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Al-Qahtani, Mutlaq Majed (2003) *Enforcement of international judicial decisions of the International Court of Justice in public international law*. PhD thesis.

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**ENFORCEMENT OF INTERNATIONAL  
JUDICIAL DECISIONS OF THE  
INTERNATIONAL COURT OF JUSTICE  
IN PUBLIC INTERNATIONAL LAW**

**A Thesis Submitted for the Degree of Doctor of  
Philosophy to the Faculty of Law and Financial  
Studies, University of Glasgow**



**By**

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**September, 2003  
Glasgow, Scotland,  
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**Dedicated to**

*You!*

## ABSTRACT

Enforcement of international judicial decisions of the International Court of Justice has suffered serious negligence in public international law. Thus, the first significance of this thesis lies in dearth of the authoritative legal literature on this topic. Bearing in mind the unprecedented increase interest in international dispute settlement which can be explained by the phenomenon of proliferation of international judicial bodies and in the qualitative and quantitative nature of contentious disputes brought before the ICJ, non-compliance with the judicial decisions of the Court is definitely to increase. This study has explored the problem of non-compliance with and enforcement of the judicial decisions of the ICJ; a problem that now exists beyond any doubt as Chapter 1 of this study exposes. However, enforcement cannot be directly made without some initial and critical scrutiny into the legal foundations of the bindingness and enforceability of these judicial decisions normally the rules of *pacta sunt servanda* and of *res judicata*, to which Chapters 2 and 3 are devoted. Similarly, the problem of non-compliance with and enforcement of judicial decisions should not usefully be considered in the abstract. Thus, Chapter 4 elucidates the legal nature and the scope of judicial decisions that are subject to enforcement.

Article 94 (2) of the UN. Charter provides no exclusive authority for the Security Council to be the ultimate and sole enforcer of the judicial decisions of the ICJ decisions nor is there a straightforward and independent enforcement means of international obligations especially those derived from international judicial decisions. Hence, this study explores and involves various players and invests various means to establish a network of enforcement mechanisms available to all States regardless of their position in the international community. In so doing, the rest of the thesis is devoted to judicial enforcement and institutional enforcement respectively. Chapter 5 examines judicial enforcement through the ICJ itself, while Chapter 6 examines the role of domestic courts of States in this process. Injured State could also seek institutional enforcement. Chapter 7 examines the role of the United Nations, while Chapters 8 and 9 deal with the role of regional organisations and specialised agencies in this process respectively. Notwithstanding the indispensability of judicial and institutional enforcement, they are not always successful or predictable or independently adequate. They may fail to be effective or incapable of inducing a defaulting State to comply with its international legal obligations under the judgment of the ICJ. So, proposals have been advanced to mitigate or to contain this problem. These proposals, however, have suffered from a lack of support in law and practice, and thus other alternative recommendations and suggestions are provided in Chapter 10, which presents also the final conclusions of this study.

## ACKNOWLEDGEMENT

First and foremost, I wish to express my sincere appreciation and gratitude to my supervisor, Dr. Iain Scobbie, whom I first met in the Peace Palace, at the Hague, the home of the International Court of Justice. His contribution to the substance and presentation of this work is remarkable. His patience and kindness have never ever been failing, and to whom I will remain very much indebted to the rest of my time. I am also grateful to the Government of the State of Qatar who generously sponsored my postgraduate studies in the United States of America and in the United Kingdom. I am also appreciative to His Excellency, Hassan bin Abdullah Al-Ghanim, Minister of Justice of the State of Qatar, Dr. Najeeb Mohammed Al-Nuami, former Minister of Justice, Mr. Sultan bin Abdullah Al-Swadi, Under-Secretary of State, Ministry of Justice, Dr. Ahmed Al-Gaatri, Deputy Secretary of the Asian-African Legal Consultative Organization and Ibrahim Al-Hitmi, Director of Legal Opinions and Contracts, Ministry of Justice, and Mr. Faisal Mohamed Al-Yousif for their support and encouragement. I am also thankful to Professor Lori Damrosch of University of Columbia, Professor James Crawford of University of Cambridge, and Professor Christoph Schreuer of University of Vienna for their valuable comments and help. I am also grateful to Professor Thomas Franck of New York University for his generous permission to use New York Law School Library on the Fall of 2000. Special thanks go to Ms. Rosemary Noona, Legal Librarian, Dag Hammarskjold Library, United Nations, New York, for her indispensable assistance. Special thanks also go to the legal librarians in the United Nations Library at Geneva, Glasgow University Library, Edinburgh University Library, Dundee University Library, National Library (Edinburgh), Cambridge University Library, and the British Library. Last but not least, I am profoundly appreciative to my beloved mother, my wife and daughters who have borne the brunt of my travails and endured the inevitable pressures we have been through. The support of these individuals and other remains the indispensable foundation of this humble work without which this study could not have been brought to a successful conclusion. Needless to state that the views presented in this thesis are mine alone and do not necessarily represent in any way the views of the Government of the State of Qatar. I also hardly need to state that I am entirely responsible for any errors and inaccuracies that may still persist in this thesis.

## LIST OF ABBREVIATIONS

<i>ABAJ</i>	American Bar Association Journal
<i>AdV</i>	Archiv des Völkerrechts
<i>Afri.J.Int'l &amp; Comp.L</i>	African Journal of International & Comparative Law
Arbitr. Int.	Arbitration International
<i>AJ</i>	Arbitration Journal
<i>AJIL</i>	American Journal of International Law
<i>All E.R.</i>	All England Law Reports
<i>Am. Rev. Int'l Arb.</i>	American Review of International Arbitration
<i>Am. U. Int'l L. Rev.</i>	American University International Law Review
<i>AöR</i>	Archiv des öffentlichen Rechts
<i>ASIL</i>	American Society of International Law
<i>AU</i>	African Union
<i>Austr. JIL</i>	Austrian Journal of International Law
<i>AVR</i>	Archiv des öffentlichen Rechts
<i>Brooklyn. J. Int'l L</i>	Brooklyn Journal of International Law
<i>BYBIL</i>	British Yearbook of International Law
<i>Calif.W Int'l.L.J</i>	California Western International Law Journal
<i>Cath. U. L. Rev.</i>	Catholic University Law Review
<i>Chi. J. Int'l L.</i>	Chicago Journal of International Law
<i>Colum. J. Transnat'l L.</i>	Columbia Journal of Transnational Law
<i>Colum. L. Rev.</i>	Columbia Law Review
<i>Conn. J. Int'l L.</i>	Connecticut Journal of International Law
<i>Cornell Int'l L.J.</i>	Cornell International Law Journal
<i>Cornell L. Rev.</i>	Cornell Law Review
<i>Crim. L. Forum.</i>	Criminal Law Forum
<i>CTS</i>	Consolidated Treaty Series
<i>Denv. J. Intl'l L. &amp; Pol'y.</i>	Denver Journal of International Law and Policy
<i>Duke J. Comp. &amp; Int'l L.</i>	Duke Journal of Comparative & International Law
<i>E.L.Rev.</i>	European Law Review
<i>EC</i>	European Community
<i>ECHR</i>	European Court of Human Rights
<i>ECJ</i>	Court of Justice of the European Communities

<i>ECR</i>	European Court Reports
<i>EJIL</i>	European Journal of International Law
<i>EPIL</i>	Encyclopaedia of Public International Law
<i>F.A</i>	Foreign Affairs Magazine
<i>FAO</i>	Food and Agricultural Organisation
<i>Geo.L.J</i>	Georgetown Law Journal
<i>GYBIL</i>	German Yearbook of International Law
<i>Harv. Int'l L.J.</i>	Harvard International Law Journal
<i>Hastings Int'l &amp; Comp.L.Rev</i>	Hastings International & Comparative Law Review
<i>HLJ</i>	Howard Law Journal
<i>Inter-Am. CHR.</i>	Inter-American Court of Human Rights
<i>IAEA</i>	International Atomic Energy Agency
<i>ICAO</i>	International Civil Aviation Organisation
<i>ICC</i>	International Criminal Court
<i>ICJ</i>	International Court of Justice
<i>ICJ. Rep.</i>	International Court of Justice Report
<i>ICJYB</i>	International Court of Justice Year Book
<i>ICLQ</i>	International and Comparative Law Quarterly
<i>ICSID</i>	International Center for Settlement of Investment of Disputes
<i>ICTR</i>	International Criminal Tribunal for Rwanda
<i>ICTY</i>	International Criminal Tribunal for the Former Yugoslavia
<i>ILM</i>	International Legal Materials
<i>ILO</i>	International Labour Organization
<i>ILR</i>	International Law Reports
<i>IMF</i>	International Monetary Fund
<i>Ind. J. Global Legal Stud.</i>	Indiana Journal of Global Legal Studies
<i>Indian J. Int. Law</i>	Indian Journal of International Law
<i>Internat. Lawyer</i>	International Lawyer
<i>Int'l &amp; Comp. L. Rev.</i>	International and Comparative Law Review
<i>IO</i>	International Organization

<i>Int'l Rev. L. &amp; Econ.</i>	International Review of Law and Economics
<i>ITLOS</i>	International Tribunal for the Law of the Sea
<i>ITU</i>	International Telecommunication Union
<i>J. Int'l Legal Stud.</i>	Journal of International Legal Studies
<i>J. World Tread</i>	Journal of World Tread
<i>J.Int.Arb.</i>	Journal of International Arbitration
<i>JLS</i>	Journal of Legal Studies
<i>LAS</i>	League of Arab States
<i>Leiden J Int'l. L</i>	Leiden Journal of International Law
<i>LNOJ</i>	League of Nations Official Journal
<i>LNTS</i>	League of Nations Treaty Series
<i>Md. J. Int'l L. &amp; Trade.</i>	Maryland Journal of International Law and Trade
<i>Mich. J. Int'l L.</i>	Michigan Journal of International Law
<i>MLR</i>	Modern Law Review
<i>N.Y.U. J. Int'l L. &amp; Pol.</i>	New York University Journal of International Law and Politics
<i>NILR</i>	Netherlands International Law Review
<i>NYBIL</i>	Netherlands Yearbook of international law
<i>OAS</i>	Organization of American States
<i>OAU</i>	Organization of African Unity
<i>Ocean Dev. &amp; Int'l L.</i>	Ocean Development and International Law
<i>OIC</i>	Organization of Islamic Conference
<i>OJ</i>	Official Journal of the European Communities
<i>OJLS</i>	Oxford Journal of Legal Studies
<i>Pace Int'l L. Rev.</i>	Pace International Law Review
<i>PCA</i>	Permanent Court of Arbitration
<i>PCIJ</i>	Permanent Court of International Justice
<i>Pol. Yb. Int'l.L</i>	Polish Yearbook of international law
<i>Procès-Verbaux</i>	Permanent Court of International Justice, Advisory Committee of Jurists, Procès-Verbaux of the proceedings of the Committee June 16 <sup>th</sup> - July 24 <sup>th</sup> 1920, (The Hague 1920).
<i>RdC</i>	Recueil des Cours
<i>REDI</i>	Revue Egyptienne de Droit International

SCOR	Security Council Official Records
<i>Stan. J. Int'l L.</i>	Stanford Journal of International Law
Stan. L. Rev	Stanford Law Review
<i>UNCIO</i>	United Nations Conference on International Organisation
<i>UNCLT</i>	United Nations Conference on the Law of Treaties
<i>UNESCO</i>	United Nations Educational, Scientific, and Cultural Organization
<i>UNRIAA</i>	United Nations Reports of International Arbitral Awards
<i>UNTS</i>	United Nations Treaty Series
<i>USC</i>	United States Code
<i>Va. J. Int'l L.</i>	Virginia Journal of International Law
<i>WHO</i>	World Health Organization
<i>Yale J. Int'l L.</i>	Yale Journal of International Law
<i>Yale L.J.</i>	Yale Law Journal
<i>YBILC</i>	Year book of International Law Commission
<i>ZaöRV</i>	Zeitschrift für ausl. Öff. Recht und Völkerrecht

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## CHAPTER ONE:

# GENERAL INTRODUCTION: THE PROBLEM OF COMPLIANCE WITH AND ENFORCEMENT OF THE JUDICIAL DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE

One of the most challenging problems facing the international community and effective settlement of international disputes is the problem of non-compliance with and enforcement of international law in general, and international judicial decisions<sup>1</sup> of international courts and tribunals in particular. Non-compliance with and enforcement of the judicial decisions of the International Court of Justice (ICJ / the Court), which is the focal focus of this thesis, is a problem that can threaten the integrity, authority and viability of the ICJ. It can also undermine the stability of international adjudication and eventually international peace and security.

However, adequate consideration of the problem was not undertaken during the pre-Charter phase or during the San Francisco Conference. In fact, there were more concerns with the problem of the jurisdiction of the ICJ than the enforcement of its decisions.<sup>2</sup> This position might have been largely motivated by the so-called good “record” of compliance with the decisions of the Permanent Court of International Justice (1922-1939), although there was no formal record of good compliance with the decisions of the PCIJ. However, if there was a record of good compliance with the judgments of the PCIJ, it would have to be seen in proportion since regard should be made to the number of cases dealt with by the Court since its inception and the legal nature of the disputes brought before it. The PCIJ dealt with 38 contentious cases most of them involved questions of treaty interpretation and 12 of which were settled

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<sup>1</sup> As a matter of convenience the term “*judicial decision*”, or only “*decision*” will be used to include both orders of provisional measures and judgments of the Court unless it is otherwise provided. See also the ICJ in *LaGrand* case (Germany v. United States), in which the Court treated decisions of the Court under Article 94 (1) of the UN. Charter to include also judgments as well as orders of provisional measures. ICJ. Rep. (2001), para. 108.

<sup>2</sup> See, e.g., Deutsch, E. P., “*Problems of Enforcement of Decrees of International Tribunals*”, 50 *ABAJ* (1964), pp. 1134-1139, at p.1136. Professor Greig attributed this failure to the mainstream consideration that because of its willingness to submit a claim to judicial determination, the disputant is likely to comply with the judgment given, Greig, D.W, *international Law*, 2<sup>nd</sup> ed, (Butterworths, 1976), p. 688. Professor Rosenne, however, suggested that this failure was attributable to the non-regulation of this type of obligation by the Statute of the PCIJ. Rosenne, S., *The Law and Practice of the International Court, 1920-1996*, (hereafter cited as *The Law and Practice*) 3<sup>rd</sup> ed, (Martinus Nijhoff, 1997), p. 211. See also *infra* Chapter 2, Section 2.

out of Court. Nevertheless, besides Greece's non-compliance with the judgment of PCIJ in the *Société Commerciale de Belgique* case,<sup>3</sup> it was reported that there appeared to be some cases in which judgments of the PCIJ were not fully complied with, namely, the *Wimbeldon* case,<sup>4</sup> and *Brazilian Loans* case.<sup>5</sup> In other cases no information was available about the enforcement of the PCIJ's judgments nor was there a general assumption to substantiate that those decisions were fully implemented. Therefore, the so-called good record of compliance with the judgments of the PCIJ is largely illusory.

However, non-compliance with the decisions of the ICJ became a real problem only after the inception of the Charter of the United Nations and the Statute of the ICJ and the operation of the Court itself. To mitigate this undisputed reality, as we shall see, most international law commentators have also relied heavily on the unwarranted dependence on liberal reference to the jurisdiction of the Court,<sup>6</sup> reciprocity, conscience, common interest, moral authority and the prestige of the Court,<sup>7</sup> to suggest that the problem of non-compliance with and enforcement of judicial decisions of the ICJ does not exist or at least is not likely to occur or amount to a serious problem in international law in the light of these factors. It has also been suggested that most of the judgments of the ICJ are self-executory and declaratory<sup>8</sup> in nature and that the relatively small number and unimportant disputes that are brought before the Court,<sup>9</sup> do not trigger any need for enforcement action to be taken to give them effect. Although these assertions can be relevant, they are not thoroughly accurate.

<sup>3</sup> (1939), PCIJ., Ser. A/B, No.78, 160.

<sup>4</sup> (1923), PCIJ., Ser. A.1., No.1, 167. See, e.g., Charney, J. I., "Disputes Implicating the Institutional Credibility of the Court: Problems of Non-Appearance, Non-Participation, and Non-Performance", in Damrosch, L., *International Court of Justice at a Crossroads*, (Transnational Publishers, 1987), pp. 288-318, at p. 293 and fn. 34.

<sup>5</sup> (1929), PCIJ., No.15, Ser. A, No.21. See, e.g., Murty, B. S., "Settlement of Disputes", in Sørensen, M., (ed), *Manual of Public International Law*, (Macmillan, 1968), pp. 674-737, at p. 710.

<sup>6</sup> See e.g., Brierly, J.L., *The Outlook for International Law*, (Oxford, 1944) pp. 120-1; Sloan, F.B., "Enforcement of Arbitral Awards in International Agencies" 3 *A.J* (1948), 134-146 at p.135; Schachter, O., "Enforcement of International Judicial and Arbitral Decisions", 54 *AJIL* (1960), pp. 1-24, at p.5; Jenks, C. W., *The Prospects of International Adjudication*, (Steven & Sons, 1964), p. 666, and Anand, R.P., *Studies in International Adjudication*, (Oceana Publications, 1969), pp.253-255.

<sup>7</sup> See, e.g., Gormeley, W. P., "The Status of Awards of International Tribunals: Possible Avoidance Versus Legal Enforcement", 10 *HLJ* (1964), pp. 33-107.

<sup>8</sup>The terms "self-executory" and "executory" judgments used throughout this study are interchangeably used with the terms declaratory and non-declaratory judgments unless it is provided otherwise. Self-executory and declaratory judgments refer to judgments, which by their nature do not require affirmative enforcement action or measures to give them effect, while executory and non-declaratory judgments refers to judgments which by their nature require an affirmative action for their enforcement.

<sup>9</sup> Schachter, O., *supra* note 6, p. 5.

In fact, 40 per cent of the judgments rendered by the ICJ since its establishment relate to issues of jurisdiction and admissibility,<sup>10</sup> while other cases had been settled before the Court rendered its final judgment.<sup>11</sup> Likewise, compliance with and enforcement of the Court's decisions is sometimes obvious but is generally obscured,<sup>12</sup> very slow or reluctantly complied with.<sup>13</sup> Additionally, the problem of non-compliance with and non-enforcement of judicial decisions of the ICJ could not adequately be perceived, not because the problem did not exist, but because it is sometimes difficult to obtain enforcement of a judicial decision against the recalcitrant party, especially through the Security Council of the United Nations under Article 94 of the UN Charter. Moreover, both parties can be found in violation of the judgment under consideration. This is probably the reason that Article 94 of the Charter has not been invoked very often. Hence, many cases went by without any problem or calling for scrutiny. Therefore, notwithstanding the limited validity and importance of these asserted factors and elements in the post-adjudicative phase of the ICJ, they should not lead us to overlook the acuteness of the problem of compliance with and enforcement of the judicial decisions of the ICJ since it is now becoming more disturbing more than ever anticipated.

In fact, when few commentators viewed the question of compliance with the decisions of the ICJ in the 1960s, 1970s and even in the 1980s, the ICJ was dealing with handful of cases. At that time, its docket never exceeded four contentious cases. However, since the mid 1980s, 1990s, and the 2000s in particular, the ICJ has been busier than ever before in its entire history.<sup>14</sup> Its docket has been extremely full. In August 2003, there were twenty-six contentious cases pending before the Court. Its workload has grown dramatically as a result of the increase in the number of more

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<sup>10</sup> *International Court of Justice: Questions and answers about the principal organ of the United Nations*, (UN Department of Public Information, 2000), p. 56.

<sup>11</sup> See, e.g., *Passage through the Great Belt* (Finland v. Denmark), Order of 10 September 1992, ICJ. Rep. (1992), p. 348; *Certain Phosphate Lands in Nauru* (Nauru v. Australia), Order of 13 September 1993, ICJ. Rep. (1993), 325; and *Vienna Convention on Consular Relations* (Paraguay v. United States), Order of 10 November 1998, ICJ. Rep. (1998), p. 426.

<sup>12</sup> Lutz, R. E., "Perspectives on the World Court, the United States, and International Dispute Resolution in a changing World", 25 *Internat. Lawyer*, (1991), pp. 675-711, at p. 698.

<sup>13</sup> A notable example is the Judgment of the ICJ of 15 Dec 1949 in the *Corfu Channel case* (UK v. Albania), which eventually was complied with in 1992. See Marston, G., (ed), "United Kingdom Materials on International Law 1992", 63 *BYBIL*, (1993), 615-841, at p. 781. See also *ICJ Yearbook 1995-1996*, pp. 256-257.

<sup>14</sup> Hight, K., "The Peace Palace Heats Up: The World Court in Business Again", 85 *AJIL*, (1991), pp. 646-654.

cases as well as their increasingly voluminous nature.<sup>15</sup> These cases came from every continent and touch upon wide range of sensitive issues.<sup>16</sup> There has been also an increased interest in international dispute settlement, which can be explained by the unprecedented proliferation of international judicial bodies. Professor Philippe Sands, for instance, has described this phenomenon as the “fourth phase” in international adjudication which “is characterized by compulsory jurisdiction and binding decision-making powers.”<sup>17</sup> If this is true, as it may be, the risk and the problem of non-compliance with and enforcement of these judicial decisions will very likely increase.

But as a matter of fact, we do not have to reach this phase of compulsory adjudication or wait for it to establish the existence of the problem at hand since it already exists as far as the problem of non-compliance with the judicial decisions of the ICJ is concerned. Nor is it necessary to engage in a vast task, at least from scholarly perspective, to establish what really and exactly happens after a judgment is rendered even in the absence of a formal record of compliance or other reliable data or sources in this regard.<sup>18</sup> In fact, there are well-known cases of non-compliance with the judicial decisions of the ICJ and, unfortunately, this number is increasing and involving even major powers and permanent members of the Security Council of the United Nations.

Apart from the first judgment rendered by the ICJ since its establishment, namely the Judgment of 15 December 1949 in the *Corfu Channel* case,<sup>19</sup> which was complied with by Albania only after more than forty years of defiance in 1992,<sup>20</sup> Iran refused to comply with the Court’s Order of provisional measures of 5 July, 1951 in *Anglo-Iranian Oil Co. Case* (United Kingdom v. Iran).<sup>21</sup> Another example was the Icelandic disregard of the Court’s Orders of provisional measures of 17 August 1972 in *Fisheries Jurisdiction cases* (United Kingdom v. Iceland),<sup>22</sup> and (Germany v.

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<sup>15</sup> See the *Report of the Joint Inspection Unit on the Review of Management and Administration in the Registry of the International Court of Justice*. A/55/834/Add.1, 14 March 2001.

<sup>16</sup> See speech by H.E. Judge Gilbert Guillaume, President of the International Court of Justice, to the General Assembly of the United Nations 29 October 2002.

<sup>17</sup> Sands, P., “Introduction and Acknowledgement”, in Sands, P., Mackenzie, R., and Shany, Y., (eds), *Manual on International Courts and Tribunals*, (Butterworths, 1999), p.xxvi.

<sup>18</sup> In the same vein see, e.g., Sir Robert Jennings’ Presentation, “Contributions of the Court to the Resolution of International Tensions”, in Peck, C., & Lee, R. S., (eds), *Increasing the Effectiveness of International Court of Justice: Proceedings of the ICJ / UNITAR Colloquium to Celebrate the 50<sup>th</sup> Anniversary of the Court*, (Martinus Nijhoff, 1997), pp.76-85, at p. 81.

<sup>19</sup> ICJ. Rep. (1949), p. 244.

<sup>20</sup> *ICJ Yearbook 1995-1996*, pp. 256-257.

<sup>21</sup> ICJ. Rep. (1951), p.89.

<sup>22</sup> ICJ. Rep. (1972), p. 12.

Iceland).<sup>23</sup> Indeed western powers and especially those who are permanent members of the Security Council of the United Nations are no exception when a judgment goes against their political interests. In the *Nuclear Tests* cases, *Australia v. France*,<sup>24</sup> and *New Zealand v. France*,<sup>25</sup> France refused to comply with the Court's Orders of provisional measures of 22 June 1973 in these cases. France even went further to state that it would not execute any judgment that would be rendered. The French justification was that it could not comply with the Court's Orders on the ground that the prohibition of the tests would have compromised its national defence, independence and equal status with other permanent members of the United Nations Security Council.<sup>26</sup> Again Iceland in the *Fisheries Jurisdiction* cases *United Kingdom v. Iceland*,<sup>27</sup> and *Germany v. Iceland*,<sup>28</sup> did not comply with the Court's Judgment on the merits of 25 July 1974 in these cases. Iran also refused to comply with the Court's Order of provisional measures of 15 December 1979 in the *United States Diplomatic and Consular Staff in Tehran*,<sup>29</sup> and the Court's Judgment of 24 May 1980 on the merits of the same case.<sup>30</sup>

However, it was not until the mid 1980s when the post-adjudicative phase of the ICJ turned into a serious stage where the defaulting State was also a major power and at the same time a permanent member of the Security Council. In the *Nicaragua* case (*Nicaragua v. United States*), the United States disregarded blatantly the Court's Order of provisional measures of 10 May 1984.<sup>31</sup> More strikingly, is its defiance of the Court's Judgment of 27 June 1986.<sup>32</sup> The international community viewed this defiance with concern. It was considered as "the sad turn of events in this matter in terms of its unfortunate repercussions on global peace as well as its psychological, legal and political effects on the other members of the United Nations and the world

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<sup>23</sup> ICJ. Rep. (1972), p. 30.

<sup>24</sup> ICJ. Rep. (1973), p. 99.

<sup>25</sup> ICJ. Rep. (1973), p.135.

<sup>26</sup> Guy de Lacharrière, "Comentaries sur la position juridique de la France a l'égard de la locete des ses experiences nucleaires" XIX AFDI (1973), p.235, p.249, cited in Koskenniemi, M., "Commentary: The Post-Adjudicative Phase: Judicial Error and Limits of Law" in Peck, C., & Lee, R., (eds), *Increasing the Effectiveness of International Court of Justice: Proceedings of the ICJ / UNITAR Colloquium to Celebrate the 50<sup>th</sup> Anniversary of the Court*, (Martinus Nijhoff, 1997), pp.347-357, at p. 353.

<sup>27</sup> ICJ. Rep. (1974), p.3.

<sup>28</sup> ICJ. Rep. (1974), p. 175.

<sup>29</sup> ICJ. Rep. (1979), p.7.

<sup>30</sup> ICJ. Rep. (1980), p. 3.

<sup>31</sup> ICJ. Rep. (1984), p.169.

<sup>32</sup> ICJ. Rep. (1986), p. 14.

community generally”.<sup>33</sup> Since then, and in particular in the 1990s and 2000s, non-compliance with the ICJ’s orders and judgments has become disturbing, greater than was ever anticipated when the ICJ was established in 1945. For instance, in 1993, Yugoslavia did not comply with the Court’s Orders of provisional measures of 8 April of 1993 in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)),<sup>34</sup> which was also reiterated in an Order of provisional measures on 13 September 1993.<sup>35</sup> In 1996, Cameroon and Nigeria did not comply with the Court’s Order of provisional measures of 15 March 1996 in the *Land and Maritime Boundary* (Cameroon v. Nigeria).<sup>36</sup> The problem of non-implementation of the Court’s judicial decisions has even been brought before the Court itself for an additional ruling. On 3 September 1998, Slovakia filed in the Registry of the Court a request for an additional Judgment in the *Gabcikovo-Nagymaros Project* (Hungary/Slovakia).<sup>37</sup> In its request, Slovakia indicated that such an additional Judgment was necessary, “because of the unwillingness of Hungary to implement the Judgment delivered by the Court in that case on 25 September 1997”.<sup>38</sup> The request is still pending before the Court and its fate is thus unknown. Again, the United States failed to comply with Orders of provisional measures indicated by the Court on 9 April 1998 in the *Breard* case (Paraguay v. United States of America),<sup>39</sup> and of 3 March 1999 in *LaGrand* case (Germany v. United States).<sup>40</sup> Similarly, Uganda did not comply with the Court’s Order of provisional measures of 1 July 2000 in the *Armed Activities on the Territory of the Congo* (Congo v. Uganda).<sup>41</sup> More recently, Nigeria formally and publicly decided not to obey the Court’s Judgment of 10 October 2002 in the *Land and Maritime Boundary* (Cameroon v. Nigeria: Equatorial Guinea intervening).<sup>42</sup>

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<sup>33</sup> Ajibola, B., “Compliance with Judgments of the International Court of Justice”, in Bulterman, M.K., and Kuijer, M., (eds), *Compliance with Judgments of International Courts*, (Martinus Nijhoff Publishers, 1996), pp. 9-38, at p.23.

<sup>34</sup> ICJ. Rep. (1993), p. 3.

<sup>35</sup> ICJ. Rep. (1993), p. 325.

<sup>36</sup> ICJ. Rep. (1996), p.13.

<sup>37</sup> ICJ. Rep. (1997), p.7.

<sup>38</sup> ICJ. Press Release 98/28.

<sup>39</sup> ICJ. Rep. (1998), p. 248.

<sup>40</sup> ICJ. Rep. (1999), p. 9.

<sup>41</sup> ICJ. Rep. (2000), p. 111.

<sup>42</sup> ICJ. Rep. (2002). See also, Reuters/Washington Post, Thursday, 24 October 2002, at A30.

Consequently, it can be concluded from this brief survey of *known* cases, which involve various developed and developing States, and from various continents touching upon various issues, that the problem of non-compliance with the Court decisions does exist. It would thus be totally false to suggest that the problem of non-compliance with and enforcement of the judicial decisions of the Court does not exist or that it is not a problem in public international law.<sup>43</sup> Therefore, Professor Jonathan Charney rightly acknowledged in 1987 “the record of resistance to the Court’s authority is troubling”.<sup>44</sup> Similarly, Professors John Collier and Vaughan Lowe have admitted in 1999 that, “it is true that the record of compliance with International Court judgments is far from perfect...and the record of compliance with interim measures is even worse”.<sup>45</sup> The same concern even came quite recently from one of the judges of the ICJ itself. In his declaration appended to Order of 1 July 2000 in *Armed Activities on the Territory of the Congo (Congo v. Uganda)*, Judge Oda rightly noted 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>46</sup>

However, establishing the existence of the problem of non-compliance with the decisions of the ICJ in State practice and in the literature is not a solution to the problem *per se*, although it is an important element in assessing the problem and providing solutions accordingly. Thus, serious and critical examination of the problem of enforcement of the judicial decisions of the ICJ must be undertaken, a task which is extremely difficult from both practical and theoretical perspectives. The complexity of this problem has been in fact correctly acknowledged in the literature. Professors Fitzmaurice (1956), Greig (1976), Tanzi (1995), and Wolfrum (2001) have admitted that the problem of enforcement of ICJ judicial decisions is one of the most difficult problems in the field of public international law and international relations that poses unique problems that touch upon the most delicate areas of both international law and

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<sup>43</sup> In the same vein see, e.g., Anand, R.P, *supra* note 6, p 253; Reisman, M., *Nullity and Revision: The Review and Enforcement of International Judgments and Awards*, (Yale Univ. Press, 1971), p. 640; Magid, P., “The Post-Adjudicative Phase” in Peck, C., & Lee, R. S., (eds), *Increasing the Effectiveness of International Court of Justice: Proceedings of the ICJ / UNITAR Colloquium to Celebrate the 50<sup>th</sup> Anniversary of the Court*, (Martinus Nijhoff, 1997), pp. 324-369, at p. 364.

<sup>44</sup> Charney, J. I., *supra* note 7, p. 302.

<sup>45</sup> Collier, J., & Lowe, V., *The Settlement of Disputes in International Law*, (Oxford Univ. 1999), p. 263.

<sup>46</sup> ICJ. Rep. (2000), Declaration of Judge Oda, p. 132, para.6.(emphasis added).

the law of the United Nations.<sup>47</sup> In comparison with the enforcement system in domestic law, Keohane, Moravcsik and Slaughter likewise stated in 2000 “implementation and compliance in international disputes are problematic to a far greater degree than they are in well-functioning, domestic rule-of-law systems”.<sup>48</sup>

Notwithstanding its problematic and delicate nature and the unique problems it poses, as well as its importance, international scholars and international lawyers have surprisingly neglected to examine adequately the problem of enforcement of international judicial decisions in general and those of the ICJ, in particular. Therefore, Professor Shabtai Rosenne, who is the leading authority in the jurisprudence of the International Court, quite correctly observed in 1957 and again in 1997 that “a striking feature of the literature dealing with the judicial settlement of international disputes is its comparative disinterest in the post-adjudication phase”.<sup>49</sup> Professor Rosenne’s assertion is still valid. As a matter of fact, the author of this study is only aware of two published monographs written in English, which deal at any length with the problem of enforcement of international judicial decisions, namely: Nantwi, E.K., *Enforcement of International Judicial Decision and Arbitral Award in Public International Law*, (1966), and Reisman, W.M., *Nullity and Revision: The Review and Enforcement of International Judgments and Awards*, (1971). However, it should be mentioned that these monographs had been written before the significant increase in the resistance to the authority of the ICJ, which began in the early 1970s.<sup>50</sup> Besides these two monographs there have been some published chapters and articles here and there, which have not in fact been designed to expose the problem at hand in its totality.<sup>51</sup>

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<sup>47</sup> Fitzmaurice, G., “*The Foundations of the Authority of International Law and the Problem of Enforcement*”, 19 *MLR* (1956), pp. 1- 13, at p. 1; Greig, D.W., *supra* note 2, p. 688; Tanzi, A., “*Problems of Enforcement of Decisions of the International Court of Justice and the Law of the United Nations*” 6 *EJIL* (1995), pp. 539-572, at p. 539; Wolfrum, R., “*Implementation of Decisions of International Courts*”, in Nordquist, M.H., & Moore, J.N., *Current Marine Environmental Issues and International Tribunals for the Law of the Sea*, (Kluwer International Law, 2001), pp.103-112, at p. 103.

<sup>48</sup> Keohane, O., Moravcsik, A., & Slaughter, A-M., “*Legalized Dispute Resolution: Interstate and Transnational*”, 54 *I.O.*, (2000), pp. 457-488, at p. 466.

<sup>49</sup> Rosenne, S., *The International Court of Justice: an essay in political and legal theory*, (A.W. Sijthoff, 1957), p.73, and was reproduced in his, *The Law and Practice*, p. 202. In the same vein, see Wolfrum, R., *supra* note 47, p. 103.

<sup>50</sup> Charney, J. I., *supra* note 4, p. 295.

<sup>51</sup> Schachter, O, *supra* note 6, pp. 1-24, Deutsch, E. P., *supra* note 2, pp. 1134-1139; Jenks, C. W., *supra* note 6, pp.663-726, Gormeley, W. P., *supra* note 7, pp. 33-107; O’Connell, M. E., “*The Prospects for Enforcing Monetary Judgments of the International Court of Justice: A Study of Nicaragua’s Judgment Against the United States*”, 30 *Va. J. Int’l L* (1990), pp. 891-940, Tanzi, A., *supra* note 47, pp.539-572, Guillaume, G., “*Enforcement of Decisions of the International Court of Justice*” in Jasentuliyana. M (ed), *Perspectives on International Law*, (Kluwer, 1995), pp. 275-288; Ajibola, B., *supra* note 33, pp. 9-38.

Surely, improving compliance with international judicial decisions of international courts and tribunals, as Judge Schwebel put it, “remains a fundamental challenge to the international community”.<sup>52</sup> On the other hand, the ongoing process of the evolution of international law in various directions, including international adjudication especially before the ICJ may not probably continue until, *inter alia*, compliance with and enforcement of its judicial decisions is improved.<sup>53</sup> Similarly, effective enforcement depends largely on how effective the law is and thus the substance of the law cannot adequately be improved without improving its enforcement mechanism. In the light of this, if those who respect the role of law, international law students and lawyers as well as institutions shall step back every time there is a possibility of fortifying the international legal system there will be no chance for its development and improvement.<sup>54</sup> Bearing in mind these objectives, this study tries to explore the problem of enforcement of the judicial decisions of the ICJ through the examination of the legal foundations of compliance with and enforcement of its decisions including its orders of provisional measures and the employment of various enforcement means and options at the disposal of every member of the international community, which can also be applied, *mutatis mutandis*, to judicial decisions and arbitral awards of international judicial bodies and international arbitration.

Understanding adequately the legal basis behind the obligation of compliance with and enforcement of the decisions of the ICJ is a fundamental factor towards the more comprehensive and expeditious implementation of the Court’s decisions. Thus, enforcement cannot be directly made without some initial and critical scrutiny into the principles of *pacta sunt servanda* and *res judicata* as the legal foundation of the bindingness and enforceability of judicial decisions under Articles 94 (1) of the UN Charter and under Articles 59 and 60 of the Statute of the ICJ to which Chapters 2 and 3 are devoted. It is not the only aim of these Chapters to increase awareness of these principles and their applications as well as the obligation of compliance and its requirements, but also to clarify some complicated problems they pose in the post-adjudicative phase, e.g., the exceptions to the principles of *pacta sunt servanda* and

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<sup>52</sup> Schwebel, S.M., “Commentary” in Bulterman, M.K., and Kuijer, M., (eds), *Compliance with Judgments of International Courts*, (Martinus Nijhoff Publishers, 1996), pp. 39-42, at p. 39.

<sup>53</sup> Jenks, C.W., *supra* note 6, p. 666.

<sup>54</sup> Djajic, S., “The Effect of International Court of Justice Decisions on Municipal Courts in the United States: *Breard v. Greene*”, 23 *Hastings Int’l & Comp. L. Rev.* (1999), pp. 27-108, at p. 46.

the finality of *res judicata* as well as the status of would-be intervening States and the application of *res judicata* to them accordingly.

Again, the problem of non-compliance with and enforcement of the judicial decisions of the Court cannot usefully be considered in the abstract. Adequate understanding of the legal nature and the scope of the judicial decisions of the Court that are subject to enforcement is a precondition to their effective implementation. This is significant because there is a fundamental difference between compliance with and enforcement of incidental decisions and compliance with and enforcement of final decisions.<sup>55</sup> On the other hand, these judicial decisions themselves differ in their nature and content and whether they are binding under Article 59 and 60 of the Statute and Article 94 (1) of the Charter, and hence, enforceable under Article 94 (2) of the UN Charter is quite controversial. So, Chapter 4 is devoted to tackling these complex issues.

The principal enforcement machinery of judicial decisions of the ICJ is conferred on the Security Council under Article 94 (2) of the U.N Charter, which provides, "If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give to the judgment". Nevertheless, Article 94 of the UN Charter itself provides no exclusive authority for the Security Council to be the ultimate and sole enforcer of the ICJ decisions.<sup>56</sup> Nor is there a straightforward and independent enforcement means of international obligations especially those derived from international judicial decisions. Furthermore, the ICJ may render various types of judgments and each one may require a particular form of enforcement mechanism that is not necessarily available or effective within other means or mechanisms of enforcement. Thus, this study will try to explore and involve various players and invest various enforcement means to establish a network of enforcement mechanisms available to all States whether they are major or small States, developed or developing States, strong or weak States. In so doing, the rest of this thesis, Chapters 5– 9, will

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<sup>55</sup> Rosenne, S., *The Law and Practice*, *supra* note 49, p. 214.

<sup>56</sup> Schachter, O., *supra* note 6, p. 24; Waart, P. J.I.M., "Non-Appearance Does Not Make Sense: Comments", in Boled, A & Dijk, A., *Forty Years International Court of Justice: Jurisdiction, Equity and Equality*, (Europa Instituut Utrecht, 1988), pp. 71-84, at p. 80; Mosler, H., & Oellers-Frahm, K.H., "Article 94", in Simma, B., *et al.*, (ed), *The Charter of the United Nations: A Commentary*, (Oxford Univ. Press, 2002), pp. 1174-1179, at p. 1178 and Rosenne, S., *The Law and the Practice*, *supra* note 2, p. 258.

deal with judicial and institutional enforcement respectively. Chapter 5 examines judicial enforcement through the ICJ itself, a role which has been underestimated in the existing literature.<sup>57</sup> While Chapter 6 examines the role of domestic courts of States in this process, a role that has also been said to be relatively new. An injured State can also seek institutional enforcement. Chapter 7 examines the role of the United Nations and its organs, namely the Security Council and the General Assembly, and the Secretary-General in whose name the Secretariat acts, while Chapters 8 and 9 deal with the role of international regional organisations and specialised agencies in this process respectively. It should be noted, however, that institutional enforcement mechanisms dealt with in this thesis are more concerned with the applicable laws and procedures available to the injured States in general within these institutions as opposed to their political implications or their actual unitization by the States since it goes beyond the scope and the nature of this thesis.

Notwithstanding the indispensability of judicial and institutional enforcement in this regard, they are not always successful or predictable. They may fail to be effective or incapable of inducing the defaulting State to comply with its international legal obligations under the judgment of the Court. So as a result of this probability, the role of self-help and countermeasures remains arguably an ultimate means of enforcement in international law. However, due to constrain in time and limits, the author has been unable to consider these means of enforcement in this study. In any event, self-help and countermeasures do not in themselves provide an adequate remedy for the injured State(s) and they do not sufficiently fulfil the deficiency of enforcement of public international law in general. Instead, they merely provide an interim measure or provisional remedy in which this study has no interest. In addition, self-help and countermeasures have been said to be designed for powerful States.<sup>58</sup> Therefore, their availability and practicality is limited. So, in order to enhance these legitimate enforcement mechanisms and to mitigate or to contain the problem of enforcement of international judicial decisions of the ICJ, some proposals have been heard. These proposals have, however, suffered from a lack of support. Thus, other alternatives will be provided in Chapter 10, which also presents the final conclusions.

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<sup>57</sup> See, e.g., Al-Qahtani, M., "The Role of the International Court of Justice in the Enforcement of its Judicial Decisions", 15 *Leiden J Int'l. L* (2002), pp. 781-804.

<sup>58</sup> Tomuschat, C., "Are Counter-measures Subject to Prior Recourse to Dispute Settlement Procedures?" 5, *EJIL*, (1994), pp. 77-88, at p. 78.

## CHAPTER TWO:

# THE OBLIGATION OF COMPLIANCE WITH AND ENFORCEMENT OF JUDICIAL DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE UNDER ARTICLE 94 (1) OF THE UN. CHARTER: THE PRINCIPLES OF *PACTA SUNT SERVANDA* AND GOOD FAITH

### 1. Introduction

One of the basic rules safeguarding the performance of existing international legal obligations is the principle of *pacta sunt servanda*,<sup>1</sup> a principle which is integral part of the principle of good faith (*bona fides*).<sup>2</sup> The principle is enshrined in Article 26, headed *pacta sunt servanda*, of the Vienna Convention on the Law of Treaties of 6 May 1969. It provides, "Every Treaty in force is binding upon the parties to it and must be performed by them in good faith".<sup>3</sup> These legal principles, which seem to have existed from the very beginning of human society,<sup>4</sup> are rooted in the natural and logical necessity constraining nations to live up their promises.<sup>5</sup> However, the first universal affirmation of this proposition in modern history was in Article 2 (2) of the UN. Charter.<sup>6</sup> It reads, "All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter". This obligation is equally applicable to rights and duties,<sup>7</sup> and to the creation and performance of international obligations,<sup>8</sup>

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<sup>1</sup> *Nuclear Tests cases* (Australia v. France), ICJ. Rep. (1974), pp. 253 and 268 paras 43 and 46; (New Zealand v. France), ICJ. Rep. (1974), 473 and 457, paras. 46 and 49; *Land and Maritime Boundary between Cameroon and Nigeria*, (Cameroon v. Nigeria), Judgment of 11 June 1998, ICJ. Rep. (1998), para 38; O'Conner, J. F., *Good Faith in International Law*, (Dartmouth, 1991), p. 108.

<sup>2</sup> Fitzmaurice, M., "The Practical Working of the Law of Treaties", in Evans, M., *International Law*, (Oxford Univ. Press, 2003), pp. 173-201, at p. 183.

<sup>3</sup> See also O'Conner, J. F., *supra* note 1, p. 8.

<sup>4</sup> *Ibid.*, p. 108.

<sup>5</sup> Suganami, H., "Why Ought Treaties To Be Kept?" 33 *YBWA*, (1979), pp. 243-256, at p.243.

<sup>6</sup> Rosenne, S., *Developments in the Law of Treaties 1945-1986*, (Cambridge Univ. Press, 1986), p.150.

<sup>7</sup> Lukashuk, I., "The Principle of *Pacta Sunt Servanda* and the Nature of Obligation under International Law", 83 *AJIL* (1985), pp. 513-518, at p. 514-515.

<sup>8</sup> *Border and Transborder Armed Actions* (Nicaragua v. Honduras) Jurisdiction and Admissibility, Judgment, ICJ.Rep. (1988), p. 105, para. 94 cited also in *Land and Maritime Boundary between Cameroon and Nigeria*, (Cameroon v. Nigeria), ICJ. Rep. (1998), para 39.

whatever their source may be.<sup>9</sup> One of these fundamental obligations is the obligation to carry out the judgments of the ICJ under Article 94 (1) of the UN Charter, which stipulates that “Each Member of the United Nations undertakes to comply with the decisions of the International Court of Justice in any case to which it is a party”. The phraseology of this provision contains a treaty stipulation underpinning the obligations already placed upon the States concerned by a more general application of the principle of *pacta sunt servanda*.<sup>10</sup>

In any event, there is no absolute principle of *pacta sunt servanda*. States generally invoke certain doctrines against the operation of *pacta sunt servanda*, to preclude wrongfulness, namely the doctrines of necessity, *force majeure* and *rebus sic stantibus*.<sup>11</sup> To what extent are these doctrines validly applicable to the post-adjudicative phase of the ICJ? An affirmative answer or an allegation of the self-evidence of the principle of *pacta sunt servanda* in the post-adjudicative phase without some examination of these doctrines is inadequate. These inseparable and related questions call also for an examination of the obligation of compliance with and application of the principles of *pacta sunt servanda* and good faith under Article 94 (1) of the U.N Charter and the Security Council Resolution 9 (1946), and through the State practice in the formation of Special Agreements and in the jurisprudence of the Court before we discuss these exceptions to the rule.

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<sup>9</sup> *Nuclear Tests (New Zealand v. France)*, ICJ. Rep. (1974), p. 473, para. 49.

<sup>10</sup> Couvreur, P., “*The Effectiveness of the International Court of Justice in the Peaceful Settlement of International Disputes*”, in Muller, A.S., Raic and Thuranszky, J.M., (eds), *The International Court of Justice: its future after fifty years*, (Martinus Nijhoff, 1997), pp. 83-116, at p. 108.

<sup>11</sup> Lachs, M., “*Pacta sunt servanda*”, in Bernhardt, R., (ed) *7 EPIL*, (North-Holland Elsevier Science Publisher, 1984), pp. 364-371, at p. 369.

## 2. Article 94 (1) of the UN. Charter

Chapter VII of the Dumbarton Oaks Proposals for the Establishment of a General International Organisation which was proposed by the representatives of the United States, the United Kingdom, the Soviet Union and China at Washington D.C, in 1944,<sup>12</sup> was headed “An International Court of Justice” and with a recommendation that the statute of the new court should be either the Statute of the Permanent Court of International Justice itself or a new statute using the Statute of the PCIJ as a basis.<sup>13</sup> Those States later invited other States to send their legal experts to meet in Washington D.C, to discuss Chapter VII on the “International Court of Justice” from 9 to 20 April 1945. This became known as the Washington Committee of Jurists. Basically, the legal experts used the Statute of the PCIJ as a springboard for their discussions. Apparently, however, the relative rarity of non-compliance with the judgments of the PCIJ and the absence of its Statute from any stipulation to enforce its judgments, accounted for the initial failure of the original Dumbarton Oaks Proposal to provide any stipulation on the member States of a duty to comply with the judgments of the proposed international court of justice.<sup>14</sup> Nevertheless, few governments noticed that deficiency in their comments on the Dumbarton Oaks Proposal. In the course of the tenth meeting held on April 16, the Cuban Delegation cautioned against the lack of any provision in the Proposal about “the problem of enforcement of judgments” of the Court, and hence, advised the committee to call the attention of the San Francisco Conference to it.<sup>15</sup> Subsequently, Wang Chung-hui of China proposed “empowering the Security Council to take necessary steps for enforcing the judgments of the Court if any State should not comply with them”.<sup>16</sup> But Gerald Fitzmaurice of the United Kingdom and the Committee’s chairman, Green Hackworth of the United States suggested that the proper place of such a provision should be in the Charter and not in the Statute of the Court.<sup>17</sup> The views of

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<sup>12</sup> See generally, Marston, G., “The London Committee and the Statute of the International Court of Justice”, in Lowe, V., & Fitzmaurice, M., (eds), *Fifty Years of the International Court of Justice: Essays in honour of Sir Robert Jennings*, (Cambridge Univ. Press, 1996), pp. 40-60.

<sup>13</sup> 3 *UNCIO*, pp.11-12.

<sup>14</sup> Deutsch, E. P., “Problems of Enforcement of Decrees of International Tribunals”, 50 *ABAJ* (1964), pp. 1134-1139, at p. 1136. See, however, Greig, D.W, *international Law*, 2<sup>nd</sup> ed, (Butterworths, 1976), p. 688; Rosenne, S., *The Law and Practice of the International Court, 1920-1996*, (hereafter cited as *The Law and Practice*) 3<sup>rd</sup> ed, (Martinus Nijhoff, 1997), p. 211.

<sup>15</sup> 3 *UNCIO*, p. 209.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*, pp. 209-210.

Fitzmaurice and Hackworth prevailed; thus, no provision of this nature was included in the "Draft Statute" of the Court.

Again at the San Francisco Conference, Cuba submitted an amendment to the "Draft Statute" entitled a "Draft Proposal for the addition of certain precepts to the Statute of the Permanent Court of International Justice". In a section headed "Execution of Judgments", paragraph 1 provided that "the Members of the Organization and the States which subscribe to this Statute bind themselves to comply faithfully and in good faith with the judgment or decision rendered by the Court".<sup>18</sup> However, the proposed amendment was not adopted by the Committee. Instead it adopted an Australian proposal adding a new paragraph to the draft Charter. It stipulated an unequivocal undertaking of all members of the United Nations to comply with any decision of the Court to which they were parties.<sup>19</sup> The proposal with some grammatical and minor drafting modifications became Article 94, paragraph (1) of the Charter of the United Nations, which reads, "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".

It seems that there was no need to qualify the duty to comply with the judicial decisions of the Court in good faith in Article 94 (1) as it was the case in Article 13 (4) of the Covenant since this qualification would have been superfluous and repetitive of the principle already stipulated in Article 2 (2) of the Charter, which requires all member States to undertake to "fulfil in good faith the obligations assumed by them in accordance with the present Charter". Consequently, although, the elimination of the phrase "carry out in full good faith any award or decision" rendered by the Court is, according to Professor Rosenne, "regrettable",<sup>20</sup> it has nevertheless no substantial effect as far as the principles of *pacta sunt servanda* and good faith are concerned. Thus, Professor Lauterpacht correctly argued that Article 94 of the Charter "is merely declaratory".<sup>21</sup>

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<sup>18</sup> *Ibid.*, p. 493 and pp. 503- 504.

<sup>19</sup> 14 *UNCIO*, (1945), p. 553.

<sup>20</sup> Rosenne, S., *The Law and Practice*, *supra* note 14, p. 214.

<sup>21</sup> Lauterpacht, H., (ed), *Oppenheim's International Law*, Vol. II. 7<sup>th</sup> ed., (Longmans, 1952), p. 75. See also Sloan, F. B., "Enforcement of Arbitral Awards in International Agencies", 3 *AJ*, (1948), pp.134-146, at p. 142.

### 3. Security Council Resolution 9 (1946)

Unlike the Covenant of League of Nations, all States members of the United Nations are automatically parties to the Statute of the Court.<sup>22</sup> One of the major innovations of the Dumbarton Oaks Proposals, subsequently adopted at the San Francisco Conference, was Article 93 (1) of the UN Charter. It provides that “All members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice”, without any declaration or other legal instrument being required. According to Kelsen, however, this provision is superfluous since this is the necessary consequence of the provision of Article 92 that the Statute “forms an integral part of the present Charter.”<sup>23</sup> The provision might be superfluous in a strict sense, but nevertheless, the fact that the Statute “forms an integral part of the present Charter” establishes a crucial idea that the principles of *pacta sunt servanda* and good faith can also be derived from the Statute and applies equally to the rights and obligations under the Statute of the Court. The Statute of the Court, thus, obtains the same “primacy over other international agreements accorded to the Charter itself in Article 103”,<sup>24</sup> whereas the provision that all members of the United Nations “are *ipso facto* parties to the Statute” emphasizes the “intimate relationship of the Court to the United Nations system”.<sup>25</sup>

However, under Article 35 (2) of the Statute of the Court, a State which is not a member of the UN nor is a party to the Statute of the Court may be authorized by the Security Council under certain conditions to have access to the Court, but only if such a State accepts primarily the obligation incumbent upon the members of the Charter and the parties of the Statute stipulated under Article 94 of the Charter. This proposition was adopted by the Security Council in the light of recommendations of its Committee of Experts in its Resolution 9 of 15 October 1946 after it had been

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<sup>22</sup> Membership in the League of Nations was not combined with the participation in the Statute of the PCIJ, which was an Annex to the Protocol of Signature of the Statute of the Permanent Court of International Justice of 16 December 1920. 6 *LNTS*, p. 384. For historical evaluation see, Gross, L., “*Compulsory Jurisdiction under the Optional Clause: History and Practice*” in Damrosch, L. F, (ed), *The International Court of Justice at a Crossroads*, (Transnational Publishers, 1987) pp. 19-57 and Rosenne, S., *The Law and Practice*, *supra* note 14, p. 728.

<sup>23</sup> Kelsen, H., *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems*, (Stevens & Sons Limited, 1950), p. 81.

<sup>24</sup> Goodrich, L. M., Hambro, E., & Simons, A. P., *Charter of the United Nations: Commentary and Documents*, (Columbia Univ. Press, 1969), p.552.

<sup>25</sup> *Ibid.*, p. 553.

approached by the President of the Court on 1 May 1946. Under paragraph 1 of that resolution, the Court is open to States, which:

shall previously have deposited with Registrar of the Court a declaration by which it accepts the jurisdiction of the Court, in accordance with the Charter of the United Nations and with the terms and subject to the conditions of the Statute and Rules of the Court, undertakes to *comply in good faith* with the decision or decisions of the Court and to accept all the obligations of a Member of the United Nations under Article 94 of the Charter.<sup>26</sup>

As far as the principle of good faith is concerned, one would assume, as Professor Rosenne has done, that the insertion of undertaking to “comply in good faith” with decisions of the Court is a “further obligation” imposed upon non-member States or non-parties to the Statute of the Court which may constitute a sort of violation of Article 35 (2) of the Statute itself, which forbids the Security Council from adopting any condition which may place such parties in a position of inequality before the Court.<sup>27</sup> But in fact, the omission of the phrase “good faith”, appeared in Article 13 (4) of the Covenant, from Article 94 of the Charter should, as we have demonstrated,<sup>28</sup> neither be considered as a “regrettable omission” nor should be considered as a “further obligation” imposed by the Security Council since its implication in the international post-adjudicative phase is unequivocally inevitable.<sup>29</sup> However, the insertion of the qualification of the duty incumbent upon non-members of the UN. Charter to comply with the decisions of the ICJ “in good faith” is crucial since Article 2 (2) of the Charter requires only member States of the Charter, as opposed to non-member States, to fulfil their obligations in good faith. It was thus necessary to demand non-member of the UN to comply with the judgment of the Court in good faith.

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<sup>26</sup> SCOR. 1<sup>st</sup> Yr. Ser. No. 2, 76<sup>th</sup> Mtg, 15 October 1946, pp. 466-468; reprinted in *YBICJ* (1996-97), pp. 70-71. This Resolution was basically largely derived from the League Council Resolution of 17 May 1922 relating to the same matter. 3 *LNOJ*, 526, p. 609 (1922).

<sup>27</sup> Rosenne, S., *The Law and Practice*, *supra* note 14, pp. 212-3.

<sup>28</sup> See *supra* Section 2.

<sup>29</sup> *YBILC*, (1958-II), (A/3859), p. 81 para 14.

Shortly after the adoption of that resolution, Switzerland, as a non-member of the UN, requested on 26 October 1946 information on the conditions to be met under Article 93 (2) of the Charter, in order to be a party to the Statute of the Court. Subsequently, the Security Council referred the matter to its Committee of Experts which recommended three requirements which were adopted by the Security Council and subsequently by the General Assembly of the United Nations in its resolution 91 (I) of 11 December 1946. These conditions were: depositing a signed and ratified instrument containing: (i) general acceptance of the provisions of the Statute; (ii) acceptance of all the obligations of a member of the United Nations under Article 94 of the Charter and (iii) an undertaking to contribute to the expenses of the Court.<sup>30</sup> The Committee's position was explained as seeking to "define the obligations of Article 94 in the same way as for UN Members, non-members which become parties to the Statute, and non-parties which have not been given access to the Court".<sup>31</sup> It indicated that it was the desire of the Committee to state that "The obligation imposed by Article 94 upon a Member of the United Nations should, in the opinion of the Committee, apply equally to non-members of the United Nations which become parties to the Statute and to non-parties which are allowed access to the Court."

These stipulations, however, were not sufficient *per se* to induce non-member State party to a case before the Court to comply with its obligations. It was thus necessary to require such a party to acquiesce to the complementary obligations under Article 94 of the Charter. The Committee correctly observed that the obligations of a Member of the United Nations under Article 94 "include the complementary obligations arising under Articles 25 and 103 of the Charter in so far as the provisions of those Articles may relate to the provisions of Article 94".<sup>32</sup> Consequently, the adherence to the Statute by non-members of the United Nations is essentially conditional on a fundamental undertaking to comply with the decisions of the ICJ.<sup>33</sup> Hence, once a State is admitted it becomes on an equal footing with other States

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<sup>30</sup> See the discussion at the 78<sup>th</sup> and 80<sup>th</sup> meetings of the Security Council on 30 October and 5 November 1946 and Resolution 11 of 15 November 1946. 1 SCOR 2<sup>nd</sup> Ser, No. 20, p. 485-87 and 22, pp. 501-2.

<sup>31</sup> Bailey, D. S., *The Procedure of the UN Security Council*, (Clarendon Press, 1988), p. 281.

<sup>32</sup> 1 SCOR 2<sup>nd</sup> Ser, Suppl. 8, annex 13, p. 160, para. 40.

<sup>33</sup> Kelsen, H., *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems*, (Stevens & Sons, 1950), p. 103.

members of the UN with respect to the Court in general,<sup>34</sup> and under an obligation to comply with the judgments of the Court under Article 94, including the necessary relevant obligations of Articles 25 and 103 of the UN. Charter in particular.

#### 4. State Practice in the Formation of Special Agreements

Notwithstanding the constant retention of the undertaking to comply with and enforcement the decision to be given in the *compromise* and the submission to judicial decisions or arbitral awards in good faith, some commentators suggest that there is no need to stipulate clearly in the *compromise* or special agreement conferring jurisdiction upon the Court to decide particular contentious disputes that the decision to be given is binding and final and must be complied with in good faith accordingly. Generally, commentators had recourse to the application of the principle in the private law of contract and its inherent implication in municipal judicial proceedings. They have argued that such stipulations are unnecessary since the obligation of compliance with these decisions is implicit in the submission itself and inherent in judicial decisions. For instance, Jackson Ralston stated that, “it is not believed that provisions of this kind add anything to the sanctity of an arbitral finding – of course, the effect of such finding being inherent in and of itself without additional words in the protocol”.<sup>35</sup> Similarly, Kenneth Carlston wrote that by entering into the agreement and participating in the proceedings before the tribunal, the parties implicitly engaged to execute the award when rendered without the need for a special clause in the *compromise* that the award was to be binding upon the parties.<sup>36</sup> Relying on both the principles of *pacta sunt servanda* and *res judicata*, John Liddle Simpson and Hazel Fox, in 1959, argued that judicial decisions duly pronounced by a competent tribunal are “binding upon the parties [this] is inherent in the judicial process, whether international or municipal”.<sup>37</sup> More recently, Professor Shabtai Rosenne acknowledges that:

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<sup>34</sup> See Article 4 (3) of the Statute; and the General Assembly Res. 244 (III) of 8 October 1948. Parties to the Statute may also participate in the procedure of making amendments to the Statute of the Court. See also Article 69 of the Statute of the Court; and the GA Res. 2529 (XXIV) of 4 Dec. 1969.

<sup>35</sup> Ralston, J., *International Arbitration from Athens to Locarno*, (Stanford Univ. Press, 1929), p.52.

<sup>36</sup> Carlson, K. S., *The Process of International Arbitration*, (Columbia Univ. Press, 1946), p.211.

<sup>37</sup> Simpson, J.L., & Fox, H., *International Arbitration: Law and Practice*, (Stevens & Sons, 1959), p. 228; Greig, D.W., *supra* note 14, p. 678.

side by side with the undertaking to comply with the decision of the Court contained in Article 94 (1) of the Charter, there exists a general principle of international law according to which, when States agree to submit their dispute to an international tribunal, they assume the obligation to comply with the decision of that tribunal.<sup>38</sup>

Notwithstanding the validity of these propositions and the inherent application of the principles of good faith and *pacta sunt servanda* in Article 94 (1) of the Charter and in the post-adjudicative phase of the ICJ, a number of States have continued to provide unequivocally in their special agreements for the bindingness and enforceability of the judicial decisions of the Court and give an explicit undertaking to comply with them in good faith. They expressly stipulate a provision that the judgment of the Court “shall be binding on the Parties”, and indicate varied but similar stipulations such as that the judgment of the ICJ or the award of arbitral tribunal “shall be executed in good faith by the Parties”, “carried out by the Parties in good faith”, “acted upon the Parties in good faith”, “undertake to execute in good faith the award of the Court”, “to conform in good faith the judgment or award”, and some provide a combination of these stipulations such as “the Parties shall execute these binding awards in good faith”, “the Parties undertake to observe and carry out in full good faith the arbitral award” or “to execute the award given by the Court as rapidly as possible”.<sup>39</sup>

Although under Article 27 of the Statute of the Court “a judgment given by any of the Chambers provided for in Articles 26 and 29 shall be considered as rendered by the Court”, and thus is covered by Article 94 (2) of the Charter,<sup>40</sup> States have also chosen to reiterate the obligation of compliance with the judgments of the Chambers of the Court or the Court itself in their special agreements. For instance, Canada and the United States agreed in Article 7 of their special agreement in *Delimitation of the Maritime Boundary in the Gulf of Maine Area* case, that “the

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<sup>38</sup> Rosenne, S., *The World Court What It is and how It Works*, 5<sup>th</sup> ed, (Martinus Nijhoff, 1995), p.11; Schachter, O., “*The Enforcement of International Judicial and Arbitral Decisions*”, 50 *AJIL*, (1960), pp.1-24, at p.2.

<sup>39</sup> United Nations, *Systematic Survey of Treaties for the Pacific Settlement of International Disputes, 1928-1948*, (United Nations Publication, Sales No. 49. V.3) (1948).

<sup>40</sup> Thirlway, H., “*The Law and Procedure of the International Court of Justice 1960-1989*”, 72 *BYBIL* (2001), pp. 37-181, at p. 55. See generally, Rosenne, S., “*Article 27 of the Statute of the International Court of Justice*” 32 *Va. J. Int'l L.*(1991), pp.213-231.

decision of the Chamber shall be final and binding and binding upon them".<sup>41</sup> Similarly, in *Land, Island and Maritime Frontier Dispute*, El Salvador and Honduras even went further to stipulate in Article 6 of the Special Agreement of 24 May 1986, that they "will execute the Judgment of the Chamber in its entirety and in complete good faith".<sup>42</sup>

In the *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, the parties in their Doha Minutes of 1990 agreed that they would refer their disputes to the Court for "a final ruling binding upon [them], who shall have to execute its terms".<sup>43</sup> Similarly, in the *Gabcikovo-Nagymaros Project* case (Hungary/Slovakia), the Parties agreed in Article 5 of the Special Agreement signed at Brussels on 7 April 1993 that they "shall accept the Judgment of the Court as final and binding upon them and shall execute it in its entirety and in good faith" and "Immediately after the transmission of the Judgment the Parties shall enter into negotiations on the modalities for its execution". They also agreed "If they are unable to reach agreement within six months, either Party may request the Court to render an additional Judgment to determine the modalities for executing its Judgment."<sup>44</sup> Likewise, in the *Kasikili / Sedudu Island* case, Botswana and Namibia, which jointly notified the Court of a special agreement concluded between them on 15 February 1996, concerning the boundary around *Kasikili / Sedudu Island* and the legal status of the island. In Article 9 of their Special Agreement, the Parties agreed to "1. The Judgment of the Court on the dispute described in Article I shall be final and binding on the Parties. 2. As soon as possible after the delivery of the Court's judgment, the Parties shall take steps necessary to carry out the judgment".<sup>45</sup> More strikingly, in the *Frontier Dispute*, Benin and Niger committed themselves in Article 7 of the Special Agreement of 15 June 2001, to "accept as final and binding upon them the judgment of the Chamber rendered pursuant to the present Special Agreement". They in fact,

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<sup>41</sup> ICJ. Rep. (1984), p. 255. In the *Frontier Dispute*, Burkina Faso and Mali agreed in Article 4 (1) of their Special Agreement of 16 September 1983, that they "accept the Judgment of the Chamber given pursuant to the Special Agreement as final and binding upon them". *Frontier Dispute*, (Burkina Faso and Mali), ICJ. Rep. (1986), p. 558, para 2.

<sup>42</sup> ICJ. Rep. (1992), p. 358.

<sup>43</sup> ICJ. Rep. (1994), para 17.

<sup>44</sup> ICJ. Rep. (1997), para. 2.

<sup>45</sup> ICJ. Rep. (1999), para 2. In *Sovereignty over Pulau Litigan and Pulau Sipadan*, Indonesia and Malaysia agreed in Article 5 of the Special Agreement of 31 May 1997 to "accept the Judgment of the Court given pursuant to this Special Agreement as final and binding upon them. *Sovereignty over Pulau Litigan and Pulau Sipadan*, (Indonesia and Malaysia), ICJ. Rep. (2002), para 2.

went further to stipulate a time in which the judgment must be implemented. Article 7, paragraph 2 reads, that “ From the day on which the judgment is rendered, the Parties shall have 18 months in which to commence the works of demarcation of the boundary”. They, moreover, agreed in paragraph 3 that “In case of difficulty in the implementation of the judgment, either Party may seize the Court pursuant to Article 60 of its Statute.”<sup>46</sup>

It seems that States have found the adoption of these conditions imperative for further effectiveness and reassurance of the obligation of compliance with the judicial decisions of the Court under Articles 2 (2) and 94 (1) of the UN. Charter notwithstanding the inherent applicability of these Articles and the operation of the principles of *pacta sunt servanda* and good faith accordingly.

## 5. Obligation of Compliance in the Jurisprudence of the Court

The obligation of compliance with international judicial decisions in general, and those of the ICJ in particular, as well as the faithful application of the principles of *pacta sunt servanda* and good faith have been affirmed in a number of judicial pronouncements.<sup>47</sup> It has also been reiterated more often by members of the Court as a further authority for the indication of the binding force and effect of these decisions as it has been stipulated in the Charter of the United Nations.<sup>48</sup> For instance, in the *Continental Shelf* (Tunisia / Libya) case, Judge Gros put forward three questions to both parties during the oral proceedings in order to explain their government’s position concerning the binding force of the judgment to be given by the Court with regard to: (1) the principles and rules of international law which might be indicated by the Court, (2) the circumstances which characterized the area, regarded by the Court as pertinent, and (3) any equitable principles which the Court might take into account.<sup>49</sup> The Agent of Tunisia responded that the judgment of the Court on all those concerns was to be binding on the parties in accordance with Article 94 (1) of the

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<sup>46</sup> Press Release 2002/13 of 3 May 2002. <<http://www.icj-cij.org>>.

<sup>47</sup> Chailley, P., “*Harvard Research in International Law, Part III, Law of Treaties*”, 29 *AJIL* (1935) (Supplement), p. 977. See also, *Nicaragua* case, ICJ. Rep. (1984), p. 418; and *Land and Maritime Boundary* (Cameroon v. Nigeria), ICJ. Rep. (1998), para 38.

<sup>48</sup> See, *Ad hoc* Judge Guggenheim in *Nottebohm* (Second Phase), ICJ. Rep. (1955), pp. 60-61; the Joint Dissenting Opinion of Gerald Fitzmaurice and Sir Percy Spender in *South West Africa* (preliminary objection) ICJ.Rep.(1962), pp.552-53; Judge Jessup in *South West Africa* (Second Phase),ICJ.Rep. (1966),pp.332-33 and Judge de Castro in the *Western Sahara* Advisory Opinion,ICJ.Rep.(1975), p.138.

<sup>49</sup> *Continental Shelf* (Tunisia / Libya), ICJ. *Pleadings*. Vol. 5, p. 244.

Charter and other relevant provisions of the Statute and Rules of the Court.<sup>50</sup> Libya, in its response, disregarded these provisions and instead relied on the *compromise* concluded by the Parties and by which they referred their differences to the Court. Its position was stated as follows:

Bearing in mind that Libya and Tunisia have agreed in Article 3 of the Special Agreement ... to 'comply with the judgment of the Court and with its explanations and clarification' ... The Judgment to be given by the Court in accordance with the Special Agreement will have binding force with regard to the principles and rules of international law found to be applicable for the delimitation of the area of the continental shelf....<sup>51</sup>

In response to these questions, the Court asserted the relationship and coexistence between Article 94 of the Charter and Articles 59 and 60 of the Statute of the Court and Article 94 (2) of the Rules of the Court of 1978, or in other words, the relationship and coexistence between the principles of *pacta sunt servanda* and *res judicata*. It stated unequivocally that the Court renders "a judgment which will have therefore the effect and the force attributed to it under Article 94 of the Charter of the United Nations and the said provisions of the Statute and the Rules of the Court".<sup>52</sup> In support of this finding the Court also referred to Articles 2 and 3 of the Special Agreement concluded between the parties which "make it clear that the Parties recognize the obligation to comply with the Judgment of the Court".<sup>53</sup> Although Judge Gros appended a Dissenting Opinion, he concurred with the majority on that specific point which appeared to be a response to the absence of reference to the obligation deriving from Article 94 of the Charter and Statute of the Court. He observed that Libya had not referred to the obligation to respect and carry out the Court's judgment, as laid down in the Charter and the Statute, "because that would have undermined its contention that the Special Agreement provides for referral, after

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<sup>50</sup> *Ibid.*, p. 349.

<sup>51</sup> *Ibid.*, p. 501.

<sup>52</sup> ICJ. Rep. (1982), 40, para 29.

<sup>53</sup> *Ibid.*, para. 30.

the Court has delivered judgment, to an unfettered agreement between the Parties which could thus adjust the terms of the Judgment".<sup>54</sup> He then concluded:

It has been argued that two States can always agree by treaty their legal situation and that the judgment could not make an exception to this rule. This is a somewhat simplistic view of things when what the situation calls for is a decision whether the Court, being thus warned of the intentions of a party, can keep silent in the face of such an opinion. The question was whether, before the judgment which the Parties asked the Court to deliver and which must be binding on them, the Special Agreement could validly have reserved for them the right wholly or partly to modify the Court's jurisdictional act. That is an unacceptable notion for the Court, which does not give States opinions but declares to them, with binding force, what it holds to be the law applicable to the dispute submitted to it. And, having been warned that one of the States felt able to disregard this, while the other State took the opposite position, the Court ought to have asked itself whether it might not thereby be prevented from properly exercising its judicial function.<sup>55</sup>

This approach was also recognized by Judge Evensen, who stated:

I share the view of the Court that clearly the Court's task is to render a binding and final 'judgment in a contentious case in accordance with Articles 59 and 60 of the Statute and Article 94, paragraph 2, of the Rules of Court, a judgment which will have therefore the effect and the force attributed to it under Article 94 of the Charter of the United Nations and the said provisions of the Statute and the Rules of the Court' (Judgment, para 29). Of course the Court has not been asked to render an advisory opinion ... Nor could it agree to give in any other

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<sup>54</sup> *Ibid.*, p. 144, para 2.

<sup>55</sup> *Ibid.*, pp. 145-46, para. 5. In support of his finding, Judge Gros cited also the Court's judgment of 7 June 1932 in the *Free Zones* case which had said, "After mature consideration, the Court maintains its opinion that it would be incompatible with the Statute, and with its position as a Court of Justice, to give a judgment which would be dependent for its validity on the subsequent approval of the Parties". (1932) PCIJ, Ser., A/B, No. 46, p. 161.

way solely to give “guidance” to the Parties to the present dispute which would lack the essential elements of a formal judgment (UN Charter, Art. 96). I share the view that the Court in its Judgment should lay down the practical method for the application of the principles and rules of international law with the degree of precision applied by the Court in the operative part thereof.<sup>56</sup>

The Court also has never been less categorical. In the *Nicaragua* case, the Court was of the view that the principle of good faith plays an important role in this network of engagements. It emphasised “the need in international relations for respect for good faith”.<sup>57</sup> The Court also reiterated a finding of the PCIJ in *Chorzów Factory* case, in which it had stated that it “neither can nor should contemplate the contingencies of the judgment not being complied with”.<sup>58</sup> The Court noted that “Both Parties have undertaken to comply with the decision of the Court, under Article 94 of the Charter”, and “once the Court has found that a State has entered into a commitment concerning its future conduct it is not the Court’s function to contemplate that it will not comply”.<sup>59</sup> This positive approach to the meaning and effect of Article 94 of the Charter was sustained by Judges Nagendra Singh and Ruda in their Separate Opinions. Judge Singh stated that “the binding character of the judgment under the Statute (Art. 59) is made sacrosanct by a provision of the United Nations Charter (Art. 94)”.<sup>60</sup> Similarly, Judge Ruda, although citing Article 94 of the Charter, made no reference to the binding force and effect of the judgment of the Court under any particular ground. He, nevertheless, maintained that:

No reservation made by a State, at any stage of the proceedings, could derogate from this solemn obligation, freely entered into, which is, moreover, the cornerstone of the system, centered upon the Court, for the judicial settlement of international disputes. The United States, like any other party to the Statute, is bound by the decisions taken by the Court and there is no right to be reserved but the right to have them

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<sup>56</sup> ICJ. Rep. (1982), pp. 279-280, para. 2.

<sup>57</sup> ICJ. Rep. (1984), p. 418.

<sup>58</sup> *Chorzów Factory* case, (1927), PCIJ, Ser. A, No.17, p. 63; ICJ.Rep.(1984), pp.437-38, para 101.

<sup>59</sup> *Ibid.* The Court cited its judgment in *Nuclear Test cases*. ICJ. Rep.(1974), p.272, para. 60; p.477, para. 63.

<sup>60</sup> *Nicaragua*. ICJ. Rep. (1986), pp. 155-56.

complied with by such other parties as they may bind.<sup>61</sup>

The unequivocal indication of the application of the rule of *pacta sunt servanda* and the principle of good faith as implied in Article 94 of the Charter and the finality and bindingness effect of the judgment of the Court supplemented by the *compromise*, making the judgment binding and enforceable, was significantly indicated by the Chamber of the Court in *Frontier Dispute* (Burkina Faso / Mali). The Chamber stated:

the Parties, having concluded a Special Agreement for the Settlement of their dispute by a Chamber of the Court, did not merely by doing so undertake to comply with the Court's decisions pursuant to Article 94, paragraph 1, of the Charter of the United Nations, but also declared expressly in that Special Agreement that they "accept the Judgment of the Charter given pursuant to the Special Agreement as final and binding upon them" (Art. IV, para.1).<sup>62</sup>

In the *Gabcikovo-Nagymaros Project* case (Hungary/Slovakia), the parties agreed in Article 5 of the Special Agreement of 1993 "If they are unable to reach agreement within six months, either Party may request the Court to render an additional Judgment to determine the modalities for executing its Judgment."<sup>63</sup> The Court asserted that a response to this contractual obligation would be prescriptive rather than declaratory, because it would determine what the rights and obligations of the Parties were. It noted, however, that the Parties agreed to seek agreement on the modalities of the execution of the Judgment in the light of the decision made by Court.<sup>64</sup> It emphasised that it was not for the Court to determine what should be the final result of these negotiations to be conducted by the Parties. Instead it was for the Parties themselves to find an agreed solution that took account the objectives of the Treaty, as well as the norms of international environmental law and the principles of the law of international watercourses. The Court recalled in this context that, as it had said in the *North Sea Continental Shelf* cases: "[the Parties] are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case

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<sup>61</sup> *Ibid*, pp. 174-75, paras. 5-6.

<sup>62</sup> ICJ. Rep. (1986), p. 649, para. 178; Couvreur, P., *supra* note 10, p. 105; and the Dissenting Opinions of Judges Mawdesley, Weeramantry and Judge *ad hoc* Thierry in *Arbitral Award of 31 July 1989* (Guinea – Bissau v. Senegal), ICJ. Rep. (1991), 59.

<sup>63</sup> ICJ. Rep. (1997), para. 2.

<sup>64</sup> *Ibid*, para 131.

when either of them insists upon its own position without contemplating any modification of it".<sup>65</sup> Then it concluded:

What is required in the present case by the rule *pacta sunt servanda*, as reflected in Article 26 of the Vienna Convention of 1969 on the Law of Treaties, is that the Parties find an agreed solution within the co-operative context of the Treaty. Article 26 combines two elements, which are of equal importance. It provides that "Every treaty in force is binding upon the parties to it and must be performed by them in good faith". This latter element, in the Court's view, implies that, in this case, it is the purpose of the Treaty, and the intentions of the parties in concluding it, which should prevail over its literal application. The principle of good faith obliges the Parties to apply it in a reasonable way and in such a manner that its purpose can be realized.<sup>66</sup>

Similarly, the Court in the *Land and Maritime Boundary* (Cameroon v. Nigeria) (Preliminary Objections) observed, "the principle of good faith is a well-established principle of international law. It is set forth in Article 2, paragraph 2, of the Charter of the United Nations; it is also embodied in Article 26 of the Vienna Convention on the Law of Treaties of 23 May 1969".<sup>67</sup> Naturally, therefore, the jurisprudence of the Court has constantly observed the sanctity of the principles of good faith and *pacta sunt servanda* as a well-established principles of international law equally applicable to rights and duties, and to the creation and performance of international obligations, including obligations under the judicial decisions of the Court. However, this does not suggest that there is an absolute rule of *pacta sunt servanda*.

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<sup>65</sup> ICJ. Rep. (1969), p. 47, para. 85; ICJ. Rep. (1997), para. 141.

<sup>66</sup> ICJ. Rep. (1997), para. 142.

<sup>67</sup> ICJ. Rep. (1998), para. 38. In support of its assertion, the Court cited the Arbitral Award of 7 September 1910 in the *North Atlantic Fisheries* case, 11 *UNRIAA*, p. 188; *Factory at Chorzów* case (Merits) Judgment No. 13, (1928) PCIJ., Ser. A, No. 17, p. 30; *Free Zones of Upper Savoy and the District of Gex*, Order of 6 December 1930, (1930), PCIJ., Ser. A, No. 24, p. 12 and (1932), PCIJ., Ser. A/B, No. 46, p. 167; *Rights of Nationals of the United States of America in Morocco*, ICJ. Rep. (1952) p. 212; *Fisheries Jurisdiction* (Germany v. Iceland) (Jurisdiction) ICJ. Rep. (1973), p. 18; the *Nuclear Tests cases*, ICJ. Rep. (1974), pp. 268 and 473; *Border and Transborder Armed Actions* (Nicaragua v. Honduras), ICJ. Rep. 1988, p. 105.

## 6. Exceptions to the Rule of *Pacta Sunt Servanda*

Observance of treaties and judicial decisions as international obligations are two faces of the same coin to which the principle of *pacta sunt servanda* operates. In the *Arbitral Award Made by the King of Spain on 22 December 1906*, (Honduras v. Nicaragua), Honduras asked the Court to declare that the Nicaragua's failure to comply with the award of 1906 constituted "a breach of an international obligation within the meaning of Article 36, paragraph 2 (c) of the Statute of the Court and of general international law".<sup>68</sup> In response, Nicaragua argued, *inter alia*, that the award was "incapable of execution".<sup>69</sup> Having considered the award to be capable of execution notwithstanding Nicaragua's allegation, the Court found that that "Nicaragua is under an obligation to give effect to it".<sup>70</sup> This judgment indicated a basic legal principle pertinent to the definitiveness of international judicial decisions, namely, that final judgment can never be repudiated by a plea of prescription or constant non-recognition *per se*. So, protest or a claim of non-acquiescence does not have any legal effect whatsoever on the binding force of *pacta sunt servanda* in the post-adjudicative phase. However, this does not suggest that there is an absolute rule of *pacta sunt servanda*. Therefore, the doctrines of necessity, *force majeure*, and *rebus sic stantibus* have generally been invoked by States to preclude wrongfulness arising from the breach of an obligation including the obligation of compliance with and enforcement of judicial decision and arbitral awards, and subsequently against the application of *pacta sunt servanda*.<sup>71</sup> To what extent these doctrines are legally applicable to the post-adjudicative phase of the ICJ and Articles 2(2) and 94 of the UN. Charter, in particular?

### 6.1. State of Necessity

Under Article 25 (1) (a) of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts (2001), a State may not invoke the state of necessity as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act "is the only

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<sup>68</sup> ICJ. Rep. (1960), p. 195-97.

<sup>69</sup> *Ibid.*, pp. 197-99.

<sup>70</sup> *Ibid.*, p. 217.

<sup>71</sup> Lachs, M., *supra* note 11, p. 369.

means for the State to safeguard an essential interest against a grave and imminent peril".<sup>72</sup> In the Commentary, the ILC defines the extent of this provision to include "particular interests of the State and its people, as well as of the international community as a whole".<sup>73</sup>

In the aftermath of the Court's Judgment of 10 October, 2002 in *Land and Maritime Boundary* (Cameroon v. Nigeria: Equatorial Guinea intervening), Nigeria, in an official statement issued on October 23, 2002, refused to comply with the Court's judgment in order to maintain the *status quo* in Bakassi Peninsula where inhabitants are predominately Nigerians, but which was decided by the Court to fall under the sovereignty of Cameroon.<sup>74</sup> The statement read, "being a nation ruled by law we are bound to continue to exercise jurisdiction over these areas in accordance with the constitution," and "On no account will Nigeria abandon her people and their interests. For Nigeria, it is not a matter of oil or natural resources on land or in coastal waters, it is a matter of the welfare and the well-being of her people on their land."<sup>75</sup> This statement seems to amount to an argument invoking the state of necessity to refuse compliance with the Court's judgment.

