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**Reforming the International Court of Justice:
the Urgency for a More Advanced Scope of Jurisdiction**

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Abstract

*It can be argued that in facing the paramount problems of the twenty first century, one of the core elements of establishing a world with friendly relation among States is by the constitution of a healthy judicial field considering the fact that disputes among States are in no way can be avoided. For more than seven decades the International Court of Justice has served the world and the Member States of the United Nations in particular with judicial service as it bears the function as the principal judicial organ of the United Nations. However, by analyzing the development of international law, while the ICJ has contributed to improving the relation between States by way of providing States with the proper settlement of disputes, the current system—mostly designed at a time of different global challenges and priorities—seems to have exceeded its capacity to be nimble and responsive to the needs of today's world. This article seeks to offer recommendations on how to optimize the Court's function by means of reforming its contentious jurisdiction. The purpose of this article is to open more possibilities to optimize the Court, by making the Court's jurisdiction mandatory and compulsory to all States and offer a possibility of expansion of jurisdiction as to include *ratione materiae* jurisdiction.*

Keywords: Jurisdiction, International Court of Justice, Reform

**Reformasi Mahkamah Internasional:
Urgensi Ruang Lingkup Yurisdiksi yang Lebih Luas**

Abstrak

*Dapat dikatakan bahwa dalam menghadapi masalah terpenting di abad dua puluh satu, salah satu unsur utama dalam menciptakan dunia dengan hubungan baik antar negaranya adalah melalui terciptanya ranah peradilan yang sehat, menimbang sengketa antar negara yang merupakan sebuah keniscayaan. Selama lebih dari tujuh dekade, Mahkamah Internasional telah melayani dunia dan negara anggota dari Perserikatan Bangsa-Bangsa terkhusus dalam hal penyediaan pelayanan peradilan terkait dengan fungsinya sebagai organ peradilan utama Perserikatan Bangsa-Bangsa. Bagaimanapun, dengan menganalisa perkembangan hukum internasional, walaupun Mahkamah Internasional telah berkontribusi dalam meningkatkan hubungan baik antar negara dengan cara menyediakan cara penyelesaian sengketa yang memadai, sistem yang ada sekarang ini—sebagian besar dirancang pada masa dengan tantangan dan prioritas global yang berbeda—tampaknya telah tidak efektif dalam menanggapi kebutuhan dunia zaman ini. Tulisan ini bertujuan menawarkan rekomendasi-rekomendasi perihal optimalisasi dari fungsi Mahkamah Internasional dengan cara reformasi yurisdiksi kasus kontensius yaitu diantaranya dengan menjadikan yurisdiksi Mahkamah sebagai wajib bagi setiap negara anggota, serta memperluas jangkauan yurisdiksi Mahkamah berdasarkan prinsip *ratione materiae*.*

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Kata Kunci: Mahkamah Internasional, Reformasi, Yurisdiksi

A. INTRODUCTION

The Charter of United Nations ("UN Charter") as the constitution of the United Nations ("UN") introduced International Court of Justice ("the Court" or "ICJ") as one of its principal organs along with General Assembly, Security Council, Economic and Social Council, Trusteeship Council, and Secretariat.¹ Further it is asserted in the UN Charter that the ICJ shall perform the function of "principal judicial organ" of the UN.² In order to carry this function, the Court has twofold role which are first to settle, in accordance with international law, legal disputes submitted to it by States³—also known as the 'contentious cases'—and second, to give advisory opinions on legal questions⁴ referred to it by the General Assembly, Security Council,⁵ or other duly authorized UN organs and specialized agencies.⁶

Having been in operation for more than seven decades, the long journey of the Court's work ever since its very first case—the *Corfu Channel* case which was submitted in 1947⁷—has appealed many criticisms, from its organizational to its jurisdictional matters. This article seeks to analyze the problems arising within the Court in particular with regard to its jurisdictional matters. Similar issue on reforming the ICJ from a jurisdictional perspective has been brought up in many occasions, *inter alia* the oral remarks presented by Ambassador Andrew

Jacovides at the International Law Weekend 2005,⁸ in the speech made by Judge Shi before the Sixth Committee of the General Assembly of UN in 2004,⁹ and in many writings for instance the one by Gozie Obgodo in the *Annual Survey of International & Comparative Law* in 2012,¹⁰ which has inspired this article a lot.

