional courts. Courtesy of such opinions, member states are enabled to introduce necessary domestic reforms or to oppose legislation that will be in breach of the AU Act. Moreover given the ego element that is usually associated with a contentious decision, governments usually finds it easier to give effect to advisory opinion which is devoid of the solemnity of finality than complying with a contentious decision in a case they lost.[269] Advisory opinions also have added benefit of providing speedy

266 Article 53(3) of the Protocol.

267 Article 54(2) of the protocol.

268 *Ibid.* Article 55.

269 T Buergenthal, "The European and Inter-American Human Rights Courts: Beneficial Interaction," in P Mahoney *et. a*l (eds.) *Protecting Human Rights: The European Perspective*, (Cologne: Carl Heymans, 2000) p. 123 at 131; T Buergenthal, "The Advisory Practice of the Inter-American Human Rights Court," 79 *Am. J. Int'l Law* (1985) 1.

judicial response to questions that would have taken years to determine in contentious proceedings while avoiding the friction and bitterness some judgments in contentious cases engender among countries.

5.3.7 Applicable Law

In the exercise of its functions, the court is enjoined to have regard to the following:[270]

(a) The Constitutive Act.

(b) International Treaties whether general or particular ratified by the contesting states.

(c) International custom as evidence of a general practice accepted as law.

(d) The general principles of law recognised universally or by African states.

(e) Subject to the provisions of Paragraph 1 of Article 46 of the present Statute, judicial decisions and writings of the most highly qualified publicists of various nations as well as the regulations, directives and decisions of the union as subsidiary means for the determination of the rules of law.

(f) Any other law relevant to the determination of the case.

Additionally, the court has power to decide a case *ex aequo et bono* if the parties agree thereto.

These provisions are similar to Article 38(1)-(2) of the Statute of the ICJ but with an African flavour. First, the court must have regard to the AU Act. This is against the backdrop that the AU Act in constitutional parlance is the constitutional document of the AU and *pro tanto* the centre piece of its activities.

[270] Article 28 of the Protocol.

5.3.8 Provisional Measures

Upon the institution of proceedings, the court may *suo motu* on an application by the parties indicate provisional measures if it considers that circumstances so require it to do so in order to preserve the respective rights of the parties.[271] Provisional or interim measures are adjuncts of the judicial process and in the words of Goldsworth, reflect the perennial judicial concern for effective decision making.[272] They may be mandatory or injunctive in nature. Either way, they rest on "the wide and universal recognition of the enjoining powers of court as an inherent part of their jurisdiction.[273] Its essence is the prevention of a party to a dispute from prejudicing the final outcome of the process de facto by an arbitrary act before judgment, thereby rendering ineffective any judgment of a tribunal.[274] In the words of Fix-Zamudio:

> They are of the utmost importance in any judicial proceeding because without this instrument, the final outcome that is the judgment would lack any efficacy or such efficacy would be very limited in addition to the serious or irreversible injury the parties may suffer.[275]

While the wording of the Statute admits of the court acting *ex officio* in considering the dispute and determining whether provisional measures are called for; in practice this is rather unlikely. A litigant party or parties will most probably file the relevant

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271 *Ibid.* Article 35.

272 P Goldsworth, Interim Measures of Protection in the International Court of Justice 68 *AJIL* (1974) 258.

273 Separate opinion of Judge Weeramantry in the Application of the Convention on the Prevention and Punishment of the Crime of Genocide, supra at 325, 379.

274 N Udombana, An African Human Rights Court and AN African Union Court: A Needful Duality or A Needless Duplication, Vol. 28 *BJIL* (2003) 844.

275 H Fix-Zamudio, "The European and the Inter-American Courts of Human Rights: A Brief Comparison" in P. Mahoney et al (eds.) *Protecting Human Rights: The European perspective*, (Cologne: Carl Heymans, 2000) 507 at 519.

application for the court to rule on. In considering a request for provisional measures, the court need not ascertain its jurisdiction to try the case first. It suffices if there is prima facie jurisdiction. Thus, jurisdiction is not a *conditio sine qua non* for the grant of the order as the court will be prepared to entertain the request for provisional measures even if it turns out later that it lacks jurisdiction on the merits.[276] This is the practice of the ICJ[277] and there is no reason why the AU court should not adopt same.

The choice of words used in the provision gives room for some obfuscation as to the binding nature of a provisional measure. A literal interpretation based on Article 35 which refers to the court's power to "indicate" and not to "order" provisional measures and provides that they "ought" and not "must" be taken to preserve the respective rights of the parties imports a negative intent as to its binding nature. However, the preponderance of judicial thoughts and practice evinces a binding intent.[278]

Its efficacy would be seriously compromised if they are treated solely as guidelines addressed to litigant parties.[279] Notice of provisional measures could be indicated at any stage of the proceedings but before the rendering of final judgment. Though, this is not specific in Article 35(1) of the Statutes, this conclusion is borne out of Article 35(2) which provides that pending the final decision, notice of the measures shall immediately be given to the parties and chairperson of the commission who shall then inform the Assembly.

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276 H Thirlway, "The Law and Practice of the International Court of Justice, 1960-1989," 69 *BYIL* (1998) 1, 22-23.

277 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina V. Yugoslavia (Serbia and Montenegro), Provisional Measures Order of 10 may 1984, ICJ Reports, 1984 p. 169.

278 La Grand Case (Germany V. USA) ICJ Reports, 2001, p. 466 wherein the ICJ ruled that its orders indicating provisional measures have binding effect; G Naldi, International Court of Justice Declares Provisional Measures of Protection Binding, 118 Law Quarterly Review (2002) 35.

279 H Lanterpacht, *The Development of International law by the International Court of Justice*, (Cambridge: Cambridge University Press, 1996) 110-112.

Cases brought before the court pursuant to Article 29 of the Statute shall be by written application addressed to the Registrar and shall have indicated therein the subject matter of the dispute, the applicable law and the basis of jurisdiction.[280] Upon the receipt of an application, the Registrar shall notify all parties concerned[281] as well as all member states and the organs of the union whose decisions are in dispute.[282] It needs stating that bringing notice of application to all member states is needless except in so far as it seeks to enable any such member state who is interested or might be affected by the decisions thereof to intervene and have its legal interest factored in. All court sessions are public unless the court decides on its own motion or upon the parties application to exclude the public.[283] This practice is normal in the adjudicatory function where the court in the interest of public policy can decide to hear a matter in camera provided all the essentials of fair hearing are assured.

Any member state having a legal interest in a case pending before the AU Court and which interest could be affected by the judgment may request the court to allow it to intervene in the case.[284] The right of intervention is a known judicial practice among international adjudicatory bodies. However, against the backdrop of the provisions of Article 29(1) and (2), this provision on intervention could be problematic. It will be recalled that Article 29(1) (a) provides that only state parties to the court's protocol are eligible to submit cases on any issue or dispute listed under Article 28 of the Protocol as amended. Paragraph 2 of Article 29 casts a positive bar on state parties who have not ratified the Protocol from having access to the court. Thus Article 49 could have the unintended effect of investing non state parties to the protocol with the

280 Article 33(1) of the Statutes.
281 *Ibid.* Article 33(2).
282 *Ibid.* Article 33(3).
283 *Ibid.* Article 39.
284 *Ibid.* Article 49(1).

locus standi to have access to the court. A' fortiori, it would have been neater for the said Article to read, "should a member state [which is a party to the present Protocol][285] …"

Article 49(2) makes the decision of the court pursuant to Article 49(1) binding on the intervening state. However, where the decision is with respect to the interpretation of the Constitutive Act, then such becomes binding on all member states and organs of the Union.[286] It needs stating that this is a salutary rule considering the central nature of the Constitutive Act in the life of the Union. Moreover, it saves the time and energies that would have been spent in re-interpreting an already interpreted provision of the Constitutive Act each time a new dispute arises among state parties over its import and extent.

Article 43(1) of the Statute provides that the court shall render its judgment within ninety days of having completed its deliberations. Such judgments must state the reasons on which they are based as well as contain the names of the Judges who took part thereof.[287] Article 41 of the Statute makes provision for the concept of default judgment. Its Paragraph 1 states that whenever one of the parties fails to appear before the court or fails to defend the case against it, the court shall proceed to consider the case and to give its judgment therein. However, it is not *carte blanc* for the petitioning state as the court is empowered to satisfy itself that it has jurisdiction not only in terms of Article 28, 29 and 30 of the Statute but also that the claim is well founded in fact and in law and that the other party had due notice.[288] This accords with the duty of a *judex* to do justice *ala* the inquisitorial method. The party against whom a default

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285 Emphasis mine.

286 *Ibid.* Article 50(3). This same rule applies where the intervention sought concerns the interpretation of other Treaties ratified by member states other than the parties to a dispute. Article 51(2) *Ibid*.

287 *Ibid.* Article 43(2) & (3).

288 *Ibid.* Article 41(2).

judgement is given has ninety days within which to appeal against the judgement upon being notified of it. The lodging of the appeal does not however tantamount to a stay of execution of the default judgment except there is a specific order authorising same.[289] This is in accord with conventional judicial practice wherein the lodgement of an appeal does not ipso facto result in a stay of execution.

To reinforce the attribute of the judicial function intended for the court and to de-emphasis the element of sovereignty that often impinges on the effective functioning of international courts, Article 46 of the Statute as amended provides that the decisions of the court shall be binding on the parties. This is followed by a provision declaring on the finality of the court's judgment. Ordinarily, it would have been neater and makes for greater clarity if it had been stated that the judgment of the court is without appeal.[290] However, this haziness in legal drafting evaporates when juxtaposed with the provisions of Article 46(2) of the Statute as amended which makes the finality of the court's judgement dependent on Article 18 of the Statute as amended and paragraph 3 of Article 41 of the Statute.[291] The parties are expected to comply with the judgment of the court in any dispute within the time stipulated by the court and also guarantee its execution.[292] Where a party fails to comply with a judgement, the court shall refer the matter to the Assembly which shall decide upon measures to be taken to give effect to the judgement. It needs stating that this task of the court is set in motion upon information to that effect by the party in whose favour the judgement is given. Given the inter-play of politics at the Assembly, it would have

289 *Ibid.* Article 41(3).

290 This was the approach in the ICJ Statute, Article 60 thereof. For commentaries on a similar provision under the ECJ Statute; T C Hartely, *The foundations of European Community Law, 5th edn.* (Oxford: Oxford University Press, 2004) pp. 321-322.

291 Article 18 provides for the revision of a judgment of the General Affairs Section and Human and peoples' Rights Section whose details are encapsulated in Article 48. It also provides for the trajectory of a criminal trial under the various chambers of the International Criminal Law Section culminating in the appellate chamber.

292 *Ibid.* Article 46(3).

been better for the court to directly impose sanctions for which a duty of execution in terms of Article 23(2) shall be imposed on the Assembly without more.

Article 48 of the Statutes makes provision for revision of a judgment which is based upon the discovery of a new fact of such nature as to be a decisive factor and which fact was when the judgment was given unknown to the court and also to the party claiming revision provided that such ignorance was not due to negligence. The provision on revision is a rehash of a similar provision in the ICJ Statutes.

The advent of the African Union represents a watershed given its institutional underpinnings. Human Rights, Humanitarian Law and International Criminal Law which were relegated to the background during the OAU days are now on the front burner of continental discourse as most African countries are slowly but steadily warming up to international justice in the conduct of their internal affairs. However, given the weak base of institutional development in Africa, whenever the African Court of Justice and Human and Peoples' Rights as a pivot of judicialism is mentioned, a variety of expressions which borders on the derogatory crop up. This is so given the poor leadership index of the continent's crop of leaders who constitutes the driving force of any continental institution. Against the backdrop of human rights abuses and humanitarian crises that has ravaged the continent on account of needless internecine armed conflicts, the development of the African Court of Justice and Human and peoples' Rights is worth contemplating at least for its potential future impact in reining in the concept of judicialism in the psyche of African leadership. Its establishment evidences a broader process involving the intensification of judicial

enforcement of International Law at a global level.[293] While it is not possible to predict with certitude when the draft Protocol of the AU Court of Justice and Human and peoples' Rights will enter into force, the said Protocol is now open for signature and ratification by African States.[294] This is usually a lengthy process given the lethargy of African leaders to the judicial process. Given that the structures out of which the institution has arisen are complex and intricate, no one should be in doubt that the birth of the AU Court of Justice and Human and Peoples' Rights has been complicated.[295]

The court once operational will represent an amalgam of jurisprudential development sourced within the African continent. Its major challenge given its expansive jurisdiction in the areas of Humanitarian and International Criminal Law will be the entrenched outlooks that have emerged as a result of pan-African jurisprudence surrounding human rights violations both in peace time and during conflicts as a result of bureaucratic legacies that stifle transformation on the African continent.[296] Speaking of the African Court of Justice and Human Rights which is the precursor to the African Court of Justice and Human and peoples' Rights, Meyersfeld opined thus,[297] "The ACJHR has the potential to enforce human rights through a proper judicial process relatively independent of political leaders. However, its success as a defender of such rights will depend largely on its accessibility." Given the reluctance

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293 F Vilgoen & E Baimu "Courts For Africa: Considering the Co-Existence of the African Courts on Human and Peoples' Rights and the African Court of Justice," 2004 22, *Netherlands Quarterly of Human Rights* 241 at 243.

294 Six States have so far ratified the draft Protocol.

295 R F Oppong, "The African Union, The African Economic Community and Africa's Regional Economic Communities: Untangling a Complex Web," *African Journal of International and Comparative Law* (2010) 92.

296 According to Schulman, these bureaucratic legacies refer specifically to the access of individuals and non-governmental organisations to the court and also include jurisdictional issues relating to individual leaders. See M Schulman, "The African Court of Justice and Human Rights: A Beacon of Hope or A Dead-End Odyssey? *Op. cit.* p. 4.

297 Available at http://www.chatamhouse.org/site/files. Visited on 10/06/2014.

in granting direct access to individuals and NGO's in the present court, the above observation remains relevant even till now.

