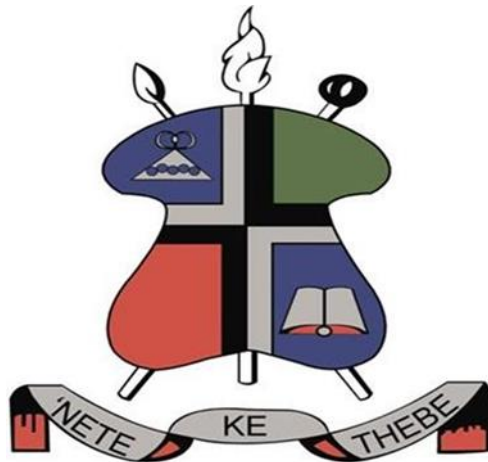


**AN ASSESSMENT OF THE EFFECTIVENESS OF THE INTERNATIONAL COURT
OF JUSTICE IN THE MAINTENANCE OF INTERNATIONAL PEACE AND
SECURITY**

By: BOLELANG IRENE MOKOATLE, 201402082



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Supervised: Dr. Lloyd Chigowe

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ABSTRACT

The United Nations system was born out of global strife and suffering caused by the two devastating world wars. Since the end of World War I one of the main concerns of the international community was the establishment of institutions that would work to maintain international peace and security. The commitment by states in the UN Charter not to resort to armed conflict is a testament of the desire of the international community to cherish peace. The United Nations itself was designed to ensure that it has the capacity to safeguard peace. While disputes between states are inevitable, the UN has mechanisms in place to resolve these disputes peacefully. One such mechanism is the International Court of Justice (ICJ). Established as the principal judicial organ of the UN, the Court has an important role of resolving legal disputes between states. Supporting the Court's work is the Security Council which not only has the power to recommend referral of disputes to the ICJ or enforce the decisions of the Court but also share the responsibility to preserve international peace and security with the Court.

The UN system has however shown some cracks. The recent inability to prevent a costly war in Ukraine and Gaza as well as failure to bring to a halt the suffering of the Rohingya Muslims facing persecution in Myanmar brings spotlight to the UN system, including the ICJ. This study therefore examines the effectiveness of the ICJ in resolving disputes that threaten international peace and security. The study examines the volume of cases brought to the Court's attention or order to determine whether this forum has been effectively used. It also assesses the rate of states' compliance with the ICJ's decisions as well as the extent to which there has been enforcement action in cases where there is non-compliance. The study argues that the ICJ has not succeeded in its role of resolving disputes that threaten international peace and security. It makes recommendations on some reforms that can be implemented in order to make the Court an effective organ that can contribute to the realisation of one of the UN's most important objectives.

DECLARATION

I BOLELANG IRENE MOKOATLE, solemnly declare that this mini dissertation has not been submitted for qualification in any other institution of higher learning, nor published in any journal, textbook or other media. The Contents of this dissertation entirely reflect my own original research, save for where the work or contributions of others has been accordingly acknowledged.

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Above all, I thank the Almighty God who gave me the strength and courage to embark on this journey by keeping me safe at all times.

LIST OF ACRONYMS

ICJ	-	International Court of Justice
GA	-	General Assembly
PCA	-	Permanent Court of Arbitration
PCIJ	-	Permanent Court of International Justice
UN	-	United Nations
UNSC	-	United Nations Security Council
USA	-	United States of America

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CHAPTER ONE: INTRODUCTION

1.1 Introduction

The United Nations (UN) was established with the objective of maintaining international peace and security. The establishment of an institution dedicated to the maintenance of peace and security was necessitated by the suffering and human cost witnessed during World War I and World War II. Because of this experience, the international community vowed to resolve their disputes peacefully and never to resort to armed conflicts. One of the important organs of the UN tasked with contributing to peaceful settlement of disputes is the International Court of Justice (ICJ). As the principal judicial organ of the UN, the role of the ICJ is to resolve legal disputes between states. Nearly a century after its establishment, the contribution of the ICJ in the peaceful settlement of disputes has been a subject of debate. What has resuscitated this debate is the recent defiance of ICJ decisions by some member states as well as its failure to prevent the catastrophe in Ukraine and Gaza as well as the persecution of Rohingya Muslims in Myanmar. More so, the failure by organs such as the Security Council to assist the ICJ in performing its mandate, also raise concern regarding the efficacy of the Court. Therefore, the purpose of this study is to examine the effectiveness of the ICJ in resolving legal disputes that threaten international peace and security.

This study comprises four chapters. Chapter One introduces the study including background to the study, problem statement, research questions and objectives, ending with the methodology used in the study. Chapter Two provides a detailed examination of the historical background behind the establishment of the ICJ. It also outlines the functions of the Court as well as its relationship with other key organs of the UN such as the Security Council. Chapter Three conducts an assessment of the effectiveness of the ICJ in resolving disputes that threaten international peace and security. Lastly, Chapter Four renders a recap of the purpose of the study, summarises the research findings and makes recommendations.

1.2 Background to the Study

The International Court of Justice (ICJ) is the judicial organ of the United Nations established in 1945. The founding documents of the Court are the United Nations Charter as well as the Statute

of the International Court of Justice. The seat of the ICJ is situated at the Peace palace in the Netherlands (The Hague).¹ The Court is vested with the responsibility to preside over legal disputes submitted to it for determination as well as to give advisory opinion on legal questions referred to it by the United Nations organs and specialised agencies.² Prior to the establishment of the ICJ, there had been other efforts to establish an international judicial institution with the mandate to peacefully resolve disputes between states. These efforts had resulted in the establishment of the Permanent Court of Arbitration in 1899,³ and the Permanent Court of International Justice (PCIJ) which were all not successful in ensuring peaceful resolution of inter-state disputes.⁴

The tribulations of World War II convinced the victorious powers who convened in San Francisco of the need for a permanent inter-state organisation to adjudicate disputes and to ensure that states rely on peaceful means to resolve their disputes instead of resorting to the use of force. For this reason, the Charter of the United Nations makes the ICJ one of the principal organs of the United Nations.⁵ Most importantly, the ICJ is one of the major organs that can be relied on to address disputes that threaten international peace and security. Thus, Article 36(3) empowers the Security Council to refer legal disputes that threaten international peace and security to the International Court of Justice in accordance with the provisions of the Statute of the Court.

Matters that can be entertained by the ICJ can be divided into two, namely contentious cases and advisory opinions.⁶ Contentious cases are legal disputes involving two or more states. The jurisdiction of the Court over contentious cases is based on the consent of the states that are party to the dispute.⁷ When determining contentious issues, the Court may issue two types of

¹ Ibid.

² Ibid.

³ Tjaco T. Van Den Hout 'Resolution of International Disputes: The Role of the Permanent Court of Arbitration – Reflections on the Centenary of the 1907 Convention for the Pacific Settlement of International Disputes' (2008) 21 *Leiden Journal of International Law* 643,661.

⁴ Vinicius Portugal, 'Understanding the International Court of Justice: Part I: The History of the Court' (2007) 16 *ILSA Quart* 50; Malcom N. Shaw '*International Law*' (Cambridge University Press 2008) 1056. For example, the PCA did not succeed in resolving the disputes that resulted in the outbreak of World War I. Similarly, the PCIJ did not in resolving the disputes that led to the outbreak of World War II.

⁵ Article 7(1) of the Charter of the United Nations.

⁶ Dapo Akande, 'Selection of the International Court of Justice as a forum for contentious and advisory proceedings (including jurisdiction)' (2016) 7 *Journal of International Dispute Settlement* 320.

⁷ Ibid.

decisions, namely provisional measures and the final decision.⁸ Provisional measures are important mechanisms that seek to preserve the rights/interests of parties pending the final determination of the disputes.⁹ Although states must consent to the Court's jurisdiction, once a judgement, including provisional measures, has been rendered, states are bound by such decisions.

Since its establishment, the ICJ has handled numerous cases. However, the Court has encountered several issues. One significant problem is that many legal disputes posing threats to international peace and security have not been referred to the Court for resolution. Thus, there is an element of bypassing the Court by both states and the Security Council. Additionally, the ICJ has faced lack of compliance and non-enforcement of its decisions. Like many other international judicial institutions, the ICJ does not have enforcement mechanisms. Instead, it relies on separate institutions to enforce its decisions. In the case of the ICJ, the United Nations Charter entrusts the power to enforce the decisions of the ICJ to the United Nations Security Council (UNSC). Where the UNSC deems it necessary, it can adopt measures to give effect to the decisions of the ICJ. In spite of that, a glance at the Court's activities reveals a growing trend of non-compliance and non-enforcement of the Court's decisions.¹⁰

1.3 Problem Statement

The ICJ's jurisdiction is based on state consent. This means that the Court relies on the willingness of states to choose its forum to resolve their disputes. The Security Council has a role in ensuring that the jurisdiction of the Court is utilised in resolving legal disputes. This is enshrined in Article 36(3) which provides that as a general rule, legal disputes should be referred to the ICJ. The expectation here is that the Security Council will use the ICJ to refer disputes that threaten international peace and security to the ICJ. The question however is, to what extent has the ICJ been relied on to resolve legal disputes that threaten international peace and security? Moreover, the Court also relies on the Security Council, a political institution to enforce its decisions. Naturally, entrusting a political institution to enforce judicial decisions has myriad challenges. However, of late, there has been a developing reluctance by the Security Council to

⁸ Article 41 of the Statute.

⁹ Robert Y. Jennings, 'The United Nations at Fifty' (1995) 89 *AM. J. INT'L L* 493.

¹⁰ Aloysius P. Llamzon 'Jurisdiction and Compliance in Recent Decisions of the International Court of Justice' (2008) 18 *The European Journal of International Law* 815, 822.

enforce decisions of the ICJ, particularly provisional measures. For instance, when Myanmar failed to comply with the ICJ's provisional measures in *The Gambia v Myanmar*, the Security Council did not take any action to enforce the decisions of the Court. This is despite the fact that the situation in Myanmar constituted a threat to international peace and security and that the enforcement of the provisional measures would have alleviated the suffering of the Rohingya. In addition, the Security Council has found itself hamstrung when it comes to the enforcement of provisional measures in matters in which the interests of the permanent members of the Security Council are implicated. A case in point is the recent failure by the Security Council to enforce provisional measures in *Ukraine v Russian Federation* where the ICJ made a finding against Russia.

Given this context, the dissertation sought to examine the effectiveness of the ICJ in resolving legal disputes that threaten international peace and security. The major research question can be succinctly stated as: To what extent has the ICJ fulfilled its mandate of ensuring that legal disputes that threaten international peace and security are resolved peacefully?

1.4 Research Questions

The study set out to address the following research questions:

1. What is the role of the ICJ in the preservation of international peace and security?
2. To what extent has the ICJ contributed to the peaceful resolution of legal disputes between states?
3. To what extent is the Security Council willing to defer to the ICJ on legal disputes that threaten international peace and security?
4. How effective are the current enforcement mechanisms of the ICJ decisions?
5. To what extent has the relationship between the ICJ and the Security Council hindered or augmented the ICJ's work in resolving disputes peacefully?
6. What is the impact of the non-enforcement of provisional orders on the role of the Court in addressing peace and security matters?

1.5 Research Objectives

The objectives of this study are:

1. Establish the role of the ICJ in preservation of international peace and security.
2. To assess the contribution of the ICJ to the peaceful resolution of legal disputes between states?
3. To assess the willingness of the Security Council to defer to the ICJ on legal disputes that threaten international peace and security.
4. To assess the effectiveness of the current enforcement mechanisms of the ICJ decisions.
5. To examine the impact of the relationship between the ICJ and the Security Council on the ability of the Court to fulfil its mandate.
6. To assess the implications of non-enforcement of provisional measures on the role of the ICJ in resolving disputes peacefully and preserving peace and security.
7. To propose reforms which are intended to strengthen the enforcement mechanisms of the ICJ.

1.6 Significance of the Research Problem

One of the fundamental objectives contained in the UN Charter is the peaceful settlement of disputes. The ICJ is one of the most important institutions designed to ensure that in cases of legal disputes, states do not resort to armed conflicts, but seek judicial remedies. In addition, the ICJ has the broadest membership as it can exercise jurisdiction over the members of the United Nations. Consequently, the ICJ is an indispensable institution, especially when it comes to issues of peace and security. However, for the ICJ to fulfil its obligations as a 'World Court', its forum must be utilised. In other words, states, the UN and its organs must have the confidence in the Court. This confidence can be shown by their willingness to have legal disputes resolved by the Court. Additionally, the ICJ must be perceived as legitimate and credible. Principally, for the Court to have an impact, its decisions must be capable of being enforced. As such, it is critical that the Court has solid and effective enforcement mechanisms.

While there has been research conducted on the effectiveness of the ICJ, this study is necessitated by the recent attention in the work of the Court. There are three cases that have brought the world's attention to the Court namely the Ukraine Case, the Myanmar Case and the Gaza genocide case. The spectacular deliberate failure to comply with the provisional measures ordered by the Court as well as the resultant failure by the Court to prevent deadly conflicts not only raise concerns regarding the effectiveness of the ICJ, but also raised questions regarding the

future of the Court. The reluctance of the UNSC to enforce these provisional leaders has not only exposed the weak ICJ enforcement mechanisms, but has also raised concerns regarding the efficacy of entrusting a few states with the power to enforce the decisions of a global judicial institution.

1.7 The Scope and Purpose of the Study

The primary focus of this study is on the contribution of the ICJ to the peaceful resolution of legal disputes between states. Therefore, while the ICJ's jurisdiction can be very broad, the focus of this study is only limited to cases that concern international peace and security. Notably, while the Court has a relationship with many other institutions, including organs of the UN, this study is centred on the Court's relationship with the Security Council as the two institutions' responsibility *vis-à-vis* peace and security matters overlap.

1.8 Research Methodology

The research adopted a doctrinal, qualitative desktop research methodology. The study critically analysed primary sources such as treaties and charters, and judicial decisions, and reports of the UNSC. Furthermore, it relied on secondary sources such as textbooks, journal articles and internet sources to examine the debates that have taken place regarding the ICJ's enforcement mechanisms. The study consists of literature analysis and did not include any interviews. As a result, ethical clearance was not required.

1.8 Chapter Outline

Chapter One constitutes the introduction to the study, background to the study, research questions and objectives as well as the methodology.

Chapter Two presents a detailed discussion of the background behind the establishment of the ICJ. It also examines the structure, composition and jurisdiction of the Court. Above all, the role of the ICJ *vis-à-vis* the objective of ensuring that legal disputes which threaten international peace and security are examined. Moreover, the chapter discusses the relationship between the ICJ and the Security Council, setting up a platform for the assessment of the effectiveness of the ICJ in chapter three.

Chapter Three assesses the extent and effectiveness of the ICJ's distribution to resolving disputes peacefully. This discussion is two-pronged: firstly, it evaluates the extent to which the ICJ forum has been utilised to resolve legal disputes between states, particularly those that threaten international peace and security. Secondly, it assesses the compliance and enforcement of ICJ decisions.