The article will hopefully become the answer to the question of whether the Court really lived up to the hopes of the international community. While the ICJ has contributed to improving the relation between States by way of providing States with the proper settlement of disputes, the current system—mostly designed at a time of different global challenges and priorities—seems to have exceeded its capacity to be nimble and responsive to the needs of today's world. This article will discuss on the effectiveness of the Court in fulfilling its function as the principal judicial organ of UN and how the writer thinks it is most appropriate to optimize the Court's works from a jurisdictional perspective, and to subsequently reform the Court into a body whose system is fit for the purpose, opportunities, and challenges presented by this era.

Chapter B will firstly address the general concept of jurisdiction of ICJ based on literature review and precedents. There we will also firstly elaborate briefly on the types of jurisdiction may be established by the Court. In Chapter C we will elaborate the problems that the author has seen to rise in

¹ Article 7(1), The Charter of the United Nations (UN Charter) 1945.

² Article 92, UN Charter.

³ Article 38(1), Statute of the international Court of Justice (ICJ Statute) 1946.

⁴ Article 65, ICJ Statute.

⁵ Article 96(1), UN Charter.

⁶ Article 96(2), UN Charter.

⁷ *Corfu Channel* case, Judgment of April 9th, 1949: I.C.J. Reports 1949, p. 4.

⁸ Ambassador Andrew Jacovides, "UN Reform and the International Court of Justice: Introductory Statement", *International Law Weekend 2005*, New York, 20th—22nd October 2005, in 12 *ILSA Journal of International & Comparative Law* 547.

⁹ Judge Shi Jiuyong, "The Advisory Function of the International Court of Justice", *Sixth Committee of the General Assembly of the United Nations*, New York, 5 November 2004.

¹⁰ S. Gozie Obgodo, "An Overview of the Challenges Facing the International Court of Justice in the 21st Century", *Annual Survey of International & Comparative Law*, Volume 18, Issue 1, 2012.

the matter of jurisdiction, while in Chapter D we will discuss the solutions in form of recommendations made by the author with reference to some recommendations which have been made by scholars.

B. THE GENERAL CONCEPT OF JURISDICTION IN THE ICJ

1. The Importance of Jurisdiction for an International Court and Its Difference with Admissibility

First and Foremost, it is necessary to assert that the regulation of the jurisdiction is an important aspect of international law, in particular for a judicial body such as the ICJ. It is recognized that jurisdiction is the *sine qua non* for the exercise of judicial powers.¹¹ Rules of jurisdiction reflect that there are limits to a State's sovereignty in legal authority, and that in some matters or under some conditions, there are other foreign legal authorities which are themselves legitimate over such States.¹²

One of the many definitions of jurisdiction that perfectly captures its importance can be found in a case before the Supreme Court of Oklahoma in 1937 in which it was upheld that, "jurisdiction is the authority by which courts and judicial officers take cognizance of and decide cases."¹³ In other words, it can be concluded that in cases where a court or judicial officer is proven to have acted with the absence of certain requisite authority, any attempt to take cognizance of, and decide upon any case, will be declared as null and void.

For international courts, jurisdiction plays the role as a policy tool in the hand

of States—as the courts' mandate providers—and in the hands of specific sets of disputing parties.¹⁴ Further, jurisdiction can also be regarded as a delegated authority, which in the case of international courts, jurisdiction of the court is delegated through the constitution of such court or the umbrella-organization.

In regard to its difference with admissibility, it is indeed one of the hardest legal questions ever asked. In his book, Yuval Shany explains that jurisdictional conditions and admissibility rules are separate and meant to apply at different stages of proceedings. Applied with discipline, jurisdiction is the legal power delegated to an international court to adjudicate a dispute—if the parties fulfill the jurisdictional requirements, the court must exercise its jurisdiction unless there is a valid reason not to. Such valid reasons include admissibility rules, to be used only with discretion and exceptionally. The conceptual problems arise because discipline is often lacking.¹⁵

In order for the ICJ to 'adjudicate' a case, the court must as a preliminary matter determine both the issues of jurisdiction as well as the issues of admissibility. Jurisdiction issues "are those which ultimately derive from whether the Court has the right and power to consider the case brought by a state," while issues of admissibility determine whether the case itself is one proper for determination when brought before the Court. Therefore, issues of jurisdiction must precede any issues of admissibility since issues of admissibility

¹¹ *Ibid*, p. 99.

