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JURISDICTION AND COMPLIANCE IN RECENT DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE

OGUNO, Paschal
Faculty of Law, Chukwuemeka Odumegwu Ojukwu University,
Igbariam Campus, Anambra State, Nigeria.

ABSTRACT

The International Court of Justice (ICJ) was established in June 1945 by the UN Charter but began work in April 1946. It is located at The Hague in the Netherlands. The ICJ serves as the principal judicial organ of the UN. It settles legal disputes between states and gives advisory opinions to the UN and its specialized agencies. Its Statute is an integral part of the UN Charter. The official languages of the Court are English and French. The International Court of Justice has been criticized as being plagued by too many expectations and too little power. It has been criticized as being an ineffective player in achieving international peace and security, largely because of its inability to control states' behaviour which has been blamed over the years on the jurisdictional design of the ICJ based on consent. In analyzing and comparing the Court's decisions in two landmark cases of *Nicaragua v. USA* and *Cameroun v. Nigeria*. This paper seeks to portray that in spite of this position by many scholars and jurists, the ICJ is still a vital institution for the resolution of inter-state disputes and a force for world public order.

Keywords: Jurisdiction, ICJ, UN Charter, Court Decisions.

1. INTRODUCTION

The ICJ is considered as a major player in world politics. Being the successor of the Permanent Court of International Justice (PCIJ), it has had a docket of cases. Critics argue that the ability of international law and the ICJ to bind states to compliance is weak.[1] However, from research it would show that the ICJ has secured, surprisingly, a large number of compliances by states which have submitted to its jurisdiction.

A study of some final judgments and interim orders issued by the Court will be studied by this work. This basis for mandatory compliance was first located in Article 13(4) of the League of Nations Covenant and later fashioned into Article 94 of the United Nations Charter, mandating member states and non-member states to the UN under Article 93(2), if the latter wish, are to comply with the orders of the ICJ. Similarly, interim orders are considered decisions under Article 94 and are also binding upon UN member states and upon non-members who opt to resolve their disputes with the ICJ.

[1] Compliance with decisions of the ICJ by Cosntanze Schulte – www.lawcourts.org/LPBR/reviews/schulte405.htm

Primary enforcement of ICJ orders is covered by article 94(2), giving the Security Council a range of options to compel or encourage compliance though some states have avoided compliance by feigning, delaying or modifying their ascent to the Court's jurisdiction (as provided for under Article 36 of the Statutes of the Court), most of which have occurred with interim orders. Definition of compliance is put forth to clarify post ICJ activities, in many cases the ICJ may not have itself led compliance, but instead facilitated negotiations or actions that produced a resolution to the dispute.

All States are parties to a large number of treaties and agreements which guide their international relations. In domestic jurisdictions, there are complete cycle of dispute resolution measures which include compliance and enforcement. There are institutions whose responsibilities are to ensure compliance of courts' decisions, for example, in criminal cases the police and the prisons. In civil matters, through the orders of the court for attachment, sale, liquidation, etc, compliance may be ensured.

At the international level, however, there is no certainty that binding decisions may be complied with. This is because where a treaty is concluded; it requires the clear consent of the parties either by signature and ratification or accession. Even if a state is involved in the process of treaty making, without ratifying same, it is unenforceable against it.[2] Thus, in international settings the mandatory jurisdiction of the court is based upon consent. In the domestic setting, with or without the consent of the parties, the court is seized of jurisdiction once certain criteria have been met. It is then possible for a state to be party to a treaty, but upon the need for adjudication, consent must be obtained.

Though ICJ is a principal organ of the UN, its jurisdiction is not automatically mandatorily on the member states of the UN, they must accept by passing a special act of submission within the state. The states that are however to the ICJ's jurisdiction are those who have ratified a treaty creating the Court's competence or have pleaded necessity on the merits of a case pending in Court (*forum prorogatum*) or have made a unilateral declaration in accordance with Article 36 para 2 of the ICJ's Statute. Of course, some states have accepted the Court's jurisdiction, but with reservations.

It is true that the ICJ has suffered a quiet mistrust in the last century on the part of the states. In 1974, France withdrew from the jurisdiction of the ICJ after the Nuclear Test Cases brought by Australia and New Zealand under the Court's compulsory jurisdiction clause. France refused to appear or abide by the Court's interim order and subsequently withdrew from the Court's jurisdiction. Again, in 1986, *Nicaragua v. USA*, the defendant contested the competence of the Court to hear the matter. And when the Court decided on hearing the case on its merits, the US refused to participate and withdrew its consent to the compulsory jurisdiction of the Court. Indeed, these acts by leading world powers went to the root of a creating a deep distrust for compliance with the ICJ's decisions. Other factors which have enhanced the mistrust for the ICJ are also as that; there is no opportunity for appeal. The procedures rely majorly on documentary evidence. Also, it is believed that the election of judges is most times more political than procedural.

As international law is administered to sovereign states, it has been argued that the need for enforcement was not projected for in establishing international law rather the Court was established as a last resort in conflict resolution. Other seemingly more peaceful measures are to be applied first, such as negotiations, good offices, inquiry, facilitation, conciliation, among others. It is true that states prefer more diplomatic ways of resolving their disputes as they are more flexible and confidential, and parties feel they are more in control of the outcome.

[2] Monitoring Compliance with and enforcement of binding decisions of International Courts – Joseph Sinde Warioba – www.mpil.de/files/pdf1/mpunyb_warioba_5.pdf

2. THE INTERNATIONAL COURT OF JUSTICE

The International Court of Justice (ICJ), which is located in The Hague, Netherlands, is commonly called the "World Court". Founded in 1946 to replace the Permanent Court of International Justice (IPCIJ), which had functioned since 1922 and was dissolved after the Second World Ward, the ICJ is by virtue of Article 92 of the United Nations Charter "the principal judicial organ of the United Nations". It is also, as Judge Lachs put it, "the guardian of legality for the international community as a whole, both within and without the United Nations".[3] Although the ICJ is not the legal successor to the PCIJ, the ICJ is in essence a continuation of the PCIJ, with virtually the same statute and jurisdiction. There is also continuity of case law, as no distinction is made in ICJ jurisprudence between decisions rendered by the PCIJ and those rendered by the ICJ.[4]

The Court is composed of fifteen judges of different nationalities, that are elected by the General Assembly and the Security Council. The Court has a dual role: to settle in accordance with international law and the legal disputes submitted to it by States, and to give advisory opinions on legal questions referred to it by duly authorized international organs and agencies. Accordingly, the jurisdiction of the Court falls into two distinct parts, namely, contentious jurisdiction and advisory jurisdiction. The ICJ is often thought of as the primary means for the resolution of disputes between States, and in fact the Court is well-recognized for its significant contribution to the development of international law.

Currently, there are also proliferations of judicial organs at the international and regional level, such as the International Criminal Court, the International Tribunal for the Law of Sea, the European Court of Human Rights, and the European Court of Justice which govern by providing for specialized disputes between individuals, international agencies and States as well.

3. JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE

3.1 States as parties to cases before the Court

As provided in Article 34, paragraph 1, of the Statute of the International Court of Justice (the "Statute"), only States may be parties in cases before the Court. This is of far reaching importance since it prohibits recourse before the Court by individuals or international organizations. It reflects the traditional theory that an inter-State dispute resolution forum can be open to States only.

Even for States, access to the Court is not automatic. There are several ways for a State to gain access to the Court. First, by Article 93 of the UN Charter, all members of the UN are *ipso-facto* members of the Statute. Second, States that are not members may become parties, on conditions to be determined in each case by the UN General Assembly, based on the recommendations of the Security Council. Therefore, countries such as Switzerland and San Marino, though not members of the UN, may become parties to the Statute of the Court. Third, any other State that is neither a member of the UN nor a party to the Statute of the ICJ may become a party to the Statute of the ICJ by depositing a declaration with the Registry of the ICJ. The declaration must state that such State accepts the jurisdiction of the Court and undertakes to comply in good faith with the Court's decisions in respect of all or a particular class or classes of disputes. Many States have found themselves in the third scenario before becoming members of the United Nations. Today, the Court is open to practically every State in the world.

[3] See Lockerbie (Libya v. U.S.), 1998 I.C.J. 115 (Preliminary Objections of Feb. 27); Lockerbie (Libya v. UK), 1998 I.C.J. 9 (Preliminary Objections of Feb. 27).

[4] For example, The Fisheries Case (Gr. Brit. And N. Ir. V. Nor.), 1951 I.C.J. 116 (Dec. 18) Illustrated ICJ's use of precedent established world community practice.

However, becoming a party to the ICJ Statute is entirely different from accepting the Court's jurisdiction. It is merely the first step toward submitting to the Court's jurisdiction.

3.2 Contentious Jurisdiction & Advisory Jurisdiction

(a) Contentious Jurisdiction

It is important to note that a state's adherence to the International Court of Justice Statute (ICJS) does not constitute acceptance of the Court's jurisdiction. It means that the State can bring a suit to the ICJ, but whether the ICJ will hear the case depends on whether it has jurisdiction, posing the fundamental question of whether the parties to the dispute have accepted its jurisdiction. Pursuant to Article 36 of the ICJS, there are three ways of expressing consent to the ICJ's jurisdiction: Firstly, acceptance of jurisdiction on an ad hoc basis for the adjudication of a particular dispute. Article 36(1), of the Statute provides that the jurisdiction of the Court comprises all cases that the parties refer to it. Such cases normally come before the Court by notification to the Registry of an agreement known as a special agreement (Compromis) and concluded by the parties especially for this purpose. This method was used in the Corfu Channel Case.[5] Secondly, also under, Article 36(1), States can adhere to a treaty, in which the Court's jurisdiction is accepted for cases relating to the interpretation or application of the treaty or for any other dispute under the treaty.[6] Many treaties will contain a 'compromissory clause' providing for dispute resolution by the ICJ. However, the facts that form the dispute must have occurred after such treaty entered into force. Also, it is necessary to determine whether a State has filed a reservation to the provision regarding dispute settlement when ratifying the treaty for example, the US ratified the Genocide Convention but stated that before any dispute can be submitted to the ICJ under Article IX, the specific consent of the US is required in each case. When Yugoslavia in 1999 tried to sue the US under Genocide Convention for acts associated with NATO's intervention in the Kosovo conflict, the ICJ found that because of the US reservation, the Court lacked jurisdiction and dismissed the case. Later claims by Yugoslavia against other NATO states were dismissed on the grounds that Yugoslavia was not at that time member of the UN and thus not a party to the ICJS. The Lockerbie cases aid understanding of this type of jurisdiction.[7]

The Lockerbie cases were brought by Libya against the United Kingdom (the "UK") and the United States (the "US") under the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation. The defendants had claimed that there was no dispute between the parties concerning the interpretation or application of the Montreal Convention as demanded by Article 14,[8] but, if at all, only between the applicant and the Security Council on the effects of the Security Council Resolution 748 (1992) and 883 (1993) (the "SC Resolutions"). In the opinion of the Court, however, several disputes existed between the parties concerning the Montreal Convention: first, on the Convention's applicability to the

[5] Corfu Channel (Merits) (United Kingdom v. Albania), 1949 I.C.J 4 (Apr. 9).

[6] See Art. IX of the Convention on the Prevention and Punishment of the Crime of Genocide: Disputes between the Contracting Parties relating to the interpretation, application or fulfillment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

[7] See Andreas L. Paulus, Jurisprudence of the International Court of Justice, Lockerbie Cases: Preliminary Objections, 9 E.J.I.L. 550 (1998).