Chapter Four draws conclusions from the preceding chapters, discusses findings and makes some recommendations. The chapter ends with some concluding remarks.

CHAPTER TWO: THE ORIGINS, STRUCTURE, AND FUNCTIONS OF THE INTERNATIONAL COURT OF JUSTICE

2.1 Introduction

The previous chapter provided some background of the subject matter. It briefly discussed the origins, establishment and functions of the International Court of Justice. Furthermore, the chapter described the problem under investigation. It then presented the research questions the study aims to answer and the objectives it seeks to achieve. With that said, this chapter presents a detailed examination of the origins and establishment of the ICJ. It also provides an overview of the organisation and functions of the Court. Additionally, the chapter examines the role of the ICJ in the peaceful settlement of disputes. Finally, it examines the relationship between the ICJ and the Security Council. The purpose of this discussion is to articulate how the two institutions relate to each other when it comes to resolving legal disputes that threaten international peace and security.

2.2 Origins of the International Court of Justice

The quest for an international tribunal that would adjudicate disputes between nations dates back a long time ago.¹¹ For the purpose of this study, the most important event in the establishment of a permanent international tribunal is the 1899 and 1907 Hague Peace Conferences, which among other things, sought to find ways in which states, predominantly European, could resolve their disputes peacefully without resorting to armed conflicts. One of the suggestions made was the establishment of an international tribunal that would address disputes between states. Although some states called for the establishment of a powerful and permanent court with compulsory jurisdiction, in the end, the Permanent Court of Arbitration (PCA) was established.¹² The PCA

¹¹, Cornelis G. Roelofsen, 'International Arbitration and Courts', in B. Fassbender & A. Peters, (eds.), *The Oxford Handbook of the History of International Law Oxford*: (Oxford University Press 2012) 145, 159

¹² In the discussion leading to the establishment of the Court, states held opposing views. On one hand, there were states that were advocating for the establishment of a powerful court with compulsory jurisdiction and that would be able to address disputes between states. On the other hand, some states were calling for the establishment of a court with optional jurisdiction. In the end, the PCJ was not granted compulsory jurisdiction. Brooks W. Daly 'Permanent Court of Arbitration' in Eduardo Valencia-Ospina and Loretta Malintoppi (eds) *The Rules, Practice, and Jurisprudence of International Courts and Tribunals* (2021) 37,38.

failed to resolve disputes that threatened international peace and security, leading to the outbreak of World War I.

At the end of the war in 1918, the discussions for the establishment of a permanent court with compulsory jurisdiction were resuscitated. The failure of peacefully resolving disputes between states and the resultant war inspired states to consider establishing a robust mechanism to mitigate international disputes. The ICJ was intended to be one of the key pillars of the newly established League of Nations. Article 14 of the Covenant of the League of Nations provided for the establishment of a Permanent Court of International Justice (PCIJ which would have jurisdiction over disputes of an international character.¹³ The Council of the League of Nations established the Committee of Jurist which drafted the Draft Statute of the Permanent Court of International Justice which established the PCIJ.¹⁴ Although the PCIJ was an improvement compared to the PCA in the sense that it was a full-fledged court of justice, not a court of arbitration, it did not succeed in preventing the outbreak of the Second World War. One of the reasons advanced to explain as to why the PICJ failed to prevent conflicts, is that the Court's jurisdiction was not compulsory. For instance, while the Court was affiliated to the League of Nations, whose objective was to prevent the escalation of disputes into conflicts, not all members of the League were members of the Court. Consequently, they could opt out of the jurisdiction of the Court.

Prior to the end of World War II, discussions about establishing yet another Court had already started. Although the PCIJ was still in existence, at least in principle, there was a lack of interest among the super powers to revive the Court. According to Kolb, one of the reasons for such lack of interest was the fact that the Court had failed to address the disputes that resulted in the outbreak of the war.¹⁵ Another reason for opting to establish a new judicial body was that a new Court would create an impression that the international communities were embarking on a new

¹³Article 14 of the Covenant of the League of Nations.

¹⁴ Philippe Couvreur *The International Court of Justice and the Effectiveness of International Law* (2017) 17

¹⁵ Robert Kolb, *The International Court of Justice* (Hart Publishing 2013) 51. While the failings of the PCIJ cannot be disputed, it is argued that blaming the PCIJ for the failure to prevent aggression is unfair. This is because as a court, it could not have been expected to do anything to prevent the aggression. This is particularly the case if one considers that the League of Nations itself was unable to prevent aggression and its members such as the United Kingdom were willing to give way to aggression through pursuing the appeasement policy.

start instead of continuing with a Court whose reputation was tainted. According to Kolb, this would “give both symbolic and material expression to the idea of making a new start”.¹⁶

Moving further, the journey towards the establishment of the ICJ started in 1943, when the United Kingdom invited experts from eleven countries which became known as the London Committee of Experts with the aim of discussing the possibility of establishing a post-war international court of justice.¹⁷ The Committee however did not come up with any concrete ideas regarding the future court. It was agreed however that the future court should not be integrated into the structure of the new global political organisation.¹⁸ This connotes that the Court should have some independence from a political organisation.¹⁹ The 1943 event was followed by the Dumbarton Oaks Conference held from August to October 1944 which canvassed “the structure and principles of the new global political organisation”.²⁰ From this Conference, the idea of establishing the United Nations was born. Worth noting is that the Conference made a decision to establish a court that would be a principal organ of the United Nations. This was a result of the discussions in London. In addition, it was also agreed that all the members of the UN would be members of the new Court.²¹ Lastly, it was agreed that the ICJ would have the competence to determine disputes arising between member states and those brought to it by the Security Council.²²

As the events continued to unfold, the Dumbarton Oaks Conference was followed by the establishment of the Committee of Jurists which became known as the Washington Committee, which met in Washington from 9 to 20 April 1945. Some of the issues dealt by the Committee included the appointment of judges,²³ whether the Court should have compulsory jurisdiction, and the enforcement of the Court’s decisions. Despite the Committee debating these issues, there were no decisions taken and instead, the issues were referred to the San Francisco

¹⁶ Ibid.

¹⁷ Greg Marston, ‘The London Committee and the Statute of the International Court of Justice’ in Fitzmaurice and Lowe; RY Jennings, ‘General Introduction’ in Zimmermann, Tomuschat and Oellers-Frahm, above n 12, 4–5.

¹⁸ Robert Kolb, *The International Court of Justice* (Hart Publishing 2013) 51.

¹⁹ This was an important point especially if one considers that it is the connectedness of the ICJ and the United Nations Security Council that has created challenges as shall be argued in this study.

²⁰ Robert Kolb, *The International Court of Justice* (Hart Publishing 2013) 51, 54.

²¹ Ibid.

²² Ibid.

²³ Ibid 55.

Conference. At the Conference, a Committee was mandated to draft the provisions of the Charter that would deal with the establishment of the Court. At the end of the Conference, the Charter of the United Nations which also established the ICJ was adopted. In addition, a decision was made to disband the PCIJ, also to adopt a Statute of the ICJ regulating the operations of the Court.

2.3 Structure and Functions of the International Court of Justice

2.2.1 Composition and Administration of the Court

The International Court of Justice (ICJ) consists of 15 judges, as specified in Article 2 and 3 of its statute. The procedure for their appointment is outlined in Articles 4 and 5, which specify that members are elected by the Security Council and the General Assembly through separate voting.²⁴ These judges serve a nine-year term, and there is no prohibition on their re-election, as per Article 13.²⁵ Judges can only be removed from their duties by unanimous agreement of all judges.²⁶ To be eligible for election, an individual must have a high moral character, hold the highest judicial position in their country, or be a recognised expert in international law.²⁷ The rationale behind the procedure of appointing judges is to bolster the Court's legitimacy and expand its judicial resources. In addition to the permanent judgments, *ad hoc* judges play a supportive role by assisting in the full comprehension of relevant arguments.²⁸

During Court proceedings, Article 31(1) stipulates that “Judges of the nationality of each of the parties shall retain their right to sit in the case before the Court.”²⁹ This principle is rooted in the belief that the Court is an impartial judicial body composed of independent members, as opposed to state representatives.³⁰ As a consequence, where one of the parties in a dispute has a judge of their nationality presiding over the case, they are given an option to appoint an *ad hoc* judge for the entirety.³¹

²⁴ICJ Statute.

²⁵Ibid.

²⁶Ibid.

²⁷Article 2 of the ICJ Statute.

²⁸(Provisional Measures) ICJ Reports, 1993, 325.

²⁹Article 31(1) of the ICJ Statute.

³⁰Malcom N. Shaw *‘International Law’* (Cambridge University Press 2008) 1056, 1061.

³¹ICJ Reports, 2008 para 6.

2.2. Jurisdiction of the Court

There are three ways in which the ICJ can assume jurisdiction over a matter.³² The jurisdiction of the Court is governed by Article 36, which operates through three mechanisms.³³ Firstly, the Court can exercise jurisdiction when parties agree to refer a matter to the ICJ.³⁴ This provision was clarified in the Case Concerning Border and Transborder Armed Actions (*Nicaragua v. Honduras*). In this case, the court was tasked with interpreting Article 31 of the 1948 Pact of Bogota, an agreement between the two states, as well as the declarations of acceptance of compulsory jurisdiction made by the parties under Article 36 (2) of the ICJ Statute.³⁵ The Court reaffirmed that parties in a dispute may bring their dispute before the ICJ in accordance with Article 36 (1) of the ICJ Statute.³⁶ Honduras argued that Article 31 merely encouraged parties to submit a declaration accepting the Court's jurisdiction, but the Court rejected this argument, determining that the commitment in Article 31 of the Pact was independent of the declarations of acceptance of its jurisdiction, thereby assuming jurisdiction.³⁷ Secondly, the Court can assume jurisdiction when states unilaterally make a declaration accepting the jurisdiction of the Court.³⁸ Thirdly, the Court may assume jurisdiction once parties consent to the Court's jurisdiction through a special agreement, as per Article 36 (2).³⁹ Article 36 (2) of the ICJ Statute is sometimes seen as an optional clause because states unilaterally deposit declarations, and the nature of these declarations is considered to depend on reciprocity.⁴⁰

In terms of subject matter, the ICJ has jurisdiction over the interpretation of treaties, questions of international law, breaches of international obligations, and the extent or nature of reparation for

³²Article 36 of the ICJ Statute.

³³Ibid.

³⁴Ibid.

³⁵ICJ Reports, 1988, 69.

³⁶Ibid.

³⁷Ibid.

³⁸Article 36(2).

³⁹Statute of ICJ

⁴⁰Malcom N. Shaw *'International Law'* (Cambridge University Press 2008) 1056, 1081.

a breach of international obligation.⁴¹ For the Court to establish jurisdiction, it must determine the existence of a legal dispute. The nature of the dispute must not be political in nature such that it lacks essential elements of the law or theoretical but must pertain to a breach of an international law obligation.⁴² This principle was reaffirmed in the *Advisory Opinion on the Applicability of Obligations to Arbitrate* under Section 21 of the Agreement between United Nations and United States regarding Headquarters of the United Nations Headquarters Agreement case.⁴³ Moreover, the United Nations General Secretary contested the closure of the Palestine Liberation Organisation (PLO) Mission offices in New York. In assessing the existence of a legal dispute, the court referred to the East Timor case (*Portugal v. Australia*). Portugal initiated proceedings against Australia regarding Australian activities in East Timor, specifically concerning a treaty between Australia and Indonesia that established a maritime area in East Timor.⁴⁴ On the one hand, Portugal argued that Australia had failed to fulfil its responsibilities as an administrator in East Timor. On the other hand, Australia maintained that no dispute existed between itself and Portugal, asserting that Indonesia should be respondent.⁴⁵ The Court noted that while Portugal and Australia had accepted its compulsory jurisdiction, Indonesia had not.⁴⁶ Subsequently, the Court determined that a legal dispute existed between the two states.⁴⁷

The determination of jurisdiction of the ICJ is a preliminary point that should be determined at the earliest stage of proceedings or before getting into the merits of the case.⁴⁸ If the Court finds that it lacks jurisdiction, it will discontinue the proceedings.⁴⁹ Once the Court assumes jurisdiction, its judgement is final and binding upon the parties except. However, advisory opinions are not binding.⁵⁰ The judgement may be revised if a new fact is established, and an

⁴¹Malcom N. Shaw *International Law* (Cambridge University Press 2008) 1056.

⁴²Ibid.

⁴³ICJ Reports, 1988, 12.

⁴⁴ICJ Reports, 1995,90.

⁴⁵Ibid.

⁴⁶Ibid.

⁴⁷ A legal dispute is one that can be resolved through the application of existing legal norms.

⁴⁸ibid 1070.

⁴⁹ibid 1070.

⁵⁰ICJ Statute.

application for such revision must be made within six months of the discovery of such a new fact, in accordance with Article 61.⁵¹

When exercising its jurisdiction, the Court evaluates whether local remedies have been exhausted.⁵² This principle was applied in the Inter-Handel Company Case (*Switzerland v. United States*), where Switzerland sought a declaration that the United States should return vested assets to Inter-handel.⁵³ The United States raised a preliminary jurisdictional objection, and the Court ruled in favour of the United States, stating that the Swiss application was inadmissible as Inter-handel had not exhausted all available remedies in US courts.⁵⁴ The significance of this rule, as articulated by Lord McNair, is “both ancient and common place...it is so fundamental that it has become almost a cliché, and it is difficult to find any real analysis of its meaning.”⁵⁵

In light of jurisdiction, only states have the access to the court.⁵⁶ Conversely, private individuals are not permitted to bring cases before the ICJ. However, international organisations may seek the Court’s jurisdiction, primarily for advisory opinions.⁵⁷ As a result, only states, primarily United Nations member states, and other states that have submitted declarations or in some other way accepted the Court's jurisdiction can be entertained by the Court.⁵⁸ Reservations can limit the Court’s jurisdiction to a certain extent, particularly when they are of a “personae” nature, including ‘*ratione temporis*’ and ‘*ratione materiae*’.⁵⁹ A ‘*ratione temporis*’ reservation occurs when states specify that the Court’s jurisdiction is valid only for a certain period while ‘*ratione materiae*’ excludes the Court’s jurisdiction when parties have agreed upon a specific dispute resolution mechanism.⁶⁰

⁵¹Statute of ICJ.

⁵²Malcom N. Shaw ‘*International Law*’ (Cambridge University Press 2008) 1056,1070.

⁵³ ICJ Reports (1959) 6.

⁵⁴Ibid.

⁵⁵Theodor Meron ‘The Incidence of the Rule of exhaustion of Local Remedies’ (1959) *Brit.Y.B.Int’l L* 83 <https://heinonline.org>.

⁵⁶ICJ Statute.

⁵⁷Statute of ICJ.

⁵⁸International Court of Justice ‘How the Court works’ <https://www.icj-cij.org>.