¹² Alex Mills, "Rethinking Jurisdiction in International Law", *British Yearbook of International Law*, Volume 84, Issue 1, 1 January 2014, p. 188.

¹³ *Board of Trustees of the Firemen's Relief & Pension Fund v Brooks*, 67 P.2d 4 Supreme Court of Oklahoma (1937).

¹⁴ Yuval Shany, *Questions of Jurisdiction and Admissibility Before International Courts*, Cambridge: Cambridge University Press, 2016, Chapter 1.

¹⁵ *Ibid*, p. 1.

can only be raised when the Court's jurisdiction has been settled.¹⁶

2. Contentious Jurisdiction of the ICJ

The contentious jurisdiction of the Court is indicated through Article 38 of the Court's Statute in which it is stated that the function of the Court is to decide on disputes submitted to it.¹⁷ Hence it can be inferred from such provision, that the contentious jurisdiction of the ICJ can only be invoked in cases where a genuine dispute of a legal nature can be proven to exist.¹⁸ The Court itself had determined in its earlier cases that the existence of a "dispute" between the Parties constitutes "the primary condition for the Court to exercise its judicial function."¹⁹ Further, quoting from the Permanent Court of International Justice ("PCIJ"), "(a) dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons."²⁰

The other critical basis for ICJ in exercising its jurisdiction in contentious cases is the consent of the parties. Article 36 of the Court's Statute stipulates that "(t)he 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,"²¹ and in the next paragraph the existence of consent is further elaborated as to be made unconditionally or on condition of reciprocity on the part of several or certain states, or for a certain time.²² From the wording of Article 36, the consent of the parties is recognized

through a variety of forms, ranging from unconditional consent to consent based upon reciprocity or consent limited in time.

The consent of the Parties may be explicit or implicit and is derived from several areas, primarily i.e. (a) by special agreement; (b) by clauses in treaties or conventions; (c) by the State's acceptance of the Court's compulsory jurisdiction.

a. Special Agreement between the State Parties

The method of special agreement has its legal basis in Article 36 paragraph 1 of the Court's Statute. Such cases normally come before the Court by notification to the Registry of an agreement known as the *Compromis* which was concluded by the Parties especially for this purpose.²³ This method was used in the *Corfu Channel* case,²⁴ the *Minquiers and Ecrehos* case,²⁵ and in several others.

b. Treaties and Conventions

In the second half of Article 36 paragraph 1 of the Court's Statute, it is provided that the jurisdiction of the Court also comprises all matters specially provided for in treaties and conventions in force.²⁶ The provision seeks to render the State Parties the chance to also consent to the Court's jurisdiction in bilateral or multilateral treaties by the conclusion of ICJ's jurisdiction clauses among its means of settling disputes in such treaties. Subsequently, where a legal dispute arises with regard to the particular matters being accommodated through the compromissory

¹⁶ Ogbodo, *Op.cit.*, p. 97.

¹⁷ Article 38(1), ICJ Statute.

¹⁸ Ogbodo, *Op. cit.*, p. 101.

¹⁹ I.C.J., Judgments, 20 December 1974, *Nuclear Tests (Australia v. France)* and *Nuclear Tests (New Zealand v. France)*, Reports 1974, p. 271, para. 55 and p. 476, para. 58.

²⁰ P.C.I.J., Judgment, 30 August 1924, *Mavrommatis Palestine Concessions*, Series A, No. 2, p. 11. See also recently, I.C.J., Judgment, 1 April 2011, *Application of the International Convention on the Elimination of All*

Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Reports 2011, pp. 84-85, para. 30.

²¹ Article 36(1), ICJ Statute.

²² Article 36(3), ICJ Statute.

²³ Malcolm Shaw, *International Law*, New York: Cambridge University Press, 2008, p. 1075.

²⁴ *Corfu Channel*, *Loc. cit.*

²⁵ *The Minquiers and Ecrehos* case, Judgment of November 17th, 1953 : I.C.J. Reports 1953, p. 47.

