
Critical Analysis on the Ineffectiveness of the ICJ in the Settlement of Disputes between States: The Example of Nicaragua Case

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Abstract

In principle, the charter of the United Nations provide that all Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered¹.the charter of the united nations determine the international court of justice as the principal judicial organ of the United Nations (UN).

The court has a twofold role of settlement in accordance with international law, the legal disputes submitted to it by States and to give advisory opinions on legal questions referred to it by duly authorized United Nations organs and specialized agencies.The establishment of ICJ could be the solution of conflict which raised between the state but basing on its statute it has lose the capacity of being response to those conflicts basing on its decision taken by it in different cases. Those who criticize the court argue that the members of the ICJ vote the interests of the states that appoint them². Politicians and diplomats from states that have recently lost their cases argue that the ICJ's rulings are politically motivated³

In its statute and from the article 59 it is said that the decision of the Court has no binding force except between the parties and in respect

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of that particular case. With regarding to its missions, this can be seen as the weakness of the statute to the settlement of the dispute between the states.

In the article 36(2) a state at any time can stop to collaborate with the ICJ. This is the case of Nicaragua against the United States of America, where the USA has encouraging, supporting and aiding military and paramilitary activities in and against, the USA refused to comply with the ruling, and withdrew its consent to compulsory jurisdiction.

Considering the article 26(1) of the Vienna convention on law of treaties, it is said that ‘‘the treaty in force is binding upon the parties to it and must be performed by them in good faith. The art 36(2) of the statute bring contradictions with this provision of the Vienna convention on law of treaties. The fact that the states are given choice in recognizing the court, breach the principle of the *pacta sunt servanda*.

The present study will focus will show the necessity to recourse to the ICJ in order to settle disputes between States in international law, precise the limitation of the competences reserved to the ICJ in settling disputes between States and will indicate how the Statute of the ICJ is used by the States in order to escape sometimes on the international justice.

Key words: ICJ, International law, Jurisdictions, Justice, settlement, Disputes.

Introduction

The International Court of Justice (ICJ) is the principal judicial organ of the United Nations (UN). It was established in June 1945 by the Charter of the United Nations and began work in April 1946. It is the only international court that has general subject matter jurisdiction over disputes between all of the members of the United Nations; virtually every state in the world. The ICJ has considerable importance, both political and scholarly. Many of the ICJ's judgments appear to have resolved real international disputes. And although in many other cases states have failed to comply with its judgments, or to acknowledge its jurisdiction, the ICJ remains a potent symbol of the possibilities of an international legal system. For its defenders, the ICJ "plays the leading role in legitimating the international legal system by resolving its disputes in a principled manner"⁴.

Critics of the ICJ mainly politicians and diplomats from states that have recently lost their cases argue that the ICJ's rulings are politically motivated. In the words of Jeane Kirkpatrick, the ICJ is a semi-legal, sometimes accept and sometimes don't⁵. The ICJ is, after all, a court, and resembles domestic courts in the United States and other countries. We test the claim of the critics that the judges vote the interest of the state that appoints them rather than galley irrelevant considerations such as whether one party has a military alliance related to legally irrelevant factors⁶.

The International Court of Justice has jurisdiction over disputes between nations, and has decided dozens of cases since it began

⁴ M. FRANCK, *Criticisms of the ICJ*, Hague, Martinus Nijhoff publishers, 1995, p. 346.

⁵ A. ERIC & D.F. MIGUEL, *Is the International Court of Justice Biased?* New York, Cambridge university press, 2004, p.30.

⁶ A.S.MULLER & D.RAIC, *The international court of justice: its future role after 50 years*, Hague, martinus nijhoff publishers ,1997,p.54.

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operations in 1946. Its defenders argue that the ICJ decides cases impartially and confers legitimacy on the international legal system. Its critics argue that the members of the ICJ vote the interests of the states that appoint them. Prior empirical scholarship is ambiguous. We test the charge of bias using statistical methods. We find strong evidence that (1) judges favor the states that appoint them, and 2 judges favor states whose wealth level is close to that of the judges' own state; and weaker evidence that 3 judges favor states whose political system is similar to that of the judges' own state, and 4 judges favor states whose culture (language and religion) is similar to that of the judges' own state. We find weak or no evidence that judges are influenced by regional and military alignments.⁷

The international court of justice lack the power of taking binding decision as it is figured in article 59 of the statute of the ICJ. The article 36(2) said that at any time the state can declare the resignation in the ICJ so this case has caused many problems in the working of the ICJ. Considering the example of NICARAGUA case where the United States was charged of recruiting, training, arming, equipping, financing, supplying and otherwise encouraging, supporting, aiding, and directing military and paramilitary actions in and against Nicaragua, the ICJ ruled in favor of Nicaragua and against the United States and awarded reparations to Nicaragua. In this case, the ICJ held that the U.S. had violated international law by supporting Contra guerrillas in their rebellion against the Nicaraguan government and by mining Nicaragua's harbors⁸.

The United States refused to participate in the proceedings after the Court rejected its argument that the ICJ lacked jurisdiction to hear the

⁷X, International court of justice, available at <http://www.law.uchicago.edu/files/file.pdf>, accessed on June 25-2014.

⁸ X, Nicaragua vs United States, available at http://www.princeton.edu/~achaney/Nicaragua_v._United_States.html , accessed on June 25-2014.

case. The U.S. later blocked enforcement of the judgment by the United Nations Security Council and thereby prevented Nicaragua from obtaining any actual compensation, this shows the incapacity of the international court of justice to handle the dispute between the states. The fact that disputes may be placed before the court by parties upon conditions prescribed by the U.N. Security Council. No state, however, may be subject to the jurisdiction of the court without the state's consent. Consent may be given by express agreement at the time the dispute is presented to the court, by prior agreement to accept the jurisdiction of the court in particular categories of cases, or by treaty provisions with respect to disputes arising from matters covered by the treaty⁹.

The judgment of the ICJ is binding and (technically) cannot be appealed (arts. 59, 60) once the parties have consented to its jurisdiction and the court has rendered a decision. This functioning has made the international court of justice not to be free in taking decision and the decision making is still doubtful¹⁰.

1. Competence of the international court of justice

This part is focusing on the description of the international court of justice, it regards to the organizational structure of the court and its competence of trying disputes between the states.

1.1. Organizational structure of the International Court of Justice

The international court of justice consists of a body of independent judges, elected regardless of their nationality from among persons of high moral character who possess the qualification required in their

⁹MORRISON & L. FRED, *Legal Issues in the Nicaragua opinion*, Boston, American Journal of International Law, 1987, p.19.

¹⁰ MORRISON & L. FRED, *supra note 6*, p.20.

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respective countries for appointment to the highest offices, or are jurisconsults of recognized competence in international law¹¹.

The court consists of 15 members of the judges of who two may be nationals of the same state¹². As regards the procedure for the appointment of judges, it is interesting to note that, it is combines both legal and political element. The idea was to exclude as far as possible the influence of national state over them¹³. The system established role in the actual creation of the permanent court of international justice. It succeeds in allaying many suspicions regarding the composition of the proposed court¹⁴.

The members of the court are elected by the general assembly and the Security Council voting separately from a list of qualified persons drawn up by the national groups whereas United Nations members are represented in the permanent court of arbitration (PCA). This provision was inserted to restrict political measures in the selection of judges¹⁵.

The judges' individual opinions can be crucial particularly in sensitive case as the alteration in the sentence adopted by the court with regard to the Namibia case of 1966. This is attributed to the change in the composition of the court that took place in the intervening period. Candidates must obtain an absolute majority of vote in the assembly in order for the UNSC to be considered. The member of the court is elected for a period of 9 years and may be re-elected. They enjoy all diplomatic immunities and privileges while performing official duties¹⁶. No member of the court can be dismissed

¹¹ Statute of international court of justice, *supra note* 23, art 2.

¹² *Id.*, art 3.

¹³ United Nations, Dag Hammarskjold library, United Nations documents index, Vol 8, 2005, p.701.

¹⁴ *Ibid.*

¹⁵ Statute of international court of justice, *supra note* 28, art 4.

¹⁶ Statute of international court of justice, *supra note* 32, art 5.

unless, in the unanimous opinion of the other members, he has ceased to fulfill the required conditions¹⁷

Thus, the Judge Oda underlined that in practical terms, therefore, it is inevitable if a chamber is to be viable that its composition must result from a consensus between the parties and the court although the chamber is a component of the court and the processes of the decision of the election whereby it comes into being be as judicially impartial as its subsequent functioning. This kind of trend may well amount to a significant element in the work of the court, under which it provides the parties with flexibility in the choice of judges to hear the case and to that extent exercise parallel arbitration. Before taking up his duties, every member of the court is obliged to make a solemn declaration in open court that he will exercise his powers impartially and conscientiously¹⁸.

Therefore, after discussing on the Organizational structure of the International Court of Justice, the following paragraph is going to focus on the competence of the ICJ.

1.2. Competence of the international court of justice

The competence of the international court of justice may be analyzed in contentious procedure and in advisory procedure.

1.2.1. Competence in contentious procedure

The status of international court of justice precise that only States members of the United Nations and other States which have become parties to the Statute of the Court or which have accepted its jurisdiction under certain conditions, may be parties to contentious cases¹⁹.

¹⁷ *Id*, art 18.

¹⁸ J.G. MERRILLS, *international disputes settlement*, 2nd (ed), London, Oxford university press , 1989, p. 128.

¹⁹ Statute of the international court of justice, *supra note 33*, art 34.

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The Court is competent to entertain a dispute only if the States concerned have accepted its jurisdiction in one or more of the following ways:

- By entering into a special agreement to submit the dispute to the Court;
- By virtue of a jurisdictional clause, i.e typically, when they are parties to a treaty containing a provision whereby, in the event of a dispute of a given type or disagreement over the interpretation or application of the treaty, one of them may refer the dispute to the Court;
- Through the reciprocal effect of declarations made by them under the Statute whereby each has accepted the jurisdiction of the Court as compulsory in the event of a dispute with another State having made a similar declaration²⁰.

The state party to a case is represented by an agent. An agent plays the same role, and has the same rights and obligations, as a solicitor with respect to a national court. But they are dealing here with international relations, and the agent is also as it were the head of a special diplomatic mission with powers to commit a sovereign State. He/she receives communications from the Registrar concerning the case and forwards to the Registrar all correspondence and pleadings duly signed or certified. In public hearings the agent opens the argument on behalf of the government he/she represents and lodges the submissions²¹.

In general, whenever a formal act is to be done by the government represented, it is done by the agent. Agents are sometimes assisted by co-agents, deputy agents or assistant agents and always have counsel

²⁰ R. DONNER, *international adjudication using ICJ*, Hague, Martinus Nijhoff publishers, 1988, p.16.