[8] See Convention for the Suppression of Acts Against the Safety of Civil Aviation (Sabotage), Sept. 23, 1971, 24 U.S.T. 565, Article 14 (providing that any dispute between two or more Contracting States concerning the interpretation or application of the Convention cannot be settled through negotiation, shall be submitted to arbitration; if within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the ICJ, in case that there is no reservation by any part to the dispute).

present case (a jurisdiction which the Court calls "general"); second, on the alleged right of Libya itself to prosecute its nationals (Artcle 7); and third, on the alleged lack of assistance by the respondents to the Libyan prosecution (Article 11). On a vote of 13 votes to three, the Court upheld its jurisdiction. According to a broad interpretation of the judgment, the relationship between the Montreal Convention and the subsequent SC Resolutions is a matter within the jurisdiction of the Court. Another narrower reading is provided by Judges Fleischhauer and Gillaume in their joint declaration: it states that ICJ jurisdiction extends only to the interpretation and application of the Montreal Convention and not to the SC Resolutions. The latter view seems more in line with the treaty-based jurisdiction of the Court in the present case; though, it, however, considerably limits judicial review of resolutions of the Security Council by the Court.

(b) Optional Clause (Declarations Accepting the Compulsory Jurisdiction of the Court)

States that are parties to the Statute may by means of a unilateral declaration undertake that they recognize as compulsory and without special agreement the jurisdiction of the court, in relation to any other state accepting the same obligation, with respect to disputes governed by international law. This is described in both Paragraph 2 and 3 of Article 36 of the Statute. Paragraph 2 provides that The States parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

- the interpretation of a treaty;
- any question of international law;
- the existence of any fact which, if established, would constitute a breach of an international obligation;
- the nature or extent of the reparation to be made for the breach of an international obligation.

A total of 65 States have recognized the compulsory jurisdiction of the Court (with or without reservations). Among those reservations, there are two that are most important. One relates to other methods of pacific settlement while the other relates to matters of domestic jurisdiction. These two reservations correspond to Article 95 and Article 2(7) of the United Nations Charter, respectively. The declarations are made for a specific period, generally for five years with tacit renewal – as a result – and usually provide for the declarations to be terminated by simple notice, such notice to take effect after a specified time or immediately. For instance, in 1985, the United States withdrew its acceptance of the ICJ's jurisdiction. A good illustration of jurisdiction by declaration is the Fisheries Jurisdiction Case.[9] On December 4, 1998, the ICJ ruled 12-5 that it lacked jurisdiction to adjudicate the dispute brought by the Kingdom of Spain against Canada in 1995. To claim the Court's jurisdiction, Spain relied on the declarations made by the two parties in accepting the Court's compulsory jurisdiction under Article 36(2) of the ICJ Statute. Canada challenged the Court's jurisdiction, invoking a reservation contained in its 1994 declaration excluding it from jurisdiction "disputes arising out of or concerning conservation and management measures taken by Canada with respect to vessels fishing in the Northwest Atlantic Fisheries Organization (NAFO) Regulatory Area…" The Court agreed with Canada that the words of an Optional Clause declaration, including a reservation contained in it, must be interpreted in a natural and reasonable way, having due regard to the intention of the State making the reservation at the time when it accepted the Court's compulsory jurisdiction. Such state's intention, in turn, may be deduced not only from the text of the relevant clause, but also from its context, the circumstances of its preparation, and the purposes intended to be

[9] See Fisheries Jurisdiction (Spain V. Can.) 1998 I.C.J. 432 (Judgment of Dec. 4).

served. The Court rejected Spain's argument that Canada's reservation should be interpreted in accordance with the legality under international law of the matters in Spain's view violated international law by involving the use of force on the high seas against a Spanish vessel. The Court explained that there is a fundamental distinction between a State's acceptance of the Court's jurisdiction, and the compatibility of particular acts with international law. The latter is a question that can be addressed only once the Court turns to the merits after having established its jurisdiction. In offering its interpretation of Canada's reservation, ,the Court held that the reservation, the Court held that the reservation's purpose was to prevent it from exercising jurisdiction over matters that might arise with regard to the international legality of Canadian legislation and its implementation. Unfortunately, the ICJ could not proceed to the merits of this case because it lacked jurisdiction.

(c) Reciprocity Principle – Article 36(2)

A state having made such a declaration accepts the Court's jurisdiction on the basis of reciprocity, and if sued by another state that has made a similar declaration, it is required to respond. Moreover, any jurisdictional defenses the applicant (the state suing) state must have been able to assert if it were a respondent (the state being sued) under its declaration, are also available to the respondent because of reciprocity. Since two unilateral declarations are involved, jurisdiction is conferred only to the extent that such declarations coincide.[10] The majority of the 65 States that have accepted the Court's jurisdiction under Article 36(2) have done so with various reservations. Consequently, the Court's jurisdiction can also be narrowed in any cases where a party has made a reservation, and the party that has not made a reservation nevertheless invokes it against the other party. Authorities agree that when a State has accepted the jurisdiction under 36(2) and declared it to be unconditional; it is still entitled to invoke the reservation of any state that filed an action against it.

The United States (US) accepted the ICJ jurisdiction through a unilateral declaration, but with the reservation that excluded disputes that it regarded as essentially within its domestic jurisdiction. This is known as the Connally Amendment. This self-judging clause was designed to ensure that the US and not the ICJ would decide whether a dispute is domestic in character and thus outside the Court's jurisdiction. This allowed any state that was sued by the US to invoke that reservation against it. However, many commentators are of the opinion that such a self-judging clause violates Article 36(6) of the Statute which provides that disputes regarding the ICJ's jurisdiction are to be settled by decision of the Court. In 1985, the US gave notice that it terminated its acceptance of the ICJ's jurisdiction under Article 36(6).[11]

(d) Withdrawal of Article 36(2) declaration

The ability of a state to withdraw or modify its Article 36(2) declaration may be limited by the terms of its declaration. Thus in Nicaragua/United States, the US declaration of 1946 accepting the Court's jurisdiction stated that it will remain in force for 5 years and thereafter until the expiration of 6 months after the giving of notice to terminate the declaration. In anticipation of litigation by Nicaragua, in 1984, (3 days before Nicaragua filed a suit before the ICJ) the US sought to amend its declaration by stating that the 1946 declaration shall not apply to any

[10] See France v. Norway (Certain Norwegian Loans) 1958

[11] Note that withdrawal by the US of its acceptance under 36(2), does not preclude jurisdiction of the ICJ over the US on the basis of 36(1): for example, the German and Mexican governments filed cases against the US by invoking the Optional Protocol Concerning Compulsory Settlement of Disputes to the Vienna Convention on Consular Relations. The claims asserted the US violated the Convention by failing to inform arrested aliens of their right to have their consulates notified of their arrests. The US lost one of the cases (*Avena case*) and withdrew from the Optional Protocol. Bush said that the US will still discharge its international obligations by leaving State courts to give effect to the Avena case.

disputes between the US and Central American states, regardless of the terms of the 1946 declaration. However, the ICJ found that it had jurisdiction over the dispute and upheld Nicaragua's contention that the US was bound by the 6-month notice requirement.

(e) Issues regarding national security

Issues regarding national security are usually the most sensitive and, thus, less likely to be submitted to the ICJ. Several states have modified their acceptance of the ICJ to exclude such matters. The US in 'Nicaragua' (1984), although it had not made such modifications to its declaration, cited national security reasons for precluding it from asserting jurisdiction. The ICJ rejected the US argument that disputes involving national security or self-defense were *ipso facto* not suitable for adjudication.

4. THE EFFECT AND ENFORCEMENT OF ICJ JUDGMENTS

Article 59 of the ICJS, states that ICJ judgments are binding upon the parties to the suit, they are deemed final and without appeal. Under Article 60, revision is possible only under certain very limited circumstances. Article 61 shows that revision can be allowed upon the following:

- Discovery of new facts that are decisive factors and were unknown to the Court and the party seeking revision.
- A 10 year statute of limitations applies (which means that there can be no revision 10 years after the date of the judgment);
- There should be no negligence on the party of the party seeking revision.

States have generally complied with ICJ decisions, as required by Article 93 of the UN Charter. If a State fails to abide by the judgment, it would violate the Charter. Article 94(2) thus permits a party in a case to complain of non-compliance to the UN Security Council, which "may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment." The Security Council may, but need not take such measures. If the Security Council chooses to act, it can do so by recommendation or decision, with only the latter being binding. Failure of a member state to comply with a Security Council decision may trigger enforcement measures.[12] (Where however, the state that does not comply with the ICJ decision is a permanent Security Council member it may not likely exercise its veto power).

4.1 Advisory Jurisdiction

Under Article 65(1) of the ICJS, the advisory jurisdiction of the UN can be invoked only by its organs or specialized agencies. States and individuals have no legal standing to request for such however, Article 96(1), UN Charter, states that the General Assembly and Security Council may seek its advisory opinion on any legal issue as well as UN organs or specialized agencies with the approval of the General Assembly and only with respect to questions that relate to the scope of their activities – Article 96(2). In one case involving the request for an advisory opinion by the World Health Organization (WHO) on the legality of the use of nuclear weapons by a State during armed conflict (the WHO Opinion Case),[13] the court held that three conditions must be satisfied in order to find that the Court has advisory jurisdiction: first, the agency requesting the opinion must be duly authorized under the Charter to request opinions from the Court; second, the opinion requested must be on a legal question;

[12] See UN Charter, Article 39, 41 and 42.
[13] Legality of the Use by a State of Nuclear Weapons in Armed Conflict 1996 I.C.J. 66 (Advisory Opinion of July 8).

and third, this question must be one arising within the scope of the activities of the requesting agency. This three-prong test is a further explanation of the Article 96 of the UN Charter. In the view of the Court, none of WHO's functions, as provided for in Article 2 of the WHO Constitution, had a sufficient connection with the question before it for that question to be capable of being considered as arising "within the scope of the activities of the requesting agency. This three-prong test is a further explanation of the Article 96 of the UN Charter. In the view of the Court, none of WHO's functions, as provided for in Article 2 of the WHO Constitution, had a sufficient connection with the question before it for that question to be capable of being considered as arising "within the scope of the activities" of the WHO.

Advisory opinions are non-binding. However, the force the opinion has for the requesting institution depends on that institution's internal law. Some international agreements provide that the advisory opinions requested by an organization are binding on the organization and states party to it. Although legally non-binding, advisory opinions cannot be easily ignored and do have an effect on the conduct of states and organizations. Kelsen[14] questioned whether the requests from the General Assembly have to relate to the work of the UN. The WHO Opinion Case is one of the cases that deals with the competence of international organizations and the extent of the Court's own advisory jurisdiction, has been greeted with more than usual controversy. Here, the issue of the competence of international organizations arose only tangentially as the questions put to the Court concerned a matter of substantive law which was apparently not connected to any particular exercise of power by the organizations involved: the legality of the threat or use of nuclear weapons.

