The Role of the International Court of Justice in the Enforcement of Its Judicial Decisions

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Abstract. Together with the Security Council and the General Assembly, the International Court of Justice is one of the most important guarantors of peace, security and co-operation among states. The role of the ICJ in the enforcement of its decisions has received little attention in the existing literature. Although international courts, regional courts and national courts do not physically enforce their decisions, they have various levels of enforcement mechanism procedures. Nevertheless, it has been widely and mistakenly believed that it is not the business of the ICJ to enforce its decisions, but rather this is the business of other political bodies of the United Nations. It is argued in this paper that this proposition is not accurate and, instead, the ICJ has at its disposal various enforcement procedures and is, moreover, under statutory obligations to participate actively in policing and enforcing its decisions.

1. INTRODUCTION

Surprisingly, the judicial enforcement of international judicial decisions receives little attention in professional writings.[1] This peculiar lack of interest might be due to the consensual basis of the Court's jurisdiction and that international judicial decisions are normally complied with in good faith as well as the silence of the Statute of the Court regarding what steps should be taken by the Court when a litigant state fails to comply with its decisions. Moreover, the unwarranted dependence on the so-called good "record"[2] of compliance with the decisions of the Permanent Court of International Justice and arguably those of the International Court of Justice ('ICJ') as well as the self-executory or the

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1. R. Jennings, *The Judicial Enforcement of International Obligations*, 47 ZaöRV 3–16, at 3 (1987).
2. We are not aware of a formal or even informal "record" of compliance with the Court's decisions. So, talking about or even mentioning the so-called "record" of compliance with

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declaratory nature of some of these decisions are alleged not to trigger any need for enforcement action or measures to be taken to give them effect. But these are mitigations to the acuteness of the problem of enforcement of international judgments.

Without further deliberation, the Draftsmen of the Statute of the ICJ and the Charter of the United Nations left the process of enforcement of the Court's decision to the discretionary authority of the Security Council. Article 94(2) of the UN Charter states

> If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give to the judgment.[3]

However, this Article provides no exclusive authority for the Security Council to be the only ultimate and sole enforcer of the ICJ decisions.[4] Therefore, some commentators have argued, *inter alia*, that the Court itself may play an active role in the enforcement of its decisions.

But this approach is believed by some to be inappropriate or very limited. They, in fact, doubt the ability of the Court to participate effectively in the enforcement of its decisions and to function as a "real" court.[5] The Court has been even described as "a toothless bulldog,"[6] especially when the Court is obviously incapable of ordering, for instance, the attachment of assets of the delinquent party. Those who adopted these propositions,[7] have generally reiterated or reproduced a proposition found in the

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3. Art. 94(2) of the UN Charter.
4. *See* O. Schachter, *The Enforcement of International Judicial and Arbitral Awards Decisions*, 53 AJIL 1–24, at 24 (1960); P.J.I.M. de Waart, *Non-Appearance Does Not Make Sense*: Comments, *in* A. Bloed & P. van Dijk, Forty Years International Court of Justice: Jurisdiction, Equity and Equality 71–84, at 80 (Europa Instituut Utrecht, 1988); H. Mosler, *Comment of Article 94*, *in* B. Simma (Ed.), The Charter of the United Nations: A Commentary 1007 (Oxford, 1994); and S. Rosenne, The Law and Practice of the International Court, 3rd Ed., at 258 (Martinus Nijhoff Publishers, 1997). *See also* in connection with Art. 24 of the Charter, Certain Expenses of the United Nations, Advisory Opinion of 20 July 1962, 1962 ICJ Rep. 151, at 163; Military and Paramilitary Activities in and against Nicaragua (Nicaragua *v.* United States of America), Judgment of 26 November 1984, 1984 ICJ Rep. 392, at 435, para. 95.
5. M.E. O'Connell, *The Prospects for Enforcing Monetary Judgments of the International Court of Justice: A Study of Nicaragua's Judgment Against the United States*, 30 VJIL 891–940, at 901 (1990).
6. B.A. Ajibola, *Compliance with Judgments of the International Court of Justice*, *in* M.K. Bulterman & M. Kuijer (Eds.), Compliance with Judgments of International Courts 11 (Martinus Nijhoff Publishers, 1996).
7. S. Rosenne, The Law and Practice of the International Court 74 (1957); P.E. Deutsch, *Problems of Enforcement of Decrees of International Tribunals*, 50 American Bar Association Journal 1134–1139, at 1134 (1964); S.K. Kapoor, *Enforcement of Judgments and Compliance with Advisory Opinions of the International Court of Justice*, *in* R.P. Dhokalia & B.C. Nirmal (Eds.), International Court in Transition: Essays in Memory of Professor Dharma Pratap 301–316, at 302 (Chugh, India, 1995); *see also* Dissenting Opinion of Judge Weeramantry in East Timor (Portugal *v.* Australia), Judgment of 30 June 1995, 1995 ICJ Rep. 90, at 219; and Ajibola, *supra* note 6, at 9 & 11.

report of the Preparatory Commission of the United Nations, which suggested that the enforcement of the Court's decision is not the business of the Court itself but rather belongs to other political bodies,[8] since "the Court, from the moment it has given its final decision, becomes *functus officio* and therefore has nothing to do with the execution or enforceability of that judgment."[9]

The Court is probably a "toothless bulldog," given the absence of an executive arm attached to it. Nevertheless, a close look into the Statute of the Court reveals that the Court has an enforcement power,[10] at least, in some derivative matters with respect to its decisions under Articles 41, 57, 60, and more strikingly under Article 61(3), through which it can effectively participate in the enforcement process. Therefore, in an attempt to mitigate this deficiency in the international legal system and to highlight the Court's capacity in the improvement of compliance with and enforcement of its decisions, various theories and measures have been advanced. These proposals are based on different arguments and each merits comment and more analysis for greater application.

But before we examine these theories and measures, we shall highlight the Court's perception of its role in the enforcement of its decisions in the face of a restricted interpretation of the Court's Decision in the *Haya de la Torre* case,[11] regarded by some commentators as proof of the Court's inability to play any role in this process.

2. The Court's Perception of Its Role in the Enforcement of Its Decisions

Although the Court's own perception of its role in the enforcement of its decisions has not yet been pronounced squarely,[12] there is one precedent allowing one to deny the Court's role in this process, namely the Court's findings in the *Haya de la Torre* case.[13] Nevertheless, a close look into that case reveals otherwise.

In the *Haya de la Torre* case the ICJ refused to respond to the question put to it by Colombia and Peru, who inquired about the manner, in which the Court's Judgment of 20 November 1950 should be executed.[14] The Court, in answering to that question, observed that it confined itself "to

8. 14 UNCIO 833, 853 and 886 (1945).
9. Ajibola, *supra* note 6, at 12; Dissenting Opinion of Judge Weeramantry in East Timor, *supra* note 7, at 219.
10. O. Schachter, *International Law in Theory and Practice: General Course in Public International Law*, 178 Recueil des cours 219 (1982); and O'Connell, *supra* note 5, at 898.
11. Haya de la Torre (Colombia *v.* Peru), Judgment of 13 June 1951, 1951 ICJ Rep. 71.
12. *See* the Mavrommatis case, in which the PCIJ found it unnecessary to consider the question whether, in certain cases it might have jurisdiction to decide disputes pertaining to non-compliance with its decisions, 1927 PCIJ (Ser. A) No. 11, at 14.
13. *Supra* note 11.
14. *Id.*, at 75.

defining the legal relations between parties" and it was not, indeed, for the Court to "make a choice amongst the various courses by which the asylum" could be terminated, and that those courses were "conditioned by facts and by possibilities which to very large extent, the Parties are alone in a position to appreciate," hence,

> a choice amongst them could not be based on legal considerations, but only on considerations of practicability or of political expediency; it is not part of the Court's judicial function to make such a choice.[15]

In other words, the Court should not indicate one specific, single and exclusive method of compliance. It is indeed appropriate to let, under certain circumstances, the desirable course of compliance with judicial decisions to the litigants themselves since they are the ultimate indicators of the legitimate favourable measure of enforcement of the Court's Decision.

