AN ANALYSIS OF THE INTERNATIONAL COURT OF JUSTICE IN CONTEMPORARY INTERNATIONAL RELATIONS

BY

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DEDICATION

Dedicated to Tendai , Tatenda and MARIA FATIMA

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ACRONYMNS AND ABBREVIATIONS

DRC	Democratic Republic of Congo
ECHR	European Court of Human Rights
EU	European Union
ICC	International Criminal Court
ICJ	International Court of Justice
IGO	International Governmental Organisations
LCNS	League of Nations
MNCS	Multi National Corporations
NATO	North Atlantic Treaty Organisation
NGO	Non Governmental Organisations
PICJ	Permanent International Court of Justice
SC	Security Council
UN	United Nations
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
US	United States
USA	United States of America
WTO	World Trade Organisation

ABSTRACT

The study investigates the challenges facing the ICJ in contemporary international relations. It can be noted that the effectiveness of the ICJ is critical for international relations in 21st century. The nature of the environment in which the ICJ operates is one that could be described as least advantageous and at times hostile. The major objective of the study sort to examine and establish whether the ICJ is not an effective or relevant court to adjudicate disputes in contemporary international relations, explore the effect of the contemporary international relations on the jurisdiction of the ICJ, investigate the effectiveness of the ICJ in contemporary international relations and to establish the challenges and problems faced by the ICJ in contemporary in international relations as well as to make recommendations for further research. This study shows that the ICJ is not effective or relevant in resolving contemporary international disputes considering complexities posed by non state actors as they are also involved in International Legal Disputes with states. The research is based on qualitative research methods using non probability sampling method such as convenience sampling, quota and purposive sampling which allows selection of decided cases through the internet. Documentary research is used, in particular online books, decided cases and academic journals. The research finding shows that to renew the influence and effectiveness of the court, some critical reforms must address the process of elections of judges of ICJ, the issue of court's non compulsory jurisdiction and enforcement of ICJ judgments. The ICJ is not changing at the pace of international relations. The ICJ should be able to adjudicate disputes arising in the 21st century, like environmental protection, terrorism as these are global problems deserving attention from global court. This research argues that the ICJ is not effective to tackle contemporary international relations disputes if jurisdiction, judges' bias and structure of the ICJ are not remedied while also offering recommendations for reform for a more efficient ICJ in contemporary international relations.

CHAPTER ONE

1.1 BACKGROUND TO THE STUDY

1.1.1 A Brief History of the ICJ

The International Court of Justice (ICJ) is a permanent international court located in the Hague, Netherlands, and it is the principal judicial organ of the United Nations (UN). According to Goldstein (1996:12) "The ICJ was established in 1945 as the successor to the Permanent International Court of Justice (PICJ), which was created in 1920 under the supervision of the League of Nations (the precursor to the United Nations)". The PICJ ceased to function during World War II and was officially dissolved in 1946 and the UN Charter created the ICJ expecting a significant number of international disputes to be brought before the court for adjudication. The ICJ is based on the statute of the International Court of Justice All members of the United Nations charter are parties to the statute, so virtually the 192 member states of UN has been, from the ICJ's founding, subject to the jurisdiction of the ICJ. The court is not being utilized fully as the court has not averaged more than two judgments in a year and the court is used less. The court has no recent judgments except those in the early 1980s like the Continental shelf.

The ICJ consists of 15 judges, each from a different state. The judges are elected by the UN General Assembly and the UN Security Council and must receive an absolute majority from both organizations in order for them to take office. Judges voting pattern can be influenced in their decisions by their national interest. If a judge votes against the interest of their states, they can be withdrawn after the end of their term and lose out on remuneration Therefore judges can vote with national interest at heart rather than enforcing international law in an impartial way. The judges terms are staggered, so that the composition of the court shifts by one fifth (not counting retirements and so forth) every three years. No two judges may share a nationality. Judges must have the standard qualifications, and typically they have significant experience as lawyers, academics, diplomats, or domestic judges. Judges are (roughly) nominated by states or coalitions of states, and then voted on by the security council and the general assembly. If a state appears before the court as a party, and a national from that state is not currently a judge, the state may appoint an ad hoc judge who serves only for that case but otherwise has the same powers as the permanent judges.

The rise of Non-Governmental Organisations (NGOs) is widely gaining momentum in international relations. According to Huntington (1973:2), the term "non-governmental organization describes a variety of organizations variously known as private voluntary organizations, civil society organizations, and nonprofit organizations." NGOs are non state actors. Their growth and relevance in international relations was largely fuelled by the inability of domestic and international institutions to provide comprehensive responses to environmental, socio-economic, political and cultural consequences of globalisation. Huntington (ibid:4) provides that "the increasing economic interdependence, political fragmentation and global threats such as pandemics, global warming, and the proliferation of Weapons of mass destruction gave birth to increasing roles currently undertaken by NGOs in international relations." Thus, NGOs emerged to respond and help coordinate new approaches to solving global issues. In light of their international influence, it is unsurprising that certain types of non-state actors have also been involved in high-profile international legal disputes. Yet, despite their relevance to international law, international lawyers have struggled to integrate non-state actors into the state-centric constructs of the discipline. The jurisdictional limitations on the ICJ are but one manifestation of this state-centrism. Notwithstanding these limitations, the ICJ presents values which are ideal and since its inception, had to grapple regularly with the complexities posed by non-state actors when dealing with issues involved in the conduct of foreign policy.

Bingbin (2004:2) argues that:

> Currently, there are a proliferation of judicial organs at the international and regional level, such as the International Criminal Court, the International Tribunal for the Law of the Sea, the European Court of Human Rights, and the European Court of Justice, to name a few. It is unclear what effect these other judicial organs have on the work of the ICJ. However, many of the other tribunals govern disputes between individuals and States rather than inter-State disputes, with the International Tribunal on the Law of the Sea as a notable exception. In addition, some of these dispute resolution fora focus on a special field. The ICJ still plays the most important role in the international judicial system for matters falling outside the jurisdiction of specialized tribunals.

This proliferation of international courts and tribunals reveals that the ICJ is losing its importance of being the international dispute settlement body for states as states have options of specialized dispute settlement bodies to approach with their disputes.

1.2 Statement of the Problem

The ICJ is seemingly not being used by member states to the extent expected of it under the current UN Charter. Accordingly, because of the less number of cases being brought before the court in recent years, the UN General Assembly in Resolution 171 (113) of 14 November 1947 entitled "Need for Greater use by UN and its organs of the ICJ" and Resolution 3232 (XXIX) dated 12 November 1974 entitled "Review In the last the role of the ICJ" making an appeal to the members of international community to make greater use of the court. The continued non usage of the ICJ may have a negative impact on the future existence of the UN charter which in essence was established to maintain relations between states. ICJ is not changing with the same pace as the international community is changing because states are still the only ones with access to ICJ where as international relations is now involving non state actors whose membership is from different states, who cooperate to focus on different issues, for example for charity, for empowering, national interest among others. Since the ICJ was established in 1945, the problem is of the evolving nature of conflicts, from conflicts between states to international armed conflicts and internal armed conflicts, including the emergence of mercenaries which are not covered by the ICJ statute. Humanitarian law is also contemporary international relations problem, however ICJ does not recognize right of individuals to bring cases contravening of personal human rights.

1.3 Research Objectives

1.3.1 Major Research Objective

The main research objective of the study is to examine and establish whether the ICJ is not an effective or relevant court to adjudicate disputes in contemporary international relations.

1.3.2 Minor Research Objectives.

The major objective is further split into the following minor research objectives as a means of enhancing clarity:

- To explore the effects of contemporary international relations on the jurisdiction of ICJ.

- To investigate the effect of contemporary international relations on the ICJ as a global court.
- To establish the challenges of the ICJ in contemporary international relations.
- To profer a list of recommendations that can be adopted by the ICJ to meet modern legal trends.

1.4 Research Questions

The main questions that the study seeks to answer are that:

- Is the ICJ an effective or relevant court to settle disputes in contemporary international relations?
- What are the origins of the ICJ?
- What effect do contemporary international relations have on the ICJ?
- How has globalization imposed problems and challenges to the ICJ?
- What is affecting the ICJ when dealing with disputes?
- What is the impact of the challenges faced by ICJ on its judgments?
- What strategies can the ICJ adopt to cope up with the modern legal trends?

1.5 Hypothesis

The effectiveness of the ICJ is has been undermined by the new emerging issues in contemporary international Relations.

1.6 Justification of the study

This research adds value or a new understanding in the existing literature on ICJ in contemporary international relations and if there is need for the ICJ function to be increased. The research will show how the international relations is changing and how more actors other than the state are now involved in political , economic, social and cultural issues at international level. It is cost effective to have this research as it is based on secondary data and will benefit the international legal system to change the working system of ICJ.

1.7 Theoretical framework

Idealists hold that international systems of morality, law, organization, and agreements can and should exist as a buffer against the anarchic nature of the international arena. Unlike political realists, idealists see human nature as being capable of other interests beyond selfish needs for power. The idealist seeks to harness this capacity for good and use it toward the project of building an international community that will replace the anarchy that rules the international system. The most important realization of idealist theory is the United Nations. Idealist thought is based on a number of theorists, but the most famous idealist thinker may be Immanuel Kant (1724-1804). The creation of the ICJ was an idealist move that states will present their disputes. However the hesitant nature of states to have their cases before ICJ is proof that idealism though noble is somehow not the answer.

Idealists such as Kant, Brown and Nardin tend to focus not only on the state but other actors in the international system such as non-governmental organizations, international treaty organizations, and organizations, such as the United Nations, that promote cooperation between states. This brings out the limitations of the ICJ as states only can bring their disputes to be adjudicated upon. Idealists accept that power is a consideration in state actions and believe that states can rise above selfish concerns for the benefit of the entire international system. Idealists believe that war can be reduced, if not eliminated, through the long term work of forging an effective system of reciprocity in the international arena. Idealists are not pacifists, however, and they understand that there are times when military might must be used against states that refuse to comply with international agreements meant to ensure stability or peace in the international system.

Mark (1998: 1) states that: “The failure of idealism to prevent World War II resulted in the emergence of realism as an alternative school of thought. Proponents of this theory, such as Kissinger and Carr who identify themselves with realists, believed that idealism failed because international conflicts were inevitable.” Mark (1998: 2) further states that:

> The study of international relations cannot be confined to a mere conformity to any one theory. It is through an amalgamation of various ideas and theories that one is able to obtain a more coherent picture of the international relations scene, and hence understand its various nuances and intricacies.

The researcher is of the view that, different theories shape international relations as international relations has room for other theories.

The research is be guided by the idealist theory alluded to by Kant (1991). States want peace and security and democracy across the world as an ideal. Idealism was developed to make the world a better place to live, a free world with equality and peace. According to Brown (1997:56) normative theory address the moral dimension of international relations and the wider interpretation of the discipline. At international level it deals with standard setting and norms creation. Crawford (2000:198) asserts that Kant's principles of politics are viewed as idealism, he argued that moral requirement of the universality determines that the political order should be on the rule of law. Ojo (1997:67) argues that human rights and their justification is a recent phenomenon in normative theory as international community is now concerned with the way states treat their citizens. Realist argues that whilst a peaceful world is the most ideal but war is inevitable as states pursue their own national interest.

