

[INSTTUTION]

**HOW EFFECTIVE IS THE JUDICIAL MEANS OF SETTLEMENT (ICJ) IN THE
PEACEFUL SETTLEMENT OF DISPUTES?**

By

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ABBREVIATIONS

ICJ	International Court of Justice
ITLS	International Tribunal for the Law of the Sea
NATO	North Atlantic Treaty Organization
NGOs	Non-governmental Organizations
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
UK	United Kingdom
UN	United Nations
US	United States
WHO	World Health Organization
WTO	World Trade Organization

ABSTRACT

The International Court of Justice continues to hold a paramount position as the world judicial organ. Its contribution to the peaceful settlement of international disputes is outstanding. As the principal judicial institution of the UN, the Court has developed important jurisprudence that many regional and international courts and tribunals continuously refer to in their operations. However, its effectiveness in dealing with contentious international disputes has been a puzzle. This is the puzzle that this study sought to unravel. Notable setbacks include, among others, the consensual jurisdiction of the Court, the lack of an effective enforcement framework, and lack of judicial impartiality and independence. It is argued that, in order to revitalize the Court's international influence, radical reforms in respect of the aforementioned setbacks must be undertaken. Crucially, the Court should be well equipped and strengthened to accommodate the 21st century disputes, which are rapidly evolving.

Key Terms: Contentious jurisdiction, enforcement of judgments, and judicial independence.

CHAPTER ONE: INTRODUCTION TO THE STUDY

1.1. Introduction

War is an adverse reality that tears the world apart.¹ Indeed, the need for peace in the world was the theory behind the creation of the United Nations (UN) and its organs. Article 2(3) of the UN Charter urges all member states to settle their disputes using non-violent means. The UN General Assembly Resolution XXV of 1970 underscores the importance of upholding international peace based on the principles of equality, justice and respect for human rights.² Under Article 52(2) of the Charter, States are required to first seek pacific methods of dispute resolution before referring their issues to the UN Security Council. Pacific methods of dispute resolution include negotiation, enquiry, mediation, arbitration, judicial settlement, and conciliation.³ While noting the salient features of these methods, the present study focuses on the effectiveness of judicial settlement of international disputes, which is the responsibility of the International Court of Justice (ICJ). Simply put, the study delves into the effectiveness of the ICJ as a form of pacific settlement of disputes.

1.2 Background

The ICJ, also known as the World Court, is the main judicial arm of the United Nations (UN). It was established in 1945 as a successor of the Permanent Court of the International Justice (PCIJ), which had existed since 1922.⁴ As an integral component of the UN, the ICJ's

¹ Dominique Alheritiere, 'Settlement of Public International Disputes on Shared Resources: Elements of a Comparative Study of International Instruments' (1985) 25 *Natural Resources Journal* 703.

² United Nations General Assembly, *Declaration of International Law Concerning Friendly Relations and Cooperation among States* (GA/RES/25/2625, 24 October 1970) <<http://www.un-documents.net/a25r2625.htm>> accessed 4 December 2015.

³ United Nations, *Charter of the United Nations* (1 UNTS XVI, 24 October 1945) Article 33 [hereinafter the UN Charter].

⁴ Ridwanul Hoque, 'Jurisdictional Problems of the International Court of Justice: Towards an Alternative Framework?' (1999) 3(1) *Bangladesh Journal of Law* 3; Peter Tomka, 'The Rule of Law and the Role of the International Court of Justice in World Affairs' (Inaugural Hilding Eek Memorial Lecture, Stockholm Centre for International Law and Justice, Monday 2 December 2013) 4 <<http://www.icj-cij.org/presscom/files/9/17849.pdf>> accessed 28 November 2016.

primary role is to adjudicate interstate disputes in line with international law.⁵ Additionally, the Court may be called upon by specialized international bodies, including the UN Security Council and General Assembly, to give advisory opinions.⁶

Since its establishment, the ICJ has been very instrumental in the administration of justice. However, the Court's effectiveness has been declining. Most of the cases submitted to the Court relate to boundary demarcation and interpretation of treaties.⁷ Its influence in more political disputes, such as use of force, has been contentious. The UN Charter expressly proscribes the use of force in the resolution international disputes.⁸ Article 2(3) thereof requires States to ensure peaceful settlement of their disputes without resorting to force. Overall, the ICJ has resolved depressingly few disputes in a world that is ridden with numerous disputes, some of which relate to gross violation of international law.⁹ States have generally remained reluctant in submitting the bulk of their cases to the ICJ.¹⁰ It is on this basis that this study seeks to establish the effectiveness of the ICJ in the peaceful settlement of disputes.

1.3 Problem Statement

The problem under study herein is whether the ICJ is effective in adjudicating the ever-increasing disputes in the modern-day world. In the recent past, international adjudication has

⁵ S Gozie Ogbodo, 'An Overview of the Challenges Facing the International Court of Justice in the 21st Century' (2012) 18 (1) *Annual Survey of International & Comparative Law* 93; see also P Tomka, 'The Rule of Law and the Role of the International Court of Justice in World Affairs' (Inaugural Hilding Eek Memorial Lecture, Stockholm Centre for International Law and Justice, Monday 2 December 2013) <<http://www.icj-cij.org/presscom/files/9/17849.pdf>> accessed 28 November 2016.

⁶ International Court of Justice, *The International Court of Justice: Handbook* (The Hague: ICJ, 2013) 5.

⁷ Vitalius Tumonis, 'Adjudication Fallacies: The Role of International Courts in Interstate Dispute Settlement' (2013) 32(1) *Wisconsin International Law Journal* 39 <https://hosted.law.wisc.edu/wordpress/wilj/files/2014/01/Tumonis_final.pdf> accessed 28 November 2016; C Greenwood, 'The Role of the International Court of Justice in the Global Community' (2011) 17(2) *University of California, Davis* 233-252 <<https://jilp.law.ucdavis.edu/issues/volume-17-2/Greenwood.pdf>> accessed 29 November 2016.

⁸ The UN Charter, Article 2(4).

⁹ Tumonis (n 7) 39.

¹⁰ *ibid* 40.

rapidly developed as States have established a number of juridical bodies, such as courts, and quasi-judicial tribunals.¹¹ However, the ICJ still remains one of the most outstanding courts in the world. It has historically played a leading role in the resolution of interstate disputes. This notwithstanding, the Court's effectiveness in the pacific settlement of disputes has attracted considerable attention lately. Critics argue that the ICJ has constantly lost power and influence since the 1950s.¹² The usage of the Court, particularly by powerful countries like the United States (US) and the United Kingdom (UK), has declined significantly. While the total number of disputes lodged before the ICJ increased since the late 1980s, the overall usage of the Court did not match the initial level. The reasons adduced for the Court's declining influence include the non-compulsory nature of its jurisdiction, the partiality of some judges, the rigidity of procedures, conflict of interest from permanent members of the UN Security Council, appointment of judges, and the enforceability of decisions.¹³ However, the existing enforcement framework and the Court's jurisdiction are the main systemic challenges that hamper the effectiveness of the Court. This study assesses these challenges with a view to proposing the ways of enhancing the effectiveness of the ICJ in the peaceful settlement of disputes.

1.4 Aims and Objectives

The main aim of the present study is to examine the effectiveness of the ICJ as a form of pacific settlement of international disputes, with specific emphasis on its jurisdiction, and the existing enforcement framework. Specifically, the study seeks to meet the following objectives:

¹¹ Janina Satzer, 'Explaining the Decreased Use of International Courts – The Case of the ICJ' (2007) 3(1) *Review of Law and Economics* 12-36 <https://portal.mahkamahkonstitusi.go.id/eLaw/mg58ufsc89hrsg/decreased_use_of_international_court.pdf> accessed 1 December 2016.

¹² *ibid*; see also J L Daly, 'Is the International Court of Justice Worth the Effort?' (1987) 20 (3) *Akron Law Review* 391-407 <<https://www.uakron.edu/dotAsset/18fe0ec2-5aee-4cb7-9c67-2f89ed887ef1.pdf>> accessed 28 November 2016.

¹³ Ogbodo (n 5) 93.

1. To examine and evaluate the pacific settlement of disputes and its nexus with the effectiveness of the ICJ.
2. To analyze the judicial settlement of disputes in the context of the ICJ and its effectiveness.
3. To establish how the ICJ's non-compulsory jurisdiction and weak enforcement mechanisms affect its effectiveness in settling international disputes.
4. To provide practical recommendations that will enhance the effectiveness of the ICJ in the peaceful settlement of international disputes.

1.5 Research Questions

The main research question for this study is as follows: how effective is the ICJ in the pacific settlement of international disputes, considering its non-compulsory jurisdiction, and the weak enforcement mechanisms? In responding to this question, the researcher intends to answer the following specific questions:

1. What is the pacific settlement of disputes and how is it related to the effectiveness of the ICJ?
2. What is the judicial settlement of disputes and how is this related to the effectiveness of the ICJ in the peaceful resolution of disputes?
3. How have the ICJ's non-compulsory jurisdiction and weak enforcement mechanisms affected the Court's effectiveness in settling international disputes?
4. How can the effectiveness of the ICJ be enhanced to create an efficient judicial framework for the resolution of disputes?

1.6 Hypothesis

The study is based on the hypothesis that, while the Court has been very instrumental in the pacific settlement of disputes since its establishment in 1945, its effectiveness has been hampered by the non-compulsory nature of its jurisdiction and the lack of an efficient enforcement mechanism. It is argued that, if these issues are addressed in a consultative and open-minded way, the Court will be in a better position to effectively accommodate the ever-evolving international disputes.

1.7 Justification

The modern-day world has changed radically and it can certainly be argued that states are witnessing a new epoch in the international legal order. This change is similar to the one that led to the creation of the League of Nations in 1919 and its transformation into the UN in 1945.¹⁴ This change comes with challenges that touch upon the position of the UN in the international community. Given that the UN forms the corpus of the international forum, its organs should be restructured in a way to enable it cope with the new challenges. Article 1 of the UN Charter mandates the UN to take the lead in maintaining international peace and security. In doing this, the UN is required to facilitate the peaceful settlement of interstate disputes as a means of averting breach of peace.¹⁵ It was on the basis of this requirement that the UN Charter established the ICJ as one of the key organs of the UN.¹⁶ The Charter expressly outlaws the use of force in the settlement of international peace.¹⁷ It also enjoins states to uphold the principle of peaceful settlement of disputes.¹⁸ As a central appendage of the UN, the ICJ provides a foundation upon which States can settle their disputes peacefully.

¹⁴ Mohamed Sameh Ahmed Mohamed, 'The Role of the International Court of Justice as the Principal Judicial Organ of the United Nations' (DPhil Thesis, University of London 1997) 1.

¹⁵ UN Charter, Article 1.

¹⁶ UN Charter, Article 92.

¹⁷ UN Charter, Article 2(4).

¹⁸ UN Charter, Article 2(3).

In this regard, the ICJ serves as the main judicial forum for the resolution of international disputes. For the ICJ to be effective, it should be structured in a way that takes into account the challenges characterizing the contemporary world.

Thus, by evaluating and examining the effectiveness of the ICJ, the study contributes to the development of an efficient international framework for the peaceful resolution of disputes. This is in keeping with the principles of the UN, particularly regarding the pacific settlement of disputes. Additionally, due to the existing gap in literature, the study is expected to contribute additional data for academic and research institutions. It may also provide useful impetus for states to create a forum that will enhance the implementation of the ICJ's decisions. As a result, the UN will be in position to effectively maintain peace and security in a world that is ever-changing.

1.8 Theoretical Framework

Assessing the effectiveness of the ICJ is a serious challenge. It requires a detailed account of the Court's jurisdiction, enforcement mechanism, election of judges, and general functioning as viable indicators. These are the main concepts that require theoretical justification in the present study. However, it should be noted that the current enforcement framework of the ICJ and the challenges regarding the election of judges touch on the independence of the Court. As noted by Helfer and Slaughter, an international court can only be effective if it is independent.¹⁹ In their view, judicial effectiveness depends on whether the international court in question is independent from external interference.²⁰ Independence in this case means that the court is composed of judges of high professional integrity, has an independent fact-

¹⁹ Laurence Helfer and Anne-Marie Slaughter, 'Toward a Theory of Effective Supranational Adjudication' (1997) 107 *Yale Law Journal* 387, cited in Laurence R. Helfer and Anne-Marie Slaughter, 'Why States Create International Tribunals: A Response to Professors Posner and Yoo' (2005) *California Law Review* 4.

²⁰ Laurence Heifer and Anne-Marie Slaughter, 'Why States Create International Tribunals: A Response to Professors Posner and Yoo' (2005) 93 *California Law Review* 906.

finding aptitude, and makes binding judgments based on principle rather than power.²¹ Burbank also defines judicial independence in terms of the judges' freedom from any inappropriate influence.²² Admittedly, an international court achieves little success when its operations are premised on political considerations rather than legal principles. This may be illustrated by the influence of the permanent members of the UN Security Council on the ICJ's decision-making process. The nature of influence and the actors involved varies depending on the theory applied.

Shany argues that the effectiveness of an international court is premised on judgment compliance, usage rates and the court's impact on the conduct of States.²³ On the contrary, Posner and Yoo posit that international courts may be ineffective if they neglect the interests of state parties and, instead, make judgments on the basis of moral ideals, individual or group interests, or the interests of non-party states.²⁴ Applying this reasoning, the authors argue that independent courts like the International Criminal Court have little prospects of succeeding when assessed in terms of judgment compliance, usage rates, as well as the success of the enabling treaty.²⁵ This reasoning might seem divisive considering the challenges that currently affect the effectiveness of the ICJ. However, while these factors form part of the key pointers of an effective judicial settlement system, they cannot be relied upon because it is difficult to measure them. Judgment compliance may not be a good indicator of a court's effectiveness because high levels of compliance may be found in both effective and ineffective courts. In addition, Posner and Yoo correctly point out that some states take years

²¹ *ibid.*

²² S B Burbank (ed.), *Judicial Independence at the Crossroads: An Interdisciplinary Approach* (New York: Sage Publishers 2002) 48.