Reading the Court's Decision more carefully also reveals that the Court may not make a selection out of the various possible alternatives since this is for the parties themselves to choose among the various means to fulfil and satisfy the obligations incumbent under the Court's Decision. This, indeed, differs from the issue of enforcement itself through adoption of different methods within the Court itself and on its own initiative. So, the Court's finding and the alleged refusal of the Court's engagement in the enforcement process is not quite clear in that finding and should not be interpreted as a precedent to prevent the Court from taking an active role in the enforcement process of its decisions.

As a matter of fact, the Court is under a general obligation to enable the parties to achieve a workable final settlement of their disputes. This was confirmed by the Court in the *Burkina Faso/Mali* case (1986). Although the Chamber of the Court in this case was approached by the parties with the task of nominating experts to give an opinion for the purposes of implementing the Court's Judgment, the Chamber acknowledged the power of the Court to contribute to the enforcement process of its decisions. It stated

> whereas there is nothing in the Statute of the Court nor in the settled jurisprudence to prevent the Chamber from exercising this power, the very purpose of

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15. *Id.*, at 79; *see also* the Tripartite Claims Commission (United States/Austria/Hungary) which stated that it was "not concerned with the enforcement of its awards or with the payment by Austria and/or Hungary of their financial obligations" and

> the problem of how and when the awards of this Commission shall be enforced and when and how the judgment shall be made or secured are political in their nature and must be settled by the appropriate political agencies of the Governments concerned.

Administrative Decisions No. 1, VI UNRIAA 206–207; *see also* Arrest Warrant of 11 April 2000 (Congo *v.* Belgium), 2002 ICJ Rep., para. 76 in which the Court ordered Belgium to "by means of its own choosing, cancel the warrant in question."

> which is to enable the Parties to achieve a final settlement of their dispute in implementation of the Judgment which it has delivered.[16]

These rulings reveal that it is not the business of the Court to direct the parties to enforce directly its decisions in certain ways, but it clearly and certainly indicates that the Court could and should participate effectively in the compliance with and enforcement of its decisions.

However, enforcement of international or national judicial decisions normally requires instituting new proceedings before the competent court to give effect to the judgment directly or indirectly in the form of constraint measures. Yet, in the case of the ICJ, it could be argued that the consent to jurisdiction over the merits under Article 36 of the Statute should comprehend jurisdiction over the enforcement of its decisions and/or that the jurisdiction of the Court over the enforcement is inherent, under Article 60 of the Court's Statute under which the Court has compulsory jurisdiction to construe its decision. On the other hand, there is an argument that the consensual jurisdiction of the Court cannot be extended to enforcement proceedings since such proceedings are new in nature and may also involve new parties, and hence, a new consent is required. Notwithstanding the vigorous arguments of both theories and practicalities to the contrary, the Court, can and should resort to some form of constraint measures or otherwise to give effect to its decisions apart from the controversial inherent power over enforcement in general.

Although there is an absence of developed international court procedures of enforcement,[17] it is not necessary to rely exclusively on the issue of jurisdiction to involve the Court in the process of enforcement of its decisions, as we shall see. In fact, the jurisdiction of the Court under Article 36(2)(b) of the Court's Statute[18] does conceive the possibility of instituting a new proceedings relating to implementation and enforcement of the decisions of the Court as long as non-compliance is an international wrong and thus is a justifiable legal question under international law.[19]

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16. Frontier Dispute Burkina Faso/Republic of Mali, Judgment of 22 December 1986, 1986 ICJ Rep. 554, at 648; O'Connell, *supra* note 5, at 898.
17. Jennings, *supra* note 1, at 15.
18. Art. 36(2)(b) provides

> 2. The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:
> […]
> (b) any question of international law.

19. *See* Rosenne, *supra* note 4, at 219. For a contrary and restricted view, however, *see* Judge Weeramantry in his Dissenting Opinion in East Timor, *supra* note 7, at 219, who said that "The raison d'etre of the Court's jurisdiction is adjudication and clarification of the law, not enforcement and implementation."

3. Enforcement Under Article 41 of the Statute and Under Article 78 of the Rules of the International Court of Justice

The Court under Article 41(1) of the Statute has "the power to indicate […] any provisional measures […] to preserve the respective rights of either party."[20] This is supplemented by Article 78 of the Rules, which provides that "the Court may request information from the parties on any matter connected with the implementation of any provisional measures it has indicated." Some commentators, however, have seen in the indication of provisional measures an intrinsic power by which the Court could ensure compliance with its decisions. According to Prof. Schachter, for instance, the Court "should be prepared to impose some sanctions on the recalcitrant state whether the applicant or the respondent," such as "damages arising out of non-compliance" or "withholding the relief sought."[21] Relying on part of Article 78 of the Rules of the Court, which empowers the Court to "request information from the parties on any matter connected with the implementation of any measures it had indicated"; Judge Ajibola believes that this is "a clear indication that the Court is not expected to give any order in vain."[22] To what extent is there any validity to such suggestions?

The primary function or purpose of provisional measures is to preserve the respective rights of either party pending the final decision, and not, in other words, to bring about settlements themselves. However, reiteration of the bindingness and enforceability as well as the acknowledgement of non-compliance with the Court's Order in the form of censure may have some implications as Singh suggested,[23] but hardly has any predominant influence in the post-adjudicative phase. Thus, when Iran had failed to comply with the Court's Order of Provisional measures of December 1979 in the *United States Diplomatic and Consular Staff in Tehran* case, the Court in the merits phase articulated "censure" of Iran's non-compliance.[24] In contrast, in the *Fisheries Jurisdiction* cases, *Nuclear Tests* cases, and more importantly in *LaGrand* case, the Court simply noted the non-observance of its Orders.[25] Such limited censure, however, is hardy contrary to

20. Art. 41 of the Statute of the ICJ.
21. Schachter, *supra* note 10, at 222.
22. Ajibola, *supra* note 6, at 16.
23. *See*, however, the Frontier Dispute (Burkina Faso/Republic of Mali), Order of 10 January 1986, 1986 ICJ Rep. 3, which has been said to terminate the hostilities between the parties *in* N. Singh, The Role and Record of International Court of Justice 124 (Martinus Nijhoff Publishers, 1989).
24. 1980 ICJ Rep. 3, at 75 and 93.
25. Fisheries Jurisdiction (United Kingdom *v.* Iceland), Judgment of 25 July 1974, 1974 ICJ Rep. 3, at 16–17; Nuclear Tests (Australia *v.* France, New Zealand *v.* France), Australia *v.* France, Judgment of 20 December 1974, 1974 ICJ Rep. 253, at 258–259; and Case Concerning the Vienna Convention on Consular Relations (Germany *v.* United States of America) ('LaGrand'), Judgment of 27 June 2001, 2001 ICJ Rep., at para. 115.

non ultra petita rule since this rule "cannot preclude the Court from addressing certain legal points in its reasoning."[26] But, any imposition of severe sanctions on the recalcitrant state such as "damages arising out of non-compliance" or "withholding the relief sought" as Prof. Schachter suggested, would be a violation to this well-known principle if these claims have not been duly requested in the applicant state's final submissions.[27]