⁵⁹ Malcom N. Shaw ‘*International Law*’ (Cambridge University Press 2008) 1056, 1083.

⁶⁰Ibid.

2.2.1 Contentious Cases

Contentious jurisdiction of the ICJ has been defined as instances where “there exists a genuine dispute of a legal nature” between states.⁶¹ A legal dispute has been defined as an agreement on a question of law or fact.⁶² The jurisdiction of the Court over the contentious cases is contained in Article 34 of the ICJ Statute. Specifically, Article 34(1) provides that only states may be parties in cases before the ICJ.⁶³ This means that individuals do not have the right to bring a matter to the Court for adjudication. More so, Article 35(1) provides that the Court’s doors shall be open to states that are party to the ICJ Statute.⁶⁴ However, non-state parties may bring a matter before the ICJ provided that they have met the conditions set by the Security Council.⁶⁵

Furthermore, the ICJ accepts jurisdiction in cases where the states have accepted the competence of the Court in that matter. Such acceptance is made in three ways. Firstly, the Court’s jurisdiction can be accepted through a special agreement between parties in which they “express an unequivocal consent to the Court's jurisdiction”.⁶⁶ Thus, the parties can notify the Court’s Registry indicating the subject matter of the dispute which they are consenting to.⁶⁷ Secondly, states can consent to jurisdiction of the ICJ through a treaty or convention that confers jurisdiction of the ICJ in the event of a dispute arising as a result of interpretation or application of a treaty.⁶⁸ This means that where a dispute arises between parties to a treaty that confers jurisdiction on the ICJ arises, one of the parties can refer the dispute to the ICJ unilaterally.⁶⁹ Lastly, consent to the ICJ’S jurisdiction can be indicated through recognising the compulsory jurisdiction of the Court.⁷⁰ This is referred to as the court’s compulsory jurisdiction. In order for

⁶¹ International Court of Justice Website: Contentious Jurisdiction <https://icj-cij.org/contentious-jurisdiction>

⁶² Ibid.

⁶³ Article 34(1).

⁶⁴ Article 35(1).

⁶⁵ Article 35(2).

⁶⁶ S. Gozie Ogbodo, "An Overview of the Challenges Facing the International Court of Justice in the 21st Century" (2012) 18 *Ann Surv Int'l & Comp L* 93 at 102.

⁶⁷ Ibid.

⁶⁸ See Article 36(I) and Article 40(1).

⁶⁹ S. Gozie Ogbodo, "An Overview of the Challenges Facing the International Court of Justice in the 21st Century" (2012) 18 *Ann Surv Int'l & Comp L* 93 at 102.

⁷⁰ See Article 34(2). See also Gozie Ogbodo, "An Overview of the Challenges Facing the International Court of Justice in the 21st Century" (2012) 18 *Ann Surv Int'l & Comp L* 93 at 13.

the Court to exercise jurisdiction on the basis of compulsory jurisdiction, both parties to a dispute should have consented to The ICJ's decisions in contentious cases that are binding on the parties.

2.2.1.1 The Role of Provisional Measures in Contentious Cases

The Court possesses the authority to issue provisional measures under Article 41 of the ICJ Statute. Provisional measures are primarily intended to safeguard the rights of either party involved in a case, pending the final determination of the dispute.⁷¹ The provisional measures are also intended to ensure that the integrity of ongoing proceedings is preserved.⁷² An illustrative example of this was seen in the *Fisheries Jurisdiction Case*, where the United Kingdom and Germany instituted proceedings against Iceland alleging that Iceland has extended its fisheries jurisdiction from 12 to 50 nautical miles.⁷³ The Court granted interim measures to safeguard British fishing rights in waters claimed by Iceland.⁷⁴

The Court's authority to grant provisional measures under Article 41 of the ICJ statute was discussed in the *Lockerbie Case (Libya v United States of America)* the Court made a distinction that grants provisional measures.⁷⁵ In this case, a Pan Am flight crashed in Lockerbie, Scotland, resulting in the deaths of passengers.⁷⁶ The United States and the United Kingdom attributed the explosion to two Libyan nationals who were subsequently charged with terrorism in Scotland. Therefore, the U.S. and the UK requested Libya to surrender these individuals.⁷⁷ Libya initiated proceedings before the ICJ, seeking provisional measures to enjoin the United Kingdom and United States from compelling Libya to surrender the accused individuals to any jurisdiction outside Libya. However, three days after the request for provisional measures, the Security Council adopted another resolution to compel Libya to surrender its nationals.⁷⁸ The Court

⁷¹ICJ Statute.

⁷²Malcom N. Shaw *'International Law'* (Cambridge University Press 2008) 1056, 1094.

⁷³ICJ Reports, 1972, 12.

⁷⁴Ibid.

⁷⁵ICJ Reports, 1992, 3.

⁷⁶Ibid.

⁷⁷Ibid.

⁷⁸ICJ Reports, 1992,3

dismissed Libya's application, citing that the resolution had nullified Libya's right to protection under the Montreal Convention.⁷⁹

When granting provisional measures, the Court must be convinced that there is an urgent necessity to prevent irreparable harm.⁸⁰ This principle was discussed in the Lockerbie case, where the Court declined to issue provisional measures, stating that such measures would be likely to impair the rights which appear *prima facie* to be enjoyed by the United Kingdom by virtue of Security Council Resolution 748 of 1992.⁸¹ These provisional measures remain in effect until a final judgement is reached or until the merits of the case are determined, which is often considered crucial for the legitimacy of the International Court of Justice.⁸²

Furthermore, in determining whether to grant provisional measures, the Court must assess whether there is an imminent risk to the civilian population of a state that could lead to irreparable harm.⁸³ This was evident in the Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Georgia v. Russian Federation*).⁸⁴ In this case, Georgia sought provisional measures against Russia to protect its nationals and prevent irreparable harm to ethnic Georgians. The Court recognised that the ethnic population was vulnerable and subject to irrevocable prejudice.⁸⁵

In international law, provisional measures hold a significant position as mechanisms employed by the International Court of Justice (ICJ) to address urgent issues that arise during the course of a dispute.⁸⁶ These measures serve both as a means to safeguard the rights of parties involved and as tools to prevent irreparable harm.⁸⁷ While they offer distinct advantages, provisional measures also present notable challenges, including questions regarding enforceability, sovereignty

⁷⁹ Malcom N. Shaw 'International Law' (Cambridge University Press 2008) 1056, 1093.

⁸⁰ ICJ reports, 1972, 12.

⁸¹ *ibid* 1096.

⁸² *ibid* 671.

⁸³ Application no. 13255/07 (Provisional Measure).

⁸⁴ *Ibid*.

⁸⁵ Malcom N. Shaw 'International Law' (Cambridge University Press 2008) 1056, 1066.

⁸⁶ Article 41(1) of Statute of the ICJ.

⁸⁷ Michael Addo, 'Interim Measures of Protection for Rights under the Vienna Convention on Consular Relations' (1999) 4 *EJIL* 715.

concerns, and potential political repercussions.⁸⁸ One of the primary advantages of provisional measures is their ability to preserve the rights of parties engaged in an international dispute.⁸⁹ When a case is pending before the ICJ, these measures ensure that no irreversible harm befalls either party during the proceedings, thereby contributing to the fairness and equity of the legal process.⁹⁰ Moreover, provisional measures come to the forefront when there is an urgent necessity to prevent irreparable harm to one of the parties involved.⁹¹ The ICJ can intervene promptly to safeguard against such harm, effectively offering a lifeline to parties facing immediate threats.⁹² In the interest of a fair and impartial resolution, provisional measures help maintain the *status quo* until a final judgement is reached.⁹³ They prevent either party from taking unilateral actions that could prematurely prejudice the outcome of the case, thereby fostering an environment conducive to equitable deliberation.⁹⁴ In international disputes, provisional measures effectively prevent conflict escalation.⁹⁵ By instructing parties to refrain from certain actions, these measures contribute to peace and stability, thereby avoiding potentially volatile situations.⁹⁶ Furthermore, provisional measures offer preliminary clarification of the rights and responsibilities of the involved parties.⁹⁷ This clarification assists in understanding the legal framework and facilitating more informed decision-making.⁹⁸

However, despite these advantages, provisional measures also come with their share of challenges; one of the most significant challenges lies in their lack of enforceability.⁹⁹ The ICJ lacks enforcement mechanisms, which means that states are not legally obligated to comply with these measures.¹⁰⁰ Therefore, this limitation raises questions about the practical efficacy of such

⁸⁸Ibid.

⁸⁹ Malcom N. Shaw *'International Law'* (Cambridge University Press 2008) 1056, 1093.

⁹⁰Ibid.

⁹¹Michael Addo, 'Interim Measures of Protection for Rights under the Vienna Convention on Consular Relations' (1999) 4 *EJIL* 715, 716.

⁹²Ibid.

⁹³Malcom N. Shaw *'International Law'* (Cambridge University Press 2008) 1056, 1094.

⁹⁴Ibid.

⁹⁵Fisheries Jurisdiction Case, ICJ Reports 1972, 12.

⁹⁶Ibid.

⁹⁷Malcom N. Shaw *'International Law'* (Cambridge University Press 2008) 1056, 1095.

⁹⁸Ibid.

⁹⁹Andrew Coleman 'The International Court of Justice and Highly Political Matters' (2003) *Melbourne Journal of International Law* (4) <https://unimelb.edu.au> accessed April, 2023.

¹⁰⁰Ibid.

measures.¹⁰¹ Additionally, provisional measures may be perceived by some states as an infringement on their sovereignty, especially if they believe that the ICJ is interfering in their internal affairs.¹⁰² This perception can lead to resistance and non-cooperation, further complicating the resolution of disputes.¹⁰³

2.2.2 Advisory Opinion

Article 65 stipulates that ICJ is allowed to give advisory opinions upon the request from any authorised body concerning legal questions presented to it.¹⁰⁴ According to Judge Lach, ICJ plays a crucial role as the guardian of legality for the international community as a whole, both within and outside the United Nations.¹⁰⁵ The ICJ's primary task is to interpret international law through the resolution of contentious cases and the issuance of advisory opinions.¹⁰⁶ The Court also possesses the authority to provide advisory opinions, which are often considered a more effective mechanism than imposing sanctions for addressing legal questions.¹⁰⁷ Advisory opinions help clarify the rights and responsibilities of the parties involved by defining the legal status of the issues at hand and these opinions significantly contribute to the effectiveness of the Court.¹⁰⁸ Advisory opinions are not binding on states, thereby raising questions about the efficacy and influence of the Court. However, the Court's ability to decide legal issues independently of political considerations, as demonstrated in the Nicaragua case and the Nuclear Weapons opinion, underscores its judicial integrity and independence.

2.3 The ICJ, the Peaceful Settlement of Disputes and the Relationship between the Court and the Security Council

2.3.1 The International Court of Justice and the Peaceful Settlement of Disputes

¹⁰¹Ibid.

¹⁰²Ibid.

¹⁰³Lockerbie Case ICJ Reports 1992, 3.

¹⁰⁴Statute of ICJ.

¹⁰⁵ Peter Tomka 'Inaugural Hilding Eek memorial Lecture' (International Court of Justice, 2 December 2013) <<https://www.icj-cij.org>> accessed March 2024.

¹⁰⁶Ibid.

¹⁰⁷ICJ Reports (1996) 226.

¹⁰⁸ Malcom N. Shaw '*International Law*' (Cambridge University Press 2008) 1056, 1108.

The UN Charter entrusts the Security Council with the primary responsibility of maintaining international peace and security.¹⁰⁹ What is evident from this provision is that the Security Council plays the leading role of dealing with matters that threaten international peace and security, resulting in the role of the ICJ being merely a subsidiary. This becomes more apparent if one considers that its members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.¹¹⁰

One of the core principles guiding the United Nations and its members is to ensure that disputes are resolved through peaceful means.¹¹¹ As one of the primary organs of the UN, the ICJ, like its predecessors, is tasked with the peaceful resolution of disputes through legal means. This is reflected in Chapter VI of the Charter of the United Nations. Article 36(1) of the Charter which authorises the Security Council to recommend appropriate procedures or methods of adjustment in order to resolve disputes. According to Article 36(3), in making recommendations in relation to the peaceful settlements of disputes, the Security Council should be mindful that legal disputes should, as a general rule, be referred to the International Court of Justice.¹¹² Although the Charter proscribes various ways which states or the Security Council may resort to in order to peacefully resolve disputes,¹¹³

Meanwhile, the role played by the Court in ensuring that disputes are resolved peacefully cannot be overstated. Couvreur characterises the role of the Court in resolving disputes as being mostly preventative.¹¹⁴ On the contrary, the Court's adjudication over matters brought before it has managed to prevent the occurrence of dispute. The role of the Court has been recognised by its various organs. In the Manila Declaration on the Peaceful Settlement of International Disputes (Manila Declaration adopted in 1982), the United Nations General Assembly urged member states when concluding treaties to insert clauses that require submission of disputes to the ICJ as

¹⁰⁹ Article 24(1).

¹¹⁰ Ibid.

¹¹¹ Article 2(3).

¹¹² Article 36(3)

¹¹³ These mechanisms include enquiry, conciliation, negotiation, arbitration mediation, among others. See Article 33(1). See also Philippe Couvreur 'The International Court of Justice and the Effectiveness of International Law' (2017) 19 *International law Reports* 126,113-114

¹¹⁴ Philippe Couvreur 'The International Court of Justice and the Effectiveness of International Law' (2017) 19 *International law Reports* 126,113-114.

well as to recognise the Court's compulsory jurisdiction.¹¹⁵ More so, the successive Secretary-Generals of the United Nations have all been supportive of a strengthened role of the ICJ in resolving disputes through peaceful means.¹¹⁶ Therefore, while it is evident that the ICJ's role in resolving disputes peacefully is well-recognised in theory, this study examines the extent of the role it has played in practice.

2.3.2 The Relationship between the ICJ and the Security Council

The question of the relationship between the ICJ and the Security Council has been a subject of considerable academic debate.¹¹⁷ In actuality, the ICJ itself has had to make pronouncements regarding its relationship with the Security Council. From these debates, it can be remarked that the relationship is controversial; firstly, it is important to justify why a relationship between the ICJ and the Security Council is important to comprehend. Since the ICJ has a role to play in resolving disputes between states parties, a responsibility which is primarily performed by the Security Council, there ought to be some form of relationship between the two institutions. Secondly, although the two institutions have the mandate to deal with peace and security matters, the Security Council has the primary mandate to address matters of dealing with these matters. As such, it is important to understand the hierarchy between the two institutions so as to prevent situations where there may be a collision course. Thirdly, it is also important to determine how the two institutions cooperate with each other. Therefore, ascertaining the relationship between the two organs is also critical because of the nature of these institutions. Unlike the ICJ which is a judicial institution, the Security Council is a political institution. This implies that the Security Council may rely on political, diplomatic and legal solutions to deal with threats of peace and

¹¹⁵ 1982 Manila Declaration on the Peaceful Settlement of International Disputes, adopted in New York, United States of America on 15 November 1982. See also Declaration on the Prevention and Removal of Disputes and Situations Which May Threaten International Peace and Security and on the Role of the United Nations in this Field, 5 December 1988, A/RES/43/51 para 15 where the General Assembly urged the Security Council to refer disputes to the ICJ for advisory opinion at an early stage.

