

Public International Law

Lecture 10



**UNIT V :- STATE RESPONSIBILITY FOR INTERNATIONALLY
WRONGFUL ACTS-**

7. The Charter of the United Nations; Articles 2(3), and 33
8. ICJ, Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion of 26 April 1988
9. Legal Means of Dispute Settlement: Arbitration and Permanent Courts
10. The Law and Procedure of the International Court of Justice
11. The Charter of the United Nations: Articles 92-96
12. The Statute of the ICJ: Articles 34, 35, 36, 41, 59, 65 and 66

UN Charter

Article 2

The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.

(3) All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

Chapter VI: Pacific Settlement of Disputes

Article 33

1. 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 a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.
2. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.

Article 34

The Security Council may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security.

Article 35

1. Any Member of the United Nations may bring any dispute, or any situation of the nature referred to in Article 34, to the attention of the Security Council or of the General Assembly.

2. A state which is not a Member of the United Nations may bring to the attention of the Security Council or of the General Assembly any dispute to which it is a party if it accepts in advance, for the purposes of the dispute, the obligations of pacific settlement provided in the present Charter.
3. The proceedings of the General Assembly in respect of matters brought to its attention under this Article will be subject to the provisions of Articles 11 and 12.

Article 36

1. The Security Council may, at any stage of a dispute of the nature referred to in Article 33 or of a situation of like nature, recommend appropriate procedures or methods of adjustment.
2. The Security Council should take into consideration any procedures for the settlement of the dispute which have already been adopted by the parties.
3. In making recommendations under this Article 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.

Article 37

1. Should the parties to a dispute of the nature referred to in Article 33 fail to settle it by the means indicated in that Article, they shall refer it to the Security Council.
2. If the Security Council deems that the continuance of the dispute is in fact likely to endanger the maintenance of international peace and security, it shall decide whether to take action under Article 36 or to recommend such terms of settlement as it may consider appropriate.

Article 38

Without prejudice to the provisions of Articles 33 to 37, the Security Council may, if all the parties to any dispute so request, make recommendations to the parties with a view to a pacific settlement of the dispute.

***ICJ, Applicability of the Obligation to Arbitrate under Section 21 of the
United Nations Headquarters Agreement of 26 June 1947, Advisory
Opinion of 26 April 1988***

On 2 March 1988, the General Assembly of the United Nations adopted a resolution whereby it requested the Court to give an advisory opinion on the question of whether the United States of America, as a party to the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations, was under an obligation to enter into arbitration in accordance with Section 21 of the Agreement. That resolution had been adopted in the wake of the signature and imminent entry into force of a law of the United States, entitled Foreign Relations Authorization Act, Title X of which established certain prohibitions regarding the Palestine Liberation Organization (PLO), *inter alia*, a prohibition

“to establish or maintain an office, headquarters, premises or other facilities or establishments within the jurisdiction of the United States at the behest or direction of, or with funds provided by the Palestine Liberation Organization”.

The PLO, in accordance with the Headquarters Agreement, had a Permanent Mission to the United Nations. The Secretary-General of the United Nations invoked the dispute settlement procedure set out in Section 21 of the Agreement and proposed that the negotiations phase of the procedure commence on 20 January 1988. The United States, for its part, informed the United Nations that it was not in a position and was not willing to enter formally into that dispute settlement procedure, in that it was still evaluating the situation and as the Secretary-General had sought assurances that the arrangements in force at the time for the Permanent Observer Mission of the Palestine Liberation Organization would not be curtailed or otherwise affected. On 11 February 1988, the United Nations informed the Department of State that it had chosen its arbitrator and pressed the United States to do the same. The Court, having regard to the fact that the decision to request an advisory opinion had been made

“taking into account the time constraint”, accelerated its procedure. Written statements were filed, within the time-limits fixed, by the United Nations, the United States of America, the German Democratic Republic and the Syrian Arab Republic, and on 11 and 12 April 1988 the Court held hearings at which the United Nations Legal Counsel took part. The Court rendered its Advisory Opinion on 26 April 1988. It began by engaging in a detailed review of the events that took place before and after the filing of the request for an advisory opinion, in order to determine whether there was, between the United Nations and the United States, a dispute of the type contemplated in the Headquarters Agreement. In so doing, the Court pointed out that its sole task was to determine whether the United States was obliged to enter into arbitration under that Agreement, not to decide whether the measures adopted by the United States in regard to the PLO Observer Mission did or did not run counter to that Agreement. The Court pointed out, *inter alia*, that the United States had stated that “it had not yet concluded that a dispute existed” between it and the United Nations “because the legislation in question had not been implemented”. Then, subsequently, referring to “the current dispute over the status of the PLO Observer Mission” it had expressed the view that arbitration would be premature. After initiating litigation in its domestic courts, the United States, in its written statement, had informed the Court of its belief that arbitration would not be “appropriate or timely”. After saying that it could not allow considerations as to what might be “appropriate” to prevail over the obligations deriving from Section 21, the Court found that the opposing attitudes of the United Nations and the United States showed the existence of a dispute, whatever the date on which it might be deemed to have arisen. It further qualified that dispute as a dispute concerning the application of the Headquarters Agreement, and then found that, taking into account the United States’ attitude, the Secretary-General had in the circumstances exhausted such possibilities of negotiation as were open to him, nor had any “other agreed mode of settlement” within the meaning of Section 21 of the Agreement been contemplated by the United Nations and the United States. The Court accordingly concluded that the United States was bound to respect the obligation to enter into arbitration, under Section 21. In so doing, it recalled the fundamental principle of international law that

international law prevailed over domestic law, a principle long endorsed by a body of judicial decisions.