²⁶ Article 36(1), ICJ Statute.

jurisdictional clause, one of the Parties may refer the case to the Court by virtue of the treaty itself. Such practice can be found for instance in the Lockerbie case which was brought by Libya against the United Kingdom and United States under the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation.²⁷

c. The Court's Compulsory Jurisdiction

State Parties may consent to the jurisdiction of the Court by recognizing the Court's compulsory jurisdiction as provided in Article 36 paragraph 2 of the Court's Statute. Each State which has recognized the compulsory jurisdiction of the Court has in principle the right to bring any one or more other States, which have accepted the same obligation, before the Court, by filing an application instituting proceedings with the Court. Conversely, it undertakes to appear before the Court should proceedings be instituted against it by one or more other such States.²⁸ The compulsory jurisdiction of the Court however is deemed to have failed its compulsory nature, since in the very provision of the compulsory jurisdiction itself the Court provides that its compulsory jurisdiction is an optional clause that State Parties may choose to adhere to.²⁹ By virtue of this fact, only when the State Parties declare that they recognize the Court's compulsory jurisdiction, then the Court has a compulsory jurisdiction over all legal disputes concerning the interpretation of a treaty, any question of international

law, the existence of any fact which—if established—would constitute a breach of an international obligation, and the nature or extent of the reparation to be made for the breach of an international obligation, as provided in Article 36 paragraph 2.³⁰

3. Advisory Jurisdiction of the ICJ

Since States alone are entitled to appear before the Court,³¹ public (governmental) international organizations cannot be parties to a case before it. However, a special procedure, the advisory procedure, is available to such organizations and to them alone. This procedure is available to five United Nations organs, fifteen specialized agencies and one related organization.³² In contrary to judgments, and except in rare cases where it is expressly provided that they shall have binding force (for instance, as in the Convention on the Privileges and Immunities of the United Nations, the Convention on the Privileges and Immunities of the Specialized Agencies of the United Nations, and the Headquarters Agreement between the United Nations and the United States of America), the Court's advisory opinions are not binding. The requesting organ, agency or organization remains free to decide, as it sees fit, what effect to give to these opinions.³³ This advisory procedure of the Court can also play an 'indirect' part in preventing disputes and conflicts from developing, by clarifying the legal parameters within which a problem may be resolved.³⁴

²⁷ *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, Preliminary Objections, Judgment, I. C.J. Reports 1998, p. 9, para. 1.

²⁸ International Court of Justice website, "Declarations Recognizing the Jurisdiction of the Court as Compulsory", <https://www.icj-cij.org/en/declarations>, accessed 24 December 2018.

²⁹ Article 36(2), ICJ Statute.

³⁰ *Ibid.*

³¹ Article 34(1), ICJ Statute.

³² Article 92—6, UN Charter; Article 65, ICJ Statute.

³³ International Court of Justice website, "Advisory Jurisdiction", <https://www.icj-cij.org/en/advisory-jurisdiction>, accessed 23 December 2018.

³⁴ Jacovides, *Op.cit.*, p. 550—1.

C. PROBLEM ARISING FROM THE CURRENT SCOPE OF ICJ

This article seeks to highlight the jurisdiction of the Court particularly the contentious jurisdiction. While performing its role as the principal judicial organ of the UN, and basically the World, the author sees that the ICJ had faced certain hardships arising within the scope of its contentious jurisdiction as follows.

1. The Underutilization of the Court's Advisory Jurisdiction

Some 144 cases have been submitted to the ICJ, of which 24 were requests for Advisory Opinions. The UN General Assembly, or bodies established by it,³⁵ has made most of the requests for Advisory Opinions. Of the 23 Advisory Opinions that were given, 21 were on matters of concern to the proper functioning of the international organization, i.e. housekeeping. That is to say that an Advisory Opinion for the ICJ that may help the organization to do its work better. On the other hand, the Opinions sought be the UN General Assembly on the legality of the threat or use of nuclear weapons, the legal consequences of the construction of a wall in the occupied Palestinian territory (as well as the pending request about Kosovo) were (or are) on matters that were (or are) politically controversial.³⁶

By 'politically controversial' is meant that they concerned problems that can be resolved (if at all) only by difficult and lengthy political negotiations, not by an Advisory Opinion. The problems were also long-standing: such as the use of nuclear weapons and the Israel/Palestine problem. They both raised issues that go far beyond

housekeeping. To criticism of its approach, the ICJ says that the role of its Advisory Opinions is to advise organs of the United Nations and UN specialized agencies what the law is in respect of a particular problem, and so help the requester deal with the problem in the future. It is not the task of an Advisory Opinion to the ICJ to settle disputes.

