11 The International Court of Justice

1) Introduction

This chapter considers the International Court of Justice (ICJ), almost certainly the most important Court dealing with inter-State disputes. It looks first at the history of the ICJ and then at the relevant provisions of the Charter of the United Nations. The Charter of the ICJ itself is then considered, followed by the Rules and Practice Directions of the Court, all vital to an understanding of how it operates. The final sections of the chapter look at some of the cases with which the ICJ has been dealing.

2) Historical Overview

The ICJ is the principal judicial organ of the United Nations and is located at the Peace Palace in The Hague. It began its work in 1946 when it replaced the Permanent Court of International Justice, which had functioned in the Peace Palace since 1922. The ICJ operates under a Statute largely similar to that of its predecessor.

The Court has a dual role: first, to settle (in accordance with international law) the legal disputes submitted to it by States; and second, to give advisory opinions on legal questions referred to it by duly authorised international organs and agencies.

The Court is composed of 15 judges elected for nine-year terms of office by the UN General Assembly and Security Council. The Court may not include more than one judge of any nationality. Elections are held every three years for one-third of the seats, and retiring judges may be re-elected. The Members of the Court do not represent their governments but are independent.

Contentious cases

Only States may apply to – and appear before – the ICJ. The Court is competent to entertain a dispute only if the States concerned have accepted its jurisdiction in one or more of the following ways:

i) by the conclusion between them of a special agreement to submit the dispute to the Court;

ii) by virtue of a pre-existing jurisdictional clause – for example, a clause in a treaty providing that, in the event of a disagreement over its interpretation or application, one of the States may refer the dispute to the Court (several hundred treaties or conventions contain a clause to this effect);

iii) through the reciprocal effect of declarations made by States under the Statute whereby each has accepted the jurisdiction of the Court as compulsory in the event of a dispute with another State (the declarations of 64 States are at present in force).

In cases of doubt as to whether the ICJ has jurisdiction, it is the Court itself that decides.

The procedure followed by the Court in contentious cases is defined in its Statute and in the Rules of Court adopted by it under the Statute. The latest version of the Rules was agreed in 1978, particular Rules being from time to time amended.[50] The proceedings include a written phase, in which the parties file and exchange pleadings, and an oral phase consisting of public hearings at which agents and counsel address the Court. As the Court has two official languages (English and French), everything written or said in one language is translated into the other.

After the oral proceedings the Court deliberates in camera and then delivers its judgment at a public sitting. The judgment is final and without appeal. Should one of the States involved fail to comply with it, the other party may have recourse to the UN Security Council.

Since 1946 the ICJ has delivered 79 Judgments on disputes concerning, among other things: land frontiers and maritime boundaries; territorial sovereignty; the non-use of force; non-interference in the internal affairs of States; diplomatic relations; hostage-taking; the right of asylum; nationality; guardianship; rights of passage; and economic rights. There has been a problem of compliance in only about five of these.

As noted in Chapter 6, the Court decides in accordance with international treaties and conventions in force, international custom, the general principles of law and, as subsidiary means, judicial decisions and the teachings of the most highly qualified publicists.

Advisory opinions

The advisory procedure of the ICJ is open solely to international organisations. The only bodies at present authorised to request advisory opinions of the Court are five organs of the UN and 16 specialised agencies of the UN.

On receiving a request, the Court decides which States and organisations might provide useful information and gives them an opportunity of presenting written or oral statements. The Court's advisory procedure is otherwise modelled on that for contentious proceedings, and the sources of applicable law are the same. In principle the ICJ's advisory opinions are consultative in character and are therefore not binding on the requesting bodies. Certain instruments or regulations can, however, provide in advance that the advisory opinion shall be binding.

Since 1946 the Court has given 24 Advisory Opinions concerning, among other things: admission to UN membership; reparation for injuries suffered in the service of the UN; territorial status of South-West Africa (Namibia) and Western Sahara; judgments rendered by international administrative tribunals; expenses of certain UN operations; applicability of the UN Headquarters Agreement; the status of human rights rapporteurs; the legality of the threat or use of nuclear weapons; and issues relating to the Palestine Wall.

