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# *Jurisdiction and Compliance in Recent Decisions of the International Court of Justice*

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## **Abstract**

*International institutions are plagued by too many expectations and too little power. One striking example is the International Court of Justice. Its malcontents criticize the Court as an ineffective player in achieving international peace and security, largely because of its perceived inability to control state behaviour. Scholars have long blamed this on the ICJ's 'flawed' jurisdictional architecture, which is based entirely on consent. Anything less than a clear indication of consent by the defendant state in a given case is thought to run serious non-compliance risks. This article takes issue with that assessment. By analysing the ICJ's final decisions since the landmark case of Nicaragua v. US, one finds that the manner in which the ICJ was seised of jurisdiction is actually a poor predictor of subsequent compliance. Rather, through complex mechanisms of authority signal and the political inertia induced by those decisions, almost all of the Court's decisions have achieved substantial, albeit imperfect, compliance. Thus, despite the likelihood that states will continue to reduce the scope of the ICJ's compulsory jurisdiction, the World Court will remain a vital, if limited, tool in resolving inter-state disputes and a force for world public order.*

## **1 Introduction**

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 International Court of Justice's ('ICJ' or 'the Court') adjudicatory jurisdiction. From its inception early in the 20th century, international lawyers envisaged judicial

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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. Judge Hersch Lauterpacht was of the view that the 'primary purpose of the International Court ... lies in its function as one of the instruments for securing peace in so far as this aim can be achieved through law',<sup>1</sup> and that '[t]he very existence of the Court, in particular when coupled with the substantial measure of obligatory jurisdiction already conferred upon it, must tend to be a factor of importance in maintaining the rule of law'.<sup>2</sup> If the ICJ was unable to contribute more towards overall peace and security, it was because, by not adhering to its compulsory jurisdiction, '[g]overnments have not availed themselves of these potentialities of international justice'.<sup>3</sup>

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,<sup>4</sup> and of providing in treaties for the submission of future disputes to the Court.<sup>5</sup> In 1992, former UN Secretary-General Boutros-Ghali described the ICJ as an 'under-used resource for the peaceful adjudication of disputes'<sup>6</sup> and rather quixotically recommended that '[a]ll Member States should accept the general jurisdiction of the International Court under Article 36 of its Statute, without any reservation, before the end of the United Nations Decade of International Law in the year 2000'.<sup>7</sup> Most recently, at the 60th anniversary celebration of the ICJ in 2006, Secretary-General Kofi Annan made a renewed call for 'all states that have not yet done so to consider recognizing the compulsory jurisdiction of the Court'.<sup>8</sup>

<sup>1</sup> H. Lauterpacht, *The Development of International Law by the International Court* (1958), at 3.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.* at 5.

<sup>4</sup> UN Res No. 3232, *Review of the Role of the International Court of Justice*, 12 Nov. 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; ...'

<sup>5</sup> *Ibid.* 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; ...'

<sup>6</sup> UN Doc. No. A/47/277, *Report of the Secretary-General Pursuant to the Statement adopted by the Summit Meeting of the Security Council on 31 Jan 1992*, 17 June 1992, para. 38.

<sup>7</sup> *Ibid.* at para. 39. The UN has since been more circumspect: 'The International Court of Justice lies at the centre of the international system for adjudicating disputes among States. In recent years, the Court's docket has grown significantly and a number of disputes have been settled, but resources remain scarce. There is a need to consider means to strengthen the work of the Court. I urge those States that have not yet done so to consider recognizing the compulsory jurisdiction of the Court – generally if possible or, failing that, at least in specific situations': *In Larger Freedom: Towards Development, Security and Human Rights For All*, Report of the UN Secretary-General, para. 139, UN Doc. A/59/2005 (21 Mar. 2005). More recently, Mexico's representative at the UN General Assembly expressed concern that an insufficient number of states had accepted the Court's compulsory jurisdiction, and urged more states to do so. The statements of Australia, Canada, and New Zealand also urged greater acceptance of compulsory jurisdiction: 'Continued Support of General Assembly Vital for International Court of Justice to Meet Growing Demands, Improve Efficiency, Delegations Told', 27 Oct. 2005, 2005 WLNR 17500117 (UN Press Release).

<sup>8</sup> 'On 60th Anniversary of World Court, Secretary-General Calls on Governments to Consider Recognizing Court's Compulsory Jurisdiction', UN Doc No. SG/SM/10414, 12 Apr. 2006.

The notion that greater acceptance of ICJ compulsory jurisdiction<sup>9</sup> has occurred or is forthcoming is, of course, hopelessly utopian, especially in light of the last 60 years of the Court's experience. States are understandably reluctant to consent to the adjudication of conflicts by the ICJ *ex ante*, considering the important political issues that may be at stake.<sup>10</sup> Thus, few states have consented to the Optional Clause of the ICJ without evisceratory caveats,<sup>11</sup> and with no perceptible trend towards greater adherence,<sup>12</sup> it is tempting to dismiss the Court's compulsory jurisdiction as illusory. Believing this to be both true and an indicator of deeper problems, one scholar has gone so far as to characterize the ICJ as being in 'long term decline'.<sup>13</sup>

Interestingly, however, actual practice belies this conclusion; the last few decades have shown that compulsory jurisdiction is far from dead letter, as the overwhelming majority of the Court's case docket has been initiated through unilateral invocation by applicant states of compulsory jurisdiction (whether through the ICJ Statute's

<sup>9</sup> In essence, 'compulsory jurisdiction' of the ICJ refers to the capacity of the Court to decide – with binding force – disputes between states upon the motion of one of the parties to the dispute: R. Szafarz, *The Compulsory Jurisdiction of the International Court of Justice* (1993), at 3. The two principal bases of compulsory jurisdiction, *ratione materiae*, which will be the primary focus of this paper, are (a) treaties in which jurisdiction over disputes between the parties is provided to the Court (ICJ Statute, Art. 36(1)); and (b) the 'optional clause' whereby states '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 . . . .' (ICJ Statute, Art. 36(2)). While some studies treat optional clause jurisdiction separately from that arising from compromissory clauses in treaties, e.g., Scott and Carr, 'The ICJ and Compulsory Jurisdiction: The Case for Closing the Clause', 81 *AJIL* (1987) 57, the present work discusses all modes of jurisdictional acquisition, including by special agreement, in order to test the core idea which de-links jurisdiction from compliance.

<sup>10</sup> See Yasuki, 'Is the International Court of Justice An Emperor Without Clothes?', 8 *Int'l Legal Theory* (2002) 1, at 10.

<sup>11</sup> Typically, states adhering to Art. 36(2) of the ICJ Statute do not do so unconditionally; they retain a number of potent reservations to the Court's jurisdiction. The Philippines' many reservations, e.g., include *inter alia* disputes 'which the Republic of the Philippines considers to be essentially within its domestic jurisdiction'; and disputes 'arising under a multilateral treaty, unless (1) all parties to the treaty are also parties to the case before the Court, or (2) the Republic of the Philippines specially agrees to jurisdiction'. A complete list of reservations is available at: [www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3](http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3).

<sup>12</sup> Currently, the only permanent member of the Security Council that recognizes the compulsory jurisdiction of the ICJ is the UK, and even the UK's adherence contains significant reservations. Overall, 66 of the 191 states party to the ICJ Statute accept the World Court's compulsory jurisdiction under Art. 36(2) as of 2005, with most maintaining strong qualifications to their consent, effectively granting jurisdiction for a narrow band of disputes. See generally Speech by ICJ President Shi Jiuyong to the General Assembly of the United Nations, 27 Oct. 2005, available at: [www.icj-cij.org/icjwww/ipresscom/SPEECHES/ispeech\\_shi\\_general\\_assembly\\_20051027.htm](http://www.icj-cij.org/icjwww/ipresscom/SPEECHES/ispeech_shi_general_assembly_20051027.htm).

<sup>13</sup> See Posner, 'The Decline of the International Court of Justice', in *International Conflict Resolution* (2006) 111, at 131. Among 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 from the ICJ's compulsory jurisdiction, (b) the fact that only 13 of the top 30 states (measured by current GDP) have submitted to compulsory jurisdiction, (c) 'in 1950, 60 percent of the states were subject to compulsory jurisdiction; today, this fraction has declined to 34 percent. And of these states, few have been involved in ICJ litigation', and (d) 'states have showed less and less enthusiasm for treaty-based jurisdiction. From 1946 to 1965, states entered (on an annual basis) 9.7 multilateral or bilateral treaties that contained clauses that granted jurisdiction to the ICJ. This number dropped to 2.8 per year from 1966 to 1985, and to 1.3 per year from 1986 to 2004': *ibid.* at 116–118.

Optional Clause or, as is increasingly the case, through compromissory clauses in bilateral or multilateral treaties).<sup>14</sup> Relatively few cases are ever instituted through Special Agreement.<sup>15</sup> Moreover, the ICJ has been getting exponentially busier in the last few years – its docket of contentious cases continues to expand,<sup>16</sup> and resort to the Court largely through compulsory jurisdiction continues.<sup>17</sup>

While some scholars have considered its escalating docket a sign of both progress and growing respect for the Court,<sup>18</sup> 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,<sup>19</sup> famously questioned the efficacy of compulsory jurisdiction. Judge Oda was intensely sceptical of compulsory jurisdiction; he did not believe that ‘wider acceptance of the compulsory jurisdiction of the Court can achieve

<sup>14</sup> Of the 105 cases filed before the ICJ until 1 December 2004, only 19 were instituted by special agreement. 11 cases did not have a basis for jurisdiction asserted. The remaining 75 cases invoked the Court’s compulsory jurisdiction. See generally Ginsburg and McAdams, ‘Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution’, 45 *William & Mary L Rev* (2004) 1229, appendix; Posner, *supra* note 9, at 133–141. Notably, according to the 2004–2005 Annual Report of the ICJ, ‘some 300 bilateral or multilateral treaties provide for the Court to have jurisdiction in the resolution of disputes arising out of their application or interpretation’: *Report of the International Court of Justice: 1 August 2004–31 July 2005* (2005), at 5.

<sup>15</sup> *Ibid.* It bears noting, however, that in two recent cases (*Congo v. France; Djibouti v. France*), applicant states have had success in utilizing prorogated jurisdiction (or *forum prorogatum*), which allows the ICJ to exercise jurisdiction despite the non-existence of mutual consent *prima facie* when the respondent state consents to jurisdiction after the case is filed (ICJ Rules of Court, Art. 38(5)). See Bekker, ‘Prorogated and Universal Jurisdiction in the International Court’, *Asil Insight* (Apr. 2003), available at [www.asil.org/insights/insigh103.htm](http://www.asil.org/insights/insigh103.htm); ‘The French Republic Consents to the Jurisdiction of the International Court of Justice to Entertain an Application Filed Against France by the Republic of Djibouti’, ICJ Press Release No. 2006/32, 10 Aug. 2006.

<sup>16</sup> *Report of the International Court of Justice, supra* note 14, at 5: ‘[o]ver the past year, the number of cases pending before the Court has remained high. Whereas in the 1970s the Court had only one or two cases on its docket at any one time, between 1990 and 1997 this number varied between nine and 13. Since then it has stood at 20 or more. As a consequence of the fact that the Court, during the period under review, has disposed of ten cases, the number now stands at 11.’

<sup>17</sup> In the docket of the Court as of Oct. 2006, there are currently 13 cases and, of these, nine were instituted through compulsory jurisdiction. These are: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*; *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*; *Armed activities on the territory of the Congo (Democratic Republic of Congo v. Uganda)*; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia and Montenegro)*; *Maritime Delimitation between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*; *Territorial and Maritime Dispute (Nicaragua v. Colombia)*; *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*; *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*; and *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*. See [www.icj-cij.org/icjwww/idocket.htm](http://www.icj-cij.org/icjwww/idocket.htm).

<sup>18</sup> 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’: C. Schulte, *Compliance with Decisions of the International Court of Justice* (2004), at 1.

