

# A CRITICAL EVALUATION OF THE CAPACITY OF THE INTERNATIONAL COURT OF JUSTICE TO CONTRIBUTE TO THE SETTLEMENT OF DISPUTES IN THE 21<sup>ST</sup> CENTURY

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## Abstract

*As the principal judicial organ of the United Nations, a key role of the International Court of Justice (ICJ) is to solve disputes among states. Referred to as the ‘World Court’, state parties often approach the ICJ in order to seek a final settlement of their disputes. The Court acts as a tool to bring the international community closer to the rule of law without being governed or controlled by the various structures of the community and in order to achieve the same, it works towards having an impartial judicial policy in order to maintain the Court’s independence and to showcase its commitment towards the law and principles of the United Nations. However, over the years, questions have been raised regarding the overall effectiveness of the ICJ in terms of reaching a final settlement of disputes. The non-compliance of the Court’s decision by the parties is a very big issue in this regard. Nonetheless, it must be borne in mind that the institutional structure of the ICJ is complex and the Court has to function within its limitations. The paper aims to analyze the issues related to the Court’s jurisdiction as well as conformity of its decisions by the litigants in order to answer the question as to whether or not the ICJ has been able to substantially contribute to dispute resolution.*

## Introduction

‘The International Court of Justice is a body of high achievement and unused potential. But it is not a body of uniformly high achievement or unlimited potential.’<sup>1</sup>

The above statement by Judge Stephen M Schwebel, undoubtedly, sums up the journey of the main judicial organ of the United Nations from its inception. Often referred to as the ‘World Court’, the International Court of Justice, hereinafter referred as the ICJ or the Court, was

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<sup>1</sup> Stephen M. Schwebel, Justice in International Law: Selected Writings of Justice Stephen M. Schwebel 4 (1<sup>st</sup> edn, Cambridge University Press 1994).

established in 1945 by the Charter of the United Nations. The primary role of the Court is to solve disputes among states and to give advisory opinion on legal issues as and when asked for by a specified United Nations body or agency.<sup>2</sup> As the name ‘World Court’ suggests, the ICJ, as an institution is universal in its composition and is intended to serve the entire international community without any bias towards a particular legal or social viewpoint. Furthermore, the Court, being an international body, whose role is to uphold the legal values of the system by adjudicating disputes between states, is independent of the parties to the dispute.<sup>3</sup> The Court acts as a tool to bring the international community closer to the rule of law without being governed or controlled by the various structures of the community and in order to achieve the same, it works towards having an impartial judicial policy in order to maintain the Court’s independence and to showcase its commitment towards the law and principles of the United Nations.<sup>4</sup> The ICJ has contributed significantly in the development of international law, thereby, continuing the legacy of its predecessor, the Permanent Court of International Justice. As international law is ever evolving, the Court through its judicial activity has exercised great influence in development of the law, in other words, through its qualitative decisions the ICJ has tried to fill gaps in a system of law which is highly unclear to states.<sup>5</sup> For example, in *Nicaragua v United States of America*,<sup>6</sup> the ICJ held that United States actions against Nicaragua violated the prohibition on the use of force and the principle of non-intervention. The decision in this case is of immense relevance because the Court reflected upon certain important issues regarding the use of force, like, the right of self-defense, the law relating to non-intervention and the maintenance of international peace and security.<sup>7</sup> But, not all cases reach the ICJ, which forces one to think, whether or not the ICJ is truly a ‘World Court’. States are often reluctant to approach courts if the dispute can be avoided in the first place or decided amicably. A state that is party to a dispute would first try to

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<sup>2</sup> ‘The International Court of Justice’ < <http://www.icj-cij.org/court/index.php?p1=1> > accessed 9 February 2015.

<sup>3</sup> Vaughan Lowe and Malgosia Fitzmaurice (eds), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* 7 (1<sup>st</sup> edn, Cambridge University Press 1996).

<sup>4</sup> Howard N. Meyer, *The World Court in Action: Judging Among the Nations* 136 (1<sup>st</sup> edn, Lanham: Rowman & Littlefield Publishers 2002).

<sup>5</sup> Christian J. Tams and James Sloan, *The Development of International Law by the International Court of Justice* 237 (1<sup>st</sup> edn, Oxford University Press, 2014).

<sup>6</sup> *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* [1986] WL 522 (I.C.J.).