5.4 ECOWAS[298] Court of Justice

Against the backdrop of the perception that the 1975 ECOWAS Treaty focused more on inter-governmental relations coupled with the emerging unipolar world occasioned by the demise of the Soviet Union in 1991, and the wave of democratization sweeping across the African Continent, ECOWAS in 1992 commissioned a review of its founding Treaty.[299] The resultant report recommended that a shift be made from ECOWAS exclusive focus on government to government relations to involving the people, NGO's and the private sector and adopt provisions establishing organs such as the parliament of the community composed of representatives elected by the peoples of the member states, an economic and social council ECOSOC comprising socio-professional groups drawn from all sections and categories of the body, the Community Court of Justice[300] among others. These and other recommendations formed the fulcrum of the report which were implemented through the adoption of the ECOWAS Revised Treaty in 1993. It needs emphasising that by the ECOWAS Revised Treaty of 1993 which entered into force on 23rd August 1995, the aims of ECOWAS include the promotion of co-operation and integration, leading to the establishment of an economic union in West Africa with a view to raising the living standards of its peoples and to maintain and enhance economic stability, foster

298 Abbreviation for Economic Community of West African States. It was set up on May 28th, 1975 by the Heads of States and Governments in West Africa sequel to the signing of the Treaty of Lagos. It originally comprises of sixteen States within the West African Sub-Region but Mauritania opted out in 2000; F Falana, ECOWAS Court: Law and Practice, (Lagos: Legaltex Publishing Company, 2010) p. 1; M T Ladan, Introduction to ECOWAS Community Law Integration, Migration, Human Rights, Access to Justice, Peace and Security, (Zaria: ABU Press Ltd, 2009) p. 1.

299 Falana, *Ibid.* p. 3; Ladan *Ibid.* p. 1.

300 Originally known as the Tribunal of the Community. It was renamed the Community Court vide Protocol A/P1/7/91 and further strengthened by the ECOWAS Revised Treaty of 1993.

relations among member states and contribute to the progress and development of the African continent.[301] Against the backdrop that the 1975 Treaty of ECOWAS did not provide for the creation of supra-national institutions to drive and superintend the regional integration process as the dominant trend then was in favour of full veneration of states independence and sovereignty, the ECOWAS Revised Treaty of 1993 created the following institutions to which it entrusted supra-national functions[302] all aimed at realising the objectives of ECOWAS. These are:

(a) The Authority of Heads of States and Government.

(b) The Council of Ministers.

(c) The Community Parliament.

(d) The Economic and Social Council.

(e) The Community Court of Justice.

(f) The Executive Secretariat.[303]

(g) The Fund for Co-operation, Compensation and Development.

(h) Specialized Technical Commissions and;

(i) Any other institution that may be established by the Authority.

This new legal regime brought about by the Revised Treaty of 1993 confers on the Community the power to enact legal instruments which are binding and which also conform to the principles of immediate and direct effect.[304] A' fortiori, it enshrines the

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301 Article 3(1) of the Revised Treaty.

302 Also referred to as the principle of supra-nationality. It simply means a situation wherein an international institution is invested with the plenitude of powers to take binding decisions on sovereign states either generally or in specific areas of state activities.

303 By virtue of Supplementary Protocol A/SP.1/06/06 which amended the Revised Treaty, the Executive Secretariat was replaced by the ECOWAS Commission.

304 Immediate effect obviates the need for the transformation of community norms to the national level and for any procedure involving their inclusion into national law, while direct effect means that that the rules of community law must deploy their full effects in a uniform manner in all member states from their date of entry into force and all through their period of validity. See also Ladan, *op. cit.* p. 8.

supremacy of Community law over national legislations. To achieve this, a wide range of binding legal instruments were devised. These are:

(a) Supplementary Act: They are passed by the Authority of Heads of States and Government to supplement the ECOWAS Treaty. They are complementary and form an integral part of the Treaty. They enter into force after publication on a date specified therein.

(b) Regulations: they are enactment of the Council of Ministers and established uniform laws throughout the Community irrespective of borders. They are directly applicable in all member states without the necessity of transformation into national laws. They (Council of Ministers) may also adopt Directives which are binding on member states. These Directives set the general objectives to be attained by the member states. It however allows them the initiative to map out procedures for the attainment of the Directives. Thus, it will be up to member states to merge, abrogate or even promulgate new legislations with a view to synchronising them with the objectives contained in the Directives, due regard been had for local circumstances.

(c) Decisions: These are acts with individual scope taken by the Council of Ministers. Its objects may be states or individuals.

(d) Judgments: These are acts of Community Court of Justice in the course of their adjudicatory functions.

(e) Implementing Regulations: These are acts of the President of the Commission for the implementation of the acts of the Authority or Council of Ministers.

5.4.1 Structure and Composition

Though now entrenched as an institution under the Revised Treaty,[305] the ECOWAS Court of Justice was created in 1991 vide Protocol A/P1/7/91 of that year which provided in details as to its powers, composition and procedures.[306] The Court is the principal legal organ of ECOWAS and has as its main function the resolution of disputes relating to the interpretation and application of the provisions of the Revised Treaty and the annexed Protocols and Convention. In the exercise of this mandate, the court is enjoined to ensure the observance of law and the principles of equity. In practical terms, it only commenced sitting in 2001, following the swearing in of the Honourable Judges of the Court. Considering its expected role vis-à-vis its environment, Odinkalu[307] posits that:

> [t]he community court is three courts in one, it is simultaneously the judicial organ of the Community, the Administrative Tribunal of ECOWAS as an international institution and pending the establishment of the Arbitration Tribunal provided for under Article 16 of the Revised Treaty, it is also a court of arbitration.

The court is made up of seven independent Judges selected and appointed by the Authority of Heads of State and Government of ECOWAS from nationals of member states. The Judges must be persons of high moral character and possess the qualification required in their respective countries for appointment to the highest

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305 Article 6 and 15 of ECOWAS Revised Treaty.

306 Article 3(1) *Ibid.*

307 C A Odinkalu, ECOWAS Court of Justice in the Protection of Human Rights, a paper presented at the Conference of the Court of Justice on the Rule of Law in the Process of Integration of West Africa held in Abuja, Nigeria on the 12-14 of November 2007, cited by Falana, *op. cit.* p. 16.

judicial offices or are jurisconsults of recognised competence in International Law particularly in the areas of Community Law or Regional Integration law."[308]

An applicant for the post of a Judge of the Court shall not be below the age of forty years and above the age of sixty years and shall have acquired a post qualification experience of not less than twenty years.[309] No two Judges of the Court shall be nationals of the same member state of the Community at the same time.[310] It needs stating that the provision on age limits for the Judges is unduly restrictive. It has the tendency of shutting out sharp, vibrant but younger candidates who through their precocity may have graduated earlier and garnered much experience in their chosen area of law. Ditto to the twenty years experience rule. it is unduly high and *pro tanto* restrictive. Especially is this so when it is realised that in some member countries, the requirement for the Judgeship of the highest court is fifteen years.[311]

The Judges serve a non- renewable term of four years, commencing from the date of their appointment. The Judges of the Court are precluded from engaging in any other occupation of a professional nature and cannot also exercise any political or administrative function.[312] For purposes of precedence, the Judges rank according to their seniority in the court and where there is equal seniority in office, precedence is reckoned according to age.[313] In the performance of their functions, the court and its members are accorded privileges and immunities identical to those enjoyed by diplomatic missions and agents in the territory of member states as well as those normally enjoyed by International Courts. In consequence, members of the Court

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308 Article 3(1) of 2006 Supplementary Protocol.
309 Article 3(1) of 2006 Supplementary protocol.
310 Article 3(2), *Ibid.*
311 For example, in Nigeria appointment to the Supreme Court requires fifteen years post call experience. See Section 231(3) of the 1999 Constitution of the FRN as amended.
312 Article 4(11) of the 1991 Protocol.
313 Article 5 of the Rules of procedure.

shall not be liable to prosecution or arrests for acts carried out or statements made in the exercise of their functions.

The members of the Court may resign their appointment anytime by addressing a letter of resignation to the President of the Commission. They may also be removed for gross misconduct or inability to perform their judicial functions.

The appointment and discipline of Judges are entrusted to a judicial council. It is a body established by the Authority of Head of States and Government of ECOWAS pursuant to Supplementary Protocol A/SP.2/06/06[314] and is composed of the Chief Justices of the member states or their representatives. The composition of the judicial council by the Chief Justices of the member states given the relative independence of the judiciary as an arm of government in most member states is intended to strengthen the independence of the ECOWAS Court as well as promote the harmonisation and integration of the legal and judicial systems of the member states.

The judicial council is chaired by a President while its bureau shall comprise of a President, Vice-President and a Rapporteur. It prepares its own rules of procedure which is adopted by the Council of Ministers. The rules address issues such as frequency of meetings, types of complaints, conservative measures and sanctions, methods of investigation, defence and protection of the interest of the Judge concerned by the case, etc.[315] The functions of the judicial council are as follows:

(a) It is responsible for the recruitment and discipline of Judges of the Court of Justice. To achieve this aim, it shortlists and interviews candidates for the post of Judge of the Court of Justice and recommends successful candidates to the Authority for Appointment.

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314 Article 4(7) thereof. The Supplementary Protocol amended Articles 3, 4 and 7 of the 1991 Protocol on the Community Court of Justice.

315 Article 5(1) of Decision A/DEC.2/06/06.

(b) It hears cases pertaining to the discipline of Judges and their inability to function due to physical or mental incapacitation. Where the issue borders on criminal conduct of the Judges, the judicial council shall through the Council of Ministers make appropriate recommendations to the Authority of Heads of State and Government.[316] In the exercise of its disciplinary powers, the judicial council is composed of the Chief Justice of member states which have no national in the court. Disciplinary proceedings shall not be instituted against a Judge on the basis of the content of the judicial decisions taken within the purview of his/her authority. However, a Judge is exculpated of any breach of discipline if at the time of the acts, he or she is labouring under an emotional or neuropsychic disorder or a particular serious illness incapacitating his or her discernment or control of his or her acts. Such serious disorder is to be confirmed by the ECOWAS Medical Board.

(c) It formulates recommendations for the attention of the Authority in case of commission of a criminal offence by a Judge of the Court of Justice.

(d) It may make such recommendations as it deems necessary for improving the functioning of the Court of Justice.

(e) It may give its opinion or make recommendation on issues on which it is competent and which are submitted for its consideration by the President of the Commission, the Council of Ministers or the Authority of Heads of States and Governments.

The Judges of the Court shall elect a President and Vice-President among themselves. He or she serves in those capacities for a renewable term of two years. The President is the head of the Community Court and shall represent the Court in its relations with

316 Article 4(2), *Ibid.*

other ECOWAS institutions and third parties. In the absence of the President, his or her duties devolve on the Vice-President. In the absence of the Vice-President, another Judge appointed in line with the Rules of Procedure of the court will act for the president.[317]

The Court also has a bureau which shall be made up of three members, namely; the President, Vice-President and the oldest and longest serving member of the ECOWAS Court. The bureau elects a member to represent the Court in the judicial council of the community annually. Its main responsibilities are:

(a) The strategic orientation of the Court and for supervising its management and administration.

(b) Examining the draft work programme and provision of policy guidelines for the annual budget to be presented to the Council of Ministers through the Administration and Finance Commission.

(c) Defining the procedures relating to the internal organisation of the court in accordance with community texts.

Given the provision relating to the office of the Chief Registrar and Director of Administration and Finance, the creation of a bureau for the Court is a surplusage which the lean resources of ECOWAS could ill afford.

5.4.2 Jurisdiction of the Court

Like all adjudicatory bodies, the issue of jurisdiction is at the heart of the court's exercise of its judicial functions as it is intrinsic to adjudication. Underscoring this issue of jurisdiction which simply means the power of a court to determine an action

[317] Article 4(4) of the 1991 Protocol .

before it, the community court in *Dr. Emmanuel Akpo v. G77 South-South Health Care Delivery Programme And Anor.*[318] held as follows:

> It is relevant to determine it at the first opportunity whether there is jurisdiction because it will be manifestly absurd to suggest that the Court proceeds with the taking of lengthy evidence of the parties to a suit where it appeared that the whole suit would be a nullity and the prerequisites of the subject matter of the case would not be within the jurisdiction of this court.

A court is competent and thus have jurisdiction to decide a matter when:

(a) It is properly constituted as regards members and qualifications of the members of the bench and no member is disqualified for one reason or another.

(b) The subject matter of the case is within its jurisdiction and there is no feature in the case which prevents the court from exercising its jurisdiction; and

(c) The case comes before the Court, initiated by due process of law and upon fulfilment of any condition precedent to the exercise of jurisdiction.[319]

Article 9 of Protocol A/P1/71/91 as amended by Article 9 of Supplementary Protocol A/SP.1/01/05 invests the Community Court with contentious jurisdiction over matters and persons. Consequently, the court has jurisdiction in respect of the following causes and matters:

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318 (Unreported) Suit No: ECW/CCJ/APP/01/07 of 16/10/2008.

319 Olajide Afolabi V. Federal Republic of Nigeria (2004) 52 WENI (2008) CCJLR 1(Pt. 1) 1.

(a) The interpretation and application of the treaty, Conventions and Protocols of the Community.

(b) The interpretation and application of the Regulations, Directives, Decisions and Other Subsidiary Legal Instruments adopted by ECOWAS.

(c) The failure by member states to honour their obligations under the Treaty, Conventions and Protocols, Regulations, Directives or Decisions of ECOWAS.

(e) The Provisions of the Treaty, Conventions and Protocols, Regulations, Directives or Decisions of ECOWAS member states.

(f) The Community and its officials.

(g) The action for action against a community institution or an official of the Community for any action or omission in the exercise of official functions.

In addition to the above, the court also has jurisdiction to determine any non-contractual liability of the Community and may order the Community to pay damages or make reparation for official acts or omissions of any community institution or community officials in the performance of official duties or functions. It also has jurisdiction to determine cases of violation of human rights that occur in any member states.

It needs stating that the human rights jurisdiction of the Court remains one of the high points of the amending Supplementary Protocol A/SP.1/01/05 as individuals and corporate bodies were thereby granted access to the Court and hence the increase in the tempo of judicial activities of the Court[320]. The Court is also to act as arbitrator pending the establishment of the arbitration tribunal.

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320 This provision should have been tied to the exhaustion of the local remedies principle since the domestic courts of member states have not been reported wanting in this regard. Probably concern for protection of human rights outweighed other considerations

The court shall also have jurisdiction over any matter provided for in an agreement where the parties provide that the Court shall settle disputes arising from the agreement. Finally, the Authority of heads of States and Governments shall have the power to adjudicate on any specific dispute that it may refer to the Court other than those specified in the Article.

