

Monitoring Compliance with and Enforcement of Binding Decisions of International Courts*

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“The very essence of global governance is the capacity of the international community to ensure compliance with the rules of society. In a country in which the rule of international law was respected, enforcement procedures would not be needed. In a world in which it is not, universal enforcement may not be achievable.”¹

I. Introduction

In international relations the rule of law is firmly asserted just as much as it is asserted in domestic relations. All states are parties to a large number of treaties and agreements which guide their international relations conduct. These treaties and agreements, thousands of them, cover every field of international relations. There are bilateral treaties and agreements, as well as multilateral regional and global treaties. The overwhelming majority of treaties have a dispute settlement procedure, including binding adjudication.

In domestic jurisdiction there is a complete system of dispute settlement, including a system of compliance and enforcement. There are

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¹ Report of the Commission on Global Governance, Chapter Six.

institutions whose responsibility it is to make sure binding decisions are complied with or enforced. For example, a criminal conviction by a court leads to loss of freedom or loss of life by the convict and there are institutions under the executive to enforce the court decision. There are police officers and prison warders to ensure a convict goes to prison to serve time or to await a death sentence which is also carried out by the executive machinery.

In civil litigation, if compliance is not voluntary by the losing party there is also machinery for enforcement. The court has power to issue an execution order which can be enforced by a court approved entity with the assistance of the executive if necessary. In that way a person may lose property by attachment, liquidation or simple sale by auction. In short, in a domestic setting there is some degree of certainty of compliance with and enforcement of a binding decision of a court.

At the international level, however, there is no certainty that binding decisions of international courts can be complied with and there is no machinery for enforcement. By analogy to domestic systems some scholars of jurisprudence have questioned whether international law is law at all. As professor O'Connell asserts:

“the analogy to domestic law is false. The international system has little in common with unitary government systems.”²

In a unitary system of government the major branches of government have a clear and effective mandate. The legislature has power to make laws which bind all, including the lawmakers themselves, the executive has power to implement decisions and the judiciary has power to administer and dispense justice.

II. The International System

The international system does not have government branches of a similar nature. Treaties and agreements, which constitute most of the effective law at the international level, are negotiated either bilaterally or multilaterally. When a treaty is concluded it requires the clear consent of every negotiator, by signature and ratification or accession. This means a state may participate in the making of a treaty at all levels but may refuse to sign it and consequently that treaty will not apply to it. It

² M.E. O'Connell, “Enforcement and the Success of International Environmental Law”, *Indian Journal of Global Legal Studies* 5 (1995), 47 et seq.

may sign the treaty but decline to ratify it, making it inapplicable. Treaties normally have reservation clauses which allow states to choose which provisions will not apply to them and even provisions which allow states to opt out of the agreement. Thus in a domestic setting the binding nature of the law is clear, whereas at the international level the law is binding upon consent and that consent can be withdrawn at any time, at least as far as treaty law is concerned. In domestic jurisdiction the authority of the court is clear and it does not need the consent of every one for a court to be seized with an issue on which there is a dispute. A party can initiate proceedings without seeking the consent of the other party or parties.

Under international law the jurisdiction of a court depends on consent. Thus a state may be party to a treaty which contains provisions for adjudication, but for a matter to come before the court there must be consent by the parties involved.

At present there are two global judicial institutions, the ICJ established under the Charter of the United Nations and the International Tribunal for the Law of the Sea (ITLOS) established under the 1982 U.N. Convention on the Law of the Sea (UNCLOS).

Though the ICJ is a principal organ of the United Nations its jurisdiction does not extend to Member States of the United Nations by virtue of their acceptance of the Charter. Rather a special submission act must be passed for the state to be subject to its jurisdiction. Only those states are subject to the jurisdiction of the ICJ which, either are a party to international agreements creating the Court's competence, or have pleaded necessity on the merits of a case pending in Court (*forum prorogatum*) or have made a unilateral declaration in accordance with Article 36 para. 2 of the Statute. Currently of the more than 180 Member States of the United Nations around 56 states have accepted the jurisdiction of the Court under Article 36 para. 2 of its Statute. Some of the reservations made by these states are so far reaching that it almost amounts to a negation of the Court's jurisdiction. It is fair to say the ICJ is an international court but it is not a universal one.

