## INTRODUCTION

The need for an international dispute settlement organ in the international community is imperative both for the proper functioning and organization of the international legal system as well as the peaceful settlement of disputes between states. The International Court of Justice has since, the post World War II era, fulfilled this function to a colossal extent. Its necessity and importance in the contemporary world order will, in this regard, be considered on the basis of the court's ability to meet these functions. This forms the core of this chapter which is to delineate the need of and importance of the world court as well as to give an induction to the workings of the same. This chapter will therefore give a brief history of the world court, outline the jurisdiction of the Court, give the legal framework governing the court and state and analyze the merits and achievements of the court thereby showing the contribution the Court has made to the development of international law. The primary objective of this chapter is therefore, to give an exposition of the necessity and importance of the court to the international legal system as well to give the reader an understanding of the basic workings of the court as this will be the basis of the discussions in the proceeding chapters.

## 1.0 HISTORICAL BACKGROUND OF INTERNATIONAL LEGAL DISPUTE SETTLEMENT

International legal dispute settlement is based on the pacific settlement of international disputes which dates back to the 18$^{th}$ century. Pacific settlement of international disputes uses methods such as negotiation, enquiry, mediation, conciliation, arbitration and

judicial settlement of disputes between states.[1] The modern history of international pacific settlement of disputes is recognized as dating back to the Jay Treaty of 1794 between the United States of America and Great Britain. The treaty provided for the creation of three mixed commissions, composed of American and British nationals in equal numbers who would decide and settle issues whose resolve could not be found via negotiation[2]. Closely linked to and supporting the practice of the Jay Treaty was the Treaty of Washington of 1871 between the United States and the United Kingdom whose purpose was to establish an arbitrary body to determine alleged breaches of neutrality by the United Kingdom during the American Civil War of the nineteenth century.[3] The tribunal was to apply certain rules governing the duties of neutral governments. The said tribunal consisted of five members to be appointed by the heads of states of the US, UK, Brazil, Italy, and Switzerland. The result of the aforesaid arbitration was the requirement that the United Kingdom pay compensation for breach of the agreed rules of neutrality. The effectiveness of the arbitral decision as well as its compliance had several effects on the international community such as the growth in the practice of inserting in treaties, clauses providing for recourse to arbitration in the event of a dispute as well as proposals by various states for the creation of a permanent international arbitral tribunal in order to obviate the need to set up a special *ad-hoc* tribunal to decide each arbitral dispute[4]. The third stage in the development of international legal dispute settlement involved a major

[1] Mediation and arbitration preceded judicial settlement in history. Mediation was primarily practiced in ancient India whilst arbitration was practiced in Greece, China and among Arabian tribes.
[2] Throughout the nineteenth century, the United States and the United Kingdom had recourse to them as did other states in Europe and the Americas.
[3] See the Alabama claims arbitration of 1872 between the United States and the United Kingdom
[4] This marked an important stage in international legal dispute settlement as it was at this point that states begun to recognize the need to have a separate body to aid in the settlement of disputes contradistinguished from the orthodox use of a state's representative(s)to negotiate on behalf a state.

contribution by the Hague Peace Conference of 1899.[5] The aim of the conference was to discuss peace and disarmament and its result was the adoption of a convention on the pacific settlement of international disputes.[6] This dealt not only with arbitration but included other modes of settlement such as good offices and mediation. The 1899 convention in this regard, made provision for the creation of an institution known as the Permanent Court of Arbitration (PCA) consisting of a panel of jurists designated by each country acceding to the convention.

## 1.1 THE PERMANENT COURT OF ARBITRATION (PCA).

The PCA took up residence at the peace palace in 1913 and contributed towards the development of international Law through various landmark decisions such as the Timor frontiers (1914) and the sovereignty over the Island of Palmas (1928) cases. Until the end of the First World War, the PCA was the major dispute settlement organ for the international community. Various authors have criticized the PCA as an inaccurate description of the machinery set up by the convention which represented only a method or device for facilitating creation of arbitral tribunals as and when necessary[7]. The post

[5] This was convened at the initiative of the Russian Czar Nicholas II
[6] At the time international law in the modern sense of the word had not matured into a distinct recognized body of law thus my preference for the term international disputes as opposed to international legal disputes
[7] Malcolm Shaw in his book *International Law* (5th Ed, 2003) pg 960 categorically states that in his view the Permanent Court of Arbitration was neither permanent nor a court.

world war era saw the inception of another major international dispute settlement institution known as the Permanent Court of International Justice (PCIJ).

## 1.2 THE PERMANENT COURT OF INTERNATIONAL JUSTICE (PCIJ).

The PCIJ may be said to be a product of the League of Nations which was the primary institution concerned with the regulation of the activities and associations between state and state. Article 14 of the covenant of the League of Nations gave the council of the League of Nations responsibility for formulating plans for the establishment of a Permanent Court of International Justice. This was the first court of a judicial nature to be established having the competence not only to hear and determine any dispute of an international character submitted to it by the parties to the dispute, but also to give an advisory opinion upon any dispute or question referred to it by the council or by the assembly[8]. The PCIJ was the first major international organ of a permanent nature to use judicial settlement as a means of international legal dispute determination. Further, unlike the PCA which would constitute an arbitral tribunal as and when the need would arise, the PCIJ was a permanent court governed by its own statute and rules of procedure, fixed before hand and binding on parties having recourse to the court. An important characteristic of this court was its complete separation from the league[9]. Further, the statute of the PCIJ never formed a part of the covenant and a member state of the league was not, by virtue of that fact, an '*ipso facto'* party of the courts statute[10]. Between 1922 and 1940, the PCIJ dealt with 29 contentious cases between states and delivered 27

[8] Unlike the PCA which used the arbitration method of dispute settlement
[9] Although the two bodies had some complementing roles such as the periodical election of the members of the court by the legal council.
[10] This is the complete opposite of the relationship between the United Nations and the ICJ. *See* Article 93 of the Charter of the United Nations.

advisory opinions. These efficient workings of the PCIJ were however to be hampered by the outbreak of the Second World War which led to the removal of the court to Geneva thus leaving only a single judge remaining at the Hague. The court then begun to lose its credibility and favour amongst states. During the period of war a conference was held between the United Kingdom, the United States, China and the USSR whose result was a joint declaration recognizing the necessity;

> "Of establishing at the earliest possible date, a general international organization, based on the principle of the sovereign equality of all peace loving states and open to membership by all such states for the maintenance of international peace and security."

Further negotiations amongst the four states led to a meeting with a committee of jurists representing 44 states and charged with the responsibility of the preparation of the draft statute for the future International Court of Justice. This draft was to be submitted to the San Francisco conference which dealt with the formation of a UN Charter. At the San Francisco conference in which 50 states participated, the notion of compulsory jurisdiction of the court was rejected and it was resolved that there was need for the creation of an entirely new court which would be the principal organ of the United Nations and of equal authority with the General Assembly and the Security Council. In April 1946 the PCIJ was formally dissolved, the ICJ meeting for the first time elected its first president Judge Jose Gustavo Guerrero (el Salvador) who was the last president of the PCIJ thus creating an element of continuity and aiding in a smooth transition from the

PCIJ to the International Court of Justice (ICJ)[11] . The International Court of Justice had its first case submitted to it in May 1947 involving incidents in the Corfu channel.[12]

### 1.3 THE INTERNATIONAL COURT OF JUSTICE

The International Court of Justice (*Cour Internationale de Justice*) was established in 1946 by the Charter of the United Nations which makes members of the UN '*ipso facto'* parties to the Court's statute thus widening its jurisdiction as compared to the PCIJ.[13] The Court is based in the Peace Palace[14] in The Hague, Netherlands with English and French being the two official languages of the court. The Court has since its inception contributed greatly towards the development of International law. An analysis of some of the cases heard and determined by the court as well as the Court's contribution to international law will be a necessary field to delve in order to properly understand an investigation into the efficacy of the court which is the subject matter of this paper.

## Achievements of the International Court Of Justices; Cases and Its Contributions to the Development of International Law

### The North Sea Continental Shelf Cases 1969 I.C.J Rep 4, 44

A dispute regarding the delimitation of the continental shelf existed amongst Germany, Denmark and Netherlands. Article 6 of the 1958 Geneva Convention on the continental

[11] Shaw is of the view that that the ICJ in essence, is a continuation of the Permanent Court, with virtually the same statute and jurisdiction and with a continuing line of cases , no distinction being made between those decided by the PCIJ and ICJ.
[12] Corfu channel case (United Kingdom v Albania)
[13] supra
[14] similar to the PCA and the PCIJ

shelf was contended by Denmark and the Netherlands to be applicable not only as a conventional rule but also to represent the accepted rule of general international Law on the subject of continental shelf delimitation. Article 6 clearly provides that where such a dispute exists, the boundary of the continental shelf appertaining to such states shall be determined by agreement between them. In the absence of agreement and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the nearest point of the baselines from which the breath of the territorial sea is measured. This not withstanding, the court rejected the equidistance as an emerging rule of general international law. The court further stated that the use of the median line as criteria on its own may result in inequitable results. Although equidistance was the criteria specified in the 1958 convention, the court provided that delimitation was to be effected by agreement in accordance with equitable principles. In this case the court *went against the standards provided by a treaty* and *created its own standards which standards were widely accepted by the international community* and were later codified under Article 83 of the UNLCLOS. This is a good example of how important a judicial decision may be when used a source of international law.

**The Anglo-Iranian Oil Co. (United Kingdom *v.* Iran) case**

The Anglo-Iranian Oil Company case had been submitted to the Court by the United Kingdom Government on May 26th 1951, and had been the subject of an Objection on the ground of lack of jurisdiction by the Government of Iran. In April, 1933, an agreement was concluded between the Government of Iran and the Anglo-Iranian Oil Company. In

March, April and May, 1951, laws were passed in Iran, enunciating the principle of the nationalization of the oil industry in Iran and establishing procedure for the enforcement of this principle. The result of these laws was a dispute between Iran and the Company. The United Kingdom adopted the cause of the latter, and in virtue of its right of diplomatic protection it instituted proceedings before the Court, whereupon Iran disputed the Court's jurisdiction. In the present case the jurisdiction depends on the Declarations accepting the compulsory jurisdiction of the Court made by Iran and by the United Kingdom under Article 36, paragraph 2, of the Statute[15]. According to this Declaration, the Court has jurisdiction only when a dispute relates to the application of a treaty or convention accepted by Iran. But Iran maintained that, according to the actual wording of the text, the jurisdiction is limited to treaties subsequent to the Declaration. The United Kingdom maintained, on the contrary, that earlier treaties may also come into consideration. In the view of the Court, both contentions might, strictly speaking, be regarded as compatible with the text. But the Court cannot base itself on a purely grammatical interpretation: it must seek the interpretation which is in harmony with a natural and reasonable way of reading the text, having due regard to the intention of Iran at the time when it formulated the Declaration. A natural and reasonable way of reading the text leads to the conclusion that only treaties subsequent to the ratification come into consideration.

