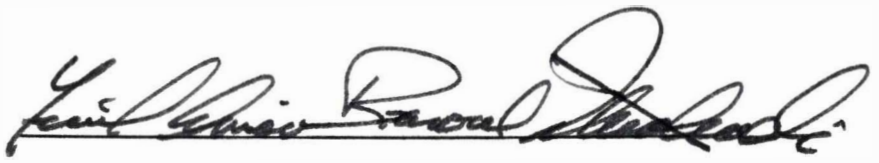
12-2020

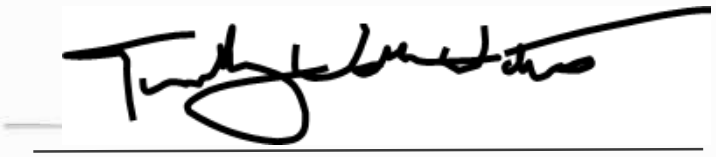
Construction of a Dispute-Resolution Framework Under the International Judicial System for the Settlement of the Inter-Korean Conflict Over the Northern Limit Line: Operating the Advisory Proceedings of the International Court of Justice

Hyun Jin Kim

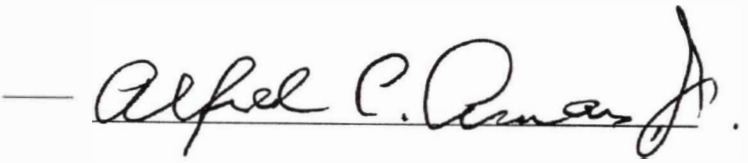
Doctoral Committee



Professor Feisal Amin Rasoul Istrabadi
Professor of Practice



Professor Timothy William Waters
Professor of Law and Val Nolan Faculty Fellow



Professor Alfred C. Aman, Jr.
Roscoe C. O'Byrne Professor of Law Emeritus

Date of Defense

November 20, 2020

CONSTRUCTION OF A DISPUTE-RESOLUTION FRAMEWORK UNDER THE INTERNATIONAL JUDICIAL SYSTEM FOR THE SETTLEMENT OF THE INTER-KOREAN CONFLICT OVER THE NORTHERN LIMIT LINE: OPERATING THE ADVISORY PROCEEDINGS OF THE INTERNATIONAL COURT OF JUSTICE

Hyun Jin Kim

Submitted to the faculty of Indiana University Maurer School of Law

in partial fulfillment of the requirements for the degree

Doctor of Juridical Science

December 2020

Accepted by the faculty, Indiana University Maurer School of Law, in partial fulfillment of the requirements for the degree of Doctor of Juridical Science.

Doctoral Committee

Professor Feisal Amin Rasoul Istrabadi
Professor of Practice
Professor of Practice, IU School of Global and International Studies
Visiting Professor by Courtesy, IU School of Public and Environmental Affairs
Founding Director, Center for the Study of the Middle East
Associate Director, Center for Constitutional Democracy

Professor Timothy William Waters
Professor of Law and Val Nolan Faculty Fellow
Associate Director, Center for Constitutional Democracy

Professor Alfred C. Aman, Jr.
Roscoe C. O'Byrne Professor of Law Emeritus

Date of Defense

Hyun Jin Kim

CONSTRUCTION OF A DISPUTE-RESOLUTION FRAMEWORK UNDER THE INTERNATIONAL JUDICIAL SYSTEM FOR THE SETTLEMENT OF THE INTER-KOREAN CONFLICT OVER THE NORTHERN LIMIT LINE:

OPERATING THE ADVISORY PROCEEDINGS OF

THE INTERNATIONAL COURT OF JUSTICE

To construct a dispute-resolution framework for the inter-Korean conflict over the Northern Limit Line ("NLL Conflict") under the international judicial system, this dissertation proposes an advisory proceeding of the International Court of Justice ("ICJ") as the most promising alternative. It has proven difficult to draw a negotiated solution to this decades-long conflict, despite each of the respective State parties involved in the NLL Conflict presenting various arguments and claims about the valid legal status of the NLL. In this context, this dissertation examines the ICJ's contribution to the resolution of international disputes, particularly controversy over the question of laws, through its advisory jurisdiction even in the absence of any involved State's consent. For the purpose of this project, therefore, this dissertation examines the mechanism of the ICJ jurisdictional system with an emphasis on the essential elements required to establish each type of jurisdiction in its advisory proceeding. Through an analysis of relevant advisory precedents, in which not only substantive but also procedural issues were considered, this paper concludes that an advisory proceeding initiated by a competent primary organ of the UN is the most promising alternative for a dispute-resolution framework for the NLL Conflict under the present UN-centered international judicial system. Based on a judicial guidance rendered by the ICJ, North and South Korea are expected to find a more equitable solution to the NLL Conflict through international law.

TABLE OF CONTENTS

INTRODUCTION

In the context of the inter-Korean relations, a conflict over the Northern Limit Line ("NLL Conflict"/"Conflict") collectively refers to the decades-long maritime confrontation between South and North Korea ("the two Koreas"). The Conflict encompasses legal, political, diplomatic, and military disputes over the valid legal status of the line separating the maritime areas of the two sides in the Yellow/West Sea. In the disputed area, the Northern Limit Line ("NLL"/"Line"), which is composed of straight-line segments, is a mid-channel line running between North Korea's shoreline and the Five Northwestern Islands ("FNI") that are solely owned by South Korea as provided in the Korean Armistice Agreement ("KAA"). Starting from the *Han* River Estuary, the Line may be seen as an extension line of the Military Demarcation Line on land ("MDL"), extending to the median point between the mainland China and the Korean Peninsula at its northwestern extremity. In fact, the Line was initially delimited by the US-led United Nations Command ("UNC") for the control of both military and civilian South Korean vessels navigating the Yellow/West Sea in the absence of any mutual agreement between the belligerent parties to the KAA on any delimitation for that maritime area.[1] The Line had acted its role as a de facto maritime demarcation boundary for almost twenty years, until the West Sea Incidents occurred in December 1973. Since then, North Korea has been continually denied its validity and legality under international law, including the KAA.

In seeking a mutually acceptable solution to the NLL Conflict, the two Koreas and the US made repeated efforts to reach out a negotiated settlement in the wake of almost every dispute. At the 346th Military Armistice Commission ("MAC") held in 1973 to deal with the aftermath of the West Sea Incidents, for example, North Korea for the first time suggested a

[1] For more detailed information on the background of the establishment of the Northern Limit Line ("NLL"), *see* Hyun Jin Kim, The Inter-Korean Conflict over the Northern Limit Line: Applying the Theory of Historical Consolidation (August 2015) (unpublished LL.M.-Thesis, Indiana University) at 5—9, *available at* http://www.repository.law.indiana.edu/etd/23/.

new method of maritime demarcation in the disputed area, as well as claiming its right to adjacent territorial waters. Afterward, as a result of the repeated efforts to normalize the stalled relations, prevent accidental military clashes, and promote mutual exchange and cooperation in the disputed area, the two Koreas in 1992 signed off the Agreement of Reconciliation, Non-aggression, Exchanges and Cooperation between the South and the North ("Basic Agreement") along with three protocols. However, there were significant limitations to such instruments, mainly because they failed to redefine the maritime jurisdiction of each side and the maritime demarcation line for the area. The Basic Agreement is defined as a gentlemen's agreement in light of international law, and thus has been deemed ineffective since North Korea's withdrawal from the Nonproliferation Treaty in 1993.

The First *Yeonpyeong* Naval Skirmish in 1999 was the critical juncture when the long-standing confrontation between the two Koreas in the disputed area became a significant security threat to the Korean Peninsula and the wider East Asian region as well. Notwithstanding subsequent efforts, the two Koreas found no solution to the NLL Conflict that had given rise to the skirmish. During the talks, clear differences in their positions toward the NLL arose. While South Korea was experiencing a split in public sentiment in the aftermath of the skirmish, North Korea tried to use the situation to its advantage to ease the economic and trade sanctions that had been imposed on it. On the other hand, the US and the UNC maintained their long-standing support of the validity and effectivity of the Line under the KAA. As will be shown later in this paper, North Korea began to propose alternatives allegedly based on international law in an effort to replace the NLL. These included the *Chosun* West Sea Military Demarcation Line ("CMDL") and the Navigation Order of the Five Western Coastal Islands ("Navigation Order"), which were invoked to undermine the valid legal status of the Line.

In 2002, the Second *Yeonpyeong* Naval Skirmish, which was another heavy blow to the regional peace and security, occurred in the disputed waters, again sparking a controversy over the legality and validity of the NLL. In spite of the heated debate, the US maintained its support of the Line as a de facto maritime demarcation line under the KAA. Accordingly, the US became more reluctant in seeking a negotiated settlement for the Conflict with North Korea, since North Korea recognized neither the validity nor the legality of the Line. Notably, the then-South Korean government kept trying to reach a compromise with North Korea based on the international law of the sea by presenting the West Sea Special Maritime Area for Peace and Cooperation Initiative ("West Sea Initiative") that had been announced at the Declaration on the Advancement of South-North Relations, Peace and Prosperity ("2007 Declaration"). Nevertheless, a concatenation of political factors, such as regime change in South Korea, resulted in a failure to produce an agreement on the Conflict. In all probability, neither of the two Koreas might have been strongly committed to such a new idea, given that no further action was taken as a follow-up measure. The conflicting points of view between the two Koreas over the status of the Line lies at the center of this continuing politico-military confrontation.

The confrontations between the two sides over the NLL reached their peak during the conservative administration that took office in 2008 to the impeachment of President Park Geun-hye stepped in 2017. As soon as President Lee Myung-bak assumed office, his administration repudiated all previous inter-Korean agreements, protocols, and declarations executed by preceding progressive administrations. Amidst this intensified politico-military confrontation, the Sinking of the South Korean Warship *Cheonan* happened, resulting in the death of 46 South Korean sailors near the disputed waters. After this incident, the South Korea took countermeasures, including the total suspension of all trade and exchange with North Korea and enforcement of economic sanctions in cooperation with the US not much later; however, North Korea instigated another military provocation against South Korea by bombing

Yeonpyeong Island, which is one of the FNI. This Bombardment of *Yeonpyeong* Island, as it is known, caused civilian casualties, causing inter-Korean relations to deteriorate beyond all recovery. The Lee administration adopted the extreme hardline policies and the confrontation between the two Koreas came to a climax

When President Moon Jae-in seized power in May 2017, both inter-Korean relations and the US-North Korea relations saw a dramatic turning point, represented by the *PyeongChang* 2018 Olympic Winter Games and the hosting of the summits convened to improve the strained relations and the peaceful settlement of long-term disputes. Prior to this turnaround, the Trump administration had taken a firm stand on the North Korea issue.[2] With tensions growing sharply between the US and North Korea because of North Korea's advanced intercontinental ballistic missile test,[3] the Moon administration of South Korea prepared a negotiation timetable for the States concerned for the denuclearization, as well as execution of a peace treaty.[4] North Korea's participation in the *PyeongChang* Olympics and a subsequent series of diplomatic events, such as the South Korean special envoy's visit to North Korea in March 2018 and the 3rd inter-Korean summit in April 2018, provided a momentum for North Korea to be considered a *normal country*. During a visit in March 2018, the North Korean representatives stated its government's position that North Korea was willing to talk about the denuclearization as well as a total prohibition of any category of weapons against South Korea. The 3rd inter-Korean summit also received a favorable evaluation from the international community, since the heads of the two Koreas agreed to the following: first, construction of a peace regime on the Korean Peninsula—legal peace—through the declaration of the end of the

[2] Donald J. Trump, President of the United States of America, Remarks to the 72nd Session of the United Nations General Assembly (Sept. 19, 2017).
[3] Peter Baker and Choe Sang-Hun, *Trump Threatens 'Fire and Fury' Against North Korea if It Endangers US*, THE NEW YORK TIMES ONLINE, Aug. 8, 2017, https://www.nytimes.com/2017/08/08/world/asia/north-korea-un-sanctions-nuclear-missile-united-nations.html (quoting President Trump's expression that "North Korea best not make any more threats to the United States. They will be met with fire and fury like the world has never seen.").
[4] Chung-in Moon and Timo Kivimaki, *Peaceful Pyeingchang Olympics can lead to lasting Korean peace: View*, EURONEWS, Feb. 9, 2018, https://www.euronews.com/2018/02/09/peaceful-pyeongchang-olympics-can-lead-to-lasting-korean-peace-view.

Korean War and the conclusion of a peace treaty; second, confidence-building—factual peace—between the confronting armed forces by cessation of all hostile acts against each other; and third, complete denuclearization.

As a result of the recent reconciliatory mood created since the Olympics, the two Koreas also agreed upon that the peaceful settlement of the NLL Conflict should be a priority as part of the aforementioned legal and factual peace goals. In the course of the 3rd inter-Korean summit, the Moon administration put economic issues ahead of political and military matters, e.g., resuming economic cooperation that had been stopped by previous administrations and reactivating the *Kaesong* Industrial Complex and the Mount *Kumgang* tourism, whereas North Korea prioritized political and military issues, e.g., lifting sanctions against North Korea imposed by the UN Resolution 2270 and the May 24 Measure imposed by the South Korean government. However, as there was consensus that the NLL Conflict posed a significant problem between them, the 2018 *Panmunjom* Declaration executed at the summit reached an accord concerning the transformation of the disputed waters around the NLL to a peace zone as part of the process for the conclusion of a peace treaty. Significantly, the Korean Central News Agency—the nation's official news agency in North Korea—or the first time used the term "NLL" in referring to the Declaration. In line with the West Sea Initiative, during which the two Koreas reconfirmed the differences of opinions about the status of the Line, the Declaration specifies the establishment of a peace zone for co-fishery and co-development. In an effort to implement the agreement, the government officials of South Korea visited both *Yeonpyeong* Island and *Baekryeong* Island to canvass the views of local residents about the establishment of such a peace zone. The South Korean government asserted, however, that the Line should not be affected by the peace zone and should be maintained as a maritime

demarcation line until the conclusion of an inter-Korean peace treaty.[5] Thus, South Korean officials stated that any negotiation on zone should include discussions with the military authorities. In South Korea, certain actions by the Moon administration in the course of the negotiations, such as presenting a detailed nautical chart of the *Han* River Estuary at a military talk held in January 2019, were widely criticized.

In spite of such diplomatic efforts, however, the final settlement of the NLL Conflict has not yet been achieved, since there is a difference of opinion between the two Koreas about the process. First, the agreements adopted at the 3rd inter-Korean summit were not followed by any specific action plan on how to implement the agreed matters to bring about a resolution of the Conflict. Since it is difficult for the two Koreas to prepare such details, a series of efforts made by both governments paradoxically served to highlight the need for judicial guidance. Second, as observed in the final draft of the 2018 Singapore Declaration executed at the first summit between the US and North Korea in June 2018, it is difficult to come up with a concrete plan solely through high-level political talks. In fact, the representatives of both governments did not accept any pre-packaged deals on the denuclearization at this summit: the US adhered to the Complete, Verifiable, Irreversible Dismantlement ("CVID"), whereas North Korea demanded the lifting of sanctions, the normalization of diplomatic relations, and the withdrawal of the US Armed Forces in Korea as preconditions for a peace agreement. Indeed, the Trump administration aggressively pushed its CVID approach as a precondition for North Korea's demands and asked for a public disclosure of North Korea's nuclear facilities. In any case, the 2nd US-North Korean summit also revealed the ineffectuality such high-level political or diplomatic package deals when not accompanied by practical action plans.

[5] *Ministers visit border islands for discussions on maritime peace zone*, THE KOREA HERALD, May 7, 2018, http://www.koreaherald.com/view.php?ud=20180505000044&ACE_SEARCH=1.

Although the States concerned, including North Korea, made meaningful efforts in accordance with international standards to solve problems that had been building up between them, it seems difficult to resolve the issues between the two Koreas, including the NLL Conflict, solely through political dialog. For the two Koreas to move forward, they must seek help from the established international system the functions beyond political talks conducted entirely between the States concerned. As a precondition to introducing the peace regime to the Korean Peninsula, the NLL Conflict, which is deemed to be the issue requiring urgent attention, should be resolved peacefully and fairly so as to be accorded recognition by the international community.

To construct a dispute-resolution framework under the international judicial system for the settlement of the NLL Conflict, therefore, this paper proposes that the advisory proceeding of the International Court of Justice ("ICJ"/"Court") be invoked. In fact, throughout its advisory proceedings, the Court has rendered judicial opinions for the States involved in international disputes, as well as for the international community on the basis of international law and has established its jurisprudence on both substantive and procedural matters. Political or diplomatic efforts, as noted above, have been turned out to be not plausible, at least with respect to the Conflict. Even if the final agreement will have to go through diplomatic efforts and be made by political decisions of the States involved in this Conflict, such decisions must be drafted with due consideration to internationally accepted rules and principles for the sake of securing legal legitimacy in the international community.

This project holds that the advisory proceeding of the ICJ is the most effective alternative for the peaceful resolution of the NLL Conflict. There are several reasons for this. First of all, the ICJ may exercise its advisory jurisdiction on any legal question at the request of the UN's primary organs, such as the General Assembly of the UN ("UNGA") and the Security Council of the UN ("UNSC"), even in the absence of the state consent. As will be

examined later in this paper, the Court has on occasion established its jurisdiction to give its advisory opinion on questions involving thorny international disputes and conflicts. The Court's opinions, despite having no binding effect on sovereign states, are regarded as highly persuasive and substantively authoritative with respect to points of law. Throughout the Conflict, the two Koreas have developed their own arguments based on a variety of legal rules, principles, or theories in relation to the validity and legality of the Line. Therefore, the Court's opinion about such legal disputes will be notably influential and, as the primary judicial organ of the UN, will contribute to the development of international law in general through exegesis on such arguments. Second, although an advisory opinion has no legally binding force over a sovereign State in the absence of consent from said State, some opinions rendered by the Court through its advisory proceedings have nonetheless played a pivotal role in the final resolution of international conflicts, or at the very least spurred the disputing States to seek a legal solution to their issues. Therefore, given that all the States concerned in the Conflict are intent on settling the issues in accordance with international standards, it seems reasonable for the two Koreas to seek judicial guidance from the Court so that they will receive a fair and equitable resolution. By constructing a dispute-resolution framework under the international judicial system, the two Koreas are more likely to introduce a peace regime to the Korean Peninsula to replace the current armistice system. Furthermore, the international community in its entirety, including the UN, will see its core mission fulfilled through the outcome of this advisory proceeding since that mission includes the maintenance of international peace and security, the peacemaking beyond peace-keeping, and the development of international law.

This dissertation, places more emphasis on procedural issues rather than substantive ones in relation to the advisory proceeding of the ICJ. Chapter I gives an overview of the inter-Korean Conflict over the NLL. The first section will explore the origin of the Line, while the second section will give a brief history of the naval skirmishes between the armed forces of the

two Koreas in the disputed waters. The third section summarizes the political and diplomatic efforts made by the States concerned, including the US, to conclude a negotiated settlement for the Conflict. The last section of this chapter elaborates all arguments, assertions, contentions, and claims presented by the two Koreas throughout the Conflict over the validity, legality, and efficacy of the Line. Chapter II will outline the mechanism of the jurisdiction system of the ICJ. The first section clarifies relevant concepts and the dual jurisdiction system. To explain how the system works in principle, the second section outlines the four basic pillars of the jurisdiction of the Court. The third section will articulate the process of establishing the advisory jurisdiction. Chapter III analyzes the precedents rendered through the Court's advisory proceeding, which have been selected for drawing the conclusion of this project. The second section provides a case analysis on each of the precedents, with priority given to the process that the Court went through for the establishment of its advisory jurisdiction therein. Last, Chapter IV will focus on demonstrating why the advisory proceeding of the Court should be regarded as the most promising dispute-resolution framework under the present international judicial system for the States concerned.

I. THE INTER-KOREAN CONFLICT OVER THE NORTHERN LIMIT LINE

A. Introduction to This Chapter

Rather than presenting a doctrinal discussion on a dispute-resolution framework for the resolution of the NLL Conflict, Chapter I of this dissertation will provide an introduction to the Conflict, focusing on the origin of the NLL, the history of armed conflicts in the disputed waters, and political efforts made by the States concerned to conclude on a negotiated settlement for the Conflict, and the position taken by the two Koreas toward the NLL. To this

end, Section B of this chapter will first examine the origin of the Line by drawing on relevant facts and information disclosed in recent years. Although there is still a great deal of information that remains unrevealed and unconfirmed, it is known, as will be dealt with in more detail later in this paper, that the Line was unilaterally designated by the UNC for its own purposes after the execution of the KAA. Since the negotiating parties to the KAA came to no agreement on the delimitation of maritime demarcation line during negotiations nor in the aftermath, this armistice agreement does not contain any express provision on the maritime delimitation. The parties ended up adopting a basic guideline governing "contiguous" maritime areas in the text of the agreement.

Section C will outline the naval skirmishes that broke out in the vicinity of the NLL between the two Koreas' naval forces. Even though small-scale clashes had occurred previously in the disputed waters, the First *Yeonpyeong* Naval Skirmish is defined as the first-ever head-to-head military conflict between the two Koreas over the Line. Afterward, the confronting naval forces engaged in another military clash, the Second *Yeonpyeong* Naval Skirmish, resulting in casualties on both sides. The two separate military collisions serve as reminders to the concerned States of the need to seek a peaceful settlement of the Conflict so as to prevent any re-occurrence of such incidents.

Section D will enumerate the political and diplomatic efforts made by the governments in the NLL Conflict to seek a negotiated settlement, before and after the two naval skirmishes. However, at issue throughout the efforts was the need to redefine the legal status of the Line and redraw a new maritime demarcation line in the disputed waters based on mutual consent. In other words, throughout the negotiations, the ownership or jurisdiction over the FNI was not in dispute. In fact, at its first official complaint in 1973, North Korea denied the validity and legality of the NLL in the Yellow/West Sea and raised for the first time an alternative demarcation line in an attempt to modify the delimitation of maritime zones in its favor. In the

final text of the Basic Agreement, the two Koreas managed to introduce some guidelines about the maritime jurisdiction in the disputed waters, although the absence of a firm agreement on the delimitation of a new maritime demarcation line eventually led to military conflicts. In bilateral and multilateral talks held between the States at various levels, a new maritime order for the disputed area was not instituted since there was a radical difference of opinion among the parties in defining the validity and legality of the Line. From 2006, the leaders of the two Koreas tried through multiple new proposals to create a peaceful arrangement with regards to the co-development of fishery resources and navigable sea lanes, such as the West Sea Initiative proclaimed in 2007. The two countries also paid more attention to finding a legal solution to the re-delimitation of the Line. However, after the regime change in South Korea in 2008, military tensions between the two Koreas rose, resulting in the Sinking of the South Korean Warship *Cheonan* and the Bombardment of *Yeonpyeong* Island. Ever since these tragic events, the two Koreas' efforts to seek a negotiated settlement on the Conflict have been stalled, even though President Moon Jae-in, who has been more committed to the improvement of inter-Korean relations than his predecessors, assumed the presidency in 2007.

Section E will focus on the dispute over the legal status of the NLL and equitable maritime delimitation, explaining what arguments and claims have been made by each of the two Koreas in terms of international law. Above all, for a better understanding of the research, Sub-Section 1 will explore the major set of principles, concepts and theories of customary and conventional international law which the two Koreas have debated throughout the NLL Conflict in defense of their own positions. Sub-Section 2 of this Section E will introduce the position taken by North Korea and will also articulate the claims made between 1973 and 2007 to modify or replace the Line. North Korea has made its rebuttal to the arguments put forth by South Korea on the basis of customary and conventional international law, asserting that there was a lack of constituent on its part sufficient enough to support South Korea's such arguments.

As will be indicated below, North Korea, in furtherance of its position, refers to the United Nations Convention on the Law of the Sea ("UNCLOS") to define the Line as a violation of the Convention, alleging that it infringes its maritime sovereignty. Moreover, the fact that North Korea takes a completely opposite stand with South Korea on the interpretation of the agreements executed between the States concerned, such as the KAA and the Basic Agreement, will be also examined. Second, Sub-Section 3 will elaborate South Korea's position throughout the dispute by investigating both South Korean experts' opinion and the official opinion publicized by the Ministry of Defense of the Republic of Korea ("ROK MND"). Based on relevant legal sources (i.e., theories and principles of customary and conventional international law, the UNCLOS, the KAA, and the Basic Agreement) South Korean jurists set forth a variety of legal opinions to defend the legal status of the Line as a maritime demarcation boundary. Although there is not a great deal of disagreement with the experts' view, the ROK MND's argument will also be elaborated in this Sub-Section 3. As a competent authority, the ROK MND declares its position with reference to the provisions of the KAA and the Basis Agreement, as well as multiple historical events that might support its argument based on international law.

B. Tracing Back to the Origin of the NLL

In the context of the inter-Korean relations, the NLL refers to a disputed de facto maritime demarcation line running between North and South Korea's western coastal areas in the Yellow/West Sea. It is generally known that this mid-channel line was initially drawn

between North Korea's shoreline and the FNI by a unilateral act of the then-UN Commander, General Mark Clark.[6]

Map 1: Northern Limit Line and the Yellow/West Sea Area
Source: Jon Van Dyke, The Maritime Boundary Dispute between North & South Korea in the Yellow (West) Sea, 38 North (July 29, 2010), http://38north.org/2010/07/the-maritime-boundary-between-north-south-korea-in-the-yellow-west-sea/.

Before the date of its designation was revealed by the declassified CIA report named "the West Coast Korean Islands,"[7] it had been broadly recognized that the NLL was established on August 30, 1953 or, at best, at some point after the end of the Korean War.[8] Due to the failure to reach an agreement on the location of maritime borders, the waters surrounding the Korean Peninsula—especially the Yellow/West Sea—remained a potential powder keg between the two armed forces. Fearing the potential for accidental or intentional hostilities in the future, General Clark designated the Line in the waters to facilitate internal operational

[6] Terence Roehrig, The Northern Limit Line: The Disputed Maritime Boundary between North and South Korea, NCNK ISSUE BRIEF, Sept. 2011, at 1—2.
[7] CENTRAL INTELLIGENCE AGENCY, THE WEST COAST KOREAN ISLANDS (1974), available at http://digitalarchive.wilsoncenter.org/document/114023.pdf?v=d900fbd9e398a7088363eb558f433093 (last visited Oct. 13, 2020) (stating that "no documentation can be found to indicate that the NLL was established prior to 1960.")
[8] Roehrig, *supra* note 6, at 2 (pointing out that "some North Korean statements acknowledge the Line was drawn sometime in the 1950s.").

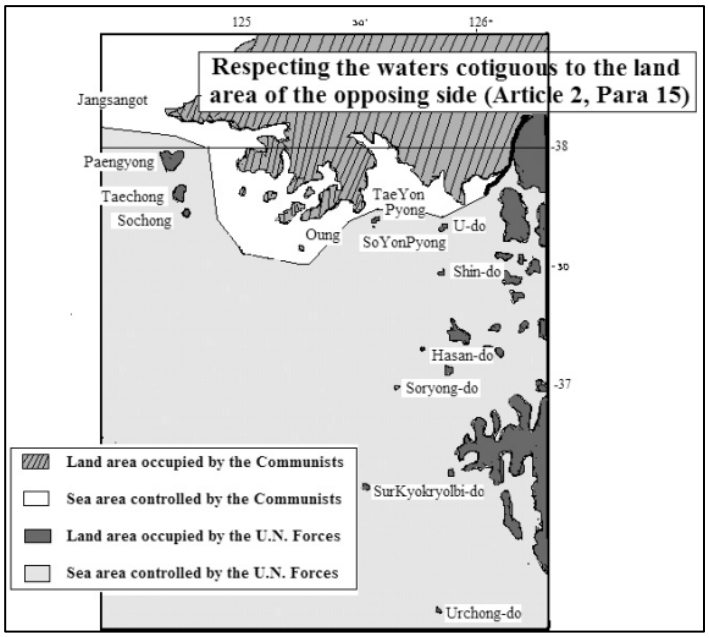
control.[9] Thus, the Line was not originally designed to serve as a maritime demarcation line—rather it was delimited to prevent South Korean naval and fishing boats from advancing far too north, unintentionally or otherwise, and also to restrict military patrols of the UNC forces after the signing of the KAA.[10] The confusion surrounding the origin of the NLL is also demonstrated by the fact that there have been several other names used to refer to the Line, such as the Northern Patrol Limit Line, since the beginning of the Conflict.[11] For all these reasons, it is difficult to find any official documentation with details on the origin of the NLL.

Technically speaking, the NLL has not been integrated into the KAA, so there is no provision defining its location or status in its texts. During the course of armistice talks for ceasefire, the negotiating parties agreed to draw the MDL, along with a two-kilometer width of the Demilitarized Zone ("DMZ"), on either side of the line.[12] They were not, however, able to decide on the establishment of maritime boundaries or to reach agreement on the breadth of territorial waters. The UNC claimed a three nautical miles (nm) zone of territorial waters, while the Communists contended that the territorial waters should be extended for 12 nm off the coastlines.[13] This conflict of opinion was rooted in the interchangeable use of the terms "coastal waters" and "territorial waters" in international law in the mid-20th century.[14] The UNCLOS later adopted the 12 nm zone, which the Communists had insisted on, as the international standard for the breadth of territorial waters.

On May 27, 1953, the negotiators explicitly prescribed the ownership of the FNI and suggested a basic guideline governing "contiguous" maritime areas, although they did not

[9] Moon Bong Ryoo, *The Korean Armistice and the Islands*, STRATEGY RESEARCH PROJECT, Nov. 2011, at 9.
[10] Roehrig, *supra* note 6, at 1; Ryoo, *supra* note 9, at 13.
[11] Roehrig, *supra* note 6, at 1.
[12] *Id.*
[13] *Id.* Based on the then-international standard "3 nautical miles of territorial waters," the Northern Limit Line ("NLL") was designated midway between the South Korean-held Five Northwestern Islands ("FNI") and North Korea's adjacent coastline, connecting the *Han* River Estuary to 12 median coordinates. Ryoo, *supra* note 9, at 9.
[14] Ryoo, *supra* note 9, at 9.

agree to the delimitation of maritime demarcation lines.[15] The final texts—namely, the KAA states that *Baekryeong*-do,[16] *Daecheong*-do, *Soceong*-do, *Yeonpyeong*-do, and *Woo*-do—stated that the FNI would remain under the military control of the Commander-in-Chief, UNC. With respect to overall maritime governance, however, Article 2, Section 15 of the KAA provides that "opposing naval forces shall respect the waters contiguous to the DMZ and to the land area of Korea under the military control of the opposing side."[17]



Map 2: Respecting the Waters Contiguous to the Land Area of the Opposing Side (Article 2, Para 15)
Source: THE MINISTRY OF NATIONAL UNIFICATION OF THE REPUBLIC OF KOREA, PROCEEDING MINUTE OF SOUTH AND NORTH MILITARY SUB-COMMITTEE 5TH SESSION 283 (1992).

At the time of the armistice negotiations, the UNC was exercising full military control over all islands and waters annexed to the Korean Peninsula, from *Yallu* River Estuary in the west to *Tuman* River Estuary in the east. However, after the KAA was signed, all air and naval military

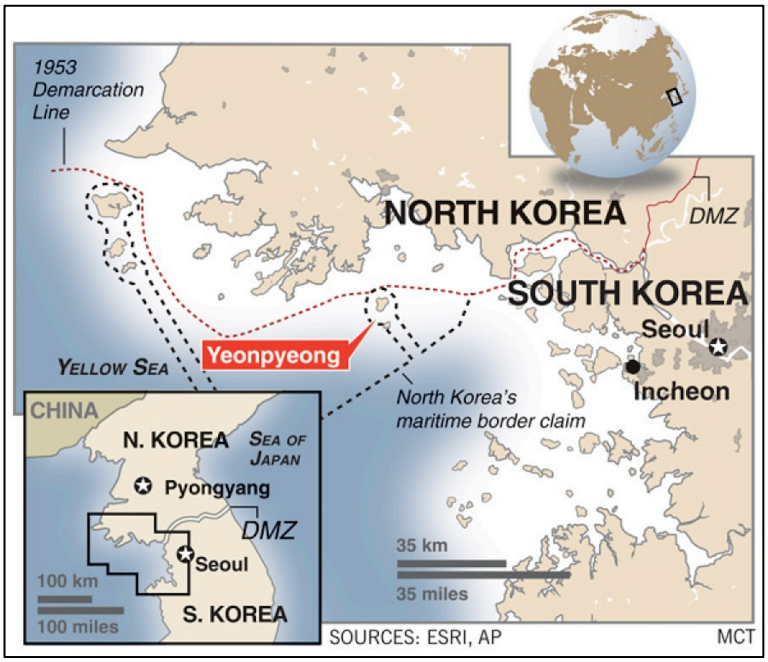
[15] Roehrig stresses that the Korean Armistice Agreement ("KAA") should have defined the term "contiguous." Roehrig, *supra* note 6, at 1.
[16] *Baekryrong* Island is the biggest among the FNI, and South Korea's northwest-most point, lying about 190km north of Incheon of South Korea and only 16 km away from *Jangsangot* Peninsula of North Korea. Ryoo, *supra* note 9, at 2.
[17] Korean War Armistice Agreement, U.N.C.-N. Kor.-China, art. 2.15, July 27, 1953, 4 U.S.T. 234 (alteration in original) [hereinafter KAA].

operations were conducted on and around the islands and waters situated below the NLL and the Northern Boundary Line ("NBL"), which was designated as the maritime boundary for the East Sea Area as the equivalent of the NLL in the west.[18]

C. Naval Skirmishes Occurred in the Disputed Water

The NLL is located only 15 km away from North Korea's coastline. As it leaves North Korea little access to its maritime areas and resources in the Yellow/West Sea, the Line has for decades caused military confrontations and armed clashes between the two Koreas. In December 1973, North Korea pronounced its official opposition to the existence of the Line, stating that it did not recognize the validity or legality of the Line.[19] However, no head-to-head clash broke out between the two sides until June 15, 1999, when for the first time North and South Korean patrol boats exchanged fire in the disputed area.

[18] Young Koo Kim, *A Maritime Demarcation Dispute on the Yellow Sea*, 2 J. E. ASIA & INT'L. L. 481, 482 (2009).
[19] Roehrig, *supra* note 6, at 1—2 (also mentioning that "the DPRK representative announced that the FNI designated in armistice were in North Korean territorial waters and that access to these islands required prior notification and permission from the DPRK.").



Map 3: Location of *Yeonpyeong* Island
Source: Jon Rabiroff and Yoo Kyong Chang, *After North Korean attack, many residents wrestling with whether to move back to island*, STARS AND STRIPES, Feb. 12, 2011, https://www.stripes.com/after-north-korean-attack-many-residents-wrestling-with-whether-to-move-back-to-island-1.134580.

This battle, now known as the First *Yeonpyeong* Naval Skirmish, resulted in the deaths of at least 30 North Korean sailors and the destruction of five North Korean boats.[20] As a result of that skirmish, at least five South Korean patrol boats were damaged and nine sailors were wounded.[21] An investigation found that an unidentified North Korean gunner on a North Korean patrol boat, which was reportedly crossing the Line, first opened fire on one of the South Korean naval boats. After the First *Yeonpyeong* Naval Skirmish, North Korean fishing boats and patrol boats crossed the Line for several times, although those crossings did not lead to an actual clash between the two forces until the Second *Yeonpyeong* Skirmish occurred on June 29, 2002 in the same vicinity. This battle, which lasted until the North Korean vessels went back to the north of the Line after about 20 minutes of fighting, inflicted considerable damage on both sides. Five South Korean sailors were killed and another 19 were wounded in

[20] Jon M. Van Dyke et al., *The North/South Boundary Dispute in the Yellow (West) Sea*, 27 MARINE POL'Y 143, 143 (2003).
[21] *Id.* The later investigation revealed that a North Korean gunner first opened fire on one of the South Korean naval boats engaged, which was ramming a North Korean boat crossing the Line. *Id.*

action, while 19 casualties were reported on the North Korean side, although this number has never been officially confirmed.[22]

D. Efforts for Negotiated Settlement

In the wake of the West Sea Incidents, the representatives appointed by each government attended a meeting at the 346th MAC to investigate the details of the Incidents and determine follow-up measures. At the meeting, the North Korean representative denied the validity and legality of the NLL, stating that the Line should not be recognized as the de jure demarcation line in the Yellow/West Sea for two reasons[23]: first, the Line had no basis in the KAA; and, second, the UNC unilaterally delineated it in the absence of any mutual consent.[24] In support of its position, North Korea further suggested a hypothetical provincial boundary line that extended parallel to the Latitude from the end of the provincial border between its *Hwanghae*-do Province and South Korea's *Gyeonggi*-do Province.[25]

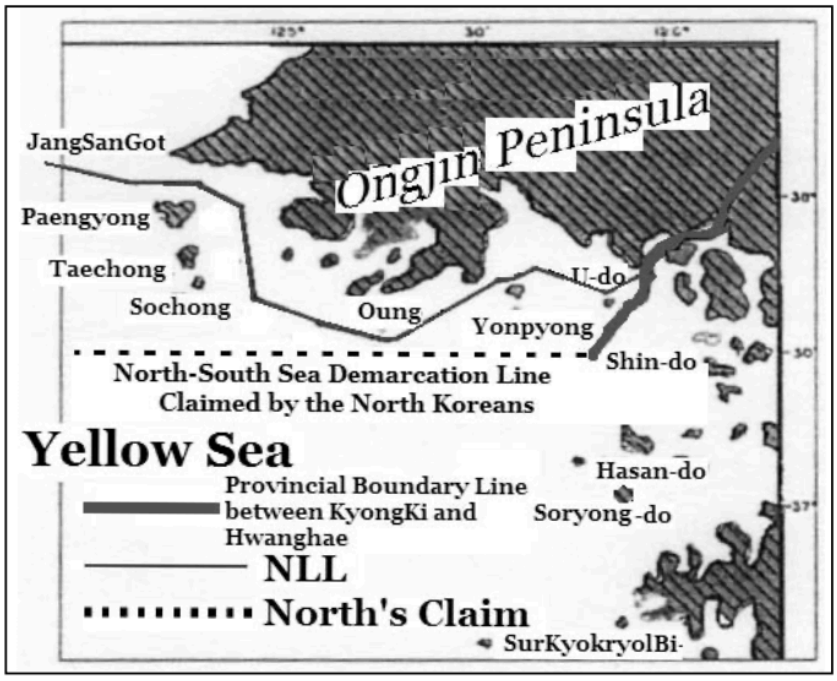
---

[22] Aiden Foster-Carter, *No-Penalty Shootout*, ASIA TIMES ONLINE, July 3, 2002, http://www.atimes.com/atimes/Korea/DG03Dg01.html. Reportedly, the engaged North Korean boats opened fire on the South Korean boats that tried to block them and other fishing boats crossing the line. *Id.*

[23] Kim, *A Maritime Demarcation Dispute on the Yellow Sea*, *supra* note 18, at 483; Roehrig, *supra* note 6, at 2. Due to the North Korean representative's statement at the 168th Military Armistice Commission ("MAC") held in May 1963, some South Korean scholars and officials argued that it disproved North Korea's acknowledgment of the Line. In fact, the two sides held this meeting to determine whether one of the North Korean spy boats had crossed the Line. In its response, the representative refuted, stating that "our boat did not cross the Line and did stay north of that." For detailed information about this meeting and the statements, *see* JOINT CHIEF OF STAFF: MILITARY MUTUAL AID ASSOCIATION, Vol. 4, MANUAL FOR THE KOREAN MILITARY ARMISTICE COMMISSION (1999), at 138—40.

[24] Kim, *A Maritime Demarcation Dispute on the Yellow Sea*, *supra* note 18, at 483.

[25] *Id.*



Map 4: The North Korea's Hypothetical Extension Line proposed in 1973
Source: Young Koo Kim, *A Maritime Demarcation Dispute on the Yellow Sea*, 2 J. E. ASIA & INT'L. L. 481, 483 (2009).

In addition to this, North Korea announced that the UNC and South Korean vessels, whether military or civilian, must get permission prior to navigating to and from the South Korean-held FNI, based on the assertion that the Islands were located within North Korea's territorial waters.[26]

In 1992, another diplomatic effort by the Military Subcommittee made during the course of negotiations concluded that the Basic Agreement was not a realistic solution to the Conflict. Amidst the difference of opinion, the two sides managed to adopt the Basic Agreement Article 11, providing that "the South-North demarcation line and areas for non-aggression shall be identical with the MDL specified in the Military Armistice Agreement of July 27, 1953 and the areas that have been under the jurisdiction of each side under the present

[26] J.R.V. Prescott, Maritime Jurisdiction in East Asian Seas, EAST-WEST ENVIRONMENT AND POLICY INSTITUTE OCCASIONAL PAPER, Vol. 4, 1987, at 48—9, *quoted in* Roehrig, *supra* note 6, at 2.

time."[27] South Korea introduced the concept of "special interim relationship" to define inter-Korean relations with respect to the interpretation of this article. In other words, due to the extraordinary circumstances of inter-Korean relations, South Korea recommended that the two Koreas must "respect political entity of each party as well as *fait accompli* jurisdiction area."[28] South Korea deemed "the areas that have been under the jurisdiction of each side until the present time" to be the maritime order created and maintained by the NLL.[29] On the other hand, North Korea stuck to its rejection of the maritime jurisdiction and boundaries created by the Line, proposing that its 1973 hypothetical boundary line should be considered as an alternative.[30]

In the aftermath of the First *Yeonpyeong* Naval Skirmish, the tendency to use the NLL Conflict as political leverage during negotiations intensified. In an attempt to get a dominant position, the negotiating representatives from the US, North Korea, and South Korea, presented their recommendations for follow-up measures throughout several rounds of talks. On June 15, 1999, the General Officer from the UNC stated that "the Line has existed for many decades as a de facto demarcation line and both Koreas have acknowledged its existence in the waters off the east and west coasts of the Korean Peninsula…so both sides must withdraw their naval forces from the vicinity."[31] South Korea proposed the reunification of separated families, as well as indicating its intention to adjust the Line in accordance with the outcome of the

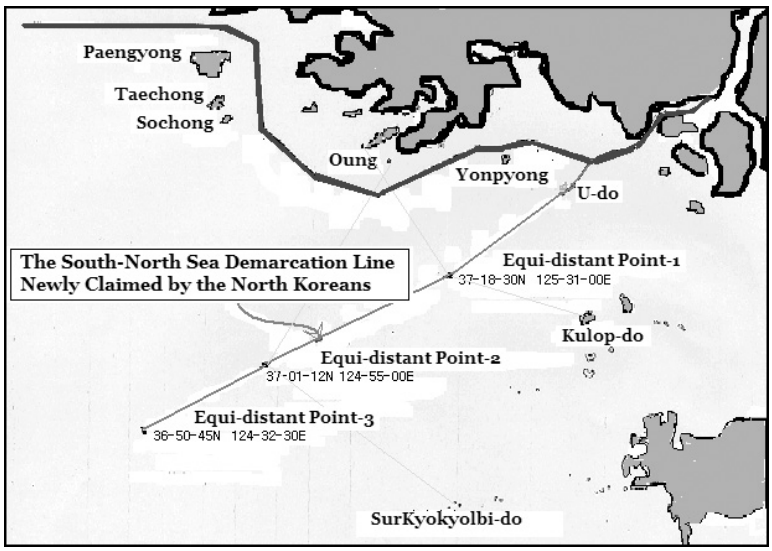
[27] Agreement on Reconciliation, Non-aggression, Exchanges and Cooperation between the South and the North art. 11, S. Kor.-N. Kor., Dec. 13, 1991 [hereinafter Basic Agreement]; *see also* Protocol on Non-aggression art. 10, S. Kor.-N. Kor., Sept. 17, 1992 (providing that "the South-North sea non-aggression demarcation line shall continue to be discussed in the future. Until the sea non-aggression demarcation has been settled, the sea non-aggression zones shall be identical with those that have been under the jurisdiction of each side until the present time.").
[28] Kim, *A Maritime Demarcation Dispute on the Yellow Sea*, *supra* note 18, at 484.
[29] *Id*; GUK-BANG-BU [THE MINISTRY OF DEFENSE OF THE REPUBLIC OF KOREA], BUK-BANG-HAN-GYE-SEON-EUL DAI-HA-NEUN WOO-RI-EUI JA-SE [THE REPUBLIC OF KOREA POSITION REGARDING THE NORTHERN LIMIT LINE] (2nd ed. 2007), at 24, *available at* http://www.military.co.kr/english/NLL/NLL.htm (last visited June 25, 2019).
[30] Kim, *A Maritime Demarcation Dispute on the Yellow Sea*, *supra* note 18, at 484.
[31] Press Release, UNC Public Affair Office, U.N. Command and North Korean Generals Discuss Naval Incidents, *cited in* Ryoo, *supra* note 9, at 10.

negotiations. North Korea did not make any change in its stance throughout the talks.[32] In August, at the General Officer-level discussion, the UNC reaffirmed its position, declaring that the adjustment of the Line as per North Korea's stance was non-negotiable.[33] The UNC requested that North Korea comply with the then-established maritime order in the disputed waters until the two sides reach a new maritime boundary line through the process at the Joint Military Commission ("JMC").[34] In furtherance of the UNC's position, in its general-level talks with North Korea, the US representative proposed that the two Koreas should contemplate possible ways to establish a South-North Joint Military Commission at which they could discuss issues surrounding the NLL Conflict.[35]

On September 2, 1999, the DPRK Army General Staff issued a special communiqué declaring the illegality of the NLL and proclaiming the CMDL as its replacement in the disputed waters. However, the CMDL claimed by North Korea did not contain any contention over the ownership of the FNI. This newly claimed demarcation line was simply delineated equidistant from the two corresponding coastlines between North and South Korea.[36] Objecting to this new claim, the US reiterated its position: "The NLL has been designated by the UNC to serve as a practical demarcation line for the effective separation of the two confronting forces in the Yellow/West Sea. It has been an effective means to de-escalate military tension in this area for 46 years."[37]

---

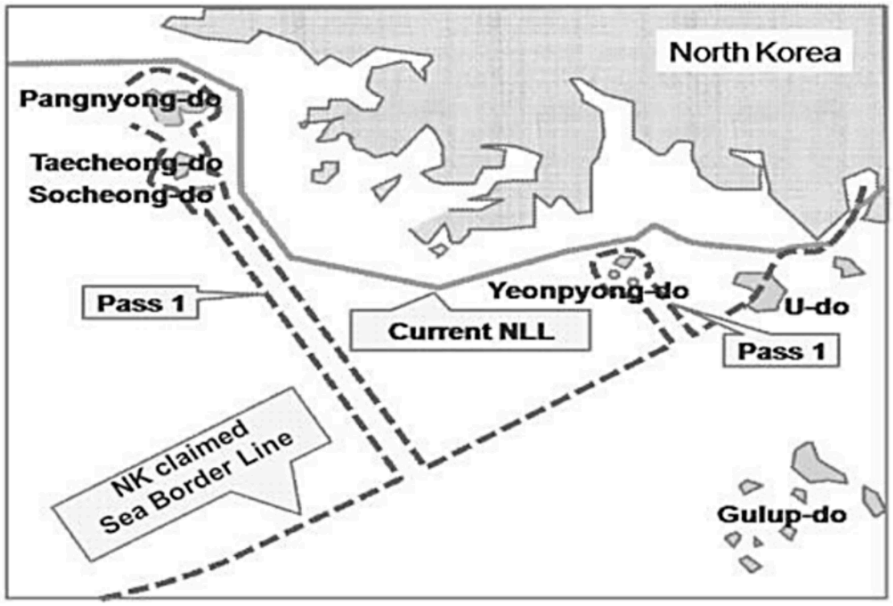
[32] *See* Van Dyke et al., *supra* note 20, at 144.
[33] *Asian Political News*, FIND ARTICLES, Nov. 29, 2008, http://findarticles.com/ /articles/mi_m0WDQ/is_1999_August_23/ai_55619988, *cited in* Ryoo, *supra* note 9, at 10.
[34] *NLL - Controversial Sea Border Between S. Korea, DPRK*, PEOPLEDAILY.COM, Nov. 21, 2002, http://english.peopledaily.com.cn/200211/21/eng20021121_107188.shtml, *cited in* Ryoo, *supra* note 9, at 10
[35] *See* Van Dyke et al., *supra* note 20, at 144.
[36] Roehrig, *supra* note 6, at 2.
[37] GUK-BANG-BU, *supra* note 29, at 10 (alteration in original).



Map 5: A New Demarcation Line Proposed by North Korea
Source: THE MINISTRY OF NATIONAL UNIFICATION OF THE REPUBLIC OF KOREA, PROCEEDING MINUTE OF SOUTH AND NORTH MILITARY SUB-COMMITTEE 5TH SESSION 266, Map 4 (1992).

There is a view that the military provocations committed by North Korea were part of its brinkmanship diplomacy. In other words, the CMDL was also referred by North Korea which during negotiations requested that the US ease the economic and trade sanctions imposed on North Korea in exchange for halting the development of long-range ballistic missile.[38] While the negotiations were ongoing, however, North Korea announced the Navigation Order in March 2000, subjecting all civilian and military vessels to its prior authorization when traveling to or from the FNI.

[38] Van Dyke et al., *supra* note 20, at 144.



Map 6: Navigational Corridors claimed by North Korea
Source: MICHAEL AL. MCDEVITT AND CATHERINE K. LEA, *East China and Yellow Seas Overview Essay*, *in* THE LONG LITTORAL PROJECT: EAST CHINA AND YELLOW SEAS 1, at 5 (2012).

In conjunction with the Navigation Order, North Korea designated a number of two nm-width navigational corridors in the area. North Korea also declared its policy to take military actions, if required, to enforce the order and navigable sea-lanes as part of exercise of sovereignty over its territorial waters.[39]

The Second *Yeonpyeong* Naval Skirmish in 2002 was another heavy blow to politico-military and diplomatic initiatives in the Korean Peninsula, putting mounting pressure on both sides to resolve the decades-long maritime dispute. It was reported that this skirmish broke out when South Korean patrol boats tried to drive out North Korean Navy and fishing boats that had navigated south of the NLL. Experts hold that the strategy was intended to bring up questions about the validity and legality of the NLL itself, rather than a diversionary tactic related to North Korea's nuclear development.[40] The Kim Dae-jung administration, although supporting the Sunshine Policy stressing reconciliation with North Korea, defined the action

[39] *Id.* at 145.
[40] *Id.* at 148.

as premeditated. Instead of overturning over the Sunshine Policy, however, the Kim administration decided to revise the rules of engagement for its armed forces to allow for more aggressive action and to request an official apology from North Korea.[41] By quoting the Basic Agreement Article 11, the then-South Korean government declared that military actions could be taken to protect the Line, which it deemed a maritime border in the disputed waters.[42]

After the Second *Yeonpyeong* Naval Skirmish, the US government reconfirmed its long-standing position toward the NLL Conflict. In the aftermath of the skirmish, the US became more reluctant to resume diplomatic talks with North Korea, while North Korea decided to cancel the bilateral ministry-level talk that was to be held in Pyongyang between the two sides.[43] The Commander-in-Chief of the US Armed Forces in Korea announced support for the South Korean government's approach toward the skirmish, holding that the North Korea's military provocations should be deemed a serious violation of the KAA.[44] In the same context, the UNC also defined North Korea's action as a breach of the KAA, thereby requesting the two sides to create a special investigative team under the supervision of the MAC to restore the effective enforcement of the armistice agreement.[45]

By contrast, while denying the validity and legality of the NLL, North Korea also denied an allegation that it had committed a preemptive attack against the South Korean boats. However, North Korea admitted that its naval boats were present at the time of the skirmish in the battle area to escort fishing boats.[46] Flipping the accusation, North Korea asserted that the South Korean boats went up north across the Line, thereby infringing its maritime

---

[41] *Id.* at 147.
[42] *Id.*
[43] *Id.*
[44] *HANKOOK DAILY, July 2, 2002*, *cited in* Van Dyke et al., *supra* note 20, at 146.
[45] *Id.* at 147.
[46] Van Dyke et al., *supra* note 20, at 145. After the clash, however, the South Korean Joint Chiefs of Staff reported that the battle was not accidental, but was resulted from North Korea's premeditated plan, pointing out that it tried to test South Korean Navy's response in two similar incidents that had occurred on June 27 and 28 and it deliberately isolated the engaged South Korean ship from the group in advance in an intention to provoke South Korea. Furthermore, the report made clear that the existence of North Korean fishing boats in the battle area was not identified as opposed to North Korea's excuse. *Id.* at 146—7.

sovereignty.[47] In line with its position, North Korea declined to attend a meeting proposed by the UNC unless the issues related to the Line were set as the primary agenda.[48] Based on its assertion that the Line had no basis in international law, North Korea pointed out the potential risk of large-scale armed clashes between the two sides unless the issues were handled in a peaceable manner.[49] North Korea offered to let South Korea to conduct a salvage operation for its sunken vessels, which were located five miles south of the NLL and 14 miles west of *Yeonpyeong* Island.[50] While not accepting the offer, South Korea still carried out its operation without giving any notification to North Korea so as to not put the Line back on the negotiation table.[51]

In late July and August 2002, North Korea changed its position, proposing to discuss follow-up measures to deal with the aftermath of the Second *Yeonpyeong* Naval Skirmish. In this context, North Korea expressed its regret for the skirmish—though it did not go as far as an official diplomatic apology—and offered proposals, such as constructing improved communication channels, establishing a maritime buffer zone, holding regular staff-officer meetings, and reinforcing search and rescue efforts in the disputed waters as part of collaborative efforts to prevent the recurrence of armed conflict.[52] Expert opinion holds that North Korea made these proposals for the following reasons: 1) reopening high-level talks between the two Koreas to resume the stalled reconciliation project; 2) holding a meeting with the UNC to discuss the aftermath of the skirmish; 3) redrawing a maritime boundary in the disputed area; and 4) offering a visit of a US special convoy to Pyongyang.[53]

---

[47] As a matter of fact, it was later confirmed by the Defense Ministry of South Korea ("ROK MND") that not South Korean naval ships, but some of its fishing boats had crossed the South Korean Navy-drawn Fishing Control Line lying 5.5 mile south of the NLL only several hours before the June 29 clash. *Id.* at 148.
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id.*

A series of talks were held between the two Koreas as part of confidence-building measures to prevent accidental armed conflicts in the disputed area. As a consequence of the 13th and 14th ministry-level talks, where the two sides had reaffirmed the need for easing military tension to develop sound diplomatic relations, the 1st and 2nd general-level talks were agreed to be held in May and June 2004 respectively to discuss more practical alternatives. In those talks, the military officials reached agreement on various terms that were designed to prevent further accidental clashes in the disputed waters.[54] Notwithstanding this agreement, however, North Korea was later accused of violating it by using the unified communication system, which had been adopted as part of the agreement between the military officials, to disrupt South Korea's naval activities in the vicinity of the disputed area.[55] Furthermore, inasmuch as the agreement did not clearly describe matters related to the disputed waters, it gave rise to a certain level of interpretational discrepancy. This is often cited as one of the reasons that the agreement could not serve as an ultimate solution to the NLL Conflict.[56]

In the general-level talks held in 2006 through 2007, the military officials involved agreed to seek a legal solution to the NLL Conflict that would be based on the KAA and international law.[57] They also agreed to foster a peaceful fishing environment in the Yellow/West Sea through prevention of accidental armed conflicts.[58] More importantly, in exchange for South Korea's relinquishment of the NLL, North Korea agreed to abolish its

[54] In general, they agreed to operate the 156.8 MHz and 156.6 MHz trunked radio system and unified visual signaling between patrol boats, and to exchange information about controlling illegal fishing in the disputed waters. *See* GUK-GA-JEONG-BO-WON [NATIONAL INTELLIGENCE SERVICE], NAM-BUK-HAN-HOP-EUI-MOON [INTER-KOREAN AGREEMENTS] (2008), at 33—5.
[55] The Peace Foundation, Examining "Special Zone of Peace and Cooperation in the Yellow/West Sea" Initiative (Dec. 12, 2007), at 18.
[56] *Id.*
[57] Both sides reached an agreement to contemplate the fundamental principles embodied in the United Nations Convention on the Law of the Sea ("UNCLOS"), e.g., the principle of equidistance and equity, and natural prolongation, for the settlement of the NLL conflict.
[58] Yong Joong Lee, *Seo-Hae-Buk-Bang-Han-Gye-Seon-E Dae-Han Nam-Buk-Han Joo-Jang-Eui Guk-Je-Beop-Jeok Bi-Gyo Bun-Seok* [*A Study on Northern Limit Line Dispute between the Two Koreas*], KYUNGBUKDAEHAKGYOBEOPHAKYEONGUWONBEOPHAKNONGO Je32Jip [KYUNGPOOK NAT'L. UNIV. L. REV. Vol. 32] 537, at 564 (2010).