In the proceedings before the Court a number of states argued that the Court should not respond to the General Assembly's request on the ground that, although Article 96(1) states that the General Assembly and the Security Council are entitled to request advisory opinions on 'any legal question', these organs are not entitled to request advisory opinions on matters unrelated to their work. The argument made was that despite the difference of wording in Articles 96(1) and 96(2), the General Assembly and the Security Council are bound by the requirement in Article 96(2) that requests for advisory opinions may only be on matters within the scope of activities of the requesting organ. This argument was put forward by Kelsen many years ago:

> "The determination of any organ's jurisdiction implies the norm not to act beyond the scope of its activity as determined by the legal instrument instituting the organ. It is not very likely that it was intended to enlarge, by Article 96(1), the scope of the activity of the General Assembly and the Security Council determined by other Articles of the Charter. Hence the words 'arising within the scope of their activities' in of Article 96 (2) are redundant"[15]

Kelsen's view finds some support though some scholars have opined that a request for an opinion on a matter outside the scope of activities of the General Assembly or Security Council 'entails no substantive enlargement of the scope of the activity of the requesting organ – merely the seeking of advice'. Indeed, there is no question of 'enlargement' of the competence of these organs if the Charter expressly gives them the right to seek opinions on 'any legal question'. The view against permitting the General Assembly and the Security Council to seek opinions on matter outside the scope of their activities seems to be based on the supposition that those organs would have to discuss the matter in respect of which the advice is sought, and they may not be competent to do so. It is posited that it is however possible to separate the request for an advisory opinion from the action to be taken as a result of that

[14] Downloaded from http://ejil.oxfordjournals.org/by guest on August 18, 2014 458 E/ZL 9 (1998), 437-467

[15] H. Kelsen. The Law of the United Nations (1951). At 546

opinion. It is quite possible that, as occurred during the period of the League and as has been subsequently advocated, the General Assembly or the Security Council may seek an opinion from the Court at the request of other international organizations. While the General Assembly or the Security Council may not have the competence to discuss the substance of the request. Article 96(1) gives them the right to seek advice which may then simply be passed on to the organ or organization with competence to act on it. However, the Court avoided this debate altogether by holding that 'the question put to the Court has a relevance to many aspects of the activities and concerns of the General Assembly including those relating to the threat or use of force in international relations, the disarmament process, and the progressive development of international law'. The Court found that the General Assembly have been given responsibility for all these matters by the Charter and the question was one that arose within the scope of the legitimate activities of the General Assembly. In addition, the Court noted that the General Assembly 'has a long standing-interest in these matters'.

In What Circumstances Should the Court Exercise Its Discretion to Refuse to Render an Opinion Requested of It?

It has long been recognized that even when the Court has jurisdiction to render an advisory opinion, it is not compelled to do so. It lies within the Court's discretion whether or not it will give an opinion asked of it. This discretion is provided for in Article 65(1) of the Court's Statute, which provides that "The Court may give an advisory opinion…" and it has been confirmed in the jurisprudence of the Court. Despite this discretion, the Court has also noted that a request for an advisory opinion should not in principle, be refused. The reason given is that the Court is itself an organ of the United Nations and its response 'represents its participation in the activities of the Organization'. The constitutional relationship between the Court and the United Nations and its response 'represents its participation in the activities of the Organization'. The constitutional relationship between the Court and the United nations thus ensures that there must be 'compelling reasons' for it not to render an advisory opinion requested of it. Though the Court had never exercised its discretion to refuse to render an advisory opinion, scholars have suggested circumstances in which the Court should make such a decision. In the opinion of Sir Gerald Fitzmaurice,[16] the Court should refuse to render an opinion:

- "If the Court felt that it could not do substantial justice in the matter, e.g. because essential facts were lacking which could not be made available to the Court by the means at its disposal, or because the question was framed in an ambiguous or tendentious way;
- If the question, though in a sense legal, involved an essentially legislative and non-judicial task, e.g. to make proposals for altering the law on some subject or for amending a treaty instrument;
- If the request related to something which had nothing to do with the work of the organ requesting it and appeared to be directed to some ulterior purpose."

No doubt some would have felt that the current request met all these conditions. It was suggested that the circumstances in which nuclear weapons might be used were unclear, that the Court was being asked to play the role of legislator and that it was being asked to involve itself in the political process of disarmament. The Court adopted the following summary of the objections presented to it:

> "The question presented is vague and abstract, addressing complex issues which are the subject of consideration among interested States

[16] See G. Fitmaurice, The Law and Procedure of the International Court of Justice (1986), at 79.

> and within other bodies of the United Nations which have an express mandate to address these matters. An opinion by the Court in regard to the question presented would provide no practical assistance to the General Assembly in carrying out its functions under the Charter. Such an opinion has the potential of undermining the progress already made or being made on this sensitive subject and, therefore is contrary to the interest of the United Nations Organization."

4.2 Proceedings at the International Court of Justice

(a) Contentious Proceedings

As stated earlier, the Court is competent to entertain a dispute only if the States concerned have accepted its jurisdiction in one or more of the following ways:

- By entering into a special agreement to submit the dispute to the Court;
- By virtue of a jurisdictional clause, i.e., typically, when they are parties to a treaty containing a provision whereby, in the event of a dispute of a given type or disagreement over the interpretation or application of the treaty, one of them may refer the dispute to the Court;
- Through the reciprocal effect of declarations made by them under the Statute whereby each has accepted the jurisdiction of the Court as compulsory in the event of a dispute with another State having made a similar declaration. A number of these declarations, which must be deposited with the United Nations Secretary-General, contain reservations excluding certain categories of dispute.

States have no permanent representatives accredited to the Court. They normally communicate with the Registrar through the medium of their Minister for Foreign Affairs or their ambassador accredited to the Netherlands. Where they are parties to a case before the Court they are represented by an agent. An agent plays the same role, and has the same rights and obligations, as a solicitor with respect to a national court or as it were the head of a special diplomatic mission with powers to commit a sovereign State. He/she receives communications from the Registrar concerning the case and forwards to the Registrar all correspondence and pleading duly signed or certified. In public hearings the agent opens the argument on behalf of the government he/she represents and lodges the submissions. In general, whenever a formal act is to be done by the government represented, it is done by the agent. Agents are sometimes assisted by co-agents, deputy agents or assistant agents and always have counsel or advocates, whose work they co-ordinate, to assist them in the preparation of the pleadings and the delivery of oral argument. Since there is no special International Court of Justice Bar, there are no conditions that have to be fulfilled for counsel or advocates to enjoy the right of arguing before it except only that they must have been appointed by a government to do so. Proceedings may be instituted in one of two ways:

- Through the notification of a special agreement: This document, which is of a bilateral nature, can be lodged with the Court of either of the States parties to the proceedings or by both of them. A special agreement must indicate the subject of the dispute and the parties thereto. Since there is neither an "applicant" State nor a "respondent" State, in the Court's publications their names are separated by an oblique stroke at the end of the official title of the case, e.g., Benin/Niger;

- By means of an application: The application, which is of a unilateral nature, is submitted by an applicant State against a respondent State. It is intended for communication to the

> latter State and the Rules of Court contain stricter requirements with respect to its content. In addition to the dispute, the applicant State must, as far as possible, indicate briefly on what basis – a treaty or a declaration of acceptance of compulsory jurisdiction – it claims the Court has jurisdiction, and must succinctly state the facts and grounds on which it bases its claim. At the end of the official title of the case the names of the two parties are separated by the abbreviation "*v*". (for the Latin *versus*), e.g., *Nicaragua v. Colombia.*[17]

The date of the institution of proceedings, which is that of the receipt by the Registrar of the special agreement or application, marks the opening of proceedings before the Court. Contentious proceedings include a written phase, in which the parties file and exchange pleadings containing a detailed statement of the points of fact and of law on which each party relies, and an oral phase consisting of public hearings at which agents and counsel address the Court. As the Court has two official languages (English and French), everything written or said in one language is translated into the other. The written pleadings are not made available to the press and public until the opening of the oral proceedings, and then only if the parties have no objection. After the oral proceedings the Court deliberates in camera and then delivers its judgment at a public sitting. The judgment is final, binding on the parties to a case and without appeal (at most it may be subject to interpretation or revision). Any judge wishing to do so may append an opinion to the judgment.

By signing the Charter, a State Member of the United Nations undertakes to comply with any decision of the Court in a case to which it is a party. Since, furthermore, a case can only be submitted to the Court and decided by it if the parties have in one way or another consented to its jurisdiction over the case, it is rare for a decision not to be implemented.[18] A State which contends that the other side has failed to perform the obligations incumbent upon it under a judgment rendered by the Court may lay the matter before the Security Council, which is empowered to recommend or decide upon the measures to be taken to give effect to the judgment.

The procedure described above is the normal procedure. Certain matters can however affect the proceedings. The most common case is that of preliminary objections raised in order to prevent the Court from delivering judgment on the merits of the case (the respondent State may contend, for example, that the Court lacks jurisdiction or that the application is in admissible). The matter is one for the Court itself to decide. Then, there are provisional measures, which can be requested as interim measures by the applicant State if the latter considers that the rights which form the subject of its application are in immediate danger. It may further occur that a State seeks to intervene in a dispute involving other States because it considers that it has an interest of a legal nature which may be affected by the decision to be taken in the dispute between those States. The Statute also makes provision for cases where the respondent State does not appear before the Court, either because it totally rejects the Court's jurisdiction or for any other reason. Hence, failure by one party to appear does not prevent proceedings in a case from taking their course. But in such a case the Court must first satisfy itself that it has jurisdiction. Finally, should the Court find that parties to separate proceedings are submitting the same arguments and submissions against a common opponent in relation to the same issue; it may order joinder of the proceedings.

The Court discharges its duties as a full court but, at the request of the parties, it may also establish *ad hoc* chambers to examine specific cases. A Chamber of Summary Procedure is elected every year by the Court in accordance with its Statute.

[17] http://www.icj-cij.org/court/index.php?p1=1&p2=6; searched August 18, 2014 by 8:35pm
[18] Supra, not 9

The sources of law that the Court must apply are: international treaties and conventions in force; international custom, the general principles of law; and judicial decisions and the teachings of the most highly qualified publicists. Moreover, if the parties agree, the Court can decide a case *ex aequo et bono,* i.e., without limiting itself to existing rules of international law. A case may be brought to a conclusion at any stage of the proceedings by a settlement between the parties or by discontinuance. In the latter case, an applicant State may at any time inform the Court that it is not going on with the proceedings, or the two parties may declare that they have agreed to withdraw the case. The Court then removes the case from its list.

(b) Advisory Proceedings

Advisory proceedings before the Court are open solely to five organs of the United Nations and to 16 specialized agencies of the United Nations. The United Nations General Assembly and Security Council may request advisory opinion on "any legal question". Other United Nations organs and specialized agencies which have been authorized to seek advisory opinions can only do so with respect to "legal questions arising within the scope of their activities". When it receives a request for an advisory opinion, the Court, in order that it may give its opinion with full knowledge of the facts, is empowered to hold written and oral proceedings, certain aspects of which recall the proceedings in contentious cases. In theory, the Court may do without such proceedings, but it has never dispensed with them entirely.

A few days after request is filed, the Court draws up a list of those States and international organizations that will be able to furnish information on the question before the Court. Those States are not in the same position as parties to contentious proceedings: their representatives before the Court are not known as agents and their participation, if any in the advisory proceedings: their representatives before the Court are not known as agents and their participation, if any, in the advisory proceedings does not render the Court's opinion binding upon them. In general, the States listed are the Member States of the organization requesting the opinion. Any state not consulted by the Court may ask to be. It is rare, however, for the ICJ to allow international organizations other than the one having requested the opinion to participate in advisory proceedings. With respect to non-governmental international organizations, the only one ever authorized by the ICJ to furnish information did not in the end do so (International Status of South West Africa).[19] The Court has rejected all such requests by private parties.

The written proceedings are shorter than but as flexible as in contentious proceedings between States.[20] Participants may file written statements, which sometimes form the object of written comments by other participants. The written statements and comments are regarded as confidential, but are generally made available to the public at the beginning of the oral proceedings. States are then usually invited to present oral statements at public sittings. Advisory proceedings are concluded by the delivery of the advisory opinion at a public sitting. It is of the essence of such opinions that they are advisory, i.e., that, unlike the Court's judgments, they have no binding effect. The requesting organ, agency or organization remains free to give effect to the opinion by any means open to it, or not to do so. Certain instruments or regulations can, however, provide beforehand that an advisory opinion by the Court shall have binding force (e.g., conventions on the privileges and immunities of the United Nations). It remains nevertheless that the authority and prestige of the Court attach to its advisory opinions and that where the organ or agency concerned endorses that opinion, that decision is as it were sanctioned by international law.