²¹ C. BALA, *ICJ: its functioning and settlement of international disputes*, Birmingham, Birmingham university press, 1997, p.68.

or advocates, whose work they co-ordinate, to assist them in the preparation of the pleadings and the delivery of oral argument. Since there is no special International Court of Justice bar, there are no conditions that have to be fulfilled for counsel or advocates to enjoy the right of arguing before it, except only that they must have been appointed by a government to do so²².

The next paragraph has been focusing on the basis of the international court of justice's competence.

1.2.1.1. Basis of the court's competence

The jurisdiction of the Court in contentious proceedings is based on the consent of the States to which it is open. The form in which this consent is expressed determines the manner in which a case may be brought before the Court²³.

However, in the next paragraph it has been necessary to focus on the special agreement as a means of issuing the case in the ICJ.

1.2.1.1.1. Special agreement

The Statute provides that the jurisdiction of the Court comprises all cases which the parties refer to it²⁴. Such cases normally come before the Court by notification to the Registry of an agreement known as a special agreement and concluded by the parties especially for this purpose²⁵. The subject of the dispute and the parties must be indicated²⁶.

The article 38, paragraph 5, of the present Rules of Court which came into force on 1 July 1978 provides that when the applicant State

²² *Id.*, p.69.

²³ O. LISSITZYN, *the ICJ: its role in the maintenance of international peace and security*, Hague, Martinus Nijhoff publishers, 1951, p.61.

²⁴ Statute of international court of justice, *supra note 36*, art 36(1)

²⁵ P.JESSUP, *the international court of justice and legal matters*, Hague, Hoteli publishers, 1947, p.287.

²⁶ Statute of international court of justice, *supra note 41*, art. 40(1)

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proposes to found the jurisdiction of the Court upon consent thereto yet to be given or manifested by the State against which such application is made, the application shall be transmitted to that State. It shall not however be entered in the General List, nor any action be taken in the proceedings, unless and until the State against which such application is made consents to the Court's jurisdiction for the purposes of the case. All contentious cases have been brought before the Court by reason of an application instituting proceedings, irrespective of whether the Court's jurisdiction was founded on a provision in a treaty or convention, declarations recognizing the Court's jurisdiction as obligatory made by each of the parties to the dispute, or any other alleged form of consent²⁷.

The competence of international court of justice is also based on the treaties or the international conventions, the following paragraph detailed those aspect.

1.2.1.1.2. Treaties or conventions

The article 36, paragraph 1, of the Statute provides also that the jurisdiction of the Court comprises all matters, especially provided for in treaties and conventions in force. In such cases a matter is normally brought before the Court by means of a written application instituting proceedings²⁸; this is a unilateral document which must indicate the subject of the dispute and the parties as it is provided by the art 40, paragraph 1 of the statute, and, as far as possible, specify the provision on which the applicant founds the jurisdiction of the Court²⁹.

To these legal instruments, must be added other treaties and conventions concluded earlier and conferring jurisdiction upon the Permanent Court of International Justice, for Article 37 of the Statute

²⁷ *Id*, art 38.

²⁸ Statute of international court of justice, *supra note 43*, art 36(1)

²⁹ *Id*, art 38

of the International Court of Justice which stipulates that whenever a treaty or convention in force provides for reference of a matter to a tribunal to have been instituted by the League of Nations, or to the Permanent Court of International Justice, the matter shall, as between the parties to the Statute, be referred to the International Court of Justice. The Permanent Court reproduced, in 1932, in its Collection of Texts governing the Jurisdiction of the Court (P.C.I.J., Series D, No. 6, fourth edition) and subsequently in Chapter X of its Annual Reports (P.C.I.J., Series E, No. 8-16) the relevant provisions of the instruments governing its jurisdiction³⁰.

By virtue of the Article referred to above, some of these provisions now govern the jurisdiction of the International Court of Justice.

Regarding to the competence, after elaborating its basis in the international court of justice, it is important to develop in the next paragraph, the procedure of instituting the proceedings.

1.2.1.2. Procedure of instituting the proceedings

Proceedings may be instituted in one of two ways: Through the notification of a special agreement: the document, which is of a bilateral nature, can be lodged with the Court by either of the States parties to the proceedings or by both of them. A special agreement must indicate the subject of the dispute and the parties thereto. Since there is neither an applicant State nor a respondent State, in the Court's publications their names are separated by an oblique stroke at the end of the official title of the case³¹

By means of an application: the application, which is of a unilateral nature, is submitted by an applicant State against a respondent State. It is intended for communication to the latter state and the rules of

³⁰ *Ibid.*

³¹ R.ROSENNE, *The law and practice of international court*, Hague, Martinus Nijhoff publishers, 2006, p.44.

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court contain strict requirements with the respect to its content. In addition to the name of the party against, which the claim is brought and the subject of the dispute, the applicant State must, as far as possible, indicate briefly the declaration of acceptance of the jurisdiction of the court, and must succinctly state the facts and grounds on which it bases its claim³².

By signing the Charter, a state Member of the United Nations undertakes to comply with any decision of the Court in a case to which it is a party³³. Since, furthermore, a case can only be submitted to the Court and decided by it if the parties have in one way or another consented to its jurisdiction over the case³⁴; it is rare for a decision not to be implemented. A state which contends that the other side has failed to perform the obligations incumbent upon it under a judgment rendered by the Court may lay the matter before the Security Council, which is empowered to recommend or decide upon the measures to be taken to give effect to the judgment³⁵. A case may be brought to a conclusion at any stage of the proceedings by a settlement between the parties or by discontinuance. In the latter case, an applicant State may at any time inform the Court that it is not going on with the proceedings, or the two parties may declare that they have agreed to withdraw the case. The Court then removes the case from its List³⁶.

³² X, International Court of Justice, available online at <http://www.icj-cij.org>, accessed July 12, 2014.

³³ X, Introducing proceeding in the ICJ, available at <http://www.icj-cij.org/court/index.php?>, accessed on August 11, 2014.

³⁴ Statute of international court of justice, *supra note 45*, art 36(2)

³⁵ United Nations, charter of the United Nations, art 94(2)

³⁶ KELLY & BARBARA, *The International Court of Justice: It's Role in a New World Legal Order*, Touro Journal of Transnational Law, 1992, p.41.

Indeed, after developing the competence of the international court of justice in contentious procedure, the following paragraph has been based on the competence in advisory procedure.

1.2.2. Competence in advisory procedure

Advisory proceedings before the Court are open solely to five organs of the United Nations and to 16 specialized agencies of the United Nations family. The United Nations General Assembly and Security Council may request advisory opinions on any legal question³⁷. The other United Nations organs and specialized agencies which have been authorized to seek advisory opinions can only do so with respect to the legal questions arising within the scope of their activities³⁸.

When it receives a request for an advisory opinion, the Court, in order that it may give its opinion with full knowledge of the facts, is empowered to hold written and oral proceedings, certain aspects of which recall the proceedings in contentious cases³⁹. The advisory proceedings are concluded by the delivery of the advisory opinion at a public sitting. The consent of the parties with regards to an advisory opinion related to the controversy is sometimes occurs, the clearest example is the Western Sahara case, and similar to the Wall case. Spain argued that because the Court would give its opinion about an issue that was contentious between Morocco, Mauritania and Spanish itself and because it did not consent to the Court hearing the case⁴⁰.

The International Court of Justice would reject the argument stating, quoting the peace treaties case that: The consent of States, parties to a dispute, is the basis of the Court's jurisdiction in contentious cases.

³⁷ Statute of international court of justice, *supra note 35*, Art 65

³⁸ S. ROSENNE, *On the non use of advisory competence of the international court of justice*, Hague, Martinus Nijhoff publishers, 1964, p.22

³⁹ *Ibid.*

⁴⁰ *Id.*, p.26.

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The situation is different in regard to the advisory proceedings even where the request for an opinion relates to a legal question actually is pending between States. The Court's reply is only of an advisory character: As such, it has no binding force and follows that no State, whether a Member of the United Nations or not, can prevent the giving of an advisory opinion which the United Nations considers to be desirable in order to obtain enlightenment as to the course of action it should take. The Court's Opinion is given not to the States, but to the organ which is entitled to request it. The lack of consent could in some circumstances, constitute a ground for declining to give the opinion requested if, in the circumstances of a given case, considerations of judicial propriety should oblige the Court to refuse an opinion, especially when the effect would be the circumventing of the consent of the State⁴¹.

2. PROBLEMATIC OF THE LACK OF COMPETENCES OF THE ICJ IN THE SETTLEMENT OF NICARAGUA CASE

In this chapter, a special analysis has been focused on the no implementation of the decisions taken by the international court of justice and particularly, on the difficulties regarding to the competences of the ICJ in Nicaragua, notably the lack of enforcement of the ICJ judgments and its effect.

2.1. Difficulties regarding to the non-binding decision of the International Court of Justice

This section has been focused on the difficulties regarding to the non-binding decision of the ICJ. It is developing the generalities, the case

⁴¹ A. KRISHNAMURTHY, *Advisory opinion under international court of justice*, 5th year Symbiosis Societies law College, available on <http://www.legalserviceindia.com/articles/lock.htm>, accessed on July 17, 2014

of Nicaragua in the court, as well as the effect of the lack of competence of the international court of justice.

2.1.1. Basic principles

In accordance with the terms of the article 59 of the statute, the decision of the court has no binding force. However, it has been noted that the court decision has no erga omnes effect would not seem to be convincing. According to this view, the judicial review is an institution that can exist without a formal doctrine of judicial supremacy and can be practiced by the ICJ even if its decisions only bind the parties. It has been concluded that the ICJ would have prospecting effect. This could avoid legal uncertainty with respect to the consequences of state action taken on the basis of security council resolution prior to ICJ's determination of its legality⁴².

Compulsory jurisdiction is limited to cases where both parties have agreed to submit to its decision, and, as such, instances of aggression tend to be automatically escalated to and adjudicated by the Security Council. According to the sovereignty principle of international law, no nation is superior or inferior against another. Therefore, there is no entity that could force the states into practice of the law or punish the states in case any violation of international law occurs. Therefore, due to the absence of binding force, although there are 1903 member states of the ICJ, the members do not necessarily have to accept the jurisdiction. Moreover, membership in the UN and ICJ does not give the court automatic jurisdiction over the member states, but it is the consent of each state to follow the jurisdiction that matters⁴³

⁴² M. MOHAMED, *The role of the ICJ as the principle judicial organs of the united nations*, Hague, Kluwer law international, 2003, p.333.

⁴³ A. YUTAKA, *The law of occupation: continuity and challenge of international humanitarian law*, Tokyo, Hotei publishing, 2009, p.210.