<sup>7</sup> *ibid.*

consider a number of options available to it and seek out the one which is most beneficial.<sup>8</sup> ‘There are a number of options available to states for the peaceful resolution of disputes like negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement and resort to regional agencies or arrangements. There is also no inherent hierarchy with respect to the methods specified for any given situation.’<sup>9</sup> It is up to states to choose which mechanism they want to adopt to address their problems. However, it is also a fact that, disputes do end up in courts because parties often wish to have a final settlement to their problems. It is advantageous for parties to get a final decision on a matter by a court than not having one through a long non-judicial process.<sup>10</sup>

Although the number of cases that go up to the ICJ is less when compared to those decided at the domestic level, still, states, do show an interest in the settlement of their disputes by approaching the ICJ. It is desirable for parties to a dispute to get it resolved as it would be beneficial for them to address any future disputes.<sup>11</sup> More importantly, a decision from a forum like the ICJ will not only clarify the law in the concerned area but also help in resolving disputes of similar nature. When the Court reflects upon certain rules or legal principles in an area of law, the same can also be used as a guideline in the framing of treaties between states so that future disputes can be avoided.<sup>12</sup> In spite of the decisions of the ICJ only binding upon the parties to a dispute in a particular case, the Court’s decisions also have an impact on states facing similar issues. For example, when the Court refers to legal rules in order to answer questions of law, the same can also act as a means to further develop the standard in the concerned area of law.<sup>13</sup> Another important aspect associated with dispute settlement through the judicial process is the quick disposal of legal matters. It is in the interest of the parties that a dispute should be disposed off as soon as possible without unreasonable delay. The ICJ has often tried to address the problem of

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<sup>8</sup> Malcolm N. Shaw, *The International Court of Justice: A Practical Perspective* (1997) 46 (4) *International and Comparative Law Quarterly* p 835.

<sup>9</sup> Charter of the United Nations 1945, art 33.

<sup>10</sup> Joan E. Donoghue, *The Role of the World Court Today* (2012) 47 (1) *Georgia Law Review* p 192.

<sup>11</sup> *ibid* 190.

<sup>12</sup> Robert Y. Jennings, *The Role of International Court of Justice* (1998) 68 (1) *British Year Book of International Law* p 5.

<sup>13</sup> Christopher Greenwood, *Role of International Court of Justice in Global Community* (2011) 17 (2) *Journal of International Law and Policy* p 243.

delays by repeatedly stressing that the quick disposal of legal matters is in the interest of both the Court as well as the litigants.<sup>14</sup>

In this background, an attempt is made in this paper to focus primarily on some of the challenges the International Court of Justice faces in trying to solve disputes between states. The paper aims to analyze the issues related to the Court's jurisdiction as well as conformity of its decisions by the litigants in order to answer the question as to whether or not the ICJ has been able to substantially contribute to dispute resolution.

### **I. Jurisdiction Under Article 36, Statute of the International Court of Justice**

The notion of jurisdiction as enunciated under article 36, paragraph 1 of the ICJ Statute<sup>15</sup> demonstrates the Court's authority to adjudicate matters between states. The Court's jurisdiction however, only extends to disputes between the parties. The Court's long held position on what constitutes a 'dispute' is as follows: 'A dispute is a disagreement on a point of law or fact, a conflict of legal views or interests between two persons.'<sup>16</sup> Although, there existed a debate in the early years of the Court as to whether the term 'dispute' constituted legal, political or both within its ambit, the same however, has been put to rest in the later years. It is very clear that the Court will not adjudicate upon a matter that has no legal element involve in it.<sup>17</sup> Moreover, the rules under international law being narrow in their application, hardly allow the possibility of a matter to come up before the Court that is devoid of any legal issue.<sup>18</sup> It is also true that cases that go up to the ICJ often have a political agenda behind them, still, the ICJ has always maintained a strong position on this issue by stating that, the Statute of the ICJ does not prohibit the Court in any manner, not to take cognizance of a dispute because one aspect of it is legal and others are not.<sup>19</sup> Apart from the jurisdiction in contentious proceedings, the Court also has the power to give advisory opinions pursuant to article 96 of Charter of the United Nations.<sup>20</sup> But, the most important aspect in relation to the jurisdiction of ICJ is that, the same is based on the

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<sup>14</sup> Hugh Thirlway, *The International Court of Justice 1989-2009: At the Heart of The Dispute Settlement System?* (2010) 57 (3) *Netherlands International Law Review* p 392.

