



Challenges of Dispute Settlement through International Court of Justice (ICJ): the Case of Ukraine v. Russian Federation the Decision on Provisional Measures on Alleged Violation of Genocide Convention

Bezabh Abebe Bahiru

PhD Candidate in International Law,
Zhejiang Gongshang University, School of Law, China
Lecturer, University of Gondar, School of Law, Ethiopia

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Abstract

This article aims to study the challenges faced by the ICJ in the international dispute resolution processes by analyzing the case between Ukraine v. Russia emphasizing the decision of the court on claims of provisional measures to stop Russian military operation in Ukraine. The qualitative approach was utilized in this research referring to both primary and secondary sources. The finding shows that ICJ has been facing challenges which is revealed in Ukraine's case too. Regardless of the marvelous efforts of ICJ, state parties are quitting the jurisdiction of ICJ by rejecting the principle of international law of treaties. Besides, the gap in institutional independence in the process of election of judges has involved the veto power of the Security Council which is a political organ. Even more, the election of ad hoc judges is based on the intention of national representation. To this effect, the verdict on Ukraine's claim has been decided by the split majority vote and judges' individual independence in decision-making has been influenced by national interest, the political orientation of judges, ideology, and, diplomatic relations of states. The worst is that the judgment enforcement UN Security Council's structural posture caused failure to execute decisions.

Favoritism and intervention by unilateral sanction are also other problems. Therefore, the writer suggests the court demand a radical change to attain its intended object.

Keywords: Challenges, ICJ, Ukraine, Russia, Genocide, Provisional Measures

1. Introduction

Under the United Nations system, ICJ is the principal dispute settlement organ (UN Charter, Article 92). The court has established to settle international disputes from all over the globe. The assumption of the court has fantasized to be a world court forum that endorsed solving multifaceted cases which could be submitted by the state parties. It has the goal to solve international conflicts in an amicable manner that keeps peace and security in the world (UN Charter, Article 1-2).

The motive for the establishment of the world justice forum was a complex phenomenon and it was not a simple task. ICJ had passed long historical progress to be as it is today's institutional capability (ICJ Handbook, 2019). Before ICJ there were other established juridical organs; their historical development shows that there were challenges before and after its establishment. At the end of WWI, the world states had a great deal of enthusiasm to found an international justice forum that was believed to protect the world from another bloody war (Spiermann, 2004). The League of Nations (LN), also known as the predecessor of the UN, was a unique institution proposed to unify the universe to the common agenda of peace and security and had taken a mandate for the formation of the world court that can solve international conflicts. However, the progress of the establishment was doubtful among the delegates of different nations. The invited legal scholars and drafting commissioners faced dilemmas in the institutional formation, the structural organization, the composition of the court, and the system that it implements (Spiermann, 2004). The dilemmas were related to, first the different types of legal systems of the world (Casals, 2022), there are many legal systems and even similar legal system followers have significant variations from one state to another. So, assuming a global justice system in such a complex diversified legal spectrum had created absolute confusion. Second, political ideology _ has a great impact on the formation of the courts; the court should be planned to be established considering the west and the east block dubious political competition (Leeuwen, Rasmussen, ed. Morris, 2021). Third, at that time the world states' were not united to a common goal which made them not confident in the universal court idea. The World War II winners (Allies) planned to prosecute and charge the perpetrators, such a move frustrated many states including Japan, Germany, Italy, and others started to

withdraw from the League of Nations by referring the Article 1 of the League of Nations. The Covenant Article 1 provides “Any Member of the League may, after two years' notice of its intention so to do, withdraw from the League, provided that all its international obligations and all its obligations under this Covenant shall have been fulfilled at the time of its withdrawal” (LN Covenant, 1920). The fourth is related to the impact of the war itself derogated the mutual trust between the members of the League of Nations. These and other specific state concerns made the establishment’s progress challenging to draw common ground.

However, those challenges were contributing factors to further improvement and the LN played a fundamental role to bring the Permanent Court of International Justice (PCIJ) which was functional from 1922 to 1946. Article 14 of the Covenant of the League of Nations and the statute of PCIJ provide the first international permanent court. The newly formed court, like its establishment process, had faced hurdles after it started exercising its judicial responsibilities. The problems faced by the PCIJ include states’ resistance to the compulsory jurisdiction of the court, states reluctance to be a party to the PICJ statute, the member states’ hesitation and lack of trust to bring cases, and the continued trend of military conflict world and beginning of the WWII had twisted the world into unstable phenomena and political rivalries between states were repeatedly mentioned drawbacks. All those problems were lessons to further renewal of PCIJ yield to the establishment of ICJ (ICJ Handbook, 2019).