However, the advisory procedure provides the Court with a very real way of participating and contributing to the overall objectives of the United Nations. In addition to offering legal guidance to the requesting bodies, it can play a role in international dispute resolution.³⁷ Nevertheless, the statistics had shown that not so many legal questions that are 'politically controversial' submitted to the ICJ, but rather more on the housekeeping matters only. Therefore, the Court's potential to give clarification regarding certain legal parameters are not utilized to its optimal limit.

2. The failure of the Court's Compulsory Jurisdiction to be Compulsory

The Court provides the State Parties with a compulsory jurisdiction while the member parties to the ICJ are free to accept or reject the compulsory jurisdiction of the Court. This concept clearly undermines the authority of the Court to adjudicate relevant international issues of fact and law, as the Court will often face State Parties not recognizing its jurisdiction which will certainly refrain it from optimizing its function to settle disputes between States.

A total of 73 states have recognized the compulsory jurisdiction of the Court (with or without reservation).³⁸ This

³⁵ Advisory Opinions of 15 December 1989 on the *Applicability of Article VI, section 22, of the Convention on the Privileges and Immunities of the United Nations (Mazilu)* [1989] ICJ Rep 177; 85 ILR 300; and of 29 April 1999 on the same provision (Cumaraswamy) [1999] ICJ Rep 62; 121 ILR 405.

³⁶ Anthony Aust, "Advisory Opinions", *Journal of International Dispute Settlement*, Volume 1, No 1, 2010, p. 131.

³⁷ Jacovides, *Op.cit.*, p. 550.

³⁸ International Court of Justice website, "Declarations Recognizing the Jurisdiction of the Court as Compulsory", <https://www.icj-cij.org/en/declarations>, accessed 24 December 2018.

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number shows the minimum participation of Member States to the UN in preserving the principal judicial nature of the Court. Not only that it is a number so low in comparison to the total of Member States which is 193 states, matters are further complicated by reservations to the acceptances of compulsory jurisdiction, which serve to limit their scope.³⁹ The reservations that have been made in declarations by states under the optional clause, restricting the jurisdiction of the ICJ, vary a great deal from state to state, and are usually an attempt to prevent the Court becoming involved in a dispute which is felt to concern vital interests.⁴⁰

Furthermore, the Court's compulsory jurisdiction gets even more ill-equipped due to the fact that four out of five permanent members of the Security Council have expressed their rejections towards such compulsory jurisdiction. By virtue of this fact, it is reasonable to be worried over the Court's prestige in the face of the international community. The ICJ as the only body with adjudication power within the UN, should have possessed a distinctive power amongst States, yet in reality it seems that the attitude of the permanent members of the Security Council—as powerful member parties—have leached off the influence of the Court and instead are now advocating the wrong campaign to encourage the melt-down of the Court's powers. In such a case, hence it is possible that somewhere in the near future this trend will end up with the Court losing its compulsory jurisdiction completely.

One of the latest remarkable jurisdiction matters raised within the ICJ was Marshall Islands' legal crusade against nuclear weapons states back in 2014, which due to jurisdiction issues were mostly dead on arrival.⁴¹ Of nine ICJ suits filed against the nuclear weapons states, six never progressed for lack of jurisdiction, and there is nothing the Court can do in its power to call for those States. Moreover, this series of proceedings have shown the other side of the compulsory jurisdiction, in which it is found out that apparently Marshall Islands did not recognize the Court's compulsory jurisdiction until one year and one day before initiating such proceedings.⁴² Indeed, the ICJ Statute merely requires that State Parties to the proceedings have declarations in force on the same day.⁴³ However this provision resulted only in the impression that the ICJ has a weak jurisdiction which subsequently will generate a judicial system prone to "hit-n-run" litigation.