1.8 Literature Review

In accordance with Article 93 of the UN Charter, all member states automatically become party to the ICJ statute however the ICJ has jurisdiction only over states that have consented to it a view that is also supported by Simma and Paulus (1998:266-277) in that: "They give the view that globalization has rendered the world single entity and states now channel their individual interest through a number of economic, political and security regional grouping among other". It follows that human beings have become significant feature in contemporary international relations. Also the court cannot hear a dispute between two or more state parties when one of the parties has not accepted its jurisdiction. This can happen even where the non-consenting party adheres to the court's statute, for mere adherence to the statute does not imply consent to its tribunals. In addition, the court does not have jurisdiction over disputes between individuals or entities that are not states (I.C.J. Statute. article. 34(1)). It also lacks jurisdiction over matters that are governed by domestic law instead of international law (article. 38(1)).

Article 38(1) of the ICJ Statute enumerates the sources of international law and provides that international law has its basis in international custom, international conventions or treaties, and general principles of law. A rule must derive from one of these three sources in order to be

considered international law. The ICJ follows a narrow path of judicial restraint on decisions and opinions it has handed down.

According to Brownlie (2008:45) Custom Customary international law is defined as a general Practice of Law under article 38(1) (b). States follow such a practice out of a sense of legal obligation. Rules or principles must be accepted by the states as legally binding in order to be considered rules of international law. Thus, the mere fact that a custom is widely followed does not make it a rule of international law. States also must view it as obligatory to follow the custom, and they must not believe that they are free to depart from it whenever they choose, or to observe it only as a matter of courtesy or moral obligation. This requirement is referred to as opinio juris. Some criticism against customary international law is directed at its subjective character and its inconsistency. States vary greatly in their opinions and interpretations of issues regarding international law. Thus, it is almost impossible to find enough consistency among states to draw a customary international rule from general practice. In addition, even if one state or judge finds that a practice is a rule of customary international law, another decision maker might reach a different conclusion. Altogether, the process of establishing rules of customary international law is lengthy and impeded by today's fast-changing world.

Conventions and Treaties Conventional international law includes international agreements and legislative treaties that establish rules expressly recognized by consenting states. Only states that are parties to a treaty are bound by it. However, a very large number of states voluntarily adhere to treaties and accept their provisions as law, even without becoming parties to them. The most important treaties in this regard are the Genocide Convention, the Vienna conventions, and the provisions of the UN Charter.

There are legal aspects of the new international economic order as modern states have embarked upon increasingly larger trading activities in a manner rendering states scarcely distinguishable from other non-state actors. The new trend in international transactions is also underlined by the shift from political to economic affairs in international relations. Mackenzie and Sands (2003) argue that the growth of international judiciary as standing international courts or tribunals has been established. They noted that judicial activity at international level has expanded far beyond what might have been envisaged when the ICJ was created. Therefore, the ICJ has too many expectations and too little power need to be reviewed as international disputes are no longer

ordinary. While Llamzon (2008) critices the ICJ as an ineffective player in achieving international peace and security, largely because of its perceived inability to control state behavior. On the other hand Phillipe (2003:271) has long blamed this on the ICJ's 'flawed' jurisdictional architecture, which is based entirely on consent. However despite the likelihood that states will continue to reduce the scope of the ICJ's compulsory jurisdiction, the World Court will remain a vital, if limited, tool in resolving inter-state disputes and a force for world public order. The purpose of the research is to further advancement of knowledge and improving what other scholars have written.

1.9 Methodology

The researcher used various research techniques. Close contextual analysis of secondary information was used. The research was based on qualitative research methods using non probability sampling method as it allowed the use of convenience type of sampling ,purposive sampling and content analysis which allows selection of decided cases through documentary research. Also purposive type of non probability sampling method uses theoretical reasons for reported case to be included in the sample. The decided cases was selected through subjective judgment from academic literature and practice. The documentary research was through secondary data from 2 or 3 decided cases as the main source of data to be used in the research, books, academic journals mainly accessed through E-research. It drew its population from the member states affiliated to the UN, the target population where the sample was drawn was those nations with existing cases that have been handled by the ICJ. Both a Meta analysis and content analysis was then conducted as a way of analysing the collected data.

1.10 Delimitations

The research focuses on the relevance of the ICJ in international relations from its inception in 1945 to the year 2000 basing on the economic, political, security, nature of conflicts and how globalisation has rendered boundaries useless. The research will analyse cases that were brought before the court. It will not be able to analyse those disputes that have not been brought before the court or which states settled by other means.

1.11 Limitations

This research is affected by the fact that, interviews to the judges in office will not be possible and the researcher is not able to interview states on why they are not utilizing the ICJ as this maybe considered to be confidential information and states use different languages other than English. However, the cases that have been decided will help in understand the work of the ICJ and the literature available at the internet will assist in analyzing the ICJ in contemporary international relations.

1.12 Dissertation Outline

The study will be structured as follows:

Chapter 1 – This covers the background to the problem, the statement of the problem and the research objectives and questions.

Chapter 2 – This focuses the historical background of the ICJ

Chapter 3 – This analyses the problems faced by the ICJ in the global community.

Chapter 4 - This examines the data for effectiveness and challenges faced by the ICJ in contemporary international relations.

Chapter 5 – This outlines the recommendations, findings and the conclusions.

CHAPTER TWO

2.0 Introduction

This chapter discusses literature review of the ICJ focusing on the origins of the ICJ, its background and sources of international law used by the ICJ when adjudicating disputes. The roles and functions of the ICJ and the theories in international relations discussed are idealism and realism .The traditional international relations will be compared with contemporary international relations analyzing the different parties involved in the international relations.

2.1 Historical Overview of ICJ

Located at The Hague, in the Netherlands, the International Court of Justice is the principal judicial organ of the UN in terms of (Article 7, UN Charter). The ICJ was formed by the UN charter of 1945 with specific competence, that is "to bring about by peaceful means and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace" (Article. 1, UN Charter). Article 34 (1) of the statute of the ICJ states that only state may be parties in cases before the ICJ. Therefore the ICJ settles legal disputes submitted to it by States which are contentious and gives advisory opinions on legal questions referred to it by authorized United Nations organs and specialized agencies. It functions in accordance with its Statute which forms an integral part of the Charter (Art. 92, UN Charter). The Statute of the ICJ, similar to that of its predecessor that is, the Permanent Court of Justice (PCIJ), is the main constitutional document constituting and regulating the Court.

It began work in 1946, when it replaced the PCIJ which was under the League of Nations. ICJ is the successor of the PCIJ which was dissolved after the Second World War (Shaw2003:6). States that: "The Court decides in accordance with international treaties, conventions in force, international custom, and the general principles of law and, as subsidiary means, judicial decisions and the teachings of the most highly qualified publicists". The number of decisions made by the ICJ has been fairly small, but there has been an increased willingness by states to use the Court since the 1980s, especially among developing countries. Some countries like the

United States of America (USA) has withdrew from compulsory jurisdiction, meaning it accepts the court's jurisdiction on a case by case basis.

2.3 Presiding Judges of the ICJ

The ICJ website has an article dated 17 September 2013which states that:

> The ICJ is an independent court that is permanently in session. It has its seat in the Peace Palace at The Hague; The Netherlands .It consists of 15 judges, who hold office for nine-year term but The Court may not include more than one national of the same State. Eligible as judges are persons of high moral character and possessing the qualifications required in their respective countries for appointment to the highest judicial offices. In order to be elected, a candidate must receive an absolute majority of the votes in both bodies. This sometimes makes it necessary for a number of rounds of voting to be carried out. The judges are elected by majority votes in the UN General Assembly and the Security Council. These organs vote simultaneously but separately. One third of the judges are elected every three years, and are eligible for reelection. The judges elect their own president and vice president, each of whom serves a three-year term.

Furthermore, the ICJ website article provides the composition of the ICJ as of 17 September 2013 as follows:

> President Peter Tomka (Slovakia); Vice-President Bernardo Sepúlveda-Amor (Mexico); Judges Hisashi Owada (Japan); Ronny Abraham (France); Kenneth Keith (New Zealand); Mohamed Bennouna (Morocco); Leonid Skotnikov (Russian Federation); Antônio A. Cançado Trindade (Brazil); Abdulqawi A. Yusuf (Somalia), Christopher Greenwood (United Kingdom), Xue Hanqin (China), Joan E. Donoghue (United States of America), Giorgio Gaja (Italy), Julia Sebutinde (Uganda) and Dalveer Bhandari (India).

This list of the ICJ judges shows that continents are not equally represented, especially judges from the African countries considering how big the African continent is and how it has regional groupings representing each region's own interest. For example there is no judge from southern Africa.

2.4 Basis for Jurisdiction of ICJ

The Court has jurisdiction in two different types of cases. Article 59 of the statute of the court and UN Charter Article 94 provides that the court has contentious jurisdiction in which decisions are binding on the parties to the dispute, Article 34 to 37 provides that ICJ is confined to cases

between States only if the states accept the jurisdiction and willing to be bound by the jurisdiction. The ICJ does not have compulsory jurisdiction over the states. There are other ways the ICJ can have jurisdiction over states besides being members of UN or the ICJ statute. (Shaw 2003, 980) states that: "the ICJ can have jurisdiction through treaties and conventions which have clauses that if a dispute arose the parties will submit to the ICJ to resolve the dispute or through special agreements, where the parties agree that the ICJ will settle their disputes." ICJ is a civil court and has no criminal jurisdiction and therefore it cannot hear cases from individuals, corporations, NGOs and even international organisations. The other type of dispute of which the ICJ can adjudicate is when a request for advisory opinion on a question of international law as provided for in Article 46 of the U.N. charter. The UN Charter provides that: the "requests may be made by the United Nations General Assembly or Security Council or by other organs of the United Nations or specialized agencies which are authorized by the General Assembly to request an opinion".

2.5 Roles and Functions of ICJ

The court's role is to settle in accordance with international law, legal disputes submitted to it by states and to give advisory opinions on legal questions referred to it by authorized UN organs and specialized agencies. Judge Greenwood 2011:235

> At the time of its establishment, the International Court of Justice was the global community's only standing international court. Today, it has been joined by a multitude of courts and tribunals dealing with matters of trade law, human rights law, international criminal law and the law of the sea, as well as a large number of ad hoc tribunals created for the purpose of hearing a single case.

This shows that States are no longer the only members of international relations. Therefore the ICJ roles have to change to accommodate other entities like the NGO's.

Judge Greenwood (2011: 237 states that:

> States are not, of course, the only members of that community. It is also necessary to consider that more than 2,000 international organizations, ranging from the United Nations to specialized bodies like the Universal Postal Union or regional gatherings such as the Arab Maghreb Union. Multinational companies frequently dispose of greater economic resources than many of the States in which they operate and non-governmental organizations (NGOs) such as Greenpeace often wield very considerable influence over policy and law-making at national and international levels".

