THE PRINCIPLE OF *RES-JUDICATA* AND DETERMINATION OF JURISDICTIONAL NEXUS OF INTERVENING PARTIES: An Evaluation of ICJ Decisions

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Introduction

The principle of res-judicata lies at the heat of the adjudicatory process. It deals with the capacity of the parties before the Court and also draw attention to the jurisdictional competence of the Court or tribunal not to engage the judicial process in a manner remarkable of abuse and lack of due process.

It is a legal principle that protects the sanctity of the Courts and the judicial process by ensuring that only proper parties and valid issues are brought before the Court. Thus, an international Court such as the ICJ can only exercise judicial powers of the judicature only where in doing so, it did not breach the rules of fair hearing or any other law or procedure of practice. Further, where *res-judicata* is a bonafide pre-defense observation and objection of a defendant or respondent, then the Court or Tribunal is not

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clothed with adequate jurisdictional competence to entertain the action before it.

In addition, like jurisdiction, the principle of *res-judicata* lies at the heart of the adjudicatory process. This assertion is due to the fact that the result of the entire proceedings of the Court or tribunal that negates this cardinal principle goes to a nullity. In view of this condition, Courts, both domestic and international must pay strict attention and observance to objections based on the applicable res-judicata, prior to assumption of jurisdiction. The competence of the Courts in this regard shall not be in doubt when the issues of res-judicata are handled within the ambits of the law.

Further, the ICJ Statute and other relevant international adjudicatory instruments requires that would-be intervening parties must evidentially indicate the relevance of their interests to the case and the parties before the court. They are to convince the Court that a jurisdictional link exist between them and the parties or the issues before the Court and that their involvement in the case would not jeopardize the interest of any of the parties or the issues. In the sections that follow, this paper shall deal with the intricacies of the principle of res-judicata in international law and incidental adjudicatory processes.

Parties and the Operation of Res-Judicata

It should be noted that the purpose of being referred to as a party with respect to cases filed before the International Court of Justice, whether as initial party or party at the later stage who can be affected by the principle of *res-judicata,* the followings are those that are recognized under the Law;

(i) Those states that can be referred to as states under Article 34 of the statute
(ii) Those states that are members of the United Nations
(iii) Those states that become parties to the statute by special agreements even if they are not members of the United Nations.

Res-Judicata on Non-Appearing Respondents (applicability)

A party to a case may decide not to appear in a proceeding filed against it for the sole purpose of frustrating the case or it could be a decoy to see whether the Court

can use the non-appearance of the party as a basis not to assume jurisdiction, as was the case in *Fisheries Jurisdiction (United Kingdom vs. Iceland)* [1].

Also a non-appearing party may decide that if it failed to appear before the Court, it may provide opportunity for the judgment of the Court not to be complied with or to raise the issue of the lack of jurisdiction of the Court on the matter. This calculated attempt to always deprive the Court of jurisdiction is always ineffective and always becomes negative strategy to the defaulting party.

It ought to be noted that the non-appearance of a party at the hearing of a case does not mean that the Court would no longer hear the case and then take a decision and for the decision to become *res-judicata* under Articles 59 and 60 of the statute, because once a party is properly served and or put on notice with respect to a case, and the said party refused to appear, the party by law is deemed to be a party before the Court and the party who is in Court is at liberty to call on the Court to allow him to prove his case. This can be done under Article 53(1) of the Statute of the Court. Once the Court convinces itself that the case ought to be heard in default, it can be so heard and decided upon without calling it a technical judgment [2].

It is important to note that the fact that a non-appearing state refused to appear before the Court does not render the judgment unenforceable against it. The judgment is enforceable and the doctrine of *res-judicata* is applicable as it was in the *Nicaragua Case (Nicaragua vs. United States)* [3].

Applicability of Res-Judicata on would-be Intervening States- Case by Case Analysis

1. The Monetary Gold Case

There are differences with respect to intervention under Article 62 and intervention under Article 63 of the Statute of the ICJ. We must understand that under Articles 62 and 63 as above mentioned, there is no part of the statute which makes intervention a compulsory exercise as intervention by all standard and

understanding is voluntary. This position is reinforced in the *Monetary Gold Case*,[4] where a request was not made, and the court being mindful that the perceived interest of the Third state would not influence the decision of the Court to the extent of deviating the attention of the Court from the subject matter brought before the Court by the parties in their pleadings.

It is thus important to state that, if the Court is influenced otherwise, this development may affect compliance with the decision of the Court by the judgement Debtor State. In furtherance of this argument, where the Court is so entitled to act, the interests of the third State which is not a party to the case are protected by Article 59 of the Statute of the Court, which provides that: "The decision of the Court has no binding force except between the parties and in respect of that particular case."

2. The East Timor Case

This view was equally stated as being the position of law in the *East Timor Case* [5]. Historically, East Timor has been under Portuguese administration since 1586. It became a Portuguese overseas province in 1896 and its status as such was confirmed by Portugal in 1926. However, due to multi socio-political pressures East Timor, just as its western neighbors was by an Indonesian law integrated into Indonesia and a provisional government was created. It is on record that on 22 February 1991 Portugal submitted an application to the International Court of Justice (ICJ) instituting proceedings against the Commonwealth of Australia, claiming to be acting on behalf of, and in the interest of, the people of East Timor in bringing the claim, while simultaneously defending its own interests.