The United Kingdom is not a party to the contract, which does not constitute a link between the two Governments or in any way, regulates the relations between them.

[15] The subject of compulsory jurisdiction is very relevant for understanding the efficacy of the court. This subject will be analyzed in detailed in chapter 2 of this paper.

Under the contract, Iran cannot claim from the United Kingdom any rights which it may claim from the Company, nor can it be called upon to perform towards the United Kingdom any obligations which it is bound to perform towards the Company.

Thus from the above case it is now clear to the international community at large that a contract entered into between a country and a foreign company does not constitute a treaty between the country of incorporation and the Host country. Further a treaty must be given a meaning whose interpretation is in harmony with a natural and reasonable way of reading the text band not merely a grammatical interpretation.

**Barcelona Traction, Light and Power Company, Limited (Belgium *v.* Spain) (New Application: 1962)**

The claim, which was brought before the Court on 19 June 1962, arose out of the adjudication in bankruptcy in Spain of Barcelona Traction, a company incorporated in Canada. Its object was to seek reparation for damage alleged by Belgium to have been sustained by Belgian nationals, shareholders in the company, as a result of acts said to be contrary to international law committed towards the company by organs of the Spanish State. The Court found that Belgium lacked *jus standi* to exercise diplomatic protection of shareholders in a Canadian company with respect to measures taken against that company in Spain. Simply put, the Court, in this regard, explained that a country may only espouse the claims of its nationals which in the case of a company, such as Barcelona Traction, is the country of incorporation.

**Military and Paramilitary Activities in and against Nicaragua (Nicaragua *v.* United States of America)**

This case is credited to be one of the most informative decisions of the World Court relating to the activities between states. The court gave the following judgment relating to sovereignty, use of force as well as the relationship between war crimes and state responsibility;

" (4) *By twelve votes to three*, Decides that the United States of America, by certain attacks on Nicaraguan territory in 1983-1984, namely attacks on Puerto Sandino on 13 September and 14 October 1983, an attack on Corinto on 10 October 1983; an attack on Potosi Naval Base on 4/5 January 1984, an attack on San Juan del Sur on 7 March 1984; attacks on patrol boats at Puerto Sandino on 28 and 30 March 1984; and an attack on San Juan del Norte on 9 April 1984, has acted, against the Republic of Nicaragua, in breach of its obligation under customary international law not to use force against another State

(5) *By twelve votes to three*, Decides that the United States of America, by directing or authorizing over Rights of Nicaraguan territory, and by the acts imputable to the United States referred to in subparagraph (4) hereof, has acted, against the Republic of Nicaragua, in breach of its obligation under customary international law not to violate the sovereignty of another State;

(9) *By fourteen votes to one*, Finds that the United States of America, by producing in 1983 a manual entitled "Operaciones sicológicas en guerra de guerrillas", and disseminating it to *contra* forces, has encouraged the commission by them of acts contrary to general principles of humanitarian law; but does not find a basis for concluding that any such acts which may have been committed are imputable to the United States of America as acts of the United States of America"

Paragraph (4) and (5) are straight to the point and need no further explanation. However, an explanation of paragraph (9) may be prudent in understanding the link between Humanitarian Law as a branch of international law and the International court of Justice. The court under this paragraph found that by disseminating the military manual to the contra forces, the United States itself could not be found responsible for the acts of the

contras themselves. Though it may have encouraged breaches of humanitarian law, such acts are imputable in humanitarian law only to the person who committed the violations thus creating individual liability. A State will therefore only be responsible for the acts of its nationals[16] creating accountability on an international level.

The cases above are just but a few of the many disputes that the court as adjudicated over thereby averting recourse by the states to aggressive modes of settling their disputes.

## 2.0 THE ORGANIZATION OF THE WORLD COURT

### 2.1 COMPOSITION

Article 3(1) of the statute of the ICJ provides that the court shall consist of fifteen members, no two of whom may be nationals of the same state. This is done in order to promote equality of representation of states as well enhance the impartiality of the bench. The aforesaid members of the court are elected by the General Assembly and the Security Council[17] from a list of persons nominated by the national groups in the Permanent Court of Arbitration in accordance with the defined provisions contained in Articles 4-12 of the ICJ statute. Article 13(1) of the statute further states that the members of the Court shall be elected for nine years by the UN General Assembly and the Security Council who must give an absolute majority of votes before a candidate is considered as elected.[18] The primary criterion used to determine whether a candidate is eligible as a judge or not is

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[16] Nationals in this regard does not mean all nationals but only those acting with the authority of the state as opposed to those who act in their private capacity.

[17] See Roseanne, *law and practice* vol 1 pp 395ff

[18] Article 10(1) of the statute of the ICJ

found under Article 2 of the Charter which states that they must be persons of high' moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law . In order to guarantee the autonomy of the judges, the members of the court have security of tenure contained in Article 1 which is to the effect that no member of the court can be dismissed unless, in the unanimous opinion of the other members, he/she no longer fulfils the required conditions.[19] This provision ensures that though appointments are made by the General Assembly, and the Security Council, dismissals shall only be done by a decision made within the institution. Thus, a judge will not be impeded from deciding judgment against a particular state on the fear of dismissal. This exhibits an element of the doctrine of 'separation of powers' which is essential for the proper functioning of any legal system.

The court in practice sits as a full bench;[20] however Article 25(3) provides that a quorum of nine judges shall suffice to constitute the court. The court may also in some instances sit as a chamber consisting of usually 3 or 5 judges for the purposes of dealing with particular categories of cases for example , labor cases and cases relating to transit and communications.[21] In 1993 a special chamber was established under Article 26(1) of the ICJ statute, to deal specifically with environmental matters.[22] '*Ad hoc'* chambers may also (and are more frequently) be convened under article 26(1). *The gulf of Maine case (USA v Canada)* is a suitable example of such an instance and in this case, the parties

[19] No judge has ever been dismissed on this ground
[20] Article 25 of the ICJ statute
[21] Article 26 of the ICJ statute
[22] This chamber has however never been utilized.

particularly made it clear they would withdraw the case unless the court appointed judges to the chamber who were acceptable to the parties.

## 2.2 '*AD HOC'* JUDGES

Article 31 of the statute of the ICJ makes provisions for the appointment of '*ad hoc'* judges where a party to a dispute brought before the court does not have a judge of its nationality sitting in that particular bench.[23] When taking up his/her temporary position, an '*ad hoc'* judge is required to make the same solemn declaration as the other judges of the court and he/she may take part in any decision concerning the case on terms of complete equality as the permanent members of the bench.[24] The reason behind this unorthodox mode of choosing judges is thought to be pegged to the encouragement of states to submit their disputes to the court because a country will be more inclined to submit to the court if it is guaranteed that its interest will be protected.

## 2.3 JURISDICTION

Article 34(1) of the statute clearly provides that only states may be parties in cases before the court all members of the United Nations are '*ipso facto'* parties to the statute of the ICJ and may therefore bring a case to the court for determination.[25]. However, under Article 93(2), a state which is not a member of the UN may become a party to the statute

[23] Conditions for this appointment are laid down in Articles 35 to 37 of the Rules of the court. Practice direction VII of the court now requires that parties when choosing a judge "*ad hoc*" pursuant to Article 31 of the statute and Article 35 of the rules of the court, should refrain from nominating persons who are acting as agent, counsel or advocate in another case before the court or have acted in that capacity in the three years preceding the date of the nomination. Furthermore parties should likewise refrain from designating as agent, counsel or advocate in a case before the court a person who in the three years preceding the date of the designation was a member of the court, judge *ad hoc*, Registrar, Deputy Registrar or higher official of the court.
[24] In practice, this may lead to a total of 17 judges sitting at the same bench.
[25] See Article 93 of the UN Charter

subject to the approval of the General Assembly.[26] Article 36 of the statute further provides that the jurisdiction of the court shall comprise all cases which the parties refer to it and all matters specifically provided for in the charter of the United Nations or in treaties and conventions in force. The question of contentious jurisdiction will be examined in detail in subsequent chapters.

## ADVISORY PROCEEDINGS (OPINION)

The advisory jurisdiction of the court is open only to five organs of the United Nations and to 16 specialized agencies of the United Nations. Advisory Opinions are a means by which UN agencies can seek the Court's help in deciding complex legal issues that might fall under their respective mandates. In principle, the Court's advisory opinions are only consultative in character, though they are influential and widely respected. The opinions can not therefore be enforced and may be likened to the declaratory orders given in various municipal systems[27].

[26] Before becoming members of the United Nations, Japan, Liechtenstein, San Marino, Nauru and Switzerland were parties to the statute of the court.

[27] The subject matter of this paper will focus mainly on international legal dispute settlement thus I will opt not to delve into the intricacies of the advisory jurisdiction of the court.

## Conclusion

Since the pre 19th century the need for an international dispute settlement mechanism has been essential for the proper functioning of the international community. The International Court of Justice is the current dispute settlement mechanism of the world community with its primary purpose being the settlement of specifically legal disputes. The court is mainly governed by the Charter of the United Nations and the Statute of the ICJ which gives the basis of the workings of the court. The court has fulfilled its objectives to a great extent. However, all legal institutions need to be the subject of periodic review in order to identify areas in their functioning that require amendment or enhancement. This is the purpose of this paper. The following chapter will in this regard address some of the jurisdictional challenges facing the International Court of Justice.

## ASSESSING THE IMPARTIALITY OF THE COURT: THE QUESTION OF THE INDEPENDENCE OF THE INTERNATIONAL JUDICIARY.

"The Court shall be composed of a body of *independent judges*, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law."

*Article 2 of the Statute of the Court.*

## THE CONCEPT OF INDEPENDENCE

In domestic law theory, the independence of the judiciary is pegged on the doctrine of separation of powers. It is contended that when power is placed on one particular body, room is created for the potential abuse of that power. In order to guard against this potential abuse, the power is split amongst different organs. Each organ then acts as a check to the extent of power exercised by another organ. So as to ensure that each organ acts as a check, the independence of each organ from the other must be guaranteed. This is the purpose of the concept of independence. It is a recognized fact that international relations are far from similar to domestic governance; however, some of the basic principles exercised in local jurisdictions are relevant and highly applicable in the international community.