However, it is submitted that, States, international organizations, corporations and NGOs are a way which human beings participate in contemporary international relations. It is therefore important to note that international organizations other than states, individuals and other entities participate more in contemporary international relations. All the same, states are still the key participants in international law and the major members of the global community and the States are considered to be equal in international law. UN has 192 member states which has different sizes in population, economic and military power among other consideration. This is the international community within which the ICJ functions. The researcher agrees with judge Greenwood that there are now many players in contemporary international relations and international law applies to them. This shows that the position of states being the only ones who can bring a case to the ICJ, the ICJ is not addressing issues in contemporary international relations as other actors like NGOs do not have locus standii in judicio at the ICJ.

2.5 Theoretical Underpinnings of ICJ

Mearsheimer (1994: 5) argues that;

> International institutions have not significantly influenced world politics and such theories should not be accepted within international affairs. Being an advocate of the realist approach, he believes the world functions in an anarchic system. Realists are in constant fear for national security and distrust the intentions and motivate other states. Under the realist approach, states must remain in perpetual restlessness, assuming other states are plotting against them. Such constant security competition forces state behavior into a constant questioning of war, power, safety, and cheating.

The researcher is of the view that, states will always be unsure of what other states will do to protect their national interest.

Mearsheimer(ibid: 8) further argues that: “In regard to such logic, no amount of cooperation can eliminate such constraints. The presence of fear is constant and inhibits institutions from developing. Thus, success in forming new logic becomes impossible for institutionalisms. While he admits that functioning institutions do exist.” Therefore the researcher agrees that no institution can successfully deal with disputes among states.

Mearsheimer (ibid: 10) points out that:

> These institutions are merely used by dominant states as a means to promote their own interests, mainly security. Institutions are affected by the balance of power in the world and are used to push the agenda of the powerful states. These institutions do not affect the behavior of a state and are only useful so long as they are promoting an idea that is beneficial to the dominate states.

It is the researcher’s view that institutions are purely stages for states to show off their influence in their relations.

As Mearsheimer (ibid: 17) further explains that:

> There is no way of knowing the intentions of other states or assuring that states will unite against the aggressor. How can a state know if the other state “will get cold feet and fail to confront the troublemaker”? Due to the anarchic nature of the international system, a state cannot be 100% certain that other states will comply. The war in Iraq can help illustrate this dilemma. When the invasion began, the USA had the support of a few of states, including Spain. Yet, following the March 2004 terrorist attacks in Madrid and sequential elections, Spain decided to withdraw its troops because it was not in its best interest to be engaged in the war.

This example proves that states have little trust but there is no reasonable explanation in how states can achieve trust. Realism has not created a world which necessarily ensures survival of the nuclear weapons, biotechnology warfare, terrorism or no certainty that other states will not back out.

Morgenthau (1978:23) states that:

> Institutions will not work in the long run because, in the end, a state will protect itself first, no questions asked. In fact, he points out that, “realists believe that the rules reflect

> state calculations of self-interest based primarily on the international distribution of power." When the United States invaded Iraq in 2003, Americans were told it was because there was first a threat of weapons of mass destruction and then to stop Hussein's genocide of his own people.

The invasion of Iraq by USA was a way which it wanted to show other states that USA was not afraid to invade other states.

According to Morgenthau(ibid:28) :

> Institutions such as the UN provided no help during the invasion. The United States went against the UN decision and declared war against Iraq's dictator Saddam Hussein, which proved the institution had no major significance in the minds of the United States. Security, competition, and war will persist despite our best efforts to eliminate it. States are always going to be in competition against one another to achieve the significant gains. The world is never going to stay in peace, because society revolves around competition. Iran has recently been the United States next target due to them resisting discontinuing weapons of mass destruction. Iran feels they need to have the weapons in order to balance their power against other states.

The ICJ requires participation of states but because UN member states have different national interest this becomes a difficult requirement to fulfill. Realists such as Kissinger and Carr believe that competition between states, especially developed states such as USA, China and UK and those in the Security Council treat each other with suspicion and live in fear of one another. Also some international institutions have been successful because they are well funded, for example European Union (EU) and North Atlantic Treaty Organisation (NATO) as these institutions deal with national interest of member states whereas ICJ is funded from the UN and is a court which member states can make reservations on its jurisdiction.

Martin and Keohane (1995: 45) argue that:

> They do not seek to completely underestimate the importance of the realist perspective toward state actors. Martin and Keohane also acknowledge that state interests are a major factor in state behavior, however, they raise enough points to question whether there might be room for other factors as well, specifically in that institutions provide information flow that can aid in cooperation. They successfully argue for the idea that institutions are essential in providing that information.

As such the researcher is for the opinion that, state and international institutions must be able to take their dispute to the ICJ as they all equally participate in contemporary international relations.

Ashworth (2002:33) argues that Idealists such as Kant believed in a harmony of interests between nations. Idealists wanted to develop a set of institutions, procedures and practices that could build upon the harmony of interests and could eradicate or at the very least control war. The jewel in the crown of idealism was the establishment of the League of Nations (LCN) in 1919.The outbreak of World War 2 resulted in the realist such as Hans Morgenthau and Henry Kissinger, pointing out that idealism was unsuccessful because international conflicts were unavoidable. This was due to various states pursuing national of being power hungry through military ways.

The failure of idealism to deal with the foremost crises of the 1930s and the outbreak of another world war caused many to look for a more pragmatic approach to international affairs. This more pragmatic approach came in the form of realism as advocated by Carr (1939:5) that institutions like the ICJ are ideal but not the solution to international problems. Idealists have a problem of overestimation of the role of law and morality in international politics and underestimation of the role of power. In international relations, powerful states such as the USA can disregard the ICJ decision, as shown in the Nicaragua 1984 when it decided not to participate in the case when the ICJ had ruled that it had jurisdiction to hear the case.

Idealists such as Ashworth (2002:36) were more concerned with how the world ought to be while realists are painted as scientists concerned with how the world actually is as shown by the development of institutions such as the ICJ. It is widely held that Carr demonstrated how realism was superior to idealism in its ability to rationally explain the persistent and ever present struggle for power amongst nations. In reality states are no longer the main actors, as there is International Governmental Organisations (IGO), Non Governmental Organisations (NGOs) and Multi National Corporations (MNCs) are now participants in international relations.

2.6 Participants in Traditional and Contemporary International Relations

Traditionally, before the 21st century, international relations focused on relations between national governments, taking them as the dominant actors on the world stage. According to Held and Mcgrew (1998:230):

> After the world war 11 up to date, the world shifted away from the traditional state-dominated model of international politics to a more complex one in which transnational corporations, financial markets, international institutions, non-governmental organizations(NGOs), and terrorist groups have joined governments to give shape to a rapidly changing and, at times, highly unpredictable global political environment.

For example, this is shown by how terrorism has moved from national boundaries to transnational level. Terrorism is now a global issue just like other non state actors as shown by the September 11 in 2001 attack. A terrorist attack causes extensive damages just like state attacks. In addition, challenges like the global economic crisis of 2008 and climate change, shortage of food among other global issues, have highlighted the growing need for co-operation between national governments and other important social and economic actors. These changes and challenges raise the question of what role conventional international relations will play in a world that is increasingly characterized by the mutual dependency of different peoples and regions for things like food, water, energy, economic growth, and security.

Contemporary international relation is very wide. It encompasses, world politics including the changing nature of state sovereignty, war and violence, global governance and international organisations, the nature of the world economy, and human rights. The international realm is has no head of states and consists of independent states which are the primary actors in international relations. However, globalization has led to the increase of Non- state actors dealing with different global issues which transcend boundaries. In contemporary international relations, states possess some offensive military power which makes them a potential danger to each other and States can never be sure about the intentions of other states hence the basic motive driving states is survival or the maintenance of sovereignty states and think strategically about how to survive. Resorting to ICJ when a dispute arises will be as a last resort and especially if it does not affect its sovereignty, for example states are willing to bring to the ICJ boundary disputes like in

the case of Ecuador and Peru 1999 arguing that border stability enhances investor confidence and assists exporters and also when it is a dispute on culture. In the western world language brings people together and in eastern world religion brings them together.

2.7 The Basis for ICJ Sources of Law in International Law

The statute of the ICJ Article 38 provides a list of different sources of international law that can be used by the ICJ when adjudicating disputes, that is:

(a) Treaties between States;

(b) Customary international law derived from the practice of States;

(c) General principles of law recognized by civilised nations; and, as subsidiary means for the determination of rules of international law:

(d) Judicial decisions and the writings of "the most highly qualified publicists".

The ICJ, which is the principal judicial organ of the United Nations, is authorised to consider these sources when deciding disputes. These various sources of international law, interact closely and influence each other.

2.7.1 Custom as a Source of Law by the ICJ

Customary international law originates from the patterns of state behavior which are called practice. Brownlie(2008: 6) states that's "Customary international law describes general practices accepted as law by States. Therefore development of customary international law is an ongoing process, making it more flexible than law contained in treaties." The problem with customary international law is how to decide which practice is customary. Shaw (2008:94) argues that, "How can one tell when a particular line of action adopted by a state reflects a legal rule or is merely prompted by, for example, courtesy?"

In international law on the other hand it is a dynamic source of law in the light of the nature of the international system and its lack of centralised government organs. Therefore international customary law is difficult to prove conclusively as it is somewhat vague and open to conflicting interpretation among states. For example, if interests of a state are threatened, so will the state attitude towards customary international law. The researcher is of the view that customary international law is a dynamic process which influence international law making as it can be influenced by contemporary issues of society

2.7.2 Treaties as a Source of Law by the ICJ

Treaties are a deliberate method of creating law. They are also known as Conventions, International Agreements, Pacts, General Acts, Charters, through to Statutes, Declarations and Covenants. All these terms create a written agreement between particular states. These states bind themselves legally creating specific relations. The treaties states enter into can be of law making in nature, which are intended to have universal or general relevance, or, they can be treaties of contractual in nature which apply between the signing states.

Shaw (1998:94) states that:

> The number of treaties entered into has expanded over the last century; witness the growing number of volumes of the United Nations Treaty Series or the United Kingdom Treaty Series. All the treaties fulfill vital roles in international relations. As governmental controls increase and the technological and communications revolutions affect international life, the number of issues which require some form of inter-state regulation multiplies.

The researcher is of the view that, Treaties are considered to be important sources of international law. Examples of important treaties are, Charter of the United Nations 1945, the Geneva Conventions on the treatment of prisoners and the protection of civilians of 1949and the Vienna Convention on Diplomatic Relations of 1961 to mention but a few.

As a general rule, parties that do not sign and ratify the particular treaty in question are not bound by its terms. However, Shaw (1998:97) notes that:

> Certain treaties attempt to establish a regime which will, of necessity, also extend to non-parties. The United Nations Charter, for example, in its creation of a definitive framework for the preservation of international peace and security, declares in article 2(6) that 'the organisation shall ensure that states which are not members of the United Nations act in accordance with these Principles listed in article 2 so far as may be necessary for the maintenance of international peace and security'.

Therefore a treaty which specifically gives jurisdiction to the ICJ is not a problem but these treaties are limited to the specific dispute mentioned in the treaty. Also treaties do not cover Non state actors, who are now participants in the contemporary international relations.