Navigation Order (designed to restrict the navigation of both civilian and military ships entering and leaving the FNI.)[59] North Korea further proposed a new maritime boundary designed for the disputed waters, while admitting South Korea's sovereignty over the FNI as defined in the KAA.[60]

Map 7: West Sea Security Line
Source: Yoo Kang-moon, *Unification minister hints at possible shift in North Korea's attitude towards Northern Limit Line*, HANKYOREH, May 7, 2018, http://english.hani.co.kr/arti/english_edition/e_northkorea/843593.html.

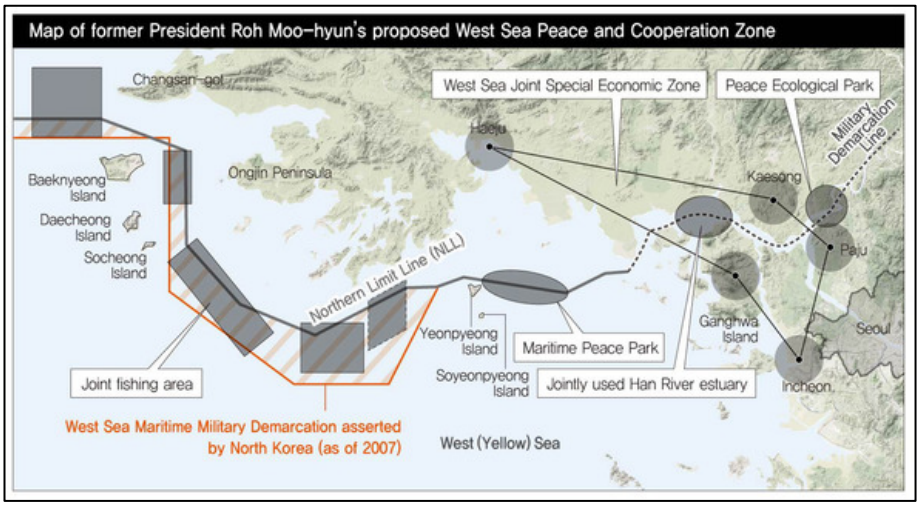
North Korea also suggested that the waters where the two sides had been engaged in armed clashes should be divided equally and that other areas should be divided in accordance with the principles and methods embodied in the UNCLOS.[61] However, South Korea insisted on the NLL and instead proposed establishing co-fishery zones and a direct sea route navigating to and from *Haeju* in North Korea.[62] South Korea added that such zones and the routes should be

[59] *Id.*
[60] The Peace Foundation, *supra* note 56, at 23. The new line claimed in the 6th general-level talk held in 2007 was analogous to the NLL in most parts, except for the part of the waters between *Yeonpyeong* and *Sochung* Island of the FNI: drawn far more south than the NLL. Tai Uk Chung, *Seo-Hae-Buk-Bang-Han-Gye-Seon Jae-Ron: Yeon-Pyeong-Do-Po-Gyeok-Sa-Geon-Ul Gye-Gi-Ro* [*The Northern Limit Line and North Korean Artillery Attack*], MINJOOBEOPHAK Je45Ho [DEMOCRATIC LEGAL STUD. Issue. 45] 255, at 265 (2011).
[61] Chung, *supra* note 61, at 265. This newly proposed maritime demarcation line was an equidistance line between the South Korean-held FNI and North Korea's *Hwanghae*-do Province; and it was analogous to the military control line of South Korea. *Id.*
[62] *Id;* Lee, *A Study on Northern Limit Line Dispute between the Two Koreas*, *supra* note 59, at 565.

explicitly designated in advance according to the respective maritime areas that had been under the jurisdiction of each side.[63] Whereas North Korea asked to incorporate the waters south of the Line into the zones,[64] South Korea did not agree to this request, saying that such an issue should be handled at the ministry-level rather than at the general-level talks.[65]

The West Sea Initiative that was included in the 2007 Declaration could well have been a critical turning point for the NLL conflict.[66] In hopes of achieving peace in the disputed area, the heads of the two Koreas discussed economic cooperation and co-prosperity as a means to ease the decades-long military tensions in the Yellow/West Sea. The West Sea Initiative suggested an idea for the establishment of the Special Maritime Area, including North Korea's *Haeju* and its adjacent waters. The Initiative also provided detailed outlines about the establishment and operation of co-fishery zones, peace zones,[67] special economic zones, and direct routes navigating to and from the port of *Haeju*, as well as a co-development plan for the *Han* River Estuary.[68]

[63] Afterward, South Korea stepped back from this approach, arguing that the two sides should share the fishing areas equally and symmetrically divided on opposite sides of the NLL, while giving up on its adherence on the delimitation method of "equidistance and equal area." The Peace Foundation, *supra* note 56, at 27.
[64] *Id.* at 26.
[65] *Id.*
[66] Declaration on the Advancement of South-North Relations art. 3, 5, S. Kor.-N. Kor., Oct. 4, 2007 [hereinafter 2007 Declaration].
[67] According to the West Sea Initiative, in these peace zones, South and North Korea were required to share responsibility of maintaining public maritime order by operating a jointly established police and administrative agency, such as the Co-Ranger operated by the International Union for Conservation of Nature and Natural Resources. The Peace Foundation, *supra* note 56, at 27.
[68] Yong Suk Jang, *Seo-Hae-Buk-Bang-Han-Gye-Seon-Gwa Pyeong-Hwa-Hyeop-Ryup-Ji-Dae Jae-Ron* [*The West Sea NLL and Special Zone for Peace and Cooperation Revisited*], TONGILMOONJEYEONGOO Je59Ho [THE KOREAN JOURNAL OF UNIFICATION AFFAIRS Issue. 59] 181, at 190 (2013).



Map 8: West Sea Peace and Cooperation Zone Proposed by South Korea in 2007
Source: Song Ho-jin & Kim Nam-il, *Lawmaker releases map showing Roh's proposed North-South joint fishing area*, HANKYOREH, July 15, 2013, http://english.hani.co.kr/arti/english_edition/e_northkorea/595745.html.

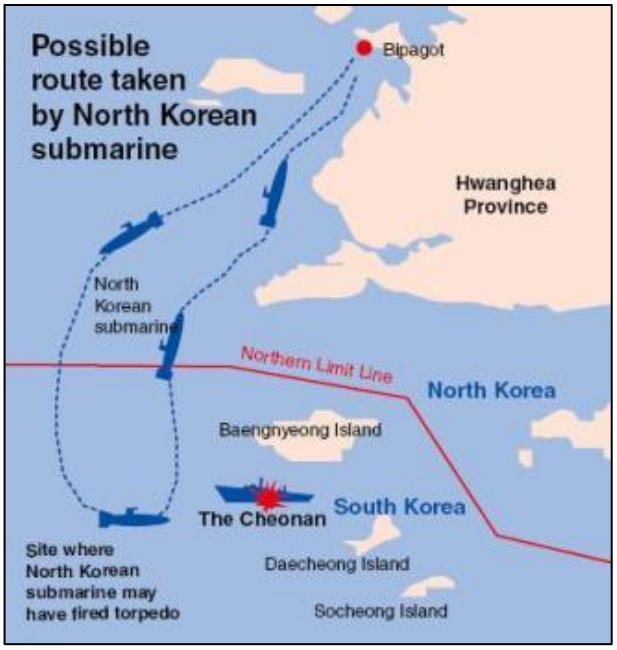
In the following ministry-level and general-level talks held in November and December 2007, respectively, the representatives discussed concrete solutions, such as the establishment of a Joint Military Commission, and navigational routes and procedures for civilian vessels.[69] However, the two Koreas eventually failed to reach agreement during the course of negotiations, since the ideas contained in the Initiative, such as the establishment of co-fishing zones or a direct navigational route from the *Haeju* port, hinged on political consensus, rather than working-level agreement.[70] More significantly, North Korea made attempts to invalidate the NLL, whereas South Korea insisted that the newly proposed maritime areas should be divided equally and symmetrically on opposite sides of the Line.

When President Lee Myung-bak took office in 2008, his administration repudiated all the previous agreements, protocols, and declarations made by past administrations, which was followed by large-scale armed conflicts in the disputed area: The Sinking of the South Korean Warship *Cheonan* and the Bombardment of *Yeonpyeong* Island in 2010. In May 2009, North

[69] Lee, *A Study on Northern Limit Line Dispute between the Two Koreas*, *supra* note 59, at 566.
[70] The Peace Foundation, *supra* note 56, at 34—5 (arguing that issues concerning North Korea's denuclearization, establishing diplomatic relationship with the US, and participation in concluding a peace treaty must be prioritized for the ultimate resolution of the NLL conflict).

Korea elevated hostilities over the disputed waters, declaring that it would disregard the legal status of the FNI and would not assure safe passage for any vessels in the area.[71] North Korea also announced that it would not acknowledge the validity and legality of the Line, claiming that the Line infringed its territorial sovereignty in its maritime areas.[72]

The Sinking of the South Korean Warship *Cheonan*, a *Pohang*-class corvette, had a tremendous impact on inter-Korean relations, rendering the decades-long negotiated efforts useless. On March 26, 2010, the *Cheonan* was sunk 1 nm off the south-west coast of *Baekryong* Island, the northernmost island of the FNI, by an alleged torpedo attack from an unidentified North Korean submarine.



Map 9: Possible route taken by North Korean submarine
Source: Song Sang-ho, *Experts suggest possible attack by N.K. submarine*, THE KOREA HERALD, Apr. 19, 2010, http://www.koreaherald.com/view.php?ud=20100419000591&cpv=1.

[71] RODONG DAILY, May 28, 2009, at 3, *cited in* Lee, *A Study on Northern Limit Line Dispute between the Two Koreas*, *supra* note 59, at 567.
[72] Lee, *A Study on Northern Limit Line Dispute between the Two Koreas*, *supra* note 59, at 567.

The *Cheonan* was carrying 104 navy personnel when it sank and 46 South Koreans died as a result of the attack.[73] At the request of President Lee Myung-bak,[74] the South Korean-led Joint Civilian-Military Investigation Group ("JIG"), comprising experts from various countries, was formed. The JIG launched its own investigation to answer the questions surrounding the reported explosion and subsequent sinking. In the summary of its report released on May 20, 2010, the JIG concluded that the *Cheonan* was hit by a North Korean-manufactured CHT-02D torpedo containing 250 kg (550 lb) of TNT equivalent explosives, which generated a bubble jet effect that created a shockwave strong enough to split the ship in two.[75] The release of the official results supported South Korean military and governmental officials' policy enforcement[76] to impose stronger sanctions against North Korea.[77] In line with this trend, the Lee administration announced trade embargoes, prohibiting all inter-Korean trades and

[73] On the night of the sinking followed by the reported explosion of the ship, it was later disclosed that South Korea and the US naval fleets had been engaged in the Key Resolve/Foal Eagle joint military exercise conducted annually 75 miles away from the location of the incident. According to the reports released thereafter, many modern warships were in particular conducting anti-submarine warfare exercises. Pauline Jelinek, *AP Enterprise: Sub attack was near US-SKorea drill*, BOSTON.COM, June 5, 2010, http://archive.boston.com/news/nation/washington/articles/2010/06/05/ap_enterprise_sub_attack_came_near_drill/. At the outset, it was reported that the ship had been torpedoed by a North Korean submarine based on the fact that the South Korean naval ships had returned fire pointed at an unidentified target. However, the South Korean government, which had been reluctant to acknowledge the possibility of North Korean involvement in its first few press briefings, announced that the shots may have been targeting at a flock of birds that had not been detected on radar. Kim Sengupta, *Warship mystery raises Korean tensions*, INDEPENDENT, Mar. 27, 2010, http://www.independent.co.uk/news/world/asia/warship-mystery-raises-korean-tensions-1928740.html; *South Korea urges restraint over sunken warship*, BBC NEWS, Apr. 1, 2010, http://news.bbc.co.uk/2/hi/asia-pacific/8598267.stm; Tania Branigan and Caroline Davies, *South Korean naval ships sinks in disputed area after 'explosion,'* THE GUARDIAN, Mar. 26, 2010, https://www.theguardian.com/world/2010/mar/26/south-korea-navy-ship-attack.

[74] *South Korea urges restraint over sunken warship*, BBC NEWS, Apr. 1, 2010, http://news.bbc.co.uk/2/hi/asia-pacific/8598267.stm; *South Korea mourns victims of ship sinking*, BBC NEWS, Apr. 26, 2010, http://news.bbc.co.uk/2/hi/asia-pacific/8643374.stm.

[75] *See* JOINT CIVILIAN-MILITARY INVESTIGATION GROUP, INVESTIGATION RESULT ON THE SINKING OF ROKS "CHEONAN" (2010), *available at* http://news.bbc.co.uk/nol/shared/bsp/hi/pdfs/20_05_10jigreport.pdf (last visited June 25, 2019). According to the first summary, it was also alleged that a group of salmon-class and shark-class North Korean submarines, escorted by a support ship, had departed Cape *Bisagot*'s naval base few days before the firing, taken a detour out to arrive in waters near *Baekryong* Island, and returned to the port on March 28, 2010 after the accomplishment of their mission. *'North Korean torpedo' sank South's navy ship – report*, BBC NEWS, May 20, 2010, http://www.bbc.com/news/10129703; *How Did N.Korea Sink the Cheonan?*, THE CHOSUN ILBO, May 21, 2010, http://english.chosun.com/site/data/html_dir/2010/05/21/2010052100698.html.

[76] *Navy Chief Vows for Revenge for Cheonan*, THE KOREA HERALD, Apr. 30, 2010; *"Change All of Plans, Weapons, Organization, Culture" Military Announces Omni-directional Reform*, HERALD ECONOMICS, May 4, 2010, http://biz.heraldcorp.com/view.php?ud=20100504000486.

[77] *North Korea accused of sinking ship*, STUFF, May 20, 2010, http://www.stuff.co.nz/world/asia/3721583/North-Korea-accused-of-sinking-ship.

exchanges, and any type of North Korean civilian ships' passage in the disputed waters.[78] In response to the investigation, North Korea released an official statement denying any involvement in the sinking[79] and offered to dispatch investigators on its behalf to re-examine the evidence presented by the JIG.[80] Furthermore, North Korea accused South Korea, Japan, and the US of manipulating the investigation process and escalating insecurity of the region.[81] North Korea further declared political and military countermeasures, including cutting off all ties and communications with South Korea.[82] In the aftermath of the sinking, all diplomatic talks were stopped, as South Korea's political leaders insisted that North Korea had to make an official apology before any dialog could be re-opened.[83] However, due to Russia's persistent objections, the UNSC issued a presidential statement condemning the attack and, in lieu of naming North Korea as the attacker, denounced "those responsible."[84]

The artillery attack on *Yeonpyeong* Island worsened the already tense political and military relations over the disputed waters, and also prompted international condemnation of North Korea's military provocations. On November 23, 2010, in response to South Korea's

---

[78] Sang-hun Choe, *South Korea cuts trade ties with North over sinking*, THE AGE, May 25, 2010, http://www.theage.com.au/world/south-korea-cuts-trade-ties-with-north-over-sinking-20100524-w7y6.html.

[79] *Military Commentator on Truth behind "Story of Attack by North,"* THE (NORTH) KOREAN CENTRAL NEWS AGENCY, May 28, 2010, http://www.kcna.co.jp/item/2010/201005/news28/20100528-18ee.html. In November 2010, the (North) Korean Central News Agency ("KCNA") published a report specifically and respectively rebutting the Joint Civilian-Military Investigation Group's conclusion. *"Cheonan" Case Termed Most Hideous Conspiratorial Farce in History*, THE (NORTH) KOREAN CENTRAL NEWS AGENCY, Nov. 2, 2010, http://www.kcna.co.jp/item/2010/201011/news02/20101102-10ee.html.

[80] In 2012, a high-profile North Korean defector, who defected to South Korea in 2011, testified that the crew members of the North Korean submarines involved had been awarded and honored, getting credits for the deadly torpedo attack. *N. Korean sailors awarded hero's title for attack on S. Korean warship: defector*, YONHAP NEWS AGENCY, Dec. 7, 2012, http://english.yonhapnews.co.kr/northkorea/2012/12/07/31/0401000000AEN20121207008700315F.HTML.

[81] Xiong Tong, *DPRK accuses U.S. of cooking up, manipulating "Cheonan case,"* XINHUA NEWS AGENCY, May 28, 2010, http://news.xinhuanet.com/english2010/world/2010-05/28/c_13321709.htm.

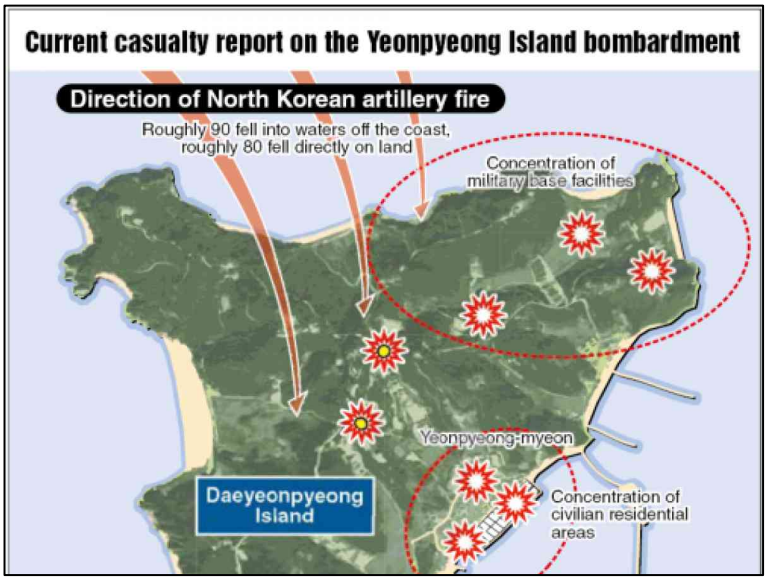
[82] Jonathan Thatcher, *Text from North Korea statement*, REUTERS, May 25, 2010, http://www.reuters.com/article/us-korea-north-text-idUSTRE64O3YU20100525.

[83] *Seoul Insists on N.Korea Apology Before Dialogue*, THE KOREA HERALD, Apr. 18, 2011; *Seoul Renews Demand for N.Korea's Responsible Steps Over Deadly Attacks*, YONHAP NEWS AGENCY, Apr. 18, 2011.

[84] Tae-ho Kwon, *Requested Security Council Cheonan measures weaken considerably*, THE HANKYOREH, July 2, 2010, http://english.hani.co.kr/arti/english_edition/e_national/428559.html.

regular artillery drill, North Korea fired approximately 170 artillery shells and rockets, hitting both military and civilian targets on the island.[85]

Map 10: North Korean artillery attack on *Yeonpyeong* Island
Source: Song Sang-ho, *N.K. artillery strikes S. Korean island*, THE KOREA HERALD, Nov. 23, 2010, http://www.koreaherald.com/view.php?ud=20101123001048.



Map 11: Direction of North Korean artillery fire
Source: Claire Lee, *Bodies of two civilians found on Yeonpyeong*, THE KOREA HERALD, Nov. 24, 2010, http://www.koreaherald.com/view.php?ud=20101124000858.

[85] Mark McDonald, *'Crisis Status' in South Korea After North Shells Island*, THE NEW YORK TIMES, Nov. 23, 2010, http://www.nytimes.com/2010/11/24/world/asia/24korea.html?src=mv&_r=0.

In response, South Korean marines stationed on the island returned fire with 80 shells and rockets, aiming at the North Korean coastal artillery batteries on *Mu*-do and *Kaemori*. South Korean jet fighters were deployed to the battle area, although they did not engage in a counterattack. As a result of the bombardment, the island suffered widespread damage. The shelling killed four people (two soldiers and two civilians); injured 19 more (16 soldiers and three civilians); destroyed military facilities, civilian buildings, and vehicles; and burned 70 percent of the island's hillsides and fields.[86] Even though North Korea did not officially announce any damage caused by South Korea's counterattack, it was later reported that the artillery batteries that had participated in the artillery attack also suffered critical damage and casualties.[87]

Despite opinions to the contrary,[88] it is generally recognized that North Korea launched this attack to extend its maritime influence over the disputed waters.[89] Prior to the direct hit on the island, North Korea first fired multiple rounds of shells and rockets into the waters north of the Line, then extended its range into the waters south.[90] According to North Korea's official statement on the incident, it took military action to warn South Korea about conducting a shooting exercise within the boundary of North Korea's territorial waters between *Yeonpyeong* and *Sochung* Island.[91] In its rebuttal, the ROK MND stated that its live-fire drill had been

---

[86] Jung Nu Ri, *Is the Shelling of Yeonpyeong Island a War Crime?: A Review under Article 8 of the Rome Statute of the International Criminal Court*, 57(1) KOR. J. INT'L L. 157, at 158 (2012).
[87] *Military suggests counterfire caused 'many casualties' in N. Korea*, YONHAP NEWS AGENCY, Dec. 2, 2010, http://english.yonhapnews.co.kr/national/2010/12/02/83/0301000000AEN20101202009100315F.HTML.
[88] *North Korea attack linked to leadership succession*, ABC NEWS, Nov. 26, 2010, http://www.abc.net.au/news/2010-11-26/north-korea-attack-linked-to-leadership-succession/2352506 (reporting that internal tensions caused by the leadership change in North Korea seems to be linked to the artillery attack inasmuch as such shelling would not have been possible without a direct order from Pyongyang).
[89] *Statement Released by Spokesman of DPRK Foreign Ministry*, THE (NORTH) KOREAN CENTRAL NEWS AGENCY, Nov. 24, 2010, http://www.kcna.co.jp/item/2010/201011/news24/20101124-17ee.html (stating that its artillery attack was to retaliate against South Korea's military exercise conducted within the boundary of its claimed territorial waters).
[90] Chung, *supra* note 61, at 287—8.
[91] *KPA Supreme Command Issues Communique*, THE (NORTH) KOREAN CENTRAL NEWS AGENCY, Nov. 23, 2010, http://www.kcna.co.jp/item/2010/201011/news23/20101123-19ee.html. *See also* Chung, *supra* note 61, at 284 (arguing that South Korea's firing shells into the disputed waters off *Baekryong* and *Yeonpyeong* Island should be considered illegal).

carried out 4–5 km away from the Line and had been directed to the southwest of the *Yeonpyeong* Island.[92] However, North Korea continued to argue that South Korea's military exercise was conducted to assert the status of the Line, even though it infringed maritime sovereignty.[93]

At both a military and political level, South Korea's response to the aftermath of the artillery attack was uncompromising, notwithstanding North Korea's efforts to settle the matter through political and diplomatic channels. The Joint Chiefs of Staff officially condemned the attack, describing it as "a premeditated, intentional illegal violation of the UNCLOS, the KAA, and the Basic Agreement. It is also an inhumane atrocity indiscriminately firing shells into unarmed civilian residential areas."[94] Because of the threat of escalation, however, there was disagreement between the governments of South Korea and the US about whether to deploy jet fighters to strike the North Korean coastal artillery batteries that were allegedly engaged in the bombing.[95] In lieu of airstrikes, South Korea and the US jointly carried out the largest military exercise in the vicinity of the NLL. In December, South Korea conducted live-fire drills in the disputed area, even though some members of the UNSC objected, and the National Assembly also approved an increased military budget.[96] In the year following the attack, South Korea expanded its military presence, not only on *Yeonpyeong* Island, but on all islands of the FNI.[97] In addition, the Lee administration revised its rules of engagement, allowing its armed

---

[92] *North Korea fires artillery into sea near western border*, THE KOREA HERALD, Nov. 23, 2010, http://www.koreaherald.com/view.php?ud=20101123000840.
[93] *Military to kick off annual defense drill next week*, YONHAP NEWS AGENCY, Nov. 26, 2010, http://english.yonhapnews.co.kr/national/2010/11/16/10/0301000000AEN20101116007000315F.HTML.
[94] *N.K. artillery strikes S. Korean island*, THE KOREA HERALD, Nov. 23, 2010, http://www.koreaherald.com/view.php?ud=20101123001048 (alteration in original).
[95] *Obama stopped South Korea's plan to retaliate against North Korea*, HANKOOK DAILY, Jan. 15, 2014, http://news.naver.com/main/read.nhn?mode=LSD&mid=sec&sid1=100&oid=038&aid=0002458076.
[96] *Increased military budget passed for the year of 2011*, MBC NEWS, Dec. 9, 2010, http://news.naver.com/main/read.nhn?mode=LSD&mid=sec&sid1=100&oid=214&aid=0000162775.
[97] *Israeli spike missiles deployed*, THE KOREA TIMES, May 19, 2013, http://www.koreatimes.co.kr/www/news/nation/2013/05/116_135966.html.

forces to act in self-defense, if deemed necessary, without the UNC's prior authorization.[98] In the political domain, the Lee administration completely shut down all political and economic exchange with North Korea, including inter-Korean Red Cross talks as well as the operation of the *Kaesong* Industrial Region.[99] As part of its policy to reopen talks, North Korea expressed its regret over what had happened to civilian residents on the island during the artillery attack.[100] However, since the South Korean government had insisted that North Korea's apology officially for its action, neither of them could find any breakthrough in their stalled relations.

E. Dispute over the Legal Status of the NLL and Equitable Maritime Delimitation

1. Principle, Concept, and Theory of Customary and Conventional International Law at Issue

Throughout the NLL Conflict, the two Koreas have offered conflicting claims about the legal basis of the NLL in international law. A major point of difference concerns the principle of acquisitive prescription and the theory of historical consolidation. South Korea argues that its authority is established by the principle of acquisitive prescription, given that North Korea has been acting in compliance with the maritime order created thereby in the disputed waters. North Korea, however, denies any acquiescence on its part, contesting that

---

[98] *Rules of engagement entirely revised to protect civilians*, SBS NEWS, Nov. 25, 2010, http://news.sbs.co.kr/news/endPage.do?news_id=N1000825552&plink=OLDURL; Charn-kiu Kim, *North Korean Bombardment on Yeonpyeong-do: An evaluation from International Humanitarian law and rules of engagement*, 33 KOR. J. INT'L L. 29, at 38 (2013).

[99] *Seoul Warns of 'Severe Punishment' Over N.Korean Attack*, CHOSUN ILBO, Nov, 24, 2010, http://english.chosun.com/site/data/html_dir/2010/11/24/2010112400306.html.

[100] *North Korea says civilian deaths, if true, very regrettable*, REUTERS, Nov. 27, 2010, http://www.reuters.com/article/us-korea-north-civilians-idUSTRE6AQ0O720101127 (condemning that "South Korea should be held responsible for the incident as it took such inhuman action as creating 'a human shield' by deploying civilians around artillery positions and inside military facilities.").

transferring a sovereign territory under this principle can only be allowed when the original authority has acquiesced in the defective possession by a possessing State for a considerable period of time without raising any objection.[101] On the other hand, South Korea also asserts the consolidation of its historical title to the Line based on both its effective occupation of the disputed area and North Korea's acquiescence therein. Conversely, North Korea argues that there was no acquiescence, recognition, nor any form of agreement on its part that South Korea could claim acquisition of said territorial sovereignty over the Line and its vicinity.[102]

As an identified legal mode of acquisition of territory in customary and conventional international law, the principle of acquisitive prescription allows the acquisition of territory subject to another sovereignty through the peaceful exercise of de facto sovereignty therein for a significant period of time.[103] In the event that a certain sovereign claims its acquisition of territory based on this principle, as analogous to the common law doctrine of adverse possession for private real estate, the claiming sovereign must prove that its occupation of the subject territory was maintained for a considerable period without being interrupted by any action of the original authority.[104] Even though the role of "immemorial possession" is generally acknowledged in the formation of this principle,[105] the principle also encompasses under its heading "prescription properly so called" in which the element of "adverse possession" comprises a significant portion. "Adverse possession" is by definition an assertion of territorial

[101] Lee, *A Study on Northern Limit Line Dispute between the Two Koreas*, *supra* note 59, at 552—3.
[102] *Id.*
[103] Randall Lesaffer, *Argument from Roman Law in Current International Law: Occupation and Acquisitive Prescription*, 16-1 EUR. J. INT'L. L. 25, 46 (2005) (quoting STARKE'S INTERNATIONAL LAW 146 (I. A. Shearer ed., 11th ed. 1994)). *But see* Land and Maritime Frontier Dispute (El Sal. v. Hond.), 1992 I.C.J. 629, at 678 (Sept. 11) (separate opinion of Judge Torres Bernardez) (insisting that "acquisitive prescription is a highly controversial concept which, for my part, I have the greatest difficulty in accepting as an established institute of international law").
[104] Lesaffer, *supra* note 104, at 46–7.
[105] D. H. N. Johnson, *Consolidation as a Root of Title*, 1955 CAMBRIDGE L. J. 215, 219 (1955); *see also* Lesaffer, *supra* note 104, 46–56.

rights against another sovereign State.[106] Therefore, a claimant State may cure its defective—at the beginning of the process—title by demonstrating its "peaceful and uninterrupted possession of the subject territory for a considerably long period of time."[107] On the basis of this principle, a State may claim a wider belt of territorial waters within the high seas that is deemed *res communis* or to a particular portion of land or sea area belonging to another sovereign—even if said waters used to be fully governed by such sovereign.[108]

Although this concept of effective occupation was originally invented to govern a situation concerning the acquisition of *terra nullius*,[109] this concept also plays a pivotal role in the interpretation and application of the principle of acquisitive prescription and the theory of historical consolidation to a given territorial dispute. However, an act of effective occupation is not in itself understood as a legal mode by which to acquire territory, but is considered one of the constitutive elements demonstrating the existence of possession of a given territory by a State claiming its acquisition either through prescription or through historical consolidation.[110] Throughout the precedent of international courts and arbitration panels, the concept has been defined as "undisturbed, uninterrupted and unchallenged possession,"[111] "continuous and peaceful display of territorial sovereignty,"[112] "continuous and peaceful display of authority, and the intention and will to act as sovereign, and some actual exercise or display of such authority."[113] Based on this understanding, it is determined on a case-by-case basis whether an

[106] Artur Koztowski, *Legal Construct of Historic Title to Territory in International Law: An Overview*, 30 POLISH Y.B. INT'L L. 61, 93 (2010) (quoting *Juridical Regime of Historic waters including historic bays-Study prepared by the Secretariat*, [1962] 2 Y.B. Int'l L. Comm'n 80, U.N. Doc. A/CN.4/143 at 64 [hereinafter Juridical Regime]).
[107] Lesaffer, *supra* note 104, at 49.
[108] Johnson, *supra* note 106, at 219—20.
[109] JEREMIE GILBERT, INDIGENOUS PEOPLE'S LAND RIGHTS UNDER INTERNATIONAL LAW: FROM VICTORS TO ACTORS 32 (2006).
[110] Lesaffer, *supra* note 104, at 51.
[111] Chamizal Case (Mex. v. U.S.), 6 R.I.A.A. 309 (Perm. Ct. Arb. June 1911).
[112] Island of Palmas Case (Neth. v. U.S.), 2 R.I.A.A. 829, at 839 (Perm. Ct. Arb. 1928).
[113] Legal Status of Eastern Greenland (Den. v. Nor.), 1933 P.C.I.J. (ser. A/B) No. 53, at 45—6.

act of a sovereign can be deemed to be a "display of sovereignty" over a given territory.[114] However, as the ICJ holds, such a display may be interpreted in various ways:

> The exercise of sovereign authority pertaining to the disputed territory;[115] the exercise of sovereignty by a State on its own[116] or by authorizing an individual activity as exercise of sovereignty on its behalf;[117] or conferring a form of license upon a private company.[118]

Furthermore, in such cases, it will also be decided whether the claiming State has displayed its sovereignty "in a peaceable way."[119] Since another State may simply stop this process of display with its "diplomatic protest," the claimant needs to show more than the mere absence of violence.[120] To that extent, acquiescence on the part of other States may be considered evidence of sovereignty.[121]

As a hybrid mode of acquisitive prescription and occupation, a State may claim its historically consolidated title to a specific territory that is *terra nullius* or one that was once fully ruled by another sovereign.[122] In the wake of *Anglo-Norwegian Fisheries Case* ("*Fisheries Case*"),[123] the theory of historical consolidation was newly introduced as a mode of territorial acquisition, distinct from occupation or acquisitive prescription,[124] embracing the notion of immemorial possession and that of adverse possession (which have been deemed contradictory to each other) as well as the mode of occupation.[125] In addition to combining such conflicting notions, the theory has also influenced the development of international law

---

[114] Lesaffer, *supra* note 104, at 51 (citing Island of Palmas Case, *supra* note 113, at 840).
[115] Sovereignty over Pulau Ligitan/Pulau Sipadan (Indon. v. Malay.), 2002 I.C.J. 625, at ¶ 136 (Dec. 2002) [hereinafter Pulau Ligitan/Pulau Sipadan Case].
[116] Minquiers and Ecrehos (Fr. v. U.K.), 1953 I.C.J. 47, at 65, 69 (Nov. 17).
[117] Pulau Ligitan/Pulau Sipadan Case, *supra* note 116, at ¶ 140.
[118] Kasikili/Sedudu Island (Bots. v. Namib.), 1999 I.C.J. 1045, at 1105 (Dec. 13).
[119] Lesaffer, *supra* note 104, at 51.
[120] *Id.*
[121] *Id.*
[122] Koztowski, *supra* note 107, at 96. *But see* Minquiers and Ecrehos Case, *supra* note 117.
[123] Anglo-Norwegian Fisheries Case (U.K. v Nor.), 1951 I.C.J. 116 (Dec.18).
[124] CHARLES DE VISSCHER, THEORIES AND REALITY OF PUBLIC INTERNATIONAL LAW 244–45 (1953).
[125] Johnson, *supra* note 106, at 219, 223.

of acquisition of territory by putting more emphasis over traditional modes on the maintenance and manifestation of sovereignty over a given territory throughout the gradual process of historical consolidation: "A title should not only be acquired, but also be continuously maintained."[126] With respect to the constituent features of a title based on historical consolidation, the International Law Commission's study suggests the following: a) the effective exercise of authority over a disputed land or maritime area by a State claiming its historic title thereto; b) the continuous display of such exercise of authority; and c) the attitude of foreign States.[127] The last feature "the attitude of foreign States," which may also be referred to as "toleration of foreign States or the international community" without asserting any adversarial claim, is considered the decisive one, inasmuch as the theory was initially designed to deal with a case concerning *res communis*.[128]

2. North Korea's Position in the Dispute

a. Against the NLL: Defying Its Validity and Legality

At the general-level talk held on the day of the First *Yeonpyeong* Naval Skirmish, North Korea publicly rejected the validity and legality of the NLL for the first time by referring to international law. Since then, North Korea has persistently tackled South Korea's justification of the Line, citing customary and conventional international law as well as the UNCLOS. First, North Korea points out that there was no official notification from the UNC about its designation of the Line.[129] Second, North Korea also asserts that it has neither acknowledged

[126] *Id.* at 223; *see also* the Island of Palmas Case, *supra* note 113.
[127] Juridical Regime, *supra* note 107, at ¶ 80. *See also* Lesaffer, *supra* note 104, at 49, 55.
[128] IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 156 (3rd ed. 1979).
[129] Seong Ho Jeh, *Buk-Bang-Han-Gye-Seon-Eui Beop-Jeok Yu-Hyo-Seong-Gwa Da-Eung Bang-Hyang* [*Legal Validity of the Korean Northern Limit Line and South Korea's Possible Measures*], CHUNGANGBEOPHAK Je7Jip Je2Ho [CHUNG-ANG L. REV. Vol. 7-2] 107, at 128—30 (2005) (casting doubt on whether the designation of

nor accepted the Line as a legally valid maritime demarcation line in the Yellow/West Sea area. As proof, North Korea notes that its naval boats and ships have been crossing the Line more than approximately 40 times a year since 1973.[130] This directly contradicts South Korea's justification of the legal status of the Line based on the principle of acquisitive prescription or the theory of historical consolidation. Indeed, the North Korean Navy refuted the South Korean-backed theory of historical consolidation, arguing that it is difficult to define the theory as a widely-accepted mode of territory acquisition in the international community.[131] Moreover, North Korea also criticized South Korea's justification of the Line based on the principle of acquisitive prescription, asserting that it has persistently and consistently protested against South Korea's exercise of authority over the disputed area for its illegality under customary and conventional international law.[132] In other words, regarding South Korea's argument that it has acquired a sovereign right through the completion of adverse but peaceful prescriptive process, North Korea contends that it has been constantly interrupting the process of acquisitive prescription by raising objections through diplomatic channels and by instigating military conflicts.

From 1999, North Korea began to contest the validity and legality of the NLL, grounded in the methods and principles achieved in the UNCLOS. North Korea points out that the Line

---

the NLL was subject to obligatory notification, whether customary international law obligates a state to notify within certain period of time, and whether the law permits an indirect and informal way of notification). *But see* Chung, *supra* note at 61, at 281—2 (asserting that the 1959 *Chosunchoongang* Yearbook simply indicated a set of disconnected demarcation lines to respect the waters contiguous to the Demilitarized Zone and to the land area of Korea under the military control of the opposing side as prescribed in the KAA, contradicting Professor Jeh's argument that North Korea at least received an indirect notification of the delineation of the NLL given the map included in its Yearbook).

[130] Young Hee Lee, *Buk-Bang-Han-Gye-Seon-Eun Hap-Beop-Jeok Goon-Sa-Boon-Gye-Seon-In-Ga?* [*Is the NLL a Legal Military Demarcation Line?*] TONGILSIRON JE3HO [CONTEMPORARY OPINION ON UNIFICATION VOL. 3] 23, at 54 (1999). *See also* Cham-Yeo-Yeon-Dae [People's Solidarity for Participatory Democracy], NLL Jaeng-Jeom-Gwa Dae-An [NLL: Problems and Solutions] (Nov. 22, 2011), at 12, http://www.peoplepower21.org/PSPD_press/962270 (last visited Oct. 13, 2020) (pointing out that South Korea never has an intention to possess the disputed waters to complete the process of acquisitive prescription in terms of international law given that its military had often used the term "high sea" to describe the waters in the late 1950s).

[131] RODONG DAILY, Mar. 3, 2000, *cited in* Lee, *A Study on Northern Limit Line Dispute between the Two Koreas*, *supra* note 59, at 555—6.

[132] *Id.*

infringes on its 12 nm-width boundary of territorial waters that each and every coastal State is inherently permitted to possess under the Convention.[133] North Korea refers to the waters between *Sochung* and *Yeonpyeong* Island, where many of the inter-Korean naval clashes have occurred, as an example of such infringement. Under the Convention, each island of the FNI shall be entitled to generate its own territorial waters boundary as against the opposing coastline of North Korea, thus supporting the legal status of the Line concerning the waters surrounding the group of islands. Nevertheless, the Line runs toward the northwest about 45 nm, unusually cutting North Korea's navigational access off through its claimed territorial waters, according to North Korea.[134] Specifically, North Korea's position is that, although the FNI are entitled to generate their own territorial waters, their generating effect should not be used in such a way to separate North Korea from access to its own territorial waters.[135] As the Line runs through the alleged boundary of territorial waters of North Korea in the disputed area, North Korea often points to this to reject the validity and legality of the Line.[136] On the premise that the Line has no basis in the Convention, North Korea further suggests a new maritime demarcation line supposedly delineated on the basis of the methods and principles of the Convention, e.g., equidistance principle, equitable principles, mutual agreement, and natural prolongation.[137]

Considering the fact that the NLL was unilaterally designated as part of self-restraining measures of the UNC after the ceasefire of the Korean War, North Korea argues that the Line should not be automatically incorporated into the KAA in the absence of mutual consent, thus

---

[133] RODONG DAILY, July 3, 1999, at 5, *cited in* Lee, *A Study on Northern Limit Line Dispute between the Two Koreas*, *supra* note 59, at 554.
[134] *See* Van Dyke et al., *supra* note 20, at 151 (citing the principle of non-encroachment prescribed in the UNCLOS Article 7(6), which prohibits such use of a straight baselines system "in such a manner as to cut off the territorial sea of another State from the high seas or an exclusive economic zone," to explain the situation).
[135] *See* Roehrig, *supra* note 6, at 4.
[136] CENTRAL INTELLIGENCE AGENCY, *supra* note 7 (stressing that for this reason the NLL might give rise to the continuing inter-Korean naval conflicts over the disputed waters).
[137] *See* GOOK-HOE-IP-BEOB-JO-SA-CHEO [NATIONAL ASSEMBLY RESEARCH SERVICE], BUK-BANG-HAN-GYE-SEON MOON-JE-WA DAE-EUNG-BANG-HYANG [THE NLL CONFLICT AND PLANS OF REACTION] at 13, 50 (2011).

denying its binding effect over the parties to the agreement.[138] In this view, North Korea considers South Korea's advocacy of the Line as a breach of the KAA—i.e., North Korea condemns South Korea for trying to create a maritime order in its favor in the Yellow/West Sea area. Hence, North Korea further argues that the disputed waters surrounding the Line should be appertained to part of its maritime territory, defining South Korean naval activities as a military provocation.[139] In fact, the two sides did not agree to draw any maritime demarcation line in the course of armistice negotiations nor later concluded any subsequent protocols to establish any maritime order for the disputed waters, as noted above. According to the KAA, the Parties are at best obliged to respect the waters contiguous to the DMZ and the land area, though they are also prohibited to engage in any type of blockade of each other's coastal area.[140] Notwithstanding the fact that the KAA prescribes a provincial boundary line between *Gyeonggi*-do and *Hwanghae*-do Province as the only demarcation line to indicate the control of coastal islands on the west coast of the Korean Peninsula,[141] it also makes clear that "no other significance or none shall be attached thereto."[142] Ironically, the UNC's approach supports North Korea over South Korea to some extent: regardless of the practicality and effectiveness of the Line as a de facto military demarcation line, the UNC deems it a part of its internal operational instructions designed to prevent South Korea's naval ships from crossing over after the signing of the armistice agreement.[143] According to the Letter from the UNC for the South Korean Defense Minister written in 1989, the UNC clearly stated that it had no

[138] Seong Ho Jeh, *Buk-Bang-Han-Gye-Seon-Eui Beop-Jeok Go-Chal* [*Legal Analysis on the Northern Limit Line*], GUKBANGJEONGCHAEKYEONGU [NAT'L DEF. POL'Y STUD], Winter 2004, at 127, 135.
[139] Lee, *Is the NLL a Legal Military Demarcation Line?*, *supra* note 131, at 34.
[140] KAA, *supra* note 17, art 2, para.15.
[141] North Korea backs its CMDL unilaterally proclaimed to replace the NLL up by relying on the fact that the provincial boundary line is located in equidistant points between the coastline of *Gyeonggi*-do and *Hwanghae*-do Province. Jeh, *Legal Validity of the Korean Northern Limit Line and South Korea's Possible Measures*, *supra* note 130, at 136.
[142] KAA, *supra* note 17, art 2, para.13(b), map 3. *See also* Lee, *Is the NLL a Legal Military Demarcation Line?*, *supra* note 131, at 37—41 (asserting that the article should not be understood in a way that it permits to connect each island of the FNI by drawing certain line for whatever purpose).
[143] Cham-Yeo-Yeon-Dae, *supra* note 131, at 4—5 (citing Letter from the United Nations Commander-in-chief for the Defense Minister of the Republic of Korea (June 3, 1989)).

legitimate authority to condemn North Korean naval boats for simply crossing the Line. However, the letter clarified that North Korean boats entering into the three nm-territorial waters boundary of the FNI without any prior approval would constitute a violation of the KAA.[144]

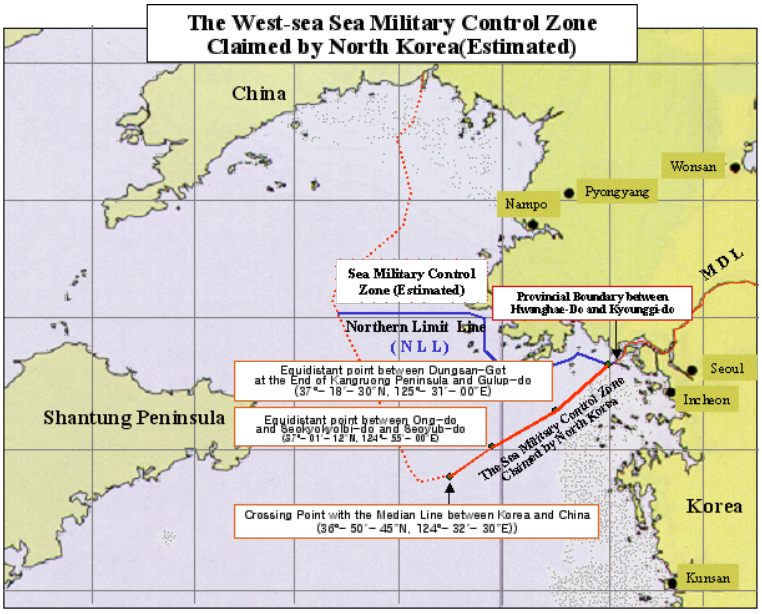
North Korea also undermines the Basic Agreement Article 11 and the Protocol on Non-aggression Articles 9 and 10, asserting that the terms employed thereof are not sufficient to provide a legal basis to defend the valid legal status of the NLL. Regarding the articles, there is a progressive point of view among South Korean experts that the phrase "the areas that have been under the jurisdiction of each side" should be understood as the areas that have been "jointly" managed by the two sides, i.e., the *Han* River Estuary and the DMZ.[145] In this view, as the Line and its vicinity have been unilaterally controlled by the UNC, rather than having been jointly controlled by the two Koreas, the agreement and the protocol were intended to assume the future establishment of a non-aggression maritime demarcation through subsequent negotiations.[146]

b. North Korea's Claims Made Since 1973

In the wake of the West Sea Incident, North Korea began to lodge an official protest against the NLL, often with its own suggestions about replacing the Line. However, the argument was intended to undermine the validity and legality of the Line, rather than casting doubt on the ownership over the FNI as stipulated in Article 2, Section 15 of the KAA. In December 1973, soon after the West Sea Incident, North Korea asserted that "the seas surrounding *Haeju*, *Dungsangot* and *Ongjin* Peninsula must appertain to the DPRK" in

[144] Letter from the United Nations Commander-in-chief for the Defense Minister of the Republic of Korea (June 3, 1989).
[145] Lee, *Is the NLL a Legal Military Demarcation Line?*, *supra* note 131, at 29—32.
[146] Cham-Yeo-Yeon-Dae, *supra* note 131, at 13.

consideration of the textual interpretation of the KAA.[147] Quoting the KAA Article 2, paragraph 13(b), as introduced above, North Korea proposed "a hypothetical extension line stretching extended parallel to the Latitude from the end of the provincial boundary line between *Hwanghae*-do and *Gyeonggi*-do Province."[148] In line with this new idea, North Korea then required all types of navigating vessels to obtain its prior authorization to enter or leave the FNI through the designated corridors, stressing that the islands lay within its "coastal waters."[149] In 1977, North Korea unilaterally proclaimed a 200 nm-width Exclusive Economic Zone ("EEZ") generated from its coastal baseline, followed by the establishment of the Military Control Zone ("MCZ") irrespective of the presence of the FNI. The new zones and boundaries claimed by North Korea at that time appeared to be a direct violation of the KAA, which expressly prescribes the presence and ownership of the islands-group.[150]



Map 12: Maritime Delimitation Claimed by North Korea

[147] RODONG DAILY, Dec. 1, 1973, at 5, *cited in* Lee, *A Study on Northern Limit Line Dispute between the Two Koreas*, *supra* note 59, at 551.
[148] Kim, *A Maritime Demarcation Dispute on the Yellow Sea*, *supra* note 18, at 483.
[149] RODONG DAILY, Dec. 3, 1973, at 6, *cited in* Lee, *A Study on Northern Limit Line Dispute between the Two Koreas*, *supra* note 59, at 544.
[150] Cham-Yeo-Yeon-Dae, *supra* note 131, at 8.

Source: GUK-BANG-BU [THE MINISTRY OF DEFENSE OF THE REPUBLIC OF KOREA], BUK-BANG-HAN-GYE-SEON-EUL DAI-HA-NEUN WOO-RI-EUI JA-SE [THE REPUBLIC OF KOREA POSITION REGARDING THE NORTHERN LIMIT LINE] (2nd ed. 2007) 19, *available at* http://www.military.co.kr/english/NLL/NLL.htm.

Since the First *Yeonpyeong* Naval Skirmish, as discussed above, North Korea has been continuously opposing to the validity and legality of the NLL,[151] denouncing the Line as "a violent encroachment on its maritime sovereignty."[152] At a ministry-level talk held in *Panmunjom* on June 22, 1999, a North Korean representative insisted that "the FNI are located within its territorial waters boundaries."[153] From this perspective, the representative further asserted that "the Line neither has any basis in the KAA, nor has any basis in any type of bilateral agreement between the two sides… North Korea never recognized its presence or role for the Yellow/West Sea area…therefore, neither a demarcation line nor a sea border has ever been delineated between the FNI and North Korea's coastline."[154]

In the 1990s, North Korea presented an argument based on the UNCLOS in furtherance of its position against the NLL. To be specific, North Korea stressed that the Line deprived its territorial integrity given the following: first, the Line encroached on the boundary of its territorial waters as guaranteed for each and every coastal State under the UNCLOS;[155] and, second, a mutual agreement between the parties to the KAA to settle the legal status of the Line. North Korea further asserted that belligerent States are supposed to delimit the boundaries of an island based upon mutual agreement in a case where such an island is lying within the opposing State's territorial waters.[156] On that basis, North Korea justified its maritime activities

[151] RODONG DAILY, June. 16, 1999, at 5, *cited in* Lee, *A Study on Northern Limit Line Dispute between the Two Koreas*, *supra* note 59, at 553.
[152] Lee, *A Study on Northern Limit Line Dispute between the Two Koreas*, *supra* note 59, at 553 [alteration in original].
[153] RODONG DAILY, June 23, 1999, at 5, *cited in* Lee, *A Study on Northern Limit Line Dispute between the Two Koreas*, *supra* note 59, at 553.
[154] RODONG DAILY, June 28, 1999, at 5, *cited in* Lee, *A Study on Northern Limit Line Dispute between the Two Koreas*, *supra* note 59, at 553.
[155] U.N. Convention on the Law of the Sea art. 3, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994) [hereinafter UNCLOS] (providing that "[E]very State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles….").
[156] RODONG DAILY, July 3, 1999, at 5 (quoting UNCLOS, *supra* note 156, at art. 15), *cited in* Lee, *A Study on Northern Limit Line Dispute between the Two Koreas*, *supra* note 59, at 555.

in the disputed area as exercise of its sovereignty and supported its unilateral declarations of the maritime zones and demarcation lines on its own behalf.[157]

In terms of international law, the North Korean Navy refuted South Korea's arguments of historical consolidation or the principle of acquisitive prescription.[158] Regarding the former, the North Korean Navy contested that there had been no consent, approval, or acquiescence, which are deemed the necessary requirements to fulfill the consolidating process.[159] With respect to the latter, the North Korean Navy also contended that the principle was originally designed and developed to legitimize a specific mode of territory acquisition, though it might be considered violent in its nature.[160] In other words, the principle requires a State to acquiesce in the violation of the possessing State for a reasonable period of time without lodging any protest to interrupt the process of acquisitive prescription.[161] In reference to this, the North Korean Navy asserted that "insofar as South Korea did not provide any other reliable legal ground to prove North Korea's acquiescence on the Line, it could not invoke acquisitive prescription in defense of the legal status of the Line."[162] Throughout its rebuttal, the North Korean Navy strongly supported its government's position: A new maritime demarcation line for the disputed waters should only be established on the basis of international law, including the KAA, requiring mutual consent between the parties concerned.[163]

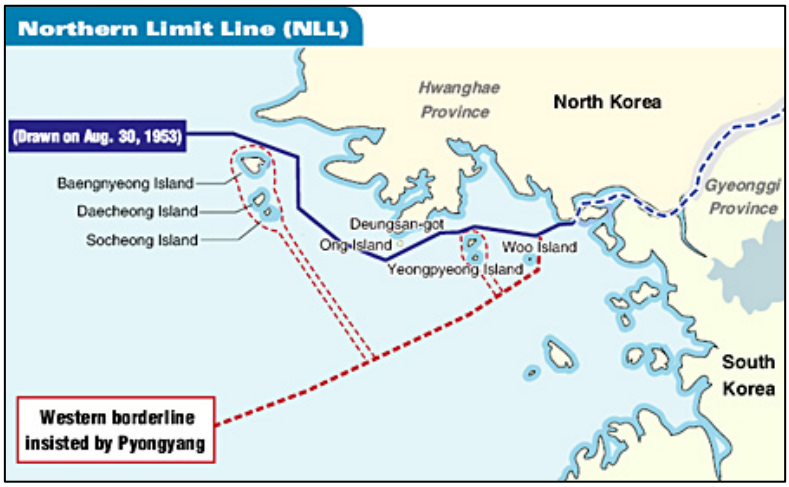
As mentioned above, North Korea unilaterally pronounced the CMDL in September 1999, which was followed by the Navigation Order. Compared to North Korea's earlier proposals, which had taken into account the provincial boundary line in delimitation, the

---

[157] RODONG DAILY, July 11, 1999, at 5, *cited in* Lee, *A Study on Northern Limit Line Dispute between the Two Koreas*, *supra* note 59, at 5.
[158] RODONG DAILY, Sept. 2, 1999, at 5; RODONG DAILY, Sept. 17, 1999, at 5; RODONG DAILY, Sept. 23, 1999, at 6, *cited in* Lee, *A Study on Northern Limit Line Dispute between the Two Koreas*, *supra* note 59, at 557—8.
[159] RODONG DAILY, Mar. 3, 2000, at 5, *cited in* Lee, *A Study on Northern Limit Line Dispute between the Two Koreas*, *supra* note 59, at 555.
[160] *Id.*
[161] *Id.*
[162] *Id.*
[163] *See* RODONG DAILY, July 3, 1999, at 5, *cited in* Lee, *A Study on Northern Limit Line Dispute between the Two Koreas*, *supra* note 59, at 554.

CMDL was not extended parallel to the Latitude, but it instead protruded deep into the gulf of *Gyeonggi* and blockaded the Seoul metropolitan region.[164] Precisely speaking, even if the CMDL was a hypothetical extension line that was running from the end of the provincial boundary line between *Hwanghae*-do province and *Gyeonggi*-do province, it connected multiple arbitrary equidistant points between the FNI and North Korea's corresponding coastline.[165] To secure the enforcement of the CMDL, North Korea afterward claimed that the waters lying north of the line should be appertaining to its maritime sovereignty.[166] In association with the CMDL, the North Korean Navy also proclaimed the Navigation Order, which restricted to a substantial degree the passage of ships of the UNC or South Korean Registry navigating to and from the FNI.[167] The order divided the disputed waters into three maritime zones: Zone 1 – *Baekryong*-do, *Taechong*-do, and *Sochung*-do; Zone 2 – *Yeonpyeong*-do and its vicinity; and Zone 3 – *U*-do. North Korea required all military and civilian vessels to navigate only through the designated navigable corridors when entering and leaving the islands situated, specifically in Zone 1 or Zone 2.[168]

[164] Kim, *A Maritime Demarcation Dispute on the Yellow Sea*, *supra* note 18, at 485.
[165] *Id.*
[166] CHOONGANG DAILY, Sept. 3, 1999, at 1—3; CHOSUN DAILY, Sept. 3, 1999, at 4. At this time North Korea publicly declined the NLL to define either as a de facto maritime demarcation line or a maritime border.
[167] RODONG DAILY, Mar. 24, 2000, at 2, *cited in* Lee, *A Study on Northern Limit Line Dispute between the Two Koreas*, *supra* note 59, at 558—9.
[168] Young Koo Kim, *Buk-Han-Ee Joo-Jang-Ha-Neun Seo-Hae-Hae-Sang-Gyeong-Gye-Seon-Gwa Tong-Hang-Jil-Seo-E Dae-Han Boon-Seok* [*Legal Appraisal on the CMDL and the Navigation Order*], SEOULGOOKJEBEOPYEONGOO Je7Kwon Je1Ho [SEOUL INT'L. L. REV. Vol. 7-1] 1, at 9 (2000).