Similarly ITLOS is an international court but it does not have general jurisdiction in the field for which it was created, the law of the sea. The quiet distrust of the ICJ particularly by the developing countries was a factor in the negotiations leading to the establishment of ITLOS. The developing countries played a leading role in the negotiations leading to the conclusion of the 1982 Convention and were generally supportive of the creation of ITLOS. They also influenced the composition of ITLOS so that two-thirds of the 21 judges come from the de-

veloping world. Though ITLOS is a truly global creature there are still traces of quiet distrust of international courts.

Similar to the ICJ, the jurisdiction of ITLOS depends on consent by states. Under article 287 of the UNCLOS a state is free to choose a binding procedure and the choice is between the ICJ, ITLOS and arbitration. Up to now only 24 out of the 135 States parties have exercised that choice and only 14 of those have chosen ITLOS.³ Further, binding adjudication has been excluded in certain matters relating to rights of states with regard to scientific research and sovereign rights with regard to fisheries.⁴

Since ITLOS is still a very young judicial institution it is not fair at this stage to make a conclusion one way or another, but the signs of quiet distrust were there at its creation.

Historically there has been quiet distrust of international binding adjudication. The events of the last century have shown that the ICJ has suffered from a fair amount of lack of confidence on the part of the states. The ICJ was established as a successor to the PCIJ which was in turn established in 1922 as a result of the Hague Peace Conferences of 1899 and 1907 to administer international law as developed in Europe since the Peace of Westphalia of 1648. As stated by the Commission on Global Governance, "until the post war period international law suffered as a global concept by being centred in Europe. Developing countries, in particular, felt, not without justification that international law was both based on Christian values and designed to advance Western expansion. It was made in Europe by European jurists to serve European ends".⁵

The 1960's saw the transition to independence of numerous countries in Africa and Asia. These countries regarded European law as the basis for their colonisation. They attained independence with a distrust for the ICJ which they regarded as an instrument of the West. The decision of the ICJ in the South West Africa Case in 1966 dealt a strong blow to confidence in the Court among developing countries.⁶ Over the last thirty years some confidence in the Court has been achieved. However the distrust has not disappeared completely.

³ See <http://www.un.org/Depts/los>

⁴ Article 297 paras 2 and 3 UNCLOS.

⁵ See note 1.

⁶ South West Africa Case, ICJ Reports 1966, 6 et seq.

There is also a perception that binding adjudication is regarded as something for small countries and that the major powers accept international adjudication only when their interests are not threatened. In 1974 France withdrew from the jurisdiction of the ICJ after the Nuclear Test Cases. The cases had been brought by Australia and New Zealand against France under the Courts compulsory jurisdiction clause. France refused to appear or abide by the Courts interim order and subsequently withdrew from the jurisdiction of the Court.⁷

In 1986 a case was filed at the ICJ against the United States which responded by contesting the competence of the Court to hear the case. When the Court decided to hear the case on the merits, the United States refused to participate and withdrew its consent to the compulsory jurisdiction of the Court.⁸ The actions of the United States and France, countries that claim leadership in international affairs, were a blow to the confidence in the Court.

Global judicial institutions are also regarded as more political than judicial organs. In domestic matters there is an elaborate court system. There are subordinate and superior courts. The subordinate courts are the courts of first instance where facts are delved into extensively before the law is applied. Oral evidence is elicited through examination and cross examination of witnesses. The court appraises not only the evidence but also the demeanour of the witnesses. If a party is dissatisfied there is the opportunity for appeal both on the facts and the law. A dispute might go through three or more courts before the final and binding decision is made. There are lower courts, middle level courts, appeal courts and supreme courts. By the end, a party to a dispute feels he\ she has had his\ her required days in court.