The devastated Second World War was over the LN and its apparatus for a peaceful solution, the PICJ, have lost their credibility in the face of the world, so, the new beginning had to start again to discuss the peaceful solution to international conflicts. Then the agenda of peaceful resolution of conflicts was basic in founding discussions of the United Nations (UN), and ultimately the UN charter in its first two articles identified and incorporated basic principles of pacific solution. Besides, the charter has also magnificently organized ICJ as one of the six bodies of the UN. ICJ has been considered a judicial organ of the UN and is mandated not only adjudication but also empowered to provide advisory opinions for special units of the UN (ICJ Statute 1945, Article 65-68 and Aliaghoub, 2006).

However, just like that its predecessor, the ICJ has been facing challenges. Challenges are not only problems that are emanated from the ICJ itself but included multi-dimensional hurdles that originated from the legal frameworks, the structural establishment of institutional independence, and also other external factors.

To show the challenges of ICJ this article applied the case analysis method and the recently submitted case between Ukraine v. Russia raised concerns by many international law scholars (ILSA webinar, 2022). Initially,

the case was pretexted by Russian President Vladimir Putin's announcement of a "special military operation" in Ukraine on Feb. 24, (Ukraine V. Russian Federation, 2022). Then a day after of military operation begin, Ukraine took steps to challenge Russia in ICJ and the written application was submitted to the court registry on Feb. 26 (Provisional order, para 1). Ukraine's application to ICJ basically used Genocide Convention; the claim was to get the decision of non-violation of the Genocide convention which is unique because the request is to disprove the Genocide allegation by Russia and to get the order of the court to stop the use of force.

Ukraine argues the jurisdiction of the court based on Article 36 statute of ICJ and Article 9 of the Genocide Convention that, Russia's justification for the invasion by allegations of genocide in the eastern regions of Luhansk and Donetsk is false and an insufficient rationale for the use of force (Order, para.2 & 20). On Feb. 26, Ukraine subsequently submitted a request for provisional measures to protect its rights based on "the risk of irreparable prejudice and urgency." This requests the court to order that Russia suspend military operations and ensure all actors take no further action in support of any such operations (Order. Para 5, ICJ statute Article 41, ICJ Rule of court Article 73, 74 & 75).

However, Russian Federation rejects the jurisdiction of the court and declare not to appear (Order, para 12 & 20). Russia stressed to justify its military operation by asserting the Neo-Nazi group's commission of the Crime of Genocide in the region of Luhansk and Donetsk in Ukraine (Russia Official Letter to ICJ 2022). Whereas, the Russian latter reject the court's jurisdiction by claiming they didn't apply the Genocide Convention; rather they contend Ar. 51 of UN Charter self-defense and argue that the Ukrainian application is not valid and the case must be canceled because Ar. 51 is not the jurisdiction of ICJ (Order, para 33).

Then after the court accept the prima facie jurisdiction Russia used Genocide as a justification to use force, and then the court invoked Ar.1 and Ar.9 of the convention to assert jurisdiction (Order, para 37). Besides, the court also analyzed the use of the Article 51 _ rule self-defense cannot bar ICJ's jurisdiction due to the fact one matter can be covered by two or more treaty rules (Order, para 40 & 46).

After a discussion of the issue on March 16, the court issued its order on provisional measures, the first decision made in the case. The court announced three orders; first, the Russian Federation shall immediately suspend the military operations, Russia was ordered to take no steps in furtherance of the military operations, and; third, both Parties were ordered to refrain from any action which might aggravate (Order, pp.19). The first two orders were decided by a majority vote of thirteen against two and the Russian and Chinese-appointed judges submitted their dissenting opinion (Ibid).

However, the last order has approved by a unanimous vote of the court which decided for the two parties to refrain from military engagement.

Laterally, the case seems nothing different from other cases, however, to discuss the ICJ's challenge we must consider the following questions. Did the Russian Federation accept the ICJ jurisdiction and appear? Who were the judges? How does an ad hoc judge appointed? How do the judges vote on provisional measures? Are the orders enforced? How fast the proceeding is? Why does the UN Security Council fail to enforce the ICJ order? The attempt to respond to these questions would assist expose challenges that are hindering the ICJ. Therefore, this article aims to analyze five basic challenges and tries to suggest solutions in general and specifically by referring to the decision given on the provisional measures in a pending case between Ukraine and Russia on the allegation of Genocide.

