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# DEMYSTIFYING THE LEGITIMACY OF INTERNATIONAL TRIBUNALS: CASE STUDY OF THE INTERNATIONAL COURT OF JUSTICE AND ITS DECISIONS ON ARMED ACTIVITIES IN THE CONGO

*Roger-Claude Liwanga\**

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## ABSTRACT

*Over the last seven decades, there has been a proliferation of international tribunals. Yet, they have not received unanimous approval, raising questions about their legitimacy. A legitimate international tribunal is one whose authority to adjudicate international disputes is perceived as justified. Using the case study of the International Court of Justice (I.C.J.), this Article highlights the three criteria that should be considered in assessing the legitimacy of an international tribunal, which include legal, sociological, and moral elements. It also contends that the I.C.J. cannot claim “full” legitimacy if any of these components are missing in its decisions. The Article further suggests that the legitimacy of the I.C.J. has a dynamic nature, as litigating parties may continually change their perception of the court’s authority at any time before, during, or after the judicial process. The Article equally describes other factors that can contribute to maintaining the international court’s legitimacy, including fairness and unbiasedness, sound interpretation of international legal norms, and transparency.*

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## INTRODUCTION

The principal function of international and regional courts is to adjudicate disputes between States or between States and individuals.<sup>1</sup> International judicial bodies, such as the International Court of Justice (I.C.J.), can issue rulings on various issues, including the scope of protection of human rights, the reparations due to victims of human rights abuses, the legality of armed aggression, the delimitation of international borders, and the conditions in which the use of force can be authorized or forbidden, among other matters.<sup>2</sup>

In June 1999, the Democratic Republic of Congo (DRC) filed a series of complaints to the I.C.J. and claimed, among other things, that Burundi, Rwanda, and Uganda committed armed aggression against its territory.<sup>3</sup> The DRC also argued that the armed forces of those countries perpetrated massive and serious human rights violations against its populations.<sup>4</sup> Through this proceeding, known as the *Cases Concerning the Armed Activities on the Territory of the Congo*, some parties questioned the I.C.J.'s legitimacy to adjudicate this dispute.<sup>5</sup> In particular, Burundi and Rwanda challenged the authority of the I.C.J. to adjudicate this dispute, positing that some provisions of the Statute of the I.C.J. and the U.N. Charter may preclude the I.C.J. from examining the merits of the DRC's claims.<sup>6</sup>

In its 2002 decisions in the *Cases Concerning the Armed Activities on the Territory of the Congo: DRC v. Rwanda and DRC v. Burundi*, the I.C.J. dismissed the charges against Burundi and Rwanda for their involvement in the armed aggression and violations of human rights in the DRC.<sup>7</sup> The I.C.J. based

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<sup>1</sup> U.N. Charter art. 92. ("The International Court of Justice shall be the principal judicial organ of the United Nations. It shall function in accordance with the annexed Statute, which is based upon the Statute of the Permanent Court of International Justice and forms an integral part of the present Charter.") See U.N. Charter Ch. XIV; see also Statute of the I.C.J., art. 36, 18 Apr. 1946.

<sup>2</sup> Nienke Grossman, *The Normative Legitimacy of International Courts*, 86 TEMP. L. REV. 61, 62 (2013).

<sup>3</sup> See Dem. Rep. Congo v. Burundi, Rwanda and Uganda, Communication 227/99, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶ 85–89 (May 2003), <https://www.globalhealthrights.org/africa/democratic-republic-of-the-congo-v-burundi-rwanda-and-uganda/>.

<sup>4</sup> Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. Rep. 116, ¶ 8 (Dec. 19); see also Dem. Rep. Congo v. Burundi, Rwanda and Uganda, [Afr. Comm'n H.P.R.].

<sup>5</sup> Armed Activities on the Territory of Congo (New Application: 2002), (Dem. Rep. Congo v. Rwanda), Judgment, 2006 I.C.J. 1, ¶¶ 126–28 (Feb. 3).

<sup>6</sup> Daniel M. Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law*, 93 AM. J. INT'L L. 596, 605 (1999).

<sup>7</sup> Dem. Rep. Congo v. Rwanda, 2006 I.C.J. ¶¶ 126–28. See generally Statute of the I.C.J., 18 Apr. 1946. The cases concerning Armed Activities on the Territory of Congo (*DRC v. Burundi*, *DRC v. Rwanda*, and *DRC v. Uganda*) relates to the same events, same issues and same parties. They were, however, brought before the I.C.J. against each respondent State upon different grounds of the Court's jurisdiction. This made it look like

its rulings on the fact that neither of these two countries had recognized its compulsory jurisdiction.<sup>8</sup> Yet, in its December 2005 judgment on the same claims against Uganda,<sup>9</sup> the I.C.J.: (1) held that Uganda violated human rights in the DRC due to acts of killing and torture committed by its army against the Congolese populations; (2) compelled the respondent State to cease military activities;<sup>10</sup> and (3) required Uganda to make financial reparations to the DRC on behalf of the victims of human rights violations.<sup>11</sup> As of June 2020, no financial compensation has been provided.<sup>12</sup>

This Article examines the legitimacy of international tribunals. The analysis of the legitimacy of the international courts, such as the I.C.J., is essential given the importance of the matters that the litigating parties submit to them. The I.C.J.'s legitimacy may have some implications on litigating parties' voluntary compliance with its judgments<sup>13</sup> or impact human behavior by transforming litigating parties' attitudes on refraining from violating international laws in the future.<sup>14</sup> Not surprisingly, the decisions rendered by a tribunal considered

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three distinct cases. The jurisdiction of the I.C.J. over the DRC's claim in *DRC v. Uganda* case was established under Article 36(2) of the I.C.J. Statute because both the DRC and Uganda had unilaterally consented to the Court's jurisdiction. See Uganda, Declaration Recognizing as Compulsory the Jurisdiction of the International Court of Justice in Conformity with Art. 36, ¶ 2 of the Statute of the I.C.J. Oct. 3, 1963, 479 U.N.T.S. 6946. The DRC recognized the I.C.J. jurisdiction in 1989, and Uganda did so in 1963 with the condition of reciprocity. Yet concerning Burundi and Rwanda, neither State had recognized the I.C.J. to exercise jurisdiction in all cases, nor acceded to a treaty providing for the I.C.J.'s jurisdiction in specified circumstances. Consequently, the I.C.J. concluded that claims against Burundi and Rwanda were inadmissible because the countries did not accept the compulsory jurisdiction of the Court. Andrew Mollel, *International Adjudication and Resolution of Armed Conflicts in the Africa's Great Lakes: A Focus on the DRC Conflict*, 1 J.L. CONFLICT RESOL. 10, 19 (2009); see also Dem. Rep. Congo v. Uganda, 2005 I.C.J. ¶ 128.

<sup>8</sup> Dem. Rep. Congo v. Uganda, 2005 I.C.J. ¶ 221.

<sup>9</sup> Dem. Rep. Congo v. Burundi, Rwanda and Uganda, [Afr. Comm'n H.P.R.] ¶ 98; see also Dem. Rep. Congo v. Uganda, 2005 I.C.J. ¶ 221.

<sup>10</sup> Dem. Rep. Congo v. Uganda, 2005 I.C.J. ¶ 221.

<sup>11</sup> *Id.*

<sup>12</sup> In a press release dated November 13, 2019, The Hauge notes:

The International Court of Justice (ICJ), the principal judicial organ of the United Nations, has decided to postpone the public hearings on the question of reparations in the case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), which had been due to take place between Monday 18 and Friday 22 November 2019. The Court made its decision taking into consideration the joint request submitted by the Parties by a letter dated 9 November 2019.

See International Court of Justice, Press Release, No. 2019/48, 13 November 2019, available at: <https://www.icj-cij.org/en/press-releases/2010-2019/desc>.

<sup>13</sup> James L. Gibson, *Understandings of Justice: Institutional Legitimacy, Procedural Justice and Political Tolerance*, 23 LAW & SOC'Y REV. 469, 470 (1989).