50 The Rules were updated in September 2005, when an amendment was made to Rule 43 in relation to notifications.

3) The Charter of the United Nations

Article 1 of the UN Charter provides that the purposes of the UN are to:

> *"maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace...."*

Articles 33 to 38 of the Charter deal with the pacific settlement of disputes. Article 33 states that the parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall first seek a solution by, among other means, negotiation, inquiry, mediation, conciliation, arbitration or judicial settlement. Article 36 provides that the Security Council may, at any stage of a dispute of the nature referred to in Article 33, recommend appropriate procedures. In making recommendations, the Security Council *"should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court"*.

Articles 92 to 96 of the Charter deal with the ICJ. Article 92 states that the Court shall be the principal judicial organ of the UN and shall *"function in accordance with the annexed Statute, which is based on the Statute of the Permanent Court of International Justice and forms an integral part of the present Charter"*. Article 94 requires each Member of the UN to comply with the decisions of the ICJ in any case to which it was a party. However, Article 95 states that nothing in the Charter is to prevent Members of the UN from entrusting the resolution of differences to *"other tribunals by virtue of agreements already in existence, or which may be concluded in the future"*.

4) The Charter of the International Court of Justice

Article 34 of the Charter of the ICJ provides that only States may be parties to cases before the Court.

Article 36 deals with the jurisdiction of the Court and provides that it may deal with all cases that the parties have referred to it and all matters specially provided for in the UN Charter, or in treaties and conventions in force. The Article goes on to provide that:

> *"The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:*
>
> *a. the interpretation of a treaty;*
>
> *b. any question of international law;*
>
> *c. the existence of any fact which, if established, would constitute a breach of an international obligation;*
>
> *d. the nature or extent of the reparation to be made for the breach of an international obligation."*

As noted earlier, the Court has the power to decide whether it has jurisdiction.

Article 38 states that it is the function of the ICJ to decide disputes submitted to it in accordance with international law and is to apply:

"a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of a 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 the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

As discussed in Chapter 6, this Article is of great significance, not simply to the Court itself but to international law generally, as it is widely accepted as setting out the sources of international law.

Articles 39 to 64 contain provisions dealing with procedure. The Court may make provisional orders preserving the respective rights of the parties. For these there is an abbreviated procedure. The normal procedure of the Court is to consist of two parts, written and oral. The written proceedings are to include memorials, counter-memorials and, if necessary, replies and rejoinders, together with documents in support. Hearings are to be in public, and the Court is to make orders for the conduct of case, deciding the form and time in which each party must conclude its arguments. The Court is to make all arrangements connected with the taking of evidence, and may call for the production of documents. It may seek expert opinion. During the course of the hearing *"... any relevant questions are to be put to the witnesses and experts under the conditions laid down by the Court..."*.

Article 53 deals with default by one of the parties:

"1. Whenever one of the parties does not appear before the Court, or fails to defend its case, the other party may call upon the Court to decide in favour of its claim.

2. The Court must, before doing so, satisfy itself, not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well founded in fact and law."

When presentation of the parties' case is completed, the President of the Court declares the hearing closed and the Court withdraws to consider the judgment. Questions are decided by a majority of the judges. In the event of the equality of votes, the President has the casting vote. Any judge may deliver a separate opinion in the event that the judgment is not unanimous. The judgment is to state the reasons on which it is based and is final and without appeal. If there is a dispute as to the meaning or scope of the judgment, the Court may construe its judgment at the request of any party. An application for revision of the judgment may be made, but *"only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence."*

An application for revision must be made at the latest within six months of the discovery of a new fact, and in any event before the lapse of 10 years from the date of the judgment.

Provision is made for possible intervention by other States in circumstances where they may be affected by the decision in a particular case (including circumstances involving the construction of a convention).

Articles 65 to 68 make provision for advisory opinions. The Court may give such opinions *"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"*. Such questions are to be laid before the Court by means of a written request containing an exact statement of the questions on which opinion is required. The request is to be accompanied by all documents *"likely to throw a light upon the question"*.

5) ICJ Rules of Court

The Preamble to the Rules of the Court refers to the UN Charter and to the Statute of the Court.

Parts 1 and II

Section A of Part I deals with judges and assessors of the Court, Section B with the Presidency, Section C with the Chamber of Summary Procedure and Section D with the internal functioning of the Court.