Method

In doing so, the article applied a qualitative approach that uses both primary and secondary sources as references to analyze research findings and the research tends to utilize a case analysis approach. International laws are used as a primary source; secondary sources include books, journal articles, investigation reports, news, articles, ICJ court reports, online sources, and other documents utilized as references.

The article has four parts; the first part is allotted to discuss introductions about brief schematization of the challenges of ICJ and establish relevant facts of the pending case between Ukraine and Russia. The second part aims to provide the institutional and legal frameworks of the ICJ by focusing on the challenges related to independence and impartiality. The third part discusses the challenges in detail explanation of the case of Ukraine v. Russia. The final part of this article will conclude the finding and present suggestions.

2. Institutional and Legal Frameworks of ICJ

2.1. Institutional Independent and Individual Independence

The institutional framework of the ICJ is different from its predecessor while it is organized as one of the six principal bodies of the United Nations (Debbas, 2019, Yusuf, 2019). Thus, under Art. 92, the court's statute forms an 'integral part' of the union (ICJ Statute, 2005). Accordingly, UN members are automatically parties to the court's Statute. Regarding the overall institutional governance of the ICJ's former President Justice Abdulqawi said that;

The establishment of the Court under the Charter as one of the principal organs of the UN was meant to ensure that it would not be subordinate to any of the political organs of the UN. The drafters of the

Charter sought to create a system of governance of the Court based on two pillars: judicial independence and administrative autonomy (Yusuf, 2019).

UN Basic Principles on Independent of Judiciary has set the general standard of the institutional independence of the judicial organ it shall be considered the rule of separation of judiciary from other organs. The UN has provided the principle to rule the independence of judicial organs of the states. So, the judiciary shall be free from any influence by the executive or legislative organ of the government. United Nations Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

Despite the above assertion the ICJ had faced challenges regarding its institutional independence from different horizontal co-organs of the UN and even there are also allegations related to the court's frustration with the influence of some superpower nations (Murphy, 2008). For this purpose the relationship between the ICJ and the Security Council is prominently scrutinized in fact the two bodies should have deemed the rule of checks and balances. However, the two spectrums of the ICJ, i.e. judges' election processes and enforcement of the decision interlinked the two organs (ICJ statute Article 10).

One of the assessment mechanisms of institutional independence is the method of appointment of the judges of ICJ. The Statute of ICJ has incorporated the election processes of judges shall be bi-cameral that demands dual confirmation of the unanimous votes of the General Assembly and the Security Council (Ibid). The nominees needed to fulfill the requirements incorporated under Article 2 of the ICJ statute reads; "persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices or are Juris -consults of recognized competence in international law"(ICJ Statute, Article 2).

Besides, the Universal Charter of the Judge devises "the independence of the judge is indispensable to impartial justice under the law. It is indivisible. All institutions and authorities, whether national or international, must respect, protect and defend that independence" (International Association of Judges (IAJ), Universal Charter of Judges, 199, Article 1).

Therefore the ICJ nominees for the position of a judgeship are expected to fulfill these minimum criteria. However, the statute has a unique mode of selection of ad hoc judges in case of the absence of a delegated judge for the party of a case. This unique feature of the temporary judges' election has made the process susceptible to bias and impartiality (ICJ Statute Article 31).

Generally, the ICJ has fifteen judges normally elected and in some circumstances 17 judges when the parties of the case have no delegation. The elected judges will select their President, and Vice President of the court and they appoint the registry of the court (Rule of Court, 2005, Article 10-14).

2.2. ICJ's Legal Frameworks

The ICJ has its own legal frameworks that are used as a pillar of its establishment. Those laws are the UN charter, ICJ statute, & Procedural Rules (Rules of Court) as amended in 2005. However, the ICJ can provide decisions by using sources of international conventions, international customs, and the general principles of law recognized by civilized nations (ICJ Statute, Article 38).

There are detailed rules of application for proceeding and provisional measures for applicant's written memorial and written respondent memorial (ICJ Rule of Court, Article 44 & 45). After the memorial submission, the oral hearing will be at a fixed date by the court and parties should appear to present their case. It is evident the ICJ proceeding procedure has been influenced by the adversarial trial process of the common law legal system. The hearing and evidence presentation is mainly oral base and the decision of the court is on the rule of precedent (ICJ Rule of Court Article 54). In addition to the application for proceeding, the applicant can claim provisional measures to stop urgent and irreparable harm (ICJ Statute Article 41 and ICJ Rule of Court Articles 73, 74, & 75). Lastly, the final ICJ's judgments and orders are confirmed by a majority vote of the judges who adjudicate the case and judges can dissent from the majority (ICJ Rule of Court, Article 94).