<sup>14</sup> Tom R. Tyler, *Legitimacy and Criminal Justice: The Benefits of Self-regulation*, 7 OHIO ST. J. CRIM. L. 307, 308 (2009).

illegitimate by the involved parties are more likely to be unaccepted, unenforced, and without impact on society than the decisions issued by a tribunal that has more legitimacy.<sup>15</sup>

This Article argues that a legitimate tribunal is one whose authority is justified and accepted.<sup>16</sup> It suggests that three criteria should be considered in assessing the I.C.J.'s legitimacy, including legal, sociological, and moral elements.<sup>17</sup> This Article further posits that the I.C.J. could not claim "full" legitimacy if any of these three components of legitimacy are missing in its decisions. In fact, the court's judgment could be legally correct and legitimate (if it was issued in accordance with the applicable laws) while at the same time being morally and sociologically illegitimate if that decision was morally unjustifiable and socially rejected.<sup>18</sup> This Article also contends that the legitimacy of the I.C.J. has a dynamic nature because litigating parties can change their perception of the I.C.J.'s authority before, during, or after the judicial proceedings.<sup>19</sup> This Article further highlights the factors that can contribute to maintaining the I.C.J.'s legitimacy, such as fairness and unbiasedness, sound interpretation of international legal norms, and transparency.<sup>20</sup> In doing so, this Article underlines the relationship between the I.C.J.'s legitimacy and State compliance with the I.C.J. decisions through addressing the question as to whether the State's non-compliance could imply the State's rejection of the I.C.J.'s legitimacy. In this regard, this Article theorizes that the States' non-compliance with the I.C.J. judgments can be linked to numerous variables, such as the lack of precision within the court's ruling; the politicization of the post-adjudicative phase, coupled with the lack of sanctions against defaulting States; and the issue of State sovereignty, coupled with the nonexistence of a judicial enforcement mechanism at domestic levels.<sup>21</sup> Yet, the

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<sup>15</sup> Gibson, *supra* note 13, at 470.

<sup>16</sup> Grossman, *supra* note 2, at 65, 85.

<sup>17</sup> Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1794–1801 (2005); *see generally* U.N. Charter; Statute of the I.C.J., 18 Apr. 1946; *see also* Bodansky, *supra* note 6, at 605; Grossman, *supra* note 2, at 64.

<sup>18</sup> *Armed Activities on the Territory of Congo (New Application: 2002)*, (Dem. Rep. Congo v. Rwanda), Judgment, 2006 I.C.J. 1, ¶ 128 (Feb. 3); *see* PETER CANE, *RESPONSIBILITY IN LAW AND MORALITY* 106 (2002); *see also* PABLO DE GREIFF, *THE HANDBOOK OF REPARATIONS* 593 (2006) (explaining that all people have a moral obligation to repair the negative consequence of their conduct even if they were not at fault in causing it). *See generally* Statute of the I.C.J. art. 36, 18 Apr. 1946.

<sup>19</sup> Nienke Grossman, *Legitimacy and International Adjudicative Bodies*, 41 GEO. WASH. INT'L L. REV. 107, 117 (2009).

<sup>20</sup> *Id.* at 115.

<sup>21</sup> *See* Roger-Claude Liwanga, *From Commitment to Compliance: Enforceability of Remedial Orders of African Human Rights Bodies*, 41 BROOK. J. INT'L L. 100, 135–38 (2015); Attila Tanzi, *Problems of Enforcement of Decisions of the International Court of Justice and the Law of the United Nations*, 6 EUR. J. INT'L L. 539, 540

Article concludes by claiming that even if each of these variables for non-compliance may not have a direct connection with the rejection of the I.C.J.'s legitimacy, each of them exposes the weakness of a tribunal that is unable to enforce its decisions; thereby revealing the contestation of the I.C.J.'s justified authority.

This Article is structured as follows: Section I will examine the concept of legitimacy of international tribunals, explore the criteria of assessing the I.C.J.'s legitimacy, and survey the factors contributing to the I.C.J.'s legitimacy. Section II will analyze the enforcement of the I.C.J.'s decisions and respond to the question of whether partial compliance or non-compliance with the I.C.J.'s judgments by State parties amounts to rejection of the I.C.J.'s legitimacy.

## I. UNDERSTANDING THE CONCEPT OF LEGITIMACY OF THE I.C.J.

This Section responds to questions such as: What is a legitimate (international) tribunal? What makes one (international) tribunal more legitimate than another? What are the indispensable elements making an international tribunal to be perceived as less legitimate in the eyes of litigating parties and/or those whom its decision would impact? Does the I.C.J. meet the criteria of a legitimate judicial institution?

### A. Definition

Before seeking to understand what a legitimate international tribunal is, it is important to understand the meaning of the term “legitimacy.” There is no single definition of the term “legitimacy.”<sup>22</sup> Etymologically, the term “legitimacy” derives from the Latin word “*legitimare*,” which means to “make lawful, declare to be lawful.”<sup>23</sup> The term “legitimacy” refers to the condition of being in accordance with law and principle or being justifiable<sup>24</sup> and denotes the “justified authority” of an institution that acts according to its assigned

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(1995); Pamela Q. Saunders, *The Integrated Enforcement of Human Rights*, 45 N.Y.U. J. INT'L L. & POL. 97, 109 (2012); CONSTANZE SCHULTE, COMPLIANCE WITH DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE 39 (2004); Richard F. Oppong & Lisa C. Niro, *Enforcing Judgments of the International Courts in National Courts*, 5 J. INT'L DISP. SETTLEMENT 344, 346 (2014); see also *Medellin v. Tex.*, 552 U.S. 491, 506, 522–23 (2008); *Société Commerciale de Belgique (Belg. v. Greece)*, Judgement, 1939 P.C.I.J. (ser. A/B) No. 78 (June 15, 1939).

<sup>22</sup> Bodansky, *supra* note 6, at 600; see also Fallon, *supra* note 17, 1794–1801.

<sup>23</sup> See *Legitimate*, ONLINE ETYMOLOGY DICTIONARY, <http://www.etymonline.com/index.php?term=legitimate>.

<sup>24</sup> See *Legitimacy*, LEXICO, <https://www.lexico.com/en/definition/legitimacy>; see also WEBSTER'S NEW COMPACT DESK DICTIONARY AND STYLE GUIDE 277 (2002).

function.<sup>25</sup> For example, the authority of the parliament is to make laws, the authority of the government is to execute the laws, and the authority of the court is to adjudicate disputes, and thus, they are viewed as employing these functions legitimately.<sup>26</sup> Black's Law Dictionary defines "legitimate" in many ways, including "lawful," "genuine," "valid," and, in the case of children, "born of legally married parents."<sup>27</sup> Thus, one can see already that legitimacy takes many forms and is not only something that is compliant with the law but also seen as socially acceptable.

In the context of courts:

Judicial legitimacy derives from the belief that judges are impartial and that their decisions are grounded in law, not ideology and politics. Often in sharp contrast to other political institutions (such as legislatures), courts are respected—indeed often revered—because their decisions are viewed as being principled rather than motivated by self-interest or partisanship.<sup>28</sup>

As to international tribunals specifically, "a legitimate international adjudicative body [is] one whose authority is perceived as justified . . . A legitimate international court or tribunal must possess some 'quality that leads people (or states) to accept [its] authority . . . because of a general sense that the authority is justified.'"<sup>29</sup> Often, it is not just one quality but various qualities, that make an institution legitimate. As such, it is clear that the concept of "international tribunal legitimacy" is likely multidimensional rather than mono dimensional.

## *B. Dimensions of the Legitimacy of the I.C.J.: The Legal, Moral, Sociological Viewpoints*

### *1. Legal Legitimacy*

The legal legitimacy of an institution relates to the legal norms that establish that institution.<sup>30</sup> The legal legitimacy of the I.C.J. emanates from the I.C.J.'s Statute and the U.N. Charter that State parties to the United Nations have

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<sup>25</sup> For Daniel Bodansky, "'legitimacy' refers to the justification of authority" and "'legitimate authority' simply means 'justified authority.'" See Bodansky, *supra* note 6, at 601–02.

<sup>26</sup> *Id.*; see also Grossman, *supra* note 2, at 64.

<sup>27</sup> *Legitimate*, BLACK'S LAW DICTIONARY (11th ed. 2019).

<sup>28</sup> James Gibson, Delmar Karlen, & Brian Smentkowski, *Court*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/court-law>.

<sup>29</sup> Grossman, *supra* note 19, at 115.

<sup>30</sup> Fallon, *supra* note 17, at 1794.

accepted.<sup>31</sup> States recognize the legal legitimacy of the I.C.J. by ratifying the U.N. Charter establishing the I.C.J. and consenting to the I.C.J.'s compulsory jurisdiction<sup>32</sup> to adjudicate the disputes involving them.<sup>33</sup> Article 36 of the Statute of the I.C.J. stipulates that:

1. 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.
2. The States parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:
  - a. the interpretation of a treaty;
  - b. any question of international law;
  - c. the existence of any fact which, 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.<sup>34</sup>

The I.C.J.'s ability to proceed is based solely on the consent of the State parties that submit themselves to the "compulsory jurisdiction" of the Court.<sup>35</sup> Once a

<sup>31</sup> U.N. Charter art. 92 ("[t]he International Court of Justice shall be the principal judicial organ of the United Nations. It shall function in accordance with the annexed Statute, which is based upon the Statute of the Permanent Court of International Justice and forms an integral part of the present Charter."). All U.N. State Members are de facto parties to the I.C.J. Statute. *See id.* Yet, States that are not U.N. members may become parties to the I.C.J. Statute on conditions determined by U.N. General Assembly upon the recommendation of the U.N. Security Council. *See id.* art. 93.