²³ Yuval Shany, 'Assessing the Effectiveness of International Courts: A Goal-based Approach' 3 <<http://www.effective-intl-adjudication.org>> accessed 2 December 2016.

²⁴ Eric A Posner and John C Yoo, 'Judicial Independence in International Tribunals' (2005) 93 *California Law Review* 7.

²⁵ *ibid* 73-74.

to comply with a judgment.²⁶ If a court's effectiveness is measured only on the basis of judgment compliance, the results may be negative especially if the States being used are still laying strategies to give effect to the judgments.

Thus, instead of using the narrow and obscure test of compliance, the existing enforcement framework can provide a good tool for measuring the effectiveness of an international court. Enforcement is a wide concept which encompasses how the existing institutions apply the law in making states to comply with judgments. In this regard, judgment compliance becomes an indicator of whether the court in question has an effective enforcement framework. This means that if judgment compliance is to be used to test the effectiveness of a court, it should be considered together with other factors. This position is consistent with the argument advanced by Heifer and Slaughter, that judgment compliance may be a weak indicator of judicial effectiveness if perceived as a stand-alone factor and separate from the interests of state parties.²⁷

In view of the different positions taken by various authors, this study focuses on the enforcement of ICJ judges as one of the key pointers of the Court's effectiveness. Another important aspect is the Court's contentious jurisdiction, which has been criticized by many authors as affecting the effectiveness of the Court. It is a well settled fact, from the foregoing discussion, that the current framework of enforcement is ridden with challenges that touch on the independence of the ICJ. Other issues that have the bearing on judicial independence include the election and re-election of ICJ judges by the General Assembly and the Security Council, as well as the appointment of *ad hoc* judges. It is because of this that the present study adopts the so-called Hart's theory of mechanical adjudication. The other reason for the adoption of this theory is that, although it does not explain the question of jurisdiction, it

²⁶ Eric A Posner and John C Yoo, 'A Theory of International Adjudication' (2004) The Chicago Working Paper No 206 (2nd Series) 24.

²⁷ Heifer and Slaughter (n 20) 906.

makes it clear that successful courts or tribunals must be alive to political realities since they stifle the courts' mission of legitimizing their operations. It provides a tool for the identification of the structural and procedural pointers of the ICJ's effectiveness, as well as the reasons for its ineffectiveness. The theory offers a more nuanced understanding of the correlation between the ICJ's independence and its judicial effectiveness.

The theory holds that a judge should identify the legal rule that governs the case before him or her by tracing its pedigree, and applying the legal principles to it in a straightforward manner and within the limits of its jurisdiction.²⁸ The parties to the case can only take part in this process by highlighting the applicable laws, case law, and other evidentiary requirements, but no other influence is legitimate.²⁹ In the event that there are no rules governing the case, the judge or court should exercise discretion, but this should eschew any arbitrary actions that may indicate that the judge or court is biased. The judge or court should limit itself to the law, facts and evidence. In other words, whether the law is plain or not, the determination of the case does not rely on the identity of the presiding judge or any external pressure, but rather on the relevant law, the parties' submissions and the ends of justice.

Applied to the present study, the mechanical adjudication theory seems to shift the responsibility of ensuring the independence of the ICJ to the judges or Court itself. This means that if the ICJ is ineffective because of external influence, it is because its judges have institutionalized that influence by virtue of their affiliation to certain States. This argument is absolutely right because most of the judges of the ICJ have been accused on voting for their own states. Accordingly, the ICJ can retain its image if the judges themselves decide cases based on the legal principles as opposed to political considerations emanating from the permanent members of the Security Council. It could be prudent for the judges to respect the

²⁸ Burbank (n 22) 49.

²⁹ *ibid.*

interests of the big five members without using the Court to meet the whims of these members. Further, the Court effective court should have structural and procedural avenues through which stakeholders can channel their policy interests without affecting the judicial image of the court.³⁰ This assertion undoubtedly sets a ground for the creation of a separate body that deals with election of judges without considering political ends.

1.9 Scope of the Study

The present study will focus on the effective contribution of the ICJ in the peaceful settlement of international disputes. It also explores the effectiveness of the ICJ in carrying out its mandate as envisaged in the UN Charter, the nexus between judicial and pacific settlement of disputes and the ICJ, and the various ways of enhancing the effectiveness of the ICJ in the administration of international justice. The study does not delve into the antecedents of the ICJ. However, the reason why the ICJ was established will shade light on whether it has really met the expectations of its founders and the principles enshrined in the UN Charter. All the issues discussed generally revolve around the effectiveness of the ICJ.

1.10 Research Methodology

The study used qualitative research based on both interpretive and diagnostic research designs. The diagnostic design was aimed at identifying the challenges facing the ICJ and analyzing, by way of cases, the practical impact of those challenges on the effectiveness of the Court. This included an analysis of the organization and jurisdiction of the ICJ, as well as its legal framework. These issues were analyzed briefly to give a general overview of the Court before embarking on its effectiveness. On the issue of effectiveness, the key challenges identified in the study included the contentious jurisdiction of the ICJ, and the question of enforcement. Other challenges included the election and re-election of judges, appointment of

³⁰ Shany (n 23).

ad hoc judges and political influence. A detailed account of these challenges points towards the independence and efficiency of the Court. The essence of the interpretive design was to examine the extent to which the challenges identified above affect the effectiveness of the ICJ. The design entailed analysis of the various cases decided by the ICJ, and interpreting texts and international laws in order to underscore the relationship between the Court and other organs of the UN.

Within the research designs above, the researcher collected both secondary and primary data from a number of sources, which are normally categorized into primary and secondary sources. The primary sources included the ICJ Statute, the UN Charter, and other related laws. Additional data was collected from relevant secondary sources, such as books, journal articles, reports, publications, and internet sources. The data collected from the various sources will be processed and analyzed in accordance with the objectives of the study. Data processing will entail data cleaning, coding, analysis and interpretation. Crucially, the analysis process will entail the linkage between the findings and the hypothesis of the study.

1.11 Chapter Breakdown

This study is generally divided into four chapters. Chapter one gives an overview of the study comprising, among others, the background, problem statement, theoretical framework, literature review, research objectives, and the research methodology.

Chapter two entails a critical analysis of the pacific settlement of disputes and how it led to the judicial settlement mechanism as it regards the ICJ and its effectiveness. It also explains why the researcher focused on the judicial settlement of disputes.

Chapter three delves into the judicial settlement of disputes by the ICJ and how it relates to the effectiveness of the ICJ. The chapter also identifies the various issues the ICJ has encountered like jurisdiction, appointment of judges, and implementation of judgments.

Chapter four provides a critical analysis of the issues identified in the preceding chapters. It also includes the summary of the findings, recommendations and the general conclusion of the study.

CHAPTER TWO

PACIFIC SETTLEMENT OF DISPUTES

2.1 Introduction

Against this backdrop, this chapter delves into the various pacific methods of resolving disputes outlined in Article 33 of the UN Charter. It also delineates the nexus between legal settlement of disputes and other pacific methods of settling disputes. It is imperative to point out that, from the wording of Article 33 of the UN Charter, legal settlement of disputes is an essential part of the pacific methods. Importantly, the chapter explains why the scope of the study is limited to the judicial settlement of disputes. It also details the composition, functioning and jurisdiction of the ICJ.

2.2 Pacific Settlement of Disputes

Pacific settlement of international disputes is entrenched in Chapter VI of the UN Charter. Under Article 33(1) of the Charter, parties to any international dispute have an obligation to resolve the dispute by negotiation, enquiry, mediation, conciliation, arbitration, and judicial settlement among others. These methods are also reflected in the UN General Assembly Resolution XXV of 1970.³¹ In the event that the parties to the dispute are unable to reach a solution by any one of the foregoing methods, they may seek other peaceful means subject to the principles of sovereign equality and the free choice of means.³²

The term “dispute” in Article 33(1) of the Charter has a deeper meaning beyond a mere disagreement. In the case of *Belgium v Bulgaria*, the PCIJ delineated the term “dispute” as a

³¹ United Nations General Assembly, *Declaration of International Law Concerning Friendly Relations and Cooperation among States*, GA/RES/25/2625, 24 October 1970 <<http://www.un-documents.net/a25r2625.htm>> accessed 4 December 2015.

³² *ibid.*

disagreement on issues of fact or law.³³ Additionally, according to the ICJ in the case of *Cameroon v United Kingdom*, a dispute is a disagreement that has the potential of affecting existing legal rights or obligations.³⁴ Article 33(1) of the Charter displays another threshold that may be useful in defining international disputes. Thus, before subjecting the dispute to a pacific dispute resolution process, it must be clear that the continuance of that dispute is likely to endanger international peace and security. This proviso leaves out many bilateral disputes which are not fundamentally a threat to international peace and security. However, whether a dispute meets the above threshold is a question that falls within the purview of the Security Council. The framing of Chapter VI of the UN Charter seems to give the Security Council the discretion to assess disputes and take appropriate actions, such as calling upon the parties to use the pacific means to settle their disagreements, and investigating any disagreement or situation that is likely to cause international friction.³⁵

Pacific settlement of dispute resolution may be categorized into diplomatic settlement and legal settlement. Diplomatic settlement encompasses communication or exchange of information, consultations, negotiation, mediation, conciliation, good offices, and inquiry.³⁶ On the other hand, legal settlement comprises international arbitration and judicial settlement in a court of law.³⁷ Both arbitration and judicial settlement lead to a binding decision. However, arbitration tribunals are intrinsically *ad hoc* and the disputants have discretion to determine the procedure and the law applicable to their dispute.³⁸ Judicial settlement is

³³ *Electricity Company of Sofia and Bulgaria (Belgium v Bulgaria) (Preliminary Objection)* (1939) PCIJ (series A/B) No 77 [83].

³⁴ *Cameroon v United Kingdom (Preliminary Objection)* [1963] ICJ Rep 15 [33-34].

³⁵ See the UN Charter, Articles 33(2) and 34.

³⁶ Ruth Lapidoth, 'Some Reflections on Peaceful Means for the Settlement of Inter-State Disputes' (Georgetown University Law Center) 6 <<http://ciwr.ucanr.edu/files/186748.pdf>> accessed 4 December 2016.

³⁷ *ibid.*

³⁸ Office of Legal Affairs, *Handbook on the Peaceful Settlement of Disputes between States* (New York: United Nations Publication 1992) 66 <<http://www.un.org/law/books/HandbookOnPSD.pdf>> accessed 4 December 2016.

provided by the International Tribunal for the Law of the Sea (ITLS) and the ICJ. The present study concentrates on the effectiveness of the ICJ.

Admittedly, all disputes can be determined by diplomatic and legal means, but most political disputes are usually resolved by diplomatic means while the legal ones are settled by legal means of settlement. The distinction between the two categories is twofold. As regards diplomatic means of settlement, all the relevant issues of the dispute are considered, and the final declaration or recommendation has no binding effect on the parties involved. For instance, the UN Security Council usually determines disputes in line with the diplomatic principles, such as consideration of all the relevant aspects, and making decisions in the form of recommendations. However, in cases involving acts of aggression or breach of peace, the Security Council may make binding decisions.³⁹

Conversely, legal means of settlement are adversarial in nature and only legal aspects are taken into account. Also, the decision of the court or arbitral tribunal has a binding force on the parties. Although arbitral tribunals resolve disputes only based the law, the parties are allowed to agree on more flexible rules.⁴⁰ The nexus between diplomatic methods and the judicial settlement or the ICJ arises when the dispute passes through the diplomatic means of dispute resolution without an amicable resolution being reached and is referred to the ICJ for further consideration, particularly on issues of law.⁴¹

2.3 Effectiveness of Pacific Settlement of Disputes

Interstate disputes are an adverse facet of international relations, and States have dedicated much effort to resolve them.⁴² While the UN Charter has designed various peaceful

³⁹ See Chapter VII of the UN Charter.

⁴⁰ Lapidoth (n 36) 7.

⁴¹ UN Charter, Article 33.

⁴² Tamar Meshel, 'Awakening the "Sleeping Beauty of the Peace Palace": The Two-Dimensional Role of Arbitration in the Pacific Settlement of Interstate Territorial Disputes Involving Armed Conflict' (LLM Thesis,

settlement alternatives, interstate disputes remain a serious challenge today.⁴³ This challenge is embedded in the multifaceted political-legal nature of the conflicts, which causes a discord between the existing pacific settlement framework in theory and what should be done in practice to ensure lasting peace and security. The persistent crisis in Syria evidences palpable weaknesses of the international peacekeeping institutions.

States continue using the aspect of territorial sovereignty to resort to conflicts. It is, however, important to note that most territorial disputes are deeply entrenched on political influence, based on historical prejudices and inequalities.⁴⁴ This makes it difficult for the disputing states to seek voluntary settlement. Additionally, many disputes are attributed to the complex legal issues and justifications raised by the parties. In most territorial disputes, the disputing states often seek to justify their stand on account of legal rights or legal principles that govern territorial sovereignty.⁴⁵ Some of the principles are *uti possidetis juris*, self-determination, and the respect for the basic human rights.⁴⁶

Another challenge lies with implementation by the UN Security Council. For instance, the Security Council has the duty to create an effective institutional framework for the implementation of mediated resolutions.⁴⁷ However, the Council has been paralyzed by the selfishness of the five permanent members (P5), rendering it ineffective to resolve violent conflict like the one in Syria.⁴⁸ In spite of the various efforts to restructure the UN, the P5 members have continued to frustrate the reform process. Given this frustration, there is need

University of Toronto (2013) 9
<https://tspace.library.utoronto.ca/bitstream/1807/43233/3/Meshel_Tamar_201311_LLM_thesis.pdf> accessed 7 December 2016.

⁴³ *ibid.*

⁴⁴ *ibid.* 10.