However, it is implausible to argue after consenting to the jurisdiction of the Court and undertaking to comply with its decision under Article 94 of the Charter, that compliance with the Court's judgment is or constitutes "a grave" or even an "imminent peril". It is difficult to apply this notion to the international obligation of compliance with and enforcement of the Court's judicial decisions even if a state of necessity is found to exist since this notion does not terminate the treaty obligations stipulated in Article 94 of the Charter and Articles 59 and 60 of the Statute. In the *Gabcikovo-Nagymaros Project* case (1997), the Court observed that the notion belongs to the law of State responsibility, and "even if a state of necessity is found to exist, it is not a ground for the termination of a treaty".<sup>76</sup>

Moreover, under Article 25 (1) (b) of the ILC's Articles, the notion of necessity may not be invoked if it can seriously impair "an essential interest of the State or States towards which the obligation exists, or of the international community

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<sup>72</sup> Article 25 (1) (a) in Crawford, J., *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, (Cambridge University Press, 2002), p. 178.

<sup>73</sup> *Ibid.*, p. 183, para. 15.

<sup>74</sup> ICJ. Rep. (2002), para.325.

<sup>75</sup> *Reuters/Washington Post*, Thursday, October 24, 2002; at p. A30.

<sup>76</sup> ICJ. Rep. (1997), para 101.

as a whole". Indeed, compliance with a given judgment can be an essential interest for the judgment creditor as well as to the international community as a whole. It follows that a recalcitrant State cannot determine unilaterally that a judgment creditor has no essential interest in the Court's decisions to which it is a party and invoke the doctrine accordingly.<sup>77</sup> The notion of necessity should have no effect on the judgment of the Court, and thus, the principles of good faith and *pacta sunt servanda*, in these circumstances, should prevail.

## 6.2. *Force Majeure*

However, whether a judgment debtor can validly invoke the doctrine of *force majeure* as reflected in Article 23 of the ILC's Articles or the principle of impossibility of performance as reflected in Article 61 of the Vienna Convention on the Law of Treaties as a ground for precluding the wrongfulness of non-compliance with the Court's judgment, is more problematic. Under Article 23 (1) of the ILC's Articles, wrongfulness is precluded "if the act is due to *force majeure*, that is the occurrence of an irresistible force or of an act unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligations".<sup>78</sup> Similarly, under Article 61 (1) of the Vienna Convention on the Law of Treaties, a party may do so "if the impossibility results from permanent disappearance or destruction of an object indispensable for the execution of the treaty". So, let us assumed, that a judgment rendered by the Court requires the judgment debtor to "restore any sculptures, stelae, fragments of monuments, sandstone model and ancient pottery" to the judgment creditor, as the Court did in its Judgment of 15 June 1962 in *Temple of Preah Vihear*,<sup>79</sup> but that these sculptures and ancient pottery had been destroyed by an act beyond the control of the judgment debtor, and thus, due to the destruction of these objects, the judgment of the Court is rendered non-executable. Suppose also that a judgment debtor claims that it cannot comply with a monetary judgment because of the serious financial difficulties, it is alleged to face, as Greece asserted in *Société Commerciale de Belgique* case.<sup>80</sup> Can a judgment debtor under these circumstances invoke the doctrines of *force majeure* or impossibility of

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<sup>77</sup> *Ibid.*, para. 58; Crawford, J., *supra* note 75, p. 184, para. 17.

<sup>78</sup> Crawford, J., *supra* note 72, p. 170.

<sup>79</sup> ICJ. Rep. (1962), 6.

<sup>80</sup> (1939) PCIJ. Ser. A/B. 78, 174.

performance to avoid compliance with and enforcement of the judgment of the Court? These, in fact, present two different scenarios.

To start with the second scenario, it would be difficult to invoke Article 23 or 61(1) as a ground for non-compliance with a monetary judgment. In the Vienna Conference on the Law of Treaties, a proposal was made to extend the scope of the Article by including in it cases such as the impossibility to make certain payments because of serious financial difficulties. The participating States did not consider such situations to be a ground for terminating or suspending a treaty, and preferred to limit themselves to a narrower concept.<sup>81</sup>

Likewise, the Court in the *Société Commerciale de Belgique* case had itself already reached the same conclusion. In that case, Belgium asked the Court to adjudicate and declare that “all the provisions of the arbitral awards given in favour of the *Société Commerciale de Belgique* on January 3<sup>rd</sup> and July 25<sup>th</sup> are without reserve definitive and obligatory for the Greek Government”,<sup>82</sup> and thus Greece had violated its international obligations by refusing to comply with these awards.<sup>83</sup> Greece asked the Court to dismiss the claim and to declare the State of Greece had been prevented by *force majeure* from executing these awards, by reason of its budgetary and monetary situation. Belgium in its second submission asked the Court to declare that Greece was bound to execute the awards; and that those conditions alleged by Greece were foreign to the execution of those awards; and that it had no right to impose any conditions on payment. The Court agreed with Belgium and decided that:

If the awards are definitive and obligatory, it is certain that the Greek Government is bound to execute them and to do so as they stand: it cannot therefore claim to subordinate payment of the financial charge imposed upon it to the conditions for the settlement of the Greek external public debt, since that has not been admitted in the awards. Nor can it make the sacrifice of any right of the Company recognized by the awards a condition precedent to payment. Since the Greek Government states that it recognizes the arbitral award as possessing

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<sup>81</sup> UNCLT, Official Records, First Session, Vienna, 26 March-24 May 1968, Doc. A/CONF.39/11, Summary records of the plenary meetings and of the meetings of the Committee of the Whole, 62nd Meeting of the Committee of the Whole, pp. 361-365.

<sup>82</sup> (1939) PCIJ. Ser. A/B. 78, p. 174.

<sup>83</sup> *Ibid.*

the force of *res judicata* it cannot contest this submission ... without contradicting itself.<sup>84</sup>

Greece was bound by the award and the decision of the Court even under circumstances of *force majeure* because the situation of *force majeure* was either alone or in combination with other factors due to the conduct of the State of Greece.<sup>85</sup> Similarly, the ILC's Commentary on Article 23 concluded, "*force majeure* does not include circumstances in which performance of an obligation has become more difficult, for example due to some political or economic crisis. Nor does it cover situations brought about by the neglect or default of the State concerned, even if the resulting injury itself was accidental and unintended".<sup>86</sup> Thus the Court in *Gabcíkovo-Nagymaros Project* case, for instance, rightly accepted Slovakia's argument as to the non-invocability of that impossibility by Hungary, because of its own breach of its obligations under the 1977 Treaty.<sup>87</sup>

While the situation in the first scenario is more problematic. Let us assume again that Thailand was unable, for unforeseeable circumstances beyond its control like an earthquake, to restore the sculptures, stelae, fragments of monuments, sandstone models and ancient pottery to Cambodia as the judgment in *Temple of Preah Vihear* called for. It would be therefore impossible to enforce the judgment of the Court in that part. Here Articles 23 (1) and 61 (1) would come into operation as the act of non-compliance with the judgment is due to *force majeure*. Likewise, if the judgment creditor prevented the judgment debtor from fulfilling its obligations as required by the Court's decisions, then the former by its own conduct would have prejudiced its rights under the judgment. As the Court observed in the *Chorzów Factory* case:

It is, moreover, a principle generally accepted in the jurisprudence of international arbitration, as well as by municipal courts, that one Party cannot avail himself of the fact that the other has not fulfilled some obligation or has not had recourse to some means of redress, if the

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<sup>84</sup> *Ibid.*, p. 176. In *Serbian Loans and Brazilian Loans* case, in which the PCIJ acknowledged the doctrine of *force majeure* as a general principle of law but did not apply to those cases due to their facts. (1929), PCIJ, Ser. A, No. 20, pp.33-40; No. 21, p.120 respectively.

<sup>85</sup> See Article 23 (2), Crawford, J., *supra* note 72, p. 170.

<sup>86</sup> *Ibid.*, p. 171.

<sup>87</sup> ICJ. Rep. (1997), paras. 49-59.

former Party has, by some illegal act, prevented the latter from fulfilling the obligation in question, or from having recourse to the tribunal which would have been open to him.<sup>88</sup>

### 6.3. *Rebus Sic Stantibus*

Under Article 62 of the Vienna Convention on the Law of Treaties a State may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty. However, whether the doctrine of *rebus sic stantibus* (fundamental change of circumstances), applies to Articles 2 (2) and 94 of the Charter as a contractual obligation, and thus to the principle of *pacta sunt servanda* is highly questionable. In the *Fisheries Jurisdiction* case,<sup>89</sup> the United Kingdom instituted proceedings on 14 April 1972 against Iceland contesting its extension of its fishery jurisdiction from 12 to 50 miles around its shores. The United Kingdom founded the jurisdiction of the Court on Article 36 (1) of the Statute and an Exchange of Notes of 11 March 1961 between the two countries under which the United Kingdom recognized Iceland's claim to a 12-mile fisheries limit in return for Iceland's agreement that any dispute as to the extension of Icelandic fisheries jurisdiction beyond that limit was to be referred to the ICJ at the request of either party. However, Iceland on 29 May 1972 notified the Court that it was unwilling to confer jurisdiction on the Court, and it also referred to "the changed circumstances resulting from the ever-increasing exploitation of the fishery resources in the seas surrounding Iceland".<sup>90</sup> Iceland also brought to the attention of the Court a resolution adopted by its Parliament on 15 February 1972, which claimed that "owing to changed circumstances the Notes concerning fishery limits exchanged in 1961 are no longer applicable and that their provisions do not constitute an obligation for Iceland".<sup>91</sup> Thus, the Government of Iceland was basing its contention on the doctrine of *rebus sic stantibus*.

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<sup>88</sup> *Chorzów Factory case (Jurisdiction, Judgment No. 8)*, (1927), PCIJ., Ser. A, No. 9, p. 31; *Gabcikovo-Nagymaros Project case*, ICJ. Rep. (1997), paras 103 & 110.

<sup>89</sup> ICJ. Rep. (1973), 3. A parallel case was brought before the Court by the Federal Republic of Germany against Iceland. ICJ. Rep. (1973).

<sup>90</sup> *Ibid.*, pp. 17-18, para 35.

<sup>91</sup> *Ibid.*, para 37.

Notwithstanding the non-appearance of Iceland in the proceedings, the Court on 2 February 1973 found by 14 to 1 that it had jurisdiction.<sup>92</sup> The Court first observed that “the compromisary clause has a bilateral character, each of the parties being entitled to invoke the jurisdiction of the Court”.<sup>93</sup> Although, the Vienna Convention was not then in force, the Court relied on Article 62 of the Convention, which according to the Court “may in many respects be considered as a codification of existing customary law on the subject of the termination of a treaty relationship on account of change of circumstances”.<sup>94</sup> The Court undoubtedly acknowledged the possibility of invoking the principle of fundamental change of circumstances as a reason for termination or suspension of a treaty “if it has resulted in a radical transformation of the extent of the obligations imposed by [the treaty]”,<sup>95</sup> and the change has “increased the burden of the obligations to be executed to the extent of rendering the performance something essentially different from that originally undertaken”.<sup>96</sup> But regardless of Article 62 or the Icelandic allegations of alleged changes of fundamental circumstances, the Court indicated that changes of fundamental circumstances “could not affect in the least of the obligation to submit to the Court’s jurisdiction”.<sup>97</sup> Indeed, it can hardly be envisaged that a fundamental change of circumstances to compromisary clauses in treaties or conventions or even in declarations under Article 36 of the Statute could affect the obligation to submit a dispute to the Court. A State cannot invoke the doctrine of *rebus sic stantibus* against the jurisdiction of the Court and subsequently the judgment to be given without contradicting itself. The Court re-emphasised decisively that:

any question as to the jurisdiction of the Court, deriving from an alleged lapse through changed circumstances, is resolvable through the accepted judicial principle enshrined in Article 36 paragraph 6 of the Court’s Statute, which provides that “in the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court”. In this case such as dispute obviously exists, ...

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<sup>92</sup> *Ibid.*

<sup>93</sup> *Ibid.*, para 31.

<sup>94</sup> *Ibid.*, para 36.

<sup>95</sup> *Ibid.*

<sup>96</sup> *Ibid.*, para 43.

<sup>97</sup> *Ibid.*, para 40.

[and] requires [the Court] to pronounce upon the question of its jurisdiction. This it has now done *with binding force*.<sup>98</sup>

In addition to the strict application of the doctrine, paragraph 2 (a) and (b) of Article 62 makes also two exceptions. It denies the applicability of the principle when it is invoked to terminate or withdraw from a treaty establishing a boundary, and when the fundamental change is the result of a breach by the party invoking it “either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty”. Thus if the judgment of the Court decides or delimits a territorial boundary, the doctrine will not be applicable. Moreover, even if a recalcitrant State’s status has been changed fundamentally by being suspended or withdrawing from the UN and the Charter, it will remain bound by the Court’s judgment and by the application of 2(2) and 94 of the Charter.<sup>99</sup> A recalcitrant State cannot terminate or suspend the operation of the principle of good faith and rule of *pacta sunt servanda* as embodied in Articles 2(2) and 94 of the Charter on the limited grounds enumerated in the Vienna Convention. Professor Rosenne, thus, rightly asserted that the judicial decisions of the Court:

cannot be equated with the decisions of the other organs of the international community, even with the decisions of the Security Council. Several reasons can be advanced for placing the Court’s decisions on a different footing. One of these is specific that parties not only agreed in advance that the judgment to be given will be binding upon them (Statute, Articles 36, 59, 61 and 63) but also have undertaken, in Article 94, paragraph 1, of the Charter, to comply with the decisions of the Court in any case to which they are a party. Here the rule *pacta sunt servanda* operates.<sup>100</sup>

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<sup>98</sup> *Ibid.*, para. 45 (emphasis added).

<sup>99</sup> Rosenne, S., *The Law and Practice*, *supra* note 14, p.625.

<sup>100</sup> *Ibid.*, 208-09.

## 7. Conclusion

The jurisdiction of the ICJ is based on the consent of sovereign States under Articles 35, 36 or 37 of the Statute of the Court. In legal doctrine, it is axiomatic that a consensual reference to international judicial bodies implies that a judicial decision is binding upon the parties to the litigation and consequently must be carried out in good faith. Signing, ratifying or adhering to the Charter and the Statute of the Court involves necessarily an undertaking to comply with the judgments of the ICJ in a case to which a State is a party,<sup>101</sup> as stipulated in Article 94 of the Charter and Article 59 of the Statute of the Court. Notwithstanding the applicability of the principles of *pacta sunt servanda* and good faith, at least by virtue of Articles 2 (2) and 94 (1) of the Charter in the post-adjudicative phase, and the affirmation of these principles in the practice of the Court and by doctrine, litigant States have continued to prefer to state unequivocally the bindingness and enforceability of the Court's decisions special agreement. This dual approach provides further reaffirmation of the obligation of compliance with the judicial decisions of the Court and has been thus seems imperative.

Generally, the doctrines of necessity, *force majeure*, and *rebus sic stantibus* have been invoked by States to preclude wrongfulness arising from the breach of international obligations, including the obligation of compliance with and enforcement of a judicial decision or arbitral award and thus against the application of *pacta sunt servanda*. These doctrines, however, are not absolutely applicable to the obligations of compliance with judicial decisions of the Court under Article 94 of the Charter and they must be dealt with cautiously. Nevertheless, in some exceptional circumstances, the doctrine of *force majeure* may be invoked only if the impossibility of enforcement results from a permanent disappearance or destruction of object indispensable for the execution of the judgment. That is probably why there is a significant reliance on the rule of *pacta sunt servanda* to guarantee compliance with and enforcement of the Court's judicial decision of the Court more safely. Yet, Article 94 of the U.N Charter and the principle of *pacta sunt servanda* must be read in an immediate liaison with Articles 59 and 60 of the Statute of the Court and thus the principle of *res judicata*, which the subsequent Chapter examines.

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<sup>101</sup> Singh, N., *The Role and Record of the International Court of Justice*, (Martinus Nijhoff, 1989), p.388.

## CHAPTER THREE:

# THE OBLIGATION OF COMPLIANCE WITH AND ENFORCEMENT OF JUDICIAL DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE UNDER ARTICLES 59 AND 60 OF THE STATUTE OF THE ICJ: THE PRINCIPLE OF *RES JUDICATA*

### 1. Introduction

The second legal basis inducing States to comply with and enforce international judicial decisions is the principle of *res judicata*. There is no doubt that the principle of *res judicata* is a principle of international law and a fundamental legal principle recognized by all legal systems within the meaning of Article 38 (1) (c) of the Statute of the ICJ. Thus, in the course of discussing Article 38 of the Statute of the PCIJ in 1920, Lord Phillimore (UK) explained the wording of that Article to include “the general principles...which were accepted by all nations - *in foro domestico*- such as ... the principle of *res judicata*”.<sup>1</sup> The principle is attached to final judicial decisions, duly rendered by a competent judicial body when the parties, cause of action and subject matter of the dispute are the same. These requirements of *res judicata* were early indicated by the British-American Claims Arbitral Tribunal in the *Newchang* case (1921). It held that “It is a well established rule of law that the doctrine of *res judicata* applies only where there is identity of the parties and the question at issue...”.<sup>2</sup> These requirements have also been maintained in Article 59 of the Statute of the PCIJ and its successor the ICJ, which reads, “the decision of the Court has no binding force except between the parties and in respect of that particular case”.<sup>3</sup>

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<sup>1</sup> *Permanent Court of International Justice, Advisory Committee of Jurists, Procès -Verbaux* of the proceedings of the Committee June 16<sup>th</sup> - July 24<sup>th</sup> 1920, (hereinafter cited as *Procès -Verbaux*), (The Hague 1920), p. 335.

<sup>2</sup> *S.S. Newchang, Claim No. 21*, 6 *UNRIAA* 64, at p. 65; also reprinted in 16 *AJIL* (1922) pp. 323-328 at p. 324, and 1 *Ann Digest* (1919-1922) Case No. 263, p.373 at p. 374.

<sup>3</sup> A similar provision had already appeared in Article 56 of the Hague Convention of 1899 which provided “The award is only binding on the parties who concluded the *compromise*” and in Article 84 of the Second Hague Convention of 1907 which provides “The award is not binding except on the parties in dispute”. 187 *C.T.S* 410 (1899); 298 *C.T.S* 233 (1907) respectively.

Although the requirements of identity of cause and identity of object or subject matter of the dispute as they are covered by the phrase “in respect of that particular case” should be uncontroversial, the identity of parties to a conflict or a dispute in judicial proceedings as far as the doctrine of *res judicata* is concerned “may be more complex” than is thought.<sup>4</sup> The complexity of the phenomenon of intervention before the ICJ, has created some obstacles to States which wish to intervene in proceedings pending before the ICJ and caused disagreement among international scholars and the Judges of the Court as to the identity and the status of a would-be intervening State to pending proceedings and subsequently as to the effect of *res judicata* upon such a potential party.<sup>5</sup> This controversy might be due to the modest judicial experience of the Court in this matter,<sup>6</sup> and to its caution in determining or considering these two sensitive issues.

Thus, although the PCIJ clearly indicated in *Chorzów Factory case* (1927) that “the object of Article 59 is simply to prevent legal principles accepted by the Court in a particular case from being binding also upon other States or in other disputes”,<sup>7</sup> some continue to wonder whether this ruling and the provisions of Article 59 are a safeguard and sufficient protection for third States from being affected by the binding force of *res judicata*. Otherwise, what would be the function of intervention under Article 62 of the Statute? Hence, the complexity of intervention proceedings and the status of a would-be intervening State find their roots in the existence of Article 59 of the Statute itself, which was inserted into the Statute *essentially* to complete the statement of law regarding third party intervention,<sup>8</sup> but which has been considered at the same time as a barrier to successful intervention,<sup>9</sup> and thus to the application of *res judicata*. Third States may claim to be necessary or indispensable parties to contentious cases brought before the Court by invoking the so-called “right” of

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<sup>4</sup> Chinkin, C., *Third Parties in International Law*, (Oxford Univ. Press, 1993), p. 15.

<sup>5</sup> See generally, Al-Qahtani, M., “*The Status of Would-be Intervening States before the International Court of Justice and the Application of Res Judicata*”, 2 *LPICT: PJ*, (2003), pp.269-294.

<sup>6</sup> Mani, V. S., *International Adjudication: Procedural Aspects*, (Martinus Nijhoff, 1980), p. 250, and Rosenne, S., *Intervention in International Court of Justice*, (Martinus Nijhoff, 1993) p.1.

<sup>7</sup> *Chorzów Factory case* (1927), PCIJ. Ser. A., No. 13, p. 12.

<sup>8</sup> Rosenne, S., *The Law and the Practice of the International Court of Justice 1920-1996*, (hereinafter cited as *The Law and Practice*), 3<sup>rd</sup> ed, (Martinus Nijhoff, 1997), p. 1643.

<sup>9</sup> Greig, D.W., “*Third Party Rights and Intervention Before the International Court*”, 32 *Va.J.Int'l.L.* (1992) pp. 287-376, at p.319.

intervention either under Article 62 or Article 63 of the Court's Statute.<sup>10</sup> On this complexity and its implication on the post-adjudicative phase, Miller suggested:

it is not clear what binding effect a decision might have on an Article 62 intervenor. The Court's action is not likely to result in a direct judgment for or against the intervenor, in the sense of the grant of a right or the imposition of an obligation. Thus is not likely to serve as the basis of a request for Security Council enforcement against an intervenor failing 'to perform the obligations incumbent upon it under a judgment rendered by the Court.'<sup>11</sup>

On the other hand, Judge Oda in *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras: Application to intervene by Nicaragua)* asserted in his Dissenting Opinion that "Nicaragua, as a non-party intervenor, will certainly be bound by this judgment in so far as it relates to the legal situation of the maritime spaces of the Gulf".<sup>12</sup> Consequently, an attempt to provide a comprehensive exposition of the different questions *res judicata* poses in the post-adjudicative phase and its binding force, as well as its derivative implications, requires some analysis of the requisites for the doctrine within Article 59 of the Statute, namely: the identification of cause of action, object (*in respect of that particular case*) and of the parties. Also the status of parties definitely requires some brief analysis of the status of a non- appearing respondent and an extensive examination of the status of would-be intervening States. This Chapter examines the legal obligations that can be derived from this principle of *res judicata* to induce States parties to comply with and enforce the judicial decisions of the Court. However, similar to the principle of *pacta sunt servanda*, there is no absolute of rule of *res judicata*. Hence, further examination into the question of the exceptions to the finality of the judicial decisions of the ICJ must also be undertaken.

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<sup>10</sup> See generally, Bernardez, S.T., "The New Theory of "Indispensable Parties" under the Statute of the International Court of Justice", in Wellens, L., (ed), *International Law: Theory and Practice*, (Kluwer International Law, 1998), pp. 737-750.

<sup>11</sup> Miller, J. T, "Intervention in Proceedings before the International Court of Justice", in Gross, L., (ed), *The Future of the International Court of Justice*, (Oceana Publications, 1976),pp.550-671,at pp.555-6.

<sup>12</sup> ICJ. Rep. (1992), p.608, para. 421.

## 2. The Requisites for *Res Judicata*

International tribunals have constantly safeguarded the principle of *res judicata* and played a significant role in the contribution to this field of law.<sup>13</sup> The International Court of Justice, and its predecessor, for example, have recognized the principle of *res judicata* through its Statute, particularly in Article 59, which provides “The decision of the Court has no binding force except between the parties and in respect of that particular case”, and in Article 60, which states in part that “the judgment is final and without appeal”.<sup>14</sup> Although the Statute of the Court contains no provision stating when a judgment becomes binding on the parties, Article 94 of the Rules of the Court of 1978 fills this gap by specifying that “the judgment ... shall be binding on the Parties on the day of the reading”. This Article does not only fill that deficiency in the Statute, but also reiterates and emphasises the binding force of the judgment on the parties. Consequently, beside Articles 59 and 60 of the Statute of the Court, it can be argued that Article 94 of the Rules contributes to the constitution of the framework of the principle of *res judicata*.<sup>15</sup> Thus, three requisites of *res judicata* must emerge, as enumerated by Judge Anzilotti in his dissenting opinion in the *Chorzów Factory* case (interpretation) in 1927, where he stated:

The first object of Article 60 being to ensure, by excluding every ordinary means of appeal against, that the Court’s judgment shall possess the formal value of *res judicata*, it is evident that that Article [60] which is closely connected with Article 59 which determines the material limits of *res judicata* when stating that “the decision of the Court has no binding force except between the Parties and in respect of that particular case”: We have here the three traditional elements of identification, *persona*, *petitum*, *cause petendi*, for it is clear that “that particular case” (*le cas qui a été décidé*) covers both the object and the ground of the claim.<sup>16</sup>

<sup>13</sup> Bowett, D.W., “*Res Judicata and the Limits of Rectification of Decision by International Tribunals*”, 8 *Afri.J.Int’ & Comp. L.*, (1996), pp. 577-591, at p. 577.

<sup>14</sup> 67 *UNTS* (1949), p. 34.

<sup>15</sup> See the *Continental Shelf* case (Tunisia / Libya). ICJ. Rep. (1982), p. 80, para 29.

<sup>16</sup> (1927), PCIJ., Ser. A. No. 13, p. 23. The exact enumeration was also adopted by the *Trail Smelter Arbitration*. It held: “There is no doubt that in the present case, there is *res judicata*. The three traditional elements for identification: parties, object and cause...are the same”. 3 *UNRIAA*, 1905, at p.1952.

## 2.1. Identity of Cause and Object: “in respect of that particular case”

The similarity of identity of parties and object or subject matter do not prevent litigants from advancing new claims based on a distinct legal cause of action as the Spanish-United States Claims Commission in *Delgado Case* articulated in 1881. It found that an earlier decision in which parties and object were identical should not preclude a new claim with new rights from being adjudicated.<sup>17</sup> In the same vein, the Franco-Venezuelan Mixed Claims Commission in the case of the *Compagnie Générale de l'Orénoque* (1906) stated “The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground for recovery, cannot be disputed...”.<sup>18</sup> Likewise, the Tribunal in *Waste Management, Inc. v. United Mexican States* in a decision of 2002 held that “a judicial decision is only *res judicata* if it is between the same parties and concerns the same question as that previously decided”.<sup>19</sup> It is difficult though to avoid any overlapping or difficulty in recognising the precise subject matter as well as the cause of action as they are covered by the notion of “same question” or “in respect of that particular case”. To avoid this difficulty Article 38 (2) of the Rules of the Court of 1978 requires litigant States to “specify the precise nature of the claim, together with a succinct statement of the facts and grounds on which the claim is based”. Yet, this requirement is not sufficient to perceive the precise subject matter and cause of action of the claim without further scrutiny being undertaken by the Court itself into this matter.

In *Corfu Channel* case, the United Kingdom instituted proceedings against Albania. The dispute arose from incidents that occurred on October 22nd 1946, in the Corfu Strait: two British destroyers struck mines in Albanian waters and suffered damage, including serious loss of life. Albania contested the jurisdiction of the Court and raised preliminary objections. After examining Albania's submissions, the Court rejected Albania's objections and fixed the time-limits for the subsequent proceedings

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<sup>17</sup> Spanish-United States Claims Commission: *Delgado Case* (1881), Moore, J., (1898), Vol. III, p. 2196, at. 2200. See also Cheng, B., *General Principles of Law as applied by International Courts and Tribunals*, (Stevens & Sons, 1953), pp. 343-46.

<sup>18</sup> Ralston, J., *Report of French-Venezuelan Mixed Claims Commission of 1902*, (Washington, 1906), p.355.

<sup>19</sup> *Waste Management, Inc. v. United Mexican States*, (Mexico's Preliminary Objection concerning the previous proceedings), ICSID Case No. ARB (AF)/00/3, Decision of 26 June 2002, 41 *ILM* (2002), pp.1315-1327, at p.1322, para.39.

on the merits.<sup>20</sup> Immediately, the parties notified the Court of a *compromis* which *inter alia* asked the Court as whether Albania was under “any duty to pay compensation” for the acts committed and whether the United Kingdom was under “any duty to give satisfaction” for the acts of which Albania complained. However, Albania in its final oral statement asserted that the Court would have no jurisdiction to assess the amount of compensation claimed by the United Kingdom. The Court in its judgment of 9 April 1949 found that it had jurisdiction and that Albania was responsible for the damages alleged by the United Kingdom and hence the question of the pecuniary compensation had to be decided in subsequent proceedings.<sup>21</sup> Subsequently, the Court directed the parties by an Order to assess the amount of compensation. Albania in its observations again asserted that the Court lacked jurisdiction. Citing Articles 36 (6) and 60 of the Statute of the Court, the United Kingdom, in its reply, argued that the issue at question (the jurisdiction) was *res judicata*. Albania made no further observation, and instead, it took no further part in the proceedings. Thus, the Court had to adjudicate upon the issue of compensation by default. In its judgment of 15 December 1949, the Court accepted the argument advanced by the United Kingdom concerning the plea of *res judicata* holding that:

The Albania’s Government disputed the jurisdiction of the Court with regard to the assessment of damages. The Court may confine itself to stating that this jurisdiction was established by its judgment of April 9<sup>th</sup>, 1949; that, in accordance with the Statute (Article 60) which, for the settlement for the present dispute, is binding upon the Albanian Government, that judgment is final and without appeal, and that therefore the matter is *res judicata*.<sup>22</sup>

Similarly, in the *Asylum* case, following a grant of a political asylum to Haya de la Torre, a Peruvian refugee, by the Colombian Embassy in Lima, Peru, the Court was asked two abstract questions relating to diplomatic asylum and the interpretation of certain provisions of the Havana Convention on Asylum of 1928. In its first judgment of 20 November 1950, the Court answered those questions put to it in the

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<sup>20</sup> ICJ. Rep. (1948), p. 15.

<sup>21</sup> *Ibid.*, p. 36.

<sup>22</sup> ICJ. Rep. (1949), 244, p. 248.

parties' submissions. It, however, indicated that the question concerning the surrender of the refugee to the Peruvian authorities had not been submitted to it.<sup>23</sup> Thus, it did not adjudicate upon that specific point. Nevertheless, it found that the granting of diplomatic asylum to Haya de la Torre by the Colombian Government was not in conformity with the Havana Convention, in force between the two Governments.<sup>24</sup> Consequently, Colombia filed a request for interpretation under Article 60 of the Statute, claiming that certain gaps existed in that judgment. Some of the questions put to the Court pertained to the qualification made by the Colombian Ambassador in Peru and to the surrender of the refugee to Peru. The Court, on 27 of November 1950, answered that question by stating that the question of qualification was not raised in its earlier judgment and as to the question of surrendering Haya de la Torre was in fact "completely left outside the submissions of the parties. The judgment in no way decided it, nor could it do so. It was for the parties to present their respective claims on this point".<sup>25</sup> That led Colombia to institute new proceedings in December 1950, which became *Haya de la Torre* case. The primary object of that proceeding was to adjudicate upon, *inter alia*, whether the Colombia was bound to surrender the refugee to Peru and hence to terminate the asylum.<sup>26</sup>

In February 1951 Cuba, as a signatory to the Havana Convention cited by Colombia, filed a declaration for intervention under Article 63 of the Statute. Peru objected to this intervention. The Court answered all those questions in its judgment of 13 June 1951, where the doctrine of *res judicata* was applied to part of the intervention and to the merits. Concerning the intervention, the Court noted that the identity of object or the subject matter of the dispute differed from the one which it had been decided by its first Judgment of 20 November 1950 in the *Asylum* case. It observed that some issues in Cuba's Memorandum were actually devoted to questions, which the earlier judgment had already "decided by the authority of *res judicata*, and ... to that extent it does not satisfy the conditions of a genuine intervention".<sup>27</sup> But because the intervention was based on new facts involving new aspects of the Convention in question "which the Court had not been called upon to consider in its previous judgment", the Court found the intervention admissible. Then

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<sup>23</sup> ICJ. Rep. (1950), p.280.

<sup>24</sup> *Ibid.*, p. 288.

<sup>25</sup> ICJ. Rep. (1950), p. 453.

<sup>26</sup> *Haya de la Torre* Case, ICJ. Rep. (1951), p. 75.

<sup>27</sup> *Ibid.*, p. 77.

the Court discussed the merits of the disputes regarding the manner in which its previous judgment should be executed, and whether Colombia was not bound in executing the judgment of 20 November 1950, to deliver the refugee to the Peruvian Government. On that specific question the Court ruled “The question of the surrender of the refugee was not decided by the judgment of November 20...*This question is new...There is consequently no res judicata upon the question of surrender*”.<sup>28</sup> The duty to terminate the asylum and to surrender the refugee constituted two separate questions and thus formed a new subject matter that could be litigated in subsequent proceedings.

In the *Waste Management, Int. v. United Mexican States* case (2002), the claimant instituted arbitration proceedings under the ICSID Additional Facility Rules in relation to a claim against the respondent with respect to “measures” taken by the latter in violation of NAFTA Articles 1105 and 1110. It was the second time on which the claimant had brought proceedings against the respondent in respect of the same claims. In the first proceedings, the Tribunal found that it itself lacked jurisdiction.<sup>29</sup> In the new proceedings, the respondent argued that the decision in the first proceedings precluded the claimant from instituting any further proceedings with respect to the same subject matter. The respondent also argued that the first Tribunal did in law decide the claim and dismissed it for want of jurisdiction against the claimant and thus its decision was to be considered *res judicata* whether or not it had actually considered the merits of the claim. On the other hand, the claimant argued that the only question or issue decided by the first proceedings and which thus acquired the effect of *res judicata* was the invalidity of a waiver and the absence of jurisdiction. It concluded that the merits of its claims had never substantially been considered by the Tribunal or any other domestic ones.<sup>30</sup> After careful reading of the first Tribunal’s reasons and decision, the Tribunal ruled that “the dismissal of a claim by an international tribunal on grounds of lack of jurisdiction does not constitute a decision on the merits and does not preclude a later claim before a tribunal which has

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<sup>28</sup> *Ibid*, p. 80 (emphasis added).

<sup>29</sup> *Waste Management, Inc. v. United Mexican States*, Arbitral Award of 2 June 2000, 40 *ILM* (2001), p. 55, at pp. 56, 62, & pp. 69-70.

<sup>30</sup> *Waste Management, Inc. v. United Mexican States*, (Mexico’s Preliminary Objection concerning the previous proceedings), ICSID Case No. ARB (AF)/00/3, Decision of 26 June 2002, 41 *ILM* (2002), pp.1315-1327, at pp.1320-22.

jurisdiction”.<sup>31</sup> The same is said to be true concerning the inadmissibility. In reaching this conclusion the Tribunal quoted Amerasinghe:

The success of an objection based on the [exhaustion of local remedies] rule has never been regarded as rendering the case *res judicata*, as might otherwise be logically required if the rule is considered truly one of substance pertaining to the merits of the case. The success of such an objection has always had the effect of delaying the justiciability of a claim on the basis that it is inadmissible because of a defect in the procedure of litigation...<sup>32</sup>

Nevertheless, the respondent maintained that in deciding whether a tribunal has jurisdiction or not, it might be required to decide an issue which pertains to the merits. The respondent tried to apply the wider doctrine of *res judicata* that is found in English law which provides for “the plea of *res judicata*, except in special cases, not only to the points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of the litigation...”<sup>33</sup> In support of its argument, the respondent cited the decision of the House of Lords in *The Sennar* case which had found a procedural issue decided by the Dutch Court of Appeal to be *res judicata* in proceedings on the merits of that case.<sup>34</sup> The reason behind this finding was that in domestic proceedings, jurisdiction and merits phases are hardly separable, while in international adjudication they are different and distinct ones. This distinction has in fact an important implication on the reception of the doctrine of *res judicata* within domestic legal system. Therefore, Dr. Scobbie has rightly articulated that “it should not be expected that *res judicata*, as a doctrine of international law, replicates exactly the contours of the doctrine as it exists with any particular domestic system”.<sup>35</sup>

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<sup>31</sup> *Ibid.*, p.1323, para.43.

<sup>32</sup> Amerasinghe, C.F., *Local Remedies in International Law*, (Cambridge Univ. Press, 1990), p. 354.

<sup>33</sup> Lord Kilbrandon in *Yat Tung Investment Co. Ltd. v. Dao Heng Bank Ltd.* [1975] A.C.581, at p. 590 quoted in *Dallal v. Bank Mellat*, 26 July 1985, 75 *ILR*, 151, at p. 161.

<sup>34</sup> *DSV Silo- und Verwaltungsgesellschaft mbH v. Owners of the Sennar and thirteen other ships (The Sennar)* [1985] 2 *All ER* 104.

<sup>35</sup> Scobbie, I., “*Res Judicata, Precedent and the International Court: a preliminary sketch*” 20 *AYBIL* (1999), pp. 299-317, at p. 301.

However, touching upon the merits of the dispute when dealing with questions and issues of jurisdiction and admissibility is sometimes inevitable. But in any event, a general consideration of some aspects of the merits in a jurisdictional phase, as a general rule, is not tantamount to *res judicata* till the merits are actually determined. In other words, there can be no decision finally determining or pre-judging any issue of the merits in a jurisdictional phase as the Court asserted in *Polish Upper Silesia*,<sup>36</sup> and *South West Africa*.<sup>37</sup> This, however, holds true only as a general rule. But in very exceptional circumstances and from a practical perspective, a judgment on a particular issue that is an essential component of the inevitable determination of the dispute will inevitably acquire the authority of *res judicata*. This proposition finds support in the assertion of the Tribunal in the *Waste Management, Inc* which held “But whatever stage of the case it is decided, a decision on a particular point constitutes a *res judicata* as between the parties to that decision if it is a necessary part of the eventual determination and is dealt with as such by the tribunal”.<sup>38</sup> In other words, when a court or tribunal establishes in a jurisdictional decision that certain essential points, for instance, are proven to be correct or otherwise, it can not be disputed on the merits since it will be inevitably *res judicata*. In any event, the Tribunal reiterated its position that the first proceedings did not decide any particular point or issue that was pertinent to the merits, and ruled “there was no decision by the first Tribunal between the parties which would constitute a *res judicata* as to the merits of the claim now [before the Tribunal]”.<sup>39</sup>

Litigant States may cause considerable obscurity and damage to their own cases by a failure to indicate their claims adequately in their submissions.<sup>40</sup> The Court, indeed, cannot deduce the intention of the litigants to contentious proceedings before it regarding what should or should not have been submitted as far as their claims are concerned, but: “One must bear in mind, in principle, it is the duty of the Court not only to reply to the questions stated in the final submissions of the parties,

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<sup>36</sup> *Polish Upper Silesia* (Jurisdiction), (1925), PCIJ, Ser. A, No. 6, p. 16.

<sup>37</sup> *South West Africa, Second Phase*, ICJ. Rep. (1966), p. 37, para 59.

<sup>38</sup> *Waste Management, Inc. v. United Mexican States*, *supra* note 28, p.1324, para.45.

<sup>39</sup> *Ibid.*, p.1324, para.46.

<sup>40</sup> See, *Fisheries case* (United Kingdom v. Norway), ICJ. Rep. (1951), p. 116, at p. 126; *Norwegian Loans case*. ICJ. Rep. (1957), p. 9 and the Dissenting Opinion of Judge Read, *ibid*, p. 82; see also Brownlie, I., “*Causes of Action in the Law of the United Nations*”, 50 *BYBIL*, (1979), pp.13-41, at p. 14.

but also to abstain from deciding points not concluded in those submissions”.<sup>41</sup> This is the statutory framework within which the Court operates. Consequently, a final judgment does not prevent the Court (if it has jurisdiction) from adjudicating disputes arising from different questions between the same parties.

## 2.2. Identity of a “Party” and the Operation of *Res Judicata*

Under Article 34 of the Statute, “only States may be parties in cases before the Court”. Article 35 also stipulates that the Court “shall be open to States” members of the United Nations or even States which become parties to the Statute by special agreements. Axiomatically, the status of a “party” to proceedings is only attributed to States that are capable of being bound by the decisions of the Court in respect of that particular case. But which States? The fact is that the identification of the actual parties as well as the non-appearing parties to pending proceedings should never be difficult. However, some brief remarks pertaining to the status of a non-appearing State and thus the application of *res judicata* should be appropriate, whereas the status of a would-be intervening State and the application of *res judicata* are not always uncontroversial, and thus requires an extensive analyses.

### 2.2.1. Application of *Res Judicata* on Non-Appearing Respondents

Non-appearance before the ICJ by States in a contentious proceedings brought against them can be a strategy to frustrate the proceedings or to impose pressure on the Court to refuse to adjudicate<sup>42</sup> and as an anticipatory preparation for a future non-

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<sup>41</sup> *Request for Interpretation of the Judgment of November 20, 1950, in the Asylum case (Colombia / Peru)*, ICJ. Rep. (1950), p. 402. A Similar finding was found in *Right of Passage Over Indian Territory (Portugal v. India)*. The Court in that case indicated that “the Court is not required to deal with this issue, for it has not been asked, either in the Application or in the final Submissions of the Parties, to decide whether or not India’s attitude towards those who instigated and brought about the events which occurred in 1954 at Dadra and Nagar-Aveli constituted a breach of its obligations under international law. The Court is only asked to adjudicate upon the compatibility of India’s action with the obligations resulting from Portugal’s rights of Passage. It is not asked to determine whether Indian’s conduct was compatible with any other obligation alleged to be imposed upon it by international law”. ICJ. Rep. (1960), pp. 30-31.

<sup>42</sup> *Fisheries Jurisdiction, (United Kingdom v. Iceland)*, ICJ. Rep. (1974), p.10.

compliance with or non-enforcement of the judgment of the ICJ.<sup>43</sup> This strategy is usually based on the ground that the Court lacks jurisdiction. Accordingly, the status of parties to the proceedings is a question entirely linked to the jurisdiction issue as opposed to the failure to appear before the Court itself.<sup>44</sup> At least one non-appearing State, namely France in the *Nuclear Tests* cases, asserted that non-appearance before the ICJ is in itself a preclusion of the attribution of the status of party to the proceedings.<sup>45</sup>

Non-appearance before the Court does not preclude it from exercising its judicial function nor does it have any legal effect on the acquisition of the status of a party before the Court and thus the application of Articles 59 and 60 of the Statute as *res judicata*. Article 53 (1) of the Statute of the Court itself treats non-appearing State as a “party” to the proceedings. It reads, “whenever *one of the parties* does not appear before the Court, or fails to defend its case, the other party may call upon the Court to decide in favour of its claim.” However, before doing so, the Court, under Article 53 (2) of the Statute, “must...satisfy itself, not only that it has jurisdiction in accordance with Article 36 and 37, but also that the claim is well founded in fact and law.” These provisions preclude a judgment in default in a technical sense by mere dependence on the facts as presented by the applicant. It is, however, sufficient for the Court “to convince itself by such methods as it considers suitable that the submissions are well founded”.<sup>46</sup> The same rule is applicable to the Court’s pronouncement on orders of provisional measures and preliminary objections.

In any event, once the jurisdiction of the Court has been established even *prima faice*, the status of a “party” to the proceedings will be attributed automatically to the non-appearing State,<sup>47</sup> regardless of whether it appears or not.<sup>48</sup> Subsequently, notwithstanding the special evidentiary problems that the non-appearance might

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<sup>43</sup> It should be mentioned, however, that this anticipatory strategy for the post-adjudicative phase lacks any effectiveness and can have a backfire effect. See e.g., Highet, K., “*Evidence, the Court, and the Nicaragua Case*”, 81 *AJIL* (1987), pp. 1-56, at p.56.

<sup>44</sup> Alexandrov, S., “*Non-Appearance before the International Court of Justice*”, 33 *Colum. J. Transnat’l L.* (1995), pp.41- 72, at p. 60.

<sup>45</sup> See the letter of the Ambassador of France in the Netherlands to the Registrar of the ICJ dated 21 May 1973, *Nuclear Tests*, ICJ. *Pleadings*, (1978), Vol. II, No. 46, at p. 363.

<sup>46</sup> *Corfu Channel* case (Assessment of the Amount of Compensation Due From the People’s Republic of Albania to the United Kingdom), Judgment 15 December 1949, ICJ. Rep. (1949), 244, p. 248.

<sup>47</sup> The same approach was adopted by Elkind, J. B., “*The Duty to Appear before the International Court of Justice*”, 37 *ICLQ* (1988), pp. 674-681, at pp. 680-81.

<sup>48</sup> See Article 1 of the Institute of International Law on *Non-Appearance before the International Court of Justice*, (Fourth Commission: Rapporteur Mr. Gaetano Arangio-Ruiz), (Session of Basil, 31 August 1991).

cause, a non-appearing party is fully bound by the orders of the Court under the rule of *pacta sunt servanda*, and the principle of *res judicata* to comply with decision to be given.

The classical elucidation of the binding force of a judgment on a non-appearing party as *res judicata* was indicated by the Court in the *Nicaragua* case (*Nicaragua v. United States*). When the Court decided that it had jurisdiction to hear the merits, the United States declared that would no longer participate in the case.<sup>49</sup> Notwithstanding the non-appearance of the United States, the Court proceeded to deliver its judgment on the merits of the case. The Court held that “*the State which has chosen not to appear remains a party to the case, and is bound by the eventual judgment in accordance with Article 59 of the Statute*”.<sup>50</sup> A non-appearing party will also be bound by the relevant provisions of the Charter, and the Statute of the Court as well as its Rules, which qualify the bindingness, and enforceability of the judicial decisions of the ICJ. This is a necessary consequence; otherwise, not only Article 53 itself would be ineffective and superfluous but also Article 94 of the Charter and Articles 36 (6), 41, 59 and 60 of the Statute and Article 94 of the Rules of the Court.

### 2.2.2. Application of *Res Judicata* on Would-be Intervening States

Under Articles 62 and 63 of the Statute of the Court, intervention is voluntary in character thus there is no obligation upon a third State to intervene in pending proceedings.<sup>51</sup> They can simply rely on Article 59 of the Statute to avoid the application of *res judicata* upon them.<sup>52</sup> But what if a State considers that it has an interest of a legal nature to protect and is granted permission to intervene under Article 62 of the Statute? Does mere participation make that State bound by the outcome of the litigation or does it depend on the status attributed to the “intervening

<sup>49</sup> 24 *ILM*, (1985), p. 246.

<sup>50</sup> ICJ.Rep. (1986), p. 24 para 28 (emphasis added). For a comprehensive examination of the question of non-appearance before the ICJ see, e.g., Elias, T. O., *The International Court of Justice and some contemporary problems*, (Martinus Nijhoff, 1983), pp. 33-66; Elkind, J. B., *Non-Appearance before the International Court of Justice: Functional and Comparative Analysis*, (Martinus Nijhoff, 1984); and Thirlway, H., *Non-appearance before the International Court of Justice*, (Cambridge Univ.Press, 1985).

<sup>51</sup> *Monetary Gold case*, ICJ. Rep. (1954), p. 32. *East Timor case*, ICJ. Rep. (1991) p. 9; *Certain Phosphate Lands in Nauru* (*Nauru v. Australia*), ICJ. Rep. (1992), pp. 261-262, para 54.

<sup>52</sup> Lauterpacht, H., *The Development of International Law by the International Court*, (Longmans, 1958), p.8.

State”? What if that State, as a tactic to secure permission to intervene in given proceedings, indicates explicitly that it intends to be bound by the final decision and during the proceedings it reverses its position, does this tactic have any impact on the status of the intervening State and the application of *res judicata*? What if one of the original parties accepts the intervention of a third State and the other party objects to it, should this acceptance or objection have any effect on the status of a would-be intervening State as far as the principle of *res judicata* is concerned? To answer this question and other related questions pertaining to the status of a would-be intervening State under Articles 62 and 63 of the Statute of the Court, a decisive distinction between intervention under Article 62 and intervention under Article 63 of the Statute since the relationship between them must remain analytically distinct.<sup>53</sup>

### 2.2.2.1. Intervention under Article 62 of the Statute

The origin of Article 62 of the Statute of the ICJ, and the confusion it has continued to cause even quite recently,<sup>54</sup> can be traced back to 1920 when the Advisory Committee of Jurists was established by the League of Nations to prepare a Statute for a Permanent Court of International Justice. The Advisory Committee of Jurists proposed the following provision, “Should a State consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene *as a third party*” as Article 60. It was eventually adopted by the Assembly of the League of Nations as Article 62 of the Statute on December 13, 1920.<sup>55</sup> This provision is almost identical to the current version of Article 62 of the Statute of the International Court of Justice except for the phrase “*as a third party*”, which only appeared in the English text of the Statute of the PCIJ.<sup>56</sup> This phrase was deleted by the Washington Committee of Jurists in 1945 in the course of drafting the current Statute of the Court. The explanation given for the deletion was that the phrase was “misleading”,<sup>57</sup> and

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<sup>53</sup> Chinkin, C., *supra* note 4, p.154; see also Lauterpacht’s criticism of Judge Sette-Camera’s Dissenting Opinion in *Libya / Malta* case, ICJ. Rep. (1984), p.86; Lauterpacht, E., *Aspects of the Administration of International Justice*, (Cambridge, 1991), p. 29.

<sup>54</sup> See Judge *ad hoc* Weeramantry’s Separate Opinion in *Pulau Ligitan and Pulau Sipadan* in which he endorsed the existence of some unsettled issues related to intervention. *Sovereignty over Pulau Ligitan and Pulau Sipadan* (Application of the Philippines to intervene), ICJ. Rep. (2001), para 1.

<sup>55</sup> 62 6 LNTS , 411 (emphasis added).

<sup>56</sup> 67 UNTS 34 (1949).

<sup>57</sup> 14 UNCIO, p. 211.

furthermore, this deletion or “emendation” did not “change the sense” or the meaning of this Article.<sup>58</sup> To what extent this explanation is valid? It will be argued that this alleged “emendation” has been one of the primary reasons, if not the only one, of the ongoing controversy among writers<sup>59</sup> as to the actual status of a would-be intervening State under Article 62 of the Court’s Statute and as to the application of *res judicata*.

The general proposition is that contentious proceedings before the Court are for third States *res inter alios acta*.<sup>60</sup> However, a State, which is not a party to a pending proceeding before the Court, but wishes to intervene, may submit an application for intervention under Article 62 of the Statute which provides: “(1). Should a State consider that it has an interest of a legal nature that may be affected by the decision in the case, it may submit a request to the Court to intervene. (2). It shall be for the Court to decide upon this request”. Such an application must now be made in accordance with Article 81 (2) of the Rules of the Court of 1978 which requires the applicant seeking permission to intervene to state its interest of a legal nature which might be affected by the decision in the case; the precise object of its intervention; and any basis of jurisdiction which is claimed to exist between the applicant and other parties. It should be emphasised, however, that neither Article 62 of the Statute nor the relevant Rules of the Court differentiate between intervention as party and intervention as a non-party. Nevertheless, a distinction between the two ought to be envisaged by the general principle of administration of justice in order to know when and how to apply the binding force of *res judicata* on would-be intervening States. The enforcement of a judgment against a would-be intervening State and for the *res judicata* to operate depends thus largely on the status attributed to such a potential party.

Notwithstanding this valid premise, Aréchaga and Miller have asserted, but without adequate qualification or justification, that a State intervening under Article 62 of the Statute becomes a “party” to the case and subsequently is bound by the

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<sup>58</sup> *Ibid.*, p. 613 & 676. For a historical analysis see, Oda, S., “Intervention in the International Court of Justice” in Bernhardt, R., & Mosler, H., (ed), *Volkerrech als Rechtsordnung Internationale Gerichtsbarkeit Menschenrechte*, (New York: Springer-Verlage, Berlin, Heidelberg, 1983), pp. 629-648, at pp. 629-39.

<sup>59</sup> Rosenne, S., *supra* note 5, p. 32.

<sup>60</sup> ICJ. Rep. (1984) 3, p.17. See also Greig, D.W., *supra* note 8, fn.1, p. 287.

judgment.<sup>61</sup> Judge Aréchaga, in support of his argument, stated two reasons against allowing intervention as a non-party: first, a non-party intervener might invoke the decision as *res judicata* against the original parties either in litigation or negotiations. Second, the intervener State would not expose itself to counterclaims or opposing submissions that could be made by the original parties.<sup>62</sup> Judge Aréchaga, after claiming that Article 62 itself “requires the intervener to become a party to the case in the full sense of the term” stated that it would be “equally bound by the judgment under Article 59 of the Statute and Article 94 of the United Nations Charter”.<sup>63</sup> While Miller, who also did not differentiate between intervention as a party and intervention as a non-party, relied exclusively on Article 62 to suggest that “it is not clear what binding effect a decision might have on an Article 62 intervenor. The Court’s action is not likely to result in a direct judgment for or against the intervenor, in the sense of the grant of a right or the imposition of an obligation.”<sup>64</sup> These assertions are misleading and must be examined in the light of the relevant jurisprudence of the Court.

The first genuine attempt to illustrate the status and the binding force of a judgment on a would-be intervening State in a pending proceeding occurred in the light of Malta’s application for intervention under Article 62 of the Statute in *Continental Shelf case (Tunisia / Libya) Application by Malta for Permission to Intervene*.<sup>65</sup> The Parties (Tunisia and Libya) in that case asked the Court to indicate the principles and rules applicable to their continental shelf claims. Malta, which was concerned about the possible effect of such a decision on its continental shelf claims, submitted an application for permission to intervene, in which it stated that it wished to participate in the proceedings not as a “party”, but rather as a “participant”, merely to express its views to the Court on issues brought before it in this pending case.<sup>66</sup> Malta argued that its interests would inevitably be affected by “the effective decision

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<sup>61</sup> Miller, J. T., *supra* note 10, p. 555, and Aréchaga, J., “Intervention under Article 62 of the Statute of the International Court of Justice”, in Bernhardt, R., & Mosler, H., (eds), *Volkerrecht als Rechtsordnung Internationale Gerichtsbarkeit Menschenrechte*, (New York: Springer-Verlage, Berlin, Heidelberg, 1983), pp. 453-465, at p. 454. See also Mani, V. S., *supra* note 5, p. 274.

<sup>62</sup> Arechaga, J., *supra* note 60, p. 455.

<sup>63</sup> *Ibid.*, p. 454.

<sup>64</sup> Miller, J. T., *supra* note 10, p.555; Mani, V. S, *supra* note 5, pp. 555-6.

<sup>65</sup> ICJ. Rep. (1981), p. 3.

<sup>66</sup> ICJ. Rep. (1981), 3, p.8. See, however, Licari, T., “Intervention under Article 62 of the Statute of the I.C.J”, 8 *Brooklyn. J Int'l L*, (1982), pp. 267-287, at p. 277.

contained in the Court's reasoning", regardless of Article 59 of the Statute.<sup>67</sup> Tunisia acknowledged that Malta had an interest of a legal nature which might be "touched", but not "affected" by the decision in the case.<sup>68</sup> Nonetheless, it suggested that Malta's interest would be adequately safeguarded by Article 59 of the Statute.<sup>69</sup> For its part, Libya, *inter alia*, contested that the primary purpose of Malta's intervention must have been more than a submission of its views.<sup>70</sup> Subsequently both parties opposed rigorously the application of Malta to intervene.

Although Malta argued that the only condition stipulated by the Statute of the Court under Article 62 was that the intervening State should establish that it had an interest of a legal nature which might be affected by the decision to be given, the Court looked for something beyond this basic stipulation. The Court recognized that Malta was attempting to intervene without assuming any responsibility or any obligation of a party within the meaning of Article 59 of the Statute by which it would be bound.<sup>71</sup> The Court found that the nature of the object of the intervention presented could not enable it to grant Malta permission to intervene and it decided *unanimously* that Malta's application was inadmissible.<sup>72</sup> Therefore, it did not examine the other requirement contemplated by Article 62 and Article 81(2) of the Rules of the Court, namely the so-called "jurisdictional link" between itself and the original parties. Consequently, it appeared to be extremely important for the Court to have had before it, *inter alia*, an unequivocal acknowledgement or admission from the intervening State that it wishes to intervene as a third party. It should also indicate irreversibly in its final submission that it would subject itself to the binding force of the judgment in the case and comply with it in accordance with Article 59 of the Statute and Article 94 of the Charter of the United Nations.<sup>73</sup> This is an implicit stipulation in Article 62 and the relevant Articles of the Rules of the Court, which can be deduced from the original wording of Article 62 of the Statute of the PCIJ.<sup>74</sup> An attempt to meet this

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<sup>67</sup> ICJ. Rep. (1981), p. 9, para 13.

<sup>68</sup> *Ibid.*, p. 10, para 15.

<sup>69</sup> *Ibid.*

<sup>70</sup> *Ibid.*

<sup>71</sup> ICJ. Rep. (1981), p. 18, para 32. See also Stanczyk, J., "The Application for Interpretation of Judgments Delivered by the International Court of Justice", XVII *Pol. Yb. Int'l L.* (1988), pp. 193-210, at p. 126.

<sup>72</sup> ICJ. Rep. (1981), p.20, para 37.

<sup>73</sup> ICJ.Rep. (1982), p.80, para. 29.

<sup>74</sup> See, e.g., Hoogh, A. J., "Intervention Under Article 63 of the Statute and the Quest for Incidental Jurisdiction Without the Consent of the Principal Parties" 6 *Leiden J Int'l L.* (1993), pp.17-46, at p. 32.

requirement was, in fact, predominant in Italy's application to intervene in the subsequent case between Libya and Malta.

Anxious to avoid facing the same obstacles that Malta had faced with its request, Italy agreed to meet this requirement and to comply with the judgment to be given under the Statute of the Court and the Charter of the United Nations. It declared that once it was "permitted to intervene, [it] will submit to such decision as the Court may make with regard to rights claimed by Italy, in full conformity with the terms of Article 59 of the Statute of the Court".<sup>75</sup> Consequently, it was demanding the status of an "*intervening party*" eligible to make submissions.<sup>76</sup> Thus, Italy was willing to assume the responsibility and the obligation contemplated in Articles 59 and 60 of the Statute and in Article 94 of the UN. Charter and thus the application of *res judicata*. Notwithstanding Italy's unequivocal undertaking to comply with the judgment to be given, both parties (Libya / Malta) opposed the Italian intervention. Libya, *inter alia*, argued that Italy's interests would be protected by Article 59 of the Statute, and that the Italian undertaking to be bound by the final judgment was not sufficient *per se* to enable it to intervene in the absence of a jurisdictional link.<sup>77</sup> The Court sustained the protective function of Article 59.<sup>78</sup> Judge Robert Jennings appended a dissenting opinion criticising severely the decision of the Court and more specifically the protective function of Article 59 of the Statute, arguing that the protection of third-party interest provided by Article 59 was "largely illusory".<sup>79</sup> In his view, Article 59 did not preclude "the force of persuasive precedent". He went on to state, "the mention of Article 59 as adequate protection of Italy would seem to have a touch of irony". He concluded:

Article 59 applies, after all, in all cases without exception ... If Article 59 ensures that a third State's rights can never be affected by the judgment, this must mean that a third State's rights can never be affected in the sense of Article 62. To interpret one article of the

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<sup>75</sup> ICJ. Rep. (1984), p.13.

<sup>76</sup> *Ibid.*

<sup>77</sup> *Ibid.*, p.15.

<sup>78</sup> *Ibid.*, p. 26, para 42. See also *Legal Status of Eastern Greenland* (1933), PCIJ, Ser.A/B, No.53,p.46.

<sup>79</sup> *Libya / Malta Continental Shelf Case*, ICJ. Rep. (1984), p. 157, See also the Dissenting Opinion of Judge Mbaye, at pp. 46-47.

Statute in such a way as to deprive another article in the same section of the Statute of all meaning, cannot be right.<sup>80</sup>

These criticisms would have sounded convincing if they had been directed against Article 62 rather than Article 59 of the Statute. Although there has been no concrete case yet decided by the Court elucidating the relationship between Article 59 and 62 of the Statute and the application of *res judicata*, and there has been no State that has been granted a permission to intervene as a “party”, as opposed to “non-party”, Article 31 (3) of Annex VI, of the United Nations Convention on the Law of the Sea of 1982 and Article 39 (4) of the Draft Statute of the Arab Court of Justice can be seen as a springboard in this regard. Article 31 (3) stipulates clearly that “*If a request to intervene is granted, the decision of the Tribunal in respect of the dispute shall be binding upon the intervening State Party in so far as it relates to matters in respect of which that State Party intervened*”(emphasis added). More categorically, Article 39 (4) of the Statute of the Arab Court of Justice provides that “*If the Court admits an application to intervene, the intervening party shall become a party to the dispute, and the Court’s judgment shall be binding upon it to the extent that the judgment is related to the issues causing it to intervene*”(emphasis added). These provisions are significant evidence reflecting the prevailing practice in this regard and a testimony to the defect of Article 62 of the Statute of the ICJ itself which has failed to provide at least clear and an adequate qualification of the status of a would-be intervening State, on one hand, and the bindingness and enforceability of the judgment to be given against such a potential party, i.e., the application of *res judicata*, on the other hand.

In addition, these provisions provide, by analogy, an additional emphasis of the adequacy of Article 59 of Statute in relation to third States. As Professor Rosenne has asserted, Article 59 of the Statute is not “ill-advised or stands in contradiction with Article 63”.<sup>81</sup> As we shall see below, Article 63 is consistent with Article 59. When a State is granted permission to intervene under Article 63, it will assume the status of “*intervening party*”, and will equally be bound by the construction given in

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<sup>80</sup> *Ibid.* p. 159. See also the Dissenting Opinion of Judge Mbaye, at pp. 46-47. Three other Judges (Mosler, Oda and Schwebel), appended Dissenting Opinions. Similar to Judge Jennings, Judge Schwebel stated, “Article 59 cannot, by any canon of interpretation, be so read as to read Article 62 out of the Statute”. *Ibid.*, p.134. See also Judge Schwebel’s Dissenting Opinion in *Certain Phosphate Lands in Nauru* case. ICJ. Rep. (1992), pp. 333-342.

<sup>81</sup> Rosenne, S., *The Law and Practice*, *supra* note 7, p. 1650.

the judgment, whereas the status of intervening State under Article 62 is not clear and depends on other criteria. In fact, this defect has been in existence since the phrase “as a third party”, was deleted by the Washington Committee of Jurists in 1945.<sup>82</sup> Consequently, Article 59 of the Statute should provide in principle an adequate protection against the application of *res judicata* to non-party States whether intervening as a *non-party* or not intervening at all. However, if the intervening State does not establish a valid jurisdictional link with the original parties it may participate not as a *party*, but rather as a *non-party* intervenor only if it established that it has an interest of a legal nature which might be affected by the decision to be given as stipulated under Article 62 and other relevant Articles of the Rules of the Court. In sum, there is no *res judicata* on a would-be intervening State unless it has been admitted as an intervening party and only in respect of the extent to which it intervened. This interpretation has elegantly been affirmed by the Court in its subsequent jurisprudence.

In the *Land, Island and Maritime Frontier Dispute (El Salvador / Honduras) Application to Intervene by Nicaragua*,<sup>83</sup> after El Salvador and Honduras had notified the Court jointly of a special agreement with respect to a number of various disputes between them, Nicaragua submitted an Application for intervention under Articles 36 (1) and 62 of the Statute of the Court, in order to present its views with respect to the adjacent maritime area and the Gulf of Fonseca.<sup>84</sup> Taking into consideration the jurisprudence of the Court in the *Continental Shelf cases*, Nicaragua indicated in its *Application* that it “*intends* to subject itself to the binding effect of the decision to be given”.<sup>85</sup> Honduras had apparently no objection to the Nicaraguan intervention, while El Salvador did object.<sup>86</sup> After various submissions presented by the parties, the Chamber found that Nicaragua had established that it had an interest of a legal nature only with respect to the waters of the Gulf of Fonseca, and unanimously granted Nicaragua permission to intervene in the proceedings.<sup>87</sup>

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<sup>82</sup> 14 *UNCIO*, p. 676.

<sup>83</sup> ICJ. Rep. (1990), p.4.

<sup>84</sup> ICJ. Rep. (1990), p. 108 para. 38.

<sup>85</sup> *Ibid.*, p. 109 para. 38 (emphasis added).

<sup>86</sup> *Ibid.*, p. 99, para. 17, and p.120, paras. 69-70.

<sup>87</sup> *Ibid.*, p. 105.

The Chamber correctly observed “no other State may involve itself in the proceedings without the consent of the original parties”.<sup>88</sup> Since it was the first time in the history of the Court in which a third State was granted permission to intervene under Article 62 of Statute, the Chamber saw it appropriate to make some observations. It stated, “the intervening State does not become party to proceedings, and does not acquire the rights, or become subject to the obligations, which attach to the status of a party, under the Statute and Rules of Court or general principles of procedural law”. It went on to add that: “Nicaragua as an intervening State has of course a right to be heard by the Court ... [to submit] a written statement and participate in the hearings”.<sup>89</sup>

However, in the merits phase, Nicaragua reversed its position regarding its intention to subject itself to the binding effect of the judgment after it had successfully secured permission to intervene by arguing that it would be protected by Article 59 of the Statute.<sup>90</sup> The Chamber recognized Nicaragua’s new position without any objection.<sup>91</sup> Furthermore, it reiterated what it had already stated in the judgment of 1990, but with some clarifications in the light of the Nicaragua's new position by holding:

The question however remains of the effect, if any, to be given to the Statement made in Nicaragua's Application for permission to intervene that it "intends to submit itself to the binding effect of the decision to be given". In the Chamber's Judgment of 13 September 1990, emphasis was laid on the need, if an intervener is to become a party, for the consent of the existing parties to the case, either consent *ad hoc* or in the form of pre-existing link of jurisdiction. This is essential because the force of *res judicata* does not operate in one direction only: if an intervener becomes a party, and is thus bound by the judgment against

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<sup>88</sup> *Ibid.*, p. 133, para 95.

<sup>89</sup> ICJ Rep. (1990), pp. 135-36 para 102.

<sup>90</sup> Nicaragua's statement in which it modified its position as appeared in the reasoning of the judgment of 1992 was as follows: " It is the understanding of Nicaragua that as a non-party in this case, it cannot be affected by the decision of the Chamber on the merits. As a non-party Nicaragua is under the protection of Article 59 of the Statute of the Court and the right it has acquired by having its Application admitted is fundamentally the right to heard by the Chamber on the merits will remain *res inter alios acta*. Nicaragua understands that this is the clear meaning of paragraph 102 of the Judgment of 31 September 1990", ICJ Rep. (1992), p.608, para. 421.

<sup>91</sup> *Ibid.*

the other parties. A non-party to a case before the Court, whether or not admitted to intervene, cannot by its own unilateral act place itself in the position of a party, and claim to be entitled to rely on the judgment against the original parties. In the present case, El Salvador requested the Chamber to deny the permission to intervene sought by Nicaragua; and neither Party has given any indication of consent to Nicaragua's being recognized to have any status which would enable it to rely on the judgment. The Chamber therefore concludes that in the circumstances of the present case, this judgment is not *res judicata* for Nicaragua.<sup>92</sup>

It is thus imperative that a judgment cannot be *res judicata* for a would-be intervening State that does not intervene as a "party". In other words, a non-party intervener before the ICJ is not bound by the judgment as *res judicata*, otherwise that would be a violation of the basic assumption of the State consent on which the jurisdiction of the ICJ relies. Nevertheless, in his dissenting opinion, Judge Oda criticised this judgment, and in particular this passage, by declaring, "In my view, Nicaragua, as a non-party intervener, will certainly be bound by this judgment in so far as it relates to the legal situation of the maritime spaces of the Gulf".<sup>93</sup> However, Judge Oda did not state the nature of the obligation by which Nicaragua would be bound. Similarly, Judge *ad hoc* Torres Bernardez, although he agreed with the finding of the judgment that "in the circumstances of the present case, the judgment is not *res judicata* for Nicaragua", wondered what "the effects of the Judgment other than that of *res judicata* (Art. 59 of the Statute) on a non-party State intervening under Article 62 of the Statute" would be.<sup>94</sup>

Professor Rosenne partly answered this wonder. He suggested "[S]urely a judgment stating what the law is as regards a -any- territorial dispute is valid *erga omnes*".<sup>95</sup> This is correct in principle as Dr. Scobbie rightly concurred.<sup>96</sup> The limited right granted to a non-party intervener should be countered with some limited

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<sup>92</sup> *Ibid.*, p. 610, para. 424.

<sup>93</sup> *Ibid.*, p. 619; see also ICJ. Rep (1981), p. 22 and ICJ. Rep (1984), p. 90.

<sup>94</sup> ICJ Rep. (1992) p. 730, para 208.

<sup>95</sup> Rosenne, S., *supra* note 5, p. 155.

<sup>96</sup> Scobbie, I., "The ICJ and the Gulf of the Fonseca", 18 *Marine Policy* (1994), pp. 249-262, at pp. 261-2.

obligation because, as Judge *ad hoc* Torres Bernardez observed, there are no “rights without obligations”.<sup>97</sup> But, under no circumstances and whatever this obligation might be, there is no obligation of *res judicata* incumbent upon their States which are not “parties” to the same proceedings or dispute. Indeed, a possible obligation such as an obligation *erga omnes* upon a non-party intervener does not preclude that party from instituting fresh proceedings involving the same subject matter as long as the principle of *res judicata* is not applicable to that non-party since it was not a party to that particular case in the first place. So, although the judgment of 1917 rendered by the Central American Court on the status of the waters of the Gulf of Fonseca<sup>98</sup> was *res judicata* only between El Salvador and Nicaragua and just *erga omnes* to Honduras, it was nevertheless brought before the Chamber in *El Salvador / Honduras* case. Consequently the interpretation given by the Chamber in its Judgment should settle the question of the status of a would-be intervening under Article 62 of the Statute and, accordingly, the application of *res judicata* to it.

Surprisingly, however, the Chamber’s Judgment in that case seems to some commentators to indicate that the status of would-be intervening State under Article 62 of the Statute has not been settled.<sup>99</sup> Other feel that this judgment is disappointing and “thoroughly misleading”,<sup>100</sup> whereas some have suggested that the composition of the Chamber had a great influence on reaching its conclusion.<sup>101</sup> These assumptions are inaccurate and they cannot be substantiated specially in the light of the subsequent jurisprudence of the Court in this regard.

The Chamber’s Judgment has, indeed, offered a reasonable avenue of preserving in broad terms the interests of the original parties from being affected by the institution of intervention granted without their consent as the Court has already maintained in the previous *Continental Shelf* cases. It is indeed difficult to deny that the Chamber’s judgment “represents a landmark development in the procedural

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<sup>97</sup> ICJ. Rep. (1992), 730, para 208.

<sup>98</sup> For the Judgment see 11 *AJIL* (1917), p. 674.

<sup>99</sup> Hoogh, A. J., *supra* note 73, p. 36

<sup>100</sup> Scobbie, I., *supra* note 95, at p. 262; see also in his article “*Res Judicata, Precedent and the International Court*”, *supra* note 34, at pp. 303-4 and Rosenne .S, *supra* note, 5, p. 155.

<sup>101</sup> Lauterpacht, E., *supra* note 52, p. 28-29, and Macdonald R. St .J, and Hughes, V., “*Intervention Before the International Court of Justice*”, 5 *Afri.J.Int’ & Pol’y* (1993), pp. 1-33, at pp., 26 & 31. There were three judges in the Chamber who had already expressed doubts against the need for jurisdictional link: Judge Oda in *Tunisia / Libya case*. ICJ Rep. (1981), p. 27; Judge Sette-Camara in *Libya / Malta case*. ICJ. Rep (1984), p. 86, and Judge Jennings. *Ibid*, pp. 155-6.

jurisprudence of the ICJ”,<sup>102</sup> and “a positive step in the development of International law”.<sup>103</sup> The approach of the Court in those cases of intervention and the conclusions reached through the examination of these cases have been maintained in the *Land and Maritime boundary disputes between Cameroon / Nigeria (Application by Equatorial Guinea to Intervene)*, and *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia / Malaysia) Application of the Philippines to intervene*.

In *Land and Maritime boundary disputes between Cameroon / Nigeria (Application by Equatorial Guinea to Intervene)* case, Equatorial Guinea filed an application to intervene under Article 62, stating unequivocally that it “does not seek to be a party to the case before the Court”.<sup>104</sup> Cameroon and Nigeria had no objection to the intervention as such.<sup>105</sup> However, Nigeria by a letter dated 13 September 1999, referred to certain passages in the written observations of Cameroon and maintained that Cameroon had misrepresented the position of Equatorial Guinea, which should have been that Equatorial Guinea “did not seek to intervene as a party, but as a third party”.<sup>106</sup> On the other hand, Cameroon, by a letter dated 11 October 1999, indicated that “it [did] not dispute the right of Equatorial Guinea to intervene as a non-party intervener”, and expressed the view that “it [was] not for Nigeria to take the place of Equatorial Guinea in deciding on the latter's entitlement to intervene”.<sup>107</sup> The Court took note of the observation made by Equatorial Guinea in a further communication, dated 11 October 1999, in which it sought the “status of a non-party intervener”.<sup>108</sup> Subsequently, the Court *unanimously* upheld the Chamber's judgment of 11 September 1992 in *El Salvador / Honduras* case, by permitting Equatorial Guinea to intervene “to the extent, in the manner and for the purposes set out in its Application for permission to intervene [as a non-party intervener]”.<sup>109</sup> So, it was enough for Equatorial Guinea to fulfil of the requirements stipulated by Article 62 and the relevant Articles of the Rules of the Court to secure permission to intervene as a non-

<sup>102</sup> Ratner, S., “*Land, Island, and Maritime Frontier Dispute, (El Salvador / Honduras) Application to Intervene*” 85 *AJIL* (1991), pp. 680-6, at p. 683.

<sup>103</sup> Macdonald, R. St. J & Hughes, V., *supra* note 100, p. 33.

<sup>104</sup> ICJ. Rep. (1999) para 5. Furthermore, Guinea emphasized that there was no basis for jurisdiction under the Statute and Rules of the Court arising out of pre-existing understandings between Equatorial Guinea, Nigeria and Cameroon. *Ibid.*

<sup>105</sup> *Ibid.*, para. 11.

<sup>106</sup> *Ibid.*

<sup>107</sup> *Ibid.*

<sup>108</sup> *Ibid.*

<sup>109</sup> *Ibid.*, para. 18.

party. Had Equatorial Guinea wished to intervene as a party, it should have established a valid jurisdictional link between itself and the original parties since this becomes not a requirement for the success of an application of intervention *per se*, but rather a decisive requirement for the attribution of the status of a party to the case and for the principle of *res judicata* to operate.<sup>110</sup> This position was reaffirmed by the Court in *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia / Malaysia) Application of the Philippines to intervene*.

In the *Sovereignty over Pulau Ligitan and Pulau Sipadan case* (Application of the Philippines to intervene), the Philippines filed an application to intervene under Article 62. It stated categorically that it “does not seek to be a party to the case before the Court concerning sovereignty over Pulau Ligitan and Pulau Sipadan ”.<sup>111</sup> In their written observations, both parties (Indonesia and Malaysia) opposed the Philippines’s intervention.<sup>112</sup> Indonesia concluded that “the Philippines ha[d] not demonstrated that it has an interest of a legal nature which may be affected by the a decision in the case and that the Application should, accordingly, be denied”. For its part, Malaysia stated that “not merely has the Philippines no right to intervene, it has no claim to make”.<sup>113</sup> Malaysia further contested, “in the present case the jurisdictional link is ... twice lacking. First there is no conventional instrument or unilateral declaration giving the Court jurisdiction to adjudicate upon the territorial dispute between the Philippines and either one of the Parties to the case; second both Parties in the present case oppose a request for intervention by the Philippines”.<sup>114</sup>

The Court observed that the Chamber had pointed out in *Land, Island and Maritime Frontier Dispute (El Salvador / Honduras) Application to Intervene by Nicaragua* and the Court had recalled in the *Land and Maritime boundary disputes between Cameroon / Nigeria (Application by Equatorial Guinea to Intervene)* that “a valid link of jurisdiction between the would-be intervener and the parties is not a requirement for the success of the application. On the contrary, the procedure of intervention is to ensure that a State with possibly affected interests may be permitted to intervene even though there is no jurisdictional link and it therefore cannot become

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<sup>110</sup> *Land, Island and Maritime Frontier Dispute (El Salvador / Honduras) Application to Intervene by Nicaragua*, ICJ.Rep. (1990), p.135, para. 99 & 100 and *Land and Maritime boundary (Cameroon v. Nigeria)*, ICJ. Rep.(1999)pp.1034-1035,para 15.

<sup>111</sup> ICJ. Rep. (2001) para 7 and 33.

<sup>112</sup> *Ibid.*, para. 8

<sup>113</sup> *Ibid.*, para. 12

<sup>114</sup> *Ibid.*, para. .32. Indonesia, however, presented no argument in this regard.

a party".<sup>115</sup> Thus, "such a jurisdictional link between the intervening State and the parties to the case is required only if the State seeking to intervene is desirous of 'itself becoming a party to the case'".<sup>116</sup> However, this was not the case with the Philippines' Application. Hence, the absence of a jurisdictional link between the Philippines and the parties did not present a bar to the Philippines intervention as long as it did not seek to intervene as a party but rather as a non-party,<sup>117</sup> regardless of the objections made by both parties to its intervention. In fact, the Philippines failed to fulfil the basic requirement of intervention, namely, that its specific legal interests might be affected in the particular circumstances of this case. Therefore its application was rejected.<sup>118</sup> Again, had the Philippines been admitted to intervene even as a non-party, the application of *res judicata* against it would have been also inconceivable for the same reasons advanced above.

#### 2.2.2.2. Intervention under Article 63 of the Statute

The binding force of *res judicata* on a would-be intervening State under Article 63 of the Statute of the ICJ is less problematic. Article 63 was initially proposed by the Advisory Committee of Jurists in 1920 in draft Article 23 (which later became Article 63 of the Statute of the PCIJ). It was almost identical to the present version of the same article but with an incidental modification as far as the binding force of the construction was concerned. Article 23 provided in relevant part that "the judgment will *have the force of res judicata* concerning the intervening party",<sup>119</sup> while the present one provides that "the construction in the judgment will *be equally binding* upon it". There was nothing, however, in the minutes of the Advisory Committee in 1920 to indicate the rationale behind that substitution. It has been suggested that this change might have been "accidental".<sup>120</sup> In fact, this substitution is immaterial as far as the doctrine of *res judicata* is concerned. The implication of *res judicata* can logically be derived from both provisions.

<sup>115</sup> *Land, Island and Maritime Frontier Dispute (El Salvador / Honduras) Application to Intervene by Nicaragua*, ICJ.Rep. (1990), p.135, para. 100 and *Land and Maritime Boundary (Cameroon v. Nigeria)*, ICJ. Rep. (1999), pp. 1034-1035, para. 15.

<sup>116</sup> ICJ. Rep. (2001), para. 35 cited the *Land, Island and Maritime Frontier Dispute (El Salvador / Honduras) Application to Intervene by Nicaragua*, ICJ.Rep. (1990), p.135, para. 99.

<sup>117</sup> ICJ. Rep. (2001), para. 36

<sup>118</sup> *Ibid*, para. 93.

<sup>119</sup> *Procès-Verbaux*, *supra* note 1, pp. 587 & 592; also cited in Rosenne, S., *supra* note 5, p. 22.

<sup>120</sup> Rosenne, S., "Some Reflections on Intervention in the International Court of Justice", 34 *NILR*, (1987), pp. 75-90, at p. 76.

Apparently the main purpose of indicating that “the judgment will *have the force of res judicata* concerning the intervening party” was merely to clarify the status of the intervening States and to restrict the effect of *res judicata* to the interpretation of the convention in question.<sup>121</sup> Thus, the phrase “construction given by the judgment” appears to be substantially equivalent to term “decision”<sup>122</sup> in Article 59 of the Statute of the Court and thus the construction, which is incorporated into the decision, acquires the authority of *res judicata*. Consequently, a State intervening under Article 63 of the Statute will be equally bound by the interpretation of the convention given by the judgment as *res judicata* notwithstanding the immaterial substitution made by the Advisory Committee in 1920.<sup>123</sup>

The first authoritative ruling substantiating this proposition was pronounced by the PCIJ in its judgment on the Polish declaration to intervene in *S.S Wimbledon* case. In that case, the Court gave the first authoritative ruling on the binding force of a construction of a convention in question given by the judgment upon an intervening State under Article 63. It reaffirmed that the construction of the convention “will be equally binding upon [intervening State] as upon the original applicant parties”.<sup>124</sup> This affirmation of the binding force of *res judicata* upon a State intervening under Article 63 implies that the status of a would-be intervening State under this provision will always and only be the status of an “intervening party” as opposed to intervening as a non-party.

The status of an intervening State under Article 63 was first expressly indicated by the Court in the *Haya de la Torre* case, when it treated Cuba as an “intervening party”.<sup>125</sup> In that case, Cuba, as a party to the Havana Convention on Asylum of 1928, filed a letter and a memorandum which the Court treated as a declaration to intervene under Article 63. In its declaration Cuba stated its position regarding the construction of the Havana Convention and also its general views about diplomatic asylum. Peru, as an original party to the case, strenuously contested the admissibility of the Cuban intervention on various grounds, *inter alia*, that it “did not

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<sup>121</sup> Arechaga, J., *supra* note 60.

<sup>122</sup> See, e.g., Keith, K., *The Extent of the Advisory Jurisdiction of the International Court of Justice*, (Leyden, 1971), pp. 28-29.

<sup>123</sup> See, e.g., Damrosch, L. P., “Multilateral Disputes”, in Damrosch, L.P., (ed), *The International Court of Justice at a Crossroads*, (Transnational Publishers, 1987), pp.376-400, at p.381 and Franck, T. M., “Fairness in the International Legal and Institutional System. *General Course of International Law*”, vol. 240 *RdC*, (1993), pp.9-498.at p. 337.

<sup>124</sup> (1923), PCIJ., Ser. A, No. 1 p. 12.

<sup>125</sup> *Haya de la Torre* (Colombia v. Peru) *Cuba Intervening*, ICJ. Rep. (1951), p. 72.

constitute an intervention in the true meaning of the term, but an attempt by a third State to appeal against the judgment delivered by the Court on November 20<sup>th</sup>, 1950".<sup>126</sup> The Court observed that: "every intervention is incidental to the proceedings in a case, it follows that a declaration filed as an intervention only acquires that character, in law, if it actually relates to the subject matter of the pending proceedings".<sup>127</sup> It also noted that the Cuban memorandum attached to its declaration was "devoted almost entirely to a decision of the question, which the judgment of November 20th 1950, had already decided, with the authority of *res judicata*".<sup>128</sup> The Court found that the declaration was not 'genuine', nevertheless, it granted Cuba permission to intervene since it was requested to interpret a new aspect of the Havana Convention, which had not been interpreted nor acquired the effect of *res judicata* its previous Judgment.