The international Court of Justice will not be efficient in administering justice if it cannot exercise its functions freely. To this end, the World Court must be independent from different actors at different levels, *Vis;*

- The Court must be independent with regard to judges at an individual level.
- The Court must be independent with regard to judiciary as a whole[28].

With respect to the individual independence of the judges, the judges must be;

a) Independent from the influence of parties to the dispute before them.

b) Independent from the influence of other states.

c) Independent from the influence of other organs.

## INDEPENDENCE OF THE JUDICIARY AT THE INDIVIDUAL LEVEL

Often the independence of the judiciary is taken to refer to the structural and institutional safeguards for the judiciary as a whole in order to guarantee their freedom to decide a case based on the merits and not on other factors such as political or economic factors. This section of this research seeks to examine the independence of the judge in her individual capacity. Thus, this section will deal with an investigation of the extent of impartiality of judges in a particular case.

### a) Independence From the Parties to a Dispute

[28]This distinction, first advanced by Shimon Shetreet in 1976, preserves traditional indicators of the independence of individual judges – such as security of tenure and impartiality – while focusing attention as well on institutional factors such as the degree of control a court has over its own budget.

The statute of the international court of justice contains elaborate provisions which are aimed at guaranteeing the impartiality of a judge as regards the parties to a particular dispute. Articles 16, 17 and 24 are particularly relevant in this regard. Article 16(1) of the statute of the Court provides that no member of the Court may exercise any political or administrative function, or engage in any other occupation of a professional nature. The article is broad in its interpretation as it does not specify whether the political or administrative functions which are prohibited are in respect to the municipal or international activities. My interpretation of the aforesaid article is that it includes functions both in the municipal and international level. The purpose of this provision is to erase any doubts as to the impartiality of a judge in any particular case. Whether it is a matter involving the exercise of advisory or contentious jurisdiction by the Court. Any link between a judge and the parties to a particular case immediately creates room for raising doubt as regards the ability of that judge to withstand the temptation of guarding his own interests instead of deciding the case based on its merits. Lack of affiliation in a political, administrative or professional set up helps the judge to decide a case freely and dispel any doubts as to his impartiality.

Article 17 of the Statute of the Court further provides that;

1. No member of the Court may act as agent, counsel, or advocate in any case.

2. No member may participate in the decision of any case in which he has previously taken part as agent, counsel, or advocate for one of the parties, or as a member of a national or international court, or of a commission of enquiry, or in any other capacity.

It is required that a judge must decide a case based on its merits free from any bias towards or in favour of a particular party. If a judge has previously advocated or acted in favour of a particular party, there is a great possibility that he will have already set his mind to a particular conclusion in relation to the case. This creates a bias in favour of the party for whom the judge was previously acting for. *Article 17* therefore acts as a guard against this and ensures that a judge makes an independent decision and not one based on previous affiliations. It may be prudent at this stage to look at some case law on this practice in order to gain a practical understanding of the aforementioned provisions. In the *Certain Phosphate Lands in Nauru (Nauru v. Australia)* case one judge recused himself from involvement in the proceedings having been involved in a previous inquiry into the matter. Another ICJ judge, having sat on the panel of the arbitral award that was the subject of the dispute, excused himself from the *Case Concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*[29]. As noble as these acts may be, there are some instances where judges of the International Court of Justice have participated in a case despite the questions of doubt created by their involvement For instance, two judges in the *Rights of Nationals of the United States in Morocco* case participated in the case although they had both been legal advisers to the parties in the early stages of the dispute[30]. The above scenarios raise serious questions regarding what criteria should be used in deciding whether a judge should recuse himself or not.

[29] Similarly, another judge did not participate in the *Anglo-Iranian Oil Co. (United Kingdom v. Iran)* case because he had, as a member of the Security Council, been engaged in certain aspects of the dispute

[30] Also, the decision to recuse Sir Muhammad Zafrulla was one aspect of the Court's controversial judgment in the *South West Africa* case, this was coupled with the fact that there was a refusal by the court to disqualify another judge under the same circumstances.

The *Furundzija* Case, heard and determined by the ICTY, presents relevant criteria for the determination of impartiality. In this case, defense accused Judge Mumba of deliberately advancing a political cause (the prosecution of rape as a war crime) at the expense of the accused. While a member of the UN Commission on the Status of Women, Judge Mumba had actively participated in the drafting of the Beijing Platform for Action, substantial parts of which advocated the aggressive prosecution of rape and other gender-based crimes as crimes against humanity. In deciding the case, the Appeals Chamber expressly adopted a test to be used in subsequent considerations:

*a) A Judge is not impartial if it is shown that actual bias exists.*

*b) There is an unacceptable appearance of bias if:*

*i) A Judge is a party to the case, or has a financial or proprietary interest in the outcome of a case, or if the Judge's decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties. Under these circumstances, a Judge's disqualification from the case is automatic; or*

*ii) The circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.*

The decision by the court in this case presents a desirable test for what constitutes a bias on the part of the judge. Further, from the above decision it was stated and held that the disqualification of a judge who may reasonably be impartial is and should at all times be automatic. This is contradistinguished by the practice of the International Court of Justice in which the court as a whole decides on whether disqualification should occur or not. This may be considered as one area for the reform of the International Court.

Judges *'ad hoc'*

Under Article 31, paragraphs 2 and 3, of the Statute of the Court, a State party to a case before the International Court of Justice which does not have a judge of its nationality on the Bench may choose a person to sit as judge *ad hoc* in that specific case under the conditions laid down in Articles 35 to 37 of the Rules of Court. Before taking up his/her duties, a judge *ad hoc* is required to make the same solemn declaration as an elected Member of the Court. He/she does not necessarily have to have (and often does not have) the nationality of the designating State. A judge *ad hoc* takes part in any decision concerning the case on terms of complete equality with his/her colleagues and receives a fee for every day on which he/she discharges his/her duties, that is to say, every day spent in The Hague in order to take part in the Court's work, plus each day devoted to consideration of the case outside the Hague. A party must announce as soon as possible its intention to choose a judge *ad hoc*. In cases, which occur not all that infrequently, where there are more than two parties to the dispute, it is laid down that parties which are actually acting in the same interest are restricted to a single judge *ad hoc* between them - or, if one of them already has a judge of its nationality on the Bench, they are not entitled to choose a judge *ad hoc* at all.

The addition of an *ad hoc* judge is aimed at ascertaining the neutrality of the bench on account of both nationality and representation. However, I am of the view that this mode of thinking is counterproductive. By creating the position of an ad hoc judge, this sends the message to other judges that it is already presumed that they will take the side of the country whose nationality they posses when deciding a particular dispute. The ripple

effect is the creation of partiality of the bench based on nationality. The only judges that then remain impartial are those who do not posses the nationality of a state involved in the case before the court or those without an interest (politically speaking) with a state before the court. The position of the 'ad hoc' judge thus creates an expected partiality within the members of the bench.

**b) Independence from States Generally**

The International Court of Justice is composed of 15 judges elected to renewable 9-year terms. However the terms of all the judges do not run concurrently. For the purposes of continuity in the carrying out of matters of the court, there are elections for five seats each third year. Judges are elected by the Security Council and the General Assembly, each of which must approve the candidate by a simple majority[31] from a list of nominees. As previously stated, nominations are made by the national groups in the Permanent Court of Arbitration or, if a Member State is not part of the PCA, by a national group appointed for the purpose of nomination. As no judge can hope to be elected to the Court without the support of her home state (for the nomination) and a significant number of others (to broker a majority in the General Assembly), ICJ elections necessarily have a political element. Judges who wish to retain their seats must and do campaign for some time beforehand. Herein lays the problem with regard to the independence of the Court. Since the re-election of the judges of the court will be done by members of the General Assembly as well as of the Security Council, a judge will be inclined not rule against a state which yields great political influence which is likely to affect his re-election. The re-

[31] The Permanent Members of the Security Council are not permitted a veto. See Article 13(1) of the Statute of the International Court of justice.

election of the judges of the court presents a circumstance in which the independence of the judges may be compromised. In any case, when the judges were being selected the General Assembly and Security Council were satisfied with the competence of the judges. The option to engage in re-election only has the effect of giving leverage to politically affluent states for the court to rule in their favour where they are parties to a dispute before the court.

As regards the jurisdictional influence that a state may use to influence a particular judge, Article 19 of the Statute of the International Court of Justice is relevant. Judges of the International Court of Justice are under Article 19 of the Statute of the Court accorded diplomatic immunity when on Court business. Thus, a state may not influence a judge of the Court by seeking to exercise its criminal or civil jurisdiction.

**c) <u>Independence from the Influence of Other Organs of the United Nations.</u>**

This may be the most widely abused area of the independence of the judges of the World Court. The Security Council is, under Article 94(2) of the Charter of the United Nation, placed with the obligation of ensuring that a decision of the Court is complied with. However, this obligation is not absolute. The Security Council has the discretion of whether or not it will enforce a decision of the Court. This is an abuse to the legitimacy of the court process particularly where the Security Council does not or refuses to enforce a decision of a judge; that judge is consequently portrayed as incompetent. Thus, a judge when making her decisions may want to ensure that her decisions are politically correct in the eyes of the Security Council to save her from the embracement of having her

decision shot down at the Security Council which makes decisions largely based on politics.

## INDEPENDENCE OF THE INTERNATIONAL JUDICIARY AS AN ORGAN OF THE UNITED NATIONS AND THE WORLD COMMUNITY

The independence of the Judiciary as a whole is the part of the independence of the judiciary that is common to most. Independence of the judiciary as a whole refers to the guarantee of the freedom of the judiciary to fulfill its functions without the interference of other organs. Most of the areas discussed in the previous section are also widely applicable in this section; however I will concentrate on the areas that are peculiar to the judiciary as a whole.

### 1. The Budget of The International Judiciary

Article 33 of the statute of the Court states that, "The expenses of the Court shall be borne by the United Nations in such a manner as shall be decided by the General Assembly[32]."

The cited provision is clear in its meaning; it places the Court in a position of utter dependency on the General Assembly. On the area of budgetary provisions, therefore, the independence of the Court is greatly limited in meeting with its administrative and day to day costs. For the past several years, the President of the Court has, in his yearly address to the General Assembly, stressed the impossibility of keeping up with the increased

[32] The procedure is as follows; The Registrar prepares the draft budget, which is then submitted to the Secretary-General and incorporated into the general programme budget of the UN. From there, it passes through the Advisory Committee on Administrative and Budgetary Questions and the Fifth Committee for successive recommendations and revisions before going to the General Assembly.

workload of the Court without additional resources[33].The traditional funding difficulty has been due in part to the inclusion of the ICJ in the general budget, so that funds accorded to it from the general appropriation of the organization result in the proportional compromise of the funding of another. This has had the effect of politicizing the budgetary process of the Court, as States vie for the fullest finding of programs they support. A political element is again created in the funding and workings of the Court.

