

A Critical Examination of the Enforcement of ICJ Decisions through the Organs of the United Nations

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Abstract

The basis of the establishment of the International Court of Justice (ICJ) is that its decisions should be enforceable and binding on most Nations of the World, but it has been seen that in reality, the decisions of the ICJ over the years have become extremely difficult to enforce leading to the efforts in making sure the said decisions are enforced through several methods other than cohesive or military interference. As a result, it becomes necessary to involve the organs of the United Nations in the enforcement of the ICJ decisions in order not to make the ICJ a toothless bulldog. This contribution therefore examines the usefulness of the organs of the United Nations such as the Security Council, the General Assembly and Secretary-General office among others, in the enforcement of such decisions. It concludes by stating that the usefulness of the organs in the United Nations is not adequately in the enforcement of the decisions of the International Court of Justice.

Keywords: International Court of Justice, Organs of the United Nations, United Nations Charter, Enforcement, Decisions, Security Council, General Assembly, Secretary-General

Introduction

It has been discussed earlier that the enforcement of the decision of International Court of Justice through the judiciary of state parties has worked up to certain limited extent. However, it can also be shown that in addition to the obligatory action of third parties on issues of enforcement. ICJ decisions can also be enforced through International Institutions especially organizations of the United Nations.

Under the United Nations Chapter³, it is provided that any party to a case which fails to perform his obligations which is imposed on it by a judgment delivered by the ICJ can be executed upon by an application to the Security Council that the defaulting party has refused to comply with the said judgment. It must then be understood that the wordings of Article 94(2) of the UN Charter has caused a lot of debates and controversies especially with respect to the competence of the Security Council of the UN and the extent of the measures available to the Council for implementing the judgments of the International Court of Justice. From the wordings of Article 94(2), it cannot be said that only the UN Security Council is given the exclusive power to enforce the decision of ICJ. This is because, even the non-compliance with the Court's decision amounts to the violation and breach of the Charter. Further, a party who feels that there is non-compliance with the judgment of the ICJ can also bring such compliant before the United Nations General Assembly under Articles 10, 11, 14, 22 and 35 of the Charter vis-à-vis the provision of Resolution 377 popularly referred to as Uniting for Peace Resolution⁴.

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³ Article 94(2) of the United Nations Charter

⁴ O. Schacter "The Enforcement of International Judicial and Arbitral Decision" 54 AJIL (1960) pp 1-24

Therefore, for the purpose of carrying out the execution of the ICJ judgment under the UN Charter⁵, the General Assembly can inaugurate a subsidiary organ as it seems necessary in the circumstance in order to so act on behalf of the Assembly. The effectiveness of this procedure is however portrayed in the negative: because, assuming a judicial committee was established, will the committee review the power of ICJ? Secondly, since the resolutions of the General Assembly is seen in the light of recommendations, can it be said that such recommendations for enforcement under the “Uniting for Peace Resolution” initiative can be so compelling that a judgment debtor state would comply?

Further, the General Secretary of the UN, popularly known, as “Secretary-General”, also has a duty to secure compliance with the judgment pursuant to Articles 98 and 99 of the UN Charter. The role of the Secretary-General cannot be overlooked once it comes to the issue of the enforcement of judgments under International Law, which as it will be found out, will include judicial decisions of the cases handled by the Court. There are some writers who on their initiatives have conducted researches as to non-compliance with the ICJ decisions. However, in these studies; the political power of the Secretary-General is always being overlooked when it comes to examining the problems of non-compliance.

The Nature and Structure of the United Nations Security Council

The Security Council is one of the major organs of the United Nations and has been found to be the principal instrument used by the United Nations as far as the settlement of disputes between the states are concerned. The Security Council membership as at 1966 was increased from its eleven memberships to fifteen and out of these eleven members; there are those we call “first class members” which are also referred to as “permanent members” of the Security Council. They are Britain, China, France, U.S.A and the former U.S.S.R. now Russia. The appointment of non-permanent member is to have enough geographical spread across the globe. It is to be understood that the decision of the Council are always carried out by words of affirmation by at least 9 members who ought to include the votes of the permanent members but under Chapter VI of the United Nations and Article 52(3), a party to a dispute and who is a member of the Security Council must not vote.

There is usually a President of the Council. He can rule on procedural steps to be taken when it has to do with the appointment of non-permanent members. They can only be in office for 2 years depending on their ability to get re-elected.

An Assessment of Article 94(2) of the United Nations Charter

At the San Francisco Conference and the meeting of the Committee III, attention was drawn to the importance of not allowing too much piling up of judicial decisions without implementation which was the state of affairs prior to the conference⁶. This attention was drawn by Norway who also made proposal that a clause be inserted in the Charter as follows “to enforce by appropriate means the execution of any final decision in a dispute between states delivered either by the Permanent Court of International Justice or by any other tribunal whose jurisdiction in the matter has been recognized by the state parties to the dispute”.⁷ The members refused to adopt this proposal but created a new proposal through the suggestion by Cuba: which was close to Norway’s proposition.

In the new proposal, a language being similar to Article 13(4) of the League Covenant earlier in place which read in part states that “the members of the League agree that they will carry out in full good faith any award or decision that is to be rendered”. The proposal of Cuba therefore was to the effect that “in the event of a state’s failure to perform the obligations incumbent upon it under a judgment rendered by the Court, the Security Council shall make recommendations or decide upon measures to be taken to give effect to the judgment”.⁸

The body at its 22nd meeting of Committee IV/I replaced the Cuban proposal which encompass the word “shall”, and by direct implication depicts mandatoriness; with the word “may” which shows discretionary power. This was a fall out from the proposal of the San Francisco Advisory Committee of Jurists.

⁵ Article 22 of the UN Charter

⁶ 43 UNCIO, pp. 368-69, and 11 UNCIO, pp. 396-397

⁷ Ibid

⁸ 13 UNCIO, p. 509

Further, in order to make sure that there is no ambiguity with respect to the fact that it is the Council's discretion to act, the proposal was encapsulated with the word "if it deems necessary".

One pertinent issue that bothered the San Francisco Advisory Committee of jurists with respect to the effect of the final version of Article 94 was, whether same would not affect the independence of the court and the Security Council. After much deliberation, the Committee observation was that: The use of this phrase might tend to weaken the position of the Court. In answer to this argument, it was pointed out that the action to be taken by the Security Council was permissive rather than obligatory and that the addition of the aforementioned phrase merely made more clearer the discretionary power of the Security Council.¹⁰

This observed fear was the best way to protect the integrity of the Court and execution of its judgment mandatorily but the reading of what eventually became Article 94(2) shows that the wordings which eventually sailed through was "if it deems necessary", meaning that the Security Council can use its discretion as to whether to enforce a judgment or not and it is not far-fetched to say that this discretionary power has substantially remained part of the reasons for non-compliance with the judgments and decisions of ICJ.

Notwithstanding the findings above, it can be conveniently asserted that, Article 13(4) of the Covenant of the League Council seems to place the Council under a strict duty to look into the attitude and behavior of the litigating parties to compliance with the Court decision. When it used the words "in the event of failure to carry out such an award or decision, the council shall propose what steps should be taken to give effect thereto". A critical examination of the said Article 13(4) of the Covenant, would show that, it only placed the burden of an impossible task on the Council especially in practical terms because the question is; why must the Council act on behalf of the affected party? This question is sustained by the fact that, in the normal circumstance, it is the party who is demanding for compliance that should apply for compliance. In consequence of the position above, it is not for the Council to place a demand for compliance on its own, as they would amount to "crying more than the bereaved". The impracticability of the provision became apparent in the case of *Central Rhodope Forest (Greece v. Bulgaria)*¹¹ and the Council was unable to take any step in proposing what to do in order to give effect to the award notwithstanding that the word "shall" was used in Article 13(4) of the Covenant and irrespective of the fact that Greece was a party to the dispute.

It may be as a result of non-practicability of Article 13(4) of the Covenant of the League as to the word "shall" that may have brought about the fear of importing same into Article 94(2) of the UN Charter that led to the discretion given to the Security Council in the said Article to take the deserved initiative to recommend or decide upon appropriate measures that will give effect to the judgments of the Court and it provides that if any party to a case fails to perform the obligations incumbent upon it under the judgment, the other party may have recourse to the Security Council.¹² It is therefore necessary to note that Article 94(2) seems more precisely in its wordings than Article 13(4) of the Covenant as it relates to who has the obligation to comply with the judgment and further shows that recourse to the Security Council does not mean an automatic law enforcement machinery for the ICJ with respect to its judgments. Additionally, it should be noted that a restrictive interpretation can be given as to who is actually the "holder of the obligation" because from our point of view, only the judgment Creditor is permitted to invoke the provision of Article 94 and not the judgment debtor.

⁹ Ibid 386, 459; and 17 UNCIO, P. 97. See also, Pomerance, M. *The United States and the World Court as a "Supreme Court of the Nations"*. Dreams, illusions and disillusion, (Martinus Nijhoff Publishers, 1996), p. 195.

¹⁰ 913 UNCIO, pp. 386, 459; 17 UNCIO, p. 97. This issue was also canvassed in the document: 12 UNCIO. P. 505.

¹¹ 15 LNOJ (1934), pp. 1432-1433 & p. 1477. More details of this case could be found at http://un.org/ilc_documentation_English_a_cn4_226.pdf. Visited on the 28th December, 2014.

The facts of this case leading to the weak approach of the Council after Turkey ceded part of its forestland to Bulgaria, the International Court had to depend on Turkey's law which regulated ownership of the forest to interpret the conditions of succession of the said forest. Only one aspect of this case is described here. Namely, the reference by the Successor State to the municipal law of its predecessor for the purpose of determining what constituted public property.

It is on record that in this case, the international jurisdiction did not in fact rule out recourse to the municipal law of the Predecessor State for the purpose of determining what constituted public property and this obviously resulted the Council's inability to take practical steps to enforce the arbitral award. The problem put to the arbitrator was different in substance.

¹² Convreuv, "The effectiveness of the International Court of Justice in Peaceful Settlement of International Disputes" in A.S. Muller, D. Raic, and J.M Thuranzky (eds) *The International Court of Justice its future role after fifty years* (Martinus Nijhoff, 1997) pp. 83-116 at p. 109.

However, after a critical look at the said Article and the nature of the judgment which may have been delivered, it can rightly be said that where the judgment debtor maintains a counterclaim, then, the judgment creditor is also a judgment debtor and the two parties are accordingly “holders of an obligation” and either can invoke the provision of Article 94(2) of the UN Charter. In *Cameroon v. Nigeria*¹³, it was observed by the ICJ, that since there exist claims and counterclaims, in this case Cameroon notwithstanding being a judgment creditor was also a judgment debtor to Nigeria, and was therefore under the obligation to withdraw all its administrative machinery of whatever nature from the areas along the boundary from Lake Chad to that of Bakassi Peninsula which has by ICJ judgment become part of Nigeria and which was part of Cameroon before the ICJ judgment. In other words, the two parties are under the obligations to comply with the judgment in line with Article 94(2) of the UN Charter.

Another fundamental area of difference between Article 13(4) of the Covenant and Article 94(2) of the UN Charter is that the League Council was only under a “duty to propose” but not under a “duty to decide the necessary steps” that must be followed in order to give effect to judicial decisions vis-à-vis arbitral awards; but with respect to the position of the Security Council pursuant to Article 94(2) of the UN Charter, it is not compulsorily under the obligation to enforce the judgments of ICJ; but the Article allowed the Security Council the discretion to make proposal or recommend on how to comply with the ICJ judgment. In addition, it also gave the power to the Security Council to “take a decision as to what to do in order to make sure that the ICJ decisions are complied with”. Therefore, it can be seen that under Article 94(2) of the UN Charter, the Security Council is clothed with the discretionary power to make or not to make recommendations or decide upon any measures that should be taken for the purpose of compliance with the Court judgment by using the words “if it deems necessary. In comparison with the council by virtue of Article 13(4) of the Statute, we find no similar provision on “discretionary power” such as “if deems necessary”. In view of the discretionary provision of Article 94(2) of the UN Charter, it will be necessary to accordingly probe into the competence or otherwise of this so-called discretionary power and thereafter to discuss the measure that may be followed by the Security Council in order to see that the Court judgment are complied with.