Thus, the fundamental requirements for intervention under Article 63 of the Statute are that the State which wishes to intervene should introduce its intervention during contentious proceedings pending before the Court and must confine its intervention to the direct construction of the convention at issue to which it is a party. Once these conditions have been met, a would-be intervening State will most likely be granted permission to intervene only as an intervening party and will consequently be bound by the judgment given with respect to the construction of the convention in question. Yet, the question as to whether the construction given by the Court in a binding judgment would have any implication or far-reaching application to other States parties to the convention in question but not parties to the case, remains to be answered.

In a commentary on the application of Article 59 of the Statute of PCIJ on the Court's decision in the *Wimbledon* case,<sup>129</sup> and in connection with the intervention of Poland, Verzijl believed that the phrase "in respect of that particular case" in Article 59 to be "illogical in the context of the Statute".<sup>130</sup> In support of his criticism, he cited

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<sup>126</sup> *Ibid.*, p. 76.

<sup>127</sup> *Ibid.*

<sup>128</sup> *Ibid.*, p.77.

<sup>129</sup> (1932), PCIJ. Ser. A, No. 1; Verzijl, J.H.W., "Die Rechtssprechung des Standigen Internationalen Gerichtshofes von 1922 bis Mai 1926", 13 *Zeitschrift für Völkerrecht*, (1926), p. 489; quoted in Rosenne, S., "Article 59 of the Statute of the International Court of Justice Revisited" in Rama-Montaldo, M., (ed), *El Derecho Interncional en un Mundo en Transformacion: Liber Amicorum al Profesor Eduardo Jimenez de Arechaga* (1995), Vol. II, pp. 1129-58, at p. 1131.

<sup>130</sup> Verzijl, J.H.W., *The Jurisprudence of the World Court: A Case by Case Commentary*, Vol. I (Sijthoff: Leyden, 1965), p. 21.

the Court's position in the *Mavrommatis Concessions* case concerning a treaty interpretation in which it had stated, "that construction, which is to be found in the Court's Judgments Nos. 2 and 5, must undoubtedly be taken into account in the decision of the present case". He also argued "an interpretation, adopted between two parties in one case must of course be adopted also in another case between the same parties, whatever the ill-advised wording of Article 59".<sup>131</sup> His wide interpretation of Article 59 and the Court's finding in that case significantly influenced the Arbitral Tribunal in the *Lighthouses* case (Greece v. France), in which Professor Verzijl was the President of the panel.<sup>132</sup> It held:

One could, moreover maintain – also arguing juridically- that the text of Article 59 of the Statute of the International Court of Justice and of the instrument which preceded it is badly drafted and that one must necessarily interpret it in a more liberal sense than its terms appear to justify ... If it were true that a judgment of the Court is clothed with the authority of *res judicata* only in the case which has been decided, that would mean that, if the *lis* concerns the interpretation of a clause of a treaty, the interpretation given could be used again in arguments in any future *lis* concerning the same clause of a treaty. Such a result would not only be absurd; it would put Article 59 in irreconcilable contradiction with the last sentence of Article 63 of the same Statute, which provides that when a third State intervenes in a case in which there is in question the construction of a multilateral convention to which it and the States concerned in the case are parties, the construction given by the Judgment will be equally binding on that State. *The res judicata extends, in consequence, beyond the strict limits of the case decided*".<sup>133</sup>

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<sup>131</sup> *Ibid.*, p. 115.

<sup>132</sup> Stuyt, M. A., *Survey of International Arbitration, 1794-1989*, (Martinus Nijhoff, 1990), p.412; see also Rosenne, S., *The Law and Practice*, *supra* note 7, fn. 48, at p. 1151.

<sup>133</sup> 23 *ILR* (1956), pp. 86-87 (emphasis added).

In reality, an authoritative interpretation of a multilateral treaty given by an authoritative and impartial international judicial body like the ICJ as the judicial organ of the United Nations may have some inevitable implication or application even in subsequent proceedings but not as “precedent” or as *res judicata*. Otherwise that would pose a serious problem of compatibility with Articles 59 and 60 of the Statute of the Court and Article 94 of the UN Charter and more importantly the basic assumption of State consent. This basic assumption was stated early by the Court in the *Monetary Gold Removed from Rome* case. It held that the stated rule in Article 59 “rests on the assumption that the Court is at least able to render a binding decision” while the issue “concerns the international responsibility of a third State” cannot be given or decided in a decision that would be binding upon any State, either the third State or any of the parties before it.<sup>134</sup>

An authoritative interpretation of a multilateral treaty may be arguably applicable to other States parties to the same instrument as *erga omnes*.<sup>135</sup> This was perceived by the ICJ in the *Aegean Sea Continental Shelf* case. In that case, the Court stated that “Although under Article 59 of the Statute...it is evident that any pronouncement of the Court as to the status of the 1928 Act whether it were found to be a convention in force or to be no longer in force, may have implications in the relations between States other than the Greece and Turkey”.<sup>136</sup> Likewise, in the *Namibia* case, the Court went further and stated that “the termination of the Mandate and declaration of the illegality of South Africa’s presence in Namibia are opposable to all States in the sense of barring *erga omnes* the legality of a situation which is maintained in violation of international law”.<sup>137</sup> So, here we have two distinct legal principles: *res judicata* and *erga omnes*.

It may thus be suggested that States intervening under Article 63 in pending proceedings will be bound by the reasoning and the operative part of the judgment relating to the construction of the Convention in question as *res judicata*; and States which have not intervened would probably be persuaded by the reasoning only as the correct legal or authoritative interpretation of the convention in question. This

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<sup>134</sup> *Monetary Gold Removed from Rome in 1943, Judgment*, ICJ. Rep. (1954), p. 19, at p. 33. See also *Mavrommatis Palestine Concessions, Judgment No. 2*, (1924), PCIJ., Ser. A, No. 2, p. 16.

<sup>135</sup> Hambro, E., “Intervention under Article 63 of the Statute of the International Court of Justice” in *II Processo Internazionale Studi in onore die Gaetano Morelli, Comunicazioni e studi*, 14 (1975) pp. 387-400, at p. 398.

<sup>136</sup> ICJ Rep. (1978), p. 16, para 39. See also Judge Nagendra, *Ibid.*, p. 47.

<sup>137</sup> ICJ. Rep (1971) 16, p. 56.

proposition would be inevitable since of the ultimate purposes of this judicial body is to produce a uniform and coherent interpretation of international instruments.<sup>138</sup> This can also be inferred, for instance, from the judgment of the Court in the *Libya / Malta Continental Shelf* case, when it referred to “justice of which equality is a manifestation ... should display consistency and a degree of predictability”.<sup>139</sup>

Indeed, the Court will adopt its previous pronouncements and interpretations not because they are treated as “precedents” as it is known in the common law system<sup>140</sup> or *res judicata* but because it is the correct position of the law. The Court will do so as long as there is no reasonable reason or cause for the Court not to follow the reasoning and conclusions reached in its earlier judgments.<sup>141</sup> Therefore, Professor Verzijl’s, as well as the Tribunal’s interpretations given in the *Lighthouses* case, referred to above, cannot be accepted. It has become an isolated “precedent” upon which personal and influential thoughts were reflected, which, in the view of Professor Lowe “can be distinguished, and its view in any event can be rejected as contrary to the weight of authority”.<sup>142</sup>

### 3. The Legal Obligation deriving from the Principle of *Res Judicata*

The general proposition is that a final judgment duly pronounced by an authoritative court should have the effect of *res judicata*, when the identity of parties, cause of action and subject matters are the same. Once these fundamental requisites of the doctrine have been established the litigant parties are, under Articles 59 and 60 of the Statute of the Court fully bound by the judgment and must comply with it as it stands. In this regard, the judgment is to be definitive and obligatory upon them.<sup>143</sup> Thus, the principle of *res judicata* has two fundamental effects: a negative obligation or definitive effect, by which the parties concerned must refrain from relitigating the same question at issue, which has been duly and finally decided by the Court even before the Court itself; and a positive obligation or obligatory effect, by which the

<sup>138</sup> *Libya / Malta Continental Shelf* case, ICJ. Rep. (1985), p. 39.

<sup>139</sup> *Ibid.*

<sup>140</sup> See, generally, Shahabuddeen, M., *Precedent in the World Court*, (Cambridge Univ. Press, 1996).

<sup>141</sup> *Land and Maritime Boundary* (Cameroon v. Nigeria), ICJ. Rep. (1998), 275, 292, para 28.

<sup>142</sup> Lowe, V., “*Res Judicata and the Rule of Law in International Arbitration*”, 8 *AfriJ.Int’ & Comp. L.* (1996), pp. 38-50, at p. 40.

<sup>143</sup> (1939), PCIJ., Ser. A/B. No. 78, 175.

parties concerned are obliged to execute the Court's judgment as it stands. In other words, litigant States are under an obligation of conduct and an obligation of result. The Court on various occasions has constantly confirmed the binding force and the conclusiveness of its judgments as well as international arbitral awards. In the very first case brought before it, the Court in *S.S. Wimbledon* case declared that it neither could nor should contemplate the possibility of its judgments not being complied with.<sup>144</sup> Even more noteworthy was the Court's famous *dictum* in the *Free Zones* case. The Court indicated quite broadly that it:

would be certainly incompatible with the character of the judgment rendered by the Court, and with the binding force attached to them by Articles 59 and 63 paragraph 2 of the Statute, for the Court to give a judgment which either of the Parties may render inoperative".<sup>145</sup>

It is submitted that the Court's approach was too ambitious and broad in that *dictum*, when it referred to "either of the Parties".<sup>146</sup> States against which a judgment has been rendered cannot escape the reality of the binding force of *res judicata* but the winning States can render this *dictum* moot.<sup>147</sup> It is undoubtedly true that States parties to the proceedings can conclude at any stage of the dispute a special agreement or a *compromise* in which they stipulate how to implement the judgment of the Court. They may also agree bilaterally to set aside the judgment of the Court (but not the authority of *res judicata* by virtue of such an agreement).<sup>148</sup> The reason being is that once the definitiveness and conclusiveness of *res judicata* in the same dispute *per se* has been finally established it "cannot again be called in question in so far as that the

<sup>144</sup> *S.S. Wimbledon* case (1923) PCIJ, Ser. A, No. 1, p. 32.

<sup>145</sup> (1930), PCIJ, A, No. 24, at p. 14; see also the similar enunciation confirmed in the judgment of 1932 that it is 'incompatible with the Statute, and with its position as a court of justice, for it to give a judgment which would be dependent for its validity on the subsequent approval of the parties'. (1932) PCIJ A/B, 46, at p. 161. See also, *Chorzów Factory* case, (1932) PCIJ, Ser. A, No. 17, at p. 11; *Corfu Channel* case, ICJ Rep. (1949), p. 248; *Asylum* case (interpretation), ICJ Rep. (1950), p. 402; *Monetary Gold Removed From Rome*. ICJ Rep. (1954), p. 33; *Barcelona Traction* case, ICJ Rep. (1964), p. 20; *Continental Shelf* case (Tunisia / Libya), ICJ Rep. (1982), p. 40; *Land, Island and Maritime Frontier Dispute* (El Salvador / Honduras), ICJ Rep. (1990), p. 133.

<sup>146</sup> See also Rosenne, S., *The Law and Practice*, *supra* note 7, p. 1134.

<sup>147</sup> See Cheng, B., *supra* note 16, p. 371, citing *Lazara Case* (1885), 2 UNRIAA, 1749-1805.

<sup>148</sup> See e.g., *Orinoco Steamship Co. Case* (1910), Scott, J. B., 1 *Hague Court Reports*, (1932), p. 226; Cheng, B., *supra* note 16, p. 371. See also the agreement concluded between Denmark and Norway on 18 December 1995 relating to the delimitation of the Jan Mayen area. The parties adopted a different line from the one indicated by the Court in the *Jan Mayen* case. United Nations, Law of the Sea, 21 *Bulletin* (1996), p. 59.

legal effects ensuing therefrom are concerned".<sup>149</sup> It seems thus fair to argue that the legal effects of the judicial decisions of the Court in particular and their *res judicata* are not subject to nullification.<sup>150</sup>

It follows, that the binding effect of international judicial decisions and their logical consequences are inherent in international adjudication.<sup>151</sup> Thus, the obligation to execute them can logically be derived from the definitive and obligatory character of these judgments. The most celebrated confirmation of this proposition was asserted by PCIJ in the *Société Commerciale de Belgique* case in 1939 between Belgium and Greece.<sup>152</sup> In that case, the Belgian Government filed an application instituting proceedings with the PCIJ against Greek Government after the latter had failed to execute arbitral awards rendered by an arbitral tribunal in favour of a Belgian company, *Socobel* in 1936.<sup>153</sup> In its application, Belgium asked the Court to adjudicate and declare that "all the provisions of the arbitral awards given in favour of the *Société Commerciale de Belgique* on January 3<sup>rd</sup> and July 25<sup>th</sup> are without reserve definitive and obligatory for the Greek Government", and thus, that the Greece violated its international obligation by refusing to comply with the awards of January and July 1936.<sup>154</sup> Although Greece had acknowledged the validity of the award, it asked the Court for confirmation of the impossibility of enforcing the award because of its alleged grave financial situation. Nevertheless, the Court agreed with Belgium's assertions. It held:

The submission is expressly presented as a consequence of the preceding submission and therefore of the existence of *res judicata*. It is in fact clear that everything in ... this submission follows logically from the definitive and obligatory character of arbitral awards. If the awards are definitive and obligatory, it is certain that the Greek Government is bound to execute them and to do so as they stand: it

<sup>149</sup> *Chorzów Factory (Interpretation)* case. (1927), PCIJ., Ser. A, No. 13, at 20; See also the *Northern Cameroon* case, ICJ. Rep. (1963), p.37.

<sup>150</sup> *Effects of Awards of the Compensation made by the United Nations Administrative Tribunal*, Advisory Opinion, ICJ. Rep. (1954), pp.55-56. See, however, *infra*, Section 4.

<sup>151</sup> Cheng, B., *supra* note 16, p. 338; See also Article 37 of the Second Hague Convention for the Pacific settlement of International Disputes, which provides: "Recourse to arbitration implies an engagement to submit in good faith to the award".

<sup>152</sup> (1939), PCIJ., Ser. A/B., 78, p. 174.

<sup>153</sup> See also *infra* Chapter 6. Section 4.1.

<sup>154</sup> (1939), PCIJ., Ser. A/B., 78, p. 174.

cannot therefore claim to subordinate payment of the financial charge imposed upon it to the conditions for the settlement of the Greek external public debt, since that has not been admitted in the awards. Nor can it make the sacrifice of any right of the Company recognized by the awards a condition precedent to payment. Since the Greek Government states that it recognizes the arbitral award as possessing the force of *res judicata* it cannot contest this submission ... without contradicting itself.<sup>155</sup>

This is a clear enunciation of the positive effect of *res judicata* to comply with the Court's judgment even under certain exceptional circumstances.<sup>156</sup> However, Professor Reisman argued that the Court was not justified in rejecting the position asserted by Greece and, accordingly, postponed the implementation of the award as long as such a postponement is inconsistent with the principle of *res judicata* which the award already acquired.<sup>157</sup> This might be correct in principle, since conflict over enforcement of a given judicial decision or arbitral award can be a distinct issue from the subject matter of the dispute that had already been litigated before a competent court. Yet, the Court itself was not competent to postpone the execution of the award nor did the Court have a supervisory jurisdiction over arbitral awards or other international judicial decisions in the absence of authorisation from the parties to do so.<sup>158</sup> providing that the Court has a jurisdiction under 36 of the Statute. In any event, insisting on immediate and unconditional execution of some judgments, such as monetary ones, may not always be the best strategy to proceed.<sup>159</sup> Therefore, the Court indirectly urged the parties concerned to reach some sort of settlement to their dispute since it is "highly desirable" in such circumstances.<sup>160</sup>

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<sup>155</sup> *Ibid.*, p.176; The same implication was also preserved in the *Barcelona Traction* (Preliminary Objection) case explaining the wording of Article 59 of the Statute to mean that the matter litigated "is finally deposited of for good". ICJ. Rep. (1964), p. 20.

<sup>156</sup> *Ibid.*, 177-8. See also *Asylum* case, ICJ. Rep. (1951), pp. 78-83.

<sup>157</sup> Reisman, M., "The Supervisory Jurisdiction of the International Court of Justice: international arbitration and international adjudication" 258 *RdC* (1996), pp. 9-394, at p. 247, & pp. 251-52.

<sup>158</sup> *Arbitral Award of 31 July 1989* (Guinea – Bissau v. Senegal), ICJ. Rep. (1991), p. 53.

<sup>159</sup> See, e.g., Koskenniemi, M., "Commentary: The Post-Adjudicative Phase: Judicial Error and Limits of Law" in Peck, C., Lee, R., (eds), *Increasing the Effectiveness of International Court of Justice: Proceedings of the ICJ / UNITAR Colloquium to Celebrate the 50<sup>th</sup> Anniversary of the Court*, (Martinus Nijhoff, 1997), pp. 347-357, at p. 355.

<sup>160</sup> *Société Commerciale de Belgique* case, (1939), PCIJ., Ser, A/B. p 178.

A similar question also arose before the ICJ as well for the first time in the case concerning the *Arbitral Award made by King of Spain on 23 December 1906*, between Honduras and Nicaragua. In that case, Nicaragua challenged the validity of the award, which had been rendered by the King of Spain in 1902 in favour of Honduras. Honduras, as we have seen in the previous Chapter, relied on its Memorial on Article 36 (2) as a springboard to establish that Nicaragua's non-compliance with the Award constituted a breach of an international obligation within the meaning of that Article.<sup>161</sup> Nicaragua, in its Counter-Memorial, claimed that it could not execute the Award due to the omissions, obscurities and contradictions of the Award which eventually made the execution impossible.<sup>162</sup> Nicaragua also stated that it had never recognized the Award as valid. The Court rejected these challenges. It stated:

even if there had not been repeated acts of recognition by Nicaragua which, the Court has found, debars it from relying subsequently on complaints of nullity and even if such complaints had been put forward in proper time, the Award would, in the judgment of the Court, still have to be recognized as valid".<sup>163</sup>

In the operative part, the Court found the Award to be valid and binding and more importantly that Nicaragua was under an obligation to give effect to it, i.e., to enforce it as it stood.<sup>164</sup> The Court's judgment indicated a basic legal principle pertinent to the definitiveness of international judicial decisions. That is to say, a final judgment can never be repudiated by plea of prescription or constant non-recognition *per se*. Protest or a claim of non-acquiescence has no effect whatsoever on the binding force of *res judicata*.

The obligatory effect of *res judicata* vested in an international judicial decision has also been revisited in the *Arbitral Award of 31 July 1989* (Guinea – Bissau v. Senegal).<sup>165</sup> Guinea-Bissau in its submission asked the Court to declare that Senegal was not justified in seeking the latter to apply the award of 31 July 1989, whereas Senegal's submission asked the Court to find that the award was valid and

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<sup>161</sup> ICJ. Rep. (1960), p. 196.

<sup>162</sup> *Ibid.*, 197.

<sup>163</sup> *Ibid.*, p. 214.

<sup>164</sup> *Ibid.*, p. 217.

<sup>165</sup> ICJ. Rep. (1991), p. 53.

binding for Senegal which Guinea-Bissau had the obligation to apply.<sup>166</sup> For its part, Guinea-Bissau argued that the Award was not supported by a real majority by virtue of a contradiction found in the Award and by Judge Barberis' (President) declaration, who had voted in favour of adoption. Second, that the failure to answer the second question in the arbitration agreement and to indicate the boundary line on a map meant that the Award did not fall within the terms of the agreement and consequently it under no obligation to enforce it.<sup>167</sup> After a close look into the terms of the Arbitration Agreement and the declaration of Judge Barberis, the Court found that the formulation adopted by Judge Barberis disclosed no contradiction with the Award and the validity of his vote remained unaffected in the face of such contention. While the Court was quite critical of the Award, nevertheless, it found that the tribunal was acting within its competence to decide the first question in the affirmative. Consequently, it felt that it was unnecessary to proceed to the second question. In its view, the wording of the Arbitration Agreement itself was behind the failure of settling the dispute rather than the failure of the tribunal to discharge its duty. Thus, the tribunal was under no obligation to produce a map, and the alleged absent of the latter "cannot in any event constitute such an irregularity as would render the Award invalid...the Award...is valid and binding upon [the parties], which have the obligation to apply it."<sup>168</sup>

The implication of the judgment of the Court elucidated the quality of *res judicata* and the integrity of international judicial settlement and equally preserved the principle of *pacta sunt servanda* deriving from the *compromise*. This implication had already been sustained by the Court in the *Application for revision and interpretation* case (Tunisia v. Libya). The Court, after noticing that the parties to the dispute were free to have recourse to judicial determination and settlement by agreement and that the Court was not entrusted with the task of drawing the delimitation line, asserted that "itself in no way affects the judgment of the Court or its binding effect on the Parties as a matter of *res judicata*". It then strenuously held that "the terms of the Court's Judgment are definitive and binding. In any event moreover, they stand, not as something proposed to the Parties by the Court but as something established by the

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<sup>166</sup> *Ibid.*, p. 56-57.

<sup>167</sup> *Ibid.*, p. 56.

<sup>168</sup> *Ibid.*, pp. 63-65, paras 30-34 and p. 74, para 63-65.

Court”.<sup>169</sup> This is also an assertion of the finality of the judicial decisions of the Court and their *res judicata* and its significance in the post-adjudicative phase.

Philippe Couvreur, however, claims that “the obligation to comply with [the Court and arbitrator] decisions derives *directly* and *exclusively* from ... the norm of *pacta sunt servanda*”.<sup>170</sup> Couvreur was referring to the principle’s implications deriving from the *compromise*. This restricted view has been proven to be inconclusive. It indeed oversimplifies the application of *res judicata* as another legal principle which induces States parties to comply with the judgments of the Court in which they are parties. The intimate relationship between the principle of *pacta sunt servanda* and the principle of *res judicata* as far as enforcement is concerned, was elegantly highlighted by the Court in the *Continental Shelf* case (Tunisia / Libya). The Court stated unequivocally that the Court renders judgments in accordance with the Articles 59 and 60 of the Statute and Article 94 (2) of the Rules of the Court “a judgment which will have therefore the effect and the force attributed to it under Article 94 of the Charter of the United Nations and the said provisions of the Statute and the Rules of the Court”.<sup>171</sup> Consequently, the principle of *res judicata*, plays, an equal role with the principle of *pacta sunt servanda* in the post-adjudication phase in so far as the compliance and enforcement procedure is concerned. Consequently, it is impossible to base *directly* and *exclusively* the obligation to enforce a judgment on the assumption of conventional norms and disregard an equally valid principle inherent in international adjudication prescribing the legal obligations of the parties.<sup>172</sup>

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<sup>169</sup> ICJ. Rep. (1985), 192, p. 218, para 48.

<sup>170</sup> Couvreur, P., “*The Effectiveness of the International Court of Justice in the Peaceful Settlement of International Disputes*”, in Muller, A.S., Raic, D., & Thuranszky, J.M., (eds), *The International Court of Justice: its future after fifty years*, (Martinus Nijhoff, 1997), pp. 83-116, at p. 105 (emphasis added). See also the Dissenting Opinions of Judges Mawdesley, Weeramantry and Judge *ad hoc* Thierry in the *Arbitral Award of 31 July 1989* (Guinea – Bissau v. Senegal), ICJ. Rep. (1991), p.59.

<sup>171</sup> ICJ. Rep. (1982), 80, para. 29. See also the Joint Dissenting Opinion of Gerald Fitzmaurice and Sir Percy Spender in *South West Africa* (preliminary objection) in which they emphasized on that “a decision given against the Respondent would be *binding* on it, and would enable Article 94 of the Charter to be invoked if necessary by the other party”. ICJ. Rep (1962), p. 552.

<sup>172</sup> Rosenne, S., *The Law and Practice*, *supra* note 7, p. 208.

#### 4. Exceptions to the Finality of *Res Judicata*

The discussion of the enforcement of judicial decisions of the ICJ undertaken in the previous sections and the subsequent Chapters presume the absence of serious doubt about the legal validity of the judicial decisions of the ICJ that are subject to enforcement. However, there is no absolute rule of *res judicata*. In principle, a final judicial decision can be nullified and reopened, under certain circumstances, by the same body or other competent judicial body on the grounds of, *inter alia*, a lack of competence, excess of jurisdiction, violation of the right to be heard, fraud, corruption and essential or manifest error and absence of reasoned award or legally valid reasoning.<sup>173</sup> So the main question to be answered is to what extent are these grounds applicable to judicial decisions of the ICJ?

This question, at the outset, is misleading. These grounds of nullification are only applicable to arbitral awards as opposed to international judicial decisions of the ICJ. The applicability of these grounds presumes the existence of a court of law to consider their applicability. In the case of the ICJ, it is completely different. Given the absence of a higher court and international appellate and supervisory procedures the legal validity of the judgments of the ICJ cannot be judicially challenged. Thus States and their judiciaries must execute its judgments without examining their legal validity.<sup>174</sup> The Statute of the ICJ reiterates the assumption of the finality and the non-nullity of the judgments of the ICJ. Article 60 of the Statute stipulates unequivocally that “The judgment is final and without appeal.” It thus follows that judgments of the ICJ are not subject to nullification or any other judicial review or scrutiny otherwise it would render Article 60 out of context. As we have illustrated, that once the definitiveness and conclusiveness of *res judicata* in the same dispute *per se* has been finally established it “cannot again be called in question in so far as that the legal effects ensuing therefrom are concerned”.<sup>175</sup> This fundamental premise, which has also been reiterated in one way or another by the Court itself even with respect to *arbitral awards* such as in the *Société Commerciale de Belgique* case, the *Arbitral*

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<sup>173</sup> See, e.g., Cheng, B., *General Principles of Law as applied by International Courts and Tribunals*, (Stevens & Sons, 1953), pp. 357-72.

<sup>174</sup> For a comprehensive examination of the non-applicability of domestic law to international obligations in general including the judgments of the ICJ, see *infra* Chapter 6, Section 2.

<sup>175</sup> *Chorzów Factory (Interpretation)* case, (1927), PCIJ., Ser. A, No. 13, at 20; See also the *Northern Cameroon* case, ICJ. Rep. (1963), p.37.

*Award made by King of Spain on 23 December 1906, and the Arbitral Award of 31 July 1989*, as has been demonstrated. Even in the context of arbitration there is a tremendous disagreement among commentators as to the level of consistency of practice and acceptability of these grounds for challenge. They also have suffered from wide acceptance as reflected in their absence from the constitutive instruments of some international judicial bodies.<sup>176</sup> Nevertheless, justice always requires judicial decisions to be valid. Hence, there should be an exception to the principle of finality when a judgment is not valid. Thus, the Statute of the Court provides an exception to this rule under Article 61 its Statute, which is the only exception to the finality of the principle of *res judicata* that the ICJ's decisions may acquire.

#### 4.1. Revision under Article 61 of the Statute

The origin of Article 61 of the Statute of the Court was derived from Article 55 of the Hague Convention of 1899 and Article 83 of the Hague Convention of 1907. Under these Articles a revision can only be made on the ground of the discovery of some new fact calculated to exercise a decisive influence on the award, and which was unknown to the Tribunal and to the party which demanded the revision at the time the discussion was closed. Article 61 (1) of the Statute echoes this fundamental requirement of a new fact and its decisiveness. It provides, "An application for revision of a judgment may be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision". It follows, that a fundamental change of circumstances or the destruction and disappearance of the object and subject of the judgment occurring after the judgment being rendered would not have any effect on the applicability of *res judicata*. Thus, the discovery of new facts is the strictest prerequisite on the availability of revision. However, the Statute went further to stipulate equally that "always provided that such ignorance was not due to negligence" of the party requesting revision. Hence, revision proceedings before the ICJ should be distinguished from various proceedings of review within municipal legal systems. Revision under Article 61 arises only from

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<sup>176</sup> See, e.g., Shany, Y., *The Competing Jurisdictions of International Courts and Tribunals*, (Oxford Univ. Press, 2003), pp.246-247.

error of fact,<sup>177</sup> but definitely not from error of law. This was noted by the *Trail Smelter Arbitration*, which held that “no error of law is considered as a possible basis for revision, either by the Hague Convention or by the Statute of the Permanent Court of International Justice”.<sup>178</sup> Nor there is an intermediate or mixed category of error,<sup>179</sup> which might be subject for a revision before the ICJ. It is thus different from an appeal in which a judgment may be challenged before a higher court on grounds of error of law as well as on error of fact.<sup>180</sup>

Whereas Articles 55 and 83 of the Hague Conventions did not fix a time limit within which a request for revision can be made, and which left for the parties themselves to reserve it in their *compromise*, Article 61 (4) and (5) requires the application for revision to be made “at latest within six months of the discovery of the new fact”, and that “no application for revision may be made after the lapse of ten years from the date of the judgment.” The major difference between these provisions is that Article 61 (3) allows the Court to require “previous compliance with the terms of the judgment before it admits proceedings in revision”. This is a fundamental provision, not only to establish the competence of the Court in the enforcement of its decisions,<sup>181</sup> but also to reiterate the sanctity of the judgment of the Court and the sensitivity of revision proceedings as far as the rule of *res judicata* is concerned. This leads Professor Rosenne to suggest that the way in which Article 61 was retained in the Statute emphasise its exceptional nature.<sup>182</sup>

In any event, revision of a judgment of the ICJ is not a legal challenge to the legal validity of the judgment *per se* although it is the only exception to the integrity and binding effect of the judgment of the Court.<sup>183</sup> This also explains the rarity of applications for revisions before the Court. Since its inception the Court has dealt only with handful of applications for revisions, namely *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case Concerning the*

<sup>177</sup> Cheng, B., *General Principles of Law*, *supra* note 171, p. 364.

<sup>178</sup> 3 UNRIAA, p. 1955.

<sup>179</sup> *Argentina / Chile Request for Revision and Subsidiary Request for Interpretation of Judgment of 21 October, 1994* lodged by Chile (Judgment of 13 October 1995) 133 ILR, p. 202.

<sup>180</sup> See, Simpson, J. L., & Fox, H., *International Arbitration: law and practice*, (Steven & Sons, 1959) p. 242; Reisman, W. M., *Nullity and Revision*, *supra* note 33, pp. 217-220.

<sup>181</sup> See *infra*, Chapter 5, Section 6.

<sup>182</sup> Rosenne, S., *The Law and Practice*, *supra* note 7, p. 1671.

<sup>183</sup> See also the Separate Opinion of Judge Koroma, *Application for Revision of the Judgment of 11 July 1996 in the Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Preliminary Objections (*Yugoslavia v. Bosnia and Herzegovina*), ICJ. Rep., (2003), para. 1.

Continental shelf case (Tunisia / Libya) (*Tunisia v. Libya*),<sup>184</sup> and *Application for Revision of the Judgment of 11 July 1996 in the Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Preliminary Objections (*Yugoslavia v. Bosnia and Herzegovina*),<sup>185</sup> and El Salvador's requests of 12 September 2002 of revision of the Judgment delivered on 11 September 1992 by the Chamber of the Court in the *case concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*. Whereas the latter is still pending, the first two requests were eventually unsuccessful. In any case, it is noteworthy that for Article 61 of the Statute, as the only statutory exception to the finality of the principle of *res judicata* that the judgments of the Court may acquire, to be applicable, the discovery of new fact must fall within the scope of *res judicata*. In other words, any discovery of new fact should be simultaneously of a decisive nature and significant both to the essential reasoning as well as to the operative provisions.<sup>186</sup>

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<sup>184</sup> ICJ. Rep. (1985).

<sup>185</sup> ICJ. Rep. (2003).

<sup>186</sup> See also *infra* Chapter 4, Section 3.1, and Chapter 5, Section 6. For recent exposition of revision under Article 61 of the Statute of the Court, see Geib, R., "Revision Proceedings before the International Court of Justice", 63 *ZaöRV* (2003), pp. 167-194.

## 5. Conclusion

Articles 59 and 60 of the Statute of the Court supplemented by Article 94 (2) of the Rules of the Court constitute the framework of the principle of *res judicata*. Consequently, three fundamental elements of the doctrine must emerge: the same parties, same object and same cause of action. Although, the two latter conditions are uncontroversial, the identification of the parties, as far as the application of the principle of *res judicata* is concerned, is not uncontroversial. While the non-appearing state acquires the status of party to the proceedings brought against it and thus is bound by the principle of *res judicata*, the status of a would-be intervening State to the proceedings is not quite so obvious and depends on some criteria. A close analysis and comprehensive examination of the Statute of the ICJ and its relevant jurisprudence reveal that a would-be intervening State may be granted permission to intervene under Article 62 of the Statute of the Court as a “non-party” only if it demonstrates that its legal interest may be affected by the decision of the Court in a pending proceedings before it. It is not required to establish a jurisdictional link between itself and the original parties, since intervention is incidental to the proceedings. In this type of intervention, the principle of *res judicata* will not operate against the non-party intervening State but obligation *erga omnes* instead. If a would-be intervening State wishes to intervene as a “party”, it must comply with the requirements set forth in the Statute and the relevant Rules of Court. So a valid jurisdictional link between the would-be intervening State and the original parties is not a requirement for the success of an application of intervention, but rather a decisive requirement for the attribution of the status of a party to the case and for the *res judicata* to operate. In this respect, it should be noted that the *res judicata* effect will operate only in relation to the intervening State’s interest of a legal nature and in so far as it relates to matters in respect of which that State intervened.

Intervention under Article 63 is less complex. When an intervening State meets the conditions of Article 63, it is most likely to be granted permission to intervene only as an intervening party, as opposed to a non-party intervening, and thus it will be equally bound by the construction of the convention in question given by the judgment as upon the original parties as *res judicata*. But notwithstanding the provisions of Articles 59 and 63 (2) of the Statute, an authoritative interpretation given by the Court of a convention in question will be persuasive and authoritative

exegesis. And, as an inevitable effect of the judicial pronouncements of the highest international judicial body, third parties to the Convention in question will be expected to preserve the interpretation given by the Court in the sense of *erga omnes* as well.

The binding force of international judgments and the obligation to execute them can logically be derived from the definitive and obligatory character of such judgments. Thus, the doctrine of *res judicata* has two fundamental effects: a negative obligation or definitive effect, by which the Parties concerned must refrain from repudiating its finality or relitigating the same subject matter and cause of action, which has been duly and finally decided by the Court; and a positive obligation or obligatory effect, by which the Parties concerned, are obliged to execute the Court's judgment as it stands. However, there is no absolute rule of *res judicata*. Thus, Article 61 of the Statute provides an exception to this rule. In any event, revision of a judgment of the Court is not a legal challenge to the legal validity of the judgment *per se* but rather its factual validity, although it is the only exception to the integrity and binding effect of the judgment of the Court. In conclusion, the obligation to comply with international judicial decisions derives *equally* from the principles of *res judicata* and *pacta sunt servanda* as provided by Articles 59 and 60 of the Statute and Article 94 of the Rules of the Court as well as Article 94 of the Charter of the United Nations.

## CHAPTER FOUR:

### THE LEGAL NATURE AND TERMS / SCOPE OF THE JUDICIAL DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE SUBJECT TO ENFORCEMENT

#### 1. Introduction

Analysing the problem of non-compliance with and enforcement of the judicial decisions of the Court cannot usefully be considered in the abstract.<sup>1</sup> In the light of the previous Chapters, an adequate understanding of the legal nature and scope of the judicial decisions of the Court that are subject to enforcement is a precondition to their effective implementation. It is thus important to examine these important issues before embarking on the question of enforcement. This is significant because there is a fundamental difference between compliance with and enforcement of incidental decisions and compliance with and enforcement of final decisions.<sup>2</sup> On the other hand, these judicial decisions themselves differ in their nature and content and whether they are binding and hence enforceable under Article 94 of the UN Charter is quite controversial.

Article 59 of the Statute of the ICJ states “the *decision* of the Court has no binding force except between the parties and in respect of that particular case”, while Article 60 of the Statute provides “the *judgment* is final and without appeal. In the event of dispute as to the meaning or scope of the *judgment*, the Court shall construe it upon the request of any party”. Similarly, Article 94 (1) of the UN Charter stipulates “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”, while paragraph 2 provides, “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

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<sup>1</sup> Jenks, C. W., *The Prospects of International Adjudication*, (Steven & Sons, 1964), p. 667.

<sup>2</sup> Rosenne, S., *The Law and the Practice of the International Court of Justice 1920-1996*, (hereinafter cited as *The Law and Practice*), 3<sup>rd</sup> ed, (Martinus Nijhoff, 1997), p.214; Wolfrum, R., “Implementation of Decisions of International Courts”, in Nordquist, M.H., & Moore, J.N., *Current Marine Environmental Issues and International Tribunals for the Law of the Sea*, (Kluwer Law International Law, 2001), pp. 103-112, at p. 103.

recommendations or decide upon measures to be taken to give effect to the *judgment*". These two terms (*decision / judgment*) cast some doubt as to what types of decision constitutes a judicial decision with binding force and hence subject to enforcement. At the outset, although there is no clear differentiation between the term "*decision*" appearing in Article 59 and the term "*judgment*" appearing in Article 60 of the Statute, and paragraphs 1 and 2 of Article 94 of the UN Charter, they are in fact identical and can be used interchangeably within the meaning of Article 94 of the Charter.<sup>3</sup> They cover judicial decisions decided by the Court including the decisions of its Chambers under Article 27 of the Statute,<sup>4</sup> as opposed to advisory opinions. But whether *orders* of provisional measures indicated by the Court under Article 41 of its Statute are covered by these terms as well and hence are enforceable has been quite controversial in the literature.<sup>5</sup>

On the other hand, the principle of *res judicata* in a judicial decision seems ambiguous. It is difficult to identify its scope easily and hence the question of its enforceable portions is quite debatable as well. For instance, Hambro (then ICJ Registrar) indicated that "it is not always easy to discern how much of the judgment is binding, even the term 'binding' is far from unambiguous".<sup>6</sup> He was alluding to whether the scope of *res judicata* included the essential reasoning upon which the *operative* paragraphs are founded. Nevertheless, Judge Anzilotti in his Dissenting Opinion in *Chorzów Factory* case (1927) confidently suggested:

It is *certain* that the binding effect attaches *only to the operative part* of the judgment and not to the statement of reasons. When I say that only the terms of a judgment are binding, I do not mean that only what is actually written in the operative part constitutes the Court's decision. On the contrary, it is certain that it is almost always necessary to refer

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<sup>3</sup> See Judge Jessup's Dissenting Opinion in *West Africa* case, ICJ. Rep. (1966), p. 332. See also, Rosenne, S., *The Law and Practice*, *supra* note 2, p.1661. See also Article 39 of the Statute, which uses the term "judgment" in paragraph 1 and the term "decision" in paragraph 2 of the same article. Similarly, Article 56 of the Statute uses the term "judgment" in paragraph 1 and term "decision" in paragraph 2.

<sup>4</sup> Thirlway, H., "*The Law and Procedure of the International Court of Justice 1960-1989*", 72 *BYBIL* (2001), pp. 37-181, at p. 55. See generally, Rosenne, S., "*Article 27 of the Statute of the International Court of Justice*" 32 *Va. J. Int'l L.* (1991), pp.213-231.

<sup>5</sup> Thirlway, H., *supra* note 4, p. 77.

<sup>6</sup> Hambro, E., "*The Reasons Behind the Decisions of the International Court of Justice* ", 7, *CLP*, (1954), pp. 212-227, at p. 215.

to the statement of reasons to understand clearly the operative part and above all to ascertain the *causa petendi*.<sup>7</sup>

Similarly, the present Court in the *Interhandel* case (Switzerland v. United States of America) specifically stated that “to implement a decision is to apply its operative part”.<sup>8</sup> Judge Tanaka in his individual opinion in the second phase of the *South West Africa* cases also claimed that the effect of *res judicata* should be limited to the operative part of the judgment and not extended to the reasons.<sup>9</sup> Likewise, in *Barcelona Traction* case, Judge Gros stated in his Separate Opinion that “...the force of *res judicata* does not extend to the reasoning of a judgment...”<sup>10</sup> These assertions, however, are thoroughly misleading and do not give an adequate picture of the position in law, and thus we should be cautious in accepting them without critical analysis. This Chapter examines first the legal nature of judicial decisions of the Court that are subject to enforcement. It also identifies those parts and terms of the decisions that are enforceable.

## 2. Legal Nature of Judicial Decisions Subject to Enforcement

Articles 59 of 60 of the Statute of the Court and Article 94 (1) of the UN Charter both speak about “*decision*” of the Court as if they had the same meaning. However, there is a difference between the term “*decision*” in Article 59 of the Statute and the same term in Article 94 (1) of the Charter. Under Article 59 the term “*decision*” covers every final decision, as opposed to orders of provisional measures and other orders or incidental decisions, of the Court that acquires the authority of *res judicata*, while the term “*decision*” under Article 94 of the UN Charter covers final decisions as well as orders of provisional measures. However, not every “order” of the Court is binding and thus enforceable under Article 94 of the Charter. In *the Free Zones of Upper Savoy and the District of Gex* case, the Court stated that, “orders made by the Court, although as a general rule read in open Court, due notice having been given to the Agents, have no ‘binding force (Article 59) or ‘final effect’ (Article

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<sup>7</sup> *Chorzów Factory* case (1927), PCIJ, Ser. A, No. 13, p. 24. B, No. 11, 30, (emphasis added).

<sup>8</sup> ICJ. Rep. (1959) p. 28.

<sup>9</sup> ICJ. Rep. (1966), p. 261.

<sup>10</sup> *Barcelona Traction, Light and Power Co. Ltd* (Belgium v. Spain), ICJ. Rep. (1970), p.267.

60)".<sup>11</sup> This assertion is misleading. In fact, not all "orders" made by the Court are not binding and non-enforceable notwithstanding the non-applicability of Articles 59 and 60 of the Statute to these orders. Accordingly, the following sub-sections examine the enforceability of orders of provisional measures, interlocutory judicial decisions on preliminary objections, and lastly final judicial decisions.

## 2.1. Enforceability of Orders of Provisional Measures

The indicated measures by the ICJ under Article 41 of its Statute take the form of an *order*. They are almost always executory and directed either to both or to one of the parties to ensure that no action of any kind is taken which might aggravate or extend the dispute submitted to the Court, or is likely to impede the implementation of the Court's judgment.<sup>12</sup> Compliance with and enforcement of these orders is, however, worse than the record of compliance with final judgments.<sup>13</sup> Why? It is probably true, as Professor Thirlway has observed, that the weight of scholarly opinion on the question of whether an order of the Court indicating provisional measures imposes a legal obligation to comply with them on the State or States to which they are addressed, "was generally to the effect that there is no such binding legal obligation".<sup>14</sup> The language employed in Article 41 and the strength of the language adopted by the Court, at least until quite recently, in its orders of provisional measures have been alleged to support this proposition. To what extent there is any legal validity to such assertions?

At the outset, there is a curious tendency to confuse the authority of orders of provisional measures with their enforceability. It is also peculiar to limit the examination of the question of the enforceability of orders of provisional measures of the Court to the provisions of Article 94 (2) of the Charter only. In 1920, a proposal was made to specify that provisional measures could be "ordered" or "prescribed" by the Court. This was, in fact, rejected on the ground that the Court lacked means to

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<sup>11</sup> (1929), PCIJ., Ser. A, No. 22, at 13. The same will be applicable to orders pronouncing the discontinuance of proceedings. See generally, Wegen, G., "Discontinuance of International Proceedings: The Hostages Case", 76 *AJIL* (1982), pp. 717-736, at p. 729 and Scobbie, I., "Discontinuance in the International Court: The Enigma of the Nuclear Tests Cases", 41 *ICLQ* (1992), pp. 808-840, at p. 828.

<sup>12</sup> See e.g., *The Frontier Dispute* (Burkina Faso v. Mali), Order of Provisional Measures of 1 January 1986, ICJ. Rep. (1986), p.7.

<sup>13</sup> Collier, J., & Lowe, V., *The Settlement of Disputes in International Law*, (Oxford Univ. 1999), p.263.

<sup>14</sup> Thirlway, H., *supra* note 4, p. 77.

ensure the execution of orders made pursuant to Article 41. The initial preliminary draft of the Statute of the Permanent Court of International Justice, as prepared by the Committee of Jurists established by the Council of the League of Nations, made no mention of provisional measures. A provision to this effect was inserted only at a later stage in the draft prepared by the Committee, following a proposal from the Brazilian jurist Raul Fernandes.

Basing himself on the Bryan Treaty of 13 October 1914 between the United States and Sweden, Raul Fernandes proposed that in case the cause of the dispute should consist of certain acts already committed or about to be committed, "the Court may, provisionally and with the least possible delay, order adequate protective measures to be taken, pending the final judgment of the Court".<sup>15</sup> The Drafting Committee made two amendments on that proposal. The phrase "the Court may . . . order" was replaced by "the Court shall have the power to *suggest*", while, a second paragraph was added providing for notice to be given to the parties and to the Council of the "measures suggested by the Court."<sup>16</sup> When the new draft was examined by the Sub-Committee of the Third Committee of the first Assembly of the League of Nations, a number of amendments were considered. Again, when Raul Fernandes suggested using the word "*ordonner*" in the French version instead of "*indiquer*", the Sub-Committee observed that the Court lacked the means to execute its decisions and thus it decided to stay with the word "*indiquer*". Subsequently, the language of the first paragraph of the English version was then made to conform to the French text: thus the word "suggest" was replaced by "indicate", and "should" by "ought to". However, in the second paragraph of the English version, the phrase "measures suggested" remained unchanged and the draft was eventually adopted as Article 41 of the Statute of the PCIJ and it passed as such into the Statute of the present Court without any discussion in 1945. So, the preparatory work of Article 41 shows that the preference given in the French text to "*indiquer*" over "*ordonner*" was motivated by the consideration that the Court did not have the means to assure the execution of its decisions.

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<sup>15</sup> Advisory Committee of Jurists, *Procès-verbaux of the Proceedings of the Committee*, 16 June-24 July 1920 (with Annexes) (hereinafter cited as *Procès-verbaux*), (The Hague, 1920), p. 609.

<sup>16</sup> *Ibid.*, pp. 567-568.

However, the fact that the Court does not itself have the means to ensure the execution of orders made pursuant to Article 41 not only is not an argument against the bindingness and enforceability of such orders, but also this proposition is questionable.<sup>17</sup> The drafters of the Statute presupposed the difficulty of the enforceability of the Court's decisions including its orders. They stated that "it is sufficiently difficult to ensure compliance with a definite decision; it would be much more difficult to ensure the putting into effect of a purely temporary decision."<sup>18</sup> The different terms employed in Article 41 and in relation to Articles 59 of the Statute and Article 94 of the Charter and the presupposition adopted by the drafters have created a confusion concerning the bindingness and enforceability of the Court's Orders. Regarding this confusion, Dumbauld, although discussing the term "*decision*" as opposed to "*order*", suggested that "though not formally binding, such decision is of great weight, as being the solemn pronouncement of a learned and august tribunal acting in the course of its official duty".<sup>19</sup> He thought the term "indicate" merely gave the Court the power to point out what the parties should or should not do pending the final judgment. He concluded that "the parties remain free to observe such indication or not as they choose".<sup>20</sup> Judge Manley Hudson, who modified his position twice, suggested in 1934 that "an 'indication' seems to be a 'suggestion': it clearly lacks the binding force attributed to a 'decision' by Article 59".<sup>21</sup> Later in 1943 he admitted:

it is not less definite than the term *order* would have been, and it would seem to have as much effect. The use of the term does not attenuate the obligation of a party within whose power the matter lies to carry out the measures "which ought to be taken". An indication by the Court under Article 41 is equivalent to a declaration of obligation contained in a judgment, and it ought to be regarded as carrying the same force and effect.<sup>22</sup>

<sup>17</sup> See, e.g., Al-Qahtani, M., "*The Role of the International Court of Justice in the Enforcement of its Judicial Decisions*", 15 *Leiden J Int'l. L* (2002), pp.781-804, at pp.783-785. See also *infra* Chapter 5, Section 2.

<sup>18</sup> *Procès-verbaux*, *supra* note 17, p. 735.

<sup>19</sup> Dumbauld, E., *Interim Measures of Protection in International Controversies*, (The Hague, 1932), p.169.

<sup>20</sup> *Ibid.* See also Fachiri, who claimed that in the absence of any specific consent to give orders with binding force and affect, "parties are not technically under a legal obligation to comply with the Court's decision although failure to do so would be highly improper". Fachiri, A., *The Permanent Court of International Justice*, 2<sup>nd</sup> ed., (Oxford, 1932), p. 111.

<sup>21</sup> Hudson, O. M., *Permanent Court of International Justice*, (Macmillan, 1934), p. 415.

<sup>22</sup> Hudson, O. M., *Permanent Court of International Justice 1920-1942*, (Macmillan, 1943), pp. 425-6.

Sir Hersch Lauterpacht was doubtful of any obligation on the parties to comply with orders indicated under Article 41 of the Statute of the Court.<sup>23</sup> He noted that “Orders of the Court under Article 41 have no binding effect; they merely *indicate* the provisional measures”.<sup>24</sup> To counter carefully this textual interpretations of Article 41 of the Statute of the Court, Fitzmaurice rightly stated that:

The whole logic of the jurisdiction to indicate interim measures entails that, when indicated, they are binding - for this jurisdiction is based on the absolute necessity, when the circumstances call for it, of being able to preserve, and to avoid prejudice to, the rights of the parties, as determined by the final judgment of the court. To indicate special measures for that purpose, if the measures, when indicated, are not even binding (let alone enforceable), lacks all point, except in so far as the parties may be expected to give a voluntary compliance to the Order of the Court.<sup>25</sup>

So, there have been some doubts as to the bindingness and enforceability of the orders of provisional measures of the Court.<sup>26</sup> However, this matter has remained without an authoritative interpretation by the Court until 27 June 2001 when it held in *LaGrand* case that orders of provisional measures indicated by the ICJ under Article 41 of the Statute are binding and consequently subject to enforcement.<sup>27</sup> Notwithstanding this authoritative interpretation of the ICJ, which will be referred to later, Professor Thirlway still thinks that the decision of the Court in the *LaGrand* case, is “out of harmony with much of the doctrine and with the practice of States and of the Court”.<sup>28</sup> In support of his thinking, he believed that the States’ reactions to non-compliance with the Court’s orders in the *Fisheries Jurisdiction* cases, *Nuclear Tests* cases, *United States Diplomatic and Consular Staff in Tehran* case, *Nicaragua* case and the Court’s negative reaction to such non-compliance, renders orders of

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<sup>23</sup> Lauterpacht, H., *The Development of International Law by the International Court*, (London, 1958), pp. 110-13, & pp. 252-6.

<sup>24</sup> Lauterpacht, H., *The Function of Law in the International Community*, (Hamden, 1966), fn 1, at p. 208.

<sup>25</sup> Fitzmaurice, G., “*The Law and Practice of the International Court, 1951-54*”, 34 *BYBIL* (1958), pp. 1-161, at p. 122 reproduced in, *Law and Procedure of the International Court of Justice*, (Cambridge: Grotius, 1986), pp. 548-9. See also Scobbie, I., *supra* note 11, p. 820, and fn. 51.

<sup>26</sup> Collins, L., *Provisional and Protective Measures in International Litigation*, (Martinus Nijhoff Publishers, 1993), pp. 9-238, at p. 219.

<sup>27</sup> ICJ. Rep. (2001), paras. 92-116.

<sup>28</sup> Thirlway, H., *supra* note 4, p. 78.

provisional measures indicated by the Court non-binding.<sup>29</sup> He argued that in no case after the *Anglo-Iranian Oil Co.* case, and until *Nicaragua* case (1986), has the State in whose favour measures have been indicated sought to enforce the obligations contained therein.<sup>30</sup>

Neither Thirlway's assertion or the cases he cited can be conclusive. The alleged practice that the Court never (prior to *LaGrand* case) treated its Orders of provisional measures as not enforceable is not accurate. The Court might have reluctantly dealt with issues relevant to non-compliance with its Orders, nevertheless such an attitude should not be interpreted to suggest that the Court accepted that idea of non-bindingness and non-enforceability of its Orders as Professor Thirlway seems to infer. On the other hand, whether the States concerned have sought enforcement of orders of provisional measures or not is in fact a false evidence of the non-binding effect and non-enforceability of these Orders, as we shall see.

Under Article 41 (2) of the Statute, "notice of the measures suggested shall forthwith be given to the parties and to the Security Council". Similarly, under Article 74 (4) of the Rules of the Court, the President may call upon the parties to act in such a way as will enable any order the Court may make on the request for provisional measures to have its appropriate effects. Article 77 of the Rules also stipulates that the measures indicated as opposed to measures suggested, "shall forthwith be communicated to the Secretary-General of the United Nations for transmission to the Security Council in pursuance of Article 41, paragraph 2, of the Statute". The Court also may under Article 78 of the Rules "request information from the parties on any matter connected with the implementation of any provisional measures it has indicated".<sup>31</sup> These provisions not only represent moral and political pressures but also are supplementary means indicating the inherent authority of the Court's orders.<sup>32</sup> Such notification shall not be given in vain notwithstanding the ill-drafting of Article 41 of the Statute and its contradictory provisions in itself and in relation to Article 94 of the Charter. It is difficult to see how this reference to the Security Council does not

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<sup>29</sup> *Ibid.*, pp. 112-114.

<sup>30</sup> *Ibid.*, 117.

<sup>31</sup> See, generally and in this particular point, Ajibola, B. A., "Compliance with Judgments of the International Court of Justice", in Bulterman, M.K., and Kuijer, M., (eds), *Compliance with Judgments of International Courts*, (Martinus Nijhoff Publishers, 1996), p. 16.

<sup>32</sup> Savadogo, L., *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda): the Court's Provisional Measures Order of 1 July 2000*", 71 BYBIL (2001), pp. 357-389, at p.379.

support the binding force of orders of provisional measures and the Security Council's authority to enforce such orders without necessarily relying on Article 94 (2).<sup>33</sup> The consequential effect, and problems created by these Articles with regard to the bindingness and enforceability of orders of provisional measures on matters pending before the Court, are better perceived from the plea of Sir Gladwyn Jebb before the Security Council after the United Kingdom took its complaint to the Security Council to enforce the Court's Order of 5 July, 1951 in *Anglo-Iranian Oil Co. Case* (United Kingdom v. Iran),<sup>34</sup> which had ordered Iran to delay the nationalisation plans of the Iranian Government against the Anglo-Iranian Oil Company but with which Iran had refused to comply. Jebb argued:

the Council has special functions in relation to decisions of the Court, both under Article 94, paragraph 2, of the Charter, and under Article 41, paragraph 2, of the Statute of the Court ... and this must clearly imply that the Council has the power to deal with matters arising out of such interim measures... Now, it is established that a final judgment of the Court is binding on the parties; that, indeed, is expressly stated by Articles 59 and 60 of the Statute and Article 94, paragraph 1, of the Charter. But, clearly, there would be no point in making the final [judgment] binding if one of the parties could frustrate that decision in advance by actions which would render the final judgment nugatory. It is, therefore, a necessary consequence, we suggest, of the bindingness of the final decision that the interim measures intended to preserve its efficacy should equally be binding.<sup>35</sup>

This argument was contested by the Iranian representative in the Council. He argued that orders of provisional measures indicated by the Court are not decisions with binding force under Article 94 (1) of the Charter and thus are not enforceable under Article 94 (2). The trend of his argument was that Article 94 (2) speaks unequivocally about enforcement of a "judgment" as opposed to "order" or any other

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<sup>33</sup> See, e.g., Goldsworthy who maintained that "it is apparent that refusal to accept an indication of interim measures should be attended by action of the Council as envisaged by Article 94 (2)", Goldsworthy, P.J., *Interim Measures of Protection in the International Court of Justice*, 68 *AJIL* (1974), pp. 258-277, at p.275.

<sup>34</sup> ICJ. Rep. (1951), p. 98.

<sup>35</sup> UNORSC, 559th meeting, 1 October 1951, S/PV.559, p. 20.

decision of the Court. He denied that notification under Article 41 (2) of the Statute to the Council of the measures indicated could provide any legal basis for the competence of the Council to take enforcement measures to give effect to the order of the Court since this notification provision had merely a function of information.<sup>36</sup> The Council decided to adjourn the debate and called upon the parties to resume negotiations until the Court found that it had its jurisdiction. The matter was never brought up again to the Council. Consequently, there is no conclusive evidence to be drawn from this example.<sup>37</sup> Nevertheless, this failure of enforcement became "the focal point for commentary on various aspects of interim measures, and particularly on the question of whether there is a duty of compliance".<sup>38</sup>

However, from a theoretical point of view, there is probably some reservation in considering orders of provisional measures to be on the same footing with final judicial decisions. Yet, Article 94 (2) of the Charter does not exclude entirely the consideration of complaints of non-compliance with Orders of provisional measures by the Council under other Articles 34, 35, and 39 of the UN. Charter.<sup>39</sup> This proposition not only is based on chapters VI and VII but also emerges from the implications of the Court's phraseology adopted in these Orders when stipulating that the parties shall inform the Court of the measures taken to implement these Orders, and the Court's formal information of the Council of the measures indicated accordingly. There is no doubt, as Judge Ajibola rightly observed, that Article 94 (1) and (2) of the UN. Charter "is not adequately or elegantly worded to assist the Court in ensuring due compliance with its orders under discussion".<sup>40</sup> Notwithstanding the insufficiency of the language employed in Article 94, there is no legitimate justification to render Orders of the Court non-binding and thus non-enforceable. In the *United States Diplomatic and Consular Staff in Tehran* case, the Court indicated its Order of 15 December 1979 which demanded the Government of Iran to release

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<sup>36</sup> S/2358/Rev. 1.

<sup>37</sup> See also Schachter, O., "The Enforcement of International Judicial and Arbitral Decisions" 54 AJIL (1960), pp. 1-24p. 23. See also Mani, V.S., *Interim Measures of Protection: Article 41 of the Statute of the ICJ and Article 94 of the UN Charter*, 10 *Indian J.L.L* (1970), pp. 359-372, p. 368, and Tanzi, A., "Problems of Enforcement of Decisions of the International Court of Justice and the Law of the United Nations", 6 *EJIL*, (1995), pp. 539-572, at p.564. For a contrary view see, Nantwi, E. K., *Enforcement of International Judicial Decisions and Arbitral Award in Public International Law*, (Leyden, 1966), p.151.

<sup>38</sup> Crockett, C. H., "The Effects of Interim Measures of Protection in the International Court of Justice", 7 *Calif.W Int'l.L J* (1977), pp.348-384, p. 350.

<sup>39</sup> Sztucki, J., *Interim Measures in The Hague Court*, (Kluwer Law & Taxation Publishers, 1983), p. 297.

<sup>40</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Yugoslavia), Separate Opinion of Judge Ajibola, ICJ. Rep. (1993), p. 403.

the hostages, to give back the Chancery and Consulates of the United States of America which had been occupied, and to afford all the diplomatic and consular personnel of the United States of America the full protection, privileges and immunities to which they were entitled under the Vienna Convention, and permit the hostages to leave Iran.<sup>41</sup> It is unjustifiable to claim that these measures were not binding or self-executory or they were merely suggestions which the parties should follow. As a result of the Iranian refusal to comply with that Order, the United States went to the Security Council to enforce that order. It argued vigorously in favour of the binding force and consequently the enforceability of the Court's Order upon which the Council eventually adopted Resolution 461 of 31 December 1979. In the debate that led to the Resolution not only did many member States refer to the Court's Order in that case, but also no Member State argued against the bindingness and enforceability of the Order.<sup>42</sup> It is true that the Court's order was only one of the underlying elements and considerations formulated in the Resolution, it nevertheless, showed that it could play a role in the context of the action to be taken by the Council.<sup>43</sup> The Resolution called specifically upon Iran to comply with the Order of the Court.<sup>44</sup>

Similarly, it is indeed inexplicable to dare to suggest that the unanimous Order of the Court of 8 April 1993 in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Yugoslavia) case to immediately prevent the commission of the crime of genocide or of complicity in genocide,<sup>45</sup> was non-binding and thus non-enforceable under Article 94 of the UN Charter. In the aftermath of that Order, the Permanent Representative of Bosnia and Herzegovina to the United Nations addressed to the President of the Security Council a letter dated 16 April 1993, in which he requested the Security Council to, *inter alia*, enforce the Court's order of provisional measures of 8 April 1993 "pursuant to Article 94, paragraph 2, of the Charter of the United Nations" and to "take immediate measures under Chapter VII of the Charter to stop the assault and to enforce the Order of the International Court of Justice".<sup>46</sup> The Council did accept the request in which

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<sup>41</sup> ICJ. Rep. (1979), pp. 20-21, para. 47.

<sup>42</sup> Elkind, J.B., *Interim Protection: A Functional Approach*, (Martinus Nijhoff, 1981), p.160.

<sup>43</sup> Sztucki, J., *supra* note 39, p.298.

<sup>44</sup> SCR. 461 (1979) para 2.

<sup>45</sup> ICJ. Rep. (1993), para. 52.

<sup>46</sup> UN.Doc. S/25616.

Article 94 (2) was invoked directly by Bosnia and Herzegovina. Subsequently, and on the same day the Security Council adopted Resolution 819, in which it took note of the Order of the Court as its legal basis. Although this case was not decisive as to the question of whether the enforcement authority of the Council under Article 94 (2) covers also orders of the Court indicating provisional measures, nevertheless, as Professor Tanzi rightly suggested that the letter from the Permanent Representative of Bosnia and Herzegovina of 16 April 1993, "can be taken as a strong element in favour of the assumption that Article 94(2) applies to provisional orders".<sup>47</sup> Likewise, after the Court had indicated its Order of provisional measures in *Land and Maritime Boundary* case (Cameroon v. Nigeria), the Security Council requested the Secretary-General to continue to keep it informed of the measures he was able to take to monitor the situation in the disputed area "bearing in mind the Order of the International Court of Justice on the matter issued on 15 March 1996".<sup>48</sup>

On the other hand, the States concerned may or may not for reasons of political expediency seek to enforce legal obligations through a political body under Article 94 of the UN Charter. They may consider that enforcing the Court's Order through the Council is not the wisest course,<sup>49</sup> and therefore they may seek other channels of enforcement or employ other means of enforcement. For example, in the aftermath of the Court's Orders of 9 April 1998 in the *Breard* case,<sup>50</sup> and the Court's Order of 3 March, 1999 in the *LaGrand* case<sup>51</sup> both Paraguay and Germany did not seek enforcement of the Court's orders through the Security Council but instead they sought to enforce them through the US Courts.<sup>52</sup> Consequently, not resorting to the Security Council is not sufficient reason *per se* to suggest that Orders of the Court are not binding and thus not enforceable under Article 94 of the Charter, as Professor Thirlway seems to infer.

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<sup>47</sup> Tanzi, A., *supra* note 37, p. 566.

<sup>48</sup> Rosenne, S., *The Law and Practice*, *supra* note 2, p. 1461.

<sup>49</sup> Bernhardt, J.P.A., "The Provisional Measures Procedure of the International Court of Justice through U.S. Staff in Tehran: *Fiat Iustitia, Pereat Curia*", 20 *Va. J. Int'l. L.*, (1980), pp. 557-613, at p.609.

<sup>50</sup> ICJ. Rep. (1998), p. 248.

<sup>51</sup> ICJ. Rep. (1999), p. 9.

<sup>52</sup> *Republic of Paraguay v. Gilmore, Breard v. Greene*, 118 S. Ct. 1352 (1998) (Nos. 97-1390, 97-8214); *Federal Republic of Germany et al. v. United States et al. case*, 119 S. Ct. 1016 (1999). See also *infra* Chapter 6, Sections 5.2 & 5.3.

In any event, Article 41 of the Statute of the Court must be interpreted in good faith, and in accordance with the ordinary meaning to be given to its terms in their context and in the light of the treaty's object and purpose. Thus, when the United States argued in *LaGrand* case that the use in the English version of term "indicate" instead of "order", and of "ought" instead of "must" or "shall", and of "suggested" instead of "ordered", was to be understood as implying that decisions under Article 41 lack mandatory effect, the Court, first observed that the fact that in 1920 the French text was the original version, that such terms as "indicate" and "ought" have a meaning equivalent to "order" and "must" or "shall".<sup>53</sup> The Court adopted the rules of interpretation as amplified in Article 33 (4) of the Vienna Convention on the Law of Treaties, which provides "when a comparison of the authentic texts discloses a difference of meaning which the application of Articles 31 and 32 does not remove the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted". Thus, the Court went to consider the object and purpose of the Statute together with the context of Article 41. It first noted that the object and purpose of the Statute is to enable the Court to fulfil the functions provided for therein, and in particular, the basic function of judicial settlement of international disputes by taking binding decisions in accordance with Article 59 of the Statute.<sup>54</sup>

Hence, it follows from the object and purpose of the Statute, as well as from the terms of Article 41 when read in their context, that the power to indicate provisional measures entails that such measures should be binding, inasmuch as the power in question is based on the necessity, when the circumstances call for it, to safeguard, and to avoid prejudice to, the rights of the parties as determined by the final judgment of the Court. All the provisional measures indicated by the Court under Article 41 are designed to avoid aggravating disputes and with the purpose of being implemented. Consequently, the contention that provisional measures indicated under Article 41 might not be binding and enforceable would be contrary to the object and purpose of that Article.<sup>55</sup>

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<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*, para 102.

<sup>55</sup> *LaGrand* case, ICJ. Rep., (2001) para 102.

Given the conclusions reached by the Court in interpreting the text of Article 41 of the Statute, it did not think it was necessary to resort to the preparatory work of Article 41 to determine its meaning. It nevertheless, pointed out that “preparatory work of the Statute does not preclude the conclusion that orders under Article 41 have binding force”.<sup>56</sup> What is important in that ruling is the Court’s treatment of Article 94 (1) of the UN. Charter, which provides that “each Member of the United Nations undertakes to comply with the *decision* of the International Court of Justice in any case to which it is a party” as to whether it precludes attributing binding effect to orders indicating provisional measures or otherwise. The Court stated that the words “the decision of the International Court of Justice” in paragraph 1 “could be understood as referring not merely to the Court’s judgments but to any decision rendered by it, thus including orders indicating provisional measures”.<sup>57</sup> It, however, stated that “It could also be interpreted to mean only judgments rendered by the Court as provided in paragraph 2 of Article 94”.<sup>58</sup> It was in the opinion “that fact that in Articles 59 to 60 of the Court’s Statute, both the word “decision” and the word “judgment” are used does little to clarify the matter”.<sup>59</sup> It concluded that:

Under the first interpretation of paragraph 1 of Article 94, the text of the paragraph would confirm the binding nature of provisional measures; whereas the second interpretation would in no way preclude their being accorded binding force under Article 41 of the Statute. The Court accordingly concludes that Article 94 of the Charter does not prevent orders made under Article 41 from having a binding character.<sup>60</sup>

In these proceedings, the United States had also alleged that the terms of the Court’s Order did not create legal obligations for it. It argued that the language used by the Court in the key portions of its Order was not language used to create binding legal obligations.<sup>61</sup> To put an end to the debate concerning the strength of the wording used when it indicates provisional measures, the Court in its Order of 1 July 2000 in

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<sup>56</sup> *Ibid.*, para 104.

<sup>57</sup> *LaGrand* case, ICJ. Rep, (2001) para 108.

<sup>58</sup> *Ibid.*

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*, and para. 109.

<sup>61</sup> *Ibid.*, para. 96.

the *Armed Activities on the Territory of the Congo* (Democratic Republic of Congo v. Uganda), indicated unanimously that both parties “*must*” prevent and refrain from any action, and in particular any armed action, which might prejudice the rights of the other Party in respect of whatever judgment the Court may render in the case, or which might aggravate or extend the dispute before the Court or make it more difficult to resolve; and that they “*must*” take all measures necessary to comply with all of their obligations under international law, in particular those under the United Nations Charter and the Charter of the Organisation of African Unity, and with United Nations Security Council resolution 1304 (2000) of 16 June 2000; and they “*must*” take all measures necessary to ensure full respect within the zone of conflict for fundamental human rights and for the applicable provisions of humanitarian law.<sup>62</sup>

Similarly, the Court employed the term “*shall*” as opposed to “*should*” in its Order of provisional measures of 5 February 2003 in the *Avena and other Mexican Nationals* (Mexico v. United States). It indicated that the United States “shall take all measures necessary” to ensure that Mr. César Roberto Fierro Reyna, Mr. Roberto Moreno Ramos and Mr. Osvaldo Torres Aguilera, all of Mexican nationality, were not to be executed pending a final judgment of the Court in the case.<sup>63</sup> Consequently the terms “*must*” and “*shall*” ought to leave us without any doubt about the bindingness and subsequently the enforceability of the Orders of the Court. These terms are not merely an exhortation. An Order of the Court is like a judgment and it must not be ineffective, artificial or illusory. Orders of provisional measures indicated by the Court under Article 41 of its Statute must be binding and enforceable, otherwise, there may be a good and reasonable ground to question their being issued at all.

Last but not least, the enforceability of orders of provisional measures ceases to be operative upon the delivery of a judgment on the merits. In the *Fisheries Jurisdiction* cases, the Agents for the United Kingdom and Germany submitted requests to the Court to confirm that interim measures of protection indicated by the Court on in its two orders of 17 August 1972 would continue until the Court had given final judgment in the case or until a further order. By a telegram of 2 July 1973 the Government of Iceland, which had not recognized the competence of the Court,

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<sup>62</sup> ICJ. Rep. (2000), para 47.

<sup>63</sup> ICJ. Rep.(2003), para 59.

submitted observations on these requests, protested against the continuation of the measures indicated. Nevertheless, the Court, on 12 July 1973, confirmed that measures indicated in its Orders of 17 and 18 August 1972 should, subject to 61 (7) of its 1946 Rules, remain operative until the Court gave final judgment in each case.<sup>64</sup>

## 2.2. Enforceability of Interlocutory Judicial Decisions on Preliminary Objections

Interlocutory judicial decisions present a more complicated problem as far as their enforceability is concerned. Decisions of the Court on a preliminary objection, in particular, are “decisions of an interlocutory character”,<sup>65</sup> which deal with a matter of jurisdiction or admissibility but which sometimes can touch upon questions pertinent to the merits of the case.<sup>66</sup> Therefore, until the proceedings on the merits are resumed, the preliminary objections having been rejected, there can be no decision finally determining or pre-judging any issue of merits,<sup>67</sup> unless this matter is an essential part of the eventual determination of the decision on the merits.<sup>68</sup> It is not necessary for the present purposes to explore this technical problem since we have already done so.<sup>69</sup> It is the purpose of this section to examine whether or not a judgment on a preliminary objection or an interlocutory judgment can be subject to enforcement under Article 94 or other relevant provisions of the UN. Charter.

Introductory decisions take the form of judgments which under Article 60 of the Statute are “final and without appeal” and consequently they can be subject to interpretation. This was established by the Court in *Request for Interpretation of the Judgment (Nigeria v. Cameroon)*.<sup>70</sup> The Court applied Article 60 of the Statute equally to the judgment on preliminary objections as well as to the judgment on the merits.<sup>71</sup> The same is applicable to revision under Article 61 of the Statute.<sup>72</sup> It should be

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<sup>64</sup> See also *Nuclear Tests (New Zealand v. France)*, ICJ. Rep. (1974), pp.477-78, para. 64.

<sup>65</sup> *South West Africa*, ICJ. Rep. (1966), p. 37, para 59.

<sup>66</sup> *Ibid.*; *Polish Upper Silesia (Jurisdiction)*, (1925), PCIJ., Ser. A, No. 6, p.16.

<sup>67</sup> *Ibid.*

<sup>68</sup> *Waste Management, Inc. v. United Mexican States*, (Mexico's Preliminary Objection concerning the previous proceedings), ICSID Case No. ARB (AF)/00/3, Decision of 26 June 2002, 41 *ILM* (2002), pp.1315-1327, at p. 1324, para.45.

<sup>69</sup> See Chapter. 3, Section 2.1 *supra*.

<sup>70</sup> ICJ. Rep. (1999), p.31.

<sup>71</sup> *Ibid.*, para. 10.

<sup>72</sup> *Application for Revision of the Judgment of 11 July 1996 in the Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Preliminary Objections (Yugoslavia v. Bosnia and Herzegovina), ICJ. Rep., (2003).

emphasised, however, that judgments on preliminary objections acquire the authority of *res judicata* only as far as the jurisdictional phase of the dispute before the Court is concerned. In the *Corfu Channel* case, the Court found that it had jurisdiction and Albania was responsible for the damaged alleged by the United Kingdom. Hence the question of pecuniary compensation had to be decided.<sup>73</sup> Subsequently, the Court directed the parties by an Order to assess the amount of compensation. In its declaratory judgment of 15 December 1949, the Court accepted the argument advanced by the United Kingdom concerning the plea of *res judicata*. It held its jurisdiction had been established by its judgment of 9 April 1949, and that in accordance with the Statute (Article 60), which was binding upon Albanian Government, that judgment was final and without appeal, and that therefore the matter was *res judicata*.<sup>74</sup> However, although Albania ceased to participate in the subsequent proceedings, it was nevertheless inconceivable to enforce such a judgment under Article 94 or other provisions of the Charter notwithstanding its bindingness and enforceability for the simple reason that the submissions of the parties were not sufficient for this purpose.

Similarly, the Court's judgments of 1994 in the *Maritime Delimitation and Territorial Questions* case (Qatar v. Bahrain) has brought up a new type of judgment which was binding under Article 60 of the Statute, but whether it is enforceable under Article 94 of the UN. Charter is probably questionable. In 1987 and 1990 both Qatar and Bahrain made express commitments in an exchange of letters of December 1987 and the Doha Minutes of December 1990 to refer their disputes to the Court. On 9 August 1991 Qatar seized the Court unilaterally.<sup>75</sup> Bahrain maintained that the documents invoked by Qatar did not constitute a legally binding agreement, and therefore they did not enable Qatar to seize the Court unilaterally. However, on 1 July 1994 the Court delivered its first jurisdictional judgment, in which it held that those documents on which Qatar relied constituted international agreements creating rights and obligations for the Parties. For the first time, the Court also decided in the *dispositif* several preliminary findings, none of which decided the points argued in the submissions. It decided to "(3) afford the Parties the opportunity to submit to the

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<sup>73</sup> *Ibid.*, p. 36.

<sup>74</sup> *Corfu Channel case* (Assessment of the Amount of Compensation Due From the People's Republic of Albania to the United Kingdom), Judgment December 15, 1949, ICJ. Rep. (1949), 244, p. 248.

<sup>75</sup> ICJ. Rep. (1991), p. 50.

Court the whole dispute, (4) fix 30 November, 1994, as the time-limit within which the Parties are jointly or separately, to take action to this end".<sup>76</sup> This judgment puzzled some members of the Court. It was quite enough for Judge Schwebel to describe the judgment as "novel-and disquieting...[it] lacks an essential quality of a judgment of this Court or of any court: it does not adjudicate the principal issue submitted to it".<sup>77</sup> The judgment also puzzled Judge Valtios who believed that "the Court has been dealing with a case that is confused in several respects and which is, if I may say so, not all that it might be from a legal standpoint".<sup>78</sup> Judge Oda criticised the Court for rendering such a judgment. He described it as an attempt by the Court "to render an interlocutory judgment- which is not unusual in domestic legal systems- for the first time in the history of this Court and its predecessor- in my view, the application of this concept of domestic law to the jurisprudence of International Court of Justice is most inappropriate".<sup>79</sup> The judgment was also unclear for Judge Shahabuddeen.<sup>80</sup>

It is what it is, the judgment was binding under Article 60 of the Court's Statute and the parties had to comply with it. It required the parties to take certain actions to comply with its *dispositif*. In so doing, Qatar submitted a letter dated 30 November 1994 entitled "*Act to comply with paragraphs (3) and (4) of operative paragraph 41 of the judgment of the Court dated 1 July 1994*". Qatar concluded in that "Act" that "the absences of an agreement between the Parties to act jointly" made it declare that it was thereby submitting "the whole dispute".<sup>81</sup> In the same day Bahrain also complied with the judgment through submitting a letter entitled "*Report of the State of Bahrain to International Court of Justice on the attempt by the Parties to implement the Court's judgment of 1st July 1994*".<sup>82</sup> It was obvious that the Court could not avoid jurisdiction once Qatar complied with the operative paragraph 41 of the judgment. Accordingly, the Court decided in its second judgment on the jurisdiction of 15 February 1995 that it had jurisdiction, and that Qatar's application was admissible.<sup>83</sup> However, had Bahrain not complied with the Judgment or decided

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<sup>76</sup> ICJ. Rep. (1994), p. 127. para. 41.

<sup>77</sup> *Ibid.*, Separate Opinion of Judge Schwebel, p. 130.

<sup>78</sup> *Ibid.*, Separate Opinion of Judge Valtios, p. 132.

<sup>79</sup> *Ibid.*, Separate Opinion of Judge Oda, p.134, para. 3.

<sup>80</sup> *Ibid.*, Declaration of Judge Shahabuddeen, p. 129.

<sup>81</sup> ICJ. Rep. (1995) pp.10-11, para. 12.

<sup>82</sup> *Ibid.*, para.13.

<sup>83</sup> *Ibid.*, para. 47.

not to appear before the Court as it was contemplating, it would have been inconceivable for Qatar to invoke Article 94 or other provisions of the Charter to induce Bahrain to comply with the Court's judgment for the simple reason that the submissions of the parties were not sufficient for this purpose as well. It should be emphasised. However, that these types of judicial decisions are binding regardless of their enforceability.

### 2.3. Enforceability of Final Judicial Decisions

Final decisions present further complicated problems and thus, as Professor Rosenne rightly observed, "it is not possible to lay down general principles applicable to every judgment".<sup>84</sup> States do not always refer their legal differences to the Court for definitive settlement and final enforceable judicial decision. They may merely seek a decision to narrow their differences and to be a springboard for further negotiations or to indicate what exactly their legal positions are in a given question. This step-by-step solution is not peculiar in international sphere. States use this strategy to keep some control over their disputes and to avoid the problem of enforcement.<sup>85</sup> In the *Ambatielos* case,<sup>86</sup> for instance, the primary question the Court had to answer was whether the United Kingdom was under an obligation to refer a commercial dispute with Greece to arbitration. The Court's answer was in the affirmative and subsequently arbitration was sought. Similarly, in the *North Sea Continental Shelf* cases, the parties asked the Court to indicate the relevant principles and rules in order to enable them to delimit their continental shelf boundaries, or how these rules were to be applied to their respective boundaries, as Libya and Malta sought in the *Continental Shelf* case.<sup>87</sup> Further in the *Jan Mayen* case,<sup>88</sup> Denmark and Norway brought before the Court one element of those needed for negotiating an agreement for delimiting their respective maritime boundaries.

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<sup>84</sup> Rosenne, S, *The Law and Practice*, supra note 2, p. 216.

<sup>85</sup> Merrills, J.G., *International Dispute Settlement*, 3<sup>rd</sup> ed., (Cambridge Univ. Press, 1998), p. 160.

<sup>86</sup> ICJ. Rep. (1953), p. 10.

<sup>87</sup> ICJ. Rep. (1985), p. 13, at p. 16.

<sup>88</sup> ICJ. Rep. (1993), p. 123.

Similarly, the Court may be asked to render a declaratory judgment that defines the legal relationship between the parties and their rights with respect to the matter before the Court.<sup>89</sup> The Court may decide that a given action was or was not in conformity with a rule of customary international law, or a treaty obligation as in the case of *Fisheries* (United Kingdom v. Norway),<sup>90</sup> and the *Northern Cameroons case*,<sup>91</sup> or that a State in possession of disputed territory has sovereignty over it, as many judgments of the Court indicate.<sup>92</sup> These judgments are declaratory and binding regardless of the question of their enforceability. Litigant States remain bound by the decision of the Court in accordance with the rule of *pacta sunt servanda* and the principle of *res judicata*, and it must be complied with and enforced in accordance with Article 59 regardless of its declaratory nature. The Court in the *Chorzów Factory* case unequivocally stated that:

The Court's Judgment No. 7 is in the nature of a declaratory judgment, the intention of which is to ensure recognition of a situation at law, once and for all and with binding force as between the Parties; so that the legal position thus established cannot again be called in question in so far as the legal effects ensuring therefrom are concerned.<sup>93</sup>

Likewise, the Court in *Tunisia / Libya* case (Revision and Interpretation), stated, "...the terms of the Court's judgments are definitive and binding ... they stand, not as something proposed to the parties by the Court but as something established by the Court".<sup>94</sup> The complexity of the legal nature and enforceability of a declaratory judgment is apparent when it relates to a rule of customary law or interprets a treaty which remains in force, and thus may have "a continuing applicability".<sup>95</sup> But the

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<sup>89</sup> *Polish Upper Silesia* (Merits) (1926), PCIJ., Ser. A, No. 7, p. 19; *Northern Cameroons case*, ICJ. Rep. (1963), p.36; see generally, Brownlie, I, "Remedies in the International Court of Justice", in Lowe, V., and Fitzmaurice, M., (eds) *Fifty Years of the International Court of Justice* (Cambridge Univ. Press, 1996), pp. 557-566, at pp. 559-564.

<sup>90</sup> In that case, the Court found "that the method employed for the delimitation of the fisheries zone by the Norwegian Decree of July 12<sup>th</sup>, 1935, is not contrary to international law", ICJ. Rep. (1951), p. 143.

<sup>91</sup> In that case, the Court was asked to render a declaratory judgment as whether prior to the termination of the Trusteeship Agreement with respect to the North Cameroons, the United Kingdom had breached the provisions of the Agreement, ICJ. Rep. (1963), pp. 36-37.

<sup>92</sup> See e.g., *Maritime Delimitation and Territorial Questions* (Qatar v. Bahrain), ICJ. Rep. (2001), p.40; *Land and Maritime Boundary* (Cameroon v. Nigeria: Equatorial Guinea Intervening), ICJ. Rep. (2002).

<sup>93</sup> *Chorzów Factory Case* (1927), PCIJ, Ser. A, No. 13, p. 20; *LaGrand*, ICJ. Rep. (2001), para. 102.

<sup>94</sup> ICJ. Rep. (1985), para. 48.

