

# Emerging Challenges and Reforms Facing the International Court of Justice in Dispute Resolution - Jurisdiction and Arbitrability

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## ABSTRACT

The International Court of Justice (ICJ), as the principal judicial organ of the United Nations, has long been of significant relevance in the resolution of international disputes and the maintenance of world peace. Nonetheless, the application of the ICJ is not promising since its establishment, and there is considerable controversy concerning several decisions and advisory opinions made by the Court. Nevertheless, the reform of the ICJ is a process aimed at renovating or modifying its substantive and procedural rules to promote efficiency and achieve justice. This paper identifies external challenges and the internal demand for renovation as the ICJ's incentives in addressing future reforms. By invoking case studies and strategic research, this article provides reform propositions concerning expanding the scope of litigation jurisdiction and limitations on the veto power.

**Keywords:** *International Court of Justice, United Nations, Reform, Challenges, Jurisdiction*

## 1. INTRODUCTION

The International Court of Justice is the body under the United Nations system responsible for inter-State legal affairs. The Court is at a crossroads in the 21st century, needing reform to tackle arising problems. While the ICJ is the only U.N. organ to resolve legal issues between states, its incompetence is revealing. In 2021, the Court determined two conflicts while the rest of the 15 conflicts remain unsettled [1]. The pending cases range from armed aggression to dispute over treaties. For instance, one case currently being heard is about Uganda's armed activities on the Congo territories. Democratic Republic of Congo (DRC) first claimed that Uganda carried out armed aggression and inhuman torture on its territories on 23 June 1999. About this case, the court first handed down its judgment in April 2005 that the evidence of invasion on DRC territory is sufficient, and the court considered the use of force of Uganda as a grave violation of the prohibition on the use of force in Article 2, paragraph 4, of the United Nations Charter.

Meanwhile, the court also found that Uganda was attributable to the issues concerning violation of human rights and humanitarian laws and the violation of the principle of non-use of force in international relations and the principle of non-intervention. However, the court did not conclude the form and amount of compensation and noted that the two parties should partake in negotiation to form an agreement on compensation, which left the conflict between the two parties unsettled till the present. In 2015, the negotiation between DRC and Uganda failed, and DRC asked the court to determine the amount of compensation. In 2020, the dispute remained unsettled, and the Court arranged four experts to deal with further problems. This ongoing case from 1999 to 2021 indicates that despite the judgment made by the Court is clear enough, the conflict between States cannot be settled efficiently due to the non-binding decision made by the Court and several disagreements that occurred during negotiation [2]. Similarly, another case regarding Hungary and Slovakia showed the incapacity in settlement of a conflict. The major disagreements that existed, in this case, are the implementation and termination of the Budapest Treaty of 16 September 1977

on the construction and operation of the Gabčíkovo-Nagymaros Barrage System and the "provisional solution." Though it reached the judgment that Hungary was not entitled to terminate the construction of the Barrage System, the court decided that Hungary and Slovakia must negotiate in good faith in the light of the prevailing situation, which resulted in the unsettlement of the conflict [3]. Overall, it is notable that merely 4 to 5 cases on average are referred to the settlement of ICJ each year [4].

Moreover, a series of specific requirements with regards to the multiple Pacific Island States reflects the hindrance of excessive requirements to file a lawsuit, which can further prove that ICJ could not operate at full capacity. Due to the unprecedentedly rapid sea-level rise caused by climate change, some entire island States could face the fate of being drowned. However, their referral to ICJ to hold large greenhouse gases emitters to account, which needs support from the U.N. General Assembly, subject to be aborted. Historically, the island States' pursuit for simply an advisory opinion, which is non-binding, has thus been up in the air. The incumbent President of the ICJ, Judge Joan E. Donoghue, stated that the court often has "cases involving boundary disputes between countries." Rather, the court should be concerned about the possible end of existing boundaries, and more importantly, existing countries. As one of the six principal organs of the United Nations, the International Court of Justice should play a key role in intergovernmental affairs concerning a wide range of issues and should also have primary responsibility for legal issues that affect the survival of states.

The role of the International Court of Justice has been one of the major responsibilities throughout the history of international law. According to Article 92 of the United Nations Charter, the ICJ is by virtue the "principal judicial organ of the United Nations" [5], which could be considered as the successor Permanent Court of International Justice (PCIJ) founded in 1946 and dissolved during the Second World War. It is thought-provoking that, as Judge Lachs put forward, the International Court of Justice should be the 'the guardian for the international community, both within and without the United Nations' [6]. However, given both the incompetence and inefficiency of the ICJ in settling international legal disputes, structural reform with regard to the veto power of the five permanent members and the scope of jurisdiction is essential.