### 2. The Jurisdiction of The Court

The jurisdiction of the international Court of justice is dependant on the consent of the parties to the dispute. This means that the Court is not free to determine a dispute which it would otherwise be competent to determine save for the consent of one or both of the parties. This is an area that raises weighty issues which will be looked at in detail in the proceeding chapter.

[33]The situation has changed only incrementally, though an 11% increase in its biennial budget is under consideration, raising its funding to $23,837,300 for 2002-2003.

**Conclusion.**

The independence of the international judges is preserved and guaranteed to a great extent under both the Charter and the Statute of the Court. In fact, it may be safe to state that this is an area that has accomplished the highest degree of efficiency in the workings of the International Court of justice. However, the budgetary constraints of the court coupled with the increased workload of the court has a negative and limiting effect on the efficiency of the international court. The requirement of ad hoc judges in almost every case tends to create doubt on the impartiality of the judges. In fact, to date no *ad hoc* judge has ever decided a case against the party that requested for her. The requirement of *ad hoc* judges presents an area for review in order to guarantee the legitimacy of the court.

## CHAPTER THREE

## ASSESSING THE PROVINCE OF THE COURT; THE QUESTION OF COMPULSORY JURISDICTION

### INTRODUCTION

The jurisdiction of the court as well as the possibility of its extension has been the subject of debate since 1959. It is often stated that the lack of Compulsory jurisdiction of the court has lead to inefficiency of the court and injustice to aggrieved states. The subject of this chapter will therefore be the Jurisdiction of the World Court. Moreover, the Object of this chapter will be to determine the desirability of a possible extension of the jurisdiction of the court through the introduction of compulsory jurisdiction.

## The Concept of Jurisdiction of the World Court

The term jurisdiction in law basically refers to the legitimate authority possessed by a court to hear, determine and interpret a particular dispute. Article 93(1) of the Charter of the United Nations states that all members of the United Nations are *ipso facto* parties to the statute of the International Court of justice. This however is not to be confused with the authority of the court to hear and determine disputes of all the members of the United Nations. The authority of the court to hear and determine various disputes is generally contained in Article 36 of the Statute of the Court.[34]

## The Concept of the Legal Dispute

Article 36(2) of the statute of the court requires that a matter brought before the court should be a *legal dispute*. The court in the *Nuclear Test Cases*[35] noted that the existence of a dispute is the primary condition for the court to exercise its judicial function. In this regard, it must be emphasized that unlike arbitrations and tribunals in which the

[34] As stated in the introduction to this paper, this research will concentrate to a great extent on the contentious jurisdiction of the court as opposed to the court's jurisdiction to give advisory opinions.
[35] ICJ Reports, 1974, pp.253, 270; 57 ILR.

jurisdiction of the respective body may change from case to case, the ICJ can not seek to deal with and determine matters all and sundry such as political, moral, or religious issues. There are some instances however, where political questions cannot but be entwined with questions of law. In such circumstances, the fact that other elements are present cannot impede the characterization of a dispute as a legal dispute[36]. Though it may be difficult to point a specific definition of the term legal dispute, the permanent court in the *Mavromatis Palestine Concessions* (Jurisdiction) Case[37] made an invaluable contribution. In this case, the court defined a legal dispute as a 'disagreement over a point of law or fact, a conflict of legal views or of interests between two persons[38]. Further, in the application of the *Genocide Convention* (Bosnia and Herzegovina V Yugoslavia) Case[39] the court stated that by reason of the rejection by Yugoslavia of the complaints formulated against it by Bosnia and Herzegovina, "there exists a legal dispute between them". Therefore the mere denial of allegations of a legal nature will lead to a legal dispute.[40] In practice, the court exercises two main types of jurisdiction:

- Contentious jurisdiction
- Advisory jurisdiction

[36] In the *Armed Actions* (Nicaragua V Honduras) *case*, ICJ Reports 1988 pp.16 the court noted that while political aspects may be present in any legal dispute brought before it, the court was only concerned to establish that the dispute in question was a legal dispute in the sense of a dispute capable of being settled by the application of principles and rules of international law.
[37] PCIJ, series A, No. 2 1924, p11
[38] A person in this regard is taken to mean an entity with international personality but specifically as per Article 34 of the ICJ Statute, a person refers to states.
[39] ICJ Reports, 1996 para 29.
[40] Shaw is of the view that in order fro a matter to constitute a legal dispute, it is sufficient for the respondent to an application before the court merely to deny the allegations made even if the jurisdiction of the court is challenged.; Malcom. N. Shaw, *"international law"* 5TH Ed 2003, Cambridge University Press.

## 2.4 CONTENTIOUS JURISDICTION

Contentious jurisdiction is the authority of the court to hear and determine legal disputes of an international character that are brought before the court by states. Only states may appear before the court for the determination of a legal dispute. This means that international organizations, individuals or corporations cannot bring contentious issues before the court. This is despite the fact that the court itself has proclaimed in a number of circumstances that;

"The development of international life and the collective increase in collective activities of states has given rise to instances of action upon the international plane by certain entities which are not states.[41] "

In addition, the court may only hear and determine a dispute where both states have recognized the courts jurisdiction through consent thereof. Therefore, a party cannot be compulsorily required to appear before the court for the determination of an international legal dispute[42]. Consent acts as the basis of the contentious jurisdiction of the court. Consent may be expressed in a variety of forms. The form in which this consent is expressed determines the manner in which a case may be brought before the court;

### 1. *Compromis*

[41] Reparations for injuries suffered in the services of the United Nations in Report 1949 p. 174
[42] On 16th October 1946, the Security Council adopted Resolution 9(1946) which provided that the court shall be open even to states which are not party to the statute of the court. Upon the condition that such states show declaration by which it accepts the jurisdiction of the court in accordance with the Charter of the United Nations and with the terms and subject to the conditions of the statute and rules of the court and undertakes to comply in good faith with the decisions of the court and to accept all the obligations of a member of the United Nations under Article 94 of the Charter. Thus, the ICJ has jurisdiction to hear and determine cases between neither parties who are neither members of the UN nor parties to the statute.

Article 36(1) provides that the jurisdiction of the court comprises all cases which the parties refer to it through an agreement concluded by the parties specifically for that purpose and is often known as a 'special agreement' (compromise). This method is based on explicit written consent[43].

## 2. Treaties and Conventions

Article 36(1) adds to the jurisdiction, matters specifically provided for in treaties and conventions in force. The matter is brought before the court by means of a written application instituting proceedings. It may therefore be stated, pursuant to Article 29 of the 1969 Vienna Convention on the Law of Treaties[44], that the jurisdiction of court in such a circumstance is compulsory. Article 36(1) gives the Court jurisdiction over "matters specifically provided for ... in treaties and conventions in force". Most modern treaties will contain a *compromissory clause*, providing for dispute resolution by the ICJ. For instance, Article 32(2) of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances provides for mediation and other dispute resolution options, but also states that,

> "… any such dispute which cannot be settled ... shall be referred, at the request of any one of the States Parties to the dispute, to the International Court of Justice for decision"[45].

[43] This method was used, for example, in The *Corfu Channel Case*, (Merits) (U.K. v. Alb.), 1949 I.C.J. 4 (Apr. 9).

[44] This article embodies the principle of *pacta sunt servanda* which means that all treaties legally bind all the parties to a particular treaty. Therefore where a clause in a particular treaty refers disputes under the treaty to the Court that provision is binding upon all the parties to the treaty who must submit to the Court.

[45] Cases founded on *compromissory* clauses have not been as effective as cases founded on special agreement, since a state may have no interest having the matter examined by the Court and may refuse to comply with a judgment. Since the 1970s, the use of such *compromissory* clauses has declined. Many

The *Lockerbie* cases aid in understanding of this type of jurisdiction[46]. The *Lockerbie* cases were brought by Libya against the United Kingdom (the "UK") and the United States (the "US") under the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation. The defendants had claimed that there was no dispute between the parties concerning the interpretation or application of the Montreal Convention as demanded by Article 14, but, if at all, only between the applicant and the Security Council on the effects of the Security Council resolutions 748 (1992) and 883 (1993) (the "SC Resolutions"). In the opinion of the Court, however, several disputes existed between the parties concerning the Montreal Convention: first, on the Convention's applicability to the present case (a jurisdiction which the Court calls "general"); second, on the alleged right of Libya itself to prosecute its nationals (Article 7); and third, on the alleged lack of assistance by the respondents to the Libyan prosecution (Article 11). On a vote of 13 votes to three, the Court upheld its jurisdiction[47].

### 3. Compulsory Jurisdiction

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modern treaties set out their own dispute settlement regime often based on forms of arbitration. Sourced from http://en.wikipedia.org/wiki/jurisdiction_of_the_international_court_of_justice

[46] See Lockerbie Cases: Preliminary Objections, 9 E.J.I.L 550 (1998).

[47] Bingbin Lu, of the Transnational Law and Business University (TLBU) in explaining the meaning of this decision gives a commentary which explains that by the court maintaining ICJ jurisdiction in the case, the judgment conceals rather than unfolds the disagreements within the Court on the impact of the Security Council Resolutions. According to a broad interpretation of the judgment, the relationship between the Montreal Convention and the subsequent Security Council Resolutions is a matter within the jurisdiction of the Court. Another narrower reading is provided by Judges Fleischhauer and Guillaume in their joint declaration: it states that ICJ jurisdiction extends only to the interpretation and application of the Montreal Convention and not to the Security Council Resolutions. By a narrow margin, the Court seems to favor the second option.

Article 36(2) of the Statute of the International Court of Justice states that the jurisdiction of the court may consist of compulsory jurisdiction. This jurisdiction is based on a declaration by parties that they recognize as compulsory *ipso facto* and without special agreement; the jurisdiction of the court in all legal disputes concerning the interpretation of a treaty, any question of international law, the existence of any fact which, if established, would constitute a breach of international obligation and finally, the nature or extent of the reparation to be made for the breach of an international obligation. This is often referred to as the "optional clause" system. A total of 64 States have recognized the compulsory jurisdiction of the Court (with or without reservations)[48].

### 4. Declarations Under The Permanent Court Of International Justice Statute

Article 36(5) provides for jurisdiction on the basis of declarations made under the Statute of the Permanent Court of International Justice. Article 37 of the statute similarly transfers jurisdiction under any compulsory clause in a treaty that gave jurisdiction to the PCIJ.