2.7.3 General Principles of Law by the ICJ

Another source of international law is general principles of law. Article 38(1) (c). Of the ICJ statute directs the ICJ to consider "the general principles of law recognised by civilised nations' in its decision making". There are various opinions as to what the general principles of law concept are intended to refer. Some writers like Jenks (1958:169) regard it "as an affirmation of Natural Law concepts, which are deemed to underlie the system of international law and constitute the method for testing the validity of the man-made rules."

The researcher is of the view that, general principles of law are not easily ascertained between states as these manmade rules are different among states and need to be harmonized.

General principles of law are established by comparing national legal systems to cover gaps left between treaties and customary law. Principles common to most legal systems may be applied in an International law situation, for example, principles such as the binding nature of agreements, protection of rights, among others

2.8 Effects of Judicial Decisions of the ICJ

According to Article 59 of the Statute of the ICJ ,the decisions of the Court have no binding force except as between the parties and in respect of the case under consideration unlike the doctrine of precedent as it is known in the common law, whereby the rulings of certain courts must be followed by other courts. While this means that there is no formal and consistent system of binding precedent, the ICJ does have regard to its previous decisions and advisory opinions and to the law that it has applied in previous cases to ensure procedural consistency. Some ICJ decisions have been influential in developing new rules of international law. For example the Reparations case (1949:174), this established the legal personality of the UN.

The sources of international law discussed above are the official list provided by article 38 of the ICJ statute. This is proving to be not an exhaustive list in contemporary international relations as there is involvement of international organizations. These are potential sources of international law as they are widely involved in the international arena. The researcher is for the view that international organizations are not considered as source of international law because the ICJ statute was drafted about 80 years ago, long before international organizations became more involved in international relations.

2.9 Conclusion

This chapter covered the historical background of ICJ in contemporary international relations discussing the formation of the ICJ, its role in international relations and the basis for ICJ sources of international law. The theories discussed are idealism and realism. Different entities involved in traditional and contemporary international relations were highlighted. The next chapter is going to highlight the problems faced by the ICJ in the global community of contemporary international relations.

CHAPTER THREE

3.0 INTRODUCTION

This chapter focuses on the ICJ and global community in the contemporary international relations covering non state actor's involvement in the global community, impartiality and independence of the judges of the ICJ. Analyse the effects of the jurisdiction of the ICJ relating to its consent based dispute settlement. It further discuss the Nicaragua case and focus on restrictions the court has encountered with regard to self defence or use of force in contemporary international relations and other challenges in different types of disputes.

3.1 ICJ and the Global Community

The U.N. Charter, Article 92 provides that: "the principal judicial organ of the United Nations". Its Statute is appended to the Charter and all member States of the United Nations are ipso facto parties to the Statute". At the time of its establishment, the ICJ was the global community's only standing international court. Its importance in contemporary international relations has been reduced as now states have an option to take their cases to other courts such as European Court of Human Rights (ECHR) and regional courts. Judge Greenwood (2011:239) states that: "the ICJ has been joined by a multitude of specialized courts and tribunals dealing with matters of trade law, human rights law, international criminal law and the law of the sea, as well as a large number of ad hoc tribunals created for the purpose of hearing a single case". Therefore this affects its maximum utilization by states as they opt to use specialized court.

Accordingly, Charney (1983:175) stated that:

> Since the 1990's, international law on the protection of investments has evolved, as a result of the conclusion by states of over 2000 bilateral investment treaties and a number of multilateral treaties such as the Energy Charter and the Treaty establishing the North American Free Trade Area, so as to give many foreign investors extensive substantive rights not to be subjected to expropriation or unfair and inequitable treatment, coupled

> with rights of access to international arbitration to enforce those rights against the state in which they have invested.

The researcher is of the view that states now rely on treaties and other agreements to enforce their rights in case of a dispute.

There are, however, a number of features of the ICJ which position it differently from other courts. Judge Greenwood (2011:235) states that:

> It has a universality which other courts and tribunals do not possess. Any of the 192 member States of the UN can be parties to cases brought before it and all can participate in the vote in the General assembly to elect the judges of the Court" as this is provided for in Article 4 of the U.N. Statute. The court still plays the party of being a universal court because 88 States have been parties in cases before the ICJ.) The court has twenty-five pending cases between states. The court has heard cases from regional groups which exist within the United Nations, that is, six are from Africa, six from Latin America and the Caribbean, three from Asia, five from Eastern Europe, and five from the West European and Other Groups.

Accordingly 43 States took part in proceedings on the request for an advisory opinion regarding the declaration of independence in respect of Kosovo. All 192 member States of the United Nations took part in the last vote to elect five judges in 2008.

3.2 The Difficulties of Interpretation of Customary International Law as an ICJ Source of Law

The nature and processes of international law during its information is difficult considering the global community of states. There are many source of international law which impact negatively or positively.

Jugde Greenwood (2011:240) emphasized that:

> The global community has no legislature of the kind found within States, in which the will of a majority can be made to prevail over that of the minority in creating new law The United Nations General Assembly (UNGA) does not have a legislative power, although its resolutions can play a part in the development of customary international law.

Taking into account the importance of the ICJ, this research will focus on analyzing customary international law which is not written and has no 'authoritative' text, but which is just there and whose meaning need to be interpreted. The case of North Sea Continental Shelf (1969:44-45) shows that, the picture is more complicated when customary international law is considered, because, under international law, rules of international customary law bind all States although formation of a new regulation of customary international law requires extensive and constant State practice, not merely the support of a majority of States.

The nature of state is debatable under international law. Thirlway (1972:45) states that: "it is artificial to distinguish between what a State does and what it says. Important acts of state behavior, such as recognition of another state, do not need a physical act." The debatable issue is deciding which particular actions are considered when creating state practice and which should be not be considered. In a way, what states do or not do can be considered as state practice, since their actions by commission or omission is considered as what they have done. This is taken as the guide to show what they desire, or what they think is to be the law. There are other issues under the formation of international customary law, like the passage of time before custom become law, can customary law be changed as international relations change.

A different view is suggested by Thirlway (1972: 57) as he discusses that: "States have done, or abstained from doing, certain things in the international field", and questions the essence of the practice required. As such, this affects the customary international as a source of law by the ICJ as states can claim that the issue at hand is not an international issue but a state issue. However, Kammerhofer (2004.523) argues that: "From this alone we cannot determine whether he makes a distinction merely between certain types of practice or whether this is a determination of the question of the nature of practice". However, Kammerhofer (ibid: 564): goes on to state that state practice is necessary, by arguing that: the "occasion of an act of State practice, must always be some specific dispute or potential dispute" basing with Thirlway's view, the researcher is of the view that state practice always includes both elements, objective and subjective, subjective state of mind of states is in their actions may be completely in their act of their actions itself.

Wolfke (1993:42) states that: apparently sets out to argue about the difficulty of distinguishing between acts against statements. He point out that: "customs arise from acts of conduct and not from promises of such acts. We are faced with a counter argument to my insistence that the 'real' question does not concern the kinds of practice, but what practice is". Wolfke (1993: 70) continues to argue that: "True, repeated verbal acts are also acts of conduct in their broad meaning and can give rise to international customs, but only to customs of making such declarations and not to customs of the conduct described in the content of the verbal acts". As such verbal acts becomes difficult to use as a source of international law as it is difficult to have verbal acts repeated in the exact words in order to be state practice.

In view of different arguments on how customary international law is formed, the research agrees with Wolfke (1993:71) that verbal acts repeated for a number of times also give rise to international law. The question comes in, what then becomes of non state actors who do not have jurisdiction at ICJ to be bound by customary law emanating from behavior of states. The ICJ becomes ineffective to deal with issues involving states and non state actors as they are partnering in different issues at the international arena. State practice therefore can mean any act or declaration by a state from which views about customary law can be inferred. Charney (1985:1) argues that:

> A small minority may not be able to prevent the evolution of a new rule, the "persistent objector" principle, by which a new rule of international law does not bind a State which has been a persistent objector from the very start of the process of evolution of that rule offers some scope for States to opt out of new rules of which they disapprove.

It can be noted from Thirlway (1997:1) that:

> Ambiguity in international law mostly manifests itself in doctrinal disputes states do not normally publish abstract views on which norms form international law. Judicial decisions, such as judgments of the ICJ, are concerned primarily with resolving disputes set before them by the involved parties and their responses are tailored to that task.

The research seek to show the ambiguity of in international law by showing the confrontational nature of the composition of jurists writing, because our understanding of the perception of law is based basically on what other lawyers have said.

3.3 Problems of the ICJ Jurisdiction in Contemporary International Relations

Under Article 93 of the UN Charter, all UN member states are ipso facto parties to the ICJ Statute, but they do not necessarily have to present their disputes to the ICJ apart from disputes where the states concerned have agreed or signed treaty to do so. The ICJ only has jurisdiction to settle disputes which states have agreed to submit to it for a decision. The consent can be in the form of binding treaties or declarations of varying scope.

Judge Greenwood (2011: 245) states that:

> There are no parties to proceedings on a request for an advisory opinion and the opinion is not binding as such, although it is an important source of guidance on the content of rules of international law which are then, of course, legally binding. The fact that all of the 192 member States of the U. N are parties to the Statute means that any of them can, in principle, be a party to a case before the Court. The jurisdiction of the Court is dependent upon the consent of the parties to a given case. Unless both parties have at some stage consented to the Court's jurisdiction, the Court cannot rule on the merits of the case between them. Such consent may be given in several different ways. In many of the cases in which the Court has given judgment on the merits, the parties had concluded an agreement after the dispute between them had come into existence agreeing to refer that dispute to the Court. This form of consent was used in Maritime Delimitation and Territorial Questions between Qatar and Bahrain, (1994:112) and has been particularly common in territorial disputes; the recent judgments of the Court.

Like in the ICJ Report (2008: 12) in the disputes between Malaysia and Singapore a case concerning a dispute of sovereignity over Pedra Branca middle rocks and south ledge also Malaysia and Indonesia 2002 ICJ REP. 575, a case concerning sovereignity over Palau Ugitch and Palau Spadon islands and, for instance, they have been based upon approval given and specified in the type of agreement.

Alternatively, consent may be given in advance of a dispute arising. Report of ICJ (2009 -2010: 55) states that: "Such consent may be found in a specific bilateral treaty providing that, should a particular dispute arise between the parties to the treaty, either party may refer the dispute to the Court", like in the fisheries jurisdiction case between U.K. v. Ice: 1973 ICJ REP. 3 which states that :

Consent may also be found in the dispute settlement provision of a multilateral treaty, such as Article 14(1) of the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1971, Any dispute between two or more Contracting States concerning the interpretation or application of this Convention which cannot be settled through negotiation, shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

Judge Greenwood (2011: 242) argues that:

> This provision, which follows a pattern employed in many conventions on terrorism and is similar to those in many treaties on other subjects, was the basis for the Court's decision that it had jurisdiction in the cases brought by Libya against the United Kingdom and the United States regarding the Lockerbie air atrocity in which a Pan-Am airliner was destroyed over Lockerbie, Scotland in December 1988 with the deaths of 279 passengers, crew and residents of Lockerbie. Libyan Arab Jamahiriyah v. U.K., 1998 ICJ REP. 9

The researcher is of the view that states should be responsible for terrorism besides the proliferation of international court and tribunals as they have the responsibility to protect.