<sup>15</sup> Statute of the International Court of Justice 1945, art 36.

<sup>16</sup> Andreas Zimmermann, Christian Tomuschat and Karin Oelles-Frahm (eds), *The Statute of International Court of Justice: A Commentary* 597 (1<sup>st</sup> edn, Oxford University Press, 2006).

<sup>17</sup> *ibid.*

<sup>18</sup> *ibid* 599.

<sup>19</sup> *ibid* 600.

<sup>20</sup> Charter of the United Nations 1945, art 96.

consent of the parties. Under the Statute, no state can be forced to present a dispute with another state for adjudication if there is lack of consent of parties.<sup>21</sup> Set up to facilitate peaceful settlement of disputes, the ICJ is based upon the premise of consent. As the likelihood of states, voluntarily consenting to the Court's authority is very less and the same may even affect the compliance of the Court's decision, freedom is given to states to either accept or reject the settlement of their disputes through the ICJ.<sup>22</sup> In order to give its consent to the jurisdiction of the Court, a state should be a party to the ICJ Statute but this in itself does not amount to a state submitting to the authority of the Court.<sup>23</sup>

Consent is required in precise form. As per article 36, paragraph 1, a dispute can be referred to the Court through a special agreement between the parties or through a compromissory clause in a treaty or agreement and under article 36, paragraph 2, states are free to make a unilateral declaration which identifies the jurisdiction of the Court as binding upon them.<sup>24</sup> Under the Optional Clause system (article 36, paragraph 2) a group of states is formed, each one having consented to the Court's jurisdiction to settle any dispute that may arise between them in future. Nonetheless, unilateral declarations under article 36 may contain reservations which limit the duration or even exclude certain types of dispute from the Court's jurisdiction.<sup>25</sup> Hence, the jurisdiction of the Court under article 36, paragraph 2 is not 'compulsory' in the real sense, as states have the choice to either accept or reject it and they can do so under such terms and conditions as they deem fit. The unilateral declaration of accepting the compulsory jurisdiction of the Court is completely discretionary and in making such declaration a state has the option of either placing conditions or accepting the Court's authority unconditionally.<sup>26</sup> Not all states have made such unilateral declarations. A total of 71 states have given their declaration of acceptance of the compulsory jurisdiction.<sup>27</sup> However, only one of the permanent members of the Security Council, the United Kingdom has consented to the Court's jurisdiction under article 36

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<sup>21</sup> *Supra* note 16 at 602.

<sup>22</sup> Gleider I Hernández, *International Court of Justice and the Judicial Function* 47 (1<sup>st</sup> edn, Oxford University Press, 2014).

<sup>23</sup> Stanimir A. Alexandrov, *The Compulsory Jurisdiction of the International Court of Justice: How Compulsory is it?* (2006) 5 (1) *Chinese Journal of International Law* p 29.

<sup>24</sup> *ibid* 30.

<sup>25</sup> *ibid* 31.

<sup>26</sup> *Supra* note 16 at 626.

<sup>27</sup> 'The International Court of Justice' <<http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3>> accessed 9 February 2015.

paragraph 2. But, it also reserves the right at any time, by means of a notification to add, amend or withdraw any of the reservations.<sup>28</sup> At the time of introduction of the Optional Clause system, the expectation was that, a substantial number of states could be persuaded to make unilateral declarations and the same would soon lead to a general acceptance of the compulsory jurisdiction of the Court's authority.<sup>29</sup> But, the same has not happened, as states over the years have shown greater tendency only to subscribe to the Optional Clause in order to structure their own declarations which gives them the choice to either accept or reject jurisdiction. The states have made the use of both the time limit clauses in order to terminate the declarations merely by a notice, and reservations through which states preserve the right to exclude themselves from the acceptance of compulsory jurisdiction.<sup>30</sup>