Map 13: Declared Navigation Corridors
Source: Jung Sung-ki, Will Leaders Agree on Tension-Reduction Plan?, THE KOREA TIMES, Sep. 4, 2020, https://www.koreatimes.co.kr/www/nation/2020/06/113_8269.html.

After the Second *Yeonpyeong* Naval Skirmish, North Korea adopted a more aggressive stance toward the NLL by giving an item-by-item rebuttal to the defenses claimed by South Korea. First, North Korea alleged that the South Korean boats committed the first-strike against its boats at the time of the military contact, while its boats were carrying out regular patrol operations within the boundary of its territorial waters.[169] In support of this approach, a spokesperson of the North Korean Foreign Ministry condemned the validity and legality of the Line, underscoring that "it was obvious that the South Korean boats had provoked by infringing upon its territorial waters and committing a surprise attack against its naval forces, and its boats took self-defense measures in their response."[170] With regard to the particulars of the skirmish, North Korea reiterated its long-standing position against the Line as follows:[171]

> First and foremost, the Line was unilaterally designated by the UNC without notifying the DPRK of the designation. Moreover, the Line is a grave violation of the KAA, international law, and the UNCLOS. Most importantly, both America and

[169] RODONG DAILY, July 2, 2002, at 4, 5, *cited in* Lee, *A Study on Northern Limit Line Dispute between the Two Koreas*, *supra* note 59, at 561.
[170] RODONG DAILY, July 4, 2002, at 5, *cited in* Lee, *A Study on Northern Limit Line Dispute between the Two Koreas*, *supra* note 59, at 562.
[171] RODONG DAILY, July 4, 2002, at 4; July 10, 2002, at 4; July 16, 2002, at 5; Aug. 2, 2002, at 5, *cited in* Lee, *A Study on Northern Limit Line Dispute between the Two Koreas*, *supra* note 59, at 562.

South Korea have dismissed its proposals to re-draw a demarcation line in the Yellow/West Sea.

North Korea proposed a new maritime demarcation line at the 6th South-North general-level talk held in 2007. In its shape and location, as shown in Map 7 above, this new line proposed by North Korea was distinguishable from the NLL and its predecessor—the CMDL. However, North Korea did not clarify whether the line was proposed as a maritime demarcation line or as a sea border.[172] In particular, this line appeared to be analogous to the NLL in many segments: e.g., the segment between *Baekryong*-do, *Daechong*-do and *Sochung*-do; the segment between *Jangsangot* and *Ongjin* Peninsula; and the segment between *Haeju* and *Deungsangot*, and *Yeonpyeong*-do. North Korea did not duplicate the Line in its new proposal, given that it extended further south of the Line, e.g., in the waters between *Sochung*-do and *Yeonpyeong*-do. Meanwhile, North Korea explicitly claimed the full 12 nm-breadth territorial waters from its coastline. This new line proposed by North Korea was designed to merge the waters at a distance of about 10 kilometers from the Line, which had been under the de facto military control of South Korea, into its own maritime jurisdiction.

3. South Korea's Position in Defense of the NLL

a. Upholding the Validity, Legality, and Effectiveness of the NLL

[172] Professor Chung believes that North Korea came up with the new line as its sea border, given that it had not been discussed at the US–North Korea general-level talk, which had been irregularly held on behalf of the Military Armistice Commission, but at the South-North general-level talk. Chung, *supra* note 61, at 266. Nevertheless, it was not clear whether North Korea considered the U.S.-North Korea general-level talk as a replacement of the Military Armistice Commission. Rather, North Korea might have wanted to negotiate with South Korea about significant economic and security issues arising from the disputed waters. Therefore, it is not accurate to say that North Korea suggested it as its sea border by simply quoting that this new line was discussed at the 6th South-North general-level talk. In other words, it is still possible to say that the line was proposed as a sea demarcation line as a replacement of the NLL.

Most South Korean experts hold that the NLL has its legal basis in customary and conventional international law; e.g., the theory of historical consolidation, effective occupation, and the principle of acquisitive prescription.[173] First, in defense of the historically consolidated status of the Line as a regional norm, prevailing opinion stresses that South Korea has effectively controlled the Line and its surrounding waters for decades since the execution of the KAA.[174] Furthermore, North Korea's attitude toward the Line, i.e., its acquiescence or toleration, coupled with the doctrine of estoppel, is referred to as proof of South Korea's acquisition of sovereign right throughout the consolidation process.[175] As will be discussed below, this argument presents multiple historical occasions in which North Korea was deemed to have acted in compliance with the presence of the Line to prove the implicit recognition on the part of North Korea.[176] Second, this opinion also cites the principle of acquisitive prescription—one of the traditional modes of territory acquisition in customary and conventional international law—to prove the legality of the Line by supporting South Korea's acquisition of sovereign right thereto.[177] According to this principle, a State may acquire a sovereign title to a particular territory being subject to another original sovereign through open, peaceful, and uninterrupted exercise of a de facto sovereignty for a significantly long period of

[173] Lee, *A Study on Northern Limit Line Dispute between the Two Koreas*, *supra* note 59, at 553. *See also* Jeh, *Legal Validity of the Korean Northern Limit Line and South Korea's Possible Measures, supra* note 130, at 115—8; Jeh, *Legal Analysis on the Northern Limit Line*, *supra* note 139, at 127, 132—5.
[174] Kim, The Inter-Korean Conflict over the Northern Limit Line: Applying the Theory of Historical Consolidation, *supra* note 1, at 61—71; Jeh, *Legal Analysis on the Northern Limit Line*, *supra* note 139, at 133; Lee, *A Study on Northern Limit Line Dispute between the Two Koreas*, *supra* note 59, at 551—3.
[175] Kim, The Inter-Korean Conflict over the Northern Limit Line: Applying the Theory of Historical Consolidation, *supra* note 1, at 40—2, 52—7, 68—71.
[176] GUK-BANG-BU, *supra* note 29, at 4—9; GOOK-HOE-IP-BEOB-JO-SA-CHEO, *supra* note 138, at 12, 50; Jeh, *Legal Analysis on the Northern Limit Line*, *supra* note 139, at 136—7. *Contra* Cham-Yeo-Yeon-Dae, *supra* note 131, at 12—3.
[177] Lee, *A Study on Northern Limit Line Dispute between the Two Koreas*, *supra* note 59, at 553. The doctrine allows a state to acquire a particular territory being subject to another sovereign state or the international community through the open and peaceable exercise of de facto sovereignty for a very long period of time. *See* Kim, The Inter-Korean Conflict over the Northern Limit Line: Applying the Theory of Historical Consolidation, *supra* note 1, at 38—40

time.[178] On that basis, North Korea has been deemed to have acted in recognition of the Line over periods of time, thereby supporting South Korea's acquisition of prescriptive right.[179]

In opposition to North Korea's claims based on the UNCLOS, South Korean legal experts have developed various defense theories to deny the application of the Convention to the NLL Conflict or to utilize the principles and methods enshrined therein on South Korea's behalf. First, Professor Lee emphasizes that the core of the Conflict is not about maritime boundary delimitation in peacetime but, rather, the legal status of the Line in the disputed waters within the milieu constructed by the KAA.[180] In this regard, Professor Lee argues that the Convention should have no influence either on the validity or legality of the Line unless otherwise agreed between the parties to the KAA.[181] Second, another group of the experts completely reject the application of the Convention to the NLL Conflict. In other words, inasmuch as the two Koreas have been in a state of war, the principles and methods that are primarily designed to deal with peacetime maritime issues should not be applicable to the Conflict.[182] This approach finds its basis in the Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident ("Report of Flotilla Incident")[183] and a disagreement of the opinions presented by the UNCLOS Member States throughout the incident.[184] Third, it is often noted that, although both Koreas had participated in the signatory

---

[178] *See* Kim, The Inter-Korean Conflict over the Northern Limit Line: Applying the Theory of Historical Consolidation, *supra* note 1, at 38—42 (quoting Lesaffer, *supra* note 104, at 46), 44—6. However, the application of acquisitive prescription might be tackled, since North Korea has never had possess original sovereign title to any parts of the disputed waters; in particular, the waters between *Yeonpyeong* and *Sochung* Island. *See* Kim, The Inter-Korean Conflict over the Northern Limit Line: Applying the Theory of Historical Consolidation, *supra* note 1, at 63.

[179] Lee, *A Study on Northern Limit Line Dispute between the Two Koreas*, *supra* note 59, at 553.

[180] Jae Min Lee, *Buk-Bang-Han-Gye-Seon-Gwa Gwan-Ryeon-Doen Gook-Je-Beop-Jeok-Moon-Je-Eui Jae-Geom-To* [*Revisiting Legal Issues over the Northern Limit Line*], SEOULGOOKJEBEOPYEONGOO Je15Kwon Je1Ho [SEOUL INT'L. L. REV. Vol. 15-1] 41, 56 (2008).

[181] *Id.*

[182] GOOK-HOE-IP-BEOB-JO-SA-CHEO, *supra* note 138, at 38.

[183] U.N. Secretary-General's Panel, *Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident*, at 102, ¶ 70 (Sept. 2011) (reporting that "…once an armed conflict has commenced, the traditional laws of naval warfare apply (*ius in bello*). Those rules would apply in place of the general provisions of the law of the sea otherwise applicable in peacetime.").

[184] Barnard H. Oxman, *The Regime of Warships Under the United Nations Convention on the Law of the Sea*, 24 VA. J. INT'L L. 809, 832 (1984) (commenting that the maritime nations participating in the course of negotiations

process, it was only South Korea that ratified the Convention thereafter. In other words, the fact that North Korea has not ratified the Convention undermines the reliability of North Korea's claims based on the Convention. Aside from a debate on whether any part of the Convention has been integrated into customary and conventional international law after being adopted, this argument points out North Korea's contradictory approach in developing its arguments based on the Convention.[185] Fourth, it is also asserted that the general rules and principles of international law, including the Convention, should not be applied to understand or to address conflict between the two Koreas, because South Korea is deemed the only legitimate sovereign State governing the Korean Peninsula and its adjacent islands since the execution of the KAA. This assertion is focused on the contextual analysis of the Constitution of the Republic of Korea, which is the official name of South Korea ("ROK Constitution").[186] This assertion is also based on rulings rendered by the South Korean courts on the nature of inter-Korean relations.[187]

---

intended to maximize their freedom of military activities in seas and oceans), *quoted in* GOOK-HOE-IP-BEOB-JO-SA-CHEO, *supra* note 138, at 38. The maritime nations intentionally avoided discussing concrete restrictions on naval operations, thus clarifying the intention to limit the application of the Convention only to peacetime marine activities. Oxman, *supra* note 185, at 811; R. R. CHURCHIL & V. A. LOWE, THE LAW OF THE SEA 421 (3rd ed. 1999); SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA, EXPLANATION 93 (Louise Doswald-Beck ed., 1995); A HANDBOOK ON THE NEW LAW OF THE SEA 1321 (Rene-Jean Dupuy & Daniel Vignes eds. 1991); Wolff Heintschel von Heinegg, *The United Nations Convention on the Law of the Sea and Maritime Security Operations*, 48 GERMAN Y. B. INT'L L. 151, 160 (2005), *cited in* GOOK-HOE-IP-BEOB-JO-SA-CHEO, *supra* note 138, at 38.

[185] GUK-BANG-BU, *supra* note 29, at 23 (accusing North Korea, which has not even ratified the UNCLOS, of violating it by unilaterally proclaiming a military demarcation line that is not conform to the provisions achieved therein).

[186] DAEHANMINKUK HUNBEOB [HUNBEON] [CONSTITUTION] art. 3 (defining that "The territory of the Republic of Korea shall consist of the Korean Peninsula and its adjacent islands."), 4 (requiring that "The Republic of Korea shall seek unification and shall formulate and carry out a policy of peaceful unification based on the principles of freedom and democracy.") (S. Kor.) [hereinafter ROK Constitution], *cited in* Kim, The Inter-Korean Conflict over the Northern Limit Line: Applying the Theory of Historical Consolidation, *supra* note 1, at 17—8.

[187] Supreme Court [S. Ct.], 90Da1451, Sept. 25, 1990 (S. Kor.); Constitutional Court [Const. Ct.], 2003 Hun-Ma114 (consol.), June 30, 2005, (17(1) KCCR, 879) (S. Kor.); Constitutional Court [Const. Ct.], 2004Hun-Ba68 (consol.), July 27, 2006 (18(2) KCCR 880) (S. Kor.); *see also* Supreme Court [S. Ct.], 89NU6396, Sept. 28, 1990 (S. Kor.) (holding that the *Copyright Act* enacted by the National Assembly is valid even in the territory of North Korea), *cited in* Kim, The Inter-Korean Conflict over the Northern Limit Line: Applying the Theory of Historical Consolidation, *supra* note 1, at 17—8. However, by contrast, the Constitutional Court of South Korea once found that one of North Korean universities should not be treated as same as a university officially registered in the Ministry of Education, Science and Technology of the Republic of Korea in spite of the Article 3 of the ROK Constitution. Constitutional Court [Const. Ct.], 2006Hun-Ma679 (consol.), Nov. 30, 2006 (18(2) KCCR 549) (S. Kor.), *cited in* Kim, The Inter-Korean Conflict over the Northern Limit Line: Applying the Theory of Historical Consolidation, *supra* note 1, at 17—8.

On the other hand, other South Korean experts invoke the UNCLOS in defense of the validity and legality of the NLL. First, there is a view that the Convention should not affect the Line absent any separate accord,[188] assuming that the two Koreas have implicitly agreed to the role and effect of the Line as a valid de facto maritime demarcation line in the Yellow/West Sea area.[189] This view stresses that Article 15 and Article 74, paragraph 4 of the Convention, which leaves the possibility of delimitation of territorial waters and EEZ between opposite or adjacent States under special circumstances, e.g., historic title or international agreements, should be considered to deny the applicability of the principles and methods embodied in the Convention to the NLL Conflict.[190] Second, since the Convention embraces the concept of "historic bay" as an exception to the general principles and methods of maritime delimitation, the ROK MND refers to this to justify its claim of sovereignty over the Line and its vicinity.[191] According to the Convention, a historic bay refers to internal waters over which a coastal State has exercised its maritime jurisdiction for a considerable period of time with foreign State's acquiescence, even if the bay does not meet the standard requirements to be defined as a bay as stipulated in Article 10.[192] This means that, regardless of its principles and methods regarding maritime boundary delimitation, the Convention allows a coastal State to exercise a special type of jurisdiction over its historic waters, including historic bays, in consideration of certain special circumstances, such as compelling strategic or economic reasons.[193] Based on

[188] Lee, *Revisiting Legal Issues over the Northern Limit Line*, *supra* note 181, at 56—7.
[189] However, this argument simply disregards what lies at the center of the NLL conflict: a dispute over the legal validity of the de facto maritime demarcation line under international legal system.
[190] UNCLOS, *supra* note 156, at art. 15 (making clear that "the equidistance principle of delimiting territorial waters does not apply "where it is necessary by reason of historic title or other special circumstances to delimit…in a way which is at variance therewith") (alteration in original). *Id.* at art. 74, para. 4 (also providing that "Where there is an agreement in force between the States concerned, questions relating to the delimitation of EEZ shall be determined in accordance with the provisions of that agreement.").
[191] GOOK-HOE-IP-BEOB-JO-SA-CHEO, *supra* note 138, at 40—1 (quoting GUK-BANG-BU, *supra* note 29).
[192] *See* UNCLOS, *supra* note 156, art. 10, para. 2 (defining that "a bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain land-locked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation.").
[193] *See Id.* art. 10, para. 6; art. 298, para. 1.

this special concept of historic maritime jurisdiction, the ROK MND supports South Korea's sovereign title to the Line and its vicinity established over the decades, contending that South Korea has effectively exercised its control over the area with North Korea's decades-long acquiescence.[194]

The fundamental principles and methods of maritime boundary delimitation that are embodied in the UNCLOS are also cited by South Korean experts in support of the legal validity of the NLL. First, Professor Kim highlights that the Line was delineated about midway between the FNI and North Korea's opposing coastlines.[195] Therefore, in his opinion, the Line should not be considered a violation of the principle of equidistance provided in the 1958 Convention on the Territorial Sea and the Contiguous Zone and in the UNCLOS.[196] Second, although the UNCLOS Article 3 permits every coastal State to have the 12 nm-width territorial waters, there are many examples of coastal States around the globe that have claimed a smaller breadth of territorial waters in consideration of their neighbors' maritime rights and privileges, such as innocent passage through congested seas or oceans.[197] In other words, according to this approach, the 12 nm-territorial sea should not be deemed to be an absolute guarantee for every coastal State. Rather, the UNCLOS encourages a State to adjust the breadth out of recognition of an adjacent or opposing State's interests, if appropriate.[198] This approach underscores that North Korea should not rely on the UNCLOS in support of its claims to the waters surrounding

[194] GOOK-HOE-IP-BEOB-JO-SA-CHEO, *supra* note 138, at 40—1 (quoting GUK-BANG-BU, *supra* note 29). The ROK MND seems to recognize that claiming sovereign title to the area would be inconsistent with the notion of territorial waters prescribed in the Convention.

[195] However, this approach would not justify the fact that South Korea has exercised military control over some parts of the disputed waters, i.e., the waters between *Sochung* Island and *Yeonpyeong* Island where there is no South Korea's maritime feature located as opposed to North Korea's coastline. *But see* GUK-BANG-BU, *supra* note 29, at 9 (claiming that "…if the NLL had been broken in the middle, *Yeonpyeong*-do and *Baekryeong*-do would be completely isolated so their security would not be assured. The military necessity was the reason why the Line had been initially drawn as a single line without being broken in middle. The UNCLOS leaves open a possibility of such exceptional cases of military necessity.") (alteration in original).

[196] Myung Ki Kim, *The Legal Status of 5 Island Groups on the Yellow Sea*, 23(1-2) KOREAN J. INT'L L. 323, 332—7 (1978).

[197] *E.g.*, Van Dyke et al., *supra* note 20, at 153—4.

[198] *Id.*

the FNI, since it is obliged to respect the opposing State's interest. Third, Professor Jeh rebuts one of North Korea's claims arising from UNCLOS Article 7, paragraph 6, which prescribes that "the system of straight baselines *may not be applied* by a State in such a manner as to cut off the territorial sea of another State from the high seas or an EEZ."[199] The professor highlights that the Line, though it may be restrictive to North Korea's navigational access to some extent, does not entirely separate North Korea from its access to external seas and oceans, given the fact that it still can navigate to and from its ports by taking a route around the Line.[200]

While admitting the fact that the KAA does not include any provision defining the NLL, some South Korean experts point out that the Line has effectively served the armistice system for decades as an essential follow-up measure for the maintenance of security and order in the Korean Peninsula, along with the Yellow/West Sea. According to this view, the Line was initially established for effective enforcement of the KAA Articles 2, paragraph 13 and paragraph 15.[201] In other words, this view argues that, despite the fact that the Line was not contained in the final texts of the KAA agreed upon by the parties thereto, it was necessary to separate the combatants for the stable management of the newly established armistice system

[199] Jeh, *Legal Validity of the Korean Northern Limit Line and South Korea's Possible Measures*, *supra* note 130, at 130—1.
[200] *Id.*
[201] KAA, *supra* note 17, art 2, para. 13(b) (stipulating that "Within ten days after this Armistice Agreement becomes effective, withdraw all of their military forces, supplies, and equipment from the rear and the coastal islands and waters of Korea of the other side. If such military forces are not withdrawn within the stated time limit, unless there is a mutually agreed and valid reason for the delay, the other side shall have the right to take any action which it deems necessary for the maintenance of security and order. The term "coastal islands" refers to those islands which, although occupied by one side at the time when this Armistice Agreement becomes effective, were controlled by the other side on June 24, 1950. However, provided that all the islands lying to the north and west of the provincial boundary line between *Whanghaedo* province and *Kyonggido* province shall be under the military control of the Supreme Commander of the Korean People's Army and the Commander of the Chinese People's Volunteers, except the group of islands including *Paengyong-do* (37° 58'N, 124° 40'E), *Taechong-do* (37° 50'N, 124° 42'E), *Sochung-do* (37° 46'N, 124° 46'E), *Yonpyong-do* (37° 38'N, 125° 40'E), and U-do (37° 36'N, 125° 58'E), which shall remain under the military control of the United Nations Commander-in-Chief."); KAA, *supra* note 17, art 2, para.15 (providing that "This Armistice Agreement shall apply to all opposing naval forces, which naval forces shall respect the water contiguous to the Demilitarized Zone and to the land area of Korea under the military control of the opposing side, and shall not engage in blockade of any kind of Korea.").

for the Korean Peninsula and for the prevention of any accidental armed conflict in the Yellow/West Sea.[202]

The National Assembly Research Service ("NARS") publicizes its research results highlighting the need for textual interpretation as prescribed in the Vienna Convention on the Law of Treatise Article 31, paragraph 1: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning…and in the light of its *object and purpose*."[203] The NARS points out that the primary object and purpose of an armistice agreement is, in general, to immediately suspend hostile activities by ceasefire, thereby separating engaged armed forces. Armistice agreements do not stipulate every detail, such as the location of military demarcation line.[204] Therefore, in the absence of any provision governing such issue, it is reasonable to assume that negotiating parties to an armistice agreement intend to retain their military occupation "as-is" when that agreement becomes fully effective on the basis of the principle of *uti possidetis*.[205] In this view, the NARS asserts that the parties to the KAA must have intended to delimit military demarcation lines between them in consideration of both land and maritime areas that had been occupied, and effectively controlled, by the other side at the time of execution, as provided in Article 2, paragraph 15 and paragraph 16.[206] In addition to that,

---

[202] Jeh, *Legal Validity of the Korean Northern Limit Line and South Korea's Possible Measures*, *supra* note 130, at 117—8; Jeh, *Legal Analysis on the Northern Limit Line*, *supra* note 139, at 134.

[203] GOOK-HOE-IP-BEOB-JO-SA-CHEO, *supra* note 138, at 22—3, 24—30 (citing Vienna Convention on the Law of Treaties, art. 31, para. 1, May 23, 1969, 1155 U.N.T.S. 331) (emphasis added) [hereinafter 1969 Vienna Convention]. *See also* Kim, *Legal Appraisal on the CMDL and the Navigation Order*, *supra* note 169, at 18—21 (asserting that "the NLL was immediately established as the line of contact between the two sides of the KAA, given that mutual agreement, either explicit or implicit, on military demarcation should be considered an integral part of an armistice agreement in pursuit of the termination of hostile activities; therefore, crossing the Line is in itself a violation of the KAA Article 1.6 and 2.15.").

[204] GOOK-HOE-IP-BEOB-JO-SA-CHEO, *supra* note 138, at 22—3.

[205] *Id.*

[206] *Id.* at 26—7 (citing KAA, *supra* note 17, art 2, para. 15 (providing that "This Armistice Agreement shall apply to all opposing naval forces, which naval forces *shall respect the water contiguous to the Demilitarized Zone and to the land area of Korea under the military control of the opposing side*…") (emphasis added); art. 2, para. 16 (also providing that "This Armistice Agreement shall apply to all opposing air forces, which air forces *shall respect the air space over the Demilitarized Zone and over the area of Korea under the military control of the opposing side, and over the waters contiguous to both*.") (emphasis added)). The report also points out that the UNC decided to withdraw its military forces from all the islands, except the FNI, located above 38th parallel in consideration of North Korea's passage right navigating to and from *Haeju*. GOOK-HOE-IP-BEOB-JO-SA-CHEO, *supra* note 138, at 26—7. *Contra* Chung, *supra* note 61, at 274 (pointing out that belligerent parties to an armistice

the NARS further suggests a legal foundation of the Line based on the textual interpretation of Article 2, paragraph 17 of the KAA: "The Commanders of the opposing sides shall establish within their respective commands *all measures and procedures necessary to insure complete compliance with all of the provisions here of* by elements of their commands."[207] In other words, the NARS report defines the UNC Commander-in-Chief General Clark's unilateral action of proclaiming the Line as a necessary follow-up measure taken to effectively implement and enforce the armistice agreement.[208] On the basis of Article 2, paragraph 13(b),[209] the NARS also asserts that North Korea is not allowed to have any jurisdiction over the waters surrounding the FNI, since doing so would be inconsistent with the object and purpose of the Agreement; i.e., it would lead to an overlap of maritime jurisdictions over the islands-group and its vicinity, thus escalating military tensions.[210] By providing the provision "…*All the islands on the west coast of Korea lying south of the above-mentioned boundary line shall remain under the military control of the Commander-in-Chief, United Nations Command*," according to the NARS, the parties to the Agreement must have intended to lay a groundwork for the management of the armistice system in the Yellow/West Sea.[211] Given all this, the NARS

agreement usually adopt a follow-up protocol to that agreement in order to delineate military demarcation lines afterward).

[207] KAA, *supra* note 17, art 2, para. 17 (emphasis added).

[208] GOOK-HOE-IP-BEOB-JO-SA-CHEO, *supra* note 138, at 27—8.

[209] KAA, *supra* note 17, art 2, para. 13(b) (providing that "Within ten (10) days after this armistice agreement becomes effective, withdraw all of their military forces, supplies, and equipment from the rear and the coastal islands and waters of Korea of the other side. If such military forces are not withdrawn within the stated time limit, and there is no mutually agreed and valid reason for the delay, the other side shall have the right to take any action which it deems necessary for the maintenance of security and order. The term "coastal islands", as used above, refers to those islands, which, though occupied by one side at the time when this armistice agreement becomes effective, were controlled by the other side on 24 June 1950; provided, however, that all the islands lying to the north and west of the provincial boundary line between HWANGHAE-DO and KYONGGI-DO shall be under the military control of the Supreme Commander of the Korean People's Army and the Commander of the Chinese People's volunteers, except the island groups of PAENGYONG-DO (37 58' N, 124 40' E), TAECHONG-DO (37 50' N, 124 42' E), SOCHONG-DO (37 46' N, 124 46' E), YONPYONG-DO (37 38' N, 125 40' E), and U-DO (37 36'N, 125 58' E), which shall remain under the military control of the Commander-in-Chief, United Nations Command. *All the island on the west coast of Korea lying south of the above-mentioned boundary line shall remain under the military control of the Commander-in-Chief, United Nations Command*.") (emphasis added).

[210] GOOK-HOE-IP-BEOB-JO-SA-CHEO, *supra* note 138, at 28—30 (quoting Lee, *Revisiting Legal Issues over the Northern Limit Line*, *supra* note 181, at 48—50).

[211] GOOK-HOE-IP-BEOB-JO-SA-CHEO, *supra* note 138, at 29.

draws a conclusion that the Line should neither be subject to any separate agreement, nor subject to joint management between the two Koreas.[212]

In light of customary and conventional international law, South Korean jurists also support the legal foundation of the NLL, arguing that the waters lying south of the Line should be defined as a valid "war zone" or "military defense zone" under the KAA.[213] Citing multiple historic examples of special maritime zones and areas that have been established under particular circumstances around the globe, Professor Jeh argues that a sovereign State may legally proclaim a war zone during wartime to achieve military objectives, and may also designate a defense zone, in its discretion, even in peacetime if it deems such measures necessary for national defense.[214] In other words, as the Korean Peninsula has not returned to *status quo ante bellum*, any aggressor involved in the Korean War, whether signatory or not, may in its sole discretion, establish and operate a special military zone or area for the management of the armistice system.[215] Thus, in this view, the professor stresses that the parties to the KAA should be obliged to act in compliance with the establishment of the Line as a valid de jure maritime demarcation line unless otherwise specified in a separate agreement between them.[216]

South Korean jurists also refers to the Basic Agreement as an evidentiary source supporting the valid legal basis of the NLL so that they can uphold the Line's binding effect over the two Koreas as an established maritime order and system in the Yellow/West Sea.[217]

---

[212] *Id.* at 23.
[213] Jeh, *Legal Analysis on the Northern Limit Line*, *supra* note 139, at 133—4. *Contra* Chung, *supra* note at 61, at 277—80 (pointing out that the UNCLOS Article 33 restricts a State's right to enforce its laws and regulations in its contiguous zone only to prevent the specified infringements as well as limiting the breadth of the zone in consideration of the principle of freedom of the high seas).
[214] Jeh, *Legal Validity of the Korean Northern Limit Line and South Korea's Possible Measures*, *supra* note 130, at 113—4 (quoting BROWNLIE, *supra note* 129, at 250).
[215] Jeh, *Legal Validity of the Korean Northern Limit Line and South Korea's Possible Measures*, *supra* note 130, at 113—4.
[216] *Id.*
[217] Jeh, *Legal Analysis on the Northern Limit Line*, *supra* note 139, at 134. However, it is heavily disputed whether the Basic Agreement could be applied as a treaty due to the difficulties of defining the inter-Korean relations. *See* GOOK-HOE-IP-BEOB-JO-SA-CHEO, *supra* note 138, at 32—5. On the premise of a special interim relationship

The Basic Agreement Article 11 stipulates that "the South-North demarcation line and the areas for non-aggression shall be identical with the MDL provided in the Military Armistice Agreement of July 27, 1953, and *the areas over which each side has exercised jurisdiction until the present time*."[218] According to the view propounded by this group, the provision of the article leaves open the possibility for the Line to be understood at least as a de facto demarcation line until the two Koreas reach a separate agreement on this issue. From this perspective, the Protocol on Non-aggression reinforces the Basic Agreement's approach by prescribing that "The South-North sea non-aggression demarcation line shall continue to be discussed in the future. *Until the sea non-aggression demarcation has been settled*, *the sea non-aggression zones shall be identical with those that have been under the jurisdiction of each side until the present time*."[219] Therefore, this view stresses that the two Koreas apparently acknowledge the existing legal status of the Line as a valid de facto demarcation line in the Yellow/West Sea until they settle a new non-aggression demarcation line in a forthcoming separate agreement.[220]

b. <u>The Official Stance of the ROK MND[221]</u>

between the two Koreas, both the Supreme Court and the Constitutional Court of Korea have a tendency to define the Basis Agreement as a gentlemen's agreement, thus denying its binding power over the South Korean government. *See, e.g.*, Supreme Court [S. Ct.], 98Du14525, July 23, 1999 (S. Kor.); Constitutional Court [Const. Ct.], 1992Hun-Ba6 (consol.), Jan. 16, 1997 (S. Kor.).

[218] Basic Agreement, *supra* note 27, art. 11 (emphasis added).

[219] Protocol on Non-aggression, *supra* note 27, art. 10 (emphasis added). *But see* Chung, *supra* note at 61, at 282—3 (arguing that "the areas over which each side has exercised its jurisdiction until the present time" and "the sea non-aggressions zone" should not be equally understood as the waters lying south of the NLL over which South Korea has exercised its maritime jurisdiction; rather, the areas and zones should be equally treated as the contiguous water prescribed in the KAA, according to Professor Chung); Cham-Yeo-Yeon-Dae, *supra* note 131, at 12—3 (arguing that the Basic Agreement and the Protocol on Non-aggression merely made clear the need to establish a sea non-aggression demarcation, rather than acknowledging the NLL as a valid demarcation in the Yellow/West Sea).

[220] Albeit declining to understand the Basic Agreement as an international treaty, the NARS report stresses that both governments expressed a clear intent to create a legally binding instrument governing their relations given the form, terms, and procedures adopted by the Agreement: Article 24 (Amendment and Supplementation), Article 25 (Effectuation), the adoption of following protocols, the ratification by North Korean legislatures, and the official announcement of the South Korean government on the effectuation of the Agreement. GOOK-HOE-IP-BEOB-JO-SA-CHEO, *supra* note 138, at 34—6.

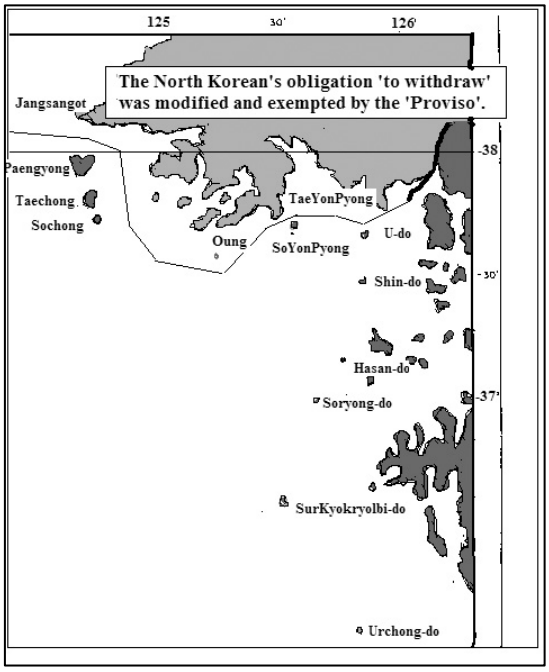
[221] *See* Cham-Yeo-Yeon-Dae, *supra* note 131.

In defense of the NLL, the ROK MND has developed arguments based on international law. First, the ROK MND asserts that the Line has taken its place as a de facto sea demarcation line in the Yellow/West Sea for the effective management of the armistice system created by the KAA.[222] The ROK MND further states that, as South Korea has effectively exercised its control over the Line and its vicinity, the Line has contributed to the materialization of the armistice.[223] The ROK MND, on that basis, requires that both South and North Korea are obliged to respect the present maritime order created by the Line in accordance with the Basic Agreement, as well as the KAA.[224] The ROK MND provides relevant material to corroborate its claim that the negotiating parties agreed that all the islands and coastal areas lying in between the 38th parallel and northwest of the provincial boundary of *Hwanghae*-do province and *Gyeonggi*-do province were occupied by the UNC-backed ROK forces at the time of the negotiation.[225]

Map 14: North Korea's Obligation to Retreat by the Primary Text of the KAA Article 2, paragraph 13(b). *Source*: THE MINISTRY OF NATIONAL UNIFICATION OF THE REPUBLIC OF KOREA, PROCEEDING MINUTE OF SOUTH AND NORTH MILITARY SUB-COMMITTEE 5TH SESSION 280(1992).

[222] GUK-BANG-BU, *supra* note 29, at 24.
[223] *Id.*
[224] *Id.*
[225] *Id.*

Accordingly, the ROK MND underscores a point that the UNC and the UNC-backed ROK forces conceded to withdraw their claim to a number of coastal islands located south of the 38th parallel so as not to blockade *Haeju* and *Ongjin* Peninsula appertained to North Korea once the KAA became fully effective after its execution.[226] According to the ROK MND, hence, the UNC and the UNC-backed ROK forces relinquished the waters situated between the 38th parallel and the northwestern-most provincial border so the armistice system could be implemented effectively.[227]



Map 15: North Korea's Modified Obligation to Withdraw
Source: Young Koo Kim, *A Maritime Demarcation Dispute on the Yellow Sea*, 2 J. E. ASIA & INT'L. L. 481, 487 (2009).

Second, on the basis of the textual interpretation of Article 2, paragraph 13(b) and paragraph 15, the ROK MND asserts that the NLL, though admitting the absence of any bilateral or multilateral agreement therein, should be complied with by the signatories to the

[226] *Id.* at 25.
[227] *Id.*

KAA as a maritime demarcation line.[228] In supporting this argument, the ROK MND argues that the two Koreas substantively recognized the legal status of the Line as a de facto sea demarcation line in the Yellow/West Sea through the adoption of the Basic Agreement Article 11 and the Protocol on Non-aggression Article 10.[229] Viewed from this perspective, at the 3rd South-North general-level talk held in 2006, the South Korean representative stated that the NLL Conflict should be an agenda to be discussed at a ministerial-level talk as it should be regarded as an established maritime order reaffirmed by the Basic Agreement and the Protocol on Non-aggression.[230] Therefore, from the ROK MND's perspective, the establishment of a new maritime demarcation line for the disputed waters should be settled through political consensus between the leaders of the two countries.[231]

The ROK MND presents multiple historical examples indicating North Korea's recognition of or acquiescence on the NLL to support its argument, which argues that South Korea has acquired sovereign right to the Line and its vicinity, based on the theory of historical consolidation or the principle of acquisitive prescription. In its argument, the ROK MND asserts that North Korea acted in accordance with the existence of the Line, thereby admitting it as a de facto military demarcation line to separate the confronting armed forces. As the first example, the ROK MND cites the 1959 *Chosunchoongang* Yearbook published in North Korea, arguing that the yearbook described the Line as a military demarcation line.[232] The second example presented by the ROK MND is that the North Korean representative's statement regarding the Line at the 168th MAC held in May 1963. The meeting was held to discuss whether a suspected North Korean spy boat had crossed the Line at the time of its operation. In the course of discussions, the UNC alleged that the spy boat had trespassed based on the

[228] *Id.* at 26.
[229] *See supra* note 28.
[230] GUK-BANG-BU, *supra* note 29, at 27.
[231] *Id.*
[232] *Id.* at 22.

map indicating the Line as a military demarcation line, stating that "we fired because your boat was crossing the NLL at that moment."[233] In its response, the North Korean representative stated that "the boat did not cross the NLL, but rather stayed north of the Line."[234] The ROK MND quotes this statement to demonstrate the implicit recognition or acquiescence on the part of North Korea prior to its first official complaint made in 1973.

In addition, the ROK MND also presents evidence in support of the legality and validity of the NLL and South Korea's sovereign right thereto. First, the ROK MND cites an example of a 1984 meeting between the North-South Korean fleets in the vicinity of the Line. Between September 29 and October 5 of that year, the North Korean Red Cross delivered flood relief supplies to its South Korean counterpart as part of humanitarian aid. Both convoy fleets, including military ships and boats, decided on a rendezvous point located on the extension of the Line at the time of that exchange. The ROK MND points out that military vessels, in practice, are not permitted to carry out military operations beyond the boundary of another sovereign State's territorial waters without prior authorization from that State. Therefore, the ROK MND suggests the rendezvous occurred between the fleets in 1984 is proof that North Korea recognized or acquiesced to the Line as a de facto demarcation line in the maritime area. Second, the ROK MND presents measures taken by international organizations as evidence. In May 1993, for instance, the Air Navigation Plan ("ANP") was published by the International Civil Aviation Organization ("ICAO") and released the adjustment of the then-existing Flight Information Region ("FIR"), in recognition of the Line. The ROK MND points out that North Korea at that time did not raise any objection against the newly adjusted FIR until the ANP came into effect in January 1998.[235] Although borders or boundaries marked on the ANP are not automatically deemed to be a demarcation line or territorial boundary between sovereign

[233] *Id.*
[234] *Id.*
[235] *Id.* at 27.

States, the ICAO draws up the ANP in accordance with lines, borders, and boundaries publicly known as established. In practice, as the ROK MND points out, each State is required to exercise its duty to rescue distressed airplanes within the designated lines, borders, and boundaries marked on the ANP.[236] On that basis, the ROK MND supports its argument that North Korea recognized or acquiesced on the Line as a practical maritime border in the disputed waters.[237]

F. Conclusion of This Chapter

Looking at the background of the origin of the NLL, it appears inevitable that the Line would cause long-standing disputes in inter-Korean relations. In the absence of a definite agreed term on maritime demarcation between the combatants of the Korean War, the Line was originally designated by a unilateral act of the then-UNC Commander General Mark Clark for the purpose of internal sea control after the execution of the KAA. Therefore, the Line was controversial from the very start as to whether it could be construed as part of the armistice system, contrary to the ownership of the FNI which is expressly provided in the text of the armistice agreement.

The two Koreas, together with the US, have made efforts to conclude a negotiated settlement for the NLL Conflict, though they could not prevent the armed clashes, including the two naval skirmishes in the disputed waters, resulting in damages and casualties on both sides. Since the West Sea Incident occurred in 1973, North Korea has made complaints about the validity and legality of the Line in terms of international law and the KAA. Even if the Basic Agreement executed in 1992 contains provisions that could have had an impact on the

[236] *Id.*
[237] *Id.*

Conflict, the two Koreas have displayed opposing views in interpreting such provisions. As observed in the following meetings held after the First *Yeonpyeong* Naval Skirmish, the two Koreas and the US-led UNC stood by their own positions regarding the issues related to the Line, and therefore no mutual agreement has been reached yet. Rather than consultation, in 1999, North Korea suggested the CMDL as a replacement of the Line and the Navigation Order with an intention to change the maritime order in the disputed area created by the Line. Since all of the States concerned adhered to their long-standing stances toward the Line-related issues even after the Second *Yeonpyeong* Naval Skirmish, their efforts to build a military confidence through political and diplomatic channels for the prevention of recurrence of such armed clashes did not lead to any practical solution. Each of North Korea's West Sea Security Line announced in 2007 and South Korea's West Sea Initiative declared in 2007 could have been a dramatic turning point that could have led to the settlement of the Conflict. Unfortunately, all such preceding efforts to draw a negotiated settlement were obstructed by the occurrence of the two tragic incidents: the Sinking of the South Korean Warship *Cheonan* and the Bombardment of *Yeonpyeong* Island in 2010. Even though the Moon administration had been taking a more progressive approach in resolving the pending issues between the two Koreas since 2017, including the Conflict, there has been no distinct improvement in the Conflict.

Since its first formal complaint against the NLL in 1973, North Korea has continually rejected both the validity and legality of the Line as a maritime demarcation line in the Yellow/West Sea. First, North Korea has been denying the existence of recognition or acquiescence on its part, as opposed to South Korea's arguments based on the principle of acquisitive prescription and the theory of historical consolidation. Second, North Korea also asserts that the Line is a violation of the UNCLOS, infringing upon its boundary of territorial waters which is an inherent right of a sovereign State granted by the convention. Third, North Korea denies any binding effect of the Line as maritime order, stressing that the KAA has no

express provision defining such maritime demarcation line. Last, North Korea has been at odds with South Korea over the interpretation of the provisions stipulated in the Basic Agreement and the Protocol on Non-aggression with respect to the determination of maritime jurisdiction.

In addition to rejecting South Korea's arguments, North Korea has made multiple suggestions in an effort to change the maritime order in the disputed waters created by the NLL. In the wake of the West Sea Incident, North Korea began to claim maritime demarcation lines, zones and navigable sea lanes, though South Korea responded strongly against such claims in defense of the safety and security of the FNI. Although North Korea did not claim its ownership of any of the islands-group, it has maintained its position since 1990 that the Line is an encroachment on its maritime sovereignty and the FNI are located in the boundary of its territorial waters. Furthermore, while refuting South Korea's arguments based on the theory of historical consolidation and the principle of acquisitive prescription, North Korea in the late 1990s unilaterally proclaimed the CMDL as a replacement of the Line and the Navigation Order as a new maritime order for the disputed waters. Nevertheless, all the aforesaid claims did not provide sufficient justification to be considered acceptable as an alternative maritime delimitation or order, because the status of the FNI, which are expressly guaranteed by the KAA, was not taken into account. Even if North Korea's suggestion in 2007 was assessed as a more equitable idea than its predecessors, such as the CMDL, the two Korea have not had an opportunity to discuss the adjustment of the Line in consideration of the suggestion up to date.

South Korean jurists set forth arguments based on various legal sources of international law to uphold the valid legal status of the NLL as an effective maritime demarcation line. First, a group of these experts supports South Korea's jurisdiction over the Line and its vicinity, relying on the theory of historical consolidation and the principle of acquisitive prescription in customary and conventional international law. Second, another group of experts defines the maritime area situated south of the Line as a war zone or military defense zone that has been

established for the performance of military objectives under the armistice system. Third, contracting North Korea's claim based on the application of the UNCLOS to the NLL Conflict, the other group of experts deny the applicability of the convention to this Conflict based on that the two Koreas technically being in a state of war. Furthermore, among this last group, there is also a supplementary view that refers to the concept of historic title and historic bay, which is prescribed in the convention, in support of the valid legal status of the Line. Some member of this group further argue that the Line is in consonance with the principles and methods of maritime boundary delimitation embodied in the convention, given the fact that the Line is running midway between the FNI and North Korea's opposing coastlines.

Methodologies of treaty interpretation are also referred to in support of the South Korea's position in the NLL Conflict. First, based on the teleological interpretation, it is argued that the Line has been served its role as an essential follow-up measure for the maintenance of the armistice system, irrespective of the fact that there is no express provision on such delimitation therein. Second, the NARS's report, in furtherance of the aforesaid view, asserts that the armistice agreement already sufficiently articulates the maritime jurisdiction of each side, including the waters surrounding the FNI, for the effective management of the armistice system. Third, it is also argued that the articles prescribed in the Basic Agreement and the Protocol on Non-aggression assume the status of the Line as a de facto maritime demarcation line in the disputed waters unless otherwise settled by the two Koreas in a future agreement.

The official stance of the ROK MND is based on similar legal analysis with the experts' views discussed in Sub-Section 3 above, though it takes a relatively tougher stance throughout the Conflict. The ROK MND argues that South Korea's exercise of effective control over the NLL and its vicinity over decades the Line has contributed to the effective management of the armistice system. Second, the ROK MND also invokes the provisions adopted in the Basic Agreement and the Protocol on Non-aggression in its favor, asserting that North Korea agreed

to at the time of executing those agreements the legal status of the Line as a de facto maritime demarcation line until a new line is drawn upon mutual consent. Last but not least, the ROK MND cites multiple historical occasions as evidence to prove the existence of recognition of or acquiescence on the Line on the part of North Korea in line with some group of the South Korean experts' approach based on the theory of historical consolidation and the principle of acquisitive prescription.

II. UNDERSTANDING THE ICJ ADVISORY JURISDICTION

A. Introduction to This Chapter

Chapter II of this dissertation will examine the operational mechanism of the ICJ jurisdiction with an emphasis given to basic concepts, types of the jurisdictions, requirements to establish each type of the jurisdictions and effect of the Court's holdings. To this end, Section B of this Chapter II will lay out an overview of the ICJ jurisdictional system by studying relevant basic concepts and distinguishing the two different jurisdictions. To distinguish the advisory jurisdiction from the contentious jurisdiction, it is first necessary to understand the legal concepts of "jurisdiction" and "competence" through comparative analysis in the context of the ICJ practice. In the same vein, the admissibility of a claim/request, on which the Court usually adjudicates after the establishment of its jurisdiction at the preliminary stage, is often regarded as a significant concept to be apprehended due to a diversified range of the admissibility objections raised by the litigating States throughout the Court's practices. Based on comprehension of said legal concepts, Section B will then provide a brief comparative analysis on the contentious and advisory jurisdiction of the Court before proposing the latter as a more promising judicial forum for the peaceful settlement of the NLL Conflict.

By examining each jurisdictional component required to establish the contentious jurisdiction of the ICJ, Section C of Chapter II will demonstrate why the advisory jurisdiction of the Court should be regarded as the more persuasive judicial option for the settlement of the NLL Conflict, with a focus on its jurisdiction *ratione consensus*. To adjudicate on international disputes of legal nature between sovereign nations, the Court requires multiple jurisdictional components to be verified prior to the establishment of its contentious jurisdiction. First, unlike its advisory proceeding, the Court's contentious proceeding requires a sovereign State to be a claimant pursuant to the Statute of the International Court of Justice ("ICJ Statute") Article 34, paragraph 1. Second, the Court also requires "international dispute arising from a disagreement on a point of law or fact, a conflict of legal views or of interests" to be submitted by litigating States. Third, even if the aforementioned requirements are properly submitted, the Court renders its judgment through contentious proceedings only where both contesting and defending States have given their consent to the contentious jurisdiction of the Court, whether *ex ante* compulsory or *ex post* optional/voluntary. Considering the arguments in Chapter I, the NLL Conflict qualifies for the first two requirements to be considered a matter to be adjudicated through the Court's contentious proceeding. However, given the fact that the state consent has been the most challenging requirement to be satisfied through the Court's preceding cases, a similar difficulty is very likely to arise to obstruct the establishment of the Court's contentious jurisdiction over the Conflict. Therefore, from this point of view, Section C will concentrate on exploring the jurisdictional components of the Court's contentious proceedings, with an emphasis on the concept of the state consent, to clarify a doctrinal hypothesis taken by this dissertation suggesting that the advisory jurisdiction of the Court is the most promising judicial option for the settlement of the NLL Conflict.

Section D of Chapter II will explore each of the jurisdictional components of the ICJ's advisory proceeding, as well as issues concerning the admissibility of an advisory request and

the Court's judicial discretion, in comparison with those of the contentious proceeding. As different jurisdictional elements are required for the establishment of its advisory jurisdiction, the Court throughout its operation has adopted a more flexible approach in exercising its judicial discretionary power *vis-à-vis* the advisory jurisdiction. However, as will be discussed below, the Court has dealt with a unique type of *ultra vires* objection throughout its advisory proceedings, since some international organs and agencies may be eligible to make such advisory requests. Nonetheless, as long as its personal jurisdiction is established, the Court tends to at more liberty to contemplate whether certain advisory requests are related to legal controversies within the scope of the activities of a requesting organization. In Section D, the Court's findings on objections based on the absence of the state consent will also be discussed to argue that the advisory proceeding of the Court is the most promising judicial forum that can be established for the resolution of the NLL Conflict. While dealing with an issue related with the admissibility objection in advisory proceeding, this Section D will also investigate the decisions made by the Court to dismiss such objections.

B. Jurisdictional System of the ICJ

1. Comparative Understanding of the Concepts of Jurisdiction and Competence

In terms of academic legal writing, scholars and experts who specialize in the ICJ present a variety of perspectives to distinguish the legal concept of "jurisdiction" from that of "competence." For example, Rosenne focuses on their conceptual difference, arguing that jurisdiction refers to the "Court's *capacity* to decide a concrete case with binding force,"[238]

[238] SHABT AL ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT 302 (vol. I, 1965), *quoted in* RENATA SZAFARZ, THE COMPULSORY JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE 1 (1993) (alteration in original) (emphasis added).

while competence is used to "elaborate the *propriety* of the Court's exercise of jurisdiction."[239] According to Rosenne, jurisdiction is concerned with the Court's *judicial capacity* and binding power on its adjudication, while competence includes the elements of *propriety* in association with exercising its judicial power.[240] On that basis, he stresses the ICJ Statute's usage of the two slightly different concepts, asserting that while jurisdiction has occasionally been used in explaining the Court's advisory proceedings, competence is a relatively more common concept used in the ICJ Statute.[241] However, Sir Fitzmaurice sets forth a different approach, emphasizing that competence is a more specific term by definition. In other words, jurisdiction is a legal question as to whether a given tribunal is entitled to adjudicate on the "*general class of cases* within the boundary of its *general field*,"[242] while competence refers to whether a tribunal is entitled to "hear and determine a *particular individual case*."[243] Accordingly, under certain circumstances, the tribunal may not have competence to deal with a particular set of questions despite having jurisdiction over the general field related to the questions.[244] Nevertheless, contrary to Rosenne's perspective, Fitzmaurice asserts that competence should be used only to illustrate *the authorized organs' capacity in the operation of their advisory jurisdiction*, whereas "jurisdiction" and "competence" may be preferably and interchangeably used when operating under contentious jurisdiction.[245] Grisel further develops Fitzmaurice's approach by incorporating another concept from international law called the "state consent." Grisel argues that jurisdiction refers to the Court's inherent authority, which is based on the ICJ Statute, empowering the Court to institute proceedings regardless of any party's non-

[239] *Id.* (emphasis added).
[240] ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT, 1992 – 1996 536 (1997), *quoted in* MAHASEN M. ALJAGHOUB, THE ADVISORY FUNCTION OF THE INTERNATIONAL COURT OF JUSTICE 1946 – 2005 36 (2006).
[241] ALJAGHOUB, *supra* note 241, at 36.
[242] Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice, 1951—4: Questions of Jurisdiction, Competence and Procedure*, 34 Y.B. INT'L. L. 8 (1958), *quoted in* SZAFARZ, *supra* note 239, at 1.
[243] *Id.*
[244] *Id.*
[245] Fitzmaurice, *supra* note 243, at 8—9, *quoted in* ALJAGHOUB, *supra* note 241, at 37 (emphasis added).

appearance and also to determine its own competence if controverted.[246] In his view, "competence is accorded as a result of the consent of the State parties involved by declaring in advance or at the moment of the arise of the dispute"[247] their willingness to have the Court to adjudicate on the merits of a given claim. In short, the Court is generally allowed to enjoy jurisdictional power over all State parties to the ICJ Statute, whereas the state consent is specifically required for the Court to have competence over the merits of a given claim.

The linguistic nuances between English and French are seen as a source of this conceptual confusion. Fitzmaurice simply underscores the different usage of jurisdiction and competence in the two languages, arguing that "English independently uses both legal terms, whereas French uses only the term '*compétence*' without distinction as far as the ICJ is concerned."[248] On the other hand, although Dubisson focuses on the linguistic nuance, his view might be understood in the same context with Fitzmaurice's writing. According to Dubisson, "in French law, the term 'jurisdiction'…is used in opposition to the term '*compétence*' because the former refers to the authority of judging considered in an abstract manner, generally or from the point of view of its sources. On the contrary, '*compétence*' is used with reference to a definite case."[249]

Unfortunately, the ICJ's practices have not provided any guidance on the two different legal concepts. Indeed, the concepts have been used interchangeably and inconsistently. According to Rosenne, since both the UN Charter and the ICJ Statute do not adopt individualistic legal terms to prescribe the concepts, it is not in practice necessary to make a clear distinction between them to understand the ICJ jurisdiction.[250] In the same vein, Fitzmaurice and Dubisson also admit that the two concepts are often used interchangeably, at

---

[246] ETIENNE GRISEL, LES EXCEPTIONS D'INCOMPETENCE ET D'IRRECEVABILITE DANS LA PROCEDURE DE LA COUR INTERNATIONALE DE JUSTICE 67 (1968), *cited in* SZAFARZ, *supra* note 239, at 2.
[247] *Id.*
[248] Fitzmaurice, *supra* note 243, at 8, *quoted in* SZAFARZ, *supra* note 239, at 2 (alteration in original).
[249] M. DUBISSON, COUR INTERNATIONALE DE JUSTICE 132 (1964) (citation omitted).
[250] ROSENNE, *supra* note 239, at 300—1, *quoted in* SZAFARZ, *supra* note 239, at 1 (alteration in original).

least with respect to understanding the jurisdictional authority of the Court.[251] Notably, the Court has addressed the jurisdictional issues by using the heading of "jurisdiction" in English and "*compétence*" in French without making any particular distinction.[252]

Academically speaking, it is not beneficial to distinguish jurisdiction from competence since they might be interchangeably used with respect to the ICJ jurisdiction. According to Szafarz, "the jurisdiction of the ICJ refers to the *general and specific capacity* of the Court to settle contentious cases between States with binding force and has the *capacity* to give advisory opinions."[253] On that basis, this study will adopt Szafarz's definition of jurisdiction in the following discussion about whether the Court would have jurisdictional authority over the inter-Korean maritime conflict over the NLL.