<sup>95</sup> *Northern Cameroons*, ICJ. Rep. (1963), p. 37; *Nuclear Tests case* (Australia v. France), ICJ. Rep. (1974), p. 263, para.30.

problem is that not every judgment is declaratory in nature and that not every declaratory judgment is self-executory. Declaratory judgments differ in their content and sometimes they overlap. In the *Nicaragua* case, for example, the Court made a series of decisions to the effect that certain actions which, *inter alia*, involved use of force were not in conformity with certain rules of customary international law and breaches of the Treaty of Friendship, Commerce and Navigation, and the United States was also under an obligation to make reparation for all injury caused to Nicaragua. It also decided that the United States was under a duty immediately to cease and to refrain from all such acts as may constitute breaches of these legal obligations.<sup>96</sup> Recognition of violation of rules of customary international law is self-executory, while requiring the defaulting party to refrain from committing acts that may violate these rules of law, is executory, i.e., the defaulting party has to take an affirmative action to fulfil its obligations under the judgment.

The Court may also order one or both of the litigant parties to take or perform specific actions. In the *Temple of Preah Vihear* case (Cambodia v. Thailand), the Court ordered Thailand to restore to Cambodia certain sculptures and other objects that it had removed from the temple on the border between the two countries.<sup>97</sup> When the Court's *judicial decisions* are executory, however, both parties are under the obligation to enforce the terms of the judgment expeditiously and without any conditions of reciprocity or mutuality but autonomously and independently of the action of the other party.<sup>98</sup> The same approach was also adopted by the Court in the *Land and Maritime Boundary* case (Cameroon and Nigeria) (2002). The Court observed that Cameroon was under an obligation expeditiously and without condition to withdraw any administration or military or police present in areas along the land boundary from Lake Chad to the Bakassi Peninsula which pursuant to the Judgment fell within the sovereignty of Nigeria. Nigeria had the same obligation in regard to any administration or military or police forces present in areas along the land boundary from Lake Chad to the Bakassi Peninsula which pursuant to the Judgment fell within the sovereignty of Cameroon.<sup>99</sup>

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<sup>96</sup> ICJ, Rep. (1986), pp. 146-8.

<sup>97</sup> ICJ, Rep. (1962), pp.36-37.

<sup>98</sup> Rosenne, S., *The Law and Practice*, *supra* note 2, p. 218.

<sup>99</sup> ICJ, Rep. (2002), para 314-15.

However, the Court can sometimes issue even an executory judgment, which poses no enforcement difficulty. In the *Arrest Warrant* case (Congo v. Belgium), for instance, the Court found in its judgment of 14 February 2002 that Belgium had breached its international obligations towards Congo by issuing an unlawful international arrest warrant of 11 April 2000 against the Foreign Minister of Congo Mr. Yerodia. It considered that “Belgium must, by means of its own choosing, cancel the warrant in question and so inform the authorities to whom it was circulated.”<sup>100</sup> This is what Congo had actually asked for. From a legal and practical point of view, however, Belgium could and should have cancelled the arrest warrant of April 2000 against Mr Yerodia who enjoyed immunity at that time, but nevertheless it could simply have issued the next day another new arrest warrant against the *former* Minister of Foreign Affairs Mr, Yerodia for the crimes of which he was accused.

In any event, it should be borne in mind that the Court does not generally direct the parties to follow certain means or measures to fulfil their obligations incumbent upon them under a given judgment. The Court normally leaves it to the parties themselves to choose among various options the way its decisions are to be enforced as long as enforcement can be attained by any possible and legitimate means. In other words, the Court needs not to indicate one specific, single and exclusive method of compliance or make a selection out of the various possible alternatives since this is for the parties themselves to choose among the various means to fulfil and satisfy the obligations incumbent under the Court’s decision.<sup>101</sup> The aim of this position is to enable the parties to achieve a workable final settlement of their disputes.<sup>102</sup>

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<sup>100</sup> ICJ. Rep.(2002),para 76.

<sup>101</sup> *Haya de la Torre* case (Colombia v. Peru), ICJ. Rep. (1951), p. 75; *Arrest Warrant of 11 April 2000* (Congo v. Belgium), ICJ. Rep.(2002),para 76.

<sup>102</sup> *Burkina Faso / Mali* case. ICJ. Rep. (1986), p. 648.

### 3: The Terms and Scope of Judicial Decisions that are Subject to Enforcement: scope of *res judicata*

Judge Anzilotti in his Dissenting Opinion in *Chorzów Factory* case (1927) attached the binding force of the Court's decisions "only to operative part of the judgment".<sup>103</sup> Furthermore, the present Court in the *Interhandel* case indicated specifically that "to implement a decision is to apply its operative part".<sup>104</sup> Moreover Judge Tanaka in his individual opinion in the second phase of the *South West Africa* cases claimed that the effect of *res judicata* should be limited to the operative part of the judgment and not be extended to the reasons.<sup>105</sup> Similarly in *Barcelona Traction* case, Judge Gros stated in his separate opinion that "...the force of *res judicata* does not extend to the reasoning of a judgment...".<sup>106</sup> In fact, these assertions are misleading and do not give an adequate picture of the position in law. They also do not settle the question of the scope of *res judicata*; a problem which puzzles many, including international tribunals. At least one tribunal admitted specifically after extensive consideration of the jurisprudence of the Court and other international tribunals as well as the writings of highly qualified publicists, that "it is by no means clear that the basic trend in international law is to accept reasoning, preliminary or incidental determinations as part of what constitutes *res judicata*".<sup>107</sup>

At the outset, it should be borne in mind that any statement which is introduced incidentally or otherwise (*obiter dicta*) into the reasoning should not have the effect of *res judicata* if it does not examine essentially the point in dispute.<sup>108</sup> The same is true to the operative part itself, which may not necessarily acquire the authority of *res judicata*. Thus, in the *operative part* of its Judgment of 10 October 2002 in the *Land and Maritime Boundary case (Cameroon v. Nigeria)*, the Court only "Takes note of the commitment undertaken by the Republic of Cameroon at the hearings that, 'faithful to its traditional policy of hospitality and tolerance', it 'will

<sup>103</sup> *The Chorzów Factory case (Interpretation of Judgments Nos. 7 and 8)*, (1927), PCIJ., Ser. A, No. 13, p. 24. B, No. 11, 30. For further examination of this position in connection with the perception of the ICJ of its role in the enforcement of its decision see chapter 5, Section 2, *infra*.

<sup>104</sup> ICJ. Rep (1959) p. 28.

<sup>105</sup> *South West Africa* ICJ. Rep. (1966), at. 261. For the opposite view see, the Dissenting Opinions of Judges Jessup. *Ibid*, p, 332, and Koretsky. *Ibid*, p. 240.

<sup>106</sup> *Barcelona Traction, Light and Power Co. Ltd*(Belgium v.Spain) (2nd Phase),ICJ.Rep.(1970), p.267.

<sup>107</sup> *Amco v. Indonesia* arbitration (Resubmission: Jurisdiction) 89 *ILR*, p. 560; 27 *ILM* (1988), p. 1292.

<sup>108</sup> See Cheng, B., *General Principles of Law as applied by International Courts and Tribunals*, (Stevens & Sons Limited, 1953), p. 348.

continue to afford protection to Nigerians living in the [Bakassi] Peninsula and in the Lake Chad area".<sup>109</sup> Taking note of a commitment made by a litigant party during the proceedings and reproducing it in the operative part itself as the Court did in this case does not suggest though that this commitment is *res judicata* or must be complied with and enforced under Articles 59 and 60 of the Statute or under Article 94 of the Charter. It is, therefore, doubtful to suggest that every reason in a judgment is binding and enforceable, or to assume that every or any operative part of a judgment has that effect.<sup>110</sup>

### 3.1. Bindingness of *Motifs*

It is hard to reject the idea that direct reasoning is an integral part of the judicial decisions of the Court, nor is it possible to envisage any separation between these fundamental features of judicial decisions. In fact, a failure to consider the significance of the substantial reasoning, which is an integral part of the whole judgment, which has been directly determined by the Court, would inevitably constitute a serious misunderstanding and misinterpretation of the very concept of the doctrine of *res judicata*.<sup>111</sup> This proposition was early asserted by the PCA in *Pious Fund* case of 1902 (United States v. Mexico) which played an important role in highlighting the principle of *res judicata* internationally<sup>112</sup> through indicating the most comprehensive formulation of the scope of *res judicata*.<sup>113</sup> It held on 14 October 1902:

Considering that all the parts of the judgment or decree concerning the points debated in litigation enlighten and mutually supplement each other and that they all serve to render precise the meaning and the bearing of the *dispositif* (decisory part of the judgment) and to determine the points upon which there is *res judicata* and which thereafter cannot be put in question.<sup>114</sup>

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<sup>109</sup> ICJ. Rep. (2002), para.325 (emphasised added).

<sup>110</sup> O'Connell, D. P., *International Law*, Vol. II, (London, 1970) p. 1105.

<sup>111</sup> *Ibid.* See also Dissenting Opinion of Judge Koretsky in the *South West Africa*, ICJ.Rep.(1966)p. 241.

<sup>112</sup> Lauterpacht, H., *Private Law Sources and Analogies of International Law*, (Longmans, 1927), p.246.

<sup>113</sup> See also Reisman, W. M., *Nullity and Revision: The Review and Enforcement of International Judgments and Awards* (Yale Univ. Press, 1971), pp. 171-72.

<sup>114</sup> See Scott, J. B., *Hague Court Reports* (Oxford, 1916), p.5; See also the persuasive findings provided by French-Venezuelan Commission (1902) in the *Company General of the Origoco* (1903) in which it held: "Every matter and point distinctly in issue in said cause, and which was directly based upon and determined in said decree, and which was its ground and basis, is concluded by the judgment..." 10 *UNRIAA*, 184, at p. 276.

The effect of the essential reasons as *res judicata* was also reiterated by the PCIJ in its Advisory Opinion of 1925 concerning the *Polish Postal Services in Danzig*, when it acknowledged the reasoning pronounced by the Permanent Court of Arbitration in the *Pious Fund* case and maintained that “It is perfectly true that all the parts of a judgment concerning the points in dispute explain and complete each other and are to be taken into account in order to determine the precise meaning and scope of the operative portion”.<sup>115</sup> The Court distinguished between the direct points in issue which have the effect of *res judicata*, and other reasoning which does not address nor relate to the former and consequently does not have that effect.<sup>116</sup> The finding of the Court in *Polish Postal Services in Danzig* also inspired Simpson and Fox when they suggested that “it is probable that any matters implied in the actual point of decision or constituting its necessary foundation have the force of *res judicata*”.<sup>117</sup>

Similarly, in the *Laguna del Desierto* (1994), the arbitral tribunal stated that “*res judicata* also applies to the meaning of the terms used in the propositions which shape an arbitral decision.”<sup>118</sup> In the same vein, when the Tribunal in the *Waste Management, Int. v. United Mexican States* case (2002), was asked to adjudicate upon a preliminary objection concerning previous proceedings between the same parties, it had to take equally, “careful reading of the first Tribunal’s *reasons* and decision” in order to find what was *res judicata* in that proceedings.<sup>119</sup> Accordingly Professor Rosenne rightly observed that “the *res judicata* does not derive from the operative clause of the judgment, which confined itself to stating which submissions of the parties were rejected or accepted and to what extent, but from the reasons in point of law given by the Court”.<sup>120</sup> Indeed, operative part (*dispositif*) of a judicial decision as well as the essential reasoning (*motifs*) on which findings are based, should equally have the binding force of *res judicata*, and hence, could be the subject of intervention, interpretation and revision. This probability highlights the substance and relevance of *motifs* and demonstrates how it can acquire the authority of *res judicata*.

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<sup>115</sup> (1925), PCIJ., Ser. B, No. 11, pp. 29-30.

<sup>116</sup> This quotation was applied by the Court in the *Chorzów Factory* case (Interpretation) when it was requested to interpret its previous judgment in the same case. (1927), PCIJ., Ser. A, No. 13, pp. 11-12.

<sup>117</sup> Simpson, L., & Fox, H., *International Arbitration: law and practice*, (Steven & Sons, 1959) p. 229.

<sup>118</sup> *Dispute Concerning the course of the Frontier between BP62 and Mount Fitzroy award*, (Argentina v. Chile), 113 *ILR*, p.62, and pp.67-68.

<sup>119</sup> *Waste Management, Inc. v. United Mexican States*, (Mexico’s Preliminary Objection concerning the previous proceedings), ICSID Case No. ARB (AF)/00/3, Decision of 26 Jun 2002, 41 *ILM* (2002), pp.1315-1327, at p.1319, para.20 (emphasised added).

<sup>120</sup> Rosenne, S., *The Law and Practice*, *supra* note 2, pp. 1660-1.

In the *Pulau Ligitan and Pulau Sipadan* case (Application of the Philippines to intervene), (2001), the Philippines filed an application to intervene under Article 62 of the Statute and based its claim on a legal interest arising out of a construction of international treaties and conventions relating to the status of North Borneo. It claimed that under Article 2 of the Special Agreement between the Governments of Indonesia and Malaysia, the Court had been requested to determine the issue of sovereignty over Pulau Ligitan and Pulau Sipadan “on the basis of treaties, agreements and other evidence” to be furnished by the Parties. The Philippines argued that its interest is “solely and exclusively addressed to treaties, agreement and other evidence ... which have a direct or indirect bearing on the matter of the legal status of North Borneo” which it “is a matter that [the Philippines] considers as its legitimate concern”. It also added that “a *decision* by the Court, or that *incidental part of the decision* by the Court, which lays down an appreciation of specific treaties, agreements and other evidence bearing on the legal status of North Borneo” could affect its legal interest in the case.<sup>121</sup>

Although the Philippines agreed in principle with the jurisprudence of the Court that a concern about the rules and general principles of law did not constitute sufficient interest under Article 62,<sup>122</sup> it argued that the case in hand “is not a question of general principles of law but of specific treaties relating to a territory, which have an effect on the Philippines”.<sup>123</sup> The Philippines was, hence, referring more specifically to the essential *motifs* as a legitimate ground on which a legal interest, which may be affected by the decision, can be based.<sup>124</sup> Against this background, Indonesia argued that the Philippines would be “protected ... by Article 59 of the Statute of the Court”.<sup>125</sup> Malaysia contested that “the Philippines does not indicate how the *decision* ... that the Court is asked to take...But...the interest of a legal nature must, if affected, be so affected by the *decision* of the Court and not just by its *reasoning*. ...it is another provision of the Statute, Article 59, that protects the general legal interest of non-party States ... [which] ensures full legal protection of third parties, including in regard to any appreciation of treaties, agreements or evidence

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<sup>121</sup> ICJ. Rep. (2001), para. 38 (emphasis added).

<sup>122</sup> *Continental Shelf case (Tunisia / Libya) Application by Malta for Permission to Intervene*, ICJ, Rep. (1981), p.17, para. 30 and *Land, Island and Maritime Frontier Dispute (El Salvador / Honduras) Application to Intervene by Nicaragua*, ICJ.Rep. (1990), p. 118, para. 61

<sup>123</sup> *Pulau Ligitan and Pulau Sipadan* (Application of the Philippines to intervene), ICJ.Rep.(2001),para., 40.

<sup>124</sup> *Ibid.*, para 45.

<sup>125</sup> *Ibid.*, para 42.

relied upon by the parties to the case ”.<sup>126</sup> The Court first interpreted the word “*decision*” in Article 62, which may affect the legal interest of a third State. It found a possible discrepancy as to its meaning in the French and the English texts but it found that they were broadly consistent. It accordingly concluded, “the interest of a legal nature to be shown by a state seeking to intervene under Article 62 *is not limited to the dispositif alone of a judgment. It may also relate to the reasons which constitute the necessary steps to the dispositif*”.<sup>127</sup>

The Court went on to amplify whether a stated interest in the Court’s legal reasoning and any interpretations it might give can constitute or amount to an interest of a legal nature for the purposes of Article 62. it stated that it “can only be examined by testing whether the legal claims which the State seeking to intervene has outlined might be thus affected ... the Court can only judge it *in concreto* and in relation to all circumstances of a particular case”.<sup>128</sup> The Court added that a State which “relies on an interest of a legal nature other than in the subject-matter of the case itself necessarily bears the burden of showing with a particular clarity the existence of the interest of a legal nature which it claims to have”<sup>129</sup> and “must show with adequate specificity how particular reasoning or interpretation of identified treaties by the Court might affect its claim”.<sup>130</sup> After further careful scrutiny into the legal interest that the Philippines claimed might be affected by the *decision* including its reasoning, the Court concluded that the Philippines had failed to show this adequately.<sup>131</sup>

Similarly, to enforce a judgment, its meaning and scope must be identified. In the event of a dispute as to its meaning or scope, the Court, under Article 60 of the Statute, shall “construe” it upon the request of any party whether the judgment creditor or the judgment debtor. The Court in the *Chorzów Factory* case (Interpretation) in 1927<sup>132</sup> examined the word “construe” by holding that this expression is meant to “give a precise definition of the meaning and scope which the Court intended to give to the judgment in question”.<sup>133</sup> It went on to state significantly

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<sup>126</sup> *Ibid.*, para. 43 (emphasis in the original).

<sup>127</sup> *Ibid.*, para. 47 (emphasis added).

<sup>128</sup> *Ibid.*, para. 55. The Court cited the finding of the Chamber of the Court in *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras) Application to intervene by Nicaragua*, ICJ. Rep. (1990), para. 61, p. 118.

<sup>129</sup> ICJ. Rep. (2001), para. 59.

<sup>130</sup> *Ibid.*, para 60.

<sup>131</sup> *Ibid.*, paras. 67 & 93.

<sup>132</sup> (1927), PCIJ., Ser. A, No. 13, p. 11.

<sup>133</sup> *Ibid.*, p. 19.

that “The interpretation adds nothing to the decision, which has acquired the force of *res judicata*, and only has binding force with the limits of what was decided in the judgment construed”.<sup>134</sup> It is therefore impossible to interpret a *dispositif* or an operative part *per se* without considering its essential reasoning.<sup>135</sup>

In *Anglo-French Continental Shelf Arbitration* (UK v. France), the tribunal held that “under certain conditions and within certain limits the reasoning in a decision may properly be invoked as a ground for requesting an interpretation of provision of its *dispositif*”.<sup>136</sup> Along the same lines, the Inter-American Court of Human Rights in *Godinez Cruz* case (1990), held that “the interpretation of a judgment involves not only precisely defining the text of the operative part of the judgment, but also specifying its scope, meaning and purpose, based on the considerations of the judgment”.<sup>137</sup> In *Request for interpretation* (Nigeria v. Cameroon), the Court reaffirmed that any request of interpretation “must relate to the operative part of the judgment and cannot concern the reasons of the judgment *except* in so far as these reasons are inseparable from the operative part”.<sup>138</sup> Consequently, the limit of interpretation cannot be restricted to the operative parts of the Court’s judgment, but rather to all essential reasons, which constituted the basis of the *dispositif*.<sup>139</sup> This reiterates not only the importance of the essential *motifs*, which is directly connected to the *dispositif*, but also establishes how the *motifs* can be binding and with the authority of *res judicata*.

Likewise, under Article 61 of the Statute, a revision can be granted only if the party seeking revision based its application upon “the discovery of some fact of such a nature as to be a decisive factor”, which was “unknown to the Court and also to the party seeking revision, always provided that such ignorance was not due to negligence”. As Judge *ad hoc* Bastid in her separate opinion in the *Application for revision and interpretation* (Tunisia v. Libya) noted, (but without any elaboration), neither the Statute of the Court nor the Rules of the Court specify the effect a successful request for revision has on the principle of *res judicata*.<sup>140</sup> Judge Bastid

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<sup>134</sup> *Ibid.*, p.21.

<sup>135</sup> *Ibid.*, pp. 17-19.

<sup>136</sup> 18 *UNRIAA*, p. 291, para. 28.

<sup>137</sup> *Godinez Cruz* case, Inter-Am Ct. H. R. (Decision of 17 August 1990), Ser C. No. 9, para. 26.

<sup>138</sup> ICJ. Rep. (1999), para.10 (emphasis added).

<sup>139</sup> *Channel Continental Shelf* (UK v. France), 18 *UNRIAA*, p.295.

<sup>140</sup> ICJ Rep. (1985), para 2, p. 247. Judge Bastid was reluctant to elaborate on the issue since there had been no judgment declaring an application of revision admissible.

must have been alluding to the relationship between the *motifs* and the *dispositif* as whether the new fact should have a decisive factor on both of them or on the latter only.

In that case, Tunisia claimed in its application for revision of the judgment of the Court of 1982 in the *Continental shelf case* (Tunisia / Libya) that it had newly discovered a fact which, had this been known to the Court, would have had a decisive influence on the Court's judgment. The new alleged fact was the resolution of the Libyan Council of Ministers of 1968, which fixed the coordinates of concession boundaries in the disputed areas.<sup>141</sup> Tunisia alleged that Libya appeared to align with the concession boundary which had been fixed by Tunisia and that the coincidence of the concession boundaries fixed by the parties had influenced the Court decisively when it adopted the same line (26° line).<sup>142</sup> The Court recalled that it had based its judgment on various relevant factors.<sup>143</sup> It then examined closely the essential reasoning of its judgment of 1982 in relation to the decisiveness of the assumption of coincidence in the two concession boundaries. It found, however, that the new fact alleged to be discovered by Tunisia had no effect whatsoever on the essential reasoning of the 1982 judgment. The Court first affirmed the importance of the nature of the new evidence as a decisive factor and then its application on the reasoning as well as on the operative provisions. It held:

But what is required for the admissibility of an application for revision is not that the new fact relied might, had it been known, have made it possible for the Court to be more specific in its decision; it must also have been a "fact of such a nature as to be decisive factor". So far from constituting such a fact, the *details* of the correct co-ordinates of Concession No. 137 would not have changed the decision of the Court as to the first sector of the delimitation.<sup>144</sup>

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<sup>141</sup> *Ibid.*, p. 192.

<sup>142</sup> Bowett, D., "Res Judicata and the Limits of Rectification of Decision by International Tribunals", 8 *Afri.J.Int' & Comp. L.* (1996), pp. 577-591, at p. 590.

<sup>143</sup> ICJ. Rep. (1985), para 35.

<sup>144</sup> *Ibid.* para 39 p. 213-214. (emphasis added).

Thus, the relationship between these essential elements of any international judgment is intimate and inseparable. Any discovery of new fact should be simultaneously of a decisive nature and significant both to the essential reasoning as well as to the operative provisions. The Court concluded that, “the *terms* of the Court’s judgments are definitive and binding... they stand, not as something proposed to the parties by the Court but as something established by the Court”.<sup>145</sup> According to Bowett, the implication of the term “*judgments*” in that case was recognized by the Court to include the reasoning to be “binding, not just the *dispositif*”.<sup>146</sup> This again underpins the importance of the *motifs* and how they can be binding as well. In conclusion, a failure to consider the significance of the substantial reasoning, which is an integral part of the whole judgment, which has been directly determined by the Court, would inevitably constitute a serious misunderstanding and misinterpretation of the very concept of the doctrine of *res judicata*.

### 3.2. Enforceability of *Motifs*

Like the *dispositif*, the enforceability of the *motifs* is not always needed due to their purpose and nature. The *motifs* are generally self-executory. But in some cases, especially in boundary and maritime disputes, the Court’s reasoning and findings are not always self-executory depending of course on the positions of the parties to the claims presented. The classical method of construing the scope of *res judicata* and the enforceable portion of the Court’s judgment can be determined by reference to the provisions of a Special Agreement,<sup>147</sup> or the final submissions of the parties themselves.<sup>148</sup> In the *Anglo-French Continental Shelf* Arbitration of March 14, 1978,<sup>149</sup> the United Kingdom, under Article 10 (2) of the Arbitration Agreement of 10 July 1975, submitted a request on October 17, 1977, seeking an interpretation of an alleged inconsistency between the boundary lines produced in the *dispositif* and the reasoning of its decision of June 30, 1977. France argued that the authority of *res judicata* under

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<sup>145</sup> ICJ. Rep. (1985), para 48.

<sup>146</sup> Bowett, D., *supra* note 141, p. 579.

<sup>147</sup> *The Treaty of Neuilly, (Interpretation)*, (1925), PCIJ. Ser. A, No. 4, p. 7.

<sup>148</sup> *Chorzów Factory* case (interpretation) (1927), PCIJ, Ser. A, No. 13, p.11; *Asylum* case (Interpretation), ICJ. Rep. (1950), p. 402. See also Qatar and Bahrain final submission, *Maritime and Delimitation and Territorial Questions* (Qatar v. Bahrain case), ICJ. Rep. (2001), paras 33-34.

<sup>149</sup> Decision of 14 March 1978 on *Delimitation of the Continental Shelf (Interpretation of the Decision of 30 June, 1977)* (UK v. France) 18 UNRIAA 271.

the Arbitration Agreement attached only to the *dispositif*.<sup>150</sup> In fact, France did not maintain that those portions of the reasoning could never have the binding force of *res judicata*, but rather it claimed that:

The authority of *res judicata* indisputably attaches only to the reply given to the question formulated in Article 2, that is to determine of the boundary, including its drawing on a chart ... what is important to determine in the present instance is not what may attach the authority of *res judicata* but to what relates the right of recourse to the Court provided for by Article 10 paragraph 2, and this provision envisages only an interpretation of the Decision.<sup>151</sup>

It should be borne in mind that in this case, the *dispositif* was basically a list of coordinates to construct boundaries. Accordingly, reference to the reasoning would be indispensable in order to clarify the obscurity of the meaning and scope of the *dispositif*. Consequently, the tribunal rejected the French contention, ruling that:

in the opinion of the Court it is equally clear that having regard to the close links that exist between the meaning of a decision and the provisions of its *dispositif*, recourse may in principle be had to the reasoning in order to elucidate the meaning and the scope of the *dispositif* ... if findings in the reasoning constitute a condition essential to the decision given in the *dispositif* these findings are to be considered as included amongst the points settled with binding force in the decision.<sup>152</sup>

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<sup>150</sup> Its contention was formulated as follows: the powers of interpretation of the possessed by the Court in virtue of the Arbitration Agreement only permit it to elucidate the meaning of an obscurity in the Decision, without allowing it to modify the content in any way; the measures which the United Kingdom asks the Court to take in order to 'reconcile' certain elements in the judgment and to 'rectify' certain element in the decision, including the boundary traced on the Chart, exceed those powers; the Court has no 'inherent power' to take measures of the scope of those appearing in the United Kingdom's submissions; and in any event the Court's decision is not in contradiction with its reasoning. *Ibid*, para. 14, p.290.

<sup>151</sup> *Ibid*, para. 19, pp. 291-92.

<sup>152</sup> *Ibid*, para 28.

When the Court deals with territorial disputes and maritime delimitation cases the bindingness and enforceability of the *motifs* becomes more obvious. In such cases, the Court normally indicates its lines and sectors not in the operative part but in the reasoning. In *Maritime and Delimitation and Territorial Questions* case (Qatar v. Bahrain) (2001), for instance, the Court concluded in paragraph 250 of the Judgment that “from all of the foregoing that the single maritime boundary that divides the various maritime zones of the State of Qatar and the State of Bahrain *shall* be formed by a series of geodesic lines joining, in the order specified, the points with the following co-ordinates ...”<sup>153</sup> In the *dispositif* the Court decided that the single maritime boundary that divides the various maritime zones of the State of Qatar and the State of Bahrain “shall be drawn as indicated in paragraph 250 of the present Judgment”.<sup>154</sup> Similarly, in the *Land and Maritime Boundary* case (Cameroon v. Nigeria) the Court recalled in paragraph 312 that it had fixed in paragraphs 57, 60, 61 and 225 of the judgment the boundary between the two States in the Lake of Chad area and the Bakassi Peninsula.<sup>155</sup> The boundary fixed in the paragraphs of the findings and the *motifs* acquired the authority of *res judicata* and thus constituted the heart of the judgment which the *dispositif* reiterated.

Hence, it would be hard for the parties to argue in these two cases, for instance, that the Court’s reasoning and finding were not binding or shall not be enforceable regardless of the fact that they were broadly reiterated in the *dispositif*. To reiterate, the operative part of a judicial decision as well as the essential reasoning on which findings are based, should equally have the binding force and effect of *res judicata*. Consequently, the views of Anzilotti in the *Chorzów Factory* case (1927),<sup>156</sup> and the Court’s position in the *Interhandel* case (1959),<sup>157</sup> and well as those of Judge Tanaka in the *South West Africa* cases,<sup>158</sup> which denied the reasoning any enforceability and limited the implementation of the judgment to its operative part, are inaccurate and must be rejected.

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<sup>153</sup> ICJ. Rep. (2001), para 250.

<sup>154</sup> *Ibid.*, para., 252.

<sup>155</sup> ICJ. Rep. (2002), para 312.

<sup>156</sup> (1927), PCIJ Ser. A, No. 13, p. 24.

<sup>157</sup> ICJ. Rep. (1959) p. 28.

<sup>158</sup> ICJ. Rep. (1966), p.261.

#### 4. Conclusion

Orders of provisional measures and final judgments are judicial decisions and, when appropriate, are subject to enforcement under Article 94 and other relevant provisions of the U.N Charter. However, not every judicial decision rendered under Articles 41, 59, 60 of the Statute is executory nor every declaratory judicial decision is self-executory. Orders of provisional measures are in most cases executory notwithstanding the fact they do not acquire the authority of *res judicata*. However, from a functional approach, orders of provisional measures are binding and must be enforced to preserve the respective rights of the litigant States. The Court may, however, render declaratory judicial decisions declaring that action or inaction of a State is or is not in conformity with rules of customary international law or other applicable international treaties. Such decisions although acquire the authority of *res judicata* but not necessarily are required to be enforceable due to their nature and purpose.

However, for the purposes of enforceability the identity of the scope of the judgment must be determined because not every *motif* of a judgment is non-binding or non-enforceable and *vice versa*. It is also true that not every *dispositif* of a judgment is binding and enforceable and *vice versa*. It is submitted that in some circumstances the essential *motifs* on which the judgment are directly based should equally have the binding force and affect of *res judicata*, and hence could be subject of intervention, interpretation and revision and consequently enforcement.

## CHAPTER FIVE:

# ENFORCEMENT OF THE JUDICIAL DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE THROUGH THE ICJ ITSELF

### 1. Introduction

Surprisingly, judicial enforcement of international judicial decisions receives little attention in professional writings,<sup>1</sup> and judicial enforcement of and through the ICJ itself is even worse.<sup>2</sup> This peculiar lack of interest or negligence might be due to, *inter alia*, a misconception about the role of the ICJ in this process. In fact, some commentators have doubted the ability of the Court to participate effectively in the enforcement process of its decisions and to function as a “real” court.<sup>3</sup> They have described the Court as “a toothless bulldog”<sup>4</sup> especially when the Court is obviously incapable of ordering, for instance, the attachment of assets of the delinquent party. Those who adopt these propositions<sup>5</sup> have generally reiterated or reproduced a proposition found in the report of the Preparatory Commission of the United Nations, which suggested that the enforcement of the Court’s decisions is not the business of the Court itself but rather belongs to other political bodies,<sup>6</sup> since “the Court, from the moment it has given its final decision, becomes *functus officio* and therefore has nothing to do with the execution or enforceability of that judgment”.<sup>7</sup> This assumption

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<sup>1</sup> Jennings, R., “*The Judicial Enforcement of International Obligations*”, 47 *ZaöRV* (1987), pp. 3-16, at p. 3.

<sup>2</sup> Al-Qahtani, M., “*The Role of the International Court of Justice in the Enforcement of its Judicial Decisions*”, 15 *Leiden J Int'l L* (2002), pp. 781-804, which was based largely on this Chapter.

<sup>3</sup> O’Connell, E., “*The Prospects for Enforcing Monetary Judgments of the International Court of Justice: A Study of Nicaragua’s Judgment Against the United States*”, 30 *Va. J. Int'l L.* (1990), pp. 891-940, at p. 901.

<sup>4</sup> Ajibola, B., “*Compliance with Judgments of the International Court of Justice*”, in Bulterman, M. K, and Kuijer, M., (eds), *Compliance with Judgments of International Courts*, (Martinus Nijhoff Publishers, 1996), pp. 9-38, at p. 11.

<sup>5</sup> Rosenne, S, *The Law and Practice of the International Court*, (1957), p. 74; Deutsch, P. E., “*Problems of Enforcement of Decrees of International Tribunals*”, 50 *ABAJ*, (1964), pp. 1134-39, at p. 1134; Kapoor, S.K., “*Enforcement of Judgments and Compliance with Advisory Opinions of the International Court of Justice*”, in Dhokalia, R. P & Nirmal, B. C., (eds), *International Court in Transition: Essays in Memory of Professor Dharma Pratap*, (Chugh, India, 1995), pp. 301-316, at p. 302; see also Judge Weeramantry’s Dissenting Opinion in *East Timor* case. ICJ. Rep. (1995), p. 219, and Ajibola, B. A., *supra* note 4, pp. 9 & 11.

<sup>6</sup> 14 *UNCIO*, (1945), pp. 833, 853 and 886.

<sup>7</sup> Ajibola, B., *supra* note 4, p. 12 & p. 24; see also Judge Weeramantry Dissenting Opinion in *East Timor* case. ICJ. Rep. (1995), p. 219.

was also alleged to be substantiated by a restricted interpretation found in the judgment of the Court in *Haya de la Torre* (Colombia v. Peru).<sup>8</sup> These assertions are in fact misleading.

The Court is probably a “toothless bulldog” given the absence of an executive arm attached to it. Nevertheless, a close look into the Statute of the Court reveals that the Court has an enforcement power,<sup>9</sup> at least, in some derivative matters with respect to its decisions under Articles, 41, 57, 60 and more strikingly under Article 61 (3), through which it can effectively participate in the enforcement process of its decisions. Therefore, in an attempt to mitigate this deficiency in the international legal system and to highlight the Court’s capacity in the improvement of compliance with and enforcement of its decisions, various theories and measures have been advanced. These proposals are based on different arguments and each merits comment and analysis for better appreciation.

Before we examine these theories and measures, however, we shall highlight the Court’s perception of its role in the enforcement of its decisions in the face of a restricted interpretation of the Court’s decision in *Haya de la Torre* case,<sup>10</sup> given by some commentators as proof of the Court’s incompetence and inability to play any role in this process.

## **2. The Court’s Perception of its Role in the Enforcement of its Decisions**

Although the Court’s own perception of its role in enforcement of its decisions has not yet been pronounced squarely,<sup>11</sup> there is only one example allowing one to deny the Court’s role in this process, namely the Court’s findings in the *Haya de la Torre* case.<sup>12</sup> Nevertheless, a close look into that case reveals otherwise. In that case the Court refused to respond to the question put to it by Colombia and Peru, who inquired about the manner in which the Court’s Judgment of 20 November 1950

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<sup>8</sup> ICJ. Rep. (1951), 71.

<sup>9</sup> Schachter, O., “*International Law in Theory and Practice: General Course in Public International Law*”, 178 *RdC*, (1982), pp. 1-395, at p.219 and O’Connell, M. E., *supra* note 3, p. 898.

<sup>10</sup> ICJ. Rep. (1951), 71, at p. 79.

<sup>11</sup> See the *Mavrommatis* case, in which the PCIJ found it unnecessary to consider the question whether, in certain cases, it might have jurisdiction to decide disputes pertaining to non-compliance with its decisions. (1927), PCIJ Ser. A, No. 11, at p. 14.

<sup>12</sup> ICJ. Rep. (1951), 71.

should be executed.<sup>13</sup> The Court, in answering that question, observed that it confined itself “to defining the legal relations between parties” and it was not, indeed, for the Court to “make a choice amongst the various courses by which the asylum” could be terminated, and that those courses were “conditioned by facts and by possibilities which to very large extent, the Parties are alone in a position to appreciate”, hence, “a choice amongst them could not be based on legal considerations, but only on considerations of practicability or of political expediency; it is not part of the Court’s judicial function to make such a choice”.<sup>14</sup> In other words, the Court should not indicate one a specific single and exclusive method of compliance. It is appropriate to leave, the desirable course of compliance with the judicial decisions of the Court to the litigants themselves unless such a course could violate a *jus cogens* norms.

Reading the Court’s decision more carefully also reveals that the Court may not make a selection out of the various means to fulfil and satisfy the obligations under its decisions since this is something for the parties themselves to evaluate. This interpretation finds vigorous support in the Court’s Judgment of 14 February 2002 in the *Arrest Warrant of 11 April 2000* (Congo v. Belgium). After finding that Belgium had breached its international obligations towards Congo by issuing an unlawful international arrest warrant of 11 April 2000 against the Foreign Minister of Congo, the Court considered that “Belgium must, *by means of its own choosing*, cancel the warrant in question and so inform the authorities to whom it was circulated”.<sup>15</sup>

As a matter of fact, the Court is under a general obligation to enable the Parties to achieve a workable final settlement of their disputes. This was confirmed by the Court in the *Burkina Faso / Mali* case (1986). Although the Chamber of the Court in this case was approached by the parties with the task of nominating experts to give an opinion for the purposes of implementing the Court’s judgment, the Chamber acknowledged the power of the Court to contribute to the enforcement process of its decisions. It stated “there is nothing in the Statute of the Court nor in the settled jurisprudence to prevent the Chamber from exercising this power, the very purpose of

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<sup>13</sup> *Ibid.*, p. 75.

<sup>14</sup> *Ibid.*, p. 79; see also the Tripartite Claims Commission (United States / Austria / Hungary) which stated that it was “not concerned with the enforcement of its awards or with the payment by Austria and / or Hungary of their financial obligations” and “the problem of how and when the awards of this Commission shall be enforced and when and how the judgment shall be made or secured are political in their nature and must be settled by the appropriate political agencies of the Governments concerned”. *Administrative Decisions No. 1*, 6 UNRIIA, pp. 206-7.

<sup>15</sup> ICJ. Rep.(2002),para 76 (emphasis added).

which is to enable the Parties to achieve a final settlement of their dispute in implementation of the Judgment which it has delivered".<sup>16</sup> Thus the Court's jurisprudence does not suggest that it is the business of the Court to direct the parties to enforce its decisions in certain ways or manner, but it clearly and certainly indicates that the Court could and should participate effectively in the process of ensuring compliance with and enforcement of its decisions or assuming an active role in the enforcement process of its decisions.

However, the enforcement of international or national judicial decisions normally requires instituting new proceedings before a competent court to give effect to the judgment directly or indirectly in the form of constraint measures. Yet, in the case of the ICJ, it can be argued that consent to jurisdiction over the merits under Article 36 of the Statute should comprehend jurisdiction over the enforcement of its decisions and/or that the jurisdiction of the Court over the enforcement is inherent by virtue of Article 60 of the Statute of the Court under which the Court has compulsory jurisdiction to construe its decision. In fact, the jurisdiction of the Court under Article 36 (2) (b) of the Court's Statute does conceive the possibility of instituting a new proceedings relating to the implementation and enforcement of the decisions of the Court as long as non-compliance is an international wrong and thus is a justiciable legal question under international law.<sup>17</sup>

On the other hand, there is an argument that the consensual jurisdiction of the Court cannot be extended to enforcement proceedings since such proceedings are new in nature and may also involve new parties, and hence, a new consent is required. Notwithstanding the vigorous arguments of both theories and practicalities to the contrary, the Court, can and should resort to some form of constraint measures or otherwise to give effect to its decisions apart from the controversial inherent power over enforcement in general. Although there is an absence of developed international court procedures of enforcement,<sup>18</sup> it is not necessary to rely exclusively on the issue of jurisdiction to involve the Court in the process of enforcement of its decisions, as we shall see.

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<sup>16</sup> ICJ. Rep. (1986), p. 648; O'Connell, M. E, *supra* note 3, p. 898.

<sup>17</sup> See, e.g., Rosenne, S., *The Law and Practice of the International Court, 1920-1996*, 3<sup>rd</sup> ed, (Martinus Nijhoff, 1997), p. 219. For a contrary and restricted view, see Judge Weeramantry in his dissenting opinion in *East Timor* case who said that "The *raison d'être* of the Court's jurisdiction is adjudication and clarification of the law, not enforcement and implementation". ICJ.Rep.(1995),p. 219.

<sup>18</sup> Jennings, R., *supra* note 1, p. 15.

### 3. Enforcement through the Indication of Measures of Protection under Article 41 of the Statute and under Article 78 of the Rules

The Court under Article 41 (1) of the Statute has “the power to indicate ... any provisional measures ... to preserve the respective rights of either party”. This is supplemented by Article 78 of the Rules, which provides that “the Court may request information from the parties on any matter connected with the implementation of any provisional measures it has indicated”. Some commentators, however, have seen in the indication of provisional measures an intrinsic power by which the Court could ensure compliance with its decisions. According to Professor Schachter, for instance, the Court “should be prepared to impose some sanctions on the recalcitrant state whether the applicant or the respondent”, such as “damages arising out of non-compliance” or “withholding the relief sought”.<sup>19</sup> Relying on part of Article 78 of the Rules of the Court, which empowers the Court to “request information from the parties on any matter connected with the implementation of any measures it had indicated”, Judge Ajibola believes that this is “a clear indication that the Court is not expected to give any order in vain”.<sup>20</sup> To what extent is there any validity to such suggestions?

The primary function or purpose of provisional measures is to preserve the respective rights of either party pending the final decision, and not, in other words, to bring about settlements themselves. However, reiteration of the bindingness and enforceability as well as the acknowledgement of non-compliance with the Court’s Order in the form of censure may have some implications as Singh suggested,<sup>21</sup> but hardly has any predominant influence in the post-adjudicative phase. Thus, when Iran failed to comply with the Court’s Order of Provisional measures of December 1979 in the *United States Diplomatic and Consular Staff in Tehran* case, the Court in the merits phase articulated “censure” of Iran’s non-compliance.<sup>22</sup> In contrast, in the *Fisheries Jurisdiction* cases, *Nuclear Tests* cases, *Nicaragua* case, and more

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<sup>19</sup> Schachter, O., *supra* note 9, p. 222.

<sup>20</sup> Ajibola, B., *supra* note 4, p. 16.

<sup>21</sup> See, however, Singh who suggested that the Order of provisional measures of the Chamber of 10 January 1986 in *Frontier Dispute (Burkina Faso/Republic of Mali)* had terminated the hostilities between the parties, Singh, N., *The Role and Record of International Court of Justice*, (Martinus Nijhoff Publishers, 1989), p. 124.

<sup>22</sup> ICJ. Rep. (1980), 3, pp. 75 & 93.

importantly in *LaGrand* case, the court simply noted the non-observance of its Orders,<sup>23</sup> and even when there was a request for further provisional measures as a consequence of non-compliance with its prior order, the Court dealt with it with reluctance. It should be reiterated, however, in this context that such possible judicial reluctance should not doubt the bindingness of the Court's orders of provisional measures. In the *Nicaragua* case, for instance, the Court's Judgment on the merits, notwithstanding *prima facie* jurisdiction to justify indication of provisional measures, stated that:

The Government of Nicaragua addressed a communication to the Court referring to the Order indicating provisional measures, informing the Court of what Nicaragua regarded as 'failure of the United States to comply with that Order', and requesting the indication of further measures ... By a letter of 16 July 1984, the President of the Court informed the Agent of Nicaragua that the Court considered that the request should await the outcome of the proceedings on jurisdiction which were then pending before the Court".<sup>24</sup>

It should be noted that the imposition of a limited censure is not quite contrary to the principle of *non ultra petita* since this principle "cannot preclude the Court from addressing certain legal points in its reasoning".<sup>25</sup> But, any imposition of severe sanctions on the recalcitrant State such as "damages arising out of non-compliance", or "withholding the relief sought" as Professor Schachter suggested, would be a violation of this well-known principle if these claims have not been duly requested in the applicant State's final submissions,<sup>26</sup> or without statutory empowerment. In *LaGrand* case (2001), the Court observed that apart from declaring the U.S. Government's violation of its international legal obligation under the Order and noting assurance of non-repetition of the delict committed, Germany's submission contained no other request. It took note of the doubts pertaining to the inconclusive of

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<sup>23</sup> See the letter addressed to the Court from the Agent of the Federal Republic of Germany, ICJ. Pleadings, Oral Arguments, *Documents*, Vol. II, p. 443. No. 90, para. 5; *Fisheries Jurisdiction* cases, ICJ. Rep. (1974), pp. 16-17; *Nuclear Tests* cases, ICJ. Rep. (1974), pp. 258-259; and *LaGrand*, ICJ. Rep. (2001), para. 115.

<sup>24</sup> ICJ. Rep. (1986), 144, para 287.

<sup>25</sup> *Arrest Warrant of 11 April 2000* case (Congo v. Belgium), ICJ. Rep. (2002), para. 43.

<sup>26</sup> *Asylum (Interpretation) Case*, ICJ. Rep. (1950) 402.

the bindingness and enforceability of orders indicating provisional measures, then concluded that, had the legal character of such orders been extensively settled by its jurisprudence, the Court would have taken these factors into consideration had Germany's submission included a claim for indemnification.<sup>27</sup> Thus, the Court seems to be reluctant to punish the delinquent for mere non-compliance with an order of provisional measures and it is bound not to award damages arising out of non-compliance when there is no claim for indemnification. Otherwise, this will run contrary to the principle of *non ultra petita*, which operates to limit the jurisdiction of the Court to those issues that are the subject of the final submissions.<sup>28</sup>

Similarly, under Article 78 of the Rules, the Court frequently requests information concerning the enforcement of its Orders. For instance, in the *LaGrand* case, the Court formally asked the United States in its Order of 3 March 1999 to "take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings, and it should inform the Court of all the measures which it has taken in implementation of that Order".<sup>29</sup> The United States did not comply with the substance of the Order to postpone the execution of LaGrand; nevertheless, it complied with second part of the Order, which required the United States to merely inform the Court of the measures taken in implementation of the Order.<sup>30</sup> The Court, in the merits, found that the United States had breached the obligation incumbent upon it under the Order.<sup>31</sup> Nevertheless, the decision was rendered against the recalcitrant State not as a sanction for non-compliance with the Order to inform the Court of the measures taken to implement its Order, as it may be inferred from Judge Ajibola's assertion, but because the respondent was already found responsible for the non-compliance with the substance of the Order to postpone the execution of LaGrand. Normally, States will comply with the requirements of Article 78 of the Rules of the Court regardless of their actual non-compliance with the substance of the Court's orders of provisional measures.

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<sup>27</sup> *LaGrand*, ICJ. Rep (2001), para 116.

<sup>28</sup> *Asylum Case*, Interpretation, ICJ. Rep. (1950) 402; *Arrest Warrant of 11 April 2000 case (Congo v. Belgium)*, ICJ. Rep. (2002), para 41-43.

<sup>29</sup> ICJ. Rep. (1999), para. 9.

<sup>30</sup> The information required on the measures taken in implementation of this Order was given to the Court by a letter of 8 March 1999 from the Legal Counselor of the United States Embassy at The Hague. According to this letter, on 3 March 1999 the State Department had transmitted to the Governor of Arizona a copy of the Court's Order. "In view of the extremely late hour of the receipt of the Court's Order", the letter of 8 March went on to say, "no further steps were feasible". ICJ.Rep.(2001), para.111.

<sup>31</sup> *Ibid.* para. 128.

Consequently, apart from the limited value of censure pending the final judgment, and other measures to be indicated by the Court through requesting the parties to refrain from taking action that is likely to impede the implementation of the Court's judgment,<sup>32</sup> the credibility of the application of Article 41 of the Statute and Article 78 of the Rules of the Court to give the Court any enforcement power to enforce its orders of provisional measures is circumstantial or temporary, nevertheless it should not be underestimated.

#### **4. Enforcement through Avoidance of Jurisdiction or Rendering Ambiguous Decisions**

Another suggested measure of enforcement is avoidance of the Court assuming jurisdiction to decide certain cases or moving through the case extremely slowly when the Court believes that its decision would not be complied with. One of the supporters of this imaginative strategy is Professor Reisman who suggests that "when the Court anticipated that a state was likely to impugn a judgment, it not infrequently disclaimed itself of jurisdiction. In other cases issues were formulated restrictively or the final judgement was almost Delphic in ambiguity".<sup>33</sup> Jonathan Charney, who seems entirely in agreement with Reisman, goes further to suggest that the Court "may move the case so slowly" or even "it may issue a judgment that is so ambiguous that it fails to commit the Court any particular result."<sup>34</sup> These suggestions have, indeed, some serious consequences, and hence are highly questionable and thus must be rejected.

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<sup>32</sup> See, e.g., *Frontier Dispute* (Burkina Faso v. Mali), Order of 1 Jan 1986, ICJ. Rep. (1986), 7.

<sup>33</sup> Reisman, M., *Enforcement of International Judgments*, 63 *AJIL* (1969), pp. 1-27, at pp. 3-4. He elsewhere also suggested that "a decision maker may validly examine the possible effects of non-enforcement of a decision on the organized decision process and on the community's public order, and he should treat these matters as factors in his ultimate decision". Reisman, M., *Nullity and Revision: The Review and Enforcement of International Judgments and Awards*, (hereafter cited as *Nullity and Revision*), (Yale Univ. Press, 1971), pp. 149-50.

<sup>34</sup> Charney, J. I., "Disputes Implicating the Institutional Credibility of the Court: Problems of Non-Appearance, Non-Participation, and Non-Performance", in Damrosch, L., *International Court of Justice at a Crossroads*, (Transnational Publishers, 1987), pp. 288-318, at p. 306.

First of all, the Court would inevitably face an obstacle dealing with the accuracy of its assessment and anticipation of the attitude of the target party<sup>35</sup> regardless of some persuasive indications of possible non-compliance with its potential decision through, for instance, the non-appearance or non-participation of the target State in the proceedings. In other words, the Court would not be able to examine definitely and decisively how the Parties' intentions in mid or post-adjudicative phases would be even before deciding preliminary objections.

Second, avoiding jurisdiction would question the Court's credibility to settle international disputes and to promote the international legal order through attracting States as litigants and promoting means and methods of settlement of international disputes<sup>36</sup> even in "cases in which its decisions might be resisted"<sup>37</sup> as long as its jurisdiction has been validly conferred. In fact, avoidance of jurisdiction in this context would rather repudiate the Parties' rights under the U.N Charter to settle their disputes by using the judicial organ of the United Nations. This repudiation would consequently entail, at least theoretically, the breach by the Court of Articles 33 (1) and 92 of the UN Charter, and Articles 1 and 36 of its Statute. In addition, it is undoubtedly true that avoiding jurisdiction would threaten the prestige of the Court, which is a predominant and persuasive instrument in the mid and post-adjudicative phases.<sup>38</sup> Adopting such measures would, in fact, encourage States to question the credibility of the Court to settle their disputes since they have already expressed their concerns *even* with respect to even the workload and procedural delay in the Court.<sup>39</sup> It should be recalled that when the Court demonstrated a reluctance or avoidance of jurisdiction in *Northern Cameroons* case,<sup>40</sup> *South West Africa* cases,<sup>41</sup> the *Barcelona Traction* case,<sup>42</sup> and *Nuclear Tests* cases,<sup>43</sup> its reputation was questioned.<sup>44</sup> On the

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<sup>35</sup> Gunther, G., "The Subtle Vices of the "Passive Virtues" A Comment on Principle and Expediency in Judicial Review", 64, *Columbia L.R.*, (1964), pp. 1-25, at p. 7.

<sup>36</sup> One of the main purposes of the General Assembly Declaration of the United Nations Decade of International Law was to "Promote means and methods for the peaceful settlement of disputes between States, including the resort to and full respect to the International Court of Justice." *UNGA Res. 44/23, UN Doc.A/Res./44/23* (1990).

<sup>37</sup> O'Connell, M. E., *supra* note 3, p. 903.

<sup>38</sup> Gormeley, W. P., "The Status of Awards of International Tribunals: Possible Avoidance Versus Legal Enforcement", 10 *HLJ* (1964), pp. 33-107, at pp. 74-75.

<sup>39</sup> Guillaume, G., "The Future of International Judicial Institutions", 44 *ICLQ* (1995), pp. 849-862, p. 851.

<sup>40</sup> *Northern Cameroons* (Cameroon v. United Kingdom), ICJ. Rep. (1963), p.29.

<sup>41</sup> *South West Africa Cases*, (Second Phase) (Judgment of 18 July 1966), ICJ. Rep. (1966), p. 6.

<sup>42</sup> *Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium v. Spain)* ICJ. Rep. (1970), 3.

<sup>43</sup> ICJ. Rep. (1974), p. 271.

<sup>44</sup> Guillaume, G., *supra* note 39, p. 851.

other hand, probably the Court's attempt to solve the *Qatar v. Bahrain* disputes, notwithstanding its controversial decisions of 1994 and 1995 in the jurisdiction phase,<sup>45</sup> was, nevertheless, eventually appreciated even by the parties themselves.<sup>46</sup>

Thirdly, it was suggested, as a ground to justify avoidance jurisdiction by the Court, that the alleged breach of an international obligation was only one element in more complicated political situations which could not be sufficiently dealt with in isolation from its political context. It is undoubtedly true that almost all disputes brought before the Court inevitably involve political issues as the Court indicated in the *United States Diplomatic and Consular Staff in Tehran* case. In that case, Iran refused to participate in proceedings in 1979 based on a claim of non-justiciability as merely political questions had been submitted and that the Court was ignorant of the political context of the dispute. Nevertheless, the Court observed that "legal disputes between sovereign States by their very nature are likely to occur in political contexts, and often form only one element in a wider and long-standing political dispute".<sup>47</sup> Thus political implication in States' disputes is so inevitable as long as they have been framed in terms of law and raised problems of international law.<sup>48</sup> Political implications in these disputes should thus have no effect of the competence of the Court. Hence, it cannot be a realistic ground for a judicial retreat.

In the follows in the same vein that when political and judicial organs of the United Nations are seized simultaneously, a failure to reach a political solution such as in *Aegean Sea Continental Shelf* case,<sup>49</sup> *United States Diplomatic and Consular Staff in Tehran* case, and *Nicaragua* case<sup>50</sup> or technically in the *Lockerbie* case, should not impair the Court's judicial task to deal with legal issues tangled with political ones when they are validly brought before it. Ostensibly, the jurisprudence of the Court in this regard affirms the Court's reluctance to accept contentions of non-

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<sup>45</sup> ICJ. Rep. (1994), 112, and ICJ. Rep. (1995), p.6; for the controversy raised by the Court's decisions of 1994, and 1995 (jurisdiction phase), see in general Lauterpacht, E., "Partial Judgment and the inherent jurisdiction of the International Court of Justice" in Lowe, V., & Fitzmaurice, M., (eds), *Fifty Years of the International Court of Justice*, (Cambridge, 1996), pp. 465-486.

<sup>46</sup> See the letter dated 19 March 2001 to the Registrar of the International Court of Justice from the Agent of the State of Bahrain and the letter dated 27 March 2001 to the Registrar of the International Court of Justice from the Agent of the State of Qatar in which they convey their gratitude to the Court for reaching its judgment. <<http://www.icj-cij.org>>.

<sup>47</sup> ICJ. Rep. (1980), pp. 19-20.

<sup>48</sup> *Western Sahara*, Advisory Opinion, ICJ. Rep. (1975), 18, para. 15; *Legality of the Use by States of Nuclear Weapons in Armed Conflict*, Advisory Opinion, ICJ. Rep. (1996), p. 66, 73, para. 15.

<sup>49</sup> ICJ. Rep. (1978), p. 3, pp. 12-13.

<sup>50</sup> ICJ. Rep. (1984), Order of 10 May 1984.

justiciability based on political questions as a strategic legal argument to impair the Court's authority to decide inseparable legal and political disputes over which it has jurisdiction. However, if avoidance of jurisdiction were to be a slightly valuable measure or as a sort of primitive enforcement measures, Article 102 of the Charter could be taken as legal basis for this judicial retreat or avoidance. How?

Article 102 of the Charter stipulates clearly "No party to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraph of this Article may invoke that treaty or agreement before any organ of the United Nations". So, the Court, which is an organ of the United Nations is entitled under this provision to refuse to entertain jurisdiction based on a non-registered treaty invoked for such purpose. The Court may have some limited room to assess at least partly the potential attitude of the defendant State in the post-adjudicative phase through its reaction during the jurisdictional phase although this sanction is limited to non-registered special and framework agreements. However, again concrete assessment of the potential attitude of defendant party is hard to be adequately established. So, notwithstanding the clear stipulation of Article 102 of the Charter, neither Qatar nor Bahrain registered the exchange of letters of 1987, which, *inter alia*, was invoked by Qatar as a basis of the jurisdiction of the Court.<sup>51</sup> The Court in *Qatar v. Bahrain* case accepted invoking, *inter alia*, this agreement as a basis of its jurisdiction notwithstanding the Bahraini initial reported contemplation of non-appearance and its vigorous contest of the jurisdiction of the Court. That was sufficient to give the Court a hint of the potential reaction of Bahrain in the post-adjudicative phase had a judgment against it especially in the question of Hawar Islands been rendered against it. Nevertheless, the Court proceeded,<sup>52</sup> regardless of the legitimacy of this possible sanction available to the Court under Article 102 of the Charter. Again, this affirms the judicial tendency of the Court to attract States to solve their difference before it, as opposed to avoid jurisdiction.

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<sup>51</sup> ICJ. Rep. (1991), p.50.

<sup>52</sup> ICJ. Rep. (1994), p. 122, para 29.

It follows in the same vein, that issuing an ambiguous decision, as has been suggested,<sup>53</sup> which would not be only “susceptible of any compliance or execution whatever, at any time in the future”,<sup>54</sup> but would also be inadmissible. First, this strategy of judicial retreat contradicts with the judicial duty imposed upon the Court and its members as not only to render a judicial decision, but also the judicial duty to render an enforceable one.<sup>55</sup> On the other hand, although issuing an ambiguous judgment could in the very short-term leave both parties to the dispute in a position to claim victory, nevertheless, it could easily be counterproductive in the long terms. It would put the interested parties in doubt as to the meaning and scope of *res judicata* and hence as to the exact extent of the parties’ rights and obligations or as to the manner in which the decision is to be enforced.

Moreover, judicial enforcement through the courts of both parties or through third States in general as an effective means of enforcement could be undermined if the Court renders ambiguous judgments. Thus, one of the major obstacles facing the co-operation of a third State is the biased assessment of that State. Ambiguous decisions could easily contribute to radical differences concerning the meaning and the scope of the decision in question and subsequently of a biased assessment by a third State. Professor Akehurst rightly argued that the solution to this possible dilemma is to make sure the Court’s decisions “always impose precise obligations on the parties”,<sup>56</sup> in order to avoid biased assessments.

Consequently, avoidance of jurisdiction or reluctance in rendering a decision or issuing an ambiguous one, are illegitimate judicial measures in the enforcement process. They are in fact inconsistent with the law and practice of the Court and would endanger the development of international law and threaten the future of international judicial institutions especially the Court’s credibility and integrity as judicial organ of the United Nations.<sup>57</sup>

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<sup>53</sup> Charney, J. I, *supra* note 36, at pp. 305-6.

<sup>54</sup> *Northern Cameroons (Cameroon v. United Kingdom)*, ICJ. Rep. (1963), p.37.

<sup>55</sup> See generally Horvath, G., “*The Duty of the Tribunal to Render an Enforceable Award*”, 18 *J.Int.Arb.* (2001), pp. 135-158.

<sup>56</sup> Akehurst, M., “*Reprisals By Third States*”, 44 *BYBIL* (1970), pp. 1-18, at p. 16.

<sup>57</sup> See also Jenks, C.W., *The Prospects of International Adjudication*, (Stevens & Sons, 1964), p. 667.

## 5. Enforcement under Article 60 of the Statute

In the light of the statutory absence of an express and precise authorisation of the Court to take action in the enforcement process of its judgments, Professor Reisman has suggested minor amendments to Articles 56 and 60 of the Court's Statute to permit the prevailing party after the expiry of fixed time limits, to "reapply unilaterally to the Court for a declaration of non-compliance" and then "it would be for the losing party to (1) claim compliance, (2) aver reasons for delay and request an extension, (3) as a counterclaim seek permission for substituted compliance",<sup>58</sup> let alone the political will endorse such questionably amendment.

At first glance such an amendment would offer the advantage of increasing the pressure on the defaulting party.<sup>59</sup> However, this suggestion is questionable not only because of its insufficient justification to the possible risk of opening the Statute of the Court to amendments as Professor Kerley rightly noted,<sup>60</sup> but also because it gives the defaulting party some room for manoeuvre to try to repudiate or modify the judgment against it by simply refusing to complying with it. Moreover, the Statute of the ICJ as an integral part of the U.N Charter<sup>61</sup> can only be amended as stipulated under Articles 108 and 109 of the Charter, and once the Charter or/and the Statute is open for reconsideration, it would be very difficult to restrain the scope of reconsideration including the possibility of unwelcome amendments.<sup>62</sup> However, if this risk can be overcome in the reconsideration process, Article 228 of the Treaty of the European Union and Article 31 of the Treaty on Creation of an Economic Union of the Commonwealth of the Independent States of 1993 and Articles 23 –29 of the Statute of the Court of Justice of Andean Community, can be taken as an ideal guide.

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<sup>58</sup> Reisman, M., *Nullity and Revision*, *supra* note 33, pp. 671-72.

<sup>59</sup> Tanzi, A., "Problems of Enforcement of Decisions of the International Court of Justice and the Law of the United Nations" 6 *EJIL* (1995), pp. 539-572, fn. 9 at p. 541.

<sup>60</sup> Kerley, E. L., "Ensuring Compliance with Judgments of the International Court of Justice", in Gross, L., (ed), *The Future of the International Court of Justice*, Vol. 1 (Oceana Publications, 1976), pp. 276-286, at p. 283.

<sup>61</sup> Article 92 of the U.N Charter.

<sup>62</sup> See e.g., Crawford, J., "The International Court of Justice, Judicial Administration and the Rule of Law", in Bowett, D.W., et al., (ed), *The International Court of Justice: Process, Practice and Procedures*, (British Institute for International and Comparative Law, 1997), pp. 112-123, at pp. 122-123.

Under Article 226 of the EU Treaty a legal action may be taken before the ECJ by the Commission against any member State that has failed to fulfil an obligation under the Treaty, including community law in general as well as protected fundamental rights integral to the legal order established by the Treaty. This, at least indirectly, could include a case of non-compliance with the decisions of the ICJ. Under Article 226, if the Commission considers that there has been a violation of Community law, it then “shall deliver a reasoned opinion on the matter” after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with this opinion within the specified period, the Commission may bring the matter before the ECJ. The ECJ is required under Article 228 of the Treaty to order the defaulting State to take the necessary measures to comply with the judgment of the Court if it is found to be in violation of an obligation under the Community law.<sup>63</sup> If the Commission considers that this a member State has not taken such measures, it shall, after giving that member State the opportunity to present its observation, issue a reasoned opinion specifying the points on which the member State has not complied with the judgment of the Court. But if the State concerned fails to take these measures to comply with the judgment of the Court within the time limit laid down by the Commission, the latter may bring the case again before the ECJ. The Court has then to “specify the amount of the lump sum or penalty payment to be paid by the Member States concerned which it considers appropriate in the circumstances”.<sup>64</sup> If the first penalty payment was ineffective in inducing the defaulting Member State to comply a fresh action is to be taken. Again if the ECJ finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it. Although Article 228 of the Treaty seems obscure, it nevertheless provides flexible interpretation that can be said to be “the most effective means of ensuring compliance with Community law”.<sup>65</sup> Similarly, Article 31 of the Treaty on the Creation of an Economic Union of the Commonwealth of the Independent States of 1993 provides that “if the Economic Court finds that a member State of an Economic Union has failed to fulfil an obligation under the present Treaty, the State shall be required to take the necessary measures to comply

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<sup>63</sup> Article 228 (1).

<sup>64</sup> Article 228 (2).

<sup>65</sup> Theodossiou, M., “An Analysis of the Recent Response of the Community to Non-Compliance with Court of Justice Judgments: Article 228 (2) E.C.”, 27 *ELR* (2002), pp. 25-46, at p.31

with the judgment of the Economic Court”.<sup>66</sup> However, this sanction raises its ambiguity. The “lump sum or penalty payment” imposed under Article 228, and the nature of the measures to be indicated under Article 31 needs to be determined and thus guidelines for their determination and application ought to be provided taking into account the surrounding circumstances of the judgment debtor.

More sophisticated procedures of judicial and institutional enforcement have also been provided in Statute of the Andean Court which devotes in Section Two of its Statute, entitled “*On the Action to declare Noncompliance*”, nine articles (23-31) dealing with the case of non-compliance with the decisions of the Court.<sup>67</sup> It primarily gives the General Secretariat of the Andean Community the authority to scrutinise whether a member State has failed to comply with the decisions of the Court and its obligations under the provisions of the Convention comprising the legal system of the Andean Community.<sup>68</sup> If he verifies the failure of compliance and the recalcitrant State continues with the behaviour that gave rise to the claim, the General Secretariat shall request a decision from the Court. However, if the General Secretariat fails to issue his ruling or fails to bring that action within sixty days after the date the claim was failed, the claimant State may appeal directly to the Court.<sup>69</sup> If the Court were to decide that a member is at fault, then this member “would be compelled to take the necessary steps to execute the judgment within a period of no more than ninety days after notification”.<sup>70</sup> But if that member fails to do so, the Court, summarily and after hearing the opinion of the General Secretariat, “shall establish the limits within which the claimant country or any other Member Country may restrict or suspend, in whole or in part, the benefits obtained by the Member Country at fault under the Cartagena Agreement”.<sup>71</sup>

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<sup>66</sup> See generally, Danilenko, G., “*The Economic Court of the Commonwealth Independent States*” 31 *N.Y.U. Int'l. L. & Pol.*, (1999), pp.893-918, and in particular pp. 906-908.

<sup>67</sup> *Treaty Creating the Court of Justice of the Cartagena Agreement* (Amended by the Cochabamba Protocol). This *Amending Protocol to the Treaty Creating the Court of Justice of the Andean Community* was signed Cochabamba, Bolivia on May 28, 1996 and came into force in August 1999. For a general reference in the Court see Hamilton. R. P, “*A Guide Researching the Caribbean Court of Justice*”, XXVII, *Brooklyn. J. Int'l L.*, (2002), pp. 531-542.

<sup>68</sup> Article 23 of the Statute of Andean Court.

<sup>69</sup> Article 24 of the Statute of Andean Court.

<sup>70</sup> Article 27 of the Statute of Andean Court.

<sup>71</sup> *Ibid.*

However, the Court may order the adoption of other measures, "should the restriction or suspension of the benefits of the Cartagena Agreement worsen the situation to be resolved or fail to be effective in that regard".<sup>72</sup> The Statute of the Andean Court perceives that imposition of these measures might cause the claimant member irreparable damage or damage difficult to repair, therefore, it permits, under Article 28 of the Court's Statute, this State to petition the Court before or after the Court rendering its final judgment to order a temporary suspension of the adopted measures.<sup>73</sup> Nevertheless, judgments rendered in actions to declare non-compliance may be reviewed by the same Court at the request of one of the parties, based on a fact that might have decisively influenced the result of the proceeding, providing that the party requesting the review was not aware of that fact on the date of judgment. However, the petition for a review must be submitted within ninety days after the date of discovery of the fact and, in any case, within a year after the judgment date.<sup>74</sup>

Alternatively, the Court can use Article 60 of its Statute as it stands in the enforcement process of its decisions without the need for such a highly questionable amendment to the Statute of the Court as was suggested by Professor Reisman. The potentiality of Article 60 was expressly stipulated by Benin and Niger in their Special Agreement, which was signed on 15 June 2001 in Cotonou and entered into force on 11 April 2002, and by which they seized the ICJ on 3 May 2002 with a boundary dispute between them. Article 7 of the Special Agreement, entitled "Judgment of the Chamber", reads as follows:

1. The Parties accept as final and binding upon them the judgment of the Chamber rendered pursuant to the present Special Agreement.
2. From the day on which the judgment is rendered, the Parties shall have 18 months in which to commence the works of demarcation of the boundary.
3. In case of difficulty in the implementation of the judgment, either Party may seize the Court pursuant to Article 60 of its Statute.<sup>75</sup>

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<sup>72</sup> *Ibid.*

<sup>73</sup> Article 28 of the Statute of Andean Court.

<sup>74</sup> Article 29 of the Statute of Andean Court.

<sup>75</sup> Press Release 2002/13 of 3 May 2002, at <<http://www.icj-cij.org>>.

Referring to Article 60 of the Statute for the purposes of implementation of the Court's decisions reveals the adequacy of this Article as it stands and how it has been perceived by litigant States regarding the role it may play in the process of enforcement of the Court's decisions. The Court, upon an application for interpretation or implementation made under Article 60 of the Statute, can indicate in an elaborate way a reiteration of the enforceability and bindingness of its judgment, a practice that has been recently adopted in judgments in the merits. This interpretation should not constitute an amendment or modification of the authority of *res judicata*, which the judgment has already acquired, but rather a reiteration of its effective nature. However, although this approach cannot eradicate the problem of non-compliance, it would at least undermine the position of the defaulting party and exert psychological public pressure on it.

Generally, the ICJ, without being asked to pronounce on a particular issue, should indicate through a similar reiteration and warning to the parties of the binding force of its decisions and the importance of enforcing them as well as the consequence that non-compliance will also entail international responsibility. This in part was done by the Court in *Land and Maritime Boundary* case (Cameroon v. Nigeria) (2002). The Court observed that the both Parties were under obligation to implement the Court's judgment expeditiously and without any condition and that the implementation of the Judgment would afford the Parties a beneficial opportunity to co-operate in the interests of the population concerned, with a view to the maintenance of security, during the withdrawal of the Nigerian administration and military and police forces.<sup>76</sup> This psychological pressure is significant for being indicated by the highest judicial organ of the international community. By doing so, the Court would safeguard the integrity of its decisions and confer double authority on them. Again, it would at least weaken any potential unwillingness to comply with these final decisions.

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<sup>76</sup> ICJ. Rep. (2002), para 314-16.

## 6. Enforcement under Article 61 (3) of the Statute and Article 99 (5) of the Rules

Generally, the Statute of the ICJ is silent regarding what steps should be taken by the Court when a litigant State fails to comply with its decisions. Nevertheless, some involvement in the process of enforcement of final decisions is possible under Article 61 (3) of the Statute in relation to revision proceedings. It provides “The Court may require previous compliance with the terms of the judgment before it admits proceedings in revision”.<sup>77</sup> This provision is supplemented by Article 99 (5) of the Rules of the Court of 1978, which provides “If the Court decides to make the admission of the proceedings in revision conditional on previous compliance with the judgment, it shall make an order accordingly”.<sup>78</sup>

The legislative history of Article 61 (3) is unclear but, according to Hudson, Article 61 (3) was inserted by the Advisory Committee of Jurists because of its fear that a party might delay the execution of a judgment until the expiration of the period in which an application for revision was completed.<sup>79</sup> However, this view does not deny the general tendency to confer on the Court some authority to participate in the enforcement process of its decisions.<sup>80</sup> By analogy, however, the substance of Article 61 (3) is common to the judicial practice of some municipal legal systems. A party may be denied the right of appeal if it has refused to comply with the judgment of a lower court.<sup>81</sup> The Court, under this provision, can formally order the Applicant State at any time to comply with the terms of its previous judgment whose revision is sought before it admits its request for revision.<sup>82</sup> The essence of this provision is to empower the Court with a discretionary power to impose a “sanction” against a party seeking revision, which has failed to comply with its judgment in question.<sup>83</sup>

<sup>77</sup> Article 61 (3) of the Statute of the Court.

<sup>78</sup> Article 99 (5) of the Rules of the Court.

<sup>79</sup> Hudson, M. O., *The Permanent Court of International Justice 1920-1942*, (Macmillan 1943), p. 209. See, generally, Geib, R., “Revision Proceedings before the International Court of Justice”, 63 *ZaöRV* (2003), pp. 167-194.

<sup>80</sup> *Permanent Court of International Justice. Advisory Committee of Jurists. Procès-Verbaux* of the proceedings of the Committee June 16<sup>th</sup> - July 24<sup>th</sup> 1920 (The Hague, 1920) pp. 744-45.

<sup>81</sup> Eg, *Hadkinson v. Hadkinson*, (1952), A11 E. R. 567; *National Union of Marine Cooks & Stewards v. Arnold*, 348 U.S. 37 (1954) quoted in Stein, T. L., “Contempt, Crisis and the Court: The World Court and the Hostage Rescue Attempt” 76 *AJIL* (1982), pp. 499-531, at p. 526.

<sup>82</sup> Application for Revision of the Judgment of 11 September 1992 in the Case concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening) (El Salvador v. Honduras), ICJ. Rep. (2003), para. 22

<sup>83</sup> Stein, T.L, *supra* note 81, pp. 525-26; Schachter, O., *supra* note 9, p.220.

However, the role of the ICJ in the enforcement of its judicial decisions is not limited to the Court itself but also to the members of the Court who are the real actors. They are expected also to play an active role in this process. Their role can be seen at least in Article 57 of the Statute and in Article 95 (2) of the Rules of Court which are the subject matter of the next section.

## 7. Avoidance of Thoroughly Elaborate Dissenting Opinions

Dissenting opinions have been given various treatments in international adjudication.<sup>84</sup> The Inter-Allied Committee set up in 1944, and later the International Committee of Jurists of 1945, which looked into the future of the International Court, favoured unanimously maintaining the practice of the Permanent Court of International Justice in the question of individual opinions. With respect to dissenting opinions, they also believed that “the system of dissenting opinions was not susceptible to weakening the authority of decisions”.<sup>85</sup> Consequently, under Article 57 of the Court’s Statute and Article 95 (2) of the Rules of Court, ICJ judges were permitted to express their individual opinions in the form of dissenting opinions or declarations. It gives them discretionary right to append their dissent. Court. But more importantly, it should be born in mind, that separate and dissenting opinions are integral to judicial process, on one hand, and part of the judgment of the Court on the other hand.

A broadly supported judicial decision can strengthen the authority of the Court,<sup>86</sup> while lengthy elaborate and distinct alternative legal arguments appended by a strong minority of the Court, on the other hand, could undermine this authority. This could in turn impact adversely on the compliance with and enforcement of the Court’s decisions. As a result, it can be argued that by modifying and “softening” the ICJ’s practice in relation to the use of dissenting opinions, the compliance process

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<sup>84</sup> See, generally, Anand, R. P., “*The Role of Individual and Dissenting Opinions in International Adjudication*”, 14 *ICLQ* (1965), pp. 788-808; Mosk, R.M., & Ginsburg, T., “*Dissenting Opinions in International Arbitration*”, in Tupamäki, M., *Liber Amicorum Bengt Broms*, (Helsinki, 1999), pp.259-284.

<sup>85</sup> Hussain, I., *Dissenting and Separate Opinions at the World Court*, (Martinus Nijhoff, 1984), p. 39.

<sup>86</sup> The authority of the Court includes the formal and moral authority. The formal authority refers to the Court’s power to give effect to its decisions and make the recalcitrant party accept its conclusion. The moral authority refers to the prestige of the Court. See generally, Lauterpacht, H., *The Development of International Law by the International Court*, (Stevens and Sons, 1958), pp. 66-70.

could be accelerated, thus making the decisions easier in terms of enforcement. One way to achieve this is to encourage dissenting judges to provide less elaborate opinions and use declarations instead.

Some commentators, however, have argued<sup>87</sup> against allowing dissenting opinions<sup>88</sup> based on the practice of the European Court of Justice, which prohibits appending dissenting opinions and keeps the deliberations secret.<sup>89</sup> It has been argued that ECJ's practice has played a significant role in the strengthening the independence and authority of the ECJ,<sup>90</sup> and that opening the door for its judges in a case would do nothing to promote and achieve homogeneity within the European Union.<sup>91</sup> Although this may be appropriate for a regional court, it may have accompanying disadvantages for an international court such as the ICJ as opposed to a regional court such as the ECJ. This difference should not be underestimated especially in relation to the limited nature of ECJ decisions. In this respect for example, the ECJ's practice reflects only the continental European practice. In addition, the ECJ was conceived to be an entirely new regional judicial body that was meant to deliver unambiguous and unequivocal judicial pronouncements,<sup>92</sup> and to allowing dissenting opinions would threaten this objective. Moreover, if one were to refer to the record of compliance with ECJ decisions and compare it to the ICJ's record, it is seen that the practice of not permitting judges to append dissenting opinions *per se* does not totally safeguard nor promote significantly compliance with the court's decisions.<sup>93</sup>

On the other hand, there are arguments in favour of maintaining the practice of appending dissenting opinions regardless of their negative political effect and implications. A leading proponent of this perspective is Sir Robert Jennings. Although

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<sup>87</sup> Dijk, P.V., "For Better or For Worse? Comments", in Bloed, A., & Dijk, A., *Forty Years International Court of Justice: Jurisdiction, Equity and Equality*, (Europa Instituut Utrecht, 1988), pp. 25-34, at p. 32.

<sup>88</sup> There are other marginal reasons, which are outside the scope of this work, against allowing dissenting opinions such as: weakening the doctrine of *stare decisis*, weakening the creditability of the persistent dissenting judges and wasting the resources of the judicial body see Alder, J., "Dissents in Courts of Last Resort: Tragic Choices?", 20 *OJLS* (2000), pp. 221-246, at pp. 242-243.

<sup>89</sup> See Articles 2 and 32 of the ECJ.

<sup>90</sup> Schemers, H.G., *Judicial Protection in the European Communities*, 4<sup>th</sup>ed (1987), pp. 450-51; and Magid, P., "The Post-Adjudicative Phase" in Peck.C & Lee. R.S (eds), *Increasing the Effectiveness of International Court of Justice: Proceedings of the ICJ / UNITAR Colloquium to Celebrate the 50<sup>th</sup> Anniversary of the Court*, (Martinus Nijhoff Publishers, 1997), pp. 324-369, fn. 67at p. 344.

<sup>91</sup> Bridge, J.W., "The Court of Justice of the European Communities and the Prospects for International Adjudication", in Janis, M.W., *International Courts for the Twenty-First Century*, (Martinus Nijhoff Publishers, 1992), pp. 87-104, at pp. 87-98.

<sup>92</sup> Schemers, H.G., *Judicial Protection in the European Communities*, 4<sup>th</sup> ed, (Kluwer Law and Taxation Publisher, 1987), pp. 450-51; Bridge, J. W., *supra* note 91, p. 97.

<sup>93</sup> Magid, P., *supra* note 90, p. 344.

he was certain that “a dissenting opinion [could] also weaken rather than add to the strength of a judgment”,<sup>94</sup> he believed that they had “a border function of expressing alternative legal arguments, or indeed alternative conclusions”,<sup>95</sup> and judges should be able to represent their various civilizations and legal systems in the court.<sup>96</sup> This practice would protect freedom of expression and conscience, and ensure the equality of all members of the panel. Thus, instead of undermining collegiality, dissent would reinforce it. It is submitted, however, that this argument overlooks the important factor of public accountability and, as such, may be counter-productive if it generates public suspicion when there is no consensus on the bench. Indeed, elaborate dissenting opinions may lead public opinion to question the unity of the decision of the Court. White J (dissenting) stated in *Pollock v Farmers Loan and Trust Co* that “the only purpose which *an elaborate dissent* can accomplish, if any, is to weaken the effect of the opinion of the majority, and thus engender want of confidence in the conclusion of courts of last resort”.<sup>97</sup>

In the light of these arguments, a distinction may be made between the practice of dissent as an integral part of the Court’s judicial process and the publication of a dissent. In reality, the most important function of thoroughly elaborate dissenting opinions may be linked to the deliberation process itself, which makes the process both important and necessary. Strong and persuasive dissenting opinions on particular points in the decision-making process represent a healthy practice from a drafting perspective. On the contrary, by *publishing* dissenting opinions and emphasising such dissent may result in different outcomes, such as the negative perceptions by the international community and the disputant States in particular.<sup>98</sup> Indeed, the relationship between the Court’s decision and dissenting opinions could occasionally question and weaken the authority of that decision. This is particularly the case with difficult and controversial questions before the court.<sup>99</sup> In *Mackay Radio & Telegraph Company v Lala-La El Khadar and Others*, the Court of

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<sup>94</sup> Jennings, R., “*The Collegiate Responsibility and Authority of the International Court of Justice*”, in Dinstein, Y., & Tabory, M., *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne*, (Martinus Nijhoff Publishers, 1989), pp. 343-353, at p. 350.

<sup>95</sup> *Ibid.*

<sup>96</sup> *Ibid.*

<sup>97</sup> (1895) 157 United States 429, 608 (emphasis added).

<sup>98</sup> Dijk, P.V., *supra* note 87, p. 32; Rosenne, S., *The World Court What it is and how it works*, 5<sup>th</sup> ed (M Martinus Nijhoff Publishers, 1995), at p. 139; Guillaume, G., *supra* note 39, p. 854.

<sup>99</sup> Dubission, *La Cour Internationale de Justice*, (Paris: Pichon et Durand-Auzias, 1964), p. 424 cited in Hussain, I., *supra* note 85, fn 9, pp. 275-76.

Appeal of the International Tribunal of Tangier rejected the binding authority and enforceability of the decision of the ICJ in *Rights of Nationals of the United States of America in Morocco*<sup>100</sup> by relying, *inter alia*, on the so-called “the validity of the four Dissenting Opinions”.<sup>101</sup>

The political background to almost all the cases brought before the Court should not be underestimated. Arguments against dissenting opinions have been raised most strongly in settings where confidence in the political settlement or in the judicial process was relatively low or uncertain.<sup>102</sup> In the aftermath of the Court’s judgment in *Nicaragua* case,<sup>103</sup> Nicaragua complained to the Security Council that the United States had decided not to comply with the Court’s decision. In that Judgment there was a strong minority. The United States itself relied on the dissenting opinions appended to the Judgment to undermine Nicaragua’s claim before the United Nations. It, in fact, distributed these dissenting opinions to all delegates to the United Nations.<sup>104</sup> Some members of the Council were in fact indirectly prompted by these opinions to doubt the validity of the Court’s decision.<sup>105</sup> From a legal perspective, the propriety of Court’s decisions should not be disputed, but this position is not necessarily be the same from a political perspective. Consequently, when Nicaragua later brought the same complaint before the General Assembly,<sup>106</sup> some States agreed with the United States that the Court’s judgment was void or at least inappropriate.<sup>107</sup>

In the *Arbitral Award of 31 July 1989* (Guinea – Bissau v. Senegal),<sup>108</sup> Guinea-Bissau brought proceedings before the Court against Senegal after they had disagreed upon the validity of an arbitral award of 31 July 1989 questioning a contentious declaration appended by the president of the arbitration, Judge Barberis. In its submission, Guinea-Bissau asked the Court to declare that Senegal was not justified in seeking the latter’s compliance with the Award, whereas Senegal’s submission asked the Court to find that the Award was valid and binding for Senegal, which

<sup>100</sup> *Rights of Nationals of the United States of America in Morocco* (France v. United States), Judgment of 27 August 1952. ICJ. Rep. (1952)

<sup>101</sup> 21 *ILR* (1954), p. 137.