For instance, the Court in *LaGrand* case (2001) observed, apart from declaring the US Government's violation of its international legal obligation under the Order and noting assurance of non-repetition of the delict committed, that Germany's submission contained no other request. It took note of the doubts pertaining to the inclusiveness of the bindingness and enforceability of orders indicating provisional measures, then concluded that, had the legal character of such orders been extensively settled by its jurisprudence, the Court would have taken these factors into consideration had Germany's submission included a claim for indemnification.[28] Thus, the Court seems reluctant to punish the delinquent for mere non-compliance with an order of provisional measures and it is determined not to award damages arising out of non-compliance when there is no claim for indemnification. Otherwise, this will run contrary to *non ultra petita* rule, which operates to limit the jurisdiction of the Court to those issues that are the subject of the final submissions.[29]

The same rule is also applicable to Article 78 of the Rules and the suggestion advanced by Judge Ajibola. Under Article 78 of the Rules, the Court frequently requests information concerning the enforcement of its Orders. For instance, in the *LaGrand* case, the Court formally asked the United States in its Order of 3 March 1999 to

> take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings, and it should inform the Court of all the measures which it has taken in implementation of that Order.[30]

The United States did not comply with the substance of the Order to postpone the execution of LaGrand; nevertheless, it complied with the second part of the Order, which required the United States to merely inform the Court of the measures taken in implementation of the Order.[31] The

26. Arrest Warrant of 11 April 2000 (Democratic Republic of Congo *v.* Belgium), Judgment of 14 February 2002, 2002 ICJ Rep. 3, at para. 43.
27. Asylum (Colombia *v.* Peru), Interpretation of Judgment of 20 November 1950, 1950 ICJ Rep. 395, at 402.
28. LaGrand, *supra* note 25, at para. 116.
29. Asylum, *supra* note 27; Arrest Warrant of 11 April 2000, *supra* note 26, at paras. 41–43.
30. Case concerning the Vienna Convention on Consular Relations (Germany *v.* United States of America) ('LaGrand'), Order of 3 March 1999, 1999 ICJ Rep. 9, at para. 9.
31. The information required on the measures taken in implementation of this Order was given to the Court by a letter of 8 March 1999 from the Legal Counselor of the United States Embassy at The Hague. According to this letter, on 3 March 1999 the State Department had transmitted to the Governor of Arizona a copy of the Court's Order. "In view of the extremely late hour of the receipt of the Court's Order," the letter of 8 March went on to say, "no further steps were feasible." LaGrand, *supra* note 25, para. 111.

Court, in the merits, found that the United States had breached the obligation incumbent upon it under the Order.[32] Nevertheless, the decision was rendered against the recalcitrant state not as a sanction for non-compliance with the Order to inform the Court of the measures taken to implement its Order, but because the respondent was found responsible for the non-compliance with the substance of the Order to postpone the execution of LaGrand. States will comply with Article 78 of the Rules regardless of their actual non-compliance with the substance of the Court's orders of provisional measures. It should be reiterated that whether the applicant state submits a claim for indemnification to seek damages arising out of non-compliance or withholding the relief sought is another adjudicative question and irrelevant to the very nature of judicial enforcement and doing so, the Court would be in breach of *non ultra petita* rule. Consequently, apart from the limited value of censure to be indicated by the Court, the credibility of the application of Article 41 of the Statute and Article 78 of the Rules of the Court to give the Court any enforcement power is illusory.

4. Enforcement Through Avoidance of Jurisdiction or Rendering Ambiguous Decisions

Another suggested measure of enforcement is avoidance of jurisdiction to decide certain cases or through moving the case so slowly when the Court believes that its decision would not be complied with. One of the supporters of this imaginative strategy is Prof. Reisman who suggests that

> when the Court anticipated that a state was likely to impugn a judgment, it no infrequently disseised itself of jurisdiction. In other cases issues were formulated restrictively or the final judgement was almost Delphic in ambiguity.[33]

Jonathan Charney, who seems entirely in agreement with Reisman, goes further to suggest that the Court "may move the case so slowly" or even "it may issue a judgment that is so ambiguous."[34] These suggestions

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32. *Id.*, at para. 128.
33. M. Reisman, *Enforcement of International Judgments*, 63 AJIL 1–27, at 3–4 (1969). In support of his view, he summarized cases of "*preliminary objections*." Reisman also elsewhere suggests that

    > a decision maker may validly examine the possible effects of non-enforcement of a decision on the organized decision process and on the community's public order, and he should treat these matters as factors in his ultimate decision.

    See also M. Reisman, Nullity and Revision: The Review and Enforcement of International Judgments and Awards 149–150 (Yale University Press, 1971).
34. J.I. Charney, *Disputes Implicating the Institutional Credibility of the Court: Problems of Non-Appearance, Non-Participation, and Non-Performance*, *in* L. Damrosch, International Court of Justice at a Crossroads 288–318, at 305–306 (1987).

have, indeed, some serious consequences, and hence, are highly questionable.

First of all, the Court would inevitably face an obstacle dealing with the accuracy of its assessment and anticipation of the attitude of the target party[35] regardless of some persuasive indications of possible non-compliance with its potential decision through, for instance, the non-appearance or non-participation of the target state in the proceedings. In other words, the Court would not be able to examine definitely and decisively how the parties' intentions in mid or post-adjudicative phases would be before even deciding preliminary objections.

Furthermore, avoiding jurisdiction would question the Court's creditability to settle international disputes and promote international legal order through attracting states and promoting means and methods of settlement of international disputes[36] even in "cases in which its decisions might be resisted"[37] as long as its jurisdiction has been validly conferred. Avoidance of jurisdiction in this context would rather repudiate the parties' rights under the UN Charter,[38] to settle their disputes by using the judicial organ of the United Nations. This repudiation would consequently entail, at least theoretically, the breach by the Court of Articles 33(1) and 92[39] of the UN Charter, and Articles 1[40] and 36[41] of its Statute.

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35. G. Gunther, *The Subtle Vices of the "Passive Virtues" – A Comment on Principle and Expediency in Judicial Review*, 64 Colum. L. Rev. 1, at 7 (1964).
36. One of the main purposes of the General Assembly Declaration of the United Nations Decade of International Law was to "Promote means and methods for the peaceful settlement of disputes between States, including the resort to and full respect to the International Court of Justice." UN General Assembly Res. 44/23, UN Doc. A/Res./44/23 (1990).
37. O'Connell, *supra* note 5, at 903.
38. Art. 33(1) of the Charter which gives the member States the free choice to settle their disputes through various means states

    > The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

39. Art. 92 of the Charter provides

    > The International Court of Justice shall be the principal judicial organ of the United Nations. It shall function in accordance with the annexed Statute, which is based upon the Statute of the Permanent Court of International Justice and forms an integral part of the present Charter.

40. Art. 1 of the Statute of the ICJ states

    > The International Court of Justice established by the Charter of the United Nations as the principal judicial organ of the United Nations shall be constituted and shall function in accordance with the provisions of the present Statute.

41. Art. 36(1) of the Statute of the ICJ provides

    > The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.