The voluntary modification of declarations on part of states has led to instability in the settlement of disputes, especially through the ICJ mechanism. Also, the option of exercising free choice vis a vis the Court's jurisdiction defends states from any judicial scrutiny even when the disputes are of a serious nature.<sup>31</sup> But, the constraints on the Statute only reflect the concerns at the time of framing of the provisions. States being sovereign entities could not have been forced to accept the Court's jurisdiction.<sup>32</sup> It is to be noted that, there are inherent limitations on the exercise of the judicial function which the Court can hardly ignore. The restraint on the Court's function is the result of its consent based jurisdiction, which makes it difficult for the Court to exercise its jurisdiction on states that have not consented to its authority.<sup>33</sup> Also, drawbacks to the Optional Clause system do require immediate attention, but, considering the complexities of how international relations function and the flexibility of international law, there may not be much scope for improvement at once.<sup>34</sup> As per Sir Hersch Lauterpacht, 'there is a fundamental contradiction between any profession of attachment to the rule of law among nations and the denial of jurisdiction of the highest international judicial organ to adjudicate upon disputes

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<sup>28</sup> The International Court of Justice' <<http://www.icj-cij.org/jurisdiction/?p1=5&p2=1&p3=3&code=GB>> accessed 9 February 2015.

<sup>29</sup> C.H.M. Waldock, Decline of the Optional Clause (1955-1956) vol. 32 British Year Book of International Law p 247.

<sup>30</sup> *ibid* 246.

<sup>31</sup> Gary L. Scott and Craig L. Carr, The ICJ and Compulsory Jurisdiction: The Case for Closing the Clause (1987) 81 (1) The American Journal of International Law p 70.

<sup>32</sup> *ibid*.

<sup>33</sup> *ibid* 71.

<sup>34</sup> *ibid* 73.

involving legal rights and obligations.<sup>35</sup> The Court, however, has always placed the consent of parties on a higher pedestal and this factor has shaped its judicial thinking all throughout.<sup>36</sup>

As noted above, the judgments of the ICJ are binding upon the parties, but the decisions of the Court are hardly complied with, thereby, making the entire exercise almost futile. Therefore, the following section will highlight the issues regarding compliance with the judgments of the Court.

## **II. Compliance with the International Court of Justice Decisions**

According to article 94, paragraph 1 of Charter of the United Nations, each member of the UN take on themselves the duty to abide by the decisions of the International Court of Justice. Note that, the rules regarding enforcement of decisions find a place in the Charter and not in the Statute of the Court.<sup>37</sup> As per article 94, paragraph 2, Charter of the United Nations, the duty to monitor the compliance of the decisions is not on the Court but it is for the Security Council to make recommendations or take necessary measures to ensure compliance.<sup>38</sup> This clearly shows a link between the ICJ and the Security Council as organizations, but with different capabilities in terms of solving disputes. The ICJ, on one hand, has the task of settling legal claims among parties and the Security Council, is assigned the task to give effect to decisions handed down by the Court in case a state refuses to abide by the same.<sup>39</sup> Before cases of non-compliance are examined, it is necessary to understand, what is meant by ‘compliance’. Compliance with the final judgment of the Court can be understood as the recognition of the decision as final with the performance of any binding obligation in good faith. Compliance also means a duty to give full effect to the judgment without the intention of avoiding it or implementing it only partially.<sup>40</sup> Since, states have been given the choice to freely determine whether or not to subject themselves to the Court’s jurisdiction, in similar manner, it is up to the states to determine as to how they will give effect to an obligation arising from a judgment. How a particular state goes about fulfilling its obligation under the judgment in order to finally put to rest a dispute may often not

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<sup>35</sup> *Supra* note 22 at 50.

<sup>36</sup> *ibid.*

<sup>37</sup> Constanze Schulte, *Compliance with Decisions of the International Court of Justice* 19 (1<sup>st</sup> edn, Oxford University Press, 2004).

<sup>38</sup> Charter of the United Nations 1945, art 94.

<sup>39</sup> Aloysius P Llamzon, *Jurisdiction and Compliance in Recent Decisions of the International Court of Justice* (2007) 18 (5) *European Journal of International Law* p 822.

<sup>40</sup> Colter Paulson, *Compliance with Final Judgments of the International Court of Justice Since 1987* (2004) 98 (3) *The American Journal of International Law* p 436.

be accepted by the other state.<sup>41</sup> Thus, a new dispute may arise vis a vis the issue of compliance which states, generally, try to resolve through negotiations. However, in many cases, the same rarely works as states often cite the reason that, it is difficult for them to adhere to a strict time limit when it comes to complying with judicial decisions obtained at an international forum at the domestic level.<sup>42</sup>

The cases of United States Diplomatic and Consular Staff in Tehran (United States of America v Iran), and Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), will be examined in the following sections as they are one of the most controversial cases that the Court decided and which raised questions regarding the effectiveness of the Court in terms of dispute settlement.

