

Part 5
Post Judgment

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Patience and Perseverance: Time and Compliance with Inter-State Judicial Decisions

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1 Introduction

Let us consider three recent views of post-judgment or post-order compliance with decisions of the International Court of Justice.¹

In 2018, then ICJ President Yusuf addressed the Royal Academy of Belgium on 'The strengths and challenges for supranational justice: the growing role of the International Court of Justice'.² He observed, 'Compliance with the Court's judgments is not only satisfactory, but *nearly total*, even though there might exist certain delays.'³ He gave the example of Nicaragua's payment of monetary compensation to Costa Rica for environmental damage caused in the border area between them following certain military activities.⁴

In 2022, the ICJ ordered that 'The Russian Federation shall immediately suspend the military operations that it commenced on 24 February 2022 in the territory of Ukraine'.⁵ The Kremlin spokesperson immediately rejected the Order: 'No, we will not be able to take this decision into account. The International Court of

1 I adopt Paulson's definition of 'acceptance of the judgment as final and reasonable performance in good faith of any binding obligatio: Colter Paulson, "Compliance with Final Judgments of the International Court of Justice", 98(3) *American Journal of International Law* (2004), 434.

2 H.E. Mr Abdulqawi Ahmed Yusuf, 'The strengths and challenges for supranational justice: the growing role of the International Court of Justice' (Brussels, 12 November 2018), 5 <<https://www.icj-cij.org/public/files/press-releases/0/000-20181112-PRE-01-00-EN.pdf>> accessed 6 June 2024.

3 *Ibid.* (emphasis added).

4 *Ibid.*

5 *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Order of 16 March 2022.

Justice has such a concept such as the consent of the parties. There can be no consent here'.⁶

But the Ukrainian Foreign Affairs spokesperson gave a different view. He observed that 'one day' Russia will choose to return to the 'family of civilised nations' and when it does, the price of re-admission will be *compliance* in full with legal rulings, such as the Provisional Measures Order.⁷

Each of these views can be considered accurate, depending on the context and the moment in time at which we assess them. I will address three themes: (1) the overall picture of compliance with ICJ Judgments.; (2) some factors that affect the chances of compliance; and (3) the concept of undue delay.

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2 Overall Picture of Compliance with ICJ Judgments

2.1 Long Term Perspective

Viewed over the long term, there is a high level of implementation of the International Court's judgments. Studies by Paulson (2004), Schulte (2004), Llamzon (2008) and Jones (2012) have found that cases of non-compliance are rare. Following an empirical study, Paulson found that 'final judgments receive a great deal of deference' and the 'willingness to appear before the Court relates directly to compliance.'⁸ Schulte noted that there has been 'a generally satisfactory compliance record for judgments', and that "the examination of the practice has revealed a surprisingly big difference between the negative record for provisional measures and the largely positive one for judgments."⁹ Llamzon similarly found that "the recent compliance record of ICJ judgments is much less delinquent than is often

6 Sofia Stuart Leeson, "Russia rejects international court ruling to stop invasion of Ukraine", *Euractiv* (2022) < <https://www.euractiv.com/section/europe-s-east/news/russia-rejects-international-court-ruling-to-stop-invasion-of-ukraine/> > accessed 6 June 2024.

7 See Monacle Radio, 'The Globalist' (Apple Podcasts) <<https://podcasts.apple.com/au/podcast/the-globalist/id474763182>> accessed 6 June 2024 (*emphasis added*)-.

8 Colter Paulson, *supra* note 1, at 434, 460.

9 Constanze Schulte, *Compliance with Decisions of the International Court of Justice* (2004), 403, 418.

portrayed.” Thus, overall, the ICJ enjoys ‘substantial compliance with its judgments.’¹⁰

According to commentators, the ICJ’s 1984 *Nicaragua*¹¹ judgment marked a ‘paradigm shift as the last in a series of instances of defiance and non-appearance’.¹² Jones, for example, notes that the ‘modern era’ of ICJ jurisprudence (defined as the ‘aggregation of cases’ considered post-*Nicaragua*) has been met with ‘substantial compliance’ and that ‘[d]irect, defiant noncompliance, where a state deliberately and ceaselessly rejects a decision of the Court and refused to implement its judgment, has not occurred in any case.’¹³ Jones links this to a number of factors that have arisen in the last 40 years:

Pressure from the international community and the presence of international organizations raise the reputation costs associated with noncompliance, thereby minimizing the risk of disobedience with judgments. Defiant noncompliance occurs where a judgment is in discord with a state’s self-interest or threatens its autonomous regime. Problems for implementation may also occur where judgments are ambiguous, but such complications are not a result of defiance. Instances of noncompliance can be cured if the subject matter is sufficiently international and there is ample external political pressure, especially where the presence of a mutually shared interest, a close relationship, or an extant or anticipated military conflict has increased the state’s need for a definitive solution. Judgments that entail compromise or allow for cooperative efforts are more easily implemented,

10 Aloysius P. Llamzon, “Jurisdiction and Compliance in Recent Decisions of the International Court of Justice”, 18(5) *European Journal of International Law* (2008), 815, 846, 852.

11 *Military and Parliamentary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Judgment, I.C.J. Reports 1986, p. 14.

12 Aloysius P. Llamzon, supra note 10, at 846: “not a single instance of open defiance of ICJ final judgments has occurred since Nicaragua. This suggests that the recent compliance record of ICJ judgments is much less delinquent than is often portrayed”.

13 Heather Jones, “Why Comply? An Analysis of Trends in Compliance with Judgments of the International Court of Justice since *Nicaragua*”, 12 *Chicago-Kent Journal of International and Comparative Law* (2012), 57, 58, 87.

regardless of whether the compromise is designated by the Court's judgment or, alternatively, is achieved through subsequent cooperation between the parties.¹⁴

Llamzon, by contrast, attributes the increased rate of compliance with the Court's approach to its jurisdiction, rather than the content of the judgments themselves. He notes 'one may briefly speculate that much [of the increased compliance] has much to do with the ICJ's more circumspect attitude towards its own jurisdiction in response to the institutional challenges the aftermath of *Nicaragua* presented.'¹⁵

Since the *Nicaragua* judgment, however, Kenya, Venezuela and Russia have also failed to appear in ICJ proceedings, and according to these earlier studies, five judgments since *Nicaragua* have been met with 'less compliance.'¹⁶

The first is the *Land, Island, and Maritime Frontier Dispute (El Salvador/Honduras; Nicaragua Intervening)*,¹⁷ which concerned a land and maritime boundary that had been disputed for over a century. In 1992, the ICJ assigned around 300 square kilometres, and access to the Pacific, to Honduras and 140 square kilometres, as well as two of the three islands at issue, to El Salvador. Several disputes then arose between the two parties in the border regions delimited by the Court, and Honduras, on multiple occasions, urged El Salvador to comply with the ICJ's judgment.¹⁸ In September 2002, El Salvador filed an application for revision of the final judgment on the basis of new information, which was rejected by the ICJ in 2003.¹⁹ After some attempts, official border

14 *Ibid.*, 87-88.