[19] Advisory Opinion, 1950 I.C.J. 128 (July 11).

[20] The Court's advisory procedure is otherwise modelled after contentious proceedings, and the sources of applicable law are the same.

4.3 The International Court of Justice and the Security Council

The relationship between the ICJ and the Security Council, and the separation of their powers, was considered by the Court in 1992, in the Pan Am case.[21] The Court had to consider an application from Libya for the order of provisional measures to protect its rights, which, it alleged, were being infringed by the threat of economic sanctions by the UK and USA. The problem was that these sanctions had been authorized by the Security Council, which resulted with a potential conflict between the Chapter VII functions of the Security Council and the judicial function of the Court. The Court decided, by eleven votes to five, that it could not order the requested provisional measures because the rights claimed by Libya, even if legitimate under the Montreal Convention, could no longer be upheld since the action was justified by the Security Council. In accordance with Article 103 of the UN Charter, obligations under the Charter took precedence over other treaty obligations.

There was a marked reluctance on the part of a majority of the Court to become involved in a dispute in such a way as to bring it potentially into conflict with the Council. The Court stated in the *Nicaragua* case (Jurisdiction) that there is no necessary inconsistency between action by the Security Council and adjudication by the ICJ. However, where there is room for conflict, the balance appears to be in favour of the Security Council. Should either party fail "to perform the obligations incumbent upon it under a judgment rendered by the Court", the Security Council may be called upon to "make recommendations or decide upon measures" if the Security Council deems such action necessary.

4.4 Compliance to the Judgments of the International Court of Justice[22]

In the quest for less destructive ways to resolve conflicts between states, one of the more enduring and idealistic solutions advocated has been the expansion of the ICJ's adjudicatory jurisdiction. International lawyers envisaged judicial settlement under the ICJ's auspices as a fundamental mode of international dispute settlement, and potentially among the strongest mechanisms for the effective enforcement of international law, mirroring the role domestic courts play intrastate. The contention has been whether the ICJ has played its role in ensuring respect of the rule of international law among nations. However, Judge Lauterpacht says, "if the ICJ was unable to contribute more towards overall peace and security, it was because, but not adhering to its compulsory jurisdiction, 'governments have not availed themselves of these potentialities of international justice'.[23]

The United Nations has been the primary exponent of a robust ICJ. In 1974, the General Assembly expressed the desirability of having states submit to the compulsory jurisdiction of the ICJ, and of providing in treaties for the submission of future disputes to the Court.[24] Also, at the 60th anniversary celebration of the ICJ in 2006, Secretary-General Kofi

[21] Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerble (Libyan Arab Jamahiriya v. United States of America), Provisional Measures, Order of 14 April 1992, ICJ Reports (1992) at 114.

[22] European Journal of International Lawejil.oxfordjournals.org
http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID2115529_code1680226.pdf%3Fabstractid%3D2115
Eur J Int Law (2007) 18 (5): 815-852. dol: 10.1093/ejil/chm047 'Jurisdiction and Compliance in Recent Decisions of the International Court of Justice' – Aloysius P. Liamzon**JSD Candidate, LL.M. 2006, Yale Law School. AB, JD, Ateneo de Manila University.

[23] H. Lauterpacht, the Development of International Law by the International Court (1958), at 5.

[24] UN Res No. 3232, *Review of the Role of the International Court of Justice,* 12 NO. 1974, UN Doc A/RES/3232 (xxix). Para. 1 states: "The General Assembly … (1) Recognizes the desirability that States study the possibility of accepting, with as few reservations as possible, the compulsory jurisdiction of the International Court of Justice in accordance with Article 36 of its Statute;…' and at para. 2 '(2) Draws the attention of States to the advantage of inserting in treaties, in cases considered possible and appropriate, clauses providing for the submission to the International Court of Justice of disputes which may arise from the interpretation or application of such treaties;…'

Annan made a renewed call for 'all states that have not yet done so to consider recognizing the compulsory jurisdiction of the Court'. It is true that states are understandably reluctant to consent to the adjudication of conflicts by the ICJ because of the important political issues that may be at stake. Thus, few states have consented to the Optional Clause of the ICJ without reservations. Typically, states adhering to Article 36(2) of the ICJ Statute do not do so unconditionally; they retain a number of potent reservations to the Court's jurisdiction. It is tempting and has been the popular view that the ICJ is in 'long term decline'. And one of the supposed indicators of decline is the reduced usage of the Court by the 'major powers', evidenced by: (a) the withdrawal by most Security Council members except the UK, from the ICJ's compulsory jurisdiction.[25]

However, actual practice belies this conclusion; as the overwhelming majority of the Court's case docket has been initiated through unilateral invocation by applicant states of compulsory jurisdiction, especially in the last two decades (whether through the ICJ Statute's Optional Clause or, as is increasingly the case, through compromissory clauses in bilateral or multilateral treaties). Relatively few cases are ever instituted through Special Agreement.

There has been an increase, in recent years, in the docket of the ICJ, which some scholars have considered is a sign of both progress and growing respect for the Court, others have expressed concern at the reliance on compulsory jurisdiction to fuel this increase. In 2000, Judge Shigeru Oda, (still a member of the Court at that time), opined that despite the growing caseload (all of which satisfied formal jurisdictional requirements under the Statute), most of these cases lacked any genuine will on the part of both parties to seek judicial settlement through the ICJ, and would thus lead to intensely difficult compliance incidents. He concluded:

> 'I am of the view that not a great deal can be expected in terms of meaningful development of the international judiciary from such an appeal… unless the parties in dispute in each individual case are genuinely willing to obtain a settlement from the Court'.[26]

Judge Oda's pessimism stemmed from a belief that cases unilaterally instituted by Applicant States through the Court's compulsory jurisdiction usually resulted in vehement objection by the Respondent State, which would then result in noncompliance with the final judgment. Defiance of ICJ judgments, in turn, would have a corrosive effect both on the ICJ itself and upon broader efforts to institute meaningful settlement of international incidents through adjudicatory means.

An examination of some final judgments that have occurred following *Nicaragua v. United States,*[27] as perhaps the single most controversial case in the ICJ's history, the contentious nature of the Court's assertion of jurisdiction, coupled with the non-appearance of the United States at the merits phase and its subsequent defiance of that judgment, as well as the relationship between jurisdiction and compliance post – Nicaragua, which should grant a marked paradigm shift on the issues of non-compliance, open defiance and non-appearance by creating a better understanding of contemporary issues facing the Court.[28] The theoretical

[25] See Posner, 'The Decline of the International Court of Justice', in *International Conflict Resolution* (2006) 111, at 131.

[26] Oda, 'The Compulsory Jurisdiction of the International Court of Justice" A Myth?', 49 *Int'l & Camp LQ* (2000) 251, at 264.

[27] *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. US),* Provisional Measures (1984) ICJ Rep 169; Jurisdiction and Admissibility [1984] ICJ Rep 392; Merits (1986) ICJ Rep 14

[28] The most comprehensive of these recent studies is that of Schulte, *supra* note 15. Another notable work is Paulson, 'Compliance with Final Judgments of the International Court of Justice since 1987', 98 *AJIL* (2004) 434, which focuses on ICJ judgments since 1987.

compliance framework originally envisaged by the UN Charter in Article 94(1) declares the fundamental theoretical compliance framework as well as the expected obligation on member states:

> '[e]ach member of the United Nations undertakes to comply with the decisions of the International Court in any case to which it is a party.'

According to Professor Rosenne, the provision appears in the Charter, and not the Statute of the ICJ, apparently to highlight the differences between the adjudicative and post-adjudicative phases in international relations as non-compliance may give rise to new political tensions, and the efficacy of the post-adjudicative phase is really not determined by another judicial examination, but rather by immediate political action.[29]

> Under the framework of the Charter, therefore, responsibility of ensuring compliance is not within the ICJ's mandate, but rather, with the principal political organ for maintaining peace and security – the Security Council. (emphasis mine).

Article 94(2) provides:

> '[i]f 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 give effect to the judgment'.

This clearly manifests the strong link between the ICJ and the Security Council as institutions with related but decidedly different competencies in the settlement of international disputes – the ICJ is tasked with allocating rights and responsibilities and assessing competing legal claims among states party, while the Security Council is tasked, upon judgment, to give effect to that decision, should the debtor state refuse to comply.

Clearly, the enforcement of ICJ judgments involves essentially political acts by both parties and the Security Council, in which the Court itself has little involvement and over which it has no power. It is thus at least partly improper to blame the ICJ (as some commentators sometimes do) when states do not comply with its decisions, as the Charter assigns the responsibility to enforce to the Security Council.

Barring a deceitful claim of compliance (i.e., where the debtor claims to have complied while knowingly contravening the judgment), some conflicts of non-compliance occur when the judgment is vague and subject to reasonably divergent interpretations. It is also possible for the debtor state to express its respect for the opinion, or even openly acknowledge its legal obligation to comply, but be unable to do so because of circumstances precluding state responsibility, such as the actual existence of a state necessity. In each of these scenarios, the authority of the ICJ and of its judgment is not directly attacked, as the parties in principle acknowledge the binding nature of the judgment and their obligation to comply as mandated by Article 94(1) of the Charter.[30]

[29] S. Rosenne, *The Law and Practice of the International Court 1920 – 1996 (1997), I, 249.*
[30] Gabcikovo-Nagymaros Project (Hungary/Slovakia) [1997] ICJ Rep 1, paras 141 -147.

4.5 THE ICJ'S DOCKET FROM 1946 – 2004: COMPLIANCE STATISTICS

One of the more interesting revelations arising from Judge Oda's study is how few ICJ cases actually arrive at final judgment relative to their docket. Of the 98 cases in the Court's docket from 1946 – 1999, 90 were considered distinct' contentious cases', of which only 47 were fit for examination. Among those 47, 11 were submitted by special agreement, while the remaining 36 were brought before the Court by means of unilateral application. Within this subset of 36, furthermore, no objection was given to the unilateral application by the respondent state in eight cases, which, put differently, means that out of the total of 47 case already disposed of by the Court, in only 19 cases was there consent – either prior or tacit – to the Court's jurisdiction. In the other 28 cases, the respondent States were regarded as not being ready to settle willingly their disputes which had been brought before the Court unilaterally by the applicant States.

Among the 28 cases that arose from unilateral application, to which jurisdictional objections were raised, the Court actually handed down judgment in only 13 cases. Because four of those judgments 'lost their object' almost immediately, in the period until 1975 (when Judge Oda joined the ICJ), 'a meaningful result – in terms of the effectiveness of judgments – was achieved only in seven cases'. From 1976 until the end of 1999, during his tenure as Judge, 'there have been only two cases brought by unilateral application where a judgment on the merits has been handed down: No. 64, United States Diplomatic and Consular Staff in Tehran, and case No. 70, Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America). In both cases, 'the Court's decision went against the respondent States [and] the judgments were not complied with as such, although in both case the court's judgment did have long-term effect.'