<sup>19</sup> Judge Oda was a member of the ICJ for over a quarter of a century, having been elected as Judge in 1976 and re-elected twice more, retiring in 2003. Notably, ‘Judge Oda’s personal judicial oeuvre is the largest in the history of the PCIJ and the ICJ’: Reisman, ‘Judge Shigeru Oda: A Tribute to an International Treasure’, 16 *Leiden J Int’l L* (2003) 57, at 65.

anything concrete',<sup>20</sup> and maintained 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. After a statistical overview of the Court's docket and the disposition of its cases at the turn of the millennium, 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. I wonder whether it is likely, or even possible, that States will one day be able to bring their disputes to the Court in a spirit of true willingness to settle them.<sup>21</sup>

Judge Oda's pessimism stemmed from a belief that cases unilaterally instituted by Applicant States through the Court's compulsory jurisdiction<sup>22</sup> usually resulted in vehement objection by the Respondent State, which would then result in non-compliance 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. In *Armed Activities on the Territory of the Congo (DRC v. Uganda)*, Judge Oda warned that 'the repeated disregard of the judgments or orders of the Court by the parties will inevitably impair the dignity of the Court and raise doubts as to the judicial role to be played by the Court in the international community'.<sup>23</sup> Conversely, he believed that cases instituted by special agreement, where the states party agreed to have the ICJ adjudicate over that *specific* dispute, would readily be complied with.

While the argument that a causal relationship exists between the modes of jurisdiction and levels of compliance with ICJ judgments is compellingly logical, it remains largely intuitive due to the lacunae in scholarship testing the link between compulsory jurisdiction and state compliance with judgments rendered thereby. 'It is ironic', according to Judge Jennings, 'that the Court's business up to the delivery of judgment is published in lavish detail, but it is not at all easy to find out what happened afterwards'.<sup>24</sup> Aware of this, Judge Oda appealed to future scholars to undertake research

<sup>20</sup> Oda, 'The Compulsory Jurisdiction of the International Court of Justice: A Myth?', 49 *Int'l & Comp LJ* (2000) 251, at 264.

<sup>21</sup> *Ibid.*

<sup>22</sup> This may occur in two ways: first, under Art. 36(2) of the ICJ Statute ('Optional Clause'), whereby each party reciprocally accepts, in advance, the jurisdiction of the ICJ to resolve certain international disputes; or, secondly, through Art. 36(1) of the Statute, whereby a dispute settlement clause in a bilateral or multilateral treaty to which both States are party exists, conferring jurisdiction over the dispute arising from the treaty to the ICJ (hereinafter referred to as 'compromissory clauses').

<sup>23</sup> *Armed Activities on the Territory of the Congo (Congo v. Uganda)*, Provisional Measures, 39 ILM (2000) 1100, at 1113 (Declaration of Oda J).

<sup>24</sup> Jennings, 'Presentation', in C. Peck and R.S. Lee (eds), *Increasing the Effectiveness of the International Court of Justice: Proceedings of the ICJ/UNITAR Colloquium to Celebrate the 50th Anniversary of the Court* (1997), at 78. ICJ President Bedjaoui has also remarked that compliance with the decisions of the Court 'is a subject of capital importance – but one that is, paradoxically, disregarded or to some extent ignored or played down by legal writers': 'Address to Asian-African Legal Consultative Committee' [1994–95] *ICJ Yearbook* 230.

on what he considered a subject ‘missing from contemporary studies’ on the ICJ: ‘a pragmatic examination ... of whether a judgment, once handed down, has actually been complied with by the parties to the dispute’.<sup>25</sup>

That deficiency in the scholarship remains, but has at least to some extent been addressed by recent studies specifically devoted to the issue of compliance with ICJ judgments.<sup>26</sup> Building upon those studies, this article examines the relationship between the ICJ’s compulsory jurisdiction and state compliance with its decisions through an analysis of recent judgments in which non-compliance was alleged by the prevailing state. Advisory Opinions, which are non-binding by nature, will not be discussed.<sup>27</sup> Temporally, the article will also limit itself to an examination of final judgments that have occurred following *Nicaragua v. US*.<sup>28</sup> As perhaps the single most controversial case in the ICJ’s history (judging from the volumes written on it), the contentious nature of the Court’s assertion of jurisdiction in *Nicaragua*, coupled with the non-appearance of the United States at the merits phase and its subsequent defiance of that judgment, is well covered and need not be repeated here. Much less examined is the relationship between jurisdiction and compliance post-*Nicaragua*, which in the account of one commentator ‘marked a paradigm shift as the last in a series of instances of open defiance and non-appearance’.<sup>29</sup>

Post-*Nicaragua* cases of non-compliance should lead to a better understanding of contemporary issues facing the Court. As will be seen, while occasions of non-compliance with final judgments are relatively infrequent, whether before or after *Nicaragua*,<sup>30</sup> and some recent ICJ cases continue to experience compliance problems, decreased hostility towards judgments rendered by virtue of compulsory jurisdiction is perceptible. To be sure, not all of the ICJ’s pronouncements have met similar appreciation: compliance

<sup>25</sup> Oda, *supra* note 17, at 251.

<sup>26</sup> 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. Earlier scholarship on compliance does exist, but is now rather dated, having focused mostly on the ICJ’s decision in *Military and Paramilitary Activities in and against Nicaragua*, and non-compliance with judgments that predate *Nicaragua*. See Charney, ‘Disputes Implicating the Institutional Credibility of the Court: Problems of Non-Appearance, Non-Participation, and Non-Performance’, in L.F. Damrosch (ed.), *The International Court of Justice at a Crossroads* (1987), at 288. In the same publication, Professor Gross noted: ‘[g]enerally speaking, since there is not much information relating to the post-adjudicative phase, one can only offer some impressionistic views’: Gross, ‘Compulsory Jurisdiction Under the Optional Clause: History and Practice’, in *ibid.*, at 19, 45. A more empirical study is found in Ginsburg and McAdams, *supra* note 14.

<sup>27</sup> Judge Oda’s study (as with virtually all other studies of compliance with ICJ judgments) does not deal with Advisory Opinions. Compliance with ICJ Advisory Opinions is still an area in which very little scholarship currently exists: Romano, ‘General Editors’ Preface’, in Schulte, *supra* note 15, at p. viii.

<sup>28</sup> *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.

<sup>29</sup> Schulte, *supra* note 15, at 403.

<sup>30</sup> Couvreur, ‘The Effectiveness of the International Court of Justice in the Peaceful Settlement of Disputes’, in A.S. Muller *et al.* (eds), *The International Court of Justice: Its Future Role After 50 Years* (1997), at 83, 112; Schulte, *supra* note 10, at 403 (‘The analysis of practice has shown a generally satisfactory compliance record for judgments’.)

with provisional measures, most notably, has been relatively weak.<sup>31</sup> One can hardly fault states for equivocating in the latter instances, however, as the binding nature of provisional measures was an unresolved question where international lawyers disagreed considerably<sup>32</sup> until *LaGrand*,<sup>33</sup> wherein the ICJ finally stated that '[o]rders on provisional measures under Article 41 [of the Statute] have binding effect'.<sup>34</sup> Until then, the textual determinacy of Article 41 could still reasonably be interpreted as non-binding, and no state is bound to comply with obligations that are indeterminate.<sup>35</sup> Given the fact that respondent states have assiduously argued this uncertainty as the basis for the lack of binding effect on them,<sup>36</sup> a focus on final judgments may be more revealing, as the obligatory character of the decision *per se* is not in dispute.

## 2 The Politics of Compliance: UN Charter Processes to Ensure Adherence to ICJ Judgments

Before examining specific cases, it is useful at the outset to step back and recall the theoretical compliance framework originally envisaged by the United Nations ('UN') Charter (the 'Charter'). Article 94(1) of the Charter places the obligation of member states straightforwardly:

[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.

The provision appears in the Charter, and not the Statute of the ICJ, apparently to highlight the difference between the adjudicative and post-adjudicative phases in international relations. According to Professor Rosenne, non-compliance may give rise to new political tensions, and the efficacy of the post-adjudicative phase is not determined by another judicial examination, but rather by immediate political action.<sup>37</sup>

Under the framework of the Charter, therefore, responsibility for ensuring compliance is not within the ICJ's mandate, but rather, with the principal political organ for maintaining peace and security – the Security Council. Article 94(2) thus 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,

<sup>31</sup> Schulte, *supra* note 10 ('The analysis of practice has shown ... a more problematical (yet somewhat successful) [record of compliance] for provisional measures.')

<sup>32</sup> See, e.g., Collins, 'Provisional and Protective Measures in International Litigation', (1992-III) *Receuil des Cours* 234; J.B. Elkind, *Interim Protection: A Functional Approach* (1981).

<sup>33</sup> *LaGrand (Germany v. US)*, Judgment of 27 June 2001 [2001] ICJ Rep 466.

<sup>34</sup> *Ibid.*, at para. 109.

<sup>35</sup> For Thomas Frank, one important indicator of the legitimacy of a purported international rule is its *determinacy*: '[t]extual determinacy is the ability of a text to convey a clear message, to appear transparent in the sense that one can see through the language of law to its essential meaning. Rules which have a readily accessible meaning and which say what they expect of those who are addressed are more likely to have a real impact on conduct': T. Franck, *Fairness in International Law and Institutions* (1995).

<sup>36</sup> See Pt. VI, Chap. IV of US counter-memorial in *LaGrand*, available at: [http://212.153.43.18/icjwww/docket/igus/iguspleadings/iGUS\\_ipleading\\_CounterMemorial\\_US\\_19990916\\_Complete.htm](http://212.153.43.18/icjwww/docket/igus/iguspleadings/iGUS_ipleading_CounterMemorial_US_19990916_Complete.htm).

<sup>37</sup> S. Rosenne, *The Law and Practice of the International Court 1920–1996* (1997), i, 249.

if it deems necessary, make recommendations or decide upon measures to be taken to 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, and the Security Council is tasked, upon judgment, to give effect to that decision, should the debtor state refuse to comply.

A number of subtle points are discernible from the text: first, only ‘judgments’ of the ICJ are subject to Article 94 enforcement. Secondly, only the judgment creditor state has the right to seek recourse from the Security Council; this was not the case with the League of Nations and Permanent Court.<sup>38</sup> Thirdly, the Security Council appears to retain discretion both as to whether it shall act to enforce at all and, if so, what concrete measures it decides to take. Clearly, therefore, the enforcement of ICJ judgments involves quintessentially 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.<sup>39</sup>

### 3 Compliance, Non-compliance, and Defiance: Recent Incidents

#### *A Operative Definitions of ‘Compliance’ and ‘Defiance’: The Subjectivity Dilemma*

Before specific non-compliance incidents are surveyed, parsing out the factors necessary for one to conclude that compliance has indeed occurred is critical. What does it mean to ‘comply’ with an ICJ judgment?

*Compliance* connotes many things, but to be meaningful it should consist of acceptance of the judgment as final and reasonable performance in good faith of any binding obligation.<sup>40</sup> *Good faith*, in turn, has been defined by the ICJ in one context as a duty ‘to

<sup>38</sup> Art. 13(4) of the League of Nations Covenant suggested that ‘proceedings were to be automatically launched irrespective of any formal complaint by the judgment creditor’: Schulte, *supra* note 15, at 20. This difference has no practical relevance, however, for, as Professor Reisman observed, the League of Nations Council never took action on its own initiative on the basis of Art. 13(4), whereas the Security Council can take action *proprio motu* if there is a threat to the peace: *ibid.*, citing W.M. Reisman, *Nullity and Revision* (1971), at 702–73.

<sup>39</sup> A number of specialized issues arise with respect to Art. 94(2), including the nature of the Council’s jurisdiction and the range of measures available to it in implementation of the decision. For a more detailed discussion see Schulte, *supra* note 10, at 38–82. These discussions are beyond the scope of this article and, in any case, are largely theoretical, as ‘the Security Council has never actually founded measures to enforce ICJ jurisdiction on Article 94(2)’: *ibid.*, at 39.

<sup>40</sup> Paulson, *supra* note 23, at 435–436, citing A. Chayes and A.H. Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (1995), at 17–22.



give effect to the Judgment of the Court',<sup>41</sup> which undoubtedly precludes superficial implementation or attempts at circumvention.<sup>42</sup> A judgment debtor's conception of what good faith is may, of course, be strikingly different from that of the judgment creditor, who may then complain of non-compliance. Barring a deceitful claim of compliance (i.e., where the debtor claims to have complied while knowingly contravening the judgment), most conflicts of this nature will be likely to occur because the judgment itself 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 of 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.<sup>43</sup> Non-compliance is thus a matter of increment and degree.