15 Aloysius P. Llamzon, *supra* note 10, at 846.

16 Colter Paulson, *supra* note 1, at 436.

17 *Land, Island, and Maritime Frontier Dispute (El Salvador/Honduras; Nicaragua Intervening)*, *Judgment*, *I.C.J. Reports 2002*, p. 350.

18 Letter Dated 28 November 2000 from the Permanent Representative of Honduras to the United Nations Addressed to the Secretary-General, UN Doc. S/2000/1142, annex (1 Dec 2000).

19 *Application for Revision of the Judgment of 11 September 1992 in the Case Concerning Land, Island, and Maritime Frontier Dispute (El Salvador/Honduras; Nicaragua Intervening) (El Salvador v. Honduras)*, *Judgment*, *I.C.J. Reports 2003*, p. 392.

demarcation was completed in 2006.²⁰ Paulson, however, noted that '[a]lthough both countries accepted the Judgment as final and binding, the Honduran allegations, the repeated failure of demarcation agreements, and the continuing border problems suggest that El Salvador may not be completely fulfilling its obligations to execute the judgment reasonably and in good faith. Since most of the problems of implementation stem from failures of negotiations, this result may amount to mutual noncompliance or simply failed good faith negotiation.'²¹

The second is the *Territorial Dispute (Libya/Chad)* case,²² in which the Court considered the war over the Aouzou Strip. It awarded the entire Strip to Chad.²³ Libya initially rejected the verdict and reportedly reinforced its troops in the area. However, after negotiation, the parties reached an agreement on the implementation of the Judgment. In May 1994, it was reported that Libya had withdrawn the last of its troops.²⁴ However, reports have since surfaced of a continued Libyan presence on the Aouzou, consisting of Libyan nationals and Libyan-supported Chadian rebels.²⁵ It has been suggested that Libya's non-compliance was due to a lack of attention, and therefore pressure, from the international community, in its peaceful acceptance of the judgment.²⁶

The third is the *Gabcikovo-Nagymaros Project (Hungary/Slovakia)* case, which concerned a 1977 treaty between

20 Sovereign Limits, 'El Salvador-Honduras' <<https://sovereignlimits.com/boundaries/el-salvador-honduras-land#:~:text=The%20International%20Court%20of%20Justice,its%20complete%20demarcation%20in%202006>> accessed 6 June 2024.

21 Colter Paulson, *supra* note 1, at 439.

22 *Territorial Dispute (Libya Arab Jamahiriya/Chad)*, Judgment, *I.C.J. Reports* 1994, p. 6.

23 *Ibid.*, p. 40.

24 Report of the Secretary-General on the United Nations Aouzou Strip Observer Group, UN Doc. S/1994/672 (6 June 1994).

25 Colter Paulson, *supra* note 1, at 441.

26 Colter Paulson, *supra* note 1, at 443: "Libya received very little praise in the international media for its peaceful acceptance of the judgment.¹⁶ Perhaps if the international community had celebrated its compliance with what must have been a tough judgment to accept, Libya would have felt more pressure afterward to refrain from quietly circumventing it."

Hungary and Czechoslovakia to build a system of locks and dams on the Danube River, which Hungary abandoned in 1989 for fear of damaging Budapest's water supply, as well as other environmental concerns. Slovakia began damming the river in 1992. The ICJ found in favour of Slovakia, and clarified that the 1977 treaty was valid and imposed a duty on the parties to negotiate the 'modalities' of implementing it in good faith.²⁷ However, the Court did note that 'newly developed norms of environmental law [were] relevant for the implementation of the Treaty'.²⁸ Negotiations began after the 1997 judgment but broke down in 1998, and then resumed after Slovakia filed a request with the ICJ for an additional judgment requiring the parties to 'resume their negotiations in good faith so as to expedite their agreement on the modalities for achieving the objectives of the Treaty of 16 September 1977.'²⁹

Negotiations appear to continue, albeit slowly, with the last press release on the topic issued over five years ago.³⁰

The fourth is *LaGrand (Germany v. United States of America)*, where the US executed Walter LaGrand (a German national tried for murder and sentenced for death in Arizona) in violation of the ICJ's provisional measures order, which had found that '[t]he United States of America should take all measures at its disposal to ensure that Walter LaGrand is not executed pending a final decision in these proceedings.'³¹ The Court subsequently confirmed that this order was binding on the US.³² Similarly, in *Avena and Other Mexican Nationals (Mexico v. US)*, the US executed Jose Medellin despite the ICJ's 2004 judgment

27 *Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, p. 7, para. 131.

28 *Ibid.*, para. 112.

29 International Court of Justice, "*Gabcikovo-Nagymaros Project (Hungary/Slovakia)*: Slovakia requests an additional judgment", Press Release No.98/29, 3 September 1998.

30 International Court of Justice, "*Gabcikovo-Nagymaros Project (Hungary/Slovakia)*: The Court places on record the discontinuance by Slovakia of the procedure begun by means of its Request for an additional judgment", Press Release No. 2017/31, 21 July 2017.

31 *LaGrand (Germany v. United States of America)*, Provisional Measures, I.C.J. Reports 1999, p. 9.

32 *LaGrand (Germany v. United States of America)*, Judgment, I.C.J. Reports 2001, p. 466, para. 128.

unanimously finding that ‘should Mexican nationals [...] be sentenced to severe penalties, without their rights under Article 36, paragraph 1(b) of the Convention having been respected, the United States of America shall provide, by means of its own choosing, review and reconsideration of the conviction and sentence’.³³

Finally, the dispute regarding the *Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria; Equatorial Guinea Intervening)*,³⁴ concerned the control of the Bakassi Peninsula and areas in Lake Chad Basin, which had been contested by Nigeria and Cameroon for at least twenty years. The ICJ awarded Cameroon the Lake Chad boundary and the Bakassi Peninsula, and Nigeria won the maritime portion of the judgment, and much of the boundary between Lake Chad and Bakassi. After the judgment was handed down, the UN issued a press statement explaining that the Presidents of Nigeria and Cameroon had agreed to abide by the ICJ judgment, which Nigeria contested.³⁵ However, an agreement on a comprehensive resolution of the dispute was concluded in 2006.³⁶ In 2022, Nigeria and Cameroon were reported to have agreed to seek ICJ assistance on clarifying some ambiguities in the Judgment.³⁷ At the time of writing, the parties have not approached the Court.

2.2 Short Term Perspective

Looking at post-judgment compliance with the short term perspective, the picture of compliance is more mixed. Of the 20 final judgments over the past decade, five judgments have been

33 *Avena and Other Mexican Nationals (Mexico v. United States of America)*, I.C.J. Reports 2004, p. 12, para. 153(11). See also para. 153(9): “the appropriate reparation in this case consists in the obligation of the United States of America to provide, by means of its own choosing, review and reconsideration of the: convictions and sentences of the Mexican nationals.”

34 *Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria; Equatorial Guinea Intervening)*, Judgment, I.C.J. Reports 2002, p. 303.

35 “Nigeria Defends Defiance of World Court Border Ruling”, UN Press Release SG/T/2344, 10 September 2002.