Moreover, it is undoubtedly true that avoiding jurisdiction would threaten the prestige of the Court, which is a predominant and persuasive instrument in the mid and post-adjudicative phases.[42] Adopting such measures would, in fact, encourage states to question the credibility of the Court to settle their disputes.[43] They have already expressed their concerns with respect to even the workload and procedural delay in the Court.[44] It should be recalled that when the Court demonstrated a reluctance or avoidance of jurisdiction in the *Northern Cameroons* case,[45] *South West Africa* cases,[46] the *Barcelona Traction* case,[47] and *Nuclear Tests* cases,[48] its reputation was seriously damaged.[49] While probably the Court's deliberate attempt to solve the *Qatar/Bahrain* disputes, notwithstanding its controversial decisions of 1994 and 1995 in the jurisdiction phase of *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (*Qatar* v. *Bahrain*),[50] the Court's final Judgment was, nevertheless, eventually appreciated even by the parties themselves.[51]

Notwithstanding the inevitable political element of disputes submitted before the Court, the Court after all is a judicial organ rather than a political one. In this regard, Prof. Schachter has rightly questioned three arguments based on political grounds to justify "judicial retreat" from deciding contentious cases when:

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42. W.P. Gormeley, *The Status of Awards of International Tribunals: Possible Avoidance Versus Legal Enforcement*, 10 Howard Law Journal 33–107, at 74–75 (1964). The author based his argument exclusively on the prestige of the Court.
43. Rosenne, *supra* note 4, at 203. The author cited the Report of the Committee for the Amendment of the Covenant of the League of Nations in order to bring it into conformity with the Pact of Paris, L.N Doc. C. 160. M.69. 1930 V, 1 May 1930, at 119.
44. G. Guillaume, *The Future of International Judicial Institutions*, 44 ICLQ 849–862, at 851 (1995).
45. Northern Cameroons (Cameroon *v.* United Kingdom), Judgment of 2 December 1963, 1963 ICJ Rep. 15, at 29.
46. South West Africa Cases (Ethiopia *v.* South Africa, Liberia *v.* South Africa), Second Phase, Judgment of 18 July 1966, 1966 ICJ Rep. 6.
47. Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium *v.* Spain), Judgment of 5 February 1970, 1970 ICJ Rep. 3.
48. *Supra* note 25, at 271.
49. M. Reisman, *Revision of the South West Africa Cases*, 7 VJIL 1 (1966); and Guillaume, *supra* note 44, at 851.
50. Jurisdiction and Admissibility, Judgment of 1 July 1994, 1994 ICJ Rep. 112 and Jurisdiction and Admissibility, Judgment of 15 February 1995, 1995 ICJ Rep 6; for the controversy raised by the Court's Decisions of 1994, and 1995 (Jurisdiction Phase), *see*, *in general*, E. Lauterpacht, *Partial Judgment and the inherent jurisdiction of the International Court of Justice*, *in* V. Lowe & M. Fitzmaurice (Eds.), Fifty Years of the International Court of Justice 465–486 (Cambridge, 1996); C. Chinkin, *A Mirage in the Sand? Distinguishing Binding and Non-Binding Relations Between States*, 10(2) LJIL, at 223–247 (1997).
51. *See* the letter dated 19 March 2001 to the Registrar of the International Court of Justice from the Agent of the State of Bahrain and the letter dated 27 March 2001 to the Registrar of the International Court of Justice from the Agent of the State of Qatar in which they convey their gratitude to the Court for reaching its Judgment, available at http://www.icj-cij.org.

> First, […] the alleged breach of obligation was but one element in a complex political and historical situation and could not be satisfactory dealt with in isolation from that political context; Second […] the issue of justiciability involves the interpretation of clauses or concepts that are claimed to be political even though included in a treaty; Third […] the particular legal dispute is being appropriately dealt with in political or diplomatic proceedings and a decision by a court or even a hearing by the court could jeopardize the possible settlement.[52]

It is undoubtedly true that almost all disputes brought before the Court inevitably involve political issues as the Court has already indicated in the *United States Diplomatic and Consular Staff in Tehran* case. Thus, when Iran refused to participate in proceedings in 1979 based on claim of non-justiciability that merely political questions had been submitted and the Court's ignorance of the political context of the dispute, the Court observed that "legal disputes between sovereign States by their very nature are likely to occur in political contexts, and often form only one element in a wider and long-standing political dispute."[53] The same proposition is found also to be applicable to the second and third arguments, which "would run counter to the underlying premise of a legal treaty as imposing some limit on discretion of the party to the agreement."[54]

While the third suggestion seems persuasive, it also raises some complicated questions. Seizing the political and judicial organ of the United Nations simultaneously and a failure to reach a political solution such as in *Aegean Sea Continental Shelf* case,[55] *United States Diplomatic and Consular Staff in Tehran* case, and *Nicaragua* case[56] or technically in the *Lockerbie* case,[57] should not impair the Court's judicial task to deal with legal issues tangled with political ones when they are validly brought before it. Ostensibly, the jurisprudence of the Court in this regard affirms the Court's reluctance to accept contentions of non-justiciability based on political questions as a strategic legal argument to impair the Court's authority to decide inseparable legal and political disputes over which it has jurisdiction.

It follows in the same vein, that issuing an ambiguous decision, as has been suggested,[58] would be susceptible of any compliance or execution

52. Schachter, *supra* note 10, at 211–213.
53. United States Diplomatic and Consular Staff in Tehran (United States of America *v.* Iran), Judgment of 24 May 1980, 1980 ICJ Rep. 3, at 19–20.
54. Schachter, *supra* note 10, at 213.
55. Continental Shelf (Greece *v.* Turkey), Judgment of 19 December 1978, 1978 ICJ Rep. 3, at 12–13.
56. Military and Paramilitary Activities in and against Nicaragua (Nicaragua *v.* United States of America), Provisional Measures, Order of 10 May 1984, 1984 ICJ Rep. 169.
57. Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya *v.* United Kingdom), 1998 ICJ Rep.
58. Charney, *supra* note 34, at 305–306.

whatever, at any time in the future.[59] It would put the interested parties in a doubt as to the meaning and scope of *res judicata* and hence as to the exact extent of the parties' rights and obligations or as to the manner in which the decision is to be enforced. Moreover, judicial enforcement through the courts of both parties or through third states in general as an effective means of enforcement, could also be undermined if the Court renders ambiguous judgments. Thus, one of the major obstacles facing the co-operation of a third state is its biased assessment. Ambiguous decisions could easily contribute to radical differences concerning the meaning and the scope of the decision in question and consequently of a biased assessment by such state. So, Prof. Akehurst rightly argued that the solution to this possible dilemma is to make sure the Court's decisions "always impose precise obligations on the parties,"[60] in order to avoid biased assessments.

Consequently, avoidance of jurisdiction or reluctance in rendering a decision or issuing an ambiguous one are illegitimate measures in the enforcement process. They are inconsistent with the law and practice of the Court and would endanger the development of international law and threaten the future of international judicial institutions especially the Court's credibility and integrity as judicial organ of the United Nations.[61]

5. Enforcement Under Article 60 of the Statute of the International Court of Justice

In the light of the statutory absence of an express and precise authorisation of the Court to take action in the enforcement process of its judgments, Prof. Reisman has suggested minor amendments to Articles 56 and 60 of the Court's Statute to permit the prevailing party after the expiry of fixed time limits, to "reapply unilaterally to the Court for a declaration of non-compliance" and then "it would be for the losing party to (1) claim compliance, (2) aver reasons for delay and request an extension, (3) as a counterclaim seek permission for substituted compliance."[62]

At first glance such an amendment would offer the advantage of increasing the pressure on the defaulting party.[63] However, this suggestion is questionable not only because of its insufficient justification to the possible risk of opening the Statute of the Court to amendments as Prof.

59. Northern Cameroons, *supra* note 45, at 37.
60. M. Akehurst, *Reprisal By Third States*, 44 BYBIL 1–18, at 16 (1970).
61. C.W. Jenks, The Prospects of International Adjudication 667 (1964).
62. Reisman, Nullity and Revision, *supra* note 33, at 671–672.
63. A. Tanzi, *Problems of Enforcement of Decisions of the International Court of Justice and the Law of the United Nations*, 6 EJIL 539–572, at 541, n. 9 (1995).

