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States' Compliance with Judgements of International Courts and Tribunals

The Role of the United Nations Security Council

MASTER DISSERTATION

BY
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To Mum, Dad, and Lina
for their unswerving
and stalwart support.

And to my Professors
for inspiring me
all along this journey.

Abbreviations

§	Paragraph
ACHR	American Convention on Human Rights
Art.	Article
CoE	Council of Europe
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECOWAS	Economic Community of West African States
e.g.	Exempli Gratia
etc.	Et Cetera
et al.	Et Alii
GA/UN	General Assembly of the United Nations
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICJ	International Court of Justice
ICJ Reports	Reports on Judgements, Advisory Opinions, and Orders of the International Court of Justice
i.e.	Id est
IHL	International Humanitarian Law
ILC	International Law Commission
LoN	League of Nations
p.	Page
PCIJ	Permanent Court of International Justice
SC	Security Council
UN	United Nations
v.	Versus

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Abstract

States' compliance with judgements, orders, provisional measures and other binding decisions from international courts and tribunals constitutes the core desideratum of international justice that, absent an international enforcing mechanism, ultimately helps fulfill the goals set by the Charter of the United Nations. This master thesis goes to assess the general position of states towards international justice, by referring to the case-law of the main international and regional courts (ICJ, ECtHR, IACHT et al.) and examining the practical outcome of each selected case. Key questions to this topic include: What are the consequences of non-compliance? Does it incur the international responsibility of the said non-compliant state? Is compliance to all orders of international tribunals binding? What happens if human rights are at stake? Is derogation from a final judgment possible? This thesis focuses on the external (i.e. international) aspect of a state but key domestic elements are also taken into account.

As the second part of the thesis title suggests, the Security Council, pursuant to Article 94 § 2 of the UN Charter, plays an important role in the implementation of ICJ judgements. What should be examined, given the historical datum that the ICJ was the only international court at the time of the ratification of the UN Charter, is a possible reassessment of this article, during the present era of the plethora of international and regional tribunals. Is recourse to that article frequent and what does state practice suggest? The interplay between the Security Council and the other bodies under assessment, and its practice related to the subject is of key importance to review the total efficacy of the international justice, in the regional and global field.

Key Words: (non-) compliance, international courts, Security Council, international responsibility, binding force, ICJ, ECtHR, IACtHR, human rights, derogation.

Introduction

> *The ultimate explanation of the binding force of all law, is that man, whether he is a single individual or whether he is associated with other men in a state, is constrained, in so far as he is a reasonable being, to believe that order and not chaos is the governing principle of the world in which he has to live.*[1]

The dawn of the twentieth century brought about a new era in international law. It is thence fore when sovereign states were observed to begin accepting a different solution to their international disputes, a solution poles apart from the prevalent ones that dominated the nineteenth century: war, blockades and, in general, unrestricted resort to the use of force. It is the time in international law history that the culmination of the *Jay Treaty* spirit, in terms of resuscitating a judicial and arbitral international dispute settlement procedure, comes to prompt developments in the international community.

Early on, arbitrational awards under Article 37 of the 1907 Convention for the Pacific Settlement of International Disputes (Hague Convention I) were to be respected that means to be complied with: "International arbitration has for its object the settlement of disputes between States by Judges of their own choice and on the basis of respect for law. Recourse to arbitration implies an engagement to submit in good faith to the Award."

Some years later, the creation of the Permanent Court of International Justice back in 1922 constituted a landmark event in the field of international justice. The idea of a permanently established court that will hear cases between states and decide upon them was surely sort of a novelty back then. Taking into consideration that states (used to) regard their sovereignty as a 'sacred cow', or the very linchpin of their existence, it

[1] Brierly, J., L. (1963) *The Law of Nations*, 6th ed., Oxford: Oxford at the Clarendon Press. 56

is indeed enthralling to think that they agreed to gradually transform the obstreperous and unruly nature of the international system, one step at a time. As Carty comments on the situation that existed before the modern era of international courts and tribunals, as to the relevant academic field:

> [...] It was a main preoccupation of international law doctrine in the nineteenth and early twentieth centuries, encapsulated in debates about whether (a) international law was binding, (b) whether treaties were legal instruments which had to be kept, and (c) whether the sovereignty of states could be legally limited or restricted.[2]

International courts and tribunals are now numerous, either global (ICJ[3]) or regional (CJEU, IACtHR etc.) with jurisdiction on matters defined either by geography or subject-matter (ITLOS for one). As it can be inferred from their respective constitutive documents, they issue decisions, whether they be judgements, provisional measures or other orders, which are now considered binding (more on that in Chapter **1**). This goes to say that states which are parties to a case and to the court whose jurisdiction is incumbent upon them, are under an international obligation to implement what is decided by the Chamber, and explained in the operative part of the said decision.

Now, absent an 'international police force' i.e., an efficient enforcing mechanism that ensures proper and sound implementation of decisions of international courts and tribunals, responsibility rests with the states (and the international community we might venture to say). It is the main *desideratum* of international justice, seeing states self-compelled to act in accordance with decisions, however against their self-defined national interest might they be. Compliance is "the essence of legality."[4] Indeed, since international courts' jurisdiction is non-mandatory and rests at the state's discretion, execution of the decisions becomes an utterly perplexed matter.

This master thesis aims to present, in Part I, the legal and political situation regarding the conformity of states behavior towards international adjudgment in its post-adjudicative phase (except in the case of provisional measures, which are issued at an early stage of proceedings). It goes to assess the general position of states towards

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[2] Carty, A. (2007) *Philosophy of International Law*, Edinburgh: Edinburgh University Press. 8

[3] It is what American scholars often refer to as the 'World Court'.

[4] Huneeus, A. (2013) "Compliance with International Court Judgments and Decisions", *Oxford Handbook of International Adjudication, Karen J. Alter, Cesare Romano and Yuval Shany, eds., 2013 Univ. of Wisconsin Legal Studies Research Paper No. 1219.* 4

international justice as well, by referring to the case-law of the most prominent international and regional courts and tribunals (ICJ, ECtHR, IACtHR etc.) and examining the rate of compliance, as far as the decisions of the said courts are concerned. Key questions to this topic include: What are the consequences of non-compliance? Does it incur the international responsibility of the said non-compliant state? Is compliance to all orders of international tribunals binding? What happens if human rights are at stake? Is derogation from a final judgment possible?

In Part II, we will assess the action undertaken by the Security Council of the United Nations which, pursuant to Article 94 § 2 of the UN Charter, plays (or, at least, *we* would like it to do so) a crucial role in the implementation of ICJ judgements. To be more exact, a question mark is needed in the end of the phrase, since this role (and the final outcome) is much contested and should be put into perspective. Is recourse to that article frequent and what does state practice suggest? The interplay between the Security Council and the other bodies is also assessed, as is its practice related to the subject. These issues are of key importance to review the total efficacy of the international justice system, in the regional and global field. Finally, what will be also examined, given the historical datum that the ICJ was the only international court at the time of the ratification of the UN Charter, is the possibility of a re-examination of this Article in a more contemporary and modern context, vis-à-vis the plethora of international and regional tribunals nowadays. This Part closes with a question: what a new role for the Security Council? Should it be more extended or more limited?

The matter under examination is approached through a legal analysis of the aforementioned questions, posed in each chapter. In the second part, however, it would not be redundant to adorn the essay with prudent inquiry into the political nature of the Security Council and its way of dealing (or not) with non-compliance. After all, politics and law are inseparable and, in our case, it is crucial to have a shrewd and knowledgeable view of both aspects, to better understand why states *generally* comply– or not? –, their motivations, the factors that pertain around the phenomenon; this will allow for a better articulation of proposals in the final chapter, which ought to be on par with current international legal doctrine and developments.

In this introductory chapter, it would be of use to clarify the terminology used. Generally, in international law literature, terms like ‘judgement’, ‘decision’, ‘ruling’,

'order', are used interchangeably.[5] This is something supported by case law. For example, in the Preliminary Objections of *South West Africa* cases in 1966, the Court did not bother to distinguish between interchangeable terms like Mandate or *exemplaire*, noting that:

> Terminology is not a determinant factor as to the character of an international agreement or undertaking. In the practice of States and of international organizations and in the jurisprudence of international courts, there exists a great variety of usage; there are many different types of acts to which the character of treaty stipulations has been attached.[6]

After all, Judge Philip Jessup, in his Dissenting Opinion in the same case noted that "there is no clear distinction between "decision" and "judgment"–the terms can be used interchangeably. [...] I shall consider below with what either Party was now obliged "to comply" (*à se conformer*)."[7]

A quick Google search will yield not many results on the matter of non-compliance; major works, even theses, on the matter are rather few and far between. As Couzigou observes: "Strangely, despite its socio-legal importance, the issue of the enforcement of binding Security Council resolutions [and ICJ judgements] has enjoyed relatively little doctrinal attention."[8] This thesis is an invitation to specialists of international relations, legal scholars and international lawyers to help shed more light on this topic. It is the author's hope that, by the end of this thesis, one may have a clear grip on the subject, but may also be incited to look further upon it.

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[5] Simma et al. (2012) *The Charter of The United Nations*, Vol II. Oxford: Oxford University Press. 189
[6] *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment of 21 December 1962. I.C.J. Reports 1962*. 331
[7] *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa), Dissenting Opinion of Judge Jessup, Judgment of 21 December 1962. I.C.J. Reports 1962*. 332
[8] Couzigou, I. (2017) "Enforcement of UN Security Council Resolutions and of International Court of Justice Judgements : the Unreliability of Political Enforcement Mechanisms", in Jakab, A., Kochenov, D. [*eds*] (2017) *The Enforcement of EU Law and Values: Ensuring Member States' Compliance*, Oxford: Oxford University Press. 1

Part I

State Compliance with International Decisions

1.1 Compliance as an indicator of the international system legitimacy

The underlying main question set forth in this thesis can be said to belong to the general inquiry of the field as to the reasons, because of which states adhere (or not) to the international law. Someone will hardly find official statements, even from the so-called 'rogue' states, that proclaimed –express– faith and observance of international law, and respect of international obligations, is not a top priority and a blueprint for the conduct of foreign policy. "Almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time."[9] Practically, though, every state has 'committed' a breach of international law in its history.

The question that emanates from these observations, related to the topic of this thesis is: do states generally comply with decisions of international courts and tribunals? We have to define 'compliance' beforehand, so that any confusion with international relations theory or municipal law aspects is cleared. Writing of compliance with international agreements (and signing an international court's Statute is one such), Chayes and Chayes define compliance in these terms "We believe that when nations enter into an international agreement of this kind, they alter their behavior, their relationships, and their expectations of one another over time in accordance with its terms. That is, they will to some extent comply with the undertakings they have made."[10]

On why compliance is important to the international judicial construct, one could not find a better enumeration of the advantages, other than Professor Huneeus' explanation of this importance:

> Compliance assures that courts meet expectations. Compliance with remedial orders assures that the adverse effects of a legal violation are attenuated and individual

[9] Henkin, L. (1979) *How Nations Behave* (2nd ed), New York: Columbia University Press. 47
[10] Chayes, A. (1993) "On Compliance", *International Organization Vol. 47, No. 2 (Spring, 1993)*. 176

> justice is done; compliance with interim orders assures that something of value is safeguarded from immediate jeopardy while a dispute is resolved; compliance with orders to assist with a criminal investigation allow prosecutions to move forward. Those who design courts care about compliance and will want to design them in ways to garner compliance; those who choose them as the venue through which to resolve disputes want to know orders will be obeyed. For these legal actors -- and therefore to social scientists interested in understanding legal phenomena -- the dynamics surrounding compliance matters quite apart from general assessments of efficacy.[11]

International law researchers are divided as to the general rate of compliance with decisions observed. Some argue that in the post-*Nicaragua* era a greater proportion is to acknowledge.[12] In that sense, states try to comply and abide by international law in most cases. According with many views, nonetheless, like the one cited here, should a state finally agree to judicial settlement, this state is internally (by means of its own will, we could indicate) compelled to comply with the decisions rendered by a court:

> [...] As States have to express agreement to submit a dispute to the ICJ, they do so only after careful consideration of the pros and cons. States are thus generally ready to execute adverse judgments. Furthermore, ICJ judgments receive quite a lot of attention and public pressure plays a role in compliance with them. Only a minority of judgments have not been implemented at all.[13]

Heather Jones concurs with that view stating (quoting Schulte) that "although no state has been directly non-compliant of a modern era judgement, some decisions have met with less compliance than others."[14] So far, the landscape seems promising and optimistic.