## **2. CHALLENGES FACING ICJ**

The International Court of Justice's settlement of legal disputes – either as contentious cases (legally binding) or advisory opinions (legally non-binding) – is of significant impact. The principal UN organ's decision is internationally recognized as highly authoritative. However, when facing legal issues concerning States and

the human rights of individuals, ICJ shows its incompetence during the process of resolution.

### ***2.1 Life of the Vulnerable and Political Conflicts***

In practice, should its contentious case decision not be carried out by the relative parties, then the Security Council intervenes and carries out the decision [7]. Though only consultative decisions, advisory opinions could serve as a very meaningful "playbook" for future political talks. Therefore, if individuals of the Pacific Island States that are doomed to be partially submerged in the future may choose to file a contentious case or seek an advisory opinion, their outlook would certainly be better – perhaps avoid being drowned.

Nevertheless, there would not be a sound contentious case as there is no such State or a small group of States solely responsible for the phenomenon of global warming, which led to the problem being drowned. This is because there is no multilateral form of dispute resolution. ICJ has always been resolving disputes within limited parties (nowhere close to more than 100 countries and mostly between two parties) [8]. Under the current framework, the U.N. General Assembly has to approve the advisory proceeding for island nations to seek an advisory opinion. In other words, whether the ICJ could help decide those island nations' future is determined by many other countries – namely, nearly 200 U.N. member States. Because there are different interests between Small Island Developing States (SIDS) and some other States, the proceeding was not and could not be passed by the General Assembly.

### ***2.2 Responsibilities to Shared Future for Mankind***

All other countries should be concerned. The drowning Pacific Island States are like the canary in the coal mine [9]. They sound alarming to the rest of the world, and, indeed, all coastal areas, which are home to roughly 10% of the world population, are facing similar future risks. Therefore, if the ICJ can efficiently draw the advisory opinion of the issue, it would help to mitigate disasters of the island nations and countries that will see more submersion of their coastal areas, including major cities; hence, structural reform to the contemporary framework regarding the scope of jurisdiction appears to be necessary and conducive to problem-solving on a broader range.

In addition, heads of multiple Pacific Island States support the cause of reform. Former President of Palau, Tommy Esang Remengesau Jr., said in the 72nd United Nations general debate that to resolve global challenges such as climate change impact successfully, "the U.N. system must be strengthened so that all its Member States can believe in the fairness and effectiveness of the overall international negotiation and dispute resolution process"

[10]. The International Court of Justice is highly responsible and of crucial role in the process of resolving disputes among countries; thus, President Remengesau was suggesting reform of the ICJ. Former Prime Minister of Vanuatu, Charlot Salwai Tabimasmal, also emphasized in the 72nd U.N. general debate that "world leaders must consider a legal framework to address the issue of climate change refugees, who would be left stranded once their homes and lands disappear" [11]. Therefore, if ICJ could not make judgments to prevent island states from submerging, it ought to secure the fundamental rights of the island states' residents at the very least. While other mechanisms are inefficient in resolving issues associated with displacement, ICJ should be a provider of basic defense for displaced individuals. As the U.N. High Commissioner for Refugees noted, "At the U.N. climate change conference (COP26) in Glasgow in November [2021], the issue of climate-related displacement was on the agenda, but little agreement was reached on actions to protect displaced people from a changing climate" [12]. Hence, ICJ should fill the void COP26 which left out, focusing on the domain of its area of authority and settlement of disputes over the issues faced.

### ***2.3 Failure in Dispute Resolution***

Besides, the internal problem facing the ICJ is the inefficiency during the process of dispute resolution. Fifteen pending cases remain to be resolved in 2021. Furthermore, in 2006, 12 pending cases existed in ICJ while only three judgments were issued during the year, one of them being advisory opinion [13]. The court has not determined the pending cases for an incredibly extended period. For instance, the Court first decided the case with regards to the armed activities on Congo territories by Uganda in 2005 but remained unsettled until now; the case about Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia) was first filed in 2014; the case concerning Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia) was first filed in 2013, but there is still no unequivocal settlement [14]. ICJ has made certain judgments among all cases, but it is limited by the jurisdiction it has—advisory jurisdiction; thus, the only measure it can take is to initiate parties involved to negotiate with compensation, which is relatively impractical since each party stick to its stance and refuse to step back in the negotiation. Therefore, the substantial intervention of the International Court of Justice is usually required by the parties involved. The court and associated states usually fail to come up with a resolution satisfying all parties, and thus cases are being pending. However, ICJ has limited power to interfere under this situation since it does not have the jurisdictional authority to make direct binding decisions. The Court is often

caught in a dilemma and has displayed incompetence in settlement of disputes. This is because ICJ certainly does not have the jurisdiction to enforce binding action, which is a prerequisite for resolving a significant number of disputes effectively. As proven above, in most cases, ICJ gives advisory opinion, which does little to help States to settle their dispute and shows its ineffectiveness while settling dispute between States.