2. Comprehending the Admissibility of a Claim/Request

To hear and decide the merits of a case at hand, the ICJ must establish its jurisdiction and, at the preliminary stage, determine the admissibility of a claim or request. Unless these two requirements are met, the Court will not be entitled to express its legal position on the case. In establishing its jurisdiction, the Court usually examines litigants, subject-matter, and the extent and limits of its judicial capacity in relation to a claim/request at issue.[254] The Court's deliberation on its jurisdiction over a certain case necessarily encompasses both institutional and material factors. At the same time, the admissibility of a claim/request is a matter of satisfying certain legal condition precedents for the Court, such as time limit and "litispendence,"[255] in preference to exercising its jurisdictional authority. Even so, ascertaining

[251] Fitzmaurice, *supra* note 243, at 8, *quoted in* SZAFARZ, *supra* note 239, at 2; DUBISSON, *supra* note 250, at 133, *quoted in* SZAFARZ, *supra* note 239, at 2.
[252] SZAFARZ, *supra* note 239, at 2.
[253] *Id.* at 2 (alteration in original) (emphasis added).
[254] ROBERT KOLB, THE ELGAR COMPANION TO THE INTERNATIONAL COURT OF JUSTICE 166 (2014).
[255] *Id.*

admissibility might also require the Court to explore both procedural and material aspects of a claim/request.

A preliminary objection to the admissibility of a claim/request is one of many grounds on which a litigating State may challenge the competence of the ICJ. In practice, the Court has often confronted admissibility objections based on various aspects of a claim/request, particularly when the nationality of the claimant or the exhaustion of local remedies is involved.[256] However, since a preliminary objection to admissibility touches upon "the validity of a claim,"[257] this is basically a question to be determined after the Court has assumed its jurisdiction.[258] Therefore, in practice, the Court determines a preliminary objection to its jurisdiction before it determines an objection to admissibility. To some extent, this enables the Court to consider admissibility exclusively by the merits of a given claim/request.[259]

To understand the concept of the admissibility of a claim/request in light of the ICJ proceedings, it is first necessary to define its conceptual differences in relation to jurisdiction. By definition, jurisdiction refers to the Court's legal power or capacity to hear a given case and decide the merits by rendering a binding judgment. Accordingly, the Court must explore "personal, material, and consensual conditions"[260] prior to giving its decision on jurisdictional questions. On the other hand, according to Kolb, the admissibility of a claim/request is more concerned with the claim/request itself as well as documents and evidence pertaining to the particular dispute. As the question of admissibility is not specifically and explicitly prescribed in any of legal sources used by the Court, litigating State parties might be allowed to plead an admissibility objection on whatever grounds to prevent the Court from proceeding to the merits.[261]

---

[256] IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 711 (7th ed. 2008).
[257] *Id.*
[258] *Id.*
[259] *Id.*
[260] *Id.* at 168.
[261] *Id.*

These two different legal concepts can be compared on several other grounds. First, jurisdiction is a question of "general interest, public policy, or principle,"[262] not a particular claim/request, document, or evidence. In the context of a particular claim/request, however, the Court will examine whether there is any error or omission while determining admissibility issues.[263] Second, a case-by-case analysis is not usually required to establish jurisdiction, inasmuch as many cases have an express provision permitting it.[264] Conversely, the Court will look at every aspect of a particular claim/request or case in determining its admissibility due to its "circumstantial and particular nature."[265] Third, regardless of whether a state party pleads or not, the Court may, on its own motion, raise an issue over the lack of jurisdiction,[266] whereas admissibility is not a question that can be raised by the Court itself.[267] Finally, the Court may separate a question of jurisdiction from its merits, while a question of admissibility may be more closely attached to the merits, thereby making it harder to separate the two concepts.[268]

Throughout its operations and practices, the ICJ and its predecessor PCIJ dealt with some preliminary objections based on admissibility. The following is a list of the objections raised by the involved States parties in an attempt to tackle the issue of admissibility:

> Prior negotiations between the parties; whether the alleged dispute is a current dispute; the existence of the necessary standing to take action; the link of nationality in the context of diplomatic protection claims or dual nationality; the exhaustion of internal remedies; the objective existence of a dispute with the characteristics necessary in a given context; the absence of litispendence; the involvement of rights of third parties; the existence or absence of a res judicata; respect for certain time limits laid down in the ICJ Statute or other texts; the lateness or otherwise of a claim in light of the general principle that claims should be presented diligently; respect for formal requirements which impose binding conditions; no abuse of power; exhaustion of negotiations and other means made compulsory, prior to seizing the Court, by a text binding on the parties concerned or by a possible implied

[262] *Id.*
[263] *Id.*
[264] *Id.*
[265] *Id.*
[266] Based on the principle of *compétence de la compétence* prescribed in the ICJ Statute Article 36, paragraph 6, the Court has the right to determine the existence of its jurisdiction to give an advisory opinion or to render a judgment in a contentious case. ALJAGHOUB, *supra* note 241, at 37.
[267] *Id.* Nonetheless, for example, the existence of a dispute – which falls within the scope of admissibility issues – may be treated as exceptional so that it may be automatically raised by the Court. *Id.*
[268] *Id.*

> understanding; and estoppel in consequence of an informal agreement not to submit a particular case to the Court.[269]

Before moving on to the merits, the judges were obliged to render their opinions on such diversified admissibility objections raised by litigating States. Since the litigants were basically allowed to raise any type of admissibility objections that seemed relevant, they attempted to persuade the judges to refrain from deciding on the merits.

In pursuit of judicial constraint and efficient administration of justice, the ICJ must follow the order of examination—i.e., the Court must determine admissibility objections at the preliminary stage before proceeding to the merits of a given case. Prior to determining admissibility, however, the Court must first establish its jurisdiction. This is because admissibility is more closely connected with particular issues of a claim/request, while establishing jurisdiction in a given case requires more fundamental and thorough deliberation pertaining to the case.[270] Therefore, the Court must refrain from determining an admissibility objection before it clarifies the existence of its jurisdiction over the case at hand. Second, the Court must draw a clear distinction between the preliminary and the merits stage to avoid prejudging the merits in the preliminary stage.[271] While it may be possible for the Court to touch upon the merits while examining issues of admissibility that are closely linked to the merits, the judges should proceed with caution. Since the Court, in the preliminary stage, might not have sufficient evidence or other resources to adjudicate on the merits, its examination must be strictly confined to issues related to jurisdiction or admissibility.[272] In so doing, the Court can also prevent itself from expressing contradictory views on the same issue in any subsequent cases. [273]

---

[269] KOLB, *supra* note 255, at 170.
[270] *Id*. at 171.
[271] *Id.*
[272] *Id.*
[273] *Id.*

Occasionally, however, there are cases in which the admissibility objection takes precedence over the objections against jurisdiction by reason of the convenience of judicial administration. In the *Interhandel* case, for example, the Court decided admissibility issues prior to the establishment of jurisdiction because the judges believed a more delicate approach would be required for the latter.[274] Regarding a number of the preliminary objections raised by the US, therefore, the Court categorized them as admissibility issues, hence placing preference on admissibility over other objections against subject-matter and temporal jurisdiction of the Court. In this particular case, the Court did so on the grounds that the objections against jurisdiction involved an issue over "automatic reservations," which must have required more profound discussion in relation to the optional declaration of the US under the ICJ Statute, Article 36, paragraph 2.[275]

Although the ICJ has already classified some issues as inherently jurisdictional, such as personal *locus standi in judicio*,[276] peculiar quality, and state consent, its practices have blurred the line between jurisdiction and admissibility of a claim. Thus, no question is solely and necessarily defined as an admissibility issue. For instance, even though setting a time limit usually falls within the scope of admissibility, it also could be a question of jurisdiction if an express time limit provision is provided under the title of jurisdiction.[277] In the *Mavromatis* case, the PCIJ held the fulfillment of a prior diplomatic negotiation as a question of jurisdiction, whereas in other cases this was defined as an admissibility issue.[278]

3. The Dual Jurisdiction System: Contentious Jurisdiction

[274] *Id.* at 172.
[275] *Id.* The US presented four preliminary objections in this case: the first through the third objections are related to temporal and subject-matter jurisdictional issues, while the fourth objection raised a question of admissibility — "exhaustion of international remedies in relation to private claims." *Id.*
[276] *Id.* at 167.
[277] KOLB, *supra* note 255, at 167.
[278] *Id.* at 169.

The ICJ may settle "*international disputes of legal nature* that are *submitted by States*" arising out of a "disagreement between States on *a question of law or fact, a conflict, or a clash of legal views or of interests*."[279] In contentious proceedings, in which ICJ jurisdiction is based on the consent of the States, the Court is allowed to exercise its optional/voluntary jurisdiction grounded in the ICJ Statute and related legal principles. Additionally, there are some other methods and traditions conferring jurisdictional power upon the Court after a concrete case and controversy arises: *ex post* optional jurisdictions. First, as the ICJ Statute, Article 36, paragraph 1 stipulates,[280] States may conclude a bilateral or multilateral agreement for specific litigating purposes only. States would then submit notification of that special agreement to the Registry, providing the subjects of a dispute and State parties concerned.[281] Second, even if the Court has neither subject-matter nor personal jurisdiction at the time of filing an application, the rule of *forum prorogatum* may provide the Court with a valid jurisdictional ground. For example, the Court may exercise its contentious jurisdictional authority in situations where litigating States have participated without raising any preliminary objections against the lack of jurisdiction.[282] Based on the legal doctrine of *implied acceptance*, the rule may enable the Court to entertain a filed application immediately following the litigants' subsequent acceptance of the Court's jurisdiction, which the Court can infer from their words or conduct.[283]

---

[279] *Contentious Jurisdiction*, INTERNATIONAL COURT OF JUSTICE, http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1 (emphasis added) (last visited Oct. 19, 2020).
[280] Statute of the International Court of Justice art. 36, para. 1, *adopted on* June 26, 1945, 33 U.N.T.S. 993 (entered into force Oct. 24, 1945) (providing that "the jurisdiction of the Court comprises all cases which the parties refer to it…") [hereinafter ICJ Statute].
[281] *Id.* art. 40, para. 1; Rules of the International Court of Justice 1978 I.C.J. Acts & Docs. art. 39 [hereinafter ICJ Rule]. Submitting the notification of a special agreement as a way of instituting a contentious proceeding is exceptional because most of the contentious proceedings, so far, have been brought before the Court by filing an application instituting proceeding. *See Basis of the Court's Jurisdiction*, INTERNATIONAL COURT OF JUSTICE, http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=2 (last visited Oct. 19, 2020).
[282] Michael Waibel, *Investment Arbitration: Jurisdiction and Admissibility*, UNIV. CAMBRIDGE LEGAL STUDIES RES. PAPER SERIES, Feb. 2014, at 5.
[283] *Basis of the Court's Jurisdiction*, INTERNATIONAL COURT OF JUSTICE, http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=2 (last visited Oct. 19, 2020).

If a valid legal basis for the establishment of contentious jurisdiction has been determined before a dispute arises, the ICJ may have compulsory jurisdiction in the contentious proceeding.[284] This type of jurisdiction is therefore *ex ante* in nature,[285] and proceeding under this jurisdiction can begin when a "unilateral written application instituting proceedings"[286] is filed. First, the Court exercises its compulsory jurisdiction on the basis of the ICJ Statute, Article 36, paragraph 1, which prescribes that "the jurisdiction of the Court comprises all matters specifically provided for in treaties and conventions in force."[287] A State's application to institute this proceeding must contain basic information to meet procedural requirements, such as the issue in a dispute and the parties involved,[288] and the particular provisions establishing the jurisdiction that the applying State is relying on.[289]

Second, the ICJ Statute also confers another basis of compulsory jurisdiction upon the ICJ—that a litigating State has already declared under an optional clause against an opposing litigant, who has also accepted the same obligation.[290] At any time, a State may unconditionally declare its compulsory obligation *ipso facto* irrespective of any other State's reciprocal acceptance of it.[291] Having started with the written application, the Court operating under this jurisdiction can express its legal opinion on almost every sort of legal question. According to ICJ Statute, Article 36, paragraph 2, "the interpretation of a treaty, any question of international law, the existence of any fact which, if established, would constitute a breach of an international

[284] Given that state consent is always required, the term "compulsory" does not necessarily mean that compulsory jurisdiction is consensual by nature. However, the term should rather be construed with regard to the scope and/or timing of consent, KOLB, *supra* note 255, at 188.
[285] *See* Waibel, *supra* note 283, at 5.
[286] *Basis of the Court's Jurisdiction*, INTERNATIONAL COURT OF JUSTICE, http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=2 (last visited Oct. 19, 2020).
[287] ICJ Statute, *supra* note 281, at art. 36, para. 1.
[288] *Id.* at art. 40, para. 1.
[289] ICJ Rule, *supra* note 282, at art. 38.
[290] ICJ Statute, *supra* note 281, at art. 36, para. 2—5. As of now, a total of 72 State parties to the ICJ Statute have made the declarations and they have been deposited with the Secretary-General of the United Nations. *Declarations Recognizing the Jurisdiction of the Court as Compulsory*, INTERNATIONAL COURT OF JUSTICE, http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3 (last visited Oct. 19, 2020).
[291] ICJ Statute, *supra* note 281, at art. 36, para. 2, 3.

obligation, the nature and/or extent of the reparation to be made for the breach of an international obligation."[292] A State that recognizes compulsory jurisdiction under the optional clause may bring any legal dispute before the Court against any other State that has accepted the same obligation through an application instituting proceedings and *vice versa*.

4. The Dual Jurisdiction System: Advisory Jurisdiction

As a special procedure, international organs and agencies affiliated with the UN can request the ICJ's advisory opinion on a specific legal question with respect to their activities or competencies.[293] When it comes to the jurisdiction *ratione personae* and *ratione materiae* of advisory proceeding, the UN Charter, Article 96 reads:

> 1. *The General Assembly* or *the Security Council* may request the International Court of Justice to give an advisory opinion on *any legal question*.
> 2. Other *organs* of the United Nations and *specialized agencies*, which may 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*.[294]

However, both the UNGA and the UNSC may only ask the Court for an advisory opinion on particular types of legal questions, inasmuch as there is a general restriction imposed on the competence of the two organs in relation to this type of jurisdiction. For instance, the UNGA may request the Court's legal advisory opinion insofar as a given concern falls into the material

[292] *Id.* at art. 36, para. 2.
[293] *Organs and Agencies of the United Nations Authorized to Request Advisory Opinions*, INTERNATIONAL COURT OF JUSTICE, http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=2&p3=1 (last visited Oct. 19, 2020). However, the Court retains the "discretionary power" as to whether it responds to an advisory request. *See* KOLB, *supra* note 255, at 272—6; *see also* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, at 234—5 (July 8) (highlighting that "the Statute leaves a discretion as to whether or not it will give an advisory opinion that has been requested of it, once it has established its competence to do so."); *but cf.* Judgments of the Administrative Tribunal of the ILO in Complaints against UNESCO, 1956 I.C.J. 71 (Dec. 2) (holding that the Court must find "compelling reasons" in order to refuse an advisory request).
[294] U.N. Charter art. 96 (emphasis added).

sphere of the competence of the UNGA provided in the UN Charter, Article 10.[295] Interestingly, although the UN Charter confers a relatively narrower competence upon the UNSC,[296] it is equally competent with the UNGA in relation to the jurisdiction *ratione materiae* of the advisory proceeding by virtue of Article 96, paragraph 1.

Albeit by more relaxed parameters, the ICJ must also establish its jurisdiction and demonstrate the admissibility of an advisory request in preference to rendering an advisory opinion. First, in order for the Court to have an advisory jurisdiction over a particular set of questions, a request must be submitted by "duly authorized organ[s], agencies, or entities"[297] empowered by the UN Charter or by a resolution of the UNGA. Accordingly, a State is not generally allowed to raise an objection against the Court's exercise of advisory jurisdiction, even if the requested issue is in some way concerns international legal disputes. In an advisory proceeding, the Court is not being asked to direct the settlement of a dispute between States, but to express its non-binding but persuasive—and, sometimes, substantially authoritative—judicial interpretation on particular legal or factual issues to assist a requesting organ or agency in dealing with said issues in accordance with international law.[298]

Second, the ICJ only entertains its jurisdiction *ratione materiae* over a given question on the condition that the question is highly connected with activities or competence of requesting organs, agencies, or entities.[299] For example, if an entity brings a question that is outside its competence, the request will certainly fail to invoke the Court's advisory jurisdiction. While domestic judiciaries generally tend to refrain from entering partisan political

[295] KOLB, *supra* note 255, at 262—3.
[296] U.N. Charter art. 24, para. 1 (stipulating that "in order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for *the maintenance of international peace and security*, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.") (emphasis added).
[297] KOLB, *supra* note 255, at 266 (citing U.N. Charter art. 96).
[298] KOLB, *supra* note 255, at. 269.
[299] *Id.*

controversies, the Court has no hesitation in confronting the political nature of a requested question or its expected political impact.[300]

It is nonetheless plausible that the ICJ's exercising of its advisory jurisdiction may be confronted based on the absence of the admissibility of a request. In practice, the grounds of inadmissibility have varied from case to case because there is no legal limit to raising an admissibility objection.[301] Thus, the Court is obliged to examine a raised objection on a case-by-case basis in conjunction with the merits of a requested question.[302] However, it must be noted that the only admissibility objection accepted by the Court was based on the "non-availability of essential factual information"[303] in the *Eastern Carelia* case.

Unless specifically agreed beforehand,[304] no requesting organ, agency, or organization, or any State concerned is legally bound by the ICJ's advisory opinion, since this is not a binding judgment of the Court with any operative force.[305] Indeed, international organs and agencies generally have no obligation to resolve all kinds of disputes by complying with international law. Rather, they remain free to resolve in accordance with "equity or political consideration," insofar as a "purely legal solution"[306] is not specifically sought. Therefore, the requesting organ or agency may strive to attain a political compromise rather than adhere to the rendered advisory opinion on the pretext of seeking a more equitable solution.

---

[300] *Id.* at 267.
[301] See generally *id.* at 270—2 (providing a list of the admissibility objections raised in advisory proceedings).
[302] KOLB, *supra* note 255, at 272.
[303] Status of Eastern Carelia, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 5, at 28—9 (July 23) [hereinafter Eastern Carelia Case].
[304] *Advisory Jurisdiction*, INTERNATIONAL COURT OF JUSTICE, http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=2 (last visited Oct. 26, 2020) (presenting examples of the agreements where the Court's advisory opinion may have a binding effect: the Convention on the Privileges and Immunities of the United Nations, the Convention on the Privileges and the Immunities of the specialized agencies of the United Nations, and the Headquarters Agreement between the United Nations and the United States of America).
[305] *See* Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinion (First Phase), 1950 I.C.J. 65, at 71 (Mar. 30) [hereinafter Peace Treaties Case, First Phase]; *see also* Applicability of Section 22 of Article VI of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, 1989 I.C.J. 177, at 188—9 (Dec. 15) [hereinafter Applicability Case].
[306] GEORGES ABI-SAAB, LES EXCEPTIONS PRELIMINAIRES DANS LA PROCEDURE DE LA COUR INTERNATIONAL 75—83 (1967), *cited in* KOLB, *supra* note 255, at 277—8.

Importantly, however, the ICJ's advisory opinion does have a binding effect as to the "point of law," hence the requesting organ or agency should invoke said opinion should it desire to settle the legal question in conformity with international law.[307] Due to a lack of competence in construing and interpreting international law, organs and agencies cannot legitimately take a contradictory or an arbitrary legal position on a point of law once the Court has made a ruling.[308] In other words, the authorized entities are strictly bound by the Court's interpretation and application of legal documents.[309]

Other than its substantial authority over construction and interpretation of the disputed point of international law, the ICJ's advisory opinion may be effective and practical in various ways. Above all, it could have substantive political impact on the requesting organ/agency when choosing their next option.[310] The Court has encouraged them to do so, stressing that it will ultimately help the development of "preventive diplomacy, peaceful international relations, and international law."[311] Besides, some international treaties and rules explicitly confer upon the Court a binding power to operate as a final decision-maker with respect to advisory opinions.[312] Furthermore, in some rare circumstances, an advisory opinion may operate as a binding precedent with the effect of *res judicata*.

C. Jurisdictional Components of the ICJ Contentious Proceeding

[307] KOLB, *supra* note 255, at 277.
[308] *Id.* at 278.
[309] *Id.* On the contrary, as the Member States can contest the Court's interpretation of the UN Charter, this may lead to a new viewpoint of interpretation or even modification of the disputed provision. *Id.*
[310] Kolb specifically points out that the "obligations of good faith, mutual consideration, respect and cooperation between the UN organs under the UN Charter Article 2 Paragraph 2" give rise to this political practice of the organs. KOLB, *supra* note 255, at 276.
[311] *Advisory Jurisdiction*, INTERNATIONAL COURT OF JUSTICE, http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=2 (last visited Oct. 26, 2020); *see also* KOLB, *supra* note 255, at 278—9 (taking examples of advisory cases, such as *Reparation* (1949), *Genocide* (1951), *Effects of Awards of Compensation* (1954), and *Namibia* (1971), to underscore that the Court's advisory opinions have helped the "development of the institutional law of the UN, treaty laws, etc. in significant ways).
[312] The UN Headquarters Agreement art. 8, sec. 21, June 26, 1947, 11 U.N.T.S. 147; Convention on the Privileges and Immunities of the Specialized Agencies art. 9, sec. 32, Aug. 16, 1949, 33 U.N.T.S. 521.

1. Jurisdiction *Ratione Personae* ("Personal Jurisdiction")

According to the ICJ Statute, Article 34, paragraph 1, a sovereign State[313] is the only claimant allowed to bring a contentious case before the ICJ and entitled to be a defendant. Unlike an advisory proceeding, therefore, international organizations are merely allowed to make informative statements in a contentious proceeding.[314] Although private individuals are allowed to testify as witnesses, they are not permitted to be litigants.

There are two ways for a country to become eligible as a State party for the purpose of instituting a contentious proceeding. First, it can automatically become a party to the ICJ Statute by being admitted as a Member State of the UN.[315] Second, on the recommendation of the UNSC, the UNGA may review certain conditions and requirements for a non-UN Member State to be an accepted State party to the ICJ Statute.[316] As indicated, the role of the UNGA and the UNSC is therefore decisive in determining the sphere of the Court's personal jurisdiction, considering that they have ultimate power when deciding UN membership,[317] as well as setting threshold conditions and requirements on whether to admit a country as a party to the ICJ Statute.[318]

2. Jurisdiction *Ratione Materiae* ("Subject-Matter/Material Jurisdiction")

[313] Under international law, states are defined with the following elements: territory, population, government, and sovereignty.
[314] KOLB, *supra* note 255, at 178
[315] U.N. Charter art. 93, para. 1 (providing that "All Members of the United Nations are *ipso facto* parties to the Statutes of the International Court of Justice.").
[316] *Id.* at art. 93, para. 2 (prescribing that "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.").
[317] U.N. Charter art. 4, para. 2 (stating that "The admission of any such state to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council.").
[318] ICJ Statute, *supra* note 281, at art. 35, para. 3 (stipulating that "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 expense of the Court. This provision shall not apply if such state is bearing a share of the expenses of the Court.").

For the ICJ to exercise its jurisdiction in a contentious proceeding, it must first identify the presence of an international dispute between opposing States.[319] By definition, international dispute refers to a "*disagreement on a point of law or fact, a conflict of legal views or of interests between two parties*."[320] Even though the Court may allow the litigating State parties to present their views and opinions in determining an international dispute, its decision will always take precedence over them to ensure an objective determination as to whether a dispute exists between the parties.[321]

More significantly, an international dispute brought before the ICJ under a contentious jurisdiction must be concerned with a litigable controversy in which the Court would suggest any substantial legal solution based on international law. If one party to the dispute alleges any violation of its right or privilege by its opponent, or alleges the opponent's breach of duty owed, it can be said that the disputing State's allegation is validly grounded in the subjective formulation of a legal claim.[322] In other words, to be contemplated by the Court, an original claim, counter-claim, remedy, or defense must have its legal basis in international law.[323] Thus, disputes involving diplomatic, historical, social, or political matters are not legally litigable in principle. However, given that an international dispute normally consists of diversified elements, a non-litigable dispute may be legally reformulated in appropriate legal terms.[324]

In rendering its decision, the ICJ must apply recognized principles and rules of international law.[325] With respect to the Court's subject-matter/material jurisdiction, the ICJ Statute, Article 38 provides the applicable legal sources, stating that "the Court, whose function

[319] *See* KOLB, *supra* note 255, at 180—2.
[320] Case of the Mavrommatis Palestine Concessions, 1924 P.C.I.J. (ser. A) No. 2, at 11 (Aug. 30).
[321] KOLB, *supra* note 255, at 181.
[322] *Id.* at 182.
[323] *Id.*
[324] *See id.* at 183.
[325] *Id.* at 183—4.

is to decide in accordance with international law such disputes as are submitted to it, shall apply international conventions…international custom…the general principles of international law…and judicial decisions and the teachings…."[326] In addition to the sources listed, however, a contesting State may invoke a special set of rules contained in a valid bilateral or multilateral agreement for the Court to consider in its deliberations.[327] Furthermore, the Court may take some domestic materials into account as part of the applicable sources insofar as the Court finds them supplementary as well as legally effective.[328] Nonetheless, it must be noted that a litigating State cannot direct the Court to apply a specific legal source, even in a case where its jurisdictional authority has been upheld by State consensus. For example, the consensual character of an international legal dispute can never be a basis for a litigant to override the Court's subject-matter/material jurisdiction in a contentious proceeding.[329]

3. Jurisdiction *Ratione Temporis* ("Temporal Jurisdiction")

The jurisdiction of most international courts and tribunals is limited by the doctrine of temporal jurisdiction, "conferring the power to adjudicate upon the Courts only with regard to certain facts or legal claims that have occurred or have been consolidated before/after certain dates."[330] By preventing international courts from ruling on past and future events, this jurisdictional limit is basically designed to guarantee the predictability of international adjudications.[331] As opposed to the ad hoc international tribunals affiliated with the UN and

[326] ICJ Statute, *supra* note 281, at art. 38 (citation omitted).
[327] KOLB, *supra* note 255, at 184 (citing ICJ Statute, *supra* note 281, at art. 36, art. 38, para. 1(a)).
[328] KOLB, *supra* note 255, at 184 (citing Serbian Loans, 1929 P.C.I.J. (ser. A) No. 20 (July 12); Brazilian Loans, 1929 P.C.I.J. (ser. B) No. 21 (July 12)).
[329] KOLB, *supra* note 255, at 184.
[330] THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 792 (Cesare P.R. Romano et al. eds., 2013) (alteration in original).
[331] *Id.*

the ICC,[332] however, the ICJ is not especially restricted by the doctrine since the ICJ Statute stipulates no such restrictive provision as to the range of its temporal jurisdiction. In practice, the Court's jurisdiction will be limited if States that are party to certain types of international legal instruments explicitly designate the specific boundary of their consent to the jurisdiction.[333]

4. Jurisdiction *Ratione Consensus* ("Consensual/Consent-based Jurisdiction")

a. Overview

The consensual/consent-based jurisdiction is the most fundamental basis of state consent in the ICJ proceedings—i.e., the international judicial bodies are entitled to review issues only where both contesting and defending States have consented to the exercise of their jurisdictional power.[334] This is absolutely necessary for the operation of international courts and tribunals. Technically speaking, the Court does not express its judicial opinion in the absence of state consent to the exercise of its jurisdiction.[335] However, since the Court does not raise an issue of state consent *ex officio*, a State must raise a preliminary objection against the Court's jurisdiction over a case at hand to avoid the presumption of consent under the rule of

[332] Statute of the International Criminal Tribunal for Rwanda, U.N. Doc. S/RES/955, art. 1 (Nov. 8, 1994) (authorizing the ICTR to review only cases involving crimes which allegedly occurred in 1994); Statute of the International Criminal Tribunal for the Former Yugoslavia, U.N. Doc. S/RES/827, art. 1 (May 25, 1993) (limiting the ICTY's temporal jurisdiction with cases involving crimes which allegedly occurred in 1991); *but see* Rome Statute of the International Criminal Court art. 11, *adopted on* July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) (providing the ICC with a temporal jurisdiction that covers only crimes which have occurred after July 1, 2002, i.e., the date of entry into force, or any later date in which jurisdiction over the crime was established, e.g., the date of entry into force for new ratifying state parties) [hereinafter ICC Statute].
[333] THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION, *supra* note 331, at 792 (citing European Convention for the Peaceful Settlement of Disputes art. 27, June 29, 1957, E.T.S. 23).
[334] KOLB, *supra* note 255, at 185.
[335] East Timor (Port. v. Austl.), 1995 I.C.J. 90, at 101 (June 30).

forum prorogatum.[336] Considering that a State gives its consent to the Court's jurisdiction through additional channels, it is by nature an extraordinary and case-specific special consent.[337] Therefore, neither ratification of the ICJ Statute nor participation in it should be automatically deemed a blanket acceptance of jurisdiction over all types of cases brought before it.

b. Establishing *Ex Ante* Compulsory Jurisdiction by Adopting a Compromissory Clause

In principle, the compulsory jurisdiction of the ICJ may be established on the basis of the state consent given before a particular dispute arises; i.e., it is thus *ex ante* by nature. By consenting to the Court's jurisdiction in advance in either a compromissory clause or optional clause, a State will be subject to it in any future dispute arising from its relationship with another State or States. However, to prevent exposure to an unexpected lawsuit, many State parties also adopt a reservation clause limiting the sphere of compulsory jurisdiction.

By inserting a compromissory clause into an agreement or a treaty, a State may confer compulsory jurisdiction over the interpretation or application of the agreement or treaty on the ICJ.[338] Under certain conditions provided by the legal text, the Court may rule on any subject-matter insofar as it is related to its interpretation and application. However, compulsory jurisdiction established by the compromissory clause is essentially specific, being confined to matters regarding the interpretation and application of that specific agreement or treaty only.[339]

[336] KOLB, *supra* note 255, at 186—7 (pointing out that the Court may raise an issue of the absence of state consent on its own initiative in order to ensure the proper administration of justice).
[337] *Id.* at 187.
[338] *See, e.g.*, General Act for the Pacific Settlement of International Disputes of 1928, Sep. 26, 1928, 71 U.N.T.C. 912; Inter-American Treaty on the Peaceful Settlement of Disputes, Apr. 30, 1948, 30 U.N.T.C. 449; European Convention on the Peaceful Settlement of Disputes, Apr. 29, 1957, 320 U.N.T.C. 4646; Convention on the Prevention and Punishment of the Crime of Genocide art. 9, Dec. 9, 1948, 78 U.N.T.S. 1021.
[339] KOLB, *supra* note 255, at 189.

c. Establishing *Ex Ante* Compulsory Jurisdiction by the Declaration of the Optional Clause

Prior to the emergence of an actual dispute, any State party to the ICJ Statute may accept the jurisdiction of the ICJ by unilaterally declaring the optional clause embodied in the ICJ Statute.[340] Therefore, it is *ex ante* jurisdiction by its nature. Once compulsory jurisdiction has been established by the declaration, the declaring State may at any time institute a proceeding before the Court against any other State party that has made the same declaration. For the Court to exercise such jurisdiction, both State parties' declarations must be concurrent at the time of institution. Since the ICJ Statute does not specifically mandate State parties to declare the optional clause, compulsory jurisdiction may only be established for those State parties that have accepted it in advance. However, the optional clause mechanism is reserved for State that are parties to the ICJ Statute, so a non-party State is not subject to that compulsory jurisdiction established. Currently, there are 72 declarations that have been deposited and filed with the Secretary-General of the UN.[341]

By including a single reservation or a series of reservations in the declaration of the optional clause, a State is able to limit the scope of the accepted compulsory jurisdiction of the ICJ. In so doing, the reserving State may exclude sensitive or inappropriate issues from being automatically adjudicated by the Court.[342] Under the optional clause system, the declaration with reservation may limit the Court's temporal, personal, and subject-matter/material jurisdiction. For instance, even though a State has accepted compulsory jurisdiction through

[340] ICJ Statute, *supra* note 281, at art. 36, § 2 (stipulating that "the State 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.").
[341] *Declaration Recognizing the Jurisdiction of the Court as Compulsory*, INTERNATIONAL COURT OF JUSTICE, http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3 (last visited Oct. 26, 2020).
[342] KOLB, *supra* note 255, at 191.

the optional declaration, it may exclude in advance an issue of armed conflict from being decided by the Court.[343]

At the preliminary stage, if a claim is brought against a State declaring the optional clause with reservations, it may raise the relevant reservation in its own defense. So long as the ICJ finds that the conditions set out in the ICJ Statute, Article 36, paragraph 6 are met, a preliminary objection based on the reservation will cause the Court to declare that it lacks jurisdiction in the case at hand.[344] However, the Court will not raise this issue on behalf of the State that benefits from the reservation. If the State does not raise this objection in defense of itself, this will constitute a waiver, thereby establishing the Court's compulsory jurisdiction over the case.[345] For example, in *Fisheries Jurisdiction*, the Court held that it lacked jurisdiction over Spain's claim to seek the release of its fishing vessels arrested by the Canadian authority, inasmuch as it upheld Canada's preliminary objection based on its reservation: "Any dispute arising out of or concerning conservation and management measures taken by Canada with respect to vessels fishing in the NAFTO Regulatory Area shall not be subject to the jurisdiction of the Court."[346]

Notably, the ICJ has upheld the defending State's offensive use of such reservations based on the notion of "equality and reciprocity."[347] Under the optional clause system, a State declaring the optional clause without making any reservations may avail itself of a claiming State's reservation, if relevant, to obtain a dismissal. In other words, a State may raise its opponent's reservation for its own benefit in order to defeat the establishment of compulsory jurisdiction. In *Norwegian Loans*, for example, Norway invoked France's reservation of domestic jurisdiction as a shield to prevent the Court from adjudicating the French claim.[348]

---

[343] *See id*.
[344] *Id.* at 192.
[345] *Id.*
[346] *Id.* (quoting Fisheries Jurisdiction (Spain v. Can.), 1998 I.C.J. 432 (Dec. 4)) (alteration in original).
[347] KOLB, *supra* note 255, at 192.
[348] Norwegian Loans (Fr. v. Nor.), 1957 I.C.J. 9 (July 6), *cited in id.* at 193.

Among the declaring States with reservations, some have declared their reservations as "automatic or self-judging," meaning that they retain the right, and some use the subjective standard to determine whether a particular case falls within the scope of the reservations. For example, a declaring State may reserve its right to determine whether disputes of domestic nature are excluded from ICJ jurisdiction.[349] However, this automatic/self-judging reservation is often criticized since it does not impose any obligation on the reserving State to be bound by the optional declaration.[350] In other words, the reserving State has merely given its limited consent to the establishment of the Court's compulsory jurisdiction. Thus, based on its own judgment on the nature of the case, that State would decide whether to raise its reservation to defeat the jurisdiction.[351] In this regard, this special form of reservation is often criticized for its inconsistency with the object and purpose of the optional clause system represented by the ICJ Statute, Article 36, paragraphs 2 and 6.[352]

In principle, an optional declaration becomes effective from the moment it is filed with the Secretary-General, and any reservation made in tandem with such a declaration cannot have a retroactive effect to later defeat ICJ jurisdiction established under the optional clause system. Due to the instantaneous effect of the declaration, any declaring State may be exposed to a claim against it even before it has any knowledge of a claiming State's deposition of its declaration. [353] Therefore, in order to protect themselves, some declaring States with reservations have used the optional clause mechanism to limit the temporal jurisdiction of the Court.[354] Once a claimant has properly instituted a case, however, no reserving State can raise

[349] KOLB, *supra* note 255, at 194 (mentioning the optional declaration of Malawi as an example).
[350] *Id.*
[351] *Id.*
[352] *Id* (arguing in particular that the ICJ Statute Article 36, paragraph 6 reserves the right to decide e jurisdiction to the Court itself).
[353] *Id* (citing Right of Passage over Indian Territory (Port. v. India), Preliminary Objections, 1957 I.C.J. 125 (Nov. 26) (Portugal initiated the proceeding against India only three days after its deposition of the optional declaration and even before India received any notification of the deposition). *See also* Territorial and Maritime Boundary (Cameroon v. Nigeria), Preliminary Objections, 1998 I.C.J. 291 (June 11).
[354] KOLB, *supra* note 255, at 195 (quoting the Australian Declaration made in 2002 as an example).

any reservation to reject jurisdiction. A reservation may only be invoked to prevent the Court from proceeding on the merits in a future lawsuit.[355] Under the optional clause system, a reserving State may not be able to defend itself from a surprise action by another State that has declared the optional clause for the purpose of instituting proceedings against the defendant. Thus, a reservation limiting the temporal jurisdiction may be the only shield for the defending State to defeat such surprise action.

Considering the ICJ's practices, it is possible for the declaring States to withdraw from their obligations, although no requirement for a notice period has yet been recommended. Therefore, under the current law of the Court, a declaration may be renounced, provided a fixed period of time for withdrawal is given and adhered to. This is allowed even if this practice runs contrary to the immediate effect of the declaration, as well as the purpose of the optional clause system stipulated in the ICJ Statute, Article 36, paragraph 2.[356] In other words, a declaring State may in theory withdraw its binding obligation under the optional clause system at any time in anticipation of a claim against it. In cases where the declarants had not provided any fixed period for the notice requirement, the Court held that such withdrawal would take place after a "reasonable time" had passed as was standard practice[357] in renunciation of an international treaty.[358] However, declarants should not abuse the Court's allowance of such withdrawal or unilateral denunciation to manipulate the purpose of the optional clause system, which was originally designed to reinforce the binding effect of such declarations.[359] Accordingly, a declaring State cannot withdraw its declaration of obligation after the Court's proceedings have

[355] *Id*. at 191—2.
[356] KOLB, *supra* note 255, at 196.
[357] *See* Territorial and Maritime Boundary (Cameroon v. Nigeria), Preliminary Objections, 1998 I.C.J. 291 (June 11).
[358] 1969 Vienna Convention, *supra* note 204, at art. 56.
[359] KOLB, *supra* note 255, at 196.

properly commenced, inasmuch as the establishment of jurisdiction is a matter to be decided at the time a case is filed.[360]

d. Establishing *Ex Post* Optional/Voluntary Jurisdiction by Concluding a Special Agreement

ICJ jurisdiction may be established if a State gives its consent after the formation of a concrete dispute: *ex post* optional/voluntary jurisdiction. The scope of the state consent required for this jurisdiction is much narrower since a State specifically agrees to the Court's exercise of jurisdiction only in relation to that particular dispute. The sphere of jurisdiction, therefore, should not be arbitrarily extended beyond the scope of the consent given.[361] Indeed, a State has more discretion and opportunity to consider surrounding legal or political issues, e.g., a claimant, an obligation, the respective position of each party, prior efforts for negotiated settlement, anticipated legal outcome, and potential risk,[362] when determining whether to give its consent. In contrast with the case of compulsory jurisdiction, this *ex post* optional/voluntary jurisdiction leaves a State at liberty to choose between accepting this jurisdiction and refraining from doing so.

After a dispute has arisen, State parties to the ICJ Statute in dispute may specifically agree to submit it to the ICJ, thereby accepting optional jurisdiction by concluding a special agreement or treaty.[363] Although this specific form of international legal document is universally required, governments of disputing States may also take more informal

[360] KOLB, *supra* note 255, at 196 (citing Right of Passage over Indian Territory (Port. v. India), Preliminary Objections, 1957 I.C.J. 125, at 142 (Nov. 26)).
[361] *Id.* at 187—8.
[362] *Id.* at 188.
[363] *E.g.*, Minquiers and Ecrehos Case, *supra* note 117, at 49—53.

governmental actions, such as a joint press communiqué signed by their foreign ministers[364] or the signed minutes of a negotiation,[365] with the intent of establishing this type of optional jurisdiction. In cases established under this jurisdiction, the Court will not simply dismiss an applying State's general and abstract formulation of its legal claim—which is not sufficiently supported by established rules and principles of law—in the hopes of promoting compromise over an international dispute.[366] Therefore, albeit insufficiently constructed, the Court will accept the application and proceed to determine the applicable law. Nonetheless, the State is still required to formulate a diligent contention to avoid being rejected by the Court and to follow the generally applicable rule relating to the burden of proof.[367] Moreover, it is still possible for applying States to highlight certain applicable laws in their special agreement or treaty.[368]

e. Establishing *Ex Post* Optional/Voluntary Jurisdiction by the Doctrine of *Forum Prorogatum*

In the absence of any prior consent to the ICJ jurisdiction, the doctrine of *forum prorogatum* may be used to confer judicial power upon the Court in situations where a defending State has expressly or even implicitly given its consent in response to a claiming State's unilateral application. Although neither the ICJ Statute nor the Rules provide any explicit basis of this doctrine, it has been developed as an important part of the Court's

[364] Aegean Sea Continental Shelf, Interim Protection, Order of 11 September 1976 (Greece v. Turk.), 1976 I.C.J. 3, ¶¶ 107—8 (holding that the Brussels Communiqué, the alleged basis of jurisdiction relied on by Greece, did not amount to an "immediate and unqualified commitment" on the part of both Greece and Turkey to accept the optional jurisdiction of the Court.).
[365] Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility (Qatar v. Bahr.), Judgment, 1994 I.C.J. 112, ¶¶ 25—9, 30—42.
[366] KOLB, *supra* note 255, at 197—8. To some extent, this joint submission system has caused a blurred distinction between a claimant and a defendant in each case relied on the special agreement jurisdiction.
[367] *Id.* at 198.
[368] *Id.* at 197.

expansion of its jurisdictional reach. Notwithstanding the absence of *ex ante* consent, the doctrine leaves open the possibility for the Court to exercise its jurisdictional authority in conjunction with the fundamental principle of consensual/consent-based jurisdiction employed in international judicial proceedings. In multiple precedents, it has been established that the supplementary nature of the principle not only confers judicial power on the Court in a case of non-existing jurisdiction, but also "subsequently enlarges a pre-existing defective or narrowly confined title of jurisdiction."[369] Therefore, the jurisdiction established by the doctrine is by nature an *ex post* optional/voluntary jurisdiction since it is formed after a specific dispute has arisen and after an application has been filed. Once jurisdiction has been established based on the presence of *ex post* consent on the part of a defending State, neither of the disputing parties are allowed to withdraw or unilaterally denounce the jurisdiction.

First, under the principle, the jurisdiction of the ICJ may be established when there is an "*express but informal consent*" on the part of a defending State.[370] Since its inception, the Court has deemed several types of state actions constituting an "express but informal consent" acceptance of its jurisdiction. In *Corfu Channel*, for instance, the Court upheld that the highest level of international authority of a State, such as the Head of State, may have the power to voluntarily consent to the establishment of the *ex post* optional/voluntary jurisdiction even without any explicit legal basis in the ICJ Statute.[371] In *Corfu Channel*, when the British government unilaterally instituted a proceeding before the Court upon the recommendation of the Security Council urging a peaceful resolution of the dispute, the Albanian government at first contested the jurisdiction, arguing that both governments had never reached any special agreement in conformity with the ICJ Statute, Article 36, paragraph 1 and Article 40, paragraph 1.[372] Moreover, Albania contended that being a UN Member State should not be automatically

[369] KOLB, *supra* note 255, at 200.
[370] *Id.* at 198.
[371] *See* Corfu Channel (Alb. v. U.K.), Preliminary Objection, 1948 I.C.J. 15, at 27.
[372] *Id.* at 21.

understood as an acceptance of the Court's jurisdiction.[373] Nevertheless, the majority of judges affirmed that Albania had voluntarily consented to the establishment of jurisdiction on the basis of the United Kingdom's transmission to Albania as well as Albania's response letter written to the Court.[374] In *Certain Questions of Mutual Assistance in Criminal Matters*, the Court also upheld a means to establish its *ex post* optional/voluntary jurisdiction when Djibouti unilaterally initiated a proceeding while admitting the lack of basis of the Court's jurisdiction and simultaneously inviting France to give its consent to the proceeding.[375] In this case, the Court found its jurisdiction was established based on the French government's later consent.

Second, under the doctrine of *forum prorogatum*, the Court will establish its jurisdiction if an implied consent could be inferred *by the act of a defending State*. For example, if a defending State is "voluntarily proceeding on the merits without raising any preliminary objection,"[376] or is "tacitly accepting the competence of the Court while expressly indicating an intention to contest it," that is a contradiction.[377] Throughout the proceedings of *Rights of Minorities in Upper Silesia*, the PCIJ upheld a tacit enlargement of the scope of its jurisdiction since Poland proceeded on the merits without raising any preliminary objection against Germany's claim, thus expanding the jurisdictional scope.[378] However, the Court needs to carefully examine and construe the intention, purpose, general direction, and relevance of procedural actions taken by the responding State rather than simply applying the doctrine through inference.[379] In other words, if a State simply argues to negate the jurisdictional basis of a claim as part of its defense plan, the Court should not infer such intent as a way to establish *forum prorogatum* jurisdiction.[380] Through this approach in *Anglo-Iranian Oil*, the Court

[373] *Id.* at 21—2.
[374] Id. at 27—9.
[375] Certain Questions of Mutual Assistance in Criminal Matters (Djib. v. Fr.), 2008 I.C.J. 179, *cited in* KOLB, *supra* note 255, at 199.
[376] KOLB, *supra* note 255, at 198—9.
[377] *Id.*
[378] Rights of Minorities in Upper Silesia (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No. 15 (Apr. 26).
[379] KOLB, *supra* note 255, at 200—1.
[380] *Id.* 201.

rejected the British argument that the Iranian preliminary objection against the admissibility of the British claim was *ipso facto* based on its implicit acceptance of the Court's jurisdiction in terms of the doctrine.[381] Rather, the Court held that Iran's preliminary objection against admissibility should not be interpreted as voluntary and indisputable consent to the Court's jurisdiction since it raised the objection as part of its defense measures and consistently challenged jurisdiction.[382] The Court's position on the interpretation of an "unequivocal indication of a voluntary and disputable acceptance of the Court's jurisdiction"[383] was reaffirmed in *Case Concerning Application of the Convention for the Prevention and Punishment of the Crime of Genocide*.

D. The ICJ Advisory Jurisdiction for International Disputes Involving Legal Questions

1. Commencing Advisory Proceeding

In addition to establishing consensual/consent-based contentious jurisdiction,[384] the Court may give its non-binding advisory opinion upon the request of the authorized international organizations and specialized agencies. These entities must be authorized by the

[381] Anglo-Iranian Oil (U.K. v. Iran), Preliminary Objections, 1952 I.C.J. 93, at 101 (July 22). In its preliminary objections, Iran also contested the Court's jurisdiction and the admissibility of the claim. The UK asserted this on the basis that the admissibility issue should not be determined without establishing the Court's jurisdiction as priority.

[382] *Id.* at 114. However, the Court admitted that governmental consent might be presumed on the basis of the *forum prorogatum* doctrine by looking to its conduct or statements involving an "element of consent." *Id.*

[383] Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, 1993 I.C.J. 419 (Apr. 8) (holding that "Yugoslavia's overall conduct showed it had constantly disputed the Court's jurisdiction and therefore its communication, including provisional measures against Bosnia, cannot, even *prima facie*, be interpreted as an 'unequivocal indication of a voluntary and indisputable acceptance of the Court's jurisdiction.'") (alteration in original), *cited in* KOLB, *supra* note 255, at 202.

[384] ICJ Statute, *supra* note 281, at art. 36, para. 1 (providing that "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 or conventions in force.").

UNGA with respect to specific questions of law under the ICJ Statute, Article 65, paragraph 1 in conjunction with the UN Charter, Article 96.[385] However, on the basis of the principle of *compétence de la competence*, a situation can arise where the Court decides not to proceed with the request. In other words, even in the absence of any interested party's objections against advisory jurisdiction, the Court may still refrain from giving its advisory opinion due to a lack of personal jurisdiction and/or subject-matter/material jurisdiction.[386] Moreover, as will be discussed below, the Court has drawn an obvious line between a request from the political organs of the UN and a request from other specialized agencies authorized by the UNGA. Specifically, the Court has interpreted the purposes and functions of the requesting specialized agencies very narrowly, being more "restrictive and cautious" so as to establish its advisory jurisdiction.[387] Conversely, the Court has been quite liberal in allowing other political organs of the UN to request an advisory opinion.[388]

2. Personal Jurisdiction in Advisory Proceeding

After either an organ or agency has filed an advisory request with the ICJ, the Court must decide its jurisdictional scope and competence in relation to such a request, examining the requesting body's standing as a precondition, i.e., personal jurisdiction.[389] According to the UN Charter, Article 96, paragraph 1, only the UNGA and the UNSC are entitled to exercise an "original right" to make a request an advisory opinion on "any legal question."[390] With respect

[385] *Id.* at art. 65, para 1 (providing that "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.").
[386] *See* ICJ Statute, *supra* note 281, at art. 36, para. 6 (providing that "in the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court."), *cited in* ALJAGHOUB, *supra* note 241, at 37—8.
[387] ALJAGHOUB, *supra* note 241, at 38.
[388] *Id.*
[389] *See* Application for Review of Judgment No. 273 of the United Nations Administrative Tribunal, Pleadings, 1982 I.C.J. 325, at 333—4; *see also* Legality of the Threat or Use of Nuclear Weapons, *supra* note 294, at 232.
[390] ALJAGHOUB, *supra* note 241, at 40.

to this original right, international legal scholars and experts offer a variety of opinions. For example, Judge Schwebel focuses on the permissive wording of the term to assert that the UNGA may request an advisory opinion on an international legal question arising from domestic judicial proceedings, hence serving as a "conduit" for national courts.[391] This broadened interpretation of the words "any legal question" seems to originate from the extensive powers of the UNGA and the UNSC provided in Chapter IV of the UN Charter.[392] By contrast, Rosenne and Kelsen disagree with such a broad interpretation of the term, arguing that both the UNGA and the UNSC must request an advisory opinion within the scope of their activities as determined by the relevant legal instrument institution—the UN Charter, Article 96.[393] In line with this, Judge Higgins also emphasizes the strong connection between request and activities, citing the recent practice of the UNGA in *Alvarez-Machain Case*.[394]

In response to several *ultra vires* objections to the personal jurisdiction over UN organizations,[395] the Court has rendered a relatively broad interpretation regarding their competence and activities in light of advisory proceeding. In *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* ("*Israeli Wall Case*"), the Court differentiated a request for an advisory opinion from a recommendation for a dispute or situation stated in the UN Charter, Article 12, paragraph 1.[396] Therefore, the Court held that the UNGA's request was consistent with the article, notwithstanding Israel's *ultra vires*

[391] Stephen Schwebel, *Relations between the International Court of Justice and the United Nations*, *in* JUSTICE IN INTERNATIONAL LAW: SELECTED WRITINGS OF STEPHEN M. SCHWEBEL 18—9 (1994).
[392] ALJAGHOUB, *supra* note 241, at 41.
[393] *Id.* at 40—1. Kelsen further argued that the phrase "arising within the scope of their activities" in the UN Charter, Article 96(2) is not necessary because Article 96(1) the Court does not seem to be drafted to enlarge the scope of the activities of the UNGA and the UNSC. HANS KELSEN, THE LAW OF THE UNITED NATIONS: A CRITICAL ANALYSIS OF ITS FUNDAMENTAL PROBLEMS 546 (1951).
[394] ALJAGHOUB, *supra* note 241, at 41.
[395] The *ultra vires* objection refers to a preliminary objection to the jurisdiction *ratione personae*, claiming that the requesting organ does not possess competence to request an advisory opinion "as it acted *ultra vires* in making the request." ALJAGHOUB, *supra* note 241, at 41.
[396] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, at ¶ 25 [hereinafter Israeli Wall Case].

objection and the UNSC's active engagement in the event.[397] In *Interpretation of Peace Treaties Case (First and Second Phase, collectively "Peace Treaties Case")*, the Court also rejected the *ultra vires* objection, stating that "clarifying the applicability of the procedure for dispute settlement provided for in the Peace Treaties with Bulgaria, Hungary, and Romania is a question of international law laying within the Court's jurisdiction."[398] Moreover, in *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter) Case* ("*Expenses Case*"), when the former Soviet Union and France invoked *ultra vires* to contest the UNGA's decision to establish peace-keeping operations, the Court clarified the presumption: "When the Organization takes action which warrants the assertion that it was appropriate for the fulfillment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the Organization."[399] In *1971 Legal Consequences for States of the Continued Presence of South Africa in Namibia notwithstanding Security Council Resolution 276 (1970) Case* ("Namibia Case"), the Court consistently upheld that "a resolution of a UN's properly constituted organ which is passed in accordance with that organ's rules of procedure, and is declared by its President to have been so passed, must be presumed to have been validly adopted."[400] In spite of the *ultra vires* objections raised, the Court's jurisprudence clearly indicates that, as long as there is no compelling reason to refuse, the Court will entertain a request for an advisory opinion.[401] As the Court has clarified in *Legality of the Threat or Use of Nuclear Weapons Case*, this wide discretion of the Court is grounded upon multiple

[397] *Id.* at ¶¶ 26—8.
[398] Peace Treaties Case, First Phase, *supra* note 306, at 70—1 (alteration in original).
[399] Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, 1962 I.C.J. 151, at 168 (alteration in original) [hereinafter Expenses Case].
[400] 1971 Legal Consequences for States of the Continued Presence of South Africa in Namibia notwithstanding Security Council Resolution 276 (1970) Case, Advisory Opinion, 1971 I.C.J. 16, at 22 [hereinafter Namibia Case], *cited in* ALJAGHOUB, *supra* note 241, at 44.
[401] *See also* Elihu Lauterpacht, *The Legal Effect of Illegal Acts of International Organisations*, *in* CAMBRIDGE ESSAYS IN INTERNATIONAL LAW: ESSAYS IN HONOUR OF LORD MCNAIR 100 (1965), *cited in* ALJAGHOUB, *supra* note 241, at 45.

provisions in the UN Charter; e.g., Article 10,[402] Article 11, paragraph 1,[403] and Article 13, paragraph 1.[404]

Under the ICJ advisory jurisdiction, UN organs and specialized agencies affiliated with the UN may also seek the Court's advisory opinion. This is the so-called "Derivative Right." It is derivative since it is required to have an authorization from the UNGA, which has the power to authorize other organs or specialized agencies with respect to a "legal question arising within the scope of their activities."[405] Although this authorization is subject to the unilateral revocation by the UNGA, the authorized organs or agencies are generally allowed to request an advisory opinion "within the scope of the activities" or relating to "legal questions arising from a concerned convention."[406] In other words, as long as the authorization is given to either organs or agencies, their derivative right to make such a request is not confined to a particular case at hand. Rather, the right can be exercised broadly.

Throughout the decades of the ICJ system, several organs of the UN and specialized agencies have been authorized to request an advisory opinion for the purpose of resolving international disputes and conflicts. As the practice of the UNGA has confirmed, the term "authorized organs" embraces both the principal and subsidiary entities in the sphere of "other organs of the UN" under the UN Charter, Article 96, paragraph 2.[407] Above all, in relation to the settlement of international disputes, withholding authorization from the UN Secretary-

[402] U.N. Charter art. 10 (providing that "The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided in the present Charter….").
[403] U.N. Charter art. 11, para.1 (providing that "The General Assembly may consider the general principles of cooperation in the maintenance of international peace and security, including the principles of governing disarmament and the regulation of armament….").
[404] U.N. Charter art. 13, para. 1 (providing that "The General Assembly shall initiate studies and make recommendations for the purpose of…encouraging the progressive development of international law and its codification.").
[405] U.N. Charter art. 96, para. 2.
[406] ALJAGHOUB, *supra* note 241, at 45.
[407] ALJAGHOUB, *supra* note 241, at 46. There are two subsidiary organs that have been authorized by the General Assembly to seek an advisory opinion: The Interim Committee of the General Assembly and the Committee for Applications for Review of Judgments of the Administrative Tribunals.