Ukraine has submitted a written application to challenge the Russian military intervention which is claimed an unjustified use of force. Ukraine has also submitted the claim for order on provisional measures to stop Russian military intervention urgently. Then after, the ICJ, pending the merit of the case, satisfied the *prima facie* jurisdiction of the court and declared Russian shall immediately suspend military operation in Ukraine pursuant to Ar. 41 statute and Ar. 75 (2) of Court rule.

3. Result and Discussion

After the brief schematization of the case between Ukraine and Russia and the presentation of the legal and institutional framework of ICJ, this part of the article discusses five findings of research identified as basic challenges of ICJ.

3.1. Russia's Rejection of ICJ Jurisdiction as a Challenge in the *Ukraine v. Russia* case

The jurisdiction of ICJ is sourced only when state parties to the case agree to compulsory jurisdiction with the consent of states. Sources may include special agreements, treaties, and conventions. Selection of the jurisdiction is a sovereign right of the state, however, the law of treaties has the rule of *pacta sunt servanda* that after the treaty parties consent to the international treaties they must abide by the terms of the treaty (International Law Commission Report, Draft Vienna Convention on Law of Treaties (VCLT), 1966). International laws' basic source of obligation is a treaty, so, every state should moderate the strict sense of sovereignty. Some writers alleged that a strict sense of sovereignty of a state would block the contemporary phenomena of international relations. Hathaway (2007) explained the problem by saying "At the international level, governments aim to maximize their ability to satisfy domestic pressures, while at the same time seeking to avoid adverse foreign developments"(Hathaway, 2007, pp.118). Nevertheless, states are frequently rejected the ICJ's jurisdiction after they consented to a certain treaty. In the case at hand, both Russia and Ukraine are members of ICJ and both are also ratified the Genocide Convention. The two countries submitted their reservation on Article 9 of the Geneva Convention, however, they withdraw their reservation (United Nations, Treaty Series, vol. 78 p 227, Genocide Convention). However, the Russian government declared the rejection of the court's jurisdiction by writing a letter quoted by the court;

The Ambassador of the Russian Federation to the Kingdom of the Netherlands indicated that his Government had decided not to participate in the oral proceedings ... and he requests the Court to refrain from indicating provisional measures and to remove the case from its list" (Order, para 12 & 16).

The court had no chance only it announced 'regrets the decision taken by the Russian Federation not to participate in the oral proceedings. Besides that, the court clearly pinpointed that 'the non-appearance of a party has a negative impact on the sound administration of justice, as it deprives the Court of assistance that a party. Despite these issues, the court recalls that the non-appearance of one of the States concerned cannot by itself constitute an obstacle to the indication of provisional measures. In the case, of military and Paramilitary Activities in and against Nicaragua, the non-appearance of the US couldn't halt to entertain the case. However, the ICJ's decision failed to be enforced (ICJ Judgment, Nicaragua v. the United States of America, (1986)).

The Russian Federation has submitted a letter of rejection of the ICJ's jurisdiction, it is not an official defendant memorial. The letter has repeatedly insisted the court couldn't hear the case due to two dubiously articulated

reasons; the first defense is, that Russia denied using the Genocide Convention to justify the military operation, and asserted Ukraine's application by using the convention is wrong to claim jurisdiction of the court. The second randomly articulated defense is Russia's claim of self-defense by using the UN Charter Article 51 _ 'inherent right of individual or collective self-defense if an armed attack occurs against a member state of UN until the security council has taken measures necessary to maintain peace and security'" (Order, para 33). Therefore, Russia throwaway the jurisdiction of the court because the case that arises from the UN charter wouldn't be the jurisdictional limit of ICJ. Russia's claim summarized that the court shall revoke the case from the list because there is no issue attached to Genocide Convention rather the issue is self-defense.

The court ruled _ that there is prima facie jurisdiction _ in all the official declarations referring protection of citizens of Luhansk and Donetsk from genocide. Besides, the court affirmed that the use of UN charter states' self-defense cannot bar the ICJ jurisdiction.

To assess the case in consideration of the challenge of jurisdiction, one would ask, do that Russia has good faith to receive the ICJ's admission of the case. The problem was beyond the legal argument; it marked the total rejection of the court before hearing the merit of the case. The Russian Federation's unilateral declaration not to appear in the court and submission of an informal 'letter' from Russia's Ambassador in the Netherland, and request the court remove the case from the list, suffices the disrespect and inconvenient to the ICJ.