3.3.1 The Basis for Jurisdiction of the ICJ

The ICJ statute provides a way which states can utilize inorder to consent to the jurisdiction of the court in advance. Article 36(2) of the Statute provides that, "Under this provision a State can consent to the jurisdiction of the Court in respect of any international law dispute which may arise between itself and any other State which accepts the same obligation".

Although this provision is considered to be providing for compulsory jurisdiction, it is commonly recognized as the optional clause because states can still selectively opt out of the jurisdiction of the ICJ in certain disputes.

Posner (2004: 70) notes that:

> Most states have, through reservations, consented to compulsory jurisdiction only for a narrow range of cases. The New Zealand declaration of April 1940, for example, excluded cases involving national security. When the ICJ nonetheless found that this clause was satisfied in the Nicaragua case, the U.S. pulled out of compulsory jurisdiction. France also withdrew from compulsory jurisdiction after the ICJ took a case without France's consent in the early 1970s. No permanent member of the security council remains subject to compulsory jurisdiction except the UK, which has, in any event, been brought to court only once under this head of jurisdiction and won the case.

Posner (2004: 8) points out that, "Jurisdiction by special agreement poses no threat to states because they can avoid it simply by refusing to consent to jurisdiction. The ICJ, in special agreement cases, serves as an elaborate arbitration device."

Therefore to be certain, long established arbitration process provides that states that utilize the ICJ do not mainly participate in the selection of the judges, consequently the ICJ, not like conventional dispute settlement panels, might be prepared to settle disputes using methods that reveal the interests of other states besides the interest of the two parties. So because of that basis states may opt to use conventional dispute settlement bodies such as World Trade Organisations , (WTO) rather than utilizing the ICJ.

Finally, states utilize Treaty based jurisdiction. In this case states consent is needed at the time the treaty is ratified. The assumption is that states have nothing to worry from treaty based jurisdiction. However, on the ground states every now and then consent to ICJ resolution of treaty covered disputes in order for them to enjoy benefits of the treaty as ICJ jurisdiction is always mutual. Many years after ratifying the treaty states can still utilize the ICJ jurisdiction clause if a dispute arises. The major role of non - State actors in international lawmaking is not limited to treaty - making procedures. They can also be instrumental to the tentative codification of new rules of customary international law.

Therefore, the fact that all of the 192 member States of the UN are parties to the Statute means that any of them can, in principle, is a party to a case before the ICJ. However the ICJ does not

have automatic jurisdiction in disputes which arise among member states. As such, the jurisdiction of the ICJ is dependent upon the consent of the parties to a given case. Unless both parties have at some stage consented to the Court's jurisdiction, the Court cannot rule on the merits of the case between them. Such consent may be given in several different ways.

In many of the cases in which the Court has given judgment on the merits, the parties had concluded an agreement after the dispute between them had come into existence agreeing to refer that dispute to the ICJ. Such consent may be found in a specific bilateral treaty providing that, should a particular dispute arise between the parties to the treaty, either party may refer the dispute to the ICJ.

Judge Greenwood (2011: 244) states that:

> Where consent has been given in a prior treaty, whether bilateral or multilateral, which is still in force when Court proceedings are commenced and which is applicable to the dispute in question, the ICJ has jurisdiction even if the respondent State is vigorously opposed to the ICJ hearing the case. The requirement of consent is satisfied by the prior agreement which cannot be overridden by subsequent opposition. The effect of these limits on the jurisdiction of the ICJ is that there are many disputes which, although they are legal in character and could in principle be the subject of adjudication, the Court cannot hear. Moreover, there are frequently disputes in respect of which the Court has only a partial jurisdiction.

Judge Greenwood (2011: 145) points out that :

> Like in the dispute between the Democratic Republic of the Congo (DRC) and its neighbors, Uganda, Rwanda and Burundi, which it accused of having invaded its territory and committed violations of international humanitarian law and human rights law there. The DRC and Uganda have both made declarations under Article 36(2) of the Statute.

In Armed Activities on the Territory of the Congo, DRC v. Uganda, 2005 ICJ Report 168. The ICJ , had authority to deal with all of the DRC's complaints against Uganda and in 2005 the ICJ handed down its decision, were it decided that Uganda was responsible for a number of violations of international law.

In the case of DRC v. Rwanda, 2006 ICJ REP. 6. , it was noted that:

> Rwanda, on the other hand, made Article 36(2) declaration, so the DRC attempted to base jurisdiction on the compromissory clauses of a series of multilateral treaties but the Court rejected that argument and held it had no jurisdiction to hear the DRC's case against Rwanda. Regardless of ICJ being the principal legal organ of the U.N., there is no true concept of compulsory jurisdiction of courts and tribunals in the global community.

As the International Court of Justice has stated in respect of Armed Activities on the Territory of the Congo, in the case of DRC v. Rwanda, 2002 ICJ REP. 219, 241, the judges states that:

> One of the fundamental principles of [the Statute of the Court] is that it cannot decide a dispute between States without the consent of those States to its jurisdiction; and the Court therefore has jurisdiction only between States parties to a dispute who not only have access to the Court but also have accepted the jurisdiction of the Court, either in general form or for the individual dispute concerned.

All these issues of deciding the ICJ's jurisdiction limits the ICJ's influence in contemporary international relations because states can always avoid the ICJ's jurisdiction when the dispute is of national interest. Also other states can learn from other states which would have escaped the ICJ's jurisdiction.

The similar rules applies to the additional international courts and tribunals, while in other situations the provisions of a treaty specify that any State which is part of a treaty has an obligation to accept the jurisdiction of a specific court or tribunal. Accordingly article 33 of the UNC lists the following methods for the pacific settlement of disputes between States: negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, and resort to regional agencies or arrangements. This also reveals that the ICJ is now a less important court because there are numerous courts and tribunals to deal with disputes between states and also disputes with non state actors.

3.4 Effects of Non State Actors on the ICJ

Non-state entities prominently appear in the contemporary international relations and international law.

In much of international law's contemporary writings, non-state actors are at most empirically acknowledged as 'special cases', Shaw (2003:42) and Wallace (2006:67) agrees that:

> Conceptually, however, non-state actors are still structurally excluded from the textbooks and discourses in international law. In those rare instances where non-state actors have been made the explicit subject of international legal or political investigation, they are posited in a dialectical relationship with international law.

According to Charnovitz (2006:348), the continuing trend to exclude non-state actors from the general international legal discourse however has not gone by unnoticed. Critical and less traditional legal scholarship has vigorously commented on the trend to marginalize entities, which are not governmental. That marginalization, however, cannot be attributed to, the other, only. Alston (2005:7) is right by consequently referring to non-state actors: "we indeed seem to suffer from the 'not-a-cat syndrome'. In adopting the term non-state, we implicitly admit that our main and sole point of reference is the state. We thereby marginalize our subject of research and reinforce the assumption that the state is the only central actor"

The increase of non-state actors has caused the nature of international responsibilities and rights to be wide, but also gave rise to the question as to the position and role of non-state actors in the contemporary international lawmaking and decision-making process. Alston (2005.9) view that: "notwithstanding the political dimension of that question, it is clear that it transcends the concepts of political power and influence." Unfortunately, the impact and influence of non-state actors, in particular NGOs and MNEs is rather uncritically assumed that it is critically investigated in most studies. The problem that non-state entities encounter is a state dominated international legal order, therefore they cannot take their disputes to the ICJ.

Charney (1983: 748) notes that "the progressive increase in the collective action of States, has already given rise to instances of action upon the international plane by certain entities, which are not States." Therefore the role of the ICJ needs to be fully considered and highlighted when U.N. reform is discussed, with the aim of promoting and strengthening of UN's principal organ's fundamental principles, of encouraging all members to resolve their international disputes by

passive means rather than warfare so that international peace and security and justice, are not threatened.

3.5 Problems of Appointment of ICJ Judges

Literature confirms that international courts or tribunals have grown in numbers over the years in contemporary international relations. A large number of international courts or tribunals have been established and disputes in contemporary international relations have expanded far beyond what might have been foreseen as there are many actors involved even though states remain the main actors in international relations.

Phillipe Sands et al (2003:176) mention that: "international courts and tribunals are diverse in their mandates, structure and organization. International judges are appointed depending on the court they are appointed". Therefore judicial independence is a requirement in order to maintain the credibility and legitimacy of international courts and tribunals. In support of Phillipe, the ICJ judges are not to be biased towards certain states and free from political influence. The question of how a judge is appointed comes into play. Every member state of the UN Charter would want to have a judge sitting on the ICJ bench as it is the principal judicial organ of the UN.

Romano (1999:709) states that, "until late 1950's, the ICJ and its fifteen judges had a virtual monopoly on the judicial resolution of international disputes." An article by Blairon(2004), Information Officer for the ICJ states that:

> The fifteen slots for appointment as judges in the ICJ are distributed by region roughly as follows, Africa has 3 slots, Latin America has 2 slots, Asia has 3 slots, Western Europe and other states, including Canada, the United States, Australia, and New Zealand has slot of 5; Eastern Europe, including Russia has 2 slots. This distribution is the same as that of the Security Council, and the permanent members of the Security Council are guaranteed one slot each. Thus, the U.S., Russia, Britain, and France always have a judge on the court, 16 other states rotate. The distribution is not formally recorded, but is the custom. There is no official list of the countries in each region, which is a problem for our coding, especially as this ambiguity is sometimes exploited. In 1999, for example, Jordan was suddenly considered as an Asian country while it had been considered as an African country until then. Judge Al-Khasawneh from Jordan was accordingly able to succeed Judge Weeramantry from Sri Lanka.

Therefore, there is no formular for the apportionment of slots for judges by regions. Powerful European states such as USA, France influence the appointment of judges to serve their interest by offering loans and aid. This shows that the independence and impartiality of the judges in contemporary international relations is not achievable.

The vast nature of the global community of states has led to the increase of international courts as there are now a wide range of tribunals with jurisdiction over particular subject matters, for example, there is now an international tribunal for the law of the seas which has 21 judges. There are now many regional courts within different regional economic arrangement. The World Trade Organization (WTO) dispute settlement board provides for dispute settlement panels to resolve international trade dispute. Also in International Criminal law there are ad hoc international criminal tribunals which have different judges provided for by each Tribunals statute. The Rome statute of the International Criminal Court (ICC) article 36(1):1998 provides for eighteen judges for the court. The convention for the settlement of investment disputes between states and nationals of other states of 1965 provides for the World Bank International Center for the Settlement of Investment disputes between foreign investors and host states to arbitrate disputes.