### 5. *Competence de la competence*

Article 36(6) of the Statute of the court gives the court the authority to determine in each circumstance whether or not it possesses jurisdiction to hear and determine a particular

[48] In the *Fisheries Jurisdiction Case*, the Court stated that the words of an *Optional Clause declaration*, including a reservation contained in it, must be interpreted in a natural and reasonable way, having due regard to the intention of the State making the reservation at the time when it accepted the Court's compulsory jurisdiction. Such state's intention, in turn, may be deduced not only from the text of the relevant clause, but also from its context, the circumstances of its preparation, and the purposes intended to be served

matter[49]. Thus, the court has jurisdiction to determine whether or not it posses' jurisdiction in a particular case.

Now that a thorough understanding of the jurisdiction of the world court has been obtained, it may be prudent at this juncture to examine some key issues which form the basis of a litany of critiques on the limited jurisdiction of the world court and whether or not the aforesaid critiques are justified.

## THE QUESTION OF COMPULSORY JURISDICTION.

The question of compulsory jurisdiction forms one of the core criticisms to the limited jurisdiction of the court. Many authors attribute the ineffectiveness of the court to hear and determine international disputes on the consensual background of the court's workings. Indeed many university lecturers and jurists have often found it difficult to explain to their students and readers respectively, that a country cannot be taken to court if it doesn't want to. The following section of this chapter will seek to examine whether or not the consensual doctrine of submission to the court leads to ineffectiveness of the International Court of Justice.

## THE ARGUMENT AGAINST COMPULSORY JURISDICTION.

Firstly it must be clarified and emphasized that international law unlike municipal law is based on the consensual application of the law. Thus, a state will never be forced to do

[49] The permanent court in the *Mavromatis Palestine Concessions* (Jurisdiction) *Case* defined a legal dispute as a 'disagreement over a point of law or fact, a conflict of legal views or of interests between two persons

that which it does not consent to (whether constructively or directly). The philosophical underpinning to this is the delicate balance between state responsibility and state sovereignty as well as the equality of states-*pari in parem non habet.* State Responsibility arises where a state fails to carry out its obligations under international law. Reparations are the main consequences that flow from the non-performance of international obligations. Yet, state sovereignty is a concept that insists that a state is sovereign and not subject to any other law or institution. International law will never survive without first giving due consideration to the sovereignty of states. Submission to international law is a voluntary act as well as an act of good faith on the part of a state. From a historical perspective, international society is still in its initial stages of development. Currently the ICJ, along with the UN, can act only in the role of a third party rather than as a superpower lording over the acts of states. In other words, the ICJ provides an option for States to settle their disputes peacefully through third party intervention.

Apart from the fundamental principle of consent in international relations, the non compulsory submission to the ICJ may also be pegged to the history of the Court. The International Court of Justice is a continuation of the PCIJ. When the PCIJ was founded in 1920, the United Kingdom, France and Italy, which were the world's most powerful States after the First World War, rejected proposals for compulsory PCIJ jurisdiction. At the 1945 San Francisco Conference, where the United Nations Charter was drafted, the jurisdiction of the Court was the subject of heated argument. The final decisions ending these arguments were against compulsory jurisdiction with the USA and the former Soviet Union, the top two superpowers after the Second World War, being the major actors involved in efforts aimed at blocking compulsory jurisdiction at the conference.

Beyond the doctrines of state sovereignty and equality of states, the impact of powerful states strongly opposing Compulsory Jurisdiction seems to have been the weight that tipped the scale[50]. It is prudent to keep in mind that during the period of the conference, the Second World War had just been concluded. The topic of Sovereignty was therefore very sensitive with few states seeking to comprise the sovereignty that they desperately fought for. Summarily, the consensual basis of international law coupled with the sensitivity of sovereignty, form the basis of resistance by states towards compulsory jurisdiction.

This presents one side of the coin. The next section will examine the reasons for a move towards compulsory jurisdiction.

## THE ARGUMENT FOR THE COMPULSORY JURISDICTION OF THE COURT.

In general, States tend to avoid being a party to a dispute before the court as much as possible[51].This is especially the case where a country has out rightly committed a wrong for which state responsibility will be likely to ensue. For the aggrieved state, other options other than the court do exist which enable it to enforce its rights[52]. However, this would be to render the World Court redundant as the peaceful settlement of disputes was

[50] Additionally, major issues of peace and security between the more powerful States have rarely been submitted to the ICJ as most governments tend to consider the recognition of the jurisdiction of the court as infringing on their sovereignty.
[51] This is evidenced especially by the proliferation in the contemporary international arena of tribunals and quasi-judicial institutions which deal with the settlement of disputes between states. The reasons for this may range from the flexibility of the tribunals, to the privacy of the proceedings or to the specificity of the subject matter.
[52] Such as sanctions by the Security Council(whether economic or by use of force), reprisals(which have since been discouraged as a remedy to countries both by the Security Council and the Court) as well as self help measures such as suspension of trade between the countries.

the very reason for the creation of the court. I would like to clarify with respect to the above, that I am not referring to all kinds of disputes (moral, political or otherwise) I am, in particular, referring to legal disputes i.e. those requiring an interpretation of the law. The compulsory jurisdiction of the court would obligate a state to use peaceful means of settlement before it uses other measures such as self help and reprisals on the other state which might not be in the wrong in the first place. Further, these measures often depend on the subjective view of the aggrieved state and not on an impartial determination of whether a breach occurred or not.

Article 38(1) (c) of the Statute of the Court states that General principles of law are one of the sources of law to the international Court of Justice. The principles of Natural Justice are among these General Principles one of which is the right of every person (natural or juristic) to a fair trial before sanctions may arise-*audi alteram partem.* Likewise, I am of the view that before a state may resort to other measures[53], the dispute must first be heard and determined by the courts to ensure that the court has an opportunity to exercise its function which is to guarantee fairness and justice in the settlement of international disputes. The consensual requirement of submission to the Court in this regard, acts as a scapegoat to states which do not want to be perceived as being at fault hence incur obligations in the form of requirements to make reparations.

In addition, compulsory jurisdiction would increase the degree of certainty in the determination of legal disputes. The very reason why a state would need to go to the court would be the existence of a dispute. A state at fault would simply refuse to submit

[53] *ibid*

to the Court and the matter would, surprisingly, end at that[54]. This omits the element of certainty of settlement through the Court thus a state will not even bother to seek the court's redress as this would in most cases, prove unfruitful and would in fact give the other state more leverage where the court declares that it has no jurisdiction.

A further argument in favor of compulsory jurisdiction is derived from the modern jurisdictional reforms in the GATT/WTO dispute settlement procedures to which most major international actors are a party to. Throughout the 1970s and 1980s, jurisdiction of GATT panels was not obligatory. The establishment of a panel to adjudicate in a dispute required a GATT-council decision which could be made only by a consensus of all states. Therefore, even the state accused of violating its GATT obligations could always block the establishment of a panel. This, however, changed in the late 1980s and early 1990s when complaining states were gradually given the right to have their allegations heard by a panel. But if not the establishment of a panel, the adoption of a panel report still required a decision by the GATT-council which could only be achieved through consensus. Hence, defending states could easily block any decision made against them. This changed in the mid-1990s when the WTO came into existence. Since then, neither the establishment of panels nor the adoption of panel reports requires a decision made by consensus. Within the newly established Dispute Settlement Body, panel reports can only be rejected unanimously. Therefore, adoption of panel reports can no longer be blocked

[54] In the following eight cases, the Court found that it could take no further steps upon an Application in which it was admitted that the opposing party did not accept its jurisdiction: Treatment in Hungary of Aircraft and Crew of United States of America (United States of America v. Hungary) (United States of America v. USSR); Aerial Incident of 10 March 1953 (United States of America v. Czechoslovakia); Antarctica (United Kingdom v. Argentina) (United Kingdom v. Chile); Aerial Incident of 7 October 1952 (United States of America v. USSR); Aerial Incident of 4 September 1954 (United States of America v. USSR); Aerial Incident of 7 November 1954 (United States of America v. USSR).

by a single state being accused of violating its obligations. The only possibility remaining for defending states now is to invoke the Appellate Body. Again, its reports can only be rejected by a unanimous decision of the Dispute Settlement Body.

Because adoption of either report has, in practice, become automatic the jurisdiction of WTO dispute settlement procedures is now compulsory[55].

From the above, modern reforms in jurisdiction seem to be in favor of the establishment of compulsory jurisdiction. It is clear that the introduction of compulsory jurisdiction was aimed at eliminating the injustices caused by the use of the consensual doctrine (whether constructive or direct) in the determination of disputes in the GATT. If the freedom to choose to be accountable for international responsibility is the basis for the consensual background of submission to the Court, then this consent, in my opinion, is already fully catered for when states freely chose to be bound by a particular convention or instrument. Thus, the purpose of the court is to merely determine whether a particular obligation enshrined in a treaty or custom is of relevance to a dispute.

The *Institut De Droit International*-a major institution concerned with the reform of international law-as early as 1959 had already made recommendations aimed towards the acceptance of compulsory jurisdiction by states[56]. In its report to the Twenty Fourth

[55] The basic idea behind the jurisprudence of WTO jurisdiction is that: "The authors of these agreements are the member governments themselves — the agreements are the outcome of negotiations among members. Ultimate responsibility for settling disputes also lies with member governments, through the Dispute Settlement Body"; *See* WTO at: http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm

[56] See JUSTITIA ET PACE INSTITUT DE DROIT INTERNATIONAL, Session of Neuchâtel – 1959; Compulsory Jurisdiction of International Courts and Tribunals

Commission on the Compulsory Jurisdiction of International Courts and Tribunals. The institute in paragraph 4 gave the following recommendation;

" 4. With a view to ensuring the effective application of general conventions, it is important to maintain and develop the practice of inserting in such conventions a clause, binding on all the parties, which makes it possible to submit disputes relating to the interpretation or application of the convention either to the International Court of Justice by *unilateral application* or to another international court or arbitral tribunal ; this clause might be based on the provisions of the Resolution concerning a model clause conferring compulsory jurisdiction on the International Court of Justice for inclusion in conventions adopted by the Institute in 1956."

It thus clear from the above instances that more and more actors in the contemporary international community seem to be advocating for the extension of the concept of compulsory jurisdiction to all members of the United Nations. About 1/3(one third) of the members of the United Nations have accepted and recognized the compulsory jurisdiction of the Court. This number in line with the above arguments will in future be expected to increase and thereby increase the number of cases submitted to the court hence increasing the efficiency of the court.