The Court also has an advisory jurisdiction.[321] Thus, it has power to express in an advisory capacity a legal opinion on the questions of the Revised Treaty at the request of the Authority, the council, one or more member state or the President of the Commission and any other institution of the Commission. Thus, in *The Request For Advisory Opinion By ECOWAS Executive Secretary,*[322] the Court opined that Rule 23(1) of Rules of Procedure of the Community Parliament is in conformity with the provisions of Article 7(2) and 14(2) (f) of the Protocol relating to the Parliament of the Community. Consequently, the Court advised that the bureau of the Parliament should continue to run the affairs of the Parliament pending the first sitting of the new Parliament.

Though, the Council of Ministers have realised the need for an appellate structure within the Court. The Court does not have any appellate jurisdiction. Consequently, any attempt to invest it with one no matter how ingenious will fail. Access to the Court or the Court's jurisdiction *ratione personae* is limited to the following persons or institutions namely:

(a) Member states where an action is brought for failure by a member state to fulfil an obligation.

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321 Article 11 of the 1991 Protocol as amended.

322 (2010) CCJLR (Pt. 3) 186.

(b) Member states, the Council of Ministers and the executive secretary in proceedings for the determination of the legality of an action in relation to any community text.

(c) Individuals and corporate bodies in proceedings for the determination of an act or inaction of a community official which violates the rights of the individuals or corporate bodies.

(d) Individuals on application for relief for violation of their human rights.

(e) Staff of any community institution after the staff member has exhausted all appeal processes available to the officer under the ECOWAS staff rules and regulations.

(f) National Courts of member states where it refers an issue bordering on the interpretation of the provisions of the Treaty or other Protocols or Regulations, in the course of its own adjudicatory functions.

In the adjudication of issues before it, the court relies on the provisions of the Treaty and its Rules of Procedure as well as the body of laws contained in Article 38 of the Statute of the ICJ. This is hardly surprising given the prime position of the ICJ as the principal legal organ of the UN and the major expounder of international legal norms.

Proceedings at the Court are initiated by an application addressed to the Court Registry. The application shall set out the subject matter of the dispute and the parties involved. The Chief Registrar of the Court shall immediately serve notice of the application and of all documents relating to the subject matter of the dispute on the defendant who shall state his grounds of defence within the time limit stipulated by the rules of procedure. Every application shall state the following.[323]

[323] Article 33 Rules of Procedure.

(a) The name and address of the applicant.

(b) The designation of the party against whom the application is made.

(c) The subject matter of the proceedings and a summary of the pleas in law on which the application is based.

(d) The nature of any evidence offered in support, where appropriate.

(e) The form of order sought by the applicant.

(f) An address for service in the place where the court has its seat and the name of the person who is authorised and has expressed willingness to accept service.

(g) In addition or instead of specifying an address for service, the application may state that the lawyers or agent agrees that service is to be effected on him by telefax or other technical means of communication.

Every application shall be accompanied by supporting documents.[324] The Court may also request the parties at any time to produce any document and / or provide any information or explanation which it may deem useful.[325] Where this request is refused, formal note shall be taken thereof.

Where an application is in default of the requirements set out above especially those of Article 33, the Chief Registrar shall prescribe a period of not more than thirty days within which the applicant is to remedy the defect within the prescribed period, the

[324] Article 33(5) *Ibid*; Article 15 of the Protocol
[325] Article 15 of the Protocol.

court shall after hearing the Judge Rapporteur[326] decide whether the non-compliance thereby renders the application formally inadmissible.[327]

The defence is required to within one month after the service on him of the application file a defence stating.[328]

(a) The name and address of the defendant.

(b) The argument of facts and law relied on.

(c) The form of order sought by the defendant.

(d) The nature of evidence offered by him.

The application initiating the proceedings and the defence may be supplemented by a Reply within one month from the date of receipt of the defence; and a Rejoinder by the defendant within one month from the date of the receipt of the reply by the applicant.[329]

All application initiating proceedings are expected to be registered and notice thereof be published in the official journal of the community. The Notice of Registration shall state;[330]

(a) The date of registration of the application.

(b) The names and addresses of the parties.

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326 The Judge-Rapporteur is a Judge nominated by the President to summarize or give a report on a case or issue. He is required to make a preliminary report to the Court in respect of an application lodged in the registry. The preliminary report shall contain recommendations as to whether inquiry or any other should be taken; Article 1 and 56 of the Rules of Procedure; Falana, *op. cit.* p. 86.

327 Article 33(b) of the Rules of Procedure. In the Advisory Opinion sought by the Executive Secretary of ECOWAS (2010) 1 CCJLR (Pt. 3) 186, the letter of the Executive Secretary of ECOWAS was addressed to the President of the Court instead of the Chief Registrar. Notwithstanding this irregularity in addressing the letter, the Court considered it and gave its advisory opinion.

328 Article 35 of the Rules of Procedure. Note that a defendant who has a separate cause of action may raise it by way of claim in the statement of defence; Qudus Gbolaham Folami & Anor V. Community Parliament (ECOWAS) (2009) CCJLR (Pt. 2) 144 at 155.

329 Article 36 of the Rules of Procedure.

330 Article 36 *Ibid.*

(c) The subject matter of the proceedings.

(d) The form of order sought by the applicant.

(e) A summary of the pleas in law and the main supporting arguments.

The Notice of Registration is significant as it serves the purposes of putting member states and members of the public at large on notice so that parties whose interest may be affected by the court's decision may intervene in the proceedings to protect their interest.

It needs stating herein that actual proceedings in ventilation of a claim consist of two parts, to wit: written or oral. The written proceedings consist of the application entered in the court, notification of the application, the defence, the reply, the rejoinder and other briefs or documents filed in support.[331] The oral proceedings consist of the hearing of parties, agents, witnesses, experts, advocates or counsel.[332]

Each party to a dispute shall be represented by one or more agents nominated by the party concerned and the agent may request the assistance of one or more advocates or counsel who are qualified to appear in court in their area of jurisdiction. Consequently, a counsel appearing for a party is required to lodge the fact the he has competence to practice before a court of a member state which is a party to the Treaty.[333]

Agents, Advisers and Lawyers appearing before the Court enjoys immunity in respect of words spoken or written by them in prosecuting their parties' case.[334] However, where the conduct of such agent, adviser or lawyer towards the Court or Judge is

331 Article 13(1) – (3) of the Protocol and Articles 32-51 of the Rules of Procedure.
332 Article 52-58 of the Rules of Procedure.
333 Article 28(3) of the Rules of procedure.
334 Article 28-30 of the Rules of the Procedure.

incompatible with the dignity of the Court, such may be excluded from the proceedings.[335]

Article 21 of the Protocol empowers any interested member state or other persons to intervene in a proceeding whose final outcome would affect their legal interest. An application to intervene must be made within a period of six weeks of the publication of the Notice of Registration.[336]

The application for intervention shall contain:

(a) The description of the case.

(b) The description of the parties.

(c) The name and address of the intervener.

(d) The intervener's address for service at the place where the court has its seat.

(e) The form of order sought by one or more of the parties in support which the intervener is applying for leave to intervene.

(f) A statement of the circumstances establishing the right of the intervener, where the application is submitted pursuant to Article 21 of the Protocol.

The Court may pursuant to Article 16 of the Protocol and in accordance with the Rules of Procedure order any manner of judicial enquiry, summon any person, organisation or institution to carry out any enquiry or give any expert opinion. The Court each time a case is brought before it may order any provisional measures or issues any provisional instructions which it may consider necessary or desirable.[337] In

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335 Article 31 of the Rules of Procedure.

336 Article 89 (1) of the Rules of Procedure; Article 59 (4) of the Rules. But consideration may be given to applications made in breach of Article 89 so long as they were brought before the decision to open the oral procedure; Article 89(7) of the Rules of Procedure. See also Chief Frank Ukor V. Rachad Laleye & Anor. (2009) CCJLR (Pt. 2) 30 where the Court declined the request for intervention by the Intervener / Applicant as same was not made within the six weeks stipulation.

337 Article 20 of the Protocol A/P1/7/91.

exercising this power, the Court usually has regard to the need for the preservation of the res in a pending suit and thus protects the integrity of its judgment or decision.

An application for provisional measure or instruction shall state the subject matter of the proceedings, the circumstances giving rise to the urgency and the pleas of fact and law establishing a prima facie case for the relief sought.[338] The application is made by a separate document and once made, shall be referred to the court within forty-eight (48) hours by the President.[339] Any order of provisional measure lasts till final judgment unless the Court orders otherwise.[340]

Article 87 of the Revised Treaty states that the official and working languages of the Community shall be English, French and Portuguese.[341] The language of a case shall be chosen by the applicant except that where the defendant is a member state, the language of a case shall be the official language of that state.

The seat of the Court is at Abuja in Nigeria[342] where the Court also holds its sittings, though the Court may however decide to convene or sit in the territory of any other member state where the circumstances so dictates.[343]

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338 Article 79 of the Rules of Procedure.

339 Article 8, *Ibid.*

340 Tokunbo Lijadu-Onyemade V. Executive Secretary ECOWAS (NO 1) (2008) 1 CCJLR (Pt. 1) 25.

341 Article 25 of the Rules of Procedure.

342 This was fixed at Abuja pursuant to Article 26(1) of the Protocol A/P1/7/91 vide Decision A/DEC.24/12/01.

343 Article 26 of the Protocol. In Musa Leo Keita V. The Republic of Mali (2009) CCJLR (Pt. 2) 58, the Court decided to sit in Bamako, Mali in consideration of the age of the Plaintiff who was 80 years old at the material time; Hadijiato Mani Koraou V. The Republic of Niger (2010) CCJLR (Pt. 3) 1 and Kokou V. ECOWAS Commission where the Court considered the extreme financial impecuniosities of the applicants as a basis to move its sitting to Niamey, Niger and Ouagodougou, Burkina Faso respectively. However, in both cases, the fact that the applications were not opposed may have greatly influenced the Court's decision.

5.4.3 Judgment of the Court

The deliberation of the Court upon which to base a judgment takes place in a closed session and only Judges who were present at the oral proceedings are entitled to take part in such deliberations.[344] Every Judge taking part in such deliberations shall state his opinion and the reasons for it. The Court shall give one decision in respect of each case which is read in open Court and is based on the conclusions reached by the majority of the Judges sequel to their deliberations.[345] Thus, there is no provision for dissenting judgment or minority opinion of the members of the Court.

The decisions of the Court are binding on the member states, the institutions of the Community as well as individuals and corporate bodies.[346] Parties are entitled to copies of the judgment which shall be published in the official journal of the Community. The refusal of a member state to implement the decision of the Court tantamount to a breach of such member's obligation to the Community and may attract the following sanctions, to wit:

(a) Suspension of new Community loans or assistance.

(b) Suspension of disbursement on ongoing Community projects or assistance.

(c) Exclusion from presenting candidate for statutory and professional posts.

(d) Suspension of voting rights, and

(e) Suspension from participating in the activities of the Community.[347]

Provision is also made for the revision of the Court's judgment.[348] An application for revision shall be made within five years of the delivery of such judgment. The request for review shall be made within three months of becoming aware of some decisive

344 Article 19(3) of the 1991 Protocol. See also Article 60 of the Rules of Procedure.
345 Article 61 of the Rules, *Ibid.*
346 Article 62 of the Rules, *ibid*; Article 15(4) of the Revised Treaty.
347 Article 77 of the Revised Treaty and Article 24 of 2005 Supplementary Protocol.
348 Article 25 of the 1991 Protocol and Article 92-94 of the Rules of Procedure.

fact which was neither known to the Court nor to the party at the time of the original decision. Such lack of knowledge however must not be due to negligence.[349]

The ECOWAS Court of Justice represents a bottom-up approach to international adjudication given the fact that hitherto the practice was to establish such supra-national judicial institutions at a continental or inter-continental level. It remains one of the few instances wherein the concept of judicialism has become entrenched at the sub-continental or sub-regional level. In the context of the African environment, it remains a milestone given the lethargy of the continent's political leadership at embracing the concept of judicialism by establishing judicial institutions. Its establishment is a further confirmation of the realisation of the select group of African nations that amicable resolution of dispute founded on law remains key to realising the full potentials of the citizens within the sub-region.

Its jurisprudence has continued to enrich the legal firmament of the sub-region as to the rights of the citizens and obligations of the States vis-à-vis international legal instruments. For instance, in the case of *Professor Essien v. Republic of Gambia,*[350] the Court interpreting Article 4(g) of the ECOWAS Revised Treaty held that member states of the ECOWAS are under a duty to recognise, promote and protect human rights and peoples' rights in accordance with the provisions of the African Charter on Human and peoples' Rights.

349 Article 25(1) of the 1991 Protocol; Mrs Tokunbo Lijadu-Onyemade V. ECOWAS Council of Ministers (No. 5) (Unreported) Suit No: ECW/CCJ/APP/02/08 of 17/11/2009.

350 (2009) CCJLR (Pt. 2) 1.

In *Hadijatou Mani Karaou V. The Republic of Niger*,[351] the Court condemned the failure of the defendant to honour her obligation under ECOWAS Revised Treaty, the African Charter on Human and Peoples' Rights and under International Human Rights Instrument by abolishing slavery which violated the applicant's human right of freedom from discrimination. Where an application will set the ECOWAS Court on a collision course with the national Courts of member state, the Court will decline jurisdiction as it is not meant to be an appellate court. Thus, in *Jerry Ugokwe V. Federal Republic of Nigeria,*[352] the plaintiff after losing his election case at both the Governorship/legislative Election Petition Tribunal and the Court of Appeal in Nigeria filed an action at the ECOWAS Court, the Court declined jurisdiction. The attitude of the Court towards decisions of national courts was succinctly stated in the case of *Musa Leo Keita V. The State Of Senegal*[353] when it held thus:

> In this perspective, the Community Court is powerless; it cannot adjudicate upon decisions of the national courts. Within the meaning of the afore-mentioned Article 10, the Community Court of Justice can only intervene when such courts or parties in litigation expressly so request it within the strict context of the interpretation of the positive law of the Community.

Its major innovation has been the opening up of access to private individuals and organisations. In a region where human rights violation and impunity holds sway, this is a welcome development. Its drawback remains the fact that like most international

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351 (2010) CCJLR (Pt. 3) 1.
352 (2008) CCJLR (Pt. 1) 149.
353 (2009) CCJLR (Pt.2) 58.

adjudicatory bodies, enforcement of the Court's decision is dependent on the willingness and ability of member states to sanction defaulting members. This has not always been easy given the power-politics that often characterised inter-states relationship; moreso as states jealously guard their sovereignty.