Competence of the Security Council by Virtue of Article 94(2) of the UN Charter

Because of the way Article 94(2) of the UN Charter was drafted, it has given rise to probe into the competence of the Security Council as it concerns the enforcement of judicial decision. In the US, in 1945, when the issue of Article 94(2) of the Charter came up before the Senate Committee on Foreign Relations, Dr. Pasvolsky testified and stated that, the way Article 94(2) works is that if any question as to enforcement and non-compliance comes up before the Court, the Security Council will first of all determine whether the non-compliance would be a threat to international peace and security or not and once it will lead to threat to international peace and security, the provision of Article 94(2) of the Charter will be invoked by the Security Council.¹⁴

In view of the forgoing, his contention was that, Article 94(2) shows that the competence of the Security Council was linked to the power granted to it in Chapter VII and not to act under the said Article 94(2) unless there exist imminent threat to World Peace and Security. There was a misinterpretation of Pasvolsky’s argument by some scholars who criticized his position; in that Article 94(2) did not contain any provision to sustain the stand of Pasvolsky, neither is there any policy nor general principle of law in existence to give life to the said argument¹⁵. In attacking the basis of Pasvolsky’s argument further, Mosler and Oellers-Frahm stated that under Article 94(2), the acts of the Security Council do not really need to determine the existence of any threat to peace and security of the world nor should same be an act of aggression as could be seen under Article 39 of the charter but that the acts may be the basis of determining the measures that are necessary to be taken as provided for further Article 41 in order to give effect to the ICJ judgments.¹⁶ The above named scholars argued further that, if the recommendation of the Security Council requires the use of force, then, they cannot act on the basis of Article 94(2) but can only act on the basis of Article 39 of the Charter especially as the legitimacy of the use of force is predicated on the basis of Article 42 of the UN Charter.

¹³ICJ Rep (2002) para 314-316. Full details of this judgment could be found at: <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=52&case=94>. Accessed on the 29th December, 2014

¹⁴ For argument in this regard see Mosler, H., & Oellers-Frahm, K.H., “Article 94”, supra note 1, p. 1177.

¹⁵ W.M Reisman. Nullity and Revision: Review and Enforcement of International Judgments and Awards Yale Univ. Press 1971 pp. 704-709. See also, C.W. Jenks, The Prospects of International Adjudication (Stevens & Sons. 1964) pp. 693-694 and H. Mosler & K. Oellers-Frahm, Article 94 Supra note 1 p. 117

¹⁶ See Mosler, H & Oellers-Frh, K., at p. 1177.

This view as could be seen is contradictory as it tends to create a division between two enforcement methods and none of which could be achieved without the Council determining the situation under Article 39 of the Charter. Therefore, the theories propounded by Pasvolsky, Mosler and Oellers-Frahm are confusing and requires further analysis.

Further, viewed against the aforementioned background, it is not in doubt that there is no exhaustive lists with respect to the measures the Security Council can take as provided for in Chapter VI, Chapter VII, Articles 41 and 42 of the UN Charter as far as international obligations and the issue of compliance with international obligations are concerned. However, the Security Council cannot also be said to be restricted by virtue of Article 94(2) from recommending or taking any appropriate steps to enforce compliance in relation to issues incumbent on it to give direction (as provided for in the statute) or actions resembling those measures enumerated under Article 41 and 42 of the Charter.

There is another angle to this argument in that, under the recognized “doctrine of implied power”, there exist no bar to the imposition of necessary measures as stipulated under Article 94(2). This implies that, once the Security Council feels that the measures are necessary, owing to the facts of each situation and the circumstances, then it is incumbent on them to act as prescribed. The court for instance in the Namibia Opinion¹⁷, stated that apart from the powers given to the Security Council as enumerated in Chapters VI, VII, VIII and XII. Under Articles 24(2) of the UN Charter, pursuant to paragraph 1 of the said Article, the Council possess inherent powers which implied that it allows it to act by taking any measures that would allow international peace and security to be achieved. In sustenance of the foregoing argument, a consideration of the instrument of: In reparation for Injuries, Advisory Opinion¹⁸, the Court stated that “the rights and duties of an entity such as the United Nations Organization must depend upon its purpose and functions as specified or implied in its constituent documents and developed in practice”.

Therefore, depending on the interpretation given to it, any case of non-compliance alone can constitute threat and problem for international peace and security and the provision giving credence to this can be seen in Articles 1(1), 33(2) and 35(1) of the United Nations Charter which are clear and unambiguous. For example, the primary concern of Article 1(1) is the maintenance of international peace and security, in other words once there is absence of the condition of peace, then there is the need for its maintenance especially as the phrase maintenance of International Peace and Security are used in most part of the UN Charter. It is therefore not correct to state that the violation of international peace can only take place if there is a violation of Article 2(4) of the UN Charter¹⁹. A party to any dispute can apply for solution of the problem through peaceful resolution of the dispute pursuant to Article 33(2) of the UN Charter. Once there is likelihood of danger to international peace and security, if after applying this section, no result or concrete results are obtained, then Article 35(1) gives any member the right to file a suit before the Court once the action is to protect World Peace and Security²⁰. It should be understood that a state that must have felt injured could be encouraged to steer a move that would threaten World Peace and Security with a view that it will be able to convince the Security Council to take an action to maintain peace and security pursuant to Chapter VI and VII of the Charter. It can be said that the competence of the Security Council as far as Article 94(2) is concerned is that it is independent of the position of other provisions and their workability in the Charters. Accordingly, the Security Council’s competence and measures to be taken in order to enforce compliance with the ICJ judgments would depend on the facts and circumstances of each particular case presented before the council.

¹⁷ ICJ Rep (1971) p. 16. Full details of this report could be accessed at: <http://www.icj-cij.org/docketfiles/53/5597.pdf>

It is important to note that the measure applied in this instance to ensure compliance and by extension make the Court’s decision binding, was that of rejecting South African application for plebiscite in Namibia to determine the existence or otherwise of the Mandate given to it. South African had applied for the Court to grant permission to conduct a plebiscite and that the plebiscite would be under the joint supervision of the Court and the Government of South Africa.

In view of this application, the Court pointed that no further evidence was required to indicate that the Mandate had been validly terminated and that in consequence. South African’s presence in Namibia was illegal and its acts on behalf of or concerning Namibia illegal and invalid. To this end, the Court was not able to entertain this proposal.

¹⁸ ICJ Rep (1949) p. 180. Full details of this report could be found at: <http://www.icj-cij.org/docket/files/4/1835.pdf>. The Report is stated as: Report of Judgments, Advisory Opinions and Orders for Reparation for Injuries Suffered in the Service of The United Nations. Advisory Opinion of April 11th, 1949.

¹⁹ R. Wolfrum. “Article 1 in B Simma, et al (eds) the Charter of the United Nations (Oxford Univ. Press) (2002) pp. 39-47

²⁰ Schweisfurth. Article 35 in B Simma. & et al (eds) The Charter of the United Nations (Oxford Univ. Press) 209 pp. 608-615 at p.611

Security Council Power to Review Court Judgment

There is normally a debate when an affected party to a judgment moves to the Security Council on the basis of Article 94(2) complaining of non-compliance. The state which refused to comply with the Court judgment is likely to challenge the jurisdiction of the Court to give such judgment or such state may start canvassing that the judgment is not valid on the merit even if such judgments have the force of *res-judicata*. The uphill task faced by the Security Council would be how to differentiate between, whether to discuss the judgment of the ICJ or enforcement of the judgment of the ICJ. The questions that would arise are;

- i. Should the Security Council give priority concern to political or legal arguments or both political and legal arguments canvassed by the state in default or those supporting such states, who are members of the Council?
- ii. Should the Security Council enforce the judgment of the Court as it was delivered?

The essence of the above question has to do with:

- 1) Whether the Security Council can be said to have the power to review the ICJ judgments and give another decision which is different from the once delivered by the Court?
- 2) Whether the Security Council should keep the judgment intact as it was and decide an alternative measures to enforce the decision?

In response to the foregoing averments, Kelson²¹ contended that Article 94(2) of the UN Charter does not impose upon the Security Council the obligation to enforce the judgments of the Court against defaulting parties because the textual interpretation of the phrase “if it deem necessary” and “upon measures to be taken to give effect to the judgment of the Court” shows that discretion of Security Council is intact and no obligation is imposed upon the Council to enforce compliance as stated earlier. The learned Professor further stated that Article 94(2) of the Charter provides for a procedure of appeal with respect to a case dealing with non-compliance and that what the Security Council will do to the appeal now depends on the Council’s discretionary power and that the Council is not under any obligation to carry out the enforcement of the Court’s judgment.

It is therefore possible for the Security Council to proffer another solution to take care of the dispute different from the decision of the Court. From what has been said. It is not in doubt that the focus on the Security Council by the judgment creditor shows that ICJ is under the control of the Security Council. Therefore, a legal dispute already decided may ultimately become a case to start all over again by the judgment creditor before the Security Council. In view of this investigation, the Security Council of the UN thus becomes a seeming appellate court, inadvertently vested with powers to segregatively review ICJ judgments rather than enforce them.

It could then be seen that although Kelson’s theory from the above position is convincing, it may not stand the test of time, because, what he is looking at as judicial review of ICJ judgment or arbitral award is not statutorily possible to occur through the Security Council; because the Council must work for the interest of the UN and its organs and not to do any act capable of impeding its interest. This view is based on the fact that, if we now say that the Council can review the judgment of the ICJ, then the power to review the judgment would be a contradiction to Article 59 of the statute which states that the decision of the Court are binding and it will further contradict Article 60 of the statute which states that the decision of the Court is final and without appeal. This study finds that if it is true that the Security Council has the power to review the ICJ judgments, then it will deprive Article 94(1) of the UN Charter of its sanctity which is to the effect that ICJ judgment will just become an advisory opinion subject to the ultimate decision of the Security Council. A better picture could be painted if consideration is made in the requirement or procedure for enforcement of judgments from domestic courts, where the parties are all resident in the forum state.

In Nigeria for instance, enforcement of such judgments and judgment orders are processed under the Sheriffs and Civil Process Act: which ultimately requires the use of court bailiffs and under the protection of the police force. Thus, the involvement of the police force in the enforcement process connotes the presence of the Security arm of Government (as in the case of ICJ, the Security Council of the UN).

²¹ H. Kelson, “The Law of the United Nations. A Critical Analysis of its Fundamental Problems. (hereinafter cited as *The Law of the United Nations*) (Stevens & Sons Limited 1950), p. 539.

How then can it be said that , the final judgment of a Court vested with jurisdiction to hear and determine a matter would be further referred to the Commissioner of Police of the state (acting for the Inspector General) to review its suitability for enforcement or otherwise under a democratic government?

This is not applicable as the judgment order of Court in itself constitutes a commandment or an order that the Registrar of Court through the Bailiffs under the protection of the Police force must obey without questioning or review. Further, it should be appreciated that Article 94(2) of the UN Charter does not provide the power of review to the Security Council nor the power to question the basis of its *res-judicata*. This idea could be traced to the circumstance of the event when the United States of America deliberately failed to comply with the ICJ judgment in favour of Nicaragua. In this situation, Nicaragua through a letter applied to the Security Council to convene an emergency meeting pursuant to Article 94 of the UN Charter to consider the issue of non-compliance. The US with a veto power used the said power of veto against draft resolution since she is a permanent member of the Security Council²². The US argument was that the ICJ passed a judgment that it had neither the jurisdiction nor the competence to render.

Notwithstanding the undeniable fact that the United States failed to provide a legal argument to back up its claims and reasons to go contrary to the principle of *res-judicata*, it was still able to veto the draft resolution (at the UN Security Council) which was unfortunate and constituted a frustration to the judgment of Court and a wrong precedent in the adjudication and administration of the international law and justice.

It should be understood however, that those who are the usual supporters of the US, such as Venezuela, Australia and Denmark on this occasion refused to support the US, but supported the draft resolution against the interest of the US. There were countries who abstained from participating in the voting exercise. They neither stood against the validity of the judgment nor did they favour the competence of the Security Council to review the decision of the International Court of Justice.