General ("UNSG") is a controversial issue.[408] Indeed, international scholars and experts debate whether the UNSG is legally permitted to make a request on any legal question within the boundary of his/her activities. Within the scope of the UNSG's administrative and political functions, the majority admits the necessity of such permission to authorize him/her to seek an advisory opinion from the Court on the basis of a liberal interpretation of the UN Charter, Articles 98 and 99.[409] However, others refute this idea, contending that authorizing the UNSG might give rise to an intensified conflict of power with the UNGA or the UNSC.[410] Furthermore, some even argue that allowing the UNSG to utilize the Court's opinion is inconsistent with the spirit of the UN Charter, which restricts his/her autonomy *vis-à-vis* the UNGA or the UNSC, over-strengthening his/her political influence.[411] Nevertheless, by reading the UN Charter, Article 96, paragraph 2 in context, the proper interpretation is that the UNSG may be legally authorized by the UNGA inasmuch as he/she is certainly one of the principal organs affiliated with the UN. Indeed, the UNSG has on occasion made several attempts to obtain the authorization from the UNGA: e.g., the Agenda for Peace: Preventive Diplomacy, Peace Making, and Peace Keeping.[412] However, it is always possible that the UNSG may make such requests by taking a detour in cooperation with the UNGA or the UNSC without mentioning any specific case or issue.

---

[408] The Economic and Social Council and the Trusteeship Council were authorized to request an advisory opinion in 1946 and in 1947, respectively.

[409] *See e.g.*, Paul Szasz, *Enhancing the Advisory Competence of the World Court*, *in* THE FUTURE OF THE INTERNATIONAL COURT OF JUSTICE 531—2 (L. Gross ed. 1976); MOHAMED BEDJAOUI, THE NEW WORLD ORDER AND THE SECURITY COUNCIL: TESTING THE LEGALITY OF ITS ACTS 78 (1994), *cited in* ALJAGHOUB, *supra* note 241, at 50.

[410] BEDJAOUI, *supra* note 410, at 78; Derek Bowett, *The Court's Role in Relation to International Organizations*, *in* FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE: ESSAYS IN HONOUR OF SIR ROBERT JENNINGS 187—8 (Vaughan Lowe & Malgosia Fitzmaurice ed., 1996), *cited in* ALJAGHOUB, *supra* note 241, at 51.

[411] BEDJAOUI, *supra* note 410, at 78.

[412] U.N. Secretary-General, *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-keeping: Rep. of the Secretary-General*, 14, U.N. Doc. A/47/277-S/2411 (June 17, 1992) (claiming that "I recommend that the Secretary-General be authorized, pursuant to Article 96, paragraph 2, of the Charter, to take advantage of the advisory competence of the Court.").

As long as a particular legal question, which arises within the sphere of activities of the authorized specialized agencies, is related to a particular international legal dispute, it is also possible that one of the agencies would seek the ICJ's advisory opinion on that issue. Currently, 16 specialized agencies,[413] defined as "international organizations of limited competence linked to the UN by special agreements under Articles 57, paragraph 1 and 63 of the UN Charter,"[414] have been authorized to ask the Court's advisory opinion. Although each agency has the power to determine the scope of its own jurisdiction in the first place,[415] the Court will ultimately decide whether the requested subject-matter falls within the scope of the activities and competence of that particular agency.[416] However, as indicated in *Legality of the Use by a State of Nuclear Weapons in Armed Conflict Case* ("WHO Nuclear Weapons Case"), the Court is reluctant to give a broad interpretation of the scope and competence of a specialized agency. In other words, in response to objections against the World Health Organization ("WHO"), which had requested an advisory opinion on the legality of the use of nuclear weapons, the Court found that the request was beyond WHO's scope of activities and competence, relying on the doctrine of *ultra vires*.[417] In this case, moreover, the Court suggested a guideline to determine the scope of activities and competence of an international organization in relation to requesting an advisory opinion from the Court. First, the relevant rules of that organization,

[413] According to ICJ Yearbook 1990-1991, the list of the authorized agencies is as follows: International Labor Organization (ILO), Food and Agriculture Organization of the United Nations (FAO), United Nations Educational, Scientific and Cultural Organization (UNESCO), World Health Organization (WHO), International Bank for Reconstruction and Development (IBRD), International Finance Corporation (IFC), International Development Association (IDA), International Monetary Fund (IMF), International Civil Aviation Organization (ICAO), International Maritime Organization (IMO), World Intellectual Property Organization (WIPO), International Fund for Agricultural Development (IFAD), United Nations Industrial Development Organization (UNIDO), International Atomic Energy Agency (IAEA).

[414] ALJAGHOUB, *supra* note 241, at 51—2.

[415] Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, 1996 I.C.J. 66, at 82 (stating that "each organ must, in the first place at least, determine its own jurisdiction.") [hereinafter WHO Nuclear Weapons Case].

[416] JO N PASQUALUCCI, THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS 40 (2003), cited in ALJAGHOUB, *supra* note 241, at 52.

[417] WHO Nuclear Weapons Case, *supra* note 416, at 74, 82 (ruling that "…the mere fact that a majority of States, in voting on a resolution, have complied with all the relevant rules of form cannot in itself suffice to remedy any fundamental defects, such as acting *ultra vires*, with which the resolution might be afflicted.").

e.g., the constitution, must be the starting point in preference to the determination.[418] Second, as governed by the "principle of specialty," every international organization is allowed to have a limited competence rather than a general competence, which only States possess.[419] Furthermore, it should be noted that the "doctrine of implied powers" allows an assumption of competence for a particular organization where a constituting legal instrument of that organization does not provide any express provision for such competence.[420]

3. Subject-Matter/Material Jurisdiction in Advisory Proceeding

The UN Charter, Article 96 in conjunction with the ICJ Statute, Article 65, states that, for the establishment of subject-matter/material jurisdiction in advisory proceeding, the next condition is that a requested question must be concerned with legal controversies arising within the scope of the activities of the organ or agency. If the legal character of the question raised by an organ or an agency is not certain, the Court may reject that request based on the lack of subject-matter/material jurisdiction. In *Western Sahara*, the Court defined the subject-matter/material jurisdiction in light of its advisory proceeding: "legal questions are framed in terms of law and raising problems of international law…are by their very nature susceptible of a reply based on law…and appear…to be questions of a legal character."[421] More importantly, in *Expenses Case*, the Court made clear that it must refuse to give an advisory opinion in cases where the question does not pertain to a legal issue.[422] However, it is obvious from those

[418] *Id.* at 74—5 (referring to 1969 Vienna Convention, *supra* note 204, art. 31).
[419] *Id.* at 78.
[420] ALJAGHOUB, *supra* note 241, at 55.
[421] Western Sahara, Advisory Opinion, 1975 I.C.J. 12, at 18—9 (Oct. 15, 1975), *cited in* ALJAGHOUB, *supra* note 241, at 39 [hereinafter Western Sahara Case]; *see also* Western Sahara Case, supra note 422, at 117 (separate opinion of Judge Dillard) (defining that "…the notion that a legal question is simply one that invites an answer 'based on law' appears to be question-begging and it derives no added authority by virtue of being frequently repeated."). In some other cases, the Court had a chance to examine the legal nature of the questions raised. *See* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, *supra* note 294, at 233—4; WHO Nuclear Weapons Case, *supra* note 416, at 71—2.
[422] Expenses Case, *supra* note 400, at 155.

precedents that the Court will still respond to certain legal questions even if they include political and factual issues, or even if that question is equivocally drafted as to its legal character.[423] However, the precedents of the PCIJ[424] raise the issue as to whether the Court has subject-matter/material jurisdiction, not only over a legal question, but also a legal dispute. Nonetheless, despite the restrictive use of the term "legal question," the Court has broadly interpreted its subject-matter/material jurisdiction as encompassing both "legal question" and "legal dispute". In this sense, UN organs or agencies may request an advisory opinion on a particular "legal dispute" between two or more States or between a State and organizations once said opinion deals with a legal question pertaining to the interests of the UN.[425]

Even if a question is properly brought before the ICJ, an objection to subject-matter/material jurisdiction in advisory proceeding may be raised at any time to try and prevent the Court from exercising advisory jurisdiction. First, the Court's jurisdiction may not be established over a particular legal question if it might risk "politicizing the Court."[426] Accordingly, the Court will disregard the "political nature of the motives inspiring the request for an advisory opinion and the political implications"[427] in establishing its subject-matter/material jurisdiction in advisory proceeding. However, given that nearly every question contains a political element, the Court can reformulate the given question into a legal construct by using its wide discretionary power to achieve the peaceful settlement of international

[423] ALJAGHOUB, *supra* note 241, at 57.
[424] The PCIJ noted that its opinion on a legal question is sought "to obtain authoritative guidance on a question of a legal nature arising during the activities of the Council or the Assembly of the League of Nations." Further, it distinguished, defining a dispute as a legal dispute actually pending between two or more states. ROSENNE, *supra* note 239, at 280.
[425] ALJAGHOUB, *supra* note 241, at 57—8.
[426] Id. at 58—9. *See* Conditions of Admission of a State to Membership in the United Nations, Advisory Opinion, 1948 I.C.J. 57, at 61 [hereinafter Admission Case] (holding that "…The Court cannot attribute a political character to a request which, framed in abstract terms, invites it to undertake an essentially judicial task, the interpretation of a treaty provision…."); *see also* Expenses Case, *supra* note 400, at 155; Interpretation of Agreement of 25 March 1951 between the WHO and Egypt, 1980 I.C.J. 73, at 87 (Dec. 1980).
[427] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, *supra* note 294, at 234.

disputes or conflicts.[428] Second, the Court is not likely to reject a request, even if it mixes factual with legal issues. The Court has held that the term "legal question," which is embodied in the UN Charter, Article 96, should not be understood as an opposing term to "factual question," given that some factual issues would not affect the legal issues raised by the requested question.[429] The Court has consistently allowed the possibility of coexistence between factual and legal issues, stating that "a mixed question of law and fact is nonetheless a legal question."[430] Lastly, an objection may be raised to block the Court's advisory jurisdiction, attacking the abstractness of a legal question. On occasion, involved States raised an objection that the abstract nature of the question might lead the Court to conclude a purely hypothetical answer that might lie outside the sphere of the judicial function of the Court. In response, the Court consistently rejected such lack-of-concreteness-objections, holding that it will render its advisory opinion on any legal questions by applying legal rules relevant to a particular situation, regardless of whether it is abstract or otherwise.[431] All things considered, although a legal question is not necessarily required to be "narrowly defined and confined to a very specific point," it should nevertheless be carefully drafted to conclude a generally applicable answer to future questions.[432]

4. Consensual/Consent-based Jurisdiction and the Role of the Doctrine of *Forum Prorogatum* in Advisory Proceeding

[428] ALJAGHOUB, *supra* note 241, at 60 (quoting U.N. Secretary-General, 8, U.N Doc. A/41/1 (1991) (stating that "Even those disputes which seem entirely political have a clearly legal component. If, for any reason, the parties fail to refer the matter to the Court, the process of achieving a fair and objectively commendable settlement and thus defusing an international crisis situation would be facilitated by obtaining the Court's advisory opinion.")).
[429] Namibia Case, *supra* note 401, at 27.
[430] Western Sahara Case, *supra* note 422, at 19. *See also* Eastern Carelia Case, *supra* note 304, at 28.
[431] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, *supra* note 294, at 237; Israeli Wall Case, *supra* note 397, at 236. *See also* Admission Case, *supra* note 427, at 61; Namibia Case, *supra* note 401, at 27.
[432] ALJAGHOUB, *supra* note 241, at 63.

The pertinent legal instruments lack any provision as to whether the state consent to the exercise of the advisory jurisdiction is necessarily required. As such, international scholars and experts present a diverse range of views where the state consent is *in absentia*, particularly in relation to a pending dispute between States or between a State and an international organization. On one hand, the argument that the state consent is a necessary precondition[433] stresses that advisory jurisdiction should not be used to circumvent the right, independence, and sovereignty of an individual State in an international adjudication system by forcefully bringing them before the Court in the absence of prior consent.[434] A contrary view, based on the collective interpretation of the UN Charter Articles 14, 37, and 96, asserts that a pending dispute should not be an excuse to prevent the establishment of advisory jurisdiction,[435] given that both the UNGA and the UNSC can request the Court to render an advisory opinion on certain international disputes regardless of an objection raised by the State parties concerned.[436]

Notwithstanding the fundamental requirement of the state consent to the exercise of the ICJ contentious jurisdiction, the Court has consistently rejected all objections arguing that the state consent is a required precondition for advisory proceedings. In most of these precedents, the Court emphasized its role as the principal judicial organ of the UN, holding that it should therefore not refuse to consider a request for an advisory opinion even if there is an ongoing dispute between States or between a State and an international organization. The Court's approach appears to be based on its institutional relationship with other organizations of the UN: "The Court's answer to requests for advisory opinions represents its participation in the

[433] ROSENNE, *supra* note 241, at 1014; Michala Pomerance, *The Advisory Role of the International Court of Justice and its 'Judicial' Character: Past and Future Prisms*, *in* THE INTERNATIONAL COURT OF JUSTICE: ITS FUTURE ROLE AFTER FIFTY YEARS 318—9 (A. S. Muller & D. Raic et al. ed., 1997).
[434] ALJAGHOUB, *supra* note 241, at 98.
[435] BENEDETTO CONFORTI, THE LAW AND PRACTICE OF THE UNITED NATIONS 270 (2000).
[436] Benedetto Conforti, *Observations on the Advisory Function of the International Court of Justice*, *in* UN LAW/FUNDAMENTAL RIGHTS: TWO TOPICS IN INTERNATIONAL LAW 86 (Antonio Cassese ed., 1979).

activities of the Organization, and, in principle, should not be refused."[437] Consistent with this approach, the Court holds that only compelling reasons can prevent the exercise of its advisory jurisdiction.[438] It appears that the Court's reasoning originates from its long-standing reluctance to adopt the notion of judicial restraint, at least with respect to the establishment of its advisory jurisdiction.[439]

Regardless of whether a given dispute is in progress between States or between a State and an international organization, the ICJ has ruled that the state consent does not constitute a necessary condition precedent for the establishment of its advisory jurisdiction. In the interest of its status as a principal organ of the UN, the Court has tried to maintain balance between its obligation to administer justice and to conduct proper judicial function.[440] In fact, despite objections pointing out the absence of the state consent, the Court tends to uphold its advisory jurisdiction and render its opinions on most requests. This is in direct contrast to the principle of *Eastern Carelia* of the PCIJ, which holds that "no State can, without its consent, be compelled to submit its dispute with other States to adjudication."[441] In *Peace Treaties Case*, Romania, Bulgaria, and Hungary argued over the interpretation of the agreement. Specifically, the States argued that domestic matters, such as human rights and fundamental freedoms, were not subject to the Court's jurisdiction. However, the Court rejected this argument, holding that sovereign States were not allowed to prevent the Court from exercising its advisory jurisdiction since this instrument was originally designed to produce a non-binding judicial interpretation

[437] Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, 1999 I.C.J. 62, at 78; Peace Treaties Case, First Phase, *supra* note 306, at 71, *cited in* ALJAGHOUB, *supra* note 241, at 95.
[438] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, *supra* note 294, at 235; Expenses Case, *supra* note at 400, 155.
[439] There is a view encouraging the political organs of the UN to exercise "political restraint" at the stage of requesting an advisory opinion. Pomerance, *supra* note 434, at 318—9.
[440] ALJAGHOUB, *supra* note 241, at 112.
[441] Eastern Carelia Case, *supra* note 304, at 27—9. The only exception where the Court declined to consider the request is the case of the Legality of the Threat or Use of Nuclear Weapons. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, *supra* note 294, at 235—6 (pointing out "…the very particular circumstances of the case, among which were that the question directly concerned an already existing dispute…."), *cited in* ALJAGHOUB, *supra* note 241, at 101.

for the proper operation of the UN, Member States, and its organs.[442] Consistently, in *Western Sahara Case*, the Court declined Spain's objection, referring to the principle achieved in *Peace Treaties Case*:[443]

> "The Court affirmed that its competence to give an opinion did not depend on the consent of the interested States, even when the case concerned a legal question actually pending between them…However, the Court recognized that lack of consent might constitute a ground for declining to give the opinion requested if considerations of judicial propriety should oblige the Court to refuse an opinion."

By introducing the consideration of judicial propriety, however, the *Western Sahara* Court acknowledged one unusual circumstance where it might refrain from giving an advisory opinion. This is where responding to a request for an advisory opinion would circumvent the principle of the consensual/consent-based jurisdiction in international adjudication.[444] Nevertheless, in multiple precedents dealing with pending legal disputes between a State and an international organization, the Court did not admit the necessity of the state consent, accordingly refusing the *Eastern Carelia* approach.[445]

In spite of debates over the role of the doctrine *forum prorogatum* in advisory proceedings, it is logical to conclude that the doctrine plays a minimal part. As discussed above, in situations where the state consent is not given, the doctrine allows the Court to presume that

---

[442] Peace Treaties Case, First Phase, *supra* note 306, at 70—1, *cited in* ALJAGHOUB, *supra* note 241, at 102. *See also* Reservations to the Convention on Genocide, Advisory Opinion, 1951 I.C.J. 15, at 19 (May 28) [hereinafter Genocide Case]; Israeli Wall Case, *supra* note 397, ¶¶ 46—9 (explaining that "the subject matter of the request is concerned with the powers and responsibilities of the UN in relation to international peace and security.") (alteration in original).

[443] Western Sahara Case, *supra* note 422, at 24—5, *cited in* ALJAGHOUB, *supra* note 241, at 104 (alteration in original).

[444] *Id.* at 25.

[445] Namibia Case, *supra* note 401, at 23—4 (holding that "it would not only remain faithful to the requirements of its judicial character…but also discharge its functions as the principal judicial organ of the UN.") (alteration in original); Applicability Case, *supra* note 306, at 188—9 (finding that "the advisory opinions on legal questions are advisory, not binding. As the opinions are intended for the guidance of the United Nations, the consent of States is not a condition precedent to the competence of the Court to give them…In the present case, the Court thus does not find any compelling reasons to refuse an advisory opinion after considering the principle of the jurisdiction *ratione consensus*.") (alteration in original).

the concerned State parties have acquiesced to the exercise of jurisdiction by inferring consent from their subsequent actions.[446] However, given the jurisprudence of the Court, the establishment of its advisory jurisdiction is not typically affected by the presence of the concerned State's consent, except where the Court voluntarily refrains due to judicial propriety. Thus, the Court does not have to rely on the doctrine to infer the state consent in a given case. In advisory proceedings, the doctrine may find its place "when the Court exercises discretion to decline a request for an advisory opinion, either because of the Court's judicial character or because of its special status as a principal organ of the United Nations."[447]

5. Objections Challenging the Admissibility of a Request

In an attempt to challenge the jurisdictional authority or competence of the ICJ, concerned States have objected to the admissibility of a request. Except in the case of *Eastern Carelia* adjudicated by its predecessor, however, the Court has never accepted any admissibility objection in relation to its advisory jurisdiction on other UN organs' activities.[448] The accepted objection was based on "non-availability of essential factual information."[449] The examples of the declined objections are as follows:[450]

> Regarding the reserved domain of national jurisdiction;[451] the lack of the necessary factual information;[452] the existence of a pending dispute; the fear of damaging the principle of equality;[453] the abuse of advisory proceedings to circumvent the

[446] JAMES FOX, DICTIONARY OF INTERNATIONAL AND COMPARATIVE LAW 26 (2003).
[447] *See* Sienho Yee, *Forum Prorogatum and the Advisory Proceedings of the International Court*, 95 AM. J. INT'L. L. 381 (2001).
[448] KOLB, *supra* note 255, at 270.
[449] Eastern Carelia Case, *supra* note 304, at 28—9.
[450] *See* KOLB, *supra* note 255, at 270.
[451] Eastern Carelia Case, *supra* note 304, at 25; Peace Treaties Case, First Phase, *supra* note 306, at 70.
[452] Eastern Carelia Case, *supra* note 304, at 28—9; Western Sahara Case, *supra* note 422, at 28—9; Israeli Wall Case, *supra* note 397, 160—2.
[453] Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal, 1973 I.C.J. 166, at 170—80.

> restrictive use of contentious proceedings;[454] possible interference with the States' sole authority to interpret a convention;[455] possible interference with on-going political negotiations;[456] the political pressures threatening the Court's judicial function;[457] mootness of a question;[458] practicality of the Court's answer.[459]

As noted previously, there is no time limit for States to raise an admissibility objection in advisory proceedings. Thus, the Court will examine every raised objection on a case-by-case basis, ensuring a balance between its advisory function as a principal judicial organ of the United Nations and possible interference with a State's sovereignty.[460]

6. The Court's Judicial Discretion in Responding to a Request: Another Issue of Admissibility

As indicated in the ICJ Statute, Article 65, the ICJ, if it finds any compelling reasons to do so, may decide to refrain from rendering its advisory opinion on the requested question even after having established the personal jurisdiction as well as the subject-matter/material jurisdiction.[461] In *Legality of the Threat or Use of Nuclear Weapons*, the Court affirmed its judicial discretionary power over the advisory requests: "The Court may give an advisory opinion…the ICJ Statute leaves a discretion as to whether or not it will give an advisory opinion that has been requested of it, once it has established its competence to do so."[462] However, the Court throughout its operation of advisory jurisdiction has never exercised this discretion in

[454] *Id.* at 171—2 (arguing that "appeals against UN Administrative Tribunal would avoid the restrictive use of the contentious procedure to States alone as provided in the ICJ Statute, Article 34(1)."), *cited in* KOLB, *supra* note 255, at 271.
[455] Genocide Case, *supra* note 443, at 19—20.
[456] Israeli Wall Case, *supra* note 397, at 159—60.
[457] Namibia Case, *supra* note 401, at 29.
[458] Western Sahara Case, *supra* note 422, at 29.
[459] Israeli Wall Case, *supra* note 397, at 162—3.
[460] *See* KOLB, *supra* note 255, at 272.
[461] ALJAGHOUB, *supra* note 241, at 35.
[462] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, *supra* note 294, at 234—5, *quoted in* KOLB, *supra* note 255, at 272.

rejecting advisory requests, although it has occasionally declined to give an answer based on other grounds.[463] Furthermore, the Court is unlikely to decline a request for an advisory opinion, even in future advisory proceedings, since it has recognized its institutional obligation to participate in the activities of the UN's organizational works,[464] as well as the need for compelling reasons as a precondition to refusal.[465] More significantly, as the principal judicial organ of the UN, the Court must protect its "judicial function and integrity" by applying legal norms and principles without arbitrary or opportunistic interpretation of the requests and surrounding circumstances.[466] Nevertheless, the Court with its discretionary power may still be able to decline a request in circumstances where exercising advisory jurisdiction would substantially or procedurally interfere with the contentious function of the Court, which is a priority as a judicial organ of the international community.[467]

E. Conclusion of This Chapter

Based on the understanding of the jurisdictional mechanism of the ICJ, it is reasonable to conclude that the Court's advisory jurisdiction is expected to serve as a judicial forum for the settlement of the NLL Conflict. Given that the contentious jurisdiction of the Court is

[463] In the cases of *Eastern Carelia* and *Legality of the Threat or Use of Nuclear Weapons*, the Court refused to answer, explaining that it had no jurisdiction at all over the requested matters.
[464] Peace Treaties Case, First Phase, *supra* note 306, at 71 (holding that "its participation in the activities of the Organization, and, in principle, should not be refused."), *quoted in* KOLB, *supra* note 255, at 273.
[465] Judgments of the Administrative Tribunal of the ILO in Complaints against UNESCO, Advisory Opinion, 1956 I.C.J. 77, at 86 (Oct. 23) (announcing that "only compelling reasons could lead it to refuse a request for an advisory opinion."), *quoted in* KOLB, *supra* note 255, at 273. *See also* Expenses Case, *supra* note 400, at 155; Namibia Case, *supra* note 401, at 27; Western Sahara Case, *supra* note 422, at 21; Applicability Case, *supra* note 306, at 191; Israeli Wall Case, *supra* note 397, at 156.
[466] *See* KOLB, *supra* note 255, at 274.
[467] The following is a list of expected situations where the Court may refuse to exercise its advisory jurisdiction due to the concerns over its principal function over contentious cases: a case is about to be submitted to the contentious procedure; advisory proceedings are premature; there is a risk that third parties will lose some of their procedural rights; the proceedings are, given the circumstances, a method of directly bypassing the contentious procedure; it irremediably lacks the necessary facts to be able to deliver a judicial act deserving that name; and the advisory proceedings will in some other way oblige the Court to act contrary to its prestige and integrity. KOLB, *supra* note 255, at 275.

operated on basis of the state consent, the establishment of such jurisdiction appears to be unattainable under the current circumstance surrounding the Conflict where the decades-long efforts to draw a negotiated settlement have achieved no meaningful result. Of course, according to the UN Charter Article 93, paragraph 1, any State concerned in the Conflict may be subject to the Court's personal jurisdiction in its contentious proceeding. Besides, as discussed in the previous chapter, the existence of an international dispute between States involving a disagreement on a point of law or fact, or a conflict of legal views or of interests may be affirmed by the Court in establishing its subject-matter/material jurisdiction in a given contentious proceeding of the Conflict. Nonetheless, an initiation of such contentious proceeding is not possible in the case of the Conflict, considering the essential requirement of the state consent; i.e., both contesting and defending States must consent to the Court's exercise of its contentious jurisdiction over their disagreement on a disputed issue. In that sense, not to mention the *ex ante* compulsory jurisdiction, the establishment of either of the *ex post* optional/voluntary jurisdictions seems achievable in the context of the Conflict. It is because, while the doctrine of *forum prorogatum* may be applicable in an exceptional circumstance, the execution of a special agreement between the States concerned in the Conflict unlikely, given past experience.

As discussed above, it must be noted that the Court has never accepted any of the objections asserting the absence of the state consent throughout the operation of its advisory proceedings, despite being able to exercise its discretionary power in regard to the establishment of its advisory jurisdiction. Given the Court's jurisprudence on the *ultra vires* objections raised in the preceding advisory proceedings, the Court tends not to decline an advisory request made by either the UNGA or the UNSC in the absence of a compelling reason to do so. Moreover, even assuming any requested question is intermixed with political, factual, or abstract issues, the Court tends to reformulate such issues in terms of law so as to make it a

question of a legal nature. Hence, in a case of this Conflict, it is reasonable to argue that the satisfaction of the requirements of both personal and subject-matter/material jurisdiction for the establishment of the advisory jurisdiction will be theoretically possible. Most importantly, note for the following discussion that the Court does not regard the state consent as a necessary condition precedent for the establishment of its advisory jurisdiction.

III. CASE ANALYSIS ON PRECEDENTS OF THE ICJ COMPARABLE TO THE NLL CONFLICT

A. Introduction to This Chapter

On the premise that the resolution of international disputes is connected with the understanding of relevant precedents to be referred to, this Chapter will examine a selection of advisory opinions that have implications for an alternative to construct a dispute-resolution framework for the NLL Conflict. Since its founding as a principal judicial organ of the UN, the ICJ has given its judicial interpretation of international law on various questions submitted by duly authorized organs and special agencies. As will be discussed below, although the advisory opinions were not binding by its nature, the Court in some of the cases has contributed to the ultimate settlement of these international controversies by its clarification of related legal issues. The Court was able to achieve this because, although its advisory opinion has no binding effect, Member States, authorized organs, and special agencies have a tendency to acknowledge the ICJ's rulings as either persuasive or even substantively authoritative. With that in mind, among the preceding rulings and rationales that have become the cornerstone of the Court's advisory proceeding, this Chapter will review the rulings and rationales of six selected cases that share comparable backgrounds with the NLL Conflict. Precisely speaking, the similarities between the legal controversies involved in those six cases and the NLL

Conflict arise out of a variety of factors: analogous factual and procedural history, controversial legal issues, and international efforts to attract voluntary participation from the States concerned. In addition to such parallels, the Court's holdings and rationales, as well as the international reaction in the aftermath of the Court's final decisions, are also of relevance to this doctrinal project.

This Chapter will provide a case analysis for six advisory cases with each analysis structured in the following order: facts, issues, holding, rationale, and other additional considerations. The first part of each case analysis on the selected advisory opinions will therefore cover the facts, such as titles of the cases and the State parties involved; what happened factually and procedurally throughout the proceedings; and the opinions rendered by the Court. This includes a discussion about what occurred before the commencement of the advisory proceeding, as well as the procedural history. The events that led the involved State parties to appear before the Court will also be introduced. Additionally, this part will deal with what the Court determined and whether it decided in favor of or against the State parties involved, e.g., whether affirmed or dismissed. The second part of each case analysis will consider the legal questions at the center of these international controversies between the States, organs, and agencies. The third part of each case analysis will examine the holdings. Through its holdings, the Court elaborated the applied rules of international law that served as the basis for its final opinions and the rationales which the Court relied on to support its reasons leading to the conclusion. The final part of each case analysis will extract the key dictum in which the Court provided its additional commentaries about its judgments. Also, some of the dissenting opinions will be introduced to the extent that they have an implication on the development of this doctrinal project. The final part will contain the parties' conflicting arguments made in the aftermath of the Court's opinions and the international responses for and against such opinions.

B. Case Brief of the Preceding Advisory Opinions: Focused on Their Implications for This Doctoral Project

1. Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (2010) ("Kosovo Opinion")

In response to a question about whether the unilateral declaration of independence for Kosovo violated any applicable rule of international law, the ICJ and the UN Member States actively participated in mediating a dispute between the Republic of Serbia and Kosovo to a pacific resolution. The declaration, which had been adopted at a meeting of the Assembly of Kosovo on February 17, 2009, resulted in the establishment of the Republic of Kosovo and instigated a heated disagreement over the legality of such a unilateral action and the separating of the territory of Kosovo.[468] Serbia believed that the adoption of the declaration by the Kosovo Provisional Institutions of Self-Government ("KPIS") was beyond the authority conferred upon it by the UN Mission in Kosovo ("UNMIK") and the Constitutional Framework promulgated thereunder.[469] Therefore, by calling for the Court's advisory opinion on this matter, the Serbian government sought international support for its stance in the hope of invalidating Kosovo's independence. On October 8, 2008, the UNGA adopted Resolution 63/3, with a vote of 77 in favor of Serbia's Initiative seeking the Court's judicial interpretation on the declaration.[470] In the subsequent procedures, more than 30 Member States, along with the

[468] Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403, ¶ 57—77 (July 22) [hereinafter Kosovo Opinion].
[469] *Id.*
[470] *UN seeks World Court Kosovo view*, BBC NEWS, Oct. 9, 2008, http://news.bbc.co.uk/2/hi/europe/7658103.stm. In the vote, 6 Member States opposed the initiative, while 74 Members abstained from voting procedure. *See* Press Release, General Assembly, Backing Request by Serbia, General Assembly Decides to Seek International Court of Justice Ruling on Legality of Kosovo's Independence, U.N. Press Release GA/10764 (Oct. 8, 2008).

then-UN Secretary General Ban Ki-moon, filed written statements with the Court to state whether they viewed the declaration as illegal by the tenets of international law.

Prior to producing its final opinion, the ICJ delivered its decisions and judgments on the given procedural matters, e.g., jurisdiction and discretion, and the substantive legal issues in dispute that were expected to largely affect other separatist movements across the world. As a procedural issue, the Court first answered the question of whether it possessed jurisdiction to give an advisory opinion, as requested by the UNGA. Ultimately, the Court found that the requested question was within the scope of the UNGA's competence to discuss "any question relating to the maintenance of international peace and security brought before it by any Member of the UN," and that it did not contravene the UNSC's exercise of its institutional function.[471] Furthermore, in light of the UN Charter, Article 96 and the ICJ Statute, Article 65, the Court also clarified that the requested question was a legal issue, adding that neither the political aspects nor the political motives driving the request were sufficient to deprive the question of its legal character.[472] After noting the discretionary power reserved to it,[473] the Court state that, although its interpretation and application of the UNSC Resolution 1244 could turn on the UNSC's decision, this did not constitute a compelling reason to refrain from answering a question in which the UNGA had a legitimate interest.[474] In a series of public hearings, substantive legal arguments were presented by Member States, demonstrating their stances for

[471] Kosovo Opinion, *supra* note 469, at ¶ 18—25 (citing the U.N. Charter art. 10 (stipulating that "The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter."), art. 11, para. 2 (prescribing that "The General Assembly may discuss any questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations…and may make recommendations…") and art. 12, para. 2 (providing that "While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests.")).
[472] Kosovo Opinion, *supra* note 469, at ¶ 26—7.
[473] *Id.* at ¶ 29—35 (noting that "the fact that it has jurisdiction does not mean that it is obliged to exercise it so as to protect the integrity of its judicial function and its nature as the principal judicial organ of the UN…it has therefore given careful considerations as to whether, in the light of its previous jurisprudence, there are compelling reasons for it to refuse to respond to the request from the General Assembly.").
[474] *Id.* at ¶ 35—48.

or against the legality of the declaration. The States that were in favor of the declaration emphasized the values of civil and human rights, territorial integrity, and the right of self-determination. Simply speaking, the question raised was whether the declaration made by the KPIS, which had restricted authority conferred by the framework of the UNSC Resolution 1244, was legitimate under international law. In its judgment, however, the Court stressed that the institutions had not been the subject who had made that declaration, given the absence of legislative process or proper publication thereafter.[475] In so doing, the Court found that a declaration of independence had been reserved for the authors, i.e., representatives of the people of Kosovo, to act outside the Constitutional Framework created under the UNMIK.[476] In its final ruling, the Court answered that the declaration had not violated international law, explaining that international law has no explicit prohibition on the unilateral declaration of independence.[477] Afterward, the Court's opinion on the legality of the declaration significantly affected other separatist movements who were seeking support and understanding from the international community.[478]

2. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (2004)

During the Second *Intifada*, Israel built the Israeli West Bank Barrier ("Wall"), which serves as an artificial barrier along and beyond the 1945 Green Line. The Wall has led to heightened tensions between Israel and Palestine, with even the international community to debating its justiciability. In defense of the legal status of the Wall, the Israeli government

[475] *Id.* at ¶ 101—21.
[476] *Id.*
[477] *Id.* at ¶ 122. However, the Court did not address Kosovo's achievement of statehood or whether Kosovo was entitled by international law to unilaterally declare its independence. *Id.* at ¶ 51—6, 82—3.
[478] *See* Heiko Krueger, *Implication of Kosovo, Abkhazia and South Ossetia for International Law – The Conduct of the Community of States in Current Secession of Conflicts*, 3(2) CAUCASIAN REV. INT'L. L. 121 (2009).

argued that it was a necessary measure spurred by terrorist acts committed inside the territory of Israel.[479] Palestinians who objected to the measure as a "racial segregation or apartheid wall" contended that it was part of Israel's efforts to annex Palestinian territory.[480] The Palestinian authorities contended that the construction of the Wall severely impaired their efforts to conclude peaceful negotiated settlements. In an emergency special session held in December 2003, the UNGA adopted Resolution ES-10/14 by 90 votes in favor to 8 votes against, along with 74 abstentions. The Resolution made an urgent request for the Court to render its advisory opinion on whether the construction of the Wall could be considered legal under the principles of international law.[481]

In an opinion rendered on July 9, 2004, the ICJ responded to several procedural contentions raised with the intention of preventing the establishment of its jurisdiction on the ground of judicial propriety. The Court first stated that the UNGA had authority to request its opinion as stipulated in the UN Charter Article 96, paragraph 1[482] and that the UNGA also acted within the scope of its qualified activities, in spite of the restriction on its competence provided in the UN Charter Article 12, paragraph 1.[483] Then, based on Resolution 377A (V), the Court affirmed that the UNGA may consider the matter immediately to make recommendations to Member States in cases where "the UNSC fails to exercise its primary responsibility for the maintenance of international peace and security."[484] Finally, the Court rejected the argument that the political nature embedded in the question blocked its advisory

---

[479] DONA J. STEWART, THE MIDDLE EAST TODAY: POLITICAL, GEOGRAPHICAL AND CULTURAL PERSPECTIVES 223 (2013).
[480] *Id.*
[481] G.A. Res. 10/14, at 3, U.N. Doc. A/RES/ES-10/14 (Dec. 12, 2003) (asking that "What are the legal consequences of the Wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Security-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolution?").
[482] Israeli Wall Case, *supra* note 397, at ¶ 14—23. *See* U.N. Charter art. 96, para. 1 (prescribing that "The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.").
[483] Israeli Wall Case, *supra* note 397, at ¶ 24—5.
[484] *Id.* at ¶ 26—40.

capacity, referring to its established jurisprudence: "The fact that a legal question also has political aspects does not suffice to deprive it of its character as a legal question and to deprive the Court of a competence."[485]

In response to the argument requiring the Court to exercise its discretionary power, the Court found that there was no compelling reason to refrain from giving its advisory opinion. First, the Court ruled that the absence of Israel's consent to contentious jurisdiction had nothing to do with the establishment of its advisory jurisdiction given that the requested matter was of direct concern to the UNGA.[486] Second, the Court rejected the contention that giving its opinion would impede the conclusion of a negotiated settlement of the Israeli-Palestinian Conflict,[487] explaining that the expected outcome and influence of its advisory opinion on that negotiation was equivocal.[488] Finally, the Court made clear that it was not the one to assess the use of the opinion, so long as said opinion was based on sufficient information and evidence.[489]

In its opinion on the substantive issues, the Court held that "the construction of the Wall and its associated regime, together with the establishment of settlements," were contrary to the rules and principles of international law, declining Israel's assertions, which were based on a right of self-defense and a state of necessity. After determining the relevant rules and principles,[490] the Court found flagrant breaches of international obligations on Israel's side to respect the right of self-determination: first, Israel's policy of establishing settlements, along

[485] *Id.* at ¶ 41.
[486] *Id.* at ¶ 43—50.
[487] On November 19, 2003, the UNSC adopted resolution 1515 in order to endorse the Quartet Performance-based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict.
[488] *Id.* at ¶ 51—4.
[489] *Id.* at ¶ 55—8.
[490] The cited rules and principles of international law, including international humanitarian law and human rights law, are as follows: The U.N. Charter Article 2, paragraph 4; the principle of self-determination of peoples enshrined in the U.N. Charter and reaffirmed by the GA resolution 2625 (XXV); the principles of the prohibition of the threat or use of force and the illegality of any territorial acquisition by such means; the Hague Regulation 1907; the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 1949 [hereinafter Fourth Geneva Convention]; International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights; and the United Nations Convention on the Rights of the Child. *See id.* at ¶ 86—113.

with other previous measures taken, illegally included 80 percent of the inhabitants living in the Occupied Palestinian Territory, thus altering the demographic composition therein;[491] second, the Court expressed its concern that the construction of the Wall would create a *fait accompli'* leading to de facto annexation insofar as it could be fixed permanently as the future frontier between Israel and Palestine.[492] Furthermore, the Court held that Israel's measures would significantly impede the Palestinian inhabitants' fundamental rights, which had been bestowed by customary international law.[493] Also, in terms of international humanitarian law and human rights law, the Court observed that "a right of self-defense and military exigencies, and a state of necessity and the needs of national security or public order," which were invoked by Israel to defend the legal status of the Wall, were not sufficient to offset its wrongfulness.[494]

Having found the breaches on the part of Israel, the ICJ stated the legal consequences of those breaches, thereby advising Israel to correct its wrongful act and other Member States and the UN to act in accordance with international law. First of all, the Court stressed that Israel must respect the Palestinian peoples' right to self-determination and must stop violating its international obligations under humanitarian law and human rights law. To this end, the Court requested Israel to "cease the construction, dismantle the structure, repeal all legislative and regulatory acts, and make reparations for all damage suffered."[495] Second, having observed that obligations under international law and international humanitarian law are essentially of

[491] *Id.* at ¶ 115—20; ¶ 122.
[492] *Id.* at ¶ 121.
[493] According to the Court's opinion, the fundamental rights of the inhabitants of the Occupied Palestinian Territory that were infringed upon by the construction and its associated regime, coupled with the establishment of settlements, are as follows: destruction or requisition of private property, restrictions on freedom of movement, confiscation of agricultural land, cutting-off of access to primary water sources, the right to work, to health, to education and to an adequate standard of living. The sources of the rules and principles of international law that the Court referred to were as follows: the Hague Regulation of 1907, the Fourth Geneva Convention, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the UN Convention on the Rights of the Child, and the relevant SC resolutions. *Id.* at ¶ 123—34.
[494] *Id.* at ¶ 135—41.
[495] *Id.* at ¶ 149—54.

an *erga omnes* character,[496] the Court advised other Member States not to recognize the illegal actions taken by Israel and not to provide any support for the illegal situation created by the construction.[497] Third, in regard to the UNGA and the UNSC, the Court advised them to consider how they should act to end the situation and its associated regime on the basis of its opinion.[498] Finally, the Court concluded its opinion by highlighting that international obligations would be respected only through implementing the relevant UNSC resolutions in good faith and that a negotiated solution based on international law should be achieved for regional peace and security.[499]

3. Legality of the Threat or Use of Nuclear Weapons (1996)

Legality of the Threat or Use of Nuclear Weapons delivered on July 8, 1996 suggested an important guideline on the procedural and other institutional issues that the ICJ had to confront before moving forward to the substantive matters; e.g., the ICJ's advisory function, and the proper role and competence of international organizations. Prior to this case, the same question was raised in *WHO Nuclear Weapons Case*, which was handed down on July 8, 1996, although the Court refused to proceed to the substance of the issue due to the WHO acting *ultra vires* in raising the question. Amidst a growing concern about the use of nuclear weapons or the threat to use nuclear weapons, the UNGA adopted resolution A/RES/49/75, asking the Court to clarify its advisory opinion as to whether "the threat or use of nuclear weapons in any circumstances permitted under international law."[500]

[496] The Court specifically cites the UN Charter and the Fourth Geneva Convention as the sources of those international obligation bearing by Member States.
[497] *Id.* at ¶ 154—9.
[498] *Id.* at ¶ 160.
[499] Id. at ¶ 161—2.
[500] G.A. Res. 49/90, at 35, U.N. Doc. A/RES/49/90 (Dec. 15, 1994).

To provide its opinion on the legality of the use and the threatened use of nuclear weapons, the Court had to refer to multiple sources of relevant international obligations and the interaction of branches of conventional international laws, while adhering to its long-standing jurisprudence, e.g., the principles of *non liquet* and *Lotus Case*. First of all, as regards the legality of the practice of "nuclear deterrence," the Court replied that "so long as a threatened retaliatory attack with nuclear weapons" was in compliance with "military necessity and proportionality," international law would not find it illegal.[501] Then, with respect to the legality of the possession of nuclear weapons, the Court, which had based its opinion on the legal principle of *non liquet,* decided that there was no specific language in any legal instruments prohibiting the possession of nuclear weapons.[502] In this view, moreover, the Court rejected the argument that nuclear weapons should be treated in the same way as bacteriological or chemical ones in the absence of specific prohibition thereof, albeit admitting a hypothetical possibility of a "comprehensive and universal conventional prohibition" at some point.[503]

Importantly, in terms of customary international law, the ICJ found no sufficient basis to universally define the possession of nuclear weapons as illegal, thus advising Member States to pursue the conclusion of negotiated settlements in good faith. Above all, the Court ruled that there was no new and clear *opinio juris* under the law to outlaw the possession of nuclear

[501] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, *supra* note 294, at ¶ 37—50.
[502] *Id.* at ¶ 39 (stating that "These provisions of the UN Charter do not refer to specific weapons. They apply to any use of force, regardless of the weapons employed. The Charter neither expressly prohibits, nor permits, the use of any specific weapon, including nuclear weapons. A weapon that is already unlawful *per se*, whether by treaty or custom, does not become lawful by reason of its being used for a legitimate purpose under the Charter.") (alteration in original).
[503] *Id.* at ¶ 54—6 (saying that "it does not seem to the Court that the use of nuclear weapons can be regarded as specifically prohibited on the basis of …the provisions of the Second Hague Declaration of 1899, the Regulations annexed to the Hague Convention IV of 1907 or the 1925 Protocol."); at ¶ 57 (concluding that "the Court does not find any specific prohibition of recourse to nuclear weapons in treaties expressly prohibiting the use of certain weapons of mass destruction."); and ¶ 62 (noting that "the treaties dealing exclusively with acquisition, manufacture, possession, deployment and testing of nuclear weapons, without specifically addressing their threat or use, do not constitute a prohibition by themselves, even though they certainly point to an increasing concern in the international community with these weapons."); ¶ 63 (pointing out that "While those testify to a growing awareness of the need to liberate the community of States and the international public from the dangers resulting from the existence of nuclear weapons, the Court does not, however, view these elements as amounting to a comprehensive and universal conventional prohibition on the use, or the threat of use, of those weapons as such.") (alteration in original).

weapons, despite the fact that a number of UN resolutions were adopted to condemn it.[504] However, the Court admitted the possibility of applying universal humanitarian laws, e.g., "a combatant is not legally allowed to target specific civilians and use certain types of weapons to cause indiscriminate damage," to the use of nuclear weapons in armed conflicts.[505] Besides, the Court did not come forward to determine whether the matter of deploying nuclear weapons as "a last resort in extreme circumstances of self-defense" is disallowed under the law.[506] To conclude, the Court advised Member States to construct "strict and effective international control" over nuclear weapons to achieve total nuclear disarmament through negotiations.[507]

This advisory opinion, including both its procedural history and the reasoning leading the ICJ to reach its holding, has many valuable implications for the operation of the advisory proceeding, as well as offering a chance to predict the Court's rulings on similar legal questions in the future. First, by declining the previous request made by the WHO, the Court crystalized its jurisprudence that international organs of the UN may only make such a request within the scope of their activities, i.e., competence. Second, regardless of its decision on the use and possession of nuclear weapons under conventional international law, the Court highlighted that Member States should abide by international humanitarian laws at all times. Third, the Court also underscored an obligation imposed on Member States to pursue the peaceful settlement of disputes through negotiations. Last, but not least, in the face of the post-colonial period, the outcome of the case suggests an enterprising way to utilize the advisory proceeding to produce the pacific resolution of international controversies, given that developing states showed a growing awareness and willingness to engage in international judicial proceedings.

[504] *Id.* at ¶ 65—73 (adding that even those resolutions were not universally adopted due to the nuclear powers' objections).
[505] *Id.* at ¶ 86.
[506] *Id.* at ¶ 97.
[507] *Id.* at ¶ 105.

4. Western Sahara (1975)

The decades-long conflict over the territory of Western Sahara, which was then called Spanish Sahara, eventually led the relevant States to submit their conflict to the ICJ, seeking its advisory opinion on the right of self-determination of the decolonized countries and the sovereignty and rightful ownership over the disputed territory. While Morocco had considered the territory part of its pre-colonial land since its independence in 1956, Spain retained the area in spite of its large-scale decolonization. In the aftermath of the *Ifni* War, the UNGA adopted resolution 2229 in 1966, asking Spain to hold a referendum on self-determination for the people living in the territory.[508] Although Spain finally announced its plan to hold the referendum in 1975, the referendum plan was suspended since Morocco decided to bring the matter to the Court. In December 1974, the UNGA adopted resolution 3292 requesting the Court to answer the following legal questions: 1) "Was Western Sahara at the time of colonization by Spain a territory belonging to no one?" and 2) "What were the legal ties between this territory and the Kingdom of Morocco and the Mauritanian entity?"[509] In the course of the hearings, the Court gave permission, not only to Spain and Morocco, but also Algeria and Mauritania to participate and present evidence to support their respective positions.

Spain argued against both Morocco and Mauritania's claims, both of which were attempting to demonstrate their legal ties to Western Sahara in order to establish their own historical sovereignty to the territory, while undermining the *Sahrawis*' right to self-determination. That is, Morocco and Mauritania separately and independently claimed their competing sovereign rights to the territory based on historical, legal, ethnic, and cultural ties.[510] In particular, Morocco set forth to prove its sovereign right and legal ties to the territory before

[508] G.A. Res. 2229 (XXI), U.N. GAOR, 21st Sess., (Dec. 20, 1966).
[509] G.A. Res. 3292 (XXIX), U.N. GAOR, 29th Sess., (Dec. 13, 1974).
[510] Gary Jay Levy, *Case Comments: Advisory Opinion on the Western Sahara*, 2 BROOK. J. INT'L L. 289, at 291—4 (1975).

the Court, relying on the principles and theories of territory acquisition under international law: "immemorial possession, geographical continuity, internal and external displays of sovereignty."[511] Spain contested Morocco's claim, claiming that the *Sultan*'s authority over the territory had never been recognized.[512] Although it did not make any territorial claim, Algeria defended *Sahrawis*'s rightful and distinct ownership, asserting that they should not be subject to either Morocco or Mauritania.[513]

In the face of those conflicting claims and arguments, the ICJ answered the questions raised by the UNGA regarding the legal status of the territory of Western Sahara and the rightful ownership thereof. In its lengthy opinion, the Court first decided that the territory was not *terra nullius*, i.e., no man's land, when Spanish colonization began in 1885, noting that "the territory was inhabited by who, if nomadic, were socially and politically organized in tribes and under chiefs competent to represent them."[514] Second, notwithstanding the existence of legal ties of allegiance between the territory and the Kingdom of Morocco—and even between the territory and the Mauritanian entity—the Court declared that such ties did not imply "strong ties of territorial sovereignty" amounting to sovereignty or rightful ownership over the area.[515] The Court refused to acknowledge the historical evidence presented by Morocco and Mauritania, stating that such evidence did not constitute legal ties of territorial sovereignty between the territory of Western Sahara and the Kingdom of Morocco or the Mauritanian entity.[516] Further, it affirmed "the application of resolution 1514 (XV) in the

[511] Jacob Mundy, Address at International Conference of the Jurists for Western Sahara: The Question of Sovereignty in the Western Sahara Conflict § 3, 4 (June 27, 2008).
[512] *Id.*
[513] U.N. GAOR, 29th Sess., 4th comm. 247, at 250, U.N. Doc. A/C.4/SR.2125.
[514] Western Sahara Case, *supra* note 422, at ¶ 75—83. *See also* Levy, *supra* note 511, at 295—7; Mundy, *supra* note 512, at § 2.
[515] Western Sahara Case, *supra* note 422, at ¶ 90—129; ¶ 130—52. *See also* Levy, *supra* note 511, at 297—302; Mundy, *supra* note 512, at § 3, 4.
[516] Western Sahara Case, *supra* note 422, at ¶ 162.

decolonization of Western Sahara and of the principle of self-determination through the free and genuine expression of the will of the peoples of the territory."[517]

In contrast to efforts made by the international community, the ICJ's opinion was disregarded creating a negotiated settlement by the contesting States under the supervision of the international bodies. This was because the inconsistency of the Court's reasoning created interpretational discrepancy among the interested States.[518] Although Spain officially ceded the northern two-thirds of the territory to Morocco and the southern third to Mauritania in compliance with the Madrid Accords concluded between Spain, Morocco, and Mauritania in 1975, it could not ultimately prevent the engaged parties from military confrontations. Indeed, the Western Sahara conflict has still not been settled. Morocco governs most of the territory since Mauritania renounced its ownership to the southern part, even though the UN and other Member States have never recognized its sovereignty. However, 82 Member States have recognized the Saharawi Arab Democratic Republic, established by the Polisario Front, as a legitimate sovereign State. In spite of international efforts, the advisory proceeding has not played the expected role of peacefully resolving the territorial dispute, mostly because of the lack of a definitive, binding, and authoritative effect of the Court's judgment and ruling.[519]

5. Advisory Opinions Concerning South West Africa (now Namibia)

a. International Status of South West Africa (1949)

[517] Western Sahara Case, *supra* note 422, at ¶ 129, 162.
[518] Morocco and Mauritania argued that the Court's opinion recognized their legitimate sovereign right to the territory on the basis of history. On the other hand, Algeria and the Polisario Front argued against them, saying that the Court's opinion supported the application of self-determination of the people of Western Sahara through the Spanish referendum.
[519] The Court basically believes its non-binding advisory opinion would ultimately help the UNGA to mediate international disputes by providing the clarification of the legal issues disputed between the involved States. In this respect, the both consider the Court's opinions "persuasive and substantive authority" as "judicial pronouncements and authoritative expression of law rendered by the highest international tribunal equal to the authority of its judgment." Levy, *supra* note 511, at 305.

In the wake of World War II, the Union of South Africa asked the UN to recognize its integration of the Territory of South West Africa, contending that the League of Nations' Mandate declaring the Union to be responsible for administering the Territory had lapsed. South West Africa was the old name for modern-day Namibia and was colonized by the German Empire in 1884. After World War I, the Union, entrusted with the League of Nations Class C Mandate under the Treaty of Versailles, took over its administration and began to rule it as the agent (or mandatory) of the League.[520] Under that mandate, the Union, though it was obliged to promote the well-being and social progress of the Territory, enjoyed exclusive administrative authority over it and was allowed to apply its laws therein.[521] With the dissolution of the League, the States debated whether the UN, as the successor to the League, would be able to enforce the mandate.[522] Despite the absence of any explicit provision on whether the effect of the mandate would continue, the UN was also supposed to take over the Territory as a UN Trust Territory since the UN Charter accepted the system of international trusteeship to "administer and supervise non-self-governing undeveloped countries."[523] Nevertheless, the transition of administration never occurred in the Territory because South Africa feared that the UN would take control and the Territory would be granted independence.[524] In 1946, the question as to whether the Territory should be granted independence or be placed under the trusteeship was discussed in the UNGA. As against the UNGA's proposal made in 1949, however, South Africa unilaterally declared its incorporation into the Union as its fifth province in the same year.[525]

---

[520] *The South West Africa Cases*, 1967 Wash. U. L. Q. 159, 159—67 (1967) (citing League of Nations Covenant art. 22) (stipulating "a permanent mandate system under which former enemy territory was to be entrusted to certain individual nations which acted as mandatories and were accountable directly to the League.").
[521] *Id.* at 159—61.
[522] *Id.* at 164.
[523] *Id.*
[524] Except for the case of South West Africa, the other mandated territories were either granted independence or were controlled by the UN's trusteeship system. *Id.* at 164.
[525] *See id.* at 159—67.

South Africa's continued presence and extensive application of its apartheid laws in the Territory of South West Africa gave rise to a number of UN resolutions, as well as a series of the ICJ's rulings after *International Status of South West Africa* as part of international efforts for the settlements of the South West Africa issue. Even if the Union expressed its dissatisfaction with the Court's finding due to its non-binding nature, the UNGA formed an ad hoc committee on South West Africa aimed at achieving effective resolution of the problem.[526] Amidst the Union's continuing enforcement of its apartheid laws within the Territory, the Court issued another advisory opinion, holding that the League's voting procedure was not binding upon the UNGA in deciding issues related to the Territory.[527] However, the Union continued annexing the Territory into South Africa, thereby resulting in a report from the committee that called on Member States to consider possible legal action to meet the mandatory obligations.[528] Although Ethiopia and Liberia filed a case with the Court in 1960 alleging that South Africa had not fulfilled its mandatory obligations, they were found in 1966 to be improper parties lacking any legal right to bring the case before the Court.[529] In spite of the UNGA resolution 2145 (XXI) in 1966, which officially terminated the mandate, South Africa persisted its administration in Namibia.[530] In *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* ("*Namibia Case*"), responding to the UNSC's request for an advisory opinion, the Court answered that the continued presence of the Union in the Territory was illegal and South Africa was obliged to immediately withdraw from Namibia.[531] Furthermore, the Court advised that there was an obligation for the UN Member States not to recognize any actions the Union

[526] *See* G.A. Res. 449-A (2), U.N. GAOR, 5th Sess., Supp. No. 20, U.N. Doc. A/1775, at 55 (Dec. 13, 1950).
[527] Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa, Advisory Opinion, 1955 I.C.J. 67 (June 7, 1955) [hereinafter South West Africa-Voting Procedure Case].
[528] U.N. GAOR, 12th Sess., Supp. No. 12, U.N. Doc. A/3626, at 4 (Jan. 1, 1957).
[529] South West Africa (Eth. & Liber. v. S. Afr.), Second Phase, Judgment, 1966 I.C.J. 6.
[530] In 1968 the UNGA officially changed the name of South West Africa to Namibia through the adoption of resolution 2372 (XXII). U.N. Doc. A/RES/2372 (XXII) (June 12, 1968).
[531] Namibia Case, supra note 401, ¶ 117—27, 133.

performed on behalf of Namibia as a valid act.[532] In 1973, the UNGA recognized the South West Africa People's Organization ("SWAPO") as a sole legitimate representative of the Namibian people and granted them UN observer status. With the Union's approval of Namibia's independence in 1988, Namibia became the independent Republic of Namibia on March 21, 1990.