CHAPTER SIX

PROSPECTS AND CHALLENGES

6.1 Prospects

Given the fact that law has always played a central cum critical role in the evolution of mankind from the cave to the computer age as well as the realisation that International Law since the middle of the last century has been developing in many directions as the complexities of life in the modern era have multiplied; disputes and their resolution remain a corollary to the roles played by law. Especially is this so at the international level where the changes and challenges that occur can be momentous and reverberate throughout the system. States are grappling with their traditional purpose of maximizing the natural resources of the earth for the benefits of their citizens. The emergent threats of terrorism and other forms of criminality are diminishing international life. Thus there is a continuing tension between those rules already established and the constantly evolving forces that seek changes within the system. The International community having realized the deleterious effects these changes, challenges and criminalities which most times assumes the toga of inter-state conflicts, can engender upon the international system, have taken steps to pre-empt them. Thus Article 2(3) of the UN Charter provides that "states should settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered." Thus, it was within this context that states and their nationals in there increased cooperation and interaction have turned to international adjudication as the preferred means of dispute settlement.[1] This resort to

[1] Thus, virtually all Treaties establishing an international organisation always make provision for this. See Article 33(1) and 92 of the U.N. Charter; Article 287 of LOSC; Article 52 of the American Convention on Human Rights; Article 15 of ECOWAS Revised Treaty; See also IP Amaza "Multiplicity of International Dispute Settlement Forum: Avoiding the Risk of Parallel Proceedings," *Dispute Resolution International* Vol. 6, No 2 (2012) 149.

international adjudication underpins the concept of judicialism which we have discussed together with its pivots which continue to proliferate either on specific issues on a general basis or on a regional basis.[2] The concept of judicialism holds out the promise of establishing a global order based on law, justice and human rights since these are the endpoint of all adjudicatory processes. Consequently, this part of the work examines the prospects of the concept in assuring unto the international community a system founded on law and the general judicial process.

6.1.1 The Judicial Role:

Implicit in the concept of judicialism is the adjudicatory function which forms the *raison d'être* for the establishment of the afore-mentioned pivots of judicialism. Disputes which have arisen must be resolved within the solemnity and finality of the legal process. In furtherance of this function, the ICJ in *The Northern Cameroun's Case*[3] declared as follows:

> The function of the court is to state the law, but it may pronounce judgment only in connection with concrete cases where there exists at the time of the adjudication on actual controversy involving a conflict of legal interests between the parties. The court's judgment must have some practical consequences in the sense that it can affect their existing legal rights or obligations from their legal relations.

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2 Y Shany, *The Competing Jurisdiction of International Courts and Tribunals* (New York: Oxford University Press, 2003) 5; See also D Terris, *et al* (ed.) *The International Judge: An Introduction to the Men and Women who Decide the World's Cases*, (Oxford: Oxford University Press, 2007) p. 121 wherein the court's were classified either as generalist and specialists on the one hand or as regional courts on the other hand.

3 ICJ Reports, 1963, p.15

The dictum above applies to every other judicial institution and is manifested in the international system in the courts' advisory and contentious jurisdiction.

6.1.2. Deepens Peaceful Co-Existence

Maintenance of international peace among states is the fundamental purpose of International Law all through the epochs of history. Consequently, every international legal instrument has always provided for the ideal of peaceful co-existence among members of the international community. In this wise, the United Nations which is the number one international legal instrument in terms of scope and influence made copious reference on the need for peaceful co-existence by enjoining all nations to avoid the use of force or threat of the use of force in the conduct of their international relations.[4] The need for peaceful co-existence underpins its aims as enumerated in Article 1-4 of the Charter. In fact, membership of the organisation is conditional upon the intending member being a peace-loving state.[5] Given the role of law as a stabilizing index of our collective aspiration for peaceful co-existence, it also established a judicial organ to resolve emergent disputes peacefully.[6] Thus was born the International Court of Justice which represents the heights of judicialism at International Law. Its forays in dispute resolution which cut across both its contentious and advisory jurisdiction has helped in no small measures in deepening peaceful co-existence among nations. For instance, its decision in the *Anglo Norwegian Fisheries Case*,[7] put a judicial imprimatur on the yardstick to be used in determining the width of the territorial sea among coastal states especially where the coastline is deeply indented or there are numerous islands running parallel to the

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4 Article 2(4) of the UN Charter; Note the U.N. Resolution on Principles of International Law Concerning Friendly Relations Amongst States in Accordance with the Charter of the United Nations, 1970.

5 Article 4(1) of the U.N. Charter.

6 Article 92.

7 ICJ Reports, 1951, p. 16.

coasts. In such a case, the normal low-water mark rule ought not be applied but rather of straight baselines drawn from the outer rock. This system has since been adopted by the states. Moreover, where the result of the baseline method is to enclose as internal sea or high seas, a right of innocent passage is thereby deemed to exist. In recent times, some of its decision has helped in enhancing the continued peaceful co-existence of states with common borders. Instances of these include the *Cameroun V. Nigeria Boundary Limitation Case*[8]

This desire for peaceful co-existence among states also drives the establishment of other judicial bodies within the United Nations system. This is in view of the realization that an unresolved conflict among two or more nations could have a spiralling adverse effect on other nation states depending on the economic, political and military influence and affiliation of the feuding states.

6.1.3 Jurisprudential Role

An ineluctable corollary to the pacific resolution of international disputes by international adjudicatory institutions is the advancement of the jurisprudence and development of International law. The latter ranks as one of the fundamental functions of all international judicial institutions. This they do while pronouncing on a particular issue before it. For instance, Article 38 (1) (d) of the ICJ Statute enjoins the Court to apply judicial decisions and teachings of the most highly qualified publicists of the various nations.[9] The significance of this provision as in other similar provisions is that the various international courts apply not only its own decisions but that of its peers.[10] A collection of these judgments will most often provide an in

8 ICJ Reports, 2002, p. 303.
9 Article 20(1) of the Protocol Establishing the A.U. Court of Justice.
10 D Terris, *Et al*, *op. cit.* p. 118.

insight into the current state of International Law vis-à-vis given issue, thereby helping in its crystalization at International Law. It needs noting that the appropriate role of a Judge in dispute settlement is not without its own controversy. On the one hand is the view that a Judge must confine himself to the issues at hand without any extrapolation. On the other hand is the view that a Judge while not free to stray outside the issues placed before him can still utilise those aspects of it which have a wider interest or connotation in order to make general pronouncements of law and principles that may enrich and develop International law. This controversy has always dogged the position of the Judge irrespective of whether he operates at national or international level. However, when critically compared to their national peers, it would be found out that International Judges have wider margin within which to manoeuvre due mainly to the fact that the legal boundaries that frame their actions are often less clearly demarcated and perhaps less patrolled. Thus, the de facto lawmaking role of International Judges cannot be disputed. The International Court of Justice and other International Courts have latched on to this latitude to play a part in shaping or re-shaping, progressively or retrogressively the scope and application of International Law. Some of their decisions introduced innovations into International law which subsequently won general acceptance. For instance, in *the Reparation For Injuries Case,*[11] the ICJ recognised the international legal personality of international institutions; whilst in the *Anglo-Norwegian Fisheries Case*,[12] it sets the criteria for the recognition of baseline from which to measure the territorial sea and which rule was later enshrined in the 1958 Geneva Convention on the territorial Sea and Contiguous

[11] ICJ Reports, 1949, p. 174.
[12] ICJ Reports, 1951, p. 16.

Zone. In *Nicaragua V. U.S*[13], it interpreted Article 2 (4) of the U.N. Charter as a rule of Customary International Law and thus having *an erga ommes* Character.

Other International Courts have also made positive impacts in expounding on the jurisprudential role of the Court. For instance, the decision of IACtHR in the *Velasquez-Rodriguez* [14] *And Godinez Cruz* [15] cases respectively on forced disappearances of persons were prime considerations for reconsidering the rules on state responsibility, Human Rights Law and International Criminal Law. Under Article 7(1) (i) of the ICC Statute, forced disappearances are now crimes against humanity which cannot thus be subject to a Statute of Limitation. Similarly, in the *Van Gend En Loos Case,*[16] the ECJ established the direct effect of EC Laws in the legal system of member states. The *Costa V. Enel Case*[17] established the doctrine of supremacy of EC norms over inconsistent national laws. Given the poor human rights record of Africa in general and the ECOWAS region in particular, the ECOWAS Court's interpretation and application of the Treaty Provision granting access to individuals[18] have in no small way sharpened the consciousness of human rights in the sub-region. This innovation wherein the Courts are enabled to create law seem obscured when viewed against the provisions of Treaties[19] and the canonical view of International Law that International Courts are not bound by their own precedents, thus, occluding the application of the concept of *stare decisis* which is the keystone of the legal architecture of the common law system. This rule has been rationalised on the need to avoid attributing International Courts with significant law making powers

13 ICJ Reports, 1984, p. 25.
14 9 HRLJ, 1988, P. 212.
15 95 ILR, P. 232.
16 1963 ECR 1.
17 1964 ECR 585.
18 Pursuant to Articles 9(4) and 10(d) of Supplementary Protocol A/SP.1/01/05; see also Ebrimah Maneh V. The Republic The Gambia (2009) CCJLR (Pt. 2) p. 116.
19 Article 59 of the U.N. Charter; Article 21(2) of the ICC Statutes.

and secondly to avoid diminishing the capacity of international adjudicative bodies to settle disputes if they were too constrained by settled jurisprudence.[20] The above view notwithstanding, it is accepted in practice that courts irrespective of any bar rely upon and cite each other abundantly in their verdicts. International Courts have evolved far beyond the mere dispute settlement function, operating as true courts of law with the implication of their having a strong tendency to remain faithful to their own previous rulings save for where there are cogent and legally valid reasons to depart therefrom consequently, International Courts tend to abide consistently with their own previous rulings and are inclined to quote each other, thereby reinforcing the precedential value of the initial judgment.

Levi captured it more aptly when he posited thus:

> Decisions especially repetitive similar decisions acquire an authority affecting the formulation of legal norms in subsequent cases. They are not merely evidence of existing law. They often become creators of law especially becoming part of International Law.[21]

The jurisprudential role of the Courts is given a further impetus when it is realised that most of their Statutes contain provisions which empowers the court to decide a case *ex aequo et bono* if the parties are in agreement. This provides the Court with a leeway to be more creative and innovative and to decide a case in good faith and justice without recourse to a pre-existing rule if such a rule will operate harshly unjustly and inefficiently.

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20 D Terris, *et al*, *op. cit*. p. 118.

21 W Levi, *Contemporary International Law: A Concise Introduction* (Boulder, Colorado: West View Press, 1979) p. 53.

6.1.4. Accountability and Responsibility

In an ideal world, a court sits aloof from the tainted world of politics. A court constitutes a world unto itself where the inhabitants speak their minds, fight their battles and play their roles according to a tightly ordered set of rules. Since law is fundamental to the well-being of any society, the *judex* has a bounden duty to uphold the law. In the exercise of this duty, the outside interests of men and women do not matter. Their loyalties, convictions and attachment are irrelevant. Ultimate allegiance is owed to the law and its precepts. In this sacred realm, politics is only entertained as mere subject to the law's dominion. Given the relationship between politics and inter-state intercourse, law become the lever that holds the balance between the state and the individuals within the rule of law and resort to impunity.

The establishment of International Courts and tribunals remains one of the enduring mechanisms aimed at entrenching accountability and responsibility among states and individuals. The fact that for centuries, International Law was state centric in attitude whilst most of the strifes that bedevilled the international system were the machinations of individuals, was the impetus for the agitation for International Courts with greater jurisdictional reach outside of the conventional state-centric international judicial bodies. The highpoint of these innovations is the International Criminal Court (ICC) at the U.N. level and various supranational and regional courts that have granted access to individuals to bring forth claims as well as defend same. Individuals are accountable for their actions and thus bear full responsibility for any consequence flowing therefrom. No longer will the act of state doctrine or the concept of sovereign immunity be a defence. All are brought before the law on an equal footing. A lot of persons who would have escaped responsibility for their actions on account of the

above doctrine has been convicted by the ICC or are currently facing trial.[22] On another plane, states are being made to account for their actions that impinge on individual rights before these supra-national judicial institutions.[23]

6.1.5. Political/Diplomatic Role

Considering the environment wherein they operate and the actual dictate of their work, International Courts serve a function where the legal and political are intimately conjoined and thus are unwittingly part of the international political system. Consequently, their roles in judicial resolution of disputes have in some cases deepened the resolve of parties of using the diplomatic means to resolve issues pending before the courts or arising from the decisions of the courts. Even the fact of their existence conduces to favour exploring diplomatic channels of dispute resolution. For example, the existence of the ICC is a sufficient deterrent for pugnacious political leaders from resorting to aggressive wars whether against external disputants or internal insurrections. This is because such leaders will surely account individually for their actions or inactions that are contrary to the rules of warfare. Ditto to military leaders.[24] Thus, we agree with Oduntan when writing of the ICJ, he posited that the use of the Court is increasingly assimilated into the diplomatic process in international relations.[25] Other international adjudicatory institutions share in this attribute. This attribute it should be noted is not exclusive to international

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22 For example Charles Taylor an ex-President of Liberia was convicted and sentenced by the special court for Sierra Leone sitting at Hague to a 50 years jail term for atrocities committed during his reign as President during the Liberian and Sierra Leonean civil wars. See en.wikipedia.org/wiki/Charles_Taylor. Accessed on 18/10/2014. President Uhuru Kenyata is currently facing trial at the ICC in Hague.

23 Hissene Habre V. Republic of Senegal, (unreported) Suit No: ECW/CCJ/APP/07/08 of 14 May 2010; SERAP V. Federal Republic of Nigeria (unreported) Suit No: ECW/ CCJ/APP/0808 of October 27, 2009.