It is noteworthy to mention that even Spain that was invited to comment about the position of the case did not agree with the US contention. What Spain did was to positively back the ICJ judgment in judgment in order to uphold the integrity of the Court. This according to Spain is that the judgment of the Court constitutes *res-judicata* and that compliance with the judgment of the Court is not only a political imperative of the highest order, but the basis of the pillars of current international legal order.²³

The Security Council as a provisional measure may urge or recommend that the parties involved in the disputes should resolve their differences pursuant to the judgment rendered by the Court and in accordance with the spirit and purpose of the UN Charter. In the view of this investigation, this is the correct stand and as observed by Ratner ²⁴, has been the position of the Council before the US deviation in the Nicaragua case. In consequence, it could not therefore have been in the contemplation of the UN Charter and the statute of the ICJ that the party who approached the Council under the provision of Article 94 would be shutout in preference to the party who did not invoke it and was actually in violation of its obligations under the judgment.

Additionally, the foregoing reasoning is predicated on the possibility of the Security Council devising some measures in order to give effect to the ICJ judgments against a party in default. According to Schacter, who succinctly asserted that, when the Security Council is involved in the policy of self-restraint, there is the tendency that it would take into consideration issues that may involve the determination, as to whether and to what extent the coercion by the international community will affect a defaulting state party. Therefore, it can be seen that the Security Council will ultimately face a possibility, that, where in an inadvertent attempt to review a valid judgment of the ICJ, the Council may render a political decision which may not necessary be in conformity to the ICJ judgment.

In this case, two decisions may emerge; one of it is a legal decision from the ICJ based on international law, protocols, treaties and other legal instruments which are contemplative of the facts of the case; and another decision from the Security Council, which is dependent on political, socio-economic and other ancillary and remote persuasions and considerations.

²²UNYB (1986) page 383

²³ J.B. Elkind, *Interim Protection: A Functional Approach*, Martinus Nijhooff Publishers, (1981), pg 153. Main argument sprang from the resolutions documented in the meeting of: S/PV.271S, p. 7.

²⁴ S. R. Ratner. "Image and Reality in the UN's Peaceful Settlement of Dispute" 6 *EJIL* (1995) pp. 426-444.

There is, in essence, the possibility that the dispute upon which the judgment of the Court was based may be decided separately when the issue of non-compliance comes up before the Security Council as we have seen in the case of United States' non-compliance issue discussed earlier.

However, Bowett was of a different view in surmising that since states have already agreed that they will comply with the Security Council decisions under Article 25 of the UN Charter and that same would be binding on them, when they are in conformity with the UN Charter; implying that the Security Council decision would not change the decision of the ICJ²⁵. In the advisory Opinion on Conditions of Admissions to the United Nations²⁶. The ICJ stated categorically that "the political character of an organ cannot release it from the observance of the treaty provisions established by the charter when they constitute limitations on its powers or criteria for its judgment".

In concluding this segment of the thesis, it is our opinion that because the Nicaragua's case has to do with a permanent member of the Security Council which vetoed the decision of the Council, it is difficult to assess how the Security Council would have treated the matter of non-compliance assuming the case has to do with a non-permanent member who is default of the ICJ judgment and who has no power of veto against the Security Council resolution/decision.

Therefore, it is no gain-saying that because of the power of veto, it is difficult for the Security Council in this regard to easily ensure compliance with the ICJ judgment when the permanent member such as the United States is in support of a recalcitrant state. The power of veto in this regard given to permanent members of United Nations especially the United States is one of the bottle-necks creating problems for the Security Council to ensure compliance as the Security Council is in difficult position to discharge its duties and responsibilities as required by virtue of Article 94(2) of the UN Charter. Even in a situation where fourteen members of the Security Council intend to abide by the ICJ judgment in order to ensure compliance, a power of "veto" cast by a permanent member would make nonsense of the other majority decision of those without veto power.

Thus, the veto power of permanent member of the Council is a negative clog in the progressive wheel of international justice and pessimistically impacts on the international legal order sought to be asserted and implemented by the instrumentality of the ICJ.

Security Council Discretionary Power

This area is described as Security Council discretionary power because, upon a careful reading of Article 94(2) of the UN Charter, there exist neither definition nor limitations with regards to "recommendations" or "measures" to be taken to give effect to the Court's decision. But it must be understood that the Security Council has been given the power to make recommendations or take measures that are necessary to give effect to the ICJ judgment. Therefore, the Security Council can be said to have discretionary power as far as the enforcement of ICJ judgment is concerned. Notwithstanding the discretion of the UN Security Council as mentioned above, it is not a blanket fiat that Security Council can just decide to take any action or measures it likes without any limit to the said action or measures. It is important to state that because of the special nature and difficult that may be apparent in relation to judicial decisions of the ICJ, vis-à-vis the enforcement of the said decisions via political bodies especially the Security Council and the non-exhaustive list found in Articles 41 and 42 of the UN Charter; it is not wrong to state that the Council may on its own make recommendations or take appropriate measures which in its discretion, seems necessary and appropriate even if those recommendations and or measures are not on the list of measures or recommendations found in Article 41 and 42. This means that, provided they are not outside its power under international law, the Council can by discretion take steps in furtherance of the objectives of the judgment: and it was this discretion that was used in Certain Expenses of the United Nations²⁷ and also in the Lockerbie case (Libya v USA)²⁸ These two cases indicate the discretionary power of the Security Council in taking appropriate measures.

²⁵ D Bowett. "The impact of Security Council Decision on Dispute Settlement Procedure" 5. EJIL (1994)pp.89-101 esp at p.93.

²⁶ ICJ Rep (1984) p.64. full details of this report could be found at: <http://www.icj-cij.org/docket/file/68/9577.pdf>. visited on the 29th December, 2014.

²⁷ ICJ Rep (1962) p 168. Full details of this report could be found at: [http://www.icj-cij.org.docket files 49 5259.pdf](http://www.icj-cij.org.docket%20files%2049%205259.pdf). it should be noted that the Security Council in the exercise of its discretionary powers may be subjective to complicated politico-economic ambivalences resulting from members varying interests, which in the long run affects the ability of the members, to dispassionately and objectively invoke powers of the organ to make the pronouncements of the court effective.

²⁸ ICJ Rep (1992) para, 42

Also, part of the discretion of the Security Council could be in the form of taking measures which are either similar to the ones provided for in Articles 41 and 42 of the UN Charter or those with less gravity in nature and this can be discharged under the implied powers given to the Security Council as provide for under Article 94(2) of the UN Charter: for which the Namibia Opinion²⁹ serves as a good example in this regard.

In Namibia issue, the court agreed with the Security Council position as it relate to its general powers which eminent its general duties of maintaining and putting in place international peace and security, in order to have peaceful co-existence in the World. The court in keeping with the pace its endorsement of the Security Council power further stated that under Article 25, the Security Council decisions is legally binding upon member states and it applied both to decisions under Chapter VII and also to those steps to be utilized pursuant to the implied powers of the Security Council. According, some of the measures which the Security Council can utilize, among others includes, suspension of scientific co-operation and banning of international flights, diplomatic and political measures, cultural and communications measures, suspension of certain rights relating to the country's expulsion from the organization, economic measures and at times military measures intended to ensure compliance. Furthermore, the Security Council may decide to make recommendation which will be sent to the General Assembly of the UN especially with regards to the suspension of the state party from exercising rights and privileges in the organization in default of compliance with the ICJ decisions.

Also, the Security Council could make recommendation to the General Assembly under Article 6 of the Charter to outrightly suspend the recalcitrant state party from the organization if there exist continuous breach of the principles guiding the United Nations Charter, vis-a-vis the obligation dealing with compliance and enforcement of the ICJ judgments. In addition to other ways the Security Council headless this situation of non-compliance; it may also decide to conduct investigations into the facts and causes of non-compliance with the ICJ judgments with a view to determine or establish what might have gone wrong. This could also involve a dispatch of a commission of inquiry to find out the alleged non-compliance and its gravity. The Security Council also has the power to establish a joint or mixed commissions or observers to monitor the compliance with the ICJ judgment.³⁰

The Security Council when it comes to the issue of delimitation and demarcation of borders which the ICJ judgment has pronounced upon, could also create a "trust fund if the parties do not fall under the criteria established under the Secretary General's Trust Fund which is meant to support states in relation to the settlement of their disputes through the International Court of Justice which is the Court meant to handle the case³¹.

It is pertinent to understand that all these forms or modes of ensuring compliance³² with the ICJ judgment were utilized as a result of the disputes between Eritrea and Ethiopia which occurred in 1998 and year 2000 including Ethiopia's non-compliance with the decision or the Boundary Commission of 2002. The United Nations established a boundary commission and claims commission based on the Peace Agreement entered into between Ethiopia and Eritrea which took place in Algeria on 12th day of December 2000. Upon the boundary commission taking a decision in 2002, the Security Council adopted same through Resolution 1430 where the parties were called upon to carry out the decision of the Boundary Commission, for which there was an adjustment with respect to the mandate given to the United Nations Missions in Ethiopia and Eritrea with a specific order to make sure the Commission's decision is carried out within time under Articles 25 and 103 of the UN Charters.³³ The foregoing imply that it is possible for the Security Council to use specialized agencies including international regional organizations whose member states are under obligations to cooperate with the United Nations in terms of enforcement of the ICJ judgments.

²⁹ M. Manuel Rama-Montaldo.: "International Legal Personlity and Implied Powers of the United Nations (Vikas publications). 1970. Pp. 141 - 148

³⁰An example of this mixed commission is the Cameroon-Nigerian Mixed Commission (CNMC) established in November, 2002 with the mandate to: demarcate the land boundary and delimitation of the maritime boundary between the two counties. Withdrawal of troops. Etc. for more detail see: <http://unowa.unmissions.org/Default.aspx?tabid=804>. Accessed on the 02/12/2015.

³¹ D. Bowett. "The Impact of Security Council Disputes Settlement Procedures" 5 EJIL (1994) pp.89-101

³² UN Doc. S/Re/1430 (2002) of 14th August 2002

³³ Available at: www.securritycouncilreport.org/.../research%20Chapter%20VII%206.23.0. Accessed 25/06/2014.

This implies that, such institutions may be required to take certain measures against the recalcitrant state notwithstanding that such institution is not a member of the United Nations, because institutions such as World Bank or IMF may be requested to give the judgment Creditor the funds with them which stood to the credit of the judgment debtor.³⁴

The Security Council in keeping to its mandate may request member states to take the assets of the judgment debtor in their territory which could also involve an order to impose certain travel restrictions on senior government officials and members of their immediate families from the recalcitrant state or states, just as the United States was given the mandate to “use all necessary means to facilitate the departure from Haiti of the military leadership” and this was complied with by the United States.³⁵ This is however ironical, because, assuming it is the same United States that is the judgment debtor, it will use its power of veto to ensure non-compliance and nothing would happen rather than the rest of the members in the Security Council resigning themselves to their faith. Furthermore, assuming the United States was in support of the Military Leadership in Haiti, the said United States at the point where the Security Council was to take the resolution, would not have vetoed the resolution, thus making the enforcement unaccomplishable: but since the US in support of the resolution against Haiti Military Leadership, compliance was easier.

In conclusion, it can be rightly said that the measures that will be used by the Security Council to effect compliance with the ICJ judgments are legally made with the view to performed their legal duties and once those measures are not in conflict with principles of good faith and not ultra-vires, then the measures would remain intact. The only problem usually faced by the Security Council is the power of veto by permanent member of the Security Council most especially the United States who usually veto the Security Council resolution once they are not in support of it.

The General Assembly

The most important and valuable forum for the deliberation about the question touching on issues of the international community is the General Assembly of the United Nations comprising of so many countries. Under Article 94(2) of the United Nations Charter, the General Assembly is not specifically given the competence to enforce compliance with the ICJ judgment, but it cannot be concluded that the Charter is against the competence of the General Assembly to enforce judicial decision of ICJ judgments.

Therefore, it can be said that under certain circumstances, the General Assembly can take up the responsibility of enforcing compliance with the ICJ judgment by virtue of Articles 10, 11, 14, 22 and 35 of the UN Charter including the General Assembly Resolution 377 popularly called “Uniting for Peace Resolution³⁶. Therefore, it is not in doubt that the General Assembly is imbued with the implied power to ensure compliance of ICJ judgments as the power emanates from the General Assembly’s duty of performance of essential aims and objectives of the United Nations. The General Assembly could therefore enter into discussions, make resolutions and equally adopt them.