⁴⁵ *ibid.*

⁴⁶ *ibid.* 11.

⁴⁷ Tim Murithi, 'The Failure of the UN Security Council in Creating the Framework Conditions for Mediation' (Paper Presented at the *International Mediation Conference*, convened by the Centre for Mediation, Department of Political Sciences, University of Pretoria, 2 to 4 June 2015, Pretoria, South Africa) 2 <<http://www.up.ac.za/media/shared/237/PDFs/International%20conference%202015/2.-t-murithi-failure-of-un-security-council-mediation-final-m.zp58709.pdf>> accessed 7 December 2016.

⁴⁸ *ibid.*

for radical restructuring of the UN system with a view to enhancing the institutional implementation of mediation, conciliation, and other diplomatic methods. Importantly, the ICJ should be strengthened in a way that enhances its effectiveness in dealing with complex interstate disputes. This will result to an authoritative and efficient judicial settlement framework that is capable of dealing with both legal and non-legal questions in a dispute.

2.4 Judicial Settlement in a Nutshell: The ICJ

Judicial settlement is one of the peaceful means of dispute settlement under Article 33(1) of the UN Charter. It falls within the purview of the ICJ and other international tribunals, such as the ITLS. This part explores the structure and functioning of the ICJ before proceeding to its effectiveness.

2.4.1 Why the Focus on Judicial Settlement (ICJ)

The proliferation of interstate disputes in the modern-day world calls for a strong judicial settlement framework to maintain peace and security. From the wording of Article 33 of the UN Charter, the ICJ is the main judicial institution that is mandated to deal with interstate disputes and other international disputes brought before it by international organizations. As the principal judicial organ under the UN framework, its effectiveness translates into an effective, efficient and expeditious pacific settlement system. The ICJ is the apex organ in the hierarchy of pacific settlement of international disputes. As such, most cases which are unsuccessfully resolved by the diplomatic means of settlement are referred to the ICJ. How the Court deals with such cases is a matter that invites a discussion of its effectiveness. This explains why the researcher in the present study focuses on the ICJ as the judicial settlement institution of the UN.

The quality of decisions, appointment of judges on merit, impartiality, compliance by states, and implementation are some of the key indicators of an effective judicial settlement mechanism. These indicators form the main yardstick upon which the effectiveness of the ICJ is tested in chapter three of the present study.

2.4.2 The Antecedents of the ICJ

The idea of an international court dates back to the two Hague Peace Conferences of 1899 and 1907.⁴⁹ The main impetus for these conferences was the need for nations to settle their disputes peacefully instead of resorting to violence against each other.⁵⁰ The 1899 Conference resulted to the adoption of the 1899 Convention on the Pacific Settlement of Disputes.⁵¹ Under Article 1 of this Convention, states undertook to resolve their disputes through pacific means of settlement, such as mediation, good offices, international arbitration and inquiry. Crucially, the signatories to the 1899 Convention agreed to work towards the establishment of permanent institution for international arbitration.⁵² This institution was referred to as the Permanent Court of Arbitration (PCA). At the same time, a Permanent Bureau was established with the same functions as those of a registry. The Bureau crafted a set of rules that would govern arbitral proceedings.

The 1907 Conference revised the 1899 Convention and the arbitral rules, thus expanding the idea of pacific settlement of disputes.⁵³ The Conference proposed for the adoption of a convention that would establish a court of arbitral justice.⁵⁴ Although this proposal never materialized, the revised Convention contained vital ideas that inspired the crafting of the Statute of the PCIJ. Article 14 of this Convention provided for the creation of the PCA.

⁴⁹ International Court of Justice, *The International Court of Justice: Handbook* (The Hague: ICJ, 2013) 10.

⁵⁰ Joan E. Donoghue, 'The Role of the World Court Today' (2012) *Georgia Law Review*, Paper 183.

⁵¹ International Court of Justice (n 69) 10.

⁵² Mohamed (n 14) 9.

⁵³ International Court of Justice (n 49) 11.

⁵⁴ *ibid.*

Moreover, Convention envisioned the creation of an International Prize Court that would settle claims emanating from belligerent activities at the sea.⁵⁵ The creation of this Court was marred by the lack of an effective legal framework as efforts to codify the law governing maritime warfare had been fruitless.⁵⁶ There was also a serious challenge in crafting an appropriate procedure for the selection of judges. Accordingly, the Convention did not see the light of day.

The First World War saw many independent measures being taken to create an international body for the pacific settlement of disputes.⁵⁷ A resolution which was passed during the Paris Peace Conference urged states to establish the League of Nations as a means of promoting international cooperation, and to provide buffers against war. The Covenant of the League of Nations commenced in 1919. The parties to this Convention agreed to resolve their disputes in line with internationally accepted principles of law.⁵⁸ Article 12 thereof provided for judicial settlement, arbitration and inquiry as the peaceful means of resolving international disputes. In addition, Article 13 of the Convention stated that disputes involving questions of fact or law would be referred to arbitration or judicial settlement. Article 14 provided for the creation of an international court to deal with interstate disputes. This gave way to the adoption of the Statute of the PCIJ on the 13th day of December, 1920. This Statute commenced in 1921.⁵⁹ The PCIJ was the first judicial body at the international level which operated as a standing court distinct from *ad hoc* tribunals.⁶⁰ By the time it was dissolved, it had settled twenty nine contentious cases and provided twenty seven advisory opinions.⁶¹

⁵⁵ Mohamed (n 14) 10.

⁵⁶ *ibid.*

⁵⁷ *ibid* 11.

⁵⁸ *ibid.*

⁵⁹ *ibid* 12.

⁶⁰ Donoghue (n 50) 183.

⁶¹ *ibid.*

The events of the Second World War raised questions regarding the effectiveness of the League of Nations.⁶² For instance, the Allied powers found it necessary to establish a new international organ that would promote peace and security. Their suggestions led to the adoption of the UN Charter in 1945. As a result, the issue of whether to retain the PCIJ or create a completely new court cropped up. According to the First Committee of the Fourth Commission of the San Francisco Conference, a new court was necessary because retaining the PCIJ would need modification of its Statute as the League of Nations had ceased to exist.⁶³ The Conference was of the view that the new court would be the principal judicial organ of the UN, and that its Statute would be annexed to the UN Charter.⁶⁴ Accordingly, the PCIJ was formally replaced by the ICJ in 1945, which commenced its operations in 1946. It should be noted that, although the ICJ was a new court, its Statute reflected the primary objectives of the PCIJ. The procedural rules of the ICJ were nearly identical to those of its predecessor. In addition, the ICJ would continue the jurisprudence developed by its predecessor.

2.4.3 The ICJ's Legal Framework

The ICJ's legal framework is entrenched in the UN Charter, the ICJ Statute, the Rules of Court, the Practice Directions, and Resolution Concerning the Internal Judicial Practice of the Court.⁶⁵ The ICJ Statute forms part of the UN Charter, indicating the centrality of the ICJ as the principal judicial organ of the UN. The UN Charter sets out the structure of the ICJ, its composition, jurisdiction, and the binding nature of its judgments. The Rules of Court, the Practice Directions and the Resolution were drafted by the ICJ in accordance with Article

⁶² Mohamed (n 14) 16.

⁶³ *ibid* 19.

⁶⁴ *ibid*.

⁶⁵ ABILA Committee on Intergovernmental Settlement of Disputes, 'Reforming the United Nations: What About the International Court of Justice?' (2006) 5 (1) Chinese Journal of International Law 45 <<http://cesareromano.com/wp-content/uploads/2015/05/ABILA-Report-on-UN-Reform-and-ICJ.pdf>> accessed 7 December 2016.

30(1) of its Statute. Accordingly, the Court can amend them at any time. Their primary object is to regulate the daily operations of the Court. The ICJ Statute can only be amended by the UN Member States. However, the Statute has not been amended thus far.

The Court's procedural law emanates from its Statute and the Rules of Court. Most of the cases are decided in accordance with Article 38 of the Court's Statute, which requires the Court to apply international law principles, customs, judicial decisions, and the work of international law experts.⁶⁶ Judicial decisions should be used subject to Article 59 of the ICJ Statute, which proscribes the application of the common law concept of *stare decisis*. In particular, Article 59 states that the ICJ's decision has no binding effect except between the parties and in the circumstances of the particular case. This notwithstanding, the Court may use its past decisions as precedent. Should the parties to the dispute agree, the Court may make its decisions based on the principles of justice and fairness (*ex aequo et bono*). Once a State has accepted the Court's jurisdiction to decide its case, it must equally accept the judgment made by the Court as final and binding.⁶⁷ The Court's judgment is not appealable, but a State can make an application for the judgment to be revised in accordance with Article 61 of the Court's Statute.

2.4.4 Composition of the ICJ

The ICJ is composed of fifteen judges elected on the basis of absolute majority.⁶⁸ Each judge is entitled to a renewable term of nine years in office. Out of the fifteen judges, five are elected from the P5 members of the UN Security Council, three from Africa, three from Asia, two from Latin America, and two from Eastern Europe.⁶⁹ Furthermore, no more than one

⁶⁶ Muhammad Kabir Hashmi, *International Court of Justice (ICJ): Study Guide* (London International Model United Nations, 16th Session 2015) 4.

⁶⁷ *ibid* 3.

⁶⁸ Ogbodo (n 5) 95.

⁶⁹ Hashmi (n 66) 3.

judge should be appointed from the same member state.⁷⁰ For a judge to be elected, he or she must get majority votes from both the UN General Assembly and the UN Security Council, be of high moral standard, be an expert in international law, and be eligible to be appointed for the highest judicial position in his or her country.⁷¹ The importance of these requirements is to ensure that only highly competent judges are elected. The composition is generally representative of all the continents in the world. If the parties to the dispute are not represented in the Court's bench, *ad hoc* judges are added. The *ad hoc* judges have a right to vote just like the other judges.

From the wording of Article 2 of the ICJ Statute, the judges must be independent and impartial in the delivery of their services. Independence and impartiality are key attributes of an effective judicial organ. However, the judges of the ICJ do not often display these attributes. This argument is further explained under the following thematic areas.

2.4.4.1 The Role of ICJ Judges in Arbitration

One of the controversial aspects relates to the provisions of the ICJ Statute which require judges to refrain from engaging in any other occupational activities apart from their role as ICJ judges.⁷² Yet, an interpretation of the rules arguably indicates that the judges may still act as arbitrators provided that there is no conflict of interests. In practice, some of the judges of the ICJ have been criticized for engaging in arbitration proceedings beyond their statutory mandate.⁷³ This may affect the independence of the ICJ, particularly if the contractual relationship between a judge and one of the parties in the arbitration case is extended to proceedings before the Court. This may be illustrated by the arbitration case between the Republic of Mauritius and the UK in which the UK selected Judge Sir Christopher

⁷⁰ Ogbodo (n 5) 95.

⁷¹ Hashmi (n 66) 3.

⁷² See Articles 16-18 of the ICJ Statute.

⁷³ Ralitsa Nesheva, '100 Years of International Justice – Time to consider a reform of the International Court of Justice' (2015) 2(2) IALS Student Law Review 18.

Greenwood, who also served as a judge of the ICJ.⁷⁴ The Republic of Mauritius argued that the appointment of the judge would be incompatible with the attribute of independence because of his close and continuing affiliation to the UK.

It is worth noting that the concept of arbitration is distinct from judicial settlement by the ICJ. Unlike arbitration which is an open process in which the parties have a say in the procedures to be applied, judicial settlement should be independent and impartial to increase the confidence of States in the process. In the same vein, the composition of the ICJ should be different from that of an arbitral tribunal. Thus, allowing the ICJ judges to serve as arbitrators, while still acting as judges of the ICJ, creates an opportunity for political influence over the decisions of the Court, and reduces States' trust in the Court. This may be illustrated by US's reluctance to submit sensitive material in the Nicaragua case.⁷⁵ It is, therefore, imperative to restrict the ICJ judges from engaging in activities outside of their mandate as specified in the ICJ Statute. This will undoubtedly enhance the effectiveness of the Court.

2.4.4.2 Election of Judges

Article 4(1) of the ICJ Statute provides that the election of judges shall be done by the UN General Assembly and the Security Council. This may be considered as one of the substantive shortfalls for various reasons. Firstly, the campaigns preceding the election of judges may be politicized because of the political nature of interstate relations.⁷⁶ The re-election process, which is normally financed and canvassed by the judges' home countries, may cost the judges especially if that country fails to support them due to their disloyalty

⁷⁴ Republic of Mauritius v. United Kingdom of Great Britain and Northern Ireland in the Matter of an Arbitration Before an Arbitral Tribunal Constituted Under Annex VII of the 1982 United Nations Convention on the Law of the Sea, Reasoned Decision on Challenge (Permanent Court of Arbitration, 30 November 2011).

⁷⁵ Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v USA) [1986] ICJ Reports 14, 158–60. The US's reluctance was based on the fact that some of the judges were from the then Eastern European bloc.

⁷⁶ Nesheva (n 73) 18.

while serving at the Court. This process will undoubtedly compromise the independence of the judges as they are likely to be biased in their judgments out of the fear of losing the support of their home country.⁷⁷ It is noteworthy to state that, since the ICJ Statute does not specify the judges' retirement age, the prospect of continuing to serve as ICJ judges *ad infinitum* will outweigh the need to adjudicate cases on the basis of merits. In other words, the judges will act as real politicians who want to win elections and not to embrace the attributes of impartiality and independence in the judicial settlement process.

Secondly, the election of judges by the Security Council and the General Assembly leaves room for conflict of interests and interference from the government officials who are involved.⁷⁸ Viewed from Montesqueu's understanding of the doctrine separation of powers, the UN Security Council is an enforcement organ while the ICJ is the judicial organ.⁷⁹ Thus, the two organs must display the attribute of independence to ensure fairness in the election process. As a matter of fact, the doctrine of separation of powers is associated with the national arms of government, but the system of the UN should be viewed from this perspective to achieve independence and impartiality in the pacific settlement of disputes.