Kerley noted,[64] but also because it gives the defaulting party some room to manoeuvre to try to repudiate or modify the judgment against it by simply refusing to complying with it. Moreover, the Statute of the ICJ as an integral part of the UN Charter,[65] can, thus, only be amended as stipulated under Articles 108 and 109 of the Charter, and once the Charter or/and the Statute is open for reconsideration, it would be very difficult to restrain the scope of reconsideration including the possibility of bad amendments.[66] However, if this risk could be overcome in the reconsideration process, and Article 60 of the Statute then the Court of Justice of the Andean Community, which has territorial jurisdiction in Bolivia, Colombia, Ecuador, Peru and Venezuela, can be taken as an ideal example.[67]

The Statute of the Andean Court ('Court') devotes in Section Two of its Statute, which is entitled "On the Action to declare Noncompliance", nine articles (23–31) dealing with the case of non-compliance with the decisions of the Court. It provides sophisticated procedures of judicial and institutional enforcement of its decisions. It primarily gives the General Secretariat of the Andean Community the authority to scrutinize whether a member state has failed to comply with the decisions of the Court and its obligations under the provisions of the Convention comprising the legal system of the Andean Community.[68] If he verifies the failure of compliance and the recalcitrant state continues with the behaviour that gave rise to the claim, the General Secretariat shall request a decision from the Court. However, if the General Secretariat fails to issue his ruling or fails to bring that action within sixty days after the date the claim was failed, the claimant country may appeal directly to the Court.[69] If the Court were to decide that a member is at fault, then such member "would be com-

64. E.L. Kerley, *Ensuring Compliance with Judgments of the International Court of Justice*, *in* L. Gross (Ed.), The Future of the International Court of Justice, Vol. 1, 276–286, at 283 (1976).
65. Art. 92 of the UN Charter states that

> The International Court of Justice shall be the principal judicial organ of the United Nations. It shall function in accordance with the annexed Statute, which is based upon the Statute of the Permanent Court of International Justice and forms an integral part of the present Charter.

66. J. Crawford, *The International Court of Justice, Judicial Administration and the Rule of Law*, *in* D.W. Bowett, *et al.* (Eds.), The International Court of Justice: Process, Practice and Procedures 112–123, at 122–123 (1997).
67. 1996 Treaty Creating the Court of Justice of the Cartagena Agreement (Amended by the Cochabamba Protocol). This Amending Protocol to the Treaty Creating the Court of Justice of the Andean Community is signed in the city of Cochabamba, Bolivia on 28 May 1996 and came into force in August 1999. For a general reference to the Court *see* R.P. Hamilton, *A Guide Researching the Caribbean Court of Justice*, XXVII Brooklyn Journal of International Law 531–542 (2002).
68. Art. 23 of the Statute of the Andean Court.
69. Art. 24 of the Statute of the Andean Court. Moreover, Art. 25 of the Andean Court's Statute gives any

pelled to take the necessary steps to execute the judgment within a period of no more than ninety days after notification."[70] But if that member fails to do so, the Court, summarily and after hearing the opinion of the General Secretariat,

> shall establish the limits within which the claimant country or any other Member Country may restrict or suspend, in whole or in part, the benefits obtained by the Member Country at fault under the Cartagena Agreement.[71]

However, the Court may order the adoption of other measures, "should the restriction or suspension of the benefits of the Cartagena Agreement worsen the situation to be resolved or fail to be effective in that regard."[72]

The Statute of the Andean Court perceives that imposition of these measures might cause the claimant member irreparable damage or damage difficult to repair, therefore, it permits, under Article 28 of the Court's Statute, this state to petition the Court before or after the court renders its final judgment to order a temporary suspension of the adopted measures.[73] Nevertheless, judgments rendered in actions to declare non-compliance may be reviewed by the same court at the request of one of the parties, based on a fact that might have decisively influenced the result of the proceeding, providing that the party requesting the review was not aware of that fact on the date of judgment. However, the petition for a review

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> natural or artificial persons whose rights have been affected by the failure of a Member Country to fulfill its obligations may appeal to the General Secretariat and to the Court, following the procedure provided for in Article 24. An action brought as stipulated in the foregoing paragraph excludes the possibility of simultaneous recourse for the same purpose to the procedure provided for in Article 31.

Furthermore, Art. 30 of the Court's Statute states

> a verdict of noncompliance issued by the Court, in the cases envisaged in Article 25, shall constitute legal and sufficient grounds for the party to ask the national judge for compensation for any damages or loss that may be due.

While Art. 31 of the Court provides that

> natural or artificial persons shall have the right to appeal to the competent national courts, as provided for by domestic law, should Member Countries fail to comply with Article 4 of this Treaty in the event that the rights of those persons are affected by that non-compliance.

In fact, contemplation of application of these Articles (25, 30, and 31 of the Statute of Andean Court) on cases of non-compliance with the decisions of the ICJ, requires an amendment of Art. 34(1) of the ICJ Statute, which only permits states to be parties in cases before the Court. However, such contemplation would be undesirable or unfavorable "on the ground that this would be a diversion from the Court's main role in hearing interstate cases, of whatever kind." *See* Crawford, *supra* note 66, at 122–123.

70. Art. 27 of the Statute of the Andean Court.
71. *Id.*
72. *Id.*
73. Art. 28 of the Statute of the Andean Court.

must be submitted within ninety days after the date of discovery of the fact and, in any case, within a year after the judgment date.[74]

Alternatively, the Court can use Article 60 of the Statute in the enforcement process of its decisions without the need for such a highly questionable amendment to the Statute of the ICJ as suggested by Prof. Reisman above. The potentiality of Article 60 has been directly stipulated by Benin and Niger in their Special Agreement, which was signed on 15 June 2001 in Cotonou and entered into force on 11 April 2002 and by which they seized the ICJ on 3 May 2002 with a boundary dispute between them. Article 7 of the Special Agreement, entitled "Judgment of the Chamber", reads as follows:

> 1. The Parties accept as final and binding upon them the judgment of the Chamber rendered pursuant to the present Special Agreement.
> 2. From the day on which the judgment is rendered, the Parties shall have 18 months in which to commence the works of demarcation of the boundary.
> 3. In case of difficulty in the implementation of the judgment, either Party may seise the Court pursuant to Article 60 of its Statute.[75]

Referring to Article 60 of the Statute for the purposes of implementation of the Court's decisions reveals the adequacy of this Article as it stands and how it has been perceived by litigant states regarding the role this Article may play in the process of enforcement of the Court's decisions. The Court, upon an application for interpretation or implementation made under Article 60 of the Statute, can indicate in an elaborate way a reiteration of the enforceability and bindingness of its judgment, a practice that has been recently adopted in judgments in the merits. This interpretation should not constitute an amendment or modification of the authority of *res judicata*, which the judgment has already acquired, but rather reiteration of its effective nature. However, although this approach cannot eradicate the problem of non-compliance, it would at least undermine the position of the defaulting party and exert psychological public pressure on it. Along the same lines, the Court's *dictum* should be reactivated.

Generally, the Court, without being asked to pronounce on a particular issue, should indicate through a similar reiteration and warning to the parties of the binding force of its decisions and the importance of enforcing them as well as the consequence that non-compliance will also entail international responsibility. This psychological pressure is significant by being indicated by the judicial organ of the international community. By doing so, the Court would safeguard the integrity of its decisions and confer double authority on them. It will eventually at least weaken any potential unwillingness of compliance with these final decisions.