*Defiance*, on the other hand, involves wholesale rejection of the judgment as invalid coupled with a refusal to comply. As discussed previously, the last instance of open defiance was *Nicaragua*. While initial verbal rejections or disapproval of particular ICJ judgments have occurred in subsequent instances, these statements are of little relevance if the debtor state subsequently acts in conformity with the decision.<sup>44</sup>

These practical (albeit admittedly subjective) criteria invite considerable room for discretion on the part of the researcher, and may explain some of the divergence of opinion in the literature concerning the gravity of non-compliance with ICJ judgments. With that in mind, the succeeding sections will concentrate not so much on initial statements expressing dissatisfaction or rejection of the Court's authority or judgement (of which there are many), but rather on subsequent actions by the debtor state – the degree to which that state's actions were controlled by the judgment, as evidenced by facts. As the fostering of international peace and security is the ICJ's ultimate *raison d'être*, if the judgment succeeds politically in reducing tensions and resolving the source of the dispute, compliance will have been achieved, regardless of defiant rhetoric aimed to assuage domestic audiences.

## **B 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

<sup>41</sup> *Gabcikovo-Nagymaros Project (Hungary/Slovakia)* [1997] ICJ Rep 1, paras 141–147.

<sup>42</sup> Paulson, *supra* note 23, at 436.

<sup>43</sup> Schulte, *supra* note 15, at 35.

<sup>44</sup> '[A]s long as the decision is properly executed, there will be no need to investigate the state's motives in order to assess the lawfulness of its behavior with Article 94(1)': *ibid.*, citing Weckel, 'Les Suites des Decisions de la Cour Internationale de Justice', 42 *Annuaire Français de Droit International* (1996) 428, at 437.

Court's docket from 1946–1999, 90 were considered distinct 'contentious cases',<sup>45</sup> of which only 47 were fit for examination.<sup>46</sup> Among those 47, 11 were submitted by special agreement,<sup>47</sup> while the remaining 36 were brought before the Court by means of unilateral application.<sup>48</sup> 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 cases 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.<sup>49</sup>

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.<sup>50</sup> Because four of those judgments 'lost their object' almost immediately,<sup>51</sup> 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'.<sup>52</sup> 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 cases the court's judgment

<sup>45</sup> 'Contentious cases' are defined by reference to Art. 40(1) of the ICJ Statute, which provides: '[c]ases are brought before the Court, as the case may be, either by the notification of the special agreement or by a written application addressed to the Registrar. In either case the subject of the dispute and the parties shall be indicated.' While there were actually 98 such cases, Judge Oda excluded eight cases due to superfluity, those cases being mere incidents to the principal case: Oda, *supra* note 11, at 253–254. Also, for self-evident reasons, advisory opinions were not considered contentious.

<sup>46</sup> Of the 90 contentious cases, only 71 were proper for examination. In eight cases *forum prorogatum* arose, while 11 other cases were eventually withdrawn: *ibid.*, at 257. Twenty-four cases were pending at that time, and were thus also excluded: *ibid.*

<sup>47</sup> *Ibid.*, at 257.

<sup>48</sup> *Ibid.*, at 258.

<sup>49</sup> *Ibid.*, at 259.

<sup>50</sup> Thirteen cases were dismissed outright at the jurisdictional phase on the ground that the ICJ manifestly lacked jurisdiction: *ibid.* 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.

<sup>51</sup> Without more detailed explication, Judge Oda stated that two of these decisions – the *Fisheries Jurisdiction Cases (UK v. Iceland)* and (*FRG v. Iceland*) [1974] ICJ Rep 3 and 175 – 'lost their object owing to contemporary developments in the law of the sea': Oda, *supra* note 11, at 260. Two other judgments 'lost their object because France had no reason to continue with the testing': Oda, *supra* note 11, at 260, citing *Nuclear Tests Cases (Australia v. France; NZ v. France)* [1973] ICJ Rep 99 and 457. As with the *Fisheries Jurisdiction* cases, the *Nuclear Test Cases* are 'accepted as being independent or separate cases, and separate judgments in these cases were handed down': *ibid.*

<sup>52</sup> These were: *Corfu Channel* [1949] ICJ Rep 3, *Ambatielos* [1953] ICJ Rep 19, *Nottebohm* [1962] ICJ Rep 6, *Right of Passage Over Indian Territory* [1960] ICJ Rep 6, *Barcelona Traction* [1970] ICJ Rep 319, *Temple of Preah Vihear* [1962] ICJ Rep 36, and *Appeal Relating to the Jurisdiction of the ICAO Council* [1972] ICJ Rep 44; Oda, *supra* note 11, at 260.

did have long-term effect'.<sup>53</sup> Judge Oda's decidedly pessimistic finding that only seven judgments arising from unilateral application to the Court's compulsory jurisdiction achieved a 'meaningful' and 'effective' result is tempered somewhat by the absence of discussion about the compliance record of cases instituted by special agreement.

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,<sup>54</sup> a 'generally satisfactory compliance record for judgments'<sup>55</sup> was achieved. While there were indeed a number of well-publicized instances of defiance in the past,<sup>56</sup> *Nicaragua* marked, in her opinion, the turning point as 'the last in a series of instances of open defiance and non-appearance'.<sup>57</sup> After *Nicaragua*, 'there is no sufficient evidence suggesting non-compliance with subsequent judgments'.<sup>58</sup> Paulson's study of the Court's judgments from 1987 to 2003 yielded a generally consistent, although slightly less buoyant, conclusion: while 'no state has been directly defiant',<sup>59</sup> in his opinion, 'five [judgments] have met with less compliance than others'.<sup>60</sup>

To avoid being overly anecdotal, the next section will briefly revisit each of these five judgments, and will attempt to reconcile, whenever possible, Schulte and Paulson's factual appreciation of compliance by the debtor states. Whenever relevant, more recent facts (such as those relating to the *Avena* and *Cameroon v. Nigeria* judgments below) will be integrated.

## C Non-compliance in Practice: Five Recent Incidents

### 1 Land, Island, and Maritime Frontier Dispute (*El Salvador/Honduras; Nicaragua Intervening*)

*Antecedents.* A boundary dispute between El Salvador and Honduras dating back to the 19th century, involving six 'pockets' of land totalling about 440 sq. km and a

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

<sup>54</sup> Schulte, *supra* note 15, at 89. It bears stressing that this number does not include judgments that did not call for any positive act of compliance, including, since *Nicaragua: Electronica Sicula SpA (ELSI) Case (USA v. Italy)*, Judgment [1989] ICJ Rep 15 (the applicant lost on the basis of substantive law); and *Oil Platforms (Iran v. US)*, Merits [2003] ICJ Rep 161 (despite finding of jurisdiction and of the US's violation of the Treaty of Amity, Economic Relations, and Consular Rights and Reparation, the ICJ held that there was no breach of obligation which the basis of jurisdiction allowed it to examine).

<sup>55</sup> *Ibid.*, at 403.

<sup>56</sup> These cases of open and deliberate refusal to honour the ICJ's judgments (at least for a time) were: *Corfu Channel*, *supra* note 52, *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 eventually settled through a memorandum of understanding reached in 1992 and implemented in 1996, 47 years after the original judgment: Schulte, *supra* note 15, at 91.

<sup>57</sup> *Ibid.*, at 403.

<sup>58</sup> *Ibid.*, at 404.

<sup>59</sup> Paulson, *supra* note 23, at 437.

<sup>60</sup> *Ibid.*, at 436.

maritime boundary encompassing three islands,<sup>61</sup> contributed to the ‘soccer war’ of 1969, which resulted in thousands of casualties and provoked further hostilities in 1976. Large-scale conflict was averted, however, through the Organization of American States’ (OAS) intervention, which resulted in a 1980 peace treaty.<sup>62</sup> The treaty created a commission charged with delimitation, and at the end of its five-year existence the commission successfully apportioned much of the disputed areas. Those not delimited were, by virtue of the treaty, to be resolved at the ICJ by a special agreement to be negotiated at that time.

*Basis for Jurisdiction.* With OAS assistance in the negotiations, Honduras and El Salvador submitted the dispute, by special agreement, to a Chamber of the ICJ in 1986.<sup>63</sup>

*Judgment.* The ICJ handed down final judgment in 1992, resulting in about two-thirds of the disputed area (about 300 sq. km) being held to belong to Honduras and 140 sq. km given to El Salvador. As for the maritime boundary, the judgment ensured Honduran access to the Pacific while giving El Salvador two of the three disputed islands.<sup>64</sup>

*Post-judgment.* Although problems in implementation were foreseen from the outset, both states immediately announced that they would accept the ICJ judgment. El Salvador’s President Cristiani stated that ‘[t]he human aspect of the solution to the problem is going to be our number one priority .... [T]he primary issue ... [is to] respect the human rights ... of all those who now find themselves on either Honduran or Salvadoran territory.’<sup>65</sup> An estimated 15,000 people were living on the apportioned land at that time.<sup>66</sup> To address the displacement, El Salvador sought dual nationality for the affected people; however, the Honduran Constitution prohibited both dual nationality and ownership of land by non-citizens within 40 km of the boundary. An agreement was reached in 1998 which provided that the residents in the border areas had the right to choose their nationality and guaranteed acquired rights regardless of the choice made.<sup>67</sup>

Other relatively minor disputes have arisen between the two states across the delimited border. In 1996, President Calderón Sol of El Salvador played down Honduran press reports of incursions by Salvadoran police into land awarded to Honduras, calling them exaggerated.<sup>68</sup> In turn, a Honduran official stated in 1997 that

<sup>61</sup> Paulson, *supra* note 23, at 437, citing President of El Salvador on ICJ Ruling on Border Dispute, *BBC Summary of World Broadcasts*, 14 Sept. 1992 (LEXIS, News Library, Allnews file).

<sup>62</sup> General Peace Treaty, El Salvador–Honduras, 30 Oct. 1980, 1310 UNTS 213.

<sup>63</sup> Merrills, ‘The International Court of Justice and the Adjudication of Territorial and Boundary Disputes’, 13 *Leiden J Int’l L* (2000) 876; Schulte, *supra* note 15, at 212.

<sup>64</sup> *Land, Island, and Maritime Frontier Dispute (El Salvador/Honduras)* [1992] ICJ Rep 351; Schulte, *supra* note 15, at 214–215.

<sup>65</sup> Paulson, *supra* note 23, at 437, citing President of El Salvador, *supra* note 61.

<sup>66</sup> Schulte, *supra* note 15, at 216.

<sup>67</sup> Paulson, *supra* note 23, at 437; Schulte, *supra* note 15, at 217 (citations omitted).

<sup>68</sup> Paulson, *supra* note 23, at 438, citing ‘El Salvador: Calderon Sol Says Border Dispute “Exaggerated” by Press’, *El Diario de Hoy*, Foreign Broadcast Information Service, doc. FBIS-LAT-96-168 (26 Aug. 1996).

Salvadorans were crossing the border with timber felled from now-Honduran forests, and that there were also reports of armed Salvadoran groups in delimited Honduran areas.<sup>69</sup> Apparently, El Salvador had been issuing logging permits for areas granted to Honduras.<sup>70</sup> Honduras sent police and military units to reinforce the border, which raised fears of conflict when nearly 1,000 Salvadorans protested their deployment. Salvadorans accused Honduras of kidnappings and forced evictions of peasants from their own land. Militarized conflict on the border, due in part to these incursions and use of forest resources, has occurred nearly every year since 1992.<sup>71</sup>

As for demarcation, while the parties agreed in 1998 to demarcate within a 12-month timeframe, as of 2002, only 120 miles of the 233-mile border was completed.<sup>72</sup> In November 2000, Honduras urged El Salvador to comply with the ICJ Judgment in a letter submitted to the United Nations Secretary-General for circulation as a Security Council document,<sup>73</sup> stating that it was implementing plans to respect the rights of nationality and ownership of Salvadorans living in Honduran territory. After over a year, Honduras followed up on January 2002 with a formal accusation of non-compliance under Article 94(2) of the Charter, asking the Council to make recommendations to induce Salvadoran obedience and, if that failed, to 'dictate the measures it deems appropriate in order to ensure that the judgment is executed'.<sup>74</sup> Honduras alleged that unjustifiable delays in the demarcation of the land boundary, attributable to El Salvador, had occurred, along with refusal to comply with the ICJ's judgment on joint ownership of the Gulf of Fonseca, which 'poses a challenge to the authority, validity and binding nature of the decisions of the main judicial organ of the United Nations'.<sup>75</sup> However, both countries appear to have fully accepted the ICJ's ruling on the gulf islands.<sup>76</sup>

Responding to the Security Council on October 2002, El Salvador denied the accusations of undue delay, claiming that it had repeatedly declared its intention to request a review of the ICJ judgment and that a dispute with Honduras over Salvadoran

<sup>69</sup> *Ibid.*, citing 'Tension on El Salvador–Honduras Border Reported Due to Spat Over Timber', *BBC Summary of World Broadcasts*, 27 Feb. 1997.