¹¹⁶ Delivering justice: a programme of action to strengthen the rule of law at the national and international levels, Report of the Secretary-General (2012), A/66/749, para. 15 (b).

¹¹⁷ Gowlland-Debbas, Vera 'The Relationship between the International Court of Justice and the Security Council in the Light of the Lockerbie case' (1994) 4 *American Journal of International Law* 643,677; and Cronin-Furman, Kathleen Renée 'The International Court of Justice and the United Nations Security Council: Rethinking a Complicated Relationship' (2006) 106 *COLuM. L. REv* 435; Philippe Couvreur 'The International Court of Justice and the Effectiveness of International Law' (2017) 19 *International law Reports* 126.

security challenges. This means therefore that there is a potential for a clash between the ICJ and the Security Council.¹¹⁸

As indicated above, the primary role of resolving disputes is vested with the Security Council. Furthermore, in exercising its powers, the ICJ may rely on the Court to deal with disputes that threaten peace and security. This denotes that the role of the ICJ and other organs are subsidiary to the Security Council when it comes to peace and security matters. Thus, it can be inferred that the role of the ICJ is to complement the work of the Security Council. One way in which the ICJ has complemented the work of the Security Council is through issuing out provisional orders which are intended to prevent situations from escalating.¹¹⁹ An example of a case where the Court issued provisional orders that complemented the role of the Security Council to maintain international peace and security is the Case Concerning Military and Paramilitary Activities in and Against Nicaragua (*Nicaragua v. United States of America*).¹²⁰ In this matter, Nicaragua filed an application against the United States accusing the United States of engaging and supporting insurgence and activities of the paramilitary groups called the *contras*. The ICJ issues provisional orders calling upon the United States to “cease and refrain from any action restricting, blocking or endangering access to or from Nicaraguan ports”.¹²¹ The Court also called for the sovereignty of Nicaragua to be respected and for the two states not to aggravate the situation. Lastly, the Court called upon the governments of the two countries to resolve the disputes and desist from actions which “might prejudice the rights of the other Party in respect of the carrying out of whatever decision the Court may render in the case”.¹²² Therefore, this judgement demonstrates that the ICJ plays a supportive role when it comes to addressing disputes that may threaten international peace and security. Theoretically, the fact that the ICJ and the Security Council share a common interest of ensuring that disputes between states are resolved peacefully means that one can legitimately expect the institutions to support each other’s work in achieving the common objective.

¹¹⁸Philippe Couvreur ‘The International Court of Justice and the Effectiveness of International Law’ (2017) 19 *International law Reports* 113,114.

¹¹⁹Ibid 126.

¹²⁰ 1987 I.C.J. 188 (Order of Nov. 18).

¹²¹Ibid.

¹²² Ibid.

However, controversy has arisen regarding the relationship between the two institutions when it comes to adjudicating powers. The controversy arose from the UN Charter's failure to clarify the extent of the Security Council's powers when it comes to the adjudication of disputes as a way of resolving disputes peacefully.¹²³ Article 37 and 38 of the UN Charter are the source of the controversy. Article 37(1) permits parties whose dispute has not been settled through judicial or other means contained in Article 33 to refer the matter to the Security Council. Article 38 also grants the Security Council the power to "make recommendations to the parties with a view to a pacific settlement of the dispute."¹²⁴ With that being the case, this creates confusion as to whether the provisions permit the Security Council judicial powers. While some scholars have argued that the Charter does not grant the Security Council the power to deal with legal disputes,¹²⁵ others have argued that the Charter intends to entrust the Security Council with *quasi-judicial* powers.¹²⁶ Nonetheless, this question has not yet been determined by the ICJ.¹²⁷ According to the current study, this question has been rendered as academic by the practice of the Security Council. The Security Council has already exercised some *quasi-judicial* powers in some cases involving legal disputes, thus creating the perception that it has *quasi-judicial* powers.¹²⁸

The relationship between the Security Council and the ICJ also extends to the enforcement of decisions. Just like many international judicial institutions, the ICJ does not have its own enforcement mechanism. Instead, there are two enforcement mechanisms that the ICJ relies on for the enforcement of its decisions. The first enforcement mechanism is when states abide by

¹²³ Cronin-Furman, Kathleen Renee. 'The International Court of Justice and the United Nations Security Council: Rethinking a Complicated Relationship' (2006) 106 *Columbia Law Review* 338, 435.

¹²⁴ Article 38 of the UN Charter.

¹²⁵ Oscar Schachter, Editorial Comment, 'The Quasi-Judicial Role of the Security Council and the General Assembly', (1964) 58 *Am. J. int'l L.* 960, 960

¹²⁶ Nigel.D. White 'The United Nations and the Maintenance of International Peace and Security' (1990) 61 *American law Journal of International Law*, 240.

¹²⁷ The questions that have been determined by the ICJ relates how to address situations where the ICJ and the Security Council are dealing with the same matter concurrently with Military and Paramilitary Activities in and Against Nicaragua (*Nicaragua. v. United States*), Merits, 1986 I.C.J. 14 (June 27); (*Lockerbie Case*) and whether the ICJ can review the assumed jurisdiction on Chapter VIII matters that are within the exclusive jurisdiction of the Security Council (*Nicaragua Case*). See Questions of Interpretation and Application of 1971 Montreal Convention Arising from Aerial Incident at Lockerbie (*Libyan Arab Jamahiriya v. U.S.*).

¹²⁸ Oscar Schachter, Editorial Comment, 'The Quasi-Judicial R6le of the Security Council and the General Assembly', (1964) 58 *Am. J. int'l L.* 960

the decisions of the ICJ in a case in which they are party to.¹²⁹ The second enforcement mechanism is contained in Article 94(2) which provides that where a party to a case fails to perform its obligations as per the ICJ's decisions, 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 judgement".¹³⁰ For the purpose of this study, there are two issues that require elaboration: the first issue relates to whether the Security has the discretion to decide whether to enforce a decision of the ICJ. The second issue is that, Article 94(2) suggests that the Security Council has the discretion whether to act on non-compliance with the decision of the ICJ. This view is supported by Tanzi who notes that the enforcement of the Court's decisions is "totally dependent on the logic of political negotiation between Members of the Council".¹³¹ Thus, the Security Council may decide whether or not to enforce the decisions of the ICJ.¹³² The implications of this position are explored in detail in the next chapter.

2.4 Conclusion

The purpose of this chapter was to provide some historical background behind the establishment of the ICJ. It was stressed that the main reason behind the establishment of the ICJ and indeed, its predecessors was to ensure that states resort to resolve their disputes peacefully. The chapter also examined the composition of the ICJ, its powers and jurisdiction. Additionally, the chapter also explored the relationship between the ICJ and the Security Council. It was therefore realised that the ICJ and the Security Council are intended to share responsibilities when it comes to resolving disputes peacefully. The question that arises is whether the Security Council, as the primary body responsible for handling peace and security issues, is willing to share its mandate with other institutions, specifically the ICJ. Understanding the attitude of the Security Council when it comes to sharing its mandate is important, as it can determine the effectiveness of the ICJ's work when it comes to resolving disputes that threaten peace and security. The chapter then discussed the issue of enforcement of the ICJ decisions, and disclosed that the Charter

¹²⁹Article 94(1) of the Statute of ICJ.

¹³⁰Article 94(2) of the Statute of ICJ.

¹³¹Attila Tanzi, 'Problems of Enforcement of Decisions of the International Court of Justice and the Law of the United Nations' (1995) 6 *EJIL* 539,572.

¹³²*Ibid.*

allows the Security Council the discretion to enforce decisions of the ICJ. The next chapter assesses the effectiveness of the ICJ's provisional orders in resolving disputes peacefully and maintenance of peace and security.

CHAPTER 3: ASSESSMENT OF THE EFFECTIVENESS OF THE INTERNATIONAL COURT OF JUSTICE IN THE PEACEFUL SETTLEMENT OF DISPUTES

3.1 Introduction

The previous chapter laid out a comprehensive background on the origins and purpose of establishing the International Court of Justice. It highlighted that one of the main reasons behind the establishment of the Court was to establish a platform that would allow states to resolve disputes peacefully. The chapter also discussed the organisation, composition and function of the Court. Finally, the chapter examined the relationship between the ICJ and the Security Council. This discussion aimed to establish a foundation for assessing the effectiveness of the ICJ's provisional measures in peacefully resolving disputes and contributing to the preservation of peace and security. Therefore, the current chapter assesses the ICJ's effectiveness in resolving disputes that threaten international peace and security. It begins by examining the extent to which the ICJ has adjudicated legal disputes that could threaten peace and security. Particularly, the chapter focuses on two issues, namely whether the disputes concerning international peace and security have been referred to the ICJ and whether the Security Council has deferred legal disputes to the Court for adjudication. This assessment is important as it establishes the willingness of states and the Security Council to rely on the adjudicatory role of the ICJ to settle disputes peacefully. Furthermore, the chapter examines the effectiveness of the ICJ provisional orders in resolving disputes peacefully. In this regard, the chapter discusses the identified disputes that threatened international peace and security that were brought before the ICJ. It then examines the extent to which the parties involved, and how the Security Council addressed the issue of non-compliance. Following this, the chapter undertakes an analysis of the effectiveness of the provisional orders in ensuring that the ICJ fulfils its mandate under the Charter.

3.2 The referral of Legal Disputes Threatening Peace and Security to the International Court of Justice

The first step in assessing the contribution of the ICJ to the peaceful resolution of disputes is to examine the extent to which legal disputes threatening international peace and security have been referred to the ICJ for adjudication. The purpose of this examination is to determine whether the

Court, as the principal judicial organ, has been effectively used to resolve legal disputes threatening international peace and security. If there is a high number of referral of disputes to the Court, then one may be inclined to conclude that there is a firm belief among the United Nations, its organs and members that the ICJ is an important institution in the resolution of disputes. If on the one hand, the CIJ is under-utilised or parties opt for other means of resolving legal disputes other than referring them to the ICJ, on the other hand, it may suggest that priority is given to other means of resolving disputes other than adjudication by the ICJ.

Since the establishment of the ICJ, it has presided over numerous cases, both contentious and those in which it was requested to give advisory opinion. Noticeable about these cases, is that almost all of them have been brought by member states. In particular, states have referred disputes that threaten peace and security to the ICJ for adjudication.¹³³ This does not only indicate states' recognition of the ICJ's role in resolving disputes that threaten peace and security as envisioned in the Charter but also suggests states' belief in the legitimacy of the ICJ. One such important judgement in the Court's history where it addressed a state-referred matter and indicated provisional measures to preserve peace and security, is the *Nicaragua Case*, discussed in Chapter Two.

In addition, the ICJ has also given advisory opinions on matters brought to its attention by the UN organs such as the General Assembly. However, one organ that has conspicuously not made use of the ICJ as a forum to resolve disputes is the Security Council. Similar to other UN organs, the Security Council has the right to request advisory opinions from the ICJ, but it has shown reluctance to do so. Since the establishment of the Court, the Security Council sought advisory opinion once, in the case concerning the legality of South Africa's continued occupation of Namibia. The case arose after the General Assembly adopted a resolution terminating South Africa's mandate over South West Africa (Namibia).¹³⁴ Despite the General Assembly's resolution and the adoption of a resolution by the Security Council recognising the General Assembly's decision to terminate South Africa's mandate, South Africa defied these resolutions.

¹³³Examples of these include Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v Israel*), Order, 26 January 2024, Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (*Ukraine v Russian Federation*), Provisional Measures I.C.J. Reports 2022, p. 211 among others.

¹³⁴GA Res 1514 (XV) of 14 December 1960.

Thus, the Security Council requested the ICJ to offer advisory opinion on the legality of South Africa's continued occupation.¹³⁵ Although the effectiveness seeking advisory opinion on this matter was questioned by some states,¹³⁶ this decision was significant as it demonstrated the Security Council's recognition of the ICJ as one of the institutions that can be relied upon to address issues affecting the United Nations, including matters concerning peace and security. Yet, this case represents the only instance that the Security Council sought advisory opinion from the ICJ.

Adding to the power to seek advisory opinions, the Security Council possesses a unique authority that no other organ has: the ability to recommend that parties to a dispute refer the matter to the ICJ for peaceful resolution. While the Security Council only has the power to make recommendations, not necessarily to direct states to refer disputes to the ICJ, the respect and authority commands may imply that states may heed its recommendations. Nevertheless, the Security Council has only made this recommendation on two occasions, namely in the *Corfu Channel Case* between Albania and the United Kingdom,¹³⁷ and the dispute between Greece and Turkey concerning the continental shelf in the Aegean Sea.¹³⁸ Apart from these two cases, the Security Council has not made use of the ICJ forum to resolve legal disputes peacefully. This is despite the fact that on numerous occasions, legal disputes which threaten international peace and security and which could have been resolved peacefully were brought before the Council. To illustrate this, an example in the sub-section below warrants discussion.

3.2.1 The Palestinian Question

The history behind the quest for statehood by Palestine is long and controversial. For the purposes of this discussion, a summary of the background is provided. Palestine was a territory of the Ottoman Empire before the outbreak of World War I. The Ottoman Empire joined the conflict of the Central Powers who were defeated by the Allied Powers. The defeat resulted in

¹³⁵Res 284 (1970).

¹³⁶ It is important, however, to note that not all members were supportive of the decision to request advisory opinion from the ICJ. For instance, the USSR raised doubts regarding the appropriateness of a matter that required the "serious political action on the part of the Security Council" to the ICJ. Poland also questioned the effectiveness of seeking advisory opinion, arguing that such an action would "only give the appearance of genuine action".

¹³⁷*Corfu Channel Case (United Kingdom v. Albania)*; Assessment of Compensation, I.C.J Reports 1949, p. 244.