24 Article 28 of the ICC Statutes.

25 G Oduntan, *The law and Practice of International Court of Justice [1945-1946]: A Critique of the Contentious and Advisory Jurisdictions*, (Enugu: Fourth Dimension Publishing Co. Ltd, 1999) p. 39.

judicial bodies as the practice is known in domestic courts wherein some out-of-court settlement are reached before the case comes up for hearing or soon thereafter. This diplomatic role of the courts could be at the pre-judgment or post judgment stages. Thus, at the pre-judgment stage, the fact that a decision could go either way coupled with the uncertainties surrounding the litigation processes generally and the need to protect commercial interests may provide the impetus for genuine negotiations by the disputing states. An instance of pre-judgment settlement in the work of the ICJ is the passage through *The Great Belt Case.*[26] The parties therein achieved settlement of their disputes within hours of the commencement of the oral proceedings. Instances abound also whereby these adjudicatory bodies encourage negotiations before fixing time limits for filing of pleadings or at the parties instance grant an extension of time to enable parties explore further avenues at negotiation. Again, the ICJ provides a ready-made precedence here in the dispute over *The Danube River Between Hungary and Slovakia*[27] The Court held that it was wrongful for Hungary to suspend and then in 1989 to abandon her obligation to a common dam project as spelt out in 1997 Treaty binding both states. The Court also found that Czechoslovakia (from which Slovakia emerged after the collapse of communism) has proceeded illegally when it diverted the river through the dam in 1992. The Court then ordered the two countries to negotiate in good faith.

In relation to post-judgment negotiation, the border dispute between Cameroun and Nigeria is most apt. Diplomatic negotiations became more robust and focused between the parties after the Court has given its judgment. Considering the legal cum political difficulties inherent in enforcing the judgment, the two states in November

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[26] Finland V. Denmark available at www.icj-cij.org/../6969pdf. visited on 19/10/2014.

[27] Case Concerning the Gabcikovo-Nagymaros Project, (Hungary V. Slovakia) 1997 ICJ Reports, p. 7.

15, 2002 set up a Joint Commission (ie, Nigeria-Cameroun Joint Commission) to untangle the legal cum political puzzles that arose from the decision.

In the final analysis, it needs stating that the use of the Court to facilitate amicable settlement of disputes is only a realization of the fact that judicial settlement is only an alternative to friendly settlement by the parties themselves.

6.1.6. Therapeutic/Cooling Off Role

Given the passion which characterises most inter-state disputes, the existence of International Courts to which aggrieved parties can submit their grievances to, act as a wedge towards the downward slope of using force to settle disputes. Especially is this so when the issues at stake borders on what is considered of great national interest as in the territorial integrity of a particular state. Thus, the submission of a dispute to an international judicial organ provide states an avenue to avoid direct military confrontation in some volatile cases in which public opinion may (albeit wrongly) be in support of direct military confrontation. This is moreso when it s considered that between the time of submission of a case to an International Court and when it is eventually disposed off all the passion and agitation for a forceful resolution of the dispute would have waned. The respective governments are shielded from the problem of losing face before their citizens as most citizens considering their knowledge (albeit limited) of the workings of the domestic system wherein once a matter is submitted to the court, parties are precluded from taking actions that would pre-empt the determination by the Court.

An apt example was the maritime and boundary dispute between Cameroun and Nigeria. At the commencement of the skirmishes, the drums of war were already been beaten especially considering the military might of Nigeria vis-à-vis Cameroun.

However, by the time the dispute was entrusted to the International Court of Justice, attention was shifted from the respective governments towards the Court. By the Time the ICJ delivered its decision, most people felt that the best way to tackle the conundrum raised by the judgment was to explore the diplomatic channel.

Countries are known to have exploited this therapeutic effect by submitting disputes which have generated huge domestic public opinion calling for immediate drastic and radical action to International Courts in order that frayed nerves might be calmed by the lengthy judicial process. Especially is this so when the referring country is militarily weak vis-à-vis the aggressor state. This therapeutic effect is further enhanced by the Court's use of sober well measured and well delivered speech. This according to Prott[28] is connected with the Court's general dispositions to judicial settlement which on the whole is done in as conciliatory a manner as possible; moreso considering the fact that Judges who serve on International Courts share a belief in the aims of International Justice and the value of International law.

In performing this role however, the court is ever mindful of the abuse this could be put to and a'fortiori, is always on guard to prevent an abuse of its judicial process. Consequently, where the institution of proceedings is meant to manipulate the Court or slow or hinder the process of international sanctions, the court has always declined to come into the matter.[29]

6.2 Challenges

Unlike in the past where inter-state intercourse involves basically a relation among sovereign states over arcane matters of diplomacy and trade, today inter-state

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28 L V Prott, *The Latent Power of Culture and the International Judge*, (London: Billing and Sons Ltd, 1979) p. 873.

29 Libya V. U.K.. (1992) ICJ Reports, 3.

intercourse has come to encompass broad range of human experience and activity. In the wake of this major historical development, the international community as represented by the nation states have created new set of legal institutions designed to settle disputes among global actors, settle conflicts that might degenerate into armed conflict and offer the promise of justice to those who cannot find it within their own countries. Their mission compels them to work across boundaries of geography, fundamental principles of International Law, background, culture, training and experience of the individual Judges to forge law and render justice that will earn the respect of citizens of countries worldwide.

Against the backdrop that an International Court has as its clientele more than one sovereign nation or citizens of these sovereign nations, International Law in the evolution of its norms has always been mindful of states sovereignty. In most instances, these courts rely on the state parties to exercise one form of jurisdiction or the other, which in itself is a direct function of the sovereign status of states in the international arena. It remains arguable however whether given the complexities of today's international life, International Courts should not dorn the garb of courts under domestic law with all the coerciveness attributed to the judicial function.

In the light of the above, we shall be discussing herein some of the challenges that dogs these International Courts in their quest of doing justice to members of the international community.

6.2.1. The Concept of Sovereignty

Given the solemnity associated with judicialism in the domestic sphere where compliance with the judgment of the court is taken as a given in view of the coercive apparatus available to the court, it remains a puzzle to keen observers of International

Law why despite the acclaimed strides of International Law over the years, compliance with the decisions of International Courts remain subject to the whims and caprices of the disputing parties. This lethargy it seems is attributable to the concept of sovereignty which is one concept that has dogged International Law and relations. This is in view of the fact that the international system in conventional terms is made up of an amalgam of states who pride in their sovereign attributes. Thus, while these states are willing to work together for the overall benefit of the international system, they are nevertheless conscious of their independence where their core interests are concerned and would a' priori go to extra length to protect these interests, moreso given the fact that there is no supreme sovereign at the international level to whom all allegiance must be owed. Various writers have spilt much ink on the history, meaning and characteristics of the term.[30] However, it seems fairly settled that the theoretical postulation underpinning the concept of sovereignty began from attempts to analyse the internal structures of the state.[31] Political philosophers and legal positivists espoused the view that there must be within each state an entity having supreme legislative and / or political power and ipso facto cannot be bound by laws itself has enacted. By a shift of meaning, the word sovereignty came to be used to describe not only the relationship of a superior to his inferiors but also the relationship of a ruler or of the state itself towards other states.[32] Consequently the word still retains its conventional but emotive overtone of unlimited

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30 J T Rourke, & M A Boyer, *International Politics on the World State*, 5th Edn. (New York: McGraw-Hill, 2004) p. 132; C H Mcllwain, *Constitutionalism and the Changing* World, (New York: Cambridge University Press, 1939) p. 47; N D Palmer and Perkins, *International Relations, 3rd* Edn. (India: AITBS, 2010) pp. 11-17.

31 M A Akerhust, *Modern Introduction to International Law,* (London: George Allen and Urwin Ltd, 1978) p. 26; H H Mensah and R Okpeahior. "Limits of States Sovereign Over the Airspace: An Analysis and Comparism of State Practices in Contemporary International Law," (2010) 1 *Ebonyi State University Journal of International Law and Jurisprudence Rev. (EBSU JILJR)* pp. 242-245; J C Nkwoh, "The Desirability of Globalization Over Economic Sovereignty in African Development, (2008/2009) *NJLS* Vol. VIII, pp. 52-53.

32 M A Akerhust, *Ibid.* pp. 26-27.

power above the law which when transposed to the international system gives a totally misleading picture of International Law and relations. The persistent source of perplexity lies in trying to reconcile the fact of the obligatory character of international Law with the difficulty felt in accepting or explaining the fact that a so-called sovereign state may also be bound or have an obligation under International Law. This feeling is made more poignant when it is realised that a sovereign head in the conventional or classical sense whilst free to do as he wishes vis-à-vis his own subjects lacks such freedom in relation to other states. A' fortiori, at International Law, the term "sovereignty" in relation to a state means no more than that the state is independent, not that it is above the law. However, this is only as far as theoretical formulations are concerned in an ideal law-abiding world wherein the terms "sovereignty" and "independence" may be used as synonymous. In the real world where power politics predominates, independence is at best, dubious. Especially is this so in terms of their foreign and defence policies. The above notwithstanding the interchangeable use of the terms "sovereignty" and "independence" to denote the legal cum political status of a state has persisted in International law. This is to detach the concept of state sovereignty from the emotive concept of a person above the law whose word is law for his inferiors or subjects. Thus, in the words of Harts:

> A state is not the name of a person or thing inherently outside the law; it is a way of referring to two facts: first that a population inhabiting a territory lives under the form of ordered government provided by a legal system with its characteristics structure of legislature, courts and primary rules and secondly, that the government enjoys a vaguely defined degree of independence.[33]

[33] H L A Hart, *The Concept of Law* (Oxford: Oxford University Press, (1972) p. 216.

Given the fact that the international society is not static but dynamic consisting of both structure and system in an organic whole. The structure determines the parts that are contained in it while the system determines how those parts interact with each other. Law being a participant in society's self—forming,[34] International Law within the context of internationalism can be likened to a social purpose actualising itself given the *raison d'être* for the existence of the international system.

Norms are very much part of international institutions which drives the international system establishing ground rules and roles and meanings to constitute, constrain, shape and enable states and non-states actors. However, evolving norms of International Law in contemporary inter-state intercourse has encroached upon hitherto settled rules of International Law that it seems apposite to argue without any scintilla of doubt that rules of International Law in recent times seem vague and conflicting on many points that there is no doubt about the area of independence left to states. Consequently, the sovereignty of a state may be dependent on a particular subject.

The above postulation notwithstanding, and given the unique feature of International Law which unlike municipal law has no centralised and unified structure to whip parties into line through the coercive apparatus;[35] the concept of sovereignty is what gives international system the leverage to operate effectively. A' fortiori, most instruments establishing international organisations accord this principle utmost primacy, for the feeling that in engaging in inter-state intercourse, one is subject to no other control on grounds of power, influence, etc, is a psychological boost in striving

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34 N J Udombana, "The Institutional Structure of the African Union: A Legal Analysis," *California Western International Law Journal,* Vol. 33, No. 1 (2002) p. 69.

35 H L A Hart, *op. cit.* p. 216.

to maintain international peace and security. Consequently, we agree with Lazhari[36] when he posits as follows:

> In an international society, which is divided among territorial units that differ greatly in size, population and wealth, culture and ideologies, sovereignty is the guarantor of the co-existence of such differences as it helps the weaker units of international society to survive without fear.

Thus, without the concept of sovereignty, majority of today's states would have little chance of independence.

In trying to appraise the role of sovereignty in inter-state relations, there are two views doctrinally speaking. On the one hand are those who feel sovereignty is primarily responsible for insufficiencies of the Law of Nations and a rigid barrier against the spread of internationalism and peaceful relations among states.[37] On the other side are those who regard it as a guarantee for democracy inside the state and for peaceful and orderly international relations in the outside.[38]

The antagonists contend that the problems and challenges facing mankind such as population explosions, terrorism and other acts of violence, hunger and pollution can only be solved on a planetary basis i.e. a world government. Realities of contemporary international relations however do not avail the above view. States are currently doing their best to solve these problems and challenges by co-operating via

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36 B Lazhari, "The Role of Sovereignty in Contemporary World Order," *ASCIL* 5 (1993) p. 216.
37 *Ibid.*
38 *Ibid.*

universal supra-national organisations, regional integration and of diplomatic co-existence in accordance with the realities of the present times and not by relinquishing their sovereignty. Any rejection of the role of sovereignty would only be in the interest of the developed countries and their multi-national corporations who are already neck-deep in the struggle for the abolition of borders and jurisdiction so as to have access to markets and national resources. It will never be in the interest of the weak units of international society if the concept of sovereignty as a key element of statehood is abandoned, as such unit will lose everything, control over their destinies and their social, cultural and political particularism. However, it is instructive to note herein that the fact that states are entering into supra-national or regional co-operation pacts does not necessarily connote a relinquishment of their sovereignty. This view is predicated on the fact that even in such establishments, states have a great measure of freedom in running their affairs when their vital interests are involved.

The protagonists of sovereignty invoke a moral basis for projecting and defending sovereignty. Thus, Beitz posits that "states like persons have a right to be respected as autonomous sources of end"[39] He contends further that the claim to autonomy by a state must rest on the conformity of its institutions with some "appropriate principles of justice" because the autonomy of state is the other face of its legitimacy.[40] Other writers are of the view that sovereignty has its foundation in the psychology of nations and peoples and that it is a matter of fact the expression on the political and legal levels of the feeling belonging to one community which share many common virtues.[41] It needs restating here with the emphasis that sovereignty does not imply that states are not subject to law. For in every sphere of human activity, there must be

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39 R Beiz, *Political Theory and International relations,* (Princeton: PUP, 1997) p. 83.

40 *Ibid.*

41 *Ibid* at p. 218.

rules guiding or regulating conduct. It is for these reasons that a state cannot now rely on the concept of sovereignty to breach all known human rights norms relating to the condition of people within its jurisdiction; for such human rights breaches may entail intervention into its territory by other states at least on humanitarian grounds to save the victims of rights violation.

6.2.2 The Concept of Judicialsm Vis-À-Vis the Concept of Sovereignty

This part of the work examines how the concept of sovereignty impinges on the work of international adjudicatory bodies which provides the beacon upon which the concept of judicialism at International Law is anchored.

As noted earlier in our disparate discussions on the establishment and functioning of these international judicial bodies, they all were creations of Treaties with the concomitant rights and obligations of members therein. However, their jurisdiction in relation to the dispute brought before them is never automatic as such depends on the willingness and co-operation of states. Consequently, consent of the state parties is a condition sine qua non for the exercise of adjudicatory functions by these International Courts. The foundation for this is the general principle of International Law that no state can be compelled to litigate against her will. In the evergreen words of Oppenhein, "International society has not reached as national societies have, the point at which any creditor or party injured can summon his debtor before a court without the latter's consent to go there."[42] Moreover, it is a trite fact that states in veneration of their sovereign rights have always attempted not appearing before the court due to one or all of the following reasons.

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[42] H Lanterpacht (ed.) *L Openheim, International Law: A Treatise Vol. 11, Disputes, War and Neutrality,* 7th edn. (London: Longmans, Green and Co, 1952) p. 57.