<sup>32</sup> Article 36, ¶¶ 3–6 of the I.C.J. Statute emphasizes the following:

3. The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain States, or for a certain time.
4. Such declarations shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the parties to the Statute and to the Registrar of the Court.
5. Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms.
6. In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.

The I.C.J.'s contentious proceeding is solely based on the consent of the State parties that submit themselves to the "compulsory jurisdiction" of the Court. Once a State has given its consent recognizing the I.C.J.'s compulsory jurisdiction, that State should subject itself to the Court's jurisdiction. *See generally id.*

<sup>33</sup> Grossman, *supra* note 19, at 112.

<sup>34</sup> Statute of the I.C.J. art. 36, 18 Apr. 1946.

<sup>35</sup> *See generally Declarations Recognizing the Jurisdiction of the Court as Compulsory*, INT'L CT. JUST.: DECLARATIONS, <https://www.icj-cij.org/en/declarations>.

State has given its consent recognizing the I.C.J.'s compulsory jurisdiction, that State should subject itself to the Court's jurisdiction.<sup>36</sup> The legal legitimacy of the I.C.J. is limited by the scope of its mandate as defined by the legal norms that created it,<sup>37</sup> meaning that the I.C.J. would become legally illegitimate if it stopped acting in compliance with those legal norms.<sup>38</sup>

## 2. Moral Legitimacy

The moral dimension of legitimacy entails that an institution is legitimate when its actions are morally justifiable or respect-worthy.<sup>39</sup> A decision of the tribunal can be legally correct (having legal legitimacy) while at the same time being morally illegitimate if that decision is morally unjustified.<sup>40</sup> This is illustratively the 2006 case of the I.C.J., which, while correctly applying its Statute in *DRC v. Rwanda*,<sup>41</sup> dismissed the charges against Rwanda for its involvement in violations of human rights in the DRC (including destruction of property, mass killings and more) simply because Rwanda did not recognize its compulsory jurisdiction.<sup>42</sup> In this example, the I.C.J.'s decision was legally legitimate because the I.C.J. Statute stipulates that the Court is only competent to adjudicate cases brought by State parties that consent to its compulsory jurisdiction.<sup>43</sup> However, the I.C.J.'s decision was morally illegitimate because it left numerous victims of human rights violations without reparations and with no compensation for the physical, emotional and economic losses suffered. Indeed, there is a moral dimension behind the idea of reparations to the extent that any person is under a moral obligation to provide reparations for the negative consequence of his/her conduct even if he/she was not at fault for

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<sup>36</sup> In light of Article 36 (2) of the I.C.J. Statute, "the States parties to the Statute of the Court 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.'" *Id.* This implies that

[e]ach 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.

*Id.*

<sup>37</sup> *Grossman, supra note 19*, at 112.

<sup>38</sup> *Bodansky, supra note 6*, at 605.

<sup>39</sup> *Fallon, supra note 17*, at 1796.

<sup>40</sup> *Id.*

<sup>41</sup> *See Armed Activities on the Territory of Congo (New Application: 2002)*, (Dem. Rep. Congo v. Rwanda), Judgment, 2006 I.C.J. 1, ¶ 128 (Feb. 3).

<sup>42</sup> *Id.*

<sup>43</sup> U.N. Charter art. 36, ¶¶ 1–2.

causing it.<sup>44</sup> In other words, reparation is a fundamental component of corrective justice, in which the injurer should reverse or undo the harm caused to the sufferer.<sup>45</sup> From the moral and normative viewpoints, there is a relationship between the injurers (Burundi and Rwanda and their armed forces) and the sufferers (the human rights victims in the DRC), and such a relationship allows the court to adequately fulfill its adjudicative function.<sup>46</sup> The court is, therefore, called to “intervene[] at the instance of the wronged party in order to undo or prevent the wrongful harm.”<sup>47</sup> In the context of the I.C.J., the court would fail to properly fulfill its task if it could not compel the wrongdoers to reverse the injuries caused or to pay compensations for the harm suffered by the victims.

### 3. *Sociological Legitimacy*

An institution such as the I.C.J. is sociologically legitimate when the population of the litigating States accepts or respects its authority.<sup>48</sup> This sociological dimension of legitimacy can be traced back to Max Weber, who considered that “legitimacy signifies an active belief by citizens, whether warranted or not, that particular claims to authority deserve respect or obedience for reasons not restricted to self-interest.”<sup>49</sup> This means, for example, that a positive attitude of the population towards the decisions of the I.C.J. would confer to the latter a popular legitimacy within international society.<sup>50</sup> The population’s acceptance of the international tribunal represents a foundation for the effectiveness of the international tribunal’s rulings.<sup>51</sup> “[T]he more an institution is perceived as legitimate, the more . . . effective it is likely to be.”<sup>52</sup>

In addition to the I.C.J., there has been a proliferation of international and regional tribunals, but their existence has not received unanimous approval.<sup>53</sup> People have formulated various criticisms of international tribunals, including labeling them as: supranational justice, culturally imperialistic justice, and selective or biased justice.<sup>54</sup>

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<sup>44</sup> CANE, *supra* note 18, at 106; *see also* DE GREIFF, *supra* note 18, at 593.

<sup>45</sup> Stephen Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449 (1992).

<sup>46</sup> Ernest Weinrib, *The Special Morality of Tort Law*, 34 MCGILL L.J. 403, 409 (1989).

<sup>47</sup> *Id.* at 409–10.

<sup>48</sup> Fallon, *supra* note 17, at 1795–96.

<sup>49</sup> *Id.* at 1795.

<sup>50</sup> Bodansky, *supra* note 6, at 601.

<sup>51</sup> *Id.* at 603.

<sup>52</sup> *Id.*; *see also* MAX WEBER, *ECONOMY AND SOCIETY* 31 (Guenther Roth & Claus Wittich eds., 1968).

<sup>53</sup> *See* AFRICAN UNION, *DECISION ON AFRICA’S RELATIONSHIP WITH THE INTERNATIONAL CRIMINAL COURT 2*, (Oct. 2013); *see also* Marlene Wind, *Challenging Sovereignty? The USA and the Establishment of the International Criminal Court*, 2 ETHICS & GLOB. POLICIES, 83, 84 (2009).

<sup>54</sup> *See* David Kennedy, *International Law and The Nineteenth Century: History of an Illusion*, 17

a. *Supranational Justice and State Sovereignty*

Sovereign States do not naturally accept an authority higher than themselves.<sup>55</sup> This is because “sovereignty is a script whose most important line is that a [S]tate has the legitimate right to exercise authority. The [S]tate can reject claims of authority and control that are made by external actors.”<sup>56</sup> Some proponents of the theory of state sovereignty have been reluctant to accept the principle of having a supranational tribunal to autonomously adjudicate international acts committed by a State’s nationals and officials.<sup>57</sup> The establishment of a supranational court (such as the I.C.J., the I.C.C., or others) constitutes a violation of the fundamental “ideals of self-government and popular sovereignty” of the States.<sup>58</sup> For the critics of international tribunals, the recognition of the authority of an international court would imply “the irrevocable transfer of national sovereignty to an unelected and unaccountable international institution.”<sup>59</sup>

b. *Culturally Imperialistic Justice*

The criticism of “cultural imperialism” is particularly used in the context where international criminal law (perceived as a law of Western origin) is imposed on the local cultural-legal practices of non-Western countries, particularly developing nations.<sup>60</sup> Certain American legal academics have observed that “more than half the world’s population lives outside the law,” and therefore there is a need “to spread American principles of justice, especially in places that resist them.”<sup>61</sup> Criticizing the “culturally paternalistic” nature of

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QUINNIPIAC L. REV. 99, 113 (1996); STEPHEN KRASNER, PROBLEMATIC SOVEREIGNTY: CONTESTED RULES AND POLITICAL POSSIBILITIES 6 (2001); TIM KELSALL, CULTURE UNDER CROSS-EXAMINATION: INTERNATIONAL JUSTICE AND THE SPECIAL COURT FOR SIERRA LEONE 8–9 (2009); Eric Posner & Miguel F.P. de Figueiredo, *Is the International Court of Justice Biased*, 34 J.L. STUD. 599, 600 (2005); see also Thomas Hensley, *National Bias and the International Court of Justice*, 12 MIDWEST J. POL. SCI. 568, 568 (1968).

