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The International Court of Justice's Jurisdiction to Review Its Judgments: Understanding Article 61 of the ICJ Statute in Light of Its Drafting History

Jamil Ddamulira Mujuzi

ABSTRACT. Judgments of the ICJ are final and not subject to appeal. However, Article 61 of the ICJ Statute empowers the ICJ to review its judgments. The ICJ replaced the Permanent Court of International Justice (PCIJ). Article 61 of the PCIJ Statute (1920) empowered the PCIL to review its decisions. When the PCIJ ceased to exist, Article 61 of its Statute was reproduced, almost verbatim, as Article 61 of the ICJ Statute. In this article, the author illustrates the drafting histories Articles 61 of the PCIJ (1920 – 1921) and ICJ (1945) respectively. The PCIJ did not invoke Article 61 of its Statute. The ICJ has so far invoked Article 61 in three judgments. It is illustrated that although the ICJ has not referred to the drafting history of Article 61 in its judgments, its interpretation of Article 61 is substantially consistent with its drafting history. The drafting history of Article 61 suggests that the first criterion that the Court is supposed to assess before deciding whether to exercise jurisdiction is whether the review application has been filed within the stipulated time. If the answer to this question is in the negative, the court should dismiss the application summarily and not discuss the other grounds of admissibility. However, practice from the Court shows that it has not followed this approach. It is also argued that the Court can invoke its inherent jurisdiction to extend the deadline for filing of review applications although the Statute and the Rules are silent on that issue.

KEYWORDS. International Court of Justice; Article 61; review of judgments; Permanent Court of International Justice; res judicata; decisive factor; new fact; discovery; negligence

The International Court of Justice's Jurisdiction to Review Its Judgments: Understanding Article 61 of the ICJ Statute in Light of Its Drafting History

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Introduction

Article 60 of the Statute of the ICJ provides that '[t]he judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party.' Thus, the general rule is that the judgement of the court is final. However, judges are not infallible. Thus, Article 60 includes an exception to the above general rule. It empowers the court to construe its judgement. The purpose of the construction is to clarify the meaning or scope of the judgement. Article 60 is operationalized by Article 98 of the Court's Rules.[1] The Court has

[1] Rule 98 provides that '[1]. In the event of dispute as to the meaning or scope of a judgment any party may make a request for its interpretation, whether the original proceedings were begun by an application or by the notification of a special agreement. [2]. A request for the interpretation of a judgment may be made either by an application or by the notification of a special agreement to that effect between the parties; the precise point or points in dispute as to the meaning or scope of the judgment shall be indicated. [3]. If the request for interpretation is made by an application, the requesting party's contentions shall be set out therein, and the other party shall be entitled to file written observations thereon within a time-limit fixed by the Court, or by the President if the Court is not sitting. [4]. Whether the request is made by an application or by

explained the circumstances in which it can invoke its powers under Article 60.[2] The second exception to the general rule, which is the focus of this article, is found in Article 61 of the ICJ Statute. It empowers the Court to review its judgment. Article 61 states that:

(1) An application for revision of a judgment may be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence.
(2) The proceedings for revision shall be opened by a judgment of the Court expressly recording the existence of the new fact, recognizing that it has such a character as to lay the case open to revision, and declaring the application admissible on this ground.
(3) The Court may require previous compliance with the terms of the judgment before it admits proceedings in revision.
(4) The application for revision must be made at latest within six months of the discovery of the new fact.
(5) No application for revision may be made after the lapse of ten years from the date of the judgment

notification of a special agreement, the Court may, if necessary, afford the parties the opportunity of furnishing further written or oral explanations.'

2 See for example, *Request for Interpretation of the Judgment of 11 June 1998 in the Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections (Nigeria v. Cameroon)*(Judgment of 25 March 1999); *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mexico v. United States of America) (Mexico v. United States of America)*(Judgment of 19 January 2009); *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand) (Cambodia v. Thailand)*(Judgment of 11 November 2013).

Article 61 is operationalized by Articles 99[3] and 100[4] of the Court's Rules.[5] As discussed below, since its establishment, the Court has dealt with three review applications.[6] The ICJ replaced the Permanent Court of International Justice (PCIJ). Article 61 of the Statute of the PCIJ empowered the PCIJ to review its decisions. The Statute of the PCIJ was replaced by that of the ICJ after several amendments. Article 61 of the Statute of the PCIJ was reproduced almost verbatim as Article 61 of the ICJ Statute. The Statute of the PCIJ was drafted between 1920 and 1921. That of the ICJ was drafted in 1945. The drafting history Article 61 of the of the Statute of the PCIJ shows it was debated extensively and the delegates were of the view that the Court should invoke it in exceptional circumstances. During the drafting of the Statute of the ICJ, Article 61 was not debated. However, some delegates suggested minor changes to it. In this article, the author illustrates the drafting histories of both Articles 61 of the Statute of the PCIJ and 61 of the ICJ Statute respectively. The author also highlights the three cases in which the ICJ has interpreted Article 61. This discussion shows that although the ICJ has to referred to the drafting history of Article 61, its interpretation of Article 61 is consistent with its drafting history. The article will start with the drafting history of Article 61 in both Statutes.