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The International Court does not enjoy a full separation of powers, with permanent members of the Security Council being able to veto enforcement of cases, even to which they consented to be bound. Because the jurisdiction does not have binding force itself, in many cases the instances of aggression are adjudicated by the Security Council in adopting a resolution, etc. There is, therefore, likelihood for the permanent member states of Security Council to avoid the responsibility brought up by the International Court of Justice, as shown in the example of Nicaragua v. United States. The statute of the international court of justice provides that the decision of the Court has no binding force except between the parties and in respect of that particular case⁴⁴

The competence of the ICJ is criticized because of the inability to control state behavior. This is the case of Nicaragua where the international court of justice has failed to render justice to the state of Nicaragua based on its competence provided in art 59 of the statute of ICJ⁴⁵. By analyzing the ICJ's final decisions since the landmark case of Nicaragua v. US, one finds that the manner in which the ICJ was seized of jurisdiction is actually a poor predictor of subsequent compliance. The ICJ lacks plenary power over international disputes, and its decisions are binding only on the states that are parties to the dispute⁴⁶.

The Court's ability to resolve individual disputes and its capacity to clarify the content of international law depend on states' willingness to bring cases to it, which in part depends on the perceived quality of its work. Even if it lacks the authority to make generally binding legal

⁴⁴Statute of the international court of justice, *supra note 54*, art 59

⁴⁵P. ALOYSIUS & P. LAMZON, *European journal of international law: Jurisdiction and Compliance in recent decisions of the International Court of Justice*, available on <http://ejil.oxfordjournals.org/content/18/5/815.full>, accessed on August 10, 2014.

⁴⁶ M. MOHAMED, *supra note 59*, p.334.

determinations, states can and presumably will accept its view of the law if they perceive the Court as an institution upon which they can rely for a careful resolution of legal questions⁴⁷.

About the non-appearance of the United States of America in the court, The Court recalls that subsequent to the delivery of its Judgment of 26 November 1984 on the jurisdiction of the Court and the admissibility of Nicaragua's application, the United States decided not to take part in the present phase of the proceedings. The non appearance of the United States in the court does not prevent the Court from giving a decision in the case, basing on art the 53 of the statute of ICJ Whenever one of the parties does not appear before the Court, or fails to defend its case, the other party may call upon the Court to decide in favor of its claim, this means that the judgment would be rendered in favor of Nicaragua but to what effect the judgment would have?. Basing on the art 59 of the statute, the decisions of the court are not binding. In this, the judgment would not have effect on the United States even if it is convicted to commit the crimes in Nicaragua. This is the basis of the failure of the court in settlement of international conflicts⁴⁸.

The Court's jurisdiction being established, it has in accordance with Article 53, to satisfy itself that the claim of the party appearing is well founded in fact and law. In this respect, the Court recalls certain guiding principles brought out in a number of previous cases, one of which excludes any possibility of a judgment automatically in favor of the party appearing. It also observes that it is valuable for the Court to know the views of the non-appearing party, even if those views are expressed in ways not provided for in the rules of Court⁴⁹

⁴⁷ *Ibid.*

⁴⁸ A. YUTAKA, *supra note 60*, p.220.

⁴⁹ *Ibid.*

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After illustrating the difficulties regarding to the non-binding decision of the ICJ, the next paragraph has been based on the case of Nicaragua before the international court of justice.

2.1.2. The case of Nicaragua before international court of justice

The United States had been supporting insurgents in Nicaragua, which was controlled by the Soviet backed Sandinista government. The Central Intelligence Agency mined Nicaraguan ports and harbors in a secret operation; when Nicaragua found out, it filed an application in the ICJ, claiming that the United States had violated various treaties as well as general principles of international law⁵⁰.

The United States argued that the ICJ did not have jurisdiction because the treaties did not confer jurisdiction on the ICJ and the compulsory jurisdiction did not apply. When the ICJ held against the United States, the United States refused to comply with the ruling and withdrew its consent to compulsory jurisdiction. The Court did not explain why consent to the resolution must be understood as it asserts; it merely made the assertion, similarly unexplained was the Court's conclusion that the United States itself had demonstrated *opinio juris* with respect to the international law principles by its acceptance of two non-binding resolutions at international conferences and by ratifying a regional treaty⁵¹.

This case also required the Court to determine the legal responsibility of the United States for the acts of the contra guerrillas directed against Nicaragua. The Court resolved the issue as follows: The Court has taken the view that the United States participation, even if

⁵⁰ ICJ, *military and paramilitary activities in and against Nicaragua*, 1986, available at <http://www.icj-cij.org/docket/index.php?sum=367&p1=3&p2=3&case=70&p3=5>, accessed on September 3, 2014.

⁵¹ A. CONSTANTINE, *counter claims before the international court of justice*, Hague, T.M.C Asser press, 2011, p.59.

preponderant or decisive, in the financing, organizing, training, supplying and equipping of the contras, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself for the purpose of attributing to the United States the acts committed by the contras in the course of their military or paramilitary operations in Nicaragua. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed. By twelve votes to three, Decides that the United States of America, by directing or authorizing over Rights of Nicaraguan territory, has acted, against the Republic of Nicaragua, in breach of its obligation under customary international law not to violate the sovereignty of another State⁵²;

By twelve votes to three, Decides that, by laying mines in the internal or territorial waters of the Republic of Nicaragua during the first months of 1984, the United States of America has acted, against the Republic of Nicaragua, in breach of its obligations under customary international law not to use force against another State, not to intervene in its affairs, not to violate its sovereignty and not to interrupt peaceful maritime commerce; the court decides that, the United States has violated its obligations under Article XIX of the Treaty of Friendship, Commerce and Navigation between the United States of America and the Republic of Nicaragua signed at Managua on 21 January 1956; After examining the facts, the Court finds it established that, on a date in late 1983 or early 1984, the President of the United States authorized a United States Government agency to lay mines in Nicaraguan ports, that in early 1984 mines were laid in or close to the ports of El Bluff, Corinto and Puerto Sandino, either in Nicaraguan internal waters or in its territorial sea or both, by persons

⁵² *Id.*, p.65.

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in the pay and acting on the instructions of that agency, under the supervision and with the logistic support of United States agents; that neither before the laying of the mines, nor subsequently, did the United States Government issue any public and official warning to international shipping of the existence and location of the mines; and that personal and material injury was caused by the explosion of the mines, which also created risks causing a rise in marine insurance rates⁵³.

After developing the issue related to the case of Nicaragua in the ICJ, the next paragraph has been focused on the effect of the lack of competence of the ICJ to the case of Nicaragua

2.1.3. Effect of the lack of competence of the international court of justice to the case of Nicaragua

Article 94 obligated those states to follow the Court's decisions under the enforcement power of the Security Council. By virtue of both Article 93 of the U.N. Charter and Article 1 of the Statute of the Court, the ICJ is required to abide by the provisions of its Statute, which was incorporated as an integral part of the U.N. Charter. Pursuant to Article 103 of the U.N. Charter, and in combination with Article 92 of the Charter and Article 1 of the Statute, obligations under the Statute of the Court are obligations of the members of the United Nations, and thus prevail over any other international agreements⁵⁴.

The members of the United Nations must be governed by the statutes of the ICJ. The statute of the international court of justice is criticized to make the court incompetent through the non binding decision of the court and the recognition. These have affected the court in trying

⁵³ D. TERRY, *Litigation strategy at the ICJ: Case study of the Nicaragua v. the US dispute*, Hague, Martinus Nijhoff publishers, 1989, p.406.

⁵⁴ Charter of the United Nations, *supra note 52*, art. 103

the case of Nicaragua where the USA has refused to recognize the court⁵⁵

Despite the foregoing, it is also true that particular ICJ decisions have been strongly criticized. For example, the Court's decision in the merits phase of Military and Paramilitary Activities in and against Nicaragua drew highly critical comments from several commentators⁵⁶;

A judgment is binding upon the parties in accordance with Article 2 and Article 94(1) of the United Nations Charter. In case of failure by one party to comply with the obligations arising from the decision of the Court, the other parties can have recourse to the Security Council for the enforcement of the decision. The Security Council may, at its own discretion, make recommendations or decide on other measures, which can be taken to give effect to the judgment⁵⁷.

The measures can be indicated by the Security Council in this regard only under Chapter VI of the United Nations Charter, meaning that they amount to a recommendation. One striking example is the International Court of Justice. Its malcontents criticize the Court as an ineffective player in achieving international peace and security, largely because of its perceived inability to control state behavior. Scholars have long blamed this on the ICJ's 'flawed' jurisdictional architecture, which is based entirely on consent⁵⁸.

⁵⁵ X, Disputes settlements, available on <http://unctad.org/en/docs/edmmisc-en.pdf>, accessed on August 7, 2014.

⁵⁶ A. ZIMMERMANN, *the statute of the ICJ: A commentary*, London, Oxford university press, 2012, p.1021.

⁵⁷ The charter of the United Nations, *supra note 71*, art 94

⁵⁸ A. P. LLAMZON, *Jurisdiction and compliance in recent decisions of the International Court of Justice*, available at <http://ejil.oxfordjournals.org/content/18/5/815.full>, accessed on August 7, 2014.

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By analyzing the ICJ's final decisions since the landmark case of Nicaragua v. US, one finds that the manner in which the ICJ was seized of jurisdiction is actually a poor predictor of subsequent compliance. Thus, 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 order⁵⁹.

Therefore, after analyzing the difficulties regarding to the non binding decisions of the ICJ, it has been necessary to focus on the non recognition of the ICJ competence.

2.2. Non-recognition of the competence of the international court of justice

This section will focus on the un-recognition of the competence of the international court of justice, it is basing on the difficulties relating to the article 36(2) of the statute, and effect of the art 36(2) of the statute of ICJ to the settlement of Nicaragua case

2.2.1. Difficulties relating to the article 36(2) of the statute of international court of justice

The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

- a. the interpretation of a treaty;
- b. any question of international law;

⁵⁹ P. MASSIDDA & S. PELLET, *representing victims before the ICJ: A manual for legal representatives*, ICC, office of public counsel for victims, 2010, available on <http://www.icc-cpi.int/iccdocs/pids/tmp/represent.pdf> , accessed on September 3, 2014.

c. the existence of any fact which, if established, would constitute a breach of an international obligation⁶⁰

2.2.1.1. Difficulties regarding to the art 36 (2) of the statute and the respect of the law of treaties

The history of the ICJ can be seen as a struggle between the internationalist aspirations of the court's supporters and the efforts of states to limit their international obligations. Consider the bases of jurisdiction. Jurisdiction by special agreement poses no threat to states because they can avoid it simply by refusing to consent to jurisdiction. All members of the United Nations charter are parties to the statute, so virtually every state has been, from the ICJ's founding, subject to the jurisdiction of the ICJ. Sixty-four states have accepted the compulsory jurisdiction of the court, frequently with reservations, and numerous multilateral treaties provide for ICJ adjudication⁶¹

Almost immediately, it became clear that the problem of jurisdiction would be a major obstacle for the Permanent Court of International Justice. One commentator stated in 1922 that, while the concept of having a world court was universally appealing, the court would not work in reality if states were not willing to accept its jurisdiction and that any attempt at compulsory jurisdiction would be premature⁶². Another commentator disagreed with this reasoning, stating that a court by its very nature must have compulsory jurisdiction. This second commentator maintained that, because the drafters of the Covenant of the League of Nations had intended to create a court as opposed to an arbitral tribunal, they therefore also had intended the

⁶⁰ Statute of international court of justice, *supra note 54*, art 36(2)

⁶¹ E. A. POSNER & M. F. DE FIGUEIREDO, *Is the International Court of Justice Biased?*, Journal of legal studies, University of Chicago, 2005, p.20.