<sup>55</sup> Kennedy, *supra* note 54, at 113.

<sup>56</sup> KRASNER, *supra* note 54, at 6.

<sup>57</sup> Lee Casey & David Rivkin, *The International Criminal Court vs. The American People*, HERITAGE FOUND. (Feb. 5, 1999), <http://www.heritage.org/research/reports/1999/02/the-international-criminal-court-vs-the-american-people>.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* In regard to the I.C.C., John Ashcroft (a former U.S Attorney General and Senator) stated that “[i]f there is one critical component of sovereignty, it is the authority to define crimes and punishment. This court strikes at the heart of sovereignty by taking this fundamental power away from individual countries and giving it to international bureaucrats.” Wind, *supra* note 53, at 84.

<sup>60</sup> See KELSALL, *supra* note 54, at 8–9; see also SANDRA BURMAN & BARBARA HARRELL-BOND, THE IMPOSITION OF LAW xiii (1979); PAUL KAHN, THE CULTURE STUDY OF LAW 46 (1999).

<sup>61</sup> David Pimentel, *Rule of Law Reform Without Cultural Imperialism? Reinforcing Customary Justice Through Collateral Review in Southern Sudan*, 2 HAGUE J. ON RULE L. 1, 2 (2010) (citation omitted) (

international tribunals, a former prosecutor at the Special Court for Sierra Leone (a U.N.-created hybrid tribunal) stated:

Our perspectives are off-kilter. We simply do not think about or factor in the justice victims seek . . . We approach the insertion of international justice paternalistically. . . . We consider our justice as the only justice . . . We don't contemplate why the tribunal is being set up, and for whom it was established.<sup>62</sup>

To illustrate the cultural distinction between the Western-based international justice system and the non-Western justice system, another commentator argued that the Western justice system (particularly in the United States) is highly oriented toward *retributive* justice and toward harsh penalties for crimes (such as the application of capital punishment), while the “traditional” justice system in non-Western countries (such as those in Africa) is oriented toward *restorative* justice focusing on healing both the victims of crime and the community at-large.<sup>63</sup> Consequently, at the local level, one can perceive international tribunals as illegitimate and reject their authority if the cultural values characterizing those international tribunals are inconsistent with domestic practices and beliefs.<sup>64</sup>

### *c. Biased and Selective Justice*

The critics of the I.C.J. have regularly accused it of being biased because its judges render decisions based on political motivations<sup>65</sup> rather than deciding solely based on legal considerations.<sup>66</sup> A 1968 study critiqued the I.C.J.'s judges

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quotations omitted).

<sup>62</sup> KELSALL, *supra* note 54, at 11 (quoting David Crane, former prosecutor at the Special Court for Sierra Leone (an UN-created hybrid tribunal)).

<sup>63</sup> Pimentel, *supra* note 61, at 4.

<sup>64</sup> *Id.* Nevertheless, there is a need for nuance when distinguishing between the legal culture of African countries and that of international tribunals. Of course, there exists a customary law in some legal systems in Africa, including the DRC, whereby tribal chiefs can adjudicate disputes based on unwritten traditional law. See Loi 82-020 du 31 mars 1982 portant Code de l'organisation et de la compétence judiciaires [Ordinance-Law 82-020 of March 31, 1982 Relating to the Code of Organization of the Judicial Competence], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Apr. 1, 1982, p. 39. According to Article 163 of the DRC Code of Organization of the Judicial Competence, the customary courts are maintained and competent to adjudicate disputes based on customs until the installation of the Tribunals of Peace. *Id.*

At the same time, upon their independence, numerous African countries adopted the written legal systems of their former colonial powers, which were either civil law or common law depending on whether the countries were former French or British colonies, respectively. These written laws (from French civil law or British common law) are the ones regularly used by African domestic courts to adjudicate local disputes. see Sandra Joireman, *Inherited Legal Systems and Effective Rule of Law: Africa and the Colonial Legacy*, 39 J. MOD. AFRICAN STUDIES 571, 571 (2001).

<sup>65</sup> Posner & F.P. de Figueiredo, *supra* note 54, at 600; Hensley, *supra* note 54, at 568.

<sup>66</sup> Posner & F.P. de Figueiredo, *supra* note 54, at 600–01.

for demonstrating favoritism to their home countries' interests based on a content analysis of its voting patterns.<sup>67</sup> A more recent empirical study on the voting patterns of I.C.J. judges reached a similar conclusion on the lack of judicial independence of I.C.J. judges in the decision-making process; the researchers concluded that most of the I.C.J. judges vote in favor of the interests of their home States which appointed them or in favor of States whose level of wealth is relatively the same as that of their home States.<sup>68</sup> According to the research, I.C.J. judges align their votes with their own home country's interest eighty-five to ninety percent of the time.<sup>69</sup> Illustratively, in *DRC v. Uganda*, the I.C.J. authorized each litigating party to respectively appoint one judge *ad hoc* by virtue of Article 31 of the I.C.J. Statute, as neither party had a judge of its nationality on the bench.<sup>70</sup> All the judges in this case were called to vote on fourteen issues that were raised during the proceedings;<sup>71</sup> the voting record revealed that out of fourteen votes, the judge appointed by Uganda cast twelve votes in favor of Uganda while the judge appointed by the DRC voted eleven times in favor of the DRC.<sup>72</sup>

In summary, a legitimate international tribunal is one that: draws its authority from a protocol or treaty establishing it; a tribunal that is accepted by the international or regional community; and whose decisions are morally justified and accepted by all parties. An international tribunal cannot claim "full" legitimacy if any of these components are missing. A decision of an international tribunal may be legally correct (having legal legitimacy) while being at the same time unpopular (lacking social legitimacy) and morally unjustified (lacking moral legitimacy).<sup>73</sup> As it will be further elaborated in the upcoming sections, in order to maintain its legitimacy, an international tribunal should at all times: (1) be fair and unbiased; (2) interpret and properly apply the correct legal norms, and; (3) be transparent in its functioning and decision-making processes.<sup>74</sup> The

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<sup>67</sup> Hensley, *supra* note 54, at 568.

<sup>68</sup> Posner & F.P. de Figueiredo, *supra* note 54, at 600–01.

<sup>69</sup> *Id.* at 601.

<sup>70</sup> *See* *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2005 I.C.J. Rep. 116, ¶ 6 (Dec. 19).

<sup>71</sup> *Id.* ¶ 345.

<sup>72</sup> *Id.* Like the I.C.J., the I.C.C. is also accused of showing signs of partiality and being selective in conducting investigations and prosecutions of international crimes; this criticism emanates principally from a group of African countries. *See* MAX DU PLESSIS, TIVANIANA MALUWA, & ANNIE O'REILLY, *AFRICA AND THE INTERNATIONAL CRIMINAL COURT 2* (Chatham House 2013), [https://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/0713pp\\_iccafrica.pdf](https://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/0713pp_iccafrica.pdf).

<sup>73</sup> Fallon, *supra* note 17, at 1796.

<sup>74</sup> *See generally* Grossman, *supra* note 2, at 114.

failure of an international tribunal to maintain full legitimacy would most likely lead to parties' non-compliance with its decisions.

### C. *Dynamism of the Nature of Legitimacy*

The legitimacy of international tribunals has a dynamic nature as potential litigating parties may change their perception of the tribunals' legitimacy before, during, and after the judicial proceedings.<sup>75</sup> For instance, although Rwanda had ratified the U.N. Charter,<sup>76</sup> it had also refused to recognize the legitimacy of the I.C.J. to adjudicate any present or future disputes that may involve it before the dispute arose (a "pre-denial" of the I.C.J.'s legitimacy), which led to the I.C.J.'s declaration of incompetence in *DRC v. Rwanda*.<sup>77</sup> Likewise, in the *Nicaragua v. United States case Concerning the Military and Paramilitary Activities in and against Nicaragua*,<sup>78</sup> the United States also decided to withdraw its prior consent to the I.C.J.'s compulsory jurisdiction following the unfavorable position of the I.C.J. towards it during the case.<sup>79</sup> In this case, the United States had referred to a peri-denial of the I.C.J.'s legitimacy.<sup>80</sup>

Similarly, in the context of the International Criminal Court ("I.C.C."), numerous African countries (including South Africa and DRC) have recognized the legitimacy of the I.C.C. through their ratification of the Rome Statute that established the I.C.C.<sup>81</sup> Yet, South Africa and DRC changed their perception of the I.C.C.'s legitimacy after the I.C.C.'s prosecution of Omar Al-Bashir (former President of Sudan),<sup>82</sup> Uhuru Kenyatta (President of Kenya), and William Ruto

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<sup>75</sup> *Id.* at 80.