<sup>70</sup> *Ibid.*, citing 'Week in Review', *Honduras This Week Online* 49 (4 Dec. 2000), available at: [www.marrder.com](http://www.marrder.com).

<sup>71</sup> *Ibid.*, citing J.I. Dominguez *et al.*, *Boundary Disputes in Latin America* (US Institute of Peace, Peaceworks No. 50 (2003), 30, available at: [www.isp.org](http://www.isp.org)).

<sup>72</sup> Schulte, *supra* note 15, at 217–218; Paulson, *supra* note 23, at 438, citing Resource Center of the Americas, 'Finding Renews Border Dispute' (10 Nov. 2002), available at: [www.americas.org](http://www.americas.org). Official agreements to fix the boundary and resolve issues of nationality and ownership were concluded in 1995, 1997, 1998, and 2002.

<sup>73</sup> Letter dated 28 Nov. 2000 from the Permanent Representative of Honduras to the United Nations Addressed to the Secretary-General, UN Doc. S/2000/1142 (1 Dec. 2000).

<sup>74</sup> Letter dated 22 Jan. 2002 from the Chargé d'Affaires ad interim of the Permanent Mission of Honduras to the United Nations Addressed to the President of the Security Council, UN Doc. No. S/2002/108.

<sup>75</sup> *Ibid.*; letter dated 11 Mar. 2002 from the Chargé d'Affaires ad interim of the Permanent Mission of Honduras to the United Nations Addressed to the President of the Security Council, UN Doc. S/2002/251.

<sup>76</sup> Paulson, *supra* note 23, at 438.

compliance was thus non-existent.<sup>77</sup> Accordingly, one day short of the 10-year limit on such requests, El Salvador filed an application for revision to the ICJ based on the alleged discovery of alterations on the ancient map used by Honduras wrongly to win a 72 sq. km portion of the river boundary leading to the Gulf of Fonseca, claiming that it would have been a decisive factor had it been available.<sup>78</sup> The application was rejected.<sup>79</sup> Both states then agreed to demarcate the areas unaffected by the application for revision.<sup>80</sup> Although not without incident, the new demarcation regime began on 30 October 2002.

While it appears that the three states bordering the Gulf of Fonseca – Nicaragua, Honduras, and El Salvador – have accepted the ICJ's judgment regarding its status as shared space subject to a further delimitation, armed conflicts persisted in the gulf's waters.<sup>81</sup> The uncertainty left by the ICJ judgment about jurisdiction seaward has also led to some issues.<sup>82</sup> All things considered, while both Honduras and El Salvador accepted the ICJ's Judgment as final and binding, the Honduran allegations of Salvadoran misconduct, repeated failure of demarcation agreements, and the continuing border problems suggest that El Salvador may not be completely fulfilling its obligations to execute the judgment reasonably and in good faith. Having said that, because most of the problems of implementation stem from failures to negotiate, perhaps it is more accurate to say that mutual non-compliance or failed good faith negotiation persists.

Nevertheless, the fact that the Judgment has already been complied with to a considerable extent, that the demarcation regime is ongoing, and that El Salvador's application for revision has been rejected<sup>83</sup> (thus foreclosing further legal avenues to contest the judgment) suggest that the ICJ judgment has had a significant, almost outcome-determinative effect on the ground, succeeding in reducing political tensions significantly. The parties state their contentment with the judgment, despite compliance

<sup>77</sup> Letter dated 24 Sept. 2002 from the Chargé d'Affaires ad interim of the Permanent Mission of El Salvador to the United Nations Addressed to the President of the Security Council, UN Doc. S/2002/1102 (2 Oct. 2002).

<sup>78</sup> ICJ Press Release No. 2002/21 (10 Sept. 2002).

<sup>79</sup> 'El Salvador Fails to Quash Border Ruling', *Financial Times*, 19 Dec. 2003, 11, 2003 WestLawNR 7504555.

<sup>80</sup> Paulson, *supra* note 23, at 439, citing letter dated 23 Oct. 2002 from the Chargé d'Affaires ad interim of the Permanent Mission of El Salvador to the United Nations Addressed to the President of the Security Council, UN Doc. S/2002/1194; letter dated 17 Sept. 2002 from the Minister of Foreign Affairs of Honduras Addressed to the President of the Security Council, UN Doc. S/2002/1088 (27 Sept. 2002).

<sup>81</sup> Paulson, *supra* note 23, at 439, citing 'A Threat to CA Peace', *Honduras This Week Online* (9 June 1997), available at: [www.mardder.com/htw](http://www.mardder.com/htw).

<sup>82</sup> At least for a time, both Nicaragua and El Salvador appeared to take the position that Honduran waters ended at the mouth of the gulf, and Nicaragua was detaining (and fining) fishermen who ventured beyond that point. The Chamber said the Judgment was not binding on Nicaragua because it had intervened as a non-party. As the Court stated that the condominium arrangement resulted in shared jurisdiction seaward from the gulf, El Salvador, if not Nicaragua, was bound to accept this reasonable consequence of the Judgment: Paulson, *supra* note 11, at 439 (citations omitted).

<sup>83</sup> Application for Revision of the Judgment of 11 Sept. 1992 in the *Case Concerning the Land, Island, and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua Intervening)* (*El Salvador v. Honduras*), Judgment of 18 Dec. 2003 [2003] ICJ Rep 392.

problems.<sup>84</sup> Indeed, the judgment has evidently fostered so much confidence in the region that Honduras professed its pleasure at Nicaragua taking their dispute about their maritime border to the ICJ, saying it now views the ICJ as a favourable alternative to 'methods that have placed regional security and integration efforts at risk'.<sup>85</sup>

## 2 Territorial Dispute (Libya/Chad)

*Antecedents.* The case arose from a longstanding territorial dispute between Libya and Chad over a region covering 330,000 square miles, including the 114,000 sq. km Aouzou Strip, a resource-rich area occupied by Libya in 1973. Throughout the 1970s and 1980s, thousands died in skirmishes over the Strip.<sup>86</sup> Conflict erupted into war in 1986–1987, and Libya sustained particularly heavy casualties. Libya then extended an olive branch through recognition of the Habré government and by offering to help rebuild Chad.<sup>87</sup> In return, while maintaining legal claim over the area, President Habré of Chad seemed to acquiesce to Libya's de facto control of the Aouzou Strip. He was apparently content to stop the fighting because of Libya's support of his regime.<sup>88</sup> This implicit understanding enabled Qaddafi to secure Libya's long-contested southern border, thus gaining control over the area's supposed (but unproven) uranium reserves.<sup>89</sup> Col. Qaddafi also had a security motive – he was afraid that Libya's southern border was especially vulnerable without the Aouzou acting as a buffer zone.<sup>90</sup> Close ethnic and cultural ties to the local populace of the Aouzou, along with State succession from the Ottoman empire and Italy, were also asserted by Libya.<sup>91</sup>

*Jurisdictional Basis.* When both states sought peace in 1989, a framework agreement on the peaceful settlement of the territorial dispute was concluded. The parties undertook to submit the dispute to the ICJ in the absence of political settlement within a period of approximately one year.<sup>92</sup> That understanding, coupled with diplomatic efforts by the Organization of African Unity, led to a special agreement that the ICJ was notified of on 31 August (Libya) and 3 September 1989 (Chad).<sup>93</sup>

*Contemporaneous Facts during Proceedings.* Soon after the joint submission, significant political change occurred in Chad. In December 1990, Idriss Déby overthrew President

<sup>84</sup> Paulson, *supra* note 23, at 439.

<sup>85</sup> 'Honduras Pleaded International Court to Handle Border Dispute', *Agence France-Presse*, 9 Dec. 1999, available in Lexis News Library, Allnews file.

<sup>86</sup> Paulson, *supra* note 23, at 439–440, citing G. Arnold, *The Maverick State: Gaddafi and the New World Order* (1996), at 75, 77; Schulte, *supra* note 15, at 229–230.

<sup>87</sup> Paulson, *supra* note 23, at 439–440.

<sup>88</sup> Arnold, *supra* note 86, at 77.

<sup>89</sup> *Ibid.* See further M.-J. Deeb, *Libya's Foreign Policy in North Africa* (1991), at 132.

<sup>90</sup> *Ibid.*, at 182.

<sup>91</sup> Libya's initial Memorial makes this claim explicitly. See Memorial of the Great Socialist Libyan People's Jamahiriya (Libya/Chad), Parts III–IV (26 Aug. 1991). See also the Judgment in *Libya/Chad* of 3 Feb. 1994 [1994] ICJ Rep 6 at paras 17, 19–21.

<sup>92</sup> See Framework Agreement on the Peaceful Settlement of the Territorial Dispute, 31 Aug. 1989, 1545 UNTS 101.

<sup>93</sup> Ajibola, 'Compliance with Judgments of the International Court of Justice', in M. Butlerman and M. Kuijer (eds), *Compliance with Judgments of International Courts* (1996), at 17; Schulte, *supra* note 15, at 232.

Habré with strong Libyan support,<sup>94</sup> notably in the form of arms. This brought about an immediate improvement in relations between Chad and Libya.<sup>95</sup> Believing that Chad had become a friendly state, Col. Qaddafi began to withdraw troops from Sudan along the Chadian border. He was taken by surprise, however, when Déby publicly announced during a 1991 reception in Tripoli that Chad would continue with its territorial claim to the Aouzou before the ICJ. Déby may have done this in order to convince the populace of Chad that he was a nationalist and independent of Qaddafi.<sup>96</sup> With ICJ proceedings well underway under a special agreement that had ended the war with Habré,<sup>97</sup> Qaddafi may have been under considerable political pressure to allow the case to proceed. Moreover, Libya's history with the ICJ was generally positive, having achieved good results in two maritime delimitation disputes,<sup>98</sup> so he may have felt that Libya's position was strong under international law.<sup>99</sup>

*Judgment.* The ICJ handed down judgment in February 1994, awarding the entire Aouzou Strip to Chad.<sup>100</sup>

*Post-judgment.* Libya initially rejected the judgment, and reportedly began reinforcing troops in the Aouzou area. After a month of negotiations, however, Qaddafi indicated that he would accept the decision,<sup>101</sup> and on 13 April 1994, Libya and Chad informed the UN Secretary-General and President of the Security Council that they had reached an agreement on the implementation of the Order.<sup>102</sup> In an October 1994 address to the UN General Assembly, ICJ President Mohammed Bedjaoui paid tribute 'to [Libya] and [Chad] which spared no effort to implement the Court's Judgment without delay, and in a spirit of friendly understanding'.<sup>103</sup>

Formal recognition is one thing, of course; compliance in fact is quite another. Libya formally recognized the ICJ judgment's delimitation of its border at the Aouzou

<sup>94</sup> Paulson, *supra* note 23, at 440, citing J.M. Burr and R.O. Collins, *Africa's Thirty Years War: Libya, Chad, and the Sudan, 1963–1993* (1999), at 262.

<sup>95</sup> *Ibid.*, citing Arnold, *supra* note 86, at 77–78.

<sup>96</sup> Burr and Collins, *supra* note 94, at 268.

<sup>97</sup> Fundamental Agreement on the Peaceful Settlement of the Territorial dispute, 31 Aug. 1989, Chad/Libya, 29 ILM (1990) 15. At the time of the change in government, memorials and countermemorials were a few months from being due: *Territorial Dispute (Libya/Chad)* [1990] ICJ Rep 149.

<sup>98</sup> *Continental Shelf (Tunis./Libya)* [1982] ICJ Rep 18; *Continental Shelf (Libya/Malta)* [1985] ICJ Rep 13.

