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After “The Court Rose”: The Rise of Diplomatic Means to Implement the Pronouncements of the International Court of Justice

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Abstract

What happens after the International Court of Justice releases a pronouncement? This article attempts to answer this question by reviewing the diplomatic initiatives taken by States as well as by other members of the Court’s ‘audience’, such as international organizations. Both judgments and advisory opinions are covered. This allows comparing the relational dynamics afferent to each type of the Court’s jurisdiction. Endorsing a broad definition of ‘follow-up’, the analysis aims at enhancing awareness as to the panoply of diplomatic initiatives that can be taken following a pronouncement of the Court as well as to the complexity of the implementation process at large.

Keywords

implementation; compliance; dispute resolution; diplomatic means; International Court of Justice (ICJ); judgments; advisory opinions; pre-adjudicative phase; negotiations; implementation clauses and agreements; mixed commissions; Trust Fund to assist States in the settlement of disputes through the ICJ; register of damage caused by the *Wall*

I. Introduction

To most international lawyers, the voice of the International Court of Justice (‘ICJ’ or ‘the Court’) is like that of a siren. Irresistibly, it attracts attention above the chorus of specialized courts, tribunals and quasi-judicial entities each speaking with their own voice and *ethos*.¹ Despite this, the

¹ For a discussion on the different *ethoi* of specialized courts compared to that of the ICJ, see, particularly, Yuval Shany, ‘No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary’ (2009) 20 EJIL 73, 83.

so-called ‘post-adjudicative phase’ has for a long time been overlooked by international lawyers. This is somewhat curious because having heard what the Court has said on a matter but ignoring the events that follow seems like only listening to half of a story.² Although within the last couple of decades there has been a growing interest in this issue, only two aspects of post-adjudication have thoroughly been looked at: the record of compliance with the Court’s judgments and the means of legal redress available in cases of non-compliance with the compulsory decisions of the ICJ.³

In this context, our intention is to approach the ‘post-adjudicative phase’ in a twofold way that has not yet been attempted. First, we envisage analyzing the implementation of both ICJ judgments and advisory opinions (AOs); second, we will concentrate on the practical *means* of implementation, and specifically on diplomatic means. Both of these topics have received scant attention,⁴ and the endeavor to analyze them jointly represents uncharted waters. This neglect persists because implementation is often seen as a political – rather than a legal – issue.⁵ Also, the tendency to concentrate

²) In a similar vein, Judge Jennings noted that ‘[i]t 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’, see Robert Jennings, ‘Presentation’ in Connie Peck and Roy Lee (eds), *Increasing the Effectiveness of the International Court of Justice: Proceedings of the ICJ/UNITAR Colloquium to Celebrate the 50th Anniversary of the Court* (Martinus Nijhoff Publishers/UNITAR 1997) 78.

³) The issue of compliance with ICJ judgments has been thoroughly dealt with. The most recent contributions are Aida Azar, *L’exécution des décisions de la Cour internationale de Justice* (Bruylant 2003) and Constanze Schulte, *Compliance with Decisions of the International Court of Justice* (OUP 2004).

⁴) As to the first aspect, only a few authors have attempted an analysis of both ICJ judgments and AOs. See, notably, Philippe Weckel, ‘Les suites des décisions de la Cour internationale de Justice’ (1996) XLII AFDI 428. Other authors dealing in general with the activity of the Court have cursorily addressed the question of the follow-up to ICJ decisions in both advisory and contentious proceedings. For instance, E.K. Natwi, *The Enforcement of International Judicial Decisions and Arbitral Awards in Public International Law* (Sijthoff-Leyden 1966) 103–113, 148–162; Jonathan Charney, ‘Disputes Implicating the Institutional Credibility of the Court: Problems of Non-Appearance, Non-Participation and Non-Performance’ in L.F. Damrosch (ed), *The International Court of Justice at a Crossroads* (Transnational Publishers 1987). Rarely, the issue of the ‘reception’ of AOs has been treated as a subject *per se*, for instance Michla Pomerance, *The Advisory Function of the International Court in the League and U.N. Years* (John Hopkins University Press 1974) 341–367. Whereas, concerning the means of implementation, a recent PhD thesis by Affef Ben Mansour attempts to fill the gap concerning the means of implementation of international decisions in general, comprising also the ICJ’s binding pronouncements in contentious cases: Affef Ben Mansour, *La mise en œuvre des arrêts et sentences des juridictions internationales* (Larcier, 2011).