36 Duncan B. Hollis, “Score One for the ICJ (with a little help from the Secretary General)”, *Opinio Juris* (16 August 2006).

37 B Olabimtan, “Nigeria, Cameroon seek judgment clarification over Bakassi peninsula”, *The Cable* (28 August 2022).

met with full compliance.³⁸ For example, in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* (compensation phase), the Court found that ‘the total sum is to be paid in five annual instalments of US \$65,000,000 due on 1 September of each year, from 2022 to 2026’.³⁹ On 16 September 2022, it was reported that Uganda had paid its first instalment of the sums due.⁴⁰

Four judgments have been met with partial compliance.⁴¹ For example, after the ICJ handed down its judgment in *Maritime*

38 See: *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, I.C.J. Reports 2015, p. 665. Nicaragua withdrew its troops in accordance with the 2015 judgment: Meghan Gilbert, “International Court Settles Land, Maritime Disputes between Costa Rica and Nicaragua”, *Sovereign Limits* (16 February 2018). See also *Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Judgment, I.C.J. Reports 2013, p. 281. This decision has been accepted by both parties: Tom Fawthrop, “Who does the Preah Vihear temple belong to”, *Aljazeera* (4 June 2011). See also *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica/Nicaragua)*, Judgment, I.C.J. Reports 2018, p. 15. The Court fixed the amount of compensation due from Nicaragua at \$378,890.59, which was paid by Nicaragua on 8 March 2018: International Court of Justice, “*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica/Nicaragua)*, Question of Compensation: Nicaragua transfers the total amount of compensation awarded to Costa Rica”, Press Release No. 2018/15, 23 March 2018. See also *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, *Reparations*, Judgment, I.C.J. Reports 2022, p. 13. Uganda has paid its first instalment of the sums due (see below). See also *Dispute Over the Status and the Use of the Waters of the Silala (Chile v. Bolivia)*, Judgment, I.C.J. Reports 2022, p. 614. Bolivia and Chile have issued statements accepting the Court’s judgment: Chilean Ministry of Foreign Affairs, “*Chile values ruling of the International Court of Justice that confirms that the Silala River is of international character*” (1 December 2022); Ruben Atahuichi, “*Cancelier Mayta considera que el fallo de la CIJ sobre el Silala es ‘positivo’ para Bolivia*”, *La Razón* (1 December 2022).

39 See also *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, *Reparations*, Judgment, I.C.J. Reports 2022, p. 13

40 “*The Week That Was: Uganda pays DRC sh248b for war reparations*”, *New Vision* <https://www.newvision.co.ug/category/news/the-week-that-was-uganda-pays-drc-sh248b-for-NV_143326#google_vignette> accessed 6 June 2024.

41 *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Judgment, I.C.J. Reports 2022, p. 266. The parties have accepted at least some parts of the judgment: “*Nicaragua v. Colombia: World Court Orders Sea Map Adjustments*”, *Political Geography Now* (16 July 2022). See also *Jadhav (India v. Pakistan)*,

Dispute (Peru v. Chile),⁴² both States rejected parts of the Judgment but created a binational implementation commission to smooth over the most sensitive points of the ICJ judgment.⁴³

Four judgments have been met with no compliance.⁴⁴ For example, after *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*,⁴⁵ Kenya rejected the ICJ's ruling, and maintained that its own original boundary claim was still valid.⁴⁶

Five judgments imposed no obligation.⁴⁷ For example, in *Equatorial Guinea v France*, the Court found that France had 'not

Judgment, I.C.J. Reports 2019, p. 418. Pakistan officially demonstrated that it had provided consular access on 02 September 2019 to India for Mr Jadhav. Pakistan subsequently passed a Bill providing the right to appeal to Mr Jadhav, which India challenged as failing to create machinery to facilitate effective review and reconsideration of Jadhav's case: see Omar S Abdellatif, "2019: ICJ Judgments Jadhav (India v. Pakistan) Final Compliance Report" UN Compliance Research Group (2021) <https://figshare.com/articles/online_resource/2019_ICJ_Judgments_Jadhav_India_V_Pakistan_Final_Compliance_Report/13651463> accessed 6 June 2024; "Comply with ICJ verdict in Jadhav case, Pakistan told", Tribune India (2021). See also *Maritime Dispute (Peru v. Chile), Judgment, I.C.J. Reports 2014*, p. 3. Both States rejected parts of the judgment but created a bilateral implementation commission for the judgment to smooth over sensitive points (see below). See also *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan coast (Nicaragua v. Colombia), Judgment, General List No. 154*, 13 July 2023. Colombia, for its part, has accepted the judgment: "[UN court rejects Nicaraguan claims in maritime spat with Colombia](#)", Aljazeera (13 July 2003).

42 *Maritime Dispute (Peru v. Chile), Judgment, I.C.J. Reports 2014*, p. 3.

43 Walter Alrévalo Ramírez, "Resistance to territorial and maritime delimitation judgments of the International Court of Justice and clashes with 'territory clauses' in the Constitutions of Latin American states", 35 *Leiden Journal of International Law* (2022), 185, 203-204.

44 *Whaling in the Antarctic (Australia/Japan: New Zealand intervening), Judgment, I.C.J. Reports 2014*, p. 226. Japan created the New Scientific Whale Research Program in the Antarctic Ocean, which took place in 2015-2016 after the ICJ terminated the previous whale research program (JARPA II). In 2017, Japan also proposed the New Scientific Whale Research Program in the western North Pacific (NEWREP-NP). Indi-Hodgson-Johnston, "Murky waters: Why is Japan still whaling in the Southern Ocean?", *The Conversation* (17 January 2017). See also *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya), Judgment, I.C.J. Reports 2021*, p. 206 (see below). See also *Certain Iranian Assets (Iran v. United States of America), Judgment, General List No. 164*, 30 March 2023. The Court left Iran and the US to reach an agreeable amount of compensation on their own. Both States have considered the judgment a "victory", but there have been no reports on the initiation of compensation negotiations as of October 2023: "ICJ orders US to pay compensation for freezing Iranian assets", Aljazeera

breached its obligations under the Vienna Convention on Diplomatic Relations' regarding a building alleged to be Equatorial Guinea's embassy.⁴⁸

3 A Comparison with Dispute Resolution under UNCLOS

It is interesting to compare the compliance rate of the ICJ with dispute resolution under UNCLOS. 15 cases reached final judgment under ITLOS or Annex VII tribunal. All except one appear to have been complied with, and generally quite quickly.⁴⁹

(30 March 2023).