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74. Art. 29 of the Statute of the Andean Court.
75. ICJ Press Release 2002/13 of 3 May 2002, available at http://www.icj-cij.org.

6. Enforcement Under Article 61(3) of the Statute and Article 99(5) of the Rules of the International Court of Justice

Generally, the Statute of the ICJ is silent regarding what steps should be taken by the Court when a litigant state fails to comply with its decisions. Nevertheless, some involvement in the process of enforcement of final decisions is possible under Article 61(3) of the Statute in relation to the revision proceedings. Article 61(3) provides "The Court may require previous compliance with the terms of the judgment before it admits proceedings in revision."[76] This provision is supplemented by Article 99(5) of the Rules of the Court of 1978, which provides "If the Court decides to make the admission of the proceedings in revision conditional on previous compliance with the judgment, it shall make an order accordingly."[77]

Revision proceedings, should, at the outset, be distinguished from various proceedings of review within municipal legal systems. Revision under Article 61 arises only from error of fact,[78] but definitely not from error of law. This was observed by the *Trail Smelter Arbitration*, which held that "no error of law is considered as a possible basis for revision, either by the Hague Convention or by the Statute of the Permanent Court of International Justice."[79] Nor is there an intermediate or mixed category of error,[80] which might be subject for a revision before the ICJ. It is thus, different from an appeal in which a judgment may be challenged before a higher court on grounds of error of law as well as on error of fact.[81] By analogy, however, the substance of Article 61(3) is common to the judicial practice of some municipal legal systems. A party may be denied the right of appeal if it has refused to comply with the judgment of a lower court.[82]

The legislative history of Article 61(3) is unclear, but according to Hudson Article 61(3) was inserted by the Advisory Committee of Jurists because of its fear that a party might delay the execution of a judgment until the expiration of the period in which an application for revision was completed.[83] However, this view does not deny the general tendency to

76. Art. 61(3) of the Statute of the ICJ.
77. Art. 99(5) of the Rules of the ICJ.
78. B. Cheng, General Principles of Law as Applied by International Courts and Tribunals 364 (London: Stevens & Sons, 1953).
79. 3 UNRIAA 1955.
80. Argentina/Chile Request for Revision and Subsidiary Request for Interpretation of Judgment of 21 October, 1994 lodged by Chile, Judgment of 13 October 1995, 133 ILR 202.
81. *See* Simpson & Fox, International Arbitration: law and practice, at 242 (1959); Reisman, Nullity and Revision, *supra* note 33, at 217–220.
82. *E.g.*, Hadkinson *v.* Hadkinson, (1952) All ER 567; National Union of Marine Cooks & Stewards *v.* Arnold, 348 U.S. 37 (1954) quoted *in* T.L. Stein, *Contempt, Crisis and the Court: The World Court and the Hostage Rescue Attempt*, 76 AJIL 499–531, at 526 (1982).
83. M.O. Hudson, The Permanent Court of International Justice 1920–1942, 209 (1943).

confer on the Court some authority to participate in the enforcement process of its decisions.[84] The Court, under this provision, can formally order the recalcitrant state to comply with its previous judgment before it admits its request for revision. In fact, the essence of this provision is to impose a "sanction"[85] by the Court against a party seeking revision, which has failed to comply with the judgment in question.

7. Avoidance of Thoroughly Elaborate Dissenting Opinions

The Inter-Allied Committee set up in 1944 and later the International Committee of Jurists of 1945 which looked into the future of the ICJ, favoured unanimously maintaining the practice of the Permanent Court of International Justice in the question of individual opinions. With respect to dissenting opinions, they believed that "the system of dissenting opinions was not susceptible to weakening the authority of decisions."[86] In general appending separate and dissenting opinions by members of international judicial institutions as an integral part of the judicial process, may probably be desirable, but it is not compulsory to do so. For instance, judges of the ICJ *may*, under Article 57 of the Statute and under Article 95(2) of the Rules of the Court, express their individual opinions to the judgment whether in form of dissenting opinions or in form of declaration if they do not agree with the decisions but wish not to state their reasons.[87] Hence, this is a right granted to members of the Court, which they can exercise when they wish to do so. However, a broadly supported judicial decision strengthens the authority[88] of the Court, while lengthy elaborate and distinct alternative legal arguments appended by a strong minority of the Court, on the other hand, shakens this authority, independence and arguably the jurisprudence of the Court. Consequently, it may have some negative impact on the compliance with and enforcement of the Court's decisions. So the question is: would the Court's contribute to

84. Permanent Court of International Justice. Advisory Committee of Jurists. Proces-Verbaux of the proceedings of the Committee June 16th–July 24th 1920, 744–745 (The Hague, 1920).
85. Stein, *supra* note 82, at 525–526; Schachter, *supra* note 10, at 220.
86. I. Hussain, Dissenting and Separate Opinions at the World Court 39 (Martinus Nijhoff, 1984).
87. Art. 57 of the Statute of the ICJ states that: "If the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion." Art. 95(2) of the Rules of the Court of 1978 provides:

> Any judge may, if he so desires, attach his individual opinion to the judgment, whether he dissents from the majority or not; a judge who wishes to record his concurrence or dissent without stating his reasons may do so in the form of a declaration. The same shall also apply to orders made by the Court.

88. The authority of the Court includes the formal and moral authority. The formal authority refers to the Court's power to give effect to its decisions and make the recalcitrant party accept its conclusion. The moral authority refers to the prestige of the Court.

the expeditious compliance with its decisions, through some modification of its practice of thoroughly elaborate dissenting opinions to either less elaborate opinions if they are deemed necessary or should there be more reliance on declarations instead.

Some commentators have argued[89] against allowing dissenting opinions[90] based on the practice of the European Court of Justice ('ECJ'), which bans entirely appending dissenting opinions and keeps the deliberations secret.[91] It has been argued that ECJ's practice has played a significant role in the independence and authority of the ECJ,[92] and opening the door for the members of the Court to dissent within the ECJ would not promote the achievement of the objectives of homogeneity within the European Community.[93] That is probably the case in regional courts; nevertheless, its disadvantages should not be undermined or overlooked if we take into consideration the limited nature and the application of the decisions of the ECJ. The practice of the ECJ in this regard reflects merely the continental European practice, a practice that, thus, is limited to the European Community. Furthermore, the ECJ was initially charged with the responsibility of developing an entirely new regional judicial body through unambiguous and unequivocal judicial pronouncements,[94] and hence allowing dissenting opinions would threaten this objective. Moreover, the record of compliance with decisions of the ECJ in comparison with those of the ICJ is not in favour of banning appending dissenting opinions entirely or suggest that this practice is the very safeguard of compliance with its decisions.[95]

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89. P. van Dijk, *For Better or For Worse? Comments*, *in* Bloed & Van Dijk, *supra* note 4, at 25–34, at 32.
90. There are other marginal reasons, which are outside the scope of this work, against allowing dissenting opinions such as: weakening the doctrine of *stare decisis*, weakening the creditability of the persistent dissenting judges, wasting the resources of the judicial body *see* J. Alder, *Dissents in Courts of Last Resort: Tragic Choices?*, 20 Oxford Journal of Legal Studies 221–246, at 242–243 (2000).
91. *See* EEC Statute of the ECJ, Art. 2 provides that:

> Before taking up his duties each Judge shall, in open court, take an oath to perform his duties impartially and conscientiously and to preserve the secrecy of the deliberations of the Court.