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[3] Article 99 of the Rules of the Court provides that '[1]. A request for the revision of a judgment shall be made by an application containing the particulars necessary to show that the conditions specified in Article 61 of the Statute are fulfilled. Any documents in support of the application shall be annexed to it. [2]. The other party shall be entitled to file written observations on the admissibility of the application within a time-limit fixed by the Court, or by the President if the Court is not sitting. These observations shall be communicated to the party making the application. [3]. The Court, before giving its judgment on the admissibility of the application may afford the parties a further opportunity of presenting their views thereon. [4]. If the Court finds that the application is admissible it shall fix time-limits for such further proceedings on the merits of the application as, after ascertaining the views of the parties, it considers necessary. [5]. If the Court decides to make the admission of the proceedings in revision conditional on previous compliance with the judgment, it shall make an order accordingly.'

[4] Article 100 provides that '[1]. If the judgment to be revised or to be interpreted was given by the Court, the request for its revision or interpretation shall be dealt with by the Court. If the judgment was given by a Chamber, the request for its revision or interpretation shall be dealt with by that Chamber. [2]. The decision of the Court, or of the Chamber, on a request for interpretation or revision of a judgment shall itself be given in the form of a judgment.'

[5] Rules of Court (1978) (Adopted on 14 April 1978 and Entered into Force on 1 July 1978).

[6] For a list of some of the publications in which Article 60 has been discussed, see for example, Serena Forlati, 'Revision of Judgment: International Court of Justice (ICJ)' (2019). Available at https://opil.ouplaw.com/display/10.1093/law-mpeipro/e3385.013.3385/law-mpeipro-e3385 (accessed 20 October 2025).

Method

This article examines the scope of the International Court of Justice's jurisdiction to review its own judgments under Article 61 of the ICJ Statute, focusing on the interpretation of "*revision*" as an exceptional remedy. Using a doctrinal legal research method, the study analyzes the text of Article 61 alongside its travaux préparatoires to clarify the original intent behind its strict admissibility requirements, particularly the discovery of a new and decisive fact. By situating Article 61 within the broader framework of finality and legal certainty in international adjudication, the article evaluates how the Court has balanced these principles in its jurisprudence.

In addition, the research adopts a historical-analytical approach to trace the drafting history of Article 61 and assess how its preparatory works inform contemporary interpretation. The study also incorporates a case law analysis of relevant ICJ decisions on revision to illustrate the practical application of the provision and identify interpretative trends. Through this combined method, the article aims to provide a clearer understanding of the limits of the Court's revisory jurisdiction and its implications for the stability and integrity of international judicial decisions.

Result and Discussion

A. The Drafting History of Article 61

For a more coherent discussion of the drafting histories of Articles 61 of the Statute of the PCIJ and 61 of the Statute of the ICJ, the drafting history of the former will be discussed first and then followed by that of the latter.

1) Article 61 of the Statute of the PCIJ

As mentioned above, Article 61 of the ICJ Statute has its roots in Article 61 of the 1921 Statute of the PCIJ. Article 61 of the Statute of the PCIJ provided that:

> *An application for revision of a judgment can be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence. The proceedings for revision will be opened by a judgment of the Court expressly recording the existence of the*

new fact, recognizing that it has such a character as to lay the case open to revision, and declaring the application admissible on this ground.
The Court may require previous compliance with the terms of the judgment before it admits proceedings in revision. The application for revision must be made at latest within six months of the discovery of the new fact. No application for revision may be made after the lapse of ten years from the date of the sentence.

The issue of the PCIJ's power to review its decisions was addressed in the Drafts of Convention relative to the establishment of an International Court of Justice submitted by different states to the Advisory Committee of Jurists in 1920.[7] For example, Article 19 of the Danish government proposal provided that:

The judgment shall decide the issue finally and without appeal. A revision of the sentence may however be granted on the request of one of the Parties if this request is supported by the discovery of a new fact, which in the opinion of the Court may have influenced the decision.[8]

Likewise, Article 26 of the Swedish Government proposal stated that:

The verdict shall decide the dispute finally, and is not subject to any appeal. Should either party, however, desire a reconsideration of the case, the Court may grant a review, should some new fact have come to light that the Court deems likely to have an influence upon the verdict if the case were reviewed.[9]

Article 47 of the Draft propose by the five neutral powers provided that:

1. A sentence duly pronounced and notified to the contesting parties settles the dispute definitely and without appeal.
2. Nevertheless, the case may be revised at the request of one of the parties, if such request is based upon the discovery of some

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7 Draft Convention relative to the establishment of an International Court of Justice.

8 Advisory Committee of Jurists, Documents presented to the Committee relating to existing plans for the establishment of a Permanent Court of International Justice (1920) at 214. Available at https://www.icj-cij.org/sites/default/files/permanent-court-of-international-justice/serie_D/D_documents_to_comm_existing_plans.pdf (accessed 05 January 2025).

9 Ibid, at 248.

new fact which existed before the sentence, and which, in the opinion of the Court, would have affected the sentence.[10]

Based on the above submissions, the 'Draft for the Organisation of the Permanent Court of International Justice' was prepared. Article 32 of this Draft stated that:

> *[1] The sentence of the Court shall be final; there shall be no appeal against it.*
> *[2] Nevertheless, the discovery of a new fact (or document), which would have been of such a kind as to influence the decision, shall authorise a request for review.*
> *[3] By a new fact (or document), is meant one which was unknown both to the Court itself and to the Party which asks for revision at the end of the preliminary proceedings.*
> *[4] In the proceedings of revision, the Party making the request, shall submit its statement and the opposing Party a counter-statement; these shall be distributed as laid down in Article 27.*
> *[5] As concerns the report and sentence, the terms of Article 28 shall be complied with.*
> [6] *Disputes which may arise between the Parties concerning the interpretation of a sentence, shall be brought before the Court.*[11]