¹³⁸ *Aegean Sea Continental Shelf, (Greece v Turkey)* Judgment, I.C.J. Reports 1978, p. 3.

the Ottoman Empire losing some of its territories to Allied Powers with Palestine, non-self-governing territories being given to the United Kingdom.¹³⁹ Upon the establishment of the League of Nations, a system was introduced whereby the countries that had occupied territories of the defeated states were allowed to control these territories. This was called the League of Nations Mandate System.¹⁴⁰ The conquerors were required to administer the territories in the interests of the inhabitants.¹⁴¹ There were conditions which were supposed to be met in holding the conquered territories. One of these conditions was that the countries that were in charge would not exercise permanent sovereignty over the territories.¹⁴² Instead, the occupied territories were expected to develop the ability to exercise self-determination and form statehood.¹⁴³ In the case of Palestine, one of the conditions upon which the British were to occupy the territory of Palestine was that the diaspora Jewish population would be allowed to settle in the territory of Palestine, where the Jewish people were a minority. The British had made the Balfour Declaration in 1917 in which they committed to the creation of a Jewish Homeland in the Palestinian territory believing that the territory has historically been Jewish.¹⁴⁴

As the Second World War broke out, Palestine had not become an independent state. The experiences of the Jewish people in Europe before and during the war resulted in the international community calling for the establishment of a Jewish state.¹⁴⁵ Then in 1947, the United Nations General Assembly (UNGA) resolved that there should be a creation of two states that would exist side by side, namely a Jewish state and a Palestine state.¹⁴⁶ Acting upon the UNGA resolution, on 14 May 1948, Israel unilaterally declared itself an independent state,¹⁴⁷ and this was followed by the recognition of Israel by various members of the international

¹³⁹Amy Maguire, Katie Thompson 'Palestine, self-determination and international justice: looking back to the ICJ and looking forward to the ICC' (2017) 26 *Griffith Law Review* 532.

¹⁴⁰Nele Matz 'Civilization and the Mandate System under the League of Nations as Origin of Trusteeship' (2005) 9 *Max Planck Y.B. United Nations L.* 47, 72.

¹⁴¹*Ibid.*

¹⁴²Curtis FJ Doebbler 'Human Rights and Palestine: The Right to Self-Determination in Legal and Historical Perspective' (2011) 2 *Beijing Law Review* 111, 112.

¹⁴³ Amy Maguire, Katie Thompson 'Palestine, self-determination and international justice: looking back to the ICJ and looking forward to the ICC' (2017) 26 *Griffith Law Review* 532.

¹⁴⁴ John Quigley, *The Statehood of Palestine: International Law in The Middle East Conflict* (Cambridge 2010) at 75.

¹⁴⁵ Ian Bickerton, Carla Klausner *A History of the Arab-Israeli Conflict* (6th edn, Prentice Hall 2010).

¹⁴⁶GA Res 181 (1947).

¹⁴⁷State of Israel Proclamation of Independence (1948).

community. However, this decision sparked the conflict,¹⁴⁸ which, up to now, continues to threaten international peace and security and has made mockery of the United Nations' ability to resolve conflicts peacefully.

Since 1947, Palestine has sought on different occasions and forums to be recognised as a state but in vain. It is therefore not necessary to discuss in detail how and why Palestine has been denied statehood. For the purpose of this study, it is essential to note that there are two major facets from which the question of Palestine's statehood has been considered, namely legal and political. Regarding the legal aspect, the question pertains to whether the criteria for statehood outlined in the Montevideo Convention have been met? The criteria is whether the "state" has permanent population, defined territory, government, and capacity to enter into relations with the other states.¹⁴⁹ There has been debate as to whether Palestine has satisfied this criteria.¹⁵⁰ At this juncture, it is important to note that this question is purely a legal question that must be interpreted by the Court. Yet the ICJ which is the principal organ of the UN has not yet been requested to determine this question. Lastly, according to the United Nations, for a state to be admitted as a member of the United Nations, it must satisfy certain conditions, namely to refrain from the threat or use of force against the territorial integrity or political independence of any state, and commit to settle their international disputes by peaceful means and observe the duty to cooperate with another in accordance with the Charter.¹⁵¹

¹⁴⁸ The conflict was between Israel and Palestine supported by other Arab countries. The conflict ended in 1949. As part of the armistice agreement, the territory was supposed to be demarcated along the Green Line, a border that has never been agreed as settled. Afterwards, Israel's claim of statehood was recognized by the United Nations and Israel was admitted into the United Nations as a member. See Israel-Egypt Armistice Agreement (1949); Israel-Jordan Peace Treaty (1949); Israel-Lebanon Armistice Agreement (1949); 38 Israel-Syria Armistice Agreement (1949); Israel-Jordan Peace Treaty, Annex I; Israel-Jordan International Boundary Delimitation and Demarcation, Annex I 39, GA Res 273 (1949).

¹⁴⁹ See Article 1 of the Montevideo Convention on Rights and Duties of States, opened for signature 26 December 1933, 16 LNTS 19.

¹⁵⁰ See Amy Maguire, Katie Thompson 'Palestine, self-determination and international justice: looking back to the ICJ and looking forward to the ICC' (2017) 26 *Griffith Law Review* 538 whom this researcher agrees with. See also Winston P Nagan, Aitza M. Haddad 'Recognition of Palestinian Statehood: A clarification of the interests of the concerned parties' (2011) 40 *Georgia Journal of International and Comparative Law* 341, 374 for alternative view.

¹⁵¹ Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, GA Res 2625(XXV). Other requirements include commitment not to "not intervene in matters within the domestic jurisdiction of any state, observe equal rights and self-determination of peoples, observe the sovereign equality of states and fulfil the its obligation under the Charter in good faith.

The question whether Palestine should get recognition as a state is largely a legal question that ought to be adjudicated by an independent adjudicator. Although some of the requirements that must be met are political in nature, the determination whether they have been met are questions of law that ought to be determined by the Court. In this study's view, such questions constitute legal disputes contemplated in Article 36 (3) of the Charter and therefore ought to be dealt with by the ICJ. Precisely, this study contends that the Security Council should have referred this question to the ICJ for advisory opinion, and this has not been the case. The Security Council has decided to deal with the question of Palestinian statehood on its own. Predictably, the question has not been approached from a legal perspective. Instead, it has been addressed from a political standpoint, particularly concerning the United States' interests in protecting Israel. In particular, the United States has set its own conditions that must be met by the Palestinian people before it entertains the idea of recognizing Palestinian Statehood.¹⁵² The United States has gone as far as using its veto to rebuff any attempt by the General Assembly to recognize the Palestinian State.¹⁵³ It can therefore be argued that instead of deferring to the ICJ as the principal judicial forum of the Court, the Security Council has sought to determine a question that is a legal dispute. Since the Council's decisions are motivated by their personal interests, the issue which ought to be determined by law has been turned into a political question. This study argues that a judicial institution, particularly the ICJ can do a better job with the Palestinian statehood question than any other organ of the UN. By failing to refer the Palestinian Statehood question to the ICJ, the Security Council, and in turn, the United Nations has denied itself of an opportunity to tackle a question that has not only troubled the organisation since its formation, but has also brought its legitimacy and effectiveness into disrepute.¹⁵⁴

¹⁵² Clyde Mark, 'Palestinians and Middle East Peace: Issues for The United States' (*Issue Brief for Congress*, 14 November 2002) available at <http://www.fas.org/sgp/crs/mi> accessed 3 March 2024.

¹⁵³ In 1974, the UNGA recognized that Palestine has the right to "self-determination, national independence and sovereignty". In the same year, the UNGA recognized the Palestine Liberation Organization (PLO) as the representative of the Palestinian people and invited the PLO to participate in its session. This status was upgraded in 2012 as Palestine was upgraded to "permanent non-member observer state status". Lastly, in 2024, the General Assembly voted overwhelmingly for the admission of Palestine into the United Nations as it has satisfied the requirements of Article 4 of the Charter. See GA Res 3236 (1974), GA Res 3376 (1975) and Oranet Orevi 'Holistic Approach to the Conflict of Israel and Palestine: Where We Are Now and Where We Can Go' (2013) 16 *Annual Survey of International and Comparative Law*.

¹⁵⁴ To its credit, the United Nations General Assembly has on several occasions sought advisory opinions from the ICJ on the legality of Israel's conduct. However, in all these requests, the Court was not asked to determine the question of Palestinian Statehood. See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I. C. J. Reports 2004, p. 136, Advisory Opinion *Legal Consequences*

From this discussion, it can be deduced that despite the Security Council and the ICJ operating on the same terrain when it comes to peacefully resolving disputes that threaten international peace and security, the Security Council is reluctant to utilise the Court. Several reasons can be advanced to explain this reluctance. For instance, it has been argued that the ICJ's reluctance to utilise the Court is because the Court has on some occasions, issued decisions that are contrary to the interests of the Security Council's permanent members.¹⁵⁵ An example of such an occasion is when the United States and France withdrew their acceptance of the Court's jurisdiction after the Court granted judgments against them. Similarly, Russia and China who are also permanent members prefer that disputes should not be resolved through adjudication by third parties but through bilateral agreements.¹⁵⁶ Given this attitude of the permanent members towards the Court, it is understandable why they do not prefer referring disputes to the ICJ and the Court has been under-utilised.

That said, this study argues that the *status quo*, whereby the Security Council circumvents the ICJ and instead deals with legal disputes, is undesirable and detrimental to the UN Charter's objective of ensuring that disputes are resolved through peaceful means. First, not all disputes warrant a political solution. This is because some problems are purely legal and therefore would require an adjudicator to resolve the disputes. The essence of Article 36(3) is that there are some disputes that require judicial settlement. Regrettably, the general rule that legal disputes must be referred to the ICJ has been completely ignored. This study contends that the fault which has led to this can be traced back to the UN Charter itself. Firstly, the Charter confers too much unfettered power to the Security Council when it comes to matters of peace and security. This has allowed it to overlook other organs of the UN. Secondly, the Charter also appears to confer *quasi-judicial* powers on the Security Council, a situation that is undesirable for a political organ. Even if one accepts that the Security Council has the primary responsibility of dealing with peace and security matters and therefore should have such powers, it is suggested that the Charter fails to clearly draw the line on when the Security Council should defer to the Court. As

Arising from The Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem, International Court of Justice (ICJ), 19 July 2024.

¹⁵⁵ 'The Rule of Law: Can the Security Council make better use of the International Court of Justice?' (*Security Council Report* No 5. 20 December 2016) ICJ December 2016. [securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/research_report_5_rule_of_law_2016.pdf](https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/research_report_5_rule_of_law_2016.pdf) accessed 10 May 2024.

¹⁵⁶Ibid.

the Charter stands, it is possible for the Security Council to completely ignore the ICJ and decide judicial matters on its own. Therefore, if the ICJ is ever going to assume its position as an arbitrator of disputes that threaten international peace and security, there is a need to revise the Charter and clearly delimit the powers of the Security Council when it comes to legal disputes.

The second reason why the under-utilisation of the ICJ and the Security Council of legal disputes by the Security Council is undesirable is the fact that the Security Council's decisions are subjected to the whims of the interests of the permanent members. In other words, unlike the ICJ which is an independent institution, the Security Council permanent members have made it clear that how they approach any disputes brought before the Council is determined by their personal interests in the matter. If legal disputes are referred to the ICJ, they are going to be considered objectively, and the permanent members' ability to exert their will in peace and security matters will be lost. According to the present study, this situation is not ideal for the permanent members who have used their veto powers to protect and advance their interests. This assessment shows that if legal disputes were brought before the ICJ instead of being dealt with by the Security Council, perhaps the UN would have been more successful in resolving disputes that threaten international peace and security such as the Palestinian question. In light of this discussion, the study concludes that the ICJ has not effectively played its role in resolving disputes that threaten international peace and security due to the fact that these disputes have been diverted from the ICJ. It is also suggested that for this situation to be corrected, there is need to vest more powers to resolve legal disputes that threaten peace and security to the ICJ.

3.3 Compliance with ICJ Decisions

Another aspect of the ICJ's role in addressing peace and security challenges involves assessing the degree to which its decisions have been complied with or enforced. This assessment is crucial for several reasons. The first reason is that it enables the study to measure the impact of the Court's decisions in practice. In other words, for one to measure the effectiveness of the ICJ, it is necessary to examine what impact its decision has had in practice. The other reason is that the assessment enables one to determine whether the organs of the UN are supportive of the Court's meaningful role in addressing peace and security. Lastly, this assessment also enables one to measure whether the UN organs, particularly the Security Council, appreciate the role of the ICJ

in addressing peace and security challenges. Since the Advisory Opinions are not binding and unenforceable, the study dwells on the enforcement of provisional measures and the final judgments. The next section assesses states' compliance with ICJ decisions.

3.3.1 Assessment of States' Compliance with ICJ Decisions

Compliance is defined as an acceptance of the judgement and reasonable performance of any binding decision in good faith.¹⁵⁷ Worth noting is that compliance has to be distinguished with enforcement. According to Lando both concepts relate or apply in the post-decision phase of judicial proceedings.¹⁵⁸ Non-compliance with decisions of courts and tribunals put international peace and security at peril which can ultimately diminish international legal order.¹⁵⁹ Contrarily, compliance is significant in international law to ensure effective system and cooperation amongst states.¹⁶⁰ With reference to the realism theory, compliance is most effective based on coercion or enforcement through power and this power is derived from the 'capability to control actions of another'.¹⁶¹ Compliance from a constructive perspective is associated with reputation and social pressure from fellow members and it is associated with a status of a member as an incentive for compliance.¹⁶² The liberal approach on the other hand depends on the benefits derived from cooperation and interdependence between members as a result of compliance.¹⁶³

The politics of compliance viewed from the perspective of the UN Charter is derived from Article 94(1) which states that each member of the UN undertakes to comply with the decisions of the decisions of the International Court of Justice in any case to which it is a party. Therefore, one of the ways in which compliance can be achieved is through the states acting in good faith and complying with the decisions of the Court in disputes where they are parties. Article 94(2),

¹⁵⁷ Aloysius P. Llamzon 'Jurisdiction and Compliance in Recent Decisions of the International Court of Justice' (2008) 18 *The European Journal of International Law* 815, 822.

¹⁵⁸ Massimo Lando, 'Compliance with Provisional Measures Indicated by the International Court of Justice' (2017) 8 *Journal of International Dispute Settlement* 22, 24.
2017, pp. 22-55.

¹⁵⁹ Ibid.

¹⁶⁰ Raymond Scott Henson, 'Law and Order in The International Community: The Impact of International Law On Interstate Relations' (PhD Thesis,2005) Graduate School of Vanderbilt University 115.

¹⁶¹ Ibid 115

¹⁶² Ibid 115

¹⁶³ Ibid 116

which concerns enforcement, can only be invoked when a party involved in legal proceedings has not complied with Article 94(1). Compliance with the decisions of the ICJ is critical for the credibility and image of the Court. Most importantly, compliance with provisional measures in disputes threatening international peace and security is crucial, as these measures can help to stop a conflict or prevent it from escalating. Alexianu notes that compliance with the Court can assist in resolving or mitigating existing disputes as well as “shore up a state’s reputation on the world stage”.¹⁶⁴

Since the establishment of ICJ, it has issued either provisional orders or final decisions on various occasions but the rate of compliance is very low. With regard to compliance with provisional orders, it should be noted that there is no comprehensive study that has been undertaken to assess states’ compliance with the provisional orders since the establishment of the Court.¹⁶⁵ In fact, before the *LaGrand Case* decided by the ICJ in 2001, it was not clear whether provisional orders are binding on states, and therefore enforceable.¹⁶⁶ A survey of the available data shows that the percentage of compliance is relatively low. For instance, Alexianu who contacted a survey of compliance with the ICJ’s provisional orders indicates that between 2001 and 2003 the Court has issued 54 provisional measures in 15 cases brought before it.¹⁶⁷ Out of these cases, there was full compliance in 5 cases, partial compliance in 3 cases and non-compliance in 7 cases.¹⁶⁸ Given this evidence, it is clear that states do not comply with the ICJ’s provisional measures.