It should however be understood that notwithstanding the competence of the General Assembly, there are instances where the competence of the General Assembly is restricted as could be seen under Article 2(7) of the Charter, and most especially Article 12 of the Charter. Critically examined, the General Assembly’s resolutions are not with the force of compulsion nor obligatoriness, except it has to do with the issue of the approval of the budget and apportionment either of the expenses incurred or to be incurred, or the admission of new members into the United Nations. That means that the recommendations of the General Assembly in most instances amount to “toothless bull-dog” as the said recommendation remains recommendatory items and not obligatory items. Furthermore, the only time the resolution of the General Assembly becomes binding is only when the parties to the ICJ judgment agree to accept the recommendations or resolution of the General Assembly as binding on them.

³⁴ M. E. O’Connell; “The Prospects for Enforcing Monetary Judgments of the International Court of Justice; a Study of Nicaragua’s Judgment against the United States. Vol. 1. Int’l L. (1990). Pp. 891-940. More materials of this argument could be seen in the works of Tom Ruys titled: The Intangible ‘Armed Attack’: Evolutions in Customary Practice pertaining to the Right of States to Self-defence and the Quest for a Definition of ‘Armed Attack’ under Article 51 UN and can be found at: <https://liriaaskuleuven.be/bitstream/123456789/246750/1/Ruys2009.pdf>. Visited 29th December, 2014.

³⁵ SCR 1295 (2000) 18th April, 2000.

³⁶ General Assembly Resolution 377 (V) of 3rd Nov. 1950, GAR (V) Supp. No. 20, p. 10.

No wonder then, we are able to see the fact that Resolution 289 of the General Assembly of 21/11/1949 were Somalia, Libya and Eritrea are parties became binding only because the “major powers” in the Italian Treaty agreed to take in good faith, the recommendations of the General Assembly as it concerns the disposal of the former Italian Colonies. It is therefore difficult to know if by a resolution the General Assembly can make a judgment debtor to comply with the judgment of ICJ. In the sub topics ahead, there will be examination of the competence of the General Assembly and its discretionary powers, General Assembly and the effectiveness of its measures and the position of the Secretary General and ICJ.

Competence of the General Assembly

By the provision of Article 10 of the United Nations Charter, it is stated that the General Assembly may discuss any question or matters within the scope of the present Charter or relating to the powers and functions of any organs and may make recommendations to the members of the United Nations or to the Security Council or to both on any such questions or matter. In analyzing the above provision, it is certain that the General Assembly is clothed with a comprehensive competence as far as the various matters that come before it. Goodrich and Hambro in stating their own view about Article 10 said that it is a World forum where all sensitive and important questions within the scope of the Charter can be discussed together among member nations.³⁷

It is a fact that this contention is true but the only limit is, as could be found under Article 12(1) which states that while the Security Council is exercising discretion in respect of any dispute or situation, the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests. The issue of expecting the requests from the Security Council before recommendations are made is to make the exception mentioned herein is primarily meant to take away the possibility of interference or duplication of discussions already taken care of by the Security Council. In other words, once an issue has been discussed and recommendation or steps have been taken by the Security Council, then there is nothing for the General Assembly to discuss in relation to a particular case³⁸.

It is observed that Article 11(1) of the UN Charter., states that Assembly either following a formal request by a member state, other organs of the UN or through its own initiative may consider the general principles of co-operation in the maintenance of the international peace and security and make recommendations with regard to such principles to the members or to the Security Council or to both even if the matter in question is still pending before the Council.

In other words, it looks as if Article 11(1) did not place any restriction on the General Assembly’s competence especially as it allows the issue of “initiative”. But a situation that requires initiative to consider the general principles of co-operation in the maintenance of international peace and security” does not in principle challenge or affect the deliberation, negotiations or the resolutions of the Security Council as far as that case is concerned. It can therefore be seen that the recommended measures made by the General Assembly, will be absurd once it is not compatible with recommended measures that may be adopted by the Security Council.

³⁷ I. M. Goodrich & E. Hambro. Charter of the United Nations (Stevens & Sons, 1949), P. 153 Article 10 of the United Nations Charter reads:

“The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provide for in the present Charter, and, except as provided in Article 12, may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters”.

The cited section above i.e. Article 10 gives the General Assembly (UNGA) power to ‘discuss any question or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter’ and to make recommendations on those subjects. This along with the Article 15 provision requiring the Security Council (UNSC) and other organs to issue reports of their activities to the General Assembly, essentially puts the General Assembly in the role of overseer over the other UN bodies. It is important and imperative to state that there is no reciprocal provision by which the Security Council or other bodies make recommendations as to the powers and functions of the General Assemble. If this case then, where does the Security Council derive its powers to function in partial negation of the provisions of the ICJ statute? Further, if the judiciary is a balancing organ of society, then all other organs of society must enhance the status of the judiciary. The United Nations Security Council sometimes perform this duty.

³⁸ I. K Nantwi Enforcement of International Judicial Decision and Arbitral Award in public International Law (Leydon.1966) P. 155

This will be the position once Article 12(1) of the UN Charter is not applicable in the circumstance. However, of important note is the commentary of Halbroner and Klein³⁹ when they stated that there is no qualitative distinction between the terms “consider” and “discuss” as it is used in Article 10 of UN Charter.

Although, this was their position, after few passages in the same work, they on their own admitted the fact that the general principal referred to in Article 11(1) of the UN Charter are all covered by the words “question” and “matter” within the meaning of Article 10 of the UN Charter. It is to be understood with due respect that the analysis given by the two renowned scholars cannot be said to be accurate. The proper way to describe the analysis of the two scholars with due respect is that they are contradictory. Assuming no distinction exist between the terms “consider” and “discuss”, then we can say that it would not have been essential to restrict what can be said to be the competence of the General Assembly as far as the provision of Article 11(2) of the UN Charter is concerned.

This is because, it is this Article that authorizes the General Assembly to discuss any question relating to the maintenance of international peace and security brought before it by any member of the United Nations or by the Security Council or by a state which is not a member of the United Nations.

Further, it is incumbent on the General Assembly under Article 12, to make recommendations with regards to any question dealing with state or states to the Security Council. It does therefore appear that the General Assembly is an institutionalized framework at the instance of the Security Council. It is therefore imperative to state that Article 12 of the UN Charter shows that there exist little risk of conflict with the concentrated power of the Security Council especially as the specific questions surrounding the issue of international peace is concerned including the issue of the restriction imposed on the UN General Assembly under Article 12(1) of the UN Charter for which the General Assembly is forbidden from issuing out recommendation on a matter which is still pending before the UN Security Council.

We must however understand that the competence of the UN General Assembly with regards to a particular dispute or circumstance flowing from a request made to it by the Security Council by virtue of Article 12(1) of the UN Charter is different from the duty to make recommendations. This is because, it is possible for the Security Council to have discussed a matter and then proceeded to request for recommendations from the UN General Assembly. Upon a critical but reserve observation of Article 11(3) of the UN Charter, it is not in doubt that the General Assembly can exercise the power under this provision to call the attention of the Security Council to any circumstance which is possible to affect international peace and security negatively. By this provision, the position of the General Assembly is uplifted when compared to the UN Security Council; but this is in the form of persuasion of members of Security Council as they cannot be forced to take any step which is not agreed to, by members of the Security Council or the power of veto by some permanent members of the Security Council. Therefore, it is still left for the Security Council to define what can be said to be “likely to endanger international peace and security”. In considering the provision of Article 14 of the UN Charter, we should know that it allows the General Assembly to recommend any measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations, including situations resulting from violation of the provisions of the present charter setting forth the purposes and principles of the United Nations.

The Security Council owes its own responsibility on this issue under Article 24 of the UN Charter but also owe another responsibility to consider whatever the General Assembly may have recommended under Article 14 of the UN Charter. It can therefore not be conveniently said that Article 35(1) of the UN Charter puts the General Assembly and the Security Council on the same footing. The only situation where such recommendation may arise is when it has to do with the right to investigate any dispute or any situation which might lead to international conflict or which may give rise to dispute that will affect negatively the maintenance of international peace and security as provided for under Article 34 of the UN Charter.

³⁹ K. Halbroner, & E. Klein, “Article 11” in Simma et al, (eds), *The Charter of the United Nations*, (Oxford University Press, 2002) Vol 1. Pp. 276-287 at p. 277

The above position of the law was given credence to in *Certain Expenses of United Nations* Advisory Opinion⁴⁰ where the Court in its wisdom stated thus: The responsibility conferred is “primarily” not exclusive. This primary responsibility is conferred upon the Security Council as stated in Article 24. The Charter makes it abundantly clear, however that the General Assembly is also to be concerned with international peace and security. Article 14[] authorizes the General Assembly to recommend measures for the peaceful adjustment []. The word “measures” implies some kind of action, and the only limitation which Article 14 imposes on the General Assembly is the restriction found in Article 12[]. Thus while it is the Security Council which, exclusively, may order coercive action, the functions and powers conferred by the Charter on the General Assembly are not confined to discussion, consideration, the initiation of studies and the making of recommendations: they are not merely hortatory.

The General Assembly in an attempt to avoid the use of veto power by the permanent members of the Security Council, exercised the responsibility of the maintenance of international peace and security through what is known as *Uniting for Peace Resolution*⁴¹, but this resolution cannot be said to have made much positive impact because the enforcement of those measures cannot be said to be given to the General Assembly through the resolution once there exist a threat to international peace and security. The only thing the General Assembly mostly rely on, is the intendment of the Charter vis-à-vis the provisions of Articles 10,11,14,22 and 35(1), (2) of the UN Charter⁴². Therefore, “disputes” or “situations” come under the competence of the General Assembly to handle complaints dealing with the judgments given by the ICJ under the provisions mentioned above. Therefore, the issue of the extent of the comprehensive competence of the General Assembly as far as the power to review the judgment of the ICJ is concerned and whether such possibility is necessary to be examined.

Power of the General Assembly to Review Court Judgment

In the performance of the duty of the General Assembly under Article 22 of the UN Charter, it is required that the General Assembly can “establish such subsidiary organs as it deems necessary for the performance of its function”. It is not in doubt therefore that the subsidiary organs of the General Assembly of the UN may involve judicial bodies having the competence to hear and determine cases, such as UN Administrative Tribunal which was established in 1949 by Resolution 351 A (IV). However, the running question is; “can the General Assembly establish such judicial bodies with the purpose of reviewing the judgment of ICJ based on the complaint submitted to it by the judgment creditor or based on the General Assembly’s own initiative after considering the issue of non compliance”. It should not be forgotten that by the provisions of Articles 56, 60 and 61 of the ICJ statute and Article 94 of the United Nations Charter, the General Assembly is constrained from reviewing the judgment of the ICJ. In the *Advisory Opinion on the effect of Awards of Compensation made by the United Nations Administration Tribunal*⁴³ the ICJ was asked to answer the General Assembly had the right on any grounds to refuse to give effect to an award of compensation made by that tribunal which was in the favour of a member of the staffs of the United Nations in relation to a contract of service said to have been terminated without his assent;

⁴⁰I. C. J Rep. (1962) P. 163. Full details of this report can be seen at: <http://unispal.un.org/UNISPAL.NSF/0/B59ECB7F4C73BDB C85256EEB004F6D20>.

Article 14 reads

“Subject to the provisions of Article 12, the General Assembly may recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations, including situations resulting from a violation of the provisions of the present Charter setting forth the Purposes and Principles of the United Nations”.

The position above tries to effectuate the relevance of the United Nations, by empowering the General Assembly. However, a community reading of Article 10 and Article 12 indicates that interest states that compose the Security Council far over rides the interest of the generally of the members of the General Assembly.

⁴¹Andrassy, J. “Uniting for Peace”. 50 AJIL (19956) pp. 563-582

⁴²Goodrich, L. M & Simons, L. B. *The United Nations and the Maintenance of International Peace and Security*, 2nd ed. (The Brookings Institution 1957) at p. 406.

