

# **Procedure and Process of International Court of Justice**

## 1) Question of Seizing and Discontinuance

1.1) Seizing the Court : It is the starting point of the procedure to gain access to the International Court of Justice . A valid seizing process merely allows a case to be entered on the light of pending case of the ICJ . Seizing the court is different from ascertaining the jurisdiction of the Court . When a case is seized by the Court , it does not mean that it has assumed jurisdiction over it . It may or may not have jurisdiction . That aspect is decided later . The process of seizing the court precedes the jurisdiction .

Cases are brought before the Court either by the notification of the special agreement or by a written application .<sup>1</sup> When proceedings are brought before the Court by the notifications of a special agreement , in conformity with Article 40 paragraph 1 of the Statute , the notification may be effected by the parties jointly or by any one or more of them .<sup>2</sup> The Court can be seized through a unilateral application under two circumstances .

- (a) a compulsory pre- existing jurisdictional agreement , or
- (b) a direct or an indirect request of the respondent who has agreed to do so on the basis of the device of '*forum prorogatum*' .

Following situation emerges from the above mentioned discussion :

- 1) In the absence of a pre existing head of jurisdiction ( either in the form of compromissory or jurisdictional clause or optional clause agreement ) , parties may seize the Court through a special agreement .
- 2) In the presence of a pre existing head of a compulsory jurisdiction , either in the form of a compromissory clause or optional clause , Court can be seized through a unilateral application .

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<sup>1</sup> Article 40 of The Statute of International Court of Justice .

<sup>2</sup> Rule 39 (1) of ICJ .

- 3) If there is an absence of the above two methods , the claiming state can ask the proposed respondent to broaden the scope through the device of forum prorogatum ( consent on an ad hoc basis ) .

The application is then sent to the Registrar of the Court who directs the Parties regarding the rectification of any formal defects in the application . The Court usually rejects such preliminary objections and is in the habit of correcting these procedural defects so that Statute and Rule of ICJ are not infringed . The application along with supported document is sent to the State and international organization that are entitled to hear it . The Court usually rejects such preliminary objections and is in the habit of correcting these procedural defects so that Statute and Rules of ICJ are not infringed . The application along with supported document is sent to the State and International Organization that are entitled to hear it .

A State may even seize the ICJ even before the respondent has indicated its agreement to the Court's Jurisdiction . When a case is initiated this way , the application to the Court is on an ad hoc basis . This is the area of *forum prorogatum* . Registrar cannot enter the case until the Respondent has given the consent .<sup>3</sup> If the Respondent declines , then the Court will make a declaration that it has no jurisdiction and the case will be dismissed . The Court was seized through this method in the Corfu Channel Case .<sup>4</sup>

ICJ may be seized by entities who have been entitled by the Statute . This is applicable for contentious as well as advisory proceedings . Private individuals cannot seize the Court as the contentious jurisdiction is limited only to the State . If individuals do happen to seize the Court ( such as the case of accused in *Nirbhaya case* ) , then the procedure states that their applications is not entered on the list of cases at the Court . It appears in the 'statistical section of the Yearbook , under the heading ' *Applications from Private Persons* ' .The Registrar will then inform the individuals that the Court cannot be seized .

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<sup>3</sup> Article 38 para 5 of the Rules of ICJ .

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Applications shall contain certain important information . The Statute of ICJ provides that for both special agreement or written application two elements are indispensable :

- (a) Subject of dispute .
- (b) Parties .<sup>5</sup>

For the sake of unilateral applications the Rules provide that the ingredients shall be :

- (a) Legal grounds on which jurisdiction is based .
- (b) Precise nature of claim .
- (c) Statement of Facts .
- (d) Grounds of claims.<sup>6</sup>

An archetype letter to Registrar of ICJ given by the Parties is as follows :

“ To the Registrar of the International Court of Justice ,  
I , the undersigned , duly authorized by the  
Government of .... Of which I am the agent , have the honour to  
submit to the ICJ under Article 40 (1) of its Statute and Article 38 of  
its Rules , an application instituting , in the name of the Republic , a  
case against the Republic of ..... in the case indicated below.”

This letter is followed by :

- (a) A brief statement of facts , followed by a presentation of the  
subject in dispute .
- (b) An explanation of the Court’s Jurisdiction .
- (c) Legal Basis of the Claim .
- (d) Nature of Orders sought .
- (e) Mention of annexed documentation .