## **3. CAUSING REASONS**

As an eminent historian, Jonathan D. Spence at Yale University stated, "It is as if there were a restlessness and a capacity for violence at the center of the human spirit that can never be contained so that no society can achieve a perfect tranquility" [15]. The turbulent or imperfectly tranquil nature of societies necessitates that the International Court of Justice, to the best of its ability, resolves disputes that have led or would lead to violence. The restless societal nature is also a reason why ICJ needs reform. Because threats to the peace and breaches of the peace haunt the international community, ICJ has to be busy itself with a wide range of topics of proceedings.

### ***3.1. Exclusivity of Case Intake***

Nevertheless, there are still significant issues that ICJ could not entertain because of structural barriers. According to the UN Charter Article 96, "the General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question ... other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities" [16]. The idea of having ICJ's advisory proceedings only open to the U.N.'s principal organs and other agencies and organizations within the U.N. system is arguably for member states to decide which issues should be advised by ICJ and which should not. However, if certain critical issues are left with the many member states to decide, quite a few member states could even perish. In his book, *The Arts of War*, Sun Tzu, a prominent Chinese military strategist, wrote, "A kingdom that has once been destroyed can never come again into being; nor can the dead ever be brought back to life" [17]. This pithy maxim reflects the possible trajectory of the Pacific Island States in the face of rising sea levels -- being drowned and never coming back into existence. Thus, it would be compelling enough for ICJ to entertain the survival for the Pacific Island States, which, combined with other Small Island Developing States, only emitted less than one percent of the greenhouse gases by human activity, as the advocative efforts for climate justice led by the Alliance of Small Island States fall short.

Further, to examine reasons for the ineffectiveness, the jurisdiction of the International Court of Justice should be considered, respectively contentious jurisdiction and opinion jurisdiction. One considerable fact is that most of the pending cases ICJ has are cases with opinion jurisdiction. Under such jurisdiction, ICJ is entitled to make judgments according to the claims and evidence provided by both parties, but they do not have the right to implement the final decision, and thus negotiation between both parties becomes common. The low effectiveness is primarily attributed to this organism where ICJ cannot issue the final result while long, usually meaningless, the negotiation begins.

### ***3.2 Downside of Bilateral Negotiations***

In addition, the strict limitation on the jurisdiction of the proceedings has become one of the major factors obstructing the settlement of disputes process. The issue is mainly reflected in the scope of the recipients of the litigation jurisdiction and the outcome of the implementation of the Court's decision as a result. This scope, to some extent, ignores the survival and well-being of the vast majority of the world's vulnerable populations. It is challenging to address issues of real urgencies, such as island nations and regions threatened with submersion due to global climate change, when litigation units are exclusively state-based and intensely politicized. According to Article 34(1) of the ICJ statute, contentious jurisdiction can only be activated when the parties in cases before the Court are States. However, as mentioned in the first part, sometimes it is hard to figure out which specific State or group of States are responsible for the rising issue. Under this circumstance, ICJ is unable to solve this problem with tough actions even if the problem is urgent and crucial. In addition, contentious jurisdictions are only available to genuine disputes of a legal nature. As written on the website of ICJ, "an international legal dispute can be defined as a disagreement on a question of law or fact, a conflict, a clash of legal views or interest." Such criteria are difficult to fulfill since most disputes in international society are not of pure legal nature. What makes ICJ more difficult to effectively resolve issues is that the consents of both parties are required to initiate contentious cases, which is hard to achieve since both parties usually hold different stances, and one of them might not accept the case.