⁴³ICJ Rep (1954) pp. 53 and 58-59

Full details of this Advisory Opinion could be found at: <http://www.icj-cij.org/docket/index.php?sum=113&code=unac&p1=3&p2=4&case=21&k=d>. Visited on 29th December, 2014

And that if the answer given by the Court is positive as far as question number one (1) is concerned, then the next question is; what are the principal grounds on which the General Assembly could lawfully exercise such a right?⁴⁴

As far as the question was concerned, the ICJ answer to the General Assembly was that they (General Assembly) have no right on any ground whatsoever to refuse giving effect to an award dealing with compensation made by the United Nations Administrative Tribunal in favour of a personnel of the United Nations whose employment was terminated.

The Court decided that there exists no point in deciding the second question anymore because the answer to the first question is not positive but negative. The Court however equally decided that the General Assembly does not have the power to transfer a judicial authority to any subsidiary organ of the United Nations pursuant to Article 22 of the Charter,ⁱ as the judgment rendered by a judicial body is *res judicata*. On controversial legal disputes, between members of the UN, even where the two parties have brought same before the General Assembly, it has always been the practice of the General Assembly not to decide nor make concrete recommendations. No wonder in the dispute that was before the General Assembly for about 8 years which concerns Iran: wherein Indonesia claimed that it has sovereignty over West new Guinea, the General Assembly did not proffer a solution on the ground that the problem dealt with legal matters which is within the purview of the ICJ and not the General Assembly.⁴⁵

It must be stated right away that at any point the General Assembly of the UN is ready to discuss the issue of the judgment of ICJ given against one of the parties, members must speak on the issue before taking a decision. The debate on it cannot allow member Nations to upturn the judgment of the ICJ. The United States representative to the UN, in attesting to this fact stated thus: My government sees no need for this Assembly to pass upon, or even go into, the reasoning of the Court (). The draft resolution accepting the advisory opinion anticipates the General Assembly performing a function which is proper to it. The General Assembly is not a Court. It is not a judicial organ of the United Nations and still less, it is the principal judicial organ of the United Nations, as Article 92 of the Charter describes the International Court of Justice. It is not the function of this Assembly...to act as a Court to review the International Court of Justice. To do so would depart from the Charter's clear intention. When the Court's opinion is asked, establishment and interpretation of the law, in the design of the Charter is the function of the Court: action to implement the law is, as the case may be, the function of other organs of the United Nations.⁴⁶

The General Assembly in a similar vein adopted resolution 337 in order to obtain an advisory opinion of the ICJ with respect to the international status of South West Africa and also as it has to do with international obligation of South Africa under the mandate of South West Africa. On the 11th day of July 1950, the ICJ gave its advisory opinion that the mandate remains valid and that by the terms of Article 22 of the League Covenant and the mandate to transmit petitions from those inhabitants of the territory to the UN, the Union of South Africa still has the obligation⁴⁷ notwithstanding the dissolution of the League of Nations.

As a result of the ICJ opinion, the General Assembly adopted the said opinion and established a Committee which is to confer with the Union of South Africa for the implementation of the ICJ findings. It must be outrightly observed here that the Committee members who were to implement compliance included United States, Denmark, Syria, Thailand, and Uruguay. Assuming the United States did not support what the General Assembly approved, it could have still gone back to the Security Council to utilize its power of veto. May be, that was the reason why the United States was made a member of the Committee to implement the afore-mentioned decision.

⁴⁴ The question was put to the Court in the case: Effects of Awards of Compensation made by the United Nations Administrative Tribunal. Advisory Opinion, ICJ Rep. (1954). p. 47.

⁴⁵ See Halbronner, K. & Klein, E. "Article 10"

⁴⁶ UN General Press Release No. 4112 of 1962 p.3

⁴⁷ ICJ Rep (1950) p. 128.

Full details of this report can be accessed at: <http://www.reworld.org/docid/4028e9d44.html>. wherein part the Opinion of the Court reads as follows: Therefore, South-West Africa is still to be considered a territory held under the Mandate of December 17th, 1920. The degree of supervision by the General Assembly should not exceed that which applied under Mandates System. These observations apply to annual reports and petitions. Having regard to Article 37 of the statute of the International Court of Justice and Article 80, paragraph 1, of the Charter, the Court was of opinion that this clause in the Mandate was still in force, and therefore that the union of South Africa was under an obligation to accept the compulsory jurisdiction of the Court according to those provisions

Also in Nicaragua's case, the competence and responsibility of the General Assembly in relation to non-compliance with the ICJ decision was made clear, especially when the Security Council could not implement the judgment which involves *Nicaragua v. United States*⁴⁸. In this case, Nicaragua appealed to the General Assembly during its 41st session and the Assembly affirmed the Court's decision which was also done in several other sessions wherein, there were calls on United States to respect and comply with the Court judgment. The said resolution went thus: Aware that under the Charter of the United Nations, the International Court of Justice is the principal judicial organ of the United Nations and that each member undertakes to comply with the decision of the Court in any case to which it is a party. Considering that Article 36 of the statute of the Court provides that "in the event of a dispute as to whether the Court has jurisdiction, the matter shall be settle by the decision of the Court".

Taking note that of the judgment International Court of Justice of 27 June 1986 in the case of "military and Paramilitary Activities in and against Nicaragua....." Urgently calls for the full and immediate compliance with the judgment of the International Court of Justice of 27 June 1986 in the case of "military and Paramilitary Activities in and against Nicaragua" in conformity with the relevant provisions of the Charter of the United Nations....."⁴⁹

It should be noted that what the General Assembly did was maintain its position and continue to appeal to the United States to comply with the Court judgment but it is difficult to exert compliance against the United States. However, out of several pressures and the maintenance of the UN General Assembly position on its resolution, there was a change of government in Nicaragua including the discontinuance of the case from Court for non-compliance. Viewed from the afore-mentioned background, it is not out of place to state that even though the General Assembly has no power to refuse the judicial decisions reached by the Court, it is very difficult to implement same through the General Assembly, especially where the United States is involved or in a situation where the Security Council is being inhibited to act as a result of the veto power of the permanent members of the United Nations.

General Assembly and its Discretionary Powers

It may be said that the General Assembly, pursuant to Articles 10, 11 and 14 of the UN Charter and Uniting for Peace Resolution have the discretion to consider, discuss, investigate and recommend those measures expected to be taken in the pursuit of giving effect to an international obligation which includes the judgment of the ICJ. It should be understood that the measures that can be taken by the General Assembly could be in the form of recommendations of coercive or enforcement action which is different from the physical act of coercive or enforcement action itself.

The ICJ itself in *Certain Expenses of UN Advisory Opinion*⁵⁰ has had cause to state the measures the General Assembly could take does not merely apply to general questions relating to peace and security but that it also relates to specific matters referred to the General Assembly by a state pursuant to Article 35 of the UN Charter⁵¹. Also under Article 22 of the UN Charter, the General Assembly has the discretion to set up investigating committees with respect to the issue of non-compliance with ICJ judgment as was done in United Nations Special Committee on Palestine (UNSCOP)⁵² which was a committee set up to investigate the conditions of the Palestinians.

⁴⁸ ICJ Rep (1986) p.4

⁴⁹ A/ROS/41/31 of 5/11/86

⁵⁰ *Certain Expenses of the United Nations* (Article 17, paragraph 2, of the Charter). Advisory Opinion. ICJ. Rep. (1962). P. 151

⁵¹ ICJ Rep (1962) p. 164

Article 35 reads as follows:

1. Any Member of the United Nations may bring any dispute, or any situation of the nature referred to in Article 34, to the attention of the Security Council or of the General Assembly.
2. A state which is not a Member of the United Nations may bring to the attention of the Security Council or of the General Assembly any dispute to which it is a party if it accepts in advance, for the purposes of the dispute, the obligations of pacific settlement provided in the present Charter.
3. The proceedings of the General Assembly in respect of matters brought to its attention under this Article will be subject to the provisions of Articles 11 and 12.

It is imperative to state that the essence of Article 35(1) is the deployment of appropriate action in any particular circumstance.

However, this condition is subjective, as there are inherent and latently ambivalent preconditions, which are capable of negatively impacting on the intent and purpose of this provision. These have been seen in many cases discussed earlier.

⁵²UNYB (1946-1947) pp. 294-301

Furthermore, the General Assembly did set up observers called United Nations Observation Group in Lebanon (UNOGIL)⁵³, and also there were the committees to supervise mandated territory, receive and also examine whatever emanates from mandatory powers and this happened in respect of International Status of South West Africa. Pursuant to the foregoing and of significant understanding is the fact that a member of the United Nations may be suspended by the General Assembly in alliance with the Security Council, based on Articles 5 and 6 of the UN Charter and that means such suspended member would not be able to exercise its rights and privileges as a member of the UN, so far as the suspension lasted.

If the member nation continues to wallow in disobedience, then, pursuant to Article 6, the next option left for the General Assembly to utilize is to expel such a member from the World body (UN). It is noteworthy to state that part of the discretion of the General Assembly is that it can also refer a particular matter of non-compliance with the ICJ judgment to the Security Council for an appropriate action to be taken against a recalcitrant state with sole purpose of enforcing compliance with the judgment.

Furthermore, the General Assembly can in its wisdom recommend to a member state to enforce compliance with the ICJ judgment by utilizing any appropriate measures, once compliance can be achieved. The blocking of assets and interruption of the trading activities of the defaulting state could form part of the recommendation of the General Assembly and under the Uniting For Peace Resolution⁵⁴, the General Assembly used its discretion to brand the Republic of China as an “aggressor nation” in relation to its intervention in the Korean War whereas there was a recommendation of economic embargo on shipment of materials which affected both North Korea and China⁵⁵

⁵³UNYB (1958) p. 38

The facts of the UNOGIL mission indicate that in May 1958, armed rebellion broke out in Lebanon when President Camille Chamoun (a Maronite Christian) indicated the intention to proceed with an amendment to the Constitutions, which would enable him to be re-elected for a second term. This development resulted in civil unrest, which started in the predominant Moslem city of Tripoli, and later spread to Beirut and far northeastern areas of the Syrian border. This assumed the proportions of a civil war.

In view of this development, on 22 May, 1958, the Lebanese Government requested a meeting of the Security Council to discuss its complaint “in respect of a situation arising from the intervention of the United Arab Republic in the internal affairs of Lebanon, the continuance of which is likely to endanger the maintenance of international peace and security” it pointed that the United Arab Republic was encouraging and supporting the rebellion by the supply of large quantities of arms to subversive elements in Lebanon, by the infiltration of armed personnel from Syria into Lebanon, and by conducting a violent press and radio campaign against the Lebanese Government.

Five days later, i.e. on 27 May, 1958, the Security Council decided to include the Lebanese complaint on its agenda for discussion and decisions but, at the request of Iraq, the Security Council agreed to postpone the debate to permit the League of Arab States to try to find a settlement of the dispute. After the League has met for six days without reaching agreement, due to members’ interest and other politico-economic complications. The Security Council took up the case and on 11 June, 1958 adopted resolution 128 (1958), by which it decided to dispatch urgently to Lebanon an observation group “so as to ensure that there is no illegal infiltration of personnel or supply of arms or other material across the Lebanese borders”. The Secretary-General was authorized to take the necessary steps to dispatch the observation group, which was asked to keep the Council informed through him. Resolution 128 (1958), supported by both Lebanon and the United Arab Republic, formed the basis for the establishment of the United Nations Observation Group in Lebanon (UNOGIL).

The important lesson here is the fact that upon failure of regional bodies to handle certain concerns, the General Assembly can wade in the implication being that the swift reaction of both the regional organ and the General Assembly should be extended to conditions of judgments of the ICJ. This method has the ability to make the judgments effective.

⁵⁴ ICJ Rep (1950) p. 137

⁵⁵ GA Res 498 (V) of Feb. 1951. Res 500 (V) of May 18, 1951. Full details of these Resolutions could be found at: <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/744/45/IMG/NR074445.pdf?OpenElement> and <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/744/45/IMG/NR074447.pdf?OpenElement>. Visited on the 29th December, 2015

Sequel to the foregoing position of this study, the General Assembly Resolution 498 (V) of February 1951 was with the intent to veto international action against China (a member of the Security Council) for its aggression in Korea. China had sought to block the proposition to back out of Korea but took steps to frustrate the move at the Security Council. However submissions were made to the General Assembly, thus resulting GA Res 498 (V) of Feb, 1951.