In the 'Memorandum of the Work of the Conference' which was annexed to the Draft Convention, the Advisory Committee of Jurists reported that:

> *The Draft lays down that all sentences of the Court are final. Revision only is permissible. The new fact upon which any such revision is based must have existed before sentence, but a litigant Party can only make use of it if discovered after the sentence was given…*[12]

The following issues emerge from Article 32 of the Draft Convention and the proposals submitted by the different states. One, the judgement of the court was final and not subject to appeal. However, a party dissatisfied with

[10] Ibid, at 324.
[11] Ibid, at 360.
[12] *Ibid*, at 336.

the court's judgement had the right to ask the court to review its decisions. Two, and related to the above, for the application for review to be admitted, the court had to be satisfied that certain conditions were met. First, a new fact or document should have been discovered. Second and related to the first one, that fact or document should have been able to influence the decision. Thus, the draft provision drew a distinction between a fact and a document. However, it did not explain the distinguishing feature(s) between the two. Third, the fact or document should have been unknown to the Court or the party seeking the review of the decision at the end of the preliminary proceedings. This has two implications. One, if there were more than one party to the case, the fact that the new fact or the document was known by one of the parties does not bar the other parties, who did not know about it, from asking the Court to review the decision. Two, the party asking the court to review the decision should have been unaware of the new fact or document at the time the court closed the pleadings (preliminary hearings). This means that such a new fact or document should have been in place at time of decision. Finally, the draft provisions did not stipulate the time within which the review application had to be filed.

In 1921, the Advisory Committee of Jurists submitted to the First Assembly of the League of Nations its plans and proposed amendments to the initial draft of the Statute of the Court.[13] Article 59 of the Draft Scheme for the Institution of the Permanent Court of International Justice[14] provided that:

> *[1] An application for revision of a judgment can be made only when it is based upon the discovery of some fact, of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence.*
>
> *[2] The proceedings for revision shall be opened by a judgment of the Court expressly recording the existence of the new fact,*

[13] Documents concerning the action taken by the Council of the League of Nations under Article 14 of the Covenant and the adoption by the Assembly of the Statute of the Permanent Court (1921) p. 10. Available at https://www.icj-cij.org/sites/default/files/permanent-court-of-international-justice/serie_D/D_documents_conseil_de_la_societe_des_nations.pdf

[14] *Ibid*, at130. The full title was 'The Draft Scheme for the Institution of the Permanent Court of International Justice mentioned in Article 14 of the Covenant of the League of Nations, Presented to the Council of the League by the Advisory Committee of Jurists as Amended by the Decision of the Council.'

recognizing that it has such a character as to lay the case open to revision, and declaring the application admissible on this ground.

[3] The Court may require previous compliance with the terms of the judgment before it admits proceedings in revision.

[4] No application for revision may be made after the lapse of five years from the date of the sentence.

There are some notable differences between the 1920 and the 1921 drafts. First, the 1920 draft provided for both a new fact or document. The 1921 restricted itself to new fact. Second, the 1920 draft was silent on the time within which the party that wanted to have the decision reviewed had to file the review application. The 1921 provided for the deadline. Third, the 1921 draft replaced the word 'sentence' with 'judgment' in the first three provisions. However, it was retained in the fourth provision. States suggested amendments to the Draft Scheme. Some of them suggested ways in which Article 59 should be amended. These suggestions are discussed next.

During the debates on Article 59, the Italian delegate suggested that the word 'document' should be added back to Article 56. However, he later withdrew this amendment 'having declared that the discovery of a document was included in the discovery of a fact.'[15] This means that a fact should be interpreted to mean a document. On the question of the time within which the application to review the judgement was to be made, there were different opinions. The Italian delegation suggested that the period should be increased from five to ten years. However, the Argentine and Swiss delegations suggested that the provision should have 'dispensed with any limitation of the period.'[16] In other words, a party should be able to file an application for review at any time. However, the Canadian delegate proposed what he thought would be a 'solution' and a 'compromise' to cater for the interests of both groups above. Thus:

> [He] proposed to reduce the period and to make it run from the discovery of the new fact. If a fixed period was adopted it might be found necessary to maintain a situation which was manifestly unjust.

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[15] *Ibid*, at 370.

[16] Ibid, at 370. See also at 160 where the Argentine delegate recommended that Article 56(4) should be 'suppressed.'

> On other hand, to dispense with any limitation of the period would be an excessive measure.[17]

The Greek delegate argued that both the Italian and the Argentine proposals were unsatisfactory because 'if it could be considered unjust to maintain a situation resulting from an ill-founded award, it might still be more unjust to reverse this situation of fact.'[18] He added that 'it was essential that after a certain period of time the position of the parties should be finally settled.'[19] In response to the Greek delegate's submission, the Canadian delegate 'suggested the idea of combining a longer fixed period than those which had been proposed with a very short period running from the discovery of the new fact.'[20] However, he did not suggest a specific amendment for discussion and adoption or otherwise. The French delegate supported his Canadian counterpart's suggestion and proposed that Article 59 should include a provision to the effect that: '[t]he application for revision must be made at latest within six months of the discovery of the new fact. No application for revision may be made after the lapse of ten years from the date of the sentence.'[21] At this stage, there were three proposed amendments: the Italian, the Argentinean (supported by the Swiss delegate) and the French (supported by the Greek and Canadian delegates). The chairman put all of them to vote in the order in which they suggested. The Argentine proposal which had suggested the deletion of the provision providing the time within which an application for review was supposed to be filed 'was unanimously rejected.'[22] The Italian proposal, suggesting the 10-year deadline but silent on shortest time in which the application has to be filed after the discovery of the new fact, 'was adopted by seven votes against three.'[23]