In *International Status of South West Africa*, the ICJ, acting on a request of the UNGA for its advisory opinion, elaborated the "international status of the Territory of South West Africa" and the "international obligations of the Union of South Africa arising therefrom."[533] First of all, the Court determined that the Union, as the appointed Mandatory, was obligated to accept its compulsory jurisdiction in accordance with Article 7 of the Mandate,[534] Article 37 of the ICJ Statute,[535] and Article 80, paragraph 1 of the UN Charter.[536] Second, even though the Court found no legal obligation on the part of the Union to convert the Territory into the UN trusteeship system, it ruled that the Union was not competent to unilaterally modify the legal status of the Territory, which should properly be placed under international mandate.[537] In this view, the Court further made it clear that the Union was still under an obligation to comply with the League's Mandate.[538] Third, the UNGA was competent to require the mandatory nation, i.e., the Union, to submit reports and to receive petitions from the inhabitants

---

[532] *Id.*
[533] International Status of South West Africa, Advisory Opinion, 1950 I.C.J. 128, at 131, 138 (July 11).
[534] The article provided that "The Mandatory agrees that if any dispute whatever shall arise between the Mandatory and another member of the League of Nations relating to the terms of the Mandate, such dispute, if it cannot be settled by negotiation, *shall* be submitted to the Permanent Court of International Justice," *quoted in* Ronald Segal, *South West Africa: An International Responsibility*, Int'l Conf. S. W. Afr. Mar. 26, 1966, at 4, 5.
[535] ICJ Statute, *supra* note 281, at art. 37 (prescribing that "Whenever a treaty or convention in force provides for reference of a matter to a tribunal to have been instituted by the League of Nations, or to the Permanent Court of International Justice, the matter shall, as between the parties to the present Statute, be referred to the International Court of Justice.").
[536] U.N. Charter art. 80, para. 1 (stipulating that "Except as may be agreed upon in individual trusteeship agreements, made under Articles 77, 79, and 81, placing each territory under the trusteeship system, and until such agreements have been concluded, nothing in this Charter shall be construed in or of itself to alter in any manner the rights whatsoever of any states or any peoples or the terms of existing international instruments to which Member of the United Nations may respectively be parties.").
[537] International Status of South West Africa, *supra* note 534, at 138, 143—4.
[538] *Id.*

of the mandate, i.e., South West Africa,[539] thus empowering the UNGA to establish a supervisory committee acting on its behalf.

In constructing its opinion, the ICJ interpreted the legal meaning of "sacred trust of civilization" and applied "the general principles of law recognized by civilized nations," in particular the principles of the English trust, as provided in the ICJ Statute Article 38, paragraph 1(c).[540] In the English common law, the legal concept of trust was based on the conscience of the trustee and the possibility of legal enforcement.[541] Other legal systems also have legal institutions similar to the English trust to protect the property or persons who are weak and dependent, such as minors.[542] Therefore, the Court stressed that, when creating a trust, an entity who is responsible should be appointed as a trustee. Sir McNair generalized in his separate opinion the common principles of the trust as follows:[543]

> 1. The control of the trustee over the property is limited in one way or another; he is not in the position of the normal complete owner, who can do what he likes with his own, as he is precluded from administering the property for his own personal benefit;
> 2. The trustee is under some kind of legal obligation, based on confidence and conscience, to carry out the trust or mission confided to him for the benefit of some other person or for some public purposes; and
> 3. Any attempt by one of these persons to absorb the property entrusted to him into his own patrimony would be illegal and would be prevented by the law.

In other words, the Court held that the League entrusted the Union with the mandate to administer the Territory until it could become an independent nation. In this regard, the Court ruled that the Union's attempt to absorb the Territory obviously violated the mandate, which was based on trust law.

---

[539] *Id.* at 137—8.
[540] ICJ Statute, *supra* note 281, at art. 38, paragraph 1(c) (prescribing that "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply the general principles of law recognized by civilized nations.").
[541] International Status of South West Africa, *supra* note 534, at 148—9 (July 11) (separate opinion of Sir McNair).
[542] *Id.* at 149.
[543] *Id.*

b. Legal Consequences for States of the Continued Presence of South Africa in Namibia notwithstanding Security Council Resolution 276 (1970)

In 1970, the UNSC instituted an advisory proceeding since South Africa continued to occupy Namibia—formerly South West Africa—even after the UNGA adopted Resolution 2145 (XXI) terminating the mandate. The UNSC, accordingly, passed Resolution 276, condemning the continued presence of South Africa in Namibia as illegal. In justification of its annexation, South Africa claimed that the Namibian people wished to be ruled as part of the territory of South Africa.[544] Aside from that, however, South Africa's application of its apartheid laws had intensified, thus leading the UNGA to issue Resolution 2145 (XXI) to terminate South Africa's mandate, given by the League of Nations, to administer Namibia.[545] Since South Africa, which was a registered UN Member State, was prohibited from taking physical control of other territories, the UNGA concluded in its resolution that South Africa's institution of its apartheid policy was a breach of the mandate and of international law. South Africa did not respond to this resolution, thereby provoking the UNSC to declare South Africa's refusal to withdraw from Namibia as illegal.[546] South Africa's defiance of the above resolutions continued, so the UNSC finally requested an advisory opinion to the ICJ on the legal consequences for States, given the continued presence of South Africa in Namibia.

In *Legal Consequences for States of the Continued Presence of South Africa in Namibia notwithstanding Security Council Resolution 276 (1970)* ("*Namibia Case*"), the ICJ's answers were all affirmative, setting forth its reasoning to define the meanings of international obligations and relationships created by the mandate. First, the Court found that all UN

[544] Advisory Opinion on Namibia, CASE BRIEFS, http://www.casebriefs.com/blog/law/international-law/international-law-keyed-to-damrosche/chapter-3/advisory-opinion-on-namibia/.
[545] G.A. Res. 2145 (XXI), U.N. GAOR 13th Sess. (Oct. 27, 1966).
[546] S.C. Res. 276, U.N. Doc. S/RES/276 (Jan. 30, 1976).

Member States were bound by UN mandate, so any violator of such mandate was legally obligated to rectify any breaches or violations thereof.[547] Second, the Court found that Member States, other than the violating State, were also bound by UN mandate to make the violators recognize their conduct as a violation of international norms and to decline any requests for assistance.[548] In this respect, the Court ruled that all States assumed the international obligation to preserve the rights of other States and its people when becoming a Member of the UN.[549] Therefore, whenever any Member State deviates from its obligations in this regard, "that State cannot be recognized as retaining the rights which it claims to derive from the relationship," according to the Court's holding.[550]

Based on its finding of the binding effect of the mandate, the ICJ held that South Africa had deliberately and consistently violated the resolutions and decisions adopted by both the UNGA and the UNSC. According to the Court, the mandate adopted by the UN had binding effects on all Member States, thereby legally obligating any violator of the mandate to rectify its violations or breaches.[551] Hence, the Court ruled that other Member States were also obliged to recognize its conduct as a violation, hence mandating the States to refuse to give any aid to that recalcitrant State.[552] Therefore, the UNGA reaffirmed the violation of the mandate on the part of South Africa since it had been occupying the territory of Namibia, notwithstanding the continued requests from the international community, thus adopting resolution 2145 (XXI) to terminate the mandate.[553] The Court found the UNGA had acted within its competence when deciding to terminate the mandate.[554] Furthermore, the Court found that the resolutions and decisions adopted by the UNSC to enforce the termination were binding upon the Member

[547] Namibia Case, *supra* note 401, at ¶ 117—27, 133.
[548] *Id.*
[549] Advisory Opinion on Namibia, *supra* note 545 (quoting Namibia Case, *supra* note 401, at ¶ 90, 129).
[550] Namibia Case, *supra* note 401, at ¶ 91.
[551] Advisory Opinion on Namibia, *supra* note 545.
[552] *Id.*
[553] Advisory Opinion on Namibia, *supra* note 545.
[554] Namibia Case, *supra* note 401, at ¶ 69—77.

States "regardless of how they voted on the measure when adopted."[555] With this reasoning, the Court ruled that South Africa was obligated to follow "the dictates of the mandate, the resolutions terminating it, and the enforcement procedures adopted by the UNSC."[556]

Despite South Africa's continued refusal to withdraw from the territory of Namibia, international efforts eventually resulted in the establishment of the independent republic of Namibia in 1990. Indeed, even after the advisory opinion was rendered in 1971, South Africa continued to occupy Namibia until agreeing in 1988 to relinquish its control in exchange for a total Cuban military withdrawal from Angola.[557] In the following year, the UNSC decided to implement Resolution 435, which was adopted in 1978 and contained a roadmap for the independence of Namibia, and to establish the UN Transition Assistance Group ("UNTAG") as part of its peace-keeping operation in this newly established republic. In November 1989, the vote to elect members of the Constituent Assembly of Namibia was held under the supervision of UNTAG. In 1990, Namibia finally became an independent republic and joined the UN membership. Although South Africa refused to relinquish control over Namibia due to the lack of binding effect and effective enforcement measures of the advisory opinion, the collective efforts of the international community impelled by the Court's rulings eventually contributed to the independence of the new republic.

6. Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (1950)

a. <u>The First Phase Delivered on Mar. 30, 1950</u>

[555] Advisory Opinion on Namibia, *supra* note 545 (citing Namibia Case, *supra* note 401, at ¶ 113).
[556] Advisory Opinion on Namibia, *supra* note 545.
[557] The Agreement among the People's Republic of Angola, the Republic of Cuba, and the Republic of South Africa, Angl.-Cuba-S. Afr., Dec. 22, 1988, 28 I.L.M. 959 (1989).

The Paris Peace Treaties with the Axis Satellites (Romania, Bulgaria, Hungary and Finland) had originally been drawn up to recognize these countries as sovereign States to allow them to join the UN membership. However, the settlement of dispute provisions in the treaties posed great difficulties throughout the drafting process. Despite the Paris Peace Conference, in which there was agreement to have the ICJ oversee any disputes, other Allied Powers preferred inter-governmental dispute settlement for political, diplomatic, and other conciliatory matters.[558] They were reluctant to utilize either the Court or international arbitral tribunals in potential disputes since such international judicial bodies might produce binding decisions. At the foreign minister-level talk held in New York on December 5, 1946, the Allies finally reached an agreement to adopt the arbitration mechanism as a last resort for the ultimate settlement of disputes should a negotiated settlement prove unsuccessful.[559] Also, the parties to the Treaties chose to utilize a special ad hoc commission for the resolution of future disputes, rather than relying on the Court, which at that time was viewed as an immature judicial institution affiliated with the UN.

On March 30, 1950, the ICJ gave its advisory opinion on the interpretation and application of the settlement-of-disputes provisions embedded in the Paris Peace Treaties, particularly with regards to the process of international arbitration. In fact, the US and the UK governments had initiated this advisory proceeding to charge Bulgaria, Hungary, and Romania with infringing upon their peoples' human rights and fundamental freedoms, which had been prescribed in the Treaties.[560] Notwithstanding the exhaustion of the prescribed procedure of settlement-of-disputes, the three governments had not complied with the request to form a

[558] Kenneth S. Carlston, *Interpretation of Peace Treaties with Bulgaria, Hungary, and Romania, Advisory Opinion of the International Court of Justice*, 44(4) AM. J. INT'L L. 728, 728—9 (1950) (quoting Martin Domke, *Settlement-of-Disputes Provisions in Axis Satellite Peace Treaties*, 41(4) AM. J. INT'L L. 911, 911 (1947)).
[559] Carlston, *supra* note 559, at 728.
[560] *Id.* at 729.

commission, arguing that there was no existing dispute between them.[561] On October 22, 1949, the UNGA, adopted a resolution to request the Court's advisory opinion on the issue.

Of the four questions requested for the ICJ's advisory opinion, the Court answered only the first two in the initial phase of the proceeding. The first question submitted was whether "the diplomatic exchanges between Bulgaria, Hungary and Romania, and certain Allied and Associated Powers disclose disputes subject to the provisions for the settlement of disputes contained in the Treaties."[562] The second question asked whether "the three States are obligated to carry out the provisions of the articles in the Treaties for the settlement of disputes, including the provisions for the appointment of their representatives to the Commissions in the event of an affirmative reply to the first question."[563]

For the first two questions, the ICJ affirmed by eleven votes to three the existence of its jurisdictional authority over the issue, the existence of the dispute concerning the settlement-of-disputes provisions contained in the Peace Treaties, and the existence of an obligation to carry out such a settlement procedure on the part of the three States. The Court first decided that, in the present case, the interpretation of the terms of the Treaties did not essentially fall within the domestic jurisdiction of each State since the object of the request was "directed solely to obtain certain clarification of a legal nature regarding the application of the settlement of disputes procedures."[564] Furthermore, the Court clarified that the request, by its very nature, was a question of international law lying within the competence of the Court given that UN Charter Article 55 called on the UN to "promote universal respect for and observance of human rights."[565]

[561] *Id* (citing the Minister in Bulgaria to the Secretary of State of the United States, Sept. 1, 1949, at 63).
[562] Peace Treaties Case, First Phase, *supra* note 306, at 67 (alteration in original).
[563] *Id.*
[564] *Id.* at 70.
[565] *Id.* at 70—1.

Second, the Court confirmed that the dispute that was subject to the settlement-of-disputes provisions, since "certain charges had been brought against certain States."[566] In relation to this, the Court added that it would not decline to give its opinion since it had not been asked to adjudicate on the merits of the dispute but, rather, to "enlighten the UNGA on the applicability of the procedure" prescribed in the Treaties.[567] Lastly, the Court ruled that the three States were obligated to appoint their representatives to the Commission based on the settlement-of-disputes provisions to deal with issues over human rights and fundamental freedoms, as the US and the UK had charged.[568] According to the Court, all the required conditions to commence the appointment and dispute settlement procedure were satisfied when the three States had been tasked to take remedial measures.[569]

b. The Second Phase Delivered on July 18, 1950

As the governments of the three States had refused to comply with the ICJ's judgment, the Court proceeded to answer the remaining questions that had been requested at the outset by the UNGA on October 22, 1949. The Second Phase started with the Acting Secretary-General's action on May 1, 1950, notifying the Court of the fact that the three States had not appointed their representatives to the Treaty Commission even after the delivery of the advisory opinion. In June 1950, the representatives of the US, the UK, and the UNSG submitted a series of oral and written statements, expressing their opinion on the remaining questions and asking the Court for its advisory opinion therein.

[566] *Id.* at 70 (alteration in original).
[567] *Id*. at 72.
[568] *Id.* at 74.
[569] *Id.* at 77 (finding that "the Treaties provide that any dispute shall be referred to a Commission 'at the request of either party,' thereby either party being obligated, at the request of the other party, to co-operate in constituting the Commission, in particular by appointing its representative.").

The main issue in the second phase was whether the UNSG was authorized to appoint the third representative to the Treaty Commission under the Treaties of Peace with Bulgaria, Hungary, and Romania in circumstances where their governments had not carried out the procedure set out in the Treaties. In fact, by its resolution adopted on October 22, 1949, the UNGA submitted another question to the Court as to "whether a Treaty Commission composed of a representative of one party and a third member appointed by the UNSG would constitute a Commission, within the meaning of the relevant treaty articles, competent to make a definitive binding decision in the settlement of a dispute."[570] Simply put, since the Court did not give an affirmative answer to the previous question as to whether the UNSG was authorized to make the appointment, the Court did not have to render its judgment on this last question on the competence of a tribunal so constituted.

Based on the natural and ordinary meanings of the terms employed by the dispute-of-settlement clauses of the Treaties, the ICJ concluded that the UNSG was not authorized to appoint the third member to the Treaty Commission, even though he was not completely prohibited from doing so.[571] According to the Court, the intention of a party to an international arbitration should not be inferred in a contrary way if there is no clause expressly permitting that inference within a given arbitration agreement.[572] In line with that approach, the Court further highlighted that "a change in the normal sequence of the appointment" might only be justified when the parties had so desired to facilitate the constitutional process provided by the Treaties.[573] In accordance with the basic rules and principles of international arbitration, the Court drew this approach based on its rationale that the UNSG might be authorized to appoint a third member only if there was an explicit agreement between the parties. Moreover, even if

[570] Interpretation of Peace Treaties, Advisory Opinion, 1950 I.C.J. 221, at 224 (July 18) (second phase) (alteration in original) [hereinafter Peace Treaties Case, Second Phase].
[571] *Id.* at 227.
[572] *Id.*
[573] *Id.* at 227—8.

a two-member Commission had been constituted without a third member being appointed by the prescribed terms, the Court held that such an incompletely composed Commission would not have "the same degree of moral authority" given that any one national Commissioner could prevent a unanimous decision.[574] More significantly, the Court justified its holding, stating that the practical difficulties created by the three States' violation of the Treaty obligation and international responsibility would not allow the Court to alternatively interpret the "conditions contemplated in the Treaties" to advocate "the exercise of the UNSG's power of appointment."[575] As the Court articulated in this case, even if there is a need to remedy the absence of an express provision for greater ends, this need does not automatically allow the Court to make such an alternative and analogical interpretation, because doing so would encourage the Court to exceed its judicial competence.[576]

Although the ICJ voiced its concern about improving the well-being of the international community as a whole, the Court manifestly maintained its impartiality as an international judicial body and demonstrated its tendency to follow established laws and legal practices, including arbitral practice in this case in particular.[577] Specifically speaking, as a court of law, the Court's opinion was to give its confidence to Member States that it would always reach its decision on the basis of established rules and principles of international law.[578] In this case, the Court elaborated that the appointment of a third member by the UNSG, other than stipulated in the Treaties, would infringe upon "the initial validity of the constitution of the Commission";[579] furthermore, even assuming that a two-member Commission constituted without a third member gave a binding decision, it would be a breach of "fundamental

[574] *Id.* at 228.
[575] *Id.* at 228—9.
[576] *Id.* at 229—30.
[577] Carlston, *supra* note 559, at 737.
[578] *Id.* at 731.
[579] Peace Treaties Case, Second Phase, *supra* note 571, at 229.

principles of jurisdiction and procedural rule of the right to be heard," according to the Court.[580] However, as Judge Azevedo made clear in his separate opinion, this case brought up the decades-old problem of how the classic international order of sovereign States could be harmonized with the powers and functions of the UN. To do so would require the solidarity of the international community rather than the anarchic tendency that originated from the conventional concept of sovereign States.

C. Conclusion of This Chapter

Considering the gravity of the NLL Conflict in the inter-Korean relations and complex legal controversies therein, it can be concluded from the case analysis that the Court is competent to set up a judicial guideline for the two Koreas through its advisory proceeding. In some precedents, the ICJ could not draw the final resolution of the disputes at hand. However, the precedents examined in this chapter certainly offer a route for the States concerned in the Conflict to construct a dispute-resolution framework for it under the present international judicial system. It is also noteworthy that, in such precedents, the Court did not accept any *ultra vires* objections raised by the States involved nor did it exercise its judicial discretion dismissing the requests on the pretext of a compelling reason to do so.

The takeaway of *Kosovo Opinion* in relation to this doctrinal project is that it demonstrates how active participation of the international community as a whole affected the establishment of advisory jurisdiction of the ICJ over such disputes. In fact, the UNGA with the support of 77 Member States in its favor adopted a resolution to initiate the advisory proceeding, which was accompanied by support from the UNSG. With respect to subject-matter/material jurisdiction-related issues in advisory proceeding, the Court reaffirmed that the

[580] Carlston, *supra* note 559, at 734—5.

establishment of its jurisdiction should not be hindered by certain underlying political aspect or motive so long as a given dispute genuinely involves a question of legal character. More importantly, the Court in this case clarified the matters related with its personal jurisdiction, coordinating the competence of the UNGA and the UNSC by referring to the UN Charter. The Court also reconfirmed its long-standing jurisprudence on an issue over judicial restraint, highlighting that it should be cautious in not exercising such restraint, given its mission and role as the principal judicial organ of the UN.

The advisory opinion over the legality of the border-type wall in *Israeli Wall Case* is a good example of the Court's jurisprudence regarding the jurisdiction-related matters—especially, how its advisory jurisdiction could be established and utilized in such thorny international conflict. In this case, the proceeding was commenced at the request of the UNGA, adopting a resolution with the support of 90 Member States. While acknowledging the UNGA's competence in relation to this conflict, the Court found that the mechanism of the UNGA could be operated in a complementary sense to that of the UNSC in certain circumstances where the latter has failed to exercise its role to maintain international peace and security. In this case, the Court also held that certain political elements intermixed with legal questions should not be interfering with the establishment of its subject-matter/material jurisdiction in advisory proceeding. Most significantly, the Court reaffirmed in this case that the absence of the state consent in relevant contentious proceeding should not be considered a mitigating factor insofar as a requested issue directly concerns the requesting organization. Regarding the purpose of this doctrinal study, moreover, this opinion is noteworthy since the Court suggested a guideline based on international humanitarian law for the States involved as well as other Member States which were not directly involved therein—albeit not binding—on how they should be acting in compliance with the legal obligation identified through its advisory proceeding.

The case analysis of this Chapter has also explored *Legality of the Threat or Use of Nuclear Weapons* with reference to *WHO Nuclear Weapons Case*, underscoring the point that the ICJ through those two cases drew a sharp dividing line between the competence of the UNGA and that of other international organizations, such as the WHO, in the context of personal jurisdiction in its advisory proceedings. The Court had not moved forward to the merits stage in *WHO Nuclear Weapons Case* by reason of the doctrine of *ultra vires*, whereas it responded to the UNGA's resolution requesting for its advisory opinion on the same legal question. Therefore, this case is a good example of why the UNGA or the UNSC, which may exercise their original right to request an advisory opinion of the Court pursuant to the UN Charter, Article 96, paragraph 1, should be considered a primary and practical option for the purpose of this doctrinal project.

Western Sahara and a set of advisory cases relating to the South West Africa issues demonstrates that collective and continuing efforts of the international community as a whole, including both the UNSC and UNGA, in accordance with an advisory opinion of the ICJ on a given international dispute play a pivotal role in the ultimate settlement thereof. Due to the lack of a definitive, binding and authoritative effect of advisory opinion rendered by the Court, the conflict over the legal status of the territory of Western Sahara and the rightful ownership thereof has not yet been resolved. Furthermore, although Namibia managed to acquire the status of an independent republic in 1990, what occurred in the cases concerning South West Africa indicates that the lack of enforceable means under the international judicial system with the Court at its center has fundamental limits to execute its opinion for the ultimate resolution. Nevertheless, the role and influence of the Court's advisory proceeding should not be undermined, inasmuch as the opinions rendered in such cases offered a neutral and equitable direction forward for the State involved therein.

As one of the early precedents of the ICJ's advisory proceeding, the case analysis of this Chapter III has analyzed *Peace Treaties Case*, since the Court in this case came to the fore as a fair and reliable advisor for the judicial settlement of an international dispute involving a legal controversy. Rather than suggesting a solution based on analogical interpretation of the international treaties at issue, the Court chose to maintain its impartiality as the principal judicial organ of the UN, which was taking its place in the international community as the newly established international judicial authority in the wake of the Second World War. The Court made clear in this case that it would interpret and apply the established rules and principles of international law to an extent not exceeding its judicial competence so as not to infringe upon a sovereignty of an independent nation. This case is noteworthy in relation to this doctrinal project, since the Court provided an outline on how it would be harmoniously blended within the international order that was being formed with the sovereign nations so as to contribute to the pacific settlement of international disputes or conflicts that would be emerging.

IV. OPERATING THE ICJ ADVISORY JURISDICTION FOR THE NLL CONFLICT: HYPOTHETICAL CONSIDERATIONS AND PROSPECT

A. Introduction to This Chapter

Grounded in the discussions in the previous sections, Chapter IV of this dissertation will simulate the operation of the jurisdictional mechanism of the ICJ in order to verify the advisory proceeding of the Court as the most promising judicial option for the States concerned in the NLL Conflict to construct the dispute-resolution framework. To this end, Section B of this chapter will deal with several issues concerning the establishment of the advisory

jurisdiction that is expected to arise from or in relation to this hypothetical case. By assuming an initiation by one of the primary organs of the UN, this section will give priority to proving how each type of jurisdiction can be affirmed in this case. Additionally, in this regard, it will also be determined in Section C as to how the Court, before proceeding to the merits stage, is expected to respond to a conceivable objection that may be raised by any party involved in this Conflict on the basis of issues not related to jurisdictional matters, i.e., the admissibility objection.

Establishing the ICJ advisory jurisdiction in a hypothetical case concerning the NLL Conflict also requires revisiting the conceptual understanding of the relevant notions, the international legal instruments, and the jurisprudence achieved in the advisory precedents rendered by the Court throughout its decades of operation. In this sense, based on an understanding of the conceptual difference between the notion of jurisprudence and that of competence in the context of the ICJ jurisdictional mechanism, it is necessary to comprehend what it means for the Court to have jurisdictional authority in this hypothetical case. Moreover, in addition to considering conceivable problems concerned with the Conflict that may arise in the course of establishing each type of jurisdiction, it is also necessary to recapitulate the jurisdictional elements comprising the advisory proceeding for a better understanding of the discussion in this chapter.

The research questions that have initially triggered this doctrinal project will be addressed by reference to the relevant legal instruments and the holdings of the precedents. This will support the argument that it is doctrinally possible to establish the ICJ's advisory jurisdiction as a judicial forum for the peaceful settlement of the NLL Conflict. First, with respect to the identification of the personal jurisdiction in this hypothetical case, a request made by one of the competent primary organs of the UN will be assumed as against any ultra *vires* objection that may be raised by any of the parties involved. Second, authorizing the UNSG or

the Secretariat will also be explored as an extension of the discussion on the establishment of the Court's personal jurisdiction. Third, an analysis will be conducted as to whether controversies surrounding the Conflict are of a sufficient legal nature to fall within the subject-matter/material jurisdiction of the Court. Last but not least, it will be affirmed for the purpose of this doctrinal project whether the lack of any state consent on the part of the States concerned in the Conflict affects the establishment and authority of the Court's jurisdictional power.

In addition to the jurisdictional matters aforementioned, Section C of this chapter will also go through other issues regarding the admissibility of a request and judicial discretion that the ICJ may encounter in this hypothetical case. Considering that the Court may be stymied with an objection asserting the lack of admissibility on the basis of diversified grounds even after the establishment of its jurisdiction over this case, this is certainly a matter to be addressed along with the jurisdiction-related matters for the purpose of this doctrinal research. Furthermore, on the basis of the preceding opinions rendered by the Court, this section will contemplate whether this hypothetical case is to be dismissed before being moved forward to the merits stage if the Court exercises its discretionary power to refrain from considering this Conflict.

B. Establishing the ICJ Jurisdiction over a Hypothetical Request for Advisory Opinion on the NLL Conflict

1. Jurisdiction in Terms of Advisory Proceeding

For ease discussion in this Chapter, the legal concept "jurisdiction" will be briefly revisited to clarify its role and function in a hypothetical advisory request concerning the NLL Conflict instituted by a competent organ of the UN, i.e., the UNGA, UNSC or, if allowed,

UNSG. Although there is a debate about the conceptual difference between the legal concepts of "jurisdiction" and "competence," it is, in practice, not necessary to distinguish them in understanding the ICJ's advisory proceeding, given the jurisprudence of the Court. Indeed, the Court has interchangeably used these concepts throughout its operation. The Court is presumed to be based on the idea of linguistic difference, since it explained its judicial capacity over the requested legal questions under the heading of "jurisdiction" in the English version of its opinions, whereas it dealt with the same type of questions under the heading of "*competence*" in the French version.[581] Nor do any of the relevant legal instruments, which provide the basis for the Court's structure and operation, such as the UN Charter and the ICJ Statute, have any independent term or language to distinguish the concepts. Nevertheless, as Fitzmaurice, Griesel, and Dubisson assert, there is at least certain linguistic nuance for the concept of "competence," indicating that a more definite, concrete, and specific capacity of the Court is required, in particular, with regard to the merits of a given case.[582] In this respect, it is to be noted that the concept "jurisdiction" has been used more frequently in the advisory proceedings to describe the judicial capacity of the Court, as Rosenne points out.[583] As Fitzmaurice suggests that the concept "competence" should be specifically used to describe the capacity of an authorized organ or agency empowering them to make a request for an advisory opinion from the Court in relation to its activities.[584] Finally, in furtherance of this doctrinal project, the notion of advisory jurisdiction in the context of the Court's advisory proceeding should be simply defined as follows: the general/specific capacity of the Court necessarily required to answer a definite factual/legal question requested by a competent organ or agency affiliated with the UN, seeking a non-binding but substantively persuasive interpretation of international law on a legal question arising from the scope of their activities.

---

[581] SZAFARZ, *supra* note 239, at 2.
[582] *See* Fitzmaurice, *supra* note 243, at 8.
[583] *See* ALJAGHOUB, *supra* note 241, at 36.
[584] *See* Fitzmaurice, *supra* note 243, at 8—9.

2. Overview of Jurisdictional Requirements Necessary to Establish the ICJ Advisory Jurisdiction

The ICJ must contemplate on its own motion its jurisdictional competence to determine whether a requesting international body has standing in making an advisory request as a precondition to the establishment of its advisory jurisdiction over a given case. To that end, the Court explores litigants, subject-matter, extent, and limit of its judicial capacity in relation to a given claim or request in either of contentious or advisory proceedings.[585] When it comes to its advisory proceeding, in particular, only the UNGA, the UNSC, other authorized UN organs, and specialized agencies are eligible to make a request for an advisory opinion from the Court, according to the UN Charter Article 96. Specifically, as far as the operation of its advisory jurisdiction is concerned, the Court is not generally entitled by the UN Charter to exercise its personal jurisdiction on its own motion over Member States, even if there is an ongoing international dispute. In other words, as a necessary precondition, a request for the Court's advisory opinion must be made by any of the qualified international organs and agencies. As stipulated in Article 96, paragraph 2, the agencies whose competence is connected with the UN, albeit limitedly, by the special agreements concluded under the UN Charter Article 57, paragraph 1, and Article 63 may find its standing in an advisory proceeding.[586] This is the most distinct difference between advisory and contentious proceedings of the Court, inasmuch as a

[585] KOLB, *supra* note 255, at 166.

[586] U.N. Charter art. 57, para. 1 (providing that "The various specialized agencies, established by intergovernmental agreement and having wide international responsibilities, as defined in their basic instruments, in economic, social, cultural, educational, health, and related fields, shall be brought into relationship with the United Nations in accordance with the provisions of Article 63."; at art. 63, para. 1 (providing that "The Economic and Social Council may enter into agreements with any of the agencies referred to in Article 57, defining the terms on which the agency concerned shall be brought into relationship with the United Nations. Such agreements shall be subject to approval by the General Assembly."); at art. 63, para. 2 (providing that "It may co-ordinate the activities of the specialized agencies through consultation with and recommendations to such agencies and through recommendations to the General Assembly and to the Members of the United Nations.").

contentious proceeding is instituted by the submission of an application by a sovereign State or States. More to the point, in terms of the personal jurisdiction of an advisory proceeding, the primary organs of the UN and other authorized and/or affiliated international organs and agencies have different capacities: Both the UNGA and UNSC are allowed to exercise an original right to make an advisory request, while the other organs and agencies are entitled to a derivative right requiring an authorization from the UNGA to be allowed to make such requests. Unless such an organ or agency submits a legal question arising out of its competence connected with its activities, the UNGA may unilaterally revoke the authorization that allowed it to file an advisory request with the Court.[587]

Having identified its personal jurisdiction over a given advisory request, the ICJ must proceed to examine whether such request is concerned about any legal question stemming from the scope of the competence of a requesting organ or agency in connection with its activities, as set forth in the UN Charter 96, paragraph 2 and the ICJ Statute Article 65, paragraph 1. To confirm its subject-matter/material jurisdiction over a request at hand, the Court must scrutinize the subject-matter of such requests by applying the following perspectives. First, a requesting organ or agency must seek an advisory opinion of the Court on "a question of a legal character," which is "framed in terms of law and raising problems of international law."[588] Although the Court may refuse to adjudicate on a non-legal question through its advisory proceeding, it has a pattern of accepting a legal question even if it is intermixed with political and/or factual elements or is drafted equivocally into the proceeding.[589] Second, the Court renders its advisory opinion on a legal question arising within the scope of competence in connection with activities of a requesting organ or agency. In this respect, therefore, the UNGA is conferred upon broader competence by the UN Charter Article 10 in making a request for an advisory opinion, even

[587] ALJAGHOUB, *supra* note 241, at 45.
[588] Western Sahara Case, *supra* note 422, at 18—9.
[589] ALJAGHOUB, *supra* note 241, at 57.

though its Article 96, paragraph 1 does not contain any specific provision explicitly discriminating against it in favor of the UNSC in terms of the parameters of the subject-matter/material jurisdiction of the Court in its advisory proceeding. However, the other organs or agencies of the UN may be narrowly authorized to request an advisory opinion of the Court insofar as their legal question is rooted in the scope of their competence linked with their activities. As pointed out above, such authorization is still subject to the UNGA's determination. In practice, the Court tends to restrict the scope of the competence of such organs or agencies, holding that they should not be treated equally with an independent sovereign State.[590] In other words, although such organs and agencies are allowed to have an independent authority to determine the sphere of their competence, such authority is subordinate to the UNGA and the Court, which retains the ultimate authority to decide its subject-matter/material jurisdiction over an advisory request.

Notwithstanding the essential role of the state consent for the establishment of the ICJ contentious jurisdiction, it is not considered a necessary prerequisite for its advisory proceeding, as identified in the jurisprudence of the Court regarding the consensual/consent-based jurisdiction.[591] Since a sovereign State is deemed to be the most salient pillar upholding the contemporary international order, international courts and tribunals may be entitled to express their judicial opinion in a particular case only where disputing States have submitted their issues to the jurisdictional authority of such courts and tribunals. However, as discussed above, the Court advisory jurisdiction is regarded as an extraordinary judicial proceeding, requiring distinct elements to be given establishment over a given advisory request. Namely, irrespective of whether a given advisory request involves a particular sovereign State, the Court will find that the state consent should not be a condition precedent for the establishment of its advisory

[590] WHO Nuclear Weapons Case, *supra* note 416, at 82.
[591] *E.g.*, Peace Treaties Case, First Phase, *supra* note 306, at 70—1; Genocide Case, *supra* note 443, at 19; Israeli Wall Case, *supra* note 397, ¶¶ 46—9; Western Sahara Case, *supra* note 422, at 24—5; Namibia Case, *supra* note 401, at 23—4; Applicability Case, *supra* note 306, at 188—9.

jurisdiction. In tandem with this approach, the Court has also consistently refused to accept any objections relying on the absence of the state consent to its advisory jurisdiction on the part of a State concerned, emphasizing its role and responsibility as the primary judicial organ of the UN. The ICJ bears an obligation to administer global justice by conducting its judicial function appropriately for the development of international law for the international community. Furthermore, the legal instruments relevant to this issue are all silent on whether the state consent is a prerequisite for exercising of the Court's advisory function. Therefore, unless there is a compelling reason for the Court to refrain from expressing its advisory opinion, such as judicial propriety[592] or judicial restraint, the state consent will not be considered by the Court a necessary precondition. In this sense, despite the role of the doctrine of *forum prorogatum* as a supplementary basis for the establishment of contentious jurisdiction of the Court, the doctrine is not likely to play an important role in the operation of advisory proceedings of the Court.

Throughout the decades-long operation of its advisory proceedings, the Court was reluctant to accept the objections raised against its exercise of jurisdictional power, mostly finding no compelling reasons to refrain from moving forward to the merits stage. In multiple advisory proceedings explored above, such as *Wall Case*, *Peace Treaties Case*, *Expenses Case* and *Namibia Case*, the Court consistently held that none of the *ultra vires* objections constituted any compelling reason. The Court specifically mentioned this in *Legality of the Threat or Use of Nuclear Weapons Case* that the UN Charter Article 10, Article 1, paragraph 11, and Article 13, paragraph 1 supported its reasoning in deciding so. Furthermore, it is to be noted that the Court was also hesitant in accepting the objections raised against the establishment of its subject-matter/material jurisdiction in the advisory proceedings. For example, the States interested in the aforementioned cases argued that the matters brought

[592] Western Sahara Case, *supra* note 422, at 24—5.

before the Court were mixed with political and factual elements and hence were not within the subject-matter/material jurisdiction of the Court. Those States also held that the requests were drafted too abstractly. However, the Court decided to apply its discretion to reformulate those legal questions, even though they were intermixed with political and factual components, rather than dismissing the requests. With regard to its consensual/consent-based jurisdiction in those preceding advisory cases, the Court also rejected all objections, finding that the requirement of the state consent should not be invoked to obstruct the exercise of its advisory jurisdiction. Even in cases where the ongoing international disputes were involved, i.e., *Peace Treaties Case* and *Western Sahara Case*, the Court did not accept the objections against its jurisdictional authority, instead stressing its role and responsibility as the principal judicial organ obligated to provide the UN, Member States, and other organs and agencies with proper legal assistance.[593] In accordance with the ICJ Statute Article 36, paragraph 6, nevertheless, the Court may still withdraw from proceeding to the merits stage at a given advisory request on its sole motion even in the absence of any objection raised against the establishment of its jurisdiction.

3. Establishing Each Type of Jurisdictions in This Case

This dissertation will focus on answering the following research questions it has sought to demonstrate through the previous chapters in support of its thesis. First, which organ or agency among the organs and agencies affiliated with the UN is the most suited to submit its request for the ICJ's advisory opinion on the NLL Conflict for its pacific settlement? Second, in what ways can such a body achieve that goal under the present international justice system? Third, what kind of objections are anticipated against the operation of the advisory jurisdiction

[593] Peace Treaties Case, First Phase, *supra* note 306, at 70—1; Israeli Wall Case, *supra* note 397, ¶¶ 46—9.

in this case? Last, considering its jurisprudence, what is the expected response of the Court to such objections? To answer these research questions, the following parts of this Section will explore pertinent issues, provisions prescribed in the relevant international legal instruments, rulings, and reasoning rendered by the Court through its precedents. With due consideration of the provisions, rulings, and reasoning, in particular, this dissertation will focus on verifying the doctrinal grounds for its thesis. This can be stated as follows: Advisory proceeding of the Court instituted by a competent organ of the UN is the most promising alternative to construct a dispute-resolution framework under the present international judicial system for the settlement of the Conflict.

a. Upholding Personal Jurisdiction over This Case: Expected Response of the Court to *Ultra Vires* Objections

The first and foremost issue to be addressed is whether the ICJ will exercise its personal jurisdiction over this hypothetical advisory request, once requested by a competent organ of the UN, in spite of an *ultra vires* objection raised against it. As discussed above, the UN Charter Article 96, paragraph 1 provides that the UNGA may exercise its original right to request for an advisory opinion,[594] as being conferred upon the Court by the ICJ Statute 65, paragraph 1, on any legal question. When it comes to the material scope of the competence, the UN Charter Article 10 empowers the UNGA to "discuss any questions or any matters *within the scope of the present Charter*…."[595] In addition, the UN Charter Article 11, paragraph 2 allows the UNGA to discuss a wide range of "*questions relating to the maintenance of international peace and security* brought before it by any Member State."[596] More to the point, the UN Charter

[594] ALJAGHOUB, *supra* note 241, at 40.
[595] U.N. Charter art. 10 (citations omitted)(emphasis added).
[596] *Id.* at art. 11, para. 2 (emphasis added).

Article 1, paragraph 1 stipulates the purpose of the UN as follows: "*maintaining international peace and security*, and to that end: *to take effective collective measures for the prevention and removal of threats to the peace*…or other breaches of the peace, and *to bring about by peaceful means*, and *in conformity with the principles of justice and international law*, *adjustment or settlement of international disputes or situations* which might lead to a breach of the peace."[597] In practice, the Court has been reluctant to accept the *ultra vires* objections raised against its personal jurisdiction in the course of its advisory proceedings, broadly interpreting the material competence and activities of the UNGA. As identified in *Legality of the Threat or Use of Nuclear Weapons Case*, the Court, in its discretion, has established its jurisprudence that a compelling reason should exist to restrain from establishing its advisory jurisdiction.[598] Starting with *Interpretation of Peace Treaties Case*,[599] the Court has also developed its jurisprudence to uphold its personal jurisdiction, while acknowledging a presumption against such *ultra vires* objections based on diversified grounds.[600] In both *Israeli Wall Case* and *Kosovo Opinion*, the Court was faced with the claim that proceeding its advisory proceeding at the request of the UNGA would infringe upon the UNSC's authority.[601] Having dismissed this *ultra vires* objection, the Court clarified that "any question relating to the maintenance of international peace and security…" may be discussed by the UNGA without contravening the

[597] *Id.* at art. 1, para. 1 (citations omitted)(emphasis added).
[598] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, *supra* note 294, at 235. *See also* Expenses Case, *supra* note at 400, at 155.
[599] Peace Treaties Case, First Phase, *supra* note 306, at 70—1 (holding that "clarifying the applicability of the procedure for dispute settlement provided for in the Peace Treaties with Bulgaria, Hungary, and Romania is a question of international law laying within the Court's jurisdiction.").
[600] Expenses Case, *supra* note 400, at 168 (holding that "when the Organization takes action which warrants the assertion that it was appropriate for the fulfillment of one of the state purposes of the United Nations, the presumption is that such action is not *ultra vires* the Organization."); Namibia Case, *supra* note 401, at 22 (holding that "a resolution of a UN's properly constituted organ which is passed in accordance with that organ's rules of procedure, and is declared by its President to have been so passed, must be presumed to have been validly adopted.").
[601] The Court dismissed the ultra vires objection raised by Israel by finding that a "recommendation" prescribed in the UN Charter Article 12(2) must be distinguished from an "advisory request." Israeli Wall Case, *supra* note 397, at ¶ 25 (highlighting that the Article 12(2) prohibits the UNGA from making any "recommendation" without the UNSC's request).

UNSC's function and authority.[602] Furthermore, the Court made clear that even if its judicial interpretation and application of the UNSC's resolutions to certain international disputes or situations may affect the UNSC's decision in any way whatsoever, it should not be deemed a compelling reason for the Court to refrain from moving forward in its advisory proceeding, so long as the UNGA was found to have a legitimate interest in such proceeding and its outcome.[603]

Considering the provisions and holdings discussed above, the ICJ is likely to establish its personal jurisdiction over this case instituted by the UNGA's request seeking its advisory opinion on legal issues surrounding the NLL Conflict despite certain *ultra vires* objections raised against it. First, the Conflict certainly involves legal questions relating to the maintenance of international peace and security, which the UNGA is allowed to discuss at its meetings pursuant to the UN Charter Article 11, paragraph 2. Furthermore, based on the collective interpretation of the UN Charter Articles 10 and 1, paragraph 1, there is no doubt that the Conflict is a decades-long conflict between sovereign States that must be settled peacefully in conformity with international law so it does not escalate. Therefore, it should be concluded that the UNGA will have a greater chance of success in requesting an advisory opinion from the Court on the Conflict. Considering the fact that the Court decided to render its opinion in both *Israeli Wall Case* and *Kosovo Opinion*, where the contradictory positions of the States involved caused heated confrontation between them, it is highly likely that the Court will also find a reason to establish its advisory jurisdiction over the Conflict based on its concerns about legal controversies affecting the peace and security in the region, which is also

[602] Kosovo Opinion, *supra* note 469, at ¶ 18—25 (citing U.N. Charter art. 10 (stipulating that "The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter."), art. 11, para. 2 (prescribing that "The General Assembly may discuss any questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations…and may make recommendations…") and art. 12, para. 2 (providing that "While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests.")).
[603] *Id.* at ¶ 35—48.

the primary concern of the UNGA. This conclusion is consistent with Rosenne and Kelsen's approach limiting the scope of personal jurisdiction in advisory proceedings. Moreover, this is also consistent with Judge Higgin's view requiring "the strong connection" between an advisory request and activities of a requesting organ.

Assuming that the UNSC makes a request for the ICJ's advisory opinion on a question relating to the NLL Conflict, it should also be discussed whether the Court will establish its personal jurisdiction over UNSC's advisory request; whether there is any discrepancy between the competence of the UNGA and that of the UNSC in making such request; and whether the Court will accept any *ultra vires* objections raised over such UNSC's request. Grounded upon the UN Charter Article 96, paragraph 1, the UNSC may also exercise its original right to request the Court's advisory opinion—the jurisdictional authority conferred upon the Court by the ICJ Statute Article 65, paragraph 1—on any legal question. More significantly, the UNSC is entrusted with "primary responsibility for the maintenance of international peace and security," as prescribed in the UN Charter Article 24, paragraph 1.[604] Furthermore, the UN Charter Chapter VI confers a special competence upon the UNSC with respect to the settlement of international disputes or situations: the UNSC's right to investigate any dispute or situation under Article 34;[605] to recommend appropriate procedures or methods for the settlement of a dispute or a situation under Article 36;[606] to take action or make appropriate recommendations

[604] U.N. Charter art. 24, para. 1 (providing that "In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.").
[605] U.N. Charter art. 34 (providing that "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.").
[606] U.N. Charter art. 36, para. 1 (providing that "The Security Council may, at any stage of a dispute of the nature referred to in Article 33 or a situation of like nature, recommend appropriate procedures or methods of adjustment."); *id.* at art. 36, para. 2 (providing that "The Security Council should take into consideration any procedures for the settlement of the dispute which have already been adopted by the parties."); *Id.* at art. 36, para. 3 (providing that "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 provisions of the Statute of the Court.").

under Article 37, paragraph 2 in the event that the parties to a dispute or a situation has failed to conclude a pacific settlement;[607] and to make recommendations without prejudice upon the request of the parties to a dispute or situation.[608] As indicated in the UN Charter Article 24, paragraph 2, such powers and responsibilities granted solely to the UNSC is deemed essential for its role to maintain international peace and security in pursuit of the purposes and principles of the UN.[609]

To answer the second and third issues, the pertinent provisions of the UN Charter should be revisited; the ICJ's jurisprudence related with the *ultra vires* objections established in its preceding advisory proceedings should also be revisited with a priority given to the UNSC's competence to make this hypothetical advisory request. When it comes to the different scope of the competence of the UNGA and that of the UNSC, the first argument is that the UNGA is generally allowed to exercise a broader range of authority on the basis of the UN Charter Article 10. Nevertheless, aside from the UN Charter Article 96, paragraph 1 which has no separate language to differentiate the Court's personal and subject-matter/material jurisdiction over the primary organs in the context of its advisory proceeding, the UNSC is permitted to exercise a more specific authority, at least in relation to the maintenance of international peace and security. Second, the Court is unlikely to reject the UNSC's advisory request insofar as there are no compelling reasons to accept an *ultra vires* objection raised to prevent the establishment of its personal jurisdiction over this case. Significantly, in *Namibia Case* where the UNSC requested the Court's advisory opinion on its own, the Court affirmed

---

[607] U.N. Charter art. 37, para. 1 (providing that "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."); *Id.* at art. 37, para. 2 (providing that "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.").

[608] U.N. Charter art. 38 (providing that "Without prejudice to the provisions of Articles 33 to 37, the Security Council may, if all the parties to a dispute so request, make recommendations to the parties with a view to a pacific settlement of the dispute.").

[609] U.N. Charter art. 24, para. 2 (prescribing that "In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of theses duties are laid down in Chapters VI, VII, VIII, and XII.").

a presumption that "a resolution of a UN's properly constituted organ which is passed in accordance with that organ's rules of procedure, and is declared by its President to have been so passed, must be presumed to have been validly adopted."[610] More importantly, based on the UN Charter Article 12, paragraph 2, the Court in both *Israeli Wall Case* and *Kosovo Opinion* recognized that the UNSC had preference over the UNGA in dealing with disputes or situations relating to the maintenance of international peace and security.[611]

Judging from the relevant articles of the UN Charter defining the UNSC's authority and responsibility, the Court is likely to affirm the establishment of its personal jurisdiction over a hypothetical advisory request instituted by the UNSC in this instance. As the UNSC is authorized to make a request for the Court's advisory opinion based on the UN Charter Article 96, paragraph 1 and the ICJ Statute Article 65, paragraph 1, the Council's request is not likely to be turned down by reason of the lack of the Court's personal jurisdiction. In addition to this, since the UN Charter Article 24, paragraph 1 confers primary responsibility for the maintenance of international peace and security on the UNSC, seeking a solution to the Conflict falls within the scope of its responsibility. Given the UN Charter Chapter VI, there is a path anticipated for the UNSC to lead the two Koreas to a peaceful settlement of the Conflict through the Court's advisory proceeding. First, the UNSC exercises its authority to investigate the Conflict since the continuance of the conflict in the disputed waters has endangered and will pose a constant threat to the peace and security in the region, according to its Article 34. Then, based on its Article 36, paragraph 1, the UNSC may recommend the two Koreas to consider the Court's advisory proceeding for the settlement of the long-lasting issue. Aside from an obligation borne by the two Koreas as a Member State of the UN to refer their issue

[610] Namibia Case, *supra* note 401, at 22, *cited in* ALJAGHOUB, *supra* note 241, at 44.
[611] Israeli Wall Case, *supra* note 397, at ¶ 25 (highlighting that the Article 12(2) prohibits the UNGA from making any "recommendation" without the UNSC's request); Kosovo Opinion, *supra* note 469, at ¶ 18—25 (citing U.N. Charter art. 12, para. 2 (providing that "While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests.")).

to the UNSC in compliance with the UN Charter Article 37, the UNSC bears its own obligation to deal with the Conflict based on its threat to the peace and security in the region. Lastly, based on its Article 38, the UNSC may also recommend the two Koreas to request for the Court's advisory opinion on the legal questions arising from the Conflict without prejudice. By taking these steps, the UNSC will fulfill its duty set forth in the Purposes and Principles of the UN in compliance with the UN Charter Article 24, paragraph 2.

Furthermore, the jurisprudence of the ICJ pertaining to the *ultra vires* objection against the establishment of its personal jurisdiction clearly indicates that the Court has a tendency to proceed to the merits stage no matter what basis is invoked to raise an *ultra vires* objection. As discussed above, the Court has been reluctant to accept the *ultra vires* objections against the establishment of its advisory jurisdiction over the requests made by the UNGA, holding that there was no compelling reason to refrain from. In *Israeli Wall Case* and *Kosovo Opinion* where the maintenance of peace and security of the region at issue was dealt with,[612] the Court rendered its opinions as to whether the UNGA's requests had infringed upon the UNSC's competence guaranteed by the UN Charter. As mentioned above, the UNSC is entrusted with a primary authority and responsibility in maintaining the peace and security regionally and globally. To that extent, it is reasonable to categorize the UNSC as having a more direct concern in reaching a peaceful resolution of the Conflict. Therefore, all things considered, it is not plausible for the Court to accept any kind of *ultra vires* objection raised against the establishment of its personal jurisdiction over a hypothetical advisory request made by the UNSC seeking its opinion on the Conflict.

b. Problems with Authorizing the Secretariat or the UNSG to Make This Hypothetical Advisory Request

[612] *See id.*

Another scenario for the establishment of the ICJ advisory jurisdiction over the NLL Conflict would be the Secretariat or the UNSG—the chief administrative officer of the Secretariat through his/her name the Secretariat may take an official action—being authorized to make a hypothetical advisory request. For decades, it has been debated whether the UNGA should confer either entity with the authority to request an advisory opinion from the Court. On the basis of the UN Charter Article 96, paragraph 2, the UNGA has given its authorization to organs and specialized agencies affiliated with the UN[613] but, despite its legal status, authorizing the Secretariat has always been controversial. Except for the Court itself, the Secretariat is deemed to be the only principal organ of the UN that has not been officially given this authority.[614] As will be discussed below, international lawyers and politicians suggest that both the Secretariat and the UNSG as its chief administrative officer should be authorized to make an advisory request. Therefore, in this respect, the first issue that will be covered in the following discussion is whether the UNGA may give a legal entitlement to either the Secretariat or the UNSG so that either of them can make a request for the Court's advisory opinion on the Conflict; and second, assuming that such authority may be legally vested in either the Secretariat or the UNSG, it should be also discussed whether the UNGA will be willing to vest such authority in either of them.

Notwithstanding the controversy, the relevant legal instruments provide a theoretical foundation supporting the authorization of the Secretariat or the UNSG. First, pursuant to the UN Charter Article 96, paragraph 2, which defines the scope of the personal jurisdiction and subject-matter/material jurisdiction, the UNGA may authorize the "other *organs* of the UN and

[613] For instance, the Economic and Social Council, the Trusteeship Council, the Interim Committee of the UNGA, the Committee on Applications for Review of Administrative Tribunal Judgments, the International Atomic Energy Agency, and several specialized agencies of the UN have been afforded to make such requests.
[614] Stephen M. Schwebel, *Authorizing the Secretary-General of the United Nations to Request Advisory Opinions of the International Court of Justice*, 78(4) AM. J. INT'L. L. 869, at 869 (1984).

specialized agencies" to make a request for the Court's advisory opinion on "legal questions arising within the scope of their activities."[615] As stipulated in the ICJ Statute Article 65, paragraph 1, moreover, the Court may express its non-binding judicial view "on any legal question at the request of *whatever body* may be authorized."[616] The functions and activities of the Secretariat and the UNSG, which might be relevant to determine the subject-matter/material jurisdiction of the Court over their advisory request, are prescribed in the UN Charter Articles 97 through 102;[617] especially Article 99 that legally entitles the UNSG to "bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security" insofar as such issues involve a legal question related to the scope of his/her functions and activities.[618] Also, according to the Convention on the Privileges and the Immunities of the United Nations ("Geneva Convention") Article 8, Section 30, the Court has jurisdiction to clarify any difference between the UN and a Member State arising from or in connection with the interpretation and application thereof.[619]

---

[615] U.N. Charter art. 96, para. 2 (emphasis added).
[616] ICJ Statute, *supra* note 281, at art. 65, para 1 (emphasis added).
[617] U.N. Charter art. 97 (prescribing that "The Secretariat shall comprise a Secretary-General and such staff as the Organization may require. The Secretary-General shall be appointed by the General Assembly upon the recommendation of the Security Council. He shall be the chief administrative officer of the Organization."); *id.* at art. 98 (prescribing that "The Secretary-General shall act in that capacity in all meetings of the General Assembly, of the Security Council, of the Economic and Social Council, and of the Trusteeship Council, and shall perform such other functions as are entrusted to him by these organs. The Secretary-General shall make an annual report to the General Assembly on the work of the Organization."); *id.* at art. 100, para. 1 (prescribing that "In the performance of their duties the Secretary-General and the staff shall not seek or receive instructions from any government or from any other authority external to the Organization. They shall refrain from any action which might reflect on their position as international officials responsible only to the Organization."); *id.* at art. 100, para. 2 (prescribing that "Each Member of the United Nations undertakes to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and not to seek to influence them in the discharge of their responsibilities."); *id.* at art. 101, para. 1 (prescribing that "The staff shall be appointed by the Secretary-General under regulations established by the General Assembly."); *id.* at art. 101, para. 2 (prescribing that "Appropriate staffs shall be permanently assigned to the Economic and Social Council, the Trusteeship Council, and, as required, to other organs of the United Nations. These staffs shall form a part of the Secretariat."); *id.* at art. 101, para. 3 (prescribing that "The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be necessity of securing the highest standards of efficiency, competence, and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible.").
[618] U.N. Charter art. 99.
[619] Convention on the Privileges and Immunities of the United Nations art. 8, sec. 30, *opened for signature* Feb. 13, 1946, 1 U.N.T.S. 15 (entered into force Sept. 17, 1946) (stipulating that "…If a difference arises between the United Nations on the one hand and a Member on the other hand, a request shall be made for an advisory opinion on any legal question involved in accordance with Article 96 of the Charter and Article 65 of the Statute of the Court. The opinion given by the Court shall be accepted as decisive by the parties.").