Further, two months later, findings reveal substantial compliance with meted sanctions from the GA to member states against China, thus resulting Res 500 (V) of May 18, 1951: which was initiated as additional measures to enhance further compliance

The General Assembly and the Effectiveness of its Measures

There exist a form of public diplomacy when situations of non-compliance with the Court's decisions are referred to the General Assembly especially as the General Assembly is more popular and influential to the members than the Security Council who are limited in number, when there is a General Assembly resolution, it is a form of public diplomacy as it represents the opinion of the members of the United Nations on that particular issue and the recalcitrant state is likely to be willing to comply with the ICJ judgment upon the said resolution being passed.

Also, technically, there may likely be a form of double authority in relation to the enforcement of the ICJ judgment because when the issue of non-compliance with the judgment is first handled by the General Assembly and a resolution is taken and set to the Security Council, the additional resolution of the Security Council will show to the recalcitrant state that with two resolutions, the issue of non-compliance has assumed a serious dimension. There is the tendency that the recalcitrant state is likely to comply with the ICJ judgment. It is also seen that such a resolution as referred to above can provide a political basis for legal action by other states and it can at least have a persuasive role in giving support for the validity of such national measures if the matter has to come up before the domestic Courts.

When the General Assembly make subsequent and relevant resolutions on the same question, it may be considered in themselves as an aspects of the enforcement or compliance with the ICJ judgments which on its own could be the basis of the necessary inducement towards compliance. Furthermore, the resolution of the General Assembly could produce more pressure against a defaulting state in order to fulfill its international obligations in accordance with the decision of the Court. In other words, the United Nations may have to adopt a resolution which will remind a defaulting state of its obligations and with an additional stand point that the non-compliance with the Court decision counts to a wrongful act against the United Nations which has the effect of affecting its international responsibility⁵⁶.

It is however important to understand that on a critical examination of the effectiveness of the resolution, it is not as rosy as have been stated above because a good example of this negative part of the effect of this resolution is the example is the example of the United States of America deliberate refusal to comply with the judgment of the ICJ in Nicaragua's case and the resultant use of force against Nicaragua including the unfortunate failure of the Security Council to uphold the primary responsibility by ensuring compliance.

The position of this paper is that the failure discussed above is occasioned by reason of the fact that the permanent members of the Security Council are not unanimous in their decision on the issue of compliance. Therefore, the United States could not be forced to comply with the ICJ judgment just because the General Assembly equally failed to take any effective action to force the United States to comply with its international obligation as far as the UN Charter is concerned vis-à-vis the statute of ICJ.

As could be seen, the essence of the effectiveness of the General Assembly, vis-à-vis its functions and resolutions upon which it may establish a sustaining subsidiary organs in terms of investigation. Observation and supervision committees and commission depend largely on the consent of the states concerned and this was what was said by the ICJ in *Certain Expenses of the United Nations*, Advisory Opinion⁵⁷.

There is no doubt that because of the inadequacy and inherent limited effectiveness of the General Assembly, it becomes imperatively necessary that there is the need to open the door for the purpose of looking towards other means of enforcing judgment of the ICJ; and this means of enforcement should be within the organization of the United Nations itself which could be through the Secretary-General of the United Nations himself, since most of the actions of the Secretariat takes place through the said Secretary-General.

with GA Res 498 (V). The implication of this finding is that if the international efforts of nations states in pursuance of UN General Assembly obligations are extended to the judgments of the ICJ, the Court would be more effective than it is now.

⁵⁶ I...I auterpacht. "Implementation of Decisions of International Organizations through National Courts" in S. M. Schwebel. *The Effectiveness of International Decisions: Papers of a Conference of the American Society of International Law and the Proceedings of the Conference* (A. W. Sijhoff – Leyden 1971) pp. 57-65

⁵⁷ I.C.J. Rep (1962) p. 165. Full details of this adversary opinion can be accessed at: <http://www.icj-cij.org/docket/files/49/5259.pdf>. Visited on the 30th December, 2014

The Position of the Secretary-General

It is a fact that the Security Council can authorize any action and also impose series of sanctions in order to enforce compliance with the judgment of ICJ and the General Assembly can therefore use any other recommended measures which can force any party in default of compliance with the ICJ judgment. It is however a truism that it is the Secretary-General who will actually perform the duty of ensuring compliance with the ICJ judgment especially, as regard international obligations through his “good office” which could happen either through the authorization of any of the UN bodies or by the initiative of the Secretary-General himself. In this case, the Secretary-General acts as the head of an administrative organ vested with powers to compel performance of statutory obligations.

The above function of the Secretary-General in itself can be described as a form of dispute settlement mechanism or enhancement which is an off-shoot of the Hague Convention of 1899 and 1907; which makes provision that before an appeal to arms, states shall have recourse as far as circumstance allow to the good offices or mediation of one or more friendly powers and that the friendly powers are further authorized to take the initiative to offer good offices or mediation even during the course of hostilities⁵⁸. The United Nations Charter however did not make provision for the situation discussed above, but both the San Francisco Conference and the Preparatory Commission on different grounds anticipated that the Secretary-General of the United Nations ought to perform the significant role as far as the United Nations is concerned. They however did not agree as to what extent and how much is the importance of the role that he should assume⁵⁹. This situation was already envisaged and taking cognizance of the Report of the Preparatory Commission of the United Nations in 1945 and the said report stated thus: The Secretary General may have an important role to play as a mediator and as an informal advisor of many Governments and will undoubtedly be called upon him from time to time. In the exercise of his administrative duties, to take decisions which may justly be called political. Under Article 99 of the Charter, moreover he has been given a quite special right which goes beyond any power previously accorded to the head of an international organization vis; to bring to the attention of the Security Council any matter (not merely any dispute or situation) which in his opinion, may threaten the maintenance of international peace and security. It is impossible to foresee how this Article will be applied; but the responsibility it confers upon the Secretary-General will require the exercise of the highest qualities of political judgment, fact and integrity.

The term “good offices” can be seen as a flexible expression, because it means very little or very much but indeed the nature and scope of the Secretary-General’s good offices cannot be clearly defined. The issue of ensuring that there exists compliance with the ICJ judgment ought to be the duty vested on the Secretary-General of the United Nations, and therefore, his role with respect to post-adjudicative phase cannot be dispended with It is however to be understood that majority of the writers who have closely examined the problems associated with non-compliance and the difficulty in the enforcement of the decisions of the ICJ judgment did not take into consideration the political function and the power inherent in the Secretary-General with regards to this issue. Therefore, it is necessary to divide the role of the Secretary-General in the process of enforcing the ICJ decisions into three different parts which are:

- (1) General political function pursuant to Article 98 and 99 of the UN Charter
- (2) The potential role of requesting for the advisory opinion from the Court pertaining to the issue of non-compliance
- (3) The role of the Secretary-General under the Secretary-General’s Trust Fund which sole purpose is to render assistance to those states in settlement of disputes through the International Court of Justice as required.

The General Political Function of the Secretary-General

The Secretary-General of the United Nations is requested through an operation paragraph of the resolutions of the General Assembly and the Security Council to carry out certain functions. It is to be noted that this drafting methodology and the formal request really indicates the importance of the Secretary-General Office who is to fine out the level of implementation of the ICJ judgments by the state involved. Furthermore, it establishes the level of political security and pressure which the Secretary-General will utilize in order to give effect to the ICJ judgment in line with international obligations.

⁵⁸ Article 9 of both 1899 and 1907, Hague Conventions

⁵⁹ L. Cordenkar. *The UN Secretary General and the Maintenance of Peace*, (Columbia University Press 1987) p. 120

Further, because the Secretary-General is the one to issue annual progress reports, there is the possibility of not keeping a given issue unattended to; while the same Secretary-General can also exercise indirectly same form of pressure in order to induce a particular judgment debtor to give effect to the decision of ICJ pursuant to Article 98 of the UN Charter which states that: The Secretary-General shall make an annual report to the General Assembly on the work of the organization.

By virtue of Rule 13(a) of the Rules of the Secretary-General, the Secretary-General's report is a compulsory part of the provisional agenda of the regular sessions of the General Assembly. Therefore, it is imperative to state that the Secretary-General's report to the session or sessions of the General Assembly can cause a situation of World-wide pressure, which can make a recalcitrant state to abide by the judgment of the Court. It is no gainsaying that on a number of occasion, the Secretary-General's reports played important role in relation to the formulation and mapping out the strategies including the decisions taken by the Security Council. This has to do with his good offices roles which have often been transformed into the mission for the securing and monitoring of the compliance of the parties with the ICJ judgments. This good offices strategy has dealt with disputes of different substance including the implementation of the ICJ judgments and decision⁶⁰.

Also, under Article 99 of the UN Charter, it is stated therein that Secretary-General may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security. The wordings of Articles 99 shows without any doubt that the Secretary-General is clothed with political powers in dealing with this situation and it can equally be referred to as special right⁶¹ which is sufficient in some peculiar circumstances with respect to making sure that the ICJ judgment are complied with. However, records show that past occupants of that office seldom utilize these enormous powers to effectuate the judgment of the ICJ.

The Secretary-General may decide to exercise powers with respect to complete information about a particular non-compliance issue and he can therefore decide to take the initiative which has to do with investigations and inquires before he decide to bring the matter of the recalcitrant state to the Security Council or the General Assembly. Acknowledgement is given to the Secretary-General. Perez de Cuellar who was made to be an Arbitrator in the case of Rainbow Warrior (New Zealand v. France)⁶² which the two parties through whoever is their representatives to the United Nations requested that the Secretary-General should be an Arbitrator with respect to the case where the sinking of a vessel called the "Rainbow Warrior" in Auckland Harbour, New Zealand.

The situation of this instance was as a result of extensive damages caused by two highly sophisticated explosive devises at the instance of the French Secret Service. In the Arbitration proceedings, the Secretary-General decided that the French Government should every three months inform the New Zealand and Secretary-General of the UN especially through diplomatic avenues, complete reports on Major Mafart and Captain Prieur. Furthermore, in line with section 5 (Arbitration) of the Conciliation vis-à-vis the supplementary agreement of 14/2/1989, including subsequent Arbitration award of 30/4/1990 France was declared to have been in breach of its international obligations to New Zealand as a result of the release of two DG SE agents from HAO Island in 1988 and it was therefore directed to pay another sum of \$2million having contravened and refused to comply with the ruling in respect of the aforementioned conciliation⁶³.

⁶⁰S. M. Schwebel. *The Secretary General of the United Nations. His Political Powers and Practice*, Harvard University Press, 1952 p. 21.

Further in addition to Schwebel's insights into the powers of the Secretary-General, the legal basis for the Secretary-General's roles lies in Article 7 and 97 through 101 of the UN Charter. Article 97 states that he is the chief administrative officer of the organization: Article 98 stipulates that he shall perform function entrusted to him the members of United Nations. Thus, from a constitutional point of view the Secretary-General possess an independent political role derived from Article 99, which reads: "...the Secretary-General may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security..."

⁶¹ 40ICLQ (1991) pp. 446-457

⁶² T. M Frank. "The Secretary General's Role in Conflict Resolutions, past, present and future conjecture 6EJIL (pp.360-387

⁶³ ICJ Rep (1994) p. 6

In the post-adjudicative phase of ICJ, the role of the Secretary-General can be glaringly seen because after the Court decision on 3/2/1994 with respect to the territorial dispute case⁶⁴. Libya/Chad, the party to the case on the 4th day of April concluded an agreement with respect to the manner of implementing the ICJ judgment.

Thus, both parties in the letters dated 6th and 7th day of April 1994 forwarded the agreement on the matter to the Secretary-General of the United Nations and he contacted the Permanent Representatives of the two Countries to the United Nations. On the 13/4/1994 the President of the Security Council was informed by the Secretary-General about these two letters and their subject matter. He equally stated that he is to send a reconnaissance team to visit the area of hostilities with a view of deploying UN observers to monitor Libya's withdrawal from, the disputed area with an instruction to execute the ICJ judgment.