When the chairman put the French proposal to vote, delegates discussed it before casting their votes. The Italian delegate argued that he did not support the French amendment because it 'would lead to difficulties, since the discovery of the new fact constitutes a very indefinite point of departure.'[24] In response, the French delegate argued that it was 'to the

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17 Ibid, at 370.
18 Ibid, at 370.
19 Ibid, at 370.
20 Ibid, at 370.
21 Ibid, at 370. Italics removed.
22 Ibid, at 370.
23 Ibid, at 370.
24 Ibid, p. 370.

interest of the party to ask for revision with the least possible delay.'[25] In response the Italian delegate argued that 'if that was the case, there was no reason for the limitation of period.'[26] The Brazilian delegate supported the Italian delegate's submission and argued that the six-month 'rule' should not be included in the provision because it 'would nullify the ten-year period' and that 'discovery of the new fact was too vague a point of departure.'[27] The Canadian delegate 'admitted that his proposal lost some of its importance when the period was limited to ten years.'[28] After those submissions, the delates voted and 'it resulted into the adoption of the formula submitted' by the French delegate 'with five votes against four.' The Chairman abstained from casting the vote.[29] At this stage, the delegates had approved two proposals: the Italian and the French. The French proposal had two parts. The second part (proving for the 10-year period) was identical to the Italian proposal. Thus, the discovery of the new fact as the point of departure did not receive overwhelming support. It was adopted by a simple majority.

In its Report and the Draft Scheme presented to the Assembly of the League of Nations based on the above discussions, the Third Committee noted that it had renamed Article 59 as Article 61 (this was after the insertion of new articles in the draft). It reported that:

> *An Argentine amendment proposed dispensing with any limitation of the period for the application of revision. Because of the difficulties which might result from a revision taking place at a time when a certain situation based on the judgment of the Court had become established and had existed for many years, the Sub-Committee was unable to adopt this proposal. The Sub-Committee has, however, made two changes in this article.*
>
> 1. *Extension of the absolute period of limitation from 5 to 10 years.*
> 2. *Introduction of a very short period (six months) for the right of making an application for revision after the discovery of the new fact.*[30]

It was emphasised that the decision of the court was final and that an application for review was not the same thing as the right of appeal. The

[25] Ibid, at 370.
[26] Ibid, at 370.
[27] Ibid, at 370.
[28] Ibid, at 370.
[29] Ibid, at 370.
[30] Ibid, at 508.

proposal that in exceptional circumstances a party should be allowed to appeal against the decision of the court was overwhelmingly rejected.[31] It is against that background that Article 61 was included in the Statute of the PCIJ.

The following should be noted about the above debates on the draft Article 59. First, a party to the proceedings had a right to make an application for the review of the judgment. This was the case although Article 61 did not expressly use the term 'right.' However, this right was not absolute. It was subject to the applicant meeting the deadline stipulated in Article 61. Second, all the delegates agreed with the Italian delegate's view that the new fact is broad enough to include the new document. Third, the word 'may' under Article 59 should be interpreted to mean shall. This is because the delegates agreed that the 10-year period was fixed. Thus, the court did not have the jurisdiction to entertain an application for review filed after the lapse of 10 years after the date of the delivery of the judgment. Forth, delegates anticipated Article 59 to impose a fixed six-month period after the discovery of the new fact. Once that fact is discovered, the party seeking the revision of the judgment had six months within which to make the application. The use of the word 'must' and the submissions made by the delegates on Article 59 imply that that period is fixed. In other words, if the application is not made within six months of the discovery of the fact, the party loses locus standi to bring the application and the Court has no jurisdiction to entertain it. Thus, the Court does not have the discretion to extend the deadline under Article 61. The six-month period starts running the day the new fact is discovered and not on the day the party obtains (takes physical possession) of the new fact. This is especially the case when the time at which the fact was discovered is different from that when the applicant took physical possession of the fact.

2) Article 61 of the Statute of the PCIJ

When the Statute of the ICJ was enacted, Article 61 of the Statute of the PCIJ was 'cut and pasted' into the former. Article 61 of the Statute of the ICJ has been reproduced above and will not be repeated here. However, it is important to highlight the two minor differences between Article 61 of the ICJ Statute and Article 61 of the Statute of the PCIJ. The first deference is that the last sentence of Article 61 of the Statute of the PCIJ provided that an

[31] Ibid, at 298.

application for revision could not be brought 'ten years from the date of the sentence.' It is not clear why the word 'sentence' was used in the Statute of the PCIJ since it was not a criminal court and had no jurisdiction to impose sentences. However, this could have been an oversight because the word 'sentence' was mentioned only once in the whole Statute. The oversight could have been attributed to the fact that, as the Commission of the Interparliamentary Union explained, the Draft Convention relative to the establishment of an International Court of Justice was based on earlier international instruments in which the word 'sentence' was used.[32] In Article 61(4) of the Statute of the ICJ, the term 'sentence' was replaced with the word 'judgment.' The drafting history of the Statute of the ICJ shows that the rationale behind this change was explained. During the debates on draft Article 61, the United Kingdom delegate argued, inter alia, that the word 'sentence' had not 'been used anywhere in the Statute' and had to be replaced with the word 'decision' or 'judgement.'[33] This was so because, he added, 'the term "sentence" was not suitable since a sentence was a punishment and not a judgment.'[34] The Chinese delegate agreed with his United Kingdom counterpart but suggested that 'the word "judgement" should be used throughout.'[35] It is against that background that term 'sentence' was replaced by 'judgement.' This was 'a formal' amendment.[36] It does not 'change the sense' of the provision.[37]