The ICJ has faced a dilemma when parties reject and failed to appear in court. As a dignified organ of the UN, it would have to be respected and all parties should abide by international law. However, countries like Russia marginalize the very purpose of the ICJ by degrading its legitimate authority. It is difficult to justify such rejection as it is the right of the state to choose jurisdiction because no one would be interested to be prosecuted by the court after the commission of a certain violation. So we have to draw the line between the principle of the sovereign right of the state and the legitimate responsibility of the state to abide by international treaties. Accordingly, the act of Russia's rejection is a challenge for ICJ that misconstrued international laws. Such a move to denial interrupts the true purpose court to solve international disputes peacefully and as we understand the war in Ukraine is a devastating impact on both Ukraine and Russia.

The issue is what type of legal remedy in case of some countries totally deny the ICJ's peaceful adjudication. The only alternative to ICJ is to hear the case in absence of the appearance of the party by the rule of *proprio motu* circumstance when the court decides the admissibility of jurisdiction as legitimate for trial without the attendance of the respondent (Rule of court,

Article 53(1)). Then the final decision would be pronounced by the court. Such an approach has difficulties, first, a trial in absence of one party could be the question of due process of law; plus the decision will not be acknowledged and enforced by the party that failed to appear. It is believed that rejection of the appearance by the respondent primary rejection of any final outcome. The decision of the ICJ in the pending case *Ukraine v. Russia* has the same effect of stagnation.

Generally from the case, we can assert that rejection of ICJ's jurisdiction is a challenge emanated from the state parties that subsequently damage the effectiveness of the court and could lead to violent means of dispute resolution.

3.2. Institutional and individual Independence of ICJ Judges in Ukraine v. Russian Case

3.2.1 Institutional Independence and Election of ICJ's Judges

The current composition of ICJ's judges has shown fifteen judges from different nationalities (ICJ Judges profile, 2022). The ICJ's current President is Justice Joan E. Donoghue is US national and the Vice President Justice Kirill Gevorgian is a Russian national. The decision of the two presidents is expected immediately after the case is submitted to the court. Because, the Vice President (Russian) is presumed to favor his nation, whereas, the President is also assumed to protect the firm political rival of Russia and diplomatic interest in the European Union (EU). The statistics show that in every term of the election ICJ of judge the permanent members of the Security Council are elected at least as a member judge (ICJ Presidency, 2022). Beyond that, from the 26 presidents of ICJ 10 were elected from the United Kingdom (four times), French (three times), and the USA (three times). This show the continuous problems that impulse to raise a question about the institutional independence of appointments that favor the permanent members of the Security Council.

The other unique appointment procedure is when the state is a party to the case and is not delegated by a judge the ICJ statute permits the election of an ad hoc judge who could represent the state (ICJ Statute, Article 31). In the case at hand, Ukraine was not delegated by a judge, so Ukraine appointed ad-hoc judge Mr. Yves Daudet, a French national, to adjudicate the case on behalf of Ukraine (UN Audiovisual Library of International Law, Biography). The question does this ad hoc judge really free of any influence? If ad hoc judges are elected to delegate to the nation that appointed them, what type of decision they will make?

ICJ judges are supposed to be elected by the standard of the ICJ statute and they are believed to be free from any influences voted by unanimous decision of the General Assembly and Security Council. According to ICJ

statute and the Rule of the court, the appointment of judges shall be independent of any influence and judges shall be of high moral character and best legal qualification.

The case Ukraine v. Russia is set to be heard by fourteen permanent judges and one ad hoc judge. The court's structural setup for the appointment of the judges has challenged and faced the issue of impartiality of the election. The Security Council is considered a political organ of the UN that can influence the election result and voting system. The worse is also the ad hoc court that clashed against the fundamental Universal Character of the judges. Some conclude ad hoc judges are "semi-legal, semi-judicial, semi-political bodies which nations sometimes accept and sometimes not" (Ma and Guo, 2017 p.163), that abuse the fundamental principles of impartiality. ICJ's institutional composition is a challenge that shows a visible alignment of domination political and ideological influence of the west blocks and the resistance of the east blocks.

3.2.2. Individual Independence of ICJ Court Judges and Decision on Provisional Measure

Judges have the fundamental principle to take their responsibilities free from any influence and shall be impartial, of good character, and morally responsible (Universal Charter of Judges, Article 1). The ICJ judges have also an oath that declares "I solemnly declare that I will perform my duties and exercise my powers as judge honorably, faithfully, impartially, and conscientiously (Rule of court, Article 4).