### ***3.3 Permanent Members and their Veto***

Furthermore, even if the ICJ makes a compulsory decision during a case, the permanent members of the Security Council, who are responsible for the enforcement of the decision, still have the authority to veto the decision and refuse to fulfill its obligation. Although the five permanent members of the United Nations are originally set to balance the power and equality in International Laws, which helps to decide on

a relatively fair method, the veto rights of the 5 States are a loophole impeding the implementation and effectiveness of the ICJ's judgment. An example would be the remarkable case, Nicaragua v. the United States. In this case, the final decision was against the U.S., but when the Security Council was about to enforce the final decision made by the Court, the U.S., the permanent member of the Council, vetoed the planned actions [18]. This revealed that the existence of the veto power of the five permanent members is one of the most important causes of the nullification. If the veto power is not restricted rigorously, the peace of the world could hardly be maintained stable.

## **4. PROPOSITIONS FOR REFORM**

Contemporary international courts of justice and, in fact, international law are facing unprecedented challenges. When referring to the distinctive intersection between the years 2021 and 2022, the incumbent secretary-general of the United Nations, António Guterres, said, "Moments of great difficulty are also moments of great opportunity" [19]. The ICJ needs to closely follow the steps of the current era to entertain as many international affairs as it can during moments of great opportunity. Concerning both the arbitrability and the jurisdiction of the ICJ, this paper proposes two propositions for reform.

### ***4.1 Expanding the scope of Jurisdiction***

In light of the emerging challenges of the times and the future, the ICJ needs to be critically re-examined, both structurally and systematically. Reforms to the ICJ must be carried out to allow ICJ to entertain more proceedings, particularly the advisory proceedings, as they typically matter to a broad group of nations. Whether the Court should make a judgment on a legal question should be decided by the Court -- namely, the 15 judges who reside in The Hague -- to better preserve peace and tranquility. It is a political fact that the ICJ judges align their views with the benefits of their native country if it was involved in a case; thus, there is already an extent of political nature in the Court. Having a profusion of nations deciding whether to proceed with a proceeding is like having a polarized United States Senate where dissonance postpones, if not hampers, progress. In this circumstance, political will prevails over legal substance. The United Nations needs a strong International Court of Justice, so if the legal substance of the Court is undermined, the hindrance must be removed -- that is, the limitation that blocks the Court from entertaining a proceeding must be broken down.

Reforms that consider the limitations of litigation jurisdiction are inevitable. A potential solution would be to widen the requirement of the parties initiating proceedings to private parties and organizations.

Although it is admitted that ambiguity does exist when it comes to cases filed by a group of States, ICJ could therefore consider initiating contentious jurisdiction when it comes to cases involving more parties, even if it is not a purely legal dispute. For instance, in the case mentioned above concerning Congo and Uganda, the Court can make a compulsory decision rather than giving advisory opinion since there is a clear judgment that Uganda violates not only the UN Charter but also human rights and humanitarian laws as well as the principle of non-use of force in international relations and the principle of non-intervention [20]. If a binding decision of expanding the scope of jurisdiction could imply at the point, there would be more practical and less time-wasting on numerous and, most of the time, meaningless negotiation.

#### **4.2 Tighter Restrictions on the Veto**

On the other hand, one reform that needs to be emphasized in the ICJ is the elimination or limitation of the veto power of the five permanent members in the enforcement of the court's decision. From the perspective of the constitution of ICJ judges, under the high standard and rigorous procedure of electing judges of the International Court of Justice, the judges elected are approved by the majority. Moreover, as stated in the ICJ Statute, these judges must have "high moral character" and "possess qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law" [21]. Therefore, ideologically, the decision made by the Court should have no political preference and be entirely just. Suppose such a decision is vetoed by the five permanent members of the United Nations during the procedure of enforcement carried out by the Security Council. In that case, it is logical to suspect that they do so out of political intent and thus immoral and disadvantageous to the international society. Additionally, under the constant change in States' power, the five permanent States might not always be able to represent the most potent or prospective States in the world. Therefore, this paper suggests that abolishing the veto power of the five permanent members over the enforcement of the Court's decisions or holding them accountable for the exercise of this power constitutes a possible solution to enhance the effectiveness of the ICJ in the future implementation of its decisions.

### **5. CONCLUSION**

In conclusion, as the only organ to deal with legal issues among States, the International Court of Justice should be highly competent and effective in settling disputes. However, in the contemporary world, the ICJ has demonstrated its limitations at almost every stage of its proceedings, including incompetence in dealing with issues involving the right to life and uncertainty in the

determination of existing cases. The proposals presented above, including breaking down the barriers that prevent the Court from admitting proceedings, limiting the veto power of the five permanent members of the United Nations, and expanding the scope of jurisdiction over proceedings, may provide wider arbitrability to upcoming disputes or at least insights for reforming the Court.

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