<sup>76</sup> See *Member States*, UNITED NATIONS: GEN. ASSEMBLY, <https://www.un.org/en/member-states>. Rwanda became a member of the United Nations on September 18, 1962 following its ratification of the U.N. Charter.

<sup>77</sup> *Armed Activities on the Territory of Congo (New Application: 2002)*, (Dem. Rep. Congo v. Rwanda), Judgment, 2006 I.C.J. 1, ¶¶ 13, 128 (Feb. 3).

<sup>78</sup> *Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. Rep. 14 ¶ 10 (June 27).

<sup>79</sup> See U.S. Department of State, *U.S. Withdrawal From the Proceedings Initiated by Nicaragua in the ICJ*, Dep't St. Bull., Mar. 1985, at 63; *United States: Letter to U.N. Secretary-General Concerning Non-Applicability of Compulsory Jurisdiction of The International Court of Justice with Regard to Disputes with Central American States*, 23 INT'L LEGAL MATERIALS 670 (1984); see also Grossman, *supra* note 2, at 72.

<sup>80</sup> *United States: Letter to U.N. Secretary-General Concerning Non-Applicability of Compulsory Jurisdiction of The International Court of Justice with Regard to Disputes with Central American States*, *supra* note 79.

<sup>81</sup> See *The States Parties to the Rome Statute*, I.C.C., [https://asp.icc-cpi.int/en\\_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx](https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx) [hereinafter *The States Parties to the Rome Statute*] (stating that the DRC and South Africa respectively ratified the Rome Statute April 11, 2002, and November 27, 2000).

<sup>82</sup> Sascha-Dominick D. Bachmann & Naa A. Sowatey-Adjei, *The African Union-ICC Controversy Before the ICJ: A Way Forward to Strengthen International Criminal Justice?*, 29 WASH. L. REV. 247, 252, 258–59 (2020).

(Deputy-President of Kenya).<sup>83</sup> Indeed, South Africa and DRC had aligned their positions with the philosophy of the African Union (a continental organization regrouping African countries) that has implicitly “declared” the I.C.C. as an “illegitimate tribunal” for compelling its State members not to collaborate with the I.C.C. in arresting the sitting heads of States for international crimes they have allegedly committed.<sup>84</sup> And such an attitude of the State members of the African Union can be understood as a “post-denial” of the I.C.C.’s legitimacy because the same countries had previously commended the establishment of the I.C.C.

The defiance of the States or individuals who have shifted their opinions of the legitimacy of international tribunals raises two fundamental questions: (1) under which conditions can a legally legitimate international tribunal still continue being perceived as a legitimate tribunal?; and (2) what are the factors contributing to an international tribunal’s legitimacy?

#### *D. Factors Contributing to an International Court’s Legitimacy*

Numerous factors contribute to the legitimacy of international tribunals, including: fairness and unbiasedness, sound interpretation and application of legal norms, and transparency.<sup>85</sup>

##### *1. Fairness and Unbiasedness*

Fairness and unbiasedness includes providing the disputing parties with an equal possibility of having their cases heard during the procedural and substantive stages of the adjudicative phase.<sup>86</sup> Of course, the disputing parties would be reluctant to approach an international or regional tribunal to rule over their complaints if that tribunal had a reputation of lacking credibility in terms of fairness and unbiasedness, meaning that a tribunal offers equal opportunity to

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<sup>83</sup> See *Prosecutor v. Kenyatta*, ICC-01/09-02/11, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, ¶¶ 1, 2. (May 30, 2011); see also *Prosecutor v. Ruto*, Case ICC-01/09-01/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ¶¶ 2, 3 (Jan. 23, 2011).

<sup>84</sup> AFRICAN UNION, DECISION ON AFRICA’S RELATIONSHIP WITH THE INTERNATIONAL CRIMINAL COURT 2 (Oct. 2013). The African Union has accused the I.C.C. of being biased and targeting only African nationals. As of December 2015, all the cases that are under investigation and prosecutions have connection with crimes allegedly committed in African countries by African citizens, including heads of States. See DU PLESSIS, MALUWA & O’REILLY, *supra* note 72, at 2; John Dugard, *Palestine and the International Criminal Court: Institutional Failure or Bias?*, 11 J. INT’L CRIM. JUST. 563 (2013)

<sup>85</sup> See generally Grossman, *supra* note 2.

<sup>86</sup> *Id.* at 81.

the parties to express their views at all stages of the adjudicative procedure.<sup>87</sup> In regards to the I.C.J., the court has clear rules of procedure describing how litigating parties can exchange documents between themselves or submit their oral and written opinions to the court before and during the proceedings.<sup>88</sup> The I.C.J.'s Rules of Procedure allow the litigating parties to jointly propose modifications to the Court's Rules, which should be approved by the I.C.J.<sup>89</sup> The legitimacy of the international tribunal is also linked to the personality of its adjudicators who are required to be unbiased.<sup>90</sup> The international tribunal may be perceived as illegitimate if its judicial personnel (judges, registrar, and others) are biased and thereby discourages potential parties from lodging their complaints to the tribunal.<sup>91</sup>

This issue of unbiased judicial personnel of international tribunals is very important, particularly in the context where some sitting judges of international judicial bodies may be sympathetic to the interests of their home countries.<sup>92</sup> The I.C.J. Statute allows a litigating party, which does not have a judge of its nationality on the bench, to choose a person of its nationality to sit as judge *ad hoc* in that specific case; that chosen *ad hoc* judge can also participate in the decision-making process in that case along with the other judges.<sup>93</sup> It is more likely that the judge that State X has chosen would be more responsive to the interests of State X and be more biased against the other State party in that case. Of course, one may argue that State X would not be confident with the decision of the I.C.J. over the dispute opposing it against State Y if that decision was taken with the participation of a judge of the nationality of the State Y with the absence of a judge of the nationality of State X.<sup>94</sup> Therefore, judges representing the nationalities of both States are required to sit on the bench. This viewpoint sounds valid, but it also contradicts the principle of judicial neutrality or independence, which requires judicial officers to apply their own integrity while performing judicial functions and to not be directly or indirectly influenced by the litigating parties.<sup>95</sup>

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<sup>87</sup> *Id.* at 64.

<sup>88</sup> *See How the Court Works*, I.C.J., <https://www.icj-cij.org/en/how-the-court-works>.

<sup>89</sup> Rules of Court, 1978 I.C.J. Acts & Docs. No. 6, art. 101.

<sup>90</sup> Grossman, *supra* note 2, at 67–68, 78–79.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 78–79; *see also* Edith B. Weiss, *Judicial Independence and Impartiality: A Preliminary Inquiry*, in *THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS* 123, 124 (Lori F. Damrosch ed., 1987).

<sup>93</sup> Statute of the I.C.J. art. 36, ¶¶ 2–3, 6, 18 Apr. 1946.

<sup>94</sup> *Judges Ad Hoc*, I.C.J., <https://www.icj-cij.org/en/judges-ad-hoc>.

<sup>95</sup> Roger-Claude Liwanga, *Judicial Independence in the Democratic Republic of Congo: Myth or Reality*, 56 J. AFR. L. 194, 194–95 (2012).

## 2. *Sound Interpretation and Application of International Law*

Another variable contributing to the legitimacy of the international tribunal is sound interpretation and application of legal norms.<sup>96</sup> The international tribunal would be considered illegitimate if it did not correctly interpret international laws and principles applicable in the specific dispute.<sup>97</sup> Let us assume that the principle of State international responsibility for human rights violations requires that the State violator provide integral reparations to victims to restore the *status quo ante* that prevailed before the commission of its illegal conduct.<sup>98</sup> If an international tribunal repeatedly and inconsistently interprets this principle by requiring the State violator to offer partial reparations for its wrongful acts, the parties may disagree and reject that tribunal's judgments, which are inconsistent with that principle of international law. Such a disagreement with the tribunal's judgments may translate into criticism and discourage other potential parties from bringing their disputes to that tribunal knowing that it often wrongly applies the legal norms and principles.<sup>99</sup> In other words, if an international tribunal regularly issues judgments which are not only inconsistent with set laws and principles, but also do not correspond with the interests of the parties, then that tribunal would cease to be considered as legitimate.<sup>100</sup>

## 3. *Transparency*

The third element contributing to the legitimacy of an international tribunal is transparency and infusion of democratic norms. There is a link between the transparency and legitimacy of international tribunals to the extent that transparency enables the litigating parties to ascertain whether the tribunal is fair and unbiased and a good interpreter of specific legal norms.<sup>101</sup> As a democratic norm, transparency is also connected to legitimacy because it allows the parties to assess to which degree an international tribunal is accountable.<sup>102</sup> In other words, an international tribunal is "transparent" when it permits the litigating

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<sup>96</sup> Grossman, *supra* note 2, at 103.