However, the ICJ's judgments have been criticized for the problem of impartiality. Judges favored the state appointing them _ for the strategic interest of their state; some judges favored the state wealth closer to them; some judges also favored the states which have the same political system, and some judges also favored language and cultural similarity with theirs (Posner and Figueiredo, 2005).

The current composition of ICJ judges includes the president is US national and the vice president is being from Russia. The other member judges were delegates from Germany, Morocco, Japan, China, Slovakia, Uganda, India, Jamaica, Somali, Lebanon, Australia, and French (ICJ Current members of Judges). The ad hoc judge who delegates Ukraine is a French national.

The ICJ has decided on two provisional measures by majority vote and one measure by unanimous vote. The two orders are first, Russian Federation shall immediately suspend the military operations and the second order against Russia to take no steps in furtherance of the military operations. The third is to order is for both parties shall refrain from any action which might aggravate or extend the dispute. Regarding the vote, the Russian and Chinese judges voted against the majority vote. It would be difficult to presume Ukraine and

the Russian judge vote against their national interests. Besides, why do the Chinese judges vote against the majority? Why did the US and its allies decide to vote against the Russian military operation in Ukraine? This is a clear indication that shows inside the courtroom of ICJ, there is visible revelry to the protection of national interest, and some judges could easily be influenced by different ideological consumption of the West and the East ideology. Therefore, the ICJ's judges are presumed independent and free from any type of influence, while, their vote on the provisional measures in *Ukraine v. Russia* exposed impartiality. The ICJ has judges who try to defend their national interests and it has also judges who favored siding in the protection of their countries' diplomatic relations. Therefore, the ICJ's judges' biased role is a fundamental challenge that affects the overall institutional effectiveness and efficiency.

3.3. Challenges related to Enforcement of Judgment by UN Security Council

The court had pronounced provisional order which was presumed to be implemented. As it has described above the court instructed the Russian Federation to stop military intervention in Ukraine. Each party should comply with the decision of the court in good faith. Besides, the court had also delivered the order to suspension of further military provocation for both parties. However, both parties execute none of the orders; and there is still ongoing war in Ukraine (UN News Global Perspective, 2022). Rather, Russian Spokesperson Dmitry Peskov told reporters on March 17, 2022, that "Russia cannot take this decision into account" (Leeson, 2022).

The Security Council was organized as the executive body of the UN that empowered the enforcement of court rulings. UN Charter Art. 94 (2) the terms that are used for granting Security Council mandate to enforcement have disputed assertion because the provision select words 'the Council 'may exercise if deems necessary' that allocates for the discretionary power of the council and optional to choose. Despite this legal confusion as to the enforcement of the ICJ decision, the council believed the executive organ of the UN and its authority suffices to enforcement of the provisional orders however, the execution of the decision must be passed by a vote of permanent members of the council. So, the enforcement of the decision of the ICJ is subject to the veto power of permanent members of the council. In this respect, there is one contentious case between *Nicaragua v. United States* (1986) _the Court found in its verdict that the United States was in breach of its obligations under customary international law not to use force against another State, 'not to intervene in its affairs, however, the US banned the enforcement of the judgment by using its veto power.

In the case between Ukraine v. Russia, the Security Council didn't attempt the enforcement of the provisional measures against Russia. After the verdict of the court, the issue of enforcement of the order was not an agenda of discussion to the council, it is obvious if the council attempted it would be quashed by the veto power of Russia. So, it seems the decision of the court was left stagnant as it is done for formality. Therefore, this shows that the ICJ judgment has been left unenforced which weakens the system.

The UN Security Council should be a legitimate organ to enforce ICJ's decision but the institutional mandate have confiscated by the complicated national interest of 'world powers' domination. It has unimaginable consequences watching the UN judicial organ verdict rejected by the veto power of a single state. If the case is in the national laws the issue of independence of the judiciary would be protected. The decision of the court should not be barred by the executive organ, whereas, the UN structurally mandated the political organ to overrule the decision of the ICJ. In this regard, the independence of the decision made by the Security Council was criticized by many as it has been abused by those permanent members. It is obvious the problem is not emanated from the court itself however, it is one of the challenges to the functional role of the organ of the UN. There will be no state to bring a case to ICJ if the decision continues as vacant and nominal.

Recently, to avoid such enforcement provisional measures the ICJ adopted Article 11 of 1976, Resolution Concerning the Internal Judicial Practice of the Court (Rule of court, Article 19). The provision is basically instated to establish an enforcement monitoring committee mandated to supervise and report the finding to the ICJ. The role is not a strong-enough executive mandate. The court tries to evaluate whether the provisional orders are implemented or not, such assessment would not add the capability of the court to enforce its decision. Nevertheless, this new development did not attempt to assume responsibility up until now.