It is therefore clear that the ICJ is no longer the only important court in contemporary international relations as there are many courts and tribunals for different types of disputes. Independence of the judiciary is an issue at the ICJ. If the ICJ judges are considered not to be impartial or independent, then its effectiveness in contemporary international relations is questionable. The ICJ statute 1945: article 2 provides that :

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

3.6 The Powers of ICJ against the Principle of Self Defence and Use of Force

Like all other principal organs in the U.N. system, the ICJ in terms of UN Charter Article 1(4) which allows it to function in accordance with the ICJ statute has a duty to further the purposes and principles of the UN, which are to "maintain international peace and security," and "take effective collective measures for the prevention and removal of threats to the peace." The court has faced problems with regard to self defence and use of force. The global nature of international relations has had an impact on the international law on the use of force (jus ad bellum). Gray (2009:1) argues that:

> Attacks of 11 September, the subsequent intervention of coalition of forces in Afghanistan 2001 and Iraq 2003 and the emergence of contentious doctrine of pre-emption and the Bush Doctrine have influenced the content of international law. Article 51 of the UN charter codifies the right of self defence both individually and collectively. This right is also governed by customary international law, which gives legally accepted criteria but is not set out in article 51, that is, the requirements of necessity and proportionality.

The number of international disputes involving the use of force since 1945 or the legal claim of self defence cannot be conclusively quantified. Majority of disputes between states when they use force are hidden under the guise of self defence. Schachter (1987: 223) contends that the number of use of force disputes since 1945 was in hundreds. States regularly and consistently use self defence claims despite being members of UN. In contrast, ICJ has only a handful of merits decisions in contentious cases that deal with this area of law. Given the numerous claims of self defence by states, this imbalance is noticeable. Therefore the ICJ being the principal organ of the UN which represents an international central organization structure is the primary organ for settling disputes between states. The ICJ position on the issue of self defence or any issue of international law is very important to the development of international law despite its judgments are only with respect to the particular case and the parties involved. The ICJ can examine law which is relevant to the dispute submitted by the parties and does not have formal system of precedent, regarding its own decisions or those of other international courts and tribunals. All of these factors indicate a court designed to act as a dispute settlement mechanism and not to contribute to the development of wider international law. This makes it least effective because other states will commit the same crime knowing that previous decisions are not precedents.

However, the court's involvement in self defence has been limited. Greenwood (1996:67) noted that, "before 1986, the view of the ICJ on law governing self defence was almost non-existent." Therefore the ICJ has not played a significant role in containing major conflicts which have affected international peace and security. On this basis, it has been noted that states are against turning to the ICJ to settle the dispute especially if it concerns the use of force. The other issue is that it's not mandatory for states to call upon the ICJ to decide on the issue of self defence before it uses forces. The ICJ is called upon to determine whether the force used was lawful or unlawful. This can be argued that this brings out the fact that the court is not important in contemporary international relations. The issue of unwillingness of states to surrender to the court's arbitration reveals the problems of the ICJ in contemporary international relations. Other international courts have mushroomed in relation to different issues hence the ICJ has been superseded by other international courts. The other problem the ICJ encounters is the inherent nature of the ICJ and its internal limitations that the court faces, like the jurisdictional limitations since it's not compulsory.

3.6 Primary Cases of the ICJ in Self Defence

The ICJ has made major decisions in five cases that have dealt directly with the rules governing self-defence. Three merits decisions were made in Nicaragua case (ICJ Reports 1986:14), Oil Platforms case (ICJ Reports 1998:190) and DRC v Uganda case (ICJ Reports 2000:111)and two advisory opinions were made in Nuclear Weapons and Israeli Wall cases(2004). However, it is also worth noting that, in addition, there are a number of other judgments of the Court in contentious cases that relate to self-defence issues in some limited manner. The classic example of such a decision is Corfu Channel (United Kingdom v Albania):1949 in which the United Kingdom asserted that it had been acting under a right of 'self-help'. Whilst the decision does not strictly deal with a claim of self defence in the contemporary sense, there are a number of parallels between that right and the UK claim of self-help certainly the fact that the case dealt directly with issues concerning the use of force. A more recent example is the Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria: 2002. In that case, both parties accused the other of breaching principles of the jus ad bellum, and Nigeria explicitly

claimed to have been acting in self defence. Ultimately, the ICJ did not examine the use of force aspects of the dispute on the merits. The researcher chose the Nicaragua case analyzing the key pronouncements of the Court.

3.7 The Nicaragua Case

The case came before the ICJ following an application made on 9 April 1984 by Nicaragua, alleging that the United States had supported and was continuing to support military and paramilitary actions of 'contra' forces opposing the Nicaraguan government. Nicaragua asserted that this support amounted to a sustained use of force on the part of the United States, contrary to international law contrary to Art 2(4) of the UN Charter. Further, Nicaragua alleged that the United States had used force in a more direct manner against it by way of attacks, such as the mining of ports and aerial incursions into Nicaraguan territory, which were believed to be carried out by persons being paid by the United States government. The Court had ruled that it had jurisdiction to entertain the dispute on two grounds that is, based on declarations of the parties accepting the jurisdiction of the Court under Art 36(2) of the Statute of the ICJ, among other treaties.

The United States made it clear that it would participate no further in the case. Thus, it filed no pleadings on the merits, nor was it represented at the oral proceedings of 12–20 September 1985. However, before its abstention from the proceedings, the United States indicated in its counter-memorial on jurisdictional issues that its actions with regard to Nicaragua, while uses of force, were lawful actions of collective self defence. This was claimed to be in response to uses of force by Nicaragua against neighbouring states. A notable aspect of the *Nicaragua* decision was the effect of a reservation entered by the United States when it declared its acceptance of the ICJ's jurisdiction under Article 36(2) of the Court's Statute. In its declaration of 26 August 1946, the United States in general accepted the jurisdiction of the ICJ but made a number of reservations to this acceptance. Rossenne (1979:415) pointed out that, one of reservations made by United States was that, "it did not recognise the jurisdiction of the Court over disputes arising under a multilateral treaty, unless all parties to the dispute affected by the decision are also parties to the case before the Court". As such, the ICJ concluded that the United States reservation essentially precluded it from applying multilateral treaty law in the case. The law that the Court was able to

apply to the dispute was customary international law alone, at least with regard to the aspects of the case. The Court therefore outlined and applied the customary international law on self defence, specifically collective self defence. It concluded that it was not satisfactorily established that the requirements for a lawful exercise of self defence in customary international law had been met.

Therefore, the justification supplied by the United States that it had been acting in collective self defence was rejected. The Court found that by supporting the contra forces, the United States had violated the principle of non-intervention and in some circumstances the prohibition on the use of force. It was further held that the 'direct' incursions by people controlled by the United States constituted unlawful uses of force. The court is not effective if a state can make reservations as to its jurisdiction and if a party can decide not to participate in the proceedings.

Accordingly, Fitzmaurice (1976:461) argues that, "there are a number of restraints upon the Court which relate to jurisdiction based on its fundamental nature as a consent-based dispute settlement body. These restraints make any attempt of the Court to provide a clear and holistic appraisal of the law that will be useful in future instances extremely difficult." This is mainly because of the ICJ'S nature of its composition. Meisheimer (1994:26) argues that: "The ICJ is often hamstrung by its own institutional history as an organ created for the settlement of disputes between states, the lawmakers of the international system." Indeed, these inherent problems of composition leaves the question of its relevance in contemporary international relations if it cannot deal with disputes brought before it in this global community.

3.8 ICJ and Political Matters in Contemporary International Relations

International community is comprised of political communities represented by nation states that are independent sovereign entities. These independent sovereign states are reluctant to admit, that there is a higher political authority. Thompson (2004:89) argues that: "in a world of competing sovereignties, the protection of real and perceived vital national interests becomes a higher priority for national governments than strict adherence to international law". This shows

that States guide their national interest jealously. The question then is if there is a dispute involving a state's national interest of a political nature, will the states allow a third party to resolve a dispute of a political nature. Accordingly, if states considered that the outcome of a dispute is important, the state will not be willing to give control of its declaration to a self regulating body. The effectiveness of the ICJ is hindered because the ICJ jurisdiction is based on consent of the parties. Accordingly Steinberger (1974:193) states that: "voluntary jurisdiction was chosen by the victors of World War II as part of a deliberate policy to ensure they could retain the ability to protect their national interests in the postwar".

If no particular state agreed to the jurisdiction consent, then, besides giving advisory opinions, the ICJ would not have cases before it as most sates shows reluctance to bring their case to the ICJ a third party.

Also, not many states have agreed to the ICJ jurisdiction, and states have been withdrawing their consent, even after making declarations, there is nothing to preventing states from withdrawing their consent. For example the US withdrawal of its consent in the Nicaragua case. therefore withdrawal of consent coupled with the reservation clauses by states on the ICJ jurisdiction it is significant that parties have a potential for non-appearance or non-participation s when the ICJ seeks to invoke its jurisdiction in terms of article 36(2). Definitely as pointed by Steinberger (ibid:144) in that: "There were many incidents of non-appearance in cases involving the application of article 36(2) during the 1970s and 1980s.

The nature of international disputes has shown that national and domestic courts are not the appropriate fora for resolving disputes between states. The ICJ has heard political matters such as Nicaragua case, the nuclear weapons opinion and Lockerbie among others .Therefore the creation of international courts and tribunals was to resolve disputes of international nature. At the international level, concerns have been raised regarding the capability of the ICJ to contribute and make a suitable contribution to the resolution of highly political matters have often been. Steinberger (1974:193) observes that:

> Experienced observers of international relations are right when they consistently note that the function of international law and of international jurisdiction in the area of the peaceful settlement of highly political disputes, and in particular of disputes containing a threat to peace or international security, is of necessity quite limited.

The researcher is of the view that international law is limited in maintain peace and security because the world has witnessed political conflicts in states like Syria, US invasion of Iraq and Libya besides all the advocacy for peaceful settlement of disputes. Powerful states like US always find a way to show off their power.

3.9 Conclusion

This chapter discussed the ICJ in contemporary international relations. The ICJ is still a useful court but it has a lot of problems considering the changing global community of states. Disputes are no longer between states only but a number of entities like NGOs, IGOs and MNCs are now involved with states and disputes arise which need to be adjudicated to. Furthermore customary international law based on state practice alone is not encompassing of the activities of non state actors. Jurisdiction of the court should include non state actors, as the states are no longer encountering disputes between themselves. This brings out a problem of non state entities in a state dominated international legal order. Judges are not impartial or independent as they are influenced by politics in their decisions and voting pattern. The next chapter is going to highlight effectiveness and challenges faced by the ICJ in contemporary international relations.

CHAPTER FOUR

4.0 Introduction

The previous chapter discussed the problems encountered by the ICJ in the global community. In this chapter the problems are analysed in order to bring out the effect of the changing global community on the effectiveness of the ICJ. This chapter will also highlight the challenges it has encountered when dealing with disputes in contemporary international relations.

4.1 Effectiveness and challenges of the ICJ in contemporary International Relations

The ICJ was created after the Second World War to be the United Nations' judicial arm, has suffered from four important shortcomings which have made it the UN's least effective body. First, the states in dispute have to agree to appear before it and be bound by its decisions. In the Nicaraguan case discussed in the previous chapter, the US chose not to submit itself to the court's jurisdiction .Secondly is the advisory opinions given in the Palestinian wall case, the opinions are not binding. Thirdly, the court does not have jurisdiction to hear criminal cases, such as the prosecution of war crimes. Lastly, the disputes it deals with have to be between states as individuals or groups can't use the court to bring states to justice. Considering that the ICJ is composed of excellent judges and all these limits on its operations has affected its input in the development of international law which is the source of law in contemporary international relations.