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[11] Huneeus, A. (2013) "Compliance with International Court Judgments and Decisions", *Oxford Handbook of International Adjudication, Karen J. Alter, Cesare Romano and Yuval Shany, eds., 2013 Univ. of Wisconsin Legal Studies Research Paper No. 1219.* 5

[12] Jones, H. (2012) "Why Comply? An Analysis of Trends in Compliance with Judgements of the International Court of Justice since *Nicaragua*", 12 *Chi.-Kent J. Int'l & Comp. Law*. 58

[13] Couzigou, I. (2017) "Enforcement of UN Security Council Resolutions and of International Court of Justice Judgements : the Unreliability of Political Enforcement Mechanisms", in Jakab, A., Kochenov, D. [*eds*] (2017) *The Enforcement of EU Law and Values: Ensuring Member States' Compliance*, Oxford: Oxford University Press. 373

[14] Jones, H. (2012) "Why Comply? An Analysis of Trends in Compliance with Judgements of the International Court of Justice since *Nicaragua*", 12 Chi.-Kent J. Int'l & Comp. Law. 59

But why states tend to follow orders from a Chamber sitting, maybe thousands of kilometres afar? This tendency to comply is attributed to the 'voluntarist fashion' the international system is structured, 'supported by so little coercive authority'.[15] In this 'legitimacy theory', proposed by Thomas Franck, coercion is distinct from that legitimacy which, under Franck means the "quality of a rule which derives from a perception on the part of those to whom it is addressed that it has come into being in accordance with right process".[16] All this means that, since states perceive a rule as legitimate and standing, they will fine-tune their international behaviour so as to adapt.

> International law is binding but not enforceable. Adjudication exists, but its impact is sporadic. Fundamentally, the problem can be encapsulated in a sentence. There is what all the parties are willing to identify as law, but there is auto-interpretation of the extent of obligation. . . . The difficulty remains, accepted by Bartelson and Jouannet, that there is no superior juridical order immediately binding upon states. They agree that sovereignty includes the right to decide the extent of an obligation. Again, both may quote Vattel 'each has the right to decide in its conscience what it must do to fulfil its duties; the effect of this is to produce before the world at least, a perfect equality of rights among Nations.[17]

The sub-context –international courts and tribunals– of the general international legal order is legitimate, because it is recognised by states as such. To explain that legitimacy, we could resort to the one Habermas defined. So, there is observance because:

> [...] there are good arguments for a political order's claim to be recognized as right and just; a legitimate order deserves recognition. *Legitimacy means a political order's worthiness to be recognized* [Habermas' emphasis]. This definition highlights the fact that legitimacy is a contestable validity claim; the stability of the order of domination (also) depends on its (at least) de facto recognition. Thus, historically as well as analytically, the concept is used above all in situations in which the legitimacy of an order is disputed, in which, as

[15] Franck, T. (1988) "Legitimacy in the International System". *The American Journal of International Law*. Vol. 82, No. 4 (Oct. 1988). 705
[16] *ibid*, 706
[17] Carty, A. (2007) *Philosophy of International Law*, Edinburgh: Edinburgh University Press. 7

> we say, legitimation problems arise. One side denies, the other asserts legitimacy. This is a *process*. . .[18]

To be more precise in the subject-matter of compliance with international courts' edicts, and to elaborate on why states comply, we could look at the categorization of factors that are conducive to compliance. In her paper, Heather Jones ascertains four of them, which avert states from defying international courts' decisions: "external political influence. . . parties' need for a definitive solution. . . substance of the judgement. . . and internal political influence".[19] Essentially, these factors are presenting that it is generally of interest, *lato sensu*, to a state to not demonstrate against a decision. The first factor is not a matter of law, but politics. The second, to all intents and purposes, serves the international legal order, which would rather have no lacunas looming in the international law landscape. As to the third factor, according to the Jones, it comprises "elements of the judgement that most readily effect compliance" and which are "the determinacy of the decision, the presence of compromise and cooperation, and whether the decision is in conflict with the self-interest of one or more of the parties."[20] Under that focal point, Chayes also mentions that, the declaration that a general tendency to abide by the agreements, undertaken by a state, exists up to the point of breach by the states because "it is in their interests to do so" is mere assumption, devoid of any ability to be examined and proven.[21]

In a methodological approach by Schulte, who has written a thorough book on compliance, as to how one should seek to answer further and deeper questions for this matter:

> A discussion post-adjudicative phase of these cases will certainly be an important aspect. Yet the discussion avoids a shortsighted approach that would merely examine whether the subsequent action of the parties squares with the formula contained in the operative part of the respective decision. A contextual examination is preferable in that it is not often possible to determine the scope of the obligation to comply and the action necessary for the decision's implementation without considering the concrete circumstances of the case. [...] Indeed, only a contextual analysis, which takes into

[18] Habermas, J. (1979) *Communication and the Evolution of Society*, (transl. by Thomas McCarthy) Boston: Beacon Press. 178-79
[19] Jones, H. (2012) "Why Comply? An Analysis of Trends in Compliance with Judgements of the International Court of Justice since *Nicaragua*", 12 Chi.-Kent J. Int'l & Comp. Law 57. 58
[20] *ibid*, 72–74
[21] Chayes, A. (1993) "On Compliance", *International Organization Vol. 47, No. 2 (Spring, 1993)*. 176

> [consideration] a variety of factors – such as the origins of the dispute, the relationship between the parties, the competing interests involved, and the route by which the case reached the court – will enable general conclusions to be drawn as to the reasons for a decision's (non-) implementation.[22]

On the other hand, if non-compliance with decisions was not a fact, this essay would have no purpose of writing. Supplementing the aforementioned views on compliance, reasons for defiance were acknowledged by a report prepared by the Commission on Legal Matters and Human Rights of the Council of Europe (CoE):

> Les problèmes relatifs à l'exécution des arrêts sont de sept ordres : raisons politiques, raisons liées aux réformes requises, raisons pratiques liées aux procédures législatives internes, raisons budgétaires, raisons liées à l'opinion publique, raisons liées à la rédaction trop ambiguë ou absconse des arrêts, raisons liées à l'interférence avec des obligations émanant d'autres instances.

In a "spectrum of defiance,"[23] scribed by law researchers András Jakab and Dimitry Kochenov, there are four levels for reasoning behind a state's non-compliance. It is important to note that this figure was utilized to refer to the European law context, but it can be transcribed to apply in general international law and, consequentially, to the judgements rendered by international tribunals. The boldest one is because of an "ideological choice not to comply in principle". This can be manifested by post-adjudicative declarations, press releases, official statements and so on and so forth. Next follows "non-compliance caused by the weakness of institutions, or systemic corruption". This is attributable to the public administration "mismanagement" or the economic situation that may prevail in the recalcitrant state. Thirdly, due to want for "economic free-riding" and, finally, "exceptional non-compliance through error of judgement or interpretation."

In his thorough examination as regards with the ICJ, Colter Paulson notes a high compliance rate with the ICJ's judgments. He references, citing other scholars, that

[22] Schulte, C. (2004) *Compliance with Decisions of the International Court of Justice*, Oxford: Oxford University Press. 7
[23] Jakab, A., Kochenov, D. [*eds*] (2017) *The Enforcement of EU Law and Values: Ensuring Member States' Compliance*, Oxford: Oxford University Press. 3

noncompliance is out of the common.[24] But, on the other hand, he alludes to the fact that an exact quantification of compliance should not prejudice the researcher with doubting the generally accepted efficiency the world court has come to achieve.[25]

The European Court of Human Rights (ECtHR), based in Strasbourg, issues judgements which are generally complied with by states, even if that compliance does not occur spontaneously,[26] and even if they openly state their discontent with the judgement.[27]

The Inter-American Court of Human Rights is an interesting case to look into. In session since 18 July 1978, it comprises 25 States-Parties to its constitutive document, the Pact of San José, which is hereby referred to as the American Convention on Human Rights (ACHR), its relevant Statute, and the Rules. The IACtHR issues a final and binding judgement, not subject to appeal (Art. 67, ACHR).[28] Its monitoring mechanism will be examined later (see chapter 1.3). Tan attests that the IACtHR enjoys a 'high level of compliance' despite the absence of an enforcing mechanism. Even though he mentions that a state-party has a difficult time prosecuting culprits within the municipal legal order,[29] it is a reality that states do expressly recognize the judgement of the court and, thus, their international responsibility.[30] One case to cite as an example –a landmark for the IACtHR– is the *Case of the 19 Merchants v. Colombia*[31] (also known as the *Tradesmen* case), in which the Court in its operative part found that Colombia was responsible for violating rights pertaining to "personal liberty, humane treatment and life" of nineteen merchants, killed in a massacre perpetrated by the paramilitary. The President of Colombia, largely responsible for the non-punishment of the murderers, whom he had pardoned, made a U-turn and fervently stated that

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[24] Paulson, C. (2004) "Compliance with Final Judgments of the International Court of Justice since 1987." *The American Journal of International Law, 98(3)*. 434

[25] *ibid*, 436.

[26] Perrakis, S. (2013) *Aspects of International Protection of Human Rights–Towards a Jus Universalis* [in Greek], Athens: I. Sideris. 218–219

[27] Lambert-Abdelgawad, E. (2017) "The Enforcement of ECtHR Judgments" in Jakab, A., Kochenov, D. [eds] (2017) *The Enforcement of EU Law and Values*: *Ensuring Member States' Compliance*, Oxford: Oxford University Press. 327

[28] For the full official text of the American Convention on Human Rights in an accessible HTML page, see here: https://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm (Last Access: 29 November 2021)

[29] Tan, M. (2005). "Member State Compliance with the Judgments of the Inter-American Court of Human Rights," *International Journal of Legal Information*: Vol. 33: Iss. 3, Article 4. 321

[30] Perrakis, S., Marouda, M. (2014). *International Justice. Institutions, Procedures and Applications of International Law*. [in Greek]. Athens-Salonica: Sakkoulas Publications. 259

[31] Inter-American Court of Human Rights, *Case of the 19 Merchants v. Colombia, Judgment of July 5, 2004, (Merits, Reparations and Costs)*

"Colombia will honour its international obligations," and agreed to a reparation plan for the families of the victims, not only in strictly monetary terms. This is an example of complete subordination to a regional court, and an honour for the regional systems of human rights protection.[32]

Painting a completely different picture, with respect to the Court of Justice of ECOWAS, some recent information, as of the time of writing this thesis, have seen the light. In November 2021, the President of the ECOWAS Court, Justice Edward Amoako Asante "has [publicly] decried the shun of a key protocol by member states as well as the low rate of compliance with judgments."[33] This constitutes a rare sighting in the international justice field, one of a Court publicly recognizing that it is not heard by states. In a geographical region where the protection of human rights is of urgent importance, one can think the many consequences of such a declaration; or better, what is happening because the member-states of ECOWAS just openly defy the Court. By adding that "[...] it is, therefore, necessary for member states that established ECOWAS to recognize the supranationality and the need for them to abide by obligations", the President of the Court is pointing to some very basic principles of international law, which seem to have been intentionally forgotten by states. He concluded by quantifying the rate of compliance of the ECOWAS Court: "30 percent unsatisfactory rate of compliance of the Court's decisions". Such an observation seems completely obverse to other Courts, even though comparing Courts is a task that has to take into consideration a plethora of factors, to produce accurate and useful results. Unfortunately, this observation and intervention by the President of the Court has been repeated in the past.[34] The creation of a relevant enforcing mechanism for that Court is a constant request of the civil society, as human rights group demand a system that will ensure compliance with decisions of the court.[35]