At the international level, however, there is no such hierarchy. The ICJ, for example, is a single institution. It does not have subordinate courts. It is both a court of first instance and a final court. There are no procedures for appeal. Its procedures rely basically on written proceedings. Even oral proceedings are largely written and, in the main, repeat the essentials of the written proceedings. Those who appear before it as advocates are normally people who practice in higher courts in their countries. Their experience relates largely to records of lower courts, that is written proceedings. Most of them come from Western

⁷ Nuclear Tests Case (Australia v. France), ICJ Reports 1974, 253 et seq.; Nuclear Tests Case (New Zealand v. France), ICJ Reports 1974, 457 et seq.

⁸ Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), ICJ Reports 1986, 14 et seq.

Europe, even in cases involving the developing world. There is therefore an underlying feeling that it is still a court under the influence of the West.

Secondly, there is an underlying distrust of the composition and the method of election. There is a feeling that there is enormous political influence in the election of the judges. For the major powers it is easier to have a judge of their own elected than is the case for smaller powers, and representation in the Court is not proportional. In addition, any party to a dispute has the right to appoint an *ad hoc* judge if there is not a national in the Court. This gives the perception that a state cannot trust the court unless it has its own representative. The fact that normally *ad hoc* judges find for the state of their nationality re-enforces the perception that the Court lacks judicial independence.

Despite the above criticism, the international judicial institutions are well established, play an important role, render important decisions and contribute enormously to the maintenance of peace and security and the development and strengthening of international law. It is true that there are problems with regard to compliance with and enforcement of binding decisions of international courts. In his authoritative work on the ICJ, in which the problems of compliance and enforcement are discussed at some length, Rosenne states that "in general, a striking feature of the literature dealing with judicial settlement of international disputes is its comparative disinterest in the post-adjudication phase."⁹ Others have argued that since there is no mechanism to enforce binding decisions, international law is not law at all. It can, however, be argued that compliance and enforcement are not major problems in international relations and that enforcement mechanisms were not intended and they are not suitable in international law.

International adjudication is a tiny aspect of the process of dispute settlement systems in international relations. Just as in domestic affairs most disputes are resolved without resort to courts. Most disputes are resolved on the basis of agreements or treaties which contain provisions to the effect that binding adjudication is a method of last resort when diplomatic methods have failed. These methods include negotiations, good offices, inquiry, facilitation, conciliation and other means of peaceful settlement of disputes.

⁹ Sh. Rosenne, *The Law and Practice of the International Court 1920-1996*, Vol. 1, 1997, 202.

Generally states prefer diplomatic means in resolving their disputes because such methods are less intrusive and less imposing. The procedure is flexible and confidential and the parties feel they are in control of the outcome. A settlement of a dispute by negotiation is likely to present fewer problems of compliance and enforcement because the parties have directly contributed to the decision. In everyday life the number of disputes settled by diplomatic means is enormous and they contribute greatly to the maintenance of peace and security in the world.

There is a temptation to think that there is a proliferation of international courts and tribunals which give binding decisions. Certainly, when the numbers are counted the impression is that there are too many such institutions. In addition to the two global judicial institutions, the ICJ and ITLOS, the Security Council has created two special tribunals for crimes committed in Yugoslavia and Rwanda.¹⁰ A Permanent International Criminal Court is in the process of being established.¹¹ There are also several regional courts such as the European Court of Justice, the European Court of Human Rights and the Inter-American Court of Human Rights. Numerous treaties and agreements have provisions for the establishment of arbitral tribunals and many such tribunals have been established. Finally there are rules for the establishment of arbitral tribunals, for example the UNCITRAL rules, the rules of the International Chamber of Commerce and the International Centre for the Settlement of Investment Disputes, and many arbitral tribunals have been so established. Numerous as these courts and tribunals may seem to be, they are in fact a very tiny number compared to the large number of disputes handled globally. When they are all put together they number fewer than the total of the courts in a single country of medium size. The average number of cases handled by the ICJ in each year for more than fifty years of its existence is roughly two. A court in any country, particularly a superior court, which handled that number of cases a year would have no justification for a permanent existence. It would be part time.