1. That vital interests are involved.
2. That the disputes are essentially of a political character.
3. That the state concerned is right in its view and therefore should not submit to any third party adjudication or intervention.
4. That the means proposed is not suitable for the particular dispute.
5. That the procedure would involve delay.
6. That the procedure would involve excessive cost.

Thus, where the international adjudicatory body finds out that the requisite consent is lacking in terms of the treaty stipulations, it will decline jurisdiction.[43] The essence of providing for the consent of the parties appearing before an international adjudicatory body is to keep in tandem the concept of the state being sovereign and the fact that International Law has no yet developed to the level whereby the jurisdiction of an International Court or tribunal can be invoked willy-nilly upon any state without its consent. But herein lies the dilemma and shortcoming in judicialism as an instrument of peaceful settlement of international disputes. The essence of any adjudicatory process should not be dependent on the consent of the disputants to appear before the adjudicatory body if the process must be functional and effective. The idea of law and judicialism is not a strange phenomenon to states, as within individual states, it is the glue that holds the municipal system together. Transposing this ideal of law and judicialism to the international system should not be seen as diminution in the concept of sovereignty but a consolidation of states aspiration that inter-state intercourse be orderly, peacefully and without friction and that in the eventuality of disputes arising therefrom, such should also be resolved peacefully.

[43] Monetary Gold Case, ICJ Reports, 1954.

Consequently, it is our view that the consent requirement in the instrument establishing international courts should be dispensed with so as to enhance their function within the international system. Municipal law provides a useful analogy in this context as the view that the sovereign cannot be sued in court has now been supplanted with the view that they are amenable to law suits.[44]

A' fortiori and in virtue of the above, moreso given the onerous tasks of the various international organisations towards the engendering and maintenance of international peace and security through the adjudicatory process, any state that venerates International Law and its unifying role and also as a desideratum for peace within the comity of states must see the role of the sovereign state as one to be played in the community of states.

Consequently, states must see the strengthening of International Law as the best and highest exercise of its sovereignty.

6.2.3. Fragmentation / Duplication of International Legal Norms

The avalanche of challenges facing mankind since the dawn of the twenty first century has engendered a planetary wake-up call that entrusts unto the consciousness of mankind the need for newer more robust and innovative approaches to problem solving. Thus the emerging and dominant trend in contemporary inter-state intercourse is the tilt towards multilateralism. The more globalised the world becomes, the less the states retain their monopoly as the main subject of international law and thus leading likely to more systems of international disputes settlement mechanism. A lot of efforts have been directed at achieving some desirable level of

[44] S. 6(6) (b) of the CFRN 1999 as amended; H.C. Alisigwe, "An Appraisal of the Doctrine of Sovereign Immunity under Private International Law: The Nigerian Perspective," (2008/2009) *NJLS* VIII, pp. 36-37.

cooperation among states.[45] These efforts are being driven by several supra-national and regional institutions. A regional organisation could be defined as a common economic, religious, cultural, geographical or political affiliation. Regional organisations constitute important stabilizing factor in the maintenance of international peace and security and widens regional integration and cements spheres of common interests. Realizing its potentials as a veritable boost to inter-state relations, the UN encourages the formation of regional organisations that are consistent with the purposes and principles of the United Nations. In specific terms, article 52 of the UN charter provides that nothing contained in the charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to international peace and security as are appropriate for such arrangements or agencies provided that these are not inconsistent with the purposes and principles of the UN Charter. Article 52(3) enjoins members of the UN entering into such arrangements or agencies to make every effort to settle local disputes[46] through such regional arrangements or by such regional agencies before referring them to the Security Council and that the Security Council encourages the development of the peaceful settlement of local disputes through such regional arrangements. However articles 52(4) 53(1) and 103 of the UN charter subjugates all regional arrangements to the organs of the UN. Thus the fact that reference is made to a regional body where appropriate does not affect the all embracing role of the UN.

The establishment of supra-national and regional organisations is a significant development in contemporary international relations cum law. The socio-economic and political challenges encountered by states have engraved upon their psyche the

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45 O Gye-Wado "The proposed Gulf of Gunmen Commission Issues in Regionalism and International Law" (1995) CJLJ Vol. 1 No. 1 at 78.

46 Local disputes in this context must be seen as referring to disputes between member states of a particular regional body. Any other meaning will run counter to the non-interference in domestic principle of international Law.

stark reality about the desirability of interdependence which has in turn necessitated commensurate efforts aimed at achieving some desirable level of cooperation among them. These organisations with their emphasis on peaceful settlement of inter-state disputes constitutes important stabilizing factor in the maintenance of international peace and security. They widen regional integration and cement spheres of common interests. Of greater importance in the context of the discourse herein is the implication of these supra-national and regional institutions to the evolution of international legal norms. Especially is this so when it is realized that the UN is the apex supra-national institution whilst its judicial organ, the International Court of Justice is at the epicenter of international dispute resolution on the basis of established international legal norms.

Most of the constituent instruments of these supra-national and regional institutions contain provisions involving an undertaking to settle disputes amicably, which aim is further solidified in the instruments thereof[47] by establishing judicial institutions specifically for these purposes. For example article 4(e) of the Constitutive Act of the African Union provides for the peaceful resolution of conflicts as one of the principles upon which the AU will function. In order to give vent to this provision, article 5(1)(c) provides for the establishment of a judicial institution.[48] Against the backdrop that judicialism at international law involves an invitation for the appraisal and reappraisal of norms regulating inter-state intercourse, the thorny issue has been how to juxtapose the pre-eminent position of the ICJ within the UN system, its ability to continuously chart the part of norm creation and validation among players in a globalised world with several inter-state judicial bodies without losing any sense of

47 T W Dagne, "Compulsory Dispute Settlement and the Problems of Multiple For a Under International Environmental Law". Available at http://ssrn.com/abstract=1460942. Accessed on 6/10/2014

48 The AU judicial organ is the AU Court of Justice and Human and Peoples Rights.

identity as the guardian of international law for the international community. Moreso when it is realized that one of the attractions of law in modern times is the certainty of its substantive rules and the consistency in the general application of the substantive rules that has evolved in the regulation of particular set of circumstances.

Evolving norms of international law through various supra-national and regional judicial institutions has its drawbacks. This is because with the worldwide character of inter-state intercourse today, the parties to a dispute often come from different (albeit) proximate regions. Consequently, no matter how desirable and inevitable the development of the regional institutions may be, increased solidarity in regional institutions run a risk of intensifying some disputes involving states of different regions by transforming them from inter-states disputes into inter-regional disputes. With the establishment of disputes settlement mechanism by various constituent instruments of regional bodies, there might be risks of competing regional concept of international law, moreso when the doctrine of judicial precedent his limited application under international law.[49] In fact at a point, there was strong argument for regional international law within the American continent. This was tagged "American International law" which was said to be a special international customary law operating in the American continent. Reliance on this form of categorization of international law was rejected by the ICJ in the *Asylum Case*[50] on the ground that such regional international law was not proved to exist.

Relatedly also the establishment of specialist dispute resolution mechanisms to tackle the specialist areas of inter-state intercourse together with the scope and jurisprudence

[49] Article 59 of the ICJ statute.
[50] ICJ Reports 1950 pp 276 – 278 *cf* El Salvador v Honduras, ICJ Reports 1987 p. 10.

they espouse has evoked much commentary among writers in recent times.[51] This is especially so when the existence of these courts is juxtaposed with the provisions of the United Nations charter and the pride of place accorded the International Court of Justice. Thus today, as the world grapples with the complexities of human existence, there seem to be a certain decentralization of some of the topics with which the ICJ can in principle deal, to the new highly specialized bodies whose members are experts in the subject matter. Can it now be said that acceding to these new supra-national judicial bodies constitute opting out of the many substantives rules of international law as espoused by the ICJ? Given the pre-eminent position of the UN charter over other treaty obligations ,the answer can only be in the negative.

Whilst the multiplicity of these new supra-national judicial bodies reflects the vitality and complexity of contemporary international life, the danger of these courts fragmenting norms of international law cannot be wished away. Such proliferation raises the risk of forum shopping in the practice of parties competing for courts espousing similar norms of international Law. The attendant overlap in jurisdiction or the institution of parallel proceedings[52] before two equally competent courts are capable of jeopardizing both the unity of international Law and its roles in inter-state relations across the world. The warnings of Charney become relevant at this juncture. He posits:

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51 G Guillaume, "The future of International judicial institutions 44 ICLQ 1995, p. 848; J Charney, "The multiplicity of international Tribunal and the universality of International law" 271 HR 1998 p. 101; S. Rosenne, "The Perplexities of Modern International Law" 291 HR 202 PP. 13, 125;Y Shany, *The Competing Jurisdiction of International Courts and Tribunals* (New York: Oxford University Press, 2003) p.5; J Pauwelyn, "Bridging Fragmentation and Unity: International law as a Universe of Inter-Connected Islands," (2003)25 Michigan Journal of International Law 903-916.

52 A parallel proceeding is a situation where a dispute already pending before a court or tribunal is again submitted for settlement by any of the parties before a different court or tribunal. It normally arises either as a part of a preliminary contest for jurisdiction between the plaintiff and the defendant – each party commencing action in his preferred forum or a plaintiff pursuing parallel litigation in more than one forum. See also Shany, *op. cit.* p. 17; G Mclachlam, *Lis Pendens in International Litigation,* (Leiden: Martinus Nijhoff Publishers, 2009) p. 38.

> Not only may the cacophony of views on the norms of international law undermine the perception that an international legal system exists, but if like cases are not treated alike, the very essence of a normative system will be lost. Should this develop, the legitimacy[53] of international law as a whole will be placed at risk.[54]

Simma on his part opines that the resulting situation might lead to international law losing "universal applicability, unity and coherence… through development of new fields that go their own way"[55]

Echoing similar sentiments, Guillaume , a former president of the ICJ posits that the proliferation of international courts give rise to a serious risk of conflicting jurisprudence as the same rule of law might be given different interpretations in different cases[56].

These warnings are underlined by the fact that judicial findings that are inconsistent with the judgement of the International Court of Justice would present particular problems for the role of international law in international relations given the pre-eminent position of the ICJ as the principal judicial organ of the UN and *pro tanto*,

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53 And *integrity* (emphasis mine)

54 J Charney, "The Impact on the International Legal System of the Growth of International Courts and Tribunals" 31 NYUJILP(1999) P.856

55 B Simma, "Universality of International Law from the Perspective of a Practitioner" (2009) 20 EJIL 265-297.

56 Address by the H-E Judge Gilbert Guillaume to the U.N. General Assembly. Available at http://www.icj-cij.org/icj.www/ipresscom/speeches/ispeech president guillaume GASS 2001026.htm. Accessed on 20/12/2012

the only judicial body vested with a universal and general subject matter jurisdiction.[57]

An instance of conflict between the international court of justice and another international court occurred in the *Tadic case*[58] before the International Tribunal for the former Yugoslavia in 1999. In order to determine its competence, the Tribunal has to establish whether there was an international armed conflict in Bosnia-Herzegovina, which in turn required a finding that certain of the internal participants in that country were acting under the control of a foreign power, Yugoslavia. The Tribunal referred to but did not follow the decision of the International Court of Justice in the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua.* In the case, the ICJ had articulated a test of effective control by the United States of the activities of the *Contras.* This was rejected by the Tribunal which articulated a more liberal approach noting that the degree of control might vary according to the circumstances and a high threshold might not always be required.

The consequences in the ensuing contradictions in the various legal rules will be that the parties will be saddled with mutually exclusive obligations[59] in international law which could in turn seriously threaten the reliability and credibility of the peaceful settlement of international disputes, thereby scuttling the dreams of the framers of the UN Charter. As a way out, Guillaume called for dialogue among the international adjudicatory bodies.

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57 R Higgins, "The ICJ, the ECJ and the Integrity of International Law" (2003) ICLQ Vol. 52 pt 1 at p. 12.

58 Prosecutor v Dusko Tadic (1996) 35 ILM 35

59 G Hafner, "Pros and Cons Ensuing from Fragmentation of International law," (2003-2004) 25 *MJIL* 849: See also C. Brown, "The Proliferation of international Courts and tribunals:Problems and Prospects" Presentation delivered at the Centre for international Law Seminar Series, University of Singapore, 13th April, 2010; S W D Han, "Decentralised Proliferation of International Judicial Bodies," (2006-2007) 16 *Journal of Transnational Law & Policy* 101, 105.

Lofty as His Excellency's position might be, we respectfully wish to differ with him on the issue of dialogue. What is really needed is for the ICJ to be given appellate jurisdiction over all other International Courts and Tribunals. This view is made more poignant by its position as the principal judicial organ of the U.N. and the guardian of international legality for the international community. Moreover, the obligations of member states under the U.N. Charter take precedence over any other obligations under the treaties.

The above grim postulations notwithstanding, it needs stating however that it is not in all areas of International law that the current multiplication of International Courts will disrupt the unity and cohesion of norms of International Law as it is a trite fact that complete uniformity of decision is impossible. Consequently, it will not be surprising that in those core areas of International Law, the various International Courts and tribunals do share relatively coherent views on those doctrines and principles of International Law which are of fundamental importance to the system.

The proliferation of international Courts is a reflection of the increasing scope and utilization of international Law and evidences the general acceptance of peaceful settlement of international disputes by states in accordance with the U.N. Charter. Resolving disputes by an impartial third-party mechanism brings a certain value on settlement of inter-state differences in a manner that is reflective of the rule of law and the growth of international co-operation. Moreover, it meets the desire of most states and non-state actors for secrecy, control over the membership of the forum, panels with special expertise or perceived regional sensitivities, preclusion of third state intervention, etc. in the words of Charney, "it permits a degree of

experimentation and exploration which can lead to improvements in International Law."[60]

We thus agree with Udombana[61] when he posits that such courts reflect the vitality and complexity of international life and should be welcomed in so far as their jurisdictions do not duplicate each other. They ultimately contribute their quota to the peaceful and just settlement of international disputes.

6.2.4. Costs

Ordinarily, the adjudicatory process depending on the socio-economic status of the litigants in his local environment is never cheap. Same challenge is faced by a prospective litigating state wishing to activate the international adjudicatory process. The expenses involved at litigating before the international adjudicatory bodies are enormous. This is notwithstanding the fact that in some of them like the ICJ, no fees are demanded because their administrative costs are financed out of the parent body's institution which like in the judicial bodies driven by the U.N. is the U.N. budget. But the cost of legal counsel, experts, secretarial assistance, travel and translation as well as the costs of boundary adjustments in territorial disputes whether of maritime or land (which will necessarily involve the use of experts on geography, cartography, oceanography, geologists and other specialists) could be excruciating and crippling for the economies of most countries especially the developing states. This is so even for those International Courts like ECOWAS Court of Justice that grants access to

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60 Charney, *op. cit.* p. 700.