However, before this time, (i.e. in 1989) Australia had concluded an agreement with Indonesia concerning the delimitation and the exploitation of the continental shelf of East Timor. According to the Portuguese application, Australia, inter alia, infringed the right of the people of East Timor to self-determination. This was the

basis of the case for which the Court observed that, whatever the nature of the obligations invoked, the Court cannot rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State not a party to the case.

Now in order to do justice to this area of study, it is important to pose the following questions and do appropriate findings to them.

The questions are;

(i) Supposing a state considers that it has an interest that has to do with a legal matter to protect and is granted permission to intervene based on the provisions of Article 6 of the Statute of the Court, will the mere participation make the State involved to be bound by the final decision of the Court or will it depend on the position that the intervening State brought before the Court?

(ii) Supposing a state tactically secured to intervene in a particular proceeding and had indicated that it would be bound by the Court judgement, only, but decided otherwise before the proceedings ended. What would be the effect of *res-judicata* on such intervening party?

(iii) How about a situation where one of the parties before the Court did not object to the intervening party application to be made a party whereas the other party objected to the application, what would be the effect of *res-judicata* with respect to the objection of the party and the non-objection by the other party?

To answer the first poser, it should be understood that under Article 62 of the Statute of the Court, a state intervening becomes a party to the case and will be subsequently bound by the judgment given by the Court. A non-party intervener can invoke the doctrine of *res-judicata* against the original parties either in terms of negotiation or with respect to negotiation[6].

In furtherance of this argument, it should be noted that Article 62 set out the procedural framework under which a State that is not a party to a proceeding, but may be affected by its judgement may apply as an intervener for which intervention is based on the need for the avoidance of repetitive litigation, as well as the need for harmony of principle, for a multiplicity of cases involving the same subject-matter that could result in contradictory determinations which obscure rather than clarify the applicable law. In the view of this study, the applicability of Article 62 is to strengthen the doctrine of *res judicata*.

3. Continental Shelf Case

In the *Continental Shelf Case (Tunisia/Libya) Application by Malta for Permission to Intervene*[7], both Tunisia and Libya requested the Court to indicate the principles and rules applicable with respect to issues dealing with the continental shelf claim and the possible effect of such judgment on their boundaries for which Malta intends to be a party.

Malta which felt that the decision on the *Continental Shelf Case* would have effect on its own claim to its continental shelf applied to join in the case. Malta, instead of applying to join as an intervening party, out-rightly applied to join as a participant just to express its opinion to the Court about the pending case. Malta's argument was that its national interest would be affected by the decision of the Court notwithstanding the provision of Article 59 of the Court's Statute[8]. Incidentally, Tunisia agreed that Malta has a legal interest to be protected, but Libya objected to the application of Malta to be made a party to the case. Later on, both Libya and Tunisia opposed the application for joinders/intervening.

The Court in determining the application decided that Malta was only attempting to intervene without taking any responsibility/obligation of a party as recognized under Article 59 of the statute of the Court by which it ought to have been bound [9]. The Court stated that Malta's application cannot succeed and as such the

application for joinder/ intervener failed; because of the nature of the application presented especially as Malta failed to subject itself to the binding force of the Court's judgment [10]. This implies that the court does not intend that its judgments should be nominal comics with ceremonial appendages of international judicial flavors. It judgements is expected to be complied with.

However, in order to overcome what happened to Malta as discussed above, the case of Libya and Malta**,** where Italy brought application for joinder/ intervener [11] is very instructive. In this case, Italy agreed to be bound by the judgment of the Court. In its own declaration, as part of the application filed, it stated that once it was allowed to intervene in the case, it will submit to whatever decision is reached by the Court in conformity with Article 59 of the Court's statute. Notwithstanding, Italy being ready to comply with the judgment of the Court, Libya and Malta opposed the application of Italy on the ground that the application lacks jurisdictional link to the case[12]. Having heard the parties, the Court disagreed with Italy and refused the grant of the application.

There has been no case yet which has been decided by the Court dealing with the relationship between Article 59 and 62 of the statute and the application of *res-judicata* and it is the finding of this study that no state has been granted permission to intervene as a party as distinguished from a non-party. In order to be specific on this issue the United Nations came up with Article 310 of Annex VI, of the United Nations Convention on the Law of the Sea of 1982 which states that 'if a state makes request to intervene and the application is granted, the decision of the tribunal in respect of the dispute shall be binding upon the intervening state party in so far as it relates to matters in respect of which that state party intervened'.

In furtherance and reinforcement of this requirement, Article 39(2) of the Statute of Arab Court of Justice provides that if the Court admits an application to

intervene, the intervening party shall become a party to the dispute and the Court's judgment shall be binding upon it to the extent that the judgment is related to the issues causing it to intervene. Now, from the above provisions, it shows that Article 62 of the Statute of the International Court of Justice is fraught with defects, because of the failure to provide a clear and adequate qualification in relation to the status of a would-be intervening state on one part and as it relates to enforceability and bindingness of the judgment to be given against such an applicant vis-à-vis applicability of the doctrine of *res-judicata*, on the other part. The unavailability of these measures implies a weakness of the ICJ judgements in terms of compliance between parties.