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[32] Material here was sourced by Hillebrecht, C. (2012) "The Domestic Mechanisms of Compliance with International Human Rights Law: Case Studies from the Inter-American Human Rights System," Human Rights Quarterly, Volume 34, Number 4, November 2012. 980–981

[33] Odunsi, W. (2021, November 1). *Ecowas Court Condemns countries' protocol shun, low compliance with judgments*. Daily Post Nigeria. Retrieved December 19, 2021, from https://dailypost.ng/2021/11/01/ecowas-court-condemns-countries-protocol-shun-low-compliance-with-judgments/

[34] Premium Times, 2021. ECOWAS court frowns at non-enforcement of decisions by member states. [online] Premium Times Nigeria. Available at: https://www.premiumtimesng.com/news/159166-ecowas-court-frowns-non-enforcement-decisions-member-states.html (Last Access: 19 December 2021)

[35] *Human Rights groups want mechanism to enforce ECOWAS Court decisions*. https://www.premiumtimesng.com/news/132305-human-rights-groups-want-mechanism-to-enforce-ecowas-court-decisions.html (Last Access: 20 Dec. 21)

Lastly, and in connection with this thesis' main objective, one has to look at the ramifications the exact opposite of compliance entails for the international judicial system, the legitimacy of the current world order; or, more specifically, the legitimacy of international courts and tribunals, which are responsible, along with other institutions, for bolstering and empowering this *desideratum* of international justice, that will have actual and practical results not only upon the everyday relations of states, but also upon the bigger picture.

If non-compliance rates rise exponentially, with reference to a specific court, the danger of that court losing its legitimacy looms; not only that, the more non-compliance persists, the more it is possible for the court to lose its 'future influence on policy', thus rendering its decisions a dead letter, and putting its very existence in jeopardy.[36]

1.2 Non-compliance under the scope of international responsibility

A state disobeying a binding decision bears international responsibility. This is a natural consequence, as the said state 'breaches a legal duty. . . which results in loss to another state,' as Brierly supports.[37] Dereliction of duty to comply, whatever the way this has to be fulfilled, essentially brings up the matter of a committing of an internationally wrongful act. As a result, non-compliance, also known as defiance, is the consequence of the "wholesale rejection of a judgement as invalid coupled with a refusal to comply."[38]

Across different international courts and tribunals,[39] the obligation to comply with a decision rendered by them (as long as the state in question is indeed party to the dispute and jurisdiction is established per a way that conforms to the relevant statute) is highlighted in their constitutive documents. Article 94 § 1 of the UN Charter states, as far as ICJ judgements are concerned that "each Member of the United Nations

[36] Carrubba, C. & Gabel, M. & Hankla, C. (2008) "Judicial Behavior Under Political Constraints: Evidence from the European Court of Justice" *American Political Science Review. 102.* 435
[37] Brownlie, I. (1998) *Principles of Public International Law*. Oxford-New York: Clarendon Press, Oxford University Press. 437
[38] Llamzon A., P., (2008) "Jurisdiction and Compliance in Recent Decisions of the International Court of Justice", *European Journal of International Law 18.* 823
[39] Constitutive documents referred here are cited in bibliography, under Conventional Texts.

undertakes to comply with the decision of the International Court of Justice in any case to which it is a party". Howbeit, when a state that is not a member of the United Nations becomes party to the ICJ Statute, the obligation provided for in Art. 94 § 1 extends to that as well. Also, pursuant to Security Council Resolution 9 (1946):

> [...] the International Court of Justice shall be open to a State which is not a party to the Statute of the International Court of Justice. . . [and which] undertakes to comply in good faith with the decision or decisions of the Court and to accept all the obligations of a Member of the United Nations under Article 94 of the Charter.[40]

Article 56 of the European Convention of Human Rights, applied in the context of the European Court of Human Rights based in Strasbourg states: "Binding force and execution of judgments: [...] The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties." Article 296 of the United Nations Convention on the Law of the Sea (UNCLOS) underscores, with respect to decisions also reached by the International Court of the Law of the Sea (ITLOS) the "[f]inality and binding force of decisions: (1) Any decision rendered by a court or tribunal having jurisdiction under this section shall be final and shall be complied with by all the parties to the dispute. (2) Any such decision shall have no binding force except between the parties and in respect of that particular dispute." In the European Union system, Article 288 (ex Article 249 TEC) of the Treaty on the Functioning of the European Union states that "a decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.". The obligation to comply with its judgement is enshrined in the following Article 68 of the ACHR and resembles the Art. 94§1 of the UN Charter providing that "[t]he States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties." The Economic Community of West African States (ECOWAS) Court of Justice also encompasses a similar clause, found in Article 15 (The Court Of Justice, Establishment And Functions) of the Revised Treaty of the Economic Community of West African States of 1993 which, in its fourth paragraph, stipulates that "judgments of the Court of Justice shall be binding on the Member States, the Institutions of the Community and on individuals and corporate bodies." The Caribbean Court of Justice, established as an organ of CARICOM (Caribbean Community) includes a compliance

[40] S/RES/9 (1946)

clause as well in Article XXII (Judgment Of The Court To Constitute *Stare Decisis*): "Judgments of the Court shall be legally binding precedents for parties in proceedings before the Court unless such judgments have been revised in accordance with Article XX."

But are only final judgements binding, and so do states have on obligation only as far as these are issued to obey them? It would not be futile here to clarify that this thesis agrees with the view that compliance with an international decision extends not only to judgements (*arrêts*) but also other orders, like provisional measures. In the *Anglo-Iranian Oil Co.* case, resort to the Security Council (a procedure which will be discussed further upon in Part II) by the United Kingdom was based on the fact that "a Court order indicating provisional measures [...] had no less binding force than the final decision".[41] This is a first recognition by the court of the respect that states must pay towards court decisions, other than judgements.

More prominently, as supported by Oellers-Frahm,[42] the precedent of the landmark *LaGrand* case sets forth that an order of provisional measures is equally binding to the state-party to the dispute it concerns, just like a final judgment on merits. Indeed, as addressed in the Judgement (Merits) of 27 June 2001:

> § 108. The Court finally needs to consider whether Article 94 of the United Nations Charter precludes attributing binding effect to orders indicating provisional measures. [...] The question arises as to the meaning to be attributed to the words "the decision of the International Court of Justice" in paragraph 1 of this Article. This wording could be understood as referring not merely to the Court's judgments *but to any decision rendered by it*, thus including orders indicating provisional measures. It could also be interpreted to mean only judgments rendered by the Court as provided in paragraph 2 of Article 94. In this regard, the fact that in Articles 56 to 60 of the Court's Statute both the word "decision" and the word "judgment" are used does little to clarify the matter. Under the first interpretation of paragraph 1 of Article 94, the text of the paragraph would confirm the binding nature of provisional measures; whereas the second interpretation would in no way preclude their being accorded binding force under Article 41 of the Statute. The Court accordingly concludes that

[41] Tanzi, A. (1995) "Problems of Enforcement of Decisions of the International Court of Justice and the Law of the United Nations", *European Journal of International Law 6 (1995)*, 564
[42] Simma et al. (2012) *The Charter of The United Nations*, Vol II. Oxford: Oxford University Press. 189

> Article 94 of the Charter does not prevent orders made under Article 41 from having a binding character.
>
> § 109. In short, it is clear that none of the sources of interpretation referred to in the relevant Articles of the Vienna Convention on the Law of Treaties, including the preparatory work, contradict the conclusions drawn from the terms of Article 41 read in their context and in the light of the object and purpose of the Statute. *Thus, the Court has reached the conclusion that orders on provisional measures under Article 41 have binding effect*.[43] (Emphasis mine.)

In a similar fashion, it can be reiterated that in the clauses of the aforementioned international courts (though this enumeration is not exhaustive), these orders of *mesures provisoires* are creating legal obligation for states which gave consent to become parties to a case, unless otherwise stated by the Statute, something which would, undoubtedly, be peculiar for a Court to declare. And if the opposite was the case before the *LaGrand* judgement, it can be assumed that, ever since, theoretical work leaves little room for uncertainty as to the binding force of provisional measures: even before this milestone, the question was posed, of whether the UN Charter language distinction between "judgements" (Art. 94 § 2) and "decisions" (Art. 94 § 1), without any hint from the *travaux préparatoires*, was done in purpose so that the Security Council does not preoccupy itself with orders other than judgments on merits.[44]

Decisions are binding upon state-parties to a dispute, as it is observed in most statutes of international courts and tribunals. Also, where a Court permits intervention by a third party, the judgement will be, according to most Statutes, equally binding upon the intervening state.[45] Zimmermann, in commenting on the relevant Articles of the I.C.J. Statute notes that "an intervening State is bound by the judgment '*equally*' with the parties. This must also be limited to the judgment in the case, for it would be illogical for a third party to have a greater commitment under a judgment than the initial parties to the dispute."[46] However, since the two types of intervention are distinct, and only one results in creating legal obligations to the intervenor, it follows that the effect

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[43] *LaGrand (Germany* v. *United States of America), Judgement, I.C.J. Reports 2001*. 505–506
[44] Tanzi, A. (1995) "Problems of Enforcement of Decisions of the International Court of Justice and the Law of the United Nations", *European Journal of International Law 6 (1995)*, 564
[45] See, as a leading example, Articles 62–63 of the *Statute of the International Court of Justice*.
[46] Zimmermann, A. et al. (2019) *The Statute of the International Court of Justice (3rd Edition): A Commentary*, Oxford: Oxford University Press. § 53–55

of the binding force of the judgement applies only if that state *actually* becomes party to the dispute, thus an established 'jurisdictional link' is necessary to account for that granting of party status to the intervening state.[47] For example, in the *Territorial and Maritime Dispute* between Nicaragua and Colombia, where Costa Rica and the Republic of Honduras requested to intervene–but only Honduras asked to become party to the case–the logical consequence would be that the judgement–should the applications to intervene had been accepted, and were not–would be equally binding upon Honduras, but not Costa Rica.[48]

To elaborate on this binding force, in the philosophical domain of the international law, the notion of a 'bindingness' of a treaty may be encompassed in the spirit of international judgements, since treaties predate international judgements by an unsurmountable amount of time:

> One may simply say, almost as a play on words, that treaties are binding, as are rules of general customary law, because there is a basic norm, i.e. derived from the idea of a *civitas maxima*, that confers legal validity upon the exercise of state consent which finds expression in such treaties and customs.[49]

It can be also asserted that this imperative stems from the fact that a judgement on merits merely brings a legal procedure to a cloture, thus ending a dispute *in vitro* and not *in vivo*.[50] The judgments of the Court are binding in law, but do they, in fact, resolve the matter? Judge Robert Jennings comments on that fact: "[...] more work needs to be done here. It is ironic that the Court's business up to the delivery of judgment is published in lavish detail, but it is not at all easy to find out what happened afterwards."[51]

Towards this objective, and for the realisation of the *raison d'être* of the international justice, full (and not partial or impaired) implementation is necessary. There are concurring views in legal literature that "[...] partial compliance can refer to behaviour that moves toward, but doesn't achieve, full implementation of a particular