⁶² SIR RICHARDS, *The jurisdiction of the Permanent Court of International justice*, London, University of Oxford, 192, p.1011.

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Permanent Court of International Justice to have compulsory jurisdiction⁶³.

Article 36 of the Statute of the Court provided for the signing of an optional protocol, by which states would consent to the compulsory jurisdiction of the court. The jurisdiction of the ICJ thereby became compulsory only as to those states which chose to make an express declaration of their consent. Article 36 explicitly permitted states to attach reservations to their declarations of consent, including limitations on the duration of the consent, under the doctrine of reciprocity⁶⁴.

The concept of jurisdiction became refined through the decisions of the PCIJ. Reservations to consent to the compulsory jurisdiction of the ICJ appeared as manifestations of what one commentator referred to as the same vague sense of fear that had years before kept some states from consenting to the jurisdiction of the PCIJ.⁹⁴ States were concerned that the ICJ might use its compulsory jurisdiction to overstep the sanctity of state sovereignty in a manner to which the state had not consented. A review of the cases decided by the ICJ prior to November 29, 1984, however, reveals very little reason for states to have feared such an exercise of the Court's compulsory jurisdiction. The ICJ followed the same course set by the PCIJ, consistently adhering to a policy of judicial restraint in resolving issues of compulsory jurisdiction⁶⁵.

Jurisdiction by special agreement poses no threat to states because they can avoid it simply by refusing to consent to jurisdiction. Concerning to the compulsory jurisdiction, again, states can avoid compulsory jurisdiction by not filing a declaration. But many states

⁶³P. HUDSON, *the First Year of the Permanent Court of International justice*, League of Nations covenant, 1923, art. 14

⁶⁴ *Ibid.*

⁶⁵ SIR RICHARDS, *supra note 79*, p.1019.

have filed this declaration, apparently because they believe the benefit being able to pull another state before the ICJ exceeds the costs being pulled before the ICJ by another state. Again, states can avoid compulsory jurisdiction by not filing a declaration. But many states have filed this declaration, apparently because they believe the benefit being able to pull another state before the ICJ exceeds the costs being pulled before the ICJ by another state. Note that the obligation is strictly reciprocal: a state can be pulled before the ICJ only by another state that has itself filed the declaration. In addition, most states have, through reservations, consented to compulsory jurisdiction only for a narrow range of cases⁶⁶.

The U.S.'s declaration, for example, excluded cases involving national security. When the ICJ nonetheless found that this clause was satisfied in the Nicaragua case (discussed below), the United States pulled out of compulsory jurisdiction. The Statute provides that a State may recognize as compulsory, in relation to any other State accepting the same obligation, the jurisdiction of the Court in legal disputes⁶⁷.

These cases are brought before the Court by means of written applications. The conditions on which such compulsory jurisdiction may be recognized are stated in paragraphs 2 and 5 of Article 36 of the Statute, which read as follows:

Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court

⁶⁶ P. HUDSON, *supra note 80*, art 14

⁶⁷ Statute of international court of justice, *supra note 77*, art 36(2)

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of Justice for the period which they still have to run and in accordance with their terms⁶⁸.

The article 36(2) of the statute is contradicting the law of treaties where the state must be bound by an agreement that it has ratified, in this case the united state might be bound by the treaties establishing the international court of justice. This article gives the gaps in provisions of the statute and allows the state to escape from being tried by the ICJ. The United States declaration of acceptance of the compulsory jurisdiction of the Court under Article 36, paragraph 2, of the Statute contained a reservation excluding from operation of the declaration. In its Judgment of 26 November 1984, the Court found, on the basis of Article 79, paragraph 7, of the Rules of Court, that the objection to jurisdiction based on the reservation raised a question concerning matters of substance relating to the merits of the case and that the objection did not possess, in the circumstances of the case, an exclusively preliminary character. Since it contained both preliminary aspects and other aspects relating to the merits, it had to be dealt with at the stage of the merits⁶⁹.

By developing the non-recognition of the competence of the international court of justice, it is important to discuss on the interpretation of the *pacta sunt servanda* by the ICJ to the case of Nicaragua.

⁶⁸ Statute of international court of justice, *supra note 84*, art 36(5)

⁶⁹ T. LAWRENCE, *describe the U.S Policy in Nicaragua*, Boston, Boston Globe publisher, 1984, p. 17.

2.2.1.2. Interpretation of the pacta sunt servanda by the ICJ to the case of Nicaragua as result of admissibility of the compulsory jurisdiction of the court by the United States

For its judgment on the merits in the case concerning military and Paramilitary Activities in and against Nicaragua brought by Nicaragua against the United States of America, the international court of justice through the voting procedure, by eleven votes to four, decides that in adjudicating the dispute brought before it by the Application filed by the Republic of Nicaragua on 9 April 1984, the Court is required to apply the multilateral treaty reservation contained in proviso (c) to the declaration of acceptance of jurisdiction made under Article 36, paragraph 2, of the Statute of the Court by the Government of the United States of America deposited on 26 August 1946; by twelve votes to three, rejects the justification of collective self-defense maintained by the United States of America in connection with the military and paramilitary activities in and against Nicaragua the subject of this case⁷⁰

By twelve votes to three, decides that the United States of America, by training, arming, equipping, financing and supplying the contra forces or otherwise encouraging, supporting and aiding military and paramilitary activities in and against Nicaragua, has acted, against the Republic of Nicaragua, in breach of its obligation under customary international law not to intervene in the affairs of another State; the principle of pacta sunt servanda should be respected by the United States, under Vienna Convention on Law of Treaties provides that the state must be bound by the international agreement signed by it⁷¹.

⁷⁰ A. ANTHONY, *international law process and prospect*, Hague, transnational publishers, 1995, p.370

⁷¹ *Id.*, p. 380.

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In this case the United States has violated international laws and convention that it has been ratified. The non appearance of the united state in the court constitute the breach of the principle of *pacta sunt servanda*, as a member of the united nations, it should be govern by the statute of the court, the ICJ decides trough voting of the judges that the United States of America, by certain attacks on Nicaraguan territory in 1983-1984, namely attacks on Puerto Sandino on 13 September and 14 October 1983, an attack on Corinto on 10 October 1983; an attack on Potosi Naval Base on 4/5 January 1984, an attack on San Juan del Sur on 7 March 1984; attacks on patrol boats at Puerto Sandino on 28 and 30 March 1984; and an attack on San Juan del Norte on 9 April 1984; and further by those acts of intervention referred to in the state of Nicaragua, hereof which involve the use of force, has acted, against the Republic of Nicaragua, in breach of its obligation under international law not to use force against another State as it is provided in the charter of the united nations in art 2 paragraph 4 that united states is a party⁷².

The next paragraph has been focused on the problems of the enforcement of the ICJ decisions.

2.2.2. The problems of the enforcement of the ICJ decision on the Nicaragua case due to the admissibility of the court jurisdiction

The enforcement of decisions of the International Court of Justice may involve problems that touch upon some of the most delicate areas of both public international law, and the law of the United Nations, at a time when these two systems of law can hardly be considered as totally separate from each other. In the body of general law and practice concerning enforcement of international rules the principle of self-help remains prominent⁷³.

⁷² *Id.*, p.382.

⁷³ T. LAWRENCE, *supra note 86*, p.18.

On the other hand, within the apparently more integrated and institutionalized context of the UN system and this is the field into which we are principally going to venture in the present study - one is confronted with highly controversial issues, such as voting procedure in the Security Council, or the relationship between the Council and the International Court of Justice, these issues being part and parcel of the everlasting controversy between law and politics⁷⁴.

The “compulsory jurisdiction” of the International Court of Justice is not truly compulsory. The Court's jurisdiction is based on the consent of the parties. States have the option to accept or not to accept the Court's jurisdiction and can do so under terms and conditions they determine themselves. However, once a State has granted its consent, and when a dispute that falls within the scope of that consent is submitted to the Court, the State must subject itself to the Court's jurisdiction. It is that legal obligation that is at the root of the term “compulsory” provided by art 36(2) of the statute of international court of justice. No State can be compelled without its consent to submit a dispute with another State to international adjudication⁷⁵.

The enforcement of decisions of the International Court of Justice may involve problems that touch upon some of the most delicate areas of both public international law, and the law of the United Nations, at a time when these two systems of law can hardly be considered as totally separate from each other. Sometimes the problems are due to the lack of binding force of the decisions taken by the international court of justice. In this case the right of veto enjoyed by the united state in this proceeding has played a big role in the prevention of adoption of decision against the united state while

⁷⁴ ATTILA TANZI, *problems of enforcement of decisions of the International Court of Justice and the Law of the United Nations*, available on <http://www.ejil.org/pdfs/6/1/1311.pdf>, accessed on July 21, 2014.

⁷⁵ A. ANTHONY, *supra note 87*, p. 390.

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the enforcement might be adopted by the Security Council under voting procedure. The U.S. later blocked enforcement of the judgment by the United Nations Security Council and thereby prevented Nicaragua from obtaining any actual compensation⁷⁶

By illustrating the problems of the enforcement of the ICJ decision, the next paragraph provided the political organs vested with the power to review the decisions of the court.

2.2.2.1. Political organs of the UN vested with the power to review a decision of the Court

The Security Council and the general assembly are the United Nations organs having the power to review the decision of the international court of justice. This part is showing the role of those organs of the UN in the enforcement of the ICJ decisions.

2.2.2.1.1. Security Council

When assessing the voting procedure which applies when the Council votes on a draft resolution aimed at giving effect to a judgment of the Court, a systematic analysis will be made of Articles 94 and 27 of the Charter in connection with the more general competence of the Council under Chapters VI and VII⁷⁷.