- 45 *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, Judgment, I.C.J. Reports 2021, p. 206.
- 46 "Somalia v. Kenya: 3 maps Explaining the Maritime Dispute & Court Ruling", Political Geography Now (13 October 2021).
- 47 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, I.C.J. Reports 2015, p. 3; *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Judgment, I.C.J. Reports 2018, p. 507; *Appeal Relating to the Jurisdiction of the ICAO Council under Article II, Section 2, of the 194 International Air Services Transit Agreement (Bahrain, Egypt and United Arab Emirates v. Qatar)*, Judgment, I.C.J. Reports 2020, p. 172; *Appeal Relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation (Bahrain, Egypt, Saudi Arabia and United Arab Emirates v. Qatar)*, Judgment, I.C.J. Reports 2020, p. 81; *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Judgment, I.C.J. Reports 2020, p. 300.
- 48 *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Judgment, I.C.J. Reports 2020, p. 300, para. 126(2).
- 49 *The "Juno Trader" Case (Saint Vincent and the Grenadines v. Guinea-Bissau)*, Judgment, ITLOS Reports 2004, p. 17F; *Barbados v. Republic of Trinidad and Tobago*, Award, PCA Case No. 2004-02, 2006; *The "Hoshinmaru" Case (Japan v. Russian Federation)*, Judgment, ITLOS Reports 2007, p. 18; *The "Tominmaru" Case (Japan v. Russian Federation)*, Judgment, ITLOS Reports 2007, p. 74; *Guyana v. Suriname*, Award, PCA Case No. 2004-04, 2007; *Dispute Concerning Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, ITLOS Reports 2012, p. 4; *The M/V "Louisa" Case (Saint Vincent and the Grenadines v. Kingdom of Spain)*, Judgment, ITLOS Reports 2013, p. 4; *The M/V "Virginia" Case (Panama/Guinea-Bissau)*, Judgment, ITLOS Reports 2014, p. 4; *Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India)*, Award, PCA Case No. 2010-16, 2014; *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award, PCA Case No. 2011-03, 2015; *Arctic Sunrise Arbitration (Netherlands v. Russian Federation)*, Award on

In *Ghana v Cote d'Ivoire*⁵⁰ after the ITLOS judgment on 23 September 2017, both states issued a joint *communiqué* emphasising that they would comply with the decision:

Cote d'Ivoire and Ghana seize the opportunity to reiterate the mutual commitment of the two countries to abide by the terms of this decision from the Special Chamber and to fully collaborate for its implementation.

The two countries affirm the strong will to work together to strengthen and intensify their brotherly relationships of cooperation and good neighbourliness.⁵¹

On 17 October 2017, Ghana and Côte d'Ivoire announced the establishment of a joint Committee to implement the ITLOS finding.⁵² The joint *communiqué* said:

Both Presidents acknowledged the spirit of brotherliness with which the maritime dispute between the two countries was handled from the beginning and, in this connection, the two leaders expressed their commitment to ensure the smooth implementation of the ruling by the Special Chamber of the International Tribunal of the Law of the Sea (ITLOS) on the delimitation of the maritime boundaries between the two countries.

In *Enrica Lexie (Italy v India)*, an arbitral tribunal established

compensation, PCA Case No. 2014-02, 2017; *Dispute Concerning Delimitation of the Maritime Boundary Between Ghana and Côte D'Ivoire in the Atlantic Ocean (Ghana/ Côte D'Ivoire)*, Judgment, ITLOS Reports 2017, p. 4; *Duzgit Integrity Arbitration (Malta v. São Tomé and Príncipe)*, Award on reparation, PCA Case No. 2014-07, 2019; *The "Enrica Lexie" Incident (Italian Republic v. Republic of India)*, Award, PCA Case No. 2015-28, 2020.

50 *Dispute Concerning Delimitation of the Maritime Boundary Between Ghana and Côte D'Ivoire in the Atlantic Ocean (Ghana/Côte D'Ivoire)*, Judgment, ITLOS Reports 2017, p. 4.

51 Mabel Aku Banesh, "[Ghana, Côte D'Ivoire agree to abide by ITLOS decision](https://www.graphic.com.gh/news/general-news/ghana-cote-d-ivoire-in-agreement-to-abide-by-itlos-decision.html)", Graphic Online (2017) <<https://www.graphic.com.gh/news/general-news/ghana-cote-d-ivoire-in-agreement-to-abide-by-itlos-decision.html>> accessed 6 June 2024.

52 "[Ghana, Ivory Coast set up joint Committee to implement ITLOS ruling](#)", Citi, 17 October 2017.

under Annex VII found in May 2020 that Italy had not violated international law, and that ‘are entitled to immunity in relation to the acts that they committed during the incident of 15 February 2012, and that India is precluded from exercising its jurisdiction over the Marines’. The tribunal ordered India to pay compensation.⁵³ The Indian Supreme Court on 15 June 2021 passed Orders implementing the Award, quashing the criminal proceedings against the Italian marines involved in the incident, and disposed of all other pending matters before the Court. The Court also mandated payment of compensation to families of the Indian nationals who had died on the Indian vessel:⁵⁴

We request the Hon’ble Chief Justice of the Kerala High Court to nominate a Judge to pass appropriate order of disbursement/investment of the amount to be paid to the heirs of each deceased (Rupees Four Crores each) so as to protect the interest of the heirs and ensure that the compensation is duly received by the heirs and not diverted/misappropriated. The order of disbursement/investment be passed after hearing the heirs of each deceased and appropriate order be passed, protecting the best interest of the heirs of each deceased. The remaining amount of Rs. Two Crores be paid to the owner of the boat – St. Antony by an account payee cheque.

In *Arctic Sunrise*,⁵⁵ Russia did not appear in the proceedings before the tribunal established under Annex VII. On 10 July 2017, the tribunal rendered an award on compensation, in which it found that Russia was obliged to pay the Netherlands EUR 5.4 million in damages, based on its finding that Russia was responsible for breach of UNCLOS.⁵⁶ On 17 May 2019, the Netherlands and Russia issued a joint *communiqué* informing that

53 *The “Enrica Lexie” Incident*, supra note 50, at para. 1094.

54 Supreme Court of India, *Latorre v. Union of India* (15 June 2021), IA No. 58644/2020, para. 8 < <https://indiankanoon.org/doc/124696983/>> accessed 6 June 2024.

55 *Arctic Sunrise Arbitration (Netherlands v. Russian Federation)* (Award on Compensation) PCA Case No. 2014-02 (10 July 2017).

56 *Ibid.*

they had agreed on a settlement.⁵⁷

One well-known case was met with non-compliance. In the *South China Sea Arbitration*, in 2016, a tribunal established under Annex VII found that China had violated the Philippines's sovereign rights in the latter's exclusive economic zone.⁵⁸ The Philippines had brought the case against China after it had taken control of the Scarborough Shoal, located 200 km off the Philippines and inside its exclusive economic zone. China's Foreign Ministry publicly denounced the award as 'null and void and [with] no binding force', and also said that China '[d]id not accept and [did] not recognise' the ruling.⁵⁹ ~~The Former President Duterte of the Philippines Philippines has also~~ dismissed the award as a 'piece of paper' that would 'take the back seat' in its bilateral negotiations with China, ~~but the current government has upheld the significance of the award even though it initially hailed the ruling as a 'milestone decision'.~~⁶⁰

~~However,~~ China has, ~~in practice on occasion~~, allowed Filipino fishers to return to the Scarborough Shoal ~~this year~~, though the shoal has recently been subject to controversy, with the Philippines launching a 'special mission' after expressing outrage upon discovery of a 300-metre-long-ball-buoy barrier policed by China's coastguard near the shoal. The special mission, aimed at maintaining the Philippines' presence in the shoal, reportedly entailed the coastguard entering the shoal, diving down, cutting the barrier, and removing its anchor.⁶¹

What could explain the higher rate of compliance with the cases

57 Alex Oude Elferink, "Settlement of the Dispute concerning the Arctic Sunrise - A belated recognition of the relevance of the award on the merits in the Arctic Sunrise case?", *NCLOS Blog*, 8 July 2019.