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[47] Simma et al. (2012) *The Charter of The United Nations*, Vol II. Oxford: Oxford University Press. 192
[48] See the reasoning in the *Territorial and Maritime Dispute (Nicaragua v. Colombia), Application for Permission to Intervene, Judgment, I.C.J. Reports 2011,* p. 348
[49] Carty, A. (2007) Philosophy of International Law, Edinburgh: Edinburgh University Press. 119
[50] Obregon, E. (2020) "Non-Compliance of Judgments and the Inherent Jurisdiction of the ICJ", *The Journal of Territorial and Maritime Studies*, Vol. 7, No. 1 (Winter/Spring 2020). 55
[51] Jennings, R. (1997) "Presentation" *Increasing the Effectiveness of the International Court of Justice*, The Hague: Martinus Nijhoff Publishers. 81

ruling. Or, in a ruling that encompasses various orders, it can refer to compliance/non-compliance to some discrete orders, and not others (or, of course, a mix of the two)"[52] as Professor Huneeus iterates. Selective compliance, as we could call it, is a problem that undermines the efficacy of international adjudication, and creates –in our opinion– dangerous "precedents" that states in future cases could use so as to justify their incomplete execution of a judgement rendered by an international court.[53] Presented in a very shrewd manner by Hillebrecht:

> [...] when faced with this spectrum of demands, states often treat their compliance obligations like choices on a menu: picking and choosing the parts of the rulings with which they want to comply. It is rare, in fact, for states to comply with none or all of the discrete elements in a ruling. Instead, they tend to comply with the rulings in part.[54]

À la carte compliance, many times comes under a veil of 'complete' subordination and respect towards the Court by the recalcitrant state. This case, which we, in agreeing with the spirit of Judge Cançado-Trindade, regard as noncompliance nonetheless, is manifested in ways that were clearly traced by Kosar and Petrov, inspired by Hawkins and Jacoby. As such partial compliance refers to "(a) split decisions, where states do some of what a court orders but not all; (b) state substitution, where states sidestep a court order, implementing an alternative response to the decision and (c) ambiguous compliance amid complexity, in which states face particularly daunting and demanding tasks."[55] This requirement was also cited by the Committee of Ministers that supervises the execution of judgements rendered by the ECtHR which "is defined by one paramount requirement: all judgments of the ECtHR must be executed. The Committee of Ministers has itself underlined that respect for the judgments of the ECtHR is a condition sine qua non for membership of the Organisation."[56]

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[52] Huneeus, A. (2013) "Compliance with International Court Judgments and Decisions", *Oxford Handbook of International Adjudication*, Karen J. Alter, Cesare Romano and Yuval Shany, eds., 2013 Univ. of Wisconsin *Legal Studies Research Paper No. 1219*. 9

[53] See Hawkins, D. & Jacoby, W. (2010) "Partial compliance: A comparison of the European and Inter-American Courts for Human Rights". *Journal of International Law and International Relations 6(1).*

[54] Hillebrecht, C. (2014) "The power of human rights tribunals: Compliance with the European Court of Human Rights and domestic policy change". *European Journal of International Relations 2014 20*. 1108

[55] Kosař, D., & Petrov, J. (2018). "Determinants of Compliance Difficulties among 'Good Compliers': Implementation of International Human Rights Rulings in the Czech Republic" *European Journal of International Law* (Vol. 29, Issue 2, pp. 397–425). Oxford University Press (OUP). 399

[56] Committee of Ministers (2008) *Supervision of the execution of judgments of the European Court of Human Rights, 1st annual report, 2007*. Strasbourg: Council of Europe. 9

The obligation for a state to act in a certain way, following an international decision is a principle of international law, emanating from the general principle of *pacta sunt servanda*. Since a state has ratified a Convention establishing an International Court or Tribunal, and since most Statutes incorporate some form of expression of obligation to comply, and finally, when a state accepts contentious jurisdiction for the Court in question to hear a case in which it is involved, it accepts to apply in a meaningful and way the *dicta* as they are prescribed in the judgement. In court judgements or orders involving human rights, states undertake to "guarantee. . . effectiveness of human rights obligations (*effet utile*)."[57] The obligations the state is charged with, after the international litigation process ends are described in the operative part of the decision ('The court decides / adjudges / declares that...' or other similar language fashion), without effect of binding force bestowed upon the reasons the Court has come to decide as such.[58]

Within the scope of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts, adopted by the said Commission in 2001, non-compliance is regarded as an internationally wrongful act because, according to Art. 2, "[t]here is an internationally wrongful act of a State when conduct consisting of an action or omission (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State."[59] For the purpose of this thesis, the circumstances under which a state failures to comply, or other matters of attributability will not be examined here. What is of interest, instead, is to examine non-compliance as a form of breach of international obligation, undertaken by the sovereign state. When a non-compliance with a judgement occurs, a new relation between the disobedient state and the other party is forged,[60] notwithstanding an Applicant or Respondent status of the state-party to the case.

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[57] Bailliet, C. (2013) "Measuring Compliance with the Inter-American Court of Human Rights: The Ongoing Challenge of Judicial Independence in Latin America," *Nordic Journal of Human Rights*, Vol. 31, No. 4. 478–479.
[58] Simma et al. (2012) *The Charter of The United Nations*, Vol II. Oxford: Oxford University Press. 190
[59] For the official text of the International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts, see here: https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf (Last Access: 29 November 2021)
[60] Roucounas, E. (2015) *Public International Law*. 2nd ed. [in Greek] Athens: Nomiki Vivliothiki. 463

Non-compliance refers to the binding nature of the operative part as was described. The manifestation of that defiance varies according to what the operative part enjoins. Apropos of ICJ decisions, a state may be directed towards remuneration, adoption of specified expedients or the commitment of "non-repetition" of the breach of international law, even though what prevails is the declaration by the Court "of a legal situation or relationship."[61] Special gravitas should be taken into consideration in instances where damage would be irreversible, as in *LaGrand*: compliance with the provisional measure of non-execution of Karl & Walter LaGrand was urgent and a matter of life-or-death. As the state, the United States in that case, cannot make up for the execution, a paradigm is set that orders like these are expected to be fully complied with. In that case, apart from that, the Court was pleased to acknowledge that the United States had taken adequate measures to ensure non-repetition of that breach:

> "[The Court]. . . takes note of the commitment undertaken by the United States of America to ensure implementation of the specific measures adopted in performance of its obligations under Article 36, paragraph 1 (b) , of the Convention; and finds that this commitment must be regarded as meeting the Federal Republic of Germany's request for a general assurance of non-repetition."[62]

The ECtHR, for one, can order a state "to refrain from doing something, such as not returning individuals to countries where it is alleged that they would face death or torture."[63] Additionally, according to the subject-matter in the jurisdiction of each international court or tribunal, action to be taken can vary in its form. Even though most ICJ decisions are 'declaratory',[64] thus leaving an open-end framework for the states in dispute to solve the situation *de facto*, this is not the case with human rights courts (as the ECtHR, or the IACtHR), which issue decisions that prescribe bold and proactive action the state found in breach of international law. In the context of the ECtHR, Rule 6 of the 'Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements' states the actions expected, following a judgement:

> [...] a. whether any just satisfaction awarded by the Court has been paid, including as the case may be, default

[61] Simma et al. (2012) *The Charter of The United Nations*, Vol II. Oxford: Oxford University Press. 189
[62] *LaGrand (Germany* v. *United States of America), Judgement, I.C.J. Reports 2001*. 516
[63] European Court of Human Rights, (2014) *The ECHR in 50 questions*, Strasbourg: Public Relations Unit of the Court. 9
[64] Simma et al. (2012) *The Charter of The United Nations*, Vol II. Oxford: Oxford University Press. 191

> interest; and b. if required, and taking into account the discretion of the High Contracting Party concerned to choose the means necessary to comply with the judgment, whether: i. individual measures1 have been taken to ensure that the violation has ceased and that the injured party is put, as far as possible, in the same situation as that party enjoyed prior to the violation of the Convention; ii. general measures have been adopted, preventing new violations similar to that or those found or putting an end to continuing violations.[65]

For example, in the *Loizidou* v. *Turkey case*, brought before the ECtHR, Turkey was ordered *inter alia* to recompensate Titina Loizidou for preventing her to enjoy her property in the occupied zone of Cyprus ("For these reasons, the Court. . . holds [...] that the respondent State [i.e. Turkey] is to pay the applicant, within three months, 300,000 [...] Cypriot pounds for pecuniary damage").[66] However, Turkey had failed to comply with the judgement in a reasonable amount of time, prompting further comments in the context of the Council of Europe.[67]

Domestic legislation or courts *cannot* (or, better, should not) impede the state from enacting the orders of an international tribunal, to which it has given its consent and accepted contentious jurisdiction–even though, the latter can be challenged up until the very issuance of the final judgement. As it is stated by the ECtHR, "domestic courts [...] have to apply the Convention. Otherwise, the European Court of Human Rights, would find against the State in the event of complaints by individuals about failure to protect their rights."[68] Irrespectively of the particular International Court that enacts a binding decision (Judgement or Provisional Measures), it is a recognized international legal principle that a State cannot invoke dissonance with domestic legislation or other state provisions to halt implementation of an international court decision to which it is a legitimate party, and thus impede the execution of the obligation stemming from it.[69]

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[65] *Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements*. Available here: https://rm.coe.int/16806eebf0 (Last access: 16 December 2021)
[66] *Loizidou Judgment Of 28 July 1998 (Article 50), 40/1993/435/514, Arrêt/Judgement, 28 juillet/July 1998*. 12
[67] P-3401/03. https://www.europarl.europa.eu/doceo/document/P-5-2003-3401_EN.html?redirect (Last Access: 18 March 2022)
[68] European Court of Human Rights, (2014) *The ECHR in 50 questions*, Strasbourg: Public Relations Unit of the Court. 3–4
[69] Couzigou, I. (2017) "Enforcement of UN Security Council Resolutions and of International Court of Justice Judgements : the Unreliability of Political Enforcement Mechanisms", in Jakab, A., Kochenov, D. [*eds*] (2017) *The Enforcement of EU Law and Values: Ensuring Member States' Compliance*, Oxford: Oxford University Press. 15

This can be based on a consistent case-law by the ICJ and its predecessor as well: it was in the *Greco-Bulgarian Communities* case, for one, that this matter was addressed: "[...] it is generally accepted principle of international law that [...] the provisions of municipal law cannot prevail over those of the treaty".[70] Moreover, in the *Polish Nationals in Danzig* the court stated that:

> It should however be observed that, while on the one hand, according to generally accepted principles, a State cannot rely, as against another State, on the provisions of the latter's Constitution, but only on international law and international obligations duly accepted, on the other hand and conversely, a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force. Applying these principles to the present case, it results that the question of the treatment of Polish nationals or other persons of Polish origin or speech must be settled exclusively on the bases of the rules of international law and the treaty provisions in force between Poland and Danzig.[71]

Is delaying execution of a judgement another facet of non-compliance? If this instigates irreparable damage to one of the parties, caused by the defiance of the decision handed by an international court, then what can be attributed to the State? In IACtHR judgements, it may take from one up to two and a half years for a state to comply with them, as was measured by Basch *et al*.[72] This phenomenon of delays in compliance is noted in jurisprudence. In paragraph 37 of the Separate Opinion by *ad hoc* Judge Caldas in the *Garibaldi v Brazil* case, it is noted that:

> Delays are among the most serious judicial errors committed by the State, and must be compensated according to international law. Procedural promptness engenders fluidity and respect in social relations, appropriate to the level of development to which the nations of the Americas aspire.[73]

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[70] *P.C.I.J., Series B, No. 17*. 32

[71] *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in Danzig Territory, Advisory Opinion, 1932 P.C.I.J. (ser. A/B) No. 44 (Feb. 4)*

[72] Bailliet, C. (2013) "Measuring Compliance with the Inter- American Court of Human Rights: The Ongoing Challenge of Judicial Independence in Latin America," Nordic Journal of Human Rights, Vol. 31, No. 4. 479

[73] *Garibaldi v Brazil, Judgment, IACtHR (23 September 2009)*, Separate Opinion by Judge De Figuerido Caldas. As translated and quoted in Bailliet (2013), 482.