And Art. 32 states, "The deliberations of the Court shall be and shall remain secret." It should be noted that a similar provision is provided in Art. 54(3) of the Statute of the ICJ.
92. H.G. Schermers, Judicial Protection in the European Communities, 4th Ed., 450–451 (1987); and P. Magid, *The Post-Adjudicative Phase*, *in* C. Peck & 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 324–369, at 344, n. 67 (Martinus Nijhoff Publishers, 1997).
93. J.W. Bridge, *The Court of Justice of the European Communities and the Prospects for International Adjudication*, *in* M.W. Janis, International Courts for the Twenty-First Century 87–104, at 87–98 (Martinus Nijhoff Publishers, 1992).
94. Schermers, *supra* note 92, at 450–451; Bridge, *supra* note 93, at 97.
95. Magid, *supra* note 92, at 344.

On the other hand, there are arguments in favour of maintaining the practice of appending dissenting opinions regardless of how elaborate they are or of their possible political negative effect and implication. One of the leading authorities in favouring this practice is Sir Robert Jennings. Although he was certain that "a dissenting opinion may also weaken rather than add to the strength of a judgment,"[96] he believed that they "have a border function of expressing alternative legal arguments, or indeed alternative conclusions."[97] He also believed that members of the Court should be able to represent and lend an additional authority of their civilization and legal systems in the decisions of the Court.[98] Keeping the practice of dissenting within the judiciary is needed to protect certain values of freedom of expression and conscience as of intrinsic value and ensure the equality of all members of the panel. Thus, dissent is undoubtedly far from undermining collegiality, instead it reinforces it. However this argument overlooks the important factor of public accountability and so might be counterproductive by generating public suspicion. Elaborate dissenting opinions appended by members of judicial bodies in general and the Court in particular; have persuaded public opinion to question the unity of their decisions. Thus, in *Pollock* v. *Farmers Loan and Trust Co.*, White J. (dissenting) said that

> the only purpose which *an elaborate dissent* can accomplish, if any, is to weaken the effect of the opinion of the majority, and thus engender want of confidence in the conclusion of courts of last resort.[99]

In the light of these conflicting arguments, a distinction ought to be made between the practice of dissent as an integral part of the judicial process and the publication of an elaborate dissent. In fact, the most important function of thoroughly elaborate dissenting opinions, which makes it desirable or indeed necessary, is in the deliberation process of the drafting process of ICJ decisions. Strong and persuasive dissenting opinions targeting particular points in the draft decision will have to be taken inevitably to strengthen the draft decision of the Court. It is indeed a healthy phenomenon for the purpose of the drafting. However, concentrating on the implication of *publication* reveals that this is not the case

96. R. Jennings, *The Collegiate Responsibility and Authority of the International Court of Justice*, *in* Y. Dinstein & M. Tabory, International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne 343–353, at 350 (Martinus Nijhoff Publishers, 1989).
97. *Id.*
98. *Id.* In support of his argument he relied on Art. 9 of the Statute of the ICJ which provides:

> At every election, the electors shall bear in mind not only that the persons to be elected should individually possess the qualifications required, but also that in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured.

99. 157 U.S. 429, at 608 (1895) (emphasis added).

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in the eyes of governments and public opinion when such thoroughly elaborate appended dissenting opinions, which are arguably part of the Court's decision, are made public.[100] Indeed, this relationship between the decision of the Court and dissenting opinions could occasionally be quoted to question and weaken the independence and the authority of the Court's decision with respect to difficult and controversial questions decided by the Court and support some reluctance of compliance with and even enforcement of the decisions of the Court.[101]

In a rarely cited decision of the Court of Appeal of the International Tribunal of Tangier in *Mackay Radio & Telegraph Company* v. *Lala-La El Khadar and Others* case (1954), the tribunal rejected the bindingness and enforceability of the ICJ's decision in *Rights of Nationals of the United States of America in Morocco* (*France* v. *United States*), Judgment of 27 August 1952, based, without further argumentation, *inter alia*, on "the validity of the four Dissenting Opinions" of the judges of the Court.[102] Moreover, in the aftermath of the decision of the Court in the *Nicaragua* case of 1986, Nicaragua made a complaint of non-compliance with the decision of the Court against the United States to the Security Council. Relying indirectly on the strong minority of the Court in that Judgment, some members of Council doubted implicitly the validity of the Court's decision, notwithstanding the US veto which was cast to defeat the Nicaraguan complaint.[103] The validity of the decisions of the Court from the legal point of view should not be disputed, but such validity is not necessarily valid from political perspective. Thus, when Nicaragua later brought the same complaint before the General Assembly[104] some states also shared the United States' view that the Judgment of the Court was void.[105] The political background in almost all the cases before the Court should not be underestimated. Thus, arguments against dissent have been raised most strongly in settings where confidence in the political settlement or in the judicial process has been relatively low or uncertain.[106]

Furthermore, it should be also recalled that one of the cases brought before the ICJ was a case of non-compliance with an arbitral award based, *inter alia*, on a contested individual opinion of one of the members of the arbitral tribunal. In the case concerning the *Arbitral Award of 31 July 1989*

100. Van Dijk, *supra* note 89, at 32; S. Rosenne, *The World Court What It Is and How It Works*, Fifth Ed., at 139 (Martinus Nijhoff Publishers, 1995); Guillaume, *supra* note 44, at 854.
101. M. Dubisson, La Cour Internationale de Justice, at 424 (Paris: Pichon et Durand-Auzias, 1964), cited *in* Hussain, *supra* note 86, at 275–276, n. 9.
102. 21 ILR 137 (1954).
103. *See* S/PV. 2718, at 42–53.
104. *See* Res. 41/31 of 3 November 1986; Res. 42/18 of 12 November 1987; Res. 43/11 of 25 October 1988; Res. 44/43 of 7 December 1989; and Res. 45/402 of 21 December 1990.
105. *See*, *generally*, M. Akehurst, *Nicaragua v. United States of America*, 27 Indian J. Int. Law 357–384 (1987).
106. Alder, *supra* note 90, at 244.

(*Guinea-Bissau* v. *Senegal*),[107] Guinea-Bissau brought proceedings before the Court against Senegal after they had disagreed upon the validity of the Arbitral Award of 31 July 1989 questioning a contentious declaration appended by the president of the arbitration. In its submission, Guinea-Bissau asked the Court to declare that Senegal was not justified in seeking the latter to comply with the Award whereas Senegal's submission asked the Court to find that the Award was valid and binding for Senegal, which Guinea-Bissau had the obligation to apply.[108] For its part, Guinea-Bissau argued that the Award was not supported by a real majority by virtue of a contradiction found in the Award and in Judge Barberis's (President) declaration, which voted in favour of the adoption of the award. Senegal argued that the declaration appended by members of the tribunal were not part of the Award, and hence any attempt by Guinea-Bissau to misuse it for that purpose "must be regarded as an abuse of process aimed at depriving Senegal of the rights belonging to it under the Award." After a close look into the terms of the Arbitration Agreement and the declaration of Judge Barberis, the Court found that the formulation adopted by Judge Barberis had disclosed no contradiction with the Award and the validity of his vote remained unaffected in the face of such contention.