58 Goh Sui Noi, Raul Dancel, Kor Kian Beng, and Hermyn Chow, "*China has no historic rights to resources in South China Sea, says UN-backed tribunal*", *The Straits Times*, 12 July 2016.

59 Ibid.

60 Hao Duy Phan and Lan Ngoc Nguyen, "The South China Sea Arbitration: Bindingness, Finality, and Compliance with UNCLOS Dispute Settlement Decisions", 8 *Asian Journal of International Law* (2018), 36; ~~- Karen Lema and Mikhail Flores, 'Philippines rejects 'use of force' to undermine its South China Sea interests', *Reuters*, 12 July 2024.~~

61 Martin Petty, "What is the Scarborough Shoal in the South China Sea and why are China and the Philippines disputing it?", *Reuters*, 27 September 2023.

under UNCLOS? It might be that the disputes are often technical and often single-issue in nature, such as delimitation or prompt release. It might also be a result of parties having a choice of methods (ICJ, ITLOS or Annex VII arbitration) under UNCLOS. Might it be that there is a greater chance of compliance where the judgment does not require the resolution of the *entire* dispute? Judgments which answer only limited questions within broader disputes may still be complied with, without the overarching dispute being settled. For example, in the *Application of the Interim Accord of 13 September 1995 (Former Yugoslav Republic of Macedonia v. Greece)*, the Court found that Greece, 'by objecting to the admission of the former Yugoslav Republic of Macedonia to NATO, has breached its obligation under Article 11, paragraph 1, of the Interim Accord of 13 September 1995'.⁶² Greece complied with the ICJ's ruling in February 2019, when it became the first State to ratify Macedonia's membership of NATO.⁶³

4 Factors Affecting Compliance

Previous studies of ICJ case law found that there was a weak or no correlation between the basis of consent and the compliance with the judgment. I will look to other factors affecting compliance: engagement of domestic institutions, clarity of the judgment, deferral of the compensation phase, the absence of monitoring mechanism, and the role of third parties.

4.1 Engagement of Domestic Institutions

Compliance can be delayed or even blocked by the domestic courts of State, with constitutional courts playing a prominent role in recent years. For example, following the 2012 *Jurisdictional Immunities* Judgment,⁶⁴ in which the ICJ found that Italian court judgments had violated Germany's immunity from jurisdiction and enforcement, the Italian Constitutional Court issued a judgment in 2014: it declared the ICJ's ruling incompatible with the right to

62 *Application of the Interim Accord of 13 September 1995 (Former Yugoslav Republic of Macedonia v. Greece)*, Judgment, I.C.J. Reports 2011, p. 644, para. 170(2).

63 Lefteris Papadimas and George Georgiopoulos, "[After years of stalling, Greece oks Macedonia in NATO](#)", Reuters, 8 February 2019.

64 *Jurisdictional Immunities (Germany v. Italy: Greece intervening)*, Judgment, I.C.J. Reports 2012, p. 99.

access to justice (under art 24 of the Italian Constitution), in combination with fundamental human rights (under art 2), including the right to access to remedy.⁶⁵ State immunity would deprive the Italian claimants of any remedy whatsoever, resulting in what the Court called the 'absolute sacrifice' of judicial protection.⁶⁶

Germany has brought a new case against Italy for allegedly failing to respect its jurisdictional immunity as a sovereign State.⁶⁷ The Court of Rome had ordered execution over German properties in Rome, where enforcement immunity was not deemed applicable because first the judicial decisions to be enforced dealt with crimes committed the Second World War, and second because Germany had allegedly failed to prove the public purpose of the respective properties, such as the German Historical Institute, the German Archaeological Institute, the Goethe Institute, and the Germanic School). In response to this and other, similar, cases, Germany turned once again to the ICJ.⁶⁸ Since then, the Italian government has been looking at how to reduce tensions with the German government, recognising the victims' rights to compensation, without undermining the Constitutional Court's stance.⁶⁹ Therefore, the Italian Government introduced a Decree-Law (later converted into law by the Parliament) on 30 April 2022 (the day after Germany had applied to the ICJ), establishing a fund for reparations for war crimes and crimes against humanity committed by the Third Reich's armed forces on Italian territory or against Italian citizens between 1 September 1939 and 8 May 1945.⁷⁰ As a result, Germany

65 Italian Constitutional Court, Judgment No. 238 (22 October 2014), para. 3.1, <https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S238_2013_en.pdf> accessed 6 June 2024.

66 Italian Constitutional Court, Judgment No. 238 (22 October 2014), para. 3.4 <https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S238_2013_en.pdf> accessed 6 June 2024.

67 *Questions of Jurisdictional Immunities of the State and Measures of Constraint Against State-owned Property (Germany v. Italy)*, Application Instituting Proceedings, General List No. 183, 2022.

68 *Questions of Jurisdictional Immunities of the State and Measures of Constraint Against State-owned Property (Germany v. Italy)*, Application Instituting Proceedings, General List No. 183, 2022.

69 Andrea Maria Pelliconi, "[The Italian Constitutional Court's new decision on state immunity and the ICJ Germany vs Italy No. 2](#)", *EJIL:Talk!*, 2022.

70 Decree-Law 30 April 2022, n. 36: Further urgent measures for the

withdrew its request for provisional measures on 6 May 2022.⁷¹

In an example from the United States, following *Avena*, the US Supreme Court found that ICJ Judgment deserved ‘respectful consideration’, but its interpretation of the Vienna Convention on Consular Relations was not binding on US courts. It was not directly enforceable federal law.⁷²

In both cases, we can contrast the domestic judicial approach with the executive and legislature’s actions. In Italy, in 2012 the parliament passed a law that sought to debar civil complaints against Germany, victims or their relatives.⁷³ As mentioned above, the Italian Parliament enacted Law 79/2022 that sets up a Fund for the reparation of injuries suffered by victims of war crimes and crimes against humanity involving the infringement of fundamental individual rights, committed by the Third Reich’s armed forces on Italian territory or against Italian citizens. The Fund will distribute tens of millions.⁷⁴

In the United States, then President George W Bush had issued ordering courts to give effect to the ICJ’s *Avena* Judgment:

The United States is a party to the Vienna Convention on Consular Relations (the “Convention”) and the Convention’s Optional Protocol Concerning the Compulsory Settlement of Disputes (Optional Protocol), which gives the International Court of Justice (ICJ) jurisdiction to decide disputes concerning the “interpretation and application” of the Convention.

I have determined, pursuant to the authority vested in me as President by the Constitution and laws of the United States

implementation of the National Recovery and Resilience Plan (PNRR) (22G00049).