Part II is concerned with the Registry.

Part III

Part III deals with proceedings in contentious cases.

Institution of proceedings

Article 38 states that, when proceedings are instituted by means of an application to the Court, that application is to indicate the party making the application, the State against which the claim is brought and the subject of the dispute. The application is to specify the legal grounds on which the jurisdiction of the Court is said to be based and is also to specify the precise nature of the claim, together with *"a succinct statement of the facts and grounds upon which the claim is based"*.

Proceedings may be brought by a 'special agreement'. Copies of the application or notification of a special agreement are to be transmitted to the UN Secretary-General, Members of the UN and other States entitled to appear before the Court.

Written proceedings

Articles 44 to 53 deal with the written proceedings. The Court is to determine the number and order of filing of pleadings and the time limits within which they are to be filed. The pleadings in a case begun by means of an application are to consist of a Memorial and a

Counter-Memorial and, if the Court directs, a Reply and a Rejoinder. In the case of a special agreement, the pleadings are to comprise a Memorial and Counter-Memorial, unless otherwise agreed.

The Court may order joinder of two or more cases and may also direct that the written or oral proceedings, including the calling of witnesses, be in common. Time limits for completion of the steps in the proceedings are to be fixed and shall be *"as short as the character of the case permits"*.

The Memorial is to contain a statement of the relevant facts, the law and the submissions. The Counter-Memorial is to contain an admission or denial of the facts stated in the Memorial and, if necessary, observations concerning the statement of law in the Memorial, with a statement of law in answer, together with that party's submissions. The Reply and Rejoinder, if authorised, shall *"not merely repeat the parties' contentions, but shall be directed to bringing out the issues that still divide them."* Relevant documents are to be annexed to the pleadings.

Oral proceedings, documents, witnesses and experts

Articles 54 to 72 are concerned with the oral proceedings. On the closure of the written proceedings the case is ready for hearing. The Court is to fix the date of the opening of the oral proceedings, and, if it considers it desirable, may decide that the proceedings be held at a place other than the seat of the Court.

The Rules contain detailed provisions dealing with production of documents, evidence, details of witnesses and experts intended to be called *"with indications in general terms of the point or points to which their evidence will be directed"*. The Court is to determine whether the parties shall present their arguments before or after the production of the evidence. The parties are nevertheless entitled to retain the right to comment on the evidence given. The order in which the parties are to be heard, the method of handling the evidence and the examination of witnesses and experts, and indeed the number of counsel and advocates to be heard on behalf of each party, is to be settled by the Court.

The hearing is to be in public and the oral statements made on behalf of each party *"shall be as succinct as possible within the limits of what is requisite for the adequate presentation of that party's contentions at the hearing. Accordingly, they shall be directed to the issues that still divide the parties, and shall not go over the whole ground covered by the pleadings, or merely repeat the facts and arguments these contain."*

This telling direction to advocates is followed by a further warning to the loquacious lawyer: *"... at the conclusion of the last statement made by a party at the hearing, its agent, without recapitulation of the arguments, shall read that party's final submissions"*.

During the hearing the Court may indicate any points or issues to which it would like the parties to address themselves, and may put questions to the agents, counsel and advocates. These are to be answered either immediately or within a time limit fixed by the President. The Court may call on the parties to produce evidence.

Article 64 sets out the form of words to be used by every witness by way of a declaration, and the form of declaration to be made by every expert. The examination of witnesses and experts is by the advocates for the parties, but under the control of the President. Before testifying, witnesses are to remain out of the courtroom.

The Court may make arrangements for inquiries to be carried out or for expert opinion to be obtained. It may also request a public international organisation to furnish information.

Interim measures, etc

Articles 73 to 89 contain provisions dealing with interim protection, preliminary objections, counter-claims and interventions. These have proved substantial elements in the Court's calendar.

Chambers

Articles 90 to 93 deal with proceedings before Chambers. These are the proceedings mentioned in Articles 26 and 29 of the Court's Statute. Article 26 is concerned with Chambers composing three or more judges formed to determine particular categories of case, such as labour cases and cases relating to transit and communications. In practice, Chambers have largely dealt with territorial issues in a particular region.