Furthermore, a case that demonstrates non-compliance with the provisional measures of the Court as well as the potential implications of such non-compliance is the recent case of *South Africa v Israel*.¹⁶⁹ The dispute arose when South Africa instituted proceedings against Israel alleging that Israel had violated its obligations under the Convention on the Prevention and

¹⁶⁴ Matei Alexianu ‘Provisional, but Not (Always) Pointless: Compliance with ICJ Provisional Measures’ (EJIL Talk, 3 November 2023) <https://www.ejiltalk.org/provisional-but-not-always-pointless-compliance-with-icj-provisional-measures/> accessed 3 April 2024.

¹⁶⁵ It is also outside the scope of this study to undertake such a survey.

¹⁶⁶ *LaGrand (Germany v United States)* (Judgement) [2001] ICJ Rep .p. 466.

¹⁶⁷ *Ibid.*

¹⁶⁸ *Ibid.*

¹⁶⁹ Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v Israel*), Order, 26 January 2024.

Punishment of the Crime of Genocide (Genocide Convention) during its armed operations in the Gaza Conflict.¹⁷⁰ The ICJ granted South Africa's request, ordering among other things, that Israel should cease to commit acts that amounted to violation of the Genocide Convention.¹⁷¹ It also ordered Israel to measure its power to prevent and punish direct and public incitement to commit genocide.¹⁷² Despite these provisional orders, Israel continued with its conduct with impunity, with the Israeli Prime Minister Benjamin Netanyahu describing the decision of the ICJ as outrageous.¹⁷³ Thus, Israel refused to comply with the ICJ's decision.¹⁷⁴ At the time of writing this research, the Israeli government has still not complied with the provisional measures.

The issue of non-compliance with provisional orders was also witnessed in the Case Concerning Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide where the President of Russia Vladimir Putin declared a special military operation towards the state of Ukraine on the 24 February 2022.¹⁷⁵ After the declaration, there was intensive military fighting in the territory of Ukraine by using force which caused displacement and widespread damage to the environment.¹⁷⁶ Ukraine instituted proceedings against Russia claiming that Russia had violated the Genocide Convention and it requested the Court to order provisional measures pending finalisation of the case which were to the effect that Russia suspend military operation immediately within the Ukraine territory in terms of Article 41 of the ICJ statute.¹⁷⁷ In response, Russia indicated that it would not participate in the proceedings because the Court did not have jurisdiction and the Court expressed regret of the non-appearance by Russia on the date of hearing for oral submissions.¹⁷⁸ Nonetheless, the Court proceeded to

¹⁷⁰Ibid.

¹⁷¹ Ibid.

¹⁷² Ibid.

¹⁷³'Israel's Netanyahu: Charge of genocide 'outrageous' (Reuters 26 January 2024) <https://www.reuters.com/world/middle-east/netanyahu-israel-committed-international-law-will-defend-itself-2024-01-26/> accessed 3 April 2024.

¹⁷⁴'Israel Not Complying with World Court Order in Genocide Case' *Human Rights Watch* 26 February 2024) <https://www.hrw.org/news/2024/02/26/israel-not-complying-world-court-order-genocide-case#:~:text=The%20Israeli%20government%20has%20failed%20to%20comply%20with,Court%20of%20Justice%2C%20in%20South%20Africa%E2%80%99s%20genocide%20case> accessed 4 April 2024.

¹⁷⁵Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (*Ukraine v Russian Federation*), Provisional Measures I.C.J. Reports 2022, p. 211.

¹⁷⁶Ibid.

¹⁷⁷Ibid 5.

¹⁷⁸Ibid 8.

discharge its function and pointed out that non-participation of Russia would not affect the validity of its decision. It therefore assumed jurisdiction in terms of Article 36(1) on the ground that both states were parties to the Genocide Convention.¹⁷⁹

In exercising the right to grant provisional measures, the Court had to determine whether the condition for urgency was met and also whether irreparable prejudice or harm can ‘occur at any moment’ before the final decision was made.¹⁸⁰ The Court observed and agreed with the submissions made that the launching of military measures by Russia has resulted in casualties to Ukraine military personnel, civilians, and bombing of numerous cities across Ukraine. The Court stressed that the loss of life constitutes irreparable harm as thousands of people have already been killed. With each passing day, the number of deaths continues to rise, leading to the ordering of the requested provisional measures. The court reaffirmed that these measures create binding legal obligations for the parties to whom they are directed.¹⁸¹ However, there has been no compliance with the provisional orders.

Besides these provisional orders, there have also been cases of non-compliance with the final decisions of the ICJ. It should be highlighted that there are some cases where the states comply with the decisions of the ICJ.¹⁸² The issue of non-compliance was firstly perceived in the case concerning Military and Paramilitary Active in and Against Nicaragua where the dispute emanated from the revolution which overthrew the elected government by the rebel group known as “Sandinistas.”¹⁸³ The new regime posed a threat to diplomatic and economic ties between Nicaragua and the United States.¹⁸⁴ To counter this, the US offered economic assistance to fight off the revolutionists and because of this, the relations between the two states turned hostile and antagonistic due to covert assistance to combat the Sandinista guerillas in 1981.¹⁸⁵ In 1984 there were mining activities carried at the Nicaragua harbour and the US was responsible for such,

¹⁷⁹Ibid para 27.

¹⁸⁰Ibid.

¹⁸¹Ibid.

¹⁸²For a detailed discussion on compliance with ICJ decisions, see C Schulte *Compliance with Decisions of the International Court of Justice* (Oxford University Press 2004).

¹⁸³ Ibid.

¹⁸⁴Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v United States of America*), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, p. 392.

¹⁸⁵Ibid.

then Nicaragua instituted proceedings before the ICJ requesting interim measures of protection to discontinue in the Central American region.¹⁸⁶

Three days before application by Nicaragua could be filed, the US filed a declaration stating that it would not accept jurisdiction of the Court on any of the disputes relating to events in Central America.¹⁸⁷ However, the ICJ rejected the argument of the US in that it did not have jurisdiction on the basis of the declaration US made.¹⁸⁸ The Court in its reasoning, elucidated that termination of jurisdiction should be made 6 months' notice prior to the termination. Therefore in this regard, the period had not lapsed hence the US was bound by the provisional measure the Court issued.¹⁸⁹ However, the US refused to comply with the provisional measures ordered by the Court.¹⁹⁰ The US further failed to comply with the final judgement of the Court.

The second instance of blatant compliance was demonstrated in the *Land, Island and Maritime Frontier Dispute Case* (EL Salvador/ Honduras; Nicaragua intervening), where a dispute arose between El Salvador and Honduras concerning 441 square kilometres of territory, resulting in hostilities.¹⁹¹ The conflict ended with a peace treaty in 1980 which apportioned the disputed area and ICJ was conferred with power to resolve the dispute through a special agreement.¹⁹² The final judgement was made in 1992 where the court ordered two thirds of the territory to be allocated to Honduras while the other portion was given to El Salvador.¹⁹³ The problem emerged during the implementation of the judgement where approximately 15,000 people were displaced after the apportioned land. To resolve this, El Salvador sought dual citizenship.¹⁹⁴ However, the Honduras Constitution prohibited dual nationality. In 1998 the border residents living at the disputed area were given liberty to select a nationality of their choice but before this could be

¹⁸⁶ Ibid 71

¹⁸⁷ Ibid 71

¹⁸⁸ Ibid 71

¹⁸⁹ Ibid 71

¹⁹⁰ Ibid 71

¹⁹¹ *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application to Intervene*, Judgment, I.C.J. Reports 1990 p. 92.

¹⁹² Ibid.

¹⁹³ Ibid 351.

¹⁹⁴ Aloysius P. Llamzon 'Jurisdiction and Compliance in Recent Decisions of the International Court of Justice' (2008) 18 *The European Journal of International Law* 815, 827.

achieved.¹⁹⁵ El Salvador then issued permits for logging on areas granted to Honduras.¹⁹⁶ The government of Honduras sent police and military personnel to reinforce the border boundaries which lead to forced evictions, kidnappings and serious casualties.¹⁹⁷

Moreover, in 2000 Honduras urged El Salvador to comply with the ICJ judgement and further invoked Article 94(2) of the Charter by urging the Security Council to make recommendations to induce El Salvador to comply.¹⁹⁸ El Salvador denied the accusation on the grounds that it had declared its intention to review the matter.¹⁹⁹ Thus, although Honduras and El Salvador accepted the decision of the ICJ as final and binding, there were repeated failures and accusations on demarcation agreement and border problems which led to a conclusion that El Salvador failed to act in good faith to comply with the judgement of the ICJ.²⁰⁰

One implication of non-compliance with the ICJ's decisions is that it undermines the court's image as an institution empowered to address disputes threatening international peace and security. As the Judge Oda of the ICJ warned, the disregard of the judgments or orders of the Court will impair the dignity of the Court and "raise doubt as to the judicial role to be played by the Court in the international community."²⁰¹ Indeed, the non-compliance in the *South Africa Genocide Case*, and other preceding cases such as *The Gambia v Myanmar*.²⁰² have undermined the dignity of the Court. Another implication is that the non-compliance has also portrayed the ICJ as an institution that is weak and whose contribution to preservation of international peace and security is not valued by states. Moreover, in the case of provisional orders, the non-compliance also raises questions regarding the efficacy of the entire process. In disputes such as the *South Africa Genocide Case* and *Ukraine v Russia* which concerns international peace and security, the failure of the provisional measures to halt the conflict makes mockery of the ICJ.

¹⁹⁵ Ibid 828.

¹⁹⁶ Ibid 828.

¹⁹⁷ Ibid 828.

¹⁹⁸ Ibid 829.

¹⁹⁹ Ibid 829.

²⁰⁰ Ibid 829. Other cases where there was non-compliance include *LaGrand (Germany v United States)* (Judgement) [2001] ICJ Rep.p. 466, *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)*, Judgment, 1. C. J. Reports 1997, p. 7

²⁰¹ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Judgment, I.C.J. Reports 2005, p. 168.

²⁰² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)*, Preliminary Objections, Judgment, I.C.J. Reports 2022, p. 477.

Given the above discussion, this study aimed to examine the extent to which the ICJ has succeeded in fulfilling its role of resolving disputes that threaten international peace and security. Therefore, the study remarks that contribution has been minimal due to non-compliance with its decision. The non-compliance has resulted in the escalating peace and security predicament. For instance, the conflict in Gaza has not only resulted in the security situation in Gaza becoming dire but also threatening to start a regional conflict as evidenced by the armed confrontations between Israel and Hezbollah as well as Iran.²⁰³ Similarly, since the Court issued provisional orders in the *Ukraine v Russia* Case, the conflict has been raging on for nearly 3 years with massive destruction and loss of lives. In light of these, it is evident that the ICJ is a distant away from fulfilling its mandate. While Llamzon predicted in 2007 that the ICJ “will remain a vital tool in resolving inter-state disputes and a force for world public order”,²⁰⁴ other scholars have tried to paint a positive picture regarding the rate of compliance with the Court’s decisions. The state of the Court in 2024 and the manner in which its attempts to resolve recent disputes have spectacularly failed, leaving one wondering whether there is going to be revival of the Court’s fortunes. This study concludes that the warning sounded by Judge Oda twenty-four years ago regarding the implications of non-compliance with the Court’s decisions have not become a reality.

3.4 Enforcement of ICJ Decisions

The discussion above painted a gloomy picture regarding states’ compliance with the decisions of the ICJ. Yet this situation cannot only be attributed to the ICJ as it does not have its own enforcement mechanisms and instead, relies on other organs.²⁰⁵ In fact, the ICJ has also acknowledged that it does not have enforcement powers and that the issues of enforcement are

²⁰³ ‘The Danger of Regional War in the Middle East’ (*International Crisis Group* 27 February 2024) <https://www.crisisgroup.org/middle-east-north-africa/east-mediterranean-mena/israelpalestine/danger-regional-war-middle-east> accessed 10 April 2024. The failure to comply with provisional orders has also resulted in the conflict escalating between Russia and Ukraine as well as the situation surrounding the deportation of Rohingyas deteriorating in Myanmar. Vibhu Mishra ‘UN rights council condemns Myanmar abuses, urges immediate action’ (UN News 10 July 2024) <https://news.un.org/en/story/2024/07/1151966> accessed 13 July 2024).

²⁰⁴ Aloysius P. Llamzon ‘Jurisdiction and Compliance in Recent Decisions of the International Court of Justice’ (2008) 18 *The European Journal of International Law* 815, 815.

²⁰⁵ Massimo Lando, ‘Compliance with Provisional Measures Indicated by the International Court of Justice’ (2017) 8 *Journal of International Dispute Settlement* 22, 35-37.

political issues that fall under the jurisdiction of other organs.²⁰⁶ While compliance concerns a party's acceptance of the judgement and willing to undertake performance in accordance with that decision, enforcement concerns the measures that are applied when a party has expressed lack of desire to undertake performance to act according to the terms of the decision.²⁰⁷ Thus, enforcement is the act that only comes in if there has been failure to comply. The UN Charter empowers organs of the UN to enforce state compliance with ICJ decisions. Therefore, the next step is to examine the mechanisms available to enforce the Court's decisions and whether, in the face of non-compliance which has been demonstrated above, the enforcement mechanisms have been utilised.

3.4.1 The Enforcement Mechanisms of the International Court of Justice Decisions

The bulwark of ICJ enforcement mechanisms is contained in Article 94(2) of the UN Charter which provides that any part that fails to perform their obligations under a "judgement" rendered by the Court, "the other party may have recourse to the Security Council..."²⁰⁸ This seemingly straightforward provision has however created confusion and has been subject of intense academic debate. To begin with, it should be pointed out that this provision applies to all judgments or final decisions rendered by the Court. The controversial question however is whether the provisional orders are encompassed in the phrases 'decision' or 'judgement'?²⁰⁹ Llamzon argues that Article 94(2) only applies in relation to judgments and therefore excludes provisional orders.²¹⁰ In support, Lando argues that failure to comply with provisional measures by a party to a dispute, does not permit recourse to the Security Council under Article 94(2).²¹¹

²⁰⁶ Ibid. See also *Asylum (Colombia/Peru) (Judgement)* [1950] ICJ Rep 266.

²⁰⁷ Ibid.

²⁰⁸ Article 94(2).

²⁰⁹ See Attila Tanzi, 'Problems of Enforcement of Decisions of the International Court of Justice and the Law of the United Nations' (1995) 6 *Eur. J. Int'l L* 539, 539.

²¹⁰ Aloysius P. Llamzon 'Jurisdiction and Compliance in Recent Decisions of the International Court of Justice' (2008) 18 *The European Journal of International Law* 815, 822.