<sup>99</sup> Paulson, *supra* note 23, at 439–440.

<sup>100</sup> *Territorial Dispute (Libya/Chad)* [1994] ICJ Rep 6, at 40.

<sup>101</sup> Paulson, *supra* note 23, at 441.

<sup>102</sup> Letter dated 13 Apr. 1994 from the Secretary-General Addressed to the President of the Security Council, UN Doc. S/1994/432, 33 ILM (1994) 791.

<sup>103</sup> Bedjaoui, 'The Place of the International Court of Justice in the General System for the Maintenance of Peace, as Instituted by the Charter of the United Nations' [1994–95] *ICJ YB* 211. Libya's international image benefited greatly from its open support of the ICJ judgment, especially considering how large the Aouzou area was; this helped strengthen Libya's ties to other North African countries, which Qaddafi had been trying to do for some time: Paulson, *supra* note 23, at 441, citing 'Libya Prepared to Withdraw from Aouzou Strip', Jana News Agency (Tripoli), 10 Mar. 1994, available at: [www-ibru.dur.ac.uk](http://www-ibru.dur.ac.uk).



area on numerous occasions<sup>104</sup> and, together with Chad, sought and received Security Council assistance to monitor the full withdrawal of Libyan troops, which ended on 30 May 1994 after the last departure of Libyan forces.<sup>105</sup> In a real sense, the ICJ decision effectively ended Libyan occupation of the Aouzou Strip.<sup>106</sup>

Despite all these positive events and the conclusion by commentators that compliance was achieved,<sup>107</sup> reports of continued Libyan presence in the Aouzou Strip have surfaced, both through Libyan nationals and Libyan-supported Chadian rebels. One observer reported in 1997 that Libya was holding parts of the Aouzou and that '[t]here has still not been a definitive solution to the Aouzou problem. It is doubtful whether Libya has indeed terminated its occupation totally'.<sup>108</sup> The US Congressional Research Service has also noted that Libyans may have been fighting in the Aouzou in 1996.<sup>109</sup> On 30 January 1997, the Chadian Ministry of Foreign Affairs formally protested Libya's publication of the '1997 Islamic Diary' for containing a map placing the Aouzou Strip within Libya; Chad threatened to take the matter to the Security Council.<sup>110</sup> The next month, however, Déby called for peace, and later that year he and Qaddafi visited each other's capitals, signalling a 'definitive reconciliation of the two countries'.<sup>111</sup> The *réconciliation définitive* of 1998 did not last, however. In

<sup>104</sup> Paulson cites Arnold, *supra* note 86, at 78 (reporting that Qaddafi had 'accepted the ruling of the ICJ without any attempt to reverse it', and that '[o]ne of Africa's longest and most costly confrontations had come to an end'). Qaddafi himself had reiterated, in 1998, that '[t]he [ICJ] verdict has been respected': Delali, 'Libya-Chad: Kadhafi's Appeal to his Compatriots', Africa News Service, 11 May 1998, available at: [www.allafrica.com](http://www.allafrica.com).

<sup>105</sup> The withdrawal of Libyan troops from the Aouzou was made official through Security Council enforcement, at the request of both parties. On 4 May 1994, the Security Council passed Res 915, establishing the UN Aouzou Strip Observer Group (UNASOG) to oversee the implementation of the ICJ judgment. The 15-member group was responsible for monitoring the full withdrawal of Libyan forces from the strip. See SC Res 915, UN Doc. S/1994/432 (4 May 1994), 33 ILM (1994) 791. Both Libya and Chad declared a plan for withdrawal on 13 May 1994, and the UN group left the area after the departure of the last Libyan forces on 30 May 1994. See Report of the Secretary-General on the United Nations Aouzou Strip Observer Group, UN Doc. S/1994/672.

<sup>106</sup> US Department of State, 'State Department Background Note on Chad', 1 Sept. 2006, 2006 WLNR 17006153.

<sup>107</sup> See, e.g., H.N. Meyer, *The World Court in Action: Judging Among Nations* (2002), at 217–218 (2002); Schulte, *supra* note 15, at 234 ('The case is exemplary in terms of the rapid and comprehensive implementation of the judgment.').

<sup>108</sup> Paulson, *supra* note 23, at 441, citing Riaz, 'Aouzou Border Dispute Between Libya and Chad' (Karachi Univ. Int'l Rel., Sept. Student Research), available at: [www.riab.org/kuirid/html/runa\\_riaz.html](http://www.riab.org/kuirid/html/runa_riaz.html).

<sup>109</sup> C.R. Mark, *CRS Issue Brief 93109: Libya*, available at [www.fas.org/man/crs/93-109.htm](http://www.fas.org/man/crs/93-109.htm) (19 Dec. 1996).

<sup>110</sup> Paulson, *supra* note 23, at 442, citing, *inter alia*, 'Chad: Ministry Protests Libyan Claims to Aouzou Strip in Map', *Agence France-Presse*, Doc. FBIS-AFR-97-021 (30 Jan. 1997).

<sup>111</sup> Both states were anxious to avoid a direct confrontation, and Chad did not appear to be overly interested in pursuing its grievances with Libya on the international stage. During the mid-1990s Qaddafi worked toward advancing regional solidarity, achieving the Community of Sahel and Saharan States in 1998, which is already among the largest regional bodies in Africa, and promoting the formation of the African Union. More importantly, Chad has little interest in provoking Qaddafi and losing his economic help by publicizing Libyan adventurism in the region. Chad and Libya may have reached the same sort of informal or practical agreement as when Habré 'ignored' the Libyan presence in Aouzou to gain economic and political support: Paulson, *supra* note 11, at 442 (citations omitted).

January 2001, Deby declared that Libya had been supporting the rebel Movement for Democracy and Justice in Chad (MDJT) in the Aouzou region. Chad had been fighting MDJT rebels in the Aouzou region since 1998, and it was believed that the rebels had Libyan support. Qaddafi denied this, and assured Chad that neither Libya nor forces inside Libya would support Togoimi.<sup>112</sup> Qaddafi led negotiations that resulted in a peace agreement signed by the security minister of Chad and a rebel leader in January 2002.<sup>113</sup> Although Libya played an important role as arbiter between the Chadian government and the MDJT, there is evidence of Libyan support for the rebels as recently as 2003.<sup>114</sup>

The ICJ judgment is important for having settled the issue of political and legal sovereignty over the Aouzou,<sup>115</sup> and for having marked the conclusion of widespread military activity.<sup>116</sup> Nevertheless, full good faith compliance may not have been achieved, given the evidence that Libya has not fully relinquished political and military domination over the area (manifested by recent support of rebel movements therein).<sup>117</sup> As respect for Chad's territorial sovereignty over the Strip includes 'withdrawing ... military and police forces and administration' from the areas lost in the judgment,<sup>118</sup> support for the MDJT is troubling.

Nevertheless, it bears emphasizing that the judgment was important in securing peace between Libya and Chad. Acceptance of the Court's ruling as legally binding has concretely meant that Libya could not claim sovereignty over the region without risking regional and international consequences. Accordingly, it has given up all formal pretence of sovereignty over the Aouzou. Despite possible continued support for the rebels, Libya has managed to keep relations fairly cordial with Chad's government. Large-scale war over the Aouzou Strip, as seen in the 1970s and 1980s, currently appears out of the question. Overall, the system worked as intended, with the Security Council, at the instance of both parties, ensuring that Libyan troops withdrew after judgment. Notably, Paulson posits that greater compliance may have been achieved if the international community had praised Libya more as a law-abider,<sup>119</sup> which may have caused far greater reputational injury to Qaddafi for circumventing the judgment. In any case, the lack of any true dispute over sovereignty, coupled with the unclear nature of Libya's support for the rebels, makes further Security Council enforcement action appear unnecessary.

<sup>112</sup> *Ibid.*, at 442, citing 'Chad: Foreign Relations', *Countrywatch*; 'Libya: Foreign Relations', *Countrywatch*, both available at: [www.countrywatch.com](http://www.countrywatch.com).

<sup>113</sup> Mark, *supra* note 109.

<sup>114</sup> "Three "Senior" Rebel MDJT Members Resign Due to "Infighting"", *Agence France-Presse*, Doc. FBIS-AFR-2003-0402 (2 Apr. 2003).

<sup>115</sup> Paulson, *supra* note 23, at 443.

<sup>116</sup> Speech of President Higgins ("The Judgment of the Court in the *Libya/Chad* case marked the conclusion of years of military activity.')

<sup>117</sup> *Ibid.*, citing M.J. Azecedo, *Roots of Violence: A History of War in Chad* (1998), at 152.

<sup>118</sup> *Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria)* [2002] ICJ Rep 160, at para. 318.

<sup>119</sup> Paulson, *supra* note 23, at 443.

### 3 Gabčíkovo-Nagymaros Project (Hungary/Slovakia)

*Antecedents.* In 1977, Hungary and the then Czechoslovakia signed a treaty jointly to build the Gabčíkovo-Nagymaros Project, a system of locks and dams on the Danube River. While Czechoslovakia's portion was at an advanced 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.<sup>120</sup> Negotiations between the two states having failed, Slovakia completed work on a variant of the proposed system and, in 1992, began damming the river.<sup>121</sup>

*Jurisdictional Basis.* Hungary and Slovakia (successor to Czechoslovakia) submitted the dispute to the ICJ by special agreement in 1993.<sup>122</sup>

*Judgment.* The ICJ's 1997 judgment upheld Slovakia's contention that the 1977 treaty remained valid and binding, notwithstanding the *rebus sic stantibus* and 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,<sup>123</sup> noting that the environmental consequences brought up by Hungary may affect treaty compliance.<sup>124</sup>

*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.<sup>125</sup> A change in Slovakia's government after its September 1998 elections prompted renewed negotiations and no further ICJ proceedings were pursued. Recent negotiations have been continuous but unproductive. There was some talk in 2002 and 2003 that Slovakia would return the dispute to the ICJ;<sup>126</sup> nevertheless, both were confident that the dispute would remain a technical (or legal), and not a political, problem.<sup>127</sup> More recent events seem to affirm this

<sup>120</sup> See *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* [1997] ICJ Rep 1, at paras 15-22, 37 ILM (1998) 162.

<sup>121</sup> *Ibid.*, at paras 22-23.

<sup>122</sup> Special Agreement for Submission to the International Court of Justice of the Differences Between Them Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia), 7 Apr. 1993, 32 ILM (1993) 1293.

<sup>123</sup> *Ibid.* at paras. 144-155.

<sup>124</sup> *Ibid.*, at paras 112-113, 200-201.

<sup>125</sup> 'Slovakia Requests an Additional Judgment', ICJ Press Communiqué 98/28 (3 Sept. 1998). See also Fuyane and Madali, 'The Hungary-Slovak Danube River Dispute: Implications for Sustainable Development and Equitable Utilization of Natural Resources in International Law', 1 *Int'l J Global Env't'l Issues* (2001) 329.

<sup>126</sup> 'Slovakia Might Seek International Adjudication Over Gabčíkovo-Nagymaros', *Infoprod*, 29 Dec. 2003, 2003 WLNR 7781025 (stating that Slovak Foreign Minister Kukan 'implied that negotiations with Hungary were going nowhere'); Paulson, *supra* note 11, at 449, citing, *inter alia*, 'Slovak Minister Optimistic About Talks With Hungary on Disputed Law', Radio Slovakia, BBC Worldwide Monitoring, 15 Aug. 2002, available in Lexis, Allnews Library, Allnews file.

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

conclusion: in 2004, after a two-year hiatus, talks resumed between both states as to how the ICJ decision would be implemented,<sup>128</sup> with both sides announcing willingness to continue negotiations, but ‘apparently accomplished little more’.<sup>129</sup>

Assessing compliance in *Gabcikovo-Nagymaros* is 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. As observed by one commentator:

[i]t is curious that the Court was upholding the parties to a bargain which both regarded was at an end, and no longer wanted to apply in its original terms. 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 was not lost on the Court. Slovakia had already expended huge sums of money on the project and did 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.*<sup>130</sup>

If one is to view an ICJ decision as a stabilization of expectations around an adjudicated solution, the most one can point to in *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 prompted 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.<sup>131</sup> Conversely, it seems at least equally plausible to argue that the duty of good faith negotiation has

<sup>128</sup> ‘Week In Review: Politics’, *Budapest Bus J*, 8 Mar. 2004, 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’).