The Case of the Military and Paramilitary Activities in and against Nicaragua may be regarded as another example in which recourse to the Security Council under Article 94(2) could be seen as a threat to the legal authority of the judicial decisions of the Court, due to the lack of action by the Council. With a letter dated 17 October 1986 the Permanent Representative of Nicaragua to the United Nations

⁷⁶X, Nicaragua v. United States, available on http://en.wikipedia.org/wiki/Nicaragua_v._United_States, accessed on July 22, 2014.

⁷⁷ T. A NTONIOS, *Disobeying the Security Council: Countermeasures against wrongful sanctions*, London, Oxford university press, 2011, p.91.

requested an emergency meeting of the Security Council 'in accordance with the provisions of Article 94 of the Charter, to consider the noncompliance with the Judgment of the International Court of Justice dated 27 June 1986'⁷⁸.

However, pursuant to that request a meeting of the Council was held a few days later during which a draft resolution was introduced that urgently called for full and immediate compliance with the Judgment of the International Court of Justice of 27 June 1986. Put to the vote, the draft resolution in point was not considered as adopted by the President of the Council owing to the negative vote of a Permanent Member, i.e., the United States. This negative result was, though, formally reached through a debate which substantially upheld, or, at least, did not aim to undermine the authority of the Court. The United States, i.e., the defaulting party, was the only Member that put forward arguments against the validity of the judgment of the Court arguing that the latter had passed a decision that it 'had neither the jurisdiction nor the competence to render'⁷⁹.

The United States was also the only Member that voted against the draft resolution. It is noteworthy that Honduras, admitted to the debate under Article 31 of the Charter, aside from blaming Nicaragua for having made 'use of the Court for propagandists' purposes, did not touch upon the Court's findings either as to its jurisdiction, or on the substantive merits of the case. Also those Members of the Council who did not support the draft resolution and, therefore, abstained, namely, France, Thailand and the United Kingdom, did not object to the validity of the Court's pronouncement. It was made clear by those delegations that their stand on the matter was based on purely political considerations regarding the implications of the Court's decision, rather than on legal grounds concerning its validity. After

⁷⁸ *Ibid.*

⁷⁹ T. A NTONIOS, *Supra note 94*, p.91.

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the above-mentioned draft resolution was vetoed in the Security Council, an identical text was submitted by Nicaragua to the General Assembly⁸⁰.

2.2.2.1.2. The General Assembly

As a result of Nicaragua's initiative to transfer the debate from the Security Council to the General Assembly, the question turns on the competence of the latter over issues of non-compliance with decisions of the International Court of Justice. Unlike the Security Council, the General Assembly is not specifically vested with a similar competence. However, one should not deduce from this that the Charter rules out such a competence. No arguments a contrariis based upon Article 94(2) can defeat the general scope of the functions and powers of the Assembly entrusted to it by Article 10, and stressed in Article 11(4) of the Charter. Limitations to the general competence of the Assembly have been expressly provided in Articles 11(2) and 12(1). According to these provisions, the General Assembly cannot lawfully deal with a dispute over non-compliance with a Court decision while the issue is pending before the Council, nor can it decide that action should be taken with respect to such a dispute⁸¹.

In line with the above reasoning, and in consideration of the fact that the draft resolution introduced by Nicaragua did not provide for any enforcement measures of the kind provided for in Chapter VII, the draft resolution was discussed and put to the vote in the General Assembly. It was adopted by ninety-four votes to three (El Salvador, Israel and the United States voting against), with forty-seven abstentions. In the debate that preceded and followed the vote the Court's authority was, basically, left intact, apart from the United

⁸⁰ E. OLUFEMI, *the development and effectiveness of international administrative law*, Hague, Hotei publishing, 2012, p.64.

⁸¹ E. OLUFEMI ELIAS, *supra note 97*, p.69.

States' reiteration of the arguments put forward in the Council against the Court's assertion of jurisdiction⁸².

After developing the problems relating to the enforcement of ICJ decisions, the following part has been based on the effect of the art 36 of the statute of the international court of justice to the settlement of Nicaragua case.

2.2.3. Effect of art 36(2) of the statute to the settlement of Nicaragua case

The United States has been and remains an active participant in cases before the Court, appearing before it several times, more than any other state, even in recent years. On the other hand, the United States has never been willing to submit itself to the plenary authority of the Court, and has typically reacted negatively to decisions by the Court that are averse to U.S. interests. As is well known, in reaction to decisions that were reached by the Court, the United States refused to participate in the proceedings on the merits of the case brought by Nicaragua in 1984, withdrew from the Court's compulsory jurisdiction in 1986⁸³

The next paragraph has been deal with the effect of the art 36 of the statute of the international court of justice toward the court itself.

2.2.3.1. Effect toward the international court of justice

The competence of the Court depends on the will of parties to the dispute. If there is a will of the parties to the dispute to settle that dispute applying to the Court, the Court will be competent to resolve

⁸²*Id.*, p.70.

⁸³ ARVELO-VÉLEZ, *my thanks for the opportunity to present this chapter at the T.M.C. Asser Institute in the Hague, USA, George Washington University, 2006, p.2.*

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the dispute. If, however, there is no any will, the Court cannot establish its jurisdiction in the dispute⁸⁴.

The appearance of article 36(2) in the statute of international court of justice is the obstacle to the admissibility of the court compulsory jurisdiction. The case of Nicaragua has marked the effect of applying this provision where the USA refused to appear before the court based on this article. This article in its nature exclude the competence of the court due to the fact that it is unable to summon the country by force but depend on the will of the state. The International Court of Justice has been criticized for its limited effectiveness and the many failures it has experienced. One or more of the involved parties refuse to accept the jurisdiction of the Court; this is the case of United States in case of Nicaragua, thus resulting in the Court being ineffective⁸⁵.

A total of 63 States have recognized the compulsory jurisdiction of the Court (with or without reservations). Besides the limited number as compared with the number of the States that are parties to the Statutes (187 in 1995), matters are further complicated by reservations to the acceptance of compulsory jurisdiction, which serve to limit their scope. On December 4, 1998, the ICJ ruled 12 that it lacked jurisdiction to adjudicate the dispute brought by the Kingdom of Spain against Canada in 1995. To claim the Court's jurisdiction, Spain relied on the declarations made by the two parties in accepting the Court's compulsory jurisdiction under Article 36(2) of the ICJ Statute⁸⁶.

⁸⁴ VESNA KNEŽEVIĆ PREDIĆ, *Law and Politics*, Vol. 1, Romania, University of Belgrade, 2000, p. 409

⁸⁵ L. PAULUS, *Jurisprudence of the International Court of Justice*, and Lockerbie Cases: *preliminary objections*, London, Oxford University press, p. 550, 1998.

⁸⁶ D. AKANDE, *the Competence of International Organizations and the Advisory Jurisdiction of the International Court of Justice*, New York, Cambridge university press, 1998, p. 437.

This is the big issue that regarded to the lack of competence of the international court of justice, the recognition of compulsory jurisdiction is the clause in the statute that affect many the credibility of the statute. The act of the united state in Nicaragua might be condemned by the ICJ but had it competence? The court has perceived inability to control state behavior⁸⁷. By analyzing the ICJ's final decisions since the landmark case of Nicaragua v. US, one finds that the manner in which the ICJ was seized of jurisdiction is actually a poor predictor of subsequent compliance⁸⁸.

Even though the ICJ was expected to become the “principal judicial organ” for the settlement of disputes among States, this hope never materialized. Additionally, major issues of peace and security between the more powerful States have rarely been submitted to the ICJ, as most governments tend to consider the recognition of the jurisdiction of the court as infringing on their sovereignty. This is one cause of the limited effectiveness of the ICJ⁸⁹.

The Court’s jurisdiction was intentionally limited at its outset. This prevented the ICJ from being totally effectual. Thus, despite the likelihood that states will continue to reduce the scope of the ICJ's compulsory jurisdiction. Voluntary jurisdiction in contentious matters such as the case of Nicaragua has been described as the ICJ’s greatest weakness. This is not an exaggeration, since in real terms the Court’s ability to function, indeed its very existence, is totally dependent upon the consent of states. Non-appearance may be a tempting proposition

⁸⁷ RICHARD FALK, *the World Court’s Achievement*, New Jersey, American Journal of International Law, 1987, p. 81

⁸⁸ A.P. LLAMZON, *Jurisdiction and Compliance in recent decisions of the International Court of Justice*, London, Oxford Journals, 2010, p.20.

⁸⁹ W. EDITH, *Judicial independence and impartiality: a preliminary inquiry, in the international court of Justice at a crossroads* , Hague, Martinus Nijhoff publishers, 1987, p. 135.

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for states that feel that they can achieve more advantageous outcomes through a purely political solution⁹⁰.

Indeed, as noted by Janis, there were many incidents of non-appearance in cases involving the application of art 36(2) this may raise concerns that justice has not been done in two ways. First, when a party fails to appear, it may allow that party 'to profit from their absence'. but one cannot consider the absence of the united state in case of Nicaragua as the favor of Nicaragua but its absence were the negligence of appearing before the court, as also it knows that the enforcement of the proceeding might be initiated by the security council after voting of decision, in that case the united state might impose the veto power and prevent the decision from passing. The case of Nicaragua has marked the infectivity of the court, due to the nature of its statute. The statute of international court of justice cannot allow the court to be effective, the absence of compulsory jurisdiction and the non-binding decision of the court might not allow the Nicaragua to reach justice.

2.2.3.2. Effect of the article 36(2) of the statute of ICJ to the state of Nicaragua

The state of Nicaragua as an applicant to the court, it had also filed a request for the indication of provisional measures under Article 41 of the Statute. The present case concerns a dispute between the Government of the Republic of Nicaragua and the Government of the United States of America occasioned, Nicaragua contends, by certain military and Para- military activities conducted in Nicaragua and in the waters off its coasts, responsibility for which is attributed by Nicaragua to the United States. By a letter from the United States Ambassador at the Hague to the Registrar dated 13 April 1984, and in

⁹⁰ S. D. MURPHY, *The United States and the International Court of Justice: Coping with Antinomies*, Washington, George Washington University law School, 2008, p. 19.

the course of the oral proceedings held on the request by Nicaragua for the indication of provisional measures, the United States of America contended (inter alia) that the Court was without jurisdiction to deal with the Application, and requested that the proceedings be terminated by the removal of the case from the list. Court is not precluded from adjudicating the legal dispute presented in the Application by any considerations of admissibility and the Application is admissible⁹¹.

To found the jurisdiction of the Court in the present proceedings, Nicaragua in its Application relied on Article 36 of the Statute of the Court and the declarations, described below, made by the Parties accepting compulsory jurisdiction pursuant to that Article. The state of Nicaragua has made a declaration recognizing the jurisdiction of the permanent court of international justice in 1929, but the problems rose when the new court (international court of justice) was established; the question was whether the declaration made by Nicaragua might still in force in the new court.