Therefore, as suggested by Rosenne [13], and to which I agree; the provisions of Article 59 and Article 63 are consistent with each other because if a state is granted leave to intervene under Article 63, it is assumed that the status of intervening party will be assigned to such a state, and such a state will be bound by the construction in the judgment, however the status of an intervening state under Article 62 is of course not clear and always depends on other feasibly remote factors. Therefore, Article 59 of the statute ought to provide in principle an adequate and sufficient protection with respect to the application of *res-judicata* to non-party states whether in the capacity as intervening as a non-party or otherwise.

It should also be understood that if the intervening state does not establish in its application the jurisdictional link, with the original party on record, then it should be able to participate as a non-party intervener and not as a party. This imply that once it is established that it has a legal interest which would be affected by the Court's judgment under Article 62, the Court is duty bound to join such state party.

The critical point of finding in this study in the circumstance of the operation of Article 62 is the fact that a pronouncement of non-joinder may create other

problems incidental to compliance with whatever judgement that would be made in the case. Therefore, we can rightly sum up that there exist no *res-judicata* effects on a would-be intervening state until such a state has been made a party called "intervening party" and the basis of the res-judicata would only be to the extent of such intervention.

4. Gulf of Fonseca Case

To show that the position of the Court confirmed the position of the law above, the case of, *Land, Island and Maritime Frontier Dispute (El Salvado/Honduras) Nicaragua Intervening* [14] is a good example where the two Countries, that is El Salvador and Honduras notified the Court that there existed a *Special Agreement* they entered into dealing with various associated disputes, at that point, Nicaragua applied for intervention based on Articles36 (1) and 62 of the Statute of the Court. This intervention was to deal with the adjacent maritime area and the *Gulf of Fonseca* [15].

Nicaragua with the background knowledge of the decision of the Court in the Continental Shelf cases stated in its application for intervention that it intends to subject itself to the binding effect of the decision that will be given by the Court. While Honduras did not object with respect to the application for intervention, El-Salvador objected [16]. This study found that the dispute with respect to the Gulf of Fonseca is dated back to the 17th century. However, a Treaty concluded between the two States of Nicaragua and Honduras on 7th October 1894 excluded the participation of El Salvador. The three nation states were Spanish colonies and were administered by Spain until their individual nation's independence from Spain.

During the period of Spanish administration, the Gulf of Fonseca was treated as a common heritage of these nations for which the American Journal of International law found that since each states lay claim to parts of the Gulf adjacent to it, the idea of community interest should not arise.

The Court eventually ruled in favour of Nicaragua after hearing all the arguments of the parties being same on the fact that Nicaragua established that, it has interest of a legal nature as it concerns the waters of the Gulf of Fonseca. The Court observed that under Article 62 no other state would have been allowed to intervene without the consent of the two original parties before the Court[17]. The Court stated that the intervening state does not become party to the proceedings and neither does it acquire the right and obligations which is attached to a party under the Statute and Rules of the Court and the general principles of procedural law.

During the hearing of the merit of the case, Nicaragua backpedalled on its position earlier taken wherein it stated that it would be bound by the judgment arguing that it is protected under Article 59 of the statute of the Court. The Court agreed with Nicaragua's position of backpedaling because a non-party to a case, just like Nicaragua, whether or not admitted 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.

In the case at hand, it could be seen that El-Salvador requested the Court not to grant Nicaragua's application and none of the two parties before the Court agreed or consented that Nicaragua's status should be affected by the judgment of the Court. The Court therefore concluded that as a result of the foregoing, the judgment of the Court is *res-judicata* either against or for Nicaragua [18].

In furtherance of the foregoing, this study is of the view and opines that the judgment of the Court cannot form the basis of *re-judicata* with respect to a would-be intervening state that does not intervene in that case as a "party" [19]. This means that, if a state intervened in respect of a case as a "non-party intervener", such a state is not bound by the judgment and the issue of *res-judicata* is not applicable to such a state.

This is because of the conventional and international law principle that before a Court and in this instance, the International Court of Justice would have jurisdiction in a case, there must be 'state consent' of the parties on whom the judgement would be binding[20].

Many people however criticized this judgment and the position of the law. Even Judge Oda in his dissenting judgment stated;

> In my view, Nicaragua, as a non-party intervener will certainly be bound by this judgment in so far as it relates to the legal situation of maritime spaces of the Gulf [21].

Judge ad-hoc, Torres Bernadez, notwithstanding that he did not dissent in his judgment, he however observed as follows;

> In the circumstances of the present case, the judgment is not *res-judicata* for Nicaragua …the effects of the judgment other than *res-judicata* is on a non-party state intervening under Article 62 of the statute……[22]

In the opinion of Judge ad-hoc Torres Bernadez that the limited right that is granted to a non-party intervener ought not to be left hanging without clothing it with some limited obligation [23].

5.Land/Maritime Boundary Disputes Between Cameroon & Nigeria

The ICJ took its position to bear in the *Land and Maritime Boundary Disputes Between Cameroon & Nigeria (Application for Intervention by Equatorial Guinea)*[24]. Further, it is on record that on 30th June 1999 Equatorial Guinea filed an application for permission to intervene in the case between Cameroon and Nigeria pursuant to Article 62 of the Statute. The main object of its intervention was "to protect [its] legal rights in the Gulf of Guinea by all legal means" and "to inform the Court of Equatorial Guinea's legal rights and interests so that these may remain unaffected as the Court proceeds to address the question of the maritime boundary between Cameroon and Nigeria".