<sup>129</sup> ‘Slovakia, Hungary to Continue Negotiations on Danube Dam Project’, *Czech Republic and Slovakia Bus Rep Weekly*, 16 Apr. 2004, 2004 WLNR 13771496.

<sup>130</sup> Okowa, ‘Case Concerning the *Gabcikovo-Nagymaros Project (Hungary/Slovakia)*’, 47 ICLQ (1998) 688, at 697 (italics supplied).

<sup>131</sup> E.g., 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’: Decision, *supra* note 120, at para. 85.

been met in this case, as agreement does not fall within the ambit of negotiation.<sup>132</sup> In any case, the fact is that the parties have thus far been unable to use the ICJ's judgment to resolve their differences.

#### 4 *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 populations of 37,500 and 60,000, respectively,<sup>133</sup> 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.<sup>134</sup> Armed clashes throughout the region continued. The stalemate caused increasing frustration on the part of Cameroon; indeed, just before its 1994 application to the ICJ, 34 of its soldiers had died in a border skirmish.<sup>135</sup>

*Jurisdictional 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 settle the dispute through existing bilateral channels.<sup>136</sup> Despite its initial resentment, Nigeria later participated fully throughout the ICJ proceedings.<sup>137</sup> On the ground, armed conflict continued while the case was pending.<sup>138</sup>

*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.<sup>139</sup> The Court also awarded Cameroon the Bakassi Peninsula. Nigeria won the maritime-related rulings contained in the Judgment and much of the boundary

<sup>132</sup> This is the view of Dr Schulte; see Schulte, *supra* note 15, at 248–249 ('Despite the delays, it would seem incorrect to speak of "non-compliance" under Article 94(1) of the Charter, since the parties are in negotiations. While they could pursue a solution more forcefully, it would be difficult to establish by conclusive evidence that the delays were due to bad faith of one party or the other.').

<sup>133</sup> 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).

<sup>134</sup> Paulson, *supra* note 23, 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 15, at 351.

<sup>135</sup> Paulson, *supra* note 23, citing 'International Court Poised to Rule on Nigeria–Cameroon Border Dispute', *Agence France-Presse*, Doc. FBIS-AFR-2002-1009 (9 Oct. 2002).

<sup>136</sup> *Preliminary Objections of Nigeria, Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria)* [1998] ICJ Rep 275, at para. 18.

<sup>137</sup> 'Cameroon's Biya Said Satisfied with Talks With Obsanjo, Annan on Bakassi Crisis', *Radio France Internationale*, Doc. FBIS-AFR-2002-0909 (9 Sept. 2002).

<sup>138</sup> In 1996, four people died and 13 were injured in another skirmish. Paulson, *supra* note 23, at 450, citing 'Nigerian Press Reports Four Killed in Border Clash with Cameroon', *Agence France-Presse*, Doc. FBIS-AFR-96-025 (6 Feb. 1996).

<sup>139</sup> See further Bekker, 'Case Report: Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria; equatorial Guinea Intervening)', 97 *AJIL* (2003) 387.

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’.<sup>140</sup> 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’.<sup>141</sup> 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.<sup>142</sup> President Obasanjo of Nigeria explained their 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.’<sup>143</sup> Nigeria’s official position is one of deliberate indifference – it neither accepts nor rejects the verdict.<sup>144</sup>

Nigeria’s recalcitrance is troubling when one considers 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 judgment in a meeting with UN Secretary-General Kofi Annan on 5 September 2002, and the United Nations issued a press statement to that effect.<sup>145</sup> 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 Annan’s staff to issue a statement’.<sup>146</sup> To some extent, however, the Nigerian government’s position is understandable when one considers that it 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.<sup>147</sup> Ethnic Nigerians in the area also feared unequal treatment and persecution by Cameroon.

The international community has taken interest in ensuring compliance with the ICJ’s judgment, and has subjected Nigeria to substantial diplomatic pressure. While the United States and France have pressured Nigeria to accept the ruling, the United

<sup>140</sup> *Land and Maritime Boundary between Cameroon and Nigeria* [2002] ICJ Rep 303, at para. 325.

<sup>141</sup> ‘Cameroon: Bakassi: Why the ICJ Judgment is Unacceptable – Government’, Africa News Service, 24 Oct. 2002, available in Lexis, News Library, Allnews file.

<sup>142</sup> *Ibid.*

<sup>143</sup> 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](http://www.allafrica.com).

<sup>144</sup> ‘Nigeria Has No Substantive Claim on Bakassi-Cameroonian Politician’, *Weekly Trust* (Kaduna), 13 Dec. 2002, available at: [www.allafrica.com](http://www.allafrica.com).

<sup>145</sup> ‘Nigeria Defends Defiance of World Court Border Ruling’, UN Press Release SG/T/2344 (10 Sept. 2002).

<sup>146</sup> Paulson, *supra* note 23, at 450, citing ‘Nigeria: Government Said Disputes UN Account of Meeting on Spat with Cameroon’, *Agence France-Presse*, Doc. FBIS-AFR-2002-1030 (30 Oct. 2002).

<sup>147</sup> ‘Some politicians fan the political flames by claiming (falsely) that Nigeria has millions of people and billions of dollars invested in Bakassi, and that people must support the president if Nigeria has to go to war. Bakassi representative Okon Ene stated that Cameroon was only interested in oil and that the Judgment would be unenforceable. Another local leader said that if Nigeria cedes the peninsula to Cameroon, it would be “[o]ver our dead bodies”’: *ibid.*, citing Asobie, ‘Nigeria, Cameroon, and the Unending Conflict Over Bakassi’, *Vanguard* (Lagos), 27 Feb. 2003.

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.'<sup>148</sup> The British Foreign Minister for Africa then met with the Nigerian ambassador to remind him that President Obasanjo had promised to abide by the Judgment.<sup>149</sup> This hard line softened considerably, however, to asking that Nigeria 'establish a dialogue with Cameroon to find a political way forward', possibly because of the possibility that Nigeria was indeed ready to resort to war.<sup>150</sup> More recently, international observers from Niger and Libya were also involved in the peaceful resolution of the dispute.<sup>151</sup>

The UN has played a pivotal role in the easing of tensions and renewing cordiality 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.<sup>152</sup> 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.<sup>153</sup> 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'.<sup>154</sup>

Despite high tension, 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,<sup>155</sup> coupled with strong internal opposition towards relinquishing the area in Nigeria and Nigeria's status as a regional power.<sup>156</sup> 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 Cameroon.' With satellite mapping, a technical team of Nigerian, Camroonian, and UN officials reportedly commenced intense cartographic demarcation work in the field in accordance with the judgment.<sup>157</sup>

<sup>148</sup> Paulson, *supra* note 23, citing *Agence France-Presse*, Doc. FBIS-AFR-2002-1025 (25 Oct. 2002).

<sup>149</sup> *Ibid.*

<sup>150</sup> Paulson, *supra* note 23, at 451 (citations omitted).

<sup>151</sup> 'Nigeria, Cameroon Reach Accord on Boundary', *The Tide Online* (Nigeria: Rivers State Newspaper Corp., 17 Jan. 2006), available at: [www.thetidenews.com](http://www.thetidenews.com).

<sup>152</sup> Larewaju, 'UN Panel on Bakassi Meets Dec. 1', *Vanguard* (Lagos), 29 Nov. 2002; Abdulmajeed, 'Bakassi: Committee to Demarcate Border Set Up', *Dailytrust* (Auja), 4 Dec. 2002, all available at: [www.allafrica.com](http://www.allafrica.com).

<sup>153</sup> Paulson, *supra* note 23, at 451, citing 'Nigeria, Cameroon to Sign Friendship, Non-Aggression Treaty', Xinhua General News Service, 1 Feb. 2004.

<sup>154</sup> *The Tide Online*, *supra* note 151.

<sup>155</sup> Reports suggest that the Bakassin 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>.

<sup>156</sup> Paulson, *supra* note 23, at 452.

<sup>157</sup> *The Tide Online*, *supra* note 151.

The decisive point of compliance occurred on 12 June 2006. Following intensive mediation efforts by UN Secretary General Kofi Annan, 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.<sup>158</sup> Mr Annan considered the agreement ‘a great achievement in conflict prevention, which practically reflects its cost-effectiveness when compared to the alternative forms of conflict resolution’.<sup>159</sup> 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 the northern part of the territory.<sup>160</sup> Thus, despite Nigeria’s earlier recalcitrance, its clear self-interest in retaining the resources of the Bakassi, and the wishes of many of its own people (some of whom appear poised to fight Cameroonian control),<sup>161</sup> compliance seems, at least as of this writing, to have been achieved.

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

*Common Antecedents.* *LaGrand*<sup>162</sup> and *Avena*<sup>163</sup> (together with its progenitor *Breard*)<sup>164</sup> are ICJ cases concerning the United States of America’s application of the Vienna Convention on Consular Relations<sup>165</sup> (‘Vienna Convention’). 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.<sup>166</sup>

Both *LaGrand* and *Avena* involved such violations. The former concerned Walter and Karl LaGrand, two German nationals, both of whom were convicted and sentenced to death in Arizona in 1984.<sup>167</sup> They were never informed of their Article 36

<sup>158</sup> See ‘Cameroon, Nigeria Sign Agreement Ending Decades-Old Border Dispute’, UN Press Release AFR/1397, 12 June 2006.

<sup>159</sup> *Ibid.*

<sup>160</sup> BBC News Report, *supra* note 155.

<sup>161</sup> *Ibid.*

<sup>162</sup> *LaGrand Case (FRG v. US)* [2001] ICJ Rep 466.

<sup>163</sup> *Avena and Other Mexican Nationals (Mexico v. US)* [2004] ICJ Rep 128

<sup>164</sup> 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 Breard 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. See *ibid.*, at 426 (Discontinuance Order). Because the case lacked final judgment, it is beyond the scope of this article.

<sup>165</sup> Vienna Convention on Consular Relations, 24 Apr. 1963, 596 UNTS 261.

<sup>166</sup> See *Medellin v. Dretke*, 125 S Ct 2088, 2096–2097 (O’Connor J., dissenting from the dismissal of certiorari, noting that ‘the individual States’ (often confessed) noncompliance with the treaty has been a vexing problem’).

<sup>167</sup> *LaGrand*, *supra* note 162, at para. 14.



right to communicate with German consular officials;<sup>168</sup> indeed, it was only in 1992 that Germany was notified of the detentions, at which time it began to issue diplomatic requests urging clemency.<sup>169</sup> Karl LaGrand was executed on 24 February 1999 following unsuccessful clemency appeals.<sup>170</sup> 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.<sup>171</sup> 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'.<sup>172</sup> The United States Supreme Court declined to exercise original jurisdiction over Germany's motion to enforce the ICJ provisional order,<sup>173</sup> and Walter LaGrand was executed later that day.<sup>174</sup>

*Avena* was also related to prisoners sentenced to death; this time, it was Mexican nationals.<sup>175</sup> 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.<sup>176</sup> 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.<sup>177</sup> It sought and obtained provisional measures from the ICJ prohibiting the US from executing any of the Mexican nationals involved prior to final judgment.<sup>178</sup> 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,<sup>179</sup> 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.

<sup>168</sup> *Ibid.* at para. 15.

<sup>169</sup> Aceves, 'International Decision: LaGrand (Germany v. United States) Judgment', 96 *AJIL* (2002) 210, at 211.

<sup>170</sup> *LaGrand*, *supra* note 162, at paras 27, 29.

<sup>171</sup> *Ibid.*, at para. 41.

<sup>172</sup> Provisional Measures Order, *La Grand Case (FRG v. US)* [1999] ICJ Rep 9, at para. 29.

<sup>173</sup> *FRG v. US*, 526 US 111 (1999). Apart from jurisdictional issues, the Supreme Court cited the tardiness of Germany in filing this case as the basis for its refusal to exercise jurisdiction.

<sup>174</sup> *LaGrand*, *supra* note 162, at para. 34.

<sup>175</sup> 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.

<sup>176</sup> Application Instituting Proceedings, *Avena and Other Mexican Nationals (Mexico v. US)* [2004] ICJ Rep 128, at paras 9–13.