<sup>102</sup> Alder, J., *supra* note 88, p. 244.

<sup>103</sup> ICJ. Rep.(1986),4

<sup>104</sup> See UN.Do. S/18227, (A/40/1147)

<sup>105</sup> See S/PV.2718, pp. 42-53.

<sup>106</sup> See Resolutions 41/31 of 3 November 1986; 42/18 of 12 November 1987; 43/11 of 25 October 1988; 44/43 of 7 December 1989 and 45/402 of 21 December 1990.

<sup>107</sup> See generally Akehurst, M., “*Nicaragua v United States of America*”, 27 *Indian J. Int. Law* (1987), pp. 357-384.

<sup>108</sup> ICJ. Rep. (1991), p. 53.

Guinea-Bissau had the obligation to apply.<sup>109</sup> For its part, Guinea-Bissau argued that the Award was not supported by a real majority by virtue of a contradiction found in the Award and in Judge Barberis's declaration, who had voted in favour of the adoption of the award. Senegal, on the other hand, argued that the declaration appended by members of the tribunal were not part of the Award, and hence any attempt by Guinea-Bissau to misuse it for that purpose, "must be regarded as an abuse of process aimed at depriving Senegal of the rights belonging to it under the Award". However, after a close look into the terms of the Arbitration Agreement and the declaration of Judge Barberis, the Court found that the formulation adopted by Judge Barberis disclosed no contradiction with the Award and the validity of his vote remained unaffected. However, this case reveals the possible negative impact of dissenting opinions on the post-adjudicative phase and how it can be misused or exploited by one of the parties to refuse or at least delay compliance.

In *Qatar v. Bahrain* case, three judges, Bedjaoui, Ranjeva and Koroma in a strong joint dissenting opinion to the Court's judgment of March 16, 2001, drew the parties' and the public's attention to the Court's failure to treat successfully the question of the status of Hawar Islands, which (to use the dissenting judges' words), carried an "exceptional emotional charge for the people of the two States." They stated that:

We would accordingly be more than justified in hoping that, with the Judgment delivered by the Court today, this case will be satisfactorily settled once and for all. Yet has this Judgment carefully identified and met all the requisite criteria for success? In this respect, our hope becomes clouded when we consider the treatment accorded to the question of the Hawar Islands and to that of the drawing of the single maritime delimitation line, which has, in our view, been arrived at by a somewhat novel method that breaks with the most soundly established practices.<sup>110</sup>

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<sup>109</sup> *Ibid.*, p. 56-7.

<sup>110</sup> ICJ. Rep. (2001), para 2

Luckily, however, both parties welcomed the judgment of the Court. Nevertheless, it can be argued that such a vigorous dissent may threaten expeditious compliance with and enforcement of the Court's judgments. So there should be some justified apprehension that contentious, ambiguous and contradictory dissenting opinions appended by a strong minority could weaken to some extent the compliance with and enforcement of these decisions, or rather be very persuasive elements of non-compliance. For instance Nigeria recently relied, *inter alia*, at least implicitly, on the dissenting opinions of the judges of the Court to refuse compliance with the Court's judgment in the merits of 10 October 2002 in the *Land and Maritime Boundary* (Cameroon v. Nigeria). In that judgment the Court, by thirteen votes to three, decided that the sovereignty over the Peninsula fell within the sovereignty of the Republic of Cameroon.<sup>111</sup> Judge Koroma and Judge *ad hoc* Ajibola appended Dissenting Opinions. Judge Koroma questioned the political nature of the judgment reached by the Court concerning the core issue of sovereignty over the Bakassi Peninsula. He asserted that:

The conclusion reached by the Court with respect to the 1884 Treaty between Great Britain and the Kings and Chiefs of Old Calabar regarding the Bakassi Peninsula is tantamount to a recognition of political reality rather than to an application of the treaty and the relevant regal principles.<sup>112</sup>

In the same vein, Judge *ad hoc* Ajibola believed that the Court's Judgment was "artificial" because it failed blatantly to take into consideration the principle of *effectivités* and the historical consolidation submitted by Nigeria. He asserted that the decision of the Court was rather a "political decision than a legal one".<sup>113</sup> Two weeks later Nigeria, in a formal statement, refused to comply with the Court's Judgment, which was based mainly on colonial treaties between the former rulers Britain, Germany, and France. It accused the judges of the Court as citizens of colonial powers of a colonial-era bias. In other words, it was basically saying the decision rendered was a political rather than a legal one and hence was virtually null and

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<sup>111</sup> ICJ. Rep. (2002), para. 225 & 325.

<sup>112</sup> *Ibid.*, Judge Koroma's Dissenting Opinion, para. 3.

<sup>113</sup> *Ibid.*, Judge Ajibola's Dissenting Opinion, para 64.

void.<sup>114</sup> Although the Dissenting Opinions of Judges Koroma and Ajibola may not be the primary reason for Nigeria's rejection of the Court's Judgment, the effect of these Dissents is nevertheless pertinent. Criticising the Court severely from within the bench itself could undermine the authority of the judgment at least before the public and thus attention by the Court itself is required.<sup>115</sup> To use Norman Redlich words:

Judges do not live in isolation. Their opinions are subject to criticism, and they are, and should be, influenced by popular reaction. The process often works in subtle ways...<sup>116</sup>

Indeed, as the Court admitted, "there are inherent limitation on the exercise of the judicial function which the Court as a Court of justice, can never ignore ... The Court itself, and not the parties must be the guardian of the Court's judicial integrity".<sup>117</sup> Therefore, the Court should be prepared to adopt an intermediate approach that incorporates the advantages and disadvantages of dissenting opinions. Instead of registering their strong dissenting opinions as separate appendices, the dissenting judges should voice their dissent by relying on "softer" means such as appended declarations. Dissenting opinions should be sparingly and strategically used and the judges themselves should apply self-restraint to promote solidarity in their conclusions thereby increasing the influence of the Court's decisions.<sup>118</sup> If required, their dissenting views could be expressed in other fora such as academic writings. This lighter approach might strengthen the Court's authority, credibility, and unity as well as expedite the compliance with and enforcement of its decisions. If there are strong dissents, they should be for internal circulation. This proposition would not only preserve the advantages generated by dissenting opinions but also it would help to sharpen the opinions of the majority while simultaneously generating the appearance of judicial solidarity, unity and legal certainty before the public.

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<sup>114</sup> Reuters/Washington Post, Thursday, 24 October 2002, at A30.

<sup>115</sup> Hudson, O. M., "The Twenty-Eighth Year of the World Court", 44 *AJIL* (1950), pp. 1-36, at p. 21.

<sup>116</sup> Redlich, "Judges as instruments of democracy" in Shetree, S., (ed), *The Role of the Courts in Society* (Nijhoff publishers, 1988) 149-156 cited in Joint dissenting opinion of Judges Bedjaoui, Ranjeva and Koroma, *Qatar v. Bahrain* case, ICJ. Rep. (2001), p. 151, para.10.

<sup>117</sup> ICJ. Rep. (1963), p. 29.

<sup>118</sup> "The International Court of Justice Efficiency of Procedures and Working Methods: Report of the Study Group Established by the British Institute of International and Comparative Law as a Contribution to the UN Decade of International Law", in Bowett, D.W., et al., (ed), *The International Court of Justice: Process, Practice and Procedures*, (British Institute for International and Comparative Law, 1997), p. 61.

## 8. Conclusion

With the exception of Article 61 (3) of the Statute of the Court, the Court's Statute is, generally, silent regarding what steps should be taken by the Court when a litigant State fails to comply with its decisions. So, it has been widely but mistakenly believed that it is not the business of the Court to enforce its decisions and that it is only the business of other political bodies. This has been proven to be inaccurate. Neither the practice of the Court nor its Statute prohibits the Court or its Judges from playing an active role in the enforcement process of its decisions. In fact, the Court is rather under a general obligation to enable the Parties to achieve a workable final settlement of their disputes even in the post-adjudicative phase. Today, the role of the Court in making substantial contribution to international peace and security and as an indispensable tool of preventive diplomacy in more complex situations<sup>119</sup> is beyond any question.<sup>120</sup> However, after careful considerations and comprehensive exposition of the role of the Court in the process of enforcement of its judicial decisions, reveals that there is relatively little that the Court can be doing with respect to the enforcement of its decisions. Yet, its role should not be underestimated completely. On the other, hand, the role of the judges of the Court, who are the real actors, should also be activated.

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<sup>119</sup> See Sir Robert Jennings' Presentation "*Contributions of the Court to the Resolution of International Tensions*", in Peck, C., & Lee, R. S., (eds), *Increasing the Effectiveness of International Court of Justice: Proceedings of the ICJ / UNITAR Colloquium to Celebrate the 50<sup>th</sup> Anniversary of the Court*, (Martinus Nijhoff Publishers, 1997), pp.76-85, at p. 79.

<sup>120</sup> Speech given by Judge Gilbert Guillaume, President of the International Court of Justice, on 29 October 2002 to the General Assembly of the United Nations. ICJ's Press Release 2002/29.

## CHAPTER SIX:

# ENFORCEMENT OF THE JUDICIAL DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE THROUGH DOMESTIC COURTS

### 1. Introduction

As has been shown in the previous Chapters that the legal nature, the limit and scope of *res judicata* and the judicial decisions, especially its orders of provisional measures as well as their judicial enforcement even through the ICJ itself may encounter some difficulties. These difficulties may persist as well in the judicial enforcement of the Court's decisions through the domestic courts.

National courts continue to be indispensable players in the enforcement of international law in general, and a valuable mechanism for the enforcement of judicial decisions of the ICJ in particular. This is so because of the lack of an adequate central enforcement agency on which public international law and the ICJ can exclusively rely. Judicial enforcement through domestic courts of international obligations is not a new phenomenon in international law.<sup>1</sup> However, their role has been said to be relatively rather new in the enforcement of ICJ judgments.<sup>2</sup> In the view of Reilly and Ordóñez, enforcement of the ICJ judicial decisions through domestic courts "lacks an established analytical framework" and that "in many respects, the reception of ICJ's decisions by domestic courts is a whole new category in itself".<sup>3</sup> This, to some extent, is true. In fact, the role of domestic courts in the process of the enforcement of ICJ judicial decisions lacks a full exposition in the literature. This is probably due to its rarity. Yet, in recent years there has been reliance on domestic courts of litigant States and those of third States to enforce judicial decisions of the ICJ and in particular its orders of provisional measures. However, enforcement through the domestic courts of States raises, some theoretical and practical problems that call for a

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<sup>1</sup> See e.g., Lauterpacht, E., "Implementation of Decisions of International Organizations through National Courts", in Schwebel, S. M., *The Effectiveness of International Decisions: Papers of a Conference of the American Society of International Law, and the Proceedings of the Conference*, (A.W.Sijhoff, 1971), pp.57-65, at p. 64.

<sup>2</sup> Jenks, C.W., *The Prospects of International Adjudication*, (Stevens and Sons, 1964), p. 706.

<sup>3</sup> Reilly, D., & Ordóñez, S., "Effect of the Jurisprudence of the International Court of Justice on National Courts", 28 *N.Y.U. Int'l. L. & Pol.* (1995-1996), pp. 435-483, at p. 448.

comprehensive examination for a better appreciation of their indispensable role in the post-adjudicative phase of the ICJ. For instance, Governments tend to rely on the so-called internal law to escape the observation of international law when they are faced with an international legal question. In the context of judicial enforcement through their judiciaries, governments will rely on the doctrine of separation of powers or the notion of the independence of the judiciary to preclude their international wrongfulness. Similarly, national courts may rely on these doctrines to justify their reluctance to enforce, for instance, a judgment of the ICJ. From an international legal perspective, reliance on internal laws or on the notion of the independence of the judiciary and non-applicability of a given judgment of the ICJ on the judicial branch of governments to escape the observation of their international obligation; are illegitimate grounds under public international law. International law treats the component units of States as a unity and a violation of a given international obligation by one of these organs should be regarded as acts or omissions of the State at the international level, i.e. as "acts of the State" capable of entailing its international responsibility. This is a logical consequence of the concept of the State in international law.

Surprisingly, however, in a recent commentary on Article 94 (1) of the UN Charter, Professors Mosler and Oellers-Frahm argued that the judiciaries of State parties "are not directly obliged by virtue of the judgment unless a direct obligation is provided for in the constitutional law of the State concerned".<sup>4</sup> To what extent is there any legal validity in such assertion, and what affect does it have, if any, on the role of the domestic courts of litigant States? The same concerns can be raised with respect to the role domestic courts of third States in this process. So the question to be raised is whether third States and their judiciaries are also under a duty to cooperate or merely are entitled to cooperate and assist in the enforcement of the decisions of the ICJ? It should be emphasised, however, that in this regard, we are only concerned with the obligation imposed upon litigant parties and third States in the process of enforcement of ICJ decisions as opposed to the notion of the invocation of the responsibility of the recalcitrant State for breach of obligations owed to the international community as a

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<sup>4</sup> Mosler, H & Oellers-Frahm, K., "Article 94" in Simma, B., *et al.*, (eds), *The Charter of the United Nations*, (Oxford Univ. Press, 2002), pp. 1172-1179, at p. 1176.

whole.<sup>5</sup> It should also be borne in mind that the responsibility of a third State examined in this context is only triggered when there is a specific claim and enforcement action filed by the injured State before the domestic courts of third States. Before answering these complicated questions and analysing judicial enforcement through domestic courts of judgment creditor, judgment debtor and those of third States, a critical examination of the non-applicability of national laws in the post-adjudicative phase of the ICJ judicial decisions and the attribution of acts of the judiciary to the State must be undertaken in order to establish the obligation incumbent upon domestic Courts to enforce the judicial decision of the ICJ.

## 2. Non-Applicability of Domestic Laws

Basing themselves on domestic laws, national courts generally exercise various levels of judicial review over foreign judgments and arbitral awards and require fulfillment of procedural requirements as a precondition for their recognition and enforcement. Domestic courts may also refuse their recognition and implementation through the invocation of certain domestic law considerations or other provisions of private international law. Notwithstanding the validity and applicability of these procedures to foreign judgments and arbitral awards whatever they may be, they are not applicable to the judicial decisions of the ICJ, which are binding, final and without appeal, and thus, must be complied with and enforced as they stand as it has been demonstrated in Chapters 2 and 3 of this study. This is a rule of international law recognized in international practice and in international judicial decisions that applies equally to all types of laws and regulations adopted by whatever authority and at whatever level within the framework of the State,<sup>6</sup> and regardless of their theoretical approach in terms of dualism or monism towards public international law.

The International Law Commission at its first session, in 1949, adopted Article 13 of the Declaration on Rights and Duties of States, which read "Every State has the duty to carry out in good faith its obligations arising from treaties and other

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<sup>5</sup> For recent expositions in this connection see e.g., Scobbie, I., "The Invocation of Responsibility for the Breach of 'Obligation under Peremptory Norms of General International Law'", 13 *EJIL* (2002), pp. 1201-1220; Klein, P., "Responsibility for Serious Breaches of Obligations Deriving from Peremptory Norms of International Law and United Nations Law", 13 *EJIL* (2002), pp. 1241-55.

<sup>6</sup> Crawford, J., *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, (Cambridge Univ. Press, 2002), pp. 89-90.

sources of international law, and it may not invoke provisions in its constitution or its laws as an excuse for failure to perform its duty”.<sup>7</sup> Likewise, at the first session of the United Nations Conference on the Law of Treaties, held at Vienna in 1968, the delegation of Pakistan proposed in the Committee of the Whole that a clause specifying that no party to a treaty might invoke the provisions of its internal law to justify the non-observance of a treaty should be inserted in the draft Convention. That proposal was eventually adopted in 1969 as Article 27 of the Vienna Convention on the Law of Treaties, states “a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty...”.<sup>8</sup> This provision came immediately after Article 26, which contains the fundamental principle of the treaties: *pacta sunt servanda*. It states, “Every treaty in force is binding upon the parties to it and must be performed in good faith”<sup>9</sup> In the same vein, Article 46 (1) of the Convention reads “A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.” So, States are not entitled to invoke their domestic laws to justify their failure to comply with and enforce any international obligation including judicial decisions of the ICJ. This same rule is applicable even in the absence of a specific provision of municipal law requiring that State or its organs to give effect to an international legal obligation.

This rule has recently been endorsed by the International Law Commission in Article 3 of the Responsibility of State for Internationally Wrongful Acts of 2001, which deals with the characterisation of an act as a wrongful. It stipulates unequivocally that “The characterisation of an act of a State as internationally wrongful is governed by international law. Such characterisation is not affected by the characterisation of the same act as lawful by internal law”. More importantly, Article 32, which clarifies the irrelevance of State’s internal law, stipulates “The responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligation under this Part.” Under these provisions, an act of State

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<sup>7</sup> UNGAOR, Fourth Session, Supplement No. 10 (A/925), pp. 8-9. For the debate in the Commission, see ILCYB (1949), pp. 105-106, 14th meeting, paras. 1-16; 147-148, 20th meeting, paras. 78-80, and 171, 24th meeting, paras. 4-8.

<sup>8</sup> 115, UNTS, p.331.

<sup>9</sup> *Ibid.*

constitutes an internationally wrongful act when it breaches any valid and existing international obligation independently of any conclusion as to whether that act was consistent with its domestic law or not. The combination of these Articles reaffirms categorically that a government or any organ or branch of a State may not violate an international obligation by asserting its act is not in violation of the provisions of internal law which covers "all provisions of the internal legal orders, whether written or unwritten and whether take the form of constitutional or legislative rules, administrative decrees or judicial decisions".<sup>10</sup> The reason behind this insertion is that recalcitrant States usually base their non-observance of their international obligations on the consistency of their actions with their existing national laws, or the absence of a national law that requires them to give effect to a given international obligation. International law rejects these defences in their totality.

The irrelevance of municipal law in this regard has also been expressly affirmed in international judicial decisions, particularly by the PCIJ at the outset of its jurisprudence. The PCIJ expressly recognized the principle in its first judgment of 17 August 1923, in the case of the *S.S Wimbledon*. In that case, Germany argued that the passage of the ship through the Kiel Canal would have constituted a violation of German neutrality orders. The Court did not accept this argument. It stated "...a neutrality order, issued by an individual State, could not prevail over the provisions of the Treaty of Peace...under Article 380 of the Treaty of Versailles, it was her [Germany's] definite duty to allow it [the passage of the *Wimbledon* through the Kiel Canal]. She could not advance her neutrality orders against the obligations which she had accepted under this Article".<sup>11</sup> The PCIJ has since then reaffirmed this rule on several occasions. In its Advisory Opinion of 31 July 1930 in the *Greco-Bulgarian Communities*, the Court asserted this rule as a general principle of international law. It explicitly stated that "it is a generally accepted principle of international law that in the relations between Powers who are contracting Parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty".<sup>12</sup> Similarly, the Court in the *Free Zones* case, observed that "it is certain that France cannot rely on her own

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<sup>10</sup> See Crawford, J., *supra* note 6, p. 90.

<sup>11</sup> (1923), PCIJ., Ser. A, No.1, pp.29-30; the *Lotus Case*, (1927), PCIJ, Ser. A, No.10, p. 24.

<sup>12</sup> (1930), PCIJ., Ser. B, No. 17, p. 32.

legislation to limit the scope of her international legal obligations...".<sup>13</sup> The classical reaffirmation of this principle, however, was stated by the Court in the *Treatment of Polish Nationals and other persons of Polish origin or speech in the Danzig Territory*. In that Opinion the Court refused to accept the assertion made by the Polish Government of its right to submit to organs of the League of Nations questions concerning the application to Polish nationals of certain provisions of the constitution of the Free City of Danzig. The Court held "it should...be observed that...a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force."<sup>14</sup>

The ICJ continues to reiterate this rule. In its Advisory Opinion concerning *Reparation for Injuries Suffered in the Service of the United Nations*, the Court stated that "as the claim is based on the breach of an international obligation on the part of the Member held responsible...the Member cannot contend that this obligation is governed by municipal law".<sup>15</sup> Chambers of the Court have also been no less categorical in this respect. For instance, in *Elettronica Sicula S.p.A (ELSI)* (United States v. Italy) case, the Chamber affirmed, "Compliance with municipal law and compliance with the provisions of a treaty are different questions. What is a breach of treaty may be lawful in the municipal law and what is unlawful in the municipal law may be wholly innocent violation of a treaty provision. Even had the Prefect held the requisition to be entirely justified in Italian law, this would not exclude the possibility that it was a violation of the FCN (Friendship, Commerce and Navigation) Treaty."<sup>16</sup>

The principle has also been affirmed in arbitral awards.<sup>17</sup> In the Award of 24 July 1930 rendered in the *Shufeldt Claim* by an Arbitral Tribunal established by the United States and Guatemala it was stated that "it is a settled principle of international law that a sovereign cannot be permitted to set up one of his own municipal laws as a

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<sup>13</sup> *Free Zones of Upper Savoy and the District of Gex*, (1932), PCIJ., Ser. A/B, No. 46, p. 167. See in the same vein for instance the Court's Advisory Opinions of 21 February 1925 on the *Exchange of Greek and Turkish Populations*, (1925), PCIJ., Ser. B, No. 10, p. 20; and of 3 March 1928 on the *Jurisdiction of the Courts of Danzig*, (1928), PCIJ. Ser. B, No. 15, pp. 26-27.

<sup>14</sup> (1932), PCIJ, Ser. A/B, No. 44, p. 24.

<sup>15</sup> ICJ. Rep. (1949), p. 180.

<sup>16</sup> ICJ. Rep. (1989), p. 51, para.73. The Chamber also observed "the fact that an act of a public authority may have been unlawful in municipal law does not necessarily mean that that act was unlawful in international law". *Ibid.*, p. 74, para.124.

<sup>17</sup> *Norwegian Shipowners' Claims*, (Norway / United States) Award of 13 October 1922, 1 UNRIAA, p.331; *Aguilar-Amory and the Royal Bank of Canada Claims*, (Great Britain / Costa Rica), Award of 18 October 1923, 2 UNRIAA, p. 386.

bar to a claim by a sovereign for a wrong done to the latter's subject".<sup>18</sup> Similarly, the Italian-United States Conciliation Commission, established under Article 83 of the 1947 Treaty of Peace, and particularly the decision in the *Wollemborg Case*, rendered on 24 September 1956, stated "one thing is certain: the Italian Government cannot avail itself, before an international court, of its domestic law to avoid fulfilling an accepted international obligation. Judicial decisions of the Permanent Court of International Justice are all identical on this point".<sup>19</sup> Regional courts have also endorsed this principle. In *Commission v. Belgium*, the latter argued that its failure to secure amendment of the offending legislation was due to the dissolution of Parliament and by other delays in the new Parliament. The European Court of Justice refused that justification holding that "the liability of a Member State under Article 169 arises whatever the agency of the State whose action or inaction is the cause of the failure to fulfil its obligations, even in the case of a constitutionality independent institution."<sup>20</sup>

The international practice and opinions of international tribunals and arbitral awards have also led international scholars to accept the validity of this principle. For instance, Gerald Fitzmaurice rightly acknowledged that the principle that a State cannot plead the provisions of its constitution as a ground to escape observation of its international obligations "is indeed one of the great principles of international law, informing the whole system and applying to every branch of it".<sup>21</sup> Similarly, Jennings and Watts pointed out that "if a state's internal law is such as to prevent it from fulfilling its international obligations, that failure is a matter for which it will be held responsible in international law." They also acknowledged the undisputed applicability of the principle. They even stated that the principle "applies equally to a state's assertion of its inability to secure the necessary changes in its law by virtue of some legal or constitutional requirement which in the circumstances cannot be met or severe or political difficulties which would be caused." They concluded that the obligation "is the obligation of the state, and the failure of an organ of the state, such as a Parliament or a court, to give effect to the international obligations of the state

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<sup>18</sup> 2 UNRIIAA, p. 1098.

<sup>19</sup> 14 UNRIIAA, p. 289.

<sup>20</sup> Case 16/69, *Commission v. Belgium* [1970] ECR. p.243. See also Case 8/70, *Commission v. Italy* [1970] ECR. P. 966.

<sup>21</sup> Fitzmaurice, G., "The General Principles of International Law Considered from the Standpoint of the Rule of Law", 92 RdC (1957-II), pp.1-227, at p. 85.

cannot be invoked by it as a justification for failure to meet its international obligations."<sup>22</sup> These assertions and reaffirmation of the validity of the principle of non-applicability and non-invocation of internal laws to escape valid international obligations is thus beyond any question. Therefore, needless to reiterate that the same rule is equally applicable to all international obligations including those deriving from Article 94 of the UN. Charter and Articles 59 and 60 of the Statute of the ICJ.

Consequently, apart from mere verification of their authenticity, judicial decisions of the ICJ are not subject to conditions for their recognition and enforcement, nor is it permissible to subject them to any form of review or nullification on the occasion of their enforcement. Additionally, their merits, fairness or the jurisdiction of the ICJ may not be re-examined under any consideration of domestic law. This rule is further supplemented by another rule, namely that any conduct by any organ of the State is an act of State under international law for the purpose of attributing the organ's conduct to the State, which the next section examines.

### **3. Attribution of the Act of the Judiciary to the State**

From a constitutional perspective, the theory of the independence of the judiciary is sound when it relates to the principle of the separation of powers. The division of powers, however, is by no means unequivocal in practice as it might seem in theory. It is also perceived differently in various legal and political systems. In any event, the principles of independence of the judiciary and the separation of powers cannot be invoked as a plea to preclude international wrongfulness. International law regards the State and its organs or branches and authorities as a single entity even if the organ in question was performing internal functions as long as its activity has an external affect. The Franco-Italian Conciliation Commission's decision of 7 December 1955 in the dispute concerning the interpretation of article 79 of the Treaty of Peace stated that "Although in some arbitral awards of the XIXth century the opinion is expressed that the independence of the courts, in accordance with the

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<sup>22</sup> Jennings, R., & Watts, A., (eds.), *Oppenheim's International Law*, vol. I, 9th ed. (Longman, 1992), p. 84; see also Professor Brownlie who stated that "A state cannot plead provisions of its own law or deficiencies in that law in answer to a claim against it for an alleged breach of its obligations under international law." Brownlie, I., *Principles of Public International Law*, 5th ed (Oxford Univ. Press, 1998), p. 34.

principle of the separation of powers generally recognized...excludes the international responsibility of the State for acts of the judiciary contrary to law, this theory now seems to be universally and rightly rejected."<sup>23</sup> Thus, domestic courts of member States, from this point of view, are organs of the States and thus are required to comply with and enforce international law including obligations under the judicial decisions of the ICJ. Needless to say that the rule applies equally to any act or omission that is inconsistent with these obligations. This has become also another principle recognised in international arbitral awards and judicial decisions, the literature and, more importantly, it has been recently codified by the International Law Commission.

In fact, this rule was early recognized by the United States of America/El Salvador arbitration tribunal in the award of 8 May 1902 the *Salvador Commercial Company* case, in which it asserted that "a State is responsible for the acts of its rulers, whether they belong to the legislative, executive or judicial department of the Government, so far as the acts are done in their official capacity."<sup>24</sup> The same assertion was maintained by the PCIJ in 1926, in the *German interests in Polish Upper Silesia* case (Merits). The Court clearly stated that "From the standpoint of international law and of the Court which is its organ, municipal laws...express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures".<sup>25</sup> Since then the Court has been constant in reaffirming this finding.<sup>26</sup>

This conclusion has also become a rule of customary character. In the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (1999), the Court restated this notion by stating, "According to a well-established rule of international law, the conduct of any organ of a State must be regarded as an action of that State. This rule...is of a customary character..."<sup>27</sup>. Likewise, the Court in the *LaGrand* case (1999), stated bluntly that "the international responsibility of a State is engaged by the action of the competent

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<sup>23</sup> 13 UNRIAA, p. 438.

<sup>24</sup> 15 UNRIAA, p., 477. See also the award of 23 July 1927 in the *Chattin* case made by the United States/Mexico General Claims Commission. 4 UNRIAA, p. 286.

<sup>25</sup> (1926), PCIJ., Ser. A, No. 7, p. 19.

<sup>26</sup> See, e.g., *S.S. "Lotus"*, (1927), PCIJ., Ser. A, No. 10, p. 24; *Jurisdiction of the Courts of Danzig, Advisory Opinion*, (1928), PCIJ., Ser. B, No. 15, p.24; *Phosphates in Morocco, Judgment*, (1938), PCIJ., Ser. A/B, No. 74, p. 28; *Ambatielos, Merits, Judgment*, ICJ. Rep. (1953), p. 21

<sup>27</sup> ICJ. Rep. (1999), 62, p. 87, para.62.

organs and authorities acting in that State, whatever they may be".<sup>28</sup> So, there is no need to appeal to ideas of progressive development of international law in order to establish the non-ambiguity of the conclusion that acts or omissions of any organ or governmental entity can be attributed to the State as internationally wrongful acts. Thus, the International Law Commission faced no obstacle in codifying this principle in Article 4 (1) of the 2001 Articles on the Responsibility of States for Internationally Wrongful Acts of 2001 which provides:

The conduct of an organ of the State shall be considered an act of that State under international law, whether that organ exercises legislative, executive, judicial or any other power functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.

The fundamental purpose this Article underlines is that any conduct of any organ of the State, whether executive, legislative or judicial is attributable to that State regardless of the legal structure of that State. Article 4 did not see it necessary to draw any distinction between different categories of State organs. Regardless of its component units, the unity of the State requires that the acts or omissions of all its organs, individual or collective, should be regarded as acts or omissions of the State at the international level, i.e. as "acts of the State" capable of entailing its international responsibility.<sup>29</sup> This is a logical consequence of the concept of the State in international law. On the other hand, limiting the act of the State to the so-called superior organs, so to speak, would be absurd since such characterisation is untenable from international legal perspective. In any event, the judiciary of the State is at least not in an inferior or subordinate position to other organs as it is easily capable of engaging materially in conduct that conflicts with an international obligation of the State. Thus, the theory of the separation of powers and the independence of the judiciary as a ground to exclude the international responsibility of the State for acts of the judiciary, or that it is not the responsibility of the judiciary to enforce international legal obligations are irrelevant grounds under international law. Needless to say, that

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<sup>28</sup> *LaGrand case*, ICJ. Rep. (1999), para. 28 and *Ibid.*, Judgment of 27 June 2001, para 81.

<sup>29</sup> Crawford, J., *supra* note 6, p.95.

the conclusions reached in these two sections are equally applicable to the judiciary of third States. This is of critical importance to bear in mind when we examine the role of their judiciaries in this process in section 6 below. Consequently, it is extremely difficult to validly suggest that Article 94 of the U.N Charter does not oblige the judiciary of the litigant States to enforce the Court's judicial decisions unless a direct obligation is provided for in the constitutional law of the State concerned as Professor Mosler and Oeller-Frahm have mistakenly claimed.

#### **4. Enforcement through the Domestic Courts of the Judgment Creditor**

The judgment creditor could seek in its domestic court satisfaction of a judicial decision of the ICJ with apparently no obstacles, through, most probably, a motion for the attachment of the assets of the judgment debtor if they are available. At first glance, this means of enforcement seems to be a persuasive and effective means of enforcement as long as domestic courts of the judgment creditor are likely to protect its governmental interest, especially when it is supported by a valid international judicial decision. However, this may not be true in all cases. There might be some difficulty in securing compliance with the ICJ decisions even through the municipal courts of the judgment creditor itself. The case in point is the *Socobel*.<sup>30</sup>

##### **4.1. *Société Commerciale de Belgique* case, (Socobel v. the Greek State)**

This case was brought before the Civil Tribunal of Brussels in 1951 by a Belgian company called *Socobel* in order to enforce a judgment of the PCIJ against Greece, in which the PCIJ had reaffirmed certain awards made in 1936 between the Greek Government and *Socobel* to be "definite and obligatory".<sup>31</sup> When Greece refused to pay the awards, which were confirmed by the Court, *Socobel* initiated garnishment proceedings against assets in Belgium owed to Greece. The Greek Government sought to have these orders set aside on the grounds of, *inter alia*, its immunity from execution and the fact that the Arbitral Award had not obtained an

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<sup>30</sup> *Société Commerciale de Belgique* case, (Socobel v. Greek State). *ILR* (1951), 3.

<sup>31</sup> *Société Commerciale de Belgique* case, (Belgium v. Greece) (1939), PCIJ Ser. A/B. No. 78, p.175.

*exequatur* in Belgium. Under the theory of restricted sovereign immunity arising out of commercial activities, the tribunal rightly dismissed the defense of sovereign immunity raised by Greece on the grounds that the assets in question, “were derived from economic activities”, took place in Belgium. It thus upheld provisional attachment of the assets as a conservatory measure.<sup>32</sup>

However, with regard to the second argument, Socobel argued that the award did not have to be confirmed in Belgium since the 1936 award had already been confirmed in proceedings before the PCIJ in 1939 and that the decisions of the PCIJ were to be binding in Belgium *ipso facto*, without even the need for formality of *exequatur*.<sup>33</sup> The tribunal disagreed with this claim. It stated, “a decision emanating from international Court, which decides disputes between States should require the *exequatur* of Belgian tribunals unless there had been national enactment or international agreement introducing such principle into the Belgian legal system”.<sup>34</sup> In principle, the Belgian Court was entitled, in certain circumstances to refuse recognition and enforcement of an international arbitral award for not obtaining an *exequatur*, but this requirement should not be applicable to the decisions of the PCIJ or now the ICJ, as it is an international obligation immune from domestic legal considerations as has been demonstrated in the previous sections.

The Belgian court did not conceive international law in this context as applicable to oblige the judiciary to give effect to the judicial decisions of the ICJ. This was a misperception of Belgium’s international obligations, and hence engaged the international responsibility of Belgium notwithstanding the validity of the application of the rule *exequatur* to foreign judgments and international arbitral awards. The requirement of *exequatur* cannot be applied even by way of analogy to the judicial decisions of the PCIJ and ICJ. Thus, Rosenne rightly asserted:

The principles of private international law which form the basis of the reciprocal enforcement of foreign or non-national judgments cannot be applied, even by way of analogy, in an internal tribunal faced with a question concerning the execution of a judgment of the International Court given in a contentious case in which the State of which that

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<sup>32</sup> Jenks, C.W., *supra* note 2, p. 708.

<sup>33</sup> *Société Commerciale de Belgique case*, 18 *ILR* (1951), p.4.

<sup>34</sup> *Ibid.*

tribunal is an organ was itself a party. The duty to carry out, or comply with, such a judgment is imposed upon the court of a State party to a case before the International Court no less than on the other organs of that State. If the internal courts are unable to do this, the international responsibility of the State will be engaged.<sup>35</sup>

However, reliance on the PCIJ/ICJ's decision by a private party, such as Socobel, is still a questionable matter since it triggers the issue of qualification or the identity of the parties to the case, and hence, the question of *res judicata*. The Belgian court's reasoning was rightly doubted by Professor Rosenne, nevertheless, his argument hardly provides an answer for the domestic courts' responsibility to give effect to ICJ's decisions brought by individuals or private parties, apart from the issue of evidence of title.<sup>36</sup> O'Connell described Rosenne's criticism as "misplaced". She claims that the Belgian courts "as the beneficiaries of the judgment, had no obligation or duty to enforce the PCIJ's decisions in its favour, any more than they were obligated to accept the benefit of the judgment at all".<sup>37</sup> This argument does not either answer the question of *res judicata* or how domestic courts are under a duty to enforce judgments pertaining to rights of private parties as the ultimate beneficiaries.

According to Article 34 (1) of the Court's Statute "only States may be parties in cases before the Court", hence, domestic courts of either the prevailing party, recalcitrant party or of a third State as we shall see, and by virtue of the principle of *res judicata*, are not under a duty to accept enforcement action brought by private party or non-party to the case. The domestic courts will have a reasonable ground to refuse enforcement in this circumstance. This led the Belgian court to conclude comfortably that:

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<sup>35</sup> Rosenne, S., *The Law and Practice of the International Court, 1920-1996*, 3<sup>rd</sup> ed, (Martinus Nijhoff, 1997), p. 226.

<sup>36</sup> See *Rose Mary* case in which the Supreme Court of Aden treated the ICJ's Order of Provisional Measures in *Anglo-Iranian Oil* dispute as sufficient evidence to establish the assumption of good faith on the part of *Anglo-Iranian Oil Company*, 17 *ILR* (1950), p.316. See also *Administration des Habous v. Deal*, 19 *ILR* (1952), p. 342; *Rex v. Cooper*, in which the Norwegian Supreme Court invoked the decision of the Court in the *Fisheries* case (UK / Norway) (ICJ. Rep. (1951), p.116), to support the argument that the delimitation undertaken by Norway of its territorial sea complied with international law, 20 *ILR* (1953), p.166.

<sup>37</sup> O'Connell, E., "The Prospects for Enforcing Monetary Judgments of the International Court of Justice: A Study of Nicaragua's Judgment Against the United States", 30 *Va J.Int'l.L* (1990), pp.891-940, at p. 915.

the Plaintiff Company cannot maintain that the decision of June 15, 1939, in a dispute between the Greek State and the Belgian State-taking up its case before the Hague Court-was a judgment in its favour even though it was not a party to the case. It is inconceivable that a party which, by definition, is not admitted to the bar of an international court should be able to rely on a judicial decision in a case to which it was not a party.<sup>38</sup>

Although the conception of non-enforceability of the judicial decisions of the ICJ before domestic courts in general either by private individuals or non-State parties to the original proceedings has been modified in certain areas, especially in field of human rights, it remains at the core of current theory of enforcement of ICJ decisions international law.<sup>39</sup> This is in line with the legal nature of the ICJ's jurisdiction and the principle of *res judicata*, even if a private individual or corporation is the subject matter of the dispute, as it is in the case of diplomatic protection disputes. It is thus implausible to disagree with the Belgian court's reasoning as far as the doctrine of *res judicata* is concerned. So, apart from the questionable reasoning regarding the validation of the PCIJ's decisions within the domestic legal system of Belgium, the court's conclusion should be conducive to the application of Article 94 of the UN Charter by the domestic court if the original party to the case (Belgium) had brought the enforcement action before its court. This case also demonstrated that plea of State immunity in connection with the enforcement of judicial decisions of the ICJ is not sustainable. It should be mentioned, however, that under the Belgian Constitution of 1971, which gives primacy of international law over municipal law, it would be no longer inconceivable to give effect to the ICJ's decisions in Belgium,<sup>40</sup> unless it has

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<sup>38</sup> *Société Commerciale de Belgique*, 18 ILR (1951), p.4.

<sup>39</sup> Note, "Judicial Enforcement of International Law Against the Federal and State Governments", 104 HLR, (1991), pp. 1269-88, at p. 1280-1284.

<sup>40</sup> Bedjaoui, M., "The Reception by National Courts of Decisions of International Tribunals", 28 N.Y.U. Int'l. L. & Pol. (1995-1996), pp. 45-64, at p. 48.

been invoked by a private individual.<sup>41</sup> The same is applicable to corporations and non-State parties to the original proceedings.

## 5. Judicial Enforcement through the Domestic Courts of the Judgment Debtor

Enforcement through domestic courts of judgment debtors is more problematic. This section will explore the problem through the investigation of three cases involving attempts to enforce decisions of the ICJ through US courts, namely: the *Committee of United States Citizens Living in Nicaragua v. Reagan case*,<sup>42</sup> which was an attempt to enforce the decision of the Court in the *Nicaragua case*,<sup>43</sup> *Republic of Paraguay et al v. Gilmore et al; In re Breard, Republic of Paraguay et al. v. Gilmore III et al; Breard v. Greene*,<sup>44</sup> which were attempts to enforce the Court's Order in the *Breard case* (1998),<sup>45</sup> and *Federal Republic of Germany et al. v. United States et al. case*,<sup>46</sup> which was an attempt to enforce the Court's Order in the *LaGrand case* (1999).<sup>47</sup>

### 5.1. Committee of United States Citizens Living in Nicaragua v. Reagan case

In July 1979, a revolutionary government (the Sandinista government) came to power in Nicaragua at the end of a bloody civil war. The new government's relations with the United States quickly deteriorated because of what the U.S. claimed to be "undemocratic policies". According to the U.S., the Sandinista government was

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<sup>41</sup> Fox, H., Gardner, P., & Wickremasinghe, C., "The Enforcement of International Judgments in the Domestic Legal System", in Eisemann, P.M., (ed), *The Integration of International and European Community Law into the National Legal Order*, (Kluwer International Law, 1996), pp.63-66, at p. 63 & 64. For the status of individuals in international law see, e.g., Nørgaard, C.A., *The Position of the Individual in International Law*, (Copenhagen: Munksgaard, 1962); Fraidenraij, S., *Changing Position of the Individual in International Law*, in *United Nations Decade of International Law*, (1998), pp.463-481; See also in relation to access to international court, Janis, M., "Individuals and the International Court", in Muller, A.S., Raic, D., and Thuranszky, J.M., (eds), *The International Court of Justice: its future role after fifty years*, (Martinus Nijhoff Publishers, 1997), pp.205-216.

<sup>42</sup> *Committee of United States Citizens Living in Nicaragua v. Reagan case*. 859 F 2d 932 (D.C. Cir 1988)

<sup>43</sup> ICJ. Rep. (1986), p.4.

<sup>44</sup> *Republic of Paraguay v. Gilmore, Breard v. Greene*, 118 S. Ct. 1352 (1998)

<sup>45</sup> ICJ. Rep. (1998), p.426.

<sup>46</sup> *Federal Republic of Germany et al. v. United States et al. case*, 119 S. Ct. 1016 (1999)

<sup>47</sup> ICJ. Rep. (1999), p. 9.

encouraging and funding insurgent movements in the surrounding region, especially in El Salvador. In 1981, the U.S. cancelled its aid program to Nicaragua and commenced a covert programme of backing Nicaraguan opponents of the new Sandinista government. As part of this program, the CIA directly supported the mining of Nicaraguan harbours in 1983. Nicaragua raised the issue in the Security Council, protesting the U.S. behaviour as a violation of international law expressed in the UN Charter, the Charter of the Organisation of American States, and international custom. The United States vetoed the appeal to the Security Council to stop its intervention in Nicaragua's affairs through, *inter alia*, supporting the *contras*. Subsequently, Nicaragua filed an application to have the case heard by the ICJ. The ICJ accepted the case; jurisdiction being conferred by Nicaragua's application and the compulsory jurisdiction accepted by the United States in 1946.

However, the U.S. disagreed with the ICJ's ruling, arguing that the Court did not have jurisdiction in this case because of certain reservations in the U.S. optional clause declaration. The U.S. boycotted the hearings but the Court proceeded in its absence. The Court found that the United States was liable for its illegal actions in Nicaragua and accountable for all damages incurred by the Sandinista government and that it was "under a duty immediately to cease and to refrain from all such acts as may constitute breaches of the foregoing legal obligations."<sup>48</sup> Then Nicaragua brought the matter before the Security Council under Article 94 of the UN. Charter to give effect to the judgment of the Court. However, the United States exercised its veto power twice against draft resolutions in 1986.<sup>49</sup> Nicaragua appealed to the General Assembly in its 41<sup>st</sup> session, which affirmed the Court's decision in that session and in subsequent sessions, calling upon the U.S to comply with the Court's judgment.<sup>50</sup> The United States maintained its defiance of the judgment of the Court and even declared that any further attempt to enforce the judgment of the Court would be pointless and even counterproductive.<sup>51</sup>

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<sup>48</sup> ICJ. Rep. (1986), 4, p. 149.

<sup>49</sup> See 41 SCOR Sup. July, August, September 1986 (S/18230) 50, 41 SCOR Sup. October, November, December 1986 (S/18415) 27. For further exposition of this point and other relevant aspect of the problem see *infra*, chapter 8, Section, 2.3.

<sup>50</sup> See Resolutions 41/31 of 3 November 1986; 42/18 of 12 November 1987; 43/11 of 25 October 1988; 44/43 of 7 December 1989 and 45/402 of 21 December 1990. For further examination of this point see *infra*, chapter 8, Section 3.2.

<sup>51</sup> See Judge Abraham Sofaer, the former Legal Adviser to the State Department. *ICJ Merits Watching, State Department's Top Legal Advisor Tells Bar*, D.C. Bar Rep, August / September 1989, at 8.

In the light of the United States' unwillingness to comply with the Court's judgment and the failure of the Security Council to give effect to the judgment of the Court, certain US citizens living in Nicaragua and organisations conducting voluntary activities there, and two U.S. organisations, sued President Reagan, in 1988, in his capacity as the President of the United States before the United States District Court of the District of Columbia. The suit sought relief for continuing U.S. violations of the ICJ judgment, which had prohibited the US from intervening in the Nicaragua's affairs through training, arming, equipping, financing and supplying the *contra* forces or otherwise encouraging, supporting and aiding military and paramilitary activities in and against Nicaragua. The suit was dismissed on various grounds, *inter alia*, that "questions involving delicate matters of foreign affairs are the quintessence of the political question", and are justiciable only when "the nub of the controversy" is no more than "tangentially related to the politics of foreign policy," as long as this matter is for the "executive discretion".<sup>52</sup> However, the dismissal was appealed to the United States Court of Appeals of the District of Columbia, under the name *Committee of United States Citizens Living in Nicaragua v. Reagan*. The Appellants sought injunctive and declaratory relief against the funding of Contras on grounds that this violated the ICJ's decision and breached, *inter alia*, three types of international law: first, non-compliance with a decision of the ICJ violated a conventional obligation, namely Article 94 of the U.N Charter; second, non-compliance with this decision violated principles of customary international law such as the principle of *pacta sunt servanda*, which requires compliance with the decisions of the ICJ; and third, non-compliance with the decisions of the Court constituted a violation of peremptory norms of international law (*jus cogens*).

In answering all these claims, the court construed, from various aspects, the application of Article 94 of the UN. Charter, which requires compliance with the ICJ's decisions. It looked into whether there was a conflict between the act appropriating military aid to the *contras* and the treaty obligations of the United States under Article 94 of the U.N Charter. It believed that Article 94 of the UN. Charter was not enforceable in U.S. courts as a treaty provision because this Article was not self-executing and it had been pre-empted by subsequent Congressional action.

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<sup>52</sup> Cited in Peter, T., and Martin, W., "Political Question Doctrine- Domestic Effect International Law, Enforcement of ICJ Decisions, Treaties, United Charter, Jus Cogens", 83 *AJIL* (1989), pp. 380-384, fn. 1 at p. 380.

Relying on the principle of the *Head Money Cases*,<sup>53</sup> the court found that the act of Congress would prevail as long as subsequent enacted statutes superseded existing customary international law.<sup>54</sup> The Appellants argued that the rule requiring parties who have submitted to an international court to abide by its judgment was not only a principle of customary international law but had become a form of *jus cogens*, and hence, was absolutely binding upon the government of the United States as a matter of domestic law. In this regard the court did not find that compliance with the ICJ's decisions met the stringent criteria for *jus cogens* under Vienna Convention on the Law of Treaties. Characterising the Appellants' attempt to "bootstrap" the ICJ's decisions to the status of *jus cogens*, the court merely noted that the frequency of non-appearance by respondents before the ICJ and the non-universality of the jurisdiction of the Court, as well as the uneven record of compliance with its decisions to conclude that the status of the ICJ's decisions were not so universally accepted to be as a peremptory norm. The court also noted that the U.S Government did not consent to the ICJ jurisdiction in *Nicaragua case*,<sup>55</sup> as a consequence of the U.S withdrawal of its declaration of compulsory jurisdiction.

It is indeed hard to accept that compliance with the judicial decisions of the ICJ *per se* acquire the status of *jus cogens*, the reason being that the obligation of compliance with and enforcement with a given judgment, as an immediate right, can be derogated by, of course, only mutual agreement of the litigant parties without necessarily violating general international law. However, the court's motion to refuse enforcement of the Judgment of the ICJ in this case is unobjectionable on other grounds. The Appellants were not parties to the dispute and thus had no standing to enforce the Judgments of the ICJ. Thus, in a holding similar to the *Socobel* case, the Court of Appeal noted that individuals had no right to bring an action under Article 94 of the U.N Charter, and in particular to enforce an ICJ decision. Therefore, it dismissed the claim by pointing out that:

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<sup>53</sup> 112 U.S. 580 (1884).

<sup>54</sup> *Head Money Cases*, 112 U.S. 580, 5 S.Ct. 247, 28, L.Ed. 798 (1888) cited in *Committee of United States Citizens Living in Nicaragua v. Reagan case*, 859 F 2d 929 (D.C. Cir 1988), p. 936.

<sup>55</sup> *Committee of United States Citizens Living in Nicaragua v. Reagan case*. 859 F 2d 932 (D.C. Cir 1988)

Neither individuals nor organizations have a cause of action in an American court to enforce ICJ judgments. The ICJ is a creation of national governments, working through the UN; its decisions operate between and among such governments and are not enforceable by individuals having no relation to the claim that the ICJ has adjudicated in this case, a claim brought by the government of Nicaragua. Appellants try to sidestep this difficulty by alleging violations of international law rather than styling their suit as an enforcement action in support of the ICJ judgment. The United States' contravention of an ICJ judgment may well violate principle of international law... these violations are no more subject to challenge by private parties in this court than the underlying contravention of the ICJ judgment.<sup>56</sup>

It is quite difficult to disagree with this conclusion. The phraseology of Article 94 of the Charter does not confer any right upon an individual to call upon governments before a domestic court to take certain action in compliance with the judgment of the ICJ. Thus the Court of Appeals further read Article 94 of the Charter in connection with Article 92 of the Statute of the ICJ, which in connection with Article 34 of the Statute, speaks about States as the only parties to have access to the contentious jurisdiction of the Court. It thus rightly concluded that:

Because only nations can be parties before ICJ, Appellants are not 'parties' within the meaning of this paragraph. Clearly this clause does not contemplate that individuals having no relationship to the ICJ case should enjoy a private right to enforce the ICJ's decision. Our interpretation of Article 94 is buttressed by a related provision in the Statute of the ICJ, which is incorporated by reference to the UN Charter [Art. 92] The Statute provides "that the decision of the Court has no binding force except between the parties and in respect of the particular case". Taken together, these Charter clauses make clear that the purpose of establishing the ICJ was to resolve disputes between national governments. We find in these clauses no intent to vest

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<sup>56</sup> *Ibid.*, pp. 933-34.

citizens who reside in a UN member nation with authority to enforce an ICJ decision against their own government.<sup>57</sup>

The court's understanding of international law in this case thwarted individuals attempts to enforce an ICJ decision. This will remain the case as long as individuals have no standing before the ICJ and consequently no standing to enforce its judgment. This was the bottom line of the court's conclusion. On the other hand, however, the court seemed not to dispute the possibility of the enforcement of an ICJ judgment if it had been brought by the original party, since, generally speaking, American courts are open to foreign States and governments, unless these States are at war with the United States or are governments not recognized by the United States.<sup>58</sup>

There are some similarities between this case and the *Socobel* case as both were brought by individuals to enforce judgments of the ICJ who were not parties to the original proceedings before the Court. By implication, therefore, and regardless of some difficulties or conflict with some domestic legal doctrines, this case clearly conceives a grant to the judgment creditor of the right to enforce a decision rendered by the ICJ in domestic courts of the judgment debtor.

It is crucial, however, to find parallels between the *Committee of U.S. Citizens Living in Nicaragua* and *Breard* and later the *LaGrand* cases. If the interpretation given to Article 94 of the UN Charter by the U.S Courts in *Committee of U.S. Citizens Living in Nicaragua* case was to be totally valid, one may conceive its application to the later cases. The jurisdiction of the ICJ was not disputed by the U.S government in the *Breard* case, neither was there any action taken by the Congress to repudiate the authority of the decision of the ICJ, instead, there was an act of Congress (the United Nations Participation Act) calling for more respect for U.S. obligations arising under the UN Charter.<sup>59</sup> Furthermore, the petitioners before the U.S. Courts were parties before the ICJ and had a cause of action to enforce the decision. In the subsequent sections, the facts of the two cases will be stated first and further analysis of these attempts, which are applicable, *mutatis mutandis*, to the domestic courts of the judgment debtor generally.

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<sup>57</sup> *Ibid.*, pp. 936, 939.

<sup>58</sup> Brown, C., "Enforcement of ICJ Decisions in United States Courts", 11 *Md. J. Int'l L. & Trade* (1987), pp.73-92, at pp. 74-75.

<sup>59</sup> 22 U.S.C. 287(a)-(e) (1994).

## 5.2. Republic of Paraguay et al v. Gilmore et al; In re Breard, Republic of Paraguay et al. v. Gilmore III et al; Breard v. Greene

On 1 September 1992, Angel Francisco Breard, a Paraguayan national living in the United States, was arrested, and subsequently convicted for murder and attempted rape by the Circuit Court of Arlington County, Virginia on 24 June 1993.<sup>60</sup> The death penalty was imposed, and execution was set for 17 February 1994. This was postponed pending other proceedings.<sup>61</sup> During these proceedings, Mr. Breard had not been informed of his right to consul assistance under Article 36 (1) (b) of the Vienna Convention on Consular Relations, i.e., the responsibility of the receiving State to inform without delay the consular of the sending State of its national being “arrested or committed to prison or to custody pending trial or is detained in any other manner...”<sup>62</sup> It was not until September 1996 that the Paraguayan consular authorities learned about Breard’s arrest. The Republic of Paraguay, through its Ambassador and Consul General to the United States, initiated an action in the United States District Court for the Eastern District of Virginia seeking a declaration of treaty violation and a *vacatur* of Breard’s sentence as well as an injunction against further violations of the treaty.<sup>63</sup> The district court found that the Paraguayan Government had no standing to bring its claim under the Convention, a ruling that was affirmed subsequently by the U.S. Court of Appeals for the Fourth Circuit.<sup>64</sup> A separate lawsuit by Paraguay also proved unsuccessful on the ground of procedural default, and Breard’s execution was eventually scheduled by the Circuit Court of Arlington County, Virginia, for 14 April 1998.

On 3 April 1998, Paraguay instituted proceedings against the United States before the ICJ, requesting the Court to adjudge and declare that it was entitled to *resitutio in integrum*, that the proceedings against Mr. Breard were void, that a re-trial of the accused, as well as any kind of future proceedings, had to be carried out in accordance with the obligations under the Vienna Convention, and that the United

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<sup>60</sup> *Breard v. Virginia*, 445 S.E.2D (1994).

<sup>61</sup> For a comprehensive account of these proceedings, see Charney, J. I., & Reisman, W.M., “*Agora: Breard: The Facts*”, 92 *AJIL* (1998), pp. 666-675.

<sup>62</sup> For the Convention, see 21 *UST* 77, 596 *UNTS* 261.

<sup>63</sup> *Republic of Paraguay v. Allen*, 949 F. Supp. 1269, 1272 (E.D. Va. 1996).

<sup>64</sup> *Republic of Paraguay v. Allen*, 134 F.3d 622 and 629 (4<sup>th</sup> Cir. 1996). Furthermore, Breard initiated his own appeals for violation of his rights under the Vienna Convention, but it was rejected, *Breard v. Pruett*, 134 F.3D 615, 619-20 (4<sup>th</sup> Cir).

States had to provide a guarantee of non-repetition.<sup>65</sup> It also simultaneously filed an application for the indication of provisional measures under Article 41 of the Statute of the Court to ensure that Mr. Breard would not be executed pending the final decision in this proceeding. On 9 April 1998, the ICJ unanimously indicated provisional measures, ordering clearly and specifically that the United States should “take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings, and should inform the Court of all measures which it has taken in implementation of this Order”.<sup>66</sup>

In response to this Order, and while casting doubt on its mandatory character, the US Secretary of State diffidently implored the Virginian Governor Gilmore to voluntarily suspend the execution of Breard.<sup>67</sup> On the other hand, Breard decided to attempt to enforce the Order of the Court by filing a petition for an original writ of *habeas corpus* to stay the execution. Paraguay also filed a motion for leave to file a bill of complaint before the U.S. Supreme Court.<sup>68</sup> The Supreme Court immediately requested an opinion from the U.S. Solicitor General on the views of the United States Government concerning the petitions.

The executive made representations in the Solicitor General’s *Amice* brief, which was also co-ordinated,<sup>69</sup> and signed by the Legal Advisor of the Department of State. The brief argued that the Order of the Court was not binding, and neither the Supreme Court nor the Governor had any responsibility to enforce it.<sup>70</sup> The brief was of the view that the Order of the ICJ did not require the court to stop the execution of Breard and that the only possible means of enforcement or measure at the disposal of the United States was to inform the Governor of the Order, who should have the ultimate decision in the matter. It further pointed out that the measures at the Government’s disposal were a matter of domestic law and even if the ICJ’s Order was

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<sup>65</sup> *Application of the Republic of Paraguay*, (Paraguay v. United States), para. 25, 3 April 1998, <<http://icj.cij.org>>

<sup>66</sup> ICJ. Rep. (1998), para 41.

<sup>67</sup> *Letter from U.S. Secretary of State Madeleine K. Albright to James S. Gilmore III, Governor of Virginia* (Apr. 13, 1998). See also N.Y. TIMES, 14 April 1998, at A14.

<sup>68</sup> *Angel Francisco Breard*, 97-8214 (A-732) v. Fred W. Greene, Warden; *The Republic of Paraguay et al.*, 97-1390 (A-738) v. James S. Gilmore, Governor of Virginia, et al.; *in re Angel Francisco Breard* 97-8660 (A-767); *Republic of Paraguay et al.*, No. 125 Orig. (A-771) v. James Gilmore, III, Governor of Virginia, et al., No’s. 97-8214 (A-732), 97-1390 (A-738), 97-8660 (A-767), and 125, Orig. (A-771), Online. <<http://supct.law.cornell.edu/supct/html/97-8214.ZPC.html>>.

<sup>69</sup> U.S. Department of State Daily Press Briefing DPB # 46, Wednesday, April 15, 1998.

<sup>70</sup> Brief for the United States as *Amicus Curiae* at, p 49, *Republic of Paraguay v. Gilmore, Breard v. Greene*, 118 S. Ct. 1352 (1998) (Nos. 97-1390, 97-8214). p. 49.

binding on the international plane, on the domestic plane, the U.S. federal system imposed limits on the federal government's ability to interfere with the criminal justice system of the states.<sup>71</sup>

On the other hand, twelve eminent professors of international law filed an elaborate *Amice* brief with the Supreme Court arguing that the justices ought to enforce the Order by staying the execution and considering the case on its merits.<sup>72</sup> Nevertheless, on 14 April and less than two hours before the execution, the U.S. Supreme Court, in a 6-3 decision, denied the petition for an original writ of habeas corpus, the motion for leave to file a bill of complaint, the petitions for certiorari, and the accompanying stay applications filed by Breard and Paraguay to enforce the Order of the ICJ. While noting the ICJ's order of 9 April, demanding that the United States to "take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings...", the Supreme Court failed to address the international legal dimension at any length. It only found that:

It is unfortunate that this matter comes before [it] while proceedings are pending before the ICJ that might have been brought to that court earlier. Nonetheless, this Court must decide questions presented to it on the basis of law ... The Executive Branch, on the other hand, in exercising its authority over foreign relations may, and in this case did, utilize diplomatic discussion with Paraguay. Last night the Secretary of State sent a letter to the Governor of Virginia requesting that he stay Breard's execution. If the Governor wishes to wait for the decision of the ICJ, that is his prerogative. But nothing in our existing case law allows us to make that choice for him.<sup>73</sup>

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<sup>71</sup> *Ibid.*

<sup>72</sup> See Statement Amicus Curiae of International Law Professors: George A. Bermann, David D. Caron, Abram Chayes, Lori Fisler Damrosch, Richard N. Gardner, Louis Henkin, Harold Hongju Koh, Andreas Lowenfeld, W. Michael Reisman, Oscar Schachter, Anne-Marie Slaughter, and Edith Brown Weiss at 1, *Republic of Paraguay v. Gilmore*, 118 S.Ct. 1352 (1998) (No. 97-1390).

<sup>73</sup> *Republic of Paraguay v. Gilmore, Breard v. Greene*, 118 S.Ct. 1352 (1998) (per curiam). Without touching precisely upon the issue of binding effect of provisional measures indicated by the Court, in their dissents; Justice Stevens and Breyer declared that the international aspects of the case and their potential relevance of proceedings in an international Court provided an additional reason for granting the petitions. *Ibid.*, 1356.

The Governor of Virginia refused to issue a stay. In a statement issued on 14 April 1998, the Governor of Virginia stated that he was convinced by the argument of U.S. Department of Justice that “the rulings of the International Court of Justice are not enforceable by the courts of the United States, that the International Court of Justice has no authority to intervene in the criminal justice system of the Commonwealth of Virginia or any other state, and that the Supreme Court should not intervene in this matter”.<sup>74</sup>

### **5.3. Federal Republic of Germany et al. v. United States et al. case**

On 7 January 1982, Karl LaGrand and Walter LaGrand, German nationals, were arrested in the United States and subsequently tried before the Superior Court of Pima County, Arizona, which, on 17 February 1984, convicted them both of murder and other crimes and later sentenced them to death. At the time the LaGrands were convicted and sentenced, the competent United States authorities had failed to provide the LaGrands with the information required under Article 36 (1) (b) of the Vienna Convention on Consular Relations and its Optional Protocol. In 1992, after the LaGrands knew of their rights under the Vienna Convention, they filed applications for writs of *habeas corpus* in the United States District Court for the District of Arizona, seeking to have their convictions - or at least their death sentences - set aside. Their attempts were unsuccessful. On 24 February 1999, last-minute federal court proceedings was brought by Karl LaGrand but ultimately proved to be unsuccessful. In the course of these proceedings the United States Court of Appeals, Ninth Circuit, again held the issue of failure of consular notification to be procedurally defaulted. Karl LaGrand was executed later that same day while Walter's execution was set for 3 March 1999.

Thereafter, on 2 March 1999, Germany instituted proceedings against the United States before the ICJ. It also submitted an urgent request for the indication of provisional measures in order to protect its rights to ensure that Walter LaGrand was not executed pending final decision in the proceedings.<sup>75</sup> The ICJ found that the

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<sup>74</sup> Commonwealth of Virginia, Office of the Governor, Press Office, Statement by Governor Jim Gilmore Concerning the Execution of Angel Breard (Apr. 14, 1998), cited in Charney, J. I., & Reisman, W.M., *supra* note 61, pp. 674-75.

<sup>75</sup> ICJ. Rep. (1999), para 26.

circumstances required indication of provisional measures as a matter of the greatest urgency. Recognising the federal nature of the United States legal system, the ICJ in its Order of 3 March 1999, indicated the following provisional measures:

(a) The United States of America should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings, and should inform the Court of all the measures which it has taken in implementation of this Order; (b) The Government of the United States of America should transmit this Order to the Governor of the State of Arizona.<sup>76</sup>

In its Order, the ICJ eradicates plainly and from the beginning any excuse of a claim of domestic legal questions or doctrines. It rigorously pointed out the obligation to comply with and enforce the Court's order was incumbent upon all organs and authorities of the United States and in particular the Governor of Arizona. It stated:

whereas the international responsibility of a State is engaged by the action of the competent organs and authorities acting in that State, whatever they may be; whereas the United States should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings; whereas, according to the information available to the Court, implementation of the measures indicated in the present Order falls within the jurisdiction of the Governor of Arizona; whereas the Government of the United States is consequently under the obligation to transmit the present Order to the said Governor; whereas the Governor of Arizona is under the obligation to act in conformity with the international undertakings of the United States.<sup>77</sup>

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<sup>76</sup> *Ibid.*, para. 29.

<sup>77</sup> *Ibid.*, para. 28.

Subsequently, proceedings were brought by Germany and Walter LaGrand in the United States Supreme Court against the United States and the Governor of Arizona, seeking, *inter alia*, to enforce the ICJ's Order of provisional measures to postpone the execution of LaGrand.<sup>78</sup> In the course of these proceedings, the United States Solicitor-General as counsel of record, in a *amicus curiae* brief, took the position, *inter alia*, to oppose the stay. He thought that an order of the ICJ indicating provisional measures was not binding and did not furnish a basis for judicial relief. Encouraged and inspired by this brief, the United States Supreme Court dismissed the motion by Germany, on the ground of the tardiness of Germany's pleas and the jurisdictional barriers they implicated under the United States domestic law, and hence, refused to order the execution to be stayed. Later that day, Walter LaGrand was executed.

#### 5.4. Analysis

As sovereign States, Paraguay and Germany's decisions to become a plaintiff in a case before a domestic court of the judgment debtor to enforce an ICJ's decision, are extraordinary incidents in the history of judicial enforcement of ICJ's decisions. These incidents are a legitimate phenomenon notwithstanding the doctrine of *par in parem non habet imperium*, as this does not prevent a State from voluntarily instituting proceedings before the domestic courts of another States as long as it has implicitly or explicitly waved its immunity.<sup>79</sup> The issue whether a foreign State can appear as a party in the American courts was early addressed by Justice Bradley in the *Sapphire case* in 1860. When the French Emperor attempted to bring a suit in the United States and asserted his right to appear as a party, Justice Bradley rigorously stated: "A foreign sovereign, as well as any foreign person, who has a demand of a civil nature against any person here, may prosecute it in our courts. To deny him this privilege would manifest a want of comity and friendly feeling".<sup>80</sup> Relying on the *Head Money Cases*,<sup>81</sup> which proposed that enforcement of conventional obligations

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<sup>78</sup> *Federal Republic of Germany et al. v. United States et al.* case, 119 S. Ct. 1016 (1999).

<sup>79</sup> Damrosch, L.F., "The Justiciability of Paraguay's Claim of Treaty Violation", 92 *AJIL* (1998), pp. 697-704, at p. 700.

<sup>80</sup> 11 Wall 164, 29 L. 127 (1860).

<sup>81</sup> *Head Money Cases*, 112 U.S. 580 (1884). For an opposite view, see, *Pfizer, Inc. v. India*, 434 U.S. 308 (1978); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

depended primarily on the principle of good faith of the parties through diplomatic obligations rather than judicial redress, the U.S Government's *amicus curiae* brief, in *Republic of Paraguay v. Allen* and in *Republic of Paraguay v. Gilmore* and *Breard v. Green* cases, argued that treaty disputes between governments were not justiciable in domestic courts.<sup>82</sup> Unfortunately, however, these briefs were found by the US Courts to be persuasive grounds to dismiss those cases, and consequently, according to Professor Damrosch, "foreclosed adequate consideration of the justiciability of such claims in domestic courts".<sup>83</sup> In these particular cases, both the executive and the judicial branches of the United States exercised various measures of prejudicial effect in the enforcement of the Court's Order, in obvious violation of international law.

In fact, the judicial authorities of States are not only under a legal obligation to give effect to international obligations, and the judicial decisions of the ICJ in particular, but also to refrain from any form of repudiation or attempt to obstruct their enforcement. In the *Chorzów Factory* case, the Court stated unequivocally that it is impossible to attribute "to a judgment of a municipal court power indirectly to invalidate a judgment of an international court".<sup>84</sup> Moreover, in *Electricity Company of Sofia and Bulgaria*, the Court declared, "the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute".<sup>85</sup> The Supreme Court of the United States should have taken vigorous judicial measures to enforce the Orders of the ICJ. The United States itself acknowledged in the course of the oral proceedings before the ICJ that "the indication of provisional measures is a matter of serious consequence" and had "potentially far-reaching consequences".<sup>86</sup>

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<sup>82</sup> Brief for the United States as Amicus Curiae at 11–27, *Republic of Paraguay v. Allen*, 134 F.3d 622 (4th Cir. 1998) (No. 96-2770) & Brief for the United States as Amicus Curiae at 13–14, *Republic of Paraguay v. Gilmore and Breard v. Greene*, 118 S. Ct. 1352 (1998) (Nos. 97-1390 & 97-8214)

<sup>83</sup> Damrosch, L.F, *supra* note 79, p. 697.

<sup>84</sup> (1928) PCIJ., Ser. A, No. 17, p.33.

<sup>85</sup> (1939), PCIJ., Ser. A/B, No. 79, p. 199 also cited in *Breard* case, ICJ. Rep. (2001), para. 102.

<sup>86</sup> *Application of the Vienna Convention on Consular Relations (Paraguay v. United States), Request for the Indication of Provisional Measures, Oral Argument of 7 April 1998, Uncorrected Verbatim Record, CR 98/7*, paras. 3.2 (Mr. Crook) and 4.13 (Mr. Matheson); see also, Bernard, O., "Jurisdiction and the Power to Indicate Provisional Measures", in Damrosch, L.F, *The International Court of Justice At A Crossroads*, (Transnational Publishers, 1987), pp. 323-354, at pp. 332-33.

Additionally, the *Amicus* presented by the twelve professors in international law before the Supreme Court concerning the significance and implication of a decision of the ICJ indicating provisional measures demonstrated that such a decision should be accorded binding form by the courts of the United States under Article 94 of the UN. Charter, and hence, it ought to be complied with by branches of the United States government, whether executive or judicial, state or federal.

This can also be supplemented by the principle of judicial comity. The practice of the American courts, for instance, apparently reveals that international judicial comity is inherent in the judicial practice of the United States and that it dictates its courts to enforce foreign judgments. This was set forth early in 1895 by the Supreme Court in *Hilton v. Guyot* in which comity was the defining principle.<sup>87</sup> However, the application of this notion in the *Breard* and *LaGrand* cases seems to suggest otherwise. In those cases, judicial comity should have been the minimum in the transjudicial relations between the judicial organ of the United Nations and the U.S. Supreme Court, under which it could and should have honoured the request of the ICJ and its binding force by at least suspending the execution.

Yet, the Supreme Court's artificial ignorance and misapprehension of the United States' obligations under the Constitution of the United States, which treats the UN Charter and the Statute of the ICJ as the supreme law of the land,<sup>88</sup> and under international law, raises at first glance some uncertainties in the role of the domestic courts of the United States in the judicial enforcement of international judicial decisions. It is regrettable that the negative positions of the involved agencies and branches of the United States government, especially that of the Supreme Court, have created a false impression pertaining to the bindingness and enforceability of the Orders of provisional measures. These particular cases caused some commentators to believe that they have flouted the authority of the decisions of the ICJ and weakened the rule of international law in the United States at least as far as the post-adjudicative phase of the ICJ is concerned,<sup>89</sup> and that the United States perception of orders and judgments has not clearly established a precise practice or correlation that might

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<sup>87</sup> 159 U.S. 113, (1895).

<sup>88</sup> Vazquez, C. M., *Agora: Breard, Breard and the Federal Power to Require Compliance with I.C.J. Orders of Provisional Measures*, 92 *AJIL* (1998), pp. 683-691, at p. 685.

<sup>89</sup> Henkin, L., "Provisional Measures, U.S. Treaty Obligations, and the States", 92 *AJIL* (1998), pp. 679-683, at p. 683.

assure direct implementation of those decisions through a clear and firm obligation.<sup>90</sup> However, these suggestions should not lead us to a rash conclusion as to ineffectiveness of the US courts in this regard. This impression about the negative attitude of the U.S courts towards the ICJ can be mitigated through the unprecedented recent ruling of *Madej v. Schomig* case (2002) which upheld the *LaGrand* decision.

#### 5.4.1. *Madej v. Schomig* case (2002)

In this noteworthy case, Gregoy Madej, a Polish national living in the United States was convicted and sentenced to the death penalty for crimes committed in state of Illinois in 1981.<sup>91</sup> Madej was not informed of his rights to request notification of the Polish consulate under Article 36 of Vienna Convention of Consular Relations when he was arrested. After exhausting his appeals at the state level, he petitioned for a writ of habeas corpus in the North District of Illinois. He argued, *inter alia*, that the decision of the ICJ in the *LaGrand* case foreclosed reliance on a state procedural rule when a court confronted an alleged violation of the provisions of the Vienna Convention. In granting the motion, the district court agreed with the petitioner in its decision of 24 September 2002.

Citing the judgment of the ICJ in *LaGrand* case, the district court stated that “the *LaGrand* case does foreclose strict reliance on procedural default rules for violations of the Vienna Convention”. The court went further to examine the consequential effect of the United States voluntary submission to the jurisdiction of the ICJ and the Supreme Court declaration in *Breard* domestic proceedings. It noted that submitting to the jurisdiction of the ICJ to resolve disputes over interpretation of the Vienna Convention, on one hand, and the relationship between the ICJ and national courts, on the other hand, established the obligation of the United States in this context. It then swiftly concluded “the I.C.J. ruling conclusively determines that Article 36 of the Vienna Convention creates individually enforceable rights, resolving the question most American courts...have left open”. In rejecting the Respondent’s contention that this claim was foreclosed by *Breard* case, the district court noted the declaration of the Supreme Court in that case. Nevertheless, it again found that the

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<sup>90</sup> Djajic, S., “The Effect of International Court of Justice Decisions on Municipal Courts in the United States: *Breard v. Greene*”, 23 *Hastings Int'l & Comp. L. Rev.* (1999), pp. 27-108, at p. 49.

<sup>91</sup> *People v. Madej*, 106 Ill. 2d 201, 478 N.E. 2d 392 (1985).

Supreme Court's finding was inoperative as a consequence of the judgment of the ICJ in *LaGrand* which "has now declared that those rules do interfere with giving full effect to the purposes of the treaty...undermining a major premise of the holding".<sup>92</sup> It thus found that Madej's rights were violated under the Convention and that "the participation of the Consulate could possibly have made a difference".<sup>93</sup> It thus granted him motion that the procedural default rule not be applied to bar a federal claim that is based on the Convention. Subsequently, Illinois authorities decided not to appeal the decision that allows for Madej's re-sentencing rehearing.<sup>94</sup> Indeed, domestic courts should remain a distinct instrument in the framework of the enforcement of the ICJ's decisions<sup>95</sup> notwithstanding the occasional unfounded tendency of the judiciary to liberate their government either from their international obligations or from political domestic embarrassment. The practice of the United States Supreme Court in the enforcement of the ICJ's Orders should not therefore be taken as a precedent to undermine the role of domestic courts in the enforcement of the judicial decisions of the ICJ. The recent judgment of district court in *Madej v. Schomig* case substantiates this conclusion.

## 6. Judicial Enforcement through Domestic Courts of Third States

Technically, under Article 59 of the Statute of the ICJ and under Article 94 (1) of the UN. Charter, decisions of the ICJ have no binding force except between the parties in a particular case; and each member of the United Nations undertakes to comply with the decision of the ICJ in any case to which it is a party. These provisions seem to indicate that there is no precise obligation or a duty to enforce the decisions of the ICJ laid upon third States or upon, for instance, their judiciaries to give effect to them. The phraseology of these provisions, at least Article 94 (1), is by

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<sup>92</sup> *Madej v. Schomig*, 223, F. SuPP.2D 968, 978-79 (N.D. Ill.2002). *LaGrand* case, ICJ. Rep. (2001), p. 104, para.77.

<sup>93</sup> *Ibid.*, at 980. *LaGrand* case, ICJ. Rep. (2001), 104, paras.90-91. See also Chicago Daily Law Bulletin, 26 Sep. 2002.

<sup>94</sup> Murphy, S., (ed), "Contemporary Practice of the United States Relating to International Law", 97 *AJIL* (2003), pp. 180-181.

<sup>95</sup> Schreuer, C., "The Implementation of International Judicial Decisions By Domestic Courts", 24 *ICLQ*, (1975), pp. 153-183, at p. 159.

no means exclusive.<sup>96</sup> Neither Article 94 of the U.N Charter nor Article 59 of the Statute of the Court precludes other States from assisting the judgment creditor nor explicitly obligates them to enforce a decision to which they are not party. So under what basis and to what extent can third States cooperate in the enforcement of the Court's decisions? What form of assistance can the courts of third party offer? Could judicial comity play any role in this process?

### 6.1. General Duty to Cooperate

As outlined at the outset of the preamble of the UN Charter, members of the United Nations have decided "to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained". Among the fundamental purposes of the Charter as pointed out in Article 1 (3) is "to achieve international co-operation in solving international problems...". In order to attain the objectives of the Charter, however, "All Members" of the UN are obliged under Article 2 (2) of the Charter to "fulfil in good faith the obligations assumed by them in accordance with the present Charter". As we have demonstrated in Chapter 2, the principle of good faith has been generally endorsed to be an intrinsic factor of international co-operation.<sup>97</sup> In the *Nuclear Tests (New Zealand v. France)*, the ICJ observed that "One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith". It further stated that "Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential."<sup>98</sup> One of the most comprehensive objectives and obligations of the Charter is the pacific settlement of international disputes between member States.

Likewise, all member States are obliged to give the United Nations, including the ICJ, every assistance in *any* action it takes in accordance with the Charter, and presumably also the integral Statute of the ICJ.<sup>99</sup> Article 56 of the UN Charter

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<sup>96</sup> Waart, P. J. M., "Non-Appearance Does Not Make Sense: Comments", in Boled, A., & Dijk, A., *Forty Years International Court of Justice: Jurisdiction, Equity and Equality*, (Europa Instituut Utrecht, 1988), pp. 71-84, at p. 80.

<sup>97</sup> See also Peters, A., "International Dispute Settlement: A Network of Cooperational Duties", 14 *EJIL* (2003), pp. 1-34, at p. 1.

<sup>98</sup> ICJ. Rep. (1974), p. 473, para. 49.

<sup>99</sup> Article 2 (5) of the Charter of the United Nations.

specifies more clearly the obligations of member States as stipulated under Article 2 (2). It provides that member States “pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55” of the Charter. One of the purposes set forth in Article 55 of the Charter is the “creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations...” These provisions underline a general international legal principle to cooperate with the United Nations including its judicial organ and its members in the fulfilment of the principles and obligation arising from the UN Charter and the Statute of the ICJ even in the absence of an authorisation from the Security Council to compel States to give effect to the Court’s decision.<sup>100</sup> This can also be inferred from Article 92 of the Charter which “forms an integral part of the present Charter” and Article 93 (1) of the Charter which provides, “All Members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice”. On the other hand, member States are also obliged to refrain from giving any assistance to a defaulting party in violation of international law including any preventive measures indicated by the ICJ under Article 41 of the Statute and rights adjudicated under Article 59 and 60 of the Statute.<sup>101</sup> Under the rule of *pacta sunt servanda*, States, in this sense, are merely fulfilling their obligations undertaken under the UN Charter to assist in the enforcement of the ICJ’s decisions in good faith. Thus, the obligation to cooperate or enforce ICJ decisions by third States is not, strictly speaking, directly derived from the substance of the judgment in question or the authority of *res judicata* but rather from the principle of *pacta sunt servanda* and good faith under the UN Charter. Accordingly, in the view of Professor Schreuer, enforcement of the ICJ’s decisions through domestic courts of third States is neither compliance with the decision nor is an exercise of self-help or collective countermeasures, but rather is an act in accordance with the considerations of international public policy.<sup>102</sup>

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<sup>100</sup> Schreuer, C., *Decisions of International Institutions Before Domestic Courts*, (Oceana Publication, 1981), p.148; Waart, P. J. M, *supra* note 96, p. 80, and Schachter, O., “*The Enforcement of International judicial and Arbitral Decisions*”, 53 *AJIL*, (1960), pp. 1-24, at p. 11.

<sup>101</sup> Dumbauld, E., *Interim Measures of Protection in International Controversies*, (The Hague, 1932), p.163.

<sup>102</sup> Schreuer, C., *supra* note 95, p. 160.

It follows that the obligation incumbent upon third States and their judiciaries to recognise and enforce the judicial decisions of the ICJ is an obligation both negative and positive in nature. In the first category, third States are required not to recognize and refrain from assisting the defaulting party to violate or continue to violate its international obligations under the judgment of the ICJ. In the second category, third States are required to cooperate with the injured State to secure enforcement of its rights under the judgment of the ICJ. It is thus self-evident that the latter obligation is conditioned on a request of assistance to enforce a decision of the ICJ made by or enforcement action instituted by the injured State within the domestic courts of these States.<sup>103</sup> This interpretation was early endorsed by Sir G. Fitzmaurice in the *Monetary Gold* case.<sup>104</sup> Arguing on behalf of the United Kingdom in that case, he asserted that:

it must ... be a matter of importance to the family of nations ... that the judgments of the highest international tribunal ... should be respected and carried out. It cannot fail to be prejudicial to the international community and to the rule of law in international relations if the judgments of international tribunals ... are ... disregarded ... All countries are, if not bound, at any rate, entitled to take all such reasonable and legitimate steps as may be open to them to prevent such occurrence, and either individually or by common action to do what they can to ensure that judgments, particularly of the Court, are duly implemented and carried out at any rate, so long as the rights of their countries are respected.<sup>105</sup>

The initiative taken by the United States, United Kingdom and France in this case and the vigorous argument made by Fitzmaurice has been acknowledged either implicitly or explicitly by numerous writers, who are almost unanimous on the effectiveness and indispensability of the role of third States and their judiciary in this regard, and the general duty incumbent upon them to enforce international obligations including those under the decisions of the ICJ. Even Professor Oliver, who doubted

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<sup>103</sup> Schachter, O., *supra* note 100, p. 11.

<sup>104</sup> ICJ. Rep. (1954), p. 19.

<sup>105</sup> *ICJ Pleadings the Monetary Gold Removed From Rome in 1943*, (1954), p. 126.

the legality of the attachment as satisfaction of the *Corfu Channel* decision, admitted implicitly that its legality would have been plausible if a decision had been rendered by the ICJ or adopted by the Security Council under Article 94 of the UN Charter.<sup>106</sup> This is true since the implication of Article 94 of the UN Charter, which is directed to all branches of member States, contemplates that a foreign State may present its claim of enforcement before the judiciary of another member State, and thus, any denial of compliance with this unequivocal obligation and participation of a third State including its judiciary in the defiance of the decisions of the ICJ would entail the international responsibility of that State. So, as the former President of the ICJ, Judge Guillaume asserted that “it remains clear that a third State cannot, without violating its obligations under the Charter and the Statute, become an accessory to non-compliance with a decision of the International Court”<sup>107</sup>

Endorsement of the importance of the role of third States in this regard was also directly acknowledged by member States. For instance, during the debate concerning the non-compliance of the United States with the Court’s judgment of 27 June 1986 in the *Nicaragua* case, Mr. Moran, the Representative of Spain in the Council, emphasized the importance of compliance with the Judgments of the ICJ. He recalled that “compliance with the Charter and respect for the international legal order are fundamental concerns of all the members of the international community and have a direct and immediate bearing on each of them”.<sup>108</sup> Similarly, the Representative of Syria, Mr. Al-Atassi asserted that the non-compliance with the judgment of the ICJ “is not really confined to the conflict between the United States and Nicaragua. In actual fact this compliant relates to the obligation on the part of Member States to abide by the judgments of the highest international judicial authority, that is, the International Court of Justice”.<sup>109</sup> This is a clear indication of the importance of securing compliance with the decisions of the ICJ as an inherent legal interest of all member States in upholding the judicial organ of the international community.