It is on record that Equatorial Guinea in its submission underlined that its intervention only concerned the aspects of the maritime boundary and furthermore that it did not seek a determination of its own maritime boundaries with those of Cameroon or Nigeria because these should be determined by negotiation. It only sought assurance that the boundary to be determined by the Court would not cross over the median line with Equatorial Guinea. To this extent of not extending the Court's jurisdiction by means of formulating new issues that are not within the claims of the original parties, the Court asked the parties to address it, since there was merit in the application of Equatorial Guinea.

While Cameroon informed the Court that it had no objection in principle to the intervention, Nigeria left it to the Court to determine the suitability or otherwise of the permission sought by Equatorial Guinea to intervene. The Court found that Equatorial Guinea had sufficiently established that it had an interest of a legal nature which could be affected by the judgment and that the object pursued by Equatorial Guinea, namely to inform the Court of its legal rights which are at issue in the dispute, was a valid object under the rules governing intervention. The Court further found that the argument on the jurisdictional link as applied to the *El Salvador/Honduras case has to be maintained in order to enhance compliance with the decision of the Court. On this basis, Equatorial Guinea's application was granted.*

Thus, Equatorial Guinea in this case applied to intervene under Article 62 with the conditions that it does not seek to be a party to the case that was filed in Court. Both Cameroon and Nigeria did not object to the application filed by Equatorial Guinea. However, Nigeria observed in its letter to the Court that Cameroon interpreted Equatorial Guinea position as not seeking to intervene as a party but as a third party whereas Cameroon stated that Nigeria cannot take the position of Equatorial Guinea.

However, Equatorial Guinea in a further communication to the Court sought the status of a non-party intervener. The Court based on its decision in El Salvador/Honduras granted Equatorial Guinea application for intervention only to the extent and for the purpose set out in the application for intervention as a non-party. As could be seen from the decision of the Court, if Equatorial Guinea have the intention to intervene in the case as a party, it shall have established a clearer and valid jurisdictional link with the countries originally on record; that is Cameroon and Nigeria; because this is the requirement for the success of the application but not the only requirement in order to allow *res-judicata* to become operational.

The above position of the Court was confirmed in another matter which was *Sovereignty Over Pulau Ligitan and Pulau Sipadan (Indonesia/ Malaysia) Application for Intervention by Philippines* [25]. In this case also, Philippine filed an application for intervention under Article 62 of the statute of the Court and stated in its application that it does not seek to be a party to the case as it affects the sovereignty over the places called Pulau, Ligitan and Pulau Sipadan. Both Indonesia and Malaysia however opposed the application for intervention.

6. El-Salvador/Honduras Case

The Court's observation was that, it has already decided in *Land, Island and Maritime Frontier Dispute (El-Salvador/Honduras) Application to Intervene by Nicaragua* and the Court equally had recourse to *Land and Maritime Boundary Dispute Between Cameroon/Nigeria (Application by Equatorial Guinea to Intervene)* that a valid link of jurisdiction that is between a would-be-intervener and the parties originally on record is not a requirement for the success of the application but the procedure of intervention is to make sure that a state possibly with affected interests may be permitted to intervene even when there is no jurisdictional link.

The study found that Philippines initially filed a request on 22 February 2001 to be given copies of the pleadings and documents of the case, but this request was found

inappropriate by the Court and denied. On March 13, 2001 the Philippines submitted an application to intervene in the case, on the basis that the outcome of the case might have "direct or indirect bearing on the matter of the legal status of *North Borneo*, which is a property of the Philippines. It should be noted that this application was brought more than two years after the commencement of the case. The original parties made submissions to the Court that the application of Philippines was incompetent having been filed out of time and that the Philippines have not demonstrated that it possessed any interest of a legal nature which might be affected by the judgement of the Court in line with Article 62 of the ICJ Statute. Malaysia specifically argued that since the request of the Philippines had no proper object definable in law, the Court should not oblige the request.

The Court on its part ruled that jurisdictional link was not necessary for the grant of permission to an intervener and that Philippines was within time to file its application. However since the judgement of Court must carry the force of law and as such cannot act in vain, the Court found in agreement with the views of Malaysia, that Philippines had no proper object, implying that Malaysia would have no specific role to play in satisfaction of the judgement of Court. This study thus concludes on this issue that where the Court finds that a party would only play a nominal role both at the proceedings and after the judgement, it was not necessary to grant permission to such a party in furtherance of the principles of *res judicata*.

On the other hand, it is pertinent to discuss the issue of intervention as it concerns an application under Article 63 of the Statute of the International Court of Justice in order to be sure that justice is done with respect to this work. It is the Law that under Article 63 of the statute of the Court, that the construction of the judgment will be equally binding and have the force of res-judicata as far as an intervening state is concerned and that the res-judicata will be interpreted as far as the convention is concerned.