#### **A. United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)**

An application seeking a request for interim measures of protection against Iran was filed by the United States of America to the International Court of Justice on 29 November, 1979. The application narrated the events of the United States Embassy hostage situation in Tehran and highlighted the failure of the Iranian government to solve the situation.<sup>43</sup> As per United States, a close to seventy people were held hostage and the Government of Iran was providing assistance to the group responsible for the hostage situation. United States also alleged that, Iran was in direct violation of its obligations under international agreements as well as under customary international law to ensure the safety of diplomatic and consular officials and premises.<sup>44</sup> United States asked the Court to adjudicate and pronounce that i) Iran had been in violation of its legal obligations, ii) Iran should ensure that the hostages are released and are allowed to leave Iran safely, and iii) Iran should pay reparations to United States and also put on trial those responsible for the hostage crisis.<sup>45</sup> Iran neither chose to appear before the Court to argue its case nor did it submit any written arguments. The position of the Iranian government was, however,

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<sup>41</sup> *ibid* 446.

<sup>42</sup> *ibid* 448.

<sup>43</sup>Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran) [1980] ICJ Rep 3.

<sup>44</sup> *ibid*.

<sup>45</sup> *ibid*.



communicated to the Court by the Minister for Foreign Affairs of Iran through two letters. In the letters, the Minister referred to mostly political reasons rather than legal to persuade the Court not to admit the case.<sup>46</sup> The Minister mentioned that, ‘the question of the hostage situation presented by the United States to the Court only represents a marginal and secondary aspect of an overall problem, one such that it cannot be studied separately, and which involves, inter alia, more than 25 years of continual interference by the United States in the internal affairs of Iran, the shameless exploitation of our country, and numerous crimes perpetrated against the Iranian people, contrary to and in conflict with all international and humanitarian norms.’<sup>47</sup> The Court on December 15, 1979, passed an interim order in favour of United States granting provisional measures. In relation to Iran not being present at the hearing, the Court stated that, the non-appearance of Iran in the case does not prejudice the passing of provisional measures.<sup>48</sup>

Moreover, the Court relied upon the Minister’s letter to reach a conclusion that, the hostage crisis cannot be regarded as marginal and secondary by Iran because it involves rights of persons who were held as hostages. The Court also rejected Iran’s argument of the issue being within its sovereignty by stating that a dispute which involves diplomatic and consular relations is well within international jurisdiction.<sup>49</sup> Irrespective of the Court’s interim order and its final judgment on May 24, 1980 Iran refused to release the hostages. It was only eight months after the final judgment that Iran released the hostages. The reason for the release of the hostages was attributed to a change in Iran’s position as it realized that it was not in its political interest to hold the hostages any longer. But, as per United States official statements, the release of hostages was in compliance of the Court’s verdict.<sup>50</sup>

However, in judging the Court’s effectiveness in settling the dispute, the following needs to be borne in mind; Iran was under an obligation to comply with the decision as per article 94, paragraph 1 of the Charter but it did not do so.<sup>51</sup> Moreover, a Security Council action under article 94, paragraph 2 of the Charter could have been utilized to ensure compliance by Iran but, the United States did not ask the Council to take necessary steps because a proposal to the

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<sup>46</sup> *ibid.*

<sup>47</sup> *ibid.*

<sup>48</sup> M.W. Janis, *The Role of the International Court of Justice in Hostages Crisis* (1981) 13 (2) *Connecticut Law Review* p 269.

<sup>49</sup> *ibid* 273.

<sup>50</sup> *Supra* note 37 at 169.

<sup>51</sup> *Supra* note 48 at 277.

Security Council to impose an economic boycott on Iran had already been vetoed by the Soviet Union in January 1980.<sup>52</sup> Considering that Iran never showed any interest in the Court's hearing and it ultimately did not honour the Court's decision, a question arises, that, whether the entire hostage crisis was fit to be solved through the judicial mechanism in the first place and whether the Court was right in deciding such an issue because the reputation of the Court gets directly affected when its decisions are not respected by the parties.<sup>53</sup>