The important point, however is that international law is not suited to an enforcement mechanism and it was created with that in mind.

¹⁰ International Criminal Tribunal for the Former Yugoslavia, S/RES/808 (1993) of 22 February 1993; International Criminal Tribunal for Rwanda, S/RES/955 (1994) of 8 November 1994.

¹¹ A. Zimmermann, "The Creation of a Permanent International Criminal Court", *Max Planck UNYB* 2 (1998), 169 et seq.

Modern international law traces its origin to the Peace of Westphalia.¹² After the thirty years war the countries in Western Europe did not go back to the system of supranational institutions which had prevailed during the Holy Roman Empire. Rather they designed a system, through the 1648 Peace of Westphalia, which was based on sovereign states which were equal. As O'Connell argues:

“the rule, rule making and rule enforcement mechanisms were designed to reflect the coequal status of the members of the system... This law making technique, while having some clear disadvantages, had the major advantage of natural compliance; if a state did not intend to observe an obligation it did not consent to it in the first placeOn those occasions when states did not observe their obligations, the system developed a method of horizontal enforcement. The injured state enforced its own rights through self help, using force in some cases, and reciprocity in other.”¹³

The states which established the system were few and had been part of the Holy Roman Empire or had some sort of affinity with it. In other words they had the Christian culture and as such their legal philosophy and practice were similar. Thus, international law developed from that time was not very different from the domestic law of the Member States. Compliance with international law was therefore natural.

When the PCIJ was established in 1922 the number of states which accepted its jurisdiction was small and the majority were the European states that had developed modern international law. They still largely shared the same values and that is why compliance with decisions of the PCIJ was not a problem. All decisions made by that Court were complied with without major problems. Even now with decisions of regional courts, particularly where the states share common values, compliance is natural; for example decisions made by the European Court of Human Rights have all been complied with even in the absence of a mandatory enforcement mechanism.

Compliance with decisions of courts became a problem after World War II. Two thirds of the current members of the United Nations were not the subjects of international law until after the late 1950's. They were subjects of colonialism but did not share the same philosophy and values of civilization which were dear to the colonisers. They attained

¹² L. Gross, “The Peace of Westphalia (1648-1948)”, *AJIL* 42 (1948), 20 et seq.

¹³ See note 2.

independence with a prejudice of the judicial institutions which were created before or during their subjugation. Though a number of developing countries have resorted to the ICJ to settle their disputes, they have done so mainly with regard to disputes between themselves. There is still a lingering doubt whether they can obtain justice if the other party comes from the developed world, particularly from among the major nations.

With regard to compliance with and enforcement of binding decisions of international courts, there are no institutional mechanisms for the purpose. In the political field the Security Council is empowered under the Charter to enforce and monitor compliance in matters of maintaining peace and security. As stated earlier, in domestic jurisdiction there are institutional mechanisms to enforce compliance with court decisions. The courts sentence people to prison terms, levy fines, attach property etc. and the executive makes sure the decisions are complied with.

International Courts do not have power of enforcement because there is no world executive similar to national governments. International law as it has been developed, particularly since the mid 17th century, is based on the equality of states.

The European Convention on Human Rights confers power to the Committee of Ministers to supervise the execution of the judgment and imposes on States parties the duty to abide by the decisions of the Court. This entails the adoption of resolutions stating what is just satisfaction and requiring the government concerned to report on measures taken to comply with the judgment.

The new Criminal Tribunals for the Former Yugoslavia and Rwanda have power to impose sentences which are enforced, but the enforcement is carried out by states under agreement. This is a new development in international law. It may develop further if the proposed Permanent International Criminal Court is established. But it is unlikely to be of general application. It is likely to develop faster in areas of international human rights law and possibly international environmental law. These are areas where the law affects individuals as well as states. Individuals are the victims of human rights violations and individuals suffer from harm to the environment. Polluters are mainly juridical persons and standards set by international agreements can easily be adopted by states to punish defaulters. In this sense it is easier to develop institutions at international level, including courts, whose decisions can be enforced by states in their territories.