This is not an unknown to the political branches of the organizations connected to these Courts. The Parliamentary Assembly (Assemblée parlementaire) of the Council of Europe, with reference to the judgements rendered by the ECtHR states, in a recent resolution that the PA "[...] once again deplores the delays in implementing the Court's judgments, the lack of political will to implement judgments on the part of certain States parties and all the attempts made to undermine the Court's authority and the Convention-based human rights protection system. It reiterates that Article 46.1 of the Convention sets out the legal obligation for the States parties to implement the judgments of the Court and that this obligation is binding on all branches of State authority."[74]

1.3 Enforcement and monitoring mechanisms across international courts and tribunals

Traditionally, in a case where a state is discontent with (or damaged by) another state's behaviour, the former has some measures at hand so as to compel it: these include *inter alia* negotiations, diplomatic protests, or worse, a termination of diplomatic relations.[75]

In the field under examination, one has to look for mechanisms that abet compliance, and keep track of their implementation for a period of time that is considered crucial in the situation.

Not all courts have enforcement or monitoring mechanisms. As will be shown, Courts that deal with human rights are mostly inspired to create such mechanisms, because of the importance of their decisions to actual peoples' lives. A human's life is the legally most protected right in almost every jurisdiction, and regarded as such, international scholars would err to mostly provide for this protection, rather than other

[74] *Resolution 2178* (2017), Assembly debate on 29 June 2017 (26th Sitting) (see Doc. 14340, report of the Committee on Legal Affairs and Human Rights, rapporteur: Mr Pierre-Yves Le Borgn'). Text adopted by the Assembly on 29 June 2017 (26th Sitting).See also Recommendation 2110 (2017). Available here: https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=23987&lang=en (Last access: 19 December 2021)

[75] Couzigou, I. (2017) "Enforcement of UN Security Council Resolutions and of International Court of Justice Judgements : the Unreliability of Political Enforcement Mechanisms", in Jakab, A., Kochenov, D. [*eds*] (2017) *The Enforcement of EU Law and Values: Ensuring Member States' Compliance*, Oxford: Oxford University Press. 373

decisions on inter-state matters that may have no direct effect on someone, even if this can be contested at times.

Since most international courts are connected–either in an organic or a corollary fashion–with international organizations, enforcement measures may also be initiated by those international organizations.

A question to examine in this chapter also pertains as to the jurisdiction of courts to decide on non-compliance, either by prolonging the judicial procedure at hand, or by bringing *proprio motu* an entirely new case before itself, to deal with a recalcitrant state.

1.3.1 The International Court of Justice (ICJ)

Enforcement of judgements of the International Court of Justice through the Security Council, for which a strictly stipulated relationship exists in the UN Charter, will be examined in the next Part.

Primordially, there has been a reference in bibliography about the 'inherent jurisdiction' of the ICJ in a case still pending before the Court. This means that the Court may recognize non-compliance as such, at a stage temporally following that of the issue of the judgement, and thus proceed to settle these disaccords arising from non-compliance. It is indeed a very new concept, for which an extensive study has yet to be completed.[76]

Regional organizations, connected to the United Nations directly or indirectly, are in position to play a role, sometimes major, sometimes corollary, to secure execution of judgements by states that are members in them. In European Union, member states are, by virtue of several Articles of the Treaty of Lisbon, under duty to fulfill their international obligations.[77] In the more special field of enforcing decisions, regional cooperation can proactively lend a helping hand to the United Nations as attested by Tanzi:

> [...] It is appropriate to mention the possibility that measures aimed at giving effect to decisions of the ICI could be taken by other international organizations. The linkage between this phenomenon and the UN normative system might be found in an extensive interpretation of Article 48(2) of the UN Charter which prescribes that

[76] Obregon, E. (2020). *Non-compliance of judgments and the inherent jurisdiction of the ICJ. Journal of Territorial and Maritime Studies* (JTMS), 7(1), 53-67. The International Court of Justice by William A Schabas, Edward Elgar Publishing. 64

[77] Abiodun, A. & Abila, S. (2018) "A Critical Examination of the Enforcement of ICJ Decisions through the Organs of the United Nations", *Journal of Law and Criminal Science*, *June 2018, Vol. 6, No. 1*. 28

> Security Council decisions for the maintenance of international peace and security 'shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members'. This provision has been expressly referred to in a compatibility clause contained in Article III of the 1948 Agreement between the UN and the International Monetary Fund. More specifically, the Constituent Treaty of the International Labour Organization (Article 33) provides that in case of failure to carry out a decision of the International Court of Justice 'the Governing body may recommend to the Conference such action as it may deem wise and expedient to secure compliance therewith'. The Constituent Treaty of the International Civil Aviation Organization (Article 88) provides that the Assembly may suspend from voting any Member failing to comply with a decision of the International Court of Justice or arbitral tribunal. The same Treaty also contains the obligation for Member States (Article 87) not to allow any airline of a Member State which is not acting in conformity with any such decision to operate in their territory.[78]

Article 63 § 1 of the ICJ Statute makes proviso of the (only) role the Court plays in the implementation of its judgements: "The Court may require previous compliance with the terms of the judgment before it admits proceedings in revision." Ergo, compliance with a judgement is a condition to begin a judgement revision procedure, "a provision never applied so far."[79]

In her paper[80], Couzigou enumerates several mechanisms by bodies other than the ICJ itself or other organ of the United Nations, that exist in several international organizations: for one, the Council of Europe has such a mechanism, through which, when a decision of the ICJ that is not being complied with, the party that is subjected to damage can have recourse to the Committee of Ministers (this Convention, again, reiterates the basic obligation to comply with the judgement handed):

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[78] Tanzi, A. (1995) "Problems of Enforcement of Decisions of the International Court of Justice and the Law of the United Nations", *European Journal of International Law 6 (1995)*, 562–563

[79] Couzigou, I. (2017) "Enforcement of UN Security Council Resolutions and of International Court of Justice Judgements : the Unreliability of Political Enforcement Mechanisms", in Jakab, A., Kochenov, D. [*eds*] (2017) *The Enforcement of EU Law and Values: Ensuring Member States' Compliance*, Oxford: Oxford University Press. 15

[80] Couzigou, I. (2017) "Enforcement of UN Security Council Resolutions and of International Court of Justice Judgements : the Unreliability of Political Enforcement Mechanisms", in Jakab, A., Kochenov, D. [*eds*] (2017) *The Enforcement of EU Law and Values: Ensuring Member States' Compliance*, Oxford: Oxford University Press. 21

Article 39

> §1. Each of the High Contracting Parties shall comply with the decision of the International Court of Justice or the award of the Arbitral Tribunal in any dispute to which it is a party.
> §2 If one of the parties to a dispute fails to carry out its obligations under a decision of the International Court of Justice or an award of the Arbitral Tribunal, the other party to the dispute may appeal to the Committee of Ministers of the Council of Europe. Should it deem necessary, the latter, acting by a two-thirds majority of the representatives entitled to sit on the Committee, may make recommendations with a view to ensuring compliance with the said decision or award.[81]

1.3.2 The European Court of Human Rights (ECtHR)

In the context of the Council of Europe, the European Court of Human Rights has an established mechanism of supervising the execution not only of its judgements, but also any outcome of a friendly settlement. This becomes effective, pursuant to Article 46 of the ECHR:

Article 46 (Binding force and execution of judgments)

> §1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
> §2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.
> §3. If the Committee of Ministers considers that the supervision of the execution of a final judgment is hindered by a problem of interpretation of the judgment, it may refer the matter to the Court for a ruling on the question of interpretation. A referral decision shall require a majority vote of two-thirds of the representatives entitled to sit on the committee.
> §4. If the Committee of Ministers considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is a party, it may, after serving formal notice on that Party and by decision adopted by a majority vote of two-thirds of the representatives entitled to sit on the committee, refer to the Court the question

[81] European Convention for the Peaceful Settlement of Disputes (1957), European Treaty Series - No. 23, Strasbourg. Available here: https://rm.coe.int/1680064586 (Last access: 16 December 2021)

> whether that Party has failed to fulfil its obligation under paragraph 1.

and also, with respect to the outcomes of friendly settlements:

> *Article 39 (Friendly settlements)*
>
> §4. This decision [regarding friendly settlement] shall be transmitted to the Committee of Ministers, which shall supervise the execution of the terms of the friendly settlement as set out in the decision.

In the ECtHR, the 'Department for the Execution of Judgements of the European Court of Human Rights' title speaks for itself. As it is presented, this Department holds an advising and supportive role for the Committee of Ministers, as regards to monitoring the implementation and execution of judgements; apart from that, it engages with member-states to assist them in the better implementation of judgements, of which they carry obligations. This has to be done in an 'open' manner (which is not common, taking into consideration the new mechanism of monitoring provisional measures in the ICJ, as will be shown) so as "to ensure transparency and visibility of the results of the supervision process."[82] The first annual Report of the Committee was produced in 2007, citing that "from an execution perspective, 2007 has certainly been a work-laden year, although all in all, a positive one. It has confirmed the determination of all member states to comply with their obligations."[83] In the most recent, to the time of writing the present, report (2020) during the Greek chairmanship, it is stated that the Committee had taken measures "including. . . appropriate recourse to political leverage to deal with cases of non-execution or persistent refusal to execute the Court's judgments."[84]

However optimistic this venture might be in the international landscape, there are shortcomings. The Committee of Ministers is not vested with power to impose sanctions for non-compliance, due to inability stemming from the interpretation of the ECHR, and also due to political reasons, thus forcing the Committee to act in

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[82] Refer to a very detailed website that presents this mechanism by the ECtHR: https://www.coe.int/en/web/execution/presentation-of-the-department (Last access: 20 December 2021)
[83] Committee of Ministers (2008) *Supervision of the execution of judgments of the European Court of Human Rights, 1st Annual Report, 2007*. Strasbourg: Council of Europe. 13
[84] Committee of Ministers (2021) *Supervision of the execution of judgments of the European Court of Human Rights, 14th Annual Report, 2020*. Strasbourg: Council of Europe. 7

accordance with the ECHR, to set the sanction mechanism in motion or, after the 14th Protocol, to refer a recalcitrant state back to the ECtHR.[85]

1.3.3 The Inter-American Court of Human Rights (IACtHR)

The Inter-American Court of Human Rights (IACtHR), as mentioned above, boasts a high rate of state compliance with its judgements. It is, indeed, a story whose success can be attributed to its efficient monitoring mechanism. Since 2001, the Court oversees and follows the implementation of judgements. Essentially, this mechanism of the court of San José, operates within the framework of the ACHR and fulfils the provisions the relevant Art. 63§1. This bestows the power on the Court so it "[s]hall rule that the injured party be ensured the enjoyment of his right or freedom. . . that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party."[86] In ensuring the carrying out of its judgements, the IACtHR, since 2015, has started visiting the states, upon which a judgement has been passed, to acquire first-hand information on victims' status, to facilitate a dialogue between governments and victims and to watch over the execution of judgements concerning reparations and other actions, as prescribed by the Court.[87]

The juridical framework through which this monitoring mechanism is set in action, is governed by the Art. 69 ("Procedure for Monitoring Compliance with Judgments and Other Decisions of the Court") which reads:

> 1. The procedure for monitoring compliance with the judgments and other decisions of the Court shall be carried out through the submission of reports by the State and observations to those reports by the victims or their legal representatives. The Commission shall present observations to the State's reports and to the observations of the victims or their representatives.
> 2. The Court may require from other sources of information relevant data regarding the case in order to evaluate compliance therewith. To that end, the Tribunal may also request the expert opinions or reports that it considers appropriate.
> 3. When it deems it appropriate, the Tribunal may

[85] Perrakis, S. (2013) *Aspects of International Protection of Human Rights–Towards a Jus Universalis* [in Greek], Athens: I. Sideris. 218–221
[86] For the ACHR see bibliography.
[87] "Visits to the Monitor Compliance with Judgement", *Inter-American Court of Human Rights* website, available here: https://www.corteidh.or.cr/supervision_de_cumplimiento_visitas.cfm?lang=en (Last Access: 29 November 2021)

> convene the State and the victims' representatives to a hearing in order to monitor compliance with its decisions; the Court shall hear the opinion of the Commission at that hearing.
> 4. Once the Tribunal has obtained all relevant information, it shall determine the state of compliance with its decisions and issue the relevant orders.
> 5. These rules also apply to cases that have not been submitted by the Commission.