Thirteen cases were dismissed outright at the jurisdiction phase on the ground that the ICJ manifestly lacked jurisdiction. Thus, only 15 cases at that time proceeded to the merits phase. In two cases – Border and Transborder Armed Actions (*Nicaragua v. Honduras*) and Certain Phosphate Lands in Nauru (*Nauru v. Australia*) – the applicant state withdrew the application at the merits stage. Without more detailed explication, Judge Oda stated that two of these decisions – the Fisheries Jurisdiction Cases (*UK v. Iceland*) and (*FRG V. Iceland)*[31] – 'lost their object owing to contemporary developments in the law of the sea.' Two other judgments 'lost their object because France had no reason to continue with the testing.'[32]

A more comprehensive treatment is found in Dr. Schulte's examination of the compliance record for all ICJ judgments from 1946 to 2003. Her conclusions are more positive – of the 27 distinct cases as of the end of 2003 that reached a judgment on the merits,[33] a 'generally satisfactory compliance record for judgments' was achieved. While there were indeed a number of well-publicized instances of defiance in the past, Nicaragua marked, in her opinion, the turning point as 'the last in a series of instances of open defiance and non-appearance'.[34] After Nicaragua, 'there is no sufficient evidence suggesting non-compliance with subsequent judgments.'[35]

[31] [1974] ICJ Rep 3 and 175

[32] Oda, *supra* note 11, at 260, citing *Nuclear Tests Cases (Australia v. France; NZ v. France)* [1973] ICJ Rep 99 and 457

[33] Dr Schulte began her study of state compliance with ICJ judgments thus: '[b]usiness is booming for the International Court of Justice. Its prestige and activity have reached unprecedented heights': S. Schulte, *Compliance with Decisions of the International Court of Justice* (2004), at 1.

[34] These cases of open deliberate refusal to honour the ICJ's judgments (at least for a time) were: *Corfu Channel,* ([1949] ICJ Rep 3, Anglo-Iranian Oil Company [1952] ICJ Rep 93, *Fisheries Jurisdiction [*1974] ICJ Rep 3, Nuclear Tests [1974] ICJ Rep 253, *United states Diplomatic and Consular Staff* [1980] ICJ Rep 3, and *Nicaragua* [1986] ICJ Rep 14. Nevertheless, many of these cases eventually were complied with, at least to a substantial extent. A prime example is *Corfu Channel* - for a long time, it was the only case that could be cited as an instance of non-compliance. The case, however, was

4.5.1 Non-compliance post *Nicaragua v. USA*

(a) Gabcikovo-Nagymaros Project (Hungary/Slovakia)[36]

Antecedents:

In 1977, Hungary and then Czechoslovakia signed a treaty jointly to build the Gabcikovo-Nagymaros Project, a system of locks and dams on the Danube River. While Czechoslovakia's portion was at an advance state of completion by 1989, Hungary elected to abandon the project, apparently for fear of damaging Budapest's water supply, as well as other environmental concerns. Negotiations between the two states having failed, Slovakia completed work on a variant of the proposed system and in 1992, began damming the river.

Jurisdictional Basis:

Hungary and Slovakia's contention that the 1977 treaty remained valid and binding, notwithstanding the state of necessity arguments propounded by Hungary concerning the environmental damage that would purportedly occur due to the Project. The Court refrained from making any specific orders, and imposed instead a duty on the parties to negotiate the 'modalities' of implementing the judgment in good faith, noting that the environmental consequences brought up by Hungary may affect treaty compliance.

Post-judgment:

Consistently with the 1997 judgment, negotiations started anew, with experts from both states preparing a framework agreement for continued operation and construction at alternative sites. However, negotiations broke down in 1998, and Slovakia filed a request for additional judgment before the ICJ due to the purported 'unwillingness of Hungary to implement the judgment' and sought a declaration that Hungary was not negotiating in good faith. A change in Slovakia's government after its September 1998 elections promoted renewed negotiations (though not necessarily productive) and no further ICJ proceedings were pursued. There were further talks in 2002 and 2003 that Slovakia would return the dispute to the ICJ; nevertheless, both were confident that the dispute would remain a technical (or legal), and not a political, problem. In 2004, after a two-year hiatus, talks resumed between both states as to how the ICJ decision would be implemented,[37] with both sides announcing wiliness to continue negotiations, but 'apparently accomplished little more'.

Assessing compliance in Gabcikovo-Nagymarosis especially complicated largely because of the ambiguity inherent in the Court's requirement of further negotiations, which did little to resolve the underlying dispute and arguably left the parties in the same position they were in before the case.

Principle would suggest that a contract repudiated by both parties was a dead letter, and the Court should have been concerned only with delineating the legal consequences of its termination. The decision can only be defended as a pragmatic one. The very serious financial and political implications of a finding that the contractual regime had been frustrated were not lost on the Court. Slovakia had already expended huge sums of money on the project and did

eventually settled through a memorandum of understanding reached in 1992 and implemented in 1996, 47 years after the original judgments: Schulte, *supra* note 15, at 91.

[35] Supra note 29

[36] See Gabcikovo-nagymaros (Hungary/Slovakia) [1997] ICJ Rep 1, at paras 15-22, 37 ILM (1998) 162

[37] 'Week in Review: Politics', *Budapest Bus J*, 8 Mar. 2004 WLNR 151317 ('Experts from Hungary and Slovakia will restart talks on March 23, seeking ways to implement a decision by the International Court of Justice on the long-disputed Gabcikovo-Nagymaros Danube barrage system').

not want it abandoned. On the other hand, completion of the project in its original form was utterly unacceptable to Hungary and genuinely imposed serious environmental threats. By asking the parties to negotiate a solution, possibly with the help of a third party, it is arguable that the Court was abdicating the very responsibility that the parties had assigned to it. [Author's Emphasis).

If one is to view an ICJ decision as a stabilization of expectations around an adjudicated solution, the most one can point to the Gabcikovo-Nagymaros is that a positive obligation of negotiation in good faith was mandated. The available facts on current negotiations are too sparse to assess compliance with that obligation with finality, but if the test of good faith is a whether negotiated resolution has been achieved, then the parties are not fulfilling their duty by refusing to compromise. Slovakia has taken the ICJ judgment as wholesale justification to insist on implementation of the 1977 treaty. Probably promoted by domestic opposition to the project as an outdated and harmful communist leftover, Hungary's interpretation of the ICJ judgment is that it is not obliged to build a dam.

The judgment's *dicta* certainly gave Hungary considerable normative environmental language to support it in that position. For example, the judgment stated that the 'existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.' Apart from this rather general statement, the Court also stated that the diversion of the waters of the Danube River within its boundaries amounted to interference in a shared legal right to a common resource, thus depriving Hungary of its right to 'an equitable and reasonable share of the natural resources of the Danube'. Conversely, it seems at least equally plausible to argue that the duty of good faith negotiation has been met in this case, as agreement does not fall within the ambit of negotiation. In any case, the case is that the parties have thus far been unable to use the ICJ's judgment to resolve their differences.

(b) Land and Maritime Boundary between Cameroon and Nigeria (*Cameroon v. Nigeria; Equatorial Guinea Intervening*)

Antecedents:

Sovereignty over the Bakassi Peninsula and areas in the Lake Chad Basin was the source of this long-running territorial dispute between Nigeria and Cameroon. With estimated population of 37,500 and 60,000,[38] respectively, and significant resources located therein, both states had claimed the Bakassi Peninsula and Lake Chad Basin for at least 20 years and, despite years of bilateral negotiations, no diplomatic progress had been achieved [39] in the face of armed clashed throughout the region continued. The stalemate caused increasing frustration on the part of Cameroon; indeed, just before the its 1994 application to the ICJ, 34 of its soldiers had died in the border skirmish.

Jurisdiction Basis:

Cameroon submitted the case unilaterally, and invoked the ICJ's jurisdiction pursuant to both states' declarations adhering to Article 36(2) of the ICJ Statute. Upon commencement of the case, Nigeria initially contested jurisdiction, arguing that both states had already agreed to

[38] See Counter-Memorial of the Federal Republic of Nigeria (Cameroon v. Nigeria) [1999] ICJ Rep, Pleadings, paras. 33, 416 (May), ICJ Doc CR 2002/9, at 45, para. 134 (1 Mar. 2002).

[39] Paulson, *supra* note 28, at 449-450, citing, *Inter alia*, 'Focus on Nigeria's Response to ICJ Ruling on Bakassi Peninsula', Un Integrated Regional Information Networks, 15 Oct. 2002, at www.allafrica.com; Schulte, *supra note 33, at 351.*

settle the dispute through existing bilateral channels.[40] Despite its initial resentment, Nigeria later participated fully throughout the ICJ proceedings.[41] On the ground, armed conflict continued while the case was pending.[42]

Judgment:

The ICJ's October 2002 judgment awarded Cameroon the Lake Chad boundary it sought, and allocated around 30 villages to Cameroon and a few to Nigeria.[43] The Court also awarded Cameroon the Bakassi Peninsula. Nigeria won the maritime-related rulings contained in the Judgment and much of the boundary between Lake Chad and Bakassi. The Court explicitly obligated both parties to withdraw their military, police and administration from the affected areas 'expeditiously and without condition'.[44] As for Equatorial Guinea, the intervenor, the ICJ drew the maritime boundary in a manner favourable to it.

Post-judgment:

Soon after the ICJ judgment, Nigeria issued an official statement which appeared to accept parts of the decision it considered fair or favourable, while rejecting other parts it found 'unacceptable'.[45] Nigeria pleaded its Constitution's principles of federalism as a reason for non-compliance since 'all land and territory comprising the nation of Nigeria is specified in the Constitution', the federal government could not give up Bakassi until the requisite national and state assemblies amended the Constitution.[46] President Obasanjo explained the Nigerian position thus: '[w]e want peace, but the interest of Nigeria will not be sacrificed… [W]hat may be legally right may not be politically expedient.'[47]

Internationally, it was felt that Nigeria's position was recalcitrant being that both countries had agreed in advance to respect whatever decision the ICJ arrived at. President Paul Biya of Cameroon reported that he and President Obasanjo had agreed to abide by the ICJ judgement in a meeting with UN Secretary-General Kofi Annam on 5 September 2002, and the United Nations issued a press statement to that effect. Nigeria contested the existence of any such agreement, contending that they had merely 'discussed confidence-building measures to reduce tensions on the border and mandated Annam's staff to issue a statement'.[48] It would be empathetic to recognize that the Nigerian Government was under tremendous internal political pressure not to respect the judgment, especially with regard to Bakassi, as various large Nigerian groups have opposed it and called for war, if necessary and ethnic Nigerians in that area also feared unequal treatment and persecution by Cameroon.

Nigeria was subjected to substantial diplomatic pressure by the international community. While the United States and France have pressured Nigeria to accept the ruling, the

[40] *Priliminary Objections of Nigeria, Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria)* [1998] ICJ Rep 275, at para. 18.

[41] 'Cameroon's Biya Said Satisfied with Obasanjo, Annam on Bakassi Crisis', Radio France Internationale, Doc. FBIS-AFR-2002-0909 (9 Sept. 2002).

[42] In 1996, four people died and 13 were injured in another skirmish, Paulson *Supra* note 28, at 450, citing 'Nigerian Press Reports Four Killed in Border Clash with Cameroon', *Agence France-Presse,* Doc. FBISAFR-96-025 (6 Feb. 1996).

[43] See further Bekker, 'Case Report: Land and Maritime Boundary Cameroon and Nigeria (Cameroon v. Nigeria; Equatorial Guinea Intervening)', 97 AJIL (2003) 387.

[44] Land and Maritime Boundary between Cameroon and Nigeria [2002] ICJ Rep 303, at para. 325.

[45] 'Cameroon; Bakassi: Why the ICJ Judgment is Unacceptable – Government', Africa News Service, 24 Oct. 2002, available in Lexis, News Library, Allnews file.

[46] *Ibid.*

[47] Paulson, *supra* note 23, at 450 citing Ogwuda, 'Bakassi: I'm Ready for Talks with Biya, Says Obasanjo', Vanguard (Lagos), 30 Oct. 2002, available at www.allafrica.com.