²¹¹ Massimo Lando, 'Compliance with Provisional Measures Indicated by the International Court of Justice' (2017) 8 *Journal of International Dispute Settlement* 22, 31.

Thus, the author also argues that there is no mechanism to enforce provisional measures.²¹² It is necessary to interrogate this argument in detail.

The question of enforcement of provision measures was raised in the *Anglo-Iranian Oil Co. Case* of 1951 and the *Bosnia Case* of 1993. In the *Anglo-Iranian Oil Co.*, agreements between the Government of Iran and the Anglo-Iranian Oil Company were concluded in 1933 under which the latter would explore oil in Iran.²¹³ However, in 1951, Iran promulgated laws that nationalised the oil industry. The United Kingdom took the dispute to the ICJ on behalf of the Anglo-Iranian Company. As a way of protecting the interests of the company, the United Kingdom applied for provisional measures that were granted by the Court.²¹⁴ Soon After obtaining the provisional orders, the United Kingdom approached the Security Council with a request for the enforcement of the provisional orders.

The UK's argument before the Security Council was that the Security Council had the power under Article 94(2) to enforce provisional measures.²¹⁵ It was further argued that provisional measures did have the same binding effect on the parties as the final judgement and that if their provisional orders are not binding, this would frustrate the effectiveness of the final judgement.²¹⁶ On the other hand, Iran submitted to the Security Council that Article 94(2) did not contemplate the enforcement of provisional measures since these are neither a decision nor a judgement.²¹⁷ The Security Council did not decide on the matter, but instead adjourned the debate until the Court had handed down its decision on jurisdiction.

²¹² The author argues that the Security Council can only enforce provisional measures if they cause a threat to international peace and security. See Massimo Lando 'Compliance with Provisional Measures Indicated by the International Court of Justice' (2017) 8 *Journal of International Dispute Settlement* 22, 31.

²¹³ *Anglo-Iranian Oil Co. Case (United Kingdom v Iran)* International Court of Justice (ICJ), Judgment, 1952: I.C.J. Reports 1952, p. 93.

²¹⁴ *Anglo-Iranian Oil Co. Case Request for The Indication of Interim Measures of Protection (United Kingdom v Iran)*, 1951, I. C. J. Reports 1951, p. 89.

²¹⁵ Security Council official records, 6th year: 559th meeting, 1 October 1951 paras. 19,20 and 93-99.

²¹⁶ Attila Tanzi, 'Problems of Enforcement of Decisions of the International Court of Justice and the Law of the United Nations' (1995) 6 *Eur. J. Int'l L* 539, 564.

²¹⁷ *Ibid.*

In the *Bosnia Case*,²¹⁸ Republic of Bosnia and Herzegovina instituted the Federal Republic of Yugoslavia on allegations that the latter violating the Convention on the Prevention and Punishment of the Crime of Genocide. Thus, jurisdiction was sought on the basis of The Article IX of the Genocide Convention which confers jurisdiction on the ICJ, the Bosnia and Herzegovina was then granted provisional measures.²¹⁹ Bosnia and Herzegovina approached the Security Council with a request for the enforcement of provisional measures. In its request, the Bosnia and Herzegovina to the worsening of acts of ‘genocide,’ was perpetrated by the Federal Republic of Yugoslavia armed forces in Srebrenica.²²⁰ In addition, Bosnia and Herzegovina indicated that the continued acts of Yugoslavia were a violation of the provisional orders issued by the ICJ. However, the representative of Bosnia and Herzegovina went on to seek the Security Council to act pursuant to Chapter VII of the Charter to stop the Yugoslavia’s actions.²²¹ The Security Council then adopted Resolution 819, condemning the actions of Yugoslavia.²²² While the Resolution noted the ICJ’s decision and the provisional measures it ordered, it did not pronounce whether such measures are enforceable under Article 94(2).²²³

Based on the preceding discussion, it is clear that the answer to the question whether provisional measures are enforceable from the Security Council’s perspective remains elusive. This study points out that the argument that the phrases ‘decision’ and ‘judgement’ do not encompass provisional orders, is untenable. This argument takes into account the purposive interpretation of Article 94(2) as well as the dictates of Article 31(1) of the Vienna Convention which requires treaties to be interpreted in good faith.²²⁴ Provisional orders are an integral part of the proceedings before the ICJ. To be more precise, they seek to preserve the right of parties while awaiting the final determination of disputes. Therefore, they are equivalent to interim orders at domestic level. As this study has already pointed out, in disputes that threaten peace and security

²¹⁸ Application of the Convention on the Prevention and Punishment of the Crime of Genocide, (*Bosnia and Herzegovina v Yugoslavia*), Provisional Measures, Order of 13 September 1993, I. C.J. Reports 1993, p. 325.

²¹⁹ Ibid.

²²⁰ Letter dated 16 April 1993 from the Permanent Representative of Bosnia and Herzegovina to the United Nations addressed to the President of the Security Council S/25616.

²²¹ Attila Tanzi, ‘Problems of Enforcement of Decisions of the International Court of Justice and the Law of the United Nations’ (1995) 6 *Eur. J. Int’l L* 539, 556.

²²² S/RES/819 (1993)

²²³ Ibid.

²²⁴ United Nations, Vienna Convention on the Law of Treaties, United Nations, Treaty Series, vol. 1155, p. 331, 23 May 1969.

provisional measures have the potential to either prevent the conflict entirely or prevent its escalation. Viewed in light of the ICJ as an institution that plays a role in preserving peace and security, it is unthinkable that the drafters of the UN Charter would have granted the ICJ powers to make decisions that are unenforceable.²²⁵ Furthermore, non-enforceability of provisional orders would mean that a party to a dispute may suffer irreparable harm which will render the final judgement futile.²²⁶ Therefore, the only conclusion that can be reached is that provisional orders are enforceable.

Another enforcement mechanism is contained in Article 41(1) of the ICJ Statute which provides that the ICJ has the power to indicate provisional measures to preserve the rights of either party.²²⁷ Article 41(2) states that the Security Council and the parties shall be notified of these measures pending final decision.²²⁸ On the face of it, Article 41 one does not outline any provisional measures. Instead, it merely outlines procedures that must be followed when there is a need to issue provisional measures. This study believes that by requiring provisional measures to be communicated to the Security Council, the drafters of the Statute intended the Security Council to be aware of the existence of such provisional measures for the purposes of enforcement pursuant to Article 94(2) if requested by a party to the dispute. A similar argument was made by the United Kingdom representative in the *Anglo-Iranian Oil Co Case*.²²⁹ However, Iran argued that the requirement to notify the Security Council of provision orders is merely intended to promote co-operation between UN organs.²³⁰

Lando agrees with Iran's argument that Article 41(2) is intended to ensure cooperation between the Security Council and the ICJ. The author further contends that if Article 41(2) is construed as granting the Security Council the power to enforce provisional measures, it would mean that

²²⁵ Attila Tanzi, 'Problems of Enforcement of Decisions of the International Court of Justice and the Law of the United Nations' (1995) 6 *Eur. J. Int'l L* 539, 568.

²²⁶ Gerald Fitzmaurice, Gerald, 'The Law and Procedure of the International Court of Justice' 1951-4: Questions of Jurisdiction, Competence and Procedure', (1958) 34 *Brit. YB Int'l L* 122.

²²⁷ Article 41(1) of the ICJ Statute.

²²⁸ Article 41(2).

²²⁹ UN Doc S/PV.559 (1 October 1951) [93]- [94].

²³⁰ UN Doc S/PV.560 (15 October 1951) [62].

the Security Council is “under an obligation to intervene”.²³¹ The author reiterates that since Article 41(2) is contained in the ICJ Statute, not the UN Charter, it neither binds nor regulates functions of the Security Council.²³² These arguments are however not persuasive. First, there is no reason why the provision should only be construed as only intending to fulfil the obligation for the ICJ to cooperate with the Security Council. As already stipulated, it is also possible that the notification is intended to ensure that the Security Council becomes aware of the decision for the purposes of enforcement in the event of non-cooperation. Regarding the argument that construing Article 41(2) would mean that the Security Council is obliged to act, this study counters that there is nothing in Article 41(2) that seems to force the Security Council to act. The provision does not, in any way, take away the Security Council’s discretion as provided for under Article 94(2). It is therefore concluded that Article 41(2) should be understood as a procedure that complements article 94(2).

Lastly, what is the role of the General Assembly in the enforcement of ICJ decisions? The UN Charter does not directly confer on the General Assembly the power to enforce ICJ decisions.²³³ However, the General Assembly’s powers to enforce decisions of the ICJ are acquired indirectly. For instance, Article 10 of the Charter grants it the power to discuss questions or matters within the scope of the Charter or relating to the powers and functions of any organs provided for in the present Charter, and can make recommendations to the Member of the United Nations or the Security Council.²³⁴ Clearly, this provision makes it permissible for the General Assembly to discuss decisions of the ICJ, including non-compliance by a party to a dispute decided by the ICJ. However, as Lando correctly points out, the actions of the General Assembly must be coordinated with the Security Council.²³⁵ This is because Article 12 of the Charter prohibits the General Assembly from making recommendations on a matter that the Security Council is seized

²³¹ Massimo Lando, ‘Compliance with Provisional Measures Indicated by the International Court of Justice’ (2017) 8 *Journal of International Dispute Settlement* 22, 32.

²³² Massimo Lando, ‘Compliance with Provisional Measures Indicated by the International Court of Justice’ (2017) 8 *Journal of International Dispute Settlement* 22, 32.

²³³ Attila Tanzi, ‘Problems of Enforcement of Decisions of the International Court of Justice and the Law of the United Nations’ (1995) 6 *Eur. J. Int’l L* 539, 540.

²³⁴ Article 10. Further, Article 14 grants the General Assembly the power to recommend measures for the peaceful adjustment of any situation which may impair the welfare or friendly relations among nations.

²³⁵ Massimo Lando, ‘Compliance with Provisional Measures Indicated by the International Court of Justice’ (2017) 8 *Journal of International Dispute Settlement* 22, 33.

with. Therefore, it can be concluded that the organ with the primary responsibility of enforcing decisions of the ICJ is the Security Council while the Security Council's role is peripheral.²³⁶

3.4.2 Assessment of the Security Council's Enforcement of ICJ Decisions

Given the enforcement mechanisms discussed previously and the non-compliance highlighted in this study, the question to consider is: to what extent has there been enforcement against non-compliance with the ICJ's decisions? The brief answer to the question is that the enforcement has been non-existent. Beginning with the provisional measures, there is no instance that the Security Council or the General Assembly has enforced provisional measures despite that parties always openly disregard these provisional measures. The closest that the Security Council came to enforce provisional orders is in the *Bosnia Case* discussed in section 3.4.1 above. Despite that, the Security Council and the General Assembly have stood by, while states have openly defied provisional orders.

Furthermore, the Security Council has also failed to enforce final judgements of the ICJ. In all the judgments that have been made by the ICJ where there has been no compliance, the Security Council has failed to enforce even a single judgement. A famous example of a case where the Security Council failed to enforce the decision of the ICJ is the *Nicaragua Case*. After the ICJ found that the US had violated its obligation not to use force against another state by supporting the *contras* in Nicaragua, the US refused to comply with the Court's decision. Nicaragua approached the Security Council with a request for the enforcement of the judgement under Article 94(2) of the Charter.²³⁷ However, a draft resolution that was submitted to the Security Council was vetoed by the United States.²³⁸ It is also worth mentioning that in vetoing the draft

²³⁶ Other possible enforcement mechanisms which fall outside the scope of this study include unilateral decisions of states, and domestic courts. See Massimo Lando, 'Compliance with Provisional Measures Indicated by the International Court of Justice' (2017) 8 *Journal of International Dispute Settlement* 22.

²³⁷ Marcela Silva Bezerra, 'Enforcement of Judgements of the International Court of Justice: The Roles of the Court and the Security Council' https://www.academia.edu/34894273/Enforcement_of_Judgements_of_the_International_Court_of_Justice_The_Roles_of_the_Court_and_the_Security_Council accessed 23 May 2023.

²³⁸ 'The Rule of Law: Can the Security Council make better use of the International Court of Justice?' (*Security Council Report* No 5. 20 December 2016) ICJ December 2016. [securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/research_report_5_rule_of_law_2016.pdf](https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/research_report_5_rule_of_law_2016.pdf) accessed 10 May 2024.

resolution, the United States objected to the Jurisdiction of the ICJ over the matter. Therefore, in this matter, the Security Council failed to fulfil its role under Article 94(2).

From this discussion, it is evident that the enforcement under Article 94(2) has not been utilised. Several reasons can be advanced to explain this. First, parties to legal disputes who are affected by non-compliance do not approach the Security Council to report non-compliance and request it to exercise its discretion to enforce the decisions.²³⁹ Llamzon argues that this reluctance to report non-compliance with the decisions of the ICJ by states can be attributed to the fact that Article 94(2) presents challenges for states that want to seek enforcement of decisions.²⁴⁰ One of the challenges noted by Llamzon is the fact that the decision to enforce the Court's decision is discretionary and this creates the possibility of arbitrariness thus, lowering the chances that the Security Council can enforce compliance.²⁴¹ This study agrees with this view and further suggests that the Security Council's decisions are influenced by the interests of the permanent members rather than being made objectively, causing states to hesitate in seeking enforcement under Article 94(2). In addition, in the few cases where it was requested to enforce decisions, the Security Council demonstrated its reluctance to act. Thus, it can be expected that states would not want to engage in a futile exercise of engaging the Security Council when they can already anticipate that their requests will not receive positive responses. Therefore, this study asserts that lack of referral by states can be interpreted as a vote of no confidence in the process contemplated in Article 94(2).

Another reason for the lack of enforcement against non-compliance, as reflected in the *Nicaragua Case*, is the use of the veto by the Security Council. Security Council's permanent members can be party to disputes that are brought to the ICJ. When a permanent member fails to comply with the decision of the ICJ, the matter has to be referred to the Security Council where the same permanent member holds a veto. In the *Nicaragua case*, the Security Council stated that when determining a request under Article 94(2), the permanent members can use their

²³⁹ Aloysius P. Llamzon 'Jurisdiction and Compliance in Recent Decisions of the International Court of Justice' (2008) 18 *The European Journal of International Law* 815, 847. Attila Tanzi, 'Problems of Enforcement of Decisions of the International Court of Justice and the Law of the United Nations' (1995) 6 *Eur. J. Int'l L* 539, 539.

²⁴⁰ *Ibid.*

²⁴¹ *Ibid.*

veto.²⁴² The implication here is that a permanent member of the Security Council which has failed to comply with the ICJ decision will be requested to be an adjudicator in its own case. What is even more problematic is that a permanent member has the power to individually block an inquiry into its own compliance. According to this study, this situation is simply flawed. It cannot be genuinely expected that a request under Article 94(2) can ever receive approval by the Security Council in a matter involving a permanent member or in which the interests of the Security Council are implicated. Therefore, the study maintains that there is an inherent flaw in the Charter.