<sup>97</sup> *Id.* at 134.

<sup>98</sup> *Factory at Chorzow (Ger. v. Pol.)*, Judgment, 1928 P.C.I.J. (ser. A) No.17, at 47 (Sept. 13, 1928) ("Reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed."). Int'l Law Comm'n Draft Articles on Responsibility of States for Internationally Wrongful Acts: Rep. on the Work of its Fifty-Third Session, U.N. Doc. A/56/10, art. 31, ¶¶ 1–2 (2001).

<sup>99</sup> *Factory at Chorzow*, 1928 P.C.I.J. (ser. A), at 47.

<sup>100</sup> *Id.*

<sup>101</sup> Grossman, *supra* note 2, at 87.

<sup>102</sup> *Id.* at 87, 91.

parties and the public in the large sense to observe its functioning and its decision-making process. That transparency can be illustrated through holding public hearings, publishing the identities of judges and parties in the concerned cases, and incorporating the decision's reasoning, as well as the dissenting and separate opinions of other judges.<sup>103</sup> The justified authority of an international tribunal can be questioned if that tribunal does not offer any possibility to evaluate its decision-making process and/or the content of its decision.

## II. STATES' COMPLIANCE WITH THE I.C.J.'S DECISIONS AND THE LEGITIMACY OF THE COURT

### A. *Overview of Compliance*

United Nations State Members are entitled to approach the I.C.J. to submit their disputes for adjudication and receive a final and binding decision of the court.<sup>104</sup> Yet, nothing in the U.N. Charter or the Statutes of the I.C.J. guarantees that the disputing parties will fully enforce a ruling issued by the I.C.J. regarding their dispute.<sup>105</sup>

The question of compliance with the I.C.J.'s decisions is regulated by Article 94 of the U.N. Charter, which compels each State party to enforce the I.C.J.'s judgment<sup>106</sup> and defines "noncompliance" as a failure by a State party to perform the obligations incumbent upon it under a judgment delivered by the I.C.J.<sup>107</sup> In other words, there is compliance with the I.C.J. decision when a disputing party either carries out the actions required by the I.C.J. ruling or refrains from carrying out actions that the I.C.J.'s ruling prohibits.<sup>108</sup> Compliance implies the "acceptance of the judgment as final, and reasonable performance in good faith" of that legally binding obligation.<sup>109</sup> Complying in good faith with the I.C.J.

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<sup>103</sup> *Id.* at 86, 94.

<sup>104</sup> See U.N. Charter, art. 92 and 93(1).

<sup>105</sup> *ICJ STATS – Enforcement of ICJ Rulings*, AMANDALA (Jan. 30, 2009), <http://amandala.com.bz/news/icj-stats-enforcement-of-icj-rulings/>.

<sup>106</sup> U.N. Charter, Ch. XIV, art. 94, ¶ 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.").

<sup>107</sup> *Id.* ¶ 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 give effect to the judgment.").

<sup>108</sup> Alexandra V. Huneeus, *Compliance with International Court Judgments and Decisions*, in *THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION* 6 (2013).

<sup>109</sup> Colter Paulson, *Compliance with Final Judgments of the International Court of Justice Since 1987*, 98 AM. J. INT'L L. 434, 435 (2004); see also Beth A. Simmons, *Compliance with International Agreements*, 1 ANN. REV. POL. SCI. 75, 79 (1998); ABRAM CHAYES & ANTONIA HANDLER, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 17–22 (1995).

decision requires the disputing party to give effect to the ruling without referring to any superficial implementation of that ruling or otherwise circumventing it.<sup>110</sup>

Compliance with the I.C.J.'s decision can be catalogued into two categories: the first type of compliance relates to compliance with the I.C.J.'s orders compelling a concrete action from a disputing party, and the second type refers to compliance with the I.C.J.'s remedial orders granting relief prior to a substantive ruling.<sup>111</sup> Of course, each disputing State party is free to choose its own method of implementation of the I.C.J.'s judgment,<sup>112</sup> yet any method of implementation should not obligate the other party of the dispute who may contest it.<sup>113</sup> This could, in turn, lead to another dispute between the concerned parties.<sup>114</sup> Eric Posner's paper on the decline of the I.C.J. revealed that only twenty-nine percent of all cases adjudicated by the I.C.J. from 1986 to 2004, were enforced by the parties involved.<sup>115</sup> But how does one assess the level of the disputing party's compliance with the I.C.J.'s decisions?

### *B. Calculation of the State's Compliance with I.C.J.'s Decisions*

Assessing the state's compliance with the I.C.J.'s decision would require one to analyze: (1) the task(s) that the ruling compelled the disputing parties to execute, and (2) the behavior of the disputing parties in executing the I.C.J.'s ruling. Regarding the behavior of the disputing parties, one may observe if the disputing party has: (a) completely not executed, (b) completely executed, or (c) partially executed the I.C.J.'s decision. Partial execution can be subdivided into three sub-groups: initiated, minimal, and intermediate executions.

#### *1. Tasks Required by the Decision*

As mentioned in the introduction, in its 2005 judgment in *DRC v. Uganda*, the I.C.J. ruled that Uganda violated human rights in the DRC by acts of killing and torture committed by its army against the Congolese populations.<sup>116</sup> Therefore, the I.C.J. compelled Uganda to perform three specific tasks: (1) to

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<sup>110</sup> *Id.*

<sup>111</sup> Huneus, *supra* note 102 at 6.

<sup>112</sup> SCHULTE, *supra* note 21, at 30.

<sup>113</sup> *Id.* at 29.

<sup>114</sup> *Id.*

<sup>115</sup> Eric Posner, *The Decline of the International Court of Justice* 11 (Univ. Chi. John M. Olin Program in L. & Econ., Working Paper No. 233, 2004), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=629341](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=629341).

<sup>116</sup> See *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2005 I.C.J. Rep. 116, ¶ 221 (Dec. 19).

immediately cease military activities,<sup>117</sup> (2) to pay financial reparations to the DRC on behalf of the victims of human rights violations, and (3) to support the peace process in the DRC and the African Great Lakes region.<sup>118</sup>

## 2. *Behavior of the Disputing Parties*

The coding methodology to assess the behavior of the disputing parties in enforcing each task, which is ordered by the I.C.J.'s ruling, ranges from **0** to **10 points**. This means that a score of:

- **0 point** signifies a Non-Execution ( $E_0$ ): This represents the *status quo*, and the disputing party has not taken any action or any observable measure to begin the implementation of the task as ordered by the court. For instance, in the context of the immediate cessation of military activities,  $E_0$  would imply that Uganda has not taken any action to stop the fighting, nor have removed its army from the territory of the Congo.
- **2.5 points** means an Initiated Execution ( $E_i$ ): This represents some observable measure of the beginning of the execution of the task, meaning that the parties have established a date of the execution of the task or are having formal or informal discussions on the execution of the concerned task.
- **5 points** signifies Minimal Execution ( $E_m$ ): This represents the situation where the parties have made some efforts towards the execution of the task, but these efforts are not enough for the concerned task to be completed by the end of the established deadline given the current pace of the process. For instance, in the context of the immediate cessation of military activities,  $E_m$  would imply that Uganda has ended the combat but that at least seventy-five percent of its fighting soldiers are still present in the territory of the Congo.
- **7.5 points** implies an Intermediate Execution ( $E_I$ ): This represents the situation where the parties have made some efforts towards the execution of the task, and there is a likelihood that the task can be completed by the end of the established deadline if the current pace continues. For instance, in the context of the immediate cessation of military activities, an  $E_I$  would indicate that Uganda has ended the combat, but between twenty-five percent and seventy-five percent of its fighting soldiers have left the territory of the Congo.
- **10 points** implies a Complete Execution ( $E_c$ ): This represents the

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<sup>117</sup> *Id.* ¶ 23.

<sup>118</sup> *Id.* ¶ 221

situation where the Uganda army has not only stopped fighting, but has also removed all its soldiers and their weaponry from the territory of the Congo.

In short, there are five levels of compliance with the I.C.J.'s decision, namely:  $E_0$  (0 points),  $E_i$  (2.5 points),  $E_m$  (5 points),  $E_l$  (7.5 points) and  $E_c$  (10 points).

### 3. Overall Assessment of Uganda's Compliance with the I.C.J.'s Decision

To calculate Uganda's overall compliance with the I.C.J. decision, one can compare the Achieved Execution Score (AES) obtained by Uganda to the Expected Possible Score (EPS) that Uganda could obtain if it enforced the court's ruling. In other words, the EPS is the total expected points if all tasks in the court's ruling are fully implemented.