## Conclusion

From the arguments raised in this chapter, it is clear that the jurisdiction of the court from the perspective of the statute of the International Court if Justice is not compulsory. However, the statute does contain mechanisms which enable the court to exercise

compulsory jurisdiction through the 'optional clause'. This in my view does not constitute an absolute submission to compulsory jurisdiction as the states concerned may still make reservations as well as rescind the declaration altogether.

The main argument against the compulsory jurisdiction of the court is the consensual basis of international law. This tends to be defeated by the fact that the ICJ does not exist in a vacuum, it merely applies rules and regulations that states have already consented to. It is a general principle of law that the law should never act in vain nor should it act in manner as to defeat itself. Article 26 of the Vienna Convention on the law of treaties states that all treaties shall be binding upon all the parties to the treaty; *pacta sunt servanda.* Similarly, the courts are charged with the responsibility of ensuring that the law is followed to the letter and where the law has not been followed to issue such writs and orders as are necessary. Certainly, the concept of binding application of the law will not hold where redress to the courts is optional relying on both the 'perpetrator's' and 'victim's' consent. Treaties would then be optional in application and not binding. Most authors seem to counter this argument by stating that there are other methods of ensuring the binding nature of laws other than the court. To this, I am of the view that; firstly, any other method would mean a non-consensual mechanism in the first place e.g. economic or other sanctions by the Security Council, which do not require the consent which states are so desperate to protect. Secondly, the ICJ is the *primary* judicial organ of the United Nations. This means that it is responsible for all legal dispute settlement activities. By giving recourse to other organs before the Court has had an opportunity to settle the dispute, we are in effect, reducing the efficacy of the court by increasing the redundancy

of the court. In any case, one third of the United Nations has already accepted the compulsory jurisdiction of the court and this does not make them any less sovereign than others. The rule of law is a fundamental element of any legal system. It would be wrong for a state to cry foul and take another state to the ICJ only to refuse to submit to the court when it commits a similar breach. The ICJ has heard and determined less than 100 cases in more than 50 years yet in more than 20 contentious cases, the jurisdiction of the ICJ or the admissibility of an application (i.e., the complaint) was challenged, with the ICJ dismissing almost half of these cases due to the lack of consent by one of the parties. It may be time for state actors to think of reforming the jurisdiction of the court with the aim of extending its jurisdiction in order to increase the efficacy of the court.

## CHAPTER 4

## ASSESSING THE ENFORCEMENT OF THE COURT'S DECISIONS: THE QUESTION OF COMPLIANCE

### INTRODUCTION

The term enforcement of the decisions of the International Court of Justice simply refers to the process of ensuring compliance with the judgments of the World Court. The implementation of the decisions of the court is of utmost importance as the frequency of compliance with the judgments of the court gives the court legitimacy as the primary legal dispute settlement mechanism of the international community. The absence of a mechanism to enforce the decisions of the court would render the court superfluous especially in its purpose of peaceful dispute settlement. The above is true as a country may simply choose not to abide by a decision of the court without fear of repercussions

in the form of either political or economical sanctions which would then encourage the aggrieved party to use other means to enforce its rights[57]. The essence of peaceful settlement would, as a result, be lost in its entirety. This embodies the purpose of this chapter which is to examine the existing enforcement procedures of the decisions of the Court and the degree of efficiency achieved by using these methods.

## ENFORCEMENT OF THE DECISIONS OF THE WORLD COURT.

Fundamentally, the World Court would be rendered redundant if its decisions had no means of enforcement. Primarily, the duty of enforcement of the judgments of the court lies with the party against whom the court found in favor[58]. Simply put the party at fault. More often than not the party found to be at fault will not be in agreement with the decision of the court. Thus, without the fear of repercussions flowing from the failure to abide by a decision of the court, compliance with the court's decisions would merely rely on good faith which is inadequate especially when it is required of a state which contests the declaration of fault on its part. The preceding arguments form the basis of the requirement in the international legal system of an institution which is charged with the responsibility of ensuring that a state abides by the decisions of the court[59]. Thus, the

[57] For a commentary on the ongoing work of the International Law Commission in this area, see the collective contribution under the title 'Symposium: Counter-measures and Dispute Settlement: The Current debate within the ILC', *EJIL* (1994) 20 et seq. On the traditional prominence of the principle of self-help as a remedy against breaches of law in international relations, see Fitzmaurice, 'The Future of Public International Law', *Livre du Centenaire, Annuaire de l'Institut de Droit International* (1973) 300 et seq.

[58] Article 94(1) of the Charter of the United Nations states, "Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party."

[59] Where a country fails to perform its obligation to act in good faith and comply with the decisions of the World Court.

international legal system, as do all other legal systems, requires the establishment of an institution which is charged with the duty of ensuring compliance[60].

Indeed the international community foresaw the need of an enforcement organ and to this effect enacted Article 94 of the United Nations Charter:

*Article 94*

1. Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.
2. *If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.*

*The above provision of the UN Charter, short as it may be, forms the basis of this chapter. The wording of the provision, as will be seen in the proceeding sections, creates a variety of issues which warrant detail examination in order to determine their influence on the efficacy of the International Court of Justice in general and the efficacy of enforcement in particular[61]. Interim orders and other provisional measures form an area of much debate regarding their enforcement. Most positivists tend to hold the view that*

[60] It may be prudent at this point to lay a caveat to the effect that it would be of no consequence to create a mechanism which is only ceremonial in its function. The institution created must be free to ensure compliance with the judgment without any other organs or institutions altering the terms of the judgment. To do otherwise would be to defeat the very purpose of the adjudication process involving the court.

[61] It is worth noting that the aforementioned provision was first contained in Article 13(4) of the League of Nations Covenant. In fact it was Australia and Cuba who first fashioned the previous Article 13(4) into Article 94 of the UN Charter mandating that parties, both member states and non-member states to the UN under section 93(2)[61] are to comply with the orders of the ICJ**.**

*such provisional measures should not be enforced while those subscribing to the natural school of thought seem to think the contrary.*

*From the wording of Article 94(1) of the UN Charter[62] it is clear that the members of the United Nations( the parties found to be at fault in particular )have the primary responsibility of ensuring compliance with the decision of the court. The Security Council as mentioned in Article 94(2) acts only as the secondary mechanism charged with the responsibility of ensuring compliance with the decisions of the ICJ where a party to a dispute fails to do so under section 94(1).*

*The Security Council in discharging the above function may use a variety of measures to compel or encourage compliance. These measures may include simple appeals for compliance and other peaceful options[63]. Some authors state in this regard that the measures available to the Security Council must be purely peaceful such that the use of force would automatically be ruled out[64]. Others state that the council may use all the powers accorded to it under the Charter. The substance of this debate raises some weighty issues which will also be looked into in detail in proceeding sections.*

*It is also clear from Article 94 that the Security Council does have the option of abstaining from the enforcement of ICJ decisions which as was stated in the previous chapter has the effect of infringing the independence of the international judiciary. The*

[62] Contrary to what most authors opine, I am of the view that the primary body charged with the obligation of ensuring compliance is the state at fault itself thus the Security Council only acts as the secondary body where the party at fault fails in its obligation to comply with the decision of the court.
[63] David Schultz in his review of the book, Compliance with the decisions of t he International Court of Justice by Constanze Schulte, gives the example of "A request to the World Bank to withdraw funds from a country.
[64] Ibid, Schulte further opines that had the United States sought an ICJ pronouncement to Iraq to comply with orders to let the UN inspectors in Bush would not have been able to rely upon the Security Council's authority to use military force to enforce the court's decision.

*Security Council plays a quasi-judicial function by somewhat reviewing the decision of the court. Again, this interpretation raises some weighty issues which will be examined in detail in the proceeding sections.*

*This chapter will thus focus on the interpretation of Article 94 of the UN Charter and the repercussions on the enforcement of the decisions of the court arising from such interpretation.*

**Key Elements Arising From an Interpretation of *Article 94(2)***

- The first element evident from a literal reading of *Article 94(1)* of the UN Charter is that the primary obligation of compliance rests upon the Members of the United Nations who are parties to a particular case.
- The second element evident from *Article 94(2)* is that the Security Council is responsible for the enforcement of the decisions of the International Court of Justice thus the procedures used in making other security council decisions are still in force[65].
- The third element is that the Security Council has the discretion to determine whether to enforce a decision of the Court or not[66].
- The fourth and final element is the uncertainty of whether or not the Council has the authority to enforce interim orders or provisional decisions of the Court.

**1.**

[65] Essentially this means that the Veto power of the five permanent members of the Security Council is still applicable.
[66] The term *discretion* when broadly defined with respect to enforcement gives the Security Council the power to review the decisions of the court as the Council may choose not to enforce a particular decision in exercise of its discretion. On the problem of the concurrent jurisdiction between the Council and the Court, *see* T.G.H. Elsen, *Litispendence between the International Court of Justice and the Security Council* (1986).

## 1. The Primary Obligation Of Compliance

*Article 94(1)* of the Charter clearly states that,

> "Each Member of the United Nations undertakes to comply with the decision
>
> Of the International Court of Justice in any case to which it is a party."

The members of the United Nations therefore bind themselves to comply with the decisions of the International Court of Justice[67]. This means that the article creates an international obligation to all the members of the United Nations which means that in the event that a particular state fails to comply with the decision of the International Court of Justice, any state which is a party to the Charter may take steps to enforce this decision which constitutes an *erga omnes* obligation. In other words any member of the United Nations[68] may use other peaceful enforcement mechanisms such as economic sanctions to ensure that a decision of the Court is complied with even where such state was not a party to the dispute. Thus, the first enforcement body with the regard to the compliance with the decisions of the International Court of Justice, in my opinion, are the member states of the United Nations.

*Article 94(2)* of the United Nations Charter further adds that:

> *"If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have*

[67] *See* Article 29 of the Vienna Convention on the Law of Treaties.
[68] This means that even States that are not a party to a dispute before the Court may seek to ensure compliance with International Law as contained in the UN Charter by use of such measures as economic sanctions or breaking of diplomatic ties.

*recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment."*

From the above it is apparent that the Security Council is the second enforcement body with regard to the judgments of the court. This does not come as a surprise as the Security Council is the major enforcement organ of the United Nations. Thus, when the members of the General Assembly pass a resolution requiring sanctions on any member of the United Nations, the Security Council is the organ charged with the responsibility of the implementation of that decision. Further, under *Article 41*, where the Security Council holds the view that a state is carrying out activities which result to a threat or breach of peace, the Security Council may take any measures that it deems necessary aimed towards the stoppage of that breach of peace[69]. The question that then arises is what measures may the Security Council use in order to ensure compliance and further may force be used? The authority to take 'such measures as it deems necessary" is given to the Security Council in both *Article 41* and *Article 94(2)*. However, only *Article 41* gives examples of what measures may be taken by the Security Council in order to stop the breach of peace. The powers given to the Council under *Article 41* of the Charter are enforcement powers to be exercised by the council as the enforcement mechanism of the United Nations, likewise, the powers given to the council under *Article 94(2)* are to be exercised by the council in its enforcement capacity. Thus, from the above it is evident that the Security Council may use the measures specified under Article 41 and may also

[69] *Article 41* of the UN Charter states in this regard that, " The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures" However *Article 42* of the same adds that the Security council may use force where any measures taken prove to be inadequate.

use force where the need arises in order to ensure that a decision of the court is adhered to[70]. However this is only an assumption Article 94(2) does not expressly state what measures can be taken. Such a loophole may be used as an avenue for the delay of sanctions where a defaulting party raises such an argument. The need for amendment of Article 94(2) is clearly evident in order to dispel any doubt with regard to what measures can be taken.

## 2. The Security Council's Decision Making Procedures

The decision of whether or not to engage in efforts to secure compliance of a decision of the court involves the voting procedure of the Security Council. Evidently, this was one of the most debated issues at the San Francisco Conference, and has been one of the most politically controversial ever after the said conference[71]. The decision making process gives to five special members of the Council what is commonly referred to as '*veto power*[72]'. *Article 27* of the Charter of the United Nations provides as follows;

1. Each member of the Security Council shall have one vote

2. Decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members.

[70] This conclusion is aimed at dispelling any doubts as regards the Council's ability to use force in order to enforce a particular decision of the court.
[71] *See* Atiila Tanzi, "Problems of Enforcement of Decisions of the International Court of Justice and the Law of the United Nations", University of Florence.
[72] With regard to the so called 'veto power', as early as 1953 McDougal referred to *Article 27* as an example of 'normative ambiguity with respect to rules created by agreement'

3. Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.

The above provision gives the general rules in relation to voting by the members of the Security Council. Paragraph 3, in particular, makes provision for the exercise of veto power by the five permanent members of the Council. The Veto power of the five permanent members of the Security Council, in simple terms, means that a decision can not be implemented by the Security Council save for the five concurring votes of the permanent members of the Council[73]. Among the several problems concerning the application of *Article 27* of the Charter, the problem of voting by the Council on a draft resolution introduced under *Article 94(2)*[74] is of relevance in investigating the efficacy of the ICJ. From a reading of Article 27, two questions arise; firstly, as to whether non-compliance with a Court decision amounts to a procedural matter under *Article 27(2)*[75]. Secondly, the question as to whether a Member of the Council who was a party in the litigation before the Court should abstain in the decision making process as warranted under *Article 27(3)*.

The importance of these questions is especially relevant with regard to the five permanent members of the Security Council. This is because these questions seek to oust the application of the veto power in making Security Council decisions especially in a

[73] An exception may however be found under paragraph 2 regarding voting in relation to procedural matters. The term procedural matters is an open ended phrase meaning that this is applicable both directly and indirectly; directly meaning the procedural matters of the council itself and indirectly meaning a decision regarding the procedural matter of the General Assembly.
[74] A draft resolution is the document containing the measures to be taken by the Council relating to a party that has refused to comply with a decision of the Court.
[75] If the enforcement of the decisions of the Court are to be regarded merely as procedural matters, then no Permanent Member of the Council may exercise its veto power

situation where enforcement measures are to be taken out against one of the permanent five. The foreseeable injustice in answering the questions in the negative is this; when a decision is required to be made regarding enforcement measures against one of the five permanent members of the council, the party concerned may merely exercise its veto power and thereby avoid the sanctions of the Security Council. Consequently, a two fold problem arises; firstly this would be a total abuse of the court process because the time and efforts of the court will have been rendered superfluous through the exercise of Veto power by the defaulting party . Secondly, the exercise of veto power would tend to place the five permanent members above the law meaning that they can choose to ignore any laws without fear of repercussions from the Security Council. Thus, in the next section I will seek to give an analytical interpretation of *Article 27* of the UN Charter in order to examine the extent of applicability of the exercise of Veto power in voting on a decision under Article 94(2). Through this I will seek to determine whether an interpretation of Article 27 may be used to dilute and/or completely oust the right of a party to exercise its veto power

*a) Procedural Matters*

Article 27(2) of the UN Charter states that decisions on procedural matters shall be by an affirmative vote of all the nine members of the Security Council[76]. Therefore, if the decision to pass a resolution under Article 94(2) were to be considered as a procedural

[76] In essence this means that in making decisions of a procedural nature, the five permanent members of the Security Council can not seek to exercise there right to Veto any resolution

matter, then a party found to be at fault by the ICJ can not absolve itself from its obligation simply by vetoing the decision. This argument though appealing is put to rest by a further reading of Article 94(2) which states that the Security Council *may* choose to take measures. From this it is clear that the decision to be made by the Council is a substantive and not a procedural one. The decision is concerned not with the procedure to be taken in handling the matter[77] but with whether or not the Court's decision warrants the intervention of the Council and if so, what measures to be taken. Since the decision is not procedural in nature, the veto power of the five permanent members of the Security Council is still applicable under Article 94(2) and is not defeated by the provision contained in Article 27(2) of the Charter[78].

*b) Where a Member of the Security Council is a Party to a Dispute.*

The second instance where a permanent member of the Security Council will not be permitted to exercise its power to veto any decision is where that permanent member is a party to a dispute under Part VI and under paragraph 3 of Article 52 of the Charter[79]. The question that then arises is whether the dispute under Article 94(2) may be placed in this category or not. If the answer is in the affirmative then no permanent member may seek to exercise its veto power. I, however, hold the opinion that the question should be

[77] *See* the preparatory works of the United Nations General Assembly Resolution 267(III) of 14 April 1949 which is a resolution indicating a list of issues to be treated as procedural for the purpose of voting in the Council. The Resolution in general was aimed at stressing the need that the Permanent Members of the Council should not defeat the purpose of the Charter and its obligations through the exercise of the veto.
[78] Procedural questions deal with the manner in which a particular thing should be done. Thus article 27(2) would oust the veto power of a permanent member where the question relates to an interpretation of what procedure should be used on a particular case. Substantive issues on the other deal largely on the merits of the case and are mostly based on interpretation of facts.
[79] These provisions, in general, deal with the pacific settlement of disputes.

answered in the negative. The heading of part VI is the Pacific settlement of disputes. Fortunately under international law there are various modes of pacific settlement of disputes one of which is under part VI of the Charter. Another mode is through the International Court of Justice which is under part XIV of the Charter. Clearly this part is not encompassed under Article 27(3)[80]. The effect of this is that the exclusion of a party to a dispute in the voting process is not required where the voting is under the auspices of Article 94(2)[81]. Further, matters under Article 94(2) involve the *enforcement* of a decision of the court and not *the pacific settlement of a dispute* which is the function of Part VI of the Charter.

## CASE STUDY

### Military and Paramilitary Activities in and against Nicaragua (Nicaragua *v.* United States of America

In this case, the State of Nicaragua asserted that the United States was guilty of infringements of various provisions of international law by supporting a rebel group against the Nicaraguan government. Specifically, Nicaragua asserted that the United States was responsible for the mining of Nicaraguan ports or waters which was carried out by United States military personnel or persons of the nationality of Latin American countries in the pay of the United States[82]. Nicaragua further claimed that by the United

[80] For further arguments supporting this statement *see* Vulcan, '*L'exécution des décisions de la Cour internationale de justice d'après la Charte des Nations Unies'*, *RGDIP* (1947) 201 et seq.
[81] Article 40 of the Rules of Procedure of the Security Council reads as follows: 'Voting in the Security Council shall be in accordance with the relevant Articles of the Charter and of the Statute of the International Court of Justice.'
[82] The court on this issue in particular, found that in early 1984, the President of the United States authorized a United States Government agency to lay mines in Nicaraguan ports, that in early 1984 mines

States supporting, training and funding of the *Contra forces,* it had breached its obligation of non-intervention of internal affairs. The United States on its part claimed that it was exercising its right of collective self defence and further alleged that Nicaragua was responsible for *cross-border military attacks* on Honduras and Costa Rica. The Court, after taking all the facts into consideration adjudged that the United States had no justification of Collective Self-defence in connection with the military and paramilitary activities in and against Nicaragua; that the United States of America, by training, arming, equipping, financing and supplying the *contra* forces or otherwise encouraging, supporting and aiding military and paramilitary activities in and against Nicaragua, had acted, against the Republic of Nicaragua, in breach of its obligation under customary international law not to intervene in the affairs of another State; that the United States of America, by certain attacks on Nicaraguan territory in 1983-1984[83], acted in breach of its obligation under customary international law not to use force against another State. As a consequence, the Court decided that United States of America was under an obligation to make reparation to the Republic of Nicaragua for all injury caused to Nicaragua by the breaches of obligations under customary international law elucidated above. The Court therefore held in favor of Nicaragua and ordered the United States to make reparations. As can be expected[84] this decision was greatly resisted by the United States and thus

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were laid in or close to the ports of El Bluff, Corinto and Puerto Sandino, either in Nicaraguan internal waters or in its territorial sea or both, by persons in the pay and acting on the instructions of that agency, under the supervision and with the logistic support of United States agents; that neither before the laying of the mines, nor subsequently, did the United States Government issue any public and official warning to international shipping of the existence and location of the mines

[83] Namely attacks on Puerto Sandino on 13 September and 14 October 1983, an attack on Corinto on 10 October 1983; an attack on Potosi Naval Base on 4/5 January 1984 and an attack on San Juan del Sur on 7 March 1984.

[84] It is relevant to note that the United States during the existence of the proceedings failed to recognize the jurisdiction of the court and was in fact not present for a substantial amount of the proceedings.

compliance measures had to be taken by Nicaragua under Article 94(2) of the Charter of the United Nations.

With a letter dated 17 October 1986 the Permanent Representative of Nicaragua to the United Nations requested an emergency meeting of the Security Council 'in accordance with the provisions of Article 94 of the Charter, to consider the non-compliance with the Judgment of the International Court of Justice dated 27 June 1986.' Pursuant to this request, a meeting of the Council was held a few days later during which a draft resolution was introduced that 'urgently called for full and immediate compliance with the Judgment of the International Court of Justice of 27 June 1986 '.