The second difference is that the first sentence of Article 61(1) of the Statute of the PCIJ provided that an application for revision of a judgement 'can be made.' The term 'can' was replaced by 'may' in Article 61 of the Statute of the ICJ. However, the drafting history of the Statute of the ICJ is silent on the reasons, and at what stage, the term 'can' under Article 61(1) of the Statute of the PCIJ was replaced by the term 'may' under Article 61(1) of the Statute of the ICJ. The initial drafts of Article 61(1) of the Statute of the ICJ used the term 'can' but subsequently,[38] it was replaced with the term 'may' without even crossing-out the former contrary to what was done in

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32 Ibid, at 340.
33 United Nations Committee of Jurists, *Documents of the United Nations Conference on International Organization, San Francisco* (1945) Volume XIV, at 184.
34 Ibid, at 184.
35 Ibid, at 184.
36 Ibid, at 622.
37 Ibid, at 685.
38 Ibid, at 354, 506, 522, and 572.

cases of other amendments.[39] The replacement was also a formal amendment and could have been made to align Article 61(1) with Article 61(5) where the term 'may' instead of 'can' is used. However, the amendment doesn't have any legal implications. The drafting history of Article 61 suggests that in deciding to deal with the application for revision, the Court has to first consider the criteria under Article 61(4) and (5) before opening the proceedings under Article 16(2). This is because the moment the proceedings are commenced under Article 16(2), the assumption is that the Court has jurisdiction to assess the merits of the application based on the grounds under Article 16(1). Thus, the first question that the Court is supposed to ask before deciding whether to assess whether the applicant had complied with the grounds under Article 61(1) is whether the review application has been filed within the stipulated time. In other words, does it comply with Article 61(4) and (5). If the answer to this question is in the negative, the court should dismiss the application summarily. It should not discuss the other grounds of admissibility under Article 61(1). In other words, Article 61(3) should not be triggered. However, practice from the Court shows that it has not followed this approach. It is now important to illustrate how Article 61 has been implemented in practice.

B. Article 61 of the Statute of the ICJ in Practice

Although Article 61 of the Statute of the PCIJ empowered it to review its decisions, it was never invoked. Thus, the PCIJ never dealt with any application to review its judgement. Since its establishment, the ICJ has dealt with three review applications.[40] However, none of them was successful as the applicants failed to meet the admissibility requirements under Article 61. In this part of the article, the author will illustrate how the Court interpreted Article 61. The Court held that for an application for revision to be admissible, each of the following conditions has to be satisfied:

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39 Ibid, at 685.

40 *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the Continental Shelf (Tunisia v. Libyan Arab Jamahiriya)*, Judgment, I. C. J. Reports 1985, p. 192; *Application for Revision of the Judgment of 11 July 1996 in the Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections (Yugoslavia v. Bosnia and Herzegovina)*(Judgment of 3 February 2003); *Application for Revision of the Judgment of 11 September 1992 in the Case concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening) (El Salvador v. Honduras)* (18 December 2003).

> *(a) the application should be based upon the "discovery" of a "fact", (b) the fact, the discovery of which is relied on, must be "of such a nature as to be a decisive factor", (c) the fact should have been "unknown" to the Court and to the party claiming revision when the Judgment was given, (d) ignorance of that fact must not be "due to negligence", and (e) the application for revision must be "made at latest within six months of the discovery of the new fact" and before ten years have elapsed from the date of the Judgment*.[41]

It is the Court, and not the parties, to determine whether an application for review is admissible under Article 61. This is so because '[r]evision is not available simply by consent of the parties, but solely when the conditions of Article 61 are met.'[42] In all the three applications that the Court has dealt with, it invoked Articles 61(1) and 61(2) before dealing with Articles 61(4) and (5). This could be explained by the fact that the evidence before the court suggested that the applicants had complied with Articles 61(4) and (5). For example, in the *Tunisia v Libyan Arab Jamahiriya* case, since the Court found that the applicant had been negligent in failing to obtain the information it sought to rely on in its review application, it did not find it necessary to address the question of 'whether the application for revision was made within six months of the discovery of the fact of the co-ordinates, as required by' Article 6(4).[43]

Likewise, in the *Yugoslavia v Bosnia and Herzegovina*,[44] when the Court found that the fact on which the applicants had based their application was not new within the meaning of Article 61(1), it did not find it necessary to address the issue of whether the application had been filed in compliance with Article 61(4) and (5).[45] However, it referred to Article 61(4) and (5) in passing.[46] In *El Salvador v Honduras*,[47] the Court was confronted with the facts that required it to interpret Article 61(4) and (5). It observed that:

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41 *Yugoslavia v Bosna and Herzegovina*, ibid; *El Salvador v. Honduras*, Ibid para 20.
42 *El Salvador v. Honduras*, Ibid para 22.
43 *Tunisia v. Libyan Arab Jamahiriya*, para 28.
44 *Yugoslavia v Bosna and Herzegovina* (supra note 39).
45 Ibid, para 73.
46 Ibid, para 16.
47 *El Salvador v. Honduras* (*supra* note 39).