In light of the 2005 I.C.J. decision in *DRC v. Uganda*, the EPS is thirty points (including ten points for the complete cessation of Uganda's military activities,<sup>119</sup> ten points for the full payment of financial reparations to the DRC, and ten points for the support of the peace process in the DRC and the African Great Lakes region<sup>120</sup>).

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<sup>119</sup> *Id.* ¶ 23.

<sup>120</sup> *Id.* ¶ 221.

**Table 1: Evaluation of Uganda's Compliance with the I.C.J.'s Decision**

Tasks to Be Performed (as by the I.C.J. Ruling)	Uganda's Behavior as of June 2020					Expected Possible Score (out of 30)
	Complete Execution ( $E_c$ )	Intermediate Execution ( $E_i$ )	Minimal Execution ( $E_m$ )	Initiated Execution ( $E_i$ )	Non-Execution ( $E_0$ )	
Immediate cessation of military activities	10	----	----	---	----	
Payment of financial reparations to the DRC on behalf of the victims of human rights violations	----	----	----	2.5	----	
Support of the peace process in the region		7.5				
Achieved Execution Score						<b>20</b>

Source: Authors' estimation based on information relating to the current status of the implementation of the ruling in the *DRC v. Uganda* case

Table 1 represents the evaluation of Uganda's compliance with I.C.J.'s final decision in *DRC v. Uganda*. The table indicates that Uganda has obtained an overall score of twenty out of thirty (expected possible score) in terms of its enforcement of the I.C.J. ruling in this case. This means that first, Uganda has fully ceased the military activities in the territories of Congo as ordered by the court (earning ten out ten points); second, since the I.C.J. ruling, Uganda has been involved in numerous peace talks and initiatives in the DRC and the African Great Lakes region<sup>121</sup> despite being accused of still supporting rebel

<sup>121</sup> See, e.g., *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2005 I.C.J. Rep. 116, ¶ 257 (Dec. 19). In this case, the DRC requested specific guarantees and assurances that Uganda would not repeat its illegal conduct, and the I.C.J. noted that Uganda had an international obligation not

groups operating in the DRC (earning it 7.5 out of 10 points);<sup>122</sup> and third, Uganda has not yet made financial payments to the DRC victims of human rights abuses.<sup>123</sup> However, Uganda has been discussing with the DRC government on the amount of financial reparation to be paid.<sup>124</sup> Because of the initiation of discussion on the execution of that task, Uganda earns 2.5 points out of 10. In other words, fifteen years after the I.C.J. decision in December 2005, Uganda has only enforced about sixty-seven percent of the court's final ruling, which amounts to partial compliance.

One may argue that it was foreseeable that Uganda would not fully comply with the final decisions of the I.C.J. as the country had repeatedly failed to enforce numerous orders of the court during the jurisdictional stage of the procedure. This led Judge Oda, who was one of the judges in *DRC v. Uganda*, to warn that “the repeated disregard of the judgments or orders of the Court by the parties will inevitably impair the dignity of the Court and raise doubt as to the judicial role to be played by the Court in the international community.”<sup>125</sup>

Of course, Uganda is not the sole litigating State who either partially complies or does not comply at all with the I.C.J.'s decisions. As mentioned above, only twenty-nine percent of all decisions issued by the I.C.J. 1986 to 2004 were fully enforced by the parties involved.<sup>126</sup> At the regional level, there is a similar observation as the rate of compliance with the binding decisions of regional judicial bodies is equally low. For instance, research conducted by Hawkins and Jacoby on States' compliance with human rights bodies' decisions revealed that the Inter-American Court of Human Rights' judgments has a full compliance rate of six percent, an eighty-three percent partial compliance rate, and an eleven percent non-compliance rate.<sup>127</sup> Concerning the compliance with the European Court of Human Rights' (ECHR) decisions, the study disclosed that: only

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to repeat any wrongful acts based on the Tripartite Agreement on Regional Security in the Great Lakes Region that it had signed. *Id.*

<sup>122</sup> See Final Rep. of the Group of Experts on the Democratic Republic of Congo (2014), transmitted by Letter dated 12 December 2013 addressed to the Chairman of the Security Council Comm. Established Pursuant to Resolution 1533 (2004) Concerning the Democratic Republic of Congo, ¶ 13, U.N. Doc. S/2014/42 (Jan. 23, 2014).

<sup>123</sup> See I.C.J., Press Release, No. 2019/48, *supra* note 12.

<sup>124</sup> *Id.*

<sup>125</sup> Armed Activities on the Territory of the Congo (Congo v. Uganda), Provisional Measures, 39 ILM 131, 132 (2000) (Declaration of Oda J); see Aloysius P. Llamzon, *Jurisdiction and Compliance in Recent Decisions of the International Court of Justice*, 18 EURO. J. INT'L L., 815, 819 (2008).

<sup>126</sup> Posner, *supra* note 115, at 11.

<sup>127</sup> Darren Hawkins & Wade Jacoby, *Partial Compliance: A Comparison of the European and Inter-American Courts of Human Rights*, 6 J. INT'L L. & INT'L REL. 25, 56 (2010); see also Liwanga, *supra* note 21, at 133–34.

fourteen percent of the ECHR's verdicts on the right not to be tortured are enforced by the concerned States; thirty-two percent of decisions on protection of rights in detention are executed; forty percent of decisions against discrimination are executed; and sixty percent of decisions on freedom of expression are executed.<sup>128</sup> Likewise, the rate of compliance with the decisions of the African Commission on Human and People's Rights is unsatisfactory, as only fourteen percent of "[S]tate parties comply fully and in timely fashion with the recommendations of the African Commission" on Human and Peoples' Rights.<sup>129</sup>

From Judge Oda's aforementioned "warning statement" in *DRC v. Uganda*, two fundamental questions are posed: why do States not comply with the decisions of the I.C.J. despite formally recognizing its competence? And can such non-compliance with the I.C.J.'s decisions be interpreted as rejection of the I.C.J.'s legitimacy?<sup>130</sup>

*B. Does a State's Non-compliance Imply Rejection of an International Tribunal's Legitimacy?*

There is no empirical research establishing that States parties failing to comply with the I.C.J.'s decisions do so because they principally reject the legitimacy of the I.C.J. In fact, States' non-compliance or partial compliance with international tribunals' decisions (including the I.C.J.) is linked to numerous variables, including:

- *The lack of precision within the court's ruling:* Despite its recognition of the right of the DRC to compensation in *DRC v. Uganda*, the I.C.J. did not adjudicate on the amount of reparation nor did it recommend the elements to be taken into account while assessing the amount of compensation.<sup>131</sup> The I.C.J. decided to leave the question of the payment of reparation to the two parties to negotiate for resolving it<sup>132</sup> while reserving to itself the right to intervene in future proceedings if the parties were unable to settle

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<sup>128</sup> Liwanga, *supra* note 21, at 133–34.

<sup>129</sup> See Frans Viljoen & Lirette Louw, *State Compliance with the Recommendations of the African Commission on Human and Peoples' Rights: 1994–2004*, 101 AM. J. INT'L L. 1, 5 (2007); see also Deborah Forst, *The Execution of Judgments of the European Court: Limits and Ways Ahead*, 7 VIENNA J. INT'L CONST. L. 1, 1 (2013); Liwanga, *supra* note 21, at 133–34.

<sup>130</sup> See *Armed Activities on the Territory of the Congo (Congo v. Uganda)*, Provisional Measures, 39 ILM 131, 132 (2000) (Declaration of Judge Oda).

<sup>131</sup> *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2005 I.C.J. Rep. 116, ¶ 17 (Dec. 19).

<sup>132</sup> *Id.*

reparations between them.<sup>133</sup> Some may argue that the fact that the I.C.J.'s failure to precise in advance the reasonable timeframe (within which the negotiations between the DRC and Uganda should be conducted) might have contributed to Uganda's noncompliance with the payment of reparation fifteen years after the Court's final decision. Yet, some others can also counterargue that it was appropriate justice for the I.C.J. to give the parties the possibility to negotiate and consult experts for evaluating the exact extent of the damages and determining the appropriate amount of the reparation. This argument sounds valid. However, it should be noted that the clear stipulation of the timeframe could have avoided the risk of lengthy negotiations, which can delay the possibility for countless human rights victims to receive their financial remedy in a timely manner, as seems to be the case today.<sup>134</sup> As a rectification of its 2005 oversight, the I.C.J. appointed in 2020 independent experts to provide their opinion on the DRC's damage claims<sup>135</sup> under Article 67(1) of the I.C.J.'s Rules of the Court.<sup>136</sup>

- *The politicization of the post-adjudicative phase, coupled with the lack of sanctions against defaulting States:* Article 94(2) of the U.N. Charter provides: "If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the International Court of Justice, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures . . . to give effect to the judgment."<sup>137</sup> The enforcement of the I.C.J. decisions is solely attributed to nonjudicial institutions rather than judicial institutions; "This wording implies that the Security Council has a discretionary power to either enforce or not enforce compliance with the I.C.J.'s decisions no

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<sup>133</sup> *Id.* at 260.