The third contentious issue relates to the re-election of judges pursuant to Article 13(1) of the ICJ Statute. This provision is silent on the number of times an incumbent judge can be re-elected. Moreover, a conflict may arise where the re-election exercise is scheduled at the time when a judgment of the Court is scheduled for voting, or when the judge who is being re-elected is presiding over a certain case. The worst scenario is when the judge tries to secure more votes for himself at the UN Security Council or the General Assembly in exchange of a favorable decision in a particular case. The judge may do this by influencing the other judges to twist the judgment in a particular way. This may potentially affect the effectiveness of the

⁷⁷ *ibid.*

⁷⁸ ABILA Committee on Intergovernmental Settlement of Disputes (65) 39-65.

⁷⁹ Nesheva (n 73) 18.

Court by subjecting the judges involved to political influence.⁸⁰ It may be argued that because the re-election process takes place after every nine years, and only few judges are re-elected, the question of independence is not likely to be serious. However, it should be noted that a third of the ICJ is scrutinized every three years as stated in Article 13(2) of the Statute.

It would be important to eliminate the re-election of judges to protect the judges from actual or potential influence by the members of the Security Council or the General Assembly. This may be remedied by extending the tenure of the judges to twelve years.⁸¹ A lesson could be drawn from the International Criminal Court (ICC) and the European Court of Human Rights where judges are elected for a term of nine years without an option of re-election.⁸²

2.4.4.3 Appointment of *ad hoc* judges

The practice of nominating *ad hoc* judges under Article 31 of the ICJ Statute greatly undermines the effectiveness of the ICJ. First, this provision accords the parties the opportunity to select an *ad hoc* judge if the ICJ bench is not representative of their nationalities. This implies that, any party to a dispute before the ICJ is entitled to a judge of the same nationality or an *ad hoc* judge.⁸³ One may argue that the nomination of *ad hoc* judges ensures fair administration of justice in the ICJ, but this is not always the case. A critical consideration of the practice displays an abuse of the Court's process.⁸⁴

Existing literature provides credible evidence that, regardless of the Court's majority decision, *ad hoc* judges have a tendency of voting for the country that nominated them.⁸⁵ This also happens with existing judges of the ICJ. Studies indicate that national prejudice has

⁸⁰ ABILA Committee on Intergovernmental Settlement of Disputes (n 65) 50.

⁸¹ *ibid.*

⁸² Nesheva (n 73) 18.

⁸³ Ogbodo (n 5) 108.

⁸⁴ *ibid.*

⁸⁵ See, e.g. William Samore, 'National Origins v. Impartiality Decisions: A Study of World Court Holdings' (1956) 34 Chicago-Kent Law Review 193; II Ro Suh, 'Voting Behavior of National Judges in International Courts' (1969) 63 American Journal of International Law 236.

significant impact on the decision making process of the Court. When the home state of a judge is not a party to a case before the Court, the judge tends to vote along cultural, wealth and political dimensions.⁸⁶

For instance, in the *Corfu Channel* dispute between the UK and Albania,⁸⁷ the majority judges rejected Albania's preliminary objection, but an ad hoc judge, who had been nominated by Albania, dissented.⁸⁸ Another practical example is in relation to the ICJ's advisory opinion on the Admission of a State to the UN, in which the Court held that the requirements for admission enshrined in Article 4 of the UN Charter were comprehensive. However, two judges from Poland and the former Yugoslavia ardently dissented in support of the arguments advanced by their governments that the requirements were not exhaustive. In view of these examples, it can be argued that the practice of allowing a contentious party to nominate a representative judge is utterly inimical to the attribute of impartiality.

The implication of Article 31 of the ICJ Statute is that a contentious party can only be certain of getting justice if, and only if, there is a representative judge in the Court.⁸⁹ If there is no such a judge, the party has a right to choose an *ad hoc* judge. This practice not only contravenes the impartial image of the Court; it also displays the Court's inability to ensure that justice is served without undue regard to technicalities that may hamper the integrity of the judicial settlement process. Because the *ad hoc* judge is a nominee of the State that is appearing before the Court, is highly probable that the judge will remain loyal to that State to secure future nomination.

⁸⁶ Eric A Posner and Miguel F P de Figueiredo, 'Is the International Court of Justice Biased?' (2005) 34 (2) *Journal of Legal Studies* 625
<<http://www.ericposner.com/Is%20the%20International%20Court%20of%20Justice%20Biased.pdf>> accessed 28 November 2016

⁸⁷ *Corfu Channel (Merits) (United Kingdom v. Albania)*, 1949 ICJ 4 (Apr. 9).

⁸⁸ Samore (n 176) 199.

⁸⁹ Ogbodo (n 5) 108.

2.4.4.4 The Dominance of the P5 Members in the ICJ

The UN Security Council is composed of the five permanent member states that enjoy veto powers. Each of these members has a representative judge at the ICJ. They, therefore, hold a dominant position, which has proved very influential in the Court's decision making process.⁹⁰ As noted above, the Security Council has a role in the enforcement of Court's decisions. Under Article 94(2) of the UN Charter, any party that fails to comply with the Court's judgment may be referred to the Security Council by the other party. The Security Council has the discretion to make recommendations, or decide upon the measures that should be taken to ensure the defiant party complies with the Court's decision.⁹¹ The disproportionate influence of the permanent members perceptively affects the enforcement of judgments, as well as the Court's image of impartiality.⁹²

With the dominance of the powerful states in the Court's bench, it would be pointless to encourage developing States to waive their right to nominate *ad hoc* judges and therefore be at par with the powerful states.⁹³ One of the positive measures that can guarantee equality to the smaller states is amending the ICJ Statute in order to expand the composition of the Court. This is likely to enable the states to have more representation in the Court.

2.4.5 Jurisdiction of the ICJ

The ICJ is the main judicial organ under the UN framework that is recognized for its remarkable contribution in the development of international jurisprudence.⁹⁴ From the wording of Article 36(1) and (2), the ICJ has jurisdiction over disputes referred to it by the parties. The proceedings are usually initiated by either or both of the parties. This happens in

⁹⁰ Ogbodo (n 5) 107.

⁹¹ UN Charter Article 94(2).

⁹² Ogbodo (n 5) 107.

⁹³ Suh (n 85) 236.

⁹⁴ LU Bingbin, 'Reform of the International Court of Justice: A Jurisdictional Perspective' (2004) 5 (2) *Perspectives* 1; See also Article 36 of the Statute of the International Court of Justice.

two ways. The first is through a special agreement between the parties to lodge a complaint before the Court. The complaint must clearly indicate the parties to the dispute and the subject matter thereof. The second entails submission of a unilateral application by one of the disputing states (the applicant) against the other state (the respondent). The proceedings are normally open to the public except where the parties agree that they should be closed to the public. Additionally, by virtue of Article 65 of the ICJ Statute, the Court may give advisory opinions on any legal matters submitted to it by other UN organs and international organizations authorized by the UN Charter. The proceedings of an application for the Court's advisory opinion are similar to the other cases.

2.5 Conclusion

In conclusion, pacific settlement is a wide concept that comprises exchange of information or communication, negotiation, conciliation, mediation, arbitration, good offices, inquiry, and judicial settlement. As discussed above, these mechanisms can be classified into diplomatic and legal settlement mechanisms. Many states prefer diplomatic methods because of their flexibility and the fact that all questions of fact are considered in the resolution process. However, as indicated above, these methods may not necessarily be a panacea for the increasing rate of interstate disputes. International disputes are generally complex and political-legal in nature. In spite of this, states continue to submit their disputes to diplomatic settlement mechanisms, which basically address issues of fact, leaving out questions of law that should be determined in a legal settlement platform. The challenge of delay, resulting from the long process of finding a mediator or deadlocks in the course of negotiation, leads to a prolonged settlement discourse that worsens the nature of the dispute. Admittedly, the judicial settlement process is complex and adversarial in nature, but this does not outweigh the overall advantages of submitting disputes to this form of pacific settlement. Indeed, the binding nature of decisions makes it possible for powerful states to comply with the decisions

pronounced through judicial settlement. It should, however, be noted that implementation can only be successful if the judicial settlement mechanism used is effective. Whether the ICJ is effective is a question that is addressed in the ensuing chapter. Incidentally, diplomatic settlement has been paralyzed by the weak UN Security Council.

CHAPTER THREE

EFFECTIVENESS OF THE ICJ: A CRITICAL ANALYSIS OF THE ICJ'S CONTENTIOUS JURISDICTION

3.1 Introduction

The crux of this chapter is whether the ICJ has effectively contributed to the peaceful settlement of international disputes. The creation of the ICJ as a principal judicial organ of the UN brought hope of an effective pacific settlement of disputes, but this never materialized. Critics argue that the Court is ineffective because of the numerous failures it has exhibited. For instance, only sixty three States have accepted the Court's compulsory jurisdiction under Article 36(2) of its Statute. The Court has decided less than one hundred cases since its creation, although it has become more active lately.⁹⁵ Most of these cases are of less international importance.⁹⁶ While many of ICJ's decisions have been complied with, recalcitrant States have rarely complied. The limited use of the ICJ may be attributed to shortfalls regarding the jurisdiction of the Court and the enforcement of decisions. This chapter concentrates only on the question of jurisdiction. The challenge of enforcement forms part of chapter four of the study.

3.2 Jurisdiction of the ICJ

The ICJ has a dual jurisdiction: advisory jurisdiction and contentious jurisdiction. The ICJ derives its competence to issue advisory opinions from Article 65 of its Statute, which mandates the Court to give advisory opinions on any legal issue at the request of any specialized organization recognized under the UN Charter.⁹⁷ However, since most of the

⁹⁵ Bingbin (n 94) 5.

⁹⁶ *ibid.*

⁹⁷ Statute of the International Court of Justice, Article 65(1).

jurisdictional challenges relate to the Court's contentious jurisdiction, the discussion under this part excludes anything about advisory jurisdiction.

The contentious jurisdiction of the ICJ is premised on the principle of states' consent and can only come into play where there is a genuine legal dispute.⁹⁸ This principle was underscored by the ICJ itself in the case of *Italy v France, United Kingdom and United States*.⁹⁹ According to the Court, its exercise of jurisdiction based on States' consent is a fundamental principle of international law.¹⁰⁰

States can express their consent in various ways. Firstly, they must be parties to the ICJ Statute. Article 34(1) of the ICJ Statute provides that only states can be parties in disputes submitted to the Court. Moreover, according to Article 35(1) of the Statute, the ICJ is only open to States which are parties to the Statute. These provisions in essence limit access to the Court by individuals or international organizations. It underscores the traditional thesis that an interstate dispute resolution platform is only open to States.¹⁰¹ Nevertheless, according to the UN Charter, all UN member states are *ipso-facto* members of the ICJ Statute.¹⁰² Non-member States, such as Switzerland, may become parties to the ICJ Statute on grounds that should be determined by the General Assembly in accordance with the UN Security Council's recommendations.¹⁰³ States which are not members of the UN or parties to the ICJ Statute may become parties before the ICJ by depositing a declaration accepting the jurisdiction of the Court. Under Article 35(2) of the ICJ Statute, the Security Council has the

⁹⁸ Stanimir A Alexandrov, 'The Compulsory Jurisdiction of the International Court of Justice: How Compulsory Is It?' (2006) 5(1) Chinese Journal of International Law 29 <<http://chinesejil.oxfordjournals.org/>> accessed 10 December 2016; see also Ogbodo (n 5) 101.

⁹⁹ Case of the Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom and United States) Preliminary Question, ICJ Reports 1954, 19, 32.

¹⁰⁰ *ibid.*

¹⁰¹ *Bingbin* (n 93) 2.

¹⁰² *ibid.*

¹⁰³ *ibid.*

duty to determine the circumstances under which the ICJ should be open to other states, but such circumstances should not be detrimental to any of the parties before the Court.

In the case of *Croatia v Serbia*,¹⁰⁴ the ICJ emphasized that the question whether a party meets the threshold set out in Articles 34 and 35 of the Statute precedes the determination of the issues arising from the dispute. According to the Court, it was undisputable that Serbia and Croatia were States by virtue of Article 34(1) of the Statute and, as such, they had met the conditions laid down in that provision. Additionally, there was no doubt that, at the time Croatia filed its Application (2 July 1999), it had met one of the requirements set out in Article 35 of the Statute, which was sufficient for the Court to be open to it. The puzzle, therefore, was whether Serbia met the conditions in Article 35 for it to access the Court. Referring to the *Legality of Use of Force* cases, the Court stated that, when Serbia and Montenegro lodged their Application on 29 April 1999, Serbia had not become a member of the UN and, therefore, did not meet the conditions laid down in Article 35(1) of the Statute. In the same vein, Serbia must have lacked access to the Court when Croatia filed its case on 2 July 1999.¹⁰⁵

Secondly, states can express their consent by accepting the jurisdiction of the Court under the relevant provisions of the Statute. Under this avenue, States' consent can either be in respect of specific, already existing disputes, or all or certain types of possible future disputes.¹⁰⁶ As to the first category of disputes, a State can lodge a specific dispute before the ICJ by an ad hoc agreement known as *Compromis*.¹⁰⁷ This type of jurisdiction is generally referred to as voluntary jurisdiction.¹⁰⁸ It is enshrined in Article 36(1) of the ICJ Statute, which states that

¹⁰⁴ Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Croatia v Serbia*) (Preliminary Objections) Judgment of 18 November 2008.

¹⁰⁵ International Court of Justice, *Summaries of Judgments, Advisory Opinions and Orders of the International Court of Justice 2008-2012* (New York: United Nations Publication 2013) 38-39.

¹⁰⁶ Alexandrov (n 98) 30.