7. Haya de la Torre Case

In *Haya de la Torre Case (Columbia vs. Peru)* the Court to treated the action as a declaration to intervene in respect of a case before the Court pursuant to Article 63 of the statute of the Court. At the other end, Cuba in its own declaration stated its position as it concerns the construction of the Havana Convention and its general view concerning the issue of diplomatic asylum. Peru being an original party to the case seriously contested the application for intervention insisting that the application cannot be said to be an intervention but a third-party state intervention. The Court stated that in every intervention to the proceedings, in a case, a declaration filed as an intervention only acquire that character (as far as the law is concerned) if it actually relates to such matter of the pending proceedings before the Court[26].

In view of the foregoing, it is necessary to assert that the origin of the Colombian-Peruvian Asylum case lies in the asylum granted on 3rd January, 1949, by the Colombian Ambassador in Lima to M. Victor Raúl Haya de la Torre, Head of the American People's Revolutionary Alliance, a political party in Peru. On 3rd October, 1948, a military rebellion broke out in Peru and proceedings were instituted against Haya de la Torre for the instigation and direction of that rebellion. He was sought out by the Peruvian authorities, but without success, and after asylum had been granted to the refugee, the Colombian Ambassador in Lima requested a safe-conduct to enable Haya de la Torre, whom he qualified as a political offender, to leave the country. The Government of Peru refused, claiming that Haya de la Torre had committed common crimes and was not entitled to enjoy the benefits of asylum, as such should be allowed to face prosecution. Being unable to reach an agreement, the two Governments submitted to the Court certain questions concerning their dispute; these questions were set out in an Application submitted by Colombia and

in a Counter-Claim submitted by Peru. This view being conclusions deduced from documents relating to the *Columbia vs. Peru (Cuba Intervening).*

The Court also took note that Cuban memorandum attached was substantially devoted to the judgment of November 20th, 1950 which was already decided with the authority of *res-judicata*. The Court granted Cuba application to intervene as the Havana Convention was said not to have been interpreted before now and neither has it acquired the effect of *res-judicata*. The Court also took note that Cuban memorandum attached was substantially devoted to the judgment of November 20th, 1950 which was already decided with the authority of *res-judicata*. The Court granted Cuba application to intervene as the Havana Convention was said not to have been interpreted before now and neither has it acquired the effect of *res-judicata* [27].

Therefore, it is not in doubt that an authoritative interpretation as it relates to a multilateral treaty by any authoritative and international judicial body such as International Court of Justice may have far reaching implications in another subsequent case but it cannot serve as a res-judicata because if it is allowed to be, there would be a contradiction to Articles 59 and 60 of the statutes of the Court and Article 94 of the United Nations Charter especially in relation to the fact that jurisdiction of the Court would be derived when the State consent to the jurisdiction of the Court.

Application of Res-Judicata in Conditions of Multilateral Treaties

Furthermore, in respect of multilateral treaty where the state parties are involved in the same instrument as *erga omnes* as was illustrated in the case of *Aegean Sea Continental*[28], the ICJ perceived that although under Article 59 of the statute and in the *Namibia Case* [29] the Court decided that the termination of the mandate and the effective declaration of the illegality of South Africa's presence in Namibia are all

opposed by all the states by way of barring *erga omnes* which has to do with the legality of the situation detected as a violation of International Law.

Accordingly, in this case, two legal principles emerged and that is, "res-judicata and "e*rga omnes*". I would rather suggest that States that are intervening under Article 63 of the Statute of the ICJ with respect to pending proceedings will be expected to be bound by reasoning and the operative part of the judgment relating to the construction of the convention in place as it concerns *res-judicata* whereas those states which may not have intervened are persuaded by the reasoning only as to the basis of the legal view or interpretation of the convention in place [30].

Conclusion

The paper has considered the various sides and issues related to res-judicata as a judicial instrument of competence of a court. Various cases case laws have been analyzed to show the application of the principle intended to ensure that there is an end to litigation once and issue has been properly determined by a Court of competent jurisdiction. Thus, state parties seeking to be joined as interveners do so under the clear understanding that as parties they are bound by the judgment of the ICJ.

Thus, the essence of such interveners is to prevent a re-litigation of the issues once judgment has been entered between the parties. Secondly, where a party seeking to be joined is refused, then the court could have done so under the condition that there is no jurisdictional nexus for which the interest of the party if not represented would be impaired. For instance in the *Cameroon vs. Nigeria case* where Equatorial Guinea applied to intervene, while Cameroon objected to the Intervening conditions, Nigeria left it to the decision of the Court. Upon proper evaluation, the Court found that the intervention of Equatorial Guinea would prevent future re-litigation. Secondly the Court found the intervention would not affect the interest of the original parties before the Court.

Recommendations

The Study thus recommends as follows:

1. That since Article 34 of the ICJ Statue define the particulars of state parties, territorial nationalities that meets these requirements can bring application for intervention where matters that affects their territorial interest are the issues before the Courts.
2. Secondly, nation states that are member nations to the United Nations are also within the competences to come under protection of res-judicata where issues that affects their capacities are under adjudication processes.
3. Those states that become parties to the Statute by special agreements even if they are not members of the United Nations can seek to be joined as intervening parties that are to be bound by the Court's judgement.
4. Since Article 59 of the Statute of ICJ requires that parties seeking to join or intervene in order to benefit from the principle of res-judicata must be prepared to take responsibility or obligation under the judgment, such parties must evaluate their long term national interest and not the interest of the politicians at the time of the application.
5. In the case of El-Salvador/Honduras the Court held that jurisdictional link was not necessary to the admission of a party whose interest was well defined although remote in nature. This imply that parties seeking to intervene must show legal rights coupled with identifiable interest.
6. It should be noted that in every intervention to the proceedings, a declaration filed as an intervention only acquire that character if it actually relates to the pending proceedings before the Court. Thus, Intervention Applications should directly relate to the matter before the court and not extraneous in nature.