61 N J Udombana, "An African Human Rights Courts and an African Union Court: A Needful Duality or a Needless Duplication," (2003) *BJIL* Vol. 28 No. 3, p. 184; See also T Buergenthal, "Proliferation of International Courts and Tribunals: is it Good or Bad? (2001) 14 *Leiden Journal of International Law,* p. 267; R Higgins, "The ICJ, ECJ, and the Integrity of international Law," (2003) 52 KLQ pp. 1 & 2; B. Kingsbury, "Is the Proliferation of International Courts and Tribunals a Systemic problem?" (1999) 31 *NYUJ int'l L & Pol*. P. 679; P M Dupuy, "The Danger of Fragmentation or Unification of the International legal System and the ICJ," (1999) 31 *NYUJ Int'l L* & Pol. 791.

individuals to litigate before it.[62] This problem is further accentuated by the fact that the decisions of these courts are final and most times end in "a winner and a loser scenario." For instance, it is estimated that Nigeria spent between 48-55 billion naira to prosecute the Bakassi Case before the ICJ.[63] The cost of prosecuting one or two criminal trials at the ICC far out-weights the entire budget of a continental court like the A.U. Court of Justice and Human and Peoples' Right that many are doubting the ability of the A.U. Court of Justice and Human and Peoples' Rights to successfully prosecute trials under its criminal law jurisdiction[64]. For instance, the unit cost of a single trial for an international crime in 2009 was estimated at $20 million whilst the 2009 approved budgets of both the AU and African Commission stand at $7 642 269 and $3 671 766 respectively. Thus, the cost of a single international criminal trial is nearly double the entire budget of a continental organ such as the AU court.[65] With such a gargantuan hurdle facing the prospective litigant, the option of going to war (in the case of a State) immediately instead of waiting to lose at the court before doing so becomes attractive and in the case of a private individual, he dies in regretful solitude as his rights are abused by a more powerful governmental entity. This issue of costs too accentuates the problem of non-appearance of states and private litigants before these courts which may ultimately impinge on their jurisdiction.

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62 Pursuant to Articles 9(4) and 10(d) of Supplementary Protocol A/SP.1/01/05; see also Ebrimah Maneh V. The Republic The Gambia (2009) CCJLR (Pt. 2) p. 116.

63 D C J Dakas, I*nternational Law on Trial: Bakassi and the Eurocentricity of International Law*, (Jos: St. Stephen Bookhouse Inc, 2003) p. 113.

64 It has been opined that Criminal Courts are by far the most expensive enterprise in the international justice system with the criminal tribunals gulping as much as 7% of the regular budget of the U.N. for 2006-2007. The Criminal Court Judges have justified the high cost on the complexity of their trials and their unprecedented nature. This is against the backdrop of the fact that these courts are also the home of enormous investigative operations. See D Terris, *et. al, The International Judge: An Introduction to the Men and Women Who Decide the World's Cases*, (London, Oxford University Press, 2007) pp. 160-161.

65 Max DU Plessis, "Implications of the AU decision to give the African Court Jurisdiction over International crime," available at http://www.issafrica.org/uploads/paper235-African court.pdf accessed on 20/12/2012.

Even where the parties surmounts this impediments of costs and comes to court, complying with the court's orders whether final or interim could be a nightmare of its own cost-wise. For example, in the *Burkina Faso V. Mali Case*,[66] after the court ruled that there is need to provide a useable map, the two states could not afford the services of cartographers. It took the intervention of Switzerland which provides $400,000 assistance before both parties could implement the ICJ interim decision. To obviate this drawback on the effective performance of the ICJ in its assigned roles, the U.N. Secretary-general created a trust fund in 1989 in order to assist States in the settlement of their disputes using the mechanism of the ICJ. It was also in this regard that the U.N. floated a Trust Fund to enable Cameroun and Nigeria effectively carryout the demarcation exercise portion of the ICJ Judgment.[67]The trust fund is based on voluntary contribution. When it is realised that some states finds it difficult to pay their U.N. Statutory dues, it becomes clear that the use of trust funds may be limited assistance.

6.2.5 Structure and Composition of the Courts

The structure and composition of any adjudicatory body goes a long way in shoving up the confidence reposed in such body. Moreover, their effectiveness also is a function of the quality of the men and women who ascend to the bench. It needs stating herein that generalizations about the selection process for International Judges are difficult to form as every court has its procedure for recruiting Judges. Moreover, huge variations exist in the way individual governments approach the challenge.[68] The foregoing notwithstanding, virtually all the courts under discussion herein provides in the Statutes that persons elected to the court should be representative of the main

66 ICJ Reports, (1986) p. 554.
67 Sunday Guardian of October 26, 2003 at p. A5.
68 D Terris, *et al. op. cit*. p. 15.

forms of civilization as well as the principal legal systems of the world. No systematic and comprehensive study of this process has yet been carried out. Regrettably, lofty as the selection provisions might seem, they have not been properly adhered to. For the ICJ for example, a larger number of its Judges have been from Europe and other developed parts of the world whilst countries from Asia, Africa and other developing countries which incidentally constitute more than half of the potential client States are under-represented. A survey of thirteen major international courts and tribunals indicate that out of 215 Judges, Europe provided 137, Americans 20, Asia 16, and Pacific/Oceania Region 5. While it is true that election of Judges could particularly represent complex moments where a number of considerations like states national interests, prestige and power politics and the need to ensure representativeness interact to eventually determine the result, the fact that in most of these courts especially those that transcends the various continents, one or all the U.N. Security Council permanent members are always represented at any given time does little in assuring confidence onto the composition of the bench.[69] With respect to the ICJ and given its age vis-à-vis the other International Courts, its decisions has until recently being attacked as being Eurocentric and one aimed at maintaining vestiges of colonialism irrespective of the true feelings of the colonised peoples.[70]

Another major challenge pertains to the stipulations on "major forms of civilization and principal legal system." There exists principally two major legal systems of the world, to wit: the civil law system (which governed the Roman Empire) and the

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69 In fact the elections of judges of the Court are done in such a way that five permanent members of the U.N. Security Council are always represented on the Court's bench. See D J Harris, *Cases and Materials on International Law*, (London: Sweet & Maxwell, 1998) p. 990.

70 This was the outburst amongst the third world countries in the Namibia case. See also Taiwo Kupolati's commentaries on the court's decision in the case involving Cameroun and Nigeria. In "Cameroun V. Nigeria … in the Miry Clay of Legal Turbulence", (2002) FWLR (Pt. 132)at p. iii e*t seq.*

common law system (first developed in England and then spread around the world through British colonialism.) The others are a mix of the civil/common law systems (as in Cyprus or South Africa) or Islamic Law and / or local customary law blended to a varying degree with civil law (Tunisia) or common law (Pakistan.) A close scrutiny of the Judges educational background even among the third world or developing states will show that virtually all of them received formal western style legal education. It then follows that their appreciation and application of the legal norms will be limited to that wherein they obtain the formal legal education. This fact inevitably renders the requirement as to main forms of civilization and principal legal systems requirement hollow. None of the international Judges have been appointed on the basis of their expertise in for instance, Islamic jurisprudence which is reputedly well developed to cover various areas of human endeavour. The criterion has always been on expertise on International Law or relations as conceptualised by western legal education.

CHAPTER SEVEN

7.1 CONCLUSION

The idea of a peaceful community of nations has always thrilled the minds of men from time immemorial. This is against the backdrop of the realisation that disputes are inevitable concomitants of man's social intercourse which in man's corporate manifestation is borne by the State. Thus, as far back as 1795, Immanuel Kant in his book[1] outlined the idea of a league of nations to control conflict and promote peace between states. Whilst the idea of a League of Nations eventually concretised, its conflict control mechanism was never robust despite the institutional mechanism put in place to settle such. Consequently, its demise sequel to World War 1 provided the International Community the opportunity to make a fresh but more vigorous attempt at establishing a supra-national organisation charged with engendering a more peaceful world. Thus, was born the United Nations Organisation in 1945. To give vent to its avowed aims, the Statute of the judicial organ was annexed to the Charter and made part and parcel of it such that a signatory to the Charter is automatically a signatory to the Statute of the Court. In its close to sixty years existence, the International Court of Justice has helped in no small way in entrenching resort to law and judicialism in the settlement of international disputes. The success of the ICJ in the exposition of law as an instrument of dispute resolution has encouraged the establishment of other judicial institutions at the international level to also resolve disputes using the instrumentality of the law. Especially is this so given the keenness and challenges of contemporary international life. This would in turn lead to the appointment of a select body of men across the various continents to man these supra-

[1] Perpetual Peace: A Philosophical Sketch, available at http://www.mtholyoke.edu/acad/intrel/kant/kant1.htm accessed on July 6, 2014.

national judicial institutions. The roles of these select body of men (acting corporately as courts) in engendering a peaceful community of states through the judicial process formed the core of our discussion as we x-rayed the major supra-national judicial institutions. This is more so given the trite fact that a major thrust of every legal system (of which International Law is unarguably one) is the integrating of the particular society it is meant to regulate (i.e. preventing and controlling deviations from existing social cum international norms as well as charting a new and orderly path for confronting the challenges of the future without disrupting the equilibrium of the past, save for where the equilibrium of the past is in conflict with the harmony of the present). Recourse to judicialism in no small measures helps feuding parties in clarifying their positions, thereby reducing and transforming in the process their sometimes overstated political assertions into factual and legal claims.

The judicial route moderates tensions and leads to a better and fuller undertaking of opposing claims leading to in some cases the resumption of political negotiation even before the court renders its judgment. It is within this context that the concept of judicialism as a tool in the hands of the international community in the onerous but bounden duty of bringing about peaceful resolution of disputes among nations, curbing of impunity among individuals in positions of power and ultimately preventing mankind from the scourges of war is evaluated. It remains a moot point though whether International Law has provided a set of rules coherent and clear enough to command automatic obedience as in municipal law. This notwithstanding, but given the fact that International Law with the plethora of bilateral and multilateral treaties that seek to regulate interstate conduct in all spheres of human endeavours is constantly developing, it remains arguable whether it has not in the process become more complete and categorical. While the ultimate psychological and social basis of

law still remains within the realms of disputations, it is no longer moot that the idea of law is or has become natural to man and the international community.[2] At the international level, the idea of law proves itself as it serves a useful purpose in providing a basis for discriminating between internationally acceptable and internationally unacceptable behaviour. It is a shortcut by means of which states judgment can be formed without an argument on every occasion on basic principles.

The behaviour of states in the vastly complex and dynamic international relations of the contemporary world indicate their belief in the idea of law (albeit International Law) and the concept of judicialism. The fact that states sometimes seem to break the law more often than they respect it is less significant than the fact that states not only feel able to accuse other states of breaches of the law but also as far as possible and think it necessary to justify their action by arguing that they are within the law.

There is every reason to think that under a dynamic and responsive supra-national and regional organisations and the important contributions of their respective judicial organs, International Law will come to be an even stronger and more complete system.

7.2 Recommendations

Given the complexity and dynamism of the international society, International Law which serves as the touchstone for the validity of norms of international conduct must necessarily be in tandem with the unfolding realities of international life. Nowhere can these dynamisms be more reflected than in the international adjudicatory bodies which are at the centre of norm creation and maintenance. Consequently, we intend to highlight potential areas of change for a more enhanced international justice delivery

[2] Dennis Lloyd, *The Idea of Law*, (London: Penguin Books Ltd, 1987) pp 224-225, 334-335.

system. Thus, the features for enhancing the function of the judicial institutions and the adjudicatory process would revolve around changes relating to:

(a) Method of establishing the courts.

(b) Competence of the courts.

(c) Bases of jurisdiction of the courts.

(d) Enforcements of judgments.

7.2.1 Method of Establishing the Courts

Proposals on this pertains to the following matters, to wit: how a Judge is elected, how many Judges the court should have, their tenure of office and the system of ad hoc Judges.

Generally, two sets of criteria govern the choice of Judges for international judicial institutions. Given the pre-eminence positions of the International Court of Justice in the pantheon of international courts, and the fact that it is the standard bearer of the United Nation System from which other institutions drew inspiration from, copious references will be made to its provisions whilst similar provisions in other international instruments will be highlighted. Where however, there is a divergence in the provisions, such will be discussed.

Article 2 of the ICJ Statute provides as follows:

> The court shall be composed of a body of independent Judges, elected regardless of their nationality 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 jurisconsults of recognised competence in International Law.[3]

Article 9 of the same Statute requires that:[4]

> At every election (of a judge), the electors shall bear in mind not only that the persons to be elected should individually possess the qualifications required but also that in the body as a whole, the representation of main forms of civilisation and of the principal legal systems of the world should be assure.

The above provisions where they occur in any Statute of the judicial institutions under discussion herein are meant to complement each other and never meant to be a source of conflict in practice so long as there exist enough candidates with the requisite qualification in terms of provisions similar to Article 2 of the ICJ Statute. *Mutatis mutandi*, Article 9 type of provisions should be a standard among all international judicial bodies. This is in spite of the doubts being expressed as to the necessity for Article 9 type provisions regarding different legal systems as such may be at the expense of quality just like many have argued against provisions reflecting gender balancing or sensitivities.[5] It is our view that the composition of the court helps in

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[3] Similar provision is contained in Article 36(3) (a) of the ICC Statute, Article 2 of the ITLOS Statute, Article 253 of the TFEU, Article 4 of the Statute of the Inter American Court on Human Rights, Article, Article 4 of the Statute of the African Court of Justice and Human Rights, Article 3(1) of ECOWAS 2006 Supplementary Protocol.

[4] Article 36(8) (a) of the ICC Statute, Article 2 of the ITLOS Statute.