> *[T]he Parties raise the question whether the Application for revision was properly made within the six-month time-limit stipulated in paragraph 4 of Article 61 of the Statute. They do acknowledge, however, that the Application was submitted within the ten-year time-limit provided for in paragraph 5 of that Article, specifically, one day before the expiry of that time-limit. Honduras maintains nevertheless that, by proceeding in this fashion, the Applicant showed procedural bad faith. That is denied by El Salvador.*[48]

However, since the Court had held that the application did not disclose a new fact as contemplated in Article 61(1), it did not find it 'necessary…to ascertain whether the other conditions laid dawn in Article 61 of the Statute' were 'satisfied.'[49] In this case, one would have expected the Court to at least address the respondent's concern relating to the applicant's 'eleventh hour' filing of the application. In the author's view, although the application was filed 'one day before the expiry of the' ten-year time limit, the applicant complied with Article 61(5). Thus, they did not show 'procedural bad faith.' The applicant would still have met the requirement of Article 61(5) even if it had filed the application on the '10th anniversary' of the judgment. However, they would have failed to comply with Article 61(5) if they had filed the application a day after the tenth anniversary of the judgement. The six-month deadline under Article 61(4) is only applicable if by complying with it, the applicant does not transgress the ten-year deadline under Article 61(5).

Thus, for example, if the new fact is discovered nine years and five months after the judgment, the applicant must file the application within six months. Otherwise, it will be dismissed. However, if the new fact is discovered nine years and ten months after the judgement, the application must be filed within two months. Otherwise, it will be inadmissible under Article 61(5). It is thus evident that in all these cases, the court has invoked Article 61(1) before resolving the issue of admissibility under Article 61(4) and (5). It is true, as the Court said, that all the conditions under Article 61 have to met before the application is admitted. However, the best approach, contemplated in the drafting history of Article 61, is for the Court to first make a ruling on whether the application was filed in time. Only after answering this question in the affirmative should the Court proceed to deal with the other admissibility criteria under Article 61(1). If the court finds that

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[48] Ibid, para 35.
[49] Ibid, para 59.

the application does not meet the requirement under Articles 61(4) or (5), it should be dismissed summarily. There is no need to discuss the other criteria under Article 61(1).

The Statute, the Rules and Practice Directions[50] of the Court are silent on what happens when the six-month or 10-year deadline falls on a public holiday. In other words, will be party be allowed to file the application on the next working day? This is important especially in the light of Article 20(5) of the Rules of the Court which provides that 'the Court shall observe the public holidays customary at the place where the Court is sitting.' There are two possible answers to the above question. First, that if the deadline falls on a public holiday, the applicant should be allowed to submit the application on the next court working day. The second argument is that since the deadline is set in months or years and not in days, it is cast in stone. The duty is on the applicant to ensure that the application is submitted on the day before the public holiday. In the author's view, the first approach is more appealing as it enables the parties to exercise their right under Article 61. The Court could invoke its inherent jurisdiction to extend the deadline by a day or so due to the circumstances beyond the party's control especially in cases where the respondent will not be prejudiced by the extension.[51] It is necessary to also illustrate how the court has dealt with the other criteria under Article 61(1).

Under Article 61(1), the new fact is inadmissible if it was available at the time of the judgment but the applicant could not discover it due to their negligence. This admissibility ground arose in the case of *Tunisia v. Libyan*

[50] The Practice Directions as amended on 24 December 2023. Available at https://www.icj-cij.org/practice-directions

[51] In *Nuclear Tests (New Zealand v. France)*(Judgment of 20 December 1974) para 23, the Court held that 'it should be emphasized that the Court possesses an inherent jurisdiction enabling it to take such action as may be required, on the one hand to ensure that the exercise of its jurisdiction over the merits, if and when established, shall not be frustrated, and on the other, to provide for the orderly settlement of al1 matters in dispute, to ensure the observance of the "inherent limitations on the exercise of the judicial function" of the Court, and to "maintain its judicial character" ...Such inherent jurisdiction, on the basis of which the Court is fully empowered to make whatever findings may be necessary for the purposes just indicated, derives from the mere existence of the Court as a judicial organ established by the consent of States, and is conferred upon it in order that its basic judicial functions may be safeguarded.' For the discussion of the Court's inherent jurisdiction, see for example, Irene Miano, 'Inherent Jurisdiction in the Practice of the International Court of Justice: A Tool to Trespass on or to Protect States' Consent?' (2023) 22(3) *The Law & Practice of International Courts and Tribunals* 463 – 484;

Arab Jamahiriya.[52] The facts showed that applicant had failed to take all the necessary steps to obtain the evidence it wanted to rely on to ask the court to review the application (the exact co-ordinates contained in one a document, Concession No. 137, needed to establish the boundaries of the contested area). The Court observed that:

> *it should be noted that while Libya emphasizes that the information it supplied to the Court in the proceedings leading up to the 1982 Judgment was accurate as far as it went, it does not in fact deny that the exact co-ordinates of Concession No. 137 were not supplied to the Court by either Party, so that Tunisia would not have been able to ascertain the exact location of the Libyan concession from the pleadings and other material then before the Court. The Court must however consider whether the circumstances were such that means were available to Tunisia to ascertain the details of the co-ordinates of the concession from other sources; and indeed whether it was in Tunisia's own interests to do so. If such be the case, it does not appear to the Court that it is open to Tunisia to rely on those co-ordinates as a fact which was "unknown" to it for the purposes of Article 61, paragraph 1, of the Statute*.[53]