References and Notes

[1] The case in point draws attention to the contemplation of Article 53, paragraph 1, of the ICJ Statute, that "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". In furtherance, Paragraph 2 of that Article, went further to state that: "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." Based on these developments, the Court proceeded to adjudicate on the case despite the refusal of Iceland to neither enter appearance nor send representative.

[2] The fact that Iceland sent several opposing correspondences implying that it cannot be bound by the decision of the Court, indirectly confer jurisdiction on the Court.Thus it becomes imperative to note that the non-appearance of a party in some cases could be a ploy not to comply with the judgement of the Court. The full judgement of this case can be found in: http://www.worldcourts.com/icj/ eng/decisions/1974.07.25_fisheries1.htm. Visited 25/10/2016. Further reading could be directed to the views of :Alexandro., S. in *"Non-Appearance before the International Court of Justice" 33 Column J. Transnat'L*(1995), pp 41-72, at p. 60

[3] In this case Nicaragua filed a case against the United States. The United States tried to object to the jurisdiction of the Court to hear the case, but the Court decided that it had jurisdiction. When the United States lost the decision on jurisdiction, it refused to appear before the Court again. Upon this development, the Court decided that though the United States have refused to appear before the Court with respect to the merit of the case, it was bound by the final decision of the Court. The Court made the following findings:

(i) **The United States breached its customary international law obligation – not to use force against another State: (1) when it directly attacked Nicaragua in 1983 – 1984; and (2) when its activities with the contra forces resulted in the threat or use of force** (see paras 187-201).

(ii) **The Court held that the United States could not justify its military and paramilitary activities on the basis of collective self-defense.**

Source: http://ruwanthikagunaratne.wordpress.com/2012/11/15/nicaragua-vs-us-case-summary/ visited 29/10/2016

[4] The Statute provides that a State that is not a party to a case but may be affected by the decision of the Court is free to apply for permission to intervene in accordance with Article 62 of the Statute, which provides that:
"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." Further details may be accessed at: http://www.mpil. de/en/pub/research /details/publications/ institute/wcd.cfm? fuseaction_wcd=aktdat&aktdat =302080000200. cfm. Visited 29/10/2016.

[5] Further details may be accessed at: http://www.mpil.de/en/pub/research/ details/publications/institute/wcd.cfm?Fuseaction_wcd=aktdat&aktdat=dec 0210.cfm. Visited 29/10/2016

[6] Details of this position can be seen in the works of, Arechaga. J., *"Intervention under Article 62 of the Statute of International Court of Justice in Bernhardt.* R. O. Mosler. H. (eds,), *Volkerrechals Rachsor drug International, Gerichs Harkeit Menschenrechte, (New York: Spring Veriage, Berlin, Heidelberg, 1983),* pp. 453-456 at p.45

[7] After evaluation of the circumstances of Malta application, the Court reached a conclusion refusing the joinder of Malta on the 14th of April 1981,vide its judgment, ICJ Rep (1981) p.3. Full details could be found in: http://www. icj-cij.org/docket/index.php?sum=633&code=tl&p1=3&p2=3&case=63&k=c4&p3=5.Visited on the 29/10/2016. It should further be noted that the application of Malta represented an *indirect expression that it was not willing to comply with the judgment*. However, since Malta could not show how its interest of a legal nature would be affected by the judgment of the Court, the application was rejected.

[8] Article 59 **of the ICJ Statute provides that:**
"The decision of the Court has no binding force except between the parties and in respect of that particular case".
Full details of the Statute of The International Court of Justice could be found in:
http://www.icj-cij.org/ documents/?p1=4&p2=2&p3=0. Visited on 29/10/2016.

[9] The implication of Malta's position is that it wants to use the Court to achieve some benefits without taking responsibility. This means that, should the judgment require Malta to perform some acts in satisfaction of the claims of the other parties, Malta was not going to comply with such obligation. Since the Court is not a charitable organization, it rejected Malta's application, summarized in this study as 'benefit without responsibility'.

[10] It should be noted that Article 59 *inter alia* holds the ground for the application of *res judicata* and reinforces the importance and relevance of compliance to the judgments in order to give effect to the force of law embedded in the Court's Statute. See: ICJ Rep (1983) p. 30 para 23.

[11] The application brought by Italy for intervener was argued by the other parties who tasked Italy to prove that the application did not constitute an abuse of Court process not having concrete claims recognized by international law. In order to convince the Court on the admissibility of its application, Italy argued that, its 'interest of a legal nature' was invoked by virtue of the Special Agreement entered between Malta and Libya and that although it was not a party to the Agreement it was willing to comply with the decision of the Court. Full details of the Courts proceedings and judgment could be found in: http://www.worldcourts.com/icj/eng/decisions/1984.03.21_continental_ shelf1.htm. Visited 29/10/2016.