After a thorough understanding of the voting procedures of the Security Council as discussed in the previous section of this chapter, the decision of the Security Council can be easily predicted. Soon after the meeting, the President of the Council stated that he did not consider the draft resolution as adopted on account of a negative vote of one of the permanent members of the Security Council; notably, the United States of America against which the resolution was sought to be passed[85]. Due to this negative vote, the Security Council became disempowered and though a majority of the members were in favour of the resolution, no enforcement measures could be taken against the super power. The whole process of taking the matter to the court, having the matter heard and determined was in vain due to the veto power exercised by the United States of America.

[85] The United States was the only Member that put forward arguments against the validity of the judgment of the Court arguing that the latter had passed a decision that it 'had neither the jurisdiction nor the competence to render'. It was also the *only* member that voted against the draft resolution.

Such is the consequence of the voting procedure of the Security Council on the decisions of the Court[86].

The next section of this chapter will analyze another element of Article 94(2) which deals with the discretion given to the Security Council when enforcing a decision of the court and the effect this has on the judgments of the Court.

## 3. The Discretionary Element of the Enforcement of the Judgments of the International Court of Justice.

Article 94(2) of the UN Charter has been the subject of constant criticism from various international jurists over the years. This controversial article reads;

"If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment."

The cited provision gives the Security Council the discretion on whether or not to enforce a judgment of the International Court of Justice despite the fact that such judgment has been officially pronounced by the primary judicial organ of the world Community. The inclusion of the word '*May'* in placing the responsibility upon the Security Council gives

[86] The representative of Mexico largely criticized the exercise of veto power by the United States in this case and gave his views to the General Assembly, he stated, " it seems clear that no permanent member of the Security Council can exercise its veto when it is a party to a dispute before the Council. This is particularly so when that dispute has been put before the International Court of Justice and on which the Court has handed down a binding judgment. As stated in paragraph 3 of Article 27 of the Charter, this is particularly true when the matter raised is related to Chapter VI of the Charter pertaining to the peaceful settlement of disputes"

the Council the discretion to enforce a judgment only if it deems fit[87]. Thus, even in instances where no member of the Council is a party to the dispute, as explained in the previous section of this chapter, lack of enforcement is still plausible provided that the defaulting party has close allies in the Security Council. From this, a politicization of the judicial functions of the world community is evident. In deciding whether or not to enforce a decision of the Court, political elements and not legal justifications are the basis of the decision. The aforesaid conclusion is based on the following premise; the Security Council is the enforcement organ of the United Nations and not the judicial organ. Therefore, the decisions made by this organ are largely political in nature rather than legal. By the time a decision has been passed or delivered by the General Assembly or Court respectively, the merits of a dispute have already been dealt with. Hence, what is left for an enforcement organ is to decide on *what* measures should be taken and not *whether* the decision arrived at was the best decision or not.

Evidently, this is not the case with the judgments of the International Court of Justice. Even after the Court has performed its responsibility in arriving at the correct legal position of the dispute, the political element of the dispute has the power to override it. If a state has close allies in the Security Council or if a state is politically or economically powerful it may easily avoid making reparations simply by its influence over the Council. The authority of the Security Council that is stated above goes against the fundamental principles in dealing with matters concerning the judgments of the Court. Articles 60 and

[87] This in my view creates a conflict between the two organs; through this discretion the Security Council is given the implicit power to review the decisions of the Court. Those decisions which the Council is against are simply not enforced. This creates the impression that a decision which is *legally* correct but *politically* incorrect is simply unenforceable.

61 of the Statute of the court are relevant in this regard. Article 60 of statute of the Court States;

"The judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party."

Article 61 further states that;

" An application for revision of a judgment may be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence."

From the above provisions it is clear that ordinarily there is no appeal to a judgment of the Court while Article 61 states that review may only be done where there is discovery of facts relevant to the case which facts were not previously taken into consideration. Such is the nature of the Court. The problem that is thereby created by Article 94(2) is that the Security Council may, if it deems fit, take the merits of the case into consideration when deciding whether or not to enforce a decision of the court. In fact, there is nothing contained in the Charter that prohibits the Council from taking legal aspects into consideration when making the decision. Thus, a political organ is vested

with quasi-judicial powers giving it( though not expressly) both the powers of appeal and review of the decisions of the Court[88].

## 4. Provisional Measures of The World Court and Enforcement

Another area that has created controversy thus limiting the efficacy of the Court is the uncertainty as to whether or not Article 94(2) includes compliance with provisional measures. The aforesaid article uses the term compliance with judgments rather than compliance with orders or decisions. The question that then arises is whether the Security Council has the jurisdiction to enforce provisional measures[89] ordered by the court. Critics argue that Article 94(2) unambiguously uses the word *judgment* and not decisions. Hence a literal interpretation of the article would exclude the enforcement of interim orders given by the court.

However, even with the above argument in mind, I tend to hold the opinion that the Security Council does have the authority to enforce the interim orders and provisional measures of the court. I base my opinion upon the following;

Article 41(2) of the Statute of the court clearly states that,

> "Pending the final decision, notice of the measures suggested shall
>
> Forthwith be given to the parties and to the Security Council."

The Article requires that the Court after ordering provisional measures should give notice to the parties and specifically to "…. the Security Council". As mentioned in the earlier

[88] By review it is meant that the Security Council may admit new facts when making its decision to enforce a judgment of the Court and by Appeal it is meant that the Council may decide not to enforce the decision of the Court based on the same facts and evidence adduced in Court.
[89] These come mainly in the form of interim orders of the Court.

section as well as in previous chapters, the Security Council is the primary enforcement organ of the international community. The reason why the Court is to inform the Security Council and not the General Assembly or any other organ is simply because the Security Council is the primary organ responsible for the enforcement of decisions and resolutions of the international community. In my view, it would be erroneous to state that the Security Council does not posses the authority to enforce the provisional measures of the Court. These provisional measures are made by the Court with the understanding that they will be given effect by the defaulting party. If the defaulting party refuses to abide by the measures, then, the Security Council as the compliance mechanism of the United Nations should be permitted to fulfill its function. If States are not compulsorily required to abide by these measures then there would be no reason to give the orders to begin with.

Secondly, the word judgment must be read to include decisions of the Court and not merely judgments in isolation. An interpretation of the word judgment *ejusdem generis* will include both decisions and provisional measures[90].

At this point it may be prudent to look at a case of the World Court which was faced with the issues at hand in order to gain a better understanding of the various arguments surrounding the interpretation of Article 94(2).

[90] For a better understanding of the problem of the enforcement of provisional measures, *see* the judgment of the *Bosnia case* (ICJ Reports (1993) 325 et seq.). In particular, the opinion of Judge Ajibola who gave thorough consideration to Article 94 in his separate opinion in which he arrived at the conclusion that the provision 'is not adequately or elegantly worded to assist the Court in ensuring due compliance with its orders under discussion'

**Case study**

**The Anglo-Iranian Oil Co. (United Kingdom *v.* Iran) case**

In April, 1933, an agreement was concluded between the Government of Iran and the Anglo-Iranian Oil Company. In March, April and May, 1951, laws were passed in Iran, enunciating the principle of the nationalization of the oil industry in Iran and establishing procedure for the enforcement of this principle. The result of these laws was a dispute between Iran and the Company. The United Kingdom adopted the cause of the latter, and in virtue of its right of diplomatic protection it instituted proceedings before the Court. The Court, before delivering its final judgment, ordered that provisional measures be taken against Iran. The United Kingdom then presented the provisional measures before the Security Council for enforcement. The representative of the UK argued that the Council was competent to deal with a problem of enforcement of a Court order on the basis of both Article 94(2) of the Charter and Article 41(2) of the Statute. He further expanded on this point by arguing that the Council derived its authority to give effect to a Court order indicating provisional measures from the fact that the latter had no less binding force than the final decision.

The above argument was contested, amongst others, by the representative of Iran. He maintained that, since a Court order is neither a decision nor a judgment under Article 94, it is not legally binding; the Council was conferred with enforcement authority only with respect to a Court decision which is final and binding. As to the argument based on Article 41(2) of the Statute, he denied that the obligation for the Court to notify the Council of the provisional measures taken could provide the legal basis for the

competence of the Council to take enforcement measures to give effect to the order indicating such measures, since the notification provision had merely a function of information. Also, the representative of Equador strongly objected to considering the scope of application of Article 94(2) as encompassing Court orders indicating provisional measures, so much so, that he stated that his delegation could not vote in favour of a revised draft resolution submitted by the United Kingdom for the simple reason that it seemed to admit by implication that the Council had the competence to take action under Article 94(2), despite the fact that the Court had merely ordered provisional measures. The Council decided to adjourn the debate until the Court had handed down the judgment on its jurisdiction and the matter was never brought up again, after the Court concluded that it had no jurisdiction in the case.

The legal position in relation to the power to enforce provisional measures of the Court by the Security Council is still inconclusive[91]. Even despite that very question being raised before the Security Council, no party may claim as of right the enforcement by the Council of provisional measures given by the Court. The current uncertainty may lead to a reduction in the effectiveness of the Court where the reluctance to enforce provisional measures would affect the quality of the final decision given.

[91] The *Bosnia* case ICJ Reports (1993) 374 et seq. presents another instance where the Council was requested by a party to a dispute to enforce provisional measures. However, the Permanent Representative of Bosnia and Herzegovina to the United Nations requested the Council to enforce the provisional measures pursuant to Chapter VII of the Charter and not based on Article 94(2). The position as regards Article 94(2) therefore, is still uncertain.

## CONCLUSION

The main provision regarding the enforcement of the Court's decisions is Article 94 of the Charter of the United Nations. The provisions contained in Article 94, short as they may be, have been plagued by controversy regarding there interpretation. From the various discussions above it can be safely concluded that the defaulting party has the primary duty of ensuring compliance with the decisions of the Court. Only when the defaulting party refuses to comply with a decision of the Court can the Security Council step in to enforce a decision of the Court and ensure compliance. Further, the right of a permanent member (which is also a party to a dispute)of the Security Council to exercise its veto power is not limited by Article 27 of the Charter of the United Nations. This therefore creates a form of impunity for the five permanent members of the ICJ and ultimately reduces the efficacy of the Court in its function of the pacific settlement of international disputes. To add to that the ability of the Security Council to decide whether or not to enforce a decision of the Court, hampers the effectiveness of the judgment of the court

which consequently leads to a reduction in the efficacy of the Court. Finally, the uncertainty as regards the duty of the Security Council to enforce provisional measures impairs the efficacy of the Court as it undermines the court's decisions reflecting a non-compulsory attitude towards complying with the provisional measures of the Court. Reform may be required in order to increase the degree of compliance with the decisions of the World Court both in the present and in future.