Legal Means of Dispute Settlement: Arbitration and Permanent Courts

Arbitration is a legal method of dispute settlement which requires the prior consent of each party to the dispute. This is usually done through a special agreement between the parties called a compromise. Arbitration is provided for in Article 33 of the UN Watercourses Convention and complemented by the Annex to the Convention which sets out the rules for the establishment and operation of an Arbitral Tribunal (Article 33 (10)(b) and (Annex Articles 1-14)).

It is important to note that parties are not bound to use the particular arbitral formula of Article 33 and are instead able to utilise other procedures if ‘the parties to the dispute otherwise agree’ (Article 33(10)(b)). These other options could include use of the procedures of the Permanent Court of Arbitration (PCA), which is not a ‘court’ but rather a special mechanism, the primary purpose of which is to assist states in settling their international controversies. The PCA was established in 1899 under the Hague Convention No 1 for the Pacific Settlement of International Disputes and is able to provide its services to all arbitration cases submitted to it by agreement of the parties to a dispute. It has recently updated its procedures to respond to current international practice and a particularly relevant outcome is the 2001 Optional Rules for Arbitrating Environmental Disputes which provides more detailed provisions than the arbitration procedure in the Convention. One significant distinguishing factor between the ICJ and the PCA is that both international organisations and companies can be parties to PC proceedings under the 2001 Optional whereas only states can be parties to proceedings before the ICJ.

There have been numerous international arbitrations of water disputes since the late 19th Century, a select list of more recent cases include: the 1941 Trail Smelter Arbitration; the 1947 Lac Lanoux Arbitration between Spain and France; the 1968 Gut Dam case between the United States and Canada; the 1994 Landmark 62-Mount Fitz Roy case between Argentina and Chile; the 2004 arbitration between Netherlands and France pursuant to a nearly 70 year dispute; and the 1976

Convention on the Protection of the Rhine Against Pollution by Chlorides and the Additional Protocol of 1991. Most recently, in 2011, the PCA delivered an Order on Interim Measures regarding the Indus Waters Kishenganga Arbitration (Pakistan v. India), which is examined in the opposite column with a specific focus on the process of dispute resolution

United Nations Charter

Chapter XIV: The International Court of Justice

Article 92

The International Court of Justice shall be the principal judicial organ of the United Nations. It shall function in accordance with the annexed Statute, which is based upon the Statute of the Permanent Court of International Justice and forms an integral part of the present Charter.

Article 93

1. All Members of the United Nations are ipso facto parties to the Statute of the International Court of Justice.
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 94

1. Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.
2. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

Article 95

Nothing in the present Charter shall prevent Members of the United Nations from entrusting the solution of their differences to other tribunals by virtue of agreements already in existence or which may be concluded in the future.

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.

The Statute of the ICJ

CHAPTER II COMPETENCE OF THE COURT

Article 34

1. Only states may be parties in cases before the Court.
2. The Court, subject to and in conformity with its Rules, may request of public international organizations information relevant to cases before it, and shall receive such information presented by such organizations on their own initiative.
3. Whenever the construction of the constituent instrument of a public international organization or of an international convention adopted thereunder is in question in a case before the Court, the Registrar shall so notify the public international organization concerned and shall communicate to it copies of all the written proceedings.

Article 35

1. The Court shall be open to the states parties to the present Statute.
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.
3. When a state which is not a Member of the United Nations is a party to a case, the Court shall fix the amount which that party is to contribute towards the expenses of the Court. This provision shall not apply if such state is bearing a share of the expenses of the Court

Article 36

1. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.
2. 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.
3. 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.
4. Such declarations shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the parties to the Statute and to the Registrar of the Court.
5. Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms.
6. In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.

Article 41

1. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.
2. Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council.

Article 59

The decision of the Court has no binding force except between the parties and in respect of that particular case.

CHAPTER IV ADVISORY OPINIONS

Article 65

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.

Article 66

1. The Registrar shall forthwith give notice of the request for an advisory opinion to all states entitled to appear before the Court.

2. The Registrar shall also, by means of a special and direct communication, notify any state entitled to appear before the Court or international organization considered by the Court, or, should it not be sitting, by the President, as likely to be able to furnish information on the question, that the Court will be prepared to receive, within a time-limit to be fixed by the President, written statements, or to hear, at a public sitting to be held for the purpose, oral statements relating to the question.

3. Should any such state entitled to appear before the Court have failed to receive the special communication referred to in paragraph 2 of this Article, such state may express a desire to submit a written statement or to be heard; and the Court will decide.

4. States and organizations having presented written or oral statements or both shall be permitted to comment on the statements made by other states or organizations in the form, to the extent, and within the time-limits which the Court, or, should it not be sitting, the President, shall decide in each particular case. Accordingly, the Registrar shall in due time communicate any such written statements to states and organizations having submitted similar statements.