Further advances may develop in these areas, particularly where a treaty confers rights on individuals. One example is the European Union whose treaty has developed to apply directly to individuals in economic matters.

There are also soft means of enforcing compliance and monitoring. Reporting is the most common at international level. The ICJ and ITLOS submit annual reports to the General Assembly of the United Nations. Even if non compliance is not specifically mentioned, the annual reports are an occasion for aggrieved parties to comment. Such comments are a potent power to pressurize states to comply with Court decisions. The Inter-American Court of Human Rights is actually obliged to report on non-compliance to the General Assembly of the OAS.

Civil society is also developing to be a potent force in the monitoring of compliance with agreements. Non-governmental organizations, particularly in the areas of human rights (Human Rights Watch) and the environment (the Greens) are particularly active and can have a telling impact. If a decision is made by an international court in areas where civil society is active, monitoring is likely to occur, albeit outside what is understood to be strictly a legal mechanism. The involvement of civil society is noteworthy. International lawmaking was originally a preserve of states. Treaties and agreements were negotiated by representatives of states and the rest of the citizens of the world had little role in rule making. It is not the case now. In the two last decades of the 20th century civil society has been active in rule making. In the beginning non-governmental organizations were in the vicinity of the conference (for example at Rio de Janeiro in 1992), later they were in the corridors (for example at the Human Rights Conference in Vienna 1993) now they sit in the conference room (even though they do not, in many cases, have the right to vote). What is happening now is the development of truly international values which will make it easier for states to include international rules in domestic legislation and to naturally comply with decisions, including binding decisions of international courts.

The bottom-line, however, is that compliance with and enforcement of binding decisions of international courts is marginal in international law. International law remains a compliance-based system not an enforcement-based system. As stated earlier, compulsory binding settlement of disputes occupies a very tiny volume of the settlement of disputes in international relations. Most disputes are settled through diplomatic means. The vast majority of decisions made by international courts are complied with without the need for enforcement. Non-

compliance might be a problem intellectually and academically but in the real world it is not. As stated earlier all the decisions of the PCIJ were generally complied with; most of the decisions of the ICJ have also been implemented, if not directly, by subsequent diplomatic means based on the decision of the Court. In any case non-compliance has not caused serious problems to the maintenance of international peace and stability. Political and military issues have been more of a threat to international peace and stability than non-compliance with judicial decisions.

States normally want to look good in the community of nations. They want to be seen as law abiding. Technology is continuing to have an accelerating impact on international law-making and law enforcement. A serious misdeed of a state can be world news and a focus not only for comment and action by other states but also by civil society. This is a potent power in enforcement of the few decisions which are not complied with.

The argument may continue on the efficiency of developing a world mechanism for the enforcement of binding decisions of international Courts, but for the moment it does not appear to be a pressing issue. Judicial settlement of disputes is but a part, and a minor part for that matter, in the international system. Non-compliance is not peculiar only to the international judicial system. Non-compliance is more serious in other areas of international relations, including non-compliance with decisions and resolutions of important international organs such as the General Assembly of the United Nations and the Security Council. There appears to be no possibility that an effective mechanism can be established to be respected by all states, particularly by the super-powers. It is idle to believe the United States can be compelled by any world mechanism to comply with any decision, unless that world mechanism is the United States itself.

The importance of decisions of international courts lies in the development and strengthening of international law. In other words, the decisions of international courts contribute enormously to the development of new global values which will make it easier to accept rules without the need for enforcement. The contribution of the ICJ to the international law of the sea is a good example. The current law of the sea is principally a creature of truly global negotiations and the input from decisions of the ICJ is significant, particularly in the areas of fisheries and the continental shelf. The decisions are also useful in facilitating the resolution of disputes by diplomatic means. They are the basis

for the maintenance of peace and security rather than a source of threat to peace and security.