In international practice pertaining to the authorization of the Secretariat and the UNSG to legally entitle either of them to file an advisory request with the ICJ, the tendency has been to uphold such authorization. Having considered the practices of the UNGA, it becomes clearer that the concept of "authorized organs" embraces both the principal and subsidiary entities affiliated with the UN when interpreting "other organs of the UN" provided in the UN Charter Article 96, paragraph 2.[620] Furthermore, the UNSG has on occasion expressed an intention to utilize the advisory proceeding of the Court in handling international legal disputes and situations; e.g., *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-keeping: Rep. of the Secretary-General*.[621] Indeed, this intention was also identified in the UNSG's 1950 report sent to the Commission on Human Rights when he was confident of the capacity of the UNGA to authorize him to make an advisory request, contrary to the Human Rights Committee.[622] After contemplating a list of possible entities that could be authorized by the UNGA, the UNSG further claimed that, based on the UN Charter Articles 96, paragraph 2 and 98, the Secretariat and the UNSG as its chief administrative officer may be entrusted by the UNGA as a principal organ of the UN to make a request for the Court's advisory opinion.[623] Analogous to this opinion, the UNSG in 1955 also issued his view, asserting that the UNGA may at any time authorize the UNSG as the head of the principal organ of the UN (which in this matter meant the Secretariat) to make a request for the Court's advisory opinion and that

[620] ALJAGHOUB, *supra* note 241, at 46.
[621] U.N. Secretary-General, *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-keeping: Rep. of the Secretary-General*, *supra* note 413, ¶ 14.
[622] Schwebel, *Authorizing the Secretary-General of the United Nations to Request Advisory Opinions of the International Court of Justice*, *supra* note 615, at 870 (asserting in the report that "as the Committee was not a subsidiary organ of the UN but a body established by a separate and distinct international instrument, it would not be deemed an organ entitled by the UNGA to request advisory opinions.").
[623] U.N. Econ. & Soc. Council, ¶ 7, U.N. Doc. E/1732 (June 26, 1950) (contending that "A fourth possibility would be the Secretariat, which can be authorized under Article 96 since it is a principal organ of the United Nations…The answer to this may be found by reference to Article 98 which provides that the Secretary-General shall perform such other functions as are entrusted to him by the General Assembly and the Councils of the Organization. Accordingly, it would be necessary for the General Assembly to entrust the Secretary-General with the function of considering suggestions of the Human Rights Committee in regard to requests for advisory opinions on questions arising out of that Committee's work. Pursuant to this, the General Assembly could then extend an authorization to the Secretary-General under Article 96(2) in the same terms as those suggested in the preceding paragraph for the Commission on Human Rights.").

doing so would embody a proper division of duties between them.[624] In some of the advisory cases, such as *Peace Treaties Case* and *Kosovo Opinion*, though the UNSGs did not file those advisory requests, the UNSG actively participated during the course of those proceedings—for example, filing oral and written statements to clarify his point of view and notifying the Court of non-compliance of the involved State parties. Throughout the operation of the Court, several Member States have suggested to authorize the UNSG to make a request for an advisory opinion of the Court on a legal question arising within the scope of the competence in connection with his/her activities, whereas no strong objection has yet been raised against such suggestion.[625]

Aside from a debate over whether the Secretariat or the UNSG should be authorized to make an advisory request, most international legal scholars and lawyers generally acknowledge that at least one of them should be. Having interpreted the UN Charter Article 98 in a relatively permissive way, these jurists focuse on the administrative and political capacity of the Secretariat and the UNSG that are obligated to participate in meetings of the other principal organs of the UN.[626] However, there are some concerns about a potential conflict of authority between the Secretariat and the UNSG on the one hand and the UNGA and the UNSC on the other.[627] It is also argued that authorizing the Secretariat or the UNSG might unnecessarily strengthen their political influence contrary to the drafters' intention to limit their autonomy

[624] Judicial Review of the United Nations Administrative Tribunal Judgments, Working Paper submitted by the Secretary-General, 10 UN GAOR Annexes (Agenda Item 49) at 17, 23, UN Doc. A/AC.78/L.1 and Corr.1 (1955) (asserting that "…It would appear to be too cumbersome a procedure for the General Assembly, itself, to request advisory opinions in each case. Article 96, paragraph 2, of the Charter, however, provides that organs of the United Nations which may at any time be so authorized by the General Assembly may request advisory opinions of the Court on legal questions arising within the scope of their activities. The General Assembly could therefore authorize the Secretary-General, who is the head of a principal organ of the United Nations, to request advisory opinions on legal questions.").

[625] *See* Schwebel, *Authorizing the Secretary-General of the United Nations to Request Advisory Opinions of the International Court of Justice*, *supra* note 615, at 871.

[626] *See e.g.*, Szasz, *supra* note 410, at 531—2; BEDJAOUI, *supra* note 410, at 78, *cited in* ALJAGHOUB, *supra* note 241, at 50.

[627] BEDJAOUI, *supra* note 410, at 78; Bowett, *supra* note 411, at 187—8, *cited in* ALJAGHOUB, *supra* note 241, at 51.

vis-à-vis the UNGA or the UNSC.[628] With respect to the subject in which such authority may be vested, it is debated whether it is the Secretariat or the UNSG that is entitled to make an advisory request. Focusing on the conceptual conflict emerging from the different wording between the UN Charter Article 96, paragraph 2 and the ICJ Statute Article 65, paragraph 1, Professor Kelsen points out that the UNSG may not be competent to receive the Court's advisory opinion under the ICJ Statute in which the term "body" is employed,[629] even if he/she might be authorized to make an advisory request under the UN Charter.[630] In response, Szasz argues that "Kelsen's narrow understanding of the ICJ Statute could be overcome by simply vesting the authority in the Secretariat, whose political functions are embodied in the Secretary-General."[631] Similarly, Jessup asserts that "although under Article 7 it is the Secretariat and not the Secretary-General which is the 'organ,' any power of the Secretariat would be exercised by or under the authority of the Secretary-General."[632] On the same bent, Keith also offers a solution to the conceptual conflict, arguing that "it would be resolved in practice by authorizing the Secretariat to make requests. If the Secretariat were so authorized the Secretary-General, as head of that organ, would be constitutionally and ultimately responsible for any requests."[633]

---

[628] BEDJAOUI, *supra* note 410, at 78.

[629] ICJ Statute, *supra* note 281, at art. 65, para 1 (providing that "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.") (emphasis added).

[630] KELSEN, *supra* note 394, at 546 (pointing out that "As to the question to whom advisory opinions may be given, Article 65 of the Statute is not quite in conformity with Article 96 of the Charter. Under Article 65 of the Statute the Court is authorized to give advisory opinions only to a "body," that is to say, to a collegiate organ, consequently not to the Secretary-General, who—under Article 96, paragraph 2, of the Charter—may be authorized by the General Assembly to request such advisory opinions of the Court.").

[631] Szasz, *supra* note 410, at 499, 541 n.88, *quoted in* Schwebel, *Authorizing the Secretary-General of the United Nations to Request Advisory Opinions of the International Court of Justice*, *supra* note 615, at 875 (alteration in original).

[632] Phillip C. Jessup, *To Form a More Perfect United Nations*, 9 COLUM. J. TRANSNAT'L L. 177, at 187 (1970), *quoted in* Schwebel, *Authorizing the Secretary-General of the United Nations to Request Advisory Opinions of the International Court of Justice*, *supra* note 615, at 875 (alteration in original).

[633] K. KEITH, THE EXTENT OF THE ADVISORY JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE 38 (1971), *quoted in* Schwebel, *Authorizing the Secretary-General of the United Nations to Request Advisory Opinions of the International Court of Justice*, *supra* note 615, at 875—6 (alteration in original) (adding that "…It was surely the intention of the draftsmen of the Charter and Statute that the word 'body' in Article 65 of the Statute should be shorthand for 'authorized organs of the United Nations (including the General Assembly and the Security Council) and of the specialized agencies.").

In conclusion, either the UNSG or the Secretariat acting under his/her name should be regarded as a competent subject that can be authorized to make an advisory request in the NLL Conflict where the disputed waters appear to be connected with their activities. First of all, based on the collective construction of the relevant rules, i.e., the UN Charter Article 96, paragraph 2, Articles 97—102, and the ICJ Statute Article 65, paragraph 2, it should be concluded that the Court will have its personal jurisdiction and subject-matter/material over this hypothetical advisory request, if made by the UNSG or the Secretariat. Crucially, it should be noted that the Article 96, paragraph 2 does not require any specific qualification regarding the authority of a requesting body, but only its scope of activities.[634] As articulated in the UN Charter Articles 97—102, the Conflict should be deemed a type of international dispute or situation that requires attention from the UNSG and the Secretariat. Although Article 96, paragraph 2 provides a restricted sphere for the subject-matter/material jurisdiction over the UNSG's request, he/she may take into account a broad area of international disputes or situations given his/her competence to participate in all meetings of the other organs of the UN.[635] Indeed, the UNSG may at any time bring the Conflict before the UNSC so the latter could make a request for an advisory opinion, insofar as he/she determines that the Conflict poses a serious threat to the maintenance of international peace and security in the region due to the complex legal controversies, e.g., territorial acquisition, historic title, maritime sovereignty, boundary delimitation, and the law of the sea. Given the fact that the UNSG has from time to time conducted independent field investigations to gather relevant information without the authorization of the UNSC,[636] it is conceivable that he/she could refer the Conflict to the Court for its advisory opinion on its own motion at a certain point. In the event that any difference of opinion occurs between the UNSG and any Member States concerned in the

[634] Schwebel, *Authorizing the Secretary-General of the United Nations to Request Advisory Opinions of the International Court of Justice*, *supra* note 615, at 869—70.
[635] *But see id.* at 874.
[636] *Id.* at 872—3.

Conflict over making such independent request, the UNSG may rely on the Geneva Convention Article 8, Section 30 to bring the Conflict to the Court anyway, inasmuch as the provision allows him/her to be authorized to make such a request as long as it emerges from the scope of his/her activities.

Second, considering the efforts to authorize the Secretariat and/or the UNSG to make an advisory request made through the practices of the UN, it is conceivable that their request to institute an advisory proceeding be supported by the international community. As mentioned above, the concept "other organs of the UN" provided in the UN Charter Article 96, paragraph 2 has been construed as embracing both principal and subsidiary organs affiliated with the UN, thus including the Secretariat into the concept.[637] More significantly, it is also to be noted that the UNSGs have expressed confidence in requesting an advisory opinion on the premise that it would contribute to preventive diplomacy, peace-keeping and peacemaking. Indeed, it is undeniable that the Conflict is an international dispute and situation in which the UN has a direct concern, since it poses a security threat regionally and globally. Such confidence in the capacity of the UNGA to authorize him/her and his/her legal status as the chief administrative officer of one of the principal organs of the UN is effectively displayed in the series of the reports prepared by reference to the UN Charter Articles 96, paragraphs 2 and 98.[638] In practice, even without him/her making an advisory request, the UNSG has actively participated in the cited advisory proceedings, such as *Peace Treaties Case* and *Kosovo Opinion*. It should also be noted that the Second Phase of *Peace Treaties Case* was initiated by the then-Acting UNSG's filing a notification to the Court with respect to the non-compliance on the part of the States involved in the First Phase. On the one hand, it is very likely that some of the Permanent Members of the UNSC will express their dissatisfaction with a request made by either the

[637] ALJAGHOUB, *supra* note 241, at 46.
[638] *E.g.*, U.N. Secretary-General, *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-keeping: Rep. of the Secretary-General*, *supra* note 413, ¶ 14; U.N. Econ. & Soc. Council, *supra* note 631, ¶ 7.

UNSG or the Secretariat for an advisory opinion on the Conflict; on the other hand, it is likely that such a request will receive ample support from other Member States, given the absence of any strong objection raised at any time in the history of the UN. If such authorization is granted to the UNSG or the Secretariat, international legal scholars and experts are likely to give their support by relying on the political capacity influence that has been recognized for decades.

Notwithstanding the debate over who may be authorized to do so, it appears to have no practical relevance in terms of this hypothetical advisory request concerning the NLL Conflict. Even if the ICJ Statute Article 65, paragraph 1 uses the term "body",[639] there are many convincing alternatives to construe this usage in a manner consistent with the UN Charter Article 96, paragraph 2. First, in cases where the Secretariat has been authorized by the UNGA, it may vest its authorization in the UNSG so that he/she may file a request for an advisory opinion on the Conflict, since its political functions have been exercised through him/her.[640] Second, in addition to the political authority, all authorities retained to the Secretariat have been exercised by and under the UNSG's direction and supervision.[641] Although the UNSG cannot be technically defined as an organ under the UN Charter Article 7, it is not conceivable in actual practice for the Secretariat to independently request an advisory opinion on the Conflict without the UNSG's approval. Last but not least, it should be noted that the UNSG will be constitutionally and ultimately in charge of whatever actions and decisions made by the Secretariat.[642] In this regard, Keith's argument is persuasive: "It was surely the intention of the draftsmen of the UN Charter and the ICJ Statute that the word 'body' in Article 65 of the ICJ Statute should be shorthand for 'authorized organs of the UN, including the General Assembly

[639] As Professor Kelsen points out, this usage of the term gives rise to the disparity over the draftsmen's intention as taking only collegiate organ into consideration, thus not including the UNSG, if narrowly construed. *See supra* KELSEN, *supra* note 394, at 546.
[640] Szasz, *supra* note 410, at 541 n.88.
[641] Jessup, *supra* note 633, at 187.
[642] KEITH, *supra* note 634, at 38.

and the Security Council, and of the specialized agencies'."[643] Even assuming that the Secretariat has acquired an authorization of the UNGA to make an advisory request in pursuit of the judicial resolution of the Conflict, it is still the UNSG who has the final say.

Considering the attitudes of Member States toward the authorization of the Secretariat and the UNSG, the UNGA may be willing to vest its authority to make an advisory request in the UNSG in this case, based on the UNSG's prudence in discharging his/her responsibilities. However, it might be argued that, because the Secretariat does not represent any sovereign State, granting such authorization might significantly deviate from the "fundamental postulate of all the ICJ's judicial activities."[644] Moreover, under international law, the UNSG should not represent or advocate any interest of an individual sovereign State, nor is he/she able to act as a subject of international law as a natural person. Thus, to a certain extent, it might be seen as a significant exception to the basic rules and principles of the contemporary international judicial system in which only sovereign States and/or authorized international bodies are subject to the jurisdiction.[645] However, to "increase the likelihood that requests for advisory opinions be addressed to the Court, it is necessary to increase the number of entities empowered to approach its jurisdiction."[646] To this end, the UNSG acting on behalf of the Secretariat, which falls into the scope of the principal organs under the UN Charter Article 96, paragraph 2 that does not have an explicit authorization therefrom, should be so empowered.[647] In so doing, the Secretariat and the UNSG might be able to deal with political pressures and practical needs more properly by relying on the Court's authoritative judicial opinion since they are in charge of everyday administrative works. In practice, they are often faced with direct and

---

[643] *Id.*, *quoted in* Schwebel, *Authorizing the Secretary-General of the United Nations to Request Advisory Opinions of the International Court of Justice*, *supra* note 615, at 876 (alteration in original).
[644] Schwebel, *Authorizing the Secretary-General of the United Nations to Request Advisory Opinions of the International Court of Justice*, *supra* note 615, at 877 (alteration in original).
[645] *Id.*
[646] Szasz, *supra* note 410, at 513 (footnotes omitted), *quoted in* Schwebel, *Authorizing the Secretary-General of the United Nations to Request Advisory Opinions of the International Court of Justice*, *supra* note 615, at 877. (alteration in original)
[647] *Id.*

indirect pressures from other political organs and from Member States,[648] and it is needless to say that they are also required to take on "delicate and complicated assignments" in relation to the maintenance of international peace and security.[649] Thus, authorizing the UNSG appears to be a good starting point for referring the Conflict to the Court advisory jurisdiction so as to call the attention of other Member States concerned with the achievement of peace and stability in the disputed waters.

Although granting such authorization to the UNSG, whose legal status is debatable in the context of this hypothetical advisory request, is a major departure from the fundamentals and precedents of the ICJ jurisdictional mechanism, the UNSG's political status and responsibility as the head of the principal organ of the UN is in itself a fair guarantee against any possibility of abusive or excessive use. In defense of such authorization, it can be argued that, according to the UN Charter Article 99, the UNSG may still "seize the UNSC, not merely of questions of international law within the scope of activities, but of 'any matter which in his opinion may threaten the maintenance of international peace and security'.'"[650] Throughout the operation of advisory proceedings, such authority was granted to the UNSG, thereby allowing him/her to touch upon very delicate and complicated international disputes and situations in which critical national interests of sovereign States were at stake.[651] Thus, it seems paradoxical for the UNSC to be reluctant in authorizing the UNSG to make an advisory request in a case that has been defined as the regional security threat, in spite of the possibility of escalation, so that he/she lobbies the international community to pursue a peaceful settlement of the Conflict. Indeed, since the UN was created, there has been no abusive or excessive use of the authority by the UNSGs nor acts contrary to the collective interests of the Members States.[652]

---

[648] *Id.*
[649] *Id.*
[650] Schwebel, *Authorizing the Secretary-General of the United Nations to Request Advisory Opinions of the International Court of Justice*, *supra* note 615, at 878.
[651] *Id.*
[652] *Id.*

Historically, the UNSGs have been extremely cautious in exercising their authority under Article 99.[653] Rather, it can be said that the UNSGs have been neglectful in using their authority to contribute to the resolution of the Conflict. Inasmuch as the internal decision-making process of the Secretariat is less complicated than that of the UNSC or the UNGA,[654] authorizing the UNSG to make this hypothetical advisory request will be an easier route to the construction of a dispute-resolution framework for the two Koreas in this case and in other disputes between them.

c. Clarifying Subject-Matter/Material Jurisdiction over This Case

Having established the personal jurisdiction of the ICJ over this hypothetical advisory request seeking for the Court's opinion on the NLL Conflict, it is necessary to identify its subject-matter/material jurisdiction. The issues to be addressed are whether a controversy contained in the Conflict is a legal question as set forth in the relevant institutional documents; whether the Court is entitled to give its opinion on such a controversy involving legal disputes between sovereign States through its advisory proceeding; and whether the Court will accept any objections raised to prevent the establishment of its subject-matter/material jurisdiction.

For the ICJ to exercise its subject-matter/material jurisdiction over an advisory request, a question contained in such request must be legal by its nature. According to the UN Charter Article 96, both the UNGA and the UNSC may request for an advisory opinion on "any legal question"; in contrast, other organs of the UN and specialized agencies are confined to "the scope of their activities" in the light of the subject-matter/material jurisdiction of the Court. As for the Court, the ICJ Statute Article 65, paragraph 1 stipulates that it may answer to "any legal

[653] *Id.*
[654] *Id.*

question" insofar as it is properly submitted under the UN Charter. In fact, in advisory precedents like *Kosovo Opinion* and *Interpretation of Peace Treaties (First Phase)*, the Court reviewed the legality of the material issues therein.[655] However, in *Western Sahara*, the Court made its position clear on this issue: "Legal questions are *framed in terms of law* and *raising problems of international law*…are by their very nature *susceptible of a reply based on law*…and appear…to be questions of a legal character."[656]

In terms of advisory proceeding, then, it is essential to clarify whether a dispute or a situation occurring between sovereign States or between international organizations contains an issue that can fall into the scope of the term "legal question." As indicated in the aforementioned provisions and precedents, the ICJ has widely construed the term, stating that its subject-matter/material jurisdiction encompasses a "legal dispute" within the boundary of advisory proceeding.[657] The Court once exercised its subject-matter/material jurisdiction in *Israeli Wall*, in which the dispute between the State of Israel and the Palestinian was the central topic, involving a variety of legal issues under international law, such as self-defense right, state of necessity, military exigencies, national security, freedom of movement and blockade of access. Similarly, in *Western Sahara* where issues over the legal status of the territory in question, sovereignty claim, and rightful ownership were disputed, the Court also moved forward to the merits stage to render its advisory opinion.

However, since an objection against the subject-matter/material jurisdiction of the ICJ may at any time be raised, the Court has established its jurisprudence to deal with cases where political, factual, and abstract features were intermixed with legal one.[658] First, though the

[655] In *Kosovo Opinion*, the central issue was the legality of the unilateral declaration. In *Interpretation of Peace Treaties (First Phase)*, the central issue was the existence of the concerned States' obligation to follow the settlement-of-disputes provisions, thus requiring legal deliberation.
[656] Western Sahara Case, *supra* note 422, at 18—9, *cited in* ALJAGHOUB, *supra* note 241, at 39.
[657] ALJAGHOUB, *supra* note 241, at 57—8.
[658] *See, e.g.*, Expenses Case, *supra* note 400, at 155.

Court is wary of "politicizing,"[659] the Court tends not to be interrupted by "the political nature of the motives."[660] Contrary to domestic judiciaries, the Court has not been reluctant to handle political features, nor has it been hesitating to generate its political influence through its advisory proceedings. Given that most international disputes and situations are complicated and have been composed of such intermixed factors, the Court tends to deduce legal component, if necessary, from such intermixture in its discretion.[661] Second, the Court in *Namibia Case* affirmed that the term "legal" provided in the UN Charter Article 96 should not be construed as a contradictory one to the term "factual" in establishing the subject-matter/material jurisdiction of its advisory proceeding.[662] Even if some factual elements are blended in a given advisory request, the Court is likely to take them altogether into account with legal ones in constructing the legal question that needs to be adjudicated.[663] Third, although the lack of concreteness might cause an issue over the abuse of jurisdictional competence of the Court, it should be remembered that the Court has always been reluctant to accept any of objections based on such claim. The Court once found that it would apply relevant legal rules to render an advisory opinion on a particular question concerning an international dispute or situation regardless of whether it is abstract or concrete.[664] As long as an advisory request is cautiously drafted to require a generally applicable legal opinion on certain legal controversy concerning

[659] *Id.* at 58—9. *See* Admission Case, *supra* note 427, at 61 (holding that "…The Court cannot attribute a political character to a request which, framed in abstract terms, invites it to undertake an essentially judicial task, the interpretation of a treaty provision…."); *see also* Expenses Case, *supra* note 400, at 155; Interpretation of Agreement of 25 March 1951 between the WHO and Egypt, *supra* note 427, at 87.
[660] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, *supra* note 294, at 234.
[661] ALJAGHOUB, *supra* note 241, at 60 (quoting U.N. Secretary-General, 8, U.N Doc. A/41/1 (1991) (stating that "Even those disputes which seem entirely political have a clearly legal component. If, for any reason, the parties fail to refer the matter to the Court, the process of achieving a fair and objectively commendable settlement and thus defusing an international crisis situation would be facilitated by obtaining the Court's advisory opinion.")).
[662] Namibia Case, *supra* note 401, at 27.
[663] Western Sahara Case, *supra* note 422, at 19. *See also* Eastern Carelia Case, *supra* note 304, at 28.
[664] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, *supra* note 294, at 237; Israeli Wall Case, *supra* note 397, at 236. *See also* Admission Case, *supra* note 427, at 61; Namibia Case, *supra* note 401, at 27.

a dispute or situation, such requests are not necessarily required to be "narrowly defined and confined to a very specific point." [665]

As mentioned above, the first issue to be answered for this sub-section is whether a question included in this hypothetical advisory request can be regarded as a "legal" one over which a competent organ of the UN is entitled to seek an advisory opinion of the ICJ. Considering the fact that the two Koreas have debated over the legal status of the NLL and equitable maritime delimitation for decades, a competent organ of the UN will be able to frame an advisory request in terms of law, raising concerns of international law, as explored in Chapter I. Therefore, the legal character of the question in this hypothetical advisory request seems to be apparent to uphold the establishment of the subject-matter/material jurisdiction of the Court over this case.

In determining the subject-matter/material jurisdiction of the ICJ in this case, the second issue to be answered is whether the Court is eligible to discuss the NLL Conflict through its advisory proceeding even though such conflict between sovereign States might be more appropriately handled in its contentious proceeding to secure effectiveness. Above all, it should be noted that a competent organ of the UN may make an advisory request on an international dispute or situation involving legal controversies insofar as it is linked with the interest of the UN.[666] The relevant jurisprudence of the Court is that its subject-matter/material jurisdiction in advisory proceeding covers the concept "a legal dispute" over which it can render its judicial opinion for the maintenance of international peace and security. In practice, the Court proceeded in both *Israeli Wall* and *Western Sahara* where the disputes were concerned about complex legal controversies between sovereign States and international entities. By the same token, given that the Conflict contains legally disputable controversies pertaining to, for

[665] ALJAGHOUB, *supra* note 241, at 63.
[666] ALJAGHOUB, *supra* note 241, at 57—8.

instance, territorial sovereignty and maritime boundary delimitation, there is a strong possibility that the Court will establish its subject-matter/material jurisdiction over this case.

The last issue to be answered is whether the ICJ will accept any objection claiming the intermixed political or factual elements or abstract assertions contained in this hypothetical advisory request. First, since it is undeniable that the Conflict has been used as a political leverage via diplomatic negotiations by the States concerned therein, the Court is not likely to put so much emphasis on either political motives, political elements, or anticipated political impacts on the political dimensions in the East Asian region. Thus, once this request is lodged, the Court will be able to reformulate a question contained therein into a legal one, e.g., whether the NLL has acquired its legal status as a de facto demarcation line in the disputed waters under international law, whether South Korea has acquired any sovereign right over the Line and its vicinity under international law, or how to introduce an equitable maritime delimitation to the disputed waters. Second, as the Conflict has caused actual armed clashes between the forces of both sides, as well as diplomatic turmoil, factual components must be inseparably blended in this request. Nevertheless, given its jurisprudence, the Court is expected to find that such facts will not affect the legality of the request brought before it,[667] because any mixed question of law and fact will be deemed a legal question.[668] Last, the abstractness will not be a formidable basis of an objection in this case, since there is very low possibility that the question contained in this hypothetical advisory request will be purely hypothetical. Given that the UNGA and the UNSC cautiously drafted their requests to attenuate the abstractness of questions, as examined in the case analysis on the precedents in Chapter III, an organ seeking an advisory opinion of the Court on this case is likely to reconstruct its quest by reference to substantive legal issues

[667] Namibia Case, *supra* note 401, at 27.
[668] Western Sahara Case, *supra* note 422, at 19. *See also* Eastern Carelia Case, *supra* note 304, at 28.

involved therein.[669] Most importantly, it should be remembered that the Court has never accepted any of the objections claiming the abstract nature of questions.

In conclusion, the ICJ is expected to establish its subject-matter/material jurisdiction in this hypothetical advisory request seeking its opinion on legally disputable issues related to the NLL Conflict. Inasmuch as a competent organ of the UN has the most potential of asking the legal status of the NLL or equitable maritime delimitation for the disputed waters, it is reasonable to conclude that the legal character of the question contained in this request conforms to the UN Charter Article 96, paragraph 1 and the ICJ Statute Article 65, paragraph 1. In addition, as seen in *Israeli Wall* and *Western Sahara*, it is also expected that the Court will find the interest of the UN pertinent—seeking the maintenance of international peace and security. Furthermore, in the absence of any compelling reason to do so, any objection claiming political, factual, and abstract features is not likely to be accepted.

d. Matters Relating to Consensual/Consent-based Jurisdiction in This Case

To establish the advisory jurisdiction of the ICJ over this case concerning the NLL Conflict, it should be determined whether the state consent is required: an issue over the consensual/consent-based jurisdiction. Considering the complex politico-military circumstance surrounding the Korean Peninsula, it is highly probable that any of the States involved in this Conflict may contest the exercise of the Court's advisory jurisdiction in this case. As discussed above, it is the established principle, under the international justice system, that an international court or tribunal is not generally entitled to render its judgment on a

[669] *See* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, *supra* note 294, at 237; Israeli Wall Case, *supra* note 397, at 236. *See also* Admission Case, *supra* note 427, at 61; Namibia Case, *supra* note 401, at 27.

particular issue unless the state consent is submitted by all of the litigating States to their judicial authority.[670]

Based on its institutional status as the principal instrument of law for the UN and by reference to the non-binding effect of its advisory opinion, the ICJ has established its jurisprudence as follows: Consensual/consent-based jurisdiction should not be a prerequisite condition to its exercise of advisory jurisdiction when there is no compelling reason,[671] e.g., judicial propriety[672] or judicial restraint, for the Court to voluntarily refrain from doing so. In so finding, however, the Court did not take into account the progress of international disputes or situations between and among States and/or international agencies and/or organs.[673] In *Peace Treaties Case*, the subject States opposed to the subject-matter/material jurisdiction of the Court, arguing that the Court's authority should not interfere with domestic matters relating to basic human right and fundamental freedoms. In its response, however, the Court held that its advisory proceeding was originally designed to assist the UN, Member States, and organs and agencies by providing judicial guidance on the interpretation and application of international law.[674] In this view, therefore, no state consent was deemed necessary by the Court as a precondition to commence its advisory proceeding. In *Western Sahara Case*, the Court reaffirmed that it did not require any state consent from the interested States to uphold its competence to render an advisory opinion on that legal question at hand even if there was

[670] KOLB, *supra* note 255, at 185. *See* East Timor, *supra* note 336, at 101.
[671] *See* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, *supra* note 294, at 235; Expenses Case, *supra* note 400, at 155.
[672] *See* Western Sahara Case, *supra* note 422, at 24—5, *cited in* ALJAGHOUB, *supra* note 241, at 104.
[673] Namibia Case, *supra* note 401, at 23—4 (holding that "it would not only remain faithful to the requirements of its judicial character…but also discharge its functions as the principal judicial organ of the UN.") (alteration in original); Applicability Case, *supra* note 306, at 188—9 (finding that "the advisory opinions on legal questions are advisory, not binding. As the opinions are intended for the guidance of the United Nations, the consent of States is not a condition precedent to the competence of the Court to give them…In the present case, the Court thus does not find any compelling reasons to refuse an advisory opinion after considering the principle of the jurisdiction *ratione consensus*.") (alteration in original).
[674] Peace Treaties Case, First Phase, *supra* note 306, at 70—1, *cited in* ALJAGHOUB, *supra* note 241, at 102. *See also* Genocide Case, *supra* note 443, at 19; Israeli Wall Case, *supra* note 397, ¶¶ 46—9 (explaining that "the subject matter of the request is concerned with the powers and responsibilities of the UN in relation to international peace and security.") (alteration in original).

an on-going international conflict between sovereign States.[675] And yet, the Court left open a possibility in *Western Sahara Case* to decline certain advisory requests if deemed appropriate due to its judicial propriety.[676] In other words, the Court may refuse to render its advisory opinion in certain circumstances where giving its opinion would result in circumventing the fundamental principle of the international justice system.[677] Notably, in *Israeli Wall*, the Court also found no compelling reason to refuse the request at hand.[678]

The jurisprudence of the ICJ on this issue can be better identified through the contextual interpretation of the relevant articles of the UN Charter, which prescribe the personal jurisdiction and subject-matter/material jurisdiction in the Court's advisory proceeding. First, the UN Charter Article 96 explicitly provides that an advisory request must be submitted by "duly organized organ[s], agencies, or entities"[679] among which is empowered by either the UN Charter or any resolution of the UNGA. Based on the interpretation of such context, therefore, a State involved in an international dispute or situation is not generally entitled to raise an objection against the Court's advisory jurisdiction, since it is not originally regarded as the subject to the personal jurisdiction of advisory proceeding. Second, it should be noticed that an advisory proceeding was not invented to encourage the Court to participate directly in the dispute-resolution process between sovereign States. Rather, as the sole and primary judicial institution affiliated with the UN, the Court is occasionally called upon by an advisory request to express it non-binding but persuasive judicial opinion on a particular controversy contained in certain international disputes or situations to enhance the operation of the UN, its organs and agencies. Thus, it is problematic to conclude that the subject-matter/material

[675] Western Sahara Case, *supra* note 422, at 24—5, *cited in* ALJAGHOUB, *supra* note 241, at 104 (alteration in original).
[676] Western Sahara Case, *supra* note 422, at 24—5.
[677] *Id.* at 25.
[678] Israeli Wall Case, *supra* note 397, at ¶ 43—50.
[679] U.N. Charter art. 96.

jurisdiction in advisory proceeding is designed solely for the settlement of an international dispute or situation.

The ICJ has clearly identified its preferences on such issues by throwing out most of the raised objections claiming the state consent to be a prerequisite to the establishment of its advisory jurisdiction.[680] In so doing, the Court was firm in establishing its advisory jurisdiction as against such objections, taking a detour to go around the fundamental principle of *Eastern Carelia* achieved by the PCIJ.[681] As the principal judicial institution of the UN,[682] the Court decided to engage more actively in international disputes and situations in which sovereign States and/or organs and agencies were disputing over legal controversies. It appears that the Court has attempted to maintain a balance between the administration of justice for the international community and its institutional function as part of the UN.[683] Importantly, the Court in such precedents found that the concept of judicial restraint should not play a crucial role in the establishment of its advisory jurisdiction. In finding so, the Court continued its advisory proceeding in cases where the state consent of the States involved therein was *in absentia*.

In spite of these rulings, international scholars and lawyers continue to debate this issue, since the relevant instituting instruments stipulate no provision directly governing such issue. On the one hand, a group of scholars and lawyers assert that the state consent should be a necessary precondition to the establishment of advisory jurisdiction of the ICJ[684] in consistent

---

[680] The Court exceptionally declined to proceed the request was in *Legality of the Threat or Use of Nuclear Weapons* by holding that "…the very particular circumstances of the case, among which were that the question directly concerned an already existing dispute…." Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, *supra* note 294, at 235—6, *cited in* ALJAGHOUB, *supra* note 241, at 101.
[681] Eastern Carelia Case, *supra* note 304, at 27—9.
[682] *See* Difference Relating to Immunity From Legal Process of a Special Rapporteur of the Commission on Human Rights, *supra* note 445, at 78 (stating that "the Court's answer to requests for advisory opinions represents its participation in the activities of the Organization, and, in principle, should not be refused."); Peace Treaties Case, First Phase, *supra* note 306, at 71, *cited in* ALJAGHOUB, *supra* note 241, at 95.
[683] ALJAGHOUB, *supra* note 241, at 112 (quoting the Court's renowned holding that "no State can, without its consent, be compelled to submit its dispute with other States to adjudication.").
[684] ROSENNE, *supra* note 241, at 1014; Pomerance, *supra* note 434, at 318—9.

with the foundation of the contemporary international justice system: Voluntary submission on the part of a sovereign State to the jurisdiction of international courts and/or tribunals is necessary.[685] Based on the collective interpretation of the UN Charter Articles 14, 37, and 96, on the contrary, another group of scholars and lawyers argues that the fact that any dispute or situation between sovereign States and/or international organizations is pending should not bar the Court from expressing its advisory opinion.[686] According to this view, the Court is capable of responding to either the UNGA's or the UNSC's request for its advisory opinion, irrespective of an objection raised by an interested State against its exercise of jurisdictional authority.[687]

In this hypothetical advisory request concerning the NLL Conflict, the ICJ, whose obligation is linked with its peaceful resolution as the principal judiciary of the UN, is likely to proceed to the merits stage in the absence of any compelling reason not doing so, given that it holds that the state consent should not be a prerequisite to the establishment of its advisory jurisdiction. As in *Western Sahara Case*, the Court is not likely to take any state consent of States interested in this Conflict into account at a preliminary stage of this case. Inasmuch as the dispute over the legal status of the NLL and equitable maritime delimitation has lasted for decades between the two Koreas, the Court is likely to find a reason to move forward to the merits stage to render its opinion. Moreover, given the fact that the efforts to conclude a negotiated settlement on this Conflict have not been successful, it is expected that such a request will not be construed as a way to circumvent the fundamental principle of *Eastern Carelia*. Rather, it will be understood as an effort pursuing the maintenance of the regional peace and security in the disputed waters, which is closely connected with the international peace and security as a whole. As with *Israeli Wall*, the Court is likely to rule that the peaceful

[685] ALJAGHOUB, *supra* note 241, at 98.
[686] CONFORTI, *supra* note 436, at 270; Conforti, *supra* note 437, at 86.
[687] Conforti, *supra* note 437, at 86.

settlement of the Conflict is a matter of grave concern of the UNGA and other primary organs of the UN under the UN Charter.

Regardless of whether there is any state consent on the part of the States involved in the NLL Conflict, moreover, the ICJ is likely to conclude that an objection raised by such States against the establishment of its advisory jurisdiction is acceptable no matter what grounds they are on, based on the collective interpretation of the relevant provisions of the UN Charter. First, considering the personal jurisdiction of the Court in an advisory proceeding, no States will be deemed a subject to the Court's advisory proceeding initiated by a competent organ of the UN. Insofar as they are deemed to be non-subject in this case, the Court will not conclude that the absence of the state consent on their part prevents the establishment of its advisory jurisdiction. Second, the objective of advisory proceeding is not to find an ultimate resolution of an international dispute or situation, but to assist the UN, its organs, and agencies by providing an equitable solution (or at least reliable legal guidance) in accordance with their competence and activities. Therefore, this hypothetical advisory request may not be submitted to conclude the ultimate resolution of the Conflict, but to provide proper legal assistance for the two Koreas and, if necessary, the UN. Although the Court's opinion is acknowledged as persuasive and authoritative to a certain extent, it should be remembered that the Court will prefer not to directly engage in the ultimate settlement of the Conflict. This can also be supported from *Peace Treatise Case*, where the ICJ expressly stated that its advisory opinion provides the UN, Member States, and other agencies and organs with judicial interpretation and application of international law.

Given that the ICJ has dismissed most of the objections asserting the necessity of the state consent in its advisory proceeding, the Court is also unlikely to accept any similar assertion in this case insofar as it finds no compelling reason to restrain itself. As long as the Court finds that its institutional function is not damaged by exercising its advisory authority in

this case, the Court will decide to actively participate in pursuit of the administration of international justice. Moreover, it should be noted that neither judicial propriety nor judicial restraint can offer an absolute basis of an objection for any of the States interested herein to prevent the establishment of the advisory jurisdiction of the Court.

All things considered, if any of the competent organs of the UN listed in the previous discussions refers this hypothetical advisory request concerning the NLL Conflict to the advisory jurisdiction of the ICJ, the Court is highly likely to proceed to fulfill its role and responsibility as the principal judicial organ of the UN under the contemporary international system. Above all, the Court held in its precedents that the state consent is not a prerequisite to the establishment of its advisory jurisdiction. Thus, if there is no compelling reason to refrain from proceeding with the establishment, the Court will decide to move forward to the merits stage in this case. Based on the contextual interpretation of the relevant provisions, none of the States interested in this Conflict will be deemed fit to raise an objection against the Court's advisory jurisdiction. Since the Court will not be able to propose a solution with executive force to this Conflict, it is more likely to proceed with this case in support of the UN.

C. Overcoming Objections Claiming Non-admissibility of a Request or Exercise of Judicial Discretion

1. Ascertaining the Admissibility of This Case

Another question arising from this hypothetical advisory request is whether any objection claiming the lack of admissibility will block the ICJ from moving forward to the merits stage after it has established its advisory jurisdiction. Considering the jurisprudence of the Court discussed in Chapter II, an issue over the admissibility needs to be examined from

various angles. First, who can raise an objection claiming lack of admissibility in a given request? Any State involved in this case may bring up a preliminary objection of this sort, asserting that the Court should not exercise its judicial capacity. Second, at what stage may such an objection be raised? Since the admissibility issues inevitably touch upon "the validity of a claim,"[688] they should be determined after the Court has assumed each of its jurisdictions at the preliminary stage.[689] The admissibility of a claim/request relates to whether certain legal condition precedents, e.g., time limit and litispendence, have been met for the Court to move forward prior to adjudicating on the merits.[690] Therefore, in practice, the Court determines a preliminary objection to the jurisdiction before it determines an objection to the admissibility of a claim/request. Specifically, even when the Court has already established its jurisdiction over the case, the Court will also be required to consider admissibility issues raised at the preliminary stage to proceed to the merits. Third, what issues will the Court contemplate in response to such objections? As issues pertaining to the admissibility are often directly connected with an advisory request, the Court will explore both procedural and substantive aspects of the Conflict, including all documents and evidence submitted to it rather than examining general interests, policies, or principles.[691] With consideration given to the particular context of this request, the Court will also determine the existence of any errors or omissions in the request.[692] However, unlike jurisdictional issues, the Court will not bring up the lack of admissibility in such requests on its own motion, but will ask any involved State to raise any relevant issues in preference to moving forward to the merits stage.[693] To some extent,

[688] *Id.*
[689] *Id.*
[690] *Id.*
[691] *Id.*
[692] *Id.*
[693] Based on the principle of *compétence de la compétence* prescribed in the ICJ Statute Article 36, Paragraph 6, the Court has the right to determine the existence of its jurisdiction to give an advisory opinion or to render a judgment in a contentious case. ALJAGHOUB, *supra* note 241, at 37. *Id.* Nonetheless, for example, the existence of a dispute – which falls within the scope of admissibility issues – may be treated exceptional so it may be automatically raised by the Court. *Id.*

the Court may be able to separate a question of jurisdiction from the merits, while admissibility may be more closely attached to the merits itself, thereby making separation more problematic.[694] Last, what kind of admissibility objections are expected to be brought before the Court? In practice, as there is no defined category either in the legal sources or in the jurisprudence about the types of admissibility objection, the Court in this case is likely to encounter with diversified grounds for admissibility.[695]

Throughout its existence, the States involved in the ICJ proceedings have presented a wide range of admissibility objections based on various grounds in both contentious and advisory proceedings. To date, however, only one objection claiming "non-availability of essential factual information" was accepted by the PCIJ at the preliminary stage in *Eastern Carelia*. In the precedents reviewed in Chapter III, the admissibility objection, which might have an implication for this doctoral project, was raised in *Interpretation of Peace Treaties*, *First Phase*, where the three signatory States had asserted their position on the following grounds: The arbitral procedure provided in the Peace Treaties of 1947 for the settlement of disputes relating to its interpretation or application should not be placed at issue since there was no dispute. In response, by reference to the functional difference between contentious and advisory proceedings, the Court decided that it would have to discover the existence of a dispute for the purpose of enlightening the UNGA in regard to the application of the treaty since there were claims brought against those States to be adjudicated.[696]

So, judging from the preceding advisory cases, what types of admissibility objections are anticipated to be raised to prevent the establishment of the ICJ advisory jurisdiction over this case? First, as witnessed in *Interpretation of Peace Treaties*, *First Phase*, the non-existence of an international dispute or situation may cited. Although there has been no large-scale armed

[694] *Id.*
[695] BROWNLIE, *supra* note 257, at 711.
[696] *Id.*

conflict after the Bombardment of *Yeonpyeong* Island, the NLL Conflict has been at the center of the regional confrontation that can always be escalated into a large-scale armed conflict between the two sides, including the US and China. Second, the history of political and diplomatic negotiations held to draw a negotiated settlement for the Conflict may also be adduced as a basis of admissibility objections. However, as pointed out at the outset of this project, such negotiations have not led to any practical and effective solution to the Conflict. Therefore, it is not likely to be considered a persuasive ground for the Court to dismiss the admissibility of this request. Third, it may be argued whether a competent organ of the UN making this request has the necessary standing. Based on the discussions above, though the Secretariat acting through the UNSG may still be an option to be counted, either the UNGA or the UNSC appears to be the most promising subject to refer the Conflict to the Court's advisory proceeding. If so, the lack of necessary standing should not be a basis for an admissibility objection, given the scope of roles and responsibilities of both organs prescribed in the UN Charter. Last, it may also be disputed whether any other compulsory means provided in the ICJ Statute have been exhausted in preference to the Court. Apart from the fact that the States concerned in this Conflict have made the decades-long efforts to find a solution thereto through political and diplomatic channels, no compulsory means need to be necessarily exhausted by the two Koreas, as well as other States concerned herein, before commencing the Court's advisory proceeding.

Considering the jurisprudence established by the ICJ related to the admissibility objections, it is unlikely that any admissibility objections will be accepted by the Court to prevent it moving forward to the merits stage. As mentioned, the concept of admissibility was originally designed to cast doubt on the competence of the Court after it being established the jurisdictional authority over a given claim/request brought before it. In response to an objection claiming the admissibility, the Court has explored a wide range of issues that are closely linked

with the merits of the cases on a case-by-case basis. As a State interested is not restricted in raising an admissibility objection, it will be able to plead such objection based on whatever grounds to prevent the Court from proceeding to the merits stage of this case. In conclusion, although any objection claiming the non-admissibility of this request is likely to delay the process of an advisory proceeding of the Court in this case, it is not conceivable that such objections will entirely prevent the Court from rendering its advisory opinion.

2. Issue over Exercising Judicial Discretion in This Case

The final issue to be determined is whether the ICJ will exercise its discretion after having established each type of its jurisdictions over this hypothetical request. The Court has established a principle that it may refrain from exercising its advisory jurisdiction in its sole discretion even after it confirms both personal and subject-matter/material jurisdictions, if and when it finds any compelling reason to do so. This was clarified by the Court in *Legality of the Threat or Use of Nuclear Weapons*: "The Court may give an advisory opinion…the ICJ Statute leaves a discretion as to whether or not it will give an advisory opinion that has been requested of it, once it has established its competence to do so."[697] In *Kosovo Opinion*, the Court decided not to use its discretionary power. Similarly, in *Israeli Wall*, the Court contended that it should turn down the advisory request due to judicial propriety, yet nevertheless decided to move forward in that proceeding, ruling that insofar as its conclusion would be based on sufficient information and evidence, and expected influence would not be unequivocal, it would be entitled to deal with the legal and political elements bound up with the issue at hand.

[697] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, *supra* note 294, at 234—5, *quoted in* KOLB, *supra* note 255, at 272.

Based on the rulings established in the preceding advisory opinions and the self-awareness of the ICJ about its role and responsibility as the primary judicial organ of the UN, it is logical to conclude that this hypothetical advisory request concerning the NLL Conflict will be adjudicated by the Court. In support of this conclusion, it should first be noted that the Court has never used its discretionary power to reject any advisory requests.[698] In addition to this, the Conflict has many similar features in many aspects with *Kosovo Opinion* and *Israeli Wall* where the Court did not turn down the advisory requests by using its discretionary power, due to the gravity to the States concerned and the potential impact on future regional and international relations that would be achieved through a peaceful resolution. Most importantly, however, the Conflict posed and will pose a direct threat to the regional and global security that requires attention from the UN and its principal organs, i.e., the UNGA, the UNSC, and the Secretariat. Indeed, the Court tends to accept an advisory request made by such political organs of the UN more liberally,[699] whereas it tends to be more "restrictive and cautious"[700] in accepting an advisory request from the specialized agencies. Given that the Court placed emphasis on its role and responsibility within the organization as the principal judicial authority under the contemporary international order,[701] the Court is not likely to find any compelling reason to refuse the request in this case. On the premise that the Court determines that accepting this request will not disrupt its authority in contentious proceeding,[702] the Court will exercise judicial authority to promote its judicial function and integrity by applying legal norms and

[698] In the cases of *Eastern Carelia* and *Legality of the Threat or Use of Nuclear Weapons*, the Court refused to answer, explaining that it had no jurisdiction at all over the requested matters.
[699] *Id.*
[700] ALJAGHOUB, *supra* note 241, at 38.
[701] Peace Treaties Case, First Phase, *supra* note 306, at 71 (holding that "its participation in the activities of the Organization, and, in principle, should not be refused."), *quoted in* KOLB, *supra* note 255, at 273.
[702] The following is a list of expected situations where the Court may refuse to exercise its advisory jurisdiction due to the concerns over its principal function over contentious cases: a case is about to be submitted to the contentious procedure; advisory proceedings are premature; there is a risk that third parties will lose some of their procedural rights; the proceedings are, given the circumstances, a method of directly bypassing the contentious procedure; it irremediably lacks the necessary facts to be able to deliver a judicial act deserving that name; and the advisory proceedings will in some other way oblige the Court to act contrary to its prestige and integrity. KOLB, *supra* note 255, at 275.

principles in an equitable manner, preventing arbitrary and capricious interpretation and application of international law to the Conflict.[703]

D. Conclusion of This Chapter

Based on the discussions above, it can be doctrinally concluded that there is no decisive disruptive factor at the preliminary stage impeding the ICJ's exercise of its jurisdictional authority over the NLL Conflict, regardless of which primary organ is actually making this hypothetical advisory request. As explained in Section B of this chapter, an advisory request made appropriately and legitimately by one of the competent primary organs of the UN, though the competence of the Secretariat and the UNSG acting on behalf of the Secretariat may be controversial, to receive the Court's opinion on the Conflict will meet the requirements necessary to get through the preliminary stage. More to the point, any objection based on other grounds, such as the lack of admissibility, is not likely to be accepted by the Court given its jurisprudence established throughout the preceding proceedings.

After verifying the possibility of establishing each type of the jurisdictions in this case, it is possible to confirm that an advisory proceeding of the ICJ should be considered the most promising alternative for the construction of a dispute-resolution framework for the NLL Conflict under the present international judicial system associated with the UN. First, based on the collective interpretation of the relevant legal instruments, it can be concluded that the Court will establish its personal jurisdiction over this hypothetical advisory request seeking an opinion on the Conflict in spite of any *ultra vires* objection raised against it. Although the UNGA, which is provided broader competence by the UN Charter, appears to be a more realistic and valid body to make this request due to the complexities among the Permanent

[703] *See* KOLB, *supra* note 255, at 274.

Members of the UNSC, it should also be noted that the UNSC is originally entrusted with a primary authority and responsibility for the maintenance of international peace and security. Second, in order to increase the likelihood that the Conflict is submitted to the Court's advisory jurisdiction, the UNSG, acting on behalf of the Secretariat as the head of the principal organ of the UN, may be also entrusted to make this request. Even though there might be a concern about abusive or excessive use of authority by the UNSG or the Secretariat acting through it, this will contribute to more attempts to settle international disputes or situations in a more equitable way in compliance with the established rules and principles of international law. Third, as the Court has interpreted the sphere of subject-matter/material jurisdiction in a flexible manner in connection with its advisory proceeding, the controversies arising out of the Conflict will fall into the scope of the term "legal question," regardless of certain political or factual elements or abstract compositions intermixed with legal ones. Last, as the Court has persistently held, the state consent is not a prerequisite to the establishment of its advisory jurisdiction instituted by a request of an international body. Therefore, it is reasonable to conclude that an advisory proceeding of the Court should be regarded as the most promising alternative to construct a judicial forum for the settlement of the Conflict where obtaining the state consent from any of the States concerned seems unattainable.

Although other types of objections may be raised to disrupt the ICJ moving forward to the merits stage in this case, such objections seem unlikely to stymie the process of the Court, given the established jurisprudence of advisory proceedings. First, any State involved in the Conflict may pose a preliminary objection of admissibility to disrupt the Court's proceeding. Even though such State may invoke whatever grounds in support of its objection, a question of admissibility tends to be closely attached to the merits of a request at issue. Considering the Court's findings on this matter, it is unlikely that a State will effectively extract a persuasive ground of non-admissibility from the facts and circumstances surrounding the Conflict. Second,

it is not conceivable for the Court to find any compelling reason to refrain from rendering its advisory opinion in this case where the Conflict posed and will continue to pose a serious security threat to the region and the globe. In *Kosovo Opinion* and *Israeli Wall Case*, in which both factual circumstances and legal questions are analogous to those surrounding the Conflict, the Court proceeded through its procedures to render its advisory opinions on the basis that the issues posed a direct concern to the international community.

CONCLUSION

Due to the lack of its legal basis in any form of mutual agreement between the parties to the KAA, the valid legal status of the NLL as a maritime demarcation line and equitable maritime delimitation for the disputed waters have been at issue for decades, giving rise to continuing military confrontations between the two Koreas in the Yellow/West Sea. Though some facts still remain unconfirmed, it is generally recognized that the Line was originally designated as a line of internal operational control by the UNC to prevent South Korean naval and civilian boats from navigating too far north by mistake or with intention after the execution of the KAA. Inasmuch as the delimitation of land and/or maritime jurisdiction is regarded as one of the most crucial elements of an international peace treaty or armistice agreement, it is hard to incorporate the Line into the KAA system in the absence of any mutual consent. Moreover, it is also difficult to confirm that the Line has been recognized by the parties as a maritime demarcation line, considering the decades-long dispute over its validity and legality since the West Sea Incidents occurred in 1973. Since the States concerned in the Conflict have not been able to draw a negotiated settlement based on mutually acceptable international standards regarding the status of the Line and boundary delimitation through their political and diplomatic efforts, it was inevitable that military conflicts would flare over the Line and its

vicinity, including the First and Second *Yeonpyeong* Naval Skirmishes, the Bombardment of *Yeonpyeong* Island and the Sinking of South Korean Warship *Cheonan*.

In recognition of a need to relieve such heated politico-military tensions in the disputed waters, the States concerned in the NLL Conflict have tried to resolve the dispute, since they agree that the resolution of the Conflict is a starting point for the construction of a peace regime in the Korean Peninsula. Unfortunately, however, none of these attempts have been successful thus far. Throughout the Conflict, a variety of arguments and claims have been proffered for and against the legal status of the NLL, as well as options for a new maritime delimitation in the disputed waters. When reconciliation was favored by the governments of the two Koreas, there were meetings at various official levels to seek possible ways for the peaceful use and development of the disputed area. At that time, the West Sea Initiative was announced by the Roh Moo-hyun administration in order to implement such initiatives, though that was not followed up by the subsequent administrations led by the conservative party. There were also a series of meetings held to deal with the aftermath of the armed conflicts between the two sides. Nevertheless, however, none of these meetings led to any ultimate solution to the Conflict. Even if the two Koreas signed off multiple documented agreements, i.e., the 1992 Basic Agreement and the Protocol on Non-aggression attached thereto, those agreements did not facilitate a final resolution of the Conflict due to the absence of an action plan specifying concrete steps for implementing the agreed issues pertaining to the status of the Line and redrawing thereof. At the 3rd inter-Korean summit held in 2018, the heads of the two Koreas expressed their concerns about the Conflict and exchanged opinions on its peaceful settlement, although that has not resulted in any implementation.

Notwithstanding the fact that the dispute over the valid legal status of the NLL and equitable maritime delimitation lie at the center of the NLL Conflict, there has been no noteworthy attempt from any of the States concerned to seek a judicial solution under the

present international system. Although the lack of basis of the Line in international law has caused the constant wrangling between the two Koreas, they have instead sought a political solution through diplomatic talks. Throughout the Conflict, North Korea has been defying both the validity and legality of the Line by asserting that it neither recognizes any legal claim to it nor has acquiesced to such. Accordingly, North Korea has been attacking South Korea's arguments based on the principle of acquisitive prescription or the theory of historical consolidation. In addition, North Korea has pointed to the absence of an express provision pertaining to the Line in the text of the KAA, refuting South Korea's argument that the Line has served as an effective follow-up measure for the enforcement of the armistice system. North Korea, furthermore, refers to the UNCLOS that governs the contemporary international maritime order to reinforce its argument against the legal status of the Line. Conversely, South Korea has been maintaining a symmetrical position in defense of the validity, legality, and even effectiveness of the Line throughout the Conflict. That is to say, South Korea has justified the legal status of the Line by reference to the principle and theory of customary and conventional international law, e.g., the principle of acquisitive prescription and the theory of historical consolidation. To legitimize its status in the KAA system, South Korea has also asserted that the Line has been implemented as a necessary follow-up measure for the stable materialization and effective management of the armistice system in the post-war time, invoking the basic principle of treaty interpretation under the Vienna Convention on the Law of Treatise. Despite North Korea's rebuttal, South Korea has asserted the Basic Agreement and the Protocol on Non-aggression as convincing documented proof supporting the valid legal status of the Line as the maritime demarcation line in the disputed waters until the two Korea reach a separate agreement on maritime delimitation.