¹⁰⁷ *ibid.*

¹⁰⁸ *ibid.*

the ICJ has jurisdiction in all matters referred to it by the disputing parties.¹⁰⁹ In the *Corfu Channel* case involving United Kingdom (UK) and Albania,¹¹⁰ the dispute arose from two UK destroyers which struck mines in Albania waters on the 22 October 1946, causing damage and deaths. The UK government approached the UN Security Council, which recommended that the two states submit their dispute to the ICJ. Accordingly, the UK made an Application before the ICJ, but Albania objected it on the basis of admissibility. The ICJ, however, ruled that it had jurisdiction to resolve the dispute. The two States then submitted a Special Agreement requesting the ICJ to give its judgment on the dispute. According to the ICJ, the unilateral application made by the UK together with the letters submitted by Albania constituted consent.

Moreover, consent in respect of specific, already existing disputes may be expressed by accepting the Security Council's recommendation made pursuant to the provisions of the UN Charter.¹¹¹ For instance, in the *Corfu Channel* case above, the government of Albania accepted the Security Council's recommendation to refer the dispute to the ICJ.¹¹² A state may also express its consent in respect of a dispute by conduct. This type of jurisdiction is known as *forum prorogatum*.¹¹³

The jurisdiction of the ICJ in regard to all or certain types of disputes is referred to as compulsory jurisdiction.¹¹⁴ States can give their consent to the ICJ's compulsory jurisdiction in different ways. The first one is through treaties or conventions pursuant to Article 36(1) of the ICJ Statute. Under such circumstances, the State is only required to become a party to any of the treaties or conventions in order to seize the ICJ of disputes without further consent. In

¹⁰⁹ See Article 36 of the Statute of the International Court of Justice.

¹¹⁰ *Corfu Channel (Merits) (United Kingdom v. Albania)*, 1949 ICJ 4 (Apr. 9).

¹¹¹ See Articles 33 and 36 of the UN Charter.

¹¹² *Corfu Channel Case (UK v. Albania)*, Order (31 July 1947), ICJ Reports 1947.

¹¹³ See *Rights of Minorities in Upper Silesia (Minority Schools) (Germany v. Poland)*, Judgment, 1928 PCIJ, Series A, No 15, 4, 24.

¹¹⁴ Alexandrov (n 98) 30.

the case of *Liechtenstein v Guatemala*,¹¹⁵ the ICJ pointed out that compulsory jurisdiction emanates from a previous agreement which provides a framework upon which the State concerned can access the Court without a Special Agreement. This may be illustrated by the Lockerbie cases. These cases were lodged by Libya against the UK and the US, based on the provisions of the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation. The defendants contended that there was no dispute regarding the construction of the Convention, but if it ever existed, it was only between the applicant and the UN Security Council regarding the Security Council resolutions 748 (1992) and 883(1993).¹¹⁶ It was held that the matter was correctly within the jurisdiction of the Court. According to Judges Fleischhauer and Guillaume, the jurisdiction of the ICJ extends to the question of interpretation and application of the Montreal Convention. While this reasoning is consistent with the treaty-based jurisdiction provided for in Article 36(1) of the ICJ Statute, it seems to limit the ICJ from reviewing the Security Council's resolutions.

Furthermore, States may express their consent to the compulsory jurisdiction of the ICJ by depositing a unilateral declaration accepting as compulsory *ipso facto* and without special agreement the jurisdiction of the Court and undertaking to comply with its decisions.¹¹⁷ It should, however, be noted that the Court's compulsory jurisdiction provided for in Article 36(2) of the Statute is not strictly compulsory. States are free to accept it within certain terms and conditions, or reservations. In the *Case of Military and Paramilitary Activities in and against Nicaragua*,¹¹⁸ the ICJ clearly stated that declarations in respect of compulsory jurisdiction are facultative, unilateral arrangements that states have the option of making,

¹¹⁵ *Nottebohm Case (Liechtenstein v Guatemala)* Preliminary Objections, Judgment, ICJ Reports 1953, 111, 122.

¹¹⁶ Bingbin (n 94) 3.

¹¹⁷ See Article 36(2) of the ICJ Statute.

¹¹⁸ *Case of Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)*, Jurisdiction and Admissibility, ICJ Reports 1984.

either unconditionally or with reservations.¹¹⁹ The Court's compulsory jurisdiction is also based on the consent of the States expressed through their unilateral declaration.

The *Fisheries Jurisdiction* case¹²⁰ also provides an important illustration. Following the ICJ's ruling that it lacked jurisdiction to settle the dispute that had been filed by the UK against Canada, Spain rebutted the ruling on account of a declaration made by the two states under Article 36(2) of the ICJ Statute. On the other hand, Canada cited a reservation in its 1994 declaration which limited the ICJ's jurisdiction in relation to disputes arising from Canada's conservation and management measures. Rejecting Spain's claim, the ICJ held that the words of a declaration made in accordance with Article 36(2) of the its Statute must be construed in a natural and reasonable way, taking into account the intention of the State that made the reservation.

Once a State has submitted a declaration accepting the jurisdiction of the ICJ, the State expresses its intention of being subject to the obligation of Article 36(2) in respect of all other States which deposit a declaration under Article 36(2). For instance, in the *Land and Maritime Boundary* case,¹²¹ the government of Cameroon made a declaration on 3 March 1994, and submitted its dispute on 29 March 1994 to the ICJ. Nigeria, which had deposited its declaration earlier, argued that it was not aware of Cameroon's declaration, and that such haste move by Cameroon was inappropriate. The ICJ, however, stated that any State Party to the ICJ Statute which complies with the Court's jurisdiction as provided for in Article 36(2) of the Statute submits to the jurisdiction in its relations with other states which have already complied with the provisions. It also makes a standing offer to all other State Parties which have not complied with Article 36(2). Thus, if any state accepts the offer by making a

¹¹⁹ *ibid* 392, 418 [59]; see also the ICJ Statute Article 36(3).

¹²⁰ *Fisheries Jurisdiction (Spain v. Canada)* 1998 ICJ 432 (Judgment of Dec. 4).

¹²¹ *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria)*, Preliminary Objections, Judgment, ICJ Reports 1998, 275, 290 [22].

declaration accepting the jurisdiction of the Court, the consensual bond is automatically created and there is no need to meet further conditions.¹²² Accordingly, Nigeria had become a “sitting duck” because its declaration had extended a standing offer to all other states, including Cameroon.

3.3 Jurisdictional Challenges Facing the ICJ

The question of jurisdiction may be discussed under the following thematic areas: ICJ’s jurisdiction *ratione personae*; jurisdiction *ratione materiae*; and the consensual nature of the ICJ jurisdiction.

3.3.1 ICJ’s Jurisdiction *ratione personae*

The jurisdiction of the ICJ has attracted diverse criticisms. From the discussion above, the ICJ’s compulsory jurisdiction is state-centric. In other words, the provisions on of the ICJ Statute on jurisdiction *ratione personae* are limited only to states. Arising from this is the issue whether the Court’s jurisdiction *ratione personae* should be expanded to guarantee access by unauthorized international organizations and non-governmental organizations (NGOs). This is a contentious issue today considering the rapid increase in the number of international organizations and NGOs. When the ICJ was created in 1945 to continue the jurisprudence of PCIJ, the main players were States. There were very few international organizations and NGOs. Today, the UN member states have also increased from 51 to 193. Similarly, the number of organizations has rapidly increased, and their involvement in the international affairs cannot be underestimated. Some of the organizations which have been active in voicing concerns and pushing for reforms at the UN include Christian Aid, and the Aga Khan Foundation.¹²³ The *Chad-Cameroon* pipeline development provides a good

¹²² *ibid* [25].

¹²³ Nesheva (n 73) 20.

example of a case where NGOs have been committed in helping the local communities to access justice.

Moreover, the role of international organizations is envisioned in Articles 53 and 54 of the UN Charter. Regional agencies like the African Union, the European Union, and the Arab League fall are important actors which are worth considering. However, the ICJ has in a number of cases refused to extend its jurisdiction where international organizations are parties. For instance, in the WHO Opinion case,¹²⁴ the ICJ was reluctant to give an advisory opinion on the basis that it lacked jurisdiction in the matter. One of the reasons advanced for the ICJ's limited jurisdiction is the technicalities that should be avoided when organizations lodge cases before the Court.¹²⁵ For instance, during the 1999 war in Kosovo, Yugoslavia lodged a case before the ICJ arguing that the North Atlantic Treaty Organization (NATO) had intervened in the war without being authorized by the UN Security Council.¹²⁶ The ICJ dismissed the case on account of lack of jurisdiction, but Yugoslavia attempted to circumvent this impediment by filing separate cases against NATO members.¹²⁷ The ICJ dismissed the cases at the preliminary stage on basis that it manifestly lacked jurisdiction.

There are a number of reasons why it is important to extend the ICJ's contentious jurisdiction to international organizations.¹²⁸ It should be made clear that the proposal of extending jurisdiction to organizations is about giving them an opportunity to be parties in cases submitted to the ICJ. Granting *locus standi* to international organizations only relates to

¹²⁴ Legality of the Use by a State of Nuclear Weapons in Armed Conflict 1996 ICJ 66 (Advisory Opinion of 8 July).

¹²⁵ Nesheva (n 73) 20.

¹²⁶ ABILA Committee on Intergovernmental Settlement of Disputes (n 85) 55.

¹²⁷ Case concerning Legality of Use of Force (Serbia and Montenegro v. UK; Serbia and Montenegro v. Portugal; Serbia and Montenegro v. Netherlands; Serbia and Montenegro v. Italy; Serbia and Montenegro v. Germany; Serbia and Montenegro v. France; Serbia and Montenegro v. Canada; and Serbia and Montenegro v. Belgium), Judgments of 15 December 2004.

¹²⁸ Paul Szasz, 'Granting International Organizations Ius standi in the International Court of Justice' in A Muller *et al* (eds), *The International Court of Justice: Its Future Role after Fifty Years* (1997) 169.

jurisdiction *ratione personae*.¹²⁹ It does not fundamentally affect the subsistence of jurisdiction *ratione materiae*.¹³⁰ The first reason emanates from the active involvement of international organizations in international relations. Secondly, one of the reasons behind the ongoing debate over the reform of the UN is the need for it to build a firm relationship with regional agencies and specialized organizations.¹³¹

Closely allied to the question of jurisdiction *ratione personae* is that, when submitting Article 36(2) declarations, a state may make reservations excluding from the Court's compulsory jurisdiction disputes brought by certain states. Such reservations are premised on the standard of reciprocity or other relations between states. It might also be based on non-recognition of certain states or diplomatic relations. For instance, Israel's declaration of 1951 contained a reservation excluding disputes lodged by unfriendly states, regardless of their membership to the UN. Similarly, India's declaration of 1974 included a reservation that excluded states which it had not recognized, or which it had no diplomatic relations with at the time of filing a dispute before the ICJ.

3.3.2 Jurisdiction *ratione materiae*

By virtue of Article 36(2) of the ICJ Statute, the jurisdiction *ratione materiae* of the ICJ is limited to legal questions regarding treaty interpretations, international law, the existence of any fact, as well as the nature and extent of the reparation to be made in respect of breach of an international obligation.¹³² Accordingly, political questions do not fall within the jurisdiction of the Court, and if such questions are brought before the ICJ it must declare its lack of jurisdiction. The rationale for this argument is that the IC has the primary role of applying the law, which ultimately prevents it from deciding political questions. Thus, in any

¹²⁹ ABILA Committee on Intergovernmental Settlement of Disputes (n 65) 55.

¹³⁰ *ibid.*

¹³¹ *ibid.*

¹³² Mohamed (n 14)188.

dispute filed before the Court, it is important that the Court first weighs the justiciability of that dispute in accordance with Article 36(2) above and other relevant provisions of the ICJ Statute. Doing that may be difficult, arguably because each case has both legal and political dimensions.

Another challenge entails the possibility of having disputes of a mixed character, particularly those concerning the use of force. It may be argued that such disputes fall within the jurisdiction of the Security Council by virtue of Chapter VII of the UN Charter, but this does not disqualify chances of parties filing such disputes before the ICJ. This argument has been rebutted based on the fact that the ICJ should never decline to determine a dispute just because it has political connotations. In the same vein, there is no explicit legal condition that bars the Court from adjudicating on issues of use of force. As a matter of fact, political disputes may have a legal character.

From a practical point of view, the ICJ has determined many cases of justiciability in line with Articles 36(2) and 38 of its Statute. In the *Aegean* dispute,¹³³ Turkey raised an objection to the jurisdiction of the Court on the basis that its conflict with Greece was political in character. The Court held that, since the dispute involved an aspect of rights in relation to the demarcation of the continental shelf, it had a legal character. In the 1979 *Tehran* case involving the United States, Iran reject the ICJ's jurisdiction, terming the dispute as non-justiciable.¹³⁴ Iran argued that it was impossible to determine the case without considering the US's continuous interference with Iran's domestic affairs, and the many crimes perpetrated against the people of Iran contrary to international law. According to Iran, the issue of hostages was political in nature as it stemmed from a complex political situation. As such, Iran was of the view that Court had no jurisdiction to deal with the dispute. However, the

¹³³ ICJ Rep (1978).

¹³⁴ *The Case Concerning United States Diplomatic and Consular Staff in Tehran* ICJ Rep (1979).

Court dismissed Iran's argument and pronounced its jurisdiction over the dispute. It further dismissed the argument that it had no powers to determine the dispute because it was of a mixed character. The Court stipulated that there was no indication in its Statute or Rules of Procedure barring it from determining a dispute because of the presence of other aspects, however crucial. It made it clear that its responsibility is to determine legal questions and that to disregard political issues would be to deviate from its international obligations.

It is important to note that legal questions by their very nature may stem from political contexts, and if the ICJ declines to exercise its jurisdiction, it will negate the fundamental object of the pacific settlement of international disputes. In the case of the *Border and Transborder*,¹³⁵ Honduras challenged the jurisdiction of the ICJ based on the fact that the political nature of the dispute was inimical to the Court's judicial function. This argument was dismissed on the ground that political elements may be part of any legal question lodged before it.