The declaration of compulsory jurisdiction to the state of Nicaragua is due to the fact that a State that wishes to express its consent to the jurisdiction of the Court is required to become a party to the Statute of the Court. So even if the Nicaragua under art 36(2) has recognized the compulsory jurisdiction, it was required also to be part of the statute which it had reached in 1945⁹².

This has affected the state of Nicaragua in delaying the proceedings in examining whether Nicaragua has accepted compulsory jurisdiction. Nicaragua has in fact also contended that the validity of Nicaragua's

⁹¹ J. T CHRISTIAN, *the statute of the ICJ: A commentary*, London, Oxford university press, 2012, p.694.

⁹² *Ibid.*

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recognition of the compulsory jurisdiction of the Court finds an independent basis in the conduct of the Parties⁹³.

However, while the declaration had not acquired binding force, it is not disputed that it could have done so, the correspondence brought to the Court's attention by the Parties, between the Secretariat of the League of Nations and various Governments including the Government of Nicaragua, leaves no doubt as to the fact that, at any time between the making of Nicaragua's declaration and the day on which the new Court came into existence, if not later, ratification of the Protocol of Signature would have sufficed to transform the content of the 1929 Declaration into a binding commitment ; no one would have asked Nicaragua to make a new declaration.

It follows that such a declaration as that made by Nicaragua had a certain potential effect which could be maintained indefinitely⁹⁴.

The consent of the party to accept compulsory jurisdiction of the court, has enabled the united state not to appear before the court, this has affect the Nicaragua from reaching justice and getting compensation from the damage caused by the united state of America.

3. NECESSITY OF THE ICJ IN THE PEACEFUL SETTLEMENT OF INTERNATIONAL DISPUTES

This chapter is focusing on the necessity of the ICJ in the peaceful settlement of international disputes, it is examining the Necessity of amending the statute of International Court of Justice, and it is basing on the necessity of extending the jurisdiction of the international court of justice and the amendment of the statute of international court of justice.

⁹³ J. T CHRISTIAN, *supra note* 108, p.694.

⁹⁴ X, Nicaragua v. United States: Preliminary Objections, ICJ, 1984, available on <http://chinesejil.oxfordjournals.org/content/5/1/29.full>, accessed on July 22, 2014.

3.1. Necessity of amending the statute of international court of justice

The International Court of Justice has been criticized for its limited effectiveness and the many failures it has experienced. In order to understand and discuss the operation and problems of the ICJ, jurisdiction is the key issue. This section explores reform of the ICJ from a jurisdictional perspective, and discusses the theory and history of the ICJ's jurisdiction.

3.1.1. A Reform approach from the jurisdictional perspective

The Court has a dual role: to settle in accordance with international law the legal disputes submitted to it by States, and to give advisory opinions on legal questions referred to it by duly authorized international organs and agencies. Accordingly, the jurisdiction of the Court falls into two distinct parts, namely, contentious jurisdiction and advisory jurisdiction. The ICJ is often thought of as the primary means for the resolution of disputes between States, and in fact the Court is well-recognized for its significant contribution to the development of international law⁹⁵

In developing the reform approach of the statute of international court of justice, the next paragraph has been focused on the effectiveness of the present international court of justice.

3.1.1.1. Effectiveness of the Present International Court of Justice

Even though the ICJ was expected to become the principal judicial organ for the settlement of disputes among States, this hope never

⁹⁵ J. T CHRISTIAN, *supra note 110*, p.700.

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materialized. The Court has been criticized for its limited effectiveness and the many failures it has experienced⁹⁶.

In this case the jurisdiction of the court needs to be extended in order for the court to be effective.

The ICJ has not lived up to the hopes of many of its early supporters; that hope being the ICJ, along with the United Nations, would evolve into an international government. To begin with, only a total of 63 States have recognized the compulsory jurisdiction of the Court (with or without reservations) through the optional clause system. In more than 20 contentious cases, the ICJ's jurisdiction or the admissibility of an application (the complaint) was challenged, with the ICJ dismissing almost half of these cases⁹⁷. Although States have complied with the ICJ's judgments in many of the cases, recalcitrant States have on occasion refused to comply⁹⁸.

Therefore, if the jurisdiction becomes compulsory, it will be no chance to escape justice by withdrawing its recognition to the court.

It is the case of Nicaragua where the USA refused to comply with the court judgment; the reasons for the ICJ's limited influence vary. These include the limits on the ICJ's jurisdiction, its relatively rigid procedure, and the enforceability of its judgments. But its jurisdiction is the biggest systematic problem. In principle, the jurisdiction of ICJ is not a compulsory one. A case can only be submitted to the Court with the consent of the States concerned. Accordingly, no sovereign State can be made a party in proceedings before the Court unless it has in some manner or other consented thereto. International society

⁹⁶ X, Ineffectiveness of the ICJ, available <http://unsystemessays.blogspot.com/2008/01/reform-of-icj.html>, accessed on August 10, 2014.

⁹⁷ B. W. EDITH, *Judicial Independence and Impartiality: A Preliminary Inquiry*, L. Damrosch (ed), Hague, Martinus Nijhoff publishers, p.135, 1987.

⁹⁸ J. BACCHUS, *Table Talk: Around the table of the appellate body of the World Trade Organization*, Vol. 5, Hague, Vand. J. transnational law, 2002, p.7.

is still developing, as is the jurisdiction of international tribunals. From the very beginning, almost all the international tribunals have adopted non-compulsory jurisdiction, including the ICJ⁹⁹.

By focusing on the reform perspective, it has been necessary to develop in the next paragraph the proposal of extending the jurisdiction of the ICJ.

3.1.1.2. Extending the Jurisdiction of international court of justice

The ICJ has been criticized for its limited effectiveness and the many failures it has experienced. These circumstances have many reasons, such as the time consuming nature of ICJ proceedings, but the most important reason is the extent of the ICJ's jurisdiction. If we want to see a more efficient ICJ, some reform steps must be taken to solve the jurisdictional problem. But what can the Court do under the Statute as it is now in order to limit its shortcomings? Reforming a World Court is not an easy matter¹⁰⁰.

The goal should be achieved step by step. In my opinion the ICJ can construe its jurisdiction broadly when there are differences as to what the scope of its jurisdiction is. To extend the construction of the ICJ's jurisdiction does not mean there should be a license to misuse it. I am sure the World Court can do a much better job of exercising its competence under the current ICJ Statute and in an environment of proliferating international courts and tribunals, if it chooses to interpret its jurisdiction broadly¹⁰¹.

Hence, various proposals have been made to extend the jurisdiction of the international court of justice to embrace disputes involving parties

⁹⁹ *Ibid.*

¹⁰⁰ F. SEYERSTED, *Common law of international organizations*, Hague, Martinus Nijhoff publishers, 2008, p.44.

¹⁰¹ *Ibid.*

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other than states these proposals have been made to great extent with a view to bring before the court what the present writer describes as internal disputes of intergovernmental organizations. The proposals merits full support insofar as they strive to give effect to the international procedural capacity of intergovernmental organizations and other subject of international law that is not a state¹⁰².

However, certain of the proposals which have been made tend to extent the jurisdiction of the court in contentious proceedings even to internal disputes; this would involve an extension of the tasks of the courts to a field which is different from that for which it was created¹⁰³

However, it has been important to focus in the next paragraph, to the necessity of the ICJ to enforce its decisions.

3.1.2. Necessity of the ICJ to enforce its decisions without interference of the United Nations Security Council

After the deliberations are concluded and the case has not been settled or discontinued, the court delivers a judgment at a public sitting. Judgment of the international court of justice are final and without appeal. They are binding only on the parties in respect a particular case. A victorious state may proceed to request the court to fix monetary or other compensation in subsequent proceedings. If the party fails to comply with such decision of the court, the winning party may recourse to the Security Council to make a recommendation but if we analyze this method of recommendation, it is not the binding language used, the state can excuse in good faith. The state of Nicaragua after the united states fail to comply with the ICJ decisions, has brought the case in the united nations security

¹⁰² *Ibid.*

¹⁰³ P. HUDSON, *the permanent court of international justice*, New York, Carnegie publication center , 1943, p.187.

council but the US vetoed the decision of the council. This shows the ineffectiveness of the ICJ enforcement decisions¹⁰⁴.

The decisions of the ICJ should be enforced by the general assembly to which the veto power will not be opposed. Therefore, the UN organs must ensure respect for the rule of law and the mission of the organization especially because ICJ has no power to enforce its judgment. The charter of the United Nations in its art 94 provides that Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party¹⁰⁵. 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 judgment¹⁰⁶.

To the case of Nicaragua, it had recourse to the security council to ask the enforcement of the ICJ decision to its case against the United States of America, but still there is a problems within the voting procedure of the UNSC decision, in this case the US had used its veto to prevent the adoption of the enforcement of ICJ decision, this marked the failure of the ICJ in matter relating to the enforcement of its decisions¹⁰⁷.

Needless to say empowering UN organs to enforce ICJ judgments, represents a duty upon them to enhance the role of the court, since the effectiveness of any legal system depend on the existence of machinery to execute and apply the law, in this regard, the UN organs have the power, to recommend or decide measures should a party to a

¹⁰⁴ O. SCHACHTER, *Enforcement of international judicial and arbitral decisions*, New York, Cambridge university press, 1960, p.16.

¹⁰⁵ Charter of the united nations, *supra note 74*, art 94(1)

¹⁰⁶ R. ANAND, *Execution of international judicial awards: experience since 1945*, Hague, Martinus Nijhoff publishers, 1965, p.701.

¹⁰⁷ R. ANAND, *supra note 123*, p.703.

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case fail to fulfill judgment rendered by the ICJ but this power must be limited in order to give effectiveness to the court. The security council according to art 94(2) it is empowered if deems necessary to recommend or decide an appropriate measures to ensure compliance with a decision of the court against a recalcitrant state, in addition the General Assembly has the power to discuss and make recommendation in the event of non compliance with judgment of the ICJ¹⁰⁸.

The next paragraph has been based on the necessity of enforcing the judgment of Nicaragua in the American court.

3.1.3. Necessity of enforcing the judgment of Nicaragua against the US in the American court, a solution to the lack of enforcement of judgment in the ICJ decisions

Following World War II the International Court of Justice (ICJ) was set up to settle disputes between nations.' Prior to 1985 the United States was an ICJ member, and accepted compulsory jurisdiction in many instances. However, the question of whether an ICJ decision can be successfully enforced against the United States in a U.S. court has never been litigated. To enforce an ICJ judgment a party must be able to bring suit. In other words, the party seeking enforcement must have an interest or injury, rising to the level of a case or controversy. Clearly, Nicaragua has suffered an injury and thus under normal circumstances would have access to U.S. courts. However, it must first be determined whether a foreign nation can be a party to an action maintained in a U.S. court¹⁰⁹.