71 International Court of Justice, “Questions of Jurisdictional Immunities of the State and Measures of Constraint Against State-owned Property (Germany v. Italy): Germany withdraws its request for the indication of provisional measures”, Press Release No. 2022/18, 6 May 2022.

72 *Sanchez-Llamas v. Oregon*, 126 S.Ct. 2669, United States Supreme Court, June 28, 2006.

73 Lorenzo Gradoni, “*Is the Dispute between Germany and Italy over State Immunities Coming to an End (Despite Being Back at the ICJ)?*”, *EJIL:Talk!*, 10 May 2022.

74 Law 79/2022, 29 June 2022: Further urgent measures for the implementation of the National Recovery and Resilience Plan (PNRR).

of America, that the United States will discharge its international obligations under the decision of the International Court of Justice in the Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America (Avena), 2004 I.C.J. 128 (Mar. 31), by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision.⁷⁵

It appears that the governments tend to act more quickly than the judiciary in response to an ICJ judgment. However, in democracies with judicial review, the governments' decisions are only a first step towards compliance, which can be undone years later by judicial rulings. Further delays are generated by the back and forth between the ICJ, government, domestic courts, back to the government and, in some cases, back to the ICJ.

4.2 Vagueness in the Court's Judgment

Following the ICJ's Judgment in *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*,⁷⁶ Colombia argued that the ICJ did not actually order Colombia to cease its presence in Nicaraguan waters, only its interference with Nicaraguan vessels and fishing activities. The Court had ordered Colombia to 'immediately cease' its conduct by: (i) by interfering with fishing and marine scientific research activities of Nicaraguan-flagged or Nicaraguan-licensed vessels and with the operations of Nicaraguan naval vessels in Nicaragua's exclusive economic zone; (ii) by purporting to enforce conservation measures in Nicaragua's exclusive economic zone; and (iii) by authorizing fishing activities in Nicaragua's exclusive economic zone.⁷⁷ Colombian representatives have reportedly said that "the ruling [was] mainly in favor of Colombia" because "[judges] did not ask us to cease

75 "President Bush Orders Courts to Give Foreign Nationals on Death Row Further Review", Death Penalty Information Centre, 2005.

76 *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Judgment, I.C.J. Reports 2022, p. 266.

77 *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Judgment, I.C.J. Reports 2022, p. 266, para. 261(2).

our presence in Nicaraguan waters. ... They never ordered us to leave'. The Colombian representative also noted the Court 'has maintained the possibility of the Colombian navy being there and doing operations in the fights against organized crime in the area.'⁷⁸

In this way, the vagueness in the Court's judgment led to an instance of apparent non-compliance.

4.3 Deferring the Compensation Phase

The ultimate conclusion of a case – the calculation of damages – may be delayed for years by the deferral of the compensation phase. This is often at the request of the parties.

In *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, in its application to the Court, the DRC requested that the determination of compensation at a later stage from the decision on the merits. The DRC requested that the Court find that:

the Democratic Republic of the Congo is entitled to compensation from Uganda in respect of all acts of looting, destruction, removal of property and persons and other unlawful acts attributable to Uganda, in respect of which the Democratic Republic of the Congo reserves the right to determine at a later date the precise amount of the damage suffered, in addition to its claim for the restitution of all property removed.⁷⁹

The Court therefore found:

that, failing agreement between the Parties, the question of reparation due to the Republic of Uganda shall be settled by the Court, and reserves for this purpose the subsequent procedure in the case.⁸⁰

78 "Colombia must 'cease' maritime interference: U.N. court", The Hindu, 22 April 2022.

79 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Application Instituting Proceedings, General List No. 116, 1999, 19.

80 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Reports 2005, p. 168, para. 260.

Similarly, in *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*,⁸¹ both parties requested that ‘the amount of the compensation [would] be determined in a subsequent phase’ of the case.⁸²

In *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*,⁸³ both parties requested that the Court authorise them to ‘submit an assessment of the amount of the compensation due to [them] of the amount of the compensation due to [them]’ ‘in a subsequent phase of the proceedings in the event that the two Parties should be unable to agree on the amount thereof within a period of six months following delivery of the judgment.’⁸⁴ The ICJ issued its decision on compensation on 19 June 2012.⁸⁵

4.4 Absence of a Monitoring Mechanism

The political realities of relying on the UN Security Council for monitoring and enforcement under Article 94 of the Charter are well known.⁸⁶ It is a dead letter, and will never be revived as long as the Permanent Five are somehow implicated in a case.

In December 2020, the ICJ announced the adoption of a new Article 11 of its Internal Judicial Practice.⁸⁷ It provides for the

81 *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Judgment, I.C.J. Reports 2015, p. 665; *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Compensation, Judgment, I.C.J. Reports 2018, p. 15.

82 *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Judgment, I.C.J. Reports 2015, p. 665, paras. 49, 51.

83 *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment, I.C.J. Reports 2010, p. 639.

84 *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment, I.C.J. Reports 2010, p. 639, para. 13.

85 *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Compensation, Judgment, I.C.J. Reports 2012, p. 324.

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

87 International Court of Justice, “Adoption of a new Article 11 of the Resolution concerning the Internal Judicial Practice of the Court, on procedures for monitoring the implementation of provisional measures indicated by the Court”, Press Release No. 2020/38, 21 December 2020.

creation of an *ad hoc* committee of three judges to assist the monitoring of the implementation of provisional measures. The committee is to examine the information submitted by the parties, report to the Court, make recommendations, and the Court shall decide on the subsequent actions.⁸⁸

In 2020, in *The Gambia v. Myanmar* the Court ordered measures against Myanmar and to report periodically to the Court. In March 2022, in the *Ukraine v Russia* case, the ICJ ordered provisional measures but did not require Russia to provide a report on implementation. The Court similarly found, in the *Azerbaijan v. Armenia* case, that Azerbaijan's request for the Court to implement provisional measures requiring Armenia to 'provide regular reports on the implementation of provisional measures' was not warranted on the facts.⁸⁹ A similar finding was reached in the Court's conclusion on Armenia's requests in *Armenia v. Azerbaijan*.⁹⁰ The reports and any reaction from the ICJ committee are not public.

In any event, the Court can always use its inherent powers to help manage the outcome of a case. In *Nuclear Tests*, the Court did not regard itself as constrained by the fact that Australia and New Zealand had not, after the French announcement of the conclusion of its testing, discontinued the proceedings under Article 74 of the 1972 Rules. The Court found that 'this does not prevent the Court from making its own independent finding',⁹¹ and it determined that the 'object of the claim has been achieved by other mean',⁹² such as means other than litigation. The Court stated that it saw: 'no reason to allow the continuance of proceedings which it knows are bound to be fruitless. While judicial settlement may provide a path to international harmony

88 Ibid.

89 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan v. Armenia), Provisional Measures, Order of 7 December 2021, I.C.J. Reports 2021*, p. 405, para. 73.

90 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan), Provisional Measures, Order of 7 December 2021, I.C.J. Reports 2021*, p. 361, para. 95.

91 *Nuclear Tests Case (Australia v. France), Judgment, I.C.J. Reports 1974*, p. 253, paras. 54, 57.