From the foregoing discussion, it may be concluded that, while the ICJ has not established comprehensive criteria delineating legal and political questions, it has not declined to exercise its jurisdiction in any case having political elements. The Court has often taken a wide legal perspective of the question of justiciability by identifying legal aspects in any dispute that is allegedly political. In view of this, the political nature of a dispute does not in any way bar the Court from discharging its judicial mandate. As noted above, the Court has asserted that all legal disputes lodged before it have a political connotation, and once it is clear that the dispute raises legal questions, the Court will undoubtedly proceed regardless of the dispute's political nature.

¹³⁵ ICJ Rep 1988.

3.3.3 The Consensual Nature of the ICJ Jurisdiction

The other controversial issue is in relation to the ICJ's consensual jurisdiction. As stated above, the jurisdiction of the Court is not compulsory *sensu stricto*. Article 36(2) of the ICJ Statute requires States to express their consent by filing a declaration that indicates their acceptance of the Court's compulsory jurisdiction. This provision provides a leeway for states to avoid international litigation by merely not giving their consent. It generally renders the Court practically ineffective in carrying out its international mandate. To date, only 63 states have accepted the Court's jurisdiction as compulsory, but with reservations.¹³⁶

In cases where a particular state has not given its consent or reservations, the ICJ has invariably held that it lacks jurisdiction. A perfect example is the *Fisheries Jurisdiction* case,¹³⁷ in which the ICJ ruled that it lacked jurisdiction. In this case, Spain lodged a complaint against Canada, relying on a declaration signed by both States under Article 36(1) of the ICJ Statute. Canada, however, rebutted this complaint by invoking its reservation in the 1994 declaration. According to the CJ, the dispute between the two States fell squarely within the confines of Canada's reservation in the 1994 declaration. As such, the Court lacked jurisdiction to entertain the dispute. This case provides an explicit illustration of how states can make reservations to exclude certain contentious aspects from international litigation. This constitutes a further obstacle that affects the effectiveness of the Court.

The discourse about the non-compulsory nature of the ICJ jurisdiction dates back to the 1945 when the ICJ was created.¹³⁸ As pointed out above, the reason for the creation of the ICJ was to establish a more influential juridical organ that would effectively settle interstate disputes. Discussions leading to the new Court were characterized by disagreements as to whether the

¹³⁶ Nesheva (n 73) 21.

¹³⁷ *Fisheries Jurisdiction (Spain v. Canada)* 1998 ICJ 432 (Judgment of Dec. 4).

¹³⁸ Nesheva (n 73) 21.

Court would have compulsory jurisdiction.¹³⁹ Some states, such as Italy, UK and France, had initially opposed proposals regarding compulsory jurisdiction.¹⁴⁰ During the San Francisco Conference, the US and the Russian Federation joined the opposition.¹⁴¹ As such, the proposals for compulsory jurisdiction did not see the light of day.

Surprisingly, France, the US, Russia and the UK are among the Permanent Five members of the UN Security Council. With their veto power, no decision could be made without their approval. This is still the same with the current UN system. Interestingly, almost all the Permanent Five members of the Security Council have benefited from the consensual nature of the ICJ's jurisdiction. For instance, US withdrew its consent in 1985 while France pulled out in 1974. The only permanent member state that recognizes ICJ's compulsory jurisdiction is the UK. By withdrawing their consent to the compulsory jurisdiction, the Permanent Five members have greatly contributed to the ineffectiveness of the ICJ.¹⁴² This tendency will undoubtedly continue to hamper the influence of the ICJ in the pacific settlement of disputes especially if other powerful countries choose not to comply with the Court's compulsory jurisdiction.¹⁴³

States, such as New Zealand and Australia, have supported suggestions for reform of the consensual nature of the ICJ jurisdiction, but this has not been successful. As shall be indicated in chapter five, this study argues that the UN system should borrow from the compulsory nature of the World Trade Organization (WTO) framework to improve the effectiveness of the ICJ. This may be seen by some States as utopian, but it is a very important suggestion that can improve the effectiveness of the ICJ. The WTO framework has

¹³⁹ *ibid.*

¹⁴⁰ *ibid.*

¹⁴¹ Mohamed (n 14) 18.

¹⁴² Ogbodo (n 5) 15.

¹⁴³ *ibid.*

two salient features: compulsory jurisdiction; and the appellate powers of review.¹⁴⁴ Since their introduction, the WTO has been very effective in carrying out its international mandate. Another crucial suggestion is to restrict state reservations, which has also been advocated by New Zealand.¹⁴⁵

3.4 The Impact of Preliminary Objections

One challenge which may be described as minor is in regard to preliminary objections. The rationale for omitting an in-depth analysis of preliminary objections in the present study is because virtually all cases brought before the ICJ have involved objections. It should be noted that such objections potentially waste the ICJ's time, thereby impairing the effectiveness of the judicial settlement process. Preliminary objections can be raised on issues of fact or jurisdiction. In the *Peace Treaties* case, the ICJ affirmed that the question of jurisdiction should be submitted in the form of a preliminary objection.¹⁴⁶ In reality, it is very difficult for a court to avoid preliminary objections, unless the substantive or procedural rules of the court are adjusted to lay down strict measures. For instance, a provision can be inserted in the rules to the effect that any preliminary objection can be raised only if there is a probability of success. This will lock out incidences where parties raise preliminary objections just to waste the Court's time

3.5 Conclusion

It appears from the foregoing discussion that judicial settlement under the ICJ faces quite a number of challenges in relation to its contentious jurisdiction, which certainly affect its

¹⁴⁴ See the Understanding on Rules and Procedures Governing the Settlement of Disputes, annex 2 of the Agreement Establishing the World Trade Organization (adopted 15 April 1994, entered into force 1 January 1995).

¹⁴⁵ Geoffrey Palmer, 'International Law and Reform of the International Court of Justice' in Antony Anghie and Garry Sturgess, *Legal Visions of the 21st Century: Essays in Honour of Judge Christopher Weeramantry* (Nijhoff, 2004) 598.

¹⁴⁶ ICJ Rep 1950 [72].

effectiveness. These notable deficiencies include, *inter alia*, the Court's non-compulsory jurisdiction and jurisdiction *ratione personae*. The issue of jurisdiction *ratione materiae* is not a challenge per se, because the Court has invariably made pointed out that all legal questions under Article 36(2) have political aspects and the Court has an obligation to exercise its mandate regardless of the political character of a dispute.

CHAPTER FOUR

A CRITICAL ANALYSIS OF NON-COMPLIANCE AND ENFORCEMENT OF JUDGMENTS AS AN IMPEDIMENT TO THE ICJ'S EFFECTIVENESS

4.1 Introduction

This chapter delves into the problem of enforcement and compliance of ICJ decisions. It begins by highlighting how the ICJ has contributed to non-compliance and cases where it has intervened in ensuring that States comply with its judgments. Quite important is the fact that the ICJ's jurisdiction does not extend to enforcement of judgments. The implication of this challenge is discussed extensively, giving reasons why the Court should be granted the mandate to enforce its decisions. A comparison with the WTO provides a basis for this discussion. Another aspect in this chapter is the role of the Security Council in the enforcement of ICJ judgments.

4.2 How the ICJ has contributed to Non-Compliance

Compliance with the decisions of the ICJ refers to the full acceptance of the decisions as final and reasonable performance in good faith of any binding obligation.¹⁴⁷ Compliance in good faith includes a duty to enforce the ICJ's decisions in order to avoid their superficial implementation or otherwise circumventing them.¹⁴⁸

In the quest for an effective international judicial settlement system, one of the dominant and idealistic concerns has been whether the ICJ's adjudicatory function should be extended to induce compliance with its judgments. In the 2013 *Alleged Violations of Sovereign Rights*

¹⁴⁷ Colter Paulson, 'Compliance with Final Judgments of the International Court of Justice since 1987' (2004) 98(3) *The American Journal of International Law* 435-436.

¹⁴⁸ *ibid* 436.

(*Nicaragua v Colombia*) case,¹⁴⁹ Nicaragua requested the ICJ to *inter alia* make a determination affirming its ‘inherent jurisdiction’ over issues of compliance. This request provides the Court with a chance to re-examine its jurisprudence, and determine the justiciability of questions of compliance. Whether the Court should make such determination is a question that will arguably justify its acknowledgment that states will not always comply with its judgments.¹⁵⁰ Nicaragua’s request seems misguided bearing in mind the fact that the ICJ’s post-judgment jurisdiction is limited to the interpretation and revision of judgments as stipulated in Articles 60 and 61 of the ICJ Statute respectively. These provisions clearly contrast with the WTO dispute settlement system, which allows adjudication on questions of compliance. The possible outcome of the above case may be that the ICJ lacks inherent jurisdiction over compliance matters, which, certainly, compatible with the cautious approach adopted by the Court regarding its jurisdiction and state consent.

As Judge Shigeru Oda ever argued, although the number of cases has been increasingly flowing, the efficacy of the Court still remains a challenge. Judge Oda was of the view that the wider acceptance of the ICJ’s compulsory jurisdiction may not achieve any positive results as most of the cases decided by the Court lack any the legitimate will of the parties concerned to seek judicial settlement, making it difficult for them to comply.¹⁵¹ In his view, cases lodged by the applicants through the ICJ’s compulsory jurisdiction would vehemently be objected by the respondents, leading to non-compliance with the final decisions.¹⁵² The upshot of this is an ineffective judicial settlement system. In the case of *DRC v Uganda*,¹⁵³

¹⁴⁹ *Alleged Violations of Sovereign Rights (Nicaragua v. Colombia)* ICJ 26 November 2013.

¹⁵⁰ Geraldo Vidigal, ‘Compliance Adjudication at the ICJ: The *Alleged Violations Case*’ (*EJIL: TALK*, 26 January 2016) <<http://www.ejiltalk.org/compliance-adjudication-at-the-icj-the-alleged-violations-case/>> accessed 5 January 2017.

¹⁵¹ Aloysius P Llamzon, ‘Jurisdiction and Compliance in Recent Decisions of the International Court of Justice’ (2008) 18 (5) *The European Journal of International Law* 819.

¹⁵² *ibid.*

¹⁵³ *Armed Activities on the Territory of the Congo (Congo v. Uganda) Provisional Measures*, 39 ILM (2000) 1113 (Declaration of Oda J).

Judge Oda pointed out that the continuous disregard of the ICJ's decisions would inexorably impair the image of the Court, and raise questions as to its effectiveness in creating consistent international jurisprudence. Judge Oda's arguments were not misplaced, as the Court's inactive engagement in the compliance and enforcement process has greatly impaired the effectiveness of international judicial settlement.

However, it should be noted that out of the many cases decided by the ICJ, only a few of them have resulted to well-publicized questions of non-compliance.¹⁵⁴ It is, therefore, debatable to argue that the ICJ has contributed to non-compliance. Under the current UN judicial settlement framework, the responsibility of ensuring compliance with the ICJ decisions lies with the Security Council, which is the principal political organ of the UN. It can undoubtedly be argued that cases of non-compliance are based on the lack of a legal provision allowing the Court's to make coercive directions regarding compliance with its judgments. The Court has previously distanced itself from issues of non-compliance, shifting them to the UN Security Council. For instance in the 1951 case of *Haya de la Torre*, the Court declined to give meaningful directions in respect of the enforcement of its judgment in the 1950 *Asylum* case. The Court argued that the implementation of judgments must be founded only on considerations of practicality or political expediency and, thus, does not form part of the Court's judicial powers. In view of the Court's strict position, subsequent cases of non-compliance, apart from the *Nuclear Tests* case, were framed as requests for interpretation. Whether this is sufficient to show the Court's contribution to non-compliance is rhetoric. An assumption in that respect can only be tenable if evidence is adduced to show that the Court has indeed caused non-compliance.

¹⁵⁴ Llamzon (n 151) 825.

One case that buttresses the ICJ's ineffectiveness and how it has contributed to non-compliance is the *Gabcíkovo-Nagymaros Project* involving Hungary and Slovakia.¹⁵⁵ In this case, the two parties signed a treaty to implement a joint project. Slovakia performed its part of the bargain to an advanced stage, but Hungary declined to proceed on the ground that the project would cause environmental damage. As a result, Slovakia lodged the resultant dispute before the ICJ by a special agreement, and the Court upheld the validity and binding nature of the 1977 treaty between the disputing States. The ICJ, however, declined to make any specific orders and instead imposed an obligation on the two states to negotiate the measures of complying with its judgment in good faith, stating that the environmental damage question raised by Hungary would frustrate treaty compliance. The parties commenced negotiations but a deadlock arose in 1998. As such, Slovakia requested the Court to make further judgment due to the ostensible unwillingness of Hungary to comply with the earlier judgment. Subsequent negotiations also seemed unproductive. Assessing compliance in this case seems intricate due to the ambiguity intrinsic in the Court's judgment requiring the parties to negotiate. The Court's judgment undoubtedly did little to settle the dispute and debatably worsened the situation. By directing the parties to negotiate the matter, perhaps with the assistance of a third party, the ICJ was arguably abdicating the duty assigned to it by the parties. In fact, as noted by Llamzon, Slovakia understood the ICJ judgment as insisting on the implementation of the 1977 treaty.¹⁵⁶ On the other hand, Hungary seemed to interpret the judgment to the effect that it had no obligation to implement the project. According to Llamzon, the judgment's *dicta* created a normative framework supporting Hungary's non-compliance with the 1977 treaty.¹⁵⁷ In a nutshell, the ICJ's judgment did not assist the parties to resolve their dispute. This evidences its ineffectiveness in respect of compliance.

¹⁵⁵ *Gabcíkovo-Nagymaros Project (Hungary/Slovakia)* [1997] ICJ Rep 1.

¹⁵⁶ Llamzon (n 151) 833.