3. The Court's Inability to Act Proactively towards Unsettling Disputes not Brought Before It

One of the core element to establish the Court's jurisdiction is the existence of dispute⁴⁴ and the fact that one or both of the Parties must submit it to the Court.⁴⁵ However, it is undeniable that not all disputes arising in the international fora are brought before the Court. Indeed, the ICJ is not an obligatory means of settlement of disputes, whereby the UN Charter itself welcomes the liberty of States to deliberately entrust the solution of their differences to other tribunals or international courts.⁴⁶

³⁹ Bingbin Lu, "Reform of the International Court of Justice—A Jurisdictional Perspective", *Perspectives*, Volume 5, Issue 2, June 30 2004, p. 6.

⁴⁰ Shaw, *Op.cit.*, p. 1086.

⁴¹ Katherine Maddox Davis, "Hurting More than Helping: How the Marshall Islands' Seeming Bravery Against Major Powers Only Stands to Maim the Legitimacy of the World Court", *Minn. J. Int'l Law*, Volume 25, p. 79.

⁴² International Court of Justice website, Marshall Islands: "Declarations Recognizing the Jurisdiction of the Court as Compulsory", <https://www.icj-cij.org/en/declarations/mh>, accessed 25 December 2018.

⁴³ Article 36(2), ICJ Statute.

⁴⁴ See *supra* B(2).

⁴⁵ Article 36(1), ICJ Statute.

⁴⁶ Article 95, UN Charter.

Nevertheless, the world had become the witness of many violations to international law not getting adjudicated properly due to the mere fact that none of the Parties, not even the violated ones, submitted the matter to the ICJ or any other tribunals.

One of the recent example is the issue on United States' transfer of their embassy in Israel from Tel Aviv to Jerusalem, indicating their recognition of Jerusalem as the capital of Israel, while neglecting Palestine and the fact that Jerusalem itself is a disputed area that had since after the Arab-Israeli war of 1948 been divided along armistice lines drawn between Israel and Jordan.⁴⁷ The United States' conduct is clearly in contradiction with the principles and policies of the United Nations. It also undermines the US Administration's self-declared aim to broker lasting peace between Israelis and Palestinians. In this matter, never even once the ICJ was dragged in, regardless of the existence of a dispute, all due to the simple fact that no party brought it to the face of the Court. However, shouldn't it be odd for the UN's principal judicial organ to remain silent on the matter when in fact it has the function to resolve and adjudicate especially in such cases where there exists a *prima facie* violation of international law?

Another set of examples can be found upon the matter of nuclear

disarmament, brought up by Marshall Islands in 2014. It is almost undebatable that the nuclear disarmament obligation has attained the status of customary international law which means that even the non-parties are bound to it. The international community is evinced of its customary character by considering its high number of parties which is over 190,⁴⁸ also the General Assembly Resolution⁴⁹ and Security Council Resolutions⁵⁰ which call for implementation of Article VI by all States and not only the State Parties. Even the International Court of Justice has recognized the existence of such obligation with a customary character in its *dispositif* of Nuclear Weapons Advisory Opinion in 1996.⁵¹ However, it doesn't appear that this customary law is well-preserved, for instance, United Kingdom might claim that they have completed reductions from 160 to 120 operational warheads in 2015⁵² yet still pursue modernization of its warhead design, life extension of the Trident II D5 missiles, and a new SSBN fleet to replace the aging Vanguard submarines.⁵³ Then, even if it is established that there was no real dispute between Marshall Islands and the United Kingdom, India, or Pakistan, shouldn't the Court feel offended that there has been a violation of customary international law to its face when in fact indeed the nuclear weapons states are still actively

⁴⁷ Hans Koechler, "Transfer of the US Embassy to Jerusalem: Legal Implications" (2018), <https://doc-research.org/2018/05/transfer-us-embassy-jerusalem-legal-implications/> accessed 25 December 2018.

⁴⁸ See UN Office for Disarmament Affairs, Treaty on the Non-Proliferation of Nuclear Weapons, Status of the Treaty, <http://disarmament.un.org/treaties/t/npt>.

⁴⁹ United Nations General Assembly Resolution ["UNGA"], *General and Complete Disarmament*, 15 December 1994, UN Doc. A/RES/49/75.