Article 29 deals with a Chamber formed annually with a view to the speedy dispatch of business. This latter Chamber is composed of five judges and can hear cases by summary procedure.

Judgments

Articles 94 to 97 deal with the judgments of the Court. A judgment, which is to state whether it is given by the Court or by a Chamber, is to contain:

- the date on which it is read;
- the names of the judges participating in it;
- the names of the parties;
- the names of the agents, counsel and advocates of the parties;
- a summary of the proceedings;
- the submissions of the parties;
- a statement of the facts;
- the reasons in point of law;
- the operative provisions of the judgment;
- the decision, if any, in regard to costs;
- the number and names of the judges constituting the majority;
- a statement as to the text of the judgment that is authoritative.

Articles 98 to 100 deal with requests for the interpretation or revision of a judgement. Such request must satisfy the conditions set out in Article 61 of the Statute dealing with the discovery of new and decisive facts.

Part IV

Part IV of the Rules of Court is concerned with advisory proceedings under Article 65 of the Statute. The advisory opinion is to contain similar information as is required in the case of a judgement.

6) Practice Directions of the ICJ

The ICJ has in recent years begun to issue Practice Directions dealing with various aspects of the conduct of litigation before the Court that had not been covered in the Rules. For example, Practice Direction II lays emphasis on the need for clarity: The parties are to bear in mind that pleadings are intended not only to reply to the submissions and arguments of the other party, but also – and above all – are to *"present clearly the submissions and arguments of the party which is filing the proceedings. In the light of this, at the conclusion of the written pleadings of each party, there is to appear a short summary of its reasoning."*

Warning is given against the excessive use of annexes to written pleadings: *"the Court has noticed an excessive tendency towards the proliferation and protraction of annexes to written pleadings. It strongly urges parties to append to their pleadings only strictly selected documents."*

Reference was made earlier to the requirements of Article 60 of the Rules, which provides that all statements made on behalf of each party are to be *"as succinct as possible"*. Practice Direction VI states that the Court requires *"the full compliance with these provisions and observation of the requisite degree of brevity"*. Again, a telling direction to advocates.

As at early 2006, the International Court had issued 12 Practice Directions.

7) The ICJ Caseload

As mentioned earlier, since 1946 the Court has delivered 79 Judgments on disputes dealing with a variety of issues and given 24 Advisory Opinions concerning a range of topics.

In the years 2004-2006, pending cases included a maritime delimitation dispute between Nicaragua and Honduras; a frontier dispute involving Benin and Niger; a territorial and maritime dispute between Nicaragua and Colombia; certain criminal proceedings in France (*Republic of the Congo v France*); armed activities in the Congo (*Democratic Republic of the Congo v Uganda*); maritime delimitation in the Black Sea (*Romania v Ukraine);* a case concerning the application of the Convention on the Prohibition and Punishment of the Crime of Genocide (*Croatia v Serbia and Montenegro*); and claims of genocide (*Bosnia and Herzegovina v Serbia and Montenegro*).[51]

References are made in various parts of the Manual to decisions of the ICJ.

51 The public hearings on the merits in the case concerning the 'Application of the Convention on the Prevention and Punishment of the Crime of Genocide' *(Bosnia and Herzegovina v Serbia and Montenegro)* opened at the ICJ on 27 February 2006. The hearings were expected to last until early May 2006: www.icj-cij.org/icjwww/ipresscom/ipress2006/ipresscom_2006-09_bhy_20060227.htm.

8) Conclusions

It is clear that the ICJ, as the primary judicial organ of the UN, is an institution of considerable importance in the field of dispute resolution between States. The Court's importance in the field of international law is likewise of great significance: Its decisions may well have an impact beyond the Court itself.

The nature of the cases dealt with by the ICJ demonstrates its unique role in the field of inter-State dispute resolution. The number of disputes coming before the ICJ has increased in the last 15 years, and the Court is now resorted to by States from all corners of the world, including many Commonwealth countries: Australia, Botswana, Cameroon, Canada, India, Namibia, Nauru, New Zealand, Nigeria, Pakistan, Singapore, South Africa, Uganda and the United Kingdom.

Judges from the Commonwealth sitting at the ICJ include Judge Rosalyn Higgins of the United Kingdom and Judge Abdul G Koroma of Sierra Leone.