Point (a) is related to the right to amend and complete the terms of the  
application .

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<sup>5</sup> Article 40 of The Statute of International Court of Justice .

<sup>6</sup> Kolb

Point (b) is related to the right of the parties' to nominate a judge ad hoc .<sup>7</sup>

Point (c) is related to the application of interim measures .<sup>8</sup> Parties also indicate their nominated agent who get in touch with Court as their representative .

Point (d) gives the right to initiate interlocutory proceedings .

1.2) Discontinuance or Withdrawal process of the Case : The Statute of the Court does not support the process of discontinuance or Withdrawal . It is covered under Articles 88 and 89 of the Rules of the Court . The case can be withdrawn unilaterally or through a special agreement between parties . According to Kolb , following are some of the reasons for the discontinuance of the case :

- (a) A change in circumstances and its effect on the dispute .
- (b) A new opportunity to negotiate i.e. political settlement .
- (c) Normalization of relations between relations following a change of political change .
- (d) An assessment that victory is not forthcoming.<sup>9</sup>

Article 88 states the situation where the case is withdrawn by an agreement of both the parties . Article 89 of the Rules provides the situation where the case is withdrawn through unilateral measures .

Withdrawal by both the parties : Under Article 88 of the Rules , at any time , before the delivery of the judgment on merits , the parties notify the court in writing that they have agreed to discontinue the proceedings , then the Court makes an order recording the discontinuance and the case is removed from the list .<sup>10</sup> If the parties are withdrawing the case by virtue of settlement , then this fact may be recorded by the Court while removing the case from the list .<sup>11</sup> If the Court is not sitting then the Article may be made by the President .<sup>12</sup>

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<sup>7</sup> Article 31(2) of Statute and Article 35 of the Rules .

<sup>8</sup> Article 41 of the Statute and Article 73 of the Rules .

<sup>9</sup> Kolb

<sup>10</sup> Article 88 (1) of the Rules of The Court .

<sup>11</sup> Article 88 (2) of the Rules of The Court.

<sup>12</sup> Article 88 (3) of the Rules of The Court .

Withdrawal by unilateral process : The unilateral process is different . Here the Court has to do a balancing act between the two parties . If the applicant informs the Court that it does not want to continue with the proceedings then the information is received by the Registrar . If the Respondent has not taken any steps in the proceedings then the Court shall make an order officially recording the discontinuance of the proceedings and the case is removed from the list of the cases . A copy of this order is sent to the Respondent by the Registrar .<sup>13</sup> However , if the respondent has already taken some steps the Court shall fix a time limit within which the respondent may state whether it opposes the discontinuance of the proceedings . If the respondent makes not objection within the time limit then the Court shall make an acquiescence and the Court shall continue the case by removing it from the list of the case . If and objection is made by the Respondent then the proceedings shall continue.<sup>14</sup>

- 2) Stages of Proceedings after the Court has been seized : The proceedings before the Court either on Merits , Preliminary or incidental have to go through a Written and an Oral Phase . Under the regime of Statute of ICJ the Written phase is compulsory and cannot be done away with . The law of PCIJ had made the written phase optional but this is no longer the case . The law is prescribed under Article 43 of The Statute . The procedure consists of two phases i.e. a written and an oral phase .<sup>15</sup> Written proceedings shall consist of the memorials , counter memorials and replies .<sup>16</sup> Communications shall be made through the Registrar .<sup>17</sup> A certified copy of every document produced by one party shall be communicated to the other party .<sup>18</sup> Oral proceedings shall consist of the hearing by the Court of witnesses , experts , agents , counsel and advocates .<sup>19</sup> Written procedure is controlled by articles 44 to 53 of the Rules and Oral procedure is regulated by Articles 54 to 72 of the Rules . The Court has adopted Practice Directions (PD) to

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<sup>13</sup> Article 89 (1) of Rules of The Court .

<sup>14</sup> Article 89 (2) of Rules of The Court.

<sup>15</sup> Article 43 (1) of The Statute of ICJ .

<sup>16</sup> Article 43 (2) of The Statute of ICJ .

<sup>17</sup> Article 43 (3) of The Statute of ICJ .

<sup>18</sup> Article 43 (4) of The Statute of ICJ.