Berlins (2004:1) in the Guardian reported that:

> The rejection by Israel of the ICJ's opinion on the wall in Palestine is not the first time the court's view has been rubbished, and will be ignored, by the losing party. Famously, in 1986, the court delivered a firm judgment against the United States, ruling that its military interventions in Nicaragua were contrary to international law. The decision was totally ignored by the US; indeed, they did not even turn up to put their arguments to the court or to hear its final decision.

However the ICJ is noted for its failures to resolve disputes between states because in certain disputes the challenge is that, parties to the dispute refuse to acknowledge the jurisdiction of the ICJ, thus rendering the ICJ ineffective. For example the ICJ jurisdiction was refused in the US and USSR 1954 case where an aircraft was shot down and another was forced to land. Furthermore the ICJ ineffectiveness was revealed in 1960 in the case of Ethiopia and Liberia were a case was brought to the ICJ a claim being made that South Africa had violated the human rights law of the population Namibia, which had been a directive under the League of Nations and which it ruled. After an extensive and tiresome process, the ICJ decided that the case of Ethiopia and Liberia was unlawful, and thus, the case was dismissed on a technical point of law. This outraged a powerful bloc of former colonial countries and later the ICJ repudiated its reasoning in a later case of Namibian advisory opinion of 1971. This shows that the ICJ can easily be persuaded by powerful states to change its decisions.

Another case which reveals the ICJ's limitations to its effectiveness was shown in the verdict of 1979 for US diplomats held hostage in Teheran, and payment for reparations. The ICJ verdict ordered the release of the US diplomats. In this case, Iran did not follow the verdict and totally ignored it. The ruling did not appear to have any influence on Iran, which refused to participate in the proceedings. In 1984 in a case between Nicaragua and US. Nicaragua complained that the US assisted the Nicaragua contra rebels in opposition to the Sandinista government. The ICJ ruled in favour of Nicaragua's claim although the US had withdrawn its acceptance of the jurisdiction of the ICJ. The US argued that the ICJ did not have jurisdiction and refused to comply with the ruling and withdrew its consent to compulsory jurisdiction. These cases reveal how states do not comply with the ICJ decisions when resolving international disputes.

4.2 Effect of Non State actors on the effectiveness of the ICJ

Non-state actors like IGOs and NGOs have a reflective and increasing growing impact on international issues. In light of their international influence, it expected that certain types of non state actors have also been have also been taking party high profile international legal disputes, such as climate change. Nevertheless, regardless of their relevance to international law,

international lawyers have struggled to integrate non state actors into the state centric constructs of the discipline. The jurisdictional limitations on the ICJ are but one manifestation of states being the only ones who take disputes to the ICJ. Besides these limitations since its initiation the ICJ had to struggle with the complexities posed by non-state actors in international relations.

Jessup (1956:9) considers international law as: "inadequate, to describe and analyze the legal problems related to the complex interrelated world community". Jessup's(ibid:9) states that: "Conception, transnational law included both ,all law which regulates actions or events that transcend national boundaries and situations that involve individuals, corporations, states, organizations of states and other groups" . In this case researcher thinks that Jessup did not think of Non state actors as having influence in law making process but as entities affected by the rules. Mostly Non state actors are affected by countless international situations which are governed by a number of applicable legal rules and they may conflict with each other. This can be between rules of different national laws or a conflict of national law and public international law.

Considering Jessup's (1956:9) view the mushrooming of non-state actors has not only triggered question as to the diversification of international responsibilities and rights, but also with respect to the question as to the role and position of non-state actors in the international lawmaking and decision-making process. Non state actors are involved in many global issues, like climate change and these problems have led to promulgation of International law which affects states but not non state actors. This shows the ineffectiveness of the ICJ in contemporary international relations in dealing with states only whereas participants have increased. The fact that not all international players are affected by the promulgated international law can led to disgruntlement from states as the promulgated law only affects them whereas Non state actors are participating in its promulgations. Or the Non state actors can misbehave knowing that the ICJ has no jurisdiction over them.

4.3 ICJ Judges and their Votes

In practice international judges are nominated and elected with the influence of politics and this affects their impartiality. States submit names of judge for nomination knowing that these judges

will be one day deciding cases concerning their states or friends hence these judges nominated should be able to have national interest at heart. States tends to nominate a candidate who has served as former minister, legal advisors or former diplomat. Critics like Rosenne (1979: 44) argue that : "the members of the ICJ vote in the interests of the states that appoint them" also in favour of states who have influence to their states like economic and military alignments. He further points out that politicians and diplomats from states that lost their cases argue that the ICJ's rulings are politically motivated as ICJ is a "semi legal, semi juridical, semi political body which nations sometimes accept and sometimes do not". Therefore this affects the ICJ judges' effectiveness as judges are not impartial but have national and personal interest to protect. For example in the Nicaragua v US 1984 ICJ 392, the only judge to fully support the US position in the jurisdictional phase of that case happened to be the American sitting on the bench.

In the case of the ICJ judges, the fifteen judges are elected by the UN General Assembly and Security Council for a renewable term of nine years. No two judges may have the nationality of the same state. In practice the five permanent members of the Security Council always have a judge sitting at the ICJ. This is an unwritten custom and this brings in the question of judicial independence and effectiveness of the court in contemporary international relations. The other 10 judges are divided between the five regional groupings in the UN system. As such 5 permanent members have judges representing their interest whereas other nations are represented through regional groupings.

Elections to the ICJ are considered to be political. A candidate nominated need support of powerful states otherwise the prospects of being appointed are slim. Also the process of reelection is based on cases decided by the judges during their term of office. This affects the effectiveness and independence of the judges when in office. The relationship between ICJ and Security Council leaves a question of whether ICJ may review decisions of the UN Security Council. The term of office of ICJ judges is nine years as provided for by the ICJ statute Article 13(1). The length of tenure coupled with the political nature of the nominations and reelection process raises the question of whether individual judges are influenced by the need to secure reelection. This is bound to affect the decisions of the ICJ judges in contemporary international relations as they support their sponsors who put them in power.

4.4 Effect of Non Appearance of States at the ICJ in Case of a Dispute

The complicated issue of state non-appearance before the ICJ affects the court's decision as the other party is not there to argue its facts and tender evidence. The Nicaragua case still represents the Court's most comprehensive decision on self-defence; the impact of the non-appearance of the United States affects the quality of the decision. The fact that the United States abandoned the process inevitably made it more difficult for the Court to produce a clear legal judgment on the facts. For example, Highet (1986:551) questions how the ICJ can be expected to evaluate arguments that have not even been made by a non appearing state. Non-appearance had the effect of limiting the ICJ's access to evidence and obviously meant that the presentation of any evidence that the Court did have available to it was somewhat one-sided. There have been a number of ICJ cases like the Corfu Channel (United Kingdom v Albania) merits (1949) ICJ Reports 4 and Fisheries Jurisdiction Case (United Kingdom v Iceland) merits (1974) ICJ Reports 3, in which states have either withdrawn from the proceedings at some stage or failed to appear at all. These cases relate to a range of disputes. States may view fundamental issues concerning the use of force as solely, political and thus exclusively within their decision making competence. Whether this is the case or not, when the vital interests or survival of states are at stake, it would appear that they are less likely to be willing to subject themselves to judicial examination of their actions, even if jurisdiction has been established by the Court . As such disagreement between the judges is common place, particularly in the context of disputes involving contentious and politically charged issues, such as the use of force.

4.5 Judicial Bias and Politicisation of the ICJ Judges

Despite the fact that the Statute of the ICJ Article 2, provides that its members are 'independent' and 'of high moral character', it has been argued, particularly by scholars from the United States such as Hensley (1978:106) since the Nicaragua decision, that the judges of the ICJ are inherently biased. For example, in the case of Iranian hostages, Hensley(1978: 134) noted that, the Soviet and Islamic judges voted 'as one would expect. It has been claimed that there is evidence to support the idea that they are biased towards their states of origin or more generally

towards their 'regions' of origin. It is possible to interpret the voting records of ICJ judges to indicate that they are less likely to take a stance opposed to a state party of which they are a national than to find in favour of that state. Moreover, the provision for judges ad hoc in the Statute of the Court has been seen as an implicit acknowledgement of the likelihood of such partisanship on the part of the drafters of the ICJ's Statute, however Article 2 of ICJ statute provides for the independence of the members of the Court. If the permanent judges were genuinely independent, there would be no need for judges ad hoc at all.

Thirlway (1972:64) states that "the voting records of judges ad hoc indicate that they vote in favour of the states that nominated them. The realities of international dispute settlement mean that the ICJ judges are to some degree biased or politicised is undoubtedly true." It is impossible for fifteen individuals of different legal, cultural and political backgrounds to reach a unanimous single legal vision of any given dispute. ICJ judges are people and they reason and vote with the weaknesses of people. Therefore, whilst the functions of the ICJ are clear in the legal sense, it is at some level a political animal considering how the judges are elected into the Court. Rosenne (1979:364) points out that "this event is highly politically charged, with the nomination process more like a campaign for political office than the process of appointment to a judicial organ. Moreover, an increasing number of the appointees to the ICJ come from a governmental rather than a purely legal background. This fact arguably influences the political nature of the Court." The researcher is of the view that, judges are biased towards the states and allies of those states that nominated them. This reveals that there is an element of political influence as nominates candidates for election from high ranking officials.

4.6 Compliance and non compliance, enforcement and defiance in ICJ judgments

Compared to national courts the ICJ has adjudicated different types of disputes, which can be broken down as follows, Aerial Incident, Border Dispute, Diplomatic Relations, Diplomatic Relations or Property, Use of Force, Trusteeship or Decolonization, and others. However the ICJ has no policemen to which it can turn to if a party does not comply with its decisions. Article 94 (2) of the UN Charter provides that:

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

Therefore the option is there, that the SC might enforce sanctions or authorize the use of force to enforce a judgment of the ICJ. However, since its establishment, there is no judgment that has been enforced by the SC. During the years, the enforcement of ICJ decisions has depended upon the compliance of the states to which the judgment was against or depended upon the pressure the global community can bring to bear upon a non complying state.

Considering the lack of enforcement mechanism, one would easily conclude that the ICJ which has no genuinely compulsory jurisdiction and cannot not turn to any of the regular apparatus of the state which national courts can depend in order to enforce the judgement which it gives, cannot play an important role in international community.

This study examines the relationship between the ICJ's compulsory jurisdiction and state compliance with its decisions through an analysis of recent judgments in which non-compliance was alleged by the prevailing state. United Nations Charter Article 94(1) places the obligation of member states to comply with the decisions of the ICJ, by providing that: "each member of the United Nations undertakes to comply with the decisions of the International Court in any case to which it is a party."