3.4. Institutional Favoritism of ICJ

The UN is presumed as the global home of every nation which perused equality between all the countries disregarding the economic status, differences in political ideology, the composition of the ethnic groups, the language they speak, and other status of the countries. The UN charter has been established by the fundamental principle of the sovereign equality of members' states (Article 2(1)). Therefore, the ICJ as one branch of the UN is believed that avoid any discriminatory treatment between the states in handling the cases, providing verdicts, and any other communications.

However, the case Ukraine v. Russia has gained extra-ordinary emphasis like it never happened before; not only the ICJ, the other bodies of the UN have been discussing it in different units of the union _ and the General

Assembly voted to exclude Russia from the Human right council (GA/12414). The General Secretary of the UN has been declaring repeated announcements and there are many more discussions (UN Secretariat Activities, 2022).

The day after the Russian Military operation started on February 26, 2021, the file was opened by the court's registry. The next day, on February 27, the registrar communicated with Russian officials using electronic email, on February 28, the court wrote an official summon to Russia to appear to the court to defend the issue of the provisional measure. On February 30, the Ukraine delegate ad hoc judge was appointed to delegate Ukrainian. On March 1, the President of the court wrote a letter to Russia to call the attention of the Russian Federation in exercising responsibilities. On March 1, the registry also wrote a letter fixing the date of hearing on provisional measures calling parties to appear on March 7 to present their case. The Russian Ambassador to Netherland wrote a letter on March 5 to ICJ indicating his government decided not to appear in the court. On March 7 hearing opened and Ukraine present the claim while Russia failed to appear. Finally, on March 16, the court announced its verdict on a claim against the provisional measure. It is simply visible to see how the court is really concerned about the issue of provisional measures decided within 20 days. This case has gained tremendous emphasis. The court concludes its decision period on the claim of provisional measures. This would not a problem, it would be prized if such diligence and commitment were for all the cases presented. One would ask, why the UN and its units really care about the war in Ukraine.

The Standard of attention is different from the earlier cases that were submitted, which is the discriminatory treatment between parties. Some writers believed that 'the court [ICJ] had 'remained sympathetic to Ukraine's arguments to justify its decision (Lopez, 2022).

The verdict on the provisional measure in a case between *Gambia v. Myanmar* which was claimed by the Gambia had taken around three months while Ukraine's claim was decided with a certain urgency (*Gambia v. Myanmar, 2019*). Besides, some UN officials and media outlets describe discriminatory remarks that "war and conflict would only feature for only African and Arabic countries some assert that the Ukrainians didn't deserve such war _ which is very outrageous. These and other specific UN units' extra care for Ukrainian cases affirmed the existence of favoritism.

The other argument is, that there were similar military interventions by the US and NATO in Iraq, Libya, Syria, and other countries by the name of humanitarian intervention while those military interventions were little or no emphasis given by ICJ or the UN in general. The case at hand and other many symptoms have vindicated the ICJ's nutshell motive has visible favoritism towards the western political ideology. Such discriminatory favoritism has been a serious problem that was raised by third-world countries.

Therefore, the court has been challenged by critics of institutional impartiality in the handling of all the cases equally.

3.5. Interference of Unilateral Sanctions and Effect on ICJ

Sanction is an apparatus of the UN Security Council that is used to solve conflicts non-peacefully exceptionally, used forceful methods of solution to ‘to maintain or restore international peace and security (UN Charter, Article 39). While such sanctions are imposed by the multilateral decision of the council but the unilateral sanction against a state is incompatible with international *jus cogens* of the sovereignty of the state (Bjorge, 2022). Beyond that – that prohibits any intervention against the sovereign state extra-territorial sanction. Article 2 (4) UN charter proclaims, “All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations” (Charter Article 2(4)).”

The US, EU, and other allies of the west including Canada, Australia, Japan, etc. have waged the unilateral sanction against Russia. More than 30 states passed hundreds of sanctions on Russia and currently, Russia ranked first in the number of sanctions (Reuters Graphic, July 7, 2022). The basic question is will such sanction solve the problem? The unilateral economic sanction is not effective to stop the Russian military operation. Besides, most of the sanctions have been directed towards individuals’ economic infrastructures which is an unrealistic motive. Nowadays unilateral sanctions becoming a tool to protect the western hegemony; while international institutions like the UN have ignored the disguise silently. The US has recorded thousands of sanctions against other countries (US Department of Treasury, 2022).