[5] It needs stating that in recent times, Treaties establishing some of these courts have made conscious efforts at including women on the court's bench. See Article 36(8) (a) (iii) of the ICC Statute; Article 2 of the Draft Protocol on Amendment to the Protocol on the Statute of the African Court of Justice and Human and Peoples' Rights. Even the ICJ despite the absence of a provision on gender quality on the court's bench took some practical steps to reflect this quality when Rosalyn Higgins became the first woman to be elected to the court's bench in 1995 and subsequently became the Court's President in 2006.

shoring up the confidence in the court. This is more so when viewed against the backdrop of the present realities and complexities of international life cum law. The courts will be increasingly concerned with more difficult problems of International Law where the finding of relevant rule and its application to a case is a procedure in which not only the personal character but also the gender[6], cultural and the legal background of the Judge may play an important role. In practical terms however, the phrase "main systems" has been restricted to Judges schooled in the Western style jurisprudence comprising the two main legal systems of the world, to wit: the civil law system and the common law system. Islamic, African or other traditional legal regimes that may predominate a particular region are not reckoned with as it is assumed without any specific empirical proof that being from an Islamic, African or other countries where a particular legal regime holds sway in their regions suffices to import compliance with the requirement. The political realities of today's world demand that some real account be taken of the particular groupings in the world; for a "turn of mind" of a Judge may ultimately be associated with a particular gender sensitivity, culture or a particular specie of legal system.

This becomes more poignant for example where a particular issue of dispute borders on a rule of law or principle of law engendered and nurtured by colonialism[7], war crimes, etc. It will be better for the Judges to be from states which suffered the evils associated with it than from those which perpetuated it. This is to avoid a scenario

6 For a detailed discourse on this factors, see D Terris , *et al. The International Judge,* (Oxford: Oxford University Press, 2007) pp 15-91.

7 Against the backdrop of the partitioning of Africa in 1881 among European powers and the special relationship between Cameroun and France, some commentators are of the view that Nigeria lost the case involving her and Cameroun over the Bakassi Peninsular because at the particular point in time, a French national was the President of the Court and deciding otherwise would have re-opened questions on the legal validity of the 1881 Partition.

whereby a judgment of the courts would be deemed as perpetuating and giving a stamp of validity to the evils associated with colonialism, war crimes, etc.

The above notwithstanding, the ultimate success of the courts must depend invariably on the quality of its decisions which in itself is a function of the Judges qualifications in terms of the qualities required under the Article 2 type of provisions. It would be no step forward to simply ignore these realities.

The number of Judges on the Bench of these courts is another area that needs to be addressed. Save for the European Court of Justice whose total number of Judges corresponds to the membership of the organisation, other courts provide for lesser number of Judges vis-à-vis their potential client states. For example, for the ICJ, the total number of Judges on the court's bench is fifteen members whilst a quorum of nine members suffices to constitute the court. Given the fact that membership of the U.N. has risen from fifty-one original members to today's close to two hundred members, proposals have frequently been made to increase the number. The necessity for this is further underscored by the complexities of modern international life competence in these emergent complexities of modern international life. But Allot posits that pragmatism dictates caution as according to him, there is a limit to the number of Judges who can function together satisfactorily as a group.[8] He anchors his fears on the fact that a larger court would lead to divisions and groupings within the court which may finally lead to a dilution in quality.

We however wish to differ with the learned author as there is no empirical evidence to support such views. Moreover, in some national jurisdiction, the number of the Judges

[8] P J Allot, "The International Court of Justice: In *International Disputes, The Legal Aspect* Report of a Study Group of the David Davies Memorial Institute of International Studies, (London: Europa Publications Ltd, 1972) p. 139.

on the bench of their highest court stand at fifteen (15) or above and there has been no evidence that such engendered cliques or diminution in quality.[9] Furthermore, against the backdrop of the clamour for the creation of appeal sessions and increase in the use of chambers, increment in the number of Judges on the bench of the ICJ is an idea whose time has come. It is our view that a maximum of thirty Judges would suffice. Moreover, given the fact that the challenges of today's international life is becoming more complex requiring a constant reappraisal of rules of International Law, there is need to attach particular competencies in known areas of International Law as an added qualification on would-be Judges of the court,[10] especially where such is being drawn from the bench of member nation judiciaries.

The use of Judges ad hoc by International Courts has often been criticised on the ground that it is not in consonance with the independence required of Judges. The use of ad hoc Judges and its perceived defect is marginal to the court's immediate problems. They are useful in supplying local knowledge and a national viewpoint. It is not necessarily the case that they must support the contention of their appointing country. Moreover, where two parties appoint Judges ad hoc, their votes cancel each other out. Thus, its use should be maintained.

7.2.2 Changes Relating to the Competences of the Court

This concerns mainly the potential parties to proceedings before the courts and the potential subject matter of proceedings. It needs stating that at present, most International Courts are jettisoning the state-centric approach to proceedings before

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9 For example, Section 230 (2) (b) of the Constitution of the Federal Republic of Nigeria (CFRN) 1999 (as amended) which states that the number of Justices of the Supreme Court shall not exceed 21.

10 This seems the trend in the composition of some International Courts. See Article 36(3) (b) of the ICC Statute, Article 3(1) of the 2006 ECOWAS Supplementary Protocol, Article 4 of the Statute of the IACtHR, Article 3 of the Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice on Human and Peoples' Rights.

them which is in accordance with classical International Law, and allowing private individuals and organisations to have access to them in both their contentious and advisory jurisdiction either directly or indirectly.[11] However, of all the courts discussed herein, only the ICJ still clings to the classical law approach and thus will form the subject of discourse herein. At present, only states can be parties to contentious proceedings before the court and only certain international organisations may seek advisory opinions from the court. Against the backdrop that many international organisations and non state actors bear many of the rights and obligations of states and their field of action is ever expanding. There is a groundswell of support for them to be accorded access in contentious proceedings. Expanding access to the court could be in two forms. The first is to allow non state actors as parties in contentious proceedings. The second is to allow them greater participation so as to speak as *amici curiae.* A procedural problem would however arise in relation to the proposed extension of the right to participate in proceedings before the court. Such will border on whether international organisations should be assimilated in all respects to states with regards to *locus standi* before the court. If they are enabled to become parties to the Statute of the Court, this will inevitably entail an amendment of Article 93 (2) of the U.N. Charter. The said Paragraph of the Article provides as follows:

> A state which is not a member of the United Nations may become a party to the Statute of the International Court of Justice on conditions to be determined in each case by the General Assembly upon recommendation of the Security Council.

[11] Article 263 of the TFEU; Article 44 of the Inter-American convention, Article 4 ECOWAS Supplementary Protocol A/SP.1/01/05.

It is instructive to note that Paragraph 1 thereof made all members of the United Nations ipso facto parties to the Statute of the ICJ.

Similarly, Article 65 of the Statute relating to the rendering of an advisory opinion needs to be expanded to give access to some NGOs and the ruling brought under Article 94(2) of the UN Charter. It states thus:

> If a party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the court, the other party may have recourse to the Security Council, which may, if it deems necessary make recommendations or decide upon measures to be taken to give effect to the judgment.

There is also the need to grant individuals access to the court. Especially is this so where the issues concern human and property rights and humanitarian law issues. This is predicated on the fact that issues bordering on the above have assumed sublime importance in contemporary world discourse. In this regard, the use of the chamber system should be maintained and a special human rights chamber created to hear cases bordering on the above enumerated issues.[12]

It is interesting to note that many of the legal disputes among States have its roots in the treatment meted out to individuals as aliens or in their corporate manifestations as companies. The practice is for states to espouse the claims of their nationals. Criticism against allowing individuals access to the court is always predicated on the need to

[12] The jurisprudence of the ICJ shows a marked contribution to the development of humanitarian law. For details on this; see E Ibezim,"The Contribution of the International Court of Justice to International Humanitarian Law," *ABSU-PCLJ* Vol.1NO.

avoid "a floodgate" scenario and also on the need not to erode acceptances under the optional clause. We are however of the view that if the idea of law is to be entrenched within the International Community and the regime of human rights deepened, individuals should be allowed access to the Court to test the lawfulness of states action before the ICJ given its pre-eminence as the principal judicial organ of the United nations. However, in order to avoid a floodgate situation and given the fact that most instruments establishing regional human rights courts provide for individual access, the court's jurisdiction in this regard should be of appellate status.

As to the subject matter competence of the courts, there is a convergence of view that all disputes must be legal disputes. All the courts under discussion made elaborate provisions on their subject matter competence. However, that of the African Court of Justice and Human and Peoples' Rights provided some interesting dimension. This has to do with the scope of the court's jurisdictional reach *ratione materia* under the criminal law section. It will be recalled that Article 28A of the Draft Protocol provides that the ICL section shall have power to try persons for a long list of the worst crimes known to the human race ranging from genocide, crimes against humanity, war crimes, the crimes of unconstitutional change of government, piracy, terrorism, mercenarism, corruption, to money laundering, trafficking in persons, trafficking in hazardous wastes, illicit exploitation of natural resources, the crime of aggression and inchoate offences

The hubris centres on the fact that whilst some of the crimes are already established under International Law, others are not yet fixed and contain a medley of ills plaguing the African continent. It is our view that the minimum predicate for according an international court criminal jurisdiction over specified criminal actions is that the

substantive elements of those crimes are generally agreed upon which in this context means that there must be consensus among African States regarding these crimes and there elements.[13] For example, what will constitute unconstitutional change of government where such changes were successful and enjoyed popular mass appeal.[14]

7.2.3 Changes Relating to the Basis for the Courts Jurisdiction

Against the backdrop of the fact that international relations is consensual in nature and basically states driven notwithstanding the inroads made in recent times by private persons and organisations in shaping its content and extents, International Courts have to follow in tandem. Virtually all the instruments establishing the courts herein discussed made consent of the state parties a basis for jurisdictional competence. Especially is this so in the exercise of their contentious jurisdiction. This requirement of consent is a veneration of the concept of state sovereignty as it would sound incongruous to interplead a sovereign without such having given his consent. It may be given in advance in a Treaty provision wherein provision is made for the submission of disputes or by a declaration of acceptance of the court's jurisdiction either by conclusion of an agreement to submit a dispute to the courts or by actual participation in proceedings instituted unilaterally. Even where individuals or private organisation have access to these courts, such access is predicated on these states having made prior declaration allowing such access to them. Allied to and ineluctable to the consent provisions in the Statutes establishing the courts are the incidences of

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13 For example, it has been posited that when the drafters of the ICC were deciding on which crimes to place under the ICC's jurisdiction, there was general agreement that the definitions of crimes in the ICC Statute were to reflect existing Customary International Law. See P Kirsch, "Forward" in K. Dorman, *Elements of War Crimes Under the Rome Statute of the International Criminal Court: Sources and Commentary,* (Cambridge: Cambridge University,2003) p. xiii.

14 Would the leaders of the current governments in Libya, Egypt be tried by the court considering the way they came to power?

reservation clauses which seem to be in consonance with the sovereign status of states. Considering the realities of contemporary international life where resort to law and judicialism is generally acknowledged as a veritable footpath to actualising the international community's overwhelming desire for peace, the issue of reservation clauses should be dispensed with. Ditto to the practice whereby individuals and private organisations access to these international courts are predicated on their having made prior declaration allowing such access. A new rule of compulsory adjudication wherein aggrieved parties be they states or private individuals can easily approach these courts should evolve. Even if there should be reservations, the extents and limits of such reservations should be collectively agreed to. This is with a view to avoiding a situation where these courts become incapacitated from performing these assigned roles.

With specific reference to the ICJ and considering its status as the principal judicial organ of the U.N. coupled with the need to avoid the fragmentation of norms of International Law, we are of the firm view that time has come for the ICJ to be invested with appellate jurisdiction wherein decisions from other supranational and regional courts could be taken to.

7.2.4 Enforcement of Judgments

One of the hallmarks of the judicial function is the ability of the courts to enforce their judgments or decisions using the instrumentality of the state. It is this attribute that assures unto it the awe and reverence that has become associated with the exercise of adjudicatory powers. However, at International Law, the consensual nature of inter-state relations, the concept or allure of state sovereignty and power politics have all

conspired to render this attribute of the judicial function hollow. In fact, when International Law is criticised, as being ineffective as law on grounds of lacking capacity to sanction errant behaviour, part of the reasons can be attributed to the fact that most International Courts or tribunals lack supreme enforcement powers. For example, most international instruments while containing exhortatory provisions which makes it incumbent on state parties to comply with the judgment of the courts[15] leaves enforcement powers in cases of derelict on the political organs of the supra-national organisations.[16]

The U.N. Charter contains an undertaking by member states of the U.N. to comply with the decisions of the ICJ. Article 94(2) provides that in cases of non compliance, the successful party may have recourse to the U.N. Security Council which may make recommendations or take binding decisions pursuant to its enforcement powers.[17] In this provision of Article 94(2) lies the difficulties in the enforcement of the court's judgments against a recalcitrant judgment debtor nation. This is moreso when the power politics within the U.N. Security Council is factored in. Thus, it remains a moot point whether the U.N. Security Council has lived or is living up to its expectations under this provision. This is in view of the use of the veto instrument among the permanent members of the Security Council. The conundrum raised thereby is that if a judgment is given against a permanent member of the Security Council or their allies and interests, it might be otiose for the victorious party to rely on Article 94(2) of the Charter to extract compliance with the judgment of the court as any of the affected permanent members can exercise their veto power to stifle any resolution to

15 Article 94 of the U.N. Charter; Article 46(1) of the Draft Protocol on the African Court of Justice and Human and Peoples' Rights; Article 68(1) of the OAS Convention.

16 Article 94(2) U.N. Charter; Article 46(3) of the Draft Protocol on AUCtJHPR; Article 65 of OAS Convention.

17 Chapter 7 comprising Articles 39-51 of the U.N. Charter.

be considered by the Security Council. This negative use of the veto power vis-à-vis enforcement of the court's judgment manifested in the Nicaragua Case wherein consequent upon the judgment of the court against it, the U.S. vetoed a Draft Security Council Resolution calling for full and immediate compliance with the Court's judgment. This same problem, we humbly submit will also dog every other supra-national judicial institution as most regional organisations have as members a state or cluster of states that serves as the hub. For example, Nigeria is generally acclaimed as a powerhouse in Africa and ECOWAS.

Another difficulty in vesting enforcement of the court's decision on the political organs lies in the quest to constitutionalise the supra-national organisations in terms of vesting the courts with powers of judicial review over institutions. Especially is this so in organisations like the A.U., E.U. and ECOWAS wherein institutions have access to the court.

What happens where the institution with the ultimate power of sanctioning recalcitrant parties is at the receiving end of the court's judgment? Thus, much will depend on the innate desire of states to entrench the concept of judicialism into the value chain of inter-state intercourse and the resolve of the institutions to internalise the ethos of the state governed by law and the ultimate sanction of the law. However, for the court with individual access, activating the domestic execution of judgment procedure remains the best guarantee and should be consciously assured in the Statute.

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