Compliance connotes many things, but to be meaningful it should consist of acceptance of the judgment as final and reasonable performance in good faith of any binding obligation. Even if states consent to the ICJ jurisdiction, who can enforce the decision is another weakness of the ICJ.

The Statute of the ICJ article 59 and the UN Charter statute article 94(1) makes a provision that support the court's judgments and advisory opinions it gives support to the Court's judgments and advisory opinions to be enforced by way of resolutions of the security council. This is

because ther is no international police that will in actually ensure that states comply with the resolution itself. As Mark (1987:104) notes that:

> In municipal orders, the court, whose jurisdiction is compulsory, acts on behalf of and in the capacity of … the fully integrated sovereign state; the latter is responsible for the continuity and efficacy of the peacemaking process initiated by the court … The case is patently quite different in the international order: … this community, which is not integrated, or scarcely so, and which itself is entirely based on a juxtaposition of sovereignties, is in no wise comparable to a sovereign state.

The fact that there is no international sovereign, the enforcement of ICJ decisions is not guaranteed besides states giving in to peer group pressure from other nation states. Indeed, Mark (1987: 53) writes that: "there is no independent international legal system, capable of enforcing agreements in international law. The system is defective because it depends so much on the behavior and attitude of those it is supposed to regulate." Non enforcement or guarantee that the decisions will be enforced is a situation that is detrimental to the ICJ as states then shun the ICJ's authority. This ability to resist the authority of the ICJ by states is due to the concept of national autonomy which becomes a problem to the usefulness of the ICJ. States also resist authority of the ICJ when it gives advisory opinion in terms of article 65 (1) because the parties are not bound to comply with the opinion.

The states have thus devised a system, whereby they simply do not participate. They either do not consent to the jurisdiction that they grant consent subject to reservations, or by withdrawing their consent. These options arm states with excuses to challenge the power of the ICJ. Consequently for the ICJ to be successful or even to perform its role it appears to be relying on the behavior of the states concerned.

The principle of relative state sovereignty along with state unwillingness to give up control to the dispute resolution process to a third party has made it difficult for the ICJ to make a contribution to the resolution of highly political disputes in contemporary international relations. Several commentators, as well as former ICJ members, such as Sir Robert Jennings have shown doubt in the ICJ's ability to resolve disputes in extremely political matters. In most international

disputes, there is underlying political issues that loom together with the legal issues. For example in the Nicaragua and the Nuclear Weapons Opinion it was shown that the structure and organization of the international community, namely the right to self defence and the right to non intervention. These rules flow from the idea of state sovereignty and most nation states consider them important for the preservation of international peace and security. Furthermore, the environment in which the ICJ operates in is one that is unfavorable and at times, unfriendly. All the same, the ICJ has made and continues to be involved in the peaceful resolution of highly political disputes.

According to Professor Rosenne (1979:365), non-compliance may give rise to new political tensions, Defiance of ICJ judgments, in turn, would have a corrosive effect both on the ICJ itself and upon broader efforts to institute meaningful settlement of international incidents through adjudicatory means. In Armed Activities on the Territory of the Congo (DRC v. Uganda) , Judge Jennings (1997: 56), warned that: ‘ the repeated disregard of the judgments ot orders of the ICJ by the parties will inevitably impair the dignity of the court and raise doubts as to the judicial role to be played by the court in the international community” .

According to Judge Jennings (1997: 78), “the Court’s business up to the delivery of judgment is published in lavish detail, but it is not at all easy to find out what happened afterwards." Responsibility for ensuring compliance is not within the ICJ’s mandate, but rather, with the principal political organ for maintaining peace and security that is, the Security Council. Article 94(2) thus provides that:

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

As such the problem with this manner of enforcement arises when a judgment is not in favour of one of the permanent five members of the SC or their allies, as any resolution on enforcement would be vetoed against. For example, this occurred after the judgment of the Nicaragua case when Nicaragua brought the issue of the US’s non-compliance with the court’s decision before

the SC . Furthermore, states have no recourse against the SC when the SC does not enforce a judgment against a state also there is no other manner of forcing the state to comply besides being isolated by states in the form of sanctions.

4.7 Conclusion

This chapter discussed the effectiveness of the ICJ in contemporary international relations and challenges the ICJ is encountering. It also highlighted how non state actors affect the ICJ in contemporary international relations. The problem of states not appearing before the court was analysed and how this affects the ICJ decision making process. The next chapter summarises the research and gives conclusions and recommendations

CHAPTER FIVE

5.0 CONCLUSION AND RECOMMENDATIONS

5.1 CONCLUSION

The objective of the study was to examine and establish whether the ICJ is an effective and relevant court to adjudicate disputes in contemporary international relations. The study revealed that the ICJ was established as a successor to the PICJ given the mandate of settling disputes submitted to it by states in accordance with international law and give advisory opinion on legal questions referred to it by authorized UN agencies and specialized agencies.

The study points out that the ICJ is an effective court in terms of cases submitted to it but it is being underutilized because states now have an option to take their dispute to other numerous international dispute settlement mechanisms such WTO dispute settlement court. The other point that makes the ICJ not effective is because a state has to consent to its jurisdiction or depend on a jurisdiction clause in a treaty or convent. The ICJ is still relevant in contemporary international relations as a court to settle disputes between states, as this reduces congestion in other civil courts as international courts complement each other.

International relations before the twenty first century focused on relations between states taking them as the dominant actors. The study highlights that, the world has shifted to complex international relations which now include transnational corporations, financial markets and international organizations among others. The issues in contemporary international relations now encompass world politics, changing nature of war as states now experience internal armed conflicts and violence and human rights issues. Globalisation has led to the increase of NGO's dealing with different global issues which transcend boundaries. The study points out that ICJ role have been superseded by events in international relations as the ICJ is not changing with the same pace as the international community, since its establishment in 1945. The study points out that states are still the only ones with access to the ICJ, whereas contemporary international relations in now involving non state actors who corporate on different issues, for example war

and violence and human rights issues. Also, has evolved from conflicts between states to regional, Internal and armed conflicts which are not covered by the ICJ.

States are still the primary subjects of international relations and most prominent members of the global community but contemporary international relations now involves international organizations, corporations as a way which human beings participate in contemporary international relations. The position of states being the only ones who can bring their disputes to ICJ, does not address or help resolve global issues as other actors like NGO's are involved.

The problems and challenges the ICJ face are numerous in contemporary international relations. The research revealed that, the ICJ faces problem of how to curb judges being biased towards their nationals and their allies when voting.The other problem is that of the jurisdiction of the ICJ which is based on the consent of the states involved, treaties and conventions signed by the parties to the dispute which has a clause that gives the ICJ jurisdiction to settle the dispute.

The other challenge is that ICJ only gives advisory opinion to UN agencies or specialized agencies, which the parties have an option to follow or not. The court deliberates on a dispute and offers the parties an opinion which is not binding, is waste of the ICJ judges' time.

The other challenge faced by the ICJ is that of states non appearance before the ICJ. This non appearance affects the ICJ's decision as the other party is not there to argue its facts and tender evidence. If a state does not appear or withdraw its appearance there is no penalty and this affects its effectiveness in contemporary international relations.

Also the challenge of non enforcement of ICJ decisions affects the ICJ's effectiveness since it does not have any policemen which can enforce its rulings. In practice the enforcement of decisions of the ICJ has been depended upon the willingness of the states involved to comply with them or even how the state concerned give in to international pressure. It therefore is the view of the researcher that the ICJ without compulsory jurisdiction and which cannot use the normal apparatus which are available to national courts, cannot play a significant role.

Non compliance with ICJ decisions may give rise to political tensions to states concerned, and this would have a corrosive effect on the ICJ's international of maintaining international peace.

From the investigation, the study shows that the ICJ indeed is not effective in resolving international disputes between states as states still can resist the jurisdiction of the ICJ and also the proliferation of global issues like climate change and war and violence. These problems have led to many international organizations being formed to deal with these mushrooming global problems.

The study showed that, the ICJ is an effective court which is being underutilized by states to solve international disputes opting to use regional courts and tribunals.Many states make reservations of the ICJ jurisdiction on matters of sovereignty thereby limiting the cases brought before the court.The ICJ jurisdiction which is based on consent of the states inhibits its full potential as it is based on consent of the parties to the case, clauses in treaties and conventions.

The judgments given by the ICJ can be ignored by states and there is no enforcing authority, this affects the willingness of states to bring their disputes against other states to the ICJ. Also ICJ decisions have no binding force on other states except between the parties and the case under consideration.

The ICJ has no jurisdiction over IGOs, NGOs who have become part of contemporary international relations dealing with global issues like global warming, diseases affecting states across borders. Judges who are elected to sit on the ICJ bench can be influenced by national interest as their states are the ones who nominate them to be elected. Therefore they put their national interest first to remain as judges for second or third term. Judges tend to be biased towards their states of origin or their regions of origin considering how the judges are elected into the court.

The five permanent members of the UN Security Council always have a judge sitting at the ICJ. This is not written anywhere but is a practice. This affects the ICJ effectiveness as these five permanent members can veto against any judgment not in favour of their nations or allies. ICJ importance has been reduced in contemporary international relations as now states have an option to use other international, regional courts and tribunals for international disputes using international law.

Sates can decide not to appear before the ICJ even if it has jurisdiction and this affects the court's decision as the evidence before the court will be one-sided. Also states can simply not participate in the legal proceedings thereby the court get to hear evidence from one party. Enforcement of decisions of the court depends upon the willingness of the states to comply or group peer pressure from other nation states to comply, therefore this affects the effectiveness of the ICJ. The ICJ authority is avoided by states because of non enforcement mechanism.

The ICJ system is defective because it depends so much on the behavior and attitude of those it is supposed to regulate, which is different from that of national legal system. This allows states to avoid the ICJ authority.

5.2 Recommendations

The researcher recommends that for the ICJ to be effective it needs representation of different legal systems of the world and regions in the composition of the judges by having adequate and reserved sits for geographical representation from developing countries especially African countries. Judges of the ICJ votes on their decisions they make, sothere should be regional groupings representation of ICJ judges to cater for all UN members from different regions with different interest.

The researcher also recommends that the duties of the ICJ must be broadened to encompass all global issues in contemporary international relations instead of dealing with civil cases it should have jurisdiction to adjudicate criminal cases between states.

Also, the court must practice high standards of international legal order to restore the confidence of states in the ICJ and have other international courts and tribunals seen to be complementing each other rather than in competition.The researcher also recommends that in order for ICJ to enhance compliance and enforcement of its judgments and enhance its authority, the ICJ statute must be amended to include a proviso that makes it mandatory for SC to strictly impose sanctions on non complying state and ICJ should have recourse against the SC when it does not enforce judgments against a state.

ICJ statute should be amended to include non state actors like IGOs, NGOs as parties to contentious proceedings as they participate in international community issues extensively and to include states and national courts who can seek advisory opinion from the ICJ.

Non state actors should be able to participate in international law making and be bound by it because international law also affects them in their dealings with nation state.ICJ should be able to give advisory opinion to UN and its organs which is binding, because if opinions by ICJ are not binding, why waste ICJ judges deliberating on cases that no party will follow.

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