⁵⁰ United Nations Security Council Resolution ["UNSC"], 11 April 1995, UN Doc. S/RES/984; UNSCR, 24 December 2009, UN Doc. S/RES/1887.

⁵¹ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion [1996] ICJ, at. 226, ¶105(2)(F) ["Nuclear Opinion"].

⁵² "Main Committee I Statement," Report by Mr. Guy Pollard, Deputy Permanent Representative of the United Kingdom to the Conference on Disarmament, 2015 Review Conference of the Treaty on Non-Proliferation of Nuclear Weapons, 27 April - 22 May 2015.

⁵³ Secretary of State for Defence Dr. Liam Fox, "The United Kingdom's Future Nuclear Deterrent: The Submarine Initial Gate Parliamentary Report," May 2011, www.mod.uk; U.K. Ministry of Defence, "2010 to 2015 Government Policy: UK Nuclear Deterrent," Policy Paper, 8 May 2015, www.gov.uk, <http://www.nti.org/analysis/articles/united-kingdom-nuclear-disarmament/> accessed 24 December 2018.

developing their nuclear weapon arsenals? However again, the Court was left with no other choice.

D. THE RECOMMENDATION ON ICJ'S JURISDICTION

Having established the problems refraining the ICJ to operate to its fullest. The ICJ continues to command the pre-eminent position as the "principal judicial organ" of the United Nations, but to renew the influence and efficacy of the Court, vital reforms concerning the problems outlined above must be undertaken. Henceforth, the author has three recommendations particularly concerning the contentious jurisdiction of the Court.

1. Expansion in the Field of Application of the Court's Advisory Opinion

All this time, the field of application of the Court's advisory opinion has always been restricted to the five United Nations organs, fifteen specialized agencies and one related organization.⁵⁴ I strongly feel that, in a comprehensive plan for a reformed and more effective United Nations, there exists ample room for such proposals for the fuller utilization of the International Court of Justice in general and of its advisory jurisdiction in particular. The recent Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, July 9, 2004, furnishes a concrete such example.⁵⁵

In one of his lectures, Judge Shi, in a commendable attempt to stimulate debate among policymakers, cited a number of other possibilities. One is to broaden the field of application of the Court's advisory jurisdiction to intergovernmental organizations, perhaps through appropriate

resolutions of the General Assembly or the Security Council. Another is to empower the Secretary-General on his own initiative to request advisory opinions, as already proposed by Mr. Boutros-Ghali in 1992 in his Agenda for Peace and by Mr. Kofi Annan in 2001." The issue was also raised in 1998 in the Charter Committee Report (U.N. Doc. A/53/33). A third possibility is to authorize national supreme courts as well as international courts and tribunals to request advisory opinions on certain difficult or disputed questions of international law so as to allow for uniform interpretation for such rules and principles.⁵⁶

2. Render the Jurisdiction of ICJ as Mandatory and Compulsory to All State Parties

The Court's Statute shall be amended with a view towards making the jurisdiction of the Court mandatory and compulsory to all State Parties. The current situation is basically allowing States to cherry-pick the jurisdiction of the Court, which in many ways will certainly strip the Court off its own powers and designated prestige as the principal judicial organ of the UN. By making the Court's jurisdiction as mandatory and compulsory to all State Parties, not only that the ICJ will regain its leached powers, the strong and wrong precedence made by the unacceptance by the permanent members of the Security Council will be tackled down once and for all.

Some might regard this act as authoritarian, however the elimination of this optional clause does not affect the right of States to first and foremost enter the preliminary objection procedure. It is noteworthy that the

⁵⁴ Article 92—6, UN Charter; Article 65, ICJ Statute.

⁵⁵ Advisory Opinion No. 131, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 I.C.J. 131 (July 9).