[48] Nigeria Defends Defiance of World Court Border Ruling', Un Press Release SG/T/2344 (10 Sept. 2002).

United Kingdom took the lead – the British High Commission to Nigeria stated: '[ICJ] judgments are binding and not subject to appeal. Nigeria has an obligation under the United Nations Charter to comply with the judgment.'[49]

The UN has played a pivotal role in the easing of tensions and renewing cordially between Cameroon and Nigeria. At the request of both states, the United Nations set up a commission to consider the implications of the verdict, protect the rights of the people in the affected areas, and propose a workable solution.[50] The Commission's recommendations with respect to Lake Chad appear to be successful, with Cameroon taking control of the area, and both states trading villages across their long mutual border.[51] Indeed, a public statement from the Nigerian Boundary Commission on 17 January 2006 affirmed that 'both countries had agreed on the implementation of the decision on the Lake Chad Region, the land boundary from the lake to the sea and their maritime boundary', and that '[f]ield work on the land boundary, including mapping and identification of pillar site in accordance with that decision was also ongoing.'[52]

Despite high tension at the time, Nigeria and Cameroon also appear to have resolved the dispute over the Bakassi Peninsula, which was always a source of greater tension because of its vast oil resources,[53] coupled with strong internal opposition towards relinquishing the area in Nigeria and Nigeria's status as a regional power.[54] The Nigerian Boundary Commission reported that, as of January 2006, implementation of the ICJ judgment was progressing. 'Both countries [have] secured the technical assistance of the UN to undertake the field work… [and] have secured the latest satellite imagery of the border area 30 km in Nigeria and 30 km in Cameroonian, and UN officials reportedly commenced intense cartographic demarcation work in the field in accordance with the judgment.[55]

The decisive point of compliance occurred on 12 June 2006. Following intensive mediation efforts by UN Secretary General Kofi Annam, the two states entered into an agreement setting out a 'comprehensive resolution of the dispute' over the Bakassi Peninsula in reliance upon the ICJ demarcation. Mr. Annam considered the agreement 'a great achievement in conflict prevention, which practically reflects its cost effectiveness when compared to the alternative forms of conflict resolution'.[56] In August 2006, both states held a joint ceremony to mark the transfer of control over the peninsula through the withdrawal of Nigerian troops from

[49] Pulson, *supra* note 28, citing Agence France-*Presse,* Doc. FBIS-AFR-2002-1025 (25 Oct. 2002).

[50] Larwaju, 'UN Panel on Bakassi Meets Dec. 1', *Vanguard* (Lagos), 29 Nov. 2002; Abdulmajeed, 'Bakassi: Committee to Demarcate Border Set Up', Dailytrust (Abuja), 4 Dec. 2002, all available at www.allafrica.com.

[51] Paulson, *supra* note 23, at 451, citing 'Nigeria, Cameroon to Sign Friendship, Non-Aggression Treaty', Xinhua General News Service, 1 Feb. 2004.

[52] Paulson, *supra* note 23, at 451, citing 'Nigeria, Cameroon to Sign Friendship, Non-Aggression Treaty', Xinhua General News Service, 1 Feb. 2004.

[53] Reports suggest that the Bakassi Peninsula may have as much as 10% of the world's total oil and gas reserves: 'Nigeria Hands Bakassi to Cameroon', BBC News Report, 14 Aug. 2006, available at: http/news.bbc.co.uk/2/hi/Africa/4789647.stm.

156 Paulson, *supra* note 23, at 452.

[54] Reports suggest that the Bakassi Peninsula may have as much as 10% of the world's total oil and gas reserves: 'Nigeria Hands Bakassi to Cameroon', BBC News Report, 14 Aug, 2006, available at http/news.bbc.co.uk/2/hi/Africa/4789647.stm.

156 Paulson, *supra* note 23, at 452.

[55] 'Nigeria, Cameroun Reach Accord on Boundary', *The Tide Online* (Nigeria: Rivers State Newspaper Corp., 17 Jan. 2006), available at: www.thetidenews.com.

[56] See 'Cameroon, Nigeria Sign Agreement Ending Decades-Old Border Dispute', UN Press Release AFR/1397, 12 June 2006.

the northern part of the territory. Thus, despite Nigeria's earlier seeming defiance, compliance has been achieved.

(c) Avena and Other Mexican Nationals (*Mexico v. US*); LaGrand (*FRG v. US*)

Common Antecedents: LaGrand[57] and Avena[58] (together with its progenitor Breard)[59] are ICJ cases concerning the United States of America's application of the Vienna Convention on Consular Relations ('Vienna Convention').[60] Under Article 36 of the Vienna Convention, which the United States ratified in 1969, local authorities are required to inform all detained foreign nationals 'without delay' of their right to have their consulate notified of their detention, and to unfettered consular communication. US law enforcement officials were not fully aware of this notice requirement, however, and it was not uncommon for convicted foreign nationals never to have spoken with their consulates concerning their incarceration.

Both LaGrand and Avena involved such violations. The former concerned Walterand Karl LaGrand, two German nationals, both of whom were convicted and sentenced to death in Arisona in 1984. They were never informed of their Article 36 right to communicate with German consular officials; indeed, it was only in 1992 that Germany was notified of the detentions, at which time it began to issue diplomatic requests urging clemency.[61] Karl LaGrand was executed on 24 February 1999 following unsuccessful clemency appeals. Germany then filed an Application before the ICJ against the United States, alleging a violation of the Vienna Convention and that the execution of Walter LaGrand should thus be stayed. The ICJ immediately issued a provisional order stating that, '[t]he United States of America should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision of these proceedings'.[62] The United States Supreme Court declined to exercise original jurisdiction over Germany's motion to enforce the ICJ provisional order, and Walter LaGrand was executed later that day.[63]

Avena was also related to prisoners sentenced to death; this time, it was Mexican nationals.[64] In an effort to prevent the execution of 54 of its citizens sentenced to death in 10 separate jurisdictions within the US, Mexico instituted a case before the ICJ in 2003, alleging failure to comply with Article 36 of the Vienna Convention.[65] While such violations also occurred in non-capital cases, Mexico chose to focus on those 54 convicts because of the life-or-death nature of the penalty.[66] It sought and obtained provisional measures from the ICJ

[57] LaGrand Case (FRG v. US) (2001) ICJ Rep 466.

[58] Avena and Other Mexican Nationals (*Mexico v. US*) [2004] ICJ Rep. 128.

[59] The case concerned Angel Francisco Breard, a death penalty convict and national of Paraguay who was similarly not afforded Vienna Convention protection by the US. In that incident, the Governor of Virginia refused to consider an ICJ preliminary order calling upon the US to 'take all measures at its disposal to ensure that Angel Francisco Bread is not executed pending the final decision in these proceedings': Vienna Convention on Consular Relations (Paraguay v. US), Provisional Measures Order, at para. 41 (1998) ICJ Rep 248, and executed Breard. Because of this, no final judgment was reached. Because the case lacked final judgment, it is beyond the scope of this paper.

[60] Vienna Convention on Consular Relations, 24 Apr. 1963, 596 UNTS 261

[61] Aceves, 'International dEcision: LaGrand (Germany v. United States) Judgment', 96 *AJIL* (2002) 210, at 211.

[62] Provisional Measures Order, LaGrand Case (*FRG v. US*) [1999] ICJ Rep 9, at para. 29.

[63] *FRG v. US*, 526 US 111(1999). Apart from jurisdictional issues, the Supreme Court cited the tardiness of Germany in filling this case as the basis for its refusal to exercise jurisdiction.

[64] As of early 2006, of the 118 foreign citizens on death row in the US 50 are Mexican: Clarke, 'Note, Determining the Remedy for Violations of Article 36 of the VCCR: Review and Reconsideration of the Clemency Process After Avena', 38 *George Wash Int'l L Rev* (2006) 131, at 138.

[65] Application Instituting Proceedings, *Avena and Other Mexican Nationals (Mexico v. US)* [2004] ICJ Rep 128, at paras. 9-13

[66] Mexico stated that it focused its diplomatic protests on those Mexican nationals facing the death penalty because of its 'strong interest in protecting the lives of its nationals' and its 'experience that the

prohibiting the US from executing any of the Mexican nationals involved prior to final judgment.[67] None of the prisoners was indeed executed before the ICJ's Avena decision.

Jurisdictional Basis:

Both cases were instituted unilaterally by Germany and Mexico through the Vienna Convention's Optional Protocol on Compulsory Settlement of Disputes,[68] which the United States ratified. Article 1 of the Optional Protocol provides for compulsory jurisdiction in the ICJ over 'disputes arising from the interpretation or application of the Convention'. In both cases, the United States never contested the Optional Protocol's applicability.

Judgment:

The execution of Walter LaGrand in 1999 despite the ICJ's order of provisional measures, coupled with lingering uncertainty about their obligatory character, may have promoted the ICJ to declare *(for the first time) in the 2001 final judgment that its orders on provisional measures are binding.* The ICJ also ruled that by failing to inform the LaGrand brothers of their right to consular notification following their arrest, and by not permitting 'review and reconsideration' of their convictions and sentences in light of the treaty violation, the United States had breached its obligations under the Vienna Convention. The ICJ then prescribed two explicit obligations for the United States: (1) to give Germany a general assurance of non-repetition of US treaty obligations under the Vienna Convention; and (2) to review and reconsider, by taking into account any violation of rights under the Vienna Convention, the convictions and sentences of German nationals sentenced to severe penalties.[69]

Similarly, the ICJ's 2004 final judgment in Avena held that the Mexican death row prisoners in the US were entitled to a determination of whether failure to notify the Mexican consul had resulted in prejudice. The judgment affirmed that the Vienna Convention prescribed judicially enforceable rights and that the US was in breach thereof; in the process, the ICJ disregarded the US argument that the procedural default rule barred such reconsideration.[70] Likewise rejected, *however, was Mexico's claim that a violation of the Vienna Convention automatically annuls a criminal judgment*. The Court ultimately ordered reconsideration of the sentences of the Mexican nationals, and that that review should be done by judicial, instead of executive officials, independent of any US constitutional claim, on an individual basis.

Post-judgment:

Compliance with the obligations mandated by the LaGrand final judgment has met mixed success. US actions seem to have adequately addressed the obligation of non-repetition, as programmes set up by the United States to promote understanding and observance of the Vienna Convention, which began as a response to Breard, continued after the LaGrand judgment.[71] The US Department of State has called for strict compliance by law enforcement officials. It has extensively coordinated with numerous federal agencies, as well as with states

involvement of consular officials can make a difference between life and death of a Mexican national facing capital charges.'

[67] Provisional Measures Order, Avena and Other Mexican Nationals (Mexico v. US) [2004] ICJ Rep 128, para 44

[68] 21 UST 325, 596 UNTS 487.

[69] See Cassel, 'International Remedies in National Criminal Cases: ICJ Judgment in Germany v. United States', 15 *Leiden J Int'l* L (2002) 69.

[70] The procedural default rule prevents a defendant from raising a claim in federal court that was not raised in State proceedings: see *Wainwright v. Sykes*, 433 US 72 (1977).

[71] See Guccione, 'One the Law – New Weapon in Defense: Foreign Consulates', *LA Times*, 16 Nov. 2011, at B2

having large foreign populations. Indeed, in the Avena final judgment itself, the ICJ stated that the ongoing US programme to improve consular notification was adequate.[72]

The second obligation – to review and reconsider convictions in light of the Vienna Convention – has probably not been complied with.[73] A reasonable interpretation of the obligation would entail some procedure to determine whether the violation affected the substantive outcome of the case in question. Both US and the ICJ have stated that the obligation should not apply to German (ox Mexican) nationals alone, but to all foreign nationals. However, state and federal judges faced with the issue have generally ignored the redetermination requirement of LaGrand, refusing to offer review and reconsideration in accordance with its terms either because the remedy sought for the Vienna Convention was considered inappropriate, or because of the procedural default rule.[74]

Because of their close connection in fact and law, the US's adherence to LaGrand (which, as stated above, ruled for the first time that provisional measures are binding) would be obeyed. Although other factors may have been at play, Avena's provisional measures order, unlike that of Breard and LaGrand, was respected, as none of the Mexican nationals was executed pending final judgment.