In the *Qatar* v. *Bahrain* case, three judges, Bedjaoui, Ranjeva and Koroma in their strong Joint Dissenting Opinion to the Court's Judgment of 16 March 2001 drew the attention of the parties and the public to the failure of the Court to treat successfully the question of the Hawar Islands, the most sensitive issue for the parties which (to use the dissenting judges' words) carries an exceptional emotional charge for the people of the two states. They stated:

> We would accordingly be more than justified in hoping that, with the Judgment delivered by the Court today, this case will be satisfactorily settled once and for all. Yet has this Judgment carefully identified and met all the requisite criteria for success? In this respect, our hope becomes clouded when we consider the treatment accorded to the question of the Hawar Islands and to that of the drawing of the single maritime delimitation line, which has, in our view, been arrived at by a somewhat novel method that breaks with the most soundly established practices.[109]

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107. Arbitral Award of 31 July 1989 (Guinea/Bissau *v.* Senegal), Judgment of 12 November 1991, 1991 ICJ Rep. 53.
108. *Id.*, at 56–57. The two questions as provided in Art. 2 of the Arbitration Agreement were: (1) Does the Agreement concluded by an exchange of letters on 26 April 1960, and which relates to the maritime boundary, have the force of law in relations between the Republic of Guinea-Bissau and the Republic of Senegal?; (2) In the event of a negative answer to the first question, what is the course of the line delimiting the maritime territories appertaining to the Republic of Guinea-Bissau and the Republic of Senegal? *Id*., at 58.
109. Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar *v.* Bahrain), Joint Dissenting Opinion of Judges Bedjaoui, Ranjeva and Koroma, Judgment of 16 March 2001, 2001 ICJ Rep. 40, at para. 2.

Whether the parties will finally and actually comply with and enforce the Judgment is yet to been seen.[110] However, such rigorous and vigorous contemplation may threaten expeditious compliance with and enforcement of the Court's judgment. Despite Ijaz Hussain's view,[111] there should be some justified apprehension fear that contentious, ambiguous and contradictory dissenting opinions appended by strong minority could cause and weaken to some extent the compliance with and enforcement of these decisions or rather be very persuasive elements of non-compliance as Nigeria recently relied on to refuse to comply with the Court's Judgment in the merits of 10 October 2002 in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria* especially in the question of sovereignty over the Bakassi Peninsula. In that Judgment the Court by thirteen votes to three, decided that sovereignty over the Bakassi Peninsula lay with the Republic of Cameroon.[112] Judge Koroma and Judge *ad hoc* Ajibola appended their Dissenting Opinions. Judge Koroma in his Dissenting Opinion questioned the political nature of the judgment reached by the Court concerning the core issue of sovereignty over the Bakassi Peninsula. He observed that:

> the conclusion reached by the Court with respect to the 1884 Treaty between Great Britain and the Kings and Chiefs of Old Calabar regarding the Bakassi Peninsula is tantamount to a recognition of political reality rather than to an application of the treaty and the relevant legal principles.[113]

In the same vine, Judge *ad hoc* Ajibola believed that the Court's Judgment was "artificial" because it failed blatantly to take into consideration the principle of *effectivités* and the historical consolidation submitted by Nigeria. He asserted that the decision of the Court was rather a "political decision than a legal one."[114] Two weeks later Nigeria, in a formal statement, refused to comply with the Court's Judgment which was based mainly on colonial treaties between former rulers Britain, Germany and

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110. There is some indication that the parties will comply with the Judgment. See the letter dated 19 March 2001 to the Registrar of the International Court of Justice from the Agent of the State of Bahrain, and the letter dated 27 March 2001 to the Registrar of the International Court of Justice from the Agent of the State of Qatar in which they convey their gratitude to the Court for reaching its judgment, available at http://www.icj-cij.org. However, how this judgment is to be implemented is yet to be seen.
111. However, *see* Hussain who did not believe that

> reasoned dissenting opinions can offend States and that opinions of a minority, even of a homogenous and solid one, can come in the way of the implementation of judgments or opinions of the Court.

Hussain, *supra* note 86, at 40.
112. Land and Maritime Boundary between Cameroon and Nigeria (Cameroon *v.* Nigeria: Equatorial Guinea intervening), 2002 ICJ Rep., at paras. 225 and 325.
113. *Id.*, Judge Koroma's Dissenting Opinion, at para. 3.
114. *Id.*, Judge *ad hoc* Ajibola's Dissenting Opinion, at para. 64.

France. It accused the judges of the Court as citizens of the colonial powers of colonial-era bias. In other words, it was basically saying the decision rendered was a political rather than a legal one and hence was virtually null and void.[115] Although the Dissenting Opinions of Judges Koroma and Ajibola may not be the primary reason for Nigeria's rejection to accept the Court's Judgment, the effect of these opinions is, however, pertinent. Criticizing the Court severely from within the bench itself could undermine the authority of the judgment before the public accordingly and thus attention to this matter ought to be given by the Court itself.[116]

Therefore, an intermediate approach to incorporate the advantages and disadvantages of this phenomenon ought to be adopted by the Court through avoiding *elaborate* dissenting opinions by relying more frequently on another means of dissention, such as declarations appended to the decision instead and avoidance of severe criticism of the Court's findings. Any possible advantages of making dissenting opinions public could be expressed in the forum of academic writings. Therefore, dissenting opinions should be used sparingly and strategically by the judges themselves who also should apply self-restraint to promote solidity of conclusion and the consequent influence of the collegiate decision.[117] This approach would indeed strengthen the authority and credibility as well as the unity of the Court that would expedite compliance with and enforcement of its decisions. Thus, it may be suggested that *elaborate* dissents ought to be appreciated only in internal circulation.[118] This should preserve the advantages of a dissent in sharpening the opinions of the majority while at the same time securing the appearance of judicial solidarity, unity and legal certainty before the public in the far-reaching process of judicial enforcement.

8. CONCLUSION

Generally, the Statute of the ICJ is silent regarding what steps should be taken by the Court when a litigant state fails to comply with its decisions. So, it has been widely and mistakenly believed that it is not the business of the ICJ to enforce its decisions but rather this is the business of other political bodies. This position has been based also on a presumption found in the report of the Preparatory Commission of the United Nations, which suggested that the enforcement of the Court's decision is not the business

115. Reuters/Washington Post, Thursday, 24 October 2002, at A30.
116. M.O. Hudson, *The Twenty-Eight Year of the World Court*, 44 AJIL 1–36, at 21 (1950).
117. *The International Court of Justice Efficiency of Procedures and Working Methods: Report of the Study Group Established by the British Institute of International and Comparative Law as a Contribution to the UN Decade of International Law*, *in* Bowett, *et al.*, *supra* note 66, at 61.
118. Lord Hope in *Ex parte Pinochet* No. 3, [1999] 2 All ER 97, at 152.

of the Court itself but rather belongs to other political bodies,[119] and on a restricted interpretation of the Court's decision in the *Haya de la Torre* case,[120] to deny the Court any role to play in the process of its decisions.

It is argued in this paper that this proposition is not quite accurate and, instead, the ICJ has an enforcement power over its decisions and is even under statutory obligation to participate actively in policing and enforcing its decisions, at least, in some derivative matters with respect to its decisions under Articles 41, 57, 60 and more strikingly under Article 61(3). So, the Statute of the Court does not prohibit the Court from playing an active role in the process of enforcing its decisions nor does generally the practice of adjudication either nationally or internationally preclude this possibility.

The Court is rather under a general obligation to enable the parties to achieve a workable final settlement of their disputes even in the post-adjudicative phase.[121] Consequently, together with the Security Council and the General Assembly, the International Court of Justice is one of the most important guarantors of peace, security and co-operation among states.[122] They should together play a more active role in securing compliance with and enforcement of the Court's decisions to maintain international peace and security, which are the ultimate purpose of the Court's existence and the Charter of the United Nations.

119. *Supra* note 8. *See also* Ajibola, *supra* note 6, at 12; Dissenting Opinion Judge Weeramantry in East Timor, *supra* note 7, at 219.
120. *Supra* note 11.
121. Burkina Faso/Mali, *supra* note 16, at 648; O'Connell, *supra* note 5, at 898.
122. United Nations General Assembly. Provisional Verbatim Record of 36th Mtg, UN Doc. A/42/PV.36, at 6.