<sup>177</sup> 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 involvement of consular officials can make a difference between life and death for a Mexican national facing capital charges': *ibid.*

<sup>178</sup> Provisional Measures Order, *Avena and Other Mexican Nationals (Mexico v. US)* [2004] ICJ Rep 128, para. 44.

<sup>179</sup> 21 UST 325, 596 UNTS 487.

*Judgment.* The execution of Walter LaGrand in 1999 despite the ICJ's order of provisional measures, coupled with lingering uncertainty about their obligatory character,<sup>180</sup> may have prompted the ICJ to declare (for the first time) in the 2001 final judgment that its orders on provisional measures are binding.<sup>181</sup> 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.<sup>182</sup> 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.<sup>183</sup>

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.<sup>184</sup> 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.<sup>185</sup> 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,<sup>186</sup> independent of any US constitutional claim,<sup>187</sup> on an individual basis.<sup>188</sup>

*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.<sup>189</sup> 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 having large foreign populations.<sup>190</sup> Indeed, in the *Avena* final judgment itself, the ICJ stated that the ongoing US programme to improve consular notification was adequate.<sup>191</sup>

<sup>180</sup> The US argued this point vigorously; see *supra* note 33 and accompanying text.

<sup>181</sup> *LaGrand*, *supra* note 162, at para. 110.

<sup>182</sup> *Ibid.*, at para. 128.

<sup>183</sup> See Cassel, 'International Remedies in National Criminal Cases: ICJ Judgment in Germany v. United States', 15 *Leiden J Int'l L* (2002) 69.

<sup>184</sup> *Avena*, *supra* note 163, at paras 119–122.

<sup>185</sup> *Ibid.*, at para. 153. 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).

<sup>186</sup> *Ibid.*, at para. 143.

<sup>187</sup> *Ibid.*, at para. 139.

<sup>188</sup> *Ibid.*, at para. 121.

<sup>189</sup> See Guccione, 'On the Law—New Weapon in Defense: Foreign Consulates', *LA Times*, 16 Nov. 2001, at B2.

<sup>190</sup> Paulson, *supra* note 23, at 444, citing US Department of State, *Bureau of Public Affairs, History of the Department of State During the Clinton Presidency* (2001), at para.18.

<sup>191</sup> *Avena*, *supra* note 163, at paras 144–150.

The second obligation – to review and reconsider convictions in light of the Vienna Convention – has probably not been complied with.<sup>192</sup> A reasonable interpretation of the obligation would entail some procedure to determine whether the violation affected the substantive outcome of the case in question.<sup>193</sup> Both the US and the ICJ have stated that the obligation should not apply to German (or Mexican) nationals alone, but to all foreign nationals.<sup>194</sup> However, state and federal judges faced with the issue have generally ignored the re-determination 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,<sup>195</sup> or because of the procedural default rule.<sup>196</sup>

Because of their close connection in fact and law, the US's adherence to *LaGrand* should ultimately be assessed in conjunction with *Avena*, which has a more interesting compliance narrative. *Avena*'s provisional remedies order was a direct test of whether the ICJ's final judgment in *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.<sup>197</sup>

For almost a year after the *Avena* judgment, there was little reason to believe that the US's imperfect post-*LaGrand* compliance record would improve significantly, given the similar normative requirements of both judgments. Some commentators certainly took on that rather pessimistic view about compliance.<sup>198</sup> There were a few encouraging signs; the execution of an Oklahoma foreign national was stayed, for example, in reliance upon *Avena*.<sup>199</sup> 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

<sup>192</sup> Paulson, *supra* note 23, at 445.

<sup>193</sup> See *LaGrand*, *supra* note 162, at paras 90–91, 125–127.

<sup>194</sup> *Avena*, *supra* note 163, at para. 151; US Memorial in *Avena*, ICJ Doc. CR 2003/2, at 16, para. 2.14.

<sup>195</sup> See, e.g., *United States v. Minijares-Alvarez*, 264 F 3d 980, 986 (10th Cir 2001); *United States v. Felix-Felix*, 275 F 3d 627, 635 (7th Cir 2001).

<sup>196</sup> See, e.g., *State v. Issa*, 93 Ohio St 3d 49 (2001); *Gordon v. State*, 2003 WL 22964723 (Fl Sup Ct, 18 Dec. 2003).

<sup>197</sup> Clarke, *supra* note 175, at 141.

<sup>198</sup> See, e.g., Paulson, *supra* note 23, at 452 ('Although, as of this writing, it is too early to make a determination about compliance, given the above discussion on *LaGrand*, full compliance appears unlikely without substantive changes in U.S. practice.').

<sup>199</sup> 'On 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 Torres'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).

under the decision of the International Court of Justice in the Case Concerning Avena... by having state courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision.<sup>200</sup>

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, will only be clear in the coming months and years, the Memorandum alone seemed to have significant effect upon the judicial branch, as evidenced by the US Supreme Court's decision in *Medellin v. Dretke*<sup>201</sup> and its grant of certiorari in *Bustillo v. Johnson* and *Sanchez-Llamas v. Oregon*.<sup>202</sup>

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.<sup>203</sup> Although one may have speculated that the Supreme Court's grant of certiorari following *Breard* and *Medellin* may have signalled 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 then changed composition of the Court.<sup>204</sup> The Supreme Court's 28 June 2006 decision held, in essence, that even assuming *arguendo* 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

<sup>200</sup> President George W. Bush, Memorandum for the Attorney General (28 Feb. 2005), available at: [www.whitehouse.gov/news/releases/2005/02/20050228-18.html](http://www.whitehouse.gov/news/releases/2005/02/20050228-18.html).

<sup>201</sup> 125 S Ct 686 (2004). In this case concerning one of the Mexican nationals on death row in Texas, the Supreme Court initially granted certiorari, 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 certiorari 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': *ibid.*, at 2089. See further anon, 'Force of Judgments by the International Court of Justice – Vienna Convention on Consular Relations', 119 *Harv L Rev* (2005) 327.

<sup>202</sup> 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 Art. 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 Writ of Certiorari, *Sanchez-Llamas v. Oregon*, 2005 WL 2922485 (No. 04–10566).

<sup>203</sup> *Sanchez-Llamas 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.

<sup>204</sup> Reacting to the decision, Benjamin Bull, chief counsel of the Alliance Defense Fund, stated: 'My first reaction to this case is that you're seeing an immediate impact to having Chief Justice Roberts on the Court and Justice Alito replacing Justice [Sandra Day] O'Connor. If O'Connor were still on the Court, this would have gone the other way, and it's comfortable to say that tens of thousands of foreign nationals would have had their cases thrown out': Koons, 'Reaction: Sanchez-Llamas v. Oregon/Bustillo v. Johnson', Medill News Service, Northwestern University, 6 July 2006, available at: <http://docket.medill.northwestern.edu/archives/003751.php>.

*Breard's* finding that while ICJ decisions deserve 'respectful consideration',<sup>205</sup> 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.<sup>206</sup> 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.<sup>207</sup> 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'.<sup>208</sup> The Supreme Court agreed to hear the case on 30 April 2007.<sup>209</sup>

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,<sup>210</sup> effectively revoking the compulsory jurisdiction of the ICJ over the US as regards the Vienna Convention.<sup>211</sup> Leaving aside the important question of whether unilateral withdrawal from a multilateral treaty is valid under international

<sup>205</sup> *Breard*, *supra* note 164, at 375.

<sup>206</sup> 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, at 2688.

<sup>207</sup> On 15 Nov. 2006, the Texas Court of Criminal Appeals decided not to provide Medellin with review of his conviction, the *Avena* decision and President Bush's Feb. 2005 determination notwithstanding. Great reliance was placed in the *Breard* and *Sanchez-Llamas* cases to the effect that the ICJ's decisions were only entitled to 'respectful consideration', and were thus non-binding. Professor Kirgis has criticized the Texas Court's inability to distinguish *Sanchez-Llamas*, in which the accused individual was not one of the 51 Mexican nationals involved in *Avena*, from Medellin's situation (he was a named individual in *Avena*). This, along with President Bush's executive determination of the US's treaty obligations with respect to *Avena* (which was, as *Sanchez-Llamas* itself acknowledged, entitled to great weight), should have swung the Texas Court the other way: see Kirgis, 'The Texas Court of Criminal Appeals Decides Medellin's Consular Convention Case', 10 (32) *ASIL Insight*, 8 Dec. 2006, available at: [www.asil.org/insights/2006/12/insights061208.html](http://www.asil.org/insights/2006/12/insights061208.html).

<sup>208</sup> See Greenhouse, 'Supreme Court to Hear Appeal of Mexican Death Row Inmate', *NY Times*, 1 May 2007.

<sup>209</sup> See *Medellin v. Texas*, No. 06-984, which will be argued in the autumn of 2007.

<sup>210</sup> See Liptak, 'U.S. Says It Has Withdrawn from World Judicial Body', *NY Times*, 10 Mar. 2005, at A16.

<sup>211</sup> 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 State will no longer recognize the jurisdiction of the International Court of Justice reflected in that Protocol.'

law,<sup>212</sup> withdrawal from the Optional Protocol is not encouraging for future enforcement of the Vienna Convention within the United States.<sup>213</sup>

## 4 Assessment and Implications

### A *The Link Between Jurisdiction and Compliance: Testing Conventional Wisdom*

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,<sup>214</sup> it is posited that the various modes of consent yield very different 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,<sup>215</sup> as '[t]he Court's judgments in such cases have been duly complied with'.<sup>216</sup> 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.<sup>217</sup>

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.<sup>218</sup> Professor Gross was more direct, stating that cases initiated by special agreement held more promise of being effective than those brought under the compulsory jurisdiction of the ICJ.<sup>219</sup>

<sup>212</sup> See Reisman and Arsanjani, 'No Exit? A Preliminary Examination of the Legal Consequences of United States.' Withdrawal from the Optional Protocol to the Vienna Convention on Consular Relations', in M.G. Kohen, *Promoting Justice, Human Rights and Conflict Resolution Through International Law: Liber Amicorum Lucius Caflisch* (2007), at 897.

<sup>213</sup> Clarke, *supra* note 177, at 157.

<sup>214</sup> ICJ Statute, Arts. 36–37, 65.

<sup>215</sup> Oda, *supra* note 17, at 262.

<sup>216</sup> *Ibid.*

<sup>217</sup> 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 after 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'. Professors Ginsburg and McAdams make a more nuanced but similar claim: 'the strongest predictor of compliance, and the only variable to reach statistical significance, is a lack of preliminary objections... Cases in which preliminary objections were overruled were those least likely to result in compliance... compliance is most likely to occur when both sides want adjudication': Ginsburg and McAdams, *supra* note 14, at 1313.

<sup>218</sup> Charney, *supra* note 24, at 297.

<sup>219</sup> Gross, *supra* note 24, at 45–46.

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)<sup>220</sup> stated 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.<sup>221</sup>

Part II belies much of this logic. First, of the five cases discussed above (chosen specifically because they dealt with purported cases of non- or partial compliance), three were instituted by special agreement;<sup>222</sup> only two arose from compulsory jurisdiction. The only case where progress towards compliance seems wholly problematic, *Gabcíkovo-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,<sup>223</sup> 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. Nigeria* 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 seem to be on their way to substantial, although imperfect, compliance with those judgments despite early resistance (although in the case of *Avena*, the outcome of the Supreme Court case 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 is commonly advanced.

Secondly, one wonders about the methodology by which some of these studies arrived at their statistics. In the studies of Professors Posner/Yoo and Ginsburg/McAdams, for example, 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.<sup>224</sup> Indeed, for the reasons explained in Part II(a) above, there are inherent difficulties in identifying what compliance itself means, let alone deciding in empirical terms whether one state 'complied' or not; this is so, in part, because some of the decisions require prior legal interpretation (and thus present further subjective problems) of the parties in order to assess what their obligations actually are.<sup>225</sup> More importantly, compliance is

<sup>220</sup> Ginsburg and McAdams, *supra* note 14.

<sup>221</sup> Posner and Yoo, 'Judicial Independence in International Tribunals', 93 *Cal L Rev* (2005) 1, at 37, citing Ginsburg and McAdams, *supra* note 14, at appendix.

<sup>222</sup> *El Salvador/Honduras*, *supra* note 64; *Libya/Chad*, *supra* note 100; *Hungary/Slovakia*, *supra* note 120.