<sup>134</sup> Judge Caňado Trindade, who filed a separate opinion on the I.C.J.'s 2020 decision to obtain an expert opinion, underscored "the need to proceed promptly to the determination of reparations for the grave breaches of the International Law of Human Rights and International Humanitarian Law. The delays by the ICJ so far are unacceptable to me." *See* I.C.J., Separate Opinion of Judge Caňado Trindade, Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), <https://www.icj-cij.org/public/files/case-related/116/116-20200908-ORD-01-01-EN.pdf>.

<sup>135</sup> *See* Press Release, I.C.J. Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), I.C.J. Press Release 2020/30 (Oct. 16, 2020).

<sup>136</sup> Art. 67(1): "If the Court considers it necessary to arrange for an enquiry or an expert opinion, it shall, after hearing the parties, issue an order to this effect, defining the subject of the enquiry or expert opinion, stating the number and mode of appointment of the persons to hold the enquiry or of the experts, and laying down the procedure to be followed. Where appropriate, the Court shall require persons appointed to carry out an enquiry, or to give an expert opinion, to make a solemn declaration." *see* I.C.J. Rules of Court, art 67(1), 14 Apr. 1978.

<sup>137</sup> U.N. Charter, Ch. XIV, art. 94, ¶ 2.

matter whether the request of compliance was formally made by a State party favored by the decision.”<sup>138</sup> Additionally, this “means that the enforcement of the I.C.J.’s decisions is not ‘automatic;’ instead, it is subject to ‘political negotiation’ between State political leaders sitting at the Security Council.”<sup>139</sup>

- *The issue of State sovereignty, coupled with the nonexistence of a judicial enforcement mechanism at domestic levels:* The low rate of enforcement of international judgments may be partially due to the lack of involvement and/or competence of the domestic courts in the post-jurisdictional stage of international proceedings. This is because numerous domestic courts either exclude or are reluctant to enforce the international tribunals’ judgments based on the idea of reaffirming the “judicial sovereignty/autonomy” of the national courts vis-à-vis the supranational courts, which are perceived as trying to “impose” their decisions on local tribunals.<sup>140</sup> For instance, in *Medellin v. Texas*, a case concerning Jose Medellin, a Mexican national, who challenged his conviction and sentencing to death for participating in the gang rape and murder of two teenage girls in Houston by arguing the state of Texas violated his rights under the 1963 U.N. Vienna Convention on Consular Relations that the United States ratified.<sup>141</sup> In this case, the U.S. Supreme Court was approached to adjudicate the question as to whether the U.S. Constitution requires domestic courts to honor the treaty

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<sup>138</sup> Liwanga, *supra* note 21, at 137.

<sup>139</sup> *Id.* at 135–38. In terms of enforcement, the role of the I.C.J. is reduced to that of a “simple spectator” dependent on political negotiation. Political negotiation at the Security Council level also raises the issue of voting procedures.

According to Article 27 of the U.N. Charter, all decisions of the Security Council must be made by an affirmative vote of nine of its fifteen members, which include the concurring votes of the five permanent members (China, France, Russia, United Kingdom, and the United States) who have the right to veto. This voting procedure creates the risk that, for political rather than legal reasons, the Security Council would not be able to reach a decision enforcing compliance with an ICJ’s judgment condemning one of its permanent members.

*Id.*; *see, e.g.*, *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14 (Jun. 27); S.C. Res 18428 (Oct. 28, 1986). In this case, Nicaragua approached the Security Council to get enforcement of the I.C.J.’s judgment rendered in its favor, after the United States failed to comply. *Id.* The United States, a permanent member of the Security Council, argued that the I.C.J. lacked the jurisdiction or competence to adjudicate and render decision on the matter. *Id.* The United States used its veto power, and no decision on enforcing compliance with the I.C.J.’s judgment was reached by the Security Council. *Id.* *See also* Tanzi, *supra* note 21, at 542; Saunders, *supra* note 21, at 109; SCHUILTE, *supra* note 21, at 39; Oppong & Niro, *supra* note 21, at 346.

<sup>140</sup> Liwanga, *supra* note 21, at 146.

<sup>141</sup> *Medellin v. Tex.*, 552 U.S. 491, 498 (2008).

obligation of the United States by enforcing a decision of the I.C.J.<sup>142</sup> In its ruling, the U.S. Supreme Court held that an I.C.J. judgment is not directly enforceable as domestic law in the state court.<sup>143</sup> The U.S. Supreme Court also emphasized that an I.C.J. judgment “creates an international law obligation on the part of the United States, but it is not automatically binding domestic law because none of the relevant treaty sources [] creates binding federal law in the absence of implementing legislation, and no such legislation has been enacted.”<sup>144</sup> Of course, seeking enforcement of international tribunal decisions before the municipal courts can be an avenue to increase the rate of States’ compliance with the international judgments. This is because the domestic courts might not only be an “efficient mechanism for the enforcement of I.C.J. decisions,” but also for the implementation of international law in general.<sup>145</sup> The use of domestic courts to enforce decisions of international courts would also “enhance individual rights by depoliticizing the post-adjudicative phase of international litigation.”<sup>146</sup>

However, it should be noted that even if each of these variables for non-compliance does not have a direct link to the rejection of the I.C.J.’s legitimacy, cumulatively they actually expose the problem of the perceived illegitimacy of the I.C.J. By refusing to voluntarily comply with the I.C.J.’s decisions, the litigating State parties effectively contest the justified authority of the Court. In the context of the *DRC v. Uganda* case, the lack of total enforcement of the I.C.J.’s judgment by Uganda also raises the problem of the “illegitimacy” of the I.C.J. from the perspective of victims of human rights violations in the DRC. Human rights victims, who are deprived of justice and reparations because of

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<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 522–23.

<sup>144</sup> *Id.* Another question concerning the enforceability of international judgments by domestic courts is whether individuals (or any non-state actors) with interests in the implementation of decisions from international human rights judicial bodies can approach the domestic courts of defaulting States for the enforcement of judgments delivered in their favor. In *Société Commerciale de Belgique (Socobel) v. Greek State*, a private party for whom the Belgian government had exercised diplomatic protection, sought to enforce before a Belgian domestic court a judgment that had been rendered in its favor by the Permanent Court of International Justice. The Belgian Court refused to enforce that international decision, by ruling that “a party which, by definition, was not admitted to the bar of an international court should be able to rely on a decision in a case to which it was not a party.” RICHARD FRIMPONG OPPONG, *LEGAL ASPECTS OF ECONOMIC INTEGRATION IN AFRICA* 263 (2011) (ebook); see *Société Commerciale de Belgique (Belg. v. Greece)*, Judgment, 1939 P.C.I.J. (ser. A/B) No. 78 (June 15, 1939).

<sup>145</sup> Liwanga, *supra* note 21, at 140–42; SCHULTE, *supra* note 21, at 77; see also Richard F. Oppong, *Enforcing Judgments of the SADC Tribunal in the Domestic Courts of Member States*, in *MONITORING REGIONAL INTEGRATION IN SOUTHERN AFRICA YEARBOOK* 121 (Anton Bösl et al. eds., 2010).

<sup>146</sup> Liwanga, *supra* note 21, at 140–41.

Uganda's noncompliance, can question the usefulness of bringing their complaints before the international or regional judicial bodies whose decisions are not likely to be enforced by a State violator of human rights. Furthermore, when a State refuses to comply despite having the ability to do so, that may also indicate that it does not fully respect the authority of the I.C.J.

#### CONCLUSION

The purpose of this Article was to explore the concept of the legitimacy of international tribunals and examine the factors contributing to the perception of the I.C.J.'s legitimacy. The I.C.J. cannot claim full legitimacy if any of the three components of legitimacy is missing: legal, moral, and sociological legitimacy. The legal legitimacy of the I.C.J. emanates from the U.N. Charter establishing it. The I.C.J. is morally legitimate when its decisions are morally justified, and it is sociologically legitimate when its decisions are accepted by the affected communities and enforced by the concerned parties. Regarding the enforcement of the I.C.J.'s decisions, this Article highlighted the frequent refusal of litigating parties to voluntarily comply with international decisions. Such noncompliance from the concerned parties may imply a contestation of the justified or legitimate authority of the I.C.J.