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

An application was filed by Nicaragua seeking a request for interim measures before the ICJ against the United States of America on 9 April, 1984. The application sought a declaration that the United States was in violation of its duties under international law, including the prohibition on the use of force, intervention and the freedom on the high seas.<sup>54</sup> The United States contested the Court's jurisdiction because it saw a little chance of overcoming the odds in the Court as its policy of overthrowing the Sandinista regime in Nicaragua as well as its support for the counter-revolutionary group, Contras was known to everyone.<sup>55</sup> United States had given covert support in the form of financial assistance, training, and military equipment to the revolutionary group. Furthermore, it was also alleged by Nicaragua that United States had mined its harbours and launched armed raids on its ports and oil depots.<sup>56</sup> The ICJ's stand on the issue of jurisdiction in this case became highly controversial and it later led to United States withdrawing itself from the Court's proceedings.<sup>57</sup>

Nicaragua had based its application on both countries declarations accepting the compulsory jurisdiction of the Court. But, according to the United States, Nicaragua's declaration of accepting the compulsory jurisdiction of the Permanent Court of International Justice had never been ratified. Nicaragua contested this argument by stating that its declaration had conferred jurisdiction on the Court under article 36, paragraph 5 of the Statute.<sup>58</sup> The United States also

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<sup>52</sup> *ibid.*

<sup>53</sup> *Supra* note 48 at 279.

<sup>54</sup> *Supra* note 6.

<sup>55</sup> *ibid.*

<sup>56</sup> *ibid.*

<sup>57</sup> *ibid.*

<sup>58</sup> *ibid.*

relied upon its declaration under article 36, paragraph 2, which it had modified few days prior to the submission of the application by Nicaragua. United States had filed a document with the UN Secretary General, according to which, the United States was to be excluded from the applicability of the compulsory jurisdiction in relation to ‘disputes with any Central American State or arising out of or related to events in Central America, a proviso that was to take effect immediately and to remain in force for two years, so as to foster the continuing regional dispute settlement process which seeks a negotiated solution to the interrelated political, economic and security problems of Central America.’<sup>59</sup> United States also contested the application on the point that, the ICJ had no competence to deal with matters that concerned armed conflict and the right to self-defense as these fell within the purview of the Security Council, also, Nicaragua had failed to exhaust the regional diplomatic process to peacefully solve the dispute, hence it could not bring a claim to the Court.<sup>60</sup>

The decision regarding jurisdiction and admissibility was delivered by the Court on 26 November, 1984. The Court rejected the arguments made by the United States, stating that it had jurisdiction to decide under article 36, paragraphs 2 and 5 of the Statute.<sup>61</sup> Although the Court tried to explain the issues raised by the two nations in its decision, yet, the decision was highly controversial mainly because of the opinion of the dissenting judges in relation to the issue of jurisdiction. United States refused to accept the decision and decided not to participate in further proceedings of the Court on the ground that, the decision was bad in law and appeared to be biased.<sup>62</sup> The ICJ in its decision on 27 June, 1986 held that, United States did engage in the mining of Nicaraguan ports and depots thereby interrupting its freedom to use the high seas. United States also violated the law on interventions and the prohibition on the use of force. According to the Court, United States was therefore, under a duty to refrain from actions that violated international obligations and was liable to make reparations to Nicaragua.<sup>63</sup> Considering that United States chose not to take part in the proceedings of the Court and it decided not to honour the decision despite the pressure from the international community, one may view the non-compliance as a failure on the part of the ICJ in settlement of the dispute. Should the Court

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<sup>59</sup> *ibid.*

<sup>60</sup> *ibid.*

<sup>61</sup> *ibid.*

<sup>62</sup> *Supra* note 37 at 190.

<sup>63</sup> *ibid* 194.

have denied jurisdiction taking into consideration the fact that compliance may become an issue after the decision as United States policy towards Nicaragua was out in the open, is a question which is debated to this day.<sup>64</sup>

The following section attempts to relook at the issue of compliance through recent ICJ decisions.