Whether the government of Nicaragua will be able to enforce the ICJ judgment in a U.S. court is not entirely clear. The United States

¹⁰⁸ A. ASHALL, *Non military sanctions in the United Nations*, Cairo, Cairo University, 1976, p.273.

¹⁰⁹ L. GROSS, *The international court of justice and the United Nations*, Brussels, RCADI, 1967, p.326.

currently maintains diplomatic relations with Nicaragua; however, if the contras are able to set up an alternate government and the United States recognizes that government, then the denial of recognition of the present Nicaraguan government would bar them from access to United States courts. Also, because the recognition of a foreign government is a political act of the executive branch, any such determination binds the judicial branch¹¹⁰.

In addition, the executive branch may also chose to file a brief requesting that the court deny Nicaragua access to U.S. courts due to foreign policy considerations. Although this has never before happened, if the executive department stated that a Nicaraguan suit to enforce an ICJ decision would interfere with U.S. foreign policy the court may feel compelled to deny Nicaragua a right to bring suit to enforce an ICJ judgment. However, denying Nicaraguan judicial access could raise constitutional issues concerning the scope of the President's power over foreign policy. For instance, Presidential refusal to honor an ICJ decision may violate the President's duty to uphold and support the Constitution and all obligations arising there under¹¹¹.

However, any attempt to deny Nicaragua access to U.S. courts may create problems under a Treaty of Friendship, Commerce, and Navigation existing between the United States and Nicaragua. Article V (1) of this treaty opens U.S. courts to Nicaraguans both in pursuit of and in defense of their rights. The treaty, in and of itself, does not grant standing to Nicaragua, but states that Nicaragua has the right to bring suit in a U.S. court if a United States citizen could do so under similar circumstances. Thus, to deny Nicaragua a chance to sue

¹¹⁰ P. LLAMZ, *Jurisdiction and Compliance in Recent Decisions of the International Court of Justice*, *The European Journal of International Law*, Vol. 18, no.5, 2008, p. 20

¹¹¹ *Id.*, p.22

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simply because the President requested the courts to deny standing would probably violate this treaty¹¹².

The Treaty of Friendship, Commerce and Navigation between the United States and Nicaragua has not yet been implemented by congressional legislation, but the Supreme Court has enforced other on executed Treaties of Friendship, Navigation and Commerce in the past. For example, in *Asakrua vs city of Seattle* a city ordinance denying aliens a right to engage in business was struck down for violating a Friendship treaty between the United States and Japan which had not been formally implemented by Congress. Therefore, the Treaty of Friendship, Navigation and Commerce between the United States and Nicaragua might prevent a U.S. court from denying access to Nicaragua if standing would exist for a U.S. citizen under similar circumstances. The execution of the ICJ judgment of Nicaragua against the United States in the US would probably raise the credibility of US to collaborate with the court, it could allow the state of Nicaragua to get indemnities granted by the court, and it could escape the lack of the enforcement of the ICJ decision¹¹³.

Hence, after developing the necessity of amending the statute of international court of justice, the following section has been based on the remedies under ICJ.

3.2. Remedies under international court of justice, a solution to the damage caused by the united state in Nicaragua

This section examines the advantages and disadvantages of recourse to the International Court of Justice (ICJ) for those seeking a remedy for a violation of international law. One immediately enters the theoretical minefield of whether rights under international law are

¹¹² C. BROWN, *Enforcement of ICJ Decisions in United States Courts*, available at <http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1399&context=mjil> accessed on August 10, 2014

¹¹³ P. HUDSON, *supra note 120*, p.199

rights owed to the individual, or rather to his state. The various remedies which have been sought by states from the ICJ have included mere declarations of a breach, the designation of a boundary line, restitution, the award of damages, and performance. The remedy provides the link between the judicial phase and the post-judicial implementation of the judgment. It is the concrete outcome of the litigation between the parties, and one which they will have to explain to their domestic audiences. The state of Nicaragua has suffered from the conflict supported by the United States, the victims' rights to be indemnified might be considered¹¹⁴

3.2.1. Necessity of compensation to the people of Nicaragua

The United States is presently engaged in the use of force and the threat of force against Nicaragua through the instrumentality of a mercenary army of more than 10,000 men, recruited, paid, equipped, supplied, trained and directed by the United States, and by means of the direct action of personnel of the Central Intelligence Agency and the US armed forces. The United States has publicly accepted responsibility for these activities. These activities have already resulted in the deaths of more than 1,400 Nicaraguans, military and civilian, serious injury to more than 1,700 others, and \$200,000,000 in direct damage to property. The object of these activities, as admitted by the President of the United States senior US officials and members of Congress is to overthrow or at least destabilize the Government of Nicaragua. The activities of the United States are not mere isolated incursions or incidents. They are part of a continuing and organized campaign of unlawful use of force that, from its beginnings in 1981, has steadily expanded and is continuing to expand in size, scope and intensity and in the grievous losses of life and property inflicted on Nicaragua and its people. These activities are mounting in intensity and destructiveness as this case is filed. In

¹¹⁴ *Ibid.*

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March 1984, 6,000 US-backed mercenaries initiated the largest assault to date on Nicaraguan territory. Heavy fighting is still taking place, and casualties are high¹¹⁵.

Therefore, simultaneously with their assault, the mercenary forces announced that they had mined the Nicaraguan ports of Corinto, Puerto Sandino and El Bluff, as part of an effort to cut off Nicaragua economically from the rest of the world. Five foreign commercial vessels have already been disabled by exploding mines, and many others have cancelled scheduled shipments to and from Nicaragua for fear of the mines. Taken together with the previous bombings of international airports, these new actions represent not only an effort to cut Nicaragua's vital trade and communications with the outside world, but constitute a mortal hazard to third parties engaged in peaceful international commerce and travel¹¹⁶.

The U.S. later blocked enforcement of the judgment by the United Nations Security Council and thereby prevented Nicaragua from obtaining any actual compensation. Convinced that the Reagan Administration's policy toward Nicaragua constituted a violation of the most fundamental principles of international law, which are key to international peace and security?

The United States has the obligation to pay Nicaragua on its own behalf and as *parens patriae* of the citizens of Nicaragua, reparations for all damages suffered by individuals, property or the economy of Nicaragua as a result of the aforementioned violations of international

¹¹⁵ X, Request for the indication of provisional measures of protection submitted by the government of Nicaragua, available at <http://www.icj-cij.org/docket/files/70/9629.pdf>, accessed on August 10, 2014.

¹¹⁶ S. ROSENNE & Y. RONEN, *the law and the practice of the international court*, Hague, Martinus Nijhoff publishers, 2006, p.44.

law, in an amount to be determined by the Court. Nicaragua reserves the right to present to the Court a precise assessment of damages¹¹⁷.

In the late 1980s, Nicaragua was poised to pursue its compensation claim after its successful case against the US with regard to Military and Paramilitary Activities in and Against Nicaragua. In fact, Nicaragua had filed its memorial on compensation in which it claimed billions of US dollars, and the Court had written to Nicaragua to say it was minded to fix oral hearings on compensation for October 1990. However, in 1990 there was a change of government in Nicaragua which led to a decision to drop the compensation claim¹¹⁸.

In the submission of the Government of Nicaragua, the inevitable consequence of the findings of the Court in the third and fourth paragraphs of the dispositive is that the United States is bound to pay appropriate compensation for the deaths, personal injuries and material damage, resulting from its violations of the pertinent obligations of customary international law. It is generally recognized that the precise form of reparation in a case of State responsibility will depend on the particular circumstances and the merits of the case¹¹⁹.

The claim relates to material damage to property. The scope of the claim has been defined in accordance with general principles of law and the ordinary standard of international law in these matters, thus the term "property" includes all assets and enterprises, whether in public or private ownership, which would be recognized in the legal systems of the world as items of value susceptible to damage or total destruction. In the case of items forming part of the productive

¹¹⁷ A. PELLET, *Report: strengthening the role of the court as the principle judicial organs of the UN*, New York, UN publishing corporation, 1997, p.240.

¹¹⁸ *Ibid.*

¹¹⁹ T. GUGGENHEIM, *Traité de droit international publique*, vol 2, Genève, Geneva publication Ltd, 1954. p. 67.

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economy, the claim includes both replacement value and the loss of profits (*lucruin cessatts*) caused by the damage or destruction¹²⁰.

In the opinion of the Government of Nicaragua justice and ordinary logic require that the assessment of reparation extend to the security and defense costs resulting from the unlawful conduct of the United States. The impact of the military and paramilitary operations on the disposable resources of Nicaragua has been and continues to be substantial. It is obvious

that the diversion of resources available for economic development to the purposes of defense must have adverse effects, not least for an economy of the Nicaraguan type, with an extreme shortage of foreign exchange, food, clothing and fuel, on the one hand; and no arms industry, on the other.

The next paragraph has been based on the necessity of removing the veto power in the UNSC as an organ charged to enforce the ICJ decisions.

3.2.2. Necessity of removing the veto in the UNSC: a solution to the indemnification of Nicaraguan people

The main obstacle to any decision rendered by the Court is, of course, the question of enforcement. Who carries out the Court's decisions if the affected party or parties refuse to obey? The United Nations has no standing army to enforce the peace or see that disputes are settled according to Court dictates¹²¹.

Delegates to the UN conference in 1945 realized this, of course, and decided that if any party to a case fails to perform the obligations

¹²⁰ *Ibid.*

¹²¹ International Court of Justice, *Annual report to the general assembly*, Hague, ICJ, 2013, p.3.

incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council. Since the Security Council does have power and authority to organize troops, for instance, presumably the delegates have felt an unobeyed Court decision might be settled through the UN proper. Oddly enough, perhaps, only twice since the first Court case in 1946 have the parties failed to heed the Court's decisions. Albania refused to pay Great Britain compensation that the Court ordered in the Corfu Channel case, and in 1984, Nicaragua was awarded reparations from the United States, which it claimed had violated international law. When Nicaragua tried to go the Security Council, the United States, which has veto power, blocked its appeal¹²².

The enforcement of the international court of justice decisions can be made by the security council through the voting process, this is the case of Nicaragua whereby after winning the case, the court oblige the united state to give compensations to the state of Nicaragua. The international court of justice is lacking the enforcement process of its own decision, it means that the states can execute in good faith. In this case the United Nations Security Council has powers to take action to enforce the court decision¹²³.