[12] The issue of jurisdictional link was canvassed at the hearing and parties including Italy were called upon to address the Court on that issue. The Court found that since Italy's claim borders on State policy rather than 'interest of legal nature' as provided for in Article 62, the Court cannot submit to Italy's State policy outside the framework of the Court's Statute. Full details of the contentions and decision of the Court can be found in: http://www.worldcourts.com/icj/eng/ decisions /1984.03.21_continental_shelf1. Visited on 23/10/2016

[13] Rosenne, S., *The Law and Practice of the International Court of Justice,* (Martinus Nijhoff) 1965, p.1650

[14] The case came before the court in the form of joint notification by Honduras and El Salvador wherein they transmitted a Special Agreement they entered submitting their dispute to the decision of the Court with respect to the Land, Island and Maritime Frontier Dispute. The Special Agreement specified that the case should be heard by a three-person Chamber in addition to an ad hoc judge to be nominated by the two parties. Details of these proceedings could be found in:

http://www.mpil.de/en/pub/research
/details/publiccations/institute/wcd.cfm?fuseaction_wcd=aktdat&aktdat=dec0109. cfm

[15] Though Nicaragua applied to the full Court for intervention, the application was referred to the Chamber and it was granted on the ground that Nicaragua proved its interest of legal nature before the Chamber. The Court found that the claims of El Salvador that the waters of the Gulf should be subject to a condominium of the coastal States while Honduras' argued that, the gulf should be seen as a "community of interests". In view of these claims the Chamber found that both arguments embraced Nicaragua as one of the three riparian States of the Gulf and for that reason should be allowed to intervene.

[16] Full details of the proceedings and judgment could be obtained from: http://www.icj-cij.org/docket/files/75/6657 .pdf. Visited 29/10/2016.

[17] Article 62 **provides as follows:**

l. 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.
2 It shall be for the Court to decide upon this request.
The literal meaning of Article 62 did not anticipate a situation where joinder/intervener decisions are subject to the agreement of the main parties. The provision of Article 62(2) is unambiguous and is not capable of any other interpretation. Secondly, where the Court perceives that the intervention of a third party could assist the Court in the just determination of the case, the Court can ask a party to file processes to that effect. See Article 63, ICJ Statute.

[18] **The Court acted on the provisions of** Article 63**, which states thus;**

1. Whenever the construction of a convention to which states other than those concerned in the case are parties is in question, the Registrar shall notify all such states forthwith.

2. Every state so notified has the right to intervene in the proceedings; but if it uses this right, the construction given by the judgment will be equally binding upon it.

It is important to note that the essence of this provision under which the Court acted is to show that the Court does not intend nor desire that its judgements should not be obeyed or frustrated. Thus, irrespective of the parties and their various inclinations based on individual states' interest; the Court can soumoto join a state if it utilizes its right under Article 63 on the invitation of the Court.

[19] Ibid. Article 63

[20] Ibid. Article 63

[21] Judge Shigeru Oda's dissenting judgement could be seen in details at:http://www.icj-cij.org/docket/files/75/6681.pdf. Visited 30/10/2016

[22] Judge ad-hoc, Torres Bernadez observation could be found at the website: http://www.icj-cij.org/docket/ index. php? sum=390 &code =sh&p1=3&p2=3&case=75&k=0e&p3=5. Visited 30/10/2016

[23] Ibid. in addition to ICJ Rep. (1999) pg. 1029

[24] *Full details of these proceedings could be found in the website:http://www.mpil.de/en/pub/research/details/publications/ institute/ wcd. cfm?fuseaction _wcd= aktdate& aktdat=dec0301.cfm. Visited on the 30/10/2016.*

[25] Details of these proceedings could be found at: http://www.icj-cij.org/docket/files /102/7700.pdf

[26] Further details of this case could be found at: http://www.icj-cij.org/docket/files/1 4/ 1939.pdf. Visited 19/10/2016, and ICJ Rep (1951) p. 72

In addition to the views expressed in: ICJ Rep (1951) p. 76, in this regard, it is important to note that the applicability of the doctrine of ***res-judicata*** also rest on the definitiveness of the judgement of the ICJ. Thus, where a judgement is ambiguous, it opens opportunity for non-compliance and negatively impacts on the *res-judicata* of the case. A case in point is the concluding part of the judgement referred to, as reproduced below:

> "The Court has thus arrived at the conclusion that the asylum must cease, but that the Government of Colombia is under no obligation to bring this about by surrendering the refugee to the Peruvian authorities. There is no contradiction between these two findings, since surrender is not the only way of terminating asylum. Having thus defined in accordance with the Havana Convention the legal relations between the Parties with regard to the matters referred to it, the Court has completed its task. It is unable to give any practical advice as to the various courses which might be followed with a view to terminating the asylum, since, by doing so, it would depart from its judicial function. But it can be assumed that the Parties, now that their mutual legal relations have been made clear, will be able to find a practical and satisfactory solution by seeking guidance from those considerations of courtesy and good-neighbourliness which, in matters of asylum, have always held a prominent place in the relations between the Latin-American republics.