In light of the aforementioned provisions, we can understand that the State which is found in breach of a right under the ACHR and for which a verdict has been reached is required to proactively communicate with the Court in reference to a particular case so as to prove its compliance (para 1). But the Court is not limited to the reports submitted by the State, as it is endowed with a fact-finding capacity, as spelled out in paras 2–3.

1.3.4 The Monitoring of Provisional Measures by the International Court of Justice (ICJ)

A very recent development in the field of monitoring compliance with provisional measures was set forth in December 2020 by the International Court of Justice. The new Article 11 of the *Resolution concerning the Internal Judicial Practice of the Court* reads as follows:

> (*i*) Where the Court indicates provisional measures, it shall elect three judges to form an ad hoc committee which will assist the Court in monitoring the implementation of provisional measures. This committee shall include neither a Member of the Court of the nationality of one of the parties nor any judges ad hoc.
> (*ii*) The ad hoc committee shall examine the information supplied by the parties in relation to the implementation of provisional measures. It shall report periodically to the Court, recommending potential options for the Court.
> (*iii*) Any decision in this respect shall be taken by the Court. *(Article adopted by the Court on 21 December 2020)*[88]

Current cases (at the time of writing) with orders of provisional measures issued are *Immunities and Criminal Proceedings (Equatorial Guinea v France), Provisional Measures, Order of 7 December 2016; Application of the International Convention for*

[88] ICJ, *Resolution Concerning the Internal Judicial Practice of the Court*, https://www.icj-cij.org/en/other-texts/resolution-concerning-judicial-practice (Last access: 28 November 2021)

the Suppression of the Financing of Terrorism and the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v Russian Federation), Provisional Measures, Order of 19 April 2017; Jadhav Case (India v Pakistan), Provisional Measures, Order of 18 May 2017; Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v UAE), Provisional Measures Order of 23 July 2018; Alleged Violations of the 1955 Treaty of Amity, Economic Relations and Consular Rights (Iran v US), Provisional Measures, Order of 3 October 2018; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar), Provisional Measures, Order of 23 January 2020.[89]

Undoubtedly, it is a big step in temporary protection. Initially, pursuant to Article 78 of the Rules of Court, the ICJ has the possibility to request information on the implementation of the interim measures by the party or parties, and in the event that the one or both of them do not respond, it is taken into account and indicated in the relevant part of the final judgement on merits. It was not clear, however, whether the ICJ could monitor the implementation of the interim measures for the duration of the meetings.[90] The three-judge *ad hoc* Committee that was set up, will now report to the Court frequently and provide "options" so as to curb non-compliance or partial implementation of provisional measures. It remains to be seen in practice, so as to better answer questions such as whether these petitions will be published and, of course, their impact on the final court decisions. Still, at the time of writing this thesis, no other current information is available.

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[89] Pillai, P. "Cases enumerated in New Mechanism at the International Court of Justice on Implementation of Provisional Measures: Significance for The Gambia v Myanmar", *Opinio Juris*, 22 October 2021, available here: http://opiniojuris.org/2020/12/22/new-mechanism-at-the-international-court-of-justice-on-implementation-of-provisional-measures-significance-for-the-gambia-v-myanmar/ (Last access: 29 November 2021)

[90] Pillai, P. (2020, December 22). *New mechanism at the International Court of Justice on Implementation of provisional measures: Significance for the Gambia v Myanmar.* Opinio Juris. Retrieved December 20, 2021, from https://opiniojuris.org/2020/12/22/new-mechanism-at-the-international-court-of-justice-on-implementation-of-provisional-measures-significance-for-the-gambia-v-myanmar/

1.4 Permissibility of non-compliance by states?

In the Articles on International Responsibility, prepared by the International Law Commission in 2001 and adopted by the General Assembly of the United Nations in October 2002, exists Chapter V which bears the sub-title 'Circumstances precluding wrongfulness'. The quest of this chapter is to examine under which circumstances and for which specific reasons, a state can deviate from the implementing of provisions coming forth of a decision, be it a final judgement or an order for provisional measures. Of course, this is not an easy endeavour, as conditions differ from case to case and, as such, each insubordination to an international court's orders has to be examined *ad hoc*. We shall probe into the field of international responsibility again, with the purpose of finding reasonable grounds for a state to deny implementation of a judgement. This is a scholastic exercise, but we deem it can help foresee the behaviour of a state in a post-adjudicative phase.

Since a decision of all international tribunals is, in principle, 'final and without possibility of appeal', a state-party to a case can only utilise Article 60 of the Statute of the ICJ (as long as we consider the ICJ system, of course). This provides an opportunity that "in the event of dispute as to the meaning or scope of the judgement, the Court shall construe it upon the request of any party." But compliance with the judgement is nonetheless required, as Article 61 § 3 stipulates. So, in a strict reading of this, no derogation is possible by the State.

A case where non-compliance is *de facto* absolved, that is when a new norm emerges in international law that effectively cancels the *dicta* provided in the operative part of the judgement, backed by the reasoning that precedes it. For example, the directions contained in the *Fisheries Jurisdiction* case were legally superseded by the conclusion of the United Nations Convention on the Law of the Sea.[91] Is that an instance where circumstances preclude wrongfulness, as per the ILC Draft Articles on International Responsibility (2001)? Article 26 of this stipulates that "nothing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law." But in the

[91] Couzigou, I. (2017) "Enforcement of UN Security Council Resolutions and of International Court of Justice Judgements : the Unreliability of Political Enforcement Mechanisms", in Jakab, A., Kochenov, D. [*eds*] (2017) *The Enforcement of EU Law and Values: Ensuring Member States' Compliance*, Oxford: Oxford University Press. 16

next Article 27 (a) a provision follows that "the invocation of a circumstance precluding wrongfulness in accordance with this Chapter [V] is without prejudice to compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists." In the present context of the *Fisheries Jurisdiction*, was the obligation vested to the parties still valid, even after the codification of the Law of the Sea?

To conclude, with respect to the question posed in the title, literature generally accepts that derogation from the judgment is unjustifiable, with little to no exceptions. States are obliged to accept the outcome and the operative part of decisions as they are (see selective compliance, 1.2). Revision is possible but that does not alter the spirit of the judgement, and execution must be implemented in light of the operative provisions *in concreto*. Especially in cases concerning human rights and irreparable damage, no circumstances precluding wrongfulness can be invoked.

Part II

The Role of the United Nations Security Council

2.1 The Security Council in the international justice system

The Security Council of the United Nations (French: Conseil de Sécurité de l'ONU) is established as one of the principal organs of the United Nations, which are enumerated in Article 7 of the UN Charter. Its composition is dictated by Article 23 in the relevant chapter of the Charter, and comprises of fifteen members, five of which are permanent (P5): China, France, Russia, the United States of America and the United Kingdom. The other ten states are elected on a two-year tenure, and a geographical quota is in place to ensure geographical diversity. Voting procedure is described in Article 27 of the UN Charter, where the famous 'veto' power is bestowed upon the Security Council's permanent five members:

> §1. Each member of the Security Council shall have one vote.
> §2. Decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members.
> §3. Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.[92]

The mandate of the Security Council is spread across Chapters VI and (especially) VII, as well as VIII when referring to Regional Arrangements. So, according to Articles 39, 42 and 51 of the UN Charter, the Security Council:

> [...] shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

Generally, the –repeated across said Articles– wording "*to maintain or restore international peace and security*" emphasizes its role as a political body, contrary to the ICJ which is the principal judicial organ.

[92] For the UN Charter official link, please refer to the relevant bibliography section.

During the Cold War, the veto power, granted to the main two antagonizing powers (the United States and Soviet Russia), made it hard for the Security Council to decide upon resolutions and take effective action. When the Soviet Russia collapsed in 1991, a so-called 're-activation' took place, which, in essence, enabled the Council to take drastic measures vis-à-vis several international crises, thus being able to wield its Chapter VII powers. "Powers of coercive nature vested by the Charter in the Security Council which for decades seemed like a dead letter have been rediscovered since the Iraqi invasion in Kuwait [August 2, 1990]" notes Akande.[93] In her recent article, Joelle Hageboutros presents the context under which the UNSC activity, hampered during the Cold War, changed after the fall of the Soviet Union. What is new, is a "different approach to state sovereignty", a search for a new role and a switch to more collaborative procedure, notwithstanding the fact that it has been since criticized as an "exclusive club of the P5."[94]

Threat to peace? Insofar the international justice universe and the role of the Security Council within it is concerned, the question that naturally arises, after examining its scope and ultimate goals, is to what extent non-compliance constitutes a "threat to the peace", a "breach of the peace" and / or an "act of aggression"–to put it in the words of the relevant Chapter VII of the Charter. Under Article 39 of the UN Charter, the Security Council is competent to "determine the existence" of the aforementioned.

Recalling what was analyzed as far as provisional measures and their equal to judgements (since, at least, *LaGrand*) binding force are concerned, the Security Council could well define a breach of a such order as a threat to peace. Prior to the Massacre of Srebrenica in 1995, during the proceedings of the *Bosnia* case the ICJ had reached a decision to enact provisional protection and order that

> [...] The Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) should immediately, in pursuance of its undertaking in the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, take all measures within its power to prevent commission of the crime of genocide.[95]

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[93] Akande, D. (1997) "The International Court of Justice and the Security Council: Is There Room for Judicial Control of Decisions of the Political Organs of the United Nations?" *International and Comparative Law Quarterly*. Vol. 46, April 1997. 309

[94] Hageboutros, J. (2016) "The Evolving Role of the Security Council in the Post-Cold War Period." *Swarthmore International Relations Journal* Iss. 1: 10-18

[95] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*. 24

After further aggravation of the situation there by Serbia, diplomatic action was undertaken by Bosnia and Herzegovina, by having recourse to the Security Council, to prevent genocide. In its Resolution 819, adopted on 16 April 1993 the Security Council sealed –in an indirect way– the procedure of Article 94 § 2 of the UN Charter, for the second time in history:

> [...] *Taking note* that the International Court of Justice in its Order of 8 April 1993 in the case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia [Serbia and Montenegro]) unanimously indicated as a provisional measure that the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) should immediately, in pursuance of its undertaking in the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, take all measures within its power to prevent the commission of the crime of genocide.[96]

Despite that, in the same Resolution no other mention of the ICJ occurs, prompting scholars at the time, like Attila Tanzi, to find that the *Bosnia* case "is not decisive as to the question of whether the enforcement authority of the Council under Article 94 § 2 also covers Court's orders indicating provisional measures". But, further in this paper, the author acknowledges that this Resolution can be classified as a document pointing to full compliance of Yugoslavia with the Court's orders.[97]

Extent of measures. However, not only during the phase of blueprinting measures to apply to a certain non-compliance case, but also that very primary of declaring a situation as a "threat", expectation that the Security Council acts in accordance with Article 24§2 of the UN Charter, which means that it "shall act in accordance with the Purposes and Principles of the United Nations"– has to be met. Generally, though, the extent of the Security Council measures has been adequately addressed.[98] Measures the Security Council can take are found in Chapters VI (Pacific Settlement of Disputes) and VII (Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression) of the UN Charter.