The state of Nicaragua in the Security Council, has failed to get indemnities due to the opposition of the United States of America by imposing the veto power to the council decision¹²⁴

¹²² D. BAILEY & SAM DAWS, *the Procedure of the UN Security Council*, 3rd (ed), Oxford, Clarendon Press, 1998, p.53.

¹²³ *Ibid.*

¹²⁴ *Id.*, p. 57.

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Conclusion

This article has examined the competence of international court of justice in settlement of Nicaragua case. It has realized that the ICJ has failed to give justice to the Nicaraguan people due to the nature of the statute in which prevent the court from taking binding decisions, and which mark the lack of enforcement measures of its own decisions. According to this research, the case of Nicaragua before the international court of justice had making the court of being ineffective to which its statute need to be reviewed.

It is difficult to fault the ICJ for desiring to enhance its compulsory jurisdiction. The case of Paramilitary Activities arose at a time when the Court had spent decades watching its compulsory jurisdiction erode. As noble as its action may have been, if regaining lost ground in jurisdiction was an underlying motivation for the Court's decision, it was misplaced in this particular legal dispute. The ICJ may well have appeared stronger to some by virtue of this decision, but a thorough reading of the case indicates that it gained only a facade of strength at the price of sound legal reasoning. Whether or not the substantive allegations of the Nicaraguan complaint were true, there was simply no legal basis for jurisdiction. Whatever the true conduct of the United States which gave rise to the claim, the assertions which were made created a political climate in which it appeared to be the ideal opportunity for the ICJ to become an advocate of strengthening its compulsory jurisdiction. Even if the decision in this case was not politically motivated, the overreaching by the Court in Paramilitary Activities placed it in an extremely precarious position.

The International Court of Justice, despite its weaknesses, is the closest the world has ever come to ensuring that reason and law will prevail beyond a state's borders. If the ICJ should insist on following the precedent set by its decision in Paramilitary Activities, the Court itself could all too easily and too quickly be swept away.

BIBLIOGRAPHY

I. INTERNATIONAL LEGAL INSTRUMENTS

1. Charter of the United Nations, adopted on 26 June 1945, entered into force on 24 October 1945;
2. Statute of the international court of justice, adopted in June 26, 1945, entered into force on 24 October 1945;
3. Treaty of Friendship, Commerce and Navigation between united state and Nicaragua, entered into force on 21 January 1956, entered into force on 21 June,1956
4. Montevideo Convention on the Rights and Duties of States, adopted in December 26, 1933, entered into force on December 26, 1934.

II. BOOKS

1. ANTHONY A., *International law process and prospect*, Hague, transnational publishers, 1995.
2. ANTONIOS T., *Disobeying the Security Council: Countermeasures against wrongful sanctions*, London, Oxford University press, 2011.
3. ARVELO-VÉLEZ , *My thanks for the opportunity to present this chapter at the T.M.C. Asser Institute in the Hague*, USA, George Washington University, 2006.
4. ASHALL A., *Non military sanctions in the United Nations*, Cairo, and Cairo University press, 1976.
5. BAILEY D.& SAM DAWS, *The Procedure of the UN Security Council*, 3rd (ed), Oxford, Clarendon Press, 1998.
6. BALA C., *ICJ: its functioning and settlement of international disputes*, Hague, Martinus Nijhoff publishers, 1997.
7. CHRISTIAN J. T, *The statute of the ICJ: A commentary*, London, Oxford university press, 2012.

Critical Analysis on the Ineffectiveness of the ICJ in the Settlement of Disputes between States: The Example of Nicaragua Case

8. CONSTANTINE A., *Counter claims before the international court of justice*, Hague, T.M.C Asser press, 2011.
9. DAPO A., *The Competence of International Organizations and the Advisory Jurisdiction of the International Court of Justice*, Brussels, E.J.I.L publishers, 1998.
10. EDITH B., *Judicial independence and impartiality: A preliminary inquiry, in the international court of Justice at a crossroads*, Hague, Martinus Nijhoff publishers, 1987.
11. GROSS L., *The international court of justice and the United Nations*, Brussels, RCADI, 1967.
12. GUGGENHEIM T., *Traité de droit internatinno1 public*, vol 2, Genève, Volgsburg Publisher, 1954.
13. HUDSON F., *the permanent court of international justice*, New York, Carnegie publication center, 1943.
14. JAMES BACCHUS, *Table Talk: around the Table of the Appellate Body of the World Trade Organization*, Washington, transnational law, 2002.
15. JEREMY BENTHAM , *Introduction to the Principles of Morals and Legislation*, London, Oxford University press, 1780.
16. JOHN BOSSY, *Disputes and settlements: Law and human relations in the West*, New York, and Cambridge University press, 1983.
17. LAWRENCE TRIBE, *Describe the U.S Policy in Nicaragua*, Harvard, Boston Globe publisher, 1984.
18. LISSITZYN O., *The ICJ: its role in the maintenance of international peace and security*, Hague, Mrtinus Nijhoff publishers, 1951.
19. MERRILLS J.G., *International disputes settlement*, 2nd (ed), London Oxford university press, 1989.
20. MOHAMED M., *the role of the ICJ as the principle judicial organs of the United Nations*, Hague, Kluwer law international, 2003.

-
21. MURPHY T. A., *The United States and the International Court of Justice: Coping with Antinomies*, Washington, George Washington University Law School, 2008.
 22. OLUFEMI ELIAS, *The development and effectiveness of international administrative law*, Hague, Hotei publishing, 2012.
 23. DONNER R., *International adjudication using ICJ*, Hague, Martinus Nijhoff publishers, 1988.
 24. RAWLS J., *Theory of Justice*, Oxford, Oxford University press, 1999.
 25. ROSENNE O., *The law and practice of international court*, Hague, Martinus Nijhoff publishers, 2006.
 26. ROSENNE S. & YAEL RONEN, *The law and the practice of the international court*, Hague, Martinus Nijhoff publishers, 2006.
 27. SCHACHTER O., *Enforcement of international judicial and arbitral decisions*, Brussels, Cargo publisher, 1960.
 28. SEYERSTED F., *Common law of international organizations*, Hague, Martinus Nijhoff publishers, 2008.
 29. SIR RICHARDS, *The jurisdiction of the Permanent Court of International justice*, Brussels, BRIT publishers, University of Oxford, 1992.
 30. TERRY O., *Litigation strategy at the ICJ: Case study of the Nicaragua v. the US dispute*, Hague, Martinus Nijhoff publishers, 1989.
 31. VESNA KNEŽEVIĆ PREDIĆ, *Law and Politics*, Vol. 1, Romania, University of Belgrade, 2000.
 32. WEISS E. B., *Judicial Independence and Impartiality: a Preliminary Inquiry*, L. Damrosch (ed), the international court of justice, 1987.
 33. YUTAKA A., *the law of occupation: continuity and challenge of international humanitarian law*, Tokyo, Hotei publishing, 2009.
 34. ZIMMERMANN A., *The statute of the ICJ: A commentary*, London, Oxford university press, 2012.

III. REPORTS

Critical Analysis on the Ineffectiveness of the ICJ in the Settlement of
Disputes between States: The Example of Nicaragua Case

1. ALLAIN PELLET, *Report: strengthening the role of the court as the principle judicial organs of the UN*, 1997.
2. International Court of Justice, *Annual report to the general assembly*, Hague, ICJ, 2013.

IV. ELECTRONIC SOURCES

1. Competence, available on <http://dictionary.reference.com/browse/competence>, accessed on July 10-2014
2. DASTON & LORRAINE, *Life, Chance and Life Chances*, Daedalus, 2008, available on <http://en.wikipedia.org/wiki/Justice> accessed on July 10-2014
3. Settlement, Encyclopedia Britannica, available on Britannica.com accessed on July 10-2014
4. International law available on http://en.wikipedia.org/wiki/International_law, accessed on July 10-2014
5. International law, global issues, available on <http://www.un.org/en/globalissues/internationallaw>, accessed on July 10, 2014
6. International Court of Justice, available online at <http://www.icj-cij.org>, accessed July 12, 2014.
7. ADITYA KRISHNAMURTHY, advisory opinion under international court of justice, 5th year Symbiosis Societies Law College, available on <http://www.legalserviceindia.com/articles/lock.htm>, accessed on July 17, 2014
8. ALOYSIUS P., *Jurisdiction and Compliance in Recent Decisions of the International Court of Justice* available on <http://ejil.oxfordjournals.org/content/18/5/815.full>, accessed on August 7, 2014
9. ATTILA TANZI, *problems of Enforcement of Decisions of the International Court of Justice and the Law of the United*

Nations available on <http://www.ejil.org/pdfs/6/1/1311.pdf>, accessed on July 21, 2014

10. Nicaragua v. United States, available on http://en.wikipedia.org/wiki/Nicaragua_v._United_States, accessed on July 22, 2014
11. Nicaragua v. United States: Preliminary Objections, ICJ, 1984, available on <http://chinesejil.oxfordjournals.org/content/5/1/29.full>, accessed on July 22, 2014
12. Ineffectiveness of the ICJ, available <http://unsystemessays.blogspot.com/2008/01/reform-of-icj.html>, accessed on August 10, 2014
13. COLTON BROWN, Enforcement of ICJ Decisions in United States Courts, available at <http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1399&context=mjil>, accessed on August 10, 2014
14. Request for the indication of provisional measures of protection submitted by the government of Nicaragua, available at <http://www.icj-cij.org/docket/files/70/9629.pdf>, accessed on August 10, 2014

V. JOURNALS

1. RICHARD F., *The World Court's Achievement*, New York, American Journal of International Law, 1987.
2. POSNER E. A. & DE FIGUEIREDO, *Is the International Court of Justice Biased?* Journal of Legal Studies, University of Chicago, 2005.
3. Standards for Determination of Competence, Journal of the American Academy of Psychiatry and the Law, 2007, available on <http://en.wikipedia.org/wiki/Competence>, accessed on July 10, 2014.
4. MORRISON & FRED L., *Legal Issues in the Nicaragua opinion*, Boston, American journal of international law, 1987.

Critical Analysis on the Ineffectiveness of the ICJ in the Settlement of
Disputes between States: The Example of Nicaragua Case

5. LAMZON A.P., *Jurisdiction and Compliance in Recent Decisions of the International Court of Justice*, Vol 18, Oxford, Oxford Journals, 2010.
6. KELLY & BARBARA, *the International Court of Justice: It's Role in a new world legal order*, Brussels, Touro Journal of Transnational Law, 1992.
7. ALOYSIUS P., *European journal of international law, Jurisdiction and Compliance in Recent Decisions of the International Court of Justice*, available on <http://ejil.oxfordjournals.org/>, accessed on August 10, 2014.
8. LLAMZ P., *Jurisdiction and Compliance in Recent Decisions of the International Court of Justice*, The European Journal of International Law, Vol. 18, 2008.