With due consideration given to the background of the NLL Conflict, Chapter III of this dissertation has analyzed a selection of the precedents rendered by the ICJ through its

advisory proceedings. Following the basic method of a legal case analysis, six advisory opinions have been analyzed to support the conclusion of this doctrinal research. The six cases have been chosen in consideration of their comparable circumstances with the Conflict, which appear to be sufficient to offer a route for the States concerned in this Conflict to consider the advisory proceeding as the most promising alternative to construct a dispute-resolution forum under the present international judicial system. Similar factual circumstances, objections invoking procedural deficiencies, the existence of controversial legal questions, efforts made by the international community in the aftermath, consequences and impacts have been taken into consideration. Although the Court could not always lead the States involved in some international disputes or situations to the ultimate resolution, the opinions of the Court have substantively contributed in most of the cases to make progress by providing its judicial guidance. Although an advisory opinion rendered by the Court is not provided to exert binding force upon a sovereign State, the States, organs, and agencies involved in an advisory proceeding are required to deal with the settlement of disputes or situations involving legal controversies in conformity with such opinions due to its binding effect as to the point of law. From this perspective, this dissertation has analyzed six selected cases of the Court's advisory proceeding with the aim of proposing the advisory proceeding as the most promising alternative to create a judicial forum for the settlement of the Conflict under the contemporary international system.

The *Kosovo Opinion* is a good example for the States concerned in the NLL Conflict in a sense that the UNGA and the ICJ made collective and collaborative efforts to deal with the international situation involving legal questions, which was deemed to be directly concerned with the maintenance of peace and security in the Eastern European region. The Court of *Kosovo Opinion* replied to the procedural question raised in connection with the establishment of its advisory jurisdiction by referring to the UN Charter, Article 96 as well as the ICJ Statute,

Article 65. To be specific, the Court affirmed a legal nature of the question brought before it, even if it admitted to the fact that certain politico-military motives were blended therein. In its final opinion, the Court upheld the legality of KPIS's unilateral declaration of independence under international law and the opinion affected other separatist movements around the globe, thereby affecting the development of international law concerning the right to self-determination.

The *Israeli Wall Case* was selected because the substantive and procedural issues, and the ICJ's advice rendered to encourage the States involved therein to pursue a negotiated settlement for the peaceful resolution, support the conclusion of this dissertation. The substantive issue was whether the Wall had any valid legal status as Israel had alleged. Similar to South Korea's position in the NLL Conflict, Israel invoked rules and principles of international law in its favor, such as self-defense, military exigencies, state of necessity and national security, justifying the Wall as a necessary measure for the regional peace and stability. Most importantly, this case is to be noted for the purpose of this paper, because the Court of *Israeli Wall Case* upheld the UNGA's resolution to submit its request for an advisory opinion in spite of the UNSC's prior involvement in this issue, as well as re-affirming the unnecessariness of the state consent as a prerequisite to the establishment of its advisory jurisdiction. The Court found that the UNSC had neglected to perform its primary role and responsibility to protect international peace and security, and that no negotiated settlement would be expected to offer a solution to this situation. Thus, the finding of the Court supports one of the suggestions made by this dissertation that the UNGA's referral of the Conflict to the Court's advisory proceeding, regardless of the UNSC's reluctance or opposition, may always be the most promising option to initiate such proceeding. In other words, the mechanism of the UNGA could be operated in a complementary sense for that of the UNSC in certain circumstances where the latter has failed to exercise its role to maintain international peace and

security. More significantly, the Court of *Israeli Wall Case* issued a de facto judicial directive to other Member States, the UNGA and the UNSC not to support any further illegal action but to contemplate a new solution in good faith in compliance with international law. As inferred from *Israeli Wall Case*, the Court's advisory opinion on this hypothetical advisory request about the Conflict, once rendered, may provide a judicial guidance to lead the States concerned to ultimately settle the issue in accordance with the opinion. At least, the Court's interpretation of customary and conventional international law as well as the UNCLOS will have a binding effect upon the States concerned therein as to the point of law so that they will not be able to interpret the law in an arbitrary and capricious manner in their own favor.

Having analyzed the *Legality of the Threat or Use of Nuclear Weapons*, in which the growing awareness of the ICJ's advisory proceeding as an international judicial framework for interpretation and application of international law was witnessed among States, this dissertation has excluded other organs and agencies affiliated with the UN as a competent entity for requesting an advisory opinion of the Court concerning the NLL Conflict. In other words, the reason for such exclusion is that neither determining the status of the NLL nor delimiting any alternative line will directly fall within the scope of the competence of any such organs or agencies other than the primary organs. This case has been chosen to support the conclusion of this doctoral project proposing such primary organs as best suited to make this hypothetical advisory request about the Conflict.

Notwithstanding the fact that the fundamental limit of the effect of the ICJ's advisory opinion was identified, this dissertation has selected *Western Sahara Case* inasmuch as its major issues related to customary and conventional international law adjudicated by the Court are analogous to those surrounding the NLL Conflict. In this case, Morocco claimed its acquisition of the territory at issue based on its alleged historical, legal, ethnic, and/or cultural ties thereto, whereas Spain, on the other hand, declined the existence of recognition therein on

its part. Thus, the fact and issues surrounding the conflict in *Western Sahara Case* remind those surrounding the Conflict in many aspects, including the fact that there were other stakeholders, including Mauritania and the Polisario Front, claiming own position in order to prove their ties to the territory. Throughout the dispute over the legal status over the Line and equitable maritime delimitation in the disputed waters, the two Koreas have referred to the principle and theory of customary and conventional international law, as well as the UNCLOS. Therefore, this dissertation has also focused on the similar legal arguments claimed during the course of *Western Sahara Case* and its aftermath so as to demonstrate that the Court is likely to have its subject-matter/material jurisdiction over this hypothetical advisory request seeking the Court's opinion on the Court.

This dissertation also analyzed a series of advisory opinions of the ICJ concerning South West African (now Namibia), including both *International Status of South West Africa Case* and *Namibia Case*, since those can be defined as a product of the collective and collaborative efforts made by the international community for the peaceful resolution of the situation. First, in *International Status of South West Africa Case*, the Court borrowed a general principle of law recognized by civilized nations relating to the law of trust in order to define the Union's continued occupation as a violation thereof. As a matter of law, there is no definite or agreed legal source governing the NLL and other issues arising from the NLL Conflict. Therefore, as the Court in such precedents applied the general principle accepted by civilized nations, the States concerned in this Conflict will also be allowed to invoke various legal sources for and against the legal status of the Line.

Namibia Case is a good example of the UNGA's continued efforts in cooperation with the organized international framework could lead the international community in practice to figure out the ultimate solution to such thorny dispute between sovereign States. For the purpose of this doctoral project, this case has been analyzed in order to highlight that the

effective collaboration between the UNGA and the Court's substantively authoritative opinion rendered in an effort to fulfill its international obligation as the primary judicial organ of the UN successfully led the UNSC to institute this advisory proceeding. Therefore, it is possible to conclude that the UNGA's referral of the NLL Conflict to the Court's advisory proceeding will serve as a starting point for the construction of a judicial framework for the resolution of the Conflict. Moreover, the most important implication of this case is that the Court made the concerned States and other Member States comply with its advisory opinion on this matter. Despite the absence of binding force of its advisory opinion, the Court of *Namibia Case* induced constant and persistent efforts on the part of the UNGA and UNSC in accordance with its opinion regarding the issues surrounding Namibia. The outcome of this case supports the conclusion of this dissertation that an advisory opinion of the Court rendered in relation to the Conflict will be persuasive to the international community as a whole so that they will come up with ways to assist the States concerned in this Conflict to seek a peaceful resolution on a judicial basis.

In the two phases of *Peace Treaties Case*, this dissertation has discovered an implication by which of the primary organs of the UN should be the principal subject referring this hypothetical advisory request for the NLL Conflict. First, the Court in the second phase gave a direction regarding the allocation of roles and responsibilities among sovereign States, and the UN and its affiliated organs and agencies in a harmonious way in the post-war period. The Court first clarified that it would adjudicate and prepare its opinion only on the basis of established rules and principles of international law to assure sovereign States the reliability of its process, procedure, and decision rendered in a forthcoming proceeding. Therefore, it is also to be noted in the context of the Conflict that the Court in this hypothetical case will not apply rules and principles in an arbitrary and capricious way to analyze facts and issues and prepare its opinion. Second, the Court of *Peace Treaties Case* found a limited authority granted to the

UNSG in relation to such dispute-resolution at international level, by stating that the UNSG had no authority to unilaterally appoint a member to the Treaty Commission, which was one of the main issues in that case. Therefore, for the purpose of this dissertation, it is reasonable to conclude that the Secretariat and the UNSG acting on its behalf should be considered a lower priority than the UNGA or the UNSC as a primary organ instituting this hypothetical request concerning the Conflict.

Chapter II of this dissertation has elaborated the jurisdictional system of the ICJ with a priority given to advisory jurisdiction, and Chapter IV, in furtherance of this doctrinal research, has articulated how the system can be operated if this hypothetical advisory request is submitted to seek for the Court's opinion on the NLL Conflict. Simply put, having found its capacity to adjudicate an international dispute or situation involving a legal question, the Court proceed to determine the admissibility of such question in preference to touching upon the merits thereof. Basically, however, this operational mechanism is applicable to both contentious and advisory proceeding of the Court.

Considering the jurisdictional requirements and characteristics of the contentious proceeding of the ICJ, nonetheless, it is problematic as a promising alternative for the construction of a dispute-resolution framework for the NLL Conflict under the contemporary international order. As noted above, the Court is allowed to settle certain international dispute or situation of legal nature brought before it on the condition of *voluntary* submission by a sovereign State, insofar as such dispute or situation is arising out of, or in relation to any disagreement on a question of law or facts, a conflict, or a clash of legal views or of interests between sovereign States. Significantly, however, this contentious jurisdiction requires the existence of the *state consent* as an essential precondition on the part of both contesting and defending States parties involved in any forms stipulated in the ICJ Statute or permitted under international law. This consensual/consent-based jurisdiction is often defined as the main

distinction between the international judicial system and domestic ones in civilized nations. In the context of the Conflict, therefore, it is difficult to assume that the two Koreas will sign off on an agreement specially drafted to litigate this Conflict before the Court based on the ICJ Statute Article 36, paragraph 1. Moreover, nor do other options, i.e., incorporating a compromissory clause in advance or declaring the optional clause in accordance with the ICJ Statute Article 36, paragraph 2, seem likely to be adopted by both of the governments of the two Koreas, considering the history of the efforts made to conclude a negotiated settlement. Throughout the duration of this Conflict, no practical proposal for its resolution has been successfully implemented despite a great deal of time and effort invested by all of the States concerned therein.

Given the facts and circumstances surrounding the NLL Conflict, therefore, the most promising proposition, which also can be considered practical and effective, is the advisory proceeding of the ICJ. In so doing, the States concerned will establish a good precedent in handling any pending or upcoming inter-Korean disputes or situations in a judicial manner so that the two Koreas will also be able to step forward to the introduction of a peace regime to the Korean Peninsula. There are two reasons why this doctrinal project has been choosing the advisory proceeding in line with its thesis. First, in the light of procedural practicality, the establishment of advisory jurisdiction on the Conflict will be efficient and effective. As examined above, the Court may render its advisory opinion on *any legal question* at the request of the UNGA, UNSC, or any other organs or agencies that have received a legitimate authorization. In an acute confrontation between sovereign States like this Conflict, the collective body of third-party States, which is acting in compliance with the UN Charter, should be deemed more objective and neutral in determining relevant facts and circumstances surrounding such confrontations. Second, it is preferable to receive the Court's non-binding but persuasive judicial interpretation on the legal issues, since this is less burdensome than

receiving a judgment with binding force through contentious proceedings of the Court. More to the point, it is to be noted that in practice the Courts' interpretation and application of laws and legal documents in its advisory proceeding has binding force over international organs and agencies, at least as to the point of law. It is also to be remembered that, in the event that all the States concerned wish to resolve their issue according to the Court's opinion, there is also a way for them by signing off a specially drafted international treaty conferring a binding authority upon the Court's advisory opinion. In other words, it is possible for the two Koreas to be bound by an advisory opinion with respect to the Conflict if they wish to do so.

For the purpose of this doctrinal project, the UNGA, which may have a broader competence than the UNSC pursuant to the UN Charter Article 10, may be considered the most suitable entity for instituting this hypothetical advisory request concerning the NLL Conflict. The UNGA appears to have legitimate interest in the outcome of this proceeding, such as the maintenance of peace and security, design of a practical and effective collective measure for the prevention of potential security threat in the East Asian region, and ultimate settlement of such long-standing international conflict of its own accord. The UNGA is entitled to have its competence to request the Court's advisory opinion on the Conflict on its own motion without contravening the UNSC's function and authority.

Given the past history of the five veto-wielding Permanent Members, it is problematic to specify the UNSC as the only possible option for the conclusion of this dissertation. Pursuant to the UN Charter Article 96, paragraph 1, both the UNGA and the UNSC are entitled to exercise their original right to request an advisory opinion on any legal question in connection with their activities. Since the Court is not likely to accept an *ultra vires* objection raised against the establishment of its personal jurisdiction in this hypothetical case given its reasoning clarified in the precedents like the *Israeli Wall Case*, *Interpretation of Peace Treaties Case*, *Expenses Case*, *Namibia Case*, both the UNGA and the UNSC are at liberty to submit this

Conflict to the Court's advisory proceeding. Nevertheless, it is still uncertain that the UNSC is the only organ for this project, due to the fact that the UNSC's decision-making process will have to go through a voting procedure among the Permanent Members in which some members may object to the advisory jurisdiction.

For the purpose of this dissertation, other organs and agencies, except for the Secretariat or the UNSG acting on its behalf, should not be considered an option for filing this hypothetical advisory request for the NLL Conflict. In practice, there may be an occasional need for the UNSG (or in some cases Secretariat acting through the UNSG) to request an advisory opinion. To that extent, it should not be concluded that the Secretariat or the UNSG acting on its behalf cannot be a possible option in connection with this doctoral project. However, in the context of the Conflict, the involvement of the UNSG or Secretariat is likely to upset the balance among the organs of the UN, since it may be perceived as circumventing the process of consultation among the members of the international community. However, it is still doctrinally reasonable to leave open the possibility that the Secretariat or the UNSG acting on its behalf may request for the Court's advisory opinion on the Conflict on the condition that it has acquired a prior authorization from the UNGA. When it comes to other organs and agencies affiliated with the UN, the Court's holdings identified in *Legality of the Threat or Use of Nuclear Weapons Case*, where the Court accepted the *ultra vires* objection, provides a comprehensive explanation. Under the UN Charter and the ICJ Statute, those organs and agencies may be authorized to request an advisory opinion, but the legal questions involved in the Conflict are not likely to be deemed as arising within the scope of any of their activities.

Having assumed the principal organ for the personal jurisdiction of the ICJ on this hypothetical advisory request, it should be understood that the NLL Conflict is a dispute involving a mixture of diplomatic, political, historic, factual, and legal questions. Notwithstanding this, the question can be reformulated on its legal elements. As found in

Western Sahara Case and *Expenses Case*, this work of reformulation can be performed either by the subject requesting an advisory opinion prior to submission or by the Court itself at the preliminary stage. Insofar as the Conflict can be defined as a question of legal character, the Court will establish its subject-matter/material jurisdiction over this hypothetical case, irrespective of other types of elements therein. More to the point, abstractness that may be contained in the Conflict, if any, will not prevent the Court from establishing its subject-matter/material jurisdiction.

Similarities between the subject-matter of precedents explored in Chapter III and those of the NLL Conflict strongly suggest that the ICJ will establish its subject-matter/material jurisdiction on this matter. In *Israeli Wall Case*, Israel justified the status of the Wall by reference to self-defense right, state of necessity, military exigencies and national security, whereas the Wall was criticized for its restriction on freedom of movement and blockade of access. It is very likely that the issues adjudicated in *Israeli Wall Case* will also be contemplated by the Court when dealing with this hypothetical case concerning the NLL. In addition, the matters of *Western Sahara Case* were mainly concerned with the legal status of the given territory and the rightful ownership of that territory. So, assuming that this hypothetical advisory request is submitted, the Court will at the merits stage have to examine analogous issues, such as the valid legal status of the Line, the opposition to its status, and equitable maritime delimitation. Therefore, it is doctrinally reasonable to conclude that the Court will find the interests of the UN and the international community as a whole by establishing its advisory jurisdiction.

However, this should not be considered a way of circumventing the principle of *Eastern Carelia*, which requires the state consent as an essential condition precedent to international judiciary's jurisdiction over a sovereign State, as the Court reaffirmed in *Western Sahara Case* and *Peace Treaties Case*. Even assuming that any State concerned in this Conflict has not given

its consent to the establishment of the Court's advisory jurisdiction based on any given reason, the Court will not refrain from proceeding to the merits stage. Insofar as the Court has not found any compelling reason not to proceed, the Court will stick with the established jurisprudence to fulfill its obligations to administer justice and proper judicial function for the maintenance of international peace and security as the principal judicial organ of the UN. More to the point, given *Israeli Wall Case* where the Court found that seeking a peaceful settlement of the given situation was of grave concern, the Court is unlikely to find any compelling reason not to move forward its advisory proceeding in this hypothetical case.

Considering the ICJ precedents in which the Court declined a vast range of objections challenging the admissibility of an advisory request, it is unlikely for any of the States concerned in the NLL Conflict to present any compelling admissibility claim to prevent the Court from proceeding toward its merits stage. Specifically, in this Conflict, there has existed disputes involving both legal controversies and armed conflicts between the sovereign States where no political efforts have resulted in any negotiated settlement through diplomatic dialog, thus allowing the principal organs to have a basis to seek a solution on behalf of the entire Member States of the UN. Furthermore, given the Court's rationale held in the precedents like *Legality of the Threat or Use of Nuclear Weapons Case*, *Kosovo Opinion Case* and *Israeli Wall Case*, the Court in its own discretion is likely to acknowledge the necessity and gravity for the peaceful resolution of the Conflict for the maintenance of peace and security in the region as well as the globe.

As the main objective of this dissertation is to lay down a doctrinal foundation for an advisory proceeding of the ICJ, this research is expected to contribute, not only to the development of international law, but also to the improvement of inter-Korean relations. By suggesting a judicial guidance on the disputed questions of law, this hypothetical case initiated by the one of the competent primary organ's advisory request will lead to a permanent

resolution of the long-drawn-out conflict between the two Koreas where any ground-breaking solution through political or diplomatic channels is hardly achievable. In this regard, the Court has been adjudicating on a number of territorial disputes and armed conflicts through the operation of its contentious proceeding. Given that there is no difference between contentious and advisory proceeding in dealing with substantive laws, the Court will be capable of offering an equitable solution to the legal controversies arising from this Conflict. As observed in the aftermath of the precedents rendered through the Court's advisory proceedings, it will be difficult for the States concerned in this Conflict to act counter to an advisory opinion, once rendered through this hypothetical case, on the points of international law. Thus, they will not have any option but to comply with such opinion so long as it is concerned with the question of law. By offering a judicial guidance for the two Koreas in this case, the Court will also be able to fulfill its mission as the principal judicial organ of the UN, developing preventive diplomacy among Member States, peaceful relations between Member States and legal norms for the international community in its entirety. Besides, as mentioned above, it is to be remembered that the two Koreas will always be able to agree to a separate form of bilateral treaty so as to subject themselves to the Court's advisory jurisdiction rendering an advisory opinion on the legal questions emerging from the Conflict. All in all, the resolution of the inter-Korean conflict through judicial way will completely transform the existing dispute-resolution framework for the two Koreas, thereby establishing an excellent precedent for finding a judicial solution to other stalled or to any upcoming disputes between the two Koreas as a pathway to the introduction of a peace regime to the Korean Peninsula.

BIBLIOGRAPHY

1. Primary Sources

International Court of Justice

Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403 (July 22).
Aegean Sea Continental Shelf, Interim Protection, Order of 11 September 1976 (Greece v. Turk.), 1976 I.C.J. 3.
Anglo-Iranian Oil (U.K. v. Iran), Preliminary Objections, 1952 I.C.J. 93 (July 22).
Anglo-Norwegian Fisheries Case (U.K. v Nor.), 1951 I.C.J. 116 (Dec.18).
Applicability of Section 22 of Article VI of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, 1989 I.C.J. 177 (Dec. 15).
Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal, 1973 I.C.J. 166.
Application for Review of Judgment No. 273 of the United Nations Administrative Tribunal, Pleadings, 1982 I.C.J. 325.
Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, 1993 I.C.J. 419 (Apr. 8).
Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, 1962 I.C.J. 151.
Certain Questions of Mutual Assistance in Criminal Matters (Djib. v. Fr.), 2008 I.C.J. 179.
Conditions of Admission of a State to Membership in the United Nations, Advisory Opinion, 1948 I.C.J. 57.
Corfu Channel (Alb. v. U.K.), Preliminary Objection, 1948 I.C.J. 15.
Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, 1999 I.C.J. 62.
East Timor (Port. v. Austl.), 1995 I.C.J. 90 (June 30).
Fisheries Jurisdiction (Spain v. Can.), 1998 I.C.J. 432 (Dec. 4).
International Status of South West Africa, Advisory Opinion, 1950 I.C.J. 128 (July 11).
Interpretation of Agreement of 25 March 1951 between the WHO and Egypt, 1980 I.C.J. 73 (Dec. 1980).
Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinion (First Phase), 1950 I.C.J. 65 (Mar. 30).
Interpretation of Peace Treaties, Advisory Opinion (Second Phase), 1950 I.C.J. 221, at 224 (July 18).
Judgments of the Administrative Tribunal of the ILO in Complaints against UNESCO, Advisory Opinion, 1956 I.C.J. 77 (Oct. 23).
Judgments of the Administrative Tribunal of the ILO in Complaints against UNESCO, 1956 I.C.J. 71 (Dec. 2).
Kasikili/Sedudu Island (Bots. v. Namib.), 1999 I.C.J. 1045 (Dec. 13).
Land and Maritime Frontier Dispute (El Sal. v. Hond.), 1992 I.C.J. 629 (Sept. 11).
Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136.
Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8).
Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, 1996 I.C.J. 66.
Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility (Qatar v. Bahr.), Judgment, 1994 I.C.J. 112.
Minquiers and Ecrehos (Fr. v. U.K.), Judgment, 1953 I.C.J. 47 (Nov. 17).
Norwegian Loans (Fr. v. Nor.), 1957 I.C.J. 9 (July 6).
Reservations to the Convention on Genocide, Advisory Opinion, 1951 I.C.J. 15 (May 28).
Right of Passage over Indian Territory (Port. v. India), Preliminary Objections, 1957 I.C.J. 125 (Nov. 26).
South West Africa (Eth. & Liber. v. S. Afr.), Second Phase, Judgment, 1966 I.C.J. 6.
Sovereignty over Pulau Ligitan/Pulau Sipadan (Indon. v. Malay.), 2002 I.C.J. 625 (Dec. 2002).
Territorial and Maritime Boundary (Cameroon v. Nigeria), Preliminary Objections, 1998 I.C.J. 291 (June 11).

Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa, Advisory Opinion, 1955 I.C.J. 67 (June 7, 1955).
Western Sahara, Advisory Opinion, 1975 I.C.J. 12 (Oct. 15, 1975).
1971 Legal Consequences for States of the Continued Presence of South Africa in Namibia notwithstanding Security Council Resolution 276 (1970) Case, Advisory Opinion, 1971 I.C.J. 16.

Permanent Court of International Justice

Brazilian Loans, 1929 P.C.I.J. (ser. B) No. 21 (July 12).
Case of the Mavrommatis Palestine Concessions, 1924 P.C.I.J. (ser. A) No. 2 (Aug. 30).
Chamizal Case (Mex. v. U.S.), 6 R.I.A.A. 309 (Perm. Ct. Arb. June 1911).
Island of Palmas Case (Neth. v. U.S.), 2 R.I.A.A. 829 (Perm. Ct. Arb. 1928).
Legal Status of Eastern Greenland (Den. v. Nor.), 1933 P.C.I.J. (ser. A/B) No. 53.
Rights of Minorities in Upper Silesia (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No. 15 (Apr. 26).
Serbian Loans, 1929 P.C.I.J. (ser. A) No. 20 (July 12).
Status of Eastern Carelia, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 5 (July 23).

Domestic Law Cases

Constitutional Court [Const. Ct.], 92Hun-Ba6 (consol.), Jan. 16, 1997, (1997 KCCR, 9-1) (S. Kor.).
Constitutional Court [Const. Ct.], 2003 Hun-Ma114 (consol.), June 30, 2005, (17(1) KCCR, 879) (S. Kor.).
Constitutional Court [Const. Ct.], 2004Hun-Ba68 (consol.), July 27, 2006 (18(2) KCCR, 880) (S. Kor.).
Constitutional Court [Const. Ct.], 2006Hun-Ma679 (consol.), Nov. 30, 2006 (18(2) KCCR, 549) (S. Kor.).
Supreme Court [S. Ct.], 90Da1451, Sept. 25, 1990 (S. Kor.).
Supreme Court [S. Ct.], 89NU6396, Sept. 28, 1990 (S. Kor.).
Supreme Court [S. Ct.], 98Du14525, July 23, 1999 (S. Kor.).

Treaties and Other International Agreements

Agreement on Reconciliation, Non-aggression, Exchanges and Cooperation between the South and the North, S. Kor.-N. Kor., Dec. 13, 1991.
Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 1021.
Convention on the Privileges and Immunities of the Specialized Agencies, Aug. 16, 1949, 33 U.N.T.S. 521.
Convention on the Privileges and Immunities of the United Nations, sec. 30, *opened for signature* Feb. 13, 1946, 1 U.N.T.S. 15 (entered into force Sept. 17, 1946).
Declaration on the Advancement of South-North Relations, S. Kor.-N. Kor., Oct. 4, 2007.
European Convention for the Peaceful Settlement of Disputes, June 29, 1957, E.T.S. 23.
European Convention on the Peaceful Settlement of Disputes, Apr. 29, 1957, 320 U.N.T.C. 4646.
General Act for the Pacific Settlement of International Disputes of 1928, Sep. 26, 1928, 71 U.N.T.C. 912.
Inter-American Treaty on the Peaceful Settlement of Disputes, Apr. 30, 1948, 30 U.N.T.C. 449.
Korean War Armistice Agreement, U.N.C.-N. Kor.-China, July 27, 1953, 4 U.S.T. 234.
Protocol on Non-aggression, S. Kor.-N. Kor., Sept. 17, 1992.
Rome Statute of the International Criminal Court, *adopted on* July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002).
Rules of the International Court of Justice 1978 I.C.J. Acts & Docs.
Statute of the International Court of Justice, *adopted on* June 26, 1945, 33 U.N.T.S. 993 (entered into force Oct. 24, 1945).
Statute of the International Criminal Tribunal for Rwanda, U.N. Doc. S/RES/955 (Nov. 8, 1994).
Statute of the International Criminal Tribunal for the Former Yugoslavia, U.N. Doc. S/RES/827 (May 25, 1993).
The Agreement among the People's Republic of Angola, the Republic of Cuba, and the Republic of South Africa, Angl.-Cuba-S. Afr., Dec. 22, 1988, 28 I.L.M. 959 (1989).
The UN Headquarters Agreement, June 26, 1947, 11 U.N.T.S. 147.

U.N. Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994).
Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

National Constitutions

DAEHANMINKUK HUNBEOB [HUNBEON] [CONSTITUTION] (S. Kor.).

2. Secondary Sources

Books, Reports and Other Non-periodical Materials

Abi-Saab, Georges. *Les exceptions préliminaires dans la procédure de la Cour international*. 1967.
Aljaghoub, Mahasen M. *The Advisory Function of the International Court of Justice 1946 – 2005*. 2006.
Bedjaoui, Mohamed. *The New World Order and the Security Council: Testing the Legality of Its Acts*. 1994.
Bowett, Derek. "The Court's Role in Relation to International Organizations." In *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings*, edited by Vaughan Lowe and Malgosia Fitzmaurice. 1996.
Brownlie, Ian. *Principles of Public International Law*. 3rd ed., 1979.
Brownlie, Ian. *Principles of Public International Law*. 7th ed., 2008.
Central Intelligence Agency. *The West Coast Korean Islands*. 1974. http://digitalarchive.wilsoncenter.org/document/114023.pdf?v=d900fbd9e398a7088363eb558f433093.
Conforti, Benedetto. "Observations on the Advisory Function of the International Court of Justice." In *UN Law/Fundamental Rights: Two Topics in International Law*, edited by Antonio Cassese. 1979.
Conforti, Benedetto. *The Law and Practice of the United Nations*. 2000.
Cham-Yeo-Yeon-Dae [People's Solidarity for Participatory Democracy]. *NLL Jaeng-Jeom-Gwa Dae-An [NLL: Problems and Solutions]* Nov. 22, 2011. http://www.peoplepower21.org/PSPD_press/962270.
Churchil, R. R., and V. A. Lowe. *The Law of the Sea*. 3rd ed., 1999.
DE VISSCHER, CHARLES. *Theories and Reality of Public International Law*. 1953.
Doswald-Beck, Louise, ed. *San Remo Manual on International Law Applicable to Armed Conflicts at Sea, Explanation*. 1995.
Dubisson, M. *Cour Internationale de Justice*. 1964.
Dupuy, Rene-Jean, and Daniel Vignes eds. *A Handbook on the New Law of the Sea*. 1991.
Fox, James. *Dictionary of International and Comparative Law*. 2003.
Gilbert, Jeremie. *Indigenous People's Land Rights under International Law: From Victors to Actors*. 2006.
Gook-Hoe-Ip-Beob-Jo-Sa-Cheo [National Assembly Research Service]. *Buk-Bang-Han-Gye-Seon Moon-Je-Wa Dae-Eung-Bang-Hyang [The NLL Conflict and Plans of Reaction]*. 2011.
Grisel, Etienne. Les exceptions d'incompétence et d'irrecevabilité dans la procédure de la Cour Internationale de Justice. 1968.
Guk-bang-bu [The Ministry of Defense of the Republic of Korea]. *Buk-bang-han-gye-seon-eul Dai-ha-neun Woo-ri-eui Ja-se [The Republic of Korea position regarding the northern limit line]*. 2nd ed., 2007. http://www.military.co.kr/english/NLL/NLL.htm.
Guk-ga-jeong-bo-won [National Intelligence Service]. *Nam-buk-han-hop-eui-moon [Inter-Korean Agreements]*. 2008.
Joint Chief of Staff: Military Mutual Aid Association. *Vol. 4, Manual for the Korean Military Armistice Commission*. 1999.
Joint Civilian-Military Investigation Group. *Investigation Result on the Sinking of ROKS "Cheonan."* 2010. http://news.bbc.co.uk/nol/shared/bsp/hi/pdfs/20_05_10jigreport.pdf.
Keith, K. *The Extent of the Advisory Jurisdiction of the International Court of Justice*. 1971.
Kelsen, Hans. *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems*. 1951.
Kolb, Robert. *The Elgar Companion to the International Court of Justice*. 2014.
Lauterpacht, Elihu. "The Legal Effect of Illegal Acts of International Organisations." In *Cambridge Essays in International Law: Essays in Honour of Lord McNair*. 1965.

McDevitt, Michael Al., and Catherine K. Lea. "East China and Yellow Seas Overview Essay." In *The Long Littoral Project: East China and Yellow Seas*, 1. 2012.
Mundy, Jacob. *Address at International Conference of the Jurists for Western Sahara: The Question of Sovereignty in the Western Sahara Conflict*. June 27, 2008.
Pasqualucci, Jo N. *The Practice and Procedure of the Inter-American Court of Human Rights*. 2003.
Pomerance, Michala. "The Advisory Role of the International Court of Justice and its 'Judicial' Character: Past and Future Prisms." In *The International Court of Justice: Its Future Role After Fifty Years*, edited by A. S. Muller and D. Raic et al. 1997.
Prescott, J.R.V. *Maritime Jurisdiction in East Asian Seas*. East-West Environment and Policy Institute Occasional Paper, Vol. 4, 1987.
Roehrig. Terence. *The Northern Limit Line: The Disputed Maritime Boundary between North and South Korea*. NCNK Issue Brief, Sept. 2011.
Romano, Cesare P.R. et al. eds. *The Oxford Handbook of International Adjudication*. 2013.
Rosenne, Shabt. *The Law and Practice of the International Court, 1992 – 1996*. 1997.
Rosenne, Shabt al. *The Law and Practice of the International Court*. vol. I, 1965.
Ryoo, Moon Bong. *The Korean Armistice and the Islands*. Strategy Research Project, Nov. 2011.
Schwebel, Stephen. "Relations between the International Court of Justice and the United Nations." In *Justice in International Law: Selected Writings of Stephen M. Schwebel*. 1994.
Segal, Ronald. "South West Africa: An International Responsibility." In International Conference on South West Africa. Oxford, 1966.
Shearer, I. A., ed. *Starke's International Law*. 11th ed., 1994.
Stewart, Dona J. *The Middle East Today: Political, Geographical and Cultural Perspectives*. 2013.
Szafarz, Renata. The Compulsory Jurisdiction of the International Court of Justice. 1993.
Szasz, Paul. "Enhancing the Advisory Competence of the World Court." In *The Future of the International Court of Justice*, edited bv L. Gross. 1976.
The Ministry of National Unification of the Republic of Korea. Proceeding Minute of South and North Military Sub-Committee 5th Session. 1992.
The Peace Foundation. Examining "Special Zone of Peace and Cooperation in the Yellow/West Sea" Initiative. Dec. 12, 2007.
U.N. Secretary-General's Panel. Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident. Sept. 2011.
Van Dyke, Jon. *The Maritime Boundary Dispute between North & South Korea in the Yellow (West) Sea*. 38 North, July 29, 2010. http://38north.org/2010/07/the-maritime-boundary-between-north-south-korea-in-the-yellow-west-sea/.
Waibel, Michael. *Investment Arbitration: Jurisdiction and Admissibility*. Univ. Cambridge Legal Studies Res. Paper Series, Feb. 2014.

Periodical Materials

Carlston, Kenneth S. "Interpretation of Peace Treaties with Bulgaria, Hungary, and Romania, Advisory Opinion of the International Court of Justice." *Am. J. Int'l L.* 44, no. 4 (1950): 728.
Chung, Tai Uk. "Seo-Hae-Buk-Bang-Han-Gye-Seon Jae-Ron: Yeon-Pyeong-Do-Po-Gyeok-Sa-Geon-Ul Gye-Gi-Ro [The Northern Limit Line and North Korean Artillery Attack]." *MinJooBeopHak [Democratic Legal Stud.]* 45 (2001): 255.
Domke, Martin. "Settlement-of-Disputes Provisions in Axis Satellite Peace Treaties." *Am. J. Int'l L.* 41, no. 4 (1947): 911.
Fitzmaurice, Gerald. "The Law and Procedure of the International Court of Justice, 1951—4: Questions of Jurisdiction, Competence and Procedure." *Y.B. Int'l. L.* 34 (1958): 8.
Jang, Yong Suk. "Seo-Hae-Buk-Bang-Han-Gye-Seon-Gwa Pyeong-Hwa-Hyeop-Ryup-Ji-Dae Jae-Ron [The West Sea NLL and Special Zone for Peace and Cooperation Revisited]." *TongIlMoonJeYeonGoo [The Korean Journal of Unification Affairs]* 59 (2013): 181.
Jeh, Seong Ho. "Buk-Bang-Han-Gye-Seon-Eui Beop-Jeok Go-Chal [Legal Analysis on the Northern Limit Line]." *GukBangJeongChaekYeonGu [Nat'l Def. Pol'y Stud]* (Winter 2004).
Jeh, Seong Ho, "Buk-Bang-Han-Gye-Seon-Eui Beop-Jeok Yu-Hyo-Seong-Gwa Da-Eung Bang-Hyang [Legal Validity of the Korean Northern Limit Line and South Korea's Possible Measures]." *ChungAngBeopHak [Chung-Ang L. Rev.]* 7, no. 2 (2005): 107.
Jessup, Phillip C. "To Form a More Perfect United Nations." *Colum. J. Transnat'l L.* 9 (1970): 177.
Johnson, D. H. N. "Consolidation as a Root of Title." *Cambridge L. J.* (1955): 215.

Jung, Nu Ri. "Is the Shelling of Yeonpyeong Island a War Crime?: A Review under Article 8 of the Rome Statute of the International Criminal Court." *Kor. J. Int'l L.* 57, no. 1 (2012): 157.
Kim, Charn-kiu. "North Korean Bombardment on Yeonpyeong-Do: An evaluation from International Humanitarian law and rules of engagement." *Kor. J. Int'l L.* 33 (2013): 29.
Kim, Myung Ki, "The Legal Status of 5 Island Groups on the Yellow Sea." *Korean J. Int'l L.* 23, no. 1-2 (1978): 323.
Kim, Young Koo. "Buk-Han-Ee Joo-Jang-Ha-Neun Seo-Hae-Hae-Sang-Gyeong-Gye-Seon-Gwa Tong-Hang-Jil-Seo-E Dae-Han Boon-Seok [Legal Appraisal on the CMDL and the Navigation Order]." *SeoulGookJeBeopYeonGoo [Seoul Int'l. L. Rev.]* 7, no. 1 (2000): 1.
Kim, Young Koo. "A Maritime Demarcation Dispute on the Yellow Sea." J. E. Asia & Int'l. L. 2 (2009): 481.
Koztowski, Artur. "Legal Construct of Historic Title to Territory in International Law: An Overview." *Polish Y.B. Int'l L.* 30 (2010): 61.
Krueger, Heiko Krueger. "Implication of Kosovo, Abkhazia and South Ossetia for International Law – The Conduct of the Community of States in Current Secession of Conflicts." *Caucasian Rev. Int'l. L.* 3, no. 1 (2009): 121.
Lee, Jae Min. "Buk-Bang-Han-Gye-Seon-Gwa Gwan-Ryeon-Doen Gook-Je-Beop-Jeok-Moon-Je-Eui Jae-Geom-To [Revisiting Legal Issues over the Northern Limit Line]." *SeoulGookJeBeopYeonGoo [Seoul Int'l. L. Rev.]* 15, no. 1 (2008): 41.
Lee, Young Hee. "Buk-Bang-Han-Gye-Seon-Eun Hap-Beop-Jeok Goon-Sa-Boon-Gye-Seon-In-Ga? [Is the NLL a Legal Military Demarcation Line?]." *TongIlSiRon [Contemporary Opinion on Unification]* 3 (1999): 23.
Lee, Yong Joong. "Seo-Hae-Buk-Bang-Han-Gye-Seon-E Dae-Han Nam-Buk-Han Joo-Jang-Eui Guk-Je-Beop-Jeok Bi-Gyo Bun-Seok [A Study on Northern Limit Line Dispute between the Two Koreas]." *KyungbukdaehakgyoBeophakyeonguwonBeophaknongo [Kyungpook Nat'l. Univ. L. Rev.]* 32 (2010): 537.
Lesaffer, Randall. "*Argument from Roman Law in Current International Law: Occupation and Acquisitive Prescription*." *Eur. J. Int'l. L.* 16, no. 1 (2005): 25.
Levy, Gary Jay. "Case Comments: Advisory Opinion on the Western Sahara." *Brook. J. Int'l L.* 2 (1975): 289.
Oxman, Barnard H. "The Regime of Warships Under the United Nations Convention on the Law of the Sea." *Va. J. Int'l L.* 24 (1984): 809.
Schwebel, Stephen M. "Authorizing the Secretary-General of the United Nations to Request Advisory Opinions of the International Court of Justice." *Am. J. Int'l. L.* 78, no. 4 (1984): 869.
"The South West Africa Cases." *Wash. U. L. Q.* (1967): 159.
Van Dyke, Jon M. et al. "The North/South Boundary Dispute in the Yellow (West) Sea." *Marine Pol'Y* 27 (2003): 143.
von Heinegg, Wolff Heintschel. "The United Nations Convention on the Law of the Sea and Maritime Security Operations." German Y. B. Int'l L. 48 (2005): 151.
Yee, Sienho. "Forum Prorogatum and the Advisory Proceedings of the International Court." Am. J. Int'l. L. 95 (2001): 381.

Newspaper Articles & Online Newspaper Articles

Baker, Peter, and Choe Sang-Hun. "Trump Threatens 'Fire and Fury' Against North Korea if It Endangers U.S." *The New York Times Online*, August 8, 2017. https://www.nytimes.com/2017/08/08/world/asia/north-korea-un-sanctions-nuclear-missile-united-nations.html.
Branigan, Tania, and Caroline Davies. "South Korean naval ship sinks in disputed area after 'explosion.'" *The Guardian*, March 26, 2010. https://www.theguardian.com/world/2010/mar/26/south-korea-navy-ship-attack.
Choe, Sang-hun. "South Korea cuts trade ties with North over sinking." *The Age*, May 25, 2010. http://www.theage.com.au/world/south-korea-cuts-trade-ties-with-north-over-sinking-20100524-w7y6.html.
Foster-Carter, Aiden. "No-Penalty Shootout." *Asia Times Online*, July 3, 2002. http://www.atimes.com/atimes/Korea/DG03Dg01.html.
Jelinek, Pauline. "AP Enterprise: Sub attack was near US-SKorea drill." *Boston.com*, June 5, 2010. http://archive.boston.com/news/nation/washington/articles/2010/06/05/ap_enterprise_sub_attack_came_near_drill/.

Kwon, Tae-ho. "Requested Security Council Cheonan measures weaken considerably." *The Hankyoreh*, July 2, 2010. http://english.hani.co.kr/arti/english_edition/e_national/428559.html.
Lee, Claire. "Bodies of two civilians found on Yeonpyeong." *The Korea Herald*, November 24, 2010. http://www.koreaherald.com/view.php?ud=20101124000858.
McDonald, Mark. "'Crisis Status' in South Korea After North Shells Island." *The New York Times*, November 23, 2010. http://www.nytimes.com/2010/11/24/world/asia/24korea.html?src=mv&_r=0.
Rabiroff, Jon, and Yoo Kyong Chang. "After North Korean attack, many residents wrestling with whether to move back to island." *Stars and Stripes*, February. 12, 2011. https://www.stripes.com/after-north-korean-attack-many-residents-wrestling-with-whether-to-move-back-to-island-1.134580.
Sengupta, Kim. "Warship mystery raises Korean tensions." *Independent*, March 27, 2010. http://www.independent.co.uk/news/world/asia/warship-mystery-raises-korean-tensions-1928740.html.
Song, Ho-jin, and Kim Nam-il, "Lawmaker releases map showing Roh's proposed North-South joint fishing area." *Hankyoreh*, July 15. 2013, http://english.hani.co.kr/arti/english_edition/e_northkorea/595745.html.
Song, Sang-ho. "Experts suggest possible attack by N.K. submarine." *The Korea Herald*, April 19, 2010. http://www.koreaherald.com/view.php?ud=20100419000591&cpv=1.
Song, Sang-ho. "N.K. artillery strikes S. Korean island." *The Korea Herald*, November 23, 2010. http://www.koreaherald.com/view.php?ud=20101123001048.
Starr, Barbara, and Ray Sanchez. "North Korea's new ICBM likely broke up upon re-entry, US official says." *CNN Online*, December 3, 2017. https://edition.cnn.com/2017/12/02/asia/north-korea-missile-re-entry/index.html.
Thatcher, Jonathan. "Text from North Korea statement." *Reuters*, May 25, 2010. http://www.reuters.com/article/us-korea-north-text-idUSTRE64O3YU20100525.
Tong, Xiong. "DPRK accuses U.S. of cooking up, manipulating 'Cheonan case.'" *Xinhua News Agency*, May 28, 2010. http://news.xinhuanet.com/english2010/world/2010-05/28/c_13321709.htm.
Yoo, Kang-moon. "Unification minister hints at possible shift in North Korea's attitude towards Northern Limit Line." *Hankyoreh*, May 7, 2018. http://english.hani.co.kr/arti/english_edition/e_northkorea/843593.html.

"Asian Political News." *Find Articles*, November 29, 2008. http://findarticles.com/ /articles/mi_m0WDQ/is_1999_August_23/ai_55619988.
"'Cheonan'" Case Termed Most Hideous Conspiratorial Farce in History." *The (North) Korean Central News Agency*, November 2, 2010. http://www.kcna.co.jp/item/2010/201011/news02/20101102-10ee.html.
"'Change All of Plans, Weapons, Organization, Culture' Military Announces Omni-directional Reform." *Herald Economics*, May 4, 2010. http://biz.heraldcorp.com/view.php?ud=20100504000486.
"How Did N.Korea Sink the Cheonan?" *The Chosun Ilbo*, May 21, 2010. http://english.chosun.com/site/data/html_dir/2010/05/21/2010052100698.html.
"Increased military budget passed for the year of 2011." *MBC News*, December 9, 2010. http://news.naver.com/main/read.nhn?mode=LSD&mid=sec&sid1=100&oid=214&aid=0000162775.
"Israeli spike missiles deployed." *The Korea Times*, May 19, 2013. http://www.koreatimes.co.kr/www/news/nation/2013/05/116_135966.html.
"KPA Supreme Command Issues Communique." *The (North) Korean Central News Agency*, November 23, 2010. http://www.kcna.co.jp/item/2010/201011/news23/20101123-19ee.html.
"Military Commentator on Truth behind 'Story of Attack by North.'" *The (North) Korean Central News Agency*, May 28, 2010. http://www.kcna.co.jp/item/2010/201005/news28/20100528-18ee.html.
"Military suggests counterfire caused 'many casualties' in N. Korea." *Yonhap News Agency*, December 2, 2010. http://english.yonhapnews.co.kr/national/2010/12/02/83/0301000000AEN20101202009100315F.HTML.
"Military to kick off annual defense drill next week." *Yonhap News Agency*, November 26, 2010. http://english.yonhapnews.co.kr/national/2010/11/16/10/0301000000AEN20101116007000315F.HTML.
"Ministers visit border islands for discussions on maritime peace zone." *The Korea Herald*, May 7. 2018, http://www.koreaherald.com/view.php?ud=20180505000044&ACE_SEARCH=1.

"N.K. artillery strikes S. Korean island." *The Korea Herald*, November 23, 2010. http://www.koreaherald.com/view.php?ud=20101123001048.
"N. Korean sailors awarded hero's title for attack on S. Korean warship: defector." *Yonhap News Agency*, December 7, 2012. http://english.yonhapnews.co.kr/northkorea/2012/12/07/31/0401000000AEN20121207008700315F.HTML.
"Navy Chief Vows for Revenge for Cheonan." *The Korea Herald*, April 30, 2010.
"NLL - Controversial Sea Border Between S. Korea, DPRK." *Peopledaily.com*, November 21, 2002. http://english.peopledaily.com.cn/200211/21/eng20021121_107188.shtml.
"North Korea accused of sinking ship." *Stuff*, May 20, 2010. http://www.stuff.co.nz/world/asia/3721583/North-Korea-accused-of-sinking-ship.
"North Korea attack linked to leadership succession." *ABC News*, November 26, 2010. http://www.abc.net.au/news/2010-11-26/north-korea-attack-linked-to-leadership-succession/2352506.
"North Korea fires artillery into sea near western border." *The Korea Herald*, November 23, 2010. http://www.koreaherald.com/view.php?ud=20101123000840.
"North Korea says civilian deaths, if true, very regrettable." *Reuters*, November 27, 2010. http://www.reuters.com/article/us-korea-north-civilians-idUSTRE6AQ0O720101127.
"'North Korean torpedo' sank South's navy ship – report." *BBC News*, May 20, 2010. http://www.bbc.com/news/10129703.
"Obama stopped South Korea's plan to retaliate against North Korea." *Hankook Daily*, January 15, 2014.
http://news.naver.com/main/read.nhn?mode=LSD&mid=sec&sid1=100&oid=038&aid=0002458076.
"Rules of engagement entirely revised to protect civilians." *SBS News*, November 25, 2010. http://news.sbs.co.kr/news/endPage.do?news_id=N1000825552&plink=OLDURL.
"Seoul Insists on N.Korea Apology Before Dialogue." *The Korea Herald*, April 18, 2011.
"Seoul Renews Demand for N.Korea's Responsible Steps Over Deadly Attacks." *Yonhap News Agency*, April 18, 2011.
"Seoul Warns of 'Severe Punishment' Over N.Korean Attack." *The Chosun Ilbo*, November 24, 2010. http://english.chosun.com/site/data/html_dir/2010/11/24/2010112400306.html.
"South Korea mourns victims of ship sinking." *BBC News*, April 26, 2010. http://news.bbc.co.uk/2/hi/asia-pacific/8643374.stm.
"South Korea urges restraint over sunken warship." *BBC News*, April 1, 2010. http://news.bbc.co.uk/2/hi/asia-pacific/8598267.stm.
"Statement Released by Spokesman of DPRK Foreign Ministry." *The (North) Korean Central News Agency*, November 24, 2010. http://www.kcna.co.jp/item/2010/201011/news24/20101124-17ee.html.
"UN seeks World Court Kosovo view." *BBC News*, October 9, 2008. http://news.bbc.co.uk/2/hi/europe/7658103.stm.

Choongang Daily, September 3, 1999.
Chosun Daily, September 3, 1999.
Hankook Daily, July 2, 2002.
Rodong Daily, December 1, 1973.
Rodong Daily, December 3, 1973.
Rodong Daily, June 16, 1999.
Rodong Daily, June 23, 1999.
Rodong Daily, June 28, 1999.
Rodong Daily, July 3, 1999.
Rodong Daily, July 11, 1999.
Rodong Daily, September 2, 1999.
Rodong Daily, September 17, 1999.
Rodong Daily, September 23, 1999.
Rodong Daily, March 3, 2000.
Rodong Daily, March 24, 2000.
Rodong Daily, July 2, 2002.
Rodong Daily, July 4, 2002.
Rodong Daily, July 10, 2002.
Rodong Daily, July 16, 2002.

Rodong Daily, August 2, 2002.
Rodong Daily, May 28, 2009.

Dissertations and Theses

Kim, Hyun Jin. "*The Inter-Korean Conflict over the Northern Limit Line: Applying the Theory of Historical Consolidation*." LL.M.-Thesis, Indiana University, August 2015. http://www.repository.law.indiana.edu/etd/23/.

Letters, Memoranda, and Press Releases

"The Minister in Bulgaria to the Secretary of State of the United States." September 1, 1949.

Interviews

Moon, Chung-in, and Timo Kivimaki. "Peaceful Pyeingchang Olympics can lead to lasting Korean peace: View." *Euronews*, February 9, 2018. https://www.euronews.com/2018/02/09/peaceful-pyeongchang-olympics-can-lead-to-lasting-korean-peace-view.

Speeches and Addresses

Trump, Donald J. "President of the United States of America, Remarks to the 72nd Session of the United Nations General Assembly." September 19, 2017.

Internet Sources

Case Briefs. "Advisory Opinion on Namibia." http://www.casebriefs.com/blog/law/international-law/international-law-keyed-to-damrosche/chapter-3/advisory-opinion-on-namibia/.
International Court of Justice. *Advisory Jurisdiction*. http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=2.
International Court of Justice. *Basis of the Court's Jurisdiction*. http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=2.
International Court of Justice. *Declarations Recognizing the Jurisdiction of the Court as Compulsory*. http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3.
International Court of Justice. *Organs and Agencies of the United Nations Authorized to Request Advisory Opinions*. http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=2&p3=1.

United Nations Sources

G.A. Res. 449-A (2), U.N. GAOR, 5th Sess., Supp. No. 20, U.N. Doc. A/1775 (Dec. 13, 1950).
G.A. Res. 2145 (XXI), U.N. GAOR 13th Sess. (Oct. 27, 1966).
G.A. Res. 2229 (XXI), U.N. GAOR, 21st Sess., (Dec. 20, 1966).
G.A. Res. 3292 (XXIX), U.N. GAOR, 29th Sess., (Dec. 13, 1974).
G.A. Res. 49/90, U.N. Doc. A/RES/49/90 (Dec. 15, 1994).
G.A. Res. 10/14, U.N. Doc. A/RES/ES-10/14 (Dec. 12, 2003).
Judicial Review of the United Nations Administrative Tribunal Judgments, Working Paper submitted by the Secretary-General, 10 UN GAOR Annexes (Agenda Item 49), UN Doc. A/AC.78/L.1 and Corr.1 (1955).
Juridical Regime of Historic waters including historic bays-Study prepared by the Secretariat, [1962] 2 Y.B. Int'l L. Comm'n 80, U.N. Doc. A/CN.4/143.
Letter from the United Nations Commander-in-chief for the Defense Minister of the Republic of Korea (June 3, 1989).

Press Release, General Assembly, Backing Request by Serbia, General Assembly Decides to Seek International Court of Justice Ruling on Legality of Kosovo's Independence, U.N. Press Release GA/10764 (Oct. 8, 2008).
Press Release, UNC Public Affair Office, U.N. Command and North Korean Generals Discuss Naval Incidents.
S.C. Res. 276, U.N. Doc. S/RES/276 (Jan. 30, 1976).
U.N. Econ. & Soc. Council, U.N. Doc. E/1732 (June 26, 1950).
U.N. Doc. A/RES/2372 (XXII) (June 12, 1968).
U.N. GAOR, 12th Sess., Supp. No. 12, U.N. Doc. A/3626 (Jan. 1, 1957).
U.N. GAOR, 29th Sess., 4th comm. 247, U.N. Doc. A/C.4/SR.2125.
U.N. Secretary-General, 8, U.N Doc. A/41/1 (1991).
U.N. Secretary-General, *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-keeping: Rep. of the Secretary-General*, 14, U.N. Doc. A/47/277-S/2411 (June 17, 1992).

Hyun Jin Kim

PROFESSIONAL QUALIFICATIONS

Supreme Court Appellate Division Third Department, State of New York, USA

- *Attorney and Counselor-at-Law*
- Duly Licensed and Admitted to Practice in the State of New York, June 27, 2018

District of Columbia Court of Appeals, District of Columbia, USA

- *Attorney and Counselor-at-Law*
- Duly Qualified and Admitted to Practice in the City of Washington, January 09, 2017

EDUCATION

Indiana University, Maurer School of Law, Bloomington, IN, USA

- *S.J.D. (Doctor of Juridical Science)*, November 2020
- Title of the Dissertation: "*Construction of a Dispute-Resolution Framework under International Judicial System for the Settlement of the Inter-Korean Conflict over the Northern Limit Line: Operating the Advisory Proceeding of the International Court of Justice*"

Indiana University, Maurer School of Law, Bloomington, IN, USA

- *LL.M.-Thesis (Master of Laws-Thesis)*, August 2015
- Title of the LL.M.-Thesis: "*The Inter-Korean Conflict over the Northern Limit Line: Applying the Theory of Historical Consolidation*"

University of Melbourne, Melbourne Law School, Melbourne, VIC, Australia

- *LL.M. (Master of Laws-General)*, December 2011

Sungkyunkwan University (SKKU), College of Law, Seoul, South Korea

- *LL.B. (Bachelor of Laws)*, February 2009

WORK EXPERIENCE

Hotel Lotte Co., Ltd., Seoul, South Korea

- *Senior Associator* (In-house Legal Counsel), July 2019—Present
- Legal Compliance Team

ACADEMIC WORKS

- *Bombardment of the South Korean-held Yeonpyeong Island: Establishing Criminal Liability of North Korean Leaders* (Sept. 15, 2011) (research paper, University of Melbourne)
- *Comparative Study on Possible Modification on the Basic Rules Pertaining to the Burden of Proof in Tort Litigations: Korean and Australian Perspectives* (June 2, 2011) (research paper, University of Melbourne)
- *Jurisdictional Conflicts between the Supreme Court and Constitutional Court of Korea: Factual and Legal Issues* (May 9, 2011) (research paper, University of Melbourne)
- *Right to Confrontation and Its Implications on the Admission of Hearsay and Anonymous Evidence in International Criminal Proceedings* (Dec. 16, 2010) (research paper, University of Melbourne)

- *Analysis on the Investor-State Dispute Settlement Mechanism Embodied in the KORUS FTA: Focusing on Controversies over Judicial Sovereignty and Public Policy* (Oct. 18, 2010) (research paper, University of Melbourne)
- *Hirohito's War crimes and Non-Indictment at the Tokyo Trial* (Aug. 30, 2010) (research paper, University of Melbourne)
- *Economic Power Concentration in South Korea: Focused on the Problem of the Circular-Shareholding and the Holding Company* (June 21, 2010) (research paper, University of Melbourne)