There has improved compliance records; the execution of an Oklahoma foreign national was stayed, for example, in reliance upon Avena.[75] The decisive US act of compliance occurred, however, on 28 February 2005, when President George W. Bush declared, in a memorandum to the Attorney General:

> 'I have determined, pursuant to the authority vested in me as President by the Constitution and laws of the United States, that the United States will discharge its international obligations about compliance, given the above discussion on LaGrand, full compliance appears unlikely without substantive changes in U.S. practice.').[76]

While the ultimate effect of President Bush's determination that 'the United States will discharge its international obligations' under Avena, especially in terms of granting re-examinations to foreign convicts who were not afforded consular notice under the Vienna Convention seemed to have significant effect upon the judicial branch, as evidence by the US Supreme Court's decision in Medellin v. Dretke[77] and its grant of certiorari in Bustillo v. Johnson and Sanchez-Llamas v. Oregon.[78]

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[72] *Avena, supra* note 58, at paras 144-150.

[73] Paulson, *supra* note 28, at 445.

[74] See, e.g., *State v. Issa*, 93 Ohio St 3d 49 (2001); Gordon v. State, 2003 WL 22964723 (FI Sup. Ct, 18 Dec. 2003).

[75] 199 'One May 11, 2004, the Legal Adviser of the Department of State, William H. Taft IV, sent Governor Brad Henry of Oklahoma a copy of the Avena Judgment and requested that he give careful consideration regarding Osbaldo Torrees's pending clemency request to the failure to provide consular information and notification. Before the governor acted, the Oklahoma Court of Criminal Appeals, on May 13, 2004, ordered a stay of execution and remanded the Torres case for an evidentiary hearing on whether Torres had suffered prejudice because of the State's violation of his rights under the Consular Relations Convention, as well as whether he had received ineffective assistance of counsel': Shelton, 'Case Concerning Avena and Other Mexican Nationals', 98 *AJIL* (2004) 559, at 566 (citations omitted).

[76] President George W. Bus, Memorandum for the Attorney General (28 Feb. 2005), available at: www.whitehouse.gov/news/releases/2005/02/20050228-18.html.

[77] 125 S Ct 686 (2004). In this case concerning one of the Mexican nationals on death row in Texas, the Supreme Court initially granted *certioriari*, agreeing to hear the foreign prisoner's argument that *Avena* mandated a review and re-examination of his conviction. After President Bush's memorandum, however, Medellin filed a habeas corpus petition before the Texas Court of Criminal Appeals, which in turn prompted the Supreme Court to dismiss the writ of ceritori as improvidently granted because '[t]his state-court proceeding may provide Medellin with the very reconsideration of his Vienna Convention claim that he now seeks in the present proceeding': See further anon, 'Force of Judgments

The new tone of compliance set by the Executive saw its limits tested when the Supreme Court's divided decision in Sanchez-Llamas and Bustillo finally came out. Although one may have speculated that the Supreme Court's grant of certiorari following Breard and Meddlin may have signaled a willingness to interpret Vienna Convention protection in a manner more consistent with the ICJ's, such did not arise, perhaps due to the by the changed composition of the Court.[79] The Supreme Court's 28 June 2006 decision held, in essence, that even assuming that the Vienna Convention creates judicially enforceable rights, suppression of a police statement (procured from a foreign detainee not notified of his rights under the Convention) is not an appropriate remedy for the violation, and that states may apply their procedural default rules to claims under the Convention. In doing so, the Court reaffirmed Breard's finding that while ICJ decisions deserve 'respectful consideration', they are not binding. The Supreme Court thus refused to comply with Avena's interpretation that the Vienna Convention precluded reliance on procedural default rules where the 'default' was traceable to the state's failure to provide consular notification.

Because the decision confined itself to very specific issues, the broader questions of a foreign national's right to sue directly to enforce his or her Vienna Convention rights remains unresolved, along with the Executive's determination of the US's obligations with respect to the 51 Mexican nationals named in Avena. The saga is far from over, however. In a fascinating new series of twists, the Texas Court of Appeal brushed aside President Bush's executive determination and refused to review Medellin's conviction.[80] Medellin then returned the case yet again on certiorari to the US Supreme Court; interestingly, the Bush administration has sided with Medellin and filed a brief urging the Court to grant certiorari. Solicitor General Paul Clement told the Justices that, if not reversed, the Texas Court's decision 'will place the United States in breach of its international law obligation' to comply with Avena and will 'frustrate the President's judgment that foreign policy interests are best served by giving effect to that decision'. The Supreme Court agreed to hear the case on 30 April 2007.[81]

To add even further complexity to its compliance responses, the President's determination to 'discharge its international obligations' under the ICJ judgment is tempered by the United States' decision to withdraw from the Optional Protocol of the Vienna Convention, effectively revoking the compulsory jurisdiction of the ICJ over the US as regards the Vienna Convention.[82] This withdrawal from the Optional Protocol may not encourage future enforcement of the Vienna Convention within the United States.

by the International Court of Justice – Vienna Convention on Consular Relations', 119 *Harv L Rev* (2005) 327.

[78] In Nov. 2005, the US Supreme Court granted certiorari in these related cases which (as *Medellin* would have) was likely to resolve many of the issues concerning Article 36 of the Vienna Convention and treatment of its violation before US courts. See Grant of Petition for Writ of Certiorari, *Bustillo v. Johnson,* 2005 WL 2922486 (no. 05 – 51) Grant of Petition for Wit of Certiorari, *Sanchez-Llamas v. Oregon,* 2005 WL 2922485 (No. 04 – 10566).

[79] *Sanchez-Liamas v. Oregon*, 126 S Ct 2669 (2006). Roberts CJ, and Scalia, Kennedy, Thomas, and Alito JJ, comprised the majority, while Breyer, Stevens, and Souter, JJ, dissented. While concurring with the Judgment, Justice Ginsburg also joined in part of the dissenting opinion.

[80] Interestingly, Justice Ginsburg's separate concurrence noted that the Convention does not require the suspension of interrogations pending notification to the detainee's consulate: *Sanchez-Llamas*, supra note 203, 2688.

[81] *See Medellin v. Texas,* No. 06-984, which will be argued in the autumn of 2007.

[82] In a 7 Mar. 2005 letter to the Un Secretary General, US Secretary of State Condoleezza Rice stated: '[t]his letter constitutes notification by the United States of America that it hereby withdraws from the [Consular Convention's Optional Protocol Concerning the Compulsory Settlement of Disputes]. As a consequence of this withdrawal, the United States will no longer recognize the jurisdiction of the International Court of Justice reflected in that Protocol.'

5. ASSESSMENT AND IMPLICATIONS

5.1 The Link between Jurisdiction and Compliance

The orthodox understanding relates the ICJ's various modes of jurisdictional acquisition directly with the probability of compliance by the adjudged debtor state. While the ICJ decides cases only when all states party to the dispute have given their consent,[83] it is posited that the various modes of consent yield very difference compliance results. The 'ideal' form of consent, under this theory, is given in special agreements wherein states manifest consent to take a *specific* dispute before the ICJ, as '[t]he Court's judgments in such cases have been duly compiled with'. At the other end of the spectrum are those unilateral applications in which the respondent state consented in advance, either through the Optional Clause of the ICJ Statute or dispute settlement ('compromissory') clauses in treaties to which it is party, to ICJ jurisdiction over *future* disputes. According to Judge Oda, the compliance record for these two forms of compulsory jurisdiction is much more problematic than that of cases instituted by special agreement.[84]

After studying state compliance with final decisions in the wake of Nicaragua, Professor Charney similarly concluded that the ICJ should avoid cases where a judgment was likely to be resisted, as in Nicaragua, and instead establish a record of success in cases where the parties would probably live up to their obligations.[85] Indeed cases that were initiated by special agreement held more promises of being effective than those brought under the compulsory jurisdiction of the ICJ.

More recently, Professors Posner and Yoo (pointing to statistics generated by the 'first-ever review of the entire docket of the International Court of Justice' of Professors Ginsburg and McAdams) state that the compliance rate of cases instituted by special agreement was 85.7 per cent, while treaty and optional clause jurisdiction achieved only 60 per cent and 40 per cent compliance rates, respectively.[86] Of the cases treated above, the only case where progress towards compliance seems wholly problematic, Gabcikovo-Nagymaros, was instituted by special agreement, and even there, there is basis to question whether the Court provided the parties with enough guidance for effective resolution to occur, which in turn may lead one to question altogether whether compliance is the proper optic from which to evaluate the decision.

In contrast, the remaining compliance narratives, including *Cameroon v. Nigerian* and even Avena, both of which were instituted through unilateral application of the ICJ's compulsory jurisdiction, give good cause for optimism. In both instances, Nigeria and the United States showed substantial, although imperfect, compliance with those judgments despite early resistance (although in the case of Avena, the outcome of the Supreme Court was of Medellin will largely determine whether Avena has been complied with). This suggests, at the very least, that the Court's compulsory jurisdiction and subsequent compliance problems are not as neatly correlated as in commonly advanced.

Secondly, one wonders about the methodology by which some of these studies arrived at their statistics. In some of the studies, there is scant indication as to how they decided that a given case falls under, 'compliant' or 'not compliant' categories. No recounting of the relevant post-adjudicative facts of each ICJ case considered non-compliant was made. This is so, in part, because often compliance is an extremely complex process that involves many levels of local

[83] ICJ Statue, Arts. 36 – 37, 65.

[84] Objections to jurisdiction are common when compulsory jurisdiction is employed, and this is seen as the basic problem. In Judge Oda's scorecard, there were, as of the end of 1999, only 13 cases in which the ICJ 'handed down a judgment on the merits rejecting preliminary objections regarding jurisdiction', and of these 13 cases, there have been only two during the last quarter of a century that achieved a concrete result'.

[85] In Oda, *supra* note 26, at 262.

[86] Posner and Yoo, 'Judicial Independence in International Tribunals', 93 Cal L Rev (2005) 1, at 37

and federal governmental enforcement, each of which may exhibit varying degrees of compliance vis-à-vis other branches of the same government. An example of these vagaries, Professors Ginsburg and McAdams listed *Cameroon v. Nigeria* as an instance of non-compliance;[87] evidence show, however, that soon after the judgment, both parties had already complied with substantial portions of the ICJ judgment, and that full compliance has, as of August 2006, been achieved. Thirdly, little recognition is given to the fact that not a single instance of open defiance of ICJ final judgments has occurred since Nicaragua. This suggests that the recent compliance record of ICJ judgments is much less delinquent than is often portrayed. Commentators that point to the compliance ills of the ICJ inevitably rehash pre-Nicaragua judgments or orders on provisional measures (which only declared binding and cast in mandatory language in LaGrand).

5.2 The Under-utilization of the Security Council in the Enforcement of ICJ Judgments

It is unfair to compare the enforcement mechanisms available to domestic court decisions with the judgments of the ICJ. The institutional framework of the ICJ is complex, and the avenues available under the UN Charter for enforcement of its decisions reflect the disproportionate power bestowed by the Charter upon the Security Council.[88] Under the Chater's framework, non-compliance is dealt with principally through Article 94(2) of the UN Charter, which offers the creditor state recourse to the Security Council in seeking enforcement of the judgment. Thus, the Charter views compliance as much more a political issue involving international peace and security than a legal one.