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[96] S/RES/819 (1993). 1

[97] Tanzi, A. (1995) "Problems of Enforcement of Decisions of the International Court of Justice and the Law of the United Nations", *European Journal of International Law 6 (1995)*. 566–567

[98] For very detailed research on the limits of the functions and powers of the Security Council see: Akande, D. (1997) "The International Court of Justice and the Security Council: Is There Room for Judicial Control of Decisions of the Political Organs of the United Nations?" *International and Comparative Law Quarterly*. Vol. 46, April 1997. 314–325

2.2 Relation between the Security Council and the International Court of Justice (ICJ)

Before delving deeper into the role of this political organ, it is important to make clear from the beginning that the Security Council, in the context of the United Nations system is not the only competent to deal with non-compliance. As it is stated by Schacter, a state - party can also bring the matter to the attention of the General Assembly and / or of the Secretary - General. However, this thesis is not preoccupied with that procedure, and one may look further upon this in relevant bibliography.[99]

Historically, and during the League of Nations era, it was the Permanent Court of International Justice acting as the primordial judicial organ of the –then infant– international justice system. Articles 13 and 14 of the League Covenant[100] coordinated the law of peaceful dispute resolution. The importance of compliance with the decisions of the PCIJ was highlighted, not only by virtue of Article 59 ("The decision of the Court has no binding force except between the parties and in respect of that particular case"), Article 60 ("The judgment is final and without appeal [...]") and Article 61 ("[...] The Court may require previous compliance with the terms of the judgment before it admits proceedings in revision [...]") of the PCIJ Statute. Indeed, the Council, predecessor the modern-day Security Council, had the same discretionary power to act and decide upon measures. Article 13§4 of the League Covenant which stipulated that:

> The Members of the League agree that they will carry out in full good faith any award or decision that may be rendered, and that they will not resort to war against a Member of the League which complies therewith. In the event of any failure to carry out such an award or decision, the Council shall propose what steps should be taken to give effect thereto.

In the modern context of the United Nations System, the relationship between the Security Council and the International Court of Justice (ICJ) is what Tanzi calls "part and parcel of the everlasting controversy between law and politics".[101] In

[99] Schacter, O. (1960) "The Enforcement of International Judicial and Arbitral Decisions". *The American Journal of International Law*. Vol. 54. 1-24. Further research in Abiodun, A. & Abila, S. (2018) "A Critical Examination of the Enforcement of ICJ Decisions through the Organs of the United Nations", *Journal of Law and Criminal Science*, June 2018, Vol. 6, No. 1.

[100] For the League of Nations Covenant please refer to bibliography.

[101] Tanzi, A. (1995) "Problems of Enforcement of Decisions of the International Court of Justice and the Law of the United Nations", *European Journal of International Law 6 (1995)*, 539

principle, governed by Article 94§2 (Chapter XIV: The International Court of Justice) of the Charter of the United Nations, which reads as follows:

> [...]§2. 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.

There is a great incongruity with the corresponding Article, laid out in the League Covenant, due to the *travaux préparatoires* at the San Francisco Conference, during which, the jurist committee restricted the right to recourse only to the party that suffers damage from the breach of obligations, stemming from non-compliance, by the other recalcitrant party. This excludes third states, notwithstanding the permanent five members, to invoke Art. 94§2, and thus, the successor to the Council of the League of Nations is considerably vested with less powers.[102]

The history behind the drafting of this article is thoroughly presented by Stulajter:

> Norwegian proposal [...] was not taken into account. Cuban delegation, in its proposal sought to modify the provisions of Article 13 of the Covenant of the League of Nations. [...] The members of the Cuban delegation proposed that "in the event of obligation arising from the judgment of the court functioning within the organization have the Security Council power to make recommendations or undertake specific measures which would contribute to the execution of a particular decision". Great importance to the proposal, is the wording that was used (shall), which implies an obligation of the Security Council to act if there is no compliance with the decision. Cuban position in the negotiation process and generally in the international community, however, was in comparison with the victorious powers of World War II very weak in order to implement the proposal. Subsequently, however, in the next stages of the negotiations on the final form of the United Nations Commission IV. led by representatives of major powers has been replaced by the proposed optional formulation (may) [...] This clearly indicated excuses and efforts to limit the interference of other countries in the international community's monopoly on power in the world (represented by the permanent members of the UN Security Council – in particular the USA and the USSR), since it is still in their discretion use of measures for non-

[102] Simma et al. (2012) *The Charter of The United Nations*, Vol II. Oxford: Oxford University Press. 197

> compliance of the international commitment not only resulting from the decision of the international Court of Justice.[103]

Parallel recourse to the ICJ and the Security Council is not interdicted. "There is, in principle, no obstacle to the simultaneous seisin of the Security Council and the ICJ, because dispute settlement through political and legal bodies are complementary, not exclusive processes, unless special rules provide otherwise."[104]

We can, again, espy that an international judgement of the ICJ is binding and that states are *obliged* to follow the edicts–provisional measures included: Article 41 of the ICJ Statute adds another dimension to the relationship between the Court and the Security Council: "[...] Pending the final decision, notice of the [provisional] measures suggested shall forthwith be given to the parties and to the Security Council."

Prima facie, the state-party which has a right to recourse to the Security Council, on the grounds of non-compliance of the other party, is the Applicant. As Mishra documents, recourse to the Security Council via Article 94§2 of the UN Charter has been observed in three cases: the *Anglo-Iranian Oil Company* case in 1951, the famous *Nicaragua* case in 1986 and in the *Bosnia and Herzegovina v. Serbia and Montenegro* case in 2007.[105] In each of these cases, it was the Applicant state that availed itself of that right (the United Kingdom, Nicaragua, and Bosnia and Herzegovina, respectively), against the State found in breach of compliance with the judgement.

But what happens if, in a case where both the Applicant and the Respondent are found in breach of international law, the final judgement of the ICJ adjures both of them to act, and non-compliance ensues? A relevant case-study is the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening)* where the Court decided *inter alia* that:

> [...] the Federal Republic of Nigeria is under an obligation expeditiously and without condition to withdraw its administration and its military and

[103] Štulajter, M. (2017) "Problem of Enforcement of an International Law – Analysis of Law Enforcement Mechanisms of the United Nations and the World Trade Organization". *Journal of Modern Science*. Tom 2/33/2017. 327

[104] Klein, E., 'Paralleles Tätigwerden von Sicherheitsrat und Internationalem Gerichtshof bei friedensbedrohenden Streitigkeiten', in Völkerrecht ah Rechtsordnung Internationale Gerichtsbarkeit Menschenrechte: Festschrifi für Hermann Mosler (Bernhardt, R./et al., eds., 1983), pp. 467–91. *As quoted in*: Zimmermann, A. et al. (2019) *The Statute of the International Court of Justice (3rd Edition): A Commentary*, Oxford: Oxford University Press. § 53–55

[105] Mishra, A. (2015) "Problems in Enforcing ICJ's Decisions and the Security Council". *Global Journal of Human-Social Science: F Political Science*, Volume 15 Issue 5. 2

> police forces from the territories[106] which fall within the sovereignty of the Republic of Cameroon

but it equally adjudicated for the Applicant that:

> [...] the Republic of Cameroon is under an obligation expeditiously and without condition to withdraw any administration or military or police forces which may be present in the territories which fall within the sovereignty of the Federal Republic of Nigeria[107]

Consequentially, such a judgement means that in case of non-compliance both parties (Nigeria and Cameroon, in this case) have the right to possible course of action through the Security Council. But as it is noted in bibliography this would be 'problematic'.[108] The privilege of initiation of recourse to the auspice of the Council is accorded to the parties only, which means that a third state or the Council itself cannon initiate procedure.[109] However, we can counter-examine this view, under the notion that the Security Council is the prime responsible for 'maintenance of international peace and security', by arguing that it on itself can *proprio motu* regard a non-compliance event as a threat to peace, and thus bring the matter to the table.[110]

Further, in a grammatical interpretation of the said Article, it is clear that the power to act in cases of non-compliance is conferred upon the Security Council, but it rests upon itself in considering to *actually* make headway. This is expressed by the use of the word 'may' and the phrase 'if it deems necessary'. As it is a political body, this phrasing leaves much leeway for politics to enter the sphere of the international judicial system.[111] It is also supported that "this discretionary power has substantially remained part of the reasons for non - compliance with the judgements and decisions of the ICJ."[112]

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[106] Territories mean the areas close to Lake Chad and Bakassi peninsula.
[107] *Land and Maritime Boundury hetween Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening)*, Judgment, I.C.J. Reports 2002. 457
[108] Štulajter, M. (2017) "Problem of Enforcement of an International Law – Analysis of Law Enforcement Mechanisms of the United Nations and the World Trade Organization". *Journal of Modern Science*. Tom 2/33/2017. 328–329
[109] Couzigou, I. (2017) "Enforcement of UN Security Council Resolutions and of International Court of Justice Judgements : the Unreliability of Political Enforcement Mechanisms", in Jakab, A., Kochenov, D. [*eds*] (2017) *The Enforcement of EU Law and Values: Ensuring Member States' Compliance*, Oxford: Oxford University Press. 17
[110] See also: United Nations Security Council Resolution 9 (1946) as cited in the Introduction.
[111] Mishra, A. (2015) "Problems in Enforcing ICJ's Decisions and the Security Council". *Global Journal of Human-Social Science: F Political Science*, Volume 15 Issue 5. 1
[112] Abiodun, A. & Abila, S. (2018) "A Critical Examination of the Enforcement of ICJ Decisions through the Organs of the United Nations", *Journal of Law and Criminal Science*, June 2018, Vol. 6, No. 1. 23

It must not be forgotten, that the Council can also decide to do away with the case, by simply recommending proposed measures to resolve the dispute (but not decide on a more dynamic response) or, monastically, declaring that a state breaches its international obligations and should 'straighten' its comportment.[113] To what extent this is can be regarded as efficient crisis management or merely a delegation of the problem, the answer of course rests with the latter conclusion.

Hierarchy between the ICJ and the Security Council. In the *Nicaragua* judgement concerning jurisdiction, this matter is addressed by the Court, that the UN Charter does not favor the Court with precedence over other organs:

> [...] The Charter accordingly does not confer exclusive responsibility upon the Security Council for the purpose. While in Article 12 there is a provision for a clear demarcation of functions between the General Assembly and the Security Council, in respect of any dispute or situation, that the former should not make any recommendation with regard to that dispute or situation unless the Security Council so requires, there is no similar provision anywhere in the Charter with respect to the Security Council and the Court. The Council has functions of a political nature assigned to it, whereas the Court exercises purely judicial functions. Both organs can therefore perform their separate but complementary functions with respect to the same events.[114]

It is crucial to examine how and when can the Security Council act and what are the measures it can take to stop non-compliance. The relevant Article does not enumerate or specify what measures are suitable for such cases. Of course, one has to examine what the pertinent non-compliance is and in what fashion it was demonstrated.