92 *Nuclear Tests Case (Australia v. France), Judgment, I.C.J. Reports 1974*, p. 253, paras. 55, 58.

in circumstances of conflict, it is none the less true that the needless continuance of litigation is an obstacle to such harmony.⁹³

4.5 Role of Third-Party Actors Such as Other UN Bodies

Third-party actors can be, and have been, involved in the implementation of an ICJ judgment.

In *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*,⁹⁴ Nigeria initially refused to comply with the ICJ's judgment delimitating the land and maritime boundary between Cameroon and Nigeria, assigning sovereignty of the Bakassi Peninsula to Cameroon, and ordering Nigeria to 'expeditiously and without condition' withdraw its administration, military, and police forces from Cameroon.⁹⁵ However, it was not until 4 years later, after "intensive mediation" involving the UN Secretary General's Office, that the parties finally reached an agreement and Nigeria finally withdrew its forces.⁹⁶ This resolution also came after the UN Secretary General had established a Cameroon-Nigeria Mixed Commission, whose mandate covered '(i) demarcation of the land boundary and delimitation of the maritime boundary between the two countries; (ii) withdrawal of troops and transfer of authority in the Lake Chad area, along the land boundary and in the Bakassi Peninsula; (iii) addressing the situation of populations affected by the demarcation activities; and (iv) development of recommendations on confidence-building measures aiming at promoting peaceful cross-border cooperation.'⁹⁷

93 *Nuclear Tests Case (Australia v. France), Judgment, I.C.J. Reports 1974*, p. 253, para. 58; *Nuclear Tests Case (New Zealand v. France), Judgment, I.C.J. Reports 1974*, p. 477, para. 61.

94 *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 3.

95 *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 3, para. 325(V)(B).

96 "Nigeria, Cameroon Sign Agreement Ending Decades-Old Border Dispute: Sets Procedures for Nigerian Withdrawal from Bakassi Peninsula", United Nations Press Release AFR/1397, 12 June 2006.

97 "Cameroon-Nigeria Mixed Commission", United Nations Office of West Africa <<https://unowa.unmissions.org/cameroon-nigeria-mixed-commission-0>> accessed 6 June 2024.

In *Territorial Dispute (Libya v. Chad)*,⁹⁸ after the ICJ had handed down its judgment granting Chad sovereignty over the Aouzou Strip, the UN Security Council announced in 1995 that it was 'determined to assist the parties in implementing the Judgment of the International Court of Justice'.⁹⁹ The Security Council passed Resolution 915, establishing the United Nations Aouzou Observer Group, to "observe the implementation" of the ICJ's judgment, including through monitoring the full withdrawal of Libyan forces from the Aouzou Strip.¹⁰⁰

Finally, in *Case Concerning the Arbitral Award made by the King of Spain on 23 December 1906 (Honduras v. Nicaragua)*,¹⁰¹ the ICJ found that an arbitral award handed down by the King of Spain in 1906, which confirmed that the boundary between the two States was that one provided by the Mixed Boundary Commission established under the Gamez-Bonilla Treaty, was 'valid and binding' and Nicaragua was 'under an obligation to give effect to it'.¹⁰² In 1961, Nicaragua requested the good offices of the Inter-American Peace Committee in connection with problems that had arisen within its compliance to the ICJ's judgment. The Peace Committee proposed a Basis of Arrangement, which was accepted by Honduras and Nicaragua, and which established the Honduras-Nicaragua Mixed Commission. The Commission, with the collaboration of the Organization of American States, directed the demarcation of the frontier between the two States.¹⁰³

5 Undue Delay

Article 14(3) of the International Covenant on Civil and Political

98 *Territorial Dispute (Libya Arab Jamahiriya/Chad)*, Judgment, I.C.J. Reports 1994, p. 6.

99 UNSC Resolution 915, 4 May 1994.

100 "Aouzou Strip Mandate", United Nations Aouzou Strip Observer Group <<https://unowa.unmissions.org/cameroon-nigeria-mixed-commission-0>> accessed 6 June 2024.

101 *Case Concerning the Arbitral Award made by the King of Spain on 23 December 1906 (Honduras v. Nicaragua)*, I.C.J. Reports 1960, p. 192.

102 Ibid., p. 217.

103 "Honduras v. Nicaragua", 1961(4) *Duke Law Journal* (1961), 548, 553; Decision of the Chairman of the Honduras-Nicaragua Mixed Commission, Decision of 5 August 1961, UNRIAA XXVII, p. 451.

Rights (ICCPR) provides that '[i]n the determination of any criminal charge against him, everyone shall be entitled ... (c) [t]o be tried without undue delay'.

Inter-state proceedings are not criminal trials; the Respondent state does not face detention; it is often the Applicant that is disadvantaged by non-compliance, not the Respondent. However, some elements of the human rights jurisprudence can be instructive.

International human rights bodies apply a four-factor test for an 'undue' delay.¹⁰⁴ First, they look at the complexity of the case. Lengthy proceedings may be required if a case is particularly complex. Therefore, 'the higher the level of complexity, the longer the period of time that will be deemed reasonable'.¹⁰⁵ Complexity can relate to the facts and charges in issue. For example, the Human Rights Committee did not find undue delay in a fraud case that took four and a half years between arrest and judgment because 'investigations into allegations of fraud may be complex.'¹⁰⁶ The sensitive nature of the offences charged is another relevant factor.¹⁰⁷ Complexity can also relate to the proceedings themselves, which may be due to a large number of defendants, witnesses and/or victims,¹⁰⁸ the joinder of several cases,¹⁰⁹ the time that elapsed since the crime took place,¹¹⁰ the amount and complexity of evidence,¹¹¹ and (exceptionally), the

104 See, generally, Amal Clooney and Philippa Webb, *The Right to a Fair Trial in International Law* (2021), 389.

105 Ibid., 389, 398. See also HRC, *Sextus v. Trinidad and Tobago* (Comm. no. 818/1998), 16 July 2001, para. 7.2.

106 HRC, *Wolf v. Panama* (Comm. no. 289/1988), 26 March 1992, para. 6.4.

107 ECtHR, *Dobbertin v. France* (App. no. 13089/87), 25 February 1993, para. 42.

108 See e.g., European Court of Human Rights, *Wrona v. Poland* (App no. 29345/09), 10 March 2014, para. 54.

109 American Court on Human Rights, *Onyango Nganyi v. Tanzania* (App no. 006/2013), 18 March 2016, paras. 138-144.

110 Inter-American Court of Human Rights, *Portugal v. Panama* (Series C, no. 186), 12 August 2008, para. 150; IACtHR, *Radilla-Pacheco v. Mexico* (Series C, no. 209), 23 November 2009, para. 245; IACtHR, *Luna López v. Honduras* (Series C, no. 269), 10 October 2013, para. 190.