However, such an obligation may have other dimensions not just to entitle third States a right to act in accordance with a given decision, but also to impose obligations upon them to act in conformity with the prescriptions of the international

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<sup>106</sup> Oliver, C., “*The Monetary Gold Decision in Perspective*”. 49 *AJIL* (1955), pp. 216-221, at p. 220.

<sup>107</sup> Guillaume, G., “*Enforcement of Decisions of International Court of Justice*” in Jasentuliyana, N., (ed), *Perspectives on International Law*, (Kluwer Law International, 1995), pp. 275 -288, at p. 286.

<sup>108</sup> S/PV.2718, p. 6.

<sup>109</sup> *Ibid.*, p. 24-25.

community.<sup>110</sup> So, although the outcomes of dispute settlement before the ICJ are generally bilateral, their reach can be multilateral. In the *Land, Island and Maritime Frontier Dispute (El Salvador / Honduras) Application to Intervene by Nicaragua*,<sup>111</sup> although the Chamber after careful examination concluded “that in the circumstances of the present case, this judgment is not *res judicata* for Nicaragua”, with respect to the legal situation of the maritime spaces of the Gulf of Fonseca,<sup>112</sup> its obligation *erga omnes* against the non-participant States in that proceedings is unquestionable.<sup>113</sup> Thus, the explicit traditional consent of third States to a multilateral obligation is not required since it is presumed or can be inferred from their participation as organs of the international community, and because multilateral obligations are not only derived from multilateral treaties, e.g., the UN. Charter and the Statute of the ICJ, but also from international customary law.<sup>114</sup>

## 6.2. The Practice of International Criminal Courts

Similarly, international co-operation and judicial assistance with international judicial bodies have been stipulated in relation with international criminal courts and within the framework of the United Nations system. Although the International Criminal Tribunal for the former Yugoslavia (ICTY), and the International Criminal Tribunal for Rwanda (ICTR) derive their binding force from the provisions of Chapter VII of the U.N Charter and Articles 25 and 103 of the UN. Charter, the obligation to cooperate and judicially assist laid down in Article 29 (1) and (2) of the ICTY and in Article 28 (1) and (2) of ICTR which stipulate that “States shall co-operate with the International Tribunal...”, and that “States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber...”. These obligations derived their force from Security Council Resolutions 827 (1993) and 955 (1994) which were adopted under Chapter VII of the Charter. These Resolutions restated that all member States shall “take any measures necessary under their domestic law to

<sup>110</sup> For a critical examination of this point see *supra* chapter 3, section 2.2.2.2.

<sup>111</sup> ICJ Rep. (1990), 3, p.4.

<sup>112</sup> ICJ Rep. (1992) p. 609, para. 424.

<sup>113</sup> See e.g., Rosenne, S., *Intervention in the International Court of Justice*, (Martinus Nijhoff, 1993), p.155; Scobbie, I., “*The ICJ and the Gulf of the Fonseca*”, 18 *Marine Policy* (1994), pp.249-262, at pp.261-2.

<sup>114</sup> See e.g., Dominice, C., “*The International Responsibility of States for Breach of Multilateral Obligations*”, 10 *EJIL* (1999), pp. 353-63.

implement the provisions of the present resolution[s] and the Statute[s] including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 29 [Article 28] of the Statute”.

Likewise, Part 9 of the Rome Statute of the International Criminal Court (ICC) of 1998 is exclusively devoted to “International Cooperation and Judicial Assistance”. Article 86 stipulates unequivocally that “States Parties shall, in accordance with the provisions of th[e] Statute, *cooperate fully* with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court”.<sup>115</sup> Article 86 underpins a general obligation to cooperate with the ICC in accordance with the provisions of the Statute as a whole. Failure to cooperate with the ICC contrary to the provisions of the Statute bears consequences. Article 87 (7) empowers the ICC to “make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.”<sup>116</sup> This vertical relationship between these courts and the United Nations was even elucidated by the ICTY itself. In the *Tihomir Blaskic* case, the Appeals Chamber pointed out vigorously that under Article 29 of the Statute of the ICTY and Chapter VII of the UN Charter, member States must comply with any request of evidence made by the Court, otherwise they would expose themselves to a sanction imposed by the Security Council.<sup>117</sup> In this connection, a similar scheme can be found in the mechanism proposed by the Special Rapporteur of the International Law Commission, Arangio-Ruiz, in Draft Article 19 of the Second Part on State Responsibility (1995). It provided, *inter alia*, “5. A decision of the International Court of Justice that an international crime has been or is being committed shall fulfill the condition for the implementation, by any Member State of the United Nations...”<sup>118</sup> It is thus obvious that there is a general tendency to establish a co-operational network of enforcement and judicial assistance in various directions within the framework of the United Nations in order to enable these international courts to exercise their functions and power for which they were established.

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<sup>115</sup> 37 *ILM* (1998), p.999 (emphasis added).

<sup>116</sup> See, generally, Ciampi, A., “*The Obligation to Cooperate*”, in Cassese, A., Gaeta, P, and Jones, J., *The Rome Statute of the International Criminal Court: A Commentary*, Vol. II, (Oxford Univ. Press, 2002), pp. 1607-1638.

<sup>117</sup> *Prosecutor v. Tihomir Blaskic*, Appeals Chamber, Judgment of 29 October 1997, Case No. *IT-95-14T*, paras. 26-31, 33-37, at <<http://www.un.org/icty/ind-e.htm>>

<sup>118</sup> *Seventh Report on State Responsibility*, reproduced in *ILCYB*, (1995), Vol. II, Part II, 46, 117.

Apart from this intrinsic negative and positive legal obligation to cooperate in the enforcement of the judicial decisions of the ICJ, consideration of the notion of judicial comity should be given as an additional factor to enforce the judicial decisions of the ICJ within the domestic courts of third States.

### 6.3. Judicial Comity

Notwithstanding its ambiguity,<sup>119</sup> the concept of judicial comity is simply a principle under which the domestic courts of a State should give effect to, *inter alia*, the judicial decisions of national and international courts and tribunals not as a matter of legal obligation but rather as a matter of courtesy and good will to uphold the rule of law and especially where there are no applicable or incumbent legal obligations regarding their recognition and enforcement by municipal courts.<sup>120</sup> Hence, in principle, the rule of judicial comity does not involve a specific legal obligation. Nevertheless, its non-observation, which does not really constitute a wrongful act contrary to international law, can lead to unfriendly measures by the affected State to the extent of the withdrawn courtesy.<sup>121</sup> This suggests that the rule of comity is not without any value or consideration in the process of recognition and enforcement of judicial decisions and arbitral awards.

All States should have interest in upholding this rule whose primary purpose is based on the notion of co-operation and coexistence among States.<sup>122</sup> In the *Haya de la Torre* case, for instance, which arose out of a dispute concerning the modalities of

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<sup>119</sup> Lauterpacht, E., (ed), *International Law: Collected Papers of Hersch Lauterpacht*, (Cambridge, 1970), pp.43-46.

<sup>120</sup> Verzijl, J. H, *International Law in Historical Perspective*, (A. W. Sijthoff, 1968), p. 45. See generally Macalister-Smith, P., "Comity", in Bernhardt, R., (ed), *EPIL*, Vol. I, (North-Holland Elsevier Science Publisher 1992), pp. 671-674, at p. 672.

<sup>121</sup> Although there is disagreement concerning the circumstances in which the principle of judicial comity operates, the application of the rule occurs in a wide variety of contexts including, as Molly Warner Lien enumerated: "the assertion of personal jurisdiction over foreign defendants, issues in interpreting forum selection clauses, decisions about whether to abstain when the interests of foreign sovereigns are at stake, dismissals in favor of foreign forums under the forum non conveniens doctrine, decisions about whether domestic, foreign or international norms or privileges should prevail, enforcement of arbitration clause, service on foreign defendants, transnational discovery, the procedures for proving foreign law, staying proceedings in the United States pending the resolution of foreign or international proceedings, enjoining the prosecution of foreign or domestic legal proceedings, the enforceability of foreign judgments and the preclusive effect of foreign judgments. Lien, M. W., "The Cooperative and Integrative Models of International Judicial Comity: Two Illustrations Using Transnational Discovery and Breard Scenarios", 50 *Cath. U. L. Rev.* (2001), pp. 591- 652, at pp. 596-599.

<sup>122</sup> See generally, Tomuschat, C., "Obligations Arising for States Without or Against their Will", 241 *RdC*, (1993, IV), pp. 209-369.

the implementation of the judgment of 20 November 1950 in the *Asylum* case, the Court referred to “consideration of courtesy and good neighbourliness” on which the parties could reach a successful implementation of its previous judgment.<sup>123</sup>

However, for judicial policy considerations, granting comity to the ICJ as the highest and most prestigious judicial organ of the international community should be placed on a different footing. Obligations under the UN Charter, as well as those arising under the integral Statute of the ICJ and others stemming from the judicial decisions of the Court, enjoy under Article 103 of the Charter priority over other national and international obligations. Thus, the principle of judicial comity should have priority between national courts and the ICJ as compared to national courts among themselves. The same premise can be perceived from a different angle. The nature and the quality of the relationship between national courts themselves are different from the nature and quality of those between the ICJ with national courts.<sup>124</sup> The ICJ perceives domestic law as a fact,<sup>125</sup> and applies primarily and authoritatively international law, while the same competence does not intrinsically exist within domestic courts.

In other words, domestic courts should refer to the judicial decisions of the ICJ on the ground of comity to a greater extent than to other judicial decisions and arbitral awards of national and international courts and tribunals. They should also at least as a matter of comity, respect the judicial decisions of the ICJ in line with the “global allocation of judicial responsibility, sharpened by the realization that the performance of one court's function increasingly requires cooperation with others.”<sup>126</sup>

#### 6.4. Forms of Judicial Assistance

Although there is no exhaustive list of judicial assistance, its most common form, beside the enforcement itself, is by the attachment and transfer of assets belonging to the judgment debtor to the judgment creditor in satisfaction of a given judgment. This procedure is not uncommon. It was used as a judicial sanction in international matters<sup>127</sup> even before the emergence of the theory of restricted

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<sup>123</sup> ICJ. Rep. (1951), p.89.

<sup>124</sup> Lien, M., W., *supra* note 121, p. 639.

<sup>125</sup> See *e.g.*, *Nottebohm* case, ICJ. Rep. (1959), pp.20-21.

<sup>126</sup> Slaughter, A-M., “*Court to Court*”, 92 *AJIL* (1998), pp. 708-712, at p. 708.

<sup>127</sup> Dumas, J., “*Sanctions of International Arbitration*”. 5 *AJIL* (1911), at pp. 934-957, at p. 946.

sovereign immunity, which is not applicable to the enforcement of the ICJ's decisions in the first place.

However, it has been mistakenly believed that this is the only form of assistance available to the municipal courts of the litigant parties and those of the third states. Professor Jenks, for instance, thought that for certain types of international decisions or awards it is "clearly impractical or inappropriate to seek to enforce directly by means of municipal proceedings".<sup>128</sup> He suggested also that decisions determining title to territory or the extent of right of passage across territory or decisions resolving a dispute concerning the respective rights of the parties in an international waterway or coastal waters or on the high seas; or decisions passing on the validity of expropriation or the consistency of national legislation, or a proposed policy or treaty with international obligations; or interpreting the Constitution of an international organization "could not normally be enforced by proceedings in a municipal court in the same manner as a decision awarding pecuniary damages".<sup>129</sup> This assertion is simply misplaced. This particular method of enforcement is not necessarily limited to monetary or pecuniary judgments although it is probably the most common one.

Although not all the ICJ's decisions primarily involve monetary claims, nevertheless, in the view of Professor Bowett, there is no reason not to attach assets belonging to the judgment debtor found in the territory of third State or within that of the judgment creditor to enforce compliance with any judicial decision even if it is not necessarily monetary judgment.<sup>130</sup> Domestic courts are in a position to implement non-pecuniary judicial decisions. For instance, domestic courts can deal with an action of direct or indirect enforcement in relation to decisions passing on the validity of expropriation or decisions determining title to territory in the national courts of a third State. The judgment creditor may ask the domestic courts of third States to declare, for instance, the invalidity of the exploitation agreement concluded between the judgment debtor and that State in violation of the judgment of the ICJ.<sup>131</sup>

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<sup>128</sup> Jenks, C.W., *supra* note 2, pp. 711-712.

<sup>129</sup> *Ibid.*

<sup>130</sup> Bowett, D.W., "Contemporary Development in Legal Techniques in the Settlement of Disputes", 180 *RdC* (1983, II), pp. 169-235, at p. 212.

<sup>131</sup> Schreuer, C., "International Law in Municipal Law: And Decisions of International Organizations and Courts", in Bernhardt, R., (ed), 2 *EPIL* (North-Holland Elsevier Science Publisher, 1995), pp. 1228-1233, at p.1231.

In any event, the effectiveness of this form of assistance could have been possible in the aftermath of the Judgment of the ICJ in the *Nicaragua* case. Although the Court in that case reserved for further proceedings the form and amount of the reparation due to Nicaragua, it did find that the United States was under an obligation to make reparation to Nicaragua for all the injury caused to the latter. Nicaragua was not successful in securing compliance with the judgment of the Court in the Security Council despite invoking Article 94 of the UN. Charter.<sup>132</sup> Moreover, an attempt by private individuals to secure compliance with the Court's decision brought before the U.S courts was unsuccessful. Nicaragua probably could have had a more effective means of enforcement of the Court's decision, had it turned to the domestic courts of third States to attach United States government assets in satisfaction of the Court's decision as the ultimate and perhaps the only economic and effective means available to it to enforce that particular judgment in the face of the United States' defiance.<sup>133</sup>

However, this probability of assistance is not always possible without any legitimate limitations or any judicial constraint. Third States, in general and their judiciaries in particular, are under a duty to take all the necessary measures to safeguard simultaneously any competing claims of other parties, for instance, by providing for judicial control as to the respective claims of all parties.<sup>134</sup> In other words, a judgment creditor may not be allowed to misuse this process through seeking enforcement of an ICJ judgment through various domestic courts simultaneously.

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<sup>132</sup> UN Doc. S/18415; *Ibid.*, S/18428; S/PV.2718, at 51. See chapter 8, section 2.3 *infra*.

<sup>133</sup> See generally, O'Connell, M. E., *supra* note 37, pp.891-940.

<sup>134</sup> Schachter, O., *supra* note 100, pp. 11-12.

## 7. Conclusion

The implication of Article 94 of the UN Charter, which is directed to all branches of member States, contemplates that a State may present its claim of enforcement before the judiciary of another Member State. In these circumstances, States and their judiciaries may not invoke provisions of their internal laws as an excuse or justification for failure to perform their international obligation including these under the judicial decisions of the ICJ. Similarly, under international law, the rule of non-applicability and non-invocation of internal laws by a State to the non-observation of its international obligation is supplemented by another rule, namely that any conduct by any organ of the State is an act of State under international law for the purpose of attributing the organ's conduct to the State. The judiciary is a crucial component of the State and capable of engaging in activities with external effect, thus its acts or omissions are acts of State capable of entailing its State international responsibility. These are undisputed principles of international law applicable to States regardless of their theoretical approach in term of dualism or monism towards international law. It is thus imperative that the litigant States and their judiciaries are precluded by virtue of the principles of *pacta sunt servanda* and *res judicata* from either resorting to any national or international judicial remedy to repudiate or nullify the decisions of the Court or even review the judgment of Court for substantive correctness or procedural irregularities.

Enforcement through domestic courts is, to a large extent, faced with domestic and internal negative factors that may prevent these courts from discharging their judicial responsibility and living up to the expectation of international law and international lawyers. Sometimes, they tend not to intervene with their government's foreign policies. It should be emphasized, however, that domestic courts have never examined or disputed the question of the validity or intrinsic merits of the judicial decisions of the ICJ. This would be a valuable factor for more reliance on the judicial enforcement process of the ICJ's decisions through domestic courts. Thus, we should not rush into a conclusion concerning the irrelevance of domestic courts in this process.<sup>135</sup> Judicial enforcement of the decisions of the ICJ through domestic courts

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<sup>135</sup> Schreuer, C., *supra* note 101, p. 181; Benvenisti, E., "Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts" 4 *EJIL*(1993), pp.159-183, at p. 161.

remains an effective and increasingly indispensable mechanism in the enforcement of judicial decisions of the ICJ. Instead they are under a duty to give effect to the ICJ's judicial decisions.

The non-applicability of *res judicata* to third States not party to the case does not preclude or liberate them and their judiciaries from co-operating in enforcing a judicial decision of the ICJ. Member States are indeed under a general obligation derived at least from the Charter of the United Nations to give the United Nations, including its judicial organ, every assistance that is necessary to uphold and realise the purposes of the Charter, including full respect and compliance with judgments of the ICJ. Member States are also obliged to refrain from giving any assistance to the defaulting party in violation of international law including any preventive measures indicated by the Court under Article 41 of the Statute and rights adjudicated under Articles 59 and 60 of the Statute of the Court. The principle of co-operation is thus a contractual obligation derived from the Charter and is based on the principle of *pacta sunt servanda* and good faith. Finally, as a matter of policy, domestic courts of third States should also refer to the judicial decisions of the ICJ on the ground of comity to a greater extent than to other judicial decisions and arbitral awards of national and international courts and tribunals.

## CHAPTER SEVEN:

# ENFORCEMENT OF THE JUDICIAL DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE THROUGH THE ORGANIZATION OF THE UNITED NATIONS

### 1. Introduction

It has been seen in the previous Chapters that judicial enforcement of the ICJ's judicial decisions although are effective they are not always predictable or successful. However, the enforcement of the Court's decisions can also be made through international institutions. The principal institutional enforcement machinery of judicial decisions of the ICJ is conferred on the Security Council under Article 94 (2) of the U.N Charter, which provides, "If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment". The language employed in this Article, however, has generated theoretical and practical debates as to, principally, the competence of the Council under this Article and the measures available to it.

Article 94 (2) of the Charter provides, however, no exclusive authority for the Security Council to be the only ultimate enforcer of the Court's decisions.<sup>1</sup> In fact, non-compliance with the ICJ's decisions is a violation of the Charter, specifically Article 94 (1) with which other organs of the United Nations are competent to deal with. Thus, besides the role of the Security Council in this process, the affected party may bring its complaint of non-compliance with the ICJ's decisions before the General Assembly under Articles 10 and 11, 14, 22, and 35 of the Charter as well as under its Resolution 377, or as it is commonly known, the *Uniting For Peace*

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<sup>1</sup> Schachter, O., *The Enforcement of International Judicial and Arbitral Decisions* 54 *AJIL* (1960), pp.1-24, at p. 24; Waart, P. J.I.M., "Non-Appearance Does Not Make Sense: Comments", in Bloed, A & Dijk, A., *Forty Years International Court of Justice: Jurisdiction, Equity and Equality*, (Europa Instituut Utrecht, 1988), pp. 71-84, at p. 80; Mosler, H & Oellers-Frahm, K., "Article 94" in Simma, B., et al., (eds), *The Charter of the United Nations*, (Oxford Univ. Press, 2002), pp. 1172-1179, at p. 1178 and Rosenne, S., *The Law and the Practice of the International Court of Justice 1920-1996*, (hereinafter cited as *The Law and Practice*), 3<sup>rd</sup> ed, (Martinus Nijhoff, 1997), p. 258.

*Resolution.* Under Article 22 of the UN. Charter, for instance, the Assembly may “establish such subsidiary organs as it deems necessary for the performance of its functions”. Such subsidiary organs may include a judicial body with the power of adjudication.<sup>2</sup> Yet can the Assembly establish such body with the competence to deal with complaints of non-compliance with the judicial decisions of the Court either following a complaint from the affected party or on its own initiative? Also, given the fact that resolutions adopted by the General Assembly are generally recommendatory, one could wonder how effective these resolutions would be in order to induce a recalcitrant judgment debtor to comply with the Court’s judicial decision? This leads to further examination into the enforcement measures available to the Assembly and the effectiveness of its measures.

In addition, securing compliance with and enforcement of the Court’s decisions falls also within the general competence of the Secretary-General under Articles 98 and 99 of the UN. Charter. His role is indispensable in the enforcement of international law including judicial decisions of the Court. Surprisingly, however, most writers who have examined the problem of non-compliance with and enforcement of international judicial decisions in general and the decisions of the ICJ in particular overlooked the political function and the power of the Secretary-General in this context. Section four deals with his general political function under Articles 98 and 99 of the Charter and his potential role through requesting an advisory opinion from the Court pertaining to a case of non-compliance. It also deals with his role under the Secretary General's Trust Fund to Assist States in the Settlement of Disputes Through the International Court of Justice.

## **2. Security Council**

### **2.1. Article 94 (2) of the Charter: General Remarks**

The problem of enforcement of the Court’s judicial decisions was not discussed by the Washington Committee of Jurists. However, the Committee called the attention of the San Francisco Conference “to the great importance connected with formulating rules on [implementation and enforcement of the Court’s decisions] in the

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<sup>2</sup> See the General Assembly Resolution 351 A (IV) of 24 November 1949 that established the United Nations Administrative Tribunal.

Charter of the United Nations”.<sup>3</sup> At the San Francisco Conference, and in Committee III, Norway drew attention to the importance of preventing the accumulation of instances of non-compliance with judicial pronouncements. Believing that auto-execution by a State that had obtained a judgment in its favour should be excluded, Norway proposed that the Security Council should be empowered “to enforce by appropriate means the execution of any final decision in a dispute between States delivered either by the Permanent Court of International Justice or by any other tribunal whose jurisdiction in the matter has been recognized by the States parties to the dispute”.<sup>4</sup> However, this proposal was not adopted, but a different version of the proposal was later suggested by the Cuban delegation to Committee IV/1.

Using language similar to Article 13 (4) of the League Covenant,<sup>5</sup> Cuba proposed: “in the event of a state’s failure to perform the obligations incumbent upon it under a judgment rendered by the Court, the Security Council shall make recommendations or decide upon measures to be taken to give effect to the judgment”.<sup>6</sup> The mandatory language “shall” used in the Cuban proposal was replaced by a discretionary language “may” in the twenty-second meeting of Committee IV/1 as a result of a proposal made by the San Francisco Advisory Committee of Jurists.<sup>7</sup> Also to avoid any implication that the Council’s action would be mandatory, the phrase “if it deems necessary” was later added.<sup>8</sup> However, a question arose within the San Francisco Advisory Committee of Jurists as to whether the final version of Article 94(2), and particularly the phrase “if it deems necessary”, might impair the independence of the Court *vis-à-vis* the Security Council. It was observed in the summary report of Committee IV/1:

the use of this phrase might tend to weaken the position of the Court.

In answer to this argument it was pointed out that the action to be taken by the Security Council was permissive rather than obligatory and that

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<sup>3</sup> 14 *UNCIO*, p. 853.

<sup>4</sup> 3 *UNCIO*, pp. 368-69, and 11 *UNCIO*, pp. 396-397.

<sup>5</sup> Article 13 (4) of the Covenant read in part, “the Members of the League agree that they will carry out in full good faith any award or decision that to be rendered”.

<sup>6</sup> 13 *UNCIO*, p. 509.

<sup>7</sup> 13 *UNCIO*, p. 298, 301-02. The vote was 26-5.

<sup>8</sup> *Ibid.*, 386, 459; and 17 *UNCIO*, p. 97. See also, Pomerance, M., *The United States and the World Court as a “Supreme Court of the Nations”*: *Dreams, Illusions and Disillusion*, (Martinus Nijhoff Publishers, 1996), p. 195.

the addition of the aforementioned phrase merely made more clear the discretionary power of the Security Council.<sup>9</sup>

Although this was the best compromise reached at the Conference, it cannot be denied that a textual reading of that provision which eventually became Article 94 (2), specifically the phrase “if it deems necessary”, gives the Security Council some liberty as whether or not to enforce the Court’s decisions even in the face of a blatant case of non-compliance with the decisions of the Court. This in fact is a logical consequence of the potential complexity of the enforcement of the judicial decisions of the ICJ and an explanation of the nature of the enforcement process through political bodies. While under Article 13 (4) of the Covenant, the League Council, at least theoretically, was under a duty to examine automatically the conduct of the litigant parties and “in the event of failure to carry out such an award or decision, the Council shall propose what steps should be taken to give effect thereto”.

From a strictly point of view, Article 13 (4) of the Covenant seems to impose “an impossible task”,<sup>10</sup> or a duty on the Council to propose what steps were to be taken to give effect to the Court’s judgment notwithstanding the position of the affected party, which should, in normal circumstances, be the one to demand or require a compliance with the Court’s decision. The impracticality of this provision was apparent in the *Central Rhodope Forests* case (Greece v. Bulgaria), the only instance in which Article 13 (4) was invoked. In that case, Greece itself, which was a party to the dispute, brought the issue before the Council to enforce an arbitral award decided in March 1933.<sup>11</sup> The Council did not take the initiative to propose what steps to be taken to give effect to the arbitral awards in the case.

Article 94 (2) of the Charter perceives the importance of this premise and does not permit the Security Council to take the initiative to recommend or decide upon measures to be taken to give effect to the Court’s judgment, unless it is seized by the affected State. It provides, “if any party to a case” who “fails to perform the obligations incumbent upon it” under the judgment, “the other party may have recourse to the Security Council”. Article 94 (2) is thus more precise than the wording

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<sup>9</sup> 13 *UNCIO*, pp. 386, 459; 17 *UNCIO*, p. 97. For further debate on the same issue, see 12 *UNCIO*, p. 505, and pp. 519-520. See also Rosenne, S., *The International Court of Justice: an essay in political and legal theory*, (A.W. Sijthoff, 1957), p. 104.

<sup>10</sup> Rosenne, S., *The Law and Practice*, *supra* note 1, p. 258.

<sup>11</sup> The matter, however, was settled through further negotiation and without the necessity for an action to be taken by the Council. See, 15 *LNOJ* (1934), pp. 1432-1433, & p. 1477.

of Article 13 (4) of the Covenant as regards the determination of the holder of the obligation to comply.<sup>12</sup> It is also more reflective of the position of the Security Council as a non-automatic law-enforcement agency for the Court.<sup>13</sup>

However, Professor Rosenne gives a restrictive interpretation of the holder of the obligation. He categorically believes that "Only the judgment creditor can invoke Article 94."<sup>14</sup> This assertion is probably true in most cases where the judgment debtor has no claim against the judgment creditor or where there are no counterclaims or corresponding obligations incumbent upon the judgment creditor. There may be situations though where a judgment creditor is simultaneously a judgment debtor in the same case and *vice versa*. For example, in *Cameroon v. Nigeria* case (2002), the ICJ observed that Cameroon was under an obligation to withdraw any administration or military or police forces present in areas along the land boundary from Lake Chad to the Bakassi Peninsula, which pursuant the judgment, fell within the sovereignty of Nigeria. Nigeria was under the same obligation to withdraw from the Bakassi Peninsula, which pursuant the judgment fell within the sovereignty of Cameroon.<sup>15</sup> So, both parties were under obligations to take certain action to fulfil their obligations under the judgment. Any violation of the judgment by either party would entitle the injured party to invoke Article 94 (2) to induce the defaulting party to comply with its obligations.

Also, during the hearings Cameroon committed itself to protect Nigerians who predominately inhabit the Bakassi Peninsula. The Court acknowledged this fact. Moreover, in the operative part of the judgment itself, the Court, "Takes note of the commitment undertaken by the Republic of Cameroon at the hearings that, 'faithful to its traditional policy of hospitality and tolerance', it 'will continue to afford protection to Nigerians living in the [Bakassi] Peninsula and in the Lake Chad area'".<sup>16</sup> So, Nigeria which is technically a judgment debtor as far as the sovereignty over Bakassi Peninsula is concerned, may nevertheless invoke Article 94 (2) of the Charter if it can establish that Cameroon has mistreated or discriminated against, or in general terms misused its rights under the judgment towards the Nigerian inhabitants in Bakassi

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<sup>12</sup> Couvreur, P., "The Effectiveness of the International Court of Justice in Peaceful Settlement of International Disputes", in Muller, A.S., Raic, D., and Thuranszky, J.M., (eds), *The International Court of Justice: its future role after fifty years*, (Martinus Nijhoff, 1997), pp. 83-116, at p. 109.

<sup>13</sup> Rosenne, S., *supra* note 1, p. 252.

<sup>14</sup> *Ibid.*

<sup>15</sup> ICJ. Rep. (2002), para 314-15.

<sup>16</sup> *Ibid.*, para 325.

Peninsula in violation of its commitment as articulated in the *dispositif*. However, whether this commitment and the way it was retained in the operative part of the judgment acquired the authority of *res judicata* is another matter. Nevertheless, it would be sufficient for Nigeria to rely on the rule of *pacta sunt servanda* and invoke Article 94 of the Charter accordingly. Hence, invoking Article 94 (2) before the Council by one of the parties does not mean that the Council *ipso facto* recognises that the other party is a judgment debtor or a defaulting party or that it has failed to perform its obligations under the judgment.<sup>17</sup> In fact, both parties may be found to be in violation of their obligations towards each other and *vice versa*. This is probably one of the reasons that Article 94 has not been invoked very often.<sup>18</sup> So, it is important to note, that not only the judgment creditor can seize the Council under Article 94 as Professor Rosenne has suggested, but also the judgment debtor as an injured or affected party, so to speak, as long as it can establish a claim against the other.<sup>19</sup>

There are also some interesting and further instructive differences between enforcement under Article 13 (4) of the Covenant and under Article 94 (2) of the Charter in this context. Under Article 13 (4), the League Council was under a duty only to propose, as opposed to decide, what steps should be taken to give effect to judicial decisions or arbitral awards, while the Security Council under Article 94 (2) of the Charter, is under no duty to enforce the decisions of the ICJ. On the other hand, it not only can propose or recommend but can also decide what should be taken to give effect to the judgment of the ICJ. So, the fundamental difference is that the Council under Article 94 (2) of the Charter has a discretionary power to either “make recommendations or decide upon measures to be taken to give effect to the judgment” of the Court only “if it deems necessary”, while arguably the Council under Article 13 (4) of the Covenant had no similar discretionary power. In the light of this permissive phrase, it is appropriate now to examine in more detail the competence of the Council under Article 94 (2) and its so-called power to review the decisions of the Court before we turn to the nature of measures that may be taken by the Council to give

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<sup>17</sup> See the statement made by the Representative of Thailand during the debate which took place in the Security Council in the light of the Nicaragua’s request to enforcement the Court’s judgment of 27 June 1986 in the *Nicaragua* case. S/PV.2718, p. 42.

<sup>18</sup> *Ibid.*

<sup>19</sup> Of course, other member States, who are not parties to the dispute could also under Articles 34 and 35 (1) of the Charter, but not Article 94 (2), to bring the dispute to the attention of the Security Council if it could lead to international friction.

effect to the Court's decisions. There may be an overlap between these questions; nevertheless, they will be dealt with separately.

## 2.2. The Competence of the Security Council under Article 94 (2) of the UN. Charter

The wording of Article 94 (2) and its position in the Charter should raise no doubt as to the competence of the Council to deal with enforcement of judicial decisions of the ICJ independently of other provisions or Chapters of the Charter.<sup>20</sup> The first suggestion against this proposition was presented in 1945, by Dr. Pasvolsky, the United States State Department representative, when he appeared before the Senate Committee on the Foreign Relations to testify during the consideration of the ratification of the Charter of United Nations. He suggested that the meaning of Article 94 (2) was that the Security Council, when asked to enforce a decision of the Court, should first determine whether non-compliance with the Court's decision would constitute a threat to international peace and security or not.<sup>21</sup> In other words, he suggested that the Council's competence in this regard was limited to the powers granted in Chapter VII and it could not act under Article 94 (2) unless it determined that there was a threat to international peace and security.

Dr. Pasvolsky's statement, however, was misrepresented in the literature by some scholars, on the ground that there is nothing in the *travaux préparatoires* of Article 94, nor is there any reason of policy or general principle to support his view.<sup>22</sup> Others who also disagreed with his finding eventually came up with a similar conclusion. For instance, Professors Mosler and Oellers-Frahm in a recent commentary on Article 94 of the Charter categorically stated that the Security Council acts under Article 94 (2) "need not determine...the existence of any threat to peace, breach of the peace, or an act of aggression, as provided in Art. 39 of the Charter, but

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<sup>20</sup> Mosler, H., & Oellers-Frahm, K.H., "Article 94", *supra* note 1, p. 1177.

<sup>21</sup> *U.S. Senate Committee on Foreign Relation, Hearing on the UN Charter July 9-13, 1945, 79<sup>th</sup> Cong.*, PP.286-289. He also stated that "the Council is not a sheriff in the sense that the Council enforces the Court's decision when the Court asks it to enforce it" and the Council "simply handles a political situation which arises out of the fact that the judgment of the Court is not being carried out by one of the parties".

<sup>22</sup> Schachter, O., *supra* note 1, at p.20; Reisman, W.M., *Nullity and Revision; Review and Enforcement of International Judgments and Awards*, (hereinafter cited as *Nullity and Revision*), (Yale Univ. Press, 1971), pp.704-709; Jenks, C. W., *The Prospects of International Adjudication*, (Stevens & Sons, 1964), pp. 693-694; and Mosler, H & Oellers-Frahm, K., "Article 94", *supra* note 1, p. 1177.

may decide upon measures to be taken including those listed in Article 41”,<sup>23</sup> to give effect to the judgments of the ICJ. However, when the recommended or decided measures involve the use of force as indicated in Article 42 of the Charter, they concluded, “the legitimacy of the use of force (Art. 42 UN Charter) depends, however, on a determination on the basis of Art. 39... On this assumption the SC cannot act by virtue of Art. 94 (2), but can only do so on the basis of the conditions laid down in Art. 39.”<sup>24</sup> This view contradicts itself by simply differentiating between two enforcement measures, neither of which may be taken without an initial determination by the Council under Article 39 of the Charter. So, the theories of Pasvolsky and Mosler and Oellers-Frahm are misleading and thus require re-examination.

It is widely accepted that neither Chapter VI nor Chapter VII including Articles 41 and 42, enumerates an exhaustive list of the measures to be taken by the Security Council to give effect to every international obligation, including compliance with and enforcement of the decisions of the ICJ. It is indeed impossible to provide or suggest an exhaustive list of measures to be taken for every case of defiance of an international obligation. On the other hand, the Security Council is not conditioned or restricted under Article 94 (2) from recommending or deciding upon measures identical to the measures listed in Articles 41 and 42, nor is it restricted from following overlapping procedures to discharge its responsibility under the Charter.

In fact, the Council may, under the doctrine of implied powers, impose measures which are not necessarily available under other provisions when it acts under Article 94 (2) as long as “it deems [that] necessary”. In the *Namibia Opinion*,<sup>25</sup> for instance, the Court asserted that in addition to the powers specifically granted to the Security Council in Chapters VI, VII, VIII, and XII, which are enumerated in Article 24 (2) of the Charter, the Council has general implied powers in paragraph 1 of the same Article, stemming from its general responsibility for maintaining

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<sup>23</sup> Mosler, H & Oellers-Frahm, K., “Article 94”, *supra* note 1, p. 1177.

<sup>24</sup> *Ibid.* See also Schachter, *supra* note 1, p.22.

<sup>25</sup> *Namibia Opinion*, ICJ. Rep. (1971), p.16.

international peace and security.<sup>26</sup> In support of this position, the Court cited the Secretary-General's statement of January 10, 1947, which had been submitted to the Security Council. The statement declared:

The powers of the Council, under Article 24, are not restricted to the specific grants of authority contained in Chapters VI, VII, VIII, and XI. The Members of the United Nations have conferred upon the Security Council powers commensurate with its responsibility for the maintenance of peace and security. The only limitations are the fundamental principles and purposes found in Chapter I of the Charter.<sup>27</sup>

A case of non-compliance with judicial decisions of the ICJ can easily constitute a threat to international peace and security. This can be inferred, for instance, from Articles 1 (1), 33 (2), and 35 (1) of the UN Charter. Under Article 1 (1), the first and the most essential purpose of the Charter is "to maintain international peace and security". This phrase has in fact been used throughout the Charter quite frequently to suggest that a threat to international peace and security does not necessarily only occur when there is a violation of Article 2 (4) but also whenever there is an absence of conditions of peace and security.<sup>28</sup> Article 33 (2) obliges the parties to any dispute that "the continuance of which is likely to endanger the maintenance of international peace and security" to seek a solution through peaceful means. If this objective has not been obtained, Article 35 (1) gives "Any Member of the United Nations" the right to bring "any dispute, or any situation", that under Article 34 is "likely to endanger the maintenance of international peace and security", because "most of the disputes and situations endanger [...] international peace and

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<sup>26</sup> The ICJ had also affirmed this doctrine in the *Reparation Case*, when it stated, "the rights and duties of an entity such as the [United Nations] Organisation must depend upon its purpose and functions as specified or implied in its constituent documents and developed in practice." *Reparation for Injuries*, (Advisory Opinion of Apr. 11), ICJ. Rep. (1949), p. 180, see also *Competence of the ILO concerning Personal Work of the Employer*, (1926), PCIJ, Ser. B. No. 13, at p.18; *Jurisdiction of the European Commission of the Danube*, (1927), PCIJ, Ser. B. No. 14, at p.43; *International Status of South West Africa*, ICJ. Rep. (1950), p.128; *Administrative Tribunal Awards*, ICJ. Rep. (1954), p.56.

<sup>27</sup> *Namibia Opinion*, ICJ. Rep. (1971), p.52. See also *Jurisdiction of the European Commission of the Danube*. (1927), PCIJ, Ser. B. No. 14, at p.43; *Reparations case*, ICJ. Rep. (1948), p.182.

<sup>28</sup> See generally, Wolfrum, R., "Article I", in Simma, B., et al., (eds), *The Charter of the United Nations*, (Oxford Univ. Press, 2002), pp. 39-47.

security”.<sup>29</sup> Otherwise, one would argue that the injured State may be encouraged to attempt to threaten international peace and security in order to bring about a situation falling under Chapter VI and VII in order to induce the Council to act accordingly.<sup>30</sup>

Thus, given the special nature of the problem of enforcement of the ICJ's decisions, it would be inappropriate to argue that the competence of the Security Council regarding enforcement of the Court's decisions is dependant on Chapters VI or VII, or dependant on non-exhaustive measures, which may not necessarily be appropriate to be applied in this context. It is submitted that the competence of the Council under Article 94 (2) is independent of other provisions of the Charter, unless the Council recommends or decides measures specifically indicated in Articles 41 and 42 whose application must be preceded by a determination by the Security Council under Article 39 of the UN Charter. Consequently, the determination of the competence and the measures to be taken to give effect to the judicial decisions of the Court should be made on a case-by-case basis.

### **2.3. The Security Council and the Power to Review a Decision of the Court**

In fact, when an affected party has recourse to the Security Council under Article 94(2) of the Charter to give effect to the Court's decision, a debate normally takes place. The defaulting State is most likely to question the validity of the Court's decision, either on the merits of the case, or even on the Court's jurisdiction regardless of it being already determined by the Court with the binding force and effect of *res judicata*.<sup>31</sup> Hence, the Council will then have to face the task of drawing a line between the question of discussing the judgment of the Court and its enforcement. So, the question to be raised is, should the Security Council pay attention to political or legal or both arguments that might be put forward by the defaulting State or its allies in the Council? Or should it enforce the decision of the Court as it stands? In other words, is the Council in these circumstances vested with some power of review

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<sup>29</sup> Schweisfurth, T. H., "Article 35", in Simma, B., & et al., (eds), *The Charter of the United Nations*, (Oxford Univ. Press, 2002), pp. 608- 615, at p. 611.

<sup>30</sup> Magid, P., "The Post Post-Adjudicative Phase" in Peck, C., & Lee, R.S.,(eds), *Increasing the effectiveness of the International Court of Justice*, (Martinus Nijhoff, 1997), pp. 325-47, at p. 328.

<sup>31</sup> See the Court's judgment of 15 December 1949, in *Corfu Channel* case in which the Court accepted the argument advanced by the United Kingdom concerning the plea of *res judicata*. *Corfu Channel* case (Assessment of the Amount of Compensation Due From the People's Republic of Albania to the United Kingdom), Judgment 15 December 1949, ICJ. Rep. (1949), 244, p. 248.

of the Court's decisions, able to render a decision with binding force different from the Court's decision; or should it enforce the Court's decision as it stands without any reservation or modification; or should it leave the judgment intact and alternatively decide upon other measures taking the judgment of the Court as a springboard for its action?

Relying heavily upon a restricted textual interpretation of the phrase "if it deems necessary" and "upon measures to be taken to give effect to the judgment of the Court", Professor Kelsen argued that Article 94 (2) "does not impose upon the Security Council the obligation to enforce the judgments of the Court against recalcitrant parties". Instead, he suggested that it "provides for a procedure of appeal in the case of non-compliance" which is "dependant upon the Council's discretion" and that the Council "is not bound to conform with the judgment, hence, the Security Council may recommend a solution of the dispute totally different from what decided by the Court".<sup>32</sup> He also believed that recourse to the Security Council by the judgment creditor places the Court under the control of the Council and might have the effect of transforming a legal dispute into an issue *de novo* by the Council.<sup>33</sup> Kelsen's theory may sound persuasive, but in fact is misleading and thus requires some qualifications and examination.

It should be noted at the outset that if the word "review" refers to or is meant to be "a judicial review", or whatever form of review, directed against repudiating the authority of *res judicata*, the Security Council is not empowered with the authority of review notwithstanding any possible squeezing or squaring theories into round doctrines. This premise finds support in the basic assumption, that the validity of an arbitral award or judicial decision is inherently a judicial question which ought to be answered by an arbitral tribunal or judicial body and subject to judicial procedures.<sup>34</sup> The Council must act in consideration of the interest of the Organisation and its organs, and not to impede them. Otherwise, it would contradict Article 59 of the Statute under which the Court's decision is binding and, Article 60 of the Statute, by which the decision of the Court is "final and without appeal". Articles 60 as well as 61 of the Court's Statute reiterate and reinforce this proposition, which also confer

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<sup>32</sup> Kelsen, H., *The Law of the United Nations: a critical analysis of its fundamental problems*, (hereinafter cited as *The Law of the United Nations*), (Stevens & Sons Limited, 1950), p. 539.

<sup>33</sup> *Ibid.*, p. 541.

<sup>34</sup> Murty, B. S., "Settlement of Disputes", in Sørensen, M., (ed), *Manual of Public International Law*, (Macmillan, 1968), pp. 674-737, at p. 712.

upon the Court a competence over any dispute “as to the meaning and scope of the judgment”, as well as over proceedings for its self-contained system of revision. Moreover, it would deprive Article 94 (1) of the UN Charter of its content and consequently transform the decision of the Court “into a kind of advisory opinion the validity or enforceability of which could be made ultimately to depend on the attitude of the Security Council”.<sup>35</sup> Additionally, the very purpose of Article 94 (2) is certainly not to provide the Council with a power to review the Court’s decision or to question its *res judicata* accordingly. A close examination of the debates, which took place in the Council in the aftermath of the Court’s judgment of 27 June 1986 in *Nicaragua* case, confirms this finding.

When the United States refused to comply with the Court’s judgment in that case, Nicaragua, by a letter dated 17 October 1986, requested an emergency meeting of the Security Council “in accordance with the provisions of Article 94 of the Charter, to consider the non-compliance with the Judgment of the International Court of Justice dated 27 June 1986”.<sup>36</sup> Subsequently, a meeting was held during which a draft resolution was proposed. It “urgently call[ed] for full and immediate compliance with the judgment of the International Court of Justice of 27 June 1986”.<sup>37</sup> However, being a substantive matter, as opposed to procedural matter,<sup>38</sup> the United States, the defaulting party which is a permanent member with a veto power, voted against the draft resolution.<sup>39</sup> It also put forward arguments against the validity of the Court’s decision. It argued that the Court had passed a decision that it “had neither the

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<sup>35</sup> *Ibid.*

<sup>36</sup> UN Doc. S/18415.

<sup>37</sup> UN Doc. S/18428.

<sup>38</sup> See General Assembly Resolution 267 (III) of 14 April 1949, which indicated a list of procedural matters for the purpose of voting in the Security Council. It did not specifically include the issue of non-compliance with and enforcement of the Court’s judicial decisions through the Council among the procedural matters under Article 27 (2) of the Charter and the legal opinion prepared by the Office of Legal Affairs for consideration of this matter before the Council of 18 July 1986 which concluded that matter brought before the Council under Article 94 is substantive one. *UNJYB* (1986), p. 283. See also the same finding reached by Simma, B., Brunner, S., and Kaul, E., “Article 27” in Simma, B., *et al.*, others (eds), *The Charter of the United Nations*, (Oxford Univ. Press, 2002), pp. 476-523, p. 503 and Mosler, H & Oellers-Frahm, K., “Article 94”, *supra* note 1, p. 1178. See generally, McDougal, M., & Gardner, R., “The Veto and the Charter: An Interpretation for Survival” 60, *Yale.L.J* (1951), pp.258-292.

<sup>39</sup> S/PV.2718, 51. The vote was as following: In favour: Australia, Bulgaria, China, Congo, Denmark, Ghana, Madagascar, Trinidad and Tobago, Union of Soviet Socialist Republics, United Arab Emirates, and Venezuela. Against: United States. Abstaining: France, Thailand, and the United Kingdom. A similar draft resolution (S/18250) had already been submitted at the 2704th meeting of the Security Council and vetoed by the United States. For an extensive background in this regard, see, *e.g.*, Anjali, V. P., *The UN Veto in World Affairs. A Complete Record and Case History of the Security Council's Veto*, (London: Mansell, 1992) p. 372.

jurisdiction nor the competence to render”.<sup>40</sup> The US Representative went on to say that “no Court, not even the International Court of Justice, has the legal power to assert jurisdiction where no basis exists for that jurisdiction. The language and negotiating history of the Charter of the United Nations and the International Court of Justice, as well as the consistent interpretation of those instruments by the Court, this Council, and Member States, make abundantly clear that the Court's claim to jurisdiction and competence in the Nicaragua case was without foundation in law or fact”.<sup>41</sup>

It should be emphasised, however, that when the United States vetoed the draft resolution, it did not provide a legal argument supporting its claims to repudiate precisely the authority of *res judicata* on the merits. Other countries which were allies to the United States, such as Australia and Denmark voted for the draft Resolution, including Venezuela which maintained generally good relations with the United States at that time. It should also be emphasised that no other members of the Council who abstained from voting argued against the validity of the Judgment of the Court nor did they favour the competence of the Council to review the Court's decision. Instead, Spain, which was invited to make a statement, not only rejected the US argument, but also presented a vigorous legal argument upholding the Court's judgment. At the outset, Mr. Moran, the Representative of Spain emphasised on the importance of the matter under consideration. He recalled that “the Court itself has settled the matter, rightly...in the light of the arguments set forth in the Court's decision and bearing in mind that under Article 36, paragraph 6, of the Court's Statute, which is binding upon both parties involved in the dispute, it is for the Court to decide whether it has jurisdiction”.<sup>42</sup> He further argued that, “The principles of the Charter and the norms of customary law invoked in the Court's judgment constitute the full legal obligations for all States”. Mr. Moran even went further to rely on the principle of *res judicata* to support his argument. He stated, “according to the Statute, the judgment calling for respect for those principles bears the full force of *res judicata*”.<sup>43</sup> He then concluded, “compliance with it is a political imperative of the

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<sup>40</sup> S/PV.2718, at 44 -46.

<sup>41</sup> *Ibid.*, p. 46. See also a similar argument presented by Honduras, which was invited to make a statement. S/PV.2718, p. 13-17.

<sup>42</sup> S/PV.2718, p. 7. See also the Representative of Congo, *Ibid.*, p. 12.

<sup>43</sup> S/PV.2718, p. 7.

first order, since respect for the foundations of the current international legal order is at issue".<sup>44</sup>

Even the other members of the Security Council which abstained namely, the United Kingdom, Thailand and France, based their abstention on other considerations.<sup>45</sup> France, for instance, was concerned with some of "questionable references to the judgement... both on matters of substance and on the Court's role" which the draft resolution contained, but did not adequately question the validity of the Judgment of the Court nor indicated precisely what it meant by "questionable references to the judgement".<sup>46</sup> Even the position taken by the United States itself reveals that the defaulting party itself chose not to recognise that the Council had the power to repudiate the authority of *res judicata* which the Court's decision had already acquired, nor did the members of the Council or other member States which were invited to participate in the debate suggest that Article 94 (2) "provides for a procedure of appeal in the case of non-compliance" as Kelsen had claimed. It is thus submitted that the Council cannot validly re-examine or review the merits of the decision of the Court or repudiate the authority of *res judicata* in any form or manifestation.<sup>47</sup>

However, as the Representative of Thailand rightly noted, when the Council acts under Article 94 (2) that does not mean that the Council *ipso facto* recognises that the other party has failed to perform its obligation as incumbent upon it under the judgment.<sup>48</sup> Thus, the Council will have to face a dilemma explicit in paragraph 2 of Article 94, under which the Council has to take measures, "only if it considers that a party has failed to perform its obligations under a judgment of the Court, a determination which is intrinsically legal in nature".<sup>49</sup> In doing so, the Council will have to listen and deliberate upon possible vigorous arguments and forcible debate put forward by the affected parties to uphold their positions. To appraise itself with the case, the Council will inevitably have to look into the judgment itself and evaluate

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<sup>44</sup> *Ibid.* Similarly, the Representative of Syria, Mr. Al-Atassi argued that "the text of Article 94 of the Charter is clear". He then urged the members of the Council "to assume their full responsibilities to defend international legality and to constrain the United States to comply with the judgment" of the Court. *Ibid.*, p. 27.

<sup>45</sup> The Representative of the United Kingdom stated that his Government was "unable to support a draft resolution which fails to take account of the wider political factors and fails to acknowledge that Nicaragua has largely brought its troubles upon itself". *Ibid.*, p. 52.

<sup>46</sup> *Ibid.*, p. 53.

<sup>47</sup> Schachter, O., *supra* note 1, p. 20; Rosenne, S., *The Law and Practice*, *supra* note 1, p. 254-55.

<sup>48</sup> *Ibid.*, p. 42.

<sup>49</sup> *Ibid.*

these arguments accordingly. So, it may not be in the view of the Council that the party which invoked Article 94 had a claim, or that the party which did not invoke it was actually in violation of its obligations under the judgment. However, the Council may instead, and as a provisional measure,<sup>50</sup> either urge or recommend those parties to solve their differences in accordance with the judgment of the Court and the spirit of the UN Charter as it frequently does.<sup>51</sup>

But, if the Council *decides* upon measures to be taken to give effect to the Court's judgment against what it finds to be a defaulting party, it will have to bear in mind the authority of *res judicata* and treat the Court's judicial decision as an element in the process of adopting a relevant resolution to give it effect, taking into account as well the immediate political considerations.<sup>52</sup> This policy of self-restraint on the part of the UN political organ and its Members, as Professor Schachter put it, "take[s] account of the widest range of considerations that may be involved in determining whether, and to what extent, the coercion of the international community shall be brought to bear upon the recalcitrant State".<sup>53</sup> Consequently, the Security Council will inevitably face the possibility of rendering a political decision, which is not necessarily in conformity with the judgment of the Court. The basic justification for this proposition is based on the assumption that the dispute decided by the Court is tended to be considered as separate from the one arising out of the non-compliance with the Court's decision before the Council.<sup>54</sup>

It should not be forgotten, however, that this form of political decision taken by the Security Council would be to some extent in conformity with the discretionary character of the power of the Council under Article 94 (2) of the Charter.<sup>55</sup> In any event, this decision will be binding under Article 25 of the Charter and thus all member States including the litigant parties have to comply with it. Here the litigant parties may be faced with two distinct legal obligations or two binding decisions at

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<sup>50</sup> See Article 40 of the UN Charter.

<sup>51</sup> See generally, Ratner, S. R., "Image and Reality in the UN's Peaceful Settlement of Disputes", 6 *EJIL* (1995), pp.426-444.

<sup>52</sup> Schachter, O., *supra* note 1, p. 21; Kerley, E.L., "Ensuring Compliance with Judgments of the International Court of Justice", in Gross, L., (ed), *The Future of the International Court of Justice*, Vol.1 (1976), pp. 276-286, p. 278-281; Rosenne, S., *The Law and Practice*, *supra* note 1, p. 254-55; Mosler, H & Oellers-Frahm, K., "Article 94", *supra* note 1, p.1177.

<sup>53</sup> Schachter, O., *supra* note 1, p. 21.

<sup>54</sup> Tanzi, A., "Problems of Enforcement of Decisions of the International Court of Justice and the Law of the United Nations" 6 *EJIL* (1995), pp. 539-572, at p. 549.

<sup>55</sup> *Ibid.*, p. 543.

the same time, but which is not necessarily to be conflicting with each other. But if the decision taken by the Council was in violation of the authority of *res judicata*, the affected State may refuse to comply with it on the ground that the Council's decision and the measures adopted accordingly are *ultra vires*. According to Professor Bowett, States have agreed to comply with the Security Council's decisions under Article 25 of the Charter as binding *only* when they are in conformity with the Charter.<sup>56</sup> Thus, in the Advisory Opinion on *Conditions of Admission to the United Nations*, the Court stated that, "the political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitations on its powers or criteria for its judgment".<sup>57</sup>

In conclusion, this particular case of non-compliance with the Court's judgment, the *Nicaragua* case, does not give us a clear picture of how the Security Council would actually have treated the judgment of the Court had the defaulting party been a non-permanent member or if the veto right were not applicable. On the other hand, it provides us with an insight of the political dimensions of the problem. The Council simply cannot discharge its responsibility under Article 94 (2), even when fourteen of its members wish otherwise in the face of a veto cast by a permanent member State. This led the Representative of Ghana to exercise his right as a member of the Council to state after the voting that, "this failure has been made possible by the use of the veto by a permanent member of the Council. That course of action is with the competence of the Council and legitimate, and we respect the decision so made".<sup>58</sup> This is an inevitable reality of the enforcement process through the Security Council, in particular.

#### 2.4. Measures Available to the Security Council

Article 94 (2) of the UN Charter provides us with no definition or limitation of the "recommendations" or "measures" to be taken to give effect to the Court's decision.<sup>59</sup> However, this does not necessarily mean that the Security Council can take any type of action or measures without limitation. Nevertheless, given the special

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<sup>56</sup> Bowett, D., "The Impact of Security Council Decisions on Dispute Settlement Procedures" 5 *EJIL* (1994), pp. 89-101, at p. 95.

<sup>57</sup> ICJ. Rep. (1984), p. 64.

<sup>58</sup> *Ibid.*, p. 53. He further reiterated that "the decision taken today by the Council...is legal". *Ibid.*, p.56.

<sup>59</sup> Schachter, O., *supra* note 1, p. 21.

nature and the complexity of judicial decisions of the Court and their enforcement through political bodies such as the Security Council, and the non-exhaustive list provided by Articles 41 and 42 of the Charter, it could be argued that the Council may recommend or decide upon measures which it sees it appropriate even if they are different from those listed in Articles 41 and 42 as long as they are not *prima facie ultra vires*.<sup>60</sup> It should be emphasised, however, that when the Council adopts measures not enumerated in Articles 41 and 42, the measures adopted ought not to exceed in their gravity the measures enumerated under these Articles, otherwise, a recalcitrant State could refuse compliance on the ground that the Council's decision and the measures adopted accordingly are *ultra vires*. The Council could, on the other hand, take measures with similar or less gravity than those indicated under Article 41 and 42 of the Charter, under its implied powers to discharge its responsibility under Article 94 (2). In the *Namibia Opinion*, the Court endorsed the Council's general implied powers stemming from its general responsibility for maintaining and restoring international peace and security.<sup>61</sup> In this connection, the Court went further to state that Article 25, which endows decisions of the Security Council with legally binding effect upon Member States, applied not only to decisions taken under Chapter VII, but also to those taken under general implied powers.<sup>62</sup>

Therefore, the Security Council has a variety of measures to adopt, such as cultural and communications measures, including the suspension of scientific co-operation and banning international flights,<sup>63</sup> diplomatic and political measures, including the suspension of certain rights relating to the Organisation and expulsion, as well as economic measures or military measures. The Council may also make a recommendation to the General Assembly to suspend the defaulting State from the exercise of its rights and privileges in the organisation in accordance with Article 5 of the UN. Charter, since measures taken under Article 94 are regarded as preventive

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<sup>60</sup> *Certain Expenses of the United Nations*, ICJ. Rep. (1962), p.168; *Lockerbie (Libya v. USA)*, ICJ. Rep. (1992), para. 42.

<sup>61</sup> See generally, Manuel Rama-Montaldo, M., "International Legal Personality and Implied Powers of International Organizations", 44 *BYBIL*, (1970), pp.111-55; Khan, R., *Implied Powers of the United Nations*, (Vikas Publications, 1970); Zuleeg, M., "International Organizations, Implied Powers", in Bernhardt, R., (ed), 7 *EPIL*, (North-Holland Elsevier Science Publisher, 1984), pp. 312-314; Skubiszewski, K., "Implied Powers of International Organizations", in Dinstein, Y., *International Law at a Time of Perplexity*, (Martinus Nijhoff Publishers, 1989), pp. 855-868.

<sup>62</sup> *Namibia Opinion*, ICJ. Rep. (1971), pp. 52-54.

<sup>63</sup> See, e.g., SCR/670/1991 (Iraq), SCR/748/1992 (Libya), SCR/757/1992 (Yugoslavia), and SCR. 1267/1999 (Afghanistan, Taliban). See generally, Vera Gowlland-Debbas, *United Nations Sanctions and International Law*, (Kluwer Law International, 2001).

and enforcement action with the meaning of Article 5.<sup>64</sup> Similarly, it could recommend to the General Assembly under Article 6 of the Charter to expel the defaulting party if it continues persistently to violate the Principles of the Charter, including the obligation of compliance with and enforcement of the judicial decisions of the ICJ.

The Security Council may decide also to initiate investigations to establish the facts and the causes of the origin of non-compliance with the Court's decision. It may dispatch a commission of inquiry to verify the alleged violations on the ground. It could also establish joint or mixed commissions or observers to monitor, for example, the effective execution of the Court's judgment.<sup>65</sup> The Security Council could also establish a commission to facilitate enforcement of a particular decision, especially boundary disputes. For this particular purpose, the Council could create a trust fund for the delimitation and demarcation of the borders established by the Court when the parties concerned do not fall within the criteria established under the Secretary General's Trust Fund to Assist States in the Settlement of Disputes Through the International Court of Justice.<sup>66</sup>

Almost all these forms of enforcement measures have been taken in the aftermath of the hostilities between Eritrea and Ethiopia, which erupted in 1998 and again in 2000 and Ethiopia's non-compliance with the Boundary Commission's decision of 13 April 2002. In 1998, the Security Council adopted Resolution 1177 (1998), in which it, *inter alia*, requested the Secretary -General to provide support to the parties to assist them in the eventual delimitation and demarcation of their common border and, for this purpose, established a United Nations Trust Fund.<sup>67</sup> A Boundary Commission and Claims Commission was established in accordance with the Peace Agreement concluded between Ethiopia and Eritrea in Algeria on 12 December 2000.<sup>68</sup> After the Boundary Commission's decision was rendered, the Council, on 14 August 2002 adopted Resolution 1430 in which it called upon the party to enforce the decision of the Boundary Commission. It also adjusted the

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<sup>64</sup> Schutz, H-J., "Article 5", in Simma, B., *et al.*, (eds), *The Charter of the United Nations*, (Oxford Univ. Press, 2002), pp. 195-206, at p. 198.

<sup>65</sup> For further reference, see the discussions undertaken under Section 4 *infra*.

<sup>66</sup> See Section 4 *infra*.

<sup>67</sup> UN.Doc. S/Res/1177 (1998), 26 June 1998.

<sup>68</sup> UN.Doc. S/2000/1183.

mandate of United Nations Missions in Ethiopia and Eritrea, primarily in order to assist the parties to implement the Commission's decision expeditiously.<sup>69</sup>

The Security Council may also utilise specialised agencies and other international regional organisations under Articles 52 and 53 of the Charter, whose member States are under an obligation to cooperate with the United Nations and, under Articles 25 and 103 of the Charter, to give effect to the Court's decision. Under these provisions, member States of these regional organisations will have to give enforcement of the Court's decision priority over their obligations under their constituent instruments. It could request these institutions to take certain actions against a defaulting State, even if it is not a member of the regional organisation concerned. Such actions, which are not necessarily within the parameters of Chapter VIII, will nevertheless remain lawful under Article 25 of the Charter. In addition, the Council may utilise other specialised agencies to induce the recalcitrant States to comply with the Court's judgment. It may, for instance, order the World Bank or IMF to turn over the judgment debtor's fund to the judgment creditor.<sup>70</sup> The Council may invite both a regional organisation and a specialised agency, to co-ordinate with each other for effective enforcement of the measures adopted.<sup>71</sup>

The Security Council may be asked to order member states to seize the assets of the judgment debtor in their territory or if it is necessary impose restrictions on the travel of the senior officials and adults members of their immediate families of the defaulting State.<sup>72</sup> Likewise, the Council could impose a lump sum or penalty payment if the recalcitrant Member State persists in infringing its obligations under the judgment of the Court and subsequently the decision of the Council to secure compliance as rapidly as possible. Similarly, the Council may even rely on a particular member State to take all necessary means to give effect to the judgment of the Court and establish and maintain a safe and stable environment, for instance, in the disputed territory.<sup>73</sup>

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<sup>69</sup> UN.Doc. S/Re/1430 (2002), 14 August 2002.

<sup>70</sup> O'Connell, M. E., "The Prospects for Enforcing Monetary Judgments of the International Court of Justice: A Study of Nicaragua's Judgment Against the United States", 30 *Va.J.Int'l L.* (1990), pp. 891-940, at pp. 911-913.

<sup>71</sup> See SCR/1295 (2000), para.25, in which the Council invited SADC to liaise with ICAO to consider the establishment of an air traffic regime for the control of regional air space in Angola (UNITA).

<sup>72</sup> SCR/1295 (2000), 18, April 2000. See also, Section 4.1. *infra*.

<sup>73</sup> See, e.g., SCR/940 (1994) of 31 July 1994, which authorized the United States to "use all necessary means to facilitate the departure from Haiti of the military leadership". See generally, Malone, D., *Decision-making in the UN Security Council: the case of Haiti, 1990-1997*, (Oxford Univ.Press, 1998).

Alternatively, the Council and without the need to specify any concrete type of measures, may remind the member States of their obligations under the Charter and reiterate the Court's pronouncements which will thus be indirectly addressed to all member States by virtue of Article 25 of the Charter. This would be appropriate and probably effective especially in cases of declaratory judgments and self-executory judgment. Although they need no enforcement action, it nevertheless would require a duty of non-recognition by all member States and not only the parties concerned.<sup>74</sup> In conclusion, the measures that may be adopted by the Council are open-ended and would generally be legitimate unless they violate the rules of *jus cogens* and consequently are *ultra vires* acts.

### 3. The General Assembly

The General Assembly of the United Nations is the most valuable forum for discussion of any question that concerns international community. Although the General Assembly is not specifically vested with a competence to enforce the judicial decisions of the ICJ under Article 94 (2), one should not deduce from this that the Charter rules out such a competence.<sup>75</sup> Therefore, an argument against such competence based on Article 94 (2) of the Charter cannot prevent, in certain circumstances, the General Assembly from assuming this responsibility under Articles 10, 11, 14, 22 and 35 of the UN. Charter as well as under its resolution 377 which is commonly known as the *Uniting For Peace Resolution*.<sup>76</sup> Apart from the implied powers doctrine which is derived from the performance of the essential purposes of the organisation and the spirit and context of the Charter as a whole, the General Assembly has undoubtedly a wide competence to discuss and adopt resolutions, within certain constraints, on any matter, including claims of non-compliance with the Court's judicial decisions.<sup>77</sup> This general competence of the Assembly in this context is in some circumstances restricted, generally under Article 2 (7) of the Charter and specifically under Article 12 of the Charter.

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<sup>74</sup> Tanzi, A., *supra* note 54, p. 572.

<sup>75</sup> *Ibid.*, p. 546.

<sup>76</sup> GAR. 377 (v) of 3 November 1950, GAOR (V) Supp. No. 20, p. 10.

<sup>77</sup> Magid, P., *supra* note 30, p.331; Mosler, H., & Oellers-Frahm, K., "Article 94", *supra* note 1, p.1178.

However, generally speaking, the General Assembly's resolutions only possess recommendatory rather than obligatory power, except in matters such as the admission of new members, the approval of the budget and the apportionment of expenses.<sup>78</sup> Also, its resolutions can be binding when the parties concerned agreed to accept the recommendations or the resolution to be binding. Thus Resolution 289 of the General Assembly of 21 November 1949 involving Libya, Somalia and Eritrea was binding because the major powers in the Italian Peace Treaty had agreed to accept the recommendations of the General Assembly on the disposal of the former Italian colonies as binding. Additionally, the recommendatory nature of the Assembly resolutions was never doubted by the Court itself.<sup>79</sup> Thus, one would wonder how effective these resolutions would be in order to induce a recalcitrant judgment debtor to comply with the judicial decision of the ICJ. This section examines the general competence of the General Assembly under the relevant provisions of the Charter and the *Uniting For Peace Resolution* as well as the question of reviewing a decision of the Court, including the restrictions on its competence. It finally examines the enforcement measures available to it and their effectiveness.

### 3.1. The Comprehensive Competence of the General Assembly

The General Assembly under Article 10 of the UN Charter may "discuss any questions or matters within the scope of the present Charter or relating to the powers and functions of any organs" and "may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matter". Thus, Article 10 provides the Assembly with a wide competence to deal with numerous and various matters. In the view of Goodrich and Hambro, Article 10 "is a world *forum* where all important questions within the scope of the Charter can be discussed".<sup>80</sup> This is probably true except as provided in Article 12 (1) which reads "While the Security Council is exercising in respect of any dispute or situation the

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<sup>78</sup> Articles 4(2) and 17. See generally, Sloan, F.B., "The Binding Force of A 'Recommendations' of the General Assembly of the United Nations", 25 *BYBIL* (1948), pp. 1-33; also his, "General Assembly Resolutions Revisited", 58, *BYBIL*, (1987), pp.39-150.

<sup>79</sup> Thirlway, .H., "The Law and Procedure of the International Court of Justice", 67 *BYBIL*, (1996), pp.1-73, at p. 63.

<sup>80</sup> Goodrich, L.M., & Hambro, E., *Charter of the United Nations*, (Stevens & Sons, 1949), p.153, Goodrich, L. M, Hambro, E., and Simons, A. P, *Charter of the United Nations: Commentary and Documents*, 3<sup>rd</sup> & Revised ed (Columbia Univ. Press, 1969), p. 113. See generally, Vallat, F. M., "The Competence of the United Nations General Assembly", 97 *RdC*, (1959-II), pp.203-292.

functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests.” However, the primary purpose of this exception is not to prevent the General Assembly from making any measures concerning any matter or questions brought before it, but rather is to avoid any duplication or interference through simultaneous discussion of the same matter being brought before the Security Council.<sup>81</sup>

This comprehensive competence of the Assembly is reinforced in Article 11 of the Charter. Under Article 11 (1), the Assembly, either following a formal request by a member State, other organs or on its own initiative, “may consider the general principles of co-operation in the maintenance of international peace and security...” and “make recommendations with regard to such principles to the Members or to the Security Council or to both” even if the matter in question is still pending before the Council. There is no restriction on its competence in this context. So, paragraph 1 of Article 11, could be more problematic than it seems to suggest.<sup>82</sup> Although paragraph 1 speaks merely about the competence of the Assembly to “consider the general principles of cooperation in the maintenance of international peace and security”, which in principle should not contradict or interrupt the deliberation, negotiations or the resolutions of the Security Council in this regard, it nevertheless gives the Assembly the competence to “make recommendations” with regard to these principles concerning “the maintenance of international peace and security including principle governing disarmament and the regulation of armaments” directed to the Members or to the Security Council or to both any time.

It is not necessary that the recommended measures made by the Assembly concerning such principles to be compatible with the recommended measures adopted by the Council in this regard, as long as Article 12 (1) does not apply in this context. Although Halbrunner and Klein suggested that there “is no qualitative distinction between the terms ‘consider’ and ‘discuss’ as used in Art.10”, they after a few passages admitted that the general principles referred to in 11 (1) “are all covered by the ‘question’ and ‘matter’ within the meaning of Art.10”.<sup>83</sup> This analysis is not

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<sup>81</sup> See also Nantwi, E.K., *Enforcement of International Judicial Decision and Arbitral Award in Public International Law*, (Leyden, 1966), p.155.

<sup>82</sup> For a contrary view, see Halbrunner, K., & Klein, E., “Article 11”, in Simma, B., *et al.*, (eds), *The Charter of the United Nations*, (Oxford Univ. Press, 2002), Vol.1, pp.276-287, at p. 277.

<sup>83</sup> *Ibid.*

accurate and contradicts itself. If we assumed that these principles are correctly covered by the terms “question” and “matter” as used in Article 10, it would have been crucial to condition the competence of the Assembly under Article 11 (1) as Article 10 does.

Similarly, if we assumed that there is no qualitative distinction between the terms “consider” and “discuss” it would not have been essential to restrict the competence of the Assembly under Article 11 (2) which authorises the Assembly to “discuss any questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations, or by the Security Council, or by a state which is not a Member of the United Nations ... and *except as provided in Article 12*, may make recommendations with regard to any such questions to the state or states concerned or to the Security Council or to both.” So, Article 11 (2) presents less risk of conflict with the power of the Security Council because of the specific questions of international peace and security and the restriction imposed on the General Assembly under Article 12 (1) to refrain from making recommendations when the matter is pending before the Council. However, the competence of the Assembly must be differentiated from its duty to make recommendations with regard to a specific dispute or situation upon a request from the Security Council under Article 12 (1) of the Charter.

The General Assembly also, under Article 11 (3) of the Charter, has the power to call the attention of the Security Council to situations that are likely to endanger international peace and security. This power strengthens the position of the General Assembly *vis-à-vis* the Security Council.<sup>84</sup> It also represents a form of persuasion aimed at weakening any possible disinterest or unwillingness on the part of members of the Council.<sup>85</sup> Additionally, however, the General Assembly under Article 14 may “recommend any measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations, including situations resulting from violation of the provisions of the present Charter setting forth the Purposes and Principles of the United Nations”. Likewise, the Council’s responsibility under Article 24 of the Charter is not exclusive in the maintenance of international peace and security. It merely has a priority over the Assembly in this regard. Therefore, Article 35 (1) of the Charter puts the Assembly

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<sup>84</sup> *Ibid.*, p. 284.

<sup>85</sup> Goodrich, L.M., & Hambro, E., *supra* note 80, p. 171.

and the Council on equal footing, at least, concerning the right to investigate any dispute, or any situation which might lead to international friction or give rise to a dispute that is likely to endanger the maintenance of international peace and security as indicated under Article 34 of the Charter. This interpretation finds support in the Court's Advisory Opinion in *Certain Expenses of the United Nations*. In connection with Articles 14 and 24 of the Charter, the Court stated:

The responsibility conferred is 'primarily', not exclusive. This primary responsibility is conferred upon the Security Council, as stated in Article 24 [...] The Chapter makes it abundantly clear, however, that the General Assembly is also to be concerned with international peace and security. Article 14 authorizes the General Assembly to 'recommend measures for the peaceful adjustment [...]' The word 'measures' implies some kind of action, and the only limitation which Article 14 imposes on the General Assembly is the restriction found in Article 12, [...]. Thus while it is the Security Council which, exclusively, may order coercive action, the functions and powers conferred by the Charter on the General Assembly are not confined to discussion, consideration, the initiation of studies and the making of recommendations; they are not merely hortatory.<sup>86</sup>

In fact, the Assembly has exercised this responsibility in connection with its *Uniting for Peace Resolution*, which was adopted primarily to improve the United Nations' machinery on the maintenance of international peace and security,<sup>87</sup> and an attempt to avoid a veto in the Council.<sup>88</sup> It should be emphasised, however, that the power to take enforcement measures through the Assembly when there is a threat to

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<sup>86</sup> *Certain Expenses Advisory Opinion* of 20 July 1962. ICJ. Rep. (1962), p.163; *Nicaragua case*, ICJ. Rep. (1984), para. 95. See also *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, ICJ. Rep. (1996), 226, 232, para.11.

<sup>87</sup> Goodrich L.M., & Simons, L. B., *The United Nations and the Maintenance of International Peace and Security*, 2<sup>nd</sup> ed, (The Brookings Institution, 1957), p. 406.

<sup>88</sup> The most important passage of the Resolution reads: "[The General Assembly] resolves that if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Member for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force, when necessary, to maintain or restore international peace and security." GAR. 377 (v) of 3 November 1950, GAOR (V) Supp. No. 20, p. 10.

international peace and security was not given to it through this Resolution, but rather by virtue of the spirit of the Charter itself,<sup>89</sup> and other relevant provisions of the Charter, namely Articles 10, 11, 14, 22 and 35 (1), (2) of the Charter.<sup>90</sup>

In any event, the Resolution should not be treated as a transfer of the power of the Security Council but rather as an alternative mechanism to be utilised when the Security Council is proven to be ineffective or unable to discharge its responsibilities under the Charter. This compels Professor Rosenne to believe that the *Uniting For Peace Resolution* creates “a stronger parallelism between the powers and functions of the General Assembly and those of the Security Council, implies as a natural consequence recognition that organs other than the Security Council can deal with problems concerning compliance with decisions of the Court”.<sup>91</sup> The competence of the Assembly to deal with complaints of non-compliance with the decisions of the ICJ should be considered as “disputes” or “situations” under these provisions and thus within the prerequisites of other relevant provisions. Its competence in this regard should not thus be doubted. However, whether its comprehensive competence includes the power to review a decision of the Court is another question that now is to be examined.

### **3.2. The General Assembly and the Power to Review a Decision of the Court**

The General Assembly may under Article 22 of the UN Charter “establish such subsidiary organs as it deems necessary for the performance of its functions”. Such subsidiary organs may include judicial bodies with the power of adjudication. The classical example is the United Nations Administrative Tribunal, which was established by General Assembly resolution 351 A (IV) of 24 November 1949. Yet the question to be raised is whether the Assembly can establish such body with the competence to deal with complaints of non-compliance with the judicial decisions of

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<sup>89</sup> Halbronner, K., & Klein, E., “Article 10”, in Simma, B., *et al.*, (eds), *The Charter of the United Nations*, (Oxford Univ. Press, 2002), pp.257-275, at p. 266.

<sup>90</sup> For more debate regarding the powers of the General Assembly with respect to actions for the maintenance of international peace and security, see in particular Andrassy, J., “*Uniting for Peace*”, 50 *AJIL* (1956) pp.563- 582; Kosonene, A., *The United Nations General Assembly and the Authority to Establish UN Forces: an interpretative analysis of the Charter, the theories of implied and inherent powers, and the Uniting for Peace Resolution*, (Institute of Public Law, the Univ. of Helsinki, 1986).

<sup>91</sup> Rosenne, S., *The Law and Practice*, *supra* note 1, p. 259.

the ICJ either following a complaint from the affected party or on its own initiative? Indeed the competence of the Assembly to establish subsidiary organs is now beyond any question. In fact, hundreds of subsidiary organs have been established since 1946.<sup>92</sup> Yet, whether the General Assembly could validly establish a subsidiary judicial organ for the purposes of reviewing the judicial decisions of the ICJ is very questionable. Its competence in this context is also not free from any limits.

Besides the arguments undertaken in Section 2.3 above in connection with the application of Articles of 59, 60, and 61 of the Statute of the Court and Article 94 of the UN Charter which all constrain the Council from reviewing the judgment of the Court, the Court's Advisory Opinion in the *Effects of Awards of Compensation Made by the United Nations Administrative Tribunal* supports this same conclusion. In that Opinion, the Court was asked to answer whether the General Assembly had "the right on any grounds to refuse to give effect to an award of compensation made by that Tribunal in favour of a staff member of the United Nations whose contract of service has been terminated without his assent" and "If the answer given by the Court to question (1) is in the affirmative, what are the principal grounds upon which the General Assembly could lawfully exercise such a right?" To the first question the Court replied that the General Assembly did not have the right on any grounds to refuse to give effect to an award of compensation made by the UNTA in favour of a staff member of the United Nations whose contract of service had been terminated without his assent. The answer to the first question was in the negative, thus the Court saw it unnecessary to consider the second. However, it examined whether the General Assembly could transfer a judicial power to subsidiary organ established under Article 22 of the Charter. The Court found that such a power could hardly have been conferred on an advisory or subordinate organ. After pointing that a judgment rendered by such a judicial body is *res judicata* and had binding force between the parties to the dispute, asserted that the judgment of the UNAT, which was final and without appeal, was not subject to "any kind of review". It concluded, that, in any event, the General Assembly itself, in view of its composition and functions, could hardly act as a judicial organ, all the more so as one party to the disputes is the Organisation itself.<sup>93</sup>

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<sup>92</sup> Hilf, M., & Khan D-E, "Article 22" in Simma, B., et al., (eds), *The Charter of the United Nations*, (Oxford Univ. Press, 2002), pp.420-436, at p. 421 and the Annex at pp. 433-436.

<sup>93</sup> ICJ. Rep. (1954), pp. 47, 53, and 58-59.

The practice of the General Assembly seems to confirm this interpretation. It suggests its unwillingness to decide or make concrete recommendations concerning controversial legal disputes between member States even if it is brought before it by either party. So, when the question of Irian was brought before the General Assembly in its ninth session in 1954, Indonesia raised a claim to sovereignty over the territory of West New Guinea. After facing some controversial issues for eight years on this item, the General Assembly was unable to assist the parties in finding a solution because it came to the conclusion that the problem was primarily legal one which ought to be decided by a judicial body, namely the ICJ.<sup>94</sup>

In any event, when the Assembly is willing to discuss any dispute or complaints of non-compliance with a given judgment, and before making any recommendation, debates normally take place in the General Assembly which are normally furnished with arguments whether legal or politically motivated ones. As a political body, the Assembly is free to accept or reject any argument, which from its perspective are convincing, and it may adopt a resolution accordingly. But even if these arguments are convincing, on the one hand, but could threaten the integrity of the judicial decision in question on the other hand, the Assembly must refrain from recommending any measures which may repudiate the authority of *res judicata*,<sup>95</sup> or even weaken it for the same reasons advanced in section 2.3.

This conclusion is also supported by the attitudes of the Member States in the General Assembly with regard, for instance, Advisory Opinions of the Court even though they do not acquire the authority of *res judicata*.<sup>96</sup> In fact, there is a general consensus among Member States of that any finding of the ICJ even in an Advisory Opinion and even upon political considerations should not be refused or rejected.<sup>97</sup> This proposition was articulated by the Representative of the United States regarding the Advisory Opinion on *Certain Expenses of the United Nations*:

[M]y Government sees no need for this Assembly to pass upon, or even go into, the reasoning of the Court. [...] The draft resolution [accepting the advisory opinion] anticipates the General Assembly performing a function which is proper to it. The General Assembly is

<sup>94</sup> Halbronner, K., & Klein, E., "Article 10", *supra* note 89, p.261.

<sup>95</sup> Murty, B. S., *supra* note 34, p. 712.

<sup>96</sup> Kerley, E. L., *supra* note 52 p.278.

<sup>97</sup> Tanzi, A., *supra* note 54, at fn. 36 and 37, at pp. 548 and 549.

not a Court. It is not a judicial organ of the United Nations, and still less it is 'the principal judicial organ of the United Nations', as Article 92 of the Charter describes the International Court of Justice. It is not the function of this Assembly ... to act as a Court to review the International Court of Justice. To do so would depart from the Charter's clear intention. When the Court's opinion is asked, establishment and interpretation of the law, in the design of the Charter, is the function of the Court; action to implement the law is, as the case may be, the function of other organs of the United Nations.<sup>98</sup>

Likewise, on 6 December 1949 the General Assembly adopted resolution 337 to obtain an advisory opinion from the ICJ on the international status of the Territory of South West Africa and the international obligations of the Union of South Africa under the Mandate for South West Africa. The Court in its Advisory Opinion of 11 July 1950 found that the Mandate was still valid and the Union of South Africa was still obliged by the terms of Article 22 of League Covenant and the Mandate to transmit petitions from inhabitants of the territory to the United Nations despite the dissolution of the League of Nations.<sup>99</sup> Subsequently, the General Assembly endorsed the Opinion, and thus urged the Government of Union of South Africa to "take the necessary steps to give effect to the opinion of the International Court of Justice..."<sup>100</sup> Furthermore, it established a Committee consisting of five representatives of Denmark, Syria, Thailand, the United States and Uruguay to confer with the Union of South Africa to implement the Court's findings.<sup>101</sup>

Although the General Assembly Resolution 449 was intended to secure compliance with an Advisory Opinion,<sup>102</sup> it reveals the readiness of the General Assembly to deal with such matters. It should also be mentioned that the General Assembly repeatedly maintained its position concerning the implementation of the Court's Opinion until South West Africa gained its independence on 21 March 1990 under the name of Namibia.

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<sup>98</sup> UN General Press Release No. 4112, (1962), 3.

<sup>99</sup> *International Status of South West Africa*, ICJ. Rep. (1950), 128.

<sup>100</sup> GAR 449/A & B (V) of 13 Dec. 1950. GAOR, V Supp.20 (A/1775), pp.55-56.

<sup>101</sup> *Ibid.*

<sup>102</sup> Nantwi, E.K., *supra* note 81, p. 160.