In its entire history, the Security Council has never employed its Article 94 powers even on occasions of clear non-compliance. It is understandable, given the discretionary nature of Article 92(4),[89] for the Council to be passive in situations wherein the debtor state is a Permanent Member. But much more puzzling is the fact that creditor states themselves very rarely seek the Security Council's assistance in this capacity, even in the face of continued non-compliance. It has happened very rarely that states have refused to carry out the decisions of international tribunals. The difficulty has always been in getting states to submit their disputes to a tribunal. Once they have done so, they have usually been willing to accept even an adverse judgment.[90]

While it is true that Article 94(2) has failed to play a significant role in practice, the reason has certainly not been for lack of non-compliance incidents. After all, why do creditor states not resort to the Security Council more often? At least part of the reason for such paucity can be ascribed to the difficulties laid upon states seeking Security Council action. Because enforcement action under Article 94(2) is merely discretionary upon the Security Council, a finding that the ICJ judgment was defied does not, of itself, immediately trigger Security Council action; this uncertainty and potential for arbitrariness, in turn, nullifies much of the possibility that the Security Council can ever act as 'international enforcer' in the same way the Executive department does in most states.

[87] See Ginburg and McAdams, 'Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution', 45 *William & Mary Rev.* (2004) 1229, at 100.

[88] Political bodies like the Security Council and the General Assembly of the United Nations also apply law, their actions and resolutions interpret and develop the law, their judgments serve to deter violations… The question is not whether there is an effective judiciary, but whether disputes are solved in an orderly fashion in accordance with international law': L. Henkin, *How Nations Behave* (2nd edn., 1979), at 225 – 226.

[89] See Reisman, 'The Enforcement of International Judgments', 63 *AJIL* (1969) 1, at 13 – 14.

[90] L. Goodrich and E. Hambro, *Charter of the United Nations* (2nd edn, 1949), at 485. In their 1969 edition, this assessment was modified (albeit only slightly) in light of Albania's refusal to comply with the Court's decision in *Corfu Channel, supra* note 52: 'Very rarely have states refused to implement the decisions of an international tribunal. In no case did parties refuse to carry out a judgment of the Parmanent Court of International Justice. *Charter of the United Nations* (3rd edn., 1969), at 557.

Moreover, the relationship between Article 94(2) and the Security Council's general enforcement power is unclear. As Professor Reisman noted:

> 'The fundamental ambiguity of Article 94 lies not in itself but in its relationship with the rest of the Charter. Security Council decisions may commission armed force or measures short of such force *only* if peace is threatened. Clearly not every act of non-compliance constitutes an imminent threat to the peace. Were Article 94(2) an independent form of action, by-passing the need for a finding of a threat to the peace, it would have enormous constitutional and enforcement significance; on the juridical level, at least, it would make the United Nations a real international enforcer.'[91]

Another reason why Article 94(2) was never employed by the Security Council is that in appropriate cases, the mere threat of Security Council action was sufficient to trigger the desired response from the recalcitrant state. In Land, Island and Maritime Frontier Dispute,[92] for example, Honduras' letter to the Security-General was sufficient to trigger a more conciliatory tone from EI Salvador, prompting renewed vigour in negotiations that diffused tensions and ultimately sped up compliance with the ICJ's delimitation of their common border. Thus, when the debtor state does not have the power to block Security Council action, the possibility of Security Council action is often enough impetus for them to agree to a negotiated, less destructive solution in order to avoid Article 94(2).

5.3 ICJ Proceedings and Decisions as Impetus for Negotiated Settlements

Often overlooked in discussions about the Court's compulsory jurisdiction is the fact that on some occasions, the very act of submitting a dispute before the ICJ bears considerable positive effect upon the ultimate settlement of an international dispute. The past ICJ President Mohammed Bedjaoui maintained that Court procedures themselves have an important pacifying effect upon states parties. Incidental proceedings have made 'a decision contribution not only to the settlement of disputes of very different kinds, but also, directly, to the maintenance or restoration of peace between the parties'.[93]

The cases discussed above illustrate the point well. In *Cameroon v. Nigeria,* for example, Nigeria had initially resisted the unilateral application of Cameroon to adjudicate their boundary dispute before the ICJ. For decades before the ICJ intervened, both states were locked in bitter (and often bloody) dispute over various areas across their mutual border, especially the Bakassi Peninsula, and no significant progress towards any negotiated settlement was being made. After initial objections over jurisdiction, however, Nigeria eventually participated in the proceedings, and recognized the binding nature of the ICJ final judgment notwithstanding its adverse consequences. While compliance was difficult, (such is understandable considering the strength of public sentiment in Nigeria against the surrender of the Peninsula).

Cameroon v. Nigeria suggests that there are occasions where drawing up a special agreement over longstanding and deeply-felt problems is politically impossible; compulsory jurisdiction would, in such situations, offer a state's government an 'out' by simultaneously settling the issue and insulating governments from domestic criticism in the event of adverse judgment. The debtor state's government can divert some of the domestic political heat by

[91] Reisman, *supra* note 89, at 14 – 15.

[92] Application for Revision of the Judgment of 11 Sept. 1992 in the Case Concerning the Land, Island, and Maritime Frontier Dispute [E] Salvdor/Honduras: Nicaragua Intervening (El Salvador v. Honduras), Judgment of 18 Dec. 2003 [2003] ICJ Rep 392.

[93] Bedjaoui, 'Presentation', in C. Peck and R. Lee (eds), *INJ/UNITAR Colloquium to Celebrate the 50th Anniversary of the Court* (1997), at 22.

laying the blame on a 'foreign' institution exercising jurisdiction they never consented to in the first place, while at the same time affirming their reputation as a law-abider by declaring willingness to settle its international obligations under that judgment on more favourable, negotiated terms. Thus, once begun, ICJ judgments often provide inertia towards an ultimate political solution to difficult international issues. That inertia is by no means irresistible, and there are definite limitations to what international law can do. ICJ judgments are often only part of what will finally be a diplomatic solution between the two states. Still, the World Court is often a critical facilitator of the process.

5.4 Institutional Implications for the ICJ

One consistent theme underlying many of the studies about the 'effectiveness' of the ICJ and its institutional challenges is an assessment of what the Court's identity and purpose is within the international community. This multifaceted issue is probed in various ways – is the ICJ's primary function to resolve concrete disputes *ad hoc*, or is its function (as many scholars suggest) of a more general character, that of actively engaging in the interpretation and progressive development of public international law? Sir Robert Jennings, former President of the World Court, forcefully took the latter view, based largely on the central role given to the Court by the UN Charter in matters of law and the dispensation of justice:

> [a]d hoc tribunals can settle particular disputes; but the function of the established 'principal judicial organ of the United Nations' must include not only the settlement of disputes but also the scientific development of general international law… there is therefore nothing strange in the ICJ fulfilling a similar function for the international community.[94]

As a corollary to this, should the Court veer away from compulsory jurisdiction and try as much as possible to decide only upon cases instituted through special agreement, in order to secure greater compliance with its decisions and thereby be an effective settler of disputes? Or should it construe its jurisdiction as broadly as plausible, in order to resolve the greatest variety of cases and thus aid in the development of international law? The decline of the Court's compulsory jurisdiction should not be taken as an indication that the ICJ is in irreversible decline. Indeed, the approach of states towards its jurisdiction over the years suggests that the world community has matured in its understanding of the potential and limits of the ICJ, and is moving closer to an equilibrium situation where, based on rational choice, most states have decided both to comply with the Court's judgments and further restrict its compulsory jurisdiction due to the uncertainties inherent in being unable to control outcomes. The Court's docket is increasingly being left open only for cases in which: (a) states that actually wish to settle present disputes through special agreement (because they have already discounted and are prepared to accept the consequences of an adverse decision); or (b) are undaunted at the prospect of resolving future disputes through international adjudication (those who remain committed to the optional clause or have signed treaties with compromissory clauses).

This, in turn, is likely to lead to even greater compliance with the Court's decisions, thus strengthening the institution. Avena stands out among recent cases as a predictor of what states' attitudes towards the ICJ may be in the future. Ad discussed, Avena was the third in a string of cases on the Vienna Convention on Consular Relations in which the ICJ required the United States, in increasingly mandatory tones, to review the convictions of foreign death row

[94] Jennings, 'The Role of the International Court of Justice in the Development of International Environment Protection Law', 1 *Rev Eur Community & Int'l Envt'l* L (1992) 3, at 240, cited in *East Timor (Portugal v. Australia)* [1995] ICJ Rep 90 (Ranjeva J, separate opinion).

inmates whose consular notification rights were violated. Commentators had good reason to doubt that the ICJ judgments would result in US compliance, and were surprised when the President of the United States 'determined… that the United States will discharge its international obligations under the decision of the International Court of Justice in the Case Concerning Avena'. It was a pyrrhic victory for those hoping for a change in the US's attitude towards international adjudication, however, as it then promptly withdrew from the Optional Protocol to the Convention, thereby divesting the Court of jurisdiction over similar disputes in the future.

The US response to Avena does demonstrate that even the most powerful states are likely to comply with adverse ICJ judgments so long as the Court's jurisdiction and competence to rule upon the dispute is unquestionable. In order to foreclose further unpalatable judgments while simultaneously protecting the US's reputation as an international law-abider, however, one can except that the US (along with some states with similar compromissory clauses and similar ambivalence towards international law) will, in the future, continue to prune down the Court's jurisdiction.

6. CONCLUSION

Amidst a proliferation of conflicting scholarship on the institutional problems of the ICJ, the decline of compulsory jurisdiction, the strength or weakness of its compliance record, and its future place in the settlement of international disputes, it is argued that, as a whole, the post – Nicaragua Court has indeed seen better compliance with its final judgments (albeit sometimes taking years before substantial compliance was achieved), regardless of the manner by which jurisdiction was acquired.[95]

The analysis considered some of the implications of those findings, including the somewhat ironic but not altogether surprising phenomenon of an increased docket and compliance record, but reduced adherence to compulsory jurisdiction. Thus far, the Court's compliance success, regardless of the mode of jurisdictional acquisition, suggest that it has largely been successful at finding a working equilibrium among its different roles, striking the right tone between expositor of international law and political actor, between arbitral body encouraging negotiated settlement and impartial adjudicator of rights.

Overall, pessimism regarding the future of the Court is therefore entirely unwarranted, so long as expectations are managed realistically. The original intention at the founding of the UN was for the ICJ to be 'at the very heart of the general system for the maintenance of peace and security'.[96] Indeed, most disputes in the international community will continue to be settled, not through determinations of rights and applying international law, but through diplomacy and negotiation. The ICJ being the principal judicial organ of the United Nations will continue to function as it always has: as a limited, but important, forum for resolving international disputes. When unburdened of unrealistic expectations, the work of the Court can be better appreciated.

[95] There has been explosion of compliance theories under international law in the last decade. A useful synopsis of the leading theories can be found in E. Benvenisti and M. Hirsch, *The Impact of International Cooperation: Theoretical Perspectives* (2004). For a discussion of compliance theories vis-à-vis *Avena* itself see Pulkowski, 'Testing Compliance Theories: Towards US Obedience of International Law in the *Avena* Case', 19 *Leiden Int'l* L (2006) 511.

[96] Speech by Rosalyn Higgins, President of the ICJ, at the United Nations Security Council's Thematic Debate on 'Strengthening International Law', 22 June 2006, available at: www.icj-cij.org/icjwww/ipresscom/SPEECHES/ispeechpresident_higgins_20060622.htm.

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