111 IACtHR, *Genie-Lacayo v. Nicaragua* (Series C, no. 30), 29 January 1997, para. 78; IACtHR, *Luna López v. Honduras* (Series C, no. 269), 10 October 2013, para. 190; IACtHR, *Anzualdo Castro v. Peru* (Series C, no. 202), 22

context in which the violation occurred, such as an internal armed conflict.¹¹²

The second factor is the conduct of the defendant (or in inter-state cases, the Respondent state). A defendant has the right to avail himself of all local remedies available to him, even if this prolongs the proceedings.¹¹³ The European Court has therefore held that a defendant cannot be blamed for 'making full use of the multiple remedies available to them under domestic law.'¹¹⁴ A lawful prolongation of proceedings may occur where a defendant, for example, asks for a judge's recusal,¹¹⁵ asks for an assessment of the defendant's own fitness to take part in proceedings,¹¹⁶ and exercising his right to appeal.¹¹⁷ If, however, a defendant or his counsel deliberately use evasive or delaying tactics that result in the prolonged proceedings, the delay will not violate the defendant's rights because it was his own conduct which caused the delay.¹¹⁸ international human rights bodies have taken into account the fact that the defendant, for example, failed to appear

September 2009, para. 157.

112 IACtHR, *Pueblo Bello Massacre v. Colombia (Series C, no. 140)*, 31 January 2006, para. 184; IACtHR, *Ituango Massacres v. Colombia (Series C, no. 148)*, 1 July 2006, paras. 293-294; IACtHR, *Valle Jaramillo v. Colombia (Series C, no. 192)*, 27 November 2008, para. 156.

113 ECtHR, *Kolomiyets v. Russia (App. no. 76835/01)*, 22 February 2007, para. 29; ACtHPR, *Onyango Nganyi v. Tanzania (App. no. 006/2013)*, 18 March 2016, paras. 149-150; IACtHR, *Wong Ho Wing v. Peru (Series C, no. 297)*, 30 June 2015, para. 211; ICTY, *Prosecutor v. Šešelj (IT-03-67-AR15bis), Decision on Appeal against decision on continuation of proceedings*, 6 June, para. 65. See also ACtHPR, *Rashidi v. Tanzania (App. no. 009/2015)*, 28 March 2019, para. 105.

114 ECtHR, *O'Neill v. United Kingdom (App. nos 41516/10 & 75702/13)*, 28 June 2016, para. 92.

115 ICTY, *Šešelj Appeal Decision of 6 June 2014*, para. 65.

116 ICC, *Gbagbo Decision of 3 June 2013*, paras. 39-43.

117 HRC, *Larrañaga v. Philippines (Comm. no. 1421/2005)*, 24 July 2006, para. 7.10.

118 ECtHR, *Eckle v. Germany (App. no. 8130/78)*, 15 July 1982, para. 82; ACmHPR, *Spilg v. Botswana (Comm. no. 277/2003)*, December 2011, paras. 197-200.

at hearings,¹¹⁹ absconded,¹²⁰ or where the defendant's counsel repeatedly failed to show up for court hearings.¹²¹

The third element is the conduct of the authorities. Prosecutorial conduct may violate the right to be tried without undue delay if it is repetitive or careless. This can include repetitive prosecution or repeated remises, as well as 'a lack of care' on the part of the prosecution.¹²² It is also possible for the conduct of other authorities to violate the right to be tried without undue delay – including the police, the courts, the legislature, or the executive.¹²³ International human rights bodies have rejected arguments by authorities invoking insufficient resources or chronic court overload to justify undue delay – for example, the Human Rights Committee found that the 'difficult economic situation' in a State does not justify undue delay because the rights of the ICCPR 'constitute minimum standards which all States Parties have agreed to observe'.¹²⁴ It is the responsibility of States to 'organise their legal system in such a way that their courts can comply with the requirements of trial within a reasonable time.'¹²⁵

Finally, courts consider the level of prejudice to the defendant (or Respondent state) as a result of the delay. Prejudice has been

119 ECtHR, *Sařapa v. Poland* (App. no. 35489/97), 19 December 2002, para. 86; ECtHR, *Mõtsnik v. Estonia* (App. no. 50533/99), 29 April 2003, para. 38; ECtHR, *Trzaska v. Poland* (App. no. 25792/94), 11 July 2000, para. 89.

120 ECtHR, *Sari v. Turkey* (App. no. 21889/93), 8 November 2001, para. 84; ECtHR, *Vayıç v. Turkey* (App. no. 18078/02), 20 June 2006, para. 44.

121 ECCA, *St Brice v. Attorney-General* (SLUHCvap2012/0027), 31 October 2016, para. 34; ECtHR, *Mõtsnik v. Estonia* (App. no. 50533/99), 29 April 2003, para. 38.

122 HRC, *Krasnova v. Kyrgyzstan* (Comm. no. 1402/2005), 29 March 2011, para. 8.7.

123 See eg., UN Commission on Human Rights, Report on Situation of detainees at Guantánamo Bay, 2006, UN Doc. E/CN.4/2006/120, para. 38

124 HRC, *Lubuto v. Zambia* (Comm. no. 390/1990), 31 October 1995, para. 7.3.

125 ECtHR (GC), *Zana v. Turkey* (69/1996/688/880), 25 November 1997, para. 83; ECtHR, *Abdoella v. Netherlands* (App. no. 12728/87), 25 November 1992, para. 24; ECtHR, *Dobbartin v. France* (App. no. 13089/87), 25 February 1993, para. 44. See also ACmHPR, *Kwoyelo v. Uganda* (Comm. no. 431/12), 12–22 February 2018, para. 251; ECOWAS CCJ, *Diane v. Mali* (Suit no. ECW/CCJ/APP/35/17), 21 May 2018, paras. 41–45.

described as ‘what is at stake for the defendant’.¹²⁶ It has therefore been held that prejudice may arise if, due to the lapse of time, ‘the quality of the evidence available is damaged’. The Inter-American Court has observed that ‘[i]f the passage of time has a relevant impact on the judicial situation of the individual, the proceedings should be carried out more promptly so the case is decided as soon as possible.’¹²⁷

Although the assessment of one factor may be dispositive, all factors are inter-related. Even when a delay can be explained by complexity, and is not due to the negligence or misconduct of any party, nevertheless there is a point beyond which the time taken becomes excessive.

6 Concluding Remarks

I conclude with a reflection on the value of taking time. Speedy compliance with a judgment (as compared to provisional measures justified by an urgent risk of irreparable harm) is *not* always the desirable outcome – it may take time to absorb the meaning of the judgment, secure the support of domestic institutions, and make a plan for implementation. The plan may be straightforward (pay compensation) or more complex (maritime or territorial delimitation, transfer of sovereignty, legislative change). It takes time to ensure implementation in a sustainable, comprehensive manner. And the parties will hopefully use the judgment or award as an opportunity to strengthen or reset their relations. A concept, not of ‘speedy compliance’, but of ‘compliance with no undue delay’ may reward patience and perseverance, and reduce prejudice to the parties, in resolving disputes in accordance with international law.

Acknowledgements

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126 ECtHR (GC), *Frydlender v. France* (App. no. 30979/96), 27 June 2000, para. 45.

127 IACtHR, *Valle Jaramillo v. Colombia* (Series C, no. 192), 27 November 2008, para. 155.