Nicaragua's case also provides a further classical example that illustrates not only the competence and the responsibility of the General Assembly in case of non-compliance with the Court's decision, but also the practice of Member States not to repudiate the authority of the Court nor to give the Assembly any authority of review of the decision of the ICJ. After the Security Council failed to give effect to the Court's judgment in the *Nicaragua* case (*Nicaragua v. United States*),<sup>103</sup> Nicaragua appealed to the General Assembly in its 41<sup>st</sup> session, which affirmed the Court's decision, as it did in subsequent sessions, calling upon the United States to comply with the Court's judgment. The Assembly adopted Resolution 41/31 on 3 November 1986, in which the most important passage read:

Aware that, under the Charter of the United Nations, the International Court of Justice is the principal judicial organ of the United Nations and that each Member undertakes to comply with the decision of the Court in any case to which it is a party;

Considering that Article 36 of the Statute of the Court provides that "in the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court";

Taking note that of the judgment of the International Court of Justice of 27 June 1986 in the case of "Military and Paramilitary Activities in and against Nicaragua"; ...

Urgently calls for the full and immediate compliance with the judgment of the International Court of Justice of 27 June 1986 in the case of "Military and Paramilitary Activities in and against Nicaragua" in conformity with the relevant provisions of the Charter of the United Nations; ...<sup>104</sup>

It should be emphasised that in the debate that preceded and followed the vote on that resolution, and apart from the United States' reiteration of the arguments put forward in the Council against the Court's assertion of jurisdiction, the authority of the Court and *res judicata* of the Court's decision was left intact. Even the Representatives of El Salvador and Israel, who voted against the resolution, did not

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<sup>103</sup> ICJ. Rep. (1986), p.4.

<sup>104</sup> A/Res/41/31 (1986) 3 November 1986.

object to the validity of the Court's judgment but they confined their objections to the content of the draft resolution itself.<sup>105</sup> More strikingly, the representative of Mexico rigorously reiterated that compliance with Court's decisions should always be supported "regardless of any particular position taken on the substance of the issue that led to the litigation". He added, "failing to do that would undermine the legal foundations of the international order as well as the importance and compulsory nature of the judgments of the International Court of Justice".<sup>106</sup> In the same vein, the representative of Luxembourg made it clear that his government did not vote against the draft resolution because it recognised "the validity of the judgments of the International Court of Justice".<sup>107</sup> The General Assembly maintained its position until a change of government in Nicaragua which led also to the discontinuance of the case in the Court.<sup>108</sup> In conclusion, the Assembly has no authority to repudiate the validity of the judicial decisions of the ICJ through any form of recommendation that is consistent with the judgment of the Court nor is able to validly establish a subsidiary organ to review a final judgment rendered by the principal judicial organ of the United Nations.

### 3.3. Measures Available to the General Assembly

Apart from the condemnation and other measures it took in the aftermath of the Court's advisory opinion on the *International Status of the Territory of South West Africa*, and the inclusion and retention in its session an item of non-compliance with a given judgment, as it did from 1986 to 1989 in the aftermath of the United States' refusal to comply with the Judgment of the Court of 27 June 1986 in the *Nicaragua* case in four successive sessions,<sup>109</sup> the General Assembly, could under Articles 10, 11, and 14 of the Charter and the *Uniting for Peace Resolution*, consider, discuss, investigate and recommend measures to be taken to give effect to an international obligation, including the judicial decisions of the ICJ. These measures may include the recommendations of coercive or enforcement action, as opposed to actually taking

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<sup>105</sup> UNDoc. A/41/PV 53, p. 93. See generally, Akehurst, M., "*Nicaragua v. United States of America*", 27 *Indian J. Int. Law* (1987), pp. 357-384.

<sup>106</sup> UNDoc. A/41/PV 53, at 77.

<sup>107</sup> *Ibid.*, at 93.

<sup>108</sup> ICJ. Rep. (1991), p. 47. See also GAR 45/402 OF 21 December 1990 in which the Assembly decided to defer consideration of the same item which was then dropped from its agenda.

<sup>109</sup> A/Res/42/18 (1987), para. 3, A/Res/43/11 (1988), para.3, and A/Res/44/43 (1989), para.3.

coercive or enforcement action. In the view of the Court, these measures “not merely applies to general questions relating to peace and security, but also to specific cases brought before the General Assembly by a State under Article 35”.<sup>110</sup> In doing so, and in connection with its competence under Article 22 of the Charter, the General Assembly could set up investigating committees,<sup>111</sup> observers,<sup>112</sup> and committees to supervise mandated territory, receive and examine resorts from Mandatory Powers,<sup>113</sup> or to observe enforcement on the ground.

The General Assembly under Articles 5 and 6 of the Charter and in co-operation with the Security Council may suspend a member of the United Nations against which preventive or enforcement action has been taken by the Security Council from the exercise of its rights and privileges of membership, while under Article 6, the General Assembly may expel from the Organisation a Member that has persistently violated the Principles contained in the Charter upon the recommendation of the Security Council. The Assembly could also refer any question to the Security Council to take certain action to induce the recalcitrant party to comply with its obligations under the Court’s judgment.

It could also recommend to certain Member States to take certain measures against a defaulting State. For instance, in its Resolution 193 (III), 27 November 1948, the Assembly called upon Albania, Bulgaria and Yugoslavia to refrain from supporting insurgent groups in North Greece, and recommend to Member States to prevent the export of raw materials to Greece’s neighbouring States. It could also order a peacekeeping force to monitor borders or send the Secretary-General to discuss compliance with the Court’s decisions.

Additionally, the General Assembly may recommend the interruption of trade relations or blocking assets of the recalcitrant State or recommend the suspension or the denial of benefits and services to it.<sup>114</sup> Similarly, under the *Uniting for Peace Resolution*, the General Assembly asserted its authority to brand the People’s Republic of China as an aggressor for its intervention in the Korean War. It also

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<sup>110</sup> *Certain Expenses of the United Nations*, Advisory Opinion of 20 July 1962, ICJ.Rep. (1962), p. 164.

<sup>111</sup> *United Nations Special Committee on Palestine* (UNSCP), which was set up to investigate the conditions in Palestine. *UNYB* (1946-7), PP. 294, 301.

<sup>112</sup> *United Nations Observation Group in Lebanon* (UNOGIL). *UNYB* (1958), p. 38.

<sup>113</sup> *International Status of South West Africa*, ICJ. Rep. (1950), 137.

<sup>114</sup> O’Connell, M. E., *supra* note 70, p. 913.

recommended imposition of economic sanctions in the form of an embargo on the shipment of various kinds of strategic materials against China and North Korea.<sup>115</sup>

Alternatively, the General Assembly may invest its Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization to draft a declaration on the enhancement of the enforcement of the judicial decisions of the ICJ that may be relied upon on further enforcement action. By analogy, the General Assembly has already done so with respect to its *Declaration on the Enhancement of Cooperation between the United Nations and Regional Arrangements or Agencies in the Maintenance of International Peace and Security*, which was adopted in 1994.<sup>116</sup>

### 3.4. The Effectiveness of the Measures Adopted by the General Assembly

Referring disputes or situations such as claims of non-compliance with the Court's decisions to the General Assembly is probably more influential from a publicity perspective than to the relatively narrow circle of the Security Council.<sup>117</sup> An Assembly resolution generally represents a form of public diplomacy, telling what most member States think of the matter in question. Also from a technical perspective, referring such claims to the Assembly first and then to the Council after securing a resolution from the former calling upon the judgment debtor to enforce the Court's decision, would add double authority to the Court's decision.

In addition, it could be argued that the effect of consent in these resolutions as reflected by the overwhelming majority in the Assembly strengthens the validity and thus the likelihood of the enforceability of the Court's decision before this organ. It could also provide a political basis for legal action by third States and supportive of any national measures which may be taken in this context.<sup>118</sup> Furthermore, it can be relied upon, by the injured State, for instance, as a legitimate justification for judicial

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<sup>115</sup> GA Res. 498(V), Feb. 1, 1951; 500 (V), May 18, 1951. In other cases the GA although it sought to invoke the Security Council's authority to take measures under Chapter VII of the Charter against, for instance, South Africa and Portugal, it has considered itself justified in calling for the application of economic sanctions. Goodrich, Hambro & Simons, *Charter of the United Nations: Commentary and Documents*, *supra* note 80, p. 126-27.

<sup>116</sup> UN.Dco. A/RES/49/57 (1994). 84th plenary meeting 9 December 1994.

<sup>117</sup> See generally, Kunz, J.L., "Sanctions in International Law", 54 *AJIL*, (1960), pp. 324-347, at p.336.

<sup>118</sup> Schachter, O., "International Law in Theory and Practice: General Course in Public International Law", 178 *RdC*, (1982), pp.1-395, p. 226.

or institutional enforcement action. Accordingly to Professor Schachter, such a resolution can “provide a political basis for legal action by other States and have at least a persuasive role in supporting the validity of such national measures if they should be attacked in local courts”.<sup>119</sup> Moreover, further subsequent and relevant resolutions adopted by the General Assembly on the same question may be considered in themselves an essence of enforcement of the Court’s decisions,<sup>120</sup> which could be inducive to compliance. It could produce or exert more pressure on the defaulting State to fulfil its international obligations as determined by the Court. This also requires the General Assembly to adopt resolutions reminding the defaulting States of its obligation, and declaring that non-compliance with the decisions of the judicial organ of the United Nations is a wrongful act that consequently entails its international responsibility. This morally forcible language adds a new dimension to the overall role of the General Assembly in the enforcement of international obligations.<sup>121</sup>

Yet, the potential effectiveness of the Assembly’s resolutions should not be overstated. For instance, the United States’ defiance of the judgment of the ICJ in the *Nicaragua* case and its use of force in and against Nicaragua, including the failure of the Security Council to exercise its primary responsibility in this regard due to the lack of unanimity of the permanent members, adequately met the fundamental criteria established under the *Uniting For Peace Resolution*. Nevertheless, the General Assembly failed to take any effective action to induce the United States to comply with its international obligation under the Charter and the Statute of the ICJ and to restore international peace and security. Thus, the effectiveness of the General Assembly, its functions and its resolutions under which it may establish subsidiary organs including, for instance, investigation, observation, and supervision committees and commissions, depend largely, if not exclusively, on “the consent of the State or States concerned”.<sup>122</sup>

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<sup>119</sup> *Ibid.* See also Lauterpacht, E., “Implementation of Decisions of International Organizations through National Courts”, in Schwebel, S.M., *The Effectiveness of International Decisions: Papers of a Conference of the American Society of International Law, and the Proceedings of the Conference*, (A.W.Sijhoff-Leyden, 1971), pp.57-65.

<sup>120</sup> Sloan, F.B., *supra* note 78, p. 26.

<sup>121</sup> *Ibid.*; Schachter, O., *supra* note 118, p. 226; Reisman, M., *Nullity and Revision*, *supra* note 22, p.729.

<sup>122</sup> *Certain Expenses of the United Nations*, Advisory Opinion of 20 July 1962. ICJ.Rep.(1962), p. 165.

Bearing in mind the inherent limited effectiveness of the General Assembly, the door remains open to seek other channels of enforcement within the Organisation of the United Nations itself, namely through the Secretary-General in whose name the Secretariat acts.

#### 4. The Secretary-General of the United Nations

As we have seen, the Security Council can authorise actions and impose various forms of sanctions, and that the General Assembly can employ some other recommendatory measures to induce the defaulting party to comply with its obligations under the Court's judgment. Yet, it is the Secretary-General who actually performs the functions necessary to bring about compliance with these international obligations through his "good offices" either upon an authorisation from these bodies or on his own initiative. This in itself is a form of dispute settlement and an enforcement mechanism that has its roots in the Hague Conventions of 1899 and 1907 which both provide that "before an appeal to arms" States shall "have recourse, as far as circumstances allow, to the good offices or mediation of one or more friendly Powers" and that "friendly Powers" are further authorised to take the initiative "to offer good offices or mediation even during the course of hostilities".<sup>123</sup>

The Charter of the United Nations provides no specific comparable provision. However, both the San Francisco Conference and the Preparatory Commission in varying degrees anticipated that the Secretary-General of the United Nations would play a significant role in the United Nations, but there was no general understanding as to what extent and how much importance he might assume.<sup>124</sup> This was already envisaged in the Report of the Preparatory Commission of the United Nations in 1945, which stated:

The Secretary-General may have an important role to play as a mediator and as an informal advisor of many Governments, and will undoubtedly be called upon him from time to time, in the exercise of his administrative duties, to take decisions which may justly be called

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<sup>123</sup> See Article 9 of both the 1899 and 1907 Hague Conventions.

<sup>124</sup> Cordenker, L., *The UN Secretary-General and the Maintenance of Peace*, (Columbia University Press, 1967), p.120; see also Elaraby, N., "The Office of the Secretary-General and the Maintenance of International Peace and Security" 42 *REDI* (1986), pp. 1-42, at p.1.

political. Under Article 99 of the Charter, moreover, he has been given a quite special right which goes beyond any power previously accorded to the head of an international organization, viz: to bring to the attention of the Security Council any matter (not merely any dispute or situation) which in his opinion, may threaten the maintenance of international peace and security. It is impossible to foresee how this Article will be applied; but the responsibility it confers upon the Secretary-General will require the exercise of the highest qualities of political judgment tact and integrity.<sup>125</sup>

Indeed the nature and scope of his good offices cannot be clearly defined.<sup>126</sup> Nonetheless, the term "good offices" is "a very flexible term as it may mean very little or very much".<sup>127</sup> In any event, securing compliance with and enforcement of the ICJ is a matter with which the Secretary General should also be vested. His role in the post-adjudicative phase is indeed indispensable. Surprisingly, however, most writers who have examined the problem of non-compliance with and enforcement of international judicial decisions in general and the decisions of the ICJ in particular overlook the political function and the power of the Secretary-General in this regard. The role of the Secretary-General in the process of enforcement of the Court's decisions will be divided into three sections: one deals with his general political function under Articles 98 and 99 of the Charter and the second deals with his potential role through requesting an advisory opinion from the Court pertaining to a case of non-compliance, while the third one deals with his role under the Secretary General's Trust Fund to Assist States in the Settlement of Disputes Through the International Court of Justice.

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<sup>125</sup> (PC/20), Dec. 23.1945, Chap. VIII, Sect.2, para. 16

<sup>126</sup> U Thant wrote "the nature of the Secretary-General's good offices, their limitations and the conditions in which he may hope to achieve results are perhaps less well understood". Introduction to the 1969 Annual Report, A/7601/Add. 1. Para.178.

<sup>127</sup> *Handbook on the Peaceful Settlement of Disputes Between States*, in Report of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organisation, GAOR Suppl. No. 33 (A/46/33), p. 62.

#### 4.1. The General Political Function of the Secretary-General

It is the practice of the General Assembly and the Security Council, and the drafting methodology pertaining to the resolutions of these bodies to contain an operative paragraph requesting the Secretary-General to keep them informed of the implementation of their decisions. This drafting methodology and formal request not only indicates the importance of his office to check implementation by the State concerned, but also establishes the political scrutiny and pressure the Secretary-General might employ to give effect to international obligations.

By issuing annual progress reports, he could at least keep a given issue from becoming moot. He could also exercise indirectly some similar pressure to induce a judgment debtor to give effect to the Court's decision under Article 98 of the U.N Charter, which provides in part, "The Secretary-General shall make an annual report to the General Assembly on the work of the Organization". His report, according to Rule 13(a) of the Rules of the Procedure of the Secretary-General, is a compulsory component of the provisional agenda of the regular sessions of the General Assembly. Such a report can cause world-wide pressure to act in favour of certain policy. In various occasions his reports has played a significant role in formulating and shaping the strategies and the decisions of the Security Council. This is apparent in his good offices missions which have frequently been transformed into a mission to secure and monitor the parties' compliance with their international obligations. His good offices missions have tackled disputes varying in substance and context including implementation of international judicial decisions.<sup>128</sup>

Additionally, under Article 99 of the UN Charter, the Secretary-General "may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security". The phraseology of Article 99 leaves no doubt that the Secretary General is to be vested with political powers<sup>129</sup> or a "special right"<sup>130</sup> arguably sufficient, in some circumstances, to be an effective instrument in securing compliance with international obligations. Under this Article, the Secretary-General may exercise broad powers on the basis of

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<sup>128</sup> See generally, Franck, T. M., "The Secretary-General's Role in Conflict Resolution: Past, Present and Pure Conjecture", 6 *EJIL* (1995), pp.360-387.

<sup>129</sup> Schwebel, S. M., *The Secretary-General of the United Nations: His Political Powers and Practice*, (Harvard Univ. Press, 1952), p. 21.

<sup>130</sup> (PC/20), Dec. 23.1945, Chapter. VIII, Sect.2, para. 16.

comprehensive information about any situation if, in his opinion, it may threaten the maintenance of international peace and security. In doing so, the Secretary-General may take the initiative to conduct investigations and inquiries even before deciding to invoke his right in bringing to the attention of the competent body the matter in question. These investigations and inquiries might lead to submission by a recalcitrant State to the decision of the Court without even the need to invoke Article 99. In other words, Article 99 and the discretionary power it implies, could be seen as a sort of a political instrument in the hands of the Secretary-General to induce a judgment debtor to comply with the decision of the Court through declarations, proposals or draft resolutions which the Secretary-General could submit to the competent body of the United Nations in which he can indicate the disrespect of the defaulting State to the rule of law and its violation of the principles and provisions of the Charter. In fact, the information of the Secretary-General could cause world-wide pressure on the Security Council to act in favour of certain policy. Yet, whether the Security Council acts on the Secretary-General's recommendation or advice, his voice could, in the hands of a fair, respected person, be of enormous influence.

The role of the Secretary-General as an "objective third party" has also been acknowledged through, for instance, the nomination of the Secretary-General Perez de Cuellar to act as an arbitrator in the *Rainbow Warrior* case (New Zealand vs. France). Both parties, through their permanent representatives to the United Nations, asked the Secretary-General to function as arbitrator in the settlement of the dispute resulting from the sinking of a civilian vessel, the "Rainbow Warrior" in Auckland Harbour, New Zealand, as a result of extensive damage caused by two high explosive devices placed by members of the French secret service on 10 July 1985. In conciliation proceedings, he ruled on 5 July 1986, *inter alia*, that the French Government "should every three months convey to the New Zealand Government and to the Secretary-General of the United Nations, through diplomatic channels, full reports on the situation of Major Mafart and Captain Prieur in terms of the two preceding paragraphs in order to allow the New Zealand Government to be sure that they are being implemented".<sup>131</sup> Pursuant to section 5 (Arbitration) of the conciliation proceedings,

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<sup>131</sup> Conciliation Proceedings (New Zealand vs. France): Ruling by UN Secretary-General Perez de Cuellar, New York, 5 July 1986. 26 *ILM* (1987), Section 5 (Arbitration), para (c), at p. 1346 (Emphasis added). See generally, Davidson, J. S., "The Rainbow Warrior Arbitration Concerning the Treatment of the French Agents Mafart and Prieur, 40 *ICLQ*, (1991), pp. 446-457.

and based on a supplementary arbitration agreement of 14 February 1989, and under a subsequent arbitration award of 30 April 1990, France was declared to have committed a material breach of its international obligations to New Zealand (due to the release of the two DGSE agents from Hao Island in 1988) and thus was ordered to pay another US\$ 2 million for non-compliance with the conciliation ruling.<sup>132</sup>

His role in the post-adjudicative phase of the ICJ is also significant. After the Court delivered its decision of 3 February 1994 on the *Territorial dispute* case between Libya / Chad,<sup>133</sup> the parties concluded on 4 April 1994 an agreement concerning the practical modalities for the implementation of the ICJ judgment.<sup>134</sup> In letters dated 6 and 7 April 1994 both parties transmitted that agreement to the Secretary-General,<sup>135</sup> who immediately established contact with the permanent representatives of the both governments to the United Nations.<sup>136</sup> On 13 April the Secretary-General informed the President of the Security Council of the letters, agreement and the understandings reached in consultations with him and advising of his intention to send a reconnaissance team to the area to conduct a survey of conditions on the ground regarding the possible deployment of United Nations observers to monitor the withdrawal by Libya from the area in question, and that the reconnaissance team would have to visit Libya on a United Nations aircraft flying to and from Libya for the purpose of executing the judgment of the ICJ.<sup>137</sup> Although Libya was under sanctions imposed by the Security Council at that time, the Council next day adopted resolution 910 (1994) in which it welcomed the agreement and decided to suspend the operation of paragraph 4 of its resolution 748 (1992)<sup>138</sup> for the purposes of conveying the Secretary-General's reconnaissance team.<sup>139</sup>

<sup>132</sup> The Secretary-General has also acted as a mediator in the Guyana-Venezuela boundary dispute. UN Press Release SG/SM/4668, 9 December 1991. He has also mediated disputes between Russia and the Baltic Republics (Lithuania, Latvia, and Estonia) in 1993-94 arising out of differences regarding the terms for withdrawal of remaining Russian military contingents and ancillary matters. See generally, Franck, T. M., "The Secretary-General's Role in Conflict Resolution: Past, Present and Pure Conjecture", 6 *EJIL* (1995), pp.360-387.

<sup>133</sup> *Libya / Chad*, ICJ. Rep. (1994).

<sup>134</sup> 6 *Afri.J.Int' & Comp. L.*, (1994), pp. 516-518.

<sup>135</sup> S/1994/402 & S/1994/424.

<sup>136</sup> *Secretary-General's Report Concerning the Agreement on the Implementation of the ICJ Judgment Concerning the Territorial Dispute Between Chad and Libya* [27/4/1994], 6 *Afri.J.Int' & Comp L* (1994), pp521-525,atp. 522.

<sup>137</sup> UN. Doc. S/1994/432.

<sup>138</sup> Paragraph 4 of resolution 748 provided "Decides that all States shall: (a) Deny permission to any aircraft to take off from, land in or overfly their territory if it is destined to land in or has taken off from the territory of Libya, unless the particular flight has been approved on grounds of significant humanitarian need by the Committee established by paragraph 9 below; (b) Prohibit, by their nationals or from their territory, the supply of any aircraft or aircraft components to Libya, the provision of engineering and maintenance servicing of Libyan aircraft or aircraft components, the certification of air-worthiness for Libyan aircraft, the payment of new claims against existing insurance contracts, and the provision of new direct insurance for Libyan aircraft". 3063rd meeting, 31, March 1992. UN.Doc. S/RES/748 (1992).

<sup>139</sup> 3363rd meeting, 14 April 1994, UN.Doc. S/RES/910 (1994), para 1

Having examined the report of the Secretary-General dated 27 April 1994,<sup>140</sup> the Security Council also adopted resolution 915 on 4 May 1994, authorising under Chapter VII and under the command of the Secretary-General, the United Nations Aouzou Strip Observer Group (UNASOG) to assist the parties in implementing the Judgment of the Court. It also called upon the parties to co-operate fully with the Secretary-General in verifying implementation of the provisions of the agreement of 4 April 1994 and, in particular, to grant UNASOG freedom of movement and all the services it required in order to fulfil its functions.<sup>141</sup> Just two months from the first communication, the Secretary-General duly completed his task without incident. The transfer of authority from Libya to Chad was completed accordingly.<sup>142</sup> On 13 June 1994, the Security Council adopted resolution 926 in which it welcomed the Secretary-General's report, commended the work of the members of UNASOG, noted with appreciation the co-operation extended by the Government of Chad and the Government of the Libya to UNASOG in accordance with the provisions of the implementation agreement of the Court's judgment and terminated the mandate of UNASOG accordingly.<sup>143</sup>

This was not just the first occasion on which the Security Council had been directly involved with the implementation of a decision of the Court,<sup>144</sup> but it is the first example of the Secretary-General's involvement in securing implementation of a decision of the ICJ. Thus, the Secretary-General, without making any reference to specific provisions of the Charter, observed "the accomplishment of the mandate of UNASOG amply demonstrates the useful role, as envisaged by the Charter, which the United Nations can play in the peaceful settlement of disputes when the parties cooperate fully with the Organization".<sup>145</sup>

Likewise his role in Eritrea / Ethiopia has been indispensable. Since the eruption of the hostilities between Eritrea and Ethiopia in 1998, the Secretary-General has also played a vital role in finding a peaceful resolution for their conflict. As cited earlier, the Security Council adopted Resolution 1177 (1998), in which it, *inter alia*, requested the Secretary -General to make available his good offices in support of a

<sup>140</sup> S/1994/512, reproduced in 6 *Afri.J.Int' & Comp. L.* (1994), pp. 516-518.

<sup>141</sup> 3373rd meeting, 4 May 1994 UN.Doc /RES/915 (1994).

<sup>142</sup> Report of the Secretary- General to the Security Council of 6 June 1994, UN.Doc.S/1994/672.

<sup>143</sup> 3389th meeting, 13 June 1994. UN.Doc. S/RES/926 (1994).

<sup>144</sup> Rosenne, S., *The Law and Practice*, *supra* note1, p. 275.

<sup>145</sup> UN.Doc. S/1994/672, see also 100 *ILR*, 101.

peaceful resolution of the conflict and to assist them in the eventual delimitation and demarcation of their common border.<sup>146</sup> A Boundary Commission and Claims Commission were established. It was also requested by the parties to continue its work by demarcating the boundary on the ground. However, the parties faced with initial difficulties regarding the nomination of some of the Commissioners. With a proposal presented to the parties by the Secretary-General, this difficulty was successfully resolved.<sup>147</sup> The Secretary-General also successfully secured financial contribution from member States to enable the parties to meet their obligation to bear the cost of the Boundary Commission.<sup>148</sup>

On 13 April 2002, the Boundary Commission issued its final decision. Bearing in mind Article 4.16 of the Agreement by which the parties requested the United Nations to facilitate resolution of problems which may arise due to the transfer of territorial control, including the consequences for individuals residing in previously disputed territory,<sup>149</sup> the Secretary-General proposed to the Security Council to adjust the mandate of the United Nations Mission in Ethiopia and Eritrea in order to assist primarily the parties and provide administrative and logistic support to the Boundary Commission to implement its decision, which was approved by the Council in Resolution 1430.<sup>150</sup>

However, Ethiopia has shown reluctance to comply with the Commission's decision and its demarcation of their common border. It tried to reopen the decision unilaterally through suggesting that the boundary decided by the Commission should be refined so as to take better account of human and physical geography. It alleged, "it was on this basis that the Government [of Ethiopia] accepted April Decision and it is on this basis only that the Government continues to do so".<sup>151</sup> In the face of this reluctance, the Secretary-General worked closely with the President of the Commission and communication the parties to reach a successful conclusion. In a meeting that took place in London on 8 and 9 February 2003, the Secretary-General's Special Representative attended as an observer as a gesture of the United Nation's

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<sup>146</sup> UN.Doc. S/Res/1177 (1998), 26 June 1998.

<sup>147</sup> *Progress Report of the Secretary-General on Ethiopia and Eritrea*, 19 Jun 2001, UN.Doc. S/2001/608, p.6.

<sup>148</sup> *Ibid.*, p. 7.

<sup>149</sup> Article 4.16 of the Algiers Peace Agreement of 12 December 2000.

<sup>150</sup> UN.Doc. S/Re/1430 (2002), 14 August 2002.

<sup>151</sup> *Progress Report of the Secretary-General on Ethiopia and Eritrea, Annex I, Eight Report of the Eritrea-Ethiopia Boundary Commission*. UN.Doc. S/2003/257, 6 March 2003, at pp.17-19.

solidarity with both parties and the Commission in the implementation of the delimitation decision. He also addressed letters to the Government of Ethiopia urging them to participate in the meeting in a constructive manner. He also reiterated in letters sent to both Governments, without compromising the Boundary Commission's decision, the commitments of the United Nations to facilitate the implementation of the decision.<sup>152</sup>

Yet, in the light of the Eighth Report of the Eritrea-Ethiopia Boundary Commission in which the President of the Commission indicated his concerns regarding Ethiopia's reluctance to comply with the decision, the Secretary-General shared the view with the President of the Commission to report without further delay to the Security Council.<sup>153</sup> What will the Council do and whether Ethiopia will comply with the decision whose actual demarcation is proposed to commence in May 2003,<sup>154</sup> remains to be seen. It is however an indication of vigorous response on the part of the Secretary-General in the face of a reluctance to comply with a binding and final decision which may eventually threaten international peace and security.

In the *Land and Maritime Boundary* (Cameroon v. Nigeria: Equatorial Guinea intervening), Nigeria had indicated its intention not to comply with the judgment of the ICJ. So, even before the Court reached its final judgment in that case, the Secretary-General engaged in a pre-emptive policy to contain any potential non-compliance with the judgment of the Court to be given. He met with the two Heads of State of both parties in Paris on 5 September 2002 in which the parties agreed to comply with the Court's judgment. After the Court rendered its judgment in that case on 10 October 2002, the Secretary-General, on the same day, reiterated his call on Nigeria and Cameroon to respect and implement the decision of the ICJ and to award sovereignty rights over the disputed Bakassi Peninsula to Cameroon. The statement also reaffirmed the UN's readiness to help the two countries in the implementation of the Court's decision.

However, two weeks after the Court's judgment being rendered, in an official statement issued on October 23, 2002, Nigeria refused to comply with the Court's decision and maintained the *status quo* in Bakassi. The statement said, "Being a nation ruled by law we are bound to continue to exercise jurisdiction over these areas

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<sup>152</sup> *Ibid.*, p. 5.

<sup>153</sup> *Ibid.*

<sup>154</sup> *Progress Report of the Secretary-General on Ethiopia and Eritrea*, 20 Dec. 2002, S/2002/1393, p. 3.

in accordance with the constitution," and "On no account will Nigeria abandon her people and their interests. For Nigeria, it is not a matter of oil or natural resources on land or in coastal waters, it is a matter of the welfare and the well-being of her people on their land."<sup>155</sup> Subsequently the Secretary-General invited President Paul Biya of Cameroon and President Olusegun Obasanjo of Nigeria to meet in Geneva on 15 November 2002 to follow up the Judgment of the Court. The parties met with the Secretary-General, and both acknowledged the importance for their countries of respecting their obligations under the United Nations Charter. In the course of these meetings, both parties agreed to identify a number of confidence-building measures which would pave the way to resolving many of the issues which were the subject of the ICJ ruling. They further asked the Secretary-General to establish a mixed commission of the two sides, to be chaired by his Special Envoy, to consider ways of following up the ICJ ruling and its implementations.<sup>156</sup> The Commission held its first meeting in 7-9 January and the second meeting on 4 February 2003 under the supervision of the United Nations. Whether the Secretary-General of the United Nations will definitely succeed in making the parties comply with the judgment of the Court also remains to be seen.

#### 4.2. Authorising the Secretary-General to Request Advisory Opinions

One of the purposes of advisory opinions of the Court is said to "influence the practice of the organ concerned and, as the case may be, also of the States involved in the matter".<sup>157</sup> So, given the nature and the complexity of enforcement through the Security Council and General Assembly, and apart from occupying a special *amicus curiae* role,<sup>158</sup> should it be appropriate to empower the Secretary-General with the competence to scrutinise the fate of the Court's judgments or step in when it deems necessary to secure compliance with the Court's decision through at least requesting

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<sup>155</sup> Reuters/Washington Post, Thursday, October 24, 2002; at p. A30.

<sup>156</sup> Statement by Secretary-General Kofi Annan Following His Geneva Meeting With Presidents of Cameroon and Nigeria. UN Press Release SG/SM/8495/AFR/515, 15/11/2002.

<sup>157</sup> Mosler, H & Oellers-Frahm, K., "Article 96" in Simma, B., et al., *The Charter of the United Nations: A Commentary*, (Oxford Univ. Press, 2002), pp.1180-1190, at p. 1182.

<sup>158</sup> Rosenne, S., "The Secretary-General of the United Nations and the Advisory Procedure of the International Court of Justice", in Wellens, L., (ed), *International Law: Theory and Practice*, (Kluwer International Law, 1998), pp.707-717, at p. 707.

an advisory opinion from the Court especially in the face of a blatant non-compliance with the Court's decision?

Possibly the practice of the Statute of the Court of Justice of Andean Community should be appropriate as a springboard in this regard.<sup>159</sup> It devotes a section comprising nine Articles (23-31) to deal with the case of non-compliance with the decisions of the CJAC. It provides sophisticated procedures of judicial and institutional enforcement of its decisions. It primarily gives the Secretary-General of the Andean Community the authority to scrutinise whether a member State has failed to comply with the decisions of the Court and its obligations under the provisions of the Convention comprising the legal system of the Andean Community.<sup>160</sup> If he verifies the failure of compliance and the recalcitrant State continues with the behaviour that gave rise to the claim, the Secretary-General of the Community shall request a decision from the Court. However, if the Secretary-General fails to issue his ruling or fails to bring that action within sixty days after the date the claim was failed, the claimant country may appeal directly to the Court.<sup>161</sup> If the Court were to decide that a member is at fault, then such member "would be compelled to take the necessary steps to execute the judgment within a period of no more than ninety days after notification".<sup>162</sup> But if that member fails to do so, the Court, summarily and after hearing the opinion of the Secretary-General, "shall establish the limits within which the claimant country or any other Member Country may restrict or suspend, in whole or in part, the benefits obtained by the Member Country at fault under the Cartagena Agreement".<sup>163</sup> This unique empowerment of the Secretary-General reflects a valuable acceptance of the fundamental role that the Secretary-General may play in the post-adjudicative phase, but whether this mechanism can be adopted and hence its results to be attained through authorising the Secretary-General of the United Nations to request advisory opinions is quite questionable.

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<sup>159</sup> *Treaty Creating the Court of Justice of the Cartagena Agreement* (Amended by the Cochabamba Protocol). This *Amending Protocol to the Treaty Creating the Court of Justice of the Andean Community* was signed in the city of Cochabamba, Bolivia on May 28, 1996 and came into force in August 1999. For a general reference to the Court see Hamilton, R. P., "A Guide to Researching the Caribbean Court of Justice", 27 *Brooklyn J. Int'l L.* (2002), pp. 531-542.

<sup>160</sup> Article 23 of the Statute of Andean Court.

<sup>161</sup> Article 24 of the Statute of Andean Court.

<sup>162</sup> Article 27 of the Statute of Andean Court.

<sup>163</sup> *Ibid.*

Apart from the alleged fear of the possible growth of the political weight of the Secretary-General in the United Nations in relation to the Security Council and the General Assembly as a result of authorising him to request advisory opinions, such an authorisation could be counterproductive. The advisory jurisdiction of the Court under Article 65 (1) of the Statute of the Court is discretionary. According to a textual reading of Article 65 (1), the Court is under no obligation to entertain a request for an advisory opinion. This interpretation is confirmed by the Court itself which stated that its competence in this regard is “permissive” and “of a discretionary character”.<sup>164</sup> The Court also stated that it is “well established that the reply of the Court to a request for an opinion represents its participation in the activities of the UN and, in principle, should not be refused”, however, “compelling reasons would justify refusal such a request”.<sup>165</sup>

### 4.3. The Secretary General’s Trust Fund to Assist States in the Settlement of Disputes

Some parties, including in particular developing countries, may allege in the post-adjudicative phase that they are unable to execute the Court’s decision because of financial difficulties arising from the high costs pertaining to the execution of a judgment, which may need scientific and technical experts to implement it.<sup>166</sup> This foreseeable difficulty, which probably also inspired by the Switzerland’s financial assistance to Burkina Faso and Mali to help them to execute the ICJ’s decision on the *Frontier Dispute (Burkina Faso/Republic of Mali)*,<sup>167</sup> caused the Foreign Ministers of non-aligned countries in June 1989 in a special meeting at the Hague on “Peace and the Rule of Law in International Affairs”, to encourage compliance with and

<sup>164</sup> *Application for Review of Judgment No. 333 of the United Nations Administration Tribunal*, Advisory Opinion of 27 May 1987, ICJ. Rep. (1987), p.31, *Legality of the Threat or Use of Nuclear Weapons*, ICJ. Rep. (1996), p.226. *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, ICJ. Rep. (1999), pp.78-9.

<sup>165</sup> *Ibid.*

<sup>166</sup> This is not meant to include any pecuniary damages the Court might award. Bekker, P.H., “*International Legal Aid in Practice: The ICJ Trust Fund*”, 87 *AJIL* (1993), pp. 659-668, at p. 664.

<sup>167</sup> *Frontier Dispute (Burkina Faso/Republic of Mali)*, Judgment of 22 December 1986, ICJ. Rep. (1986), 554; see also the telephone interview with Mr. Roy Lee, Legal Division, UN Secretariat (Feb. 18, 1990) cited in O’Connell, M.E., “*International Legal Aid: The Secretary General’s Trust Fund to Assist States in the Settlement of Disputes Through the International Court of Justice*”, in Janis, M.W., (ed), *International Courts for the Twenty-First Century*, (Martinus Nijhoff, 1992), pp. 235-244, at p.235 & footnote 6 at p. 242. As early as 1971, the idea of establishing a multilateral assistance fund to finance litigation cost was discussed in the General Assembly Sixth Committee of the General Assembly. UN Doc. A/8568, p.8, para. 48 (1971).

enforcement of decisions of the International Court of Justice.<sup>168</sup> Subsequently, they recommended the creation of a trust fund to assist States to settle their differences through the International Court of Justice and to enable them to enforce the Court's decisions.

On 3 November 1989, and under the Financial Regulations and Rules of the United Nations following consultations with the President of the ICJ, the Secretary-General of the United Nations announced the creation of the Secretary General's Trust Fund to Assist States in the Settlement of Disputes Through the International Court of Justice.<sup>169</sup> The Secretary-General stated that, at the meantime, two categories of cases would be eligible for financial assistance: (1) cases where disputes were submitted to the ICJ by joint agreement; (2) cases where both parties were ready to implement a judgment of the Court, but one or both of them was unable to do so because of lack of funds or expertise.<sup>170</sup>

It is unfortunate, however, that Orders of provisional measures of the ICJ are not covered by the Fund. There is in fact no reason for excluding the Orders of the Court since they also may pose difficulty in their execution. The Court may order one or both State parties to take certain measures that may need technical and financial assistance not available to them in such cases. Thus, it is appropriate that Paragraph 6 of the Fund to be amended to include "the execution of an order or judgment of the Court in such cases".<sup>171</sup>

The responsibility of the Secretary-General in promoting judicial settlement, including securing the implementation of the Court's decisions, was also reiterated in Paragraph 2 of the Trust Fund, which provides "The Secretary-General, as the Chief Administrative officer of the Organization, has therefore, a special responsibility to promote judicial settlement through the Court".<sup>172</sup> Paragraph 17 of the Trust Fund

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<sup>168</sup> *The Hague Declarations of the Meeting of the Ministers of Foreign Affairs of the Movement of Non-Aligned Countries to Discuss the Issue of Peace and the Rule of Law in International Affairs*, UN.Doc. A/44/191 (1989).

<sup>169</sup> *Provisional Verbatim Record of the Forty-Third Meeting*, 44 UN. GAOR (43<sup>rd</sup> mtg), at pp. 7-11, UN.Doc.A/44/PV.43 (1989). See also the Fifty-sixth session Agenda item 13 *Report of the International Court of Justice Secretary-General's Trust Fund to Assist States in the Settlement of Disputes through the International Court of Justice*, Report of the Secretary-General A/56/456 (10 October 2001) II (2).

<sup>170</sup> 28, *ILM*, (1989), pp. 1589-1594, at p. 1589, and para. 6, p. 1592.

<sup>171</sup> For a similar suggestion, see "*A Study and Evaluation of the UN Secretary-General's Trust Fund to Assist States in the Settlement of Disputes through the International Court of Justice*", undertaken by Committee on Transnational Dispute Resolution, International Law Association, American Branch, on 9 September 2002, produced in 1 *Chinese JIL*, (2002), pp. 234-279, at p. 236.

<sup>172</sup> *Ibid.*, p. 1591.

also authorises the Secretary-General to revise the Trust Fund if circumstances so require.<sup>173</sup> Thus, the debate on his role as whether he should encourage the execution of the Court's decisions or remain neutral, reveals that the Secretary-General is under a duty to achieve international peace and security in accordance with the Charter and the Statute of the Court.<sup>174</sup> Up to October 2001, the Secretary-General had received four applications submitted by developing countries concerning, *inter alia*, the assistance in the execution of the Court's decisions.<sup>175</sup>

## 5. Conclusion

Article 94 (2) of the UN Charter does not impose upon the Security Council the duty to enforce a judgment of the Court without being approached by the affected or injured State including the judgment debtor itself. Invoking Article 94 (2) before the Council by the injured party to the dispute does not mean that the Council is *ipso facto* recognising that the other party is a judgment debtor or a defaulting party or that it has failed to perform its obligation under the judgment, because both parties may be found to be in violation of their obligations towards each other and *vice versa*. This is probably one of the reasons that Article 94 has not been invoked so often. According to a textual reading of this Article, however, the Council is also entitled to do nothing even in the face of blatant case of non-compliance. However, if the Council decides to take certain measures, its competence is independent of other provisions or chapters of the Charter unless the measures proposed involve the measures listed in Articles 41 and 42 of the Charter which can be taken only on the basis of the conditions laid down in Article 39 of the Charter. In any event, the Council is not at liberty to repudiate the authority of the *res judicata* that the Court's decision has acquired. However, enforcement through the Council is not exclusive nor is it always successful.

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<sup>173</sup> *Ibid.*, p. 1954.

<sup>174</sup> Bien-Aime, T., "A Pathway to the Hague and Beyond: The United Nations Trust Fund Proposal", 22 *NYUJ Int'l L. & P.* (1990), pp. 671-708, at p. 695

<sup>175</sup> See the Fifty-sixth session Agenda item 13 *Report of the International Court of Justice Secretary-General's Trust Fund to Assist States in the Settlement of Disputes through the International Court of Justice*, Report of the Secretary-General A/56/456 (10 October 2001) III (4 & 5).

States are thus free to bring their claims of non-compliance before the General Assembly, which has a competence to deal with such matters under Articles 10, 11, 14, and 35 of the Charter. Actually, States may find referring claims to the Assembly is more influential from a publicity perspective than to the relatively narrow circle of the Council. Notwithstanding the recommendatory nature of the Assembly resolutions, they have persuasive elements in the post-adjudicative phase, which may be invested by the States concerned to induce compliance with the Court's judicial decisions. In any event, the potential role of the United Nations in the peaceful settlement of disputes and post-settlement of international disputes depends on various elements. It is beyond doubt that its potentiality depends largely on the preferences of member States. If they decided to utilise the processes contemplated in the Charter of the United Nations, the Organisation is said to be effective.

However, the lack of consensus or unanimity to provide certain measures by member States does not diminish the UN's effectiveness in this regard. This is true, in the case of the Secretary-General who has played an indispensable role in this process without necessarily being backed up either by these organs or by the majority of member States.

## CHAPTER EIGHT:

# ENFORCEMENT OF JUDICIAL DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE THROUGH REGIONAL INTERNATIONAL ORGANIZATIONS

### 1. Introduction

Enforcement of the judicial decisions of the ICJ through the United Nations and its organs is not always possible or independent. So, States may have to utilize other institutional enforcement mechanisms. The U.N Charter itself, in Chapter VIII, sees the potentialities of international regional and sub-regional organisations imperative for the maintenance of international peace and security under which a case of non-compliance with the judicial decisions of the ICJ can fall.<sup>1</sup> Their revitalisation became obvious especially after the end of the Cold War, which was said to impair their proper utilisation.<sup>2</sup> The UN. Charter refers to regionalism in the context of pacific settlement of international disputes as well as in peace and security. Article 33 (1) of the Charter obliges the parties to any dispute that is likely to endanger international peace and security to be settled through, *inter alia*, “judicial settlement and resort to regional agencies or arrangements”. This was the ultimate compromise between universalism and regionalism reached in the San Francisco Conference.<sup>3</sup>

However, perhaps one of the most difficult questions pertinent to the role of these institutions under Chapter VIII of the Charter is the meaning and definition of “regional arrangements and agencies” under Article 52 of the UN. Charter. Also Article 53 (1) of the UN Charter reads in part: “...no enforcement action shall be taken under regional arrangements or by regional agencies without the authorisation of the Security Council...” This provision does not provide any definition of what is

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<sup>1</sup> See the statement made by the representative of the State of Qatar in the Sixth Committee of the General Assembly in its 55<sup>th</sup> Session (2000), during the discussion of *Report of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization*, who said, “Non-compliance with the Court judgments in itself constitute a threat to international peace and security and a clear violation of the United Nations Charter, principles of justice and international law”. October, 2000. Press Release GA/L/3147.

<sup>2</sup> See the Secretary-General of the U.N in his *Agenda for Peace* of 1992. A/47/277-S/24111.

<sup>3</sup> Hummer, W., & Schweitzer, M., “*Comment of Article 52*”, in Simma, B., *et al.*, (eds), *The Charter of the United Nations: A Commentary*, (Oxford University Press, 2002), pp. 807-853, at p.815.

meant by the phrase “enforcement action” or enforcement measures,<sup>4</sup> which may constrain the competence of regional organisations from taking any action without prior authorisation from the Security Council. So before we examine the role of some regional international organisations in the process of enforcement of the judicial decisions of the ICJ, a discussion, at least briefly, of the definition of “regional arrangements or agencies” for the purposes of enforcement and the notion of enforcement action in this context, must be undertaken.

## 2. Regional Organisations and the UN. Charter

### 2.1. Article 52 of the Charter and the Definition of Regional Arrangements or Agencies

The Charter of the United Nations provides no precise definition of regional arrangements and agencies which are dealt with in Articles 33, 45, 52, 53, and 54 of the Charter. At the San Francisco Conference, the Egyptian delegation proposed a definition of regional arrangements or agencies. It read “There shall be considered as regional arrangements organisations of a permanent nature grouping in a given geographical area several countries which, by reason of their proximity, community of interests or cultural, linguistic, historical, or spiritual affinities, make themselves jointly responsible for the peaceful settlement of any disputes which may arise ... as well as for the safeguarding of their interests and the development of their economic and cultural relations”.<sup>5</sup> Nevertheless this proposed definition was eventually rejected for being too “restrictive”.<sup>6</sup> Although the definition was detailed, there was nevertheless a prevalent desire not to accept a detailed definition that could hinder further development within the framework of Chapter VIII.<sup>7</sup>

That desire was reflected in the *Agenda for Peace* promulgated by the Secretary-General of the United Nations in 1992. He proposed a wide and flexible definition of regional arrangements and agencies to include “regional organisations for mutual security and defence, organisations for general regional development or for

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<sup>4</sup> See also Articles 1 (1), 2 (5), (7), 5, 11 (2), 39, 41, 42, 45, 49, 50, and 52 of the UN. Charter, which uses the notion of enforcement action and enforcement measures more or less interchangeably.

<sup>5</sup> 12 *UNCIO*, pp. 850, 957.

<sup>6</sup> *Ibid.*

<sup>7</sup> Hummer, W., & Schweitzer, M., *supra* note 3, p.817.

co-operation on a particular economic topic or function, and groups created to deal with a specific political, economic or social issues of current concern.”<sup>8</sup> This flexibility was suggested to enable diverse organisations including sub-regional organizations to contribute to the maintenance of international peace and security,<sup>9</sup> and for more integration and further effectiveness of the maintenance of international peace and security. Therefore, the traditional distinction between various types of regional organisations must now be considered obsolete.<sup>10</sup> Hence, the important factor in the definition of regional organization is not the nature of the organisation at hand, but rather the type of action undertaken by such organisation.<sup>11</sup>

This proposition is illustrated by the ICJ in the *Land and Maritime Boundary between Cameroon and Nigeria* case. In that case, Nigeria contended that role of the Statute of the Lake Chad Basin Commission which was annexed to an Agreement of 22 May 1964 signed between Cameroon, Chad, Niger and Nigeria must be understood in the framework of regional arrangement or agencies referred to in Article 52 of the Charter, and thus should have exclusive competence in relation to issues of security and public order in the region of Lake Chad, and that these issues encompassed boundary demarcation. The Court noted, “[T]he Lake Chad Basin Commission is an international organization exercising its powers within a specific geographical area; that it does not however have as its purpose the settlement at a regional level of matters relating to the maintenance of international peace and security and thus does not fall under Chapter VIII of the Charter”.<sup>12</sup>

It is thus imperative for a regional arrangement or agency in order to assume the status of a regional organization or agency within the legal framework of the Charter of the United Nations to be created by States within a specific geographical area, and to be based on a collective treaty consistent with “the Purposes and Principles of the UN, whose primary task is the maintenance of peace and security

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<sup>8</sup> A/47/277-S/24111, 17 June 1992, *An Agenda for Peace, Preventive diplomacy, peacemaking and peace-keeping*, Report of the Secretary-General pursuant to the statement adopted by the Summit Meeting of the Security Council on 31 Jan 1992, para.61, reproduced in 31 *ILM* (1992), p. 970.

<sup>9</sup> See also the Secretary-General report of 1995 to the General Assembly on cooperation with regional organizations. *UNYB* (1995), p.116. See generally, Boutros-Ghali, B., *An Agenda for Peace*, 2<sup>nd</sup> ed. (United Nations, 1995).

<sup>10</sup> Schreuer, C., “Regionalism v. Universalism”, 6 *EJIL* (1995), pp. 477-499, at p. 490.

<sup>11</sup> Gray, C., *International law and the Use of Force*, (Oxford Univ. Press, 2000), p. 206.

<sup>12</sup> *Land and Maritime Boundary*(Cameroon v. Nigeria)Preliminary Objections,ICJ.Rep.(1998),para., 67.

under the control and within the framework of the UN”,<sup>13</sup> and the settlement of regional international disputes among its member States.

## **2.2. Article 53 (1) of the Charter and the Notion of Enforcement Action**

Article 53 (1) of the UN Charter reads in part that “...no enforcement action shall be taken under regional arrangements or by regional agencies without the authorisation of the Security Council...” This provision does not provide any definition of what is meant by the phrase “enforcement action” or enforcement measures.<sup>14</sup> So the question to be raised is what is meant by and the scope of “enforcement action” in Article 53 of the Charter that may constrain the competence of regional organisations from taking any action to enforce a given international obligation including the implementation of the Court’s judicial decisions without prior authorisation from the Security Council. In other words, does the notion or the concept of “enforcement action” mean or refer to military action or does it also include non-military action i.e., diplomatic and economic sanctions?

These questions were central regarding the diplomatic and economic sanctions imposed by the Organisation of American States (OAS) against the Dominican Republic in 1960 for its activities in Venezuela. When the OAS reported these sanctions to the Security Council under Article 54 of the Charter, the Soviet Union argued that such measures should have been approved by the Security Council under Article 53 (1) of the UN Charter to be lawful since by their nature they were enforcement action, and hence, required authorisation from the Council.<sup>15</sup> The political implication of the Soviet Union’s move was understandable at that time. It was anxious to avoid the imposition of any OAS economic sanctions against Cuba without the approval of the Security Council.<sup>16</sup> On the contrary, the United States argued that the notion of enforcement action only referred to military action and not to

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<sup>13</sup> Hummer, W., & Schweitzer, M., *supra* note 3, p. 828; see also, Russell, R. B., and Muther, J.E., *A History of the United Nations Charter: The Role of the United States 1940-1945*, (Brookings Institution, Washington, 1958), pp.705-07.

<sup>14</sup> See also Articles 1 (1), 2 (5), (7), 5, 11 (2), 39, 41, 42, 45, 49, 50, and 52 of the UN Charter, which use the notion of enforcement action and enforcement measures more or less interchangeably.

<sup>15</sup> UNSCOR, 15<sup>TH</sup> Yr., 893<sup>rd</sup> Meeting, S/4481/Rev. 1, 8 Sep. 1960.

<sup>16</sup> Akehurst, M., “*Enforcement Action by Regional Agencies, with Special Reference to the Organisation of American States*”, 42 *BYBIL* (1967), pp. 175-227, at p. 189.

other diplomatic and economic sanctions. Its position was endorsed by the majority in the Security Council, with the abstentions of Poland and the Soviet Union.<sup>17</sup> However, the position of the Soviet Union concerning the OAS's diplomatic and economic sanctions imposed against Cuba in 1962 was vigorous. For the validity of those sanctions, the Soviet Union insisted on the imperative of prior authorisation of the Security Council. Again its position was defeated. Nevertheless, the United States and Soviet Union relied on the incident of the Dominican Republic to substantiate their positions. During the debate in the Security Council there was an argument upholding the legality of these sanctions, put forward by the representatives of Ireland and Ghana. It was rightly argued that actions undertaken by regional organisations should be safeguarded for effective enforcement of the principles and the purposes of the Charter.<sup>18</sup>

However, any action taken under Chapter VII and Articles 41 and 42 of the U.N Charter is "enforcement action" whether it takes the form of military or non-military measures. Whereas this proposition can be deduced from the *travaux préparatoires* of the Charter,<sup>19</sup> and in the literature,<sup>20</sup> the same conclusion may not be sustained with respect to measures and action taken under Article 53 (1) from the debate in the Security Council in the aftermath of the OAS's sanctions against the Dominican Republic and Cuba. Article 53 (1) is basically designed to increase the enforcement mechanism of international law and provide further channels and modalities that can be utilised by the Security Council to discharge effectively its responsibility under the relevant provisions of the U.N Charter. In this context, regional organisations are functioning as subsidiary organs of the United Nations.<sup>21</sup> In other words, the particular measures and actions contemplated by the Security Council, which may be taken through the utilisation of regional organisation, should not be taken by these organisations without the control and the prior authorisation of the Council.

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<sup>17</sup> *Ibid.* For further discussion, see e.g., Halderman, J.W., "Regional Enforcement Measures and the United Nations", 52 *Geo.L.J.*, (1963-1964), pp. 89-118.

<sup>18</sup> UN.Doc. S/PV.994, para.61; S/PV.996, paras.70-2; see also paras 8-9,56,62,90; S/PV.997, paras.46,48, 60.

<sup>19</sup> See e.g., 11 *UNCIO*, pp. 20 and 24.

<sup>20</sup> See e.g., Brohmer, J., Ress, G., "Article 53", in Simma, B., *et al.*, (eds), *The Charter of the United Nations: A Commentary*, (Oxford Univ. Press, 2002), pp.854-890, at p. 860-61.

<sup>21</sup> Kelsen, H., *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems*, (Stevens & Sons Limited, 1950), p.326; Brohmer, J., and Ress, G., *supra* note 13, p. 860.

The notion of enforcement action in Article 53 (1) of the Charter, in particular, must thus be linked with the notion of enforcement action undertaken by the Security Council. It does not mean or refer to permissible non-military enforcement actions or measures undertaken unilaterally by regional organisations to enforce international obligations especially in the context of securing settlement of international disputes or their post-adjudicative phase. This interpretation finds support also in Article 52 (1) which speaks about the competence of regional organisations to deal with “matters relating to the maintenance of international peace and security as are appropriate for regional action”. Although the Charter does not provide precisely when a regional action is appropriate, it nevertheless speaks about “regional action” without the imposition of certain conditions.

By the same token, regional organisations may use their best efforts to induce a Member State to comply with its obligation through the imposition of sanctions. Article 52 (2) of the Charter requires “Members of the United Nations entering into such arrangements or constituting such agencies shall make every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council.” Hence, quite apart from collective use of force in self-defence under Article 51 of the Charter, which lies outside the scope of this study, enforcement action can be defined to include any enforcement action taken by regional organisations as long as it is not in violation of Article 2 (4) of the Charter, i.e., a threat or use of force against the territorial integrity and the political independence of the defaulting member State.<sup>22</sup> This definition of enforcement action depends on the nature and the quality of the measures taken and not on the mandate under which they were taken.

One could validly argue from a practical perspective that States are entitled under general international law to break off diplomatic relations, to impose proportional economic sanctions against another State, and in certain circumstances the consequences of this action may be more drastic than the action taken by a regional organisation. Hence, the same liberty should be available to States whether in form of groups or within their regional organisation.<sup>23</sup> Thus, regional organisations are

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<sup>22</sup> Brohmer, J., and Ress, G., *supra* note 13, p.861.

<sup>23</sup> Akehurst, M., *supra* note 16, pp, 195-196.

entitled to take regional enforcement action to induce a recalcitrant Member State to adhere to its international obligations as long as the action taken is within the legal framework of the UN Charter and within the parameters of the doctrine of implied powers.<sup>24</sup> These measures may include the denial of the right to speak at meetings, to vote, to present candidates for any position or post within the organisation or to benefit from any activity or commotions of the organisation. It may also include suspension, and expulsion or withdrawal of financial benefits as well as other commercial and economic sanctions.<sup>25</sup> So, no prior approval from the Security Council is required, otherwise that would, on one hand, undermine the whole concept of regional organisation and on the other hand, weaken the ability of regional organisations in the process of enforcement of international obligations. It would also import further unwelcome political interference with regional organisations, which could render their effectiveness illusory.

### 3. Enforcement through International Regional Organisations

Political interaction in any given international organisation is likely to give rise to a dispute between its member States. This inevitable probability is acknowledged by all regional and international institutions through their constituent instruments which provide for peaceful settlement of international disputes through amicable means. Other have gone further to establish judicial institutions and commissions of dispute settlement mechanisms to solve their local differences, while some have gone a further step by providing enforcement mechanisms to secure compliance with the judicial decisions of their regional judicial bodies. Thus, some attention will be directed to the interaction between dispute settlement mechanisms available to regional organisations, on the one hand, and the enforcement actions and measures available to them when a case of non-compliance with an international obligation either arising from regional or international legal instrument or either

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<sup>24</sup> See generally, Manuel Rama-Montaldo, M., "International Legal Personality and Implied Powers of International Organizations", 44 *BYBIL*, (1970), pp.111-55; Khan, P, *Implied Power of the United Nations*, (Vikas Publication, India, 1970), p. 6 and Zuleeg, M., "International Organizations, Implied Powers", in Bernhardt, R., (ed), 7 *EPIL*, ( North-Holland, 1984), pp. 312-314, and Skubiszewski, K., "Implied Powers of International Organizations", in Dinstein, Y., *International Law at a Time of Perplexity*, (1989), pp. 855-868.

<sup>25</sup> Combacau, J., "Sanctions", in R. Bernhardt (ed), 9 *EPIL* (North-Holland Elsevier Science Publisher, 1986), p. 339; Klein, E., "Sanctions by International Organizations and Economic Communities", 30 *AdV* (1992), pp. 101-122, at p. 103.

arising from regional or international judicial decision, occurs. It should be noted, however, that no consistent practice could be established among the regional organisations examined in this section. That is due to their incomparable structures and practices as well as their political readiness. Thus, emphasis will only be given to certain regional organisations, namely the League of Arab States, Organization of American States, European Community, European Union, the Council of Europe, African Union, and the Organization of Islamic Conference.

### 3.1. The League of Arab States

The LAS is one of the oldest international regional organisations established after the Second World War as a political organisation<sup>26</sup> of comprehensive aims.<sup>27</sup> One of its main objectives is the peaceful settlement of disputes.<sup>28</sup> Under Article 5 of the Pact, member States renounce resort to force to resolve disputes among them. Although, member States do not accept the compulsory jurisdiction of the Council of the LAS to mediate or arbitrate over their disputes, they agree in Article 5 that if they seize the Council for that purpose, the Council's resolutions will be binding.<sup>29</sup> However, the Council has in fact played a limited role on many occasions to defuse some inter-regional disputes between the member States without any formal acceptance of the Council's jurisdiction under Article 5 to deal with their disputes only as a mediator, while in some other cases, it has failed to do so.<sup>30</sup>

Hence, member States have realised the insufficiency of the regional arrangement of dispute settlement and the ability of the League in this regard. Member States have had to seize other regional organisations over international judicial bodies to put an end to their disputes. A well-known example was the refusal of Morocco to accept the competence of the Council of the LAS to deal with its 1963 conflict with Algeria, and instead the acceptance of the involvement of the

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<sup>26</sup> For Pact of the League of Arab States signed on 22 March 1945 and came into force on 11 May 1945. 70 *UNTS* (1950), pp. 237-263. For a drafting background of the Pact see, Ireland, P., "The Pact of the League of Arab States", 39 *AJIL* (1945), pp. 797-800, Abul Aziz, M., "The Origin and Birth of the Arab League", 11 *REDI* (1955), pp. 39-58.

<sup>27</sup> See Article 2 of the Pact of the Arab League 70 *UNTS* (1950), p. 237.

<sup>28</sup> Khadduri, M., "The Arab League as a Regional Arrangement", 40 *AJIL* (1946), pp. 756-777.

<sup>29</sup> Article 5 of the Pact of the Arab League, 70 *UNTS* (1950), p. 237.

<sup>30</sup> See generally, Hoassouna, H., *The League of Arab States and Regional Disputes: A Study of Middle East Conflicts*, (Oceana Publication, 1975), p.122 *et seq.*, and Al-Kadhem, S.J., "The Role of the League of Arab States in Settling Inter-Arab Disputes", 32 *REDI* (1976), pp. 1-31.

Organisation of African Unity to deal with their dispute.<sup>31</sup> Some other Arab disputes have also been referred to international adjudication instead, namely the ICJ. For instance, Libya and Tunisia referred their dispute concerning their continental shelf to the Court to declare the principles and rules of international law applicable to their delimitation.<sup>32</sup> Also Qatar brought its dispute with Bahrain over maritime delimitation and territorial questions between them before the ICJ in 1991.<sup>33</sup> Whereas these disputes were solved through the ICJ, some others were solved behind doors for political reasons or political preferences as opposed to legal ones.<sup>34</sup>

Initiatives pertinent to dispute settlement including the projected creation of Arab Court of Justice (ACJ),<sup>35</sup> and the establishment of a mechanism for the prevention, management and resolution of conflicts among Arab States have been made,<sup>36</sup> but with tremendous lack of progress. For instance, the projected ACJ was the first regional international court with general jurisdiction to be contemplated soon after the establishment of the ICJ; yet, despite all LAS resolutions for more than five decades to expeditiously establish the ACJ, it has not become a reality. In any event, the enforcement mechanism of international obligations within the Pact of the LAS including compliance with judicial decisions of the Court or with the proposed ACJ is not so promising or easily to attain, and even recognition and enforcement of arbitral awards in the Middle East region is uncertain.<sup>37</sup> It demands tremendous political will among its member States to render it effective. However, when a decision of the Council of the LAS is taken unanimously its enforcement, as stipulated under Article 7 of the Pact, "shall be enforced in each member state *according to its respective laws*" (emphasis added). This leads to a further obstacle concerning the actual

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<sup>31</sup> See, Wild, P.B., "The Organization of African Unity and the Algerian-Moroccan border conflict", 20 *I.O.*, (1966), pp.18-36. See also the refusal of Lebanon to submit the conflict with the United Arab Republic (Egypt and Syria) concerning from the intervention of the UAR in the internal affairs of Lebanon. Boutros-G, B., "The Arab League (1945-1970)", 25 *REDI* (1969), pp. 67-118, at pp. 83-84.

<sup>32</sup> *Continental Shelf (Tunisia / Libya)*, Judgment on Merits, ICJ. Rep. (1982), p. 18.

<sup>33</sup> *Maritime Delimitation and Territorial Questions*, (Qatar v. Bahrain), ICJ. Rep. (2001), p. 40.

<sup>34</sup> Boutros-G, B., "The Arab League (1945-1970)", 25 *REDI* (1969), pp. 67-118, at p 83. See also Pogany, I., "The Arab League and Regional Peacekeeping", 34 *NILR*, (1987), pp.54-74, at p.74

<sup>35</sup> See Article 19 of the Pact, which leaves the door open for an amendment of the Pact to facilitate the creation of an Arab Court of Justice, should be a priority matter in case of amendment of the Pact. Preliminary Studies were taken to establish such court and were submitted in 1951 to the League for consideration, yet, the court has not yet been established. See, generally Foda, E., *The Projected Arab Court of Justice: A Study in Regional Jurisdiction with Specific Reference to the Muslim Law of Nations*, (Martinus Nijhoff, 1957).

<sup>36</sup> See the resolution adopted at the June 1996 Arab Summit Conference in 35 *ILM* (1996), p. 1289.

<sup>37</sup> See, generally, El-Ahdab, A., "Enforcement of Arbitral Awards in the Arab Countries", 11 *Arbitr. Int.* (1995), pp. 169-181.

effectiveness of the so-called “binding” decisions of the Council. Under Article 7 of the Pact, member States will have a discretionary authority as whether to ultimately comply with and enforce these decisions under their respective domestic laws.

The only constitutional sanction available to the LAS in the face of an infringement of the Pact by a member State is the expulsion from the League as stipulated under Article 18 of the Pact. Article 18, which was inspired by the expulsion clause in the League of Nations Covenant,<sup>38</sup> provides that when any member of the League places itself outside the purposes and principles of the League, it can be expelled from the League by a decision taken by a unanimous vote of all the States except the delinquent.<sup>39</sup> One of the classical violations of the Pact which triggers the application of this Article was amplified by the Council of the LAS Resolution 292/12 adopted on 1 April 1960, which stated that “any member State entering into negotiation with Israel with a view of the conclusion of a unilateral political military or economic agreement will immediately be excluded from the League in accordance with the provisions of Article 18 of the Pact”. Since its inception, however, the LAS has not expelled any member State notwithstanding the violations of this Resolution.

Although the Pact does not provide for suspension, the LAS suspended the membership of Egypt in 1979, and moved the League’s headquarters from Cairo to Tunisia as a sanction for signing a peace agreement with Israel,<sup>40</sup> as well as diplomatic and other economic sanctions in form of discontinuation of economic contributions. That diplomatic isolation involved the suspension of Egypt from the membership of the League and was understood to deprive Egypt from all rights resulting from membership including the suspension of its membership from two subsidiary bodies (Organisation of Arab Petroleum Exporting Countries, Arab Monetary Fund)<sup>41</sup> although those bodies do not provide for suspension in their constituent instruments. The validity of that decision was, however, contested by Egypt and its legality was regarded by some to be highly questionable.<sup>42</sup> This

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<sup>38</sup> Konstantions, D. M., *Expulsion from Participation in International Organizations: The Law and the Practice behind Member States’ Expulsion and Suspension of Membership*, (Kluwer, 1999), p. 95

<sup>39</sup> Article 18 of the Pact, 70 *UNTS*, p. 237.

<sup>40</sup> 18 *ILM*, (1979), p. 362-393. For the Peace agreement of 17 September 1978 (Camp David Agreements) see 17 *ILM*, (1978), P. 1463-1474.

<sup>41</sup> See generally Clements, F. A., *Arab Regional Organizations*, (Clio Press: Oxford, 1992).

<sup>42</sup> Shihab, M., “*The League of Arab States*”, in Bernhardt, R., (ed) 1 *EPIL*, (Amsterdam, North-Holland, 1992), pp. 202-06, at p. 203.

argument may be valid in principle since the Pact does not actually provide for suspension of membership but the power to suspend membership can be implied under the doctrine of implied powers.<sup>43</sup> Similarly, and from a functional perspective, the question whether the constituent instrument of the organisation empowers the organisation itself to take concrete action is in fact an unimportant element on the legality and validity of the sanctions imposed.

In conclusion, the arguably unconstitutional attitudes of the Council of the LAS in the suspension of Egypt leads to a simple conclusion that the unconstitutionality of an enforcement action or any measure to be taken within the LAS to sanction a defaulting member state or to give effect to an international obligation owed to a member State of the League, may be overcome in exceptional circumstances as long as the measures adopted are in accordance with the spirit of the Pact and within the legal framework of the United Nations and necessary for the League to discharge its responsibility. Whether enforcement of a judicial decision of the ICJ within the LAS falls under these criteria and the form of action to be taken accordingly remains to be seen.

### 3.2. Inter-American System: Organisation of American States

The Inter-American system is founded on three treaties, namely: the Inter-American Treaty of Reciprocal Assistance, which is commonly known as the Rio Treaty of 1947<sup>44</sup>, the Charter of the Organisation of the American States (OAS) of 1948<sup>45</sup> and the American Treaty of Pacific Settlement, generally known as the Bogotá Treaty of 1948.<sup>46</sup> Notwithstanding their complexity, these three treaties aim at a network of organizations, agencies and sub-agencies with the common interest of strengthening the rule of law and maintaining peace throughout the Americas through establishing compulsory third party settlement and imposing concrete sanctions against any member State that fails to comply with its obligations under international

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<sup>43</sup> See e.g., Skubiszewski, K, *supra* note 24, fn. 1, p. 855.

<sup>44</sup> 21 *UNTS*, pp.78-105; 43 *AJIL* (1949), pp.53-8; and the Protocolo de San Jose of 26 July 1975, 14 *ILM*, (1975), pp. 1122-32.

<sup>45</sup> 119 *UNTS*, pp.48-93; 46 *AJIL* (1952), pp.179-200; and the Protocol of Buenos Aires of 27 February 1967, 721 *UNTS*, pp.266-381; Protocol of Cartagena de Indias of 5 Dec. 1985, 25 *ILM*, (1986), pp.529-42.

<sup>46</sup> 30 *UNTS*, pp.56-113.

law. They altogether constitute the most elaborate regional system of international law enforcement.<sup>47</sup>

The supreme organ of the OAS is the General Assembly.<sup>48</sup> One of its principal powers is “to strengthen and co-ordinate co-operation with the United Nations and its specialised agencies”<sup>49</sup> and “to consider the reports of the Meeting of Consultation of Ministers of Foreign Affairs and the observations and recommendations presented by the Permanent Council with regard to the reports that should be presented by the other organs and entities, in accordance with the provisions of Article 91.f, as well as the reports of any organ which may be required by the General Assembly itself”.<sup>50</sup> Whereas any party to a dispute in which none of the peaceful procedures provided for in the Charter is underway may resort to the Permanent Council to obtain its good offices under Article 84 of the Charter, the Council is expected to assist the parties and recommend the procedures it considers suitable for peaceful settlement of the dispute. According to Article 86 of the Charter, in the exercise of its functions and with the consent of the parties to the dispute, the Permanent Council may establish *ad hoc* committees. The *ad hoc* committees shall have the membership and the mandate that the Permanent Council agrees upon in each individual case, with the consent of the parties to the dispute.

Article 16 of the Pact provides for a commission of investigation and conciliation. The report of the commission under Article 28 of the Pact is merely recommendatory. However, should such a report fail to solve the dispute, Article 31 provides for the compulsory jurisdiction of the ICJ. If the ICJ finds that it has no jurisdiction, both parties are obliged by virtue of Article 33 of the Pact to submit their dispute to arbitration. The constitutional endorsement of the obligatory nature of the Court’s decision and the enforcement of its decision in the OAS system is categorical. Article 50 the Pact provides:

If one of the High Contracting Parties should fail to carry out the obligations imposed upon it by a decision of the International Court of Justice or by an arbitral award, the other party or parties concerned

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<sup>47</sup> Dolzer, R., “Enforcement of International Obligations through Regional Arrangements: Structures and Experience at the OAS”, 47 *ZaöRV* (1987), pp.113-133, at p. 114.

<sup>48</sup> Article 54 of the OAS Charter.

<sup>49</sup> *Ibid.*, (c).

<sup>50</sup> *Ibid.*, (f).

shall, before restoring to the Security Council of the United Nations, propose a Meeting of Consultation of Ministers of Foreign Affairs to agree upon appropriate measures to ensure the fulfilment of the Judicial decision or arbitral award.<sup>51</sup>

However, the Charter of the OAS and the Pact are silent concerning the nature and the scope of the “appropriate measures” to be taken to ensure compliance with the judicial decisions of the Court or arbitral awards. Nonetheless, Article 8 of the Rio Treaty indicates the measures to be taken “in case of a conflict between two or more American States”.<sup>52</sup> It provides:

For the purposes of this Treaty, the measures on which the Organ of Consultation may agree will comprise one or more of the following: recall of chiefs of diplomatic missions; breaking of diplomatic relations; breaking of consular relations; partial or complete interruption of economic relations or of rail, sea, air, postal, telegraphic, telephonic, and radiotelephonic or radiotelegraphic communications; and use of armed force.<sup>53</sup>

The importance of these provisions is underlined by Article 20 of Rio Treaty which requires that a decision of the competent organ to impose one or several of these sanctions under Article 8 are to be binding upon all member States, with the sole exception that no State should be required to use armed force without its consent. The first application of these measures was taken against Dominican Republic and Cuba in the 1960s. In the aftermath of Dominican Republic’s activities against the Government of Venezuela including the attempted assassination of its President, the OAS decided in 1960 to impose against it diplomatic and economic sanctions in form of arm embargo as well as petrol and trucks. These measures were in force until the assassination of General Trujillo in 1961. Similarly, when Fidel Castro assumed power in Cuba in 1959 and proclaimed a Marxist regime in Western hemisphere this proclamation was seen as incompatible with the Inter-American system, namely the notion of “representative democracy” as enshrined in the Charter of the OAS as well

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<sup>51</sup> 30 *UNTS*, p. 102.

<sup>52</sup> Article 7 of the Rio Treaty, 21 *UNTS*, 99.

<sup>53</sup> *Ibid.*

as the objectives of the system.<sup>54</sup> Thus in January 1962 a Meeting of Consultation of the Ministers for Foreign Affairs of the OAS convened and a resolution to suspend Cuba's membership from the organisation was unanimously adopted,<sup>55</sup> which was later endorsed by the Council of the OAS. Also in 1963, Venezuela requested a Meeting of Foreign Affairs under Article 6 Rio Treaty to discuss the Cuban intervention in its territory. Subsequently, a decision was taken under Article 8 to impose diplomatic and economic sanctions against Cuba.<sup>56</sup>

Before amending the OAS Charter, efforts had been made to exploit the Inter-American Peace Committee to prevent and contain disputes that may occur among the member States. When Colombia and Peru failed to find a satisfactory political solution to their disputes over the political asylum granted to Haya de la Torre, a Peruvian refugee, by the Colombian Embassy in Peru, and the implementation of the judgments of the ICJ in those disputes,<sup>57</sup> friendly initiatives were undertaken by some member States of the OAS and more importantly through the Inter-American Peace Committee. The latter continued its pressure, supported by member States and world public opinion, to induce Peru to grant the refugee a safe conduct to leave his country. The Committee warned Peru of its intention to place its refusal to comply with the judgment of the ICJ before the Tenth Inter-American Conference in March 1954. Subsequently Peru, on 7 April 1954 allowed Haya de la Torre to leave Peru for Mexico.<sup>58</sup>

Similarly, after the ICJ rendered its judgment in the *Arbitral Award Made by the King of Spain on 32 December 1906* (Honduras v. Nicaragua), the Inter-American Peace Committee took a more active role in helping both parties to demarcate their respective boundaries. A military tension between the two countries occurred since their failure to enforce the award of 1906, but with tremendous efforts taken by the Council of OAS, the parties on 5 July 1957 concluded the Washington Agreement under which they agreed to take their disputes to the ICJ for a final ruling. On the

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<sup>54</sup> 56 *AJIL* (1962), pp. 610-12.

<sup>55</sup> *Ibid.* The resolution, however, stated that the Council of the OAS should readmit the Cuban Government once it found that the membership of Cuban Government was not prejudicial to the Security of the hemisphere.

<sup>56</sup> 3 *ILM* (1964), p. 977.

<sup>57</sup> See Fenwick, C.G., "The Honduras-Nicaragua Boundary Dispute". 51 *AJIL* (1957), p.761.

<sup>58</sup> *Asylum case* ICJ. Rep. (1950), p. 266. *Request for Interpretation of the Judgment of November 20, 1950, in the Asylum case*, ICJ. Rep. (1950), p. 395, *Haya de la Torre case*, ICJ. Rep. (1951), p.71.

<sup>58</sup> Fenwick, C., *The Organization of American States: the Inter-American regional system*, (Kaufmann, 1963), p. 202; Ball, M., *The OAS in Transition*, (Duke University Press, 1969), p. 432, and Anand, R.P., *Studies in International Adjudication*, (Oceana Publication, 1969), pp. 259-61.

same date, the Council of the OAS issued a statement echoing the language of Article 50 of the Pact. Subsequently, the dispute brought before the ICJ. The Court found in its Judgment of 18 November 1960 that the award was binding and that Nicaragua was under an obligation to give effect to it.<sup>59</sup> The parties were again unable to reach a mutual agreement on the enforcement of the ICJ's judgment.<sup>60</sup> Subsequently, Nicaragua took the initiative by asking the Inter-American Peace Committee to "suggest methods and steps conducive to a settlement of the questions that had arisen about the execution of the judgment of the International Court of Justice".<sup>61</sup> Then, in accordance with Article 50 of the Pact, a Honduras-Nicaragua Mixed Commission was set up to observe and arrange for the compliance with the ICJ decision. In 1963, the Inter-American Peace Committee reported to the Council of OAS that the Commission had completed its work.<sup>62</sup> The Council moreover reported to the Security Council, pursuant to Article 54 of the Charter of the United Nations.<sup>63</sup>

These cases illustrate the effective role those regional organisations in general, and the OAS in particular, can play in the enforcement of the judicial decisions of the ICJ. This was true in the first three of four decades of the OAS's existence. However, several developments especially in the 1980s eroded the role of the OAS and undermined the objectives of the IAS, namely the growing dominance of the United States in the regional system and more importantly its involvement in the Falkland Islands (Islas Malvinas) dispute between Argentina and the United Kingdom through supporting the latter; and the United States intervention in Grenada and its military activities in and against Nicaragua, and its invasion of Panama in 1989. The erosion of the role of the IAS in the process of stabilisation of the region was manifest also in the tendency of member States to rely more frequently on less formal arrangements, i.e., the Contadora Group, which was established in January 1983 to contain the explosive situation in Central America, including the situation between Nicaragua and the United States.

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<sup>59</sup> ICJ. Rep. (1960) p. 192.

<sup>60</sup> Nantwi, E. K., *Enforcement of International Judicial Decisions and Arbitral Award in Public International Law*, (Leyden, 1966), p.172.

<sup>61</sup> *Ibid.*

<sup>62</sup> *Report of the Inter-American Peace Committee to the Council of the Organization of American States on the termination of the activities of the Honduras-Nicaragua mixed Commission*, (Washington D.C., 1963). OEA/Ser.L/III/II.9, Pan American Union, Inter-American Peace Committee.

<sup>63</sup> Article 54 of the UN. Charter reads: "The Security Council shall at all times be kept fully informed of activities undertaken or in contemplation under regional arrangements or by regional agencies for the maintenance of international peace and security".

### 3.3. European Community to European Union (EC–EU)

Regional and sub-regional institutions in Europe have been perceived in the scholarship as the most effective system for the enforcement of international obligations. One of the fundamental characterisations of the EC and the EU that distinguishes them from other regional international regional organisations is that its Member States have transferred numerous powers and competence to them. Here lies the importance and the potential effectiveness of the EC and later the EU in the enforcement of international law in general and the judicial decisions of the ICJ in particular. Another dimension of its importance lies also in the economic strength of the Community, which can be seen as a vital element when adopting financial and economic sanctions against a defaulting State even if it is not a member of the Union.

The cornerstone provision of this obligation to enforce and cooperate in the enforcement of international law in general is stipulated clearly by the Treaty on the EU amending the EC Treaty.<sup>64</sup> Article 177 (3) states that “The Community and the Member States shall comply with the commitments and take account of the objectives they have approved in the context of the United Nations and other competent international organisations”. This provision, as a matter of Community law, can comfortably serve as a basis under which the EU is under an obligation to implement international obligations including the judicial decisions of the ICJ.

It has been the prevailing assumption since the inception of the European Economic Community (EC) established by the Treaty of Rome<sup>65</sup> that member States would comply with the law of the Community, especially international judicial decisions including the judgments of the European Court of Justice (ECJ) in particular, without necessarily stipulating any concrete sanctions or penalties to be imposed against a recalcitrant member State.<sup>66</sup> The reason, according to Professor Gormley, was that the EC was trying to develop a more sophisticated legal system based on “the observance of law and justice” as a substitution from reliance on the imposition of coercive measures of enforcement.<sup>67</sup> In other words, the moral force of the decisions of the organs of the Community was said to be sufficient *per se* to

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<sup>64</sup> Entered into force on 1 November 1993.

<sup>65</sup> 298 UNTS, 3.

<sup>66</sup> See also Art. 164 of European Atomic Energy Community (EAEC or Euratom), 298 UNST, p.218.

<sup>67</sup> Gormley, W. P., “The Status of the Awards of International Tribunals: Possible Avoidance Versus Legal Enforcement”, 10 *HLJ*, (1964), pp. 33-107, at p. 92.

induce compliance. However, the effectiveness of this sanction contemplated under the Treaty Establishing the European Coal and Steel Community (ECSC),<sup>68</sup> was in fact a sort of exaggeration. The EC itself perceives this deficiency in the ECSC and the Treaty of Rome of the EC itself as well. Thus, to avoid jeopardising the objectives and the rules of law within the Community and more importantly the judgments of the ECJ, serious initiatives have been undertaken to fill that gap on one hand, and to provide more executive and judicial co-operation in sanctioning the defaulting Member State.

Within a reasonable time and after providing the recalcitrant State with the opportunity to remedy its infringement under the TEU, a legal action may be taken before the ECJ either by the Commission under Article 226 (*ex 169*)<sup>69</sup> or by a member State under Article 227 (*ex 170*)<sup>70</sup> of the Treaty against any member State that has failed to fulfil an obligation under the Treaty, including Community law in general, as well as the protected fundamental rights integral to the legal order established by the Treaty. Although both Articles speak about the non-fulfilment of an obligation under the Treaty, it covers at least indirectly a case of non-compliance with the decisions of the ICJ, especially if this non-compliance was in further violation of the applicable law of the Community.<sup>71</sup> There is no jeopardy of threatening the integrity of the judgment of the ICJ as the action brought before the ECJ involves a non-compliance with a decision of the ICJ. The ECJ cannot examine the merits of the dispute but rather will have to pronounce on whether the judgment debtor is in violation of its obligation under the law of the Community. The primary purpose of this action would be to establish in a declaratory judgment the infringement of that Member State of its violation under the law of the Community, including its obligations under the decision of the ICJ. If the ECJ finds that a Member State has failed to fulfil its obligation under the Treaty, that Member State, under Article 228 (*ex 171*) of the Treaty, "shall be

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<sup>68</sup> Article 92 of the Treaty of Paris of 1951, 261 *UNTS*, p. 225.

<sup>69</sup> Article 226 reads, "If the Commission considers that a Member State has failed to fulfil an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice".

<sup>70</sup> However, under Article 227 a member State before bringing an action against that Member State, it shall bring the matter before the Commission. When the Commission failed to follow the procedure stipulated under Article 226 or to produce its reasoned opinion within three months of the date on which the matter was brought before it, the injured State may bring directly the matter before the ECJ.

<sup>71</sup> Dashwiid, A., & White, R., "Enforcement Actions under Articles 169 and 170 EEC", 14 *E.L. Rev.* (1989), pp. 388-412, at p. 389.

required to take the necessary measures to comply with the judgment of the Court of Justice". However, this provision was not sufficient *per se* to establish a law that can be applied uniformly by member States and the institutions of the EC. Thus there was a need to maintain a more sophisticated system of integration based on concrete sanctions as opposed to mere reliance on the moral force of the law as argued by Gormley. The ineffectiveness of this provision led to its reformation by the Treaty on the EU amending the EC, namely an additional paragraph to Article 228 (2) of the TEU.