The last reason for the Security Council's failure to enforce compliance with the ICJ decisions can also be attributed to a lack of faith in the ICJ. This study has already demonstrated that the Security Council has failed to refer legal disputes that threaten international peace and security to the ICJ. The study suggests that there cannot be another explanation except that there is lack of faith on the part of the Security Council in the ICJ system. This attitude may be a result of the unwillingness of the Security Council to share its mandate with other organs. In spite of the reasons behind this attitude, it has undermined the dignity of the ICJ by fostering a perception of the Court as ineffectual and lacking authority. This in turn, connotes that the ICJ has failed to play its part in resolving legal disputes that threaten international peace and security.

In addition, the study contends that the General Assembly has a role in enforcing compliance with ICJ decisions, albeit a weaker one. For instance, the General Assembly had an opportunity to exercise its powers in the *Nicaragua Case*. After the Security Council had failed to enforce the decision, Nicaragua submitted a draft resolution to the ICJ.²⁴³ The Draft Resolution was put to vote and was adopted with 94 states voting in favour, 4 states voting against and 47 abstaining.²⁴⁴ However, since the decisions of the General Assembly are not legally binding, this was a symbolic exercise as it has no practical effect. Consequently, the General Assembly has not yet enforced non-compliance with the ICJ decisions and this study doubts whether this will ever happen, given the limited powers of the Assembly.

²⁴²Attila Tanzi, 'Problems of Enforcement of Decisions of the International Court of Justice and the Law of the United Nations' (1995) 6 *Eur. J. Int'l L* 539, 539.

²⁴³Draft Resolution A/41/L.22.

²⁴⁴UN Doc. A/41/PV.53, at 92.

3.5 Conclusion

This chapter sought to assess the extent to which the ICJ has succeeded in fulfilling its mandate of resolving legal disputes that threaten international peace and security. From this discussion, it can be concluded that the ICJ has not performed its functions as contemplated in the Charter. Instead, the ICJ has been a bystander when it comes to disputes that threaten international peace and security. This is because its mechanisms have not been used, and when they were, there were no effective enforcement mechanisms to ensure compliance with the orders and decisions of the Court. In 2007, Llamzon argued that the pessimism on the future of the ICJ was unwarranted.²⁴⁵ However, this study suggests that the role of the ICJ and its future need to be seriously scrutinised. The failure to enforce the ICJ provisional measures in the *Myanmar Case*, the *Ukraine Case* and the *Gaza Case* as well as the resultant cost of the conflicts are factors that warrants an inquiry into the relevance of the ICJ and how the dignity and legitimacy of the Court can be restored. This study makes some recommendations to this effect in the subsequent chapter.

²⁴⁵Aloysius P. Llamzon 'Jurisdiction and Compliance in Recent Decisions of the International Court of Justice' (2008) 18 *The European Journal of International Law* 815, 852.

CHAPTER 4: CONCLUSION

4.1 Introduction

The last chapter assessed the effectiveness of the International Court of Justice (ICJ) in addressing legal disputes that threaten international peace and security. The chapter began by examining the referrals of legal disputes that threaten international peace and security. It was pointed out that although states have a track record of referring disputes to the ICJ, the Security Council has been reluctant to refer disputes to the ICJ. Thus, the Court has not been effectively used in resolving legal disputes. The chapter also examined the extent to which there has been compliance with ICJ decisions by states. It was revealed that while there has been compliance by states, non-compliance with Court decisions is widespread and this undermines the dignity of the Court. Moreover, the chapter assessed the enforcement of ICJ decisions by the Security Council. It was then indicated that there is virtually no enforcement of the ICJ, a situation which has left the legitimacy and effectiveness of the ICJ in jeopardy. Based on these findings, this chapter concludes the discussions. With that said, this chapter is divided into five sections: Section 4.1 which is the current section introduces the chapter, while Section 4.2 recaps the purpose of the study. Section 4.3 discusses the findings, followed by Section 4.4, which offers recommendations in light of the challenges uncovered. Finally, Section 4.5 concludes the study with some concluding remarks.

4.2 Purpose of the Study

This study sought to assess the effectiveness of the ICJ in fulfilling its mandate of resolving disputes that threaten international peace and security. The study recalled that the ICJ is one of the principal organs of the United Nations. The study also took note of the fact that the ICJ forum is one of the mechanisms that can be relied on to resolve disputes peacefully.²⁴⁶ The importance of the ICJ is emphasised in Article 37 of the UN Charter which provides that as a general rule, legal disputes should be referred to the ICJ which is the principal judicial organ of the United Nations. This means that the ICJ is a critical organ of the United Nations system when it comes to pacific settlement of disputes, which is one of the most important mandates of the United Nations. Therefore, the major question that the study sought to investigate is, to what

²⁴⁶ See Chapter VI of the United Nations Charter.

extent has the ICJ succeeded in fulfilling its mandate? In answering this question, the study was cognizant that in fulfilling its mandate, the ICJ works hand in hand with the Security Council which has the primary responsibility of maintaining international peace and security. In fact, the Security Council has a role to play in referring disputes to the ICJ as well as enforcing compliance with the decision of the Court. This implies that the success of the ICJ is dependent on the assistance it gets from the Security Council. Therefore, the study also sought to examine the extent to which the Security Council cooperated with the ICJ to ensure the success of the Court.

4.3 Research Findings

Chapter One introduced the topic, outlining a background to the study whereby the origins and history of the ICJ were revisited. It was pointed out that the ICJ, just like its principal body the United Nations, was established with the purpose of ensuring that the international community will address international disputes peacefully and avoid a resort to use of force. As a result, the ICJ, just like its predecessor the PCIJ, is tasked with resolving disputes between states. The key question for consideration however was whether the ICJ has succeeded in fulfilling its mandate. This is the question that the study attempted to answer. The chapter also laid out the research questions and objectives as well as the methodology to be used in the study.

Chapter Two provided a detailed history behind the establishment of the ICJ. It was revealed that the ICJ is a product of a series of attempts by the international community to establish a judicial body that would assist in resolving disputes between states.²⁴⁷ The main objective of establishing such an institution was to ensure that states would not resort to the use of force in order to resolve disputes.²⁴⁸ It was also divulged that the ICJ was built on the ashes of the PICJ which, unfortunately did not succeed in preventing states' resort to the use of force as a way of resolving their disputes.²⁴⁹ The chapter then discussed the structure, composition and jurisdiction of the ICJ. In this regard, the chapter discussed the two important cases that the ICJ can exercise jurisdiction over, namely contentious cases and advisory opinions.²⁵⁰

²⁴⁷ See section 2.2.

²⁴⁸ Ibid.

²⁴⁹ Ibid.

²⁵⁰ See section 2.5.

The chapter also discussed the role of the ICJ in the vis-à-vis in the peaceful settlement of disputes.²⁵¹ It was disclosed that the ICJ has a crucial role in the resolution of legal disputes between states. Most importantly, the UN Charter establishes a general rule that legal disputes should be referred to the ICJ. As such, the ICJ is an important organ of the UN as far as its objective of resolving disputes peacefully is concerned. Given the fact that the UN Charter entrusts the Security Council with the primary responsibility of ensuring international peace and security, it became imperative to determine its relationship with the ICJ.²⁵² Moreover, it was revealed that the ICJ plays a supportive role when it comes to resolving disputes that threaten international peace and security. The chapter also addressed the question concerning the allocation of responsibilities between the two institutions. In particular, the chapter examined whether the Security Council has *quasi-judicial* powers. Therefore, the study concluded that while the Charter is not clear on this question, the Security Council has already exercised these judicial powers in practice.²⁵³ Another way in which the Charter establishes the relationship between the two institutions is that the Security Council has the power to seek advisory opinions from the ICJ. In addition, the Security Council can also recommend states parties to refer disputes to the ICJ.²⁵⁴ Lastly, the Security Council has the responsibility to enforce decisions of the ICJ. On the basis of the findings, the study realised that the ICJ's relationship with the Security Council is critical to the fulfilment of its mandate.

Chapter Three sought to conduct an assessment of the effectiveness of the ICJ in fulfilling its mandate. In doing so, the chapter focused on two aspects, namely the adjudication of disputes that threaten international peace and security as well as the enforcement of its decisions. Regarding the referral of disputes to the Court, the chapter argued that a significant number of legal disputes threatening international peace and security have been brought before the ICJ by state parties, hence demonstrating their confidence in the Court.²⁵⁵ However, the chapter noted that the Security Council has rarely sought advisory opinions from the ICJ. In addition, the Security Council has not been recommending states to refer legal disputes that threaten

²⁵¹ Section 2.6.

²⁵² See section 2.6.2.

²⁵³ Ibid.

²⁵⁴ Ibid.

²⁵⁵ See section 3.2.

international peace and security to the ICJ despite the existence of many such cases. Instead, the Security Council has been dealing with these disputes on its own despite the UN Charter establishing a general rule that legal disputes must be referred to the ICJ.²⁵⁶ Therefore, the Security Council is not willing to defer to the ICJ when it comes to resolving disputes that threaten international peace and security. The chapter pointed out that the reluctance of the Security Council to refer disputes to the ICJ can be attributed to the fact that the Security Council does not want to share responsibilities when it comes to dealing with peace and security matters.²⁵⁷ It was also indicated that the neglect of the ICJ by the Security Council is undesirable.

As part of assessing the effectiveness of the ICJ, Chapter Three also assessed the compliance and enforcement of the ICJ decisions. With regard to compliance with the ICJ decisions, it was noted that there has been some compliance with the decisions of the ICJ.²⁵⁸ However, there are also a series of incidents of non-compliance with the decisions of the Court. This non-compliance has also come from the permanent members of the Security Council and it was put forth that the overall effect of this is undermining the dignity and legitimacy of the Court. The chapter also assessed the enforcement of ICJ decisions.²⁵⁹ Contrary to a popular view in the academic, the chapter suggested that a proper interpretation of the Charter, provisional measures should be enforceable.²⁶⁰ This is particularly the case if one considers their importance when it comes to measures in relation to disputes that threaten peace and security. The chapter noted that the primary role of enforcing the decisions of the ICJ lies with the Security Council. Although the ICJ can play some oversight over the ICJ decisions, including hearing cases of non-compliance, its resolutions condemning non-enforcement of decisions are not binding. The chapter found that there has been virtually no enforcement of the ICJ decisions, whether provisional or final decisions.²⁶¹ This means that the ICJ's relationship has hindered, instead of complementing the ICJ's work. As a consequence, this has undermined the effectiveness of the ICJ, leading to the conclusion that the ICJ's contribution to peaceful resolution of disputes is negligible. Furthermore, the chapter found that the lack of enforcement of ICJ's decisions has seriously

²⁵⁶ Ibid.

²⁵⁷Section 3.2.1.

²⁵⁸Section 3.3.

²⁵⁹Section 3.3.3.1.

²⁶⁰Ibid.

²⁶¹Section 3.3.4.

undermined the legitimacy and credibility of the Court. With reference to the findings, the study could make recommendations as outlined below.

4.4 Recommendations

4.4.1 Clarification of the relationship between the ICJ and the Security Council

This study argued that one of the challenges that has affected the ICJ's ability to deal with legal disputes that threaten international peace and security is that disputes are often diverted to the Security Council which then exercise *quasi-judicial* powers. This outcome has been blamed on the UN Charter's failure to properly demarcate the role of the two institutions as well as lack of clarity on the extent to which the Security Council can exercise judicial powers. This study therefore recommends that there is a need to review the UN Charter with the view to clarify the extent to which the Security Council can exercise judicial powers. Additionally, the study recommends that the Security Council should not be allowed the power to exercise judicial powers, and should defer all legal disputes to the ICJ.

4.4.2 The ICJ should be granted the primary role of dealing with legal disputes

This study pointed out that the UN Charter confers the primary responsibility of dealing with peace and security matters on the Security Council. This wholesale conferral of powers on the Security Council has resulted in the Council assuming a leading role even in disputes that are poorly legal and require adjudication. The Security Council is a political institution while the ICJ is a judicial institution. It is absurd that a political institution can have precedence over a judicial institution when it comes to resolving legal disputes. The recommendation is that the ICJ should be given the primary mandate of resolving legal disputes. In other words, there is a need to reinforce Article 36(3) to make it mandatory that all legal disputes are referred to the ICJ. This will enhance the role of the ICJ in resolving legal disputes that threaten international peace and security. This will also ensure that legal disputes are resolved legally, not subjected to the political desires of the Security Council.

4.4.3 Clarifying the Application of Article 94(2) to Provisional Orders

The study highlighted and disputed the common notion that provisional orders are not judgments or decisions and therefore are not enforceable. However, given their significance when it comes to legal disputes that threaten international peace and security as well the consequences of non-compliance and non-enforcement, this study argued that provisional orders should be enforceable. This therefore requires revision of Article 94(2) to ensure that it allows states to report non-compliance with provisional orders to the Security Council.

4.4.4 The Role of the *Veto* in the Enforcement of Decisions

One of the obstacles to the enforcement of ICJ decisions is the fact that permanent members have *veto* powers which enables them to block any attempt to enforce decisions of the ICJ. It is recommended that the voting procedures when dealing with enforcement of ICJ decisions should be revised to ensure that permanent members of the Security Council do not use their *veto* to block enforcement.

4.4.5 Reforming of the United Nations System

The *Nicaragua Case* demonstrated that the General Assembly was willing to enforce the ICJ decision. In addition, the Palestinian Statehood vote showed that the General Assembly was willing to objectively assess and recognise Palestine as a state in line with the two state solution which the Security Council purports to support.²⁶² Despite these sober decisions by the General Assembly, they have little impact because the UN Charter effectively renders the Assembly powerless, concentrating all authority in the Security Council. The powers vested in the Security Council have been used, not in pursuit of the UN objectives but the individual interests of the Security Council permanent members. One of the ways in which the ICJ and indeed any organ of the UN can become effective is when the United Nations system is reformed and the powers of the Security Council are watered down. Particularly, the General Assembly should be given the power to refer contentious legal disputes to the ICJ as well as to take enforcement measures if the Security Council is unable to do so. This means that the ICJ will be able to handle more legal disputes that threaten international peace and security. In addition, this will enable the ICJ's decisions to be enforced.

²⁶² Resolution 2720

4.5 Concluding Remarks

The United Nations was established with a noble idea of ensuring that disputes between states are resolved peacefully, instead of resorting to war. The UN system is equipped with the necessary organs that are intended to assist in ensuring the realisation of its mandate. One such institution is the ICJ. However, the potential of these institutions have not been realised and this can be attributed to the fact that there are obstacles inherent in the UN system that were intended to make these organs fail. Yet these obstacles are not insurmountable. All they need is commitment from the international community to ensure that the UN can serve the interests of the international community, not the interests of a few states. The establishment of the ICJ was a noble idea. However, its recent ineffectiveness in addressing issues in Ukraine, Gaza, and Myanmar raises concerns about the efficacy of the international legal system. Unless urgent reforms are taken, the ICJ is on the verge of suffering the same fate as its predecessors.

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