For these reasons, the court, on the principal Submission of the Government of Colombia and the first Submission of the Government of Peru, unanimously, finds that it cannot give effect to these Submissions and consequently rejects them; on the alternative Submission of the Government of Colombia and the second Submission of the Government of Peru, by thirteen votes to one, finds that Colombia is under no obligation to surrender Victor Raul Haya de la Torre to the Peruvian authorities; on the third Submission of the Government of Peru, unanimously, finds that the asylum granted to Victor Raul Haya de la Torre on January 3rd-4th, 1949, and maintained since that time, ought to have ceased after the delivery of the Judgment of November 20th, 1950, and should terminate".

Full details of the judgement in this case could be found in: http://english.dipublico. com.ar/asylum-case-colombia-v-peru-haya-de-la-torre-case-judgment/Visited 19/10/2016. Underlining is mine, to show how ICJ judgment creates problems of *res-judicata* and consequent non-compliance.

[27] With respect to the views in: ICJ Rep (1978) pg. 16, it is imperative to state that the Cuban intervention application and consequent judgement is all about the operability of Article 63 of the statute of the Court; where an intervening state must show what its intervention is to be in relation to the contentious proceedings and may confine its intervention to the direct construction of the convention to which it is a party and as such prefers to protect its position. Once a would-be-intervening state shows this fact in its application, there is the probability of success of its application and the intervening state would be bound by the judgment as far as the construction of the convention is concerned.

The Greek-Turkish continental shelf dispute resulted from oil exploration in the Aegean Sea. Greece began to search for oil in the early 1960s. On November 1, 1973, Turkey responded by granting twenty seven exploration permits in the Aegean to the Turkish Petroleum Company. Turkey also published a map, illustrating planned exploration and research activities, which used a median line between the Greek and Turkish coasts to divide the Aegean continental shelf. In a

diplomatic note, Greece claimed that the Turkish delimitation disregarded the continental shelves of the eastern Greek islands.

[28] Turkey replied that the delimitation was equitable. It should be noted that, without a resolution of the dispute, Turkey sent its research vessel *Candarli* into the disputed waters in May 1974. In July 1974, Turkey further granted four additional concessions in the Aegean to the Turkish Petroleum Company. Greece objected to both actions and at the 1975 NATO summit in Brussels, the Greek and Turkish Prime Ministers after deliberations issued a joint communiqué (Brussels Communiqué) regarding the resolution of the Aegean continental shelf dispute. The Brussels Communiqué stated that the two nations should employ the International Court of Justice (ICJ) to settle the seabed dispute and utilize negotiation to solve other problems. Upon presentation of a unilateral application by Greece, the ICJ subsequently rejected the basis of Greek unilateral application. First, the ICJ denied the Greek request for interim measures due to insufficient evidence of "irreparable prejudice" to Greek rights in the Aegean seabed. Secondly, the ICJ found that it lacked jurisdiction to adjudicate on the merits of the dispute. Thus, this lack of jurisdiction puts the parties in a *status quo ante,* implying that parties in the future may in similar situations approach the Court. Indirectly, this position of the Court has an unqualified effect with the *res-judicata* of the case and since *no jurisdiction implies no verdict*, compliance is by no measure required. It is clear that any decision of the Court with respect to the status of the 1928 Act, even if it were found to be a convention in force or the one which is no longer in force may definitely have implications as it concerns the states but does not include Greece and Turkey.

[29] Pursuant to the Advisory Opinion of the ICJ as seen in the documented I.C.J. Reports 1971, p. 16 at p. 56, para 125; it is clear that the obligation on States not to recognise the consequences of a serious breach of international law also extends to the legislative and administrative acts of the purported 'State', including the acts of bodies whether internal to that state or in relation to other States, that purport to act on behalf of the purported 'State'. Thus, in the *Namibia*Advisory Opinion,at paragraph 125, the ICJ stated that:

> *"...official acts performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid..."* (emphasis added)

This position of the Court did not invalidate administered issues such as; birth, marriage and death registrations, as found in the following words; *"the non-recognition of South Africa's administration of the Territory should not result in depriving the people of Namibia of any advantages derived from international co-operation"*. The Court further observed that:

> *"South Africa, being responsible for having created and maintained a situation which the Court is found to have been validly declared illegal, has the obligation to put an end to it. It is therefore under obligation to withdraw its administration from the Territory of Namibia. By maintaining the present illegal situation, and occupying the Territory without title, South Africa incurs international responsibilities arising from a continuing violation of an international obligation. It also remains accountable for any violations of its international obligations, or of the rights of the people of Namibia. The fact that South Africa no longer has any title to administer the Territory does not release it from its obligations and responsibilities under international law towards other States in respect of the exercise of its powers in relation to this Territory. Physical control of a territory and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States."*(emphasis added)

The Court in this advisory opinion again, sustained the argument that its judgements impeded or fetter the possibility of compliance in certain situations, by way of ambiguity in its decisions; for instance how is it possible to "exert physical control of the territory of a State" without affecting on its sovereignty? Secondly, does it not affect the res-judicata principle in relation to the case should issues arise due to the ambiguity of the decision?

[30] This views are based on Legal Consequences for States of the Constituted Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) and Advisory Opinion of the ICJ as documented in the I.C.J. Reports 1971, p. 16 at p. 56, para25.