As at this, even though Libya was under the sanction by the Security Council, the next day after the briefing by the Secretary-General of his intention, adopted a resolution to this effect by which it accepted the agreement reached between Libya and Chad and in order to make sure that the reconnaissance team constituted by the Secretary-General are able to work by visiting Libya on a United Nations aircraft, the Security Council suspended part of the resolution of not allowing any UN contact with Libya.

The Secretary Council having examined the Secretary-General's report on Libya/Chad which was dated 27th day of April, 1994, the Security Council adopted resolution 915 of 4th of May, 1994 which authorized through the office of the Secretary-General, what is known as Abuzou Strip Observer Group (UNASOG) who are to help the parties to implement the judgment of the Court. The parties themselves were called upon to co-operate with the Secretary-General while verifying the implementation provisions of the agreement, vis-à-vis the fact that the UNASOG must be granted freedom of movement and other services required. Within two months of the resolution, the Secretary-General peacefully concluded his job and the transfer of authority from Libya to Chad was successful.

It can be said that this was not the first occasion where the Security Council directly participated in the implementation of the decision of the ICJ; but one can say that it was the first of the situations where the Secretary-General was involved in the implementation of the ICJ judgment. No wonder the Secretary-General even if we do not make any reference to a particular provision of the Charter stated that the accomplishment of the mandate of UNASOG ably demonstrated the useful role as envisaged by the Charter, which the United Nations can play in the peaceful settlement of disputes when the parties co-operate fully with the organization⁶⁵

Another good example with respect to the role of the Secretary-General of the United Nations can be seen in the case of Eritrea/Ethiopia as at 1998. Through a resolution, the Security Council directed the Secretary General to provide a lasting peace to the conflict between Eritrea and Ethiopia and to assist in the delineation of the boundary between the two countries, which eventually led to the establishment of a boundary commission vis-à-vis a claim commission. The problem faced by the parties was the nomination of some of the commissioners, the Secretary-General made recommendations which were accepted by the parties. On the 13th day of April, 2002, the boundary commission gave its decision finally and pursuant to Article 4.16 of the parties' agreement, the parties made a request to the UN to facilitate the resolution of their problems which has occurred as a result of the transfer of the disputed territory and its consequences.

The proposal by the Secretary-General to the Security Council in order to adjust the mandate of the United Nations Mission in Ethiopia and Eritrea was to help the partisan to actually make provision for administrative and logistic support with respect to the performance of the Boundary Commission. The resolution was approved by the Security Council on 14th day of August, 2002. Further, Ethiopia⁶⁶ on its own part however showed lukewarm attitude in relation to complying with the decision of the Boundary Commission including the move to demarcate the common border between the two countries.

⁶⁴3373rd Meeting of 4/5/94 UN DOC/RES/915

⁶⁵ UN DOC S/1994/672. 100 11.R p. 101. Full details of this application could be found at: www.ejil.org pdf 18 5 250.pdf.

Visited on the 30th December, 2014 being position paper titled "Jurisdiction and Compliance in Recent Decisions of the International Court of Justice" by Aloysius P. Llamzon published by The European Journal of International Law. Vol. 18 no. 5. EJIL 2008.

⁶⁶ Progress Report of the Secretary-General on Ethiopia and Eritrea 1, Eight Report of the Eritrea-Ethiopia Boundary (Omission UN DOC 5/2003/257 6th March, 2003 at pp. 17-19

Due to this non-compliance, the Secretary-General decided to closely work with the President of the Boundary Commission and thereafter communicated to the parties as to the amicable resolution of the crisis.

Coming back home, in the Land and Maritime Boundary (Cameroon v. Nigeria: Equatorial Guinea intervening), there was an initial intention by Nigeria not to comply with the ICJ judgment. It was in this regard that the United Nations Secretary-General decided to engage in a pre-emptive measure as to any non-compliance with the judgment of the ICJ. What the Secretary-General did was to meet with the President of the two countries involved in the disputes in Paris as at 2002 and of course, they agree that they will comply with the judgment of the ICJ immediately the ICJ rendered its judgment, it was that same day that the Secretary-General restated his advice to the said countries (Nigeria and Cameroon) that the ICJ judgment must be obeyed.

Notwithstanding the afore-mentioned position and after the ICJ judgment was rendered, Nigeria however decided that it will not comply with the judgment of the Court and it state thus; “Being a nation ruled by law we are bound to continue to exercise jurisdiction over these areas in accordance with the constitution” and “on no account will Nigeria abandon her people and their interests”. This was said two weeks after the judgment that is on. Consequently, the Security Council invited the Cameroon President as at that time (President Paul Biya) and President Olusegun Obasanjo to meet in Geneva and with a follow up to the above meeting there is the need to follow up the judgment of the ICJ.

After the meeting the parties again met with the Secretary-General and it was there the two parties agreed to respect their international obligations under the Charter of the United Nations. During the various meeting, both parties agreed on a confidence building measures/actions and identified those issues to be resolved for the purpose of compliance with the ICJ judgment. The Secretary-General was requested to establish a Mixed Commission comprising experienced personalities from the two countries whose chairman will be a Special Envoy, who would map out the various ways to follow in order to implement the ICJ judgment and the recommendations as applicable to the case⁶⁷.

Thus, the first meeting of the commission took place between 7th – 9th of February 2003. While the second meeting took place on 4th day of February, 2003, with the United Nations supervising. As at now, there have been significant compliance with the judgment but the fact remains that the people of Bakasi in Cross-River State of Nigeria are still not happy with the ICJ judgment and require the Federal Government of Nigeria proceed to the Court for revision⁶⁸ of the judgment because according to the Cross-River State Government, a lot of work has been done on the issue as to how to review the judgment of the Court⁶⁹.

They argued that several countries applied for a review of similar judgment delivered against them without losing credibility. They cited the example of El-salvador v Honduras in 2002 against a judgment of 11/9/92, Yugoslavia v Bosnia and Herzegovina presented for review in 2001 against a judgment in June, 1996 and that the condition for review of ICJ judgment must be complied with first.

Since Nigeria has complied with the judgment, they should seek for review of the judgment. The Federal Government of Nigeria however insisted that it will not seek for a review of the said ICJ judgment, as it has not seen any ground upon which to apply for a review and that it does not want to incur the wrath of the UN which can come through loss of credibility⁷⁰. The Secretary-General of the United Nations can be requested to apply for an advisory opinion of the ICJ on a particular issue that is before the Security Council or the General Assembly.

⁶⁷ UN Secretary General, prof Kofi Anan’s statement after his meeting with Presidents of Cameroon Nigeria: UN press Releases SC/SM/3495/AFR/515 OF 15/11/2002.

⁶⁸ IT SHOULD BE NOTED THAT Article 61(1) of the UN Charter provides that states parties in upon discovery of new facts unknown to the Court and the party seeking revision, such facts may be presented to the Court for consideration:

Article 6(1): an application for revision of a judgment may be made only when it is based upon the discovery of some facts of which a nature as to be a decisive factor, which the judgment was given, unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence.....

Article 61(5) no application for revision may be made after the lapse of ten years from the date of the judgment (i. e, October 10, 2002- October 10, 2012 in the Bakasi case).

⁶⁹ THE NATION Newspaper of Wednesday October 10, 2012, page 62.

⁷⁰ “THE NATION Newspaper of Tuesday October 9,2012.

Therefore, one of the purposes of the advisory opinions of the ICJ is to influence the practice of the particular organ of the UN concerned including those states involved in the dispute⁷¹.

The Role of Secretary-General in Requesting for Advisory Opinions

This question arising is, given the peculiar nature and the serious complexity involved in the enforcement of ICJ judgment through the Security Council and General Assembly and apart from the position of the Secretary General as *amicus curia*; will it be proper to give the Secretary-General all the power to examine the ICJ judgment with the view to understanding the means and measures of enforcement of the said decision or that the same Secretary-General should step into the issue whenever he likes in order to secure compliance with the ICJ decision by requesting for the Court advisory opinion on the fact of a serious non-compliance with the ICJ decision?

A close look at the practice of Court of Justice of Andean Community⁷² may serve a purpose to improve the position of the UN Secretary-General in relation to the request for advisory opinion because the Andean Community devotes a section comprising of nine (9) Articles commencing from Articles 23-31 which deal with the issue of the non-compliance with the decisions of the Court of justice of Andean Community⁷³.

These Articles provided for a unique procedure of judicial and institutional enforcement of the decision of the Court mentioned above. In this Article, it directly gives the Secretary-General Andean Community the power to examine whether a particular member state has failed to comply with the decisions rendered by the Court and in respect of its obligations as agreed under the provisions of the Convention as enshrined in the laws of Andean Community⁷⁴.

Furthermore, in the Statute of Andean Court, it is stated that if the Secretary-General of Andean Community verifies the reason for the non-compliance by the recalcitrant state, and it was found that the recalcitrant state has continued with the alleged non-compliance, then the Secretary-General shall forward a request for a decision on the said non-compliance to the Court of justice of Andean Community but if the Secretary-General refused to come out with his decision on the verification as to non-compliance, or if he fails to request for advisory opinion within 60 (sixty) days after the claim was presented to him, the claimant country may then directly appeal to the Court⁷⁵.

Once the Court of Andean found a member nation guilty of non-compliance, then such member would be compelled to take the appropriate action towards the execution of the judgment within a period of not more than ninety (90) days after notification of the directive⁷⁶, but if the member nation still fails to comply with the judgment of the Court, summarily and after the court might have heard the opinion of the Secretary-General, “shall establish the limits within which the claimant country or any other Member Country may restrict or suspend, in whole or in part, the benefits obtained by the Member Country at fault under the Cartagena Agreement”

⁷¹ H. Mosler, & K. Oellers-frahm, “Article 96” in B. Simma, et al; THE Charter of the United Nations: A Commentary(oxford univ. press, 2002), pp, 1180-1190 at p. 1132.

⁷²S. Rossene, “The Advisory Procedure of the International Court of Justice” in L. Wellens, (ed) International Law: Theory and Practice (Kluwer International Law, 1993) pp. 707-717 at p. 707.

⁷³ The Treaty Creating the Court of Justice of the Cartagena Agreement (Amended by the Cochabamba Protocol) and was signed in the City of Cochabamba, Bolivia on May 28, 1996 and came to force in August 1999.

⁷⁴ R.P Hamilton. “A guide to researching the Caribbean Court of Justice” 27 Brooklyn J. Int'l (2002) pp 531-534

⁷⁵ Article 23 of the Statute of Andean Court: which states as follows:

Article 23 - if the General Secretary consider that a Member country

⁷⁶ Article 24 of the Statute of Andean Court. This Statute can be found at: http://www.comunidadandina.org/ingles/normative/ande_tries2.htm. Visited on the 30th December, 2014

Article 24:- if a Member Country considers that another Member Country has failed to comply with its obligations under the provisions comprising the legal system of the Andean Community, it may take no claim to the General Secretariat, together with the respective background of the case. The latter may then the necessary action to rectify the noncompliance within the period stipulated in the first paragraph of the previous article, if the response is received or the period elapses without any positive results, the General Secretariat shall in keeping with its internal rules and within the following fifteen days, issue a ruling on the state of compliance with those obligations which must include its reasoning

If the General Secretariat decides that the Member Country has failed to comply with its obligations and the country continues with the behaviour that gave rise to the claim, the General secretariat shall

Andean Community, the Court shall establish the limits within which the claimant country or any other member country may restrict or suspend as of whole or in part, the benefits obtained by the member country who is at fault of non-compliance under the Cartagena Agreement⁷⁷.

From the above workings of the statute of the Andean Court, it can be seen that its unique empowerment of the Secretary-General shows a valuable acceptability of the important role which is being handled by the Secretary-General on the post-adjudicative stage. But it is necessary to know if this procedure can be adopted: and what will be its results in giving authority to the Secretary-General of the United Nations, thus, requesting for advisory opinion on a subject matter. The Court in an Application for Review of Judgment No. 333 of the United Nations Administrative Tribunal⁷⁸, Legality of the Threat or Use of Nuclear Weapons⁷⁹ and difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights⁸⁰, on its own stated that its competence and authority as far as the issue of requests for opinions is concerned is permissive ad of a discretionary character and that it is well established that the reply of the Court in relation to a request for an advisory opinion represents the Court participation as far as the activities of the United Nations is concerned. The Court stated that in principle, it ought not to refuse the request for advisory opinions, but that there may exist serious and important reasons which can give rise to assume jurisdiction with respect to such request for an advisory request from the Secretary-General.