In the above extract, the Court observes that it was not aware of the exact co-ordinates of Concession No. 137. This is because neither Tunisia nor Libya included the same in their submissions to the Court before the judgement sought to be reviewed was delivered. However, the Court added that Tunisia could not invoke Article 61 to introduce that information to Court as new facts if two conditions were in place: one, if the means were available for it to obtain the information before the decision of the Court; and two, whether it was in Tunisia's own interests to obtain that information. The first condition introduces a shifting evidential burden. The duty, the initial evidential burden, was on Libya to adduce evidence and convince Court that the means were available for Tunisia to access that information. In doing so, it explained that the information in question had been accessed by other people and companies.[54] Once Libya had discharged its duty, the burden shifted to Tunisian to convince the Court as to why it could not access that information. Two, Tunisia was also required to explain why, in the event that

[52] *Tunisia v. Libyan Arab Jamahiriya* (*supra* note 39).
[53] Ibid para 23.
[54] Ibid, para 24 – 25.

it could have accessed that information or was aware of the means to get that information, it was not in its own interests to do so. This required it, for example, to explain why it thought at the time, before the judgment, that it was not in its interests to access that information. This raises the question of the relevancy of that information to Tunisia's case. If the information was relevant, it should have tried its best to access it. In accessing this information, the party is expected to use lawful (diplomatic) channels. However, if such channels aren't yielding the required results, it should 'employ other, perfectly lawful and proper, means to obtain it.'[55] The Court added that Tunisia should have collected all the available evidence and information in preparation for the conference at which the dispute was discussed and for litigation.[56] Against that background, the Court held that:

> *The fact that the concession boundary co-ordinates were obtainable by Tunisia, and the fact that it was in its own interests to ascertain them, together signify that one of the essential conditions of admissibility of a request for revision laid down in paragraph 1 of Article 61 of the Statute, namely ignorance of a new fact not due to negligence, is lacking*.[57]

Thus, for negligence to be established, it has to be proved that the information was obtainable legally and that it was in the interests of the litigant to obtain that evidence. This implies that the Court is unlikely to admit illegally obtained evidence for the purpose of the application under Article 61(1).[58] Another important question relates to the meaning of the phrase 'when the judgment was given' under Article 61(1). The three

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55 Ibid, para 26.

56 Ibid, para 27. It stated that 'Normal diligence would require that, when sending a delegation to negotiate a continental shelf delimitation, following the grant by each side of neighbouring or conflicting concessions, a State should first try to learn the exact co-ordinates of the other party's concession. Furthermore, it is to be expected that a State would not assert that such concession extended to its own area of continental shelf without knowing, or making efforts to discover, the exact limits of the concession. It is also to be expected that, in litigation the ultimate purpose of which is the establishment of a continental-shelf delimitation, and in the course of which a petroleum concession in the relevant area is described by one party without precision, the other party will not limit itself to commenting on the matter in its pleading, but itself seek out the information.'

57 Ibid, para 28.

58 For a discussion of the inadmissibility of illegally obtained evidence before the ICJ, see for example, Chittharanjan F. Amerasinghe, *Evidence in International Litigation* (2005) at 178 – 179.

applications the Court has dealt with so far show that the new facts were discovered months or years after the judgement was delivered. However, it is not impossible for the new facts to be discovered before the judgement is delivered but when it is too late for the party to bring it to the attention of the court. This could happen, for example, when the fact has been discovered after the court has closed the pleadings and busy preparing the judgment. In this case, it would be too late to invoke Article 72 of the Rules to reopen the pleadings.[59] In such a case, the party should be allowed, in the six months after the delivery of the judgment, to file an application for review on the basis of the discovery of a new fact. As discussed above, this approach was contemplated under the 1920 Draft of the Statute of the PCIJ when it was stated that the party asking the court to review the decision should have been unaware of the new fact or document at the time the court closed the pleadings (preliminary hearings). Under Article 61, there is no requirement that the new fact should have been discovered by the party making the application personally. It could be discovered by another person who then brings it to the attention of the party making the application.

Under Article 61(1), the new fact is admissible if it is of 'such a nature as to be a decisive factor' on the judgement. It has been discussed above that the drafting history of Article 61(1) shows that initially, the 1920 Draft Statute of the PCIJ had provided for a new fact that would 'influence the decision.' However, in the 1921 Draft, that phrase was replaced by the one of 'decisive factor.' The drafting history is silent on the rationale behind that change. Since the Statute of the ICJ does not define or describe the phrase 'decisive factor', the Court has interpreted it differently. It has held that the question is whether knowledge of the new fact that the party has submitted in its review application 'would have led the Court to give a different decision.'[60] It has also held that in answering this question, it will consider whether the evidence on which it based its disputed decision was 'the sole consideration taken into account by the Court.'[61] In other words, it has to be

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59 Article 72 provides that 'Any written reply by a party to a question put under Article 61, or any evidence or explanation supplied by a party under Article 62 of these Rules, received by the Court after the closure of the oral proceedings, shall be communicated to the other party, which shall be given the opportunity of commenting upon it. If necessary the oral proceedings may be reopened for that purpose.' For a discussion of Article 72of the Rules, see Andreas Zimmermann, Christian J. Tams, Christian Tomuschat, Karin Oellers-Frahm, *The Statute of the International Court of Justice: A Commentary* (2012) at 1244

60 *Tunisia v. Libyan Arab Jamahiriya* (supra note 39) at 34.