### **C. Gabčíkovo-Nagymaros Project (Hungary/Slovakia)**

A treaty was entered into between Hungary and Czechoslovakia in 1977, to construct a system of locks on the Danube River in order to prevent flooding. The treaty neither had a termination clause nor did it provide for a right to suspend or abandon the work unilaterally by a party.<sup>65</sup> While the work on the Czechoslovakia's portion was almost close to completion, Hungary first suspended work and then chose to leave the project, citing ecological concerns. Hungary later notified Czechoslovakia about it terminating the treaty. The dispute was brought before the ICJ by Hungary and Slovakia by a special agreement in 1993.<sup>66</sup> The Court was asked to decide whether or not Hungary was entitled to first suspend and then abandon the project on its own and what was the legal validity of Hungary's notification of termination of the treaty.<sup>67</sup>

ICJ gave its decision on 25 September, 1997 wherein it held that, under the 1977 treaty, Hungary was not entitled to unilaterally suspend and abandon the project in 1989. Also, Hungary's notification of terminating the treaty did not have any legal effect. The Court reached a conclusion that the parties themselves need to decide on how to go ahead with the working of the treaty keeping in mind various aspects like, protection of the environment etc.<sup>68</sup> In order to comply with the Court's decision, both the parties started negotiations. But, after the breakdown of negotiations, Slovakia again requested the ICJ for an additional judgment citing the reason that, Hungary was reluctant in enforcing the decision. However, no proceedings were brought after there was a change of government in Slovakia in 1998.<sup>69</sup> In spite of repeated talks between the parties, both states were not able to agree on the usefulness of the project. Now, regarding the role of the ICJ in the resolution of the dispute, it can be argued that, by not deciding the issue

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<sup>64</sup> *ibid* 211.

<sup>65</sup> Case Concerning The Gabčíkovo-Nagymaros Project (Hungary v Slovakia) [1997] ICJ Rep 7.

<sup>66</sup> *ibid*.

<sup>67</sup> *ibid*.

<sup>68</sup> *ibid*.

<sup>69</sup> *Supra* note 37 at 246.

between the parties and asking them to negotiate the matter themselves, the Court pushed aside the task given to it by the parties.<sup>70</sup> On the other hand, it can also be said that, by not deciding upon the matter, the Court provided an opportunity to the parties to stabilize the matter themselves because the issue was more of a political nature than legal.<sup>71</sup>

#### **D. Case Concerning Avena and other Mexican Nationals (Mexico v United States of America)**

‘On 9 January, 2003 Mexico brought proceedings against the United States of America for alleged violations of the Vienna Convention on Consular Relations, 1963. In its Application, Mexico based the jurisdiction of the Court on article 36, paragraph 1, of the Statute and on article 1 of the Optional Protocol concerning the Compulsory Settlement of Disputes, which accompanies the Vienna Convention.’<sup>72</sup> The case concerned the United States application of article 36, Vienna Convention on Consular Relations regarding the 54 Mexican prisoners who were sentenced to death in different jurisdictions within the United States. Mexico also obtained provisional measures from the ICJ which prohibited the United States from executing any of the prisoners before the final judgment from the Court. United States did not execute any prisoner before the decision came out.<sup>73</sup>

The ICJ in its 2004 decision held that the Mexican prisoners located in different jurisdictions of the United States were entitled to consular communication. The decision confirmed that the Vienna Convention laid down justiciable rights and the United States had violated those rights.<sup>74</sup> ‘The ICJ directed the United States to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the Mexican nationals on death row.’<sup>75</sup> After the Avena decision, President George W. Bush sent a memorandum to the Attorney General, stating that the United States being a party to the Vienna Convention on Consular Relation (VCCR) and its Optional Protocol Concerning the Compulsory Settlement of Disputes, will

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<sup>70</sup> *Supra* note 39 at 834.

<sup>71</sup> *Supra* note 37 at 249.

<sup>72</sup> Case Concerning Avena and other Mexican Nationals (Mexico v United States of America) [2004] I.C.J. 1

<sup>73</sup> *ibid.*

<sup>74</sup> *ibid.*

<sup>75</sup> Steve Charnovitz, Correcting America’s Continuing Failure to Comply with The Avena Judgment (2012) 106 (3) American Journal of International Law p 572.

abide by the verdict given by the Court in the Avena case.<sup>76</sup> But, the United States Supreme Court in *Medellin v Texas*,<sup>77</sup> refused to follow the Avena decision and the President's memorandum, in spite of coming to a conclusion that United States had an international obligation to follow the ICJ's verdict. The Supreme Court held that, it is Congress and not the President that has the power to enact a legislation to give effect to the Avena decision in situations wherein national laws prevents the United States in fulfilling an international obligation.<sup>78</sup> The position in the *Medellin* case was again reiterated by the Supreme Court in its 2011 decision in *Leal Garcia v Texas*, wherein a request to stay the execution of a convicted prisoner on the ground that his conviction was in violation of VCCR was rejected by the Supreme Court.<sup>79</sup>