<sup>223</sup> See *supra* note 135 and accompanying text.

<sup>224</sup> Instead, it was explained in broad terms that '[a]ny case in which a party delayed implementation of an order by greater than one year counted as an instance of noncompliance'. Ginsburg and McAdams, *supra* note 14, at 1310. Should settlement achieved through an ICJ decision but compliance with which occurred in significant measure after the lapse of a year really be considered non-compliance?

<sup>225</sup> A judgment must be clear and, whenever possible, contemplate direct acts to perform. Otherwise, further negotiation may be made more difficult by parties pointing to ambiguous language in the decision as reason to hold fast to their respective bargaining positions. A good example is the *Gabcíkovo-Nagymaros* Project, see *supra*, Part III(c).

often an extremely complex process that involves many levels of local and federal governmental enforcement, each of which may exhibit varying degrees of compliance vis-à-vis other branches of the same government. How is one to judge, for example, the compliance of Libya and Chad with their obligations under their ICJ maritime boundary decision, since much (but not nearly all) of the decision has been complied with? Or how do the US Federal State Department's practices after *LaGrand* compare with the practices of state governments? In which category are those cases to be placed? To give another example of these vagaries, Professors Ginsburg and McAdams listed *Cameroon v. Nigeria* as an instance of non-compliance;<sup>226</sup> the foregoing discussion suggests, 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.<sup>227</sup> Commentators that point to the compliance ills of the ICJ inevitably rehash pre-*Nicaragua* judgments or orders on provisional measures (which was only declared binding and cast in mandatory language in *LaGrand*). A thorough study of the possible reasons behind this considerable improvement in compliance falls beyond the scope of this article; nevertheless, one may briefly speculate that much has to do with the ICJ's more circumspect attitude towards its own jurisdiction in response to the institutional challenges the aftermath of *Nicaragua* presented.<sup>228</sup>

## **B 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.<sup>229</sup> The institutional framework of the ICJ is complex, and the avenues available under the UN Charter for enforcement of its decisions

<sup>226</sup> Ginsburg and McAdams, *supra* note 14, at 100.

<sup>227</sup> Or, as ICJ President Higgins has stated, '[t]he answer is surprising to many that out of nearly 100 contentious cases that the Court has dealt with, no more than a handful have presented problems of compliance': speech by Rosalyn Higgins, President of the ICJ, at the UN Security Council's Thematic Debate on 'Strengthening International Law', 22 June 2006.

<sup>228</sup> Professor Reisman hinted at this thus: '[f]or a period of time, the Court seemed to be elaborating a theory of jurisdiction no longer based on consent. Judge Oda has steadfastly resisted this initiative and the Court has essentially returned to his view': Reisman, 'Judge Shigeru Oda: A Tribute to an International Treasure', 16 *Leiden J Int'l L* (2003) 57, at 64.

<sup>229</sup> 'If there is no judiciary as effective as in some developed national systems, there is an International Court of Justice whose judgments and opinions, while few, are respected. The inadequacies of the judicial system are in some measure supplied by other bodies: international disputes are resolved and law is developed through a network of arbitrations by continuing or *ad hoc* tribunals. National courts help importantly to determine, clarify, develop international law. 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.



reflect the disproportionate power bestowed by the Charter upon the Security Council. Under the Charter'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),<sup>230</sup> for the Council to be inert in situations wherein the debtor state is a Permanent Member. 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.<sup>231</sup>

Interestingly, two noted experts shortly after the UN Charter entered into force believed that the enforcement of ICJ judgments under Article 94(2) would not have great importance:

Judging from past experience, this paragraph is not likely to have great importance in practice. 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.<sup>232</sup>

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. 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

<sup>230</sup> See Reisman, 'The Enforcement of International Judgments', 63 *AJIL* (1969) 1, at 13–14.

<sup>231</sup> Indeed, the Council is almost never asked to exercise its Art. 94(2) powers. See Tanzi, 'Problems of Enforcement of Decisions of the ICJ and the Law of the United Nations', 6 *EJIL* (1995) 539. One of the few instances where direct invocation of Art. 94(2) was made was in the UK's application in relation to the *Anglo-Iranian Oil Case* [1951] ICJ Rep 59. The Security Council did not take decisive action. See *ibid.*, at 15 n. 46.

<sup>232</sup> 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 Permanent Court of International Justice. The difficulty has always been in getting states to submit their disputes to international tribunals; having done so, they have generally been willing to accept an adverse judgment. The record of acceptance of judgments of the International Court has also been good; the notable exception has been the refusal of Albania to comply with the Court's decision setting the amount of compensation due the United Kingdom for damages in the *Corfu Channel* case. The United Kingdom has sought through various means to collect the amount due, but no attempt has been made to invoke Article 94(2) by bringing the matter before the Security Council.' L.M. Goodrich, E. Hambro, and A.P. Simons, *Charter of the United Nations* (3rd edn., 1969), at 557.

the Executive department does in most states. 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.<sup>233</sup>

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 the *Land, Island and Maritime Frontier Dispute* discussed above, for example, Honduras' letter to the Secretary-General was sufficient to trigger a more conciliatory tone from El Salvador, prompting renewed vigour in negotiations that diffused tensions and ultimately speeded 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).

### *C 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. Recalling that many cases submitted to the Court were settled before judgment and, at all stages, ICJ President Mohammed Bedjaoui maintained that Court procedures themselves have an important pacifying effect upon states parties. Incidental proceedings have made 'a decisive 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'.<sup>234</sup>

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

<sup>233</sup> Reisman, *supra* note 230, at 14–15. Other commentators believe, however, that Art. 94(2) is independent of the Council's Chapter VII functions: '[t]he wording and the position of Article 94(2) in the systematic context of the Charter favour an interpretation that action according to this provision is independent of other provisions of the Charter. ... [T]he SC need not determine, in the view of the author, the existence of any threat to the peace, breach of the peace, or act of aggression, as provided for in Art. 39 of the Charter, but may decide upon measures to be taken including those listed in Art. 41 ...': B. Simma (ed.), *The Charter of the United Nations: A Commentary* (2nd edn., 2002), ii, 1175.

<sup>234</sup> Bedjaoui, 'Presentation', in C. Peck and R. Lee (eds), *INJ/UNITAR Colloquium to Celebrate the 50th Anniversary of the Court* (1997), at 22.

mutual border, especially the Bakassin 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 has proven difficult, such is understandable considering the strength of public sentiment in Nigeria against the surrender of the peninsula, and it now appears that four years after the decision full compliance has been achieved.<sup>235</sup>

*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 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.

#### D 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.<sup>236</sup>

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

<sup>235</sup> For a detailed discussion see Pt III(d), *supra*.

<sup>236</sup> Jennings, 'The Role of the International Court of Justice in the Development of International Environmental Protection Law', 1 *Rev Eur Community & Int'l Env't'l L* (1992) 3, at 240, cited in *East Timor (Portugal v. Australia)* [1995] ICJ Rep 90 (Ranjeva J, separate opinion).

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 debate is virulent and important, with scholars<sup>237</sup> and even Judges of the ICJ<sup>238</sup> strongly advocating opposing visions for the Court. Imbedded within these disparate views is the no less fundamental issue of whether the ICJ should adopt facets that more closely resemble arbitral bodies ever careful to guard against an *excès de pouvoir*, or whether they should act as much as possible (given the institutional restraints) like traditional courts.<sup>239</sup>

These complex and controversial issues are endlessly debatable, and rely largely on the appraiser's policy leanings. It is important to recognize, however, that the ICJ's generally favourable compliance record in recent years (regardless of the mode of jurisdictional acquisition) should call into question some of the assumptions underlying these issues, as jurisdiction and compliance cannot be viewed with a strict cause and effect optic. The decline of the Court's compulsory jurisdiction<sup>240</sup> 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

<sup>237</sup> Compare, e.g. Posner and Yoo, *supra* note 221, with Helfer and Slaughter, 'Towards a Theory of Effective Supranational Adjudication', 107 *Yale LJ* (1997) 387.

<sup>238</sup> See Reisman, 'The Supervisory Jurisdiction of the International Court of Justice: International Arbitration and International Adjudication', 258 *Receuil des Cours* (1997) 9, at 52–53 (outlining the opinions of Judges Singh, Jennings, Mawdsley, and Ranjeva, who advocate a greater law-making function for the Court); Oda, *supra* note 12 (calling compulsory jurisdiction a 'myth' and advocating a more limited conception of the Court's jurisdiction).

<sup>239</sup> Public international adjudication and arbitration are fundamentally different, of course, especially in the fact that *ad hoc* arbitration gives parties the flexibility to choose who the third-party decision-maker will be, as opposed to permanent bodies like the ICJ, where complex political processes have resulted in the election of judges whose decision-making processes and perceived scope of discretion may or may not act in ways that prospective states parties would like. See Reisman, *supra* note 238, at 49–55. Notably, Professor Posner argues that part of the reason for the ICJ's supposed 'decline' is that unlike arbitration, States do not have the flexibility to appoint judges they are comfortable with: see Posner, *supra* note 13.

<sup>240</sup> As pointed out by more critical scholars: '[o]nly 64 of the 191 members of the UN currently accept the compulsory jurisdiction of the ICJ. This is a participation rate of about 34 percent. By contrast, 34 of 57 UN members (60 percent) accepted compulsory jurisdiction in 1947. Today, of the five permanent members of the Security Council, only Great Britain has accepted compulsory jurisdiction: France, China, the U.S., and Russia have not (nor has Germany). Among the states that do accept compulsory jurisdiction, they almost always hedge their consent with numerous conditions. That is a sign that state parties to the U.N. Charter have chosen not to make use of the Court because they cannot control its outcomes': Posner and Yoo, *supra* note 221, at 33.

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. As 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 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.

Without going into the minutiae of contemporary theories on why states obey international obligations,<sup>241</sup> 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 expect 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.

Whether this same type of unilateral withdrawal from ICJ jurisdiction (assuming its legality) will occur when other states find themselves in similar situations is an open question, as many multilateral treaties (unlike the Optional Clause) concern very narrow subject matter and states party may be less apprehensive about compulsory jurisdiction within those fields. It is quite possible, however, that further curtailments of the ICJ's compulsory jurisdiction will continue. Many States will not be satisfied until their agreements reflect an engagement with the ICJ only for cases wherein the worst possible adverse judgments against them have already been foreseen and discounted in advance. In that sense, future ICJ adjudication may not be unlike public international arbitration.

## 5 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

<sup>241</sup> There has been an 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 Law on 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 J Int'l L* (2006) 511.

record, and its future place in the settlement of international disputes, this article has attempted to view the issue from a more factual, non-doctrinal perspective. Revisiting five recent post-*Nicaragua* instances of purported non-compliance, it has 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. The mode by which the ICJ was seized of jurisdiction thus appears to be a rather poor predictor of subsequent compliance. Part 4 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.

More than ever, the ICJ is engaged in a complicated balancing of divergent institutional impulses: on the one hand, the Court should address the concerns of its over 190-state clientele by only adjudicating on disputes over which a genuine, comprehensive (not merely legal) settlement is possible, as the Court must (considering the evident inefficacy of Article 94 of the UN Charter) continue to rely on the parties themselves to give effect to their judgments. On the other hand, it should not, in an excess of caution, disregard legitimate instances in which it may exercise jurisdiction for fear of non-compliance; doing so would substitute principle for power<sup>242</sup> and bode ill for international law. Thus far, the Court's compliance success, regardless of the mode of jurisdictional acquisition, suggests that it has largely been successful at finding a working equilibrium among these 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 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'.<sup>243</sup> One need only glance at current news, however, to know that this objective has not, nor is it ever likely to, come into complete fruition. Indeed, most disputes in the international community will continue to be settled, not through determinations of rights and pathological conduct by judges applying international law, but through diplomacy and negotiation. The 'principal judicial organ of the United Nations'<sup>244</sup> 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.

<sup>242</sup> Helfer and Slaughter, *supra* note 237.

<sup>243</sup> 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](http://www.icj-cij.org/icjwww/ipresscom/SPEECHES/ispeechpresident_higgins_20060622.htm).

<sup>244</sup> UN Charter, Art. 92: 'The International Court of Justice shall be the principal judicial organ of the United Nations. It shall function in accordance with the annexed Statute, which ... forms an integral part of the present Charter.'