61 Ibid, at 35.

the 'the sole basis of the entire decision.'[62] Thus, any discovered new fact that does not meet that criterion will not 'necessarily…be regarded as a decisive factor.'[63] In other words, for the Court to conclude that the new fact is not a decisive factor, 'the Court's reasoning' should be 'wholly unaffected by the evidence…produced' in the application for review.[64] It is not enough to prove that the new fact would have enabled the court 'to be more specific in its decision.'[65] For the factor to have a decisive factor, the court will also consider the question of whether it 'might have reached different conclusions in' the judgment sought to be reviewed 'had it also had before it the versions of those documents [facts]' the partly applying for review has submitted as new facts.[66] Thus, the new fact should 'affect the reliability' of the evidence that the court relied on to make the decision that is sought to be reviewed.[67] It should be able to 'overturn the conclusions' that court arrived it.[68] The above discussion shows that the purpose of a review application is to prove that the judgment was a nullity. It is argued that influencing a decision, as contemplated in the initial draft of Article 61(1) (the 1920 draft), is not the same thing as saying that it is was the sole basis of the decision sought to be reviewed. The former requires a lower standard of proof than the later.

The Court has held that the 'new fact' must have existed at the time of the judgment. It stated that:

> *Under the terms of Article 61, paragraph 1, of the Statute, an application for revision of a Judgment may be made only when it is "based upon the discovery" of some fact which, "when the Judgment was given", was unknown. These are the characteristics which the "new" fact referred to in paragraph 2 of that Article must possess. Thus, both paragraphs refer to a fact existing at the time when the Judgment was given and discovered subsequently. A fact which occurs several years after a Judgment has been given is not a "new" fact within the meaning of Article 61, this remains the case irrespective of the legal consequences that such a fact may have.*[69]

[62] Ibid, at 35.
[63] Ibid, at 35.
[64] Ibid, para 38. See also *El Salvador v. Honduras* (supra note 39) para 40.
[65] *Tunisia v. Libyan Arab Jamahiriya* (supra note 39) at 39.
[66] *El Salvador v. Honduras* (supra note 39) para 51.
[67] Ibid, para 52.
[68] Ibid, para 53.
[69] *Yugoslavia v Bosna and Herzegovina* (supra note 39) para 67.

As demonstrated above, this interpretation is consistent with the drafting history of Article 61. Under Article 61, for the new fact to be admissible, it must have been unknown to the court and to the party claiming revision. The Court has interpreted this provision strictly. It has held that the application was inadmissible because the facts 'were known to the Court' and to the applicant 'at the time when the judgement was given.'[70] A close examination of Article 61 also shows that for the Court to review any of its judgements, there has to be an application by one of the parties to the judgement. Thus, the Court cannot review its decision *mero motu*. Strictly interpreted, Article 61 is applicable to the court's judgments. Thus, it is not applicable to the court's advisory opinions and orders. This is inferred from the fact that Article 61 mentions judgment only and is silent on advisory opinions and orders although they are specifically mentioned in the Statute.[71] However, the Court could interpret Article 68 of the Statute as empowering it to invoke its powers under Article 61 in cases of advisory opinions.[72]

Article 61 is limited to the review of the judgment when the discovered fact affected the evidence that the court relied on to write its judgement. That is, it relates to the issues before court. It does not deal with facts the relate to process that was followed to write the judgment. In this way, it is different, for example, from the approach taken in Article 84(1) of the Rome Statute of the International Criminal Court (1998) which provides that an application for the review of the Court's final judgement can be made under the following circumstances:

> *(a) New evidence has been discovered that: (i) Was not available at the time of trial, and such unavailability was not wholly or partially attributable to the party making application; and (ii) Is sufficiently important that had it been proved at trial it would have been likely to have resulted in a different verdict;*
> *(b) It has been newly discovered that decisive evidence, taken into account at trial and upon which the conviction depends, was false, forged or falsified;*
> *(c) One or more of the judges who participated in conviction or confirmation of the charges has committed, in that case, an act*

70 Ibid, para 70.

71 Articles 65 – 68 of the Statute deal with Advisory Opinions.

72 Article 68 of the Statute provides that 'In the exercise of its advisory functions the Court shall further be guided by the provisions of the present Statute which apply in contentious cases to the extent to which it recognizes them to be applicable.'

> *of serious misconduct or serious breach of duty of sufficient gravity to justify the removal of that judge or those judges from office under article 46.*

Article 61 of the Statute of the ICJ is limited to the grounds akin to those under Article 84(1)(a) and (b) of the ICC Statute above. It is silent on the grounds akin to those under Article 84(1)(c) of the ICC Statute. In the author's view, since Article 2 of the Statute of the ICJ provides that the judges of the Court are independent, if there is evidence to prove any ground similar to those under Article 84(1)(c) exists, the ICJ should be able to invoke its jurisdiction and review its judgment or opinion. Article 61 contemplates a situation where the Court can review its judgment once. The review decision being a judgment of the Court, it is also not subject to appeal. This raises the question of whether the Court has the power to review its review judgment. For example, a new fact could be discovered to show that the review judgment was obtained from fraud or deceit. Although very unlikely and highly discouraged as it has the potential to open the door for endless litigation, Article 61 does not bar the Court from reviewing such a decision on the same grounds as the first decision.

Conclusion

In this article, the author has discussed the drafting history of Article 61 of the Statute of the ICJ. The article has also shown how the Court has interpreted Article 61 of the Statute. The Court has assessed the admissibility of the review applications by first considering the factors under Article 61(1). It has been suggested that the best approach would be to consider the factors under Articles 61(4) and (5). It has also been suggested that although the Statute and the Rules are silent on the circumstances in which the Court can extend the deadline in which the applicant should submit the review application, the Court can invoke its inherent jurisdiction to extend such a deadline in exceptional circumstances. The author has also argued that the Court does not have the jurisdiction to review its judgement *mero motu*.

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