## **Conclusion**

From the above discussed cases, it is apparent that the relationship between the ICJ and States is not at all equivalent to the relationship between courts and litigants in a domestic setup (for example, Avena case). The fact that, ICJ is part of a wide range of mechanisms available to states to solve their dispute needs to be borne in mind when critiquing its effectiveness in terms of dispute resolution. As is the case with any organization, ICJ too has its limitations and it has to function within those boundaries. In judging the Court's role in the peaceful resolution of disputes, how a relevant law is applied by the ICJ to a particular dispute is rarely an issue, although questions have been raised on this in the past (Nicaragua) but, how effective is the remedy provided by the ICJ so that there are no problems in terms of compliance, has always been a concern. The international community expects a broader approach to their problems from the ICJ rather than a narrower one. States go to the ICJ in order to have a final settlement to their disputes and it would serve them no purpose if after going through a long judicial process, they do not have a final remedy. However, as per the ICJ Statute, the Court's role is only limited to giving decisions and it is left to the states to comply with the Court's verdict (bear in mind the ineffectiveness of article 94 of the Charter). A major problem that the Court has been facing both in the pre and post Nicaragua era in relation to compliance is, states contesting the Court's

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<sup>76</sup> 'Memorandum for the Attorney General' <<http://georgewbush-whitehouse.archives.gov/news/releases/2005/02/20050228-18.html>> accessed 9 February 2015.

<sup>77</sup> *Medellin v Texas*, 552 U.S. 491 [2008].

<sup>78</sup> *ibid.*

<sup>79</sup> *Leal Garcia v Texas*, 131 S.Ct. 2866 [2011].

jurisdiction to decide the matter. Although, the parties to a dispute have the right to do so, but, the focus has been more on ‘questioning’ the very subject matter of the dispute than the application of substantive law.

It is often said that, the ICJ should abstain itself from deciding upon certain controversial issues (which are highly political in nature) irrespective of it having jurisdiction over them in order to maintain a good compliance record keeping in mind the abuse of the Optional Clause system.<sup>80</sup> But, if the ICJ does this, can it guarantee genuine compliance in future in matters which are not strictly legal and can this act of stepping aside from its role by the ICJ, provide an assurance that, disputes which are left out by the ICJ because of their political nature would not come before the Court later. In spite of such complexities, the ICJ should not, in an exercise of caution, ignore genuine instances in which it can exercise jurisdiction for fear of non compliance as doing so would affect the balance between international law and its political subjects. Nonetheless, when discussing about the different aspects regarding compliance, it would be unfair to compare the enforcement mechanisms of the ICJ to that of domestic courts. The institutional structure of the ICJ is complex and the option available under the Charter for implementing its judgments remains ineffective. Furthermore, in many cases, states do not even consider the option of going to the Security Council in order to seek enforcement of the decisions.

Under the Charter, the Security Council is assigned the task to take appropriate action to enforce the Court’s decision at the request of a party seeking compliance. As a result of the involvement of the Security Council in the process of compliance, the issue of enforcement has become more political than legal in nature. In the cases discussed above, states have not asked the Security Council to use its powers under article 94, even in situations of clear non-compliance. Therefore, it is true that the Charter mechanism for enforcement of decisions has failed to play a substantial role in practice. But, why states are hesitant in resorting to the Security Council? Enforcement under the Charter provisions is only discretionary upon the Security Council. The relationship between article 94, paragraph 2 and the Security Council remains unclear to states. Another reason why states do not resort to the Security Council is because of the danger of its resolutions getting vetoed by any of the permanent five members. The need is to have an independent form of action (considering the judicial nature of the matter) which does not overlap with the normal

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<sup>80</sup> *Supra* note 29 at 246.

functioning of the Security Council. Enforcement of decisions has to be seen differently from other issues of peace and security by the Security Council. Therefore, while judging the role of the ICJ in dispute settlement, it can be concluded that, irrespective of all its problems, the Court's efforts in resolving disputes cannot be neglected, especially in the development of international law. But, the ICJ as an international forum for dispute settlement will only be able to carry out its functions in a better manner, if it is accepted as an institution with all its limitations. Although, there is scope for further improving its functioning as the 'World Court' which also includes strengthening the enforcement mechanism under the Charter, but, at the same time, it has to be understood that the ICJ is only a part of the system of dispute resolution.