Article 228 (2) gives the ECJ a new judicial power to impose a penalty, not as a response to a specific obligation under the Treaty, but rather as a sanction against non-compliance with its judgments brought under Articles 226 and 227. On the other hand, it gives the Commission a margin of discretion to consider whether there has been a violation of the judgment of the ECJ. If it "considers" that there was a violation its discretion is narrowed. It then "shall" issue a reasoned opinion specifying the points on which the Member State has not complied with in the judgment of the Court. This gives the defaulting State the formal opportunity not only to present its views but also to remedy its wrongful act. On the other hand, it delimits the subject matter of the infringement. The discretion of the Commission under Articles 228, however, differs from the one enjoys under Article 226 otherwise it would deprive Article 228 out of its context and content. The Commission's discretion will be limited to the assessment of whether the Member State has taken the appropriate measures as stipulated in the first judgment of the Court.<sup>72</sup>

Yet, if the Member State concerned fails to take the necessary measures to comply with the ECJ's judgment within the time limit laid down by the Commission, the latter may again bring the case before the court. In so doing, and within the parameters of the rule of proportionality, the Commission "shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances."<sup>73</sup> It will be then for the ECJ who "may impose a lump sum or penalty payment on [that Member State]" if it finds that it has not complied with its judgment.<sup>74</sup> The word "may" suggests that the ECJ has a

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<sup>72</sup> See generally, Theodossiou, M., "An analysis of the recent response of the Community to non-compliance with Court of justice judgments", 27 *E.L.Rev.* (2002), pp. 25-46, at pp. 27-29.

<sup>73</sup> Article 228 (2).

<sup>74</sup> *Ibid.*

discretionary competence as whether to impose a sanction or not, on the other hand, it indicates that the ECJ does not have to follow the same the lump sum or penalty of payment specified by the Commission. It follows that even if the Commission does not specify any penalty payment, but instead refers the matter to the ECJ, it will be for the latter to decide upon the appropriate lump sum or penalty of payment to be imposed against the defaulting Member State. However, the ECJ may not initiate on its own initiative any legal action to impose such a sanction without the infringement being referred to by the Commission. The latter's action is thus imperative.

Enforcement of international obligations under the judicial decisions of the ICJ through the EC is promising even if it initiated by injured States who are not members of the Community. When Iran refused to release the American diplomats hostages in Tehran in defiance of the ICJ's Order of provisional measures of 15 December 1979 in *the United States Diplomatic and Consular Staff in Tehran Case*<sup>75</sup> and even before the Court's Judgment on the merits on 24 May 1980,<sup>76</sup> the United States sought the co-operation of the European Community to take sanctions against Iran to induce to comply with its international obligations under the Court's order and later the judgment. Subsequently, on 22 April 1980 the Foreign Ministers of the EC decided to impose certain sanctions against Iran. On 18 May 1980, a formal decision was adopted by which all contracts concluded with the Iranian Government after 4 November 1979 (the date of seizing the American Embassy and its staff) were to be suspended. The EC's action was taken as a response to what was said a threat for peace and security,<sup>77</sup> especially in the aftermath of the failure of the Security Council of the United Nations to give effect to the Orders indicated by the ICJ by virtue of the Soviet veto.

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<sup>75</sup> ICJ. Rep. (1979), 7.

<sup>76</sup> ICJ. Rep. (1980), 3.

<sup>77</sup> Frowein, J., "Collective Enforcement of International Obligations", 47 *ZaöRV* (1987), pp.67-79, at p.75.

### 3.4. The Council of Europe

The Council of Europe is another valuable mechanism within the continent. Since its inception, the Council has established a significant body of standards and co-operation agreements among member States. When there is a dispute as to whether a member of the Council of Europe is in breach of its international obligations, including non-compliance with international judicial decisions and arbitral awards resort may be had to the European Convention for the Peaceful Settlement of Disputes of 29 April 1957.

Besides their undertaking under Article 94 of the UN. Charter, the contracting parties of the Convention undertake under Article 39 (1) to comply with any decision of the ICJ to which it is a party. If any party to the dispute fails to fulfil its obligations under the decision of the ICJ, the other party to the dispute may appeal under Article 39 (2) of the Convention to the decision-making body of the Council, the Committee of Ministers of the Council of Europe, which should it deem necessary, may acting by a two-thirds majority of the representatives entitled to sit on the Committee, make recommendations with a view to ensuring compliance with the decision of the Court.<sup>78</sup> Although this provision is superfluous since it repeats the stipulation of Article 94 of the UN. Charter, it empowers the Council of Europe unequivocally to make recommendations to ensure compliance with the judgment of the Court. Yet the competence of the Council under Article 39 of the Convention is limited to the power of making recommendations as opposed to deciding upon concrete measures.

Nevertheless, non-compliance with a judgment of the ICJ is a violation of Article 3 of the Statute of the Council which requires all member States to accept the principles of the rule of law and collaborate sincerely and effectively in the realisation of the aim of the Council as specified in Chapter I, Article 1 of its Statute.<sup>79</sup> When there is a serious violation of Article 3 the Committee of Ministers is authorised under Article 8 of the Statute to suspend the defaulting party from its rights of representation

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<sup>78</sup> Entered into force 30 April 1985, see 5 *EYB* (1959), p. 361.

<sup>79</sup> Article 1 enumerates the aims of the Council as follows: "(a) The aim of the Council of Europe is to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress. (b) This aim shall be pursued through the organs of the Council by discussion of questions of common concern and by agreements and common action in economic, social, cultural, scientific, legal and administrative matters and in the maintenance and further realisation of human rights and fundamental freedoms. (c) Participation in the Council of Europe shall not affect the collaboration of its members in the work of the United Nations and of other international organisations or unions to which they are parties. (d) Matters relating to national defence do not fall within the scope of the Council of Europe."

in the Council. Although any member of the Council may withdraw by notifying the Secretary General of its intention to do so under Article 7, the Committee of Ministers may also request the defaulting State to withdraw under Article 8. However, if such member does not withdraw under Article 7 or comply with the request of withdrawal, the Committee may decide that it has ceased to be a member of the Council as from such date as the Committee may determine.

### 3.5. Organisation of African Unity – African Union

Regional organisations have developed in Africa dramatically over the last decades.<sup>80</sup> The first comprehensive African organisation with general competence to be established in the continent was the Organisation of African Unity (OAU). Its firm policy, and one of its primary purposes and principles, was the peaceful settlement of disputes among member States.<sup>81</sup> However, there has been a misperception that African countries have been disillusioned about settling their disputes through international judicial bodies and that they would have strenuously opposed ratifying any provisions had been made for compulsory judicial settlement in the Charter of the OAU, or that third party adjudication may generally be considered inappropriate.<sup>82</sup> This might have been true during the first three decades the OAU, during which Africa experienced numerous challenges to its peace and security arising mostly from internal conflicts at a time of decolonization. Nevertheless, the OAU had some notable successes in conflict management, and this has been overlooked. Since its inception the OAU tried to mediate and recommend methods of settlement of conflict, mostly in boundary and territorial disputes which were of tremendous concern at the formation of the OAU, and the method of their implementation.<sup>83</sup>

Following the armed hostilities that erupted between Burkina Faso and Mali on 14 December 1974, appeals were made by the President of Senegal, and of Somalia, who then the President of the OAU. On 26 December 1974, the parties with the good

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<sup>80</sup> Sands, P., Klein, P., *Bowett's Law of International Institutions*, (Sweet & Maxwell, 2001), p. 243.

<sup>81</sup> See Articles III, IV, and XIX of the OAU's Charter. For general examination of the establishment of the OAU and its Charter see, Elias, T. O., "The Charter of the Organization of African Unity", 59 *AJIL*, (1965), p. 243, and Cervenka, Z, *The Organization of African Unity and Its Charter*, (C. Hurst & Company, 1969).

<sup>82</sup> Tiewul, S. A., "Relations between the United Nations Organizations and the Organization of African Unity in the Settlement of Secessionist Conflict", 16, *Harv. Int'l L.J.* (1975), pp. 259-302.

<sup>83</sup> See generally, Ofofu-Amaah, G. K. A., "Regional Enforcement of International Obligations", 47 *ZaöRV* (1987), pp. 80-94, at p. 86.

offices of President of Togo, set up a Mediation Commission composed of Togo, Niger, Guinea, and Senegal. It met on 6 and 7 January 1975 and set up a Military Sub-Commission and a Legal Sub-Commission. The latter's role was to draw up an initial draft proposal for submission to the Commission. On 14 June 1975, the Legal Sub-Commission presented its report to the Mediation Commission. However, Mali did not actually accept it. The OAU and other African figures continued their effort till the parties concluded on 16 September 1983 a Special Agreement under which they immediately seize the ICJ to solve their dispute which became known as the *Frontier Dispute* (Burkina Faso / Mali). However, while the case was pending before the Court particularly in December 1985, grave incidents took place between the forces of both parties. The OAU and other Heads of States were able to urge the parties to conclude a cease-fire agreement with a simultaneous request by both parties of the Chamber to indicate provisional measures to preserve their respective rights. On 10 January 1986, the Chamber unanimously ordered the parties to withdraw their forces from the disputed areas.<sup>84</sup> The efforts of the OAU continued to operate till the Court rendered its judgment on the merits on 22 December 1986.<sup>85</sup> Subsequently, the parties asked the Chamber to nominate experts to assist them in the demarcation of their frontier in this disputed area, which for the purposes of implementation the judgment of the Court, the Chamber did so in its Order of 9 April 1987.<sup>86</sup>

Many other disputes were similarly successfully brought before the ICJ and were complied with as a result of diplomatic persuasion of the parties undertaken by the OAU and its officials.<sup>87</sup> Likewise, with the assistance of the OAU, Libya and Chad ultimately submitted their territorial disputes to the ICJ. Just two months after the ICJ determined the boundaries between the parties in its Judgment of 3 February 1994,<sup>88</sup> and with the assistance of OAU, the parties concluded an agreement concerning the implementation of the Court's judgment.<sup>89</sup> The Court's Judgment was

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<sup>84</sup> *The Frontier Dispute* (Burkina Faso v. Mali), Order of Provisional Measures of 1 January 1986, ICJ Rep. (1986), para.32.

<sup>85</sup> *The Frontier Dispute* (Burkina Faso v. Mali), ICJ Rep. (1986), p. 554.

<sup>86</sup> *The Frontier Dispute* (Burkina Faso v. Mali), ICJ Rep. (1987), p. 7.

<sup>87</sup> Akande, D., "The Role of the International Court of Justice in the maintenance of International Peace", 8 *Afri.J.Int' & Comp. L.* (1996), pp.592- 616, at p. 608.

<sup>88</sup> *Territorial Dispute* (Libya/ Chad), ICJ Rep. (1994), p.6.

<sup>89</sup> See African Legal Materials-Documents, "Chad-Libya: Agreement on the Implementation of the ICJ Judgment Concerning the Territorial Dispute" (done at, Libya, April 4, 1994, 6 *Afri.J.Int' & Comp. L.*, (1994), pp. 516-518; see the letters dated 6 and 7 April 1994 by the permanent representatives of Libya and Chad transmitted to the Secretary General of the United Nations (S/1994/402) and (S/1994/424) respectively.

applied by the parties, troops withdrew under the surveillance of the Security Council, and there has been peace on the border ever since.<sup>90</sup> However, these cases suggest that there was a preference among the member States of the OAU to take their disputes either to ICJ, or to an arbitral tribunal, rather than to the fourth institution of the OAU, namely, the Commission on Mediation, Arbitration and Reconciliation. This perhaps suggests ineffectiveness and inherently limited nature of this institution.<sup>91</sup>

So, after years of growing realisation that the OAU's structures were not up to the task, African leaders issued a call to transform the Organisation of African Unity (OAU) into a new more ambitious African Union. Thus, in September 1999, the OAU Assembly convened for an extraordinary session in Libya in which a draft declaration to establish the African Union was introduced. Subsequently, a Constitutive Act of the African Union was drafted. On 11 July 2000, the Act was adopted by the OAU Assembly at its thirty-six ordinary session in Lome, Togo. On 1 March 2001, the African Union (AU) was established, and on 26 May 2001, its Constitutive Act came into force.<sup>92</sup> Its primary purpose and objective is to "promote peace, security, and stability on the continent". The Union shall function in accordance with the following principles: "Peaceful resolution of conflicts among Member States of the Union through such appropriate means as may be decided upon by the Assembly".<sup>93</sup>

By implication, the Union is also authorised under the Act to intervene in a case of non-compliance with an international obligation, including obligations under the judgments of the Court, when the non-compliance violates the principles enumerated under Article 4 of the Act.<sup>94</sup> The Act in the same Article gives member States the right to request intervention by the Union to "restore peace and security" within their territories.<sup>95</sup> This is a major innovation under the Act. Yet, whether the Assembly will act when there is a violation of these principles remains to be seen, although, the experience of the OAU raises the risk of inaction.<sup>96</sup>

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<sup>90</sup> *Ibid.*, pp. 521-526.

<sup>91</sup> Maluwa, T., "The Peaceful Settlement of Disputes Among African States, 1963-1983: some conceptual issues and practical trends", 38 *ICLQ*, (1989), pp. 299-320.

<sup>92</sup> See *Report of the Secretary-General*, CM/2210 (LXXIV). Council Ministers, 74<sup>th</sup> Ordinary Session / 9<sup>th</sup> Ordinary Session of the AEC, 2-7 July 2001.

<sup>93</sup> See Articles 3 (f) and 4 (e) respectively of the Act. Sirte Declaration, Sept. 9, 1999, at <<http://www.libya-un.org/speeches/sitre-99099.pdf>>.

<sup>94</sup> See Article 4 (e),(f), (I), (m),and (o).

<sup>95</sup> *Ibid.*, (j).

<sup>96</sup> Packer, C. A., & Rukare, D., "The New African Union and Its Constitutive Act", 96 *AJIL* (2002), pp. 365-379, at p. 373.

Beside the establishment of the Court of Justice of the Union, another major innovation of the Constituent Act is the punitive sanctions that may be taken against a member State that fails to comply with the decisions and the policies of the Union, which may also include non-compliance with the judgments of the Court. The Act envisages situations justifying the imposition of sanctions. Article 23 (1) of the Act stipulates clearly that the Assembly “shall determine the appropriate sanctions to be imposed on any Member State that defaults in the payment of its contributions to the budget of the Union”. The sanctions enumerated are: denial of the right to speak at meetings, to vote, to present candidates for any position or post within the Union or to benefit from any activity or commitments of the Union.<sup>97</sup> Notwithstanding the importance of ensuring a specific stipulation concerning the consequence of default in payment of financial contributions, this provision has been criticised for “being unduly harsh”.<sup>98</sup> However, this “harsh” sanction indicates the Union’s tendency towards more sanctions *vis-à-vis* the OAU.

This tendency is apparent in the language and the sanction stipulated in Article 23 (2) of the Act. It gives the Assembly more discretionary power to impose sanctions against any Member State that fails to comply with “the decisions and policies of the Union”. The sanctions may take the forms of the denial of transport and communications links with other Member States, or “other measures of a political and economic nature” to be determined by the Assembly. Although this Article does not define the political and economic measures that are to be taken against the defaulting member States, it is understood to include suspension, expulsion other similar economic measures stipulated in paragraph 1 of the same Article.<sup>99</sup> These arguably comprehensive measures are adequate enough to induce a recalcitrant State to comply with and enforce its international obligations including under the judicial decisions of the Court. It is thus hoped that the AU proceeds with the development of these sanctions and applies them when it is necessary.

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<sup>97</sup> Article 23 (1) of the Act

<sup>98</sup> Magliveras, K. D., & Naldi, G.J., “*The African Union-A New Dawn for Africa?*”, 51 *ICLQ*, (2002), pp. 415-425, at p. 423.

<sup>99</sup> The Act also provides for suspension of Governments that comes to power through unconstitutional means from participating in the activities of the Union. See Article 30 of the Act.

### 3.6. Organisation of the Islamic Conference (OIC)

Another possible, rather unique, avenue of enforcement of international obligations can be found in the OIC which is an international inter-governmental organisation founded on 4 March 1972 and whose Charter came into force on 28 February 1973.<sup>100</sup> The OIC derives its importance and significance from the broadness of its geographical extent, which spreads over three continents and its distinctive features, as probably the only inter-governmental organisation to be based on religious foundations. Notwithstanding its religious background, the OIC is also a political organisation as it can be inferred from Article 6 (5) of its Charter, which states that the Headquarters of the OIC shall be in Jeddah of Saudi Arabia pending the liberation of Jerusalem. The OIC's agenda and the contents of the final communiqués, its declarations as well as its Summit Resolutions reinforce the political nature of the organisation.

However, the enforceability and applicability of the Islamic law (*Shari'ah*) either among member States of the OIC or by the International Islamic Court of Justice (IICJ), in discharging their responsibility or even in the post-adjudicative phase is crucial. Article 27 (1) of Statute of the IICJ, which will be referred to later, stipulates that the Islamic law (*Shari'ah*) is the fundamental law to be applied by the IICJ. The Holy Qur'an which is the main source of the *Shari'ah* binds individuals to preserve their commitments especially those arising from agreements and pacts. This also applies to Islamic States which remain principally under the obligation to enforce not only the corpus of the *Shari'ah* but also other international and regional obligations in accordance with the Quranic provisions.<sup>101</sup> This is unequivocally a religious duty. Some Quranic verses may be quoted: "Help you one another in *Al-Birr* and *Al-Taqwa* (virtue, righteousness and piety); but do not help one another in sin and transgression",<sup>102</sup> and "Except those of the *Mushrikun* (polytheists) with whom you have a treaty, and who have not subsequently failed you in aught, nor have supported anyone against you, so fulfil their treaty to them to the end of their term..."<sup>103</sup> and

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<sup>100</sup> 914 UNTS, 111-16.

<sup>101</sup> See e.g. Mahmassani, S., *The Principles of International Law in Light of Islamic Doctrine*, 117 RdC, (1965), pp.201-328; Khadduri, M., "Islamic International Law" in R. Bernhardt, R., (ed), 6 EPIL (North-Holland Elsevier Science Publisher, 1983), pp.227-233, at pp. 230-31.

<sup>102</sup> Surah. 5. *Al-Maidah*, Part 6, verse. 2.

<sup>103</sup> Surah. 9. *At-Tauba*, Part 10, verse. 4.

“fulfil the Covenant of Allah when you have covenanted, and do not break the oaths after you have confirmed them...”<sup>104</sup>

Islamic States have also endorsed and incorporated general principles of international law into the Charter of the OIC and the Statute of the IICJ as well as in their practice known as *Siyar*,<sup>105</sup> or now as it is conveniently called, Islamic international law, and which is based on the same sources of the Islamic *Shari'ah*, to regulate the external relations of the Islamic States with non-Islamic States.<sup>106</sup> It may thus be argued that a non-Islamic State can invoke these religious obligations to establish the wrongful act of an Islamic State for violations of its religious commitments as stipulated under the Qur'an and *Siyar*.

The Charter of the OIC also reaffirms the commitment of its member States to the purposes and principles of the UN. Charter. One of the OIC's main objectives is the achievement and maintenance of international peace and security and pacific settlement of disputes among its member States.<sup>107</sup> Article 2 (B) (4), stipulates clearly that member States are to settle “any conflict that may arise by peaceful means such as negotiation, mediation, reconciliation, or arbitration.” Similarly, Article 12 provides that “any dispute that may arise in the interpretation, application or implementation of any Article in the present Charter shall be settled peacefully, and in all cases through consultations, negotiations, reconciliation or arbitration.” It is noticeable that in both cases, the Charter does not mention judicial settlement as a means of dispute settlement nor does it give other organs of the OIC the competence to deal with any specific dispute settlement procedures, if achieving settlement through these means fails.<sup>108</sup> Absence of a reference to “judicial Settlement” in the Charter of the OIC, which was also a weakness inherent in Article 5 of the Pact of the LAS, whose members are also influential members in the OIC, might have been the reason of the negative attitude amongst its member States towards this important method of dispute settlement.<sup>109</sup>

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<sup>104</sup> *Surah. 16. An-Nahl*, Part 14, verse. 91.

<sup>105</sup> The sources of *Siyar* correspond largely to the same sources indicated in Article 38 (1) of the Statute of the International Court of Justice, namely, conventions and treaties, custom, general principles and Moslem jurists.

<sup>106</sup> Khadduri, M., *War and Peace in the Law of Islam*, (John Hopkins Press, 1955), p. 47.

<sup>107</sup> Article 2 (A) (4) of the Charter.

<sup>108</sup> See in this regard Article 37 (1) of the Charter of the United Nations which reads “Should the parties to a dispute of the nature referred to in Article 33 fail to settle it by the means indicated in that Article, they shall refer it to the Security Council”.

<sup>109</sup> Moinuddin, H., *The Charter of the Islamic Conference and Legal Framework of Economic Co-operation among its Member States*, (Clarendon Press: Oxford, 1987), p. 96.

During the eighties, however, the OIC acknowledged the importance of this indispensable method of pacific settlement. It thus decided to establish the International Islamic Court of Justice (IICJ) not only to settle any dispute that may arise between its members but also to be its judicial organ. The Third Islamic Summit Conference held in Taif / Saudi Arabia in January 1981, envisaged the establishment of the IICJ and called upon the Secretary-General to convene a group of experts to draw up its Statute.<sup>110</sup> The Statute was drafted and subsequently submitted to the Fifth Islamic Summit Conference held in Kuwait in January 1987, which approved it, provided that its jurisdiction was voluntary. Its Resolution No. 12/5-P provided that the "Conference also decides to add a fourth paragraph (D) to Article 3 of the OIC Charter [which deals with the organs of the OIC] to read as follows: (The International Islamic Court of Justice). It shall exercise its functions in accordance with its Statute which is annexed to this Charter and forms a complementary part of the Charter".<sup>111</sup> Article 38 echoes Article 59 of the Statute of the ICJ. It provides that the judgments of the Court are binding only upon the parties and in respect of the particular case. Whereas Article 39 (A) provides that the judgment of the Court is binding and without appeal, Article 39 (C) states that if a party to the dispute fails to comply with the judgment of the Court, the matter shall be referred to the Conference of Foreign Ministers.<sup>112</sup>

The Statute has been accepted only by a small number of member States and has not yet come into force.<sup>113</sup> Nevertheless, when it comes into force there is no enforcement mechanism available to the OIC to induce compliance with the IICJ's decisions or with other international obligations including compliance with the judicial decisions of the ICJ. Nor does the Charter of the OIC stipulate any sanction in the form of suspension, expulsion or other enforcement actions. Regardless of this

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<sup>110</sup> Resolution No. 11/3-P adopted by the Third Islamic Summit Conference held in Taif / Saudi Arabia, from 25-28 January 1981.

<sup>111</sup> Resolution No. 12/5-P (IS) adopted by the Fifth Islamic Summit Conference held in Kuwait from 26-29 January 1987.

<sup>112</sup> See generally, Lombardini, M., "The International Islamic Court of Justice: Towards an International Islamic Legal System?", 14 *Leiden J Int'l. L* (2001), pp. 665-680.

<sup>113</sup> Resolution No. 59 / 9-P (IS) on the International Islamic Court of Justice, adopted in Ninth Session of the Islamic Summit Conference, Session of Peace and Development "Al Aqsa Intifada", held in Doha, State of Qatar, from 12 to 13 November 2000, which urged the OIC Member States that had not ratified the Statute of the IICJ to do so by completing the ratification procedure in order to enable the Court to fulfil its functions. See also Resolution No. 1/29-LEG, on the International Islamic Court of Justice and Co-operation Among Islamic States in the Judicial Field, adopted by The Twenty-ninth Session of the Islamic Conference of Foreign Ministers (Session of Solidarity and Dialogue), held in Khartoum, Republic of the Sudan, from 25 to 27 June, 2002, which reiterated exactly the same call.

undisputed reality, the OIC in fact suspended the membership of Egypt at the Third Islamic Summit Conference in January 1981 for its participation in the Camp David Agreements with Israel. The competence of the organisation to suspend Egypt was arguably valid under the doctrine of implied powers. The suspension was not only an element of a diplomatic isolation of Egypt from the LAS and the OIC but also was the only possible sanction to be imposed against Egypt for its violation of the basic principles of the OIC, which can be inferred from Article 2 (A) (5). It requires a full co-operation and co-ordination among member States in order to preserve the sacred places and to liberate them, and which includes support for the Palestinian people to recapture their rights and to liberate their lands.<sup>114</sup> The OIC has also responded to various international conflicts and other issues that concern international peace and security, mostly, however, in form of resolutions adopted to exert political pressures on the States concerned to comply with their international obligations.

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<sup>114</sup> The OIC was established primarily on the face of the arson of the Al-Aqsa Mosque in Jerusalem in August 1969. Subsequently, Moslem leaders met in Rabat/ Morocco, from 22 to 25 September 1969 to respond to this heinous act. In that meeting, they committed themselves to react and face the Palestinian issue as soon as possible. Year later, King Faisal of Saudi Arabia convened the first Islamic Conference of Foreign Ministers in Jeddah/ Saudi Arabia from 23 to 25 March 1970, which resulted the creation of the OIC.

#### **4. Conclusion**

Regional organisations have become the most obvious avenues for interstate co-operation. Their role has assumed attractive potentialities in the enforcement of international obligations including those under the judgments of the ICJ. Recalcitrant States are more likely to respond to regional pressures, and to listen to responsible figures of the region whom would be better equipped with knowledge of their regional cultures and political conditions. This sense of regional responsibility and solidarity is a valuable element in the process of the enforcement of international law in general and international judicial decisions in particular.

Regional organisations have also established various dispute settlement mechanisms including commissions of dispute settlement, mediation for the prevention and settlement of conflict, as well as judicial institutions to solve their local disputes. However, the level of these mechanisms and their effectiveness are largely dependent on and reflective of the level of integration in these organisations. The more integrated the organisation, the more effective the dispute settlement mechanisms. The same conclusion is applicable to the level and the effectiveness of their enforcement mechanisms. Thus, not all regional organisations are effective vehicles in the process of the enforcement of international legal obligations, including those under the judicial decisions of the ICJ, although they can in any event play a minimum role in mitigating the political tensions between their member States. Thus, their potentiality remains a valuable factor in this process.

# CHAPTER NINE:

## ENFORCEMENT OF THE JUDICIAL DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE THROUGH INTERNATIONAL SPECIALIZED AGENCIES

### 1. Introduction

Although international specialised agencies are specifically connected with the United Nations, they are established by inter-governmental agreements and have assumed wide international responsibilities,<sup>1</sup> and with a separate legal personality. Apart from their special agreements with the Security Council and the obligation to co-operate with the Council in carrying out its decisions,<sup>2</sup> sharing the same overall objective of the United Nations and operating within its legal framework, a number of these agencies have direct statutory responsibilities under their constituent instruments to sanction, through certain measures, a defaulting State that is unwilling to comply with its international obligations including the obligation of compliance with and enforcement of the judicial decisions of the ICJ.

Surprisingly, however, most writers, who have examined the machinery of these agencies in the context of the enforcement of judicial decisions of the ICJ, have laid a lot of emphasis on certain provisions of their constituent instruments, overlooking their limitation and restricted application to every judicial decision of the ICJ. They have also overlooked some other relevant provisions of their constituent instruments that may validly be invoked in this regard. This Chapter examines the available enforcement mechanisms within some specialized agencies, namely the International Labour Organisation, the International Civil Aviation Organisation,

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<sup>1</sup> See Article 57 (1) which reads, "The various specialized agencies, established by intergovernmental agreement and having wide international responsibilities, as defined in their basic instruments, in economic, social, cultural, educational, health, and related fields, shall be brought into relationship with the United Nations in accordance with the provisions of Article 63".

<sup>2</sup> See e.g., Article 7 of the ICAO Convention 8 *UNTS*, p. 324, 328 and Article 6 (1) of *Agreement between the United Nations and International Monetary Fund*, April 15, 1948, 16, *UNTS*, p. 328, 332. See also Article II. 5 of the UNESCO Constitution which stipulates that Members expelled from the UN Shall automatically cease to be UNESCO Members. 4 *UNTS*, p. 275.

International Atomic Energy Agency, the World Bank and International Monetary Fund, and other international specialised agencies.

## **2. International Labour Organisation**

The idea of a multilaterally authorised trade sanction was first institutionalised in the Constitution of the International Labour Organisation (ILO), as set out in the Treaty of Versailles in 1919,<sup>3</sup> which is now governed by the Instrument of Amendment of the Constitution of 26 September 1946. Its basic idea is to provide global peace between different parties on the labour market through the adoption of certain minimum standards of human working conditions. It also provides an important mechanism for dispute settlement procedures if a member State fails to fulfil its obligations under the Constitution or other relevant conventions.

Under Articles 24 and 26 (1) of the Constitution, an industrial association of workers or employers in a member State, or any member State of the ILO, has the right to file a complaint with the International Labour Office if it is not satisfied that any other member State is observing effectively an ILO Convention that it has ratified. The complaint will be received by the International Labour Office, which will inform the government concerned, and may invite it to make a statement on the subject as it may think fit. If the Governing Body does not think it is necessary to communicate the complaint to the government in question, or if, when it has made this communication, no statement in reply has been received within a reasonable time which the Governing Body considers to be satisfactory, the Governing Body may appoint a Commission of Inquiry to consider and to report on the complaint.<sup>4</sup>

Article 28 explains how the Commission of Enquiry should consider the complaint. It provides that it “shall prepare a report embodying its findings on all questions of fact relevant to determining the issue between the parties and containing such recommendations...”<sup>5</sup> This report will also be communicated to the Governing Body and all governments concerned in the complaint. Then under Article 29 (2) “each of these governments shall within three months inform the Director-General of the International Labour Office whether or not it accepts the recommendations

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<sup>3</sup> See Article 329 of the Treaty of Versailles of 1919.

<sup>4</sup> Articles 24 and 26 of the Constitution, 15 *UNTS*, pp. 90-91.

<sup>5</sup> *Ibid.*, Article 28.

contained in the report of the Commission; and if not, whether it proposes to refer the complaint to the International Court of Justice". If it refers the complaint to the ICJ, the decision of the Court to be given in regard to complaint or matter referred to it under Article 29, will "be final" under Article 31.<sup>6</sup> It will be then for the ICJ under Article 32 to "affirm, vary or reverse any of the findings or recommendation of the Commission of Enquiry, if any." However, in the case of a failure to comply with the specified recommendations contained in the report of the Commission of Enquiry, or in the decision of the ICJ, under Article 33 of the Constitution, the Governing Body "may recommend to the Conference such action as it may deem wise and expedient to secure compliance therewith."<sup>7</sup>

This provision does not detail any specific sanction; instead, it gives the Governing Body a more flexible and general power to recommend to the Conference to take what it may deem necessary to secure compliance with the recommendation of the Commission or the decision of the ICJ. It also implies that the Governing Body may not recommend any action to be taken by the Conference. It also suggests that the Conference may not take any action without the recommendation of the Governing Body. Here the political considerations play their role. However, if the Conference decides to impose sanction, it may upon the recommendation of the Governing Body, the Conference may withdraw the privileges of the recalcitrant State, which might take the form of suspension, or expulsion from the organisation,<sup>8</sup> even if there is no statutory or constitutional provision to do so.<sup>9</sup> In July 1964, two amendments were introduced to the Constitution, which permitted the Conference to suspend or exclude from membership any State suspended or excluded from the United Nations, and to exclude any member State that was found by the United Nations to be adopting policy of racial discrimination. That initiative was in fact designed against South Africa, which made it withdraw from the organisation in the same year.<sup>10</sup>

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<sup>6</sup> *Ibid.*, Article 31, p. 92.

<sup>7</sup> *Ibid.*, Article 33, p. 92.

<sup>8</sup> ILO Official Bulletin (1964), Suppl. 1 to 3, at pp. 8-12.

<sup>9</sup> Only a limited number of the constitutions of some international organizations provide the possibility of expulsion of a defaulting member State. See Schermers, H. G., & Blokker, N. M., *International Institutional Law: Unity within Diversity*, 3<sup>rd</sup> ed (Martinus Nijhoff, 1995), p.99 & pp.104-105.

<sup>10</sup> *UNYB* (1964) p. 493.

Alternatively, the Conference may if appropriate draw a case of failure to comply with the decision of the ICJ to the attention of the Security Council of the United Nations to take what it deems necessary to induce the defaulting State to comply with its obligations under the Constitution as well as under the judgment of the Court.<sup>11</sup> The Conference may also decide to direct other members of the ILO to reconsider their relations with the defaulting State and approach other international organisations to reconsider their co-operation with that State, as it did for the first time with Myanmar in 2001.

In a 1998 Commission of Inquiry to investigate whether the Government of Myanmar had violated its obligations under the Constitution and other relevant conventions of the ILO, concluded that "the obligation to suppress the use of forced or compulsory labour is violated in Myanmar in national law as well as in actual practice in a widespread and systematic manner, with total disregard for the human dignity, safety, health and basic needs of the people."<sup>12</sup> In its 276th Session 1999, the Conference considered the report and invited the Director-General of the ILO to ensure that no technical co-operation or assistance to be given to the Government of Myanmar except for the purposes of direct assistance to implement immediately the recommendations of the Commission of Inquiry.<sup>13</sup> On his part, the Director-General also warned Myanmar that if it persisted in ignoring the expressed will of the Organisation, "the Governing Body's historic decision opens the way for the Conference to enlist the support of ILO constituents, the United Nations, governments and international organisations world-wide to review their dealings with Myanmar to ensure that by their involvement they are in no way contributing to the perpetuation of this grievous human rights abuse."<sup>14</sup>

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<sup>11</sup> The Report of the Conference Delegation on Constitutional Questions in which this amendment to Article 33 was recommended contained the following comment: "Such a general clause would leave the Governing Body a discretion to adapt its action to the circumstance of the particular case, and permit it to make recommendations to the Member of the Organization or, if appropriate, to draw a case of such failure to the attention of the Security Council of the United Nations". International Labour Conference, 29<sup>th</sup> Session, Montreal, 1946, Report II (I), *Constitutional Questions Part. I: Report of the Conference Delegation on Constitutional Questions*, p. 56, cited in Sloan, B., "Enforcement of Arbitral Awards in International Agencies", 3 *AJ*, (1948), pp.134-146, fn. 16, p. 140.

<sup>12</sup> *Report of the Commission of Inquiry appointed under article 26 of the Constitution of the International Labour Organization to examine the observance by Myanmar of the Forced Labour Convention, 1930 (No. 29)* Geneva, 2 July 1998. Press Release, Thursday 20 August 1998 (ILO/98/32)

<sup>13</sup> GB.276/6, paras., 8-11.

<sup>14</sup> Press Release, 29 March 2000, (ILO/00/9).

Subsequently, at its 277<sup>th</sup> Session 2000, the Governing Body proposed a resolution recommending that the conference ask that the Director General to inform other international organisations and the United Nations about Myanmar's failure to comply with its obligations. It further called on these organisations to "reconsider...any cooperation that may be engaged in with [Myanmar] and, if appropriate, to cease as soon as possible any activity that could have the effect of directly or indirectly abetting the practice of forced or compulsory labour." It also aimed to have the UN's Economic and Social Council (ECOSOC) consider at its 279<sup>th</sup> session 2000 Myanmar's failure to comply with the ILO commission's advice and seek "the adoption of recommendations...to other specialized agencies," which would be similar to the ILO's.<sup>15</sup> At its 282<sup>nd</sup> session 2001, the Governing Body decided to allow taking measures against Myanmar to "take concrete actions" to implement the recommendations of the 1998 Commission of Inquiry which had found that resort to forced labour in the country was "widespread and systematic". The Conference also recommended that the constituents of the ILO to review their relations with Myanmar and take appropriate measures to ensure that such relations do not perpetuate or extend the system of forced or compulsory labour in that country.<sup>16</sup> These measures indicate the readiness of the ILO to respond to violations of international obligations. It also demonstrated how Article 33 of the Constitution could be significant and effective provision in the process of enforcement of the member States' obligations.

This Article may also be employed in cases of non-compliance with the judicial decisions of the ICJ as well, but not without qualification. Surprisingly, however, some commentators and international lawyers writers, who have noted without further analysis and discussions the ILO's machinery in the enforcement of the judicial decisions of the ICJ,<sup>17</sup> and those who have examined it to relative extent,<sup>18</sup>

<sup>15</sup> GB.277/6 (Add.1) 277<sup>th</sup> Session, Geneva March 2000.

<sup>16</sup> Press Release, 16 November 2001 (ILO/00/44).

<sup>17</sup> Schachter, O, "The Enforcement of International Judicial and Arbitral Decisions" 54 *AJIL* (1960), pp. 1-24, at p.24; Gormeley, W. P, *The Status of Awards of International Tribunals: Possible Avoidance Versus Legal Enforcement*, 10 *HLJ* (1964), pp. 33-107, at p. 79; O'Connell, M. E., "The Prospects for Enforcing Monetary Judgments of the International Court of Justice: A Study of Nicaragua's Judgment Against the United States", 30 *Va. J. Int'l L.* (1990), pp. 891-940, at p. 934; Guillaume, G., "Enforcement of Decisions of the International Court of Justice" in Jasentuliyana, M., (ed), *Perspectives on International Law*, (Kluwer, 1995), pp. 275-288, at p.284 and Rosenne, S., *The Law and the Practice of the International Court of Justice 1920-1996*, (hereinafter cited as *The Law and Practice*), 3<sup>rd</sup> ed, (Martinus Nijhoff,1997),p. 259.

<sup>18</sup> Sloan, B., *supra* note 11, at pp. 139-140; Jenks, C. W, *The Prospects of International Adjudication*, (Stevens & Sons Limited, 1964), pp. 696-697; and Nantwi, E. K., *Enforcement of International Judicial Decisions and Arbitral Award in Public International Law*, (Leyden, 1966), p. 164.

also placed much emphasis on Article 33 of the ILO. They overlooked its limited application, which is merely restricted to the failure to comply with specified recommendations of the Commission of Enquiry of the ILO and the decisions of the ICJ that pertains to the application of the ILO's Constitution and not to any judgment the ICJ may render in other contentious cases.

It should be necessary for the application of Article 33 in the post-adjudicative phase of the ICJ to have a substantial and not solely an artificial connection between the provisions invoked and the judgment in question.<sup>19</sup> Therefore a judgment creditor cannot bring a complaint for non-compliance with a decision of the ICJ against a judgment debtor before the competent body of the ILO in order to enforce *any* decision which may be rendered by the ICJ, unless the decision and the provision invoked is intimately related to the Constitution and the other relevant conventions under which the ILO operates, nor strictly speaking should the Conference invoke Article 33 to impose any measures designed to enforce any judicial decisions that Court may render.

However, Article 33 of the ILO Constitution is not the only available enforcement mechanism within the ILO, as some commentators seem to suggest. Articles 12 and 25 of the Constitution, which have also been overlooked, provide another valuable enforcement measure that may be employed in cases of non-compliance with the judicial decisions of the ICJ. Under Article 12 (1) of the Constitution, the ILO is under a duty to co-operate with any international organisation entrusted with the co-ordination of the activities of public international organisations having specialised responsibilities in related fields. This is reiterated in Article 26(1) of the Constitution, which states that "Any of the Members shall have the right to file a complaint with the International Labour Office if it is not satisfied that any other Member is securing the effective observance of any Convention which both have ratified in accordance with the foregoing articles".<sup>20</sup> The term "any Convention" should not include irrelevant treaties, conventions or any instruments that have not been accepted by the Conference of the ILO but only those conventions "which both have ratified in accordance with the foregoing articles".<sup>21</sup> It thus can be argued that

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<sup>19</sup> Advisory Opinion of 23 October 1956 on Judgments of the Administrative Tribunal of the ILO upon Complaints Made against UNESC, ICJ. Rep. (1956), p. 89; *Interhandel* case, ICJ. Rep. (1959), p. 24 and *Nicaragua* case, Jurisdiction and Admissibility, ICJ. Rep. (1984), p. 427, para. 81.

<sup>20</sup> Article 26, 15 *UNTS*, p. 90

<sup>21</sup> See Articles 12, 19, and 21 of the Constitution of the ILO.

violation of relevant obligations under the UN Charter and the Statute of the ICJ especially in disputes concerning the global peace between different parties on the labour market and the standards of human working conditions can fall under this category, and which may be brought before the ILO.

Again, if the ILO has not received the response from the defaulting State in question concerning the compliant within a reasonable time, or if the statement when received is not deemed to be satisfactory by the Governing Body, the ILO shall have the right under Article 25 of the Constitution "to publish the representation and the statement".<sup>22</sup> The publication of the violations of a defaulting member State and exposing the failure of the recalcitrant State to comply with its obligation publicly is generally considered to be an indispensable psychological sanction or pressure in the enforcement of international obligations. This form of mobilisation of shame and public identification and dissemination of specific acts of non-compliance or questionable compliance under Article 25 can effectively be invested in the post-adjudicative phase of the ICJ.<sup>23</sup>

### 3. International Civil Aviation Organisation

The International Civil Aviation Organization (ICAO) was created at the Chicago Conference on International Civil Aviation in 1944. It is responsible for establishing international standards; recommend practices and procedures for the safety and security of international civil aviation. Its constituent instrument, the Chicago Convention, which entered into force in 1947,<sup>24</sup> establishes formal procedures for the settlement of disputes between the contracting parties and enforcement mechanism of its outcomes. It confers on the Council of the ICAO extensive judicial functions for the settlement of disputes between the contracting parties.<sup>25</sup> Under Article 84 of the Convention, the Council is authorised to decide any disagreement between the contracting States relating to the interpretation or

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<sup>22</sup> Article 25, 15 *UNTS*, p. 90.

<sup>23</sup> See generally, Downs, G., & Jones, M., "Reputation, Compliance, and International Law", XXXI *JLS*, (2001), pp. S95-S114.

<sup>24</sup> 15 *UNTS*, p.295.

<sup>25</sup> Hingorani, R.C., *Dispute Settlement in International Civil Aviation*", 14 *A.J.*, (1959), p. 14.

application of the Convention and its Annexes, which cannot be settled by negotiation.<sup>26</sup>

This Article was invoked recently by the United States on 14 March 2000 to resolve a dispute with the fifteen members of the European Union over the adoption of a regulation restricting the operation within Europe of certain aircraft fitted with "hushkit" noise reduction devices, and those re-engined with engines of a certain design.<sup>27</sup> The EU's "hushkit" regulation was seen by the United States as a discrimination against the U.S. companies and thus was a violation of the Convention.<sup>28</sup> However, on 13 June 2002, United States withdrew its complaint against all the EU States except Belgium on the ground that following the repeal of the hushkit regulation, Belgium adopted a decree restricting the operation of certain aircraft at Belgian airports which was thus seen to perpetuate discriminatory aspects of the EU's hushkit regulation.<sup>29</sup>

The Council's decision, which is to be decided by a majority vote of all Council Members not parties to the dispute,<sup>30</sup> is binding<sup>31</sup> unless it is appealed either to an *ad hoc* tribunal,<sup>32</sup> or to the ICJ,<sup>33</sup> whose decisions "shall be final and binding".<sup>34</sup> The first case of appeal to the Court under this provision was the *Appeal Relating to the Jurisdiction of the ICAO Council* (India v. Pakistan). In February 1971, following an incident involving the diversion to Pakistan of an Indian aircraft, India suspended over flights of its territory by Pakistan civil aircraft. Pakistan regarded that action to be a breach of the Convention. It thus complained to the Council of the ICAO. India

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<sup>26</sup> 15 *UNTS*, p. 352.

<sup>27</sup> European Council Regulation No. 925/1999, 29 April 1999, *OJEC*, Vol. 42, 8 May 1999.

<sup>28</sup> See the U.S Mission to the European Union, at <<http://www.useu.be/ISSUES/compl0314.html>>. It is not quite clear though why Professors Philippe Sands and Pierre Klein suggested that Article 84 of the Convention was never used. Sands, P., & Klein, P., *Bowett's Law of International Institutions*, (Sweet & Maxwell, 2001), p. 343. See, however, Milde, M., "Dispute Settlement in the Framework of the ICAO", in Boeckstiegel, (ed), *Settlement of Space Law Disputes*, (Carl Heymams Verlag, 1980), pp. 90-93.

<sup>29</sup> See the U.S Mission to the European Union, at:

<<http://www.useu.be/Categories/HushKits/June1302USHustkitAviationComplaint.html>>

<sup>30</sup> Articles 84, 52 and 53. The Council is composed of 33 Contracting States elected by the Assembly. The Council elects its own President.

<sup>31</sup> Buergethal, T., *Law-Making in the International Civil Aviation Organization*, (Syracuse Univ. Press, 1969) pp. 140-41.

<sup>32</sup> See Articles 84 and 85 of the Convention. 15 *UNTS* (1948), pp. 352-354.

<sup>33</sup> While the Article speaks about the Permanent Court of International Justice, it is clear that the PCIJ has been replaced by International Court of Justice by virtue of Article 37 of the Statute of the Court as the judicial institution under the Convention to exercise this function to enforce of the judicial decisions of the ICJ accordingly.

<sup>34</sup> Article 86 of the Convention, 15 *UNTS*, p. 354.

raised preliminary objections to the jurisdiction of the Council to decide such a dispute; nevertheless its objections were rejected. India then appealed to the ICJ. During the written and oral proceedings, Pakistan contended, *inter alia*, that the Court was not competent to hear the appeal. In its Judgment of 18 August 1972, the Court found that it was competent to hear the appeal of India. It further decided that the ICAO Council was competent to deal with both the Application and the Complaint of which it had been seised by Pakistan, and accordingly dismissed the appeal laid before it by the Government of India.<sup>35</sup>

In the case of non-compliance with the judicial decisions of the ICJ rendered under Article 84, the Convention provides two forms of sanctions. Whereas the first sanction applies to cases of non-compliance by the airlines of a contracting state under Article 87,<sup>36</sup> and which may take the form of denying the airline of the recalcitrant State access to air space and landing rights,<sup>37</sup> the second sanction applies to cases of non-compliance by the contracting State itself. Article 88 entitled "Penalty for non-conformity by State" not only permits the Assembly of the Organisation to sanction the recalcitrant States, but also obliges the Assembly to do so once it has found the contracting party in default. Under Article 88 "the Assembly *shall* suspend the voting power in the Assembly and in the Council of any contracting State that is found in default under the provisions of this Charter".<sup>38</sup> The language of this Article is not limited to decisions relating to the Convention, but it can be invoked against a recalcitrant State as well as against any other contracting party, which is found to be in breach of the provisions of the Convention.<sup>39</sup>

Nevertheless, we should not neglect to qualify the type or the nature of judicial decision of the ICJ that can be brought before the Council of the ICAO and subsequently the measure to be taken to give it effect. Consequently, similar to the discussions undertaken under Article 33 of the Constitution of the ILO, most writers,

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<sup>35</sup> ICJ.Rep. (1972), 46.

<sup>36</sup> 15 *UNTS* (1948), 353.

<sup>37</sup> *Ibid.* See also Domke, M., "The Settlement of Disputes in International Agencies", 1 *A.J.*, (1946), pp. 146-155, at p. 154. See also Article 9 of the Convention under which the Contracting parties may restrict the flight of aircraft over certain areas for certain reasons including, arguably, violation of international law. 15 *UNTS*, p. 298

<sup>38</sup> Article 88 "Penalty for non-conformity by State": "The Assembly shall suspend the voting power in the Assembly and in the Council of any contracting State that is found in default under the provisions of this Chapter". Article 88, 15 *UNTS*, p. 354 (emphasis added).

<sup>39</sup> Hingorani, R.C., *supra* note 25, p. 23; Buergenthal, T., *supra* note 31, p. 150.

who have touched upon the problem of enforcement of ICJ decisions and the measures to be taken through international specialized agencies to give effect to them, continue to overlook the relevance of the type of decisions which can be enforced and hence subject to the application of the relevant provisions of the ICAO Convention. They suggest the application of Articles 87 and 88 of the Convention without advancing any precise qualification or further argumentation.<sup>40</sup>

Articles 87 and 88 are only applicable to any decisions of the Council, which have been appealed to the ICJ by a member State under Articles 84 and 86 of the Convention, and the Court has decided upon this appeal. Accordingly, Articles 87 and 88 of the Convention cannot be considered as a statutory empowerment of a general enforcement power to enforce *any* decision rendered by the Court without any qualification or intimate relation with relevant provisions of the Convention. It should be thus necessary for the applications of Article 87 and 88 in the post-adjudicative phase of the ICJ to have a substantial as opposed to artificial connection between the provisions invoked and the judgment in question.<sup>41</sup>

Nevertheless, in some circumstances non-compliance with decisions of the ICJ could constitute even partially a threat against international civil aviation or unlawful acts such as an unlawful seizure of aircraft in violation of an ICJ decision. The ICAO may deal with such matters under the Convention of International Civil Aviation as long as it eventually falls under the relevant provisions of the Convention, and hence, apply these sanctions even if they were irrelevant in the first place. Once these conditions are met, enforcement through the ICAO is to be considered effective.

Without necessarily relying on specific provisions, the Council of the ICAO may, alternatively, condemn certain actions relevant to international aviation. On 13 March 2002 the Council of the ICAO by the High-level, Ministerial Conference on Aviation Security held at the Organization's Headquarters, 19 and 20 February 2002, on the basis of a paper presented by Arab States Members of the Arab Civil Aviation Commission, strongly condemned all acts of unlawful interference against civil

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<sup>40</sup> See e.g., Sloan, B., *supra* note 11, p. 139; Schachter, O., *supra* note 17, p. 24; Jenks, C. W., *supra* note 17, pp. 697-698; Reisman, M., "The Role of the Economic Agencies in the Enforcement of International Judgment and Awards", (hereinafter cited as *The Role of the Economic Agencies*) 19 *I.O.*, (1965), pp. 929-947, at 934; Nantwi, E. K., *supra* note 18, pp. 163-164; O'Connell, M. E., *supra* note 17, p. 935, and Guillaume, G., *supra* note 17, p.284.

<sup>41</sup> Advisory Opinion of 23 October 1956 on Judgments of the Administrative Tribunal of the ILO upon Complaints Made against UNESC, ICJ. Rep. (1956), p. 89; *Interhandel* case, ICJ.Rep. (1959), p. 24; *Nicaragua* case, Jurisdiction and Admissibility, ICJ. Rep. (1984), p. 427, para. 81.

aviation, wherever, by whomsoever and for whatever reasons they are perpetrated; and the destruction of the Gaza International Airport and its air navigation facilities by Israeli forces.

The Council may also call upon member states to act in certain way and in accordance with the relevant instruments of the ICAO. In response to a compliant made by the Government of Democratic Republic of the Congo on 9 and 20 October 1998, against the Governments of Rwanda and Uganda, the Council adopted a declaration on 10 March 1999 in which it urged all States to refrain from the use of weapons against civil aircraft in flight and to be guided by the principles, rules, Standards and Recommended Practices (SARPs) of the Convention on International Civil Aviation and its Annexes, and related aviation security conventions, for the safe and efficient development of civil aviation.<sup>42</sup>

#### **4. International Monetary Fund - The World Bank**

The International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (IBRD) commonly known as the World Bank, which emerged from the Bretton Woods Agreements,<sup>43</sup> may also be invoked to enforce the judicial decisions of the ICJ. The control that the IMF and the Bank possess or enjoy over the assets of the Contracting Members, and the possibility of withholding credit, would indicate their importance as methods of securing compliance with the judicial decisions of the ICJ. But, the fact of the matter is that the purposes of the IMF and the World Bank are to promote the international monetary stability, co-operation,<sup>44</sup> and the development of member States.<sup>45</sup> Thus, the major question to raise is how could such agencies play a role in enforcing ICJ decisions by attachment techniques without contradicting their aims and purposes. Would not that affect the working capital of those agencies and their main principles? Would not such effort, which is non-economic in its nature, impair the agencies' credibility?

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<sup>42</sup> Declaration Adopted by the Council of the International Civil Aviation Organization at the Ninth Meeting of its 156<sup>th</sup> Session on 10 March 1999.

<sup>43</sup> Washington .D.C, 27 December 1945, 2 *UNTS*, 134.

<sup>44</sup> Article 1 of the IMF.

<sup>45</sup> Article 1 of the World Bank.

The purposes of the IMF and the World Bank are said to imply that the IMF and the World Bank have no political role to play in the enforcement of the ICJ decisions because any course of action that goes beyond the purposes of the Fund and the Bank would be *ultra vires*.<sup>46</sup> This presumption is not always accurate and it overlooks the circumstances surrounding their constitutional prescriptions as well as the development of unforeseen circumstances, which may be coloured with legal-political elements pertaining to the activities of the IMF and the World Bank. Generally, as the ICJ has indicated as a rule that when an organisation takes any appropriate action to fulfil one of its stated purposes, the presumption is that such action is not *ultra vires*.<sup>47</sup> It was probably indispensable for the IMF and the World Bank to initially establish an image exclusively based on economic objectives in order to obtain the trust and confidence necessary for the establishment of these agencies.<sup>48</sup>

More gradually but vigorously the IMF has adopted various sanctions schemes since its inception.<sup>49</sup> The Third Amendment of the IMF Articles of Agreement, which entered into force on 11 November 1992, provides the IMF with three new sanctions, (a) If a member fails to fulfil “any of its obligations under this Agreement”, the Fund may declare the member ineligible to use the general resources of the Fund (b) If, after the expiration of a reasonable period following a declaration of ineligibility under (a) above, the member persists in its failure to fulfill “any of its obligations under this Agreement”, the Fund may, by a seventy percent majority of the total voting power, suspend the voting rights of the member.<sup>50</sup> According to Sir Joseph Gold, who has been considered as the leading authority on legal aspects of the IMF, the “obligations” concerned are not confined to those of a financial character.<sup>51</sup> Thus, the term “obligation” may be extended to include other international obligations, including obligations arising under the judicial decisions of the ICJ.

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<sup>46</sup> See Article 4 (10) of the Agreement of the Bank states categorically that: “The Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes stated in Article I”.

<sup>47</sup> *Certain Expenses of the United Nations*, Advisory Opinion, ICJ. Rep. (1962), p.168.

<sup>48</sup> Reisman, M., *Nullity and Revision: The Review and Enforcement of International Judgments and Awards*, (Yale Univ. Press, 1971), p.739.

<sup>49</sup> See, generally, Gold, J., “The ‘Sanctions’ of the International Monetary Fund”, 66 *AJIL* (1972), pp. 737-762.

<sup>50</sup> Article XXVI (2) (a), (b).

<sup>51</sup> Gold, J., “The IMF Invents New Penalties” in Blokker, N., & Muller, S., (eds), *Towards More Effective Supervision by International Organizations: Essays in the Honour of Henry G. Schemers*, (Martinus Nijhoff, 1994), pp. 127-147, at p. 139.

This finds support even in the new third sanction itself, which relates to the denial of right of a member to be involved in the process of amending Articles of Agreement and the denial of right to participate in the appointment or election of the officers who compose the IMF's organs. Under Article XXVI (2) (c), the Fund may, by a seventy percent majority of the total voting power, suspend the voting rights of the member; If, after the expiration of a reasonable period following a decision of suspension under (b) above, the member persists in its failure to fulfil "*any of its obligations under this Agreement*". That member may be required to withdraw from membership in the Fund by a decision of the Board of Governors carried by a majority of the Governors having eighty-five percent of the total voting power.<sup>52</sup>

While the main powers of the Bank are vested in a Board of Governors, composed of one governor appointed by each member of the Bank,<sup>53</sup> if any member fails to fulfil "*any of its obligations*" to the Bank, the Board of Governors may suspend its membership by a majority of the total voting power. The suspended member will automatically cease to be a member one year from the date of its suspension unless a decision is taken by the same majority to restore the member to good standing. Although, under suspension, a member is not entitled to exercise any rights under the Agreement, except the right of withdrawal, it remains subject to all obligations.<sup>54</sup>

Any disagreement as to the interpretation of the provisions of the Agreement arising between any member and the Bank or between any members of the Bank shall be submitted to the Executive Directors for their decision,<sup>55</sup> which nevertheless can be appealed to the Board of Governors, whose decision is final.<sup>56</sup> But whenever a disagreement arises between the Bank and a country which has ceased to be a member, or between the Bank and any member during the permanent suspension of the Bank, this disagreement shall be submitted to arbitration by a tribunal of three arbitrators, one appointed by the Bank, another by the country involved and an umpire who, unless the parties otherwise agree, shall be appointed by the President of the International Court of Justice or such other authority as may have been prescribed by

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<sup>52</sup> Article XXVI (2).

<sup>53</sup> Article 5 (2) (a) of the Agreement of the Bank.

<sup>54</sup> Article 6 (2).

<sup>55</sup> Article 9 (a) of the Agreement of the Bank.

<sup>56</sup> Article 9 (b) of the Agreement of the Bank. However, pending the result of the reference to the Board, the Bank may, so far as it deems necessary, act on the basis of the decision of the Executive Directors. *Ibid.*

regulation adopted by the Bank. The umpire shall have full power to settle any questions of procedure in any case where the parties are in disagreement with respect thereto.<sup>57</sup>

Enforcement of the judicial decisions of the ICJ in particular by means of attachment would hardly be considered as an action taken in contrary to the principles of the Fund and the World Bank. Under Article 9 (3) of the Fund Agreement “The Fund, its property and its assets, wherever located and by whomsoever held, shall enjoy immunity from every form of judicial process except to the extent that it expressly waives its immunity for the purpose of any proceedings or by the terms of any contract”.<sup>58</sup> Under Article 9 (4) Property and assets of the Fund, wherever located and by whomsoever held, “shall be immune from search, requisition, confiscation, expropriation, or any other form of seizure by executive or legislative action”.<sup>59</sup> This does not, however, prevent the Fund or the World Bank from effectively participating in the enforcement process of the ICJ decisions when it is necessary.

A contrary view to this proposition may conflict with the provisions of the UN Charter. Apart from the supremacy and prevalence of the obligations of member States under the UN Charter as Article 103 unequivocally stipulates,<sup>60</sup> the Charter envisaged a comprehensive network of international institutional co-operation.<sup>61</sup> Article 57 of the Charter requires these agencies to “be brought into relationship with the United Nations in accordance with the provisions of Article 63”. Article 63 (2) reiterates this vision through a co-ordination of “the activities of the specialized agencies through consultation with and recommendations to such agencies and through recommendations to the General Assembly and to the Members of the United Nations”.

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<sup>57</sup> Article 9 (c) of the Agreement of the Bank.

<sup>58</sup> Article 9 (3) of the Fund.

<sup>59</sup> Article 9 (4) of the Fund; see also 9 (6), which states, “To the extent necessary to carry out the activities provided for in this Agreement, all property and assets of the Fund shall be free from restrictions, regulations, controls, and moratoria of any nature.

<sup>60</sup> Article 103 of the UN Charter stipulates that “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail”,

<sup>61</sup> Reisman, M., “*The Role of the Economic Agencies*”, *supra* note 40, p. 939.

## 5. International Atomic Energy Agency

One of the primary purposes of the International Atomic Energy Agency (IAEA) is to accelerate and enlarge the contribution of atomic energy to peace, health and prosperity throughout the world. It aims to ensure, so far as it is able, that assistance provided by it or at its request or under its supervision or control is not used in such a way as to further any military purpose.<sup>62</sup> Also one of the IAEA primary functions is to encourage and assist research on, and development and practical application of, atomic energy for peaceful uses throughout the world and to establish and administer safeguards designed to ensure that special fissionable and other materials, services, equipment, facilities, and information made available by the Agency or at its request or under its supervision or control are not used in such a way as to further any military purpose.<sup>63</sup>

The relationship between membership rights and obligations in the IAEA is specifically articulated.<sup>64</sup> Under Article IV (C) of the IAEA Statute,<sup>65</sup> member States will only enjoy the rights and benefits<sup>66</sup> resulting from membership, when they fulfil in good faith the obligations assumed by them in accordance with the Statute.<sup>67</sup> However, any question or dispute concerning the interpretation or application of the Statute, which is not settled by negotiation, shall be referred to the ICJ under Article XVII of the IAEA unless the parties concerned agree on another mode of settlement.<sup>68</sup>

Violation of the obligations and proposes of the Statute of the IAEA, including non-compliance with the outcomes of Article XVII, that is to say non-compliance with and enforcement of an ICJ decision, would trigger the application of Article XIX (B) of the IAEA Statute, which states that “a member which has persistently violated the provisions of this Statute or of any agreement entered into by it pursuant to this Statute may be suspended from the exercise of the privileges and rights of membership by the General Conference acting by a two- thirds majority of the

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<sup>62</sup> Article II of the IAEA Statute.

<sup>63</sup> Article III (A) (3) & (5).

<sup>64</sup> Konstantions, D. M, *Expulsion from Participation in International Organizations: The Law and the Practice behind Member States' Expulsion and Suspension of Membership*, (Kluwer, 1999), p.137.

<sup>65</sup> The Statute was approved on 23 October 1956 by the Conference on the Statute of the International Atomic Energy Agency, which was held at the Headquarters of the United Nations. It came into force on 29 July 1957. 276 *UNTS*, pp. 3-125.

<sup>66</sup> For the benefits see Articles X and XI of the IAEA Statute.

<sup>67</sup> Article IV (C).

<sup>68</sup> Article XVII (A).

members present and voting upon recommendation by the Board of Governors”.<sup>69</sup> Consequently, the application of Article XIX (B) in the post-adjudicative phase of the ICJ depends on whether a member State, in pursuance of Article XVII, fails to give effect to the ICJ decision. So, similarly to the ILO and ICAO, the Statute of the IAEA contains no direct enforcement of the ICJ decisions nor is there any direct relationship between these provisions.<sup>70</sup>

However, pursuant to Article XII of the IAEA Statute, the Agency has extensive powers, which may mitigate this flaw. Article XII (C) contemplates a situation in which a member State fails to comply with the Statute of the IAEA or the provisions of safeguards agreements made thereunder, the Board of Governors “shall report the non-compliance to all members and to the Security Council and General Assembly of the United Nations”. In the event of failure of the recipient State or States to take fully corrective action within a reasonable time, the Board may also take one or both of the following measures: “direct curtailment or suspension of assistance being provided by the Agency or by a member, and call for the return of materials and equipment made available to the recipient member or group of members”.<sup>71</sup> These measures seem also to be limited, since they are dependent on the co-operation of defaulting State. Thus, the only real sanctions, in this regard, may be those taken by the Security Council or the General Assembly of the United Nations pursuant to the report submitted by the Board of Governors under Article XII (C).<sup>72</sup>

In the face of the Democratic People's Republic of Korea (DPRK) withdrawal from the Non-Proliferation Treaty by virtue of its letter dated 10 January 2003, the Board of Governors adopted under Article XII (C) a resolution on 12 February 2003. It decided to report to all Members of the Agency and to the Security Council and General Assembly of the United Nations after adopting resolution finding the DPRK in further non-compliance with international nuclear safeguards. It also called upon it to fully and urgently cooperate with international inspectors and to comply with its obligations under international non-proliferation treaties. It would be then left for

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<sup>69</sup> Article XIX (B).

<sup>70</sup> Jenks, C. W., *supra* note 18, p. 698, and Nantwi, E. K., *supra* note 18, p. 168.

<sup>71</sup> Article XII (C).

<sup>72</sup> Boulanger, W., “*Decisions and other Measures Taken by the International Atomic Energy Agency*”, in Schwebel, S. M., *The Effectiveness of International Decisions*, (A. W. Sijthoff, 1971), pp. 285-289, at p. 288 and see generally, Grossman, C., “*Supervision with the International Atomic Energy Agency*”, in Dik, P.V, Hoof, G, H & Mestdagh, K., *Supervisory Mechanism in International Economic Organizations*, (Kluwer Law & Taxation Publishers, 1984), pp. 489-514.

these bodies of the United Nations to decide upon this report and take the measures necessary to induce the defaulting State to comply with its international obligations in accordance with the UN. Charter.

## 6. Other International Specialized Agencies

The establishment of international specialized agencies is encouraged by the functionalist theories to overcome the politicisation of economic and social co-operation.<sup>73</sup> But this novel theory was deeply affected by the inevitable reality of public international law, which involves legal issues coloured with political dimensions.<sup>74</sup> Besides the practice of the ILO, IACO, IMF, World Bank, and IAEA, other international specialized agencies such as WHO, FAO, UNESCO and ITU seem to be moving towards more co-operative approach as opposed to their traditional functionalist theory approach. Apart from the suspension of voting rights for failure of a Member State to meet its financial obligations to the agency as some other agencies envisage,<sup>75</sup> international specialized agencies have foreseen, "in other exceptional circumstances", the possibility of the suspension of the voting privileges and services to which a member State is entitled.<sup>76</sup>

For instance, when over 30 African and Arab states introduced a draft resolution in the 17th Session of the WHO in 1964, to apply Article 7 of the WHO Constitution to South Africa for its racial discrimination policies and to amend the Constitution to permit suspension and expulsion of any member State violating the principles and objectives of the WHO,<sup>77</sup> Western countries objected to the draft resolution because they were anxious that the term "exceptional circumstances" would be used indiscriminately against any member State whose policies were objected to by the majority in the WHO.<sup>78</sup> However, South Africa had to withdraw

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<sup>73</sup> Sands, P., & Klein, P., *supra* note 28, p. 78.

<sup>74</sup> Klein, E., "United Nations, Specialized Agencies", in Bernhardt, R., (ed), 4 *EPIL*, (North-Holland, 2000), pp. 1172-1193, at p. 1189.

<sup>75</sup> See Article 28 (9) of the ITU Constitution and Article 3(4) of the FAO Constitution, which only envisages the suspension of voting rights in case of arrears. See, however, Article 9 (2) (a) of the Agreement on the International Fund for Agricultural Development (IFAD) which shares similar purposes, nevertheless, it envisages the possibility of suspension of a member State for failure to comply with any of its obligations to the Fund.

<sup>76</sup> Article 7 of the WHO Constitution

<sup>77</sup> UNYB (19642), pp. 509-510.

<sup>78</sup> Konstantions, D. M, *supra* note 64, p. 152.

from the Organization in March 1964. It also withdrew from the Food and Agricultural Organization (FAO) in December 1963 under Article 19 of the Constitution of the FAO, but it was expelled from the International Telecommunication Union (ITU) in 1965.<sup>79</sup>

Similarly, in May 1965, the Executive Council of UNESCO decided not to invite Portugal to attend the UNESCO's meetings pending the outcome of the outcome of a study into the educational situation in African territories under Portuguese administration.<sup>80</sup> Portugal insisted that this decision to be submitted to the ICJ for an advisory opinion to examine its legality.<sup>81</sup> However, its request was rejected by the UNESCO General Conference in November 1966 on the ground that the General Conference itself was competent to rule on its own constitutional acts.<sup>82</sup> WIPO did the same thing when it did not invite South Africa to participate in the Organisation's meetings after 1979. Likewise, after the Israeli invasion of Lebanon in 1982 and its involvement on Sabra and Shatila Refugee Camp massacre in Beirut, the Israeli delegation's credentials to the ITU's Conference in that year were refused notwithstanding the non-political objectives of the Union. It seems, however, that these types of specialized agencies can play a role in the enforcement of international law depending on the urgency and the exceptional circumstances surrounding the case and the judgment in question. Whether non-compliance with and enforcement of certain decisions of the ICJ meet this criterion of exceptionalism is a matter that should be decided a case-by-case basis.

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<sup>79</sup> *UNYB*, (1965), p. 775.

<sup>80</sup> *Ibid.*

<sup>81</sup> 6 *ILM*, (1967), p. 190.

<sup>82</sup> *Ibid.*, p. 188.

## **7. Conclusion**

In fact, almost every specialized agency has its own internal enforcement mechanisms of some relevant international obligations, including obligations under judicial decisions of the ICJ. It should not be overlooked, however, that there are restrictions on the enforcement power of these agencies. They may enforce ICJ decisions but not without any qualification or linkage between the decision rendered and against which enforcement measure is to be taken. Moreover, certain international specialized agencies are effective against only their members, which do not necessarily include all members of the United Nations and subsequently parties to the Statute of the ICJ. Consequently, their effectiveness is limited to certain situations or circumstances and to member States only and, thus, they might play a role in securing compliance with some or certain types of judicial decisions of the ICJ. While some other specialized agencies, by virtue of their very nature and aims, which are largely humanitarian, are less effective or rather, more delicate and exerting them may, politically, be counterproductive.

Yet, international specialized agencies should remain an effective tool in the enforcement of international law notwithstanding their limited application. Their significance and the available enforcement measures stipulated or implied in their constituent instruments should not also be overlooked. They derive their effectiveness from the particular value of the withdrawing and suspending privilege or the other services that they provide. The increasing dependence of member States on these services reinforces their importance which may be invested in the process of compliance with and enforcement of international law in general and judicial decisions of the ICJ in particular.

# CHAPTER TEN:

## CONCLUSIONS AND RECOMMENDATIONS

“I do not presume to think that this work settles every doubt in the minds of those who understand it, but I maintain that it settles the greater part of their difficulties. No intelligent man will require and expect that on introducing any subject I shall completely exhaust it; or that in commencing the exposition of a figure I shall fully explain all its parts.”<sup>1</sup>

Enforcement of the judicial decisions of the ICJ has suffered from inadequate exposition in the literature that contributed to its weakness. This study has, at the outset, tried to expose the problem through a brief survey of cases of non-compliance with the Orders and Judgments of the Court in order to establish the existence of this problem as a problem in public international law. This survey showed that the problem does exist, and that it is even becoming more serious and disturbing problem than ever anticipated. This is because there has been an unprecedented interest in international adjudication before the ICJ from every continent and that the nature of these disputes brought before the ICJ have touched upon extremely wide range of sensitive issues.<sup>2</sup>

On the other hand, the process of enforcement of the judicial decisions of the ICJ especially through the Organisation of the United Nations and in particular through the Security Council has been generally regarded as political in character. According to Professor Rosenne, “the process by which the decision of the Court is implemented consists in the main of a succession of political decisions”.<sup>3</sup> This is partly correct. International law and international relations are closely connected and intertwined. Enforcement of international law and international obligations are

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<sup>1</sup> Maimonides, M., (Abu-Imran Musa Ibn-Maymun), *The Guide to the Perplexed, (Dalalat al-Ha'ireen)* translated from the original Arabic text, by Friedländer, M., Introduction, (London: Routledge & Kegan Paul Ltd., 1904), p. 2.

<sup>2</sup> See Speech by H.E. Judge Gilbert Guillaume, President of the International Court of Justice, to the General Assembly of the United Nations 29 October 2002. ICJ'S Press Release 2002/29.

<sup>3</sup> Rosenne, S., *The Law and Practice of the International Court, 1920-1996*, (Martinus Nijhoff, 1997), p. 201.

generally caused and accomplished by political efforts in the international sphere. Nevertheless, the political aspect of the problem does not necessarily render the entire process of enforcement purely and solely political issue. The legal characters of the international legal instruments in question, e.g., the Charter of the United Nations, and the Statute of the ICJ, and the implications and applications of the rule of *pacta sunt servanda* and more importantly the principle *res judicata* in the post-adjudicative phase preserve the political-legal nature of this process. Hence, enforcement of judicial decisions of the ICJ is a problem in international law that requires distinctive measures of enforcement compatible with both its political and legal nature.

However, as realism tells us, it is probably uneasy to establish a public international law-enforcement system analogous to its counterpart within the domestic legal order. This should not be treated a serious defect in the international legal system but rather as an explanation of the nature of public international law. Nonetheless, the expansion of international law and the active role assumed by its participants to cover various areas of laws and the gradual erosion of the classical concept of State sovereignty and the consequential perception of this phenomenon by members of international community as a whole contribute, at least theoretically, to a quasi-centralised and integrated legal system of enforcement corresponds to its distinctive legal nature. It is co-managed by member States, the United Nations, regional organisations and specialised agencies.<sup>4</sup> This integrated system, as it has been examined throughout this study, is largely developed within the legal system and framework of the United Nations. This proposition led Professor Philippe Sands, for instance, to conclude that “there exists a far more organised, if not systematic structure of international legal relations”,<sup>5</sup> which holds true, to a large extent, to its enforcement. Thus, enforcement of international obligations including those under judicial decisions of the ICJ, includes: any permissible enforcement action or measure available under public international law, taken by one or more subjects of international law through judicial bodies, the United Nations, regional organisations, and specialised agencies to induce the defaulting party to comply with its obligations,

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<sup>4</sup> See in the same vein, Capaldo, G.Z., “The Law of the Global Community: An Integrated System of Enforce “Public” International Law”, 1 *Global Community Yearbook of International Law & Jurisprudence*, (2001), pp.71-120.

<sup>5</sup> Sands, P., “The Future of International Adjudication”, 14 *Conn.J.Int’L.L.*, (1999), pp. 1-13, at p.2.

which would otherwise violate the territorial integrity or political independence of the recalcitrant State.

This study has not been intended, however, to put the reader under any illusion that we are living in a perfect and a very well organised international legal system. Even if the centralisation system of the international legal order may be a long-term goal, it is not yet a reality notwithstanding some of the close co-ordination among international legal persons. Thus, this study has endeavoured to engage various players and typical vehicles in the process of enforcement of judicial decisions of the ICJ in order to reach a satisfactory standard of analogous enforcement mechanism matching the distinctive nature of public international law in this regard. However, the effectiveness of the system of peaceful settlement of international disputes including its post-adjudicative phase depends largely, if not exclusively on the willingness of member States to utilise and exploit the available enforcement processes and mechanisms contemplated in the UN. Charter and under public international law.

The legal foundations of the obligation of compliance with and enforcement of the judicial decisions of the ICJ analysed in this thesis namely, the principles of *pacta sunt servanda*, good faith and *res judicata*, and the enforcement methods either judicial or institutional, notwithstanding their unequivocal indispensability, securing compliance with the judicial decisions of the ICJ is not always successful or predictable or independently adequate. They may fail to be effective or capable of inducing the defaulting State to comply with its international legal obligations under the judgment of the Court. So as a result of this the role of self-help, which now embraces and intertwines the notion of countermeasures, remains arguably an ultimate means of enforcement in international law.

Yet, self-help and countermeasures do not in themselves provide an adequate remedy for the injured State(s) and they do not sufficiently fulfil the deficiency of enforcement of public international law in general. Instead, they merely provide interim measures or provisional remedies. In addition, self-help and countermeasures have been said to be designed for powerful States.<sup>6</sup> Their viability is therefore limited. In any event, whatever form these means may take their validity depends on their compatibility with the legal framework of the Charter of the United Nations within which lawful enforcement operates. Subsequently, from a policy perspective, States

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<sup>6</sup> Tomuschat, C., "Are Counter-measures Subject to Prior Recourse to Dispute Settlement Procedures?" 5, *EJIL*, (1994), pp. 77-88, at p. 78.

have no other options in the face of the domination of the Superpower and major States than to resort to judicial and institutional means of enforcement of the judicial decisions of the ICJ as the only option available equally to all member States, notwithstanding their peculiarities and sluggish effectiveness.<sup>7</sup>

However, in order to enhance the enforcement mechanisms and to mitigate or to contain the problem of enforcement of international judicial decisions, however, some proposals have been heard, e.g., through the amendment of the relevant provisions of the UN Charter, namely Article 94 of the Charter,<sup>8</sup> and Articles 56 and 60 of the Statute of the ICJ.<sup>9</sup> It has also been suggested that the Security Council should play a greater role in this process through the suspension of the right to any members of the Council to exercise its veto power.<sup>10</sup> It has also been suggested the establishment of an independent body within the United Nations called "United Nations Judgment Enforcement Council (UNJEC) vested with the power referred to in Article 94 (2) of the Charter."<sup>11</sup> It has also been proposed a draft Protocol for the Enforcement of ICJ Judgments to render the judgments of the ICJ automatically enforceable within domestic courts.<sup>12</sup> These proposals and suggestions seem sound and persuasive, nevertheless, they are highly questionable, let alone the absence of a political will to endorse them. While the proposal to a draft Protocol for the enforcement of ICJ decisions, not only superfluous in the light of Articles 2 (2) and 94 of the Charter and Articles 59 and 60 of the Statute and Article 94 of the Rules of the Court,<sup>13</sup> but also is counterproductive since it would undermine the principle of non-applicability of domestic laws to international obligations.<sup>14</sup> Therefore, these proposals have suffered from a lack of support in law and practice, and hence, other alternatives should be provided without necessarily engaging in any suggested amendments of the UN. Charter of the Statute of the ICJ or any unrealistic or impractical initiatives.

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<sup>7</sup> See generally, Ratner, S. R., "Image and Reality in the UN's Peaceful Settlement of Disputes", 6 *EJIL* (1995), pp.426-444.

<sup>8</sup> Ajibola, B., "Compliance with Judgments of the International Court of Justice", in Bulterman, M.K., and Kuijer, M., (eds), *Compliance with Judgments of International Courts*, (Martinus Nijhoff Publishers, 1996), pp. 9-38, at p. 29.

<sup>9</sup> Reisman, M., *Enforcement of International Judgments*", 63 *AJIL* (1969), pp. 1-27, at p. 27

<sup>10</sup> Ajibola, B., *supra* note 8, p.29.

<sup>11</sup> *Ibid.*

<sup>12</sup> Reisman, W.M., *supra* note 9, p. 27.

<sup>13</sup> See *supra* Chapters 2 and 3 respectively.

<sup>14</sup> See *supra* Chapter 6, Section. 2.

It is widely endorsed that supervision of the implementation of international obligations is generally important to promote compliance with these obligations. The ICJ and its judges in particular, can develop their competence not only to resolve disputes and to interpret international treaties and conventions but also to act as a mechanism for monitoring and policing compliance with its judicial decisions. This is not a peculiar judicial practice.<sup>15</sup> This study proposes the establishment of a mechanism by the ICJ in co-operation with other regional and international institutions and further revitalisation of the role of the Secretary-General of the United Nations. The ICJ may adopt a follow up procedure and surveillance of implementation of its decisions through requiring every litigant State party or any other member State which has participated directly or indirectly to the non-compliance with the decisions of the Court to submit a report on its compliance with and enforcement of the decision of the Court. In so doing, State parties to the case will be required to explain formally how they have complied with or why they have not complied with a given decision of the Court. They may have to be required to appear before a Chamber of the Court established exclusively to monitoring compliance with the Court's decisions. Non-appearance, however, before such body will not result at any event in an order or a decision against it. Instead, it will be for the Court to send a report to States to that effect, and within 60 days after the date of adoption of the report, to the Organisation of the United Nations, especially the Secretary-General of the United Nations, who shall inform all member States, regional and sub-regional organisations, and international specialised agencies to consider as appropriate what action should be taken against the defaulting party. This procedure gives the monitoring body the opportunity to apply pressure and mobilisation of shame against the recalcitrant State party to induce it to comply with its obligations under the decisions of the Court. The ICJ and through its President may also invest its annual report to the General Assembly to mobilise the objective of this proposal.<sup>16</sup> Although this approach cannot eradicate the problem of non-compliance, it would at least undermine the position of the defaulting party and exert tremendous psychological public pressure on it to a large extent.

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<sup>15</sup> See *supra* Chapter 5.

<sup>16</sup> See the Speech by Judge Shi, the President of the International Court of Justice to the General Assembly of the United Nations, 31 October 2003, in which he referred to Article 94 of the UN Charter as well as Articles 41 of the Statute and especially his emphasis on the importance of compliance with orders of provisional measures and final judgments of the Court.

However, if it is impracticable to comply immediately with the Judgment of the ICJ and the report of the Chamber, the parties concerned shall have a reasonable period of time to be determined by the Council and shall not exceed 12 months after the date of adoption of the report of the Chamber unless the parties to the dispute mutually agree otherwise. If the parties concerned fail to fulfil their obligations under the Judgment, the Security Council shall decide upon the necessary measures to give effect to the decision of the ICJ. If the Security Council fails to take any measures capable of inducing the States concerned to comply with its obligations under the Judgment within 12 months after the date of adoption of the report of the Chamber, all member States, regional and sub-regional organisations as well as international specialized agencies should take what they deem necessary to induce compliance with the judgment of the ICJ. Bearing in mind the enforcement mechanisms developed by the European Union, Andean Community and the World Trade Organisation, as well as international environmental agreements, it is recommended that further research into the structure and procedures of such a mechanism within the ICJ to be undertaken.

Further studies may also be undertaken to empower the ICJ with the competence to impose a penalty payment every month against the recalcitrant Member State following the judgment of the ICJ and until full compliance with the judgment is achieved. It should be mentioned that the accumulation of this penalty payment could bring the defaulting State in arrears in payment exceeding its financial contributions to the Organisation of the United Nations, which will give the General Assembly the competence under Article 19 of the UN Charter to suspend that State from exercising its right to vote in the Assembly and even automatically.<sup>17</sup> This proposal would be also effective even in the face of the so-called super-powers. No veto can be exercised nor the problem of the recommendatory nature of the Assembly's resolution may arise. The decision of the Assembly to suspend the exercise to vote will be binding and enforceable, if not automatic. It is also recommended that the General Assembly should invest its Special Committee on the

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<sup>17</sup> Article 19 of the U.N Charter provides: A Member of the United Nations which is in arrears in the payment of its financial contributions to the Organization shall have no vote in the General Assembly if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years. The General Assembly may, nevertheless, permit such a Member to vote if it is satisfied that the failure to pay is due to conditions beyond the of the Member.

Charter of the United Nations and on the Strengthening of the Role of the Organization to draft a declaration on the enhancement of the enforcement of the judicial decisions of the ICJ to strengthen these objectives.<sup>18</sup>

Again, effective enforcement does not depend exclusively on how effective these proposals may be, but rather on how far participants of public international law are willing to maintain and adhere to international law. Looking at the law and practice of the ICJ, individuals States and their judiciaries, the United Nations, regional organisations and specialized agencies in the context of international co-operation and enforcement of international obligations reveals that the real problem is not between regionalism, universalism, and specialism, but rather between themselves and nationalism. Thus, for an effective co-operation and enforcement of international obligations including those under the judicial decisions of the ICJ, and subsequently the stability of the international adjudication, international legal order and ultimately the international peace and security, a constructive interaction of the mechanisms of all these levels will carry the most effective solution not only for the problem of non-compliance with and enforcement of the judicial decisions of the ICJ, but also for the problem of the international community.

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<sup>18</sup> The General Assembly has already done so with respect to its *Declaration on the Enhancement of Co-operation between the United Nations and Regional Arrangements or Agencies in the Maintenance of International Peace and Security*. UN.Doc. A/RES/49/57 (1994). 84th plenary meeting 9 Dec. 1994.

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