¹⁵⁷ *ibid.*

In the 1992 *El Salvador/Honduras* boundary dispute, the ICJ held that about two-thirds of the disputed area belonged to Honduras while the rest would go to El Salvador. The Court's decision also allowed Honduras to access the Pacific while El Salvador was left with two of the three disputed islands. In this case, the issue of non-compliance as foreseen, but the parties concerned, including Nicaragua, had committed themselves to accept the Court's judgment. The Court's judgment, however, created a platform for many uncertainties. For instance, although the parties accepted the Court's judgment as final and binding, Honduras subsequently raised allegations of El Salvador's misconduct in respect of the demarcation agreements, and the systematic border problems. These allegations indicated lack of willingness on the part of El Salvador to comply with the Court's judgment in good faith. In fact, a claim of non-compliance was instituted before the Security Council, but El Salvador contented that it had repeatedly made clear its intention to apply for a review of the Court's judgment and that the question of non-compliance was non-existent.

It is imperative to note that the judgment of the Court in respect of the *El Salvador/Honduras* case has already been complied with and the revision matter instituted by El Salvador rejected. This indicates that, although the Court faces some serious challenges as pointed out earlier, its judgments have greatly contributed in reducing political tension in some States. It is irrefutable that the parties in the above case expressed their acceptance of the Court's judgment, despite the subsequent compliance issues. As a matter of fact, Honduras professed its confidence in the ICJ as an ideal alternative to dispute resolution methods that had for a long time placed the region in total anarchy.¹⁵⁸

In the *Libya/Chad Territorial Dispute*,¹⁵⁹ the ICJ made a judgment awarding the disputed strip of Aouzou to Chad. Initially, the government of Libya rejected the decision and started

¹⁵⁸ *ibid* 829.

¹⁵⁹ Judgment of 3 February 1994 [1994] ICJ Rep 6.

to reinforce its troops in the disputed strip. Negotiations were held, which led to the two States agreeing to implement the judgment of the Court. In 1994, the ICJ's President urged the two countries to ensure that the judgment of the Court is fully implemented in a spirit of understanding. This, however, did not bear fruit because, despite Libya's formal recognition of the judgement, it did not completely give up its political and military dominion over the disputed territory. The Government of Libya continued to support rebel movements in the territory, indicating its unwillingness to comply with the ICJ judgment. It should be noted that the two countries finally settled the issue to secure peace. Acceptance of the Court's judgment meant that Libya could not raise sovereignty claims over the disputed region without threatening regional and international peace. As such, Libya gave up all its claims of sovereignty over the region to ensure cordial relationship with Chad.

In the *Land and Maritime Boundary (Cameroon v Nigeria)* case,¹⁶⁰ a dispute was instituted before the ICJ regarding the sovereignty over the Bakassi Peninsula and other areas in the Lake Chad Basin. In its judgment of 2002, the ICJ granted Cameroon sovereignty over Lake Chad Basin and the Bakassi Peninsula, including 30 villages. Nigeria was awarded a few villages and much of the boundary between Lake Chad and the disputed Peninsula. The Court also directed the parties to withdraw their troops from the disputed region. However, while accepting some parts of the judgement, Nigeria officially rejected the 'unfavorable' parts, invoking the constitutional principle of federalism to justify non-compliance. According to the Government of Nigeria, it could not give up the Bakassi Peninsula without amending its Constitution. This is surprising given that Nigeria and Cameroon had made it clear that they would respect whatever judgment made by the Court. Nigeria's non-compliance became a dominant issue globally, with the international community exerting a lot of pressure for the two countries to dialogue. The UN Secretary General played a central role in this dispute by

¹⁶⁰ *L and and Maritime Boundary between Cameroon and Nigeria* [2002] ICJ Rep 303.

initiating mediation processes which finally led to a comprehensive resolution of the deadlock in accordance with the ICJ demarcation.

4.3 The Inactive Role of the ICJ in the Enforcement Process

The effectiveness of the pacific settlement of disputes depends on the existence of an institutional forum to enforce and apply the law. Since the ICJ is the key judicial organ of the UN, Article 94 of the UN Charter provides for a formal framework for the enforcement of the Court's decisions. Under paragraph 1 thereof, States should comply with the judgments of the Court in any cases to which they are parties. Failure to do so shifts the obligation to the Security Council, which exercises discretionary powers to make appropriate recommendations in accordance with Article 94(2) of the Charter. As a matter of fact, the failure of a State to give effect to the decisions of the ICJ undermines the judicial authority of that Court and the entire UN system. This is why it is important for other UN organs to respect the rule of law, particularly because the ICJ lacks powers to enforce its decisions.

Since its creation, the ICJ has played a significant role in enhancing the confidence of States in the pacific settlement of international disputes.¹⁶¹ However, the Court's effectiveness in achieving its judicial objectives has been negated by various subtle issues discernible from Article 94(2) above. Firstly, only the decisions of the ICJ are subject to the enforcement framework set out under this provision. Secondly, only the State in whose favor the judgment was delivered is entitled to lodge a claim of non-compliance before the Security Council. Thirdly, the Council has discretion to decide whether it should act on the claim, and the Court has little involvement in Council's decisions. The highly controversial issues central to this study include the procedure of voting in the Security Council, as well the discretionary

¹⁶¹ Aman Mishra, 'Problems in Enforcing ICJ's Decisions and the Security Council' (2015) 5(1) Global Journal of Human-Social Science (F), read the abstract <https://globaljournals.org/GJHSS_Volume15/1-Problems-in-Enforcing.pdf> accessed 16 December 2016.

powers of the Security and its relationship with the ICJ. This part discusses how these issues affect the effectiveness of the ICJ.

4.3.1 The Discretionary and Political Nature of Enforcement

As aforementioned, the Security Council is the enforcement wing of the UN, and its relationship with the ICJ contributes immensely in the effectiveness of the judicial settlement system. Article 94(2) of the UN Charter seems to create harmony between the ICJ and the Security Council as organs with similar but decidedly distinct competencies in the pacific settlement of disputes. The Security Council is the principal political organ and, virtually, the only enforcement machinery of the UN. It also has the mandate of promoting peaceful resolution of disputes as envisaged in Chapter VI of the UN Charter. It should, thus, be born in mind that, by bestowing the power to enforce ICJ decisions on the Security Council, the above provision is fully consistent with the political foundation of the UN Charter. This foundation is centered on the veto powers of the five Permanent members of the Council. The influence of the five permanent members has been very tragic on the independence of the ICJ because their reasoning is largely based on politics than the legal reasoning taken by the Court.¹⁶²

An in-depth assessment of Article 94(2) leads to the conclusion that the existing enforcement framework is fraught with challenges that affect the effectiveness of the ICJ. First, this provision provides that the Security Council may, if it deems it necessary, give recommendations or take appropriate measures to give effect to the decisions of the ICJ. This provision confers on the Security Council the discretion to enforce the judgments of the Court. This means that the Security Council cannot be compelled to give effect to the Court's judgments if it fails to do so.

¹⁶² Llamzon (n 151) 815–852.

It should be pointed out that, in its initial version, Article 94(2) obligated the Security Council to act on any case of non-compliance brought to its attention by the successful party.¹⁶³ However, the final version of Article 94(2) contained the words “if it deems necessary,” which raised questions during the San Francisco Conference as to whether the entire provision would weaken the independence of the Court.¹⁶⁴ It was observed that the Security Council’s actions would be permissive as opposed to being obligatory, and that the introduction of the above clause merely affirmed the discretionary nature of the powers exercised by the Security Council.

Secondly, the vesting of the discretionary powers on the Security Council is very tragic as it renders the Court wholly dependent on the political will of the Council. It also creates an avenue for politics to interfere with the decisions of the Security Council regarding the enforcement of a particular judgment. This, for instance, happens when a claim of non-compliance goes through political negotiation by the various members of the Security Council. This essentially corrupts the process and contravenes Article 60 of the ICJ Statute which makes the decisions of the Court final. It is very unfortunate that the ICJ Statute does not prescribe how the Court can enforce its own decisions. Considering that the ICJ is the principal judicial organ of the UN, the Statute should contain a remedy for non-compliance in which the Court takes the lead in facilitating compliance. This is, however, arguable, as similar suggestions have in the past not seen the light of day.¹⁶⁵

4.3.2 Extent of Action by the Security Council: Power to Review

In assessing Article 94(2) of the Charter, a question arises as to whether the Council’s discretionary powers of enforcement include the review of ICJ judgments. Apparently, there

¹⁶³ Attila Tanzi, ‘Problems of Enforcement of Decisions of the International Court of Justice and the Law of the United Nations’ (1995) 6 *European Journal of International Law* 541.

¹⁶⁴ *ibid.*

¹⁶⁵ *ibid.*

is no express provision in the Charter that confers review powers on the Security Council. The *raison d'être* for Article 94(2) is undoubtedly not to vest the Council with such powers. In contrast, Article 60 of the ICJ Statute makes it clear that the Court's judgment shall be final and not appealable. Crucially, Article 61 of the Statute provides the Court with exclusive powers over any dispute in respect of its judgments, as well as the review proceedings. It also allows the parties to the dispute to make an application for revision of a judgment upon discovery of a new fact unknown to the Court at the time it delivered the judgment.

However, these provisions do not override the fact that the Council may act pursuant to Articles 34 and 39 of the UN Charter in a manner that constitutes political revision of the decisions of the ICJ. When a matter of non-compliance is brought before the Security Council, the defaulting party may have issues about the validity of the Court's judgment, either on the merits, or on the issue of jurisdiction, which must also be addressed by the Court itself in line with Article 36(6) of the its Statute. Such issues may provide a platform for political revision of the ICJ's judgment. The probative weight of this process should be relative to the strength of the arguments made to challenge the Court's judgment and, particularly, to the number of the Council members supporting such arguments.¹⁶⁶ This form of revision may be sanctioned, taking into account the discretionary powers vested in the Security Council.

A case in point is the *Anglo-Iranian Oil Company* case,¹⁶⁷ in which the UK claimed that the Government of Iran had failed to comply with the ICJ's order for provisional measures. On its part, the Iran challenged the validity of the order based on the fact that the ICJ had no jurisdiction to make the order by dint of Articles 1(2) and 2(7) of the UN Charter. It is

¹⁶⁶ Tanzi (n 163) 543.

¹⁶⁷ United Kingdom v Iran [1952] ICJ 2.

important to note that, at the time the issue of validity was being discussed by the Security Council, the same matter was still pending before the ICJ, which later made a decision on its jurisdiction. It would have been prudent for the Council to adjourn its discussions on the issue until the Court had decided on its competence. The reasoning is that, from the outset, the discussions in the Security Council were not gaining ground, and were in parallel to the Court proceedings.

This case raises another important concern: what would happen to a matter lodged before the ICJ if the same matter has already being considered by the Security Council. The *Lockerbie* case provides a good illustration. Based on the investigations conducted jointly by the UK and US, the Security Council made a resolution extraditing the suspects from Libya, but the Government of Libya rejected it bluntly. It lodged a case against the US and UK before the ICJ under Article 14(1) of the 1971 Montreal Convention. In its case, Libya argued that it had decided to subject the suspects to domestic remedies and that it had met all international obligations. An objection was, however, raised that the matter was already being considered by the Security Council and, as such, the Court should not make any provisional orders or any other relief. The Court ruled that it could not exercise its powers under Article 41 of its Statute, and the parties must comply with Article 25 of the UN Charter in carrying out the Security Council's decisions.

The case of the *Military and Paramilitary Activities in and against Nicaragua*¹⁶⁸ provides another illustration of the impact of the Security Council's actions on the legal authority of the ICJ's decisions. Pursuant to Article 94(2) of the UN Charter, a representative of Nicaragua made a claim of non-compliance with the ICJ's judgment of 27 June 1986. The Council considered the claim and made a draft resolution calling for immediate compliance

¹⁶⁸ Case of Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States), Jurisdiction and Admissibility, ICJ Reports 1984.

with the judgment. However, at the voting stage, the President of the Council declined to consider the draft as adopted because the US, which is a Permanent Member in the Council, had opposed the resolution. As a judgment debtor, the US was the only state that challenged the validity of the Court's judgment. The draft resolution was also opposed by France, Thailand and the UK, but this was not in respect of the validity of the Court's judgment.¹⁶⁹ The States made it clear that their position was purely founded on political considerations concerning the practical effect of the judgment, and not on legal considerations regarding its validity.¹⁷⁰

After the voting of the Security Council resolution in the Nicaragua case, the resolution was forwarded to the General Assembly for further consideration.¹⁷¹ A question therefore arises as to whether the General Assembly has powers to deal with the question of non-compliance. While the Security Council has the powers to enforce judgments under Article 94(2) of the Charter, the General Assembly lacks such powers. Under Articles 11(2) and 12(1) of the Charter, the General Assembly's powers do not extend to the non-compliance of a decision of the Court, particularly if the matter is still pending before Security Council. Additionally, the General Assembly does not have powers to decide on the measures that should be taken in respect of the dispute.

However, it should not be blindly argued that the Charter completely rules out such powers. From a textual interpretation of the Charter, the General Assembly may consider disputes in accordance with Article 10 and Chapter VI of the Charter. It should, however, be born in mind that a recommendation made by the General Assembly or the Security Council may touch on the merits of the case in a way that is at odds with the Court's decision. Accordingly, if a matter is brought before any of the two organs, caution should be taken not

¹⁶⁹ Tanzi (n 163) 545.

¹⁷⁰ *ibid.*

¹⁷¹ *ibid.*

to undermine the authority and independence of the Court. The organs should at best limit themselves to the political consideration of a dispute with a view to upholding the decision of the Court.

4.3.3 Voting for Article 94(2) Resolutions

The procedure of voting at the Security Council under Article 27 of the UN Charter has been one of the very contentious issues since the San Francisco Conference.¹⁷² The challenge of voting under Article 27 is twofold. Firstly, the Security Council has to determine whether a claim of non-compliance with the ICJ's judgment amounts to a procedural question within Article 27(2) of the Charter. If the answer to this issue is in the affirmative, no permanent member may exercise its veto power. Second, if the issue is answered in the negative, a member of the Council who is one of the parties to the dispute should not vote by virtue of Article 27(3) of the Charter. These issues arose in the Nicaragua case as is discussed below.