⁵⁶ Judge Shi, *Loc.cit.*

absence of an optional clause simply means that all State Parties must respect the Court and recognize the Court's power as a judicial body by taking responsibility before it. The Court may reflect on how World Trade Organizations ("WTO") managed its judicial proceedings, as many scholars recommend WTO dispute settlement system as a good example for introducing compulsory adjudication and appellate review on a worldwide level through "constitutional reforms."⁵⁷ In WTO, All WTO Members are subject to it, as they have all signed and ratified the WTO Agreement as a single undertaking, of which the Dispute Settlement Understanding ("DSU") is a part. The DSU subjects all WTO Members to the dispute settlement system for all disputes arising under the WTO Agreement. Therefore, unlike other systems of international dispute resolution, there is no need for the parties to a dispute to accept the jurisdiction of the WTO dispute settlement system in a separate declaration or agreement. This consent to accept the jurisdiction of the WTO dispute settlement system is already contained in a Member's accession to the WTO. As a result, every Member enjoys assured access to the dispute settlement system and no responding Member may escape that jurisdiction.⁵⁸

As it stands, having the compulsory jurisdiction of the Court as an optional clause as it currently is will result in the Court being not well-equipped to meet the increasing global expectations in the 21st century.

3. Expanding the Court's Contentious Jurisdiction to Include Jurisdiction *Ratione Materiae*

Although very ambitious and quite extreme, this recommendation shall be considered as one of the feasible measures to be done in order for the Court to live up to its principal judicial nature. The matters as discussed above are those matters in an international pressing nature, or in other words have raised the concern of the international community without any offer of solution.

Practically speaking, this recommendation might have been done by the General Assembly or the Security Council, however the utilization of the two bodies have shown no indication of the issue heading to a better conclusion. Take the matter of the United States' embassy in Jerusalem for instance. The General Assembly had held an emergency session resulting in the Resolution ES-10/L.22 declaring the status of Jerusalem as Israel's capital as "null and void".⁵⁹ However, no significant effect was made afterwards, and even a year after the adoption, the United States' embassy still stands tall to date, with even more countries following and considering following its lead, such as Guatemala, Paraguay, Czech Republic, Romania, and Honduras.⁶⁰

Security Council, whose decision practically bears a legally binding power,⁶¹ is not any better in seizing the matter. The Security Council was reportedly to be stunted by the veto against the adoption of any resolution regarding the matter of the United

⁵⁷ Bingbin Lu, *Loc. cit.*

⁵⁸ World Trade Organizations website, "Introduction to the WTO Dispute Settlement System", https://www.wto.org/english/tratop_e/dispu_e/dispute_settlement_cbt_e/c1s3p3_e.htm accessed 25 December 2018.

⁵⁹ United Nations General Assembly, Resolution ES-10/L.22, 37th plenary meeting on the tenth emergency special session, 2017.

⁶⁰ Ashley Turner, "After US embassy makes controversial move to Jerusalem, more countries follow its lead", <https://www.cnn.com/2018/05/17/after-us-embassy-move-to-jerusalem-more-countries-follow-its-lead.html> accessed 25 December 2018.

⁶¹ Article 25, UN Charter.

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States' embassy. The undeniable politics inside the Security Council is proven to be standing in the way for justice.

This is mainly why the ICJ needs to have jurisdiction *ratione materiae* established in the Court's Statute, that is to enable the Court as an impartial body and the only judicial organ of UN to take actions and adjudicate the matter *vis a vis* the incumbent international law, particularly when other bodies have been proven as inadequate.

Jurisdiction *ratione materiae* itself is in other words, a subject-matter jurisdiction.⁶² By implementing this type of jurisdiction, therefore neither the absence of actual dispute against other States nor the absence of institution of proceedings before the Court, will thwart the road to justice which will then be paved by the ICJ as the principal judicial organ.

E. CONCLUSION

The recommendations made by this article seek to restore the status of the ICJ, in both name and practice, as the world's principal judicial organ. Facing issues of jurisdiction, the ICJ's legitimacy and power have undeniably been compromised. The reforms proffered in this article are requisite if the Court is to be equipped to effectively handle the evolving myriad of legal issues confronting the global community in the 21st century. This article argues that the ICJ is ill-equipped to tackle modern international disputes if the jurisdictional and compositional problems outlined above are not remedied, while also offering recommendations for reform.

In conclusion, the reform of the ICJ is particularly needed in order to enhance its power in the face of the international community, and to tackle the obstacles in the 21st century. There are rooms for

ample improvements, and the possibilities go far beyond the recommendations offered in this article.

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⁶² Alexander Proelss, "The Limits of Jurisdiction Ratione Materiae of UNCLOS Tribunals", *Hitotsubashi Journal of Law and Politics*, Volume 1, Issue 02, 2018, p. 48.

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