Role of Secretary-General under His Trust Fund

During the time when the execution of the ICJ judgment is to take place, which is called the post-adjudicative stage, any of the parties, may give reason that because of the difficulty in its financial position, it will not be easy for the compliance with the judgment as the said judgment may involve the use of scientific and technical experts before the Court judgment can be complied with. It is not difficult to say that this is a foreseeable difficulty and there is the need to prepare against it. The situation of Switzerland's Financial assistance to both Burkina Faso and Mali with respect to assisting both countries to comply with the ICJ decisions in the Frontier Dispute (Burkina Faso v. Republic of Mali)⁸¹ led to the Foreign Ministers of non-aligned countries in June 1989 through the International Court of Justice and accordingly the Secretary-General stated those categories of persons entitled to his financial support.

The Undefined Supervisory Role of the Security Council over the ICJ: Review of the Lockerbie Case (Libya v. U.K, 1992)

The facts of the case are as follows: upon the indictment of two Libyan nationals by a grand jury in the District of Columbia in the United States and a charge by the Lord Advocate in Scotland⁸², the stage was set for the game of superiority between the Security Council and the ICJ.

Consequent on this development, Libya filed two separate applications in the International Court for provisional measures⁸³ under Article 14(1) of the Montreal Convention⁸⁴ based on a claim of inability to settle the dispute with the USA and UK by negotiation and arbitration as required by statu

⁷⁷ Article 27 of the Statute of Andean Court. This Statute can be found at:

http://www.comunidadandina.org/ingles/normative/ande_tries2.htm Visited on the 30th December, 2014.

⁷⁸Ibid

⁷⁹ I.C.J Rep (1987) p. 31. Full details of this report could be accessed at: <http://www.icj-cij.org/docket/files/72/9651.pdf>. Visited on the 24/12/2014

⁸⁰ I.C.J. Rep (1996) p. 226. Full details of this report could be accessed at: <http://www.icj-cij.org/docket/index.php?i=498&code=unan&p1=3&p2=4&case=95&k=el&p3=5>. Visited on the 24/12/2014

⁸¹ I.C.J Rep (1987) p. 31. Full details of this report could be accessed at: <http://www.mpil.de/en/pubresearch/archive>. Visited on the 24/12/2014.

It should be noted that the permissive character of Article 65 of the Statute gives the Court the power to examine whether the circumstances of the case are of such a character as should lead it to decline jurisdiction to answer the request such discretionary power does not exist when the Court is not competent to answer the question forming the subject-matter of the request since it is not a "legal question". In such a case, the Court has no discretion in the matter: it must decline to give the opinion requested.

See also: I.C.J. Repo (1986) p. 554. Full details of this report could be found at:

http://www.genevaacademy.ch/RULAC/pdf_state/International-Court-of-Justice-Frontier-Dispute-Burkina-Faso-v-Mali-Summary-of-the-Judgment-of-the-22-December-1986.pdf. Visited on 30 December 2014.

⁸² A. Rosenthal, U.S. Accuses Libya as 2 are Charged in Pan Am Bombing, N.Y. TIMES, Nov. 15, 1991, at Al.

⁸³ Libya v. U.K. 1992 I.C.J. at 5-6, paras. 5, 6.

⁸⁴ Article 14 (1) provides:

In this regard, Libya further invited the Court to determine the legality or otherwise of the actions of the parties given the circumstance of the case, and asked the Court to restrain the United States and United Kingdom from compelling or coercing Libya into surrounding the accused persons for trial outside Libya. Libya further contended that its domestic law does not permit the extradition of Libyan nationals for criminal trials in foreign lands; and also informed the Court of its proposal to the US and UK to support its efforts to try the accused persons in Libya.

In addition, it also asked the Court to prevent any steps that may impinge on the rights of Libya with respect to the legal proceedings before the International Court of Justice. Incidentally, after hearing the matter between 26th and 28th March, 1992 the Court adjourned for ruling on the merits of the applications. It is on record that three days after the last date of hearing, the Security Council, invoking the provisions of Chapter VII of the UN Charter, initiated and adopted Resolution 748⁸⁵, which required Libya to extradite the named culprits by 15th April 1992 or face international sanctions.

The sanctions included civil aviation, arms and diplomatic staffing privileges. In furtherance of the directive of the Security Council, the Court entered its decision on the 14th of April, 1992 denying Libya the request for provisional measures. The next day, the Security Council imposed the said sanctions against Libya.

In its brief decision, the Court held that, based on Article 25 of the UN Charter. Resolution 748 satisfied the requirement for interim measures and is binding on the parties and the by passing. Resolution 748, the Security Council has fulfilled its obligation under Article 25 of the UN Charter, for which according to Article 103,⁸⁶ of the Montreal Convention relied on by Libya, cannot override the provisions of the UN Charter. The Court further indicated that the provisional measures requested by Libya if granted would deprive the contending parties that is, the UN and UK of their rights under the Resolution⁸⁷.

In view of the foregoing, this study is of the firm understanding that, the applications of Libya for which the Court was invited to give its opinion with respect to the request for provisional measures did not bring Resolution 748 into context; however, the Court still ruled on the validity of the said Resolution 748 even when it was not an issue before the Court.

This action in the view of this indicates the Court's direct affirmation of the acts of the Security Council. Under international law, this action has the potential of prejudicing the interest of Libya especially where the result of the investigative panel is not a Court judgment and cannot form the basis of judicial indictment in both domestic and international law. Secondly, shouldn't the accused persons be presumed innocent until proven guilty before a Court of competent jurisdiction?

Any Dispute between two or more Contracting States concerning the interpretation or application of this Convention which cannot be settled through negotiation, shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

⁸⁵ It should be noted that, prior to Resolution 748, the Security Council have on 21st January 1992 passed Resolution 731 which was as a result of the independent investigative hearings which culminated into the indictment of the named culprits. Abdel Baset Ali al-Megrahi and Lamem Khalifa Fhimah both of whom are officials of the Libyan Government Resolution 731 indicated the need for the global community, especially national governments and the Secretary-General of UN to put pressure on Libya to co-operate fully with the UK and US requests in the matter.

⁸⁶ Article 103 of the Montreal Convention provides thus:

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

⁸⁷ The particular rights referred to in the judgment of the Court are rights which the United Kingdom and United States might be deprived of, by the indication of provisional measures requested for by Libya. And which if granted would negate the demands by the Joint Declaration of the United States and United Kingdom of November 27, 1994 this calls on Libya to:

-surrender for trial all those charged with the crime: and accept responsibility for the action of Libya officials.

Disclose all it knows of this crime: including the names of those responsible, and allow full access to all witnesses, documents and material evidence, including all the remaining timers;

Pay appropriate compensation.

Joint Declaration of the United States and United Kingdom. Nov. 27, 1991. 31 I. L. M. 723.

It is therefore the opinion of this study that the direct affirmation of the Court in this instance constitutes a pre-judging of the accused before the hearing of the case. This is inimical to natural justice, fairness and equity and this has multiplier effect on the quality extent of compliance to the decision of the Court.

Further, although, the Court drew inference from the provisions of Articles 27 and 103 of the UN Charter to give effect to the Security Council's position, the dissenting views of judge Bbedjaoui is the same as that of this study, that the Court should not have relied on the provisions of Resolution 748 for its decision since same issue before the Court, neither did the Security Council approach the Court for its advisory opinion⁸⁸ as required under Article 96(1) of the UN Charter. This is because; such advisory opinion would have had the effect of authenticating and validating the Court's opinion for an issue that was not originally before it. The implementation of this lack of synergy is the fact that the Court observed that the matter is admissible but refused to determine it on the merit of the case and Libya also refused to comply with the Security Council and by extension the Court and remained sanctioned until the matter was settled out of Court between the parties in 2003.

The foregoing thus imply that while the Security Council has unlimited political obligations to world peace, the ICJ should be allowed to dispense its judicial functions and as such should not be teleguided by the Security Council as in the instant case, where the Security Council adoption of Resolution 748 three days after hearing the application of the Libya, indicated the direction the Court should tilt. The implication of this is that, had the Court granted the provisional measure sought by Libya, then the Security Council would have frustrated all efforts towards compliance. This view is reinforced when considered alongside the fact that the Court is also by Statute empowered to enquire into the acts of the various organs of the UN as to ascertain the legality of their acts or otherwise. This imply that as executors of the judgments of the ICJ, the Security Council is not to play a supervisory role over the ICJ⁸⁹.

In addition to the foregoing, the effect of Court's concurrence on 15th of April, 1992, has the legal effect of enforcement of the judgment of the Court. Further, although, the Security Council acted outside a direct mandate of the Court, its actions could be said to be a partial directive to the Court since the Resolutions were made when the matter was pending before the Court. This imply that a contrary view of the Court could be seen as a threat to world peace. Secondly the action of the Security Council and its consequent ratification by the Court did not only indicate the global policing nature of the Security Council but also its hidden supervisory role over the International Court of Justice, and its judgments.

This case thus unveils the perceived weakness of the Court and its over reliance for survival on the Security Council, as against the traditional statutory duty of the Security Council as stated in Article 94(1) and (2) of the UN Charter⁹⁰, and Article 36 of the International Court of Justice Statute⁹¹.

⁸⁸ Articles 96(1) of the UN Charter provides as follows:

1. The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.
2. Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities.

⁸⁹ Ibid 75(2)

⁹⁰ Article 94 reads as follows:

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

⁹¹ Article 36 reads as follows:

- a. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.
- b. 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 treaty;
 - b. Any question of international law;
 - c. The existence of any facts, if established, would constitute a breach of an international obligation;
 - d. The nature or extent of the reparation to be made for the breach of an international obligation.

Thus, this case further illustrate the fact that although there exist a statutorily defined separation of powers between the ICJ and the Security Council. This separation this power sometimes appear fictional and sometimes requires a deliberate action which may not be in the interest of the parties before the Court. In the instant case, the study found that while the Security Court has the mandate to provide political solution to inter-states disputes and issues the ICJ is empowered to carry out judicial functions. When these roles crosses paths, a deliberate action is required to maintain the statutory balance of functions.

Conclusion and Recommendation

This study has discussed judgment enforcement provisions of the UN Charter which did not confer such powers on the Court but on the Security Council and General Assembly. The competences of these organs to enforce the judgment of the Court have been largely discussed. These competences lies in the fact that these organizations although characterized by varying structural complexities are limited by many attributes. For instance in the *Reparation for injuries, Advisory Opinion of 1949* the Court inter-alia stated that “the rights and duties of an entity such as the ONU must be dependent upon its purpose and functions as specified or implied in its constituent documents and developed in practice”. This imply that if enforcement of Court judgment is not clearly a duty incumbent on the organization based on its enabling statute, then such powers or rights cannot be read into such statute or conferred on such organization by any other instrument, except where such powers to confer are provided for by the enabling statute.

Further, the study has also shown that irrespective of the powers of the enabling statute, there is the need to resort to the UN Charter for such directive especially where non-compliance of a recalcitrant party can threaten world peace and security. To this end, as was observed in the *Pan Am case*, the UN Charter is superior to any other international instrument and its provisions can be the basis for judgment enforcement directives to an international organization to act outside the mandates of its enabling statute.

It is recommended that there should be immediate restriction of the use of “veto” power on the ICJ decisions in order to give enough respect to the said decision by not only the member nations but all the nations of the World. This will bring about separation of powers to work in favour of the ICJ as an independent institution instead of being subjected to the control and manipulations of the permanent members of the Security Council. The provisions of Article 94(2) of the UN Charter should be amended to state that the Security Council should immediately ensure compliance with the ICJ Decisions instead of “if they deem necessary”.

It is equally recommended that once there is a decision of the ICJ, it must be readily carried out by all the organs of the United Nations and any member nation who refused to carry out or support the carrying out of such decision or decisions should be suspended or expelled from membership of the organs of the United Nations, or even from the United Nations in General in addition to the penalty of a fine of \$100,000 (one hundred thousand dollars) within 3 months of non-compliance.