<sup>19</sup> Article 43 (5) of The Statute of ICJ .

lighten its procedure and to speed up the process .<sup>20</sup> The utility of written phase lies in the notion that a case can be presented in detail through documentation and argumentation.<sup>21</sup> Oral phase allows the pleaders to provide a synthesis of the salient point . It clears the way for court's deliberations and decisions .<sup>22</sup>

2.1) Written phase : The written phase is initiated by virtue of Article 31 of the Rules of The Court . The process is initiated after the President of the Court summons the agents of both the parties and ascertains the views of the parties with regard to the question of procedure . The dual method of written and oral phase is made imperative .<sup>23</sup> The reason for it being compulsory is the proper administration of justice . The Court gets to know the full information about the facts of the case .<sup>24</sup>

Documentation process : Documents submitted to the Courts are primarily of two types :

- (i) Documents related to fact and Law .
- (ii) Documents supporting Evidence .

Written proceedings shall consist of memorials , counter memorials and replies (if required) along with a self attestation by the agent of the submitting parties declaring that the parties have complied with the procedural requirements and this is accompanied by 125 copies of the proceedings . Such an amount is required to be circulated among number of States<sup>25</sup> and International Organizations.<sup>26</sup> In spite of the presence of an electronic form , the hard copy is indispensable .<sup>27</sup>

The first document to be submitted is the Applicant's Memorial. It is the first pleading . If it is the case of submission under a special agreement then both the parties may submit the documents simultaneously as there is no formal applicant or respondent .<sup>28</sup> A memorial of the applicant shall consists of :

- (a) Statement of Relevant facts .
- (b) Statement of law .

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<sup>20</sup> Kolb

<sup>21</sup> Kolb

<sup>22</sup> Kolb

<sup>23</sup> Article 43 of the Statute of ICJ .

<sup>24</sup> Kolb

<sup>25</sup> Article 51 (1) of the Rules

<sup>26</sup> Article 34 (3) of the Statute.

<sup>27</sup> Kolb.

<sup>28</sup> Kolb

(c) Statement of submission.

The memorial shall contain an Annexure containing all the cited documents .<sup>29</sup> At the conclusion of each party pleadings there has to be a summary of its reasoning .<sup>30</sup> At this stage the parties are not required to prove anything , only the disputed facts are required to be proven .<sup>31</sup>

The first memorial filed by the respondent is called the Counter Memorial . It shall contain the following :

- (a) Admission or denial of the facts stated in the memorial.
- (b) Any additional facts.
- (c) Observation concerning statement of law in the memorial .
- (d) Statement of law in answer.
- (e) Submissions.
- (f) Annexure of listed documents.

Additional Pleadings : They are required by the parties or the Court to clear the view of the case . An additional pleading is called a Reply (if filed by the applicant in addition to the Memorial and in reply to the Counter Memorial ) , and a rejoinder ( if filed by the respondent ) . Reply and rejoinder shall not repeat the issues between the parties but shall bring out the issues that divide them .<sup>32</sup> Whether there is a necessity of an additional round of pleadings is left to the discretion of the Court . A counterclaim against the Applicant's original claim is a part of Respondent's Counter Memorial .<sup>33</sup> In proceedings started by unilateral application there are no further rounds of pleadings . The written phase ends with a reply and a rejoinder .<sup>34</sup>

Documents containing Evidence : The above mentioned documents contain the parties' respective arguments . In addition , certain documents are also filed to support these arguments . These are the Documents containing Evidence . They shall be annexed to the original of every pleading certified copies of any relevant

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<sup>29</sup> Article 50 (3) of Rules of the Court .

<sup>30</sup> Practice Document II , 2

<sup>31</sup> Kolb.

<sup>32</sup> Article 49 ( 3) of Rules of The Court .

<sup>33</sup> Article 80 of the Rules of The Court .

<sup>34</sup> Kolb .

documents adduced in support of the contentions contained in the pleading.<sup>35</sup> After the revision of the Rules of 1978, it is no longer to produce the original. Even the certified copies will do. Only a part of the relevant document is required to be annexed.<sup>36</sup> The types of documents used in evidence include, diplomatic correspondence, letters, treaties, notes of parliamentary debates, decision of internal legislation, decrees, notes of parliamentary debates, decisions of internal tribunals, notarized documents, opinions and advice, maps and charts, photographic images, satellite imagery and films.<sup>37</sup> ( To Be Continued ...)\*\*

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<sup>35</sup> Article 50 (1) of The Rules of ICJ .

<sup>36</sup> Article 50 (2) of The Rules of ICJ.

<sup>37</sup> Kolb .