On the first issue of characterizing a question of non-compliance as a procedural matter under Article 27(2), reference should be made to the General Assembly Resolution 267(III) of 1949, which catalogued a number of incidences that should be treated as procedural.¹⁷³ These included decisions to remind the Council members of their responsibilities under the Charter. As already noted, the five permanent members of the Security Council enjoy the veto power. From the preparatory process, the main purpose of the resolution was to emphasize on the need for the permanent members to remain true to the Charter in their exercise of the veto power.¹⁷⁴ When this issue arose in the Nicaragua case, it sounded effective from a political

¹⁷² *ibid* 550.

¹⁷³ *ibid*.

¹⁷⁴ *ibid*.

perspective, and, indeed, the US exercised its veto power against a resolution that called it to comply with the Court's judgment.¹⁷⁵

However, the legal perspective of this issue leads to a different conclusion. To begin with, a resolution of the General Assembly cannot simply bind the Security Council, especially if it is dealing with the question of voting. Article 10 of the Charter mandates the General Assembly to make recommendations to the Council, which may touch on the powers and functions of the Council. However, from a practical point of view, recommendations are not legally binding, and it is inordinate for the General Assembly to amend the Council's voting procedures through a resolution, unless it is purely within Article 108 of the charter. As a general principle, each organ of the UN should be a master of its own procedural rules. One may argue that the above General Assembly resolution 267(III) was meant to interpret the Charter, but even if that is the case, it cannot be regarded as legally binding as there is no provision under the Charter that grants the General Assembly the competence to interpret the Charter.

On the second issue of abstinence, article 27(3) of the Charter provides that a party to a dispute which has been determined by the ICJ should desist from voting on a draft resolution concerning decisions made pursuant to Chapter VI and Article 52(3) of the Charter. This provision has various connotations, especially because it may also bind the permanent members. One inference from the provision is that it does not apply to resolutions under Article 94(2) as this belongs to Chapter XIV of the Charter. This point of view must have been unreservedly pursued in the *Nicaragua case* when the US veto vote led to the non-adoption of Resolution S/18428. However, it should be born in mind that the President of the Council's ruling in the *Nicaragua case* is a special precedent since it involved a permanent member.

¹⁷⁵ *ibid.*

4.4 Lessons from the World Trade Organization

Unlike the ICJ, the WTO dispute settlement system does not presume that states will comply with its decisions.¹⁷⁶ On the contrary, the system takes cognisance of the reality that states might fail to comply.¹⁷⁷ Since the WTO dispute settlement system is based on the practical appreciation of behaviour of States, it establishes a comprehensive post-adjudication framework under Article 21 of the Rules and Procedures Governing the Settlement of Disputes (DSU). Unlike the ICJ, the WTO dispute settlement body (DSB) takes a central position in the post-adjudication process.

Article 21(1) of the DSU underscores the importance of prompt compliance with the DSB's judgments in ensuring an effective dispute settlement process. In practice, a losing party is required to inform the DSB, in a meeting, of its intent to put into effect the decisions of the DSB.¹⁷⁸ At the same time, the party must state whether its compliance will take place immediately. If the party makes it clear that immediate compliance will be impracticable, a reasonable period of time is granted for compliance to be achieved. In this regard, the grant of reasonable time is only available conditionally, that is if the party is incapable of complying immediately. In reality, most members of the WTO have often claimed they cannot immediately comply with the decisions of the DSB. Reasonable time in this case refers to a grace period within which the losing party is required to continue applying the WTO inconsistent measures while taking appropriate measures to comply with the substantive decision.¹⁷⁹ The reasonable period of time may be determined in three distinct ways. First is by way of a proposal made by the member concerned, which must be approved by the DSB

¹⁷⁶ Steve Charnovitz, 'The Enforcement of WTO Judgments' (2009) 34(2) *Yale Journal of International Law* 560.

¹⁷⁷ Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 of the Marrakesh Agreement Establishing the World Trade Organization (15 April 1994) Article 22(2) [hereinafter referred to as the DSU] <https://www.wto.org/english/docs_e/legal_e/28-dsu.pdf> accessed 5 January 2017.

¹⁷⁸ DSU Article 21(3).

¹⁷⁹ World Trade Organization, *A Handbook on the WTO Dispute Settlement System* (Cambridge, UK: Cambridge University Press 2004) 76.

through consensus. This option has thus far never happened.¹⁸⁰ Secondly, the parties to the dispute may mutually agree within 45 days after the DSB's decision. Finally, the reasonable time may be decided by an arbitrator. What this indicates is that the WTO compliance procedural steps are guided by strict timelines.

One important lesson is that the DSB keeps the enforcement process of its decisions under surveillance. Any party to a dispute is free to raise a question issue of compliance before the DSB. Unless otherwise decided by the DSB, a question of compliance can be tabled before the DSB six months after the date of determination of the reasonable period of time. That question remains on the agenda of the DSB until it is determined. Importantly, the party concerned has a duty to provide the DSB with a comprehensive status report showing its compliance progress.¹⁸¹ The submission of such a report ensures transparency and promotes implementation. Additionally, the status report opens the floor for the other party, principally the complainant, to claim full and expeditious compliance, and to aver that it is following the matter closely. Even then, the DSB continues to keep matter under surveillance until full implementation is achieved.¹⁸² This also applies in cases of compensation or suspension of concessions or other obligations.¹⁸³

It is important to note that, unlike the ICJ, the WTO dispute settlement system provides for a mutually acceptable resolution of disputes, compensation to the judgment creditor, and temporary suspension of concessions or other obligations as a last resort.¹⁸⁴ Article 22(1) provides that, where a party fails to comply with its obligations within reasonable time, the other party is free to seek temporary measures, which may be compensation or the suspension of WTO obligations. This means that the WTO system contains an automatic procedure in

¹⁸⁰ *ibid.*

¹⁸¹ DSU Article 21(6).

¹⁸² 79.

¹⁸³ DSU Article 22(8).

¹⁸⁴ Charnovitz (n 176) 560.

which the DSB plays a central role in the enforcement, particularly where a party has failed to comply.¹⁸⁵ The intervention of the DSB is in such a way that no member state can block the implementation process. This is distinct from the ICJ's enforcement system in which the UN Security Council's directives can be blocked by any of the states involved, thereby plaguing the effectiveness of the judicial settlement process. Crucially, the provisions for temporary suspension of concessions or other obligations create an important tool for inducing compliance with the DSB decisions. The ICJ legal framework lacks such provisions.

4.5 Conclusion

In conclusion, the ICJ's enforcement and compliance framework is ineffective. The role of the UN Security Council pursuant to Article 94(2) of the ICJ Statute has completely swayed the independence of the Court. Although the Court has intervened in certain cases to induce compliance, its inactive involvement in the overall enforcement process provides clear evidence of ineffectiveness. In view of the remarkable enforcement framework displayed by the WTO, it will be important for the ICJ to take part in the post-judicial enforcement process. For instance, the ICJ can be empowered to specify the principles that should govern compliance and to lay down specific timelines within which compliance should take place. Once the set timeline has lapsed and the losing party has not complied, the winning party will be entitled to apply unilaterally for the further directions of the Court. In this case, the Court will be given an opportunity to expedite, through coercive means, the enforcement of its decisions.

¹⁸⁵ *ibid* 561.

CHAPTER FIVE

FINDINGS AND RECOMMENDATIONS

5.1 Introduction

This study sought to evaluate the effectiveness of the ICJ in adjudicating international disputes. The study was premised on the hypothesis that, while the Court has been very instrumental in the pacific settlement of disputes since its establishment in 1945, its effectiveness has been hampered by such issues as the consensual nature of its jurisdiction, and the lack of an efficient enforcement framework. Accordingly, the main objective of the study was to examine these issues and their impact on the effectiveness of the Court. This was done based on the jurisprudence established by the Court, as well as the current legal framework. This chapter provides a summary of the study's findings and the recommendations set forth to address the issues identified.

5.2 Research Findings

The first finding of the study is in regard to the contentious jurisdiction of the ICJ. As discussed in chapter three, the current jurisdiction of the Court is limited only to States, which is very tragic as it restricts individuals and international organizations from accessing the services of the Court. The second aspect of jurisdiction explored in this study is its consensual or non-compulsory character. Article 36(2) of the ICJ Statute requires States to express their consent to the jurisdiction of the Court by way of a declaration. This aspect makes it difficult for some cases to proceed to litigation. It also provides an opportunity for States to decline the jurisdiction of the Court in cases to which they are parties and, therefore avoid certain proceedings. Most states invoke the principle of sovereignty, though not openly before the Court as this could mean they are challenging the Court's jurisdiction out of self-

interests. What is more worrying is the fact that four of the five permanent members of the Security Council are not supportive of the Court's compulsory jurisdiction. Yet, these are the very members that have total representation in the Court's bench. Their influence continues to seriously undermine the effectiveness of the Court.

As regards the enforcement of the Court's judgment, it was found that the role of the Security Council in this process exacerbates the ineffectiveness of the judicial settlement. It generates conflict of interests, which call for the separation of the ICJ judgments from the Security Council. It is no doubt that the enforcement of the Court's judgments under Article 94(2) has been subjected to the political shenanigans characterizing the Security Council. A case in point is the US's veto power, which suppressed the Security Council's resolution in the case of *Nicaragua v US*.

Other findings include the election and re-election of judges, as well as the appointment of ad hoc judges. These issues directly touch on the independence and impartiality of the ICJ.

5.3 Recommendations

Reforming the ICJ is not an easy task. It requires a step-by-step tactic which is informed by the rapid development of international law. Considering the seriousness of the foregoing challenges, the present study makes the following recommendations: addressing jurisdictional setbacks; overhaul of the process of electing and re-electing judges; rethinking the representation of the big five members in the Court; and other related proposals.

5.3.1 Addressing Jurisdictional Setbacks

In view of the jurisdictional challenges facing the ICJ, it could be crucial for the Court to construe its jurisdiction extensively more so when there are differences in relation to the scope of the jurisdiction. The provisions of the ICJ Statute may be amended to make the

ICJ's jurisdiction purely mandatory to all states. The current situation whereby States have the discretion of consenting to the compulsory jurisdiction of the Court has immensely watered down the integrity of the Court. As the principal judicial organ in the world, the ICJ should possess the commanding force in any question about its jurisdiction in order to be in a better position to deal with the increasing number of disputes.

Declarations made pursuant to Article 36(2) of the ICJ Statute should be construed in a natural and rational manner. To avoid cases like the Nicaragua one, the UN Charter and the ICJ Statute can be amended to include a non-compliance declaration clause. It should be made clear in the amendments that any state that submits a declaration of acceptance of its compulsory jurisdiction must also submit the declaration of non-compliance. This is important because, from the findings of this study, many states have not been complying with the decisions of the Court as required of them under Article 36(1) of the ICJ Statute.

Most importantly, while the ICJ and the political organs of the UN remain interdependent in various respects, they must embrace the principle of separation of powers as a means of achieving independence and impartiality in the pacific settlement of disputes. The Court should exercise its competence extensively, but taking into account the limits set out under the ICJ Statute and the increase of international courts and tribunals. Further, while acknowledging their complementary roles, the ICJ and the Security Council should remain true to their international roles. To ensure independence, the organs should take into account their distinctive competence since the ICJ is the principal judicial organ while the Security Council is the enforcement institution. This will drastically eliminate political influence on the judicial settlement process.

5.3.2 Enforcement of ICJ Decisions

The current institutional framework for the enforcement of the ICJ decisions is clearly weak and politically swayed. To reincarnate this framework, the Security Council and the ICJ should be cautious on how they exercise their powers. Specifically, the Security Council should apply Article 94(2) in accordance with the standard of self-restraint. The Council should desist from political and other considerations that might impair access to justice, and the veto power should seldom be exercised in cases decided by the ICJ.

5.3.3 An Overhaul of the Framework for Election of Judges

From the findings above, it is clear that the ICJ continues to be politicized. This may be seen as a minor challenge, but its impact on the effectiveness of the Court cannot be underestimated. The political influence of the Court is associated with the vulnerabilities such as the double role of the Court's judges as arbitrators, as well as the re-election of the judges. The starting point is to reform these vices so as to make the Court less politicized and restore its integrity. This is a vital prerequisite towards achieving judicial independence, which is an end result of an effective judicial system.

First, it is proposed that the current system of election of judges should be overhauled by shifting the responsibility to a separate body with international recognition to avoid political interference. Such a body may be the International Law Commission, which constitutes renowned legal jurists and publicists. These experts have what it takes to conduct credible elections that eschew political considerations. The present organs can cede their powers to the separate body as the only electoral body of the ICJ. However, the separate body should coordinate with the other organs, particularly the General Assembly which will have the powers to confirm or approve the list of judges elected. By doing this, the integrity of the process will not be negated by politics.

Closely related to this is the question of re-election of judges. As already pointed out, this practice should be eliminated to protect the judges from actual or potential influence by the members of the Security Council or the General Assembly. This may be remedied by lengthening the tenure of office of the judges to, for instance, twelve years as most experts have proposed in the past. Best practices could be borrowed from the ICC and the European Court of Human Rights where judges are elected for a term of nine years without an option of re-election.

Secondly, it is important to restrict the ICJ judges from engaging in activities outside of their mandate as theoretically provided for in the ICJ Statute. This will certainly enhance the effectiveness of the Court by ensuring that the judges do not engage in relationships that can extend to cases brought before them by the parties whose cases they have dealt with in arbitration.

Thirdly, as regards the appointment of *ad hoc* judges by states which are not represented in the Court's bench, one of the positive measures that can be taken to guarantee equality to those states is amending the ICJ Statute in order to expand the composition of the Court. This is likely to enable the states to have more representation in the Court.

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