The unilateral economic sanction against Russia by the western allies has a serious impact on aggravating the conflicts. In this regard, for the ICJ it is difficult to assume its responsibility to solve international disputes when the states are declaring unilateral sanctions. So, unilateral sanctions are another method of isolationism that instigate the escalation of conflicts, which would end in the fatal disaster of another world war.

IV. Conclusion and Recommendation

4.1. Conclusion

Despite tremendous effort and ambition, ICJ has been facing plenty of challenges. One of the challenges is states after they entered into a treaty by consent to be bound by the jurisdiction of ICJ, reject the principle of international law of treaties_ *pacta suntan servanda*. The red line of the sovereign right of a state to choose jurisdiction and state responsibilities to

abide by the treaty should be clearly demarcated. However, there are visible symptoms of states like Russia, damaged trust in the role of ICJ which is reflected by rejecting jurisdiction and appearance.

ICJ also faced the challenge of institutional independence in the election of judges that intervened by a vote of a political organ of the UN i.e. Security Council. The election of ad hoc judges is based on the motive of the national delegation. Therefore, it is clear the ICJ is not free from the influence of the Council and other superpower countries with respect to the appointment of judges and functional roles. The verdict on the claim of Ukraine's provisional measure is the decision by split vote and the judges' individual independence in decision-making power has been influenced by national interest, political biases of judges, and ideological diplomatic reasons. The order on the provisional measure in Ukraine v. Russia case failed to be enforced. The judgments of the court are nowadays becoming nominal and are not executed. The Security Council's structural posture with ICJ caused failure to execute decisions as it seemed to be.

The war in Ukraine attract the attention of the world and the case has gained extraordinary emphasis from the ICJ the fast procedure and the verdict reflects the unique handling of cases_ that would amount to favoritism in the treatment of states. To the worst, the unilateral sanction against any state would not be supportive of a peaceful solution to any dispute.

In, the current scenario there are diverging interests regarding ICJ, on one side there are states who want to sustain the statuesque, on the other side, there are also states who desperately demand amendment and equal treatment.

4.2. Recommendation

Based on the above analysis the following suggestions can be taken as the solutions;

- a) Challenges regarding the rejection of jurisdiction _ the states shall commit to the international treaties _ one of the basic rules of international law is 'good faith', so each state has to act in good faith. There is no means of a warrant to arrest a state so, each party state should collaborate with ICJ to keep a peaceful solution to international disputes. Besides, the court shall assess its organizational status and overall functions and shall be free of any intervention to regain the confidence of the states. The alternative of the court to continue the hearing without the appearance of the defendant shall be complemented by the active role of the judges to equalize the two sides that make the final verdict trustworthy.
- b) Regarding Institutional and Individual Independence _ ICJ demands fundamental change;

- The appointment of judges _ should be direct and free of political and other influences of the Security Council. The Council is a political organ so the judiciary shall not be appointed by the executive. Therefore, the bicameral approach to the election must be abolished. The UN General Assembly must empower itself to election of judges direct and transparent way by avoiding any political delegations.
 - Increase the number of Judges _ the current maximum number of judges is 15, but it should be increased the number to make it better diversified and participatory.
 - Allot cases randomly by lot to decrease impartiality _ when if the number of judges is increased, judges for single a case can be allotted with the lottery method to minimize the biasness. By default, there will be no fixed judges, rather their will circulation of judges. For example, if the number of judges increased to 45, then 15 of them may be appointed for a single case, and the presidency is also possible to make rotational each case.
 - Regarding Ad hoc judges _ it is better to avoid the votes of the ad-hoc judges in the decision-making process _ *defacto* delegate defense lawyers should be prohibited from casting their vote.
- c) Revoke the Security Council's veto power on ICJ decisions, _The decision of the ICJ shall be free to be enforced without the veto of permanent members of the Security Council. The Council is a politically castrated organ, so that, the verdict of the court shall not be subject to veto. Rather, it is difficult to assume the independence of the judicial organ.
- d) Increase the number of permanent members of the Security Council _ the other alternative solution is, to increase additional member states to the Security Council, avoid political rivalry and make it an independent executive organ by diversifying its representation.
- e) Avoid non-peaceful means of solutions including unilateral sanctions and let ICJ work effectively. After all, the UN shall play a significant role to attain the goals of peace and security world, thus it shall be devoted to establishing an independent organ to safeguard peace and security for all nations.

Generally, to attain its objectives, the ICJ should contemplate the current changing global world to re-consider the interest of all nations to serve justice based on equality, and impartiality, without discrimination. So that laws and experiences that emulate discrimination, impartiality, and injustice should be avoided or amended.

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