As far as use of force to coerce a state to comply is concerned i.e., military measures, are permissible under the general functioning of the Security Council, it has never reached such a decision.[115] According to Tanzi, they "have not ever even been proposed."[116] Also, in literature, there is not agreement as to the option of military intervention in such cases, even though a great portion of scholars cannot justify the

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[113] Couzigou, I. (2017) "Enforcement of UN Security Council Resolutions and of International Court of Justice Judgements : the Unreliability of Political Enforcement Mechanisms", in Jakab, A., Kochenov, D. [*eds*] (2017) *The Enforcement of EU Law and Values: Ensuring Member States' Compliance*, Oxford: Oxford University Press. 17

[114] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984. 434–435

[115] Couzigou, I. (2017) "Enforcement of UN Security Council Resolutions and of International Court of Justice Judgements : the Unreliability of Political Enforcement Mechanisms", in Jakab, A., Kochenov, D. [*eds*] (2017) *The Enforcement of EU Law and Values: Ensuring Member States' Compliance*, Oxford: Oxford University Press. 17

[116] Tanzi, A. (1995) "Problems of Enforcement of Decisions of the International Court of Justice and the Law of the United Nations", *European Journal of International Law 6 (1995)*. 561

adoption of forcible measures, which are not explicitly prescribed in Article 94 § 2 of the UN Charter.[117]

The possibility of a referral of a case from the Security Council to the International Court of Justice has only been realized once, during the early phase of the United Nations. It was in the *Corfu Channel* case, in accordance with Article 36§3 of the UN Charter. But, to this date, no other cases of non-compliance, brough to the Security Council have been referred to the ICJ, in fashion of an adopted UNSC measure.[118]

In instances, however that involve deciding measures and taking generic action, it is deemed by many scholars that the Security Council essentially reviews the ICJ judgements, under a political lens.[119] This is contrary to what happened in the *Lockerbie* case, where the opposite was the case.[120]

To conclude, this relationship is not based on firm grounds, since the discretionary competence for the Security Council to act is largely influenced by political will and power games between the members. As such, and in the way Oellers-Frahm concludes her commentary on this, by holding back to the optimism of this Article: "[The mechanism] should not be overestimated as a means for executing judgements of the ICJ, in particular if 'veto-powers' are concerned."[121]

2.3 Relation between the Security Council and the International Criminal Court

The Rome Statute of the International Criminal Court establishes, through Article 13 (b) its relationship with the Security Council, providing that

[117] See for example Schulte, C. (2004) *Compliance with Decisions of the International Court of Justice*, Oxford: Oxford University Press. 54–55; Azar, A. (2003) *L'exécution des Décisions de la Cour Internationale de Justice*, Bruylant. 151–153. As cited in Couzigou, I. *ibid*, 19.
[118] More on this relation can be found in Distefano, G. and Henry, E., (2012) *The International Court of Justice and the Security Council: Disentangling Themis and Ares*. Unabridged and unedited draft of a chapter titled "The Icj And The Evolution Of International Law: The Enduring Impact Of The Corfu Channel Case", in K. Bannelier, Th. Christakis, S. Heathcote, eds., Routledge, 2012, at 60-83., Available at SSRN: https://ssrn.com/abstract=2011851 (Last Access: 20 Dec. 21)
[119] Mishra, A. (2015) "Problems in Enforcing ICJ's Decisions and the Security Council". *Global Journal of Human-Social Science: F Political Science*, Volume 15 Issue 5. 1
[120] See Martenczuk, B. (1999) "The Security Council, the International Court and judicial review: what lessons from Lockerbie?", *European Journal of International Law 10 (1999)*. 515–547
[121] Simma et al. (2012) *The Charter of The United Nations*, Vol II. Oxford: Oxford University Press. 202–203

> [t]he Court may exercise its jurisdiction with respect to a crime referred to in Article 5 in accordance with the provisions of this Statute if. . . . a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations [...]"[122]

Article 87 Requests for cooperation: general provisions

> 5. (a) The Court may invite any State not party to this Statute to provide assistance under this Part on the basis of an ad hoc arrangement, an agreement with such State or any other appropriate basis.
>
> (b) Where a State not party to this Statute, which has entered into an ad hoc arrangement or an agreement with the Court, fails to cooperate with requests pursuant to any such arrangement or agreement, the Court may so inform the Assembly of States Parties or, where the Security Council referred the matter to the Court, the Security Council.
>
> [...] 7. Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.

The Security Council has, since 2005, referred cases to the International Criminal Court. Beginning with the Resolution 1593 (2005)[123] concerning the situation in Darfur, it stated that:

> 1. Decides to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court;
> 2. Decides that the Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully;
> 3. Invites the Court and the African Union to discuss practical arrangements that will facilitate the work of the Prosecutor and of the Court, including the possibility of conducting proceedings in the region, which would contribute to regional efforts in the fight against impunity;
> 4. Also encourages the Court, as appropriate and in accordance with the Rome Statute, to support international cooperation with domestic efforts to promote the rule of law, protect human rights and combat impunity in Darfur;

[122] For the official text of the Rome Statute, please refer to bibliography.
[123] S/RES/1593 (2005), 31 March 2005

As to the implementation and the monitoring of compliance with a sentence Article 106 (Supervision of enforcement of sentences and conditions of imprisonment) holds that "the enforcement of a sentence of imprisonment shall be subject to the supervision of the Court and shall be consistent with widely accepted international treaty standards governing treatment of prisoners."

The matter of the relationship between the ICC and the Security Council, in terms of compliance has not been addressed adequately in scholar literature. The greatest part of bibliography refers to the competence of the Security Council to refer cases to the ICC, which is not the subject of the current thesis. As compliance, here it is meant the cooperation of states to aid the work of the ICC (since it tries persons) and the implementation of sentences.

2.4 A new role for the Security Council?

At this point, we want to propose an amelioration of the position of the Security Council within the international justice system. As posited in the introduction, the landscape of international courts and tribunals has changed since the end of World War II. While these newly founded institutions deliver on their promise and issue landmark judgements in the field of international law, and some may incorporate monitoring mechanisms (like the ECtHR or the IACtHR), there is little connection of them with the Security Council, which still reigns in the field of international peace and security maintenance.

While, in other fields, cooperation of the United Nations in general, and the Security Council in particular, with regional organizations has been fruitful–one might remember the 'silent' and indirect authorization of use of force by ECOWAS in the Liberia crisis–the helping hand by the Security Council to deal with recalcitrant states, not compliant with decisions of regional courts is not formally expressed.

What is needed, is an extension of the compliance recourse clause of the Article 94§2 of the UN Charter, to include, if not all decisions (i.e., provisional measures) at least judgements on merits, issued by other recognized international or regional courts. This could be iterated in that clause with an interpretational addendum or provision.

The Security Council, because of resources, past experience, and a well-known bureaucracy, is more able to exert pressure on states to follow judgements, other than

the ICJ's. Political organs of regional organizations (like ECOWAS for one) are torn by ethnic strife, corruption and a *quid pro quo* approach that, while no one denies its existence in the UN bureaucracy, the rates are incomparable. One could echo the voices of human rights group advocating for enforcement mechanisms (see previous Part), in organizations that lack funds and all the aforementioned qualities of the Security Council.

Miracles are not expected; the power of politics in this organ is not contested– to the contrary, it has been expressed, time and again, in this thesis, that the ever impending might of the 'veto power' threatens any attempt to bring non-compliance to a halt. But it would not be imprudent to assume that a State that is subjected to damage from another State that defies a decision, and a causal relation exists between those two, that the State proclaiming to have recourse to the Security Council, pursuant to a firm procedure laid out in a revised Article, will have effect on the other State's behavior.

Enthusiastic as this endeavor might sound, it is realistic to think that it will take many years and a great amount of political will to implement it. It will be another concession, not only from state sovereignty to supranationality, but also to that of the region towards a center of decision-making (the UN). And, certainly, the Security Council is not a panacea to global problems.

Conclusions

In the course of writing this thesis, the author came across this phrase, more or less similar, in almost every paper that is concerned with the issue of compliance of states with judgements of international courts and tribunals: that bibliography still lacks, to this day, a solid and extended study of the post-adjudicative phase of international justice, complete with legal and political assessment.

In the first (and most extended) Part I, we examined the general notion of compliance, for which multiple definitions were proposed. A very high compliance rate was confirmed across major international courts and tribunals (with exceptions of course), an element which is quintessential to the continuity of existence of the courts as such, and not as mere institutions that simply declare a situation as a breach of international obligations, or unlawful. The behavior of states was found to generally be submissive to the orders. However, non-compliance still occurs and, in some cases, still persists. We tried to shed some light on the reasons, because of which a state is compelled to follow the edicts of a court, to which it has legally consented to jurisdiction and binding effect of the final outcome. The concept of the international judicial order's legitimacy, as perceived by the states, is the main motive, along with other factors. Next, we attempted to present three major international courts and along them, the general stance of their member-states towards them. The inference was drawn that, while in the northern hemisphere, international and regional courts are, in most cases, respected, as is the case in the Americas, the ECOWAS Court in Africa, has still way ahead to reach that level of compliance observed elsewhere. In a purely legal manner, we probed into the notion of international responsibility, and how adherence to international courts' judgements and decisions is a pillar of state obligations not to be bypassed. Obligation to comply has been, since long time ago, extended to any measure of temporary–provisional–protection. Thus, provisional measures have the same binding effect and legal results as a judgement on merits. Any legally induced intervenor to a case bears the same responsibilities, as the parties that the proceedings originally concerned. Partial compliance by a state, or *à la carte* execution, constitutes

a treacherous and equally unlawful breach of international obligations, a problem that has been highlighted by international and regional institutions. It was proven that municipal legal order and courts cannot stop the state from fulfilling its international obligations. And this has to be done in due time, from the temporal point a judgement or order of provisional measures is issued. Next to that, we presented the main organs of enforcing and monitoring compliance of various courts. Finally, we addressed the question of permissibility of non-compliance by states, to which the answer errs to the negative side. This, in our view, best serves the interest of international community and humans, who are the final 'users' of international law. At this point, it is important to stress that, as it was also stated *in passim*, not all international judgements actually solve problems (with reference to *in vitro* versus *in vivo* solutions). At the worst-case scenario, they could also exacerbate the existing ones.

In Part II, we tried to connect the issue of compliance at hand, with the mandate of the Security Council, as a political organ of the United Nations primarily responsible for the maintenance of international peace and security. In connection with the ICJ, there have only been a few cases of non-compliance before it. The discretionary power given to it, in contrast with its predecessor (the Council of the League of Nations), gives a more restricted room for action, given also the political nature and power play between permanent and rotating members of the Security Council. In a further examination of the relationship between those two organs, there is no hierarchy, as long as neither of them enters the respective field of the other. That being said, the revision of decisions of each and other, is problematic as shown in case-law. After all, the Security Council has never, to-date, reached a decision on measures for non-compliant states, and even those proposed were never of military nature. One should not expect miracles stemming from Article 94 § 2 of the UN Charter. Next, we tried to investigate relationship of the Security Council with other international courts or tribunals, something which was hard, concerning the sole field of compliance. A great deal of action is witnessed in the field of international criminal law and the corresponding International Criminal Court (ICC). Finally, we tried to articulate some proposals regarding a new role for the Security Council, pertaining to the modern international order, notwithstanding political or legal, that, in our view, will help shape a more just international community, absent an established enforcing–policing–mechanism.

In assessing the subtitle of this thesis at hand, one could also add a question mark at the end of the phrase. Historically, there is much difference in the *modus operandi* of the Security Council before and after the Cold War. As it was iterated earlier in the Introduction chapter, under no circumstances do we stress that the UNSC is a panacea to every international problem. One could say that the extension of the UNSC jurisdiction to take over *all* matters pertaining to international justice, even if it is unable to reach a unanimous decision, precludes the danger that sovereign states will seek more interstate arbitrational solutions, thus diminishing the importance and reach of international courts and tribunals, the consequences of which are another interesting object of study.

Can someone be optimistic about international justice, after what has been presented in this paper? For the author of the thesis at hand, and in terms of what we experience each day inside this ever-changing world order, the answer is affirmative. Who would think that the compliance rates of international courts and tribunals are generally that high? At this point we could stress a point that starts to dominate in the scholar field, the one that state sovereignty has, all those years, receded in favor of fulfillment of world goals. And in these turbulent times, of climate crisis, with a pandemic claiming millions of lives, military aggression in several regions and resurgence of illiberal regimes, international justice is being (and has to) bolstered for the sake of humanity.

⁂

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