⁵) Overall, it has been noticed that the enforcement of international judgments relies on the same mechanisms providing for the enforcement of any kind of international law obligation. Hence,

much more on judgments explains the dearth of reflection on the practical features and theoretical underpinnings of implementation when it comes to AOs.

Overall, these brief remarks hint at the need for thoroughly rethinking the very notion of implementation and its manifestations. Accordingly, we will first clarify what we mean by implementation for present purposes (Section II). Then, we will look more closely at the diplomatic means used to implement ICJ judgments (Section III) and its AOs (Section IV).

II. Implementation of an ICJ Pronouncement Through Diplomatic Means: Thrust and Content of the Notion

A. *Implementation and Compliance: Indivisible Twins?*

What action will be taken after the Court's decision is up to the concerned States and, therefore, prone to the vagaries of the political interaction between them. This is why implementation is generally perceived as quite far from the realm of international law.⁶ Yet, certain commentators⁷ have appealed to good faith as the principle that can facilitate implementation, and which limits the leeway of parties.⁸ While reaching opposite outcomes, both approaches are heavily focused on the obligation to execute a Court's pronouncement. In one case, implementation defies legal analysis due to a lack of means to ensure execution of a pronouncement; in the other case,

the matter acquires a political rather than a legal character. On this point, see Edvard Hambro, *L'exécution des sentences internationales* (Recueil Sirey 1935) 47; Constantin Vulcan, 'L'exécution des décisions de la Cour internationale de Justice d'après la Charte des Nations Unies' (1947) 51 RGDIP 187; Shabtai Rosenne, 'L'exécution et la mise en vigueur des décisions de la Cour internationale de Justice' (1953) 57 RGDIP 532; Ehran Tuncel, *L'exécution des décisions de la Cour internationale de Justice selon la Charte des Nations Unies* (Messeiller 1960) 16, 60; Pasquale Paone, 'Considerazioni sull'esecuzione delle sentenze della Corte internazionale di Giustizia' XIV Comunicazioni e studi, (1975) 632; Gilbert Guillaume, 'Avant-Propos' in Azar (n 3) xv. A similar observation was also made by the Committee of Jurists charged with the task of elaborating the Statute of the International Court of Justice. As they observed, '[i]t was not the business of the Court to ensure the executions of its decisions'. See *Documents of the United Nations Conference on International Organizations*, vol. 4, 853.

⁶ For instance, Shabtai Rosenne, *The Law and Practice of the International Court (1920–2005)* (Martinus Nijhoff Publishers 2006) 208.

⁷ Weckel (n 4) 429.

⁸ Ben Mansour (n 4) 134–148.

implementation is given a legal rubber stamp through the principle of good faith, which is relevant to the execution of any international law obligation. Indirectly, this reveals a close linkage between implementation and compliance.

It is, then, not surprising if the terms of 'implementation' and 'compliance' are employed almost interchangeably when speaking of the 'post-adjudicative phase'.⁹ More precisely, 'implementation' is taken to comprise all the actions that may facilitate or result in compliance, while compliance itself would indicate the 'state of conformity or identity between an actor's behavior and a specified rule.'¹⁰ As such, it appears that the obligation of execution is the backbone of implementation.¹¹ Accordingly, focus turns towards the *parties* and what they do *after* the pronouncement, with little interest being shown for anything that happens before that or the involvement of other subjects.

Odd as it may seem, a similar conception of implementation has been applied to AOs.¹² Different arguments have been raised to obviate the lack of a formal obligation of execution. For instance, it has been maintained that since the Court also exercises a fully-fledged legal declaration in its

⁹ The notions of 'implementation' and 'compliance' are used in general with regard to the execution of an international obligation.

¹⁰ See Kal Raustiala and Anne-Marie Slaughter, 'International Law, International Relations and Compliance' in Walter Carlsnes et al. (eds), *Handbook of International Relations* (SAGE 2002) 538, 539. The same authors define implementation as 'the process of putting international commitments into practice: the passage of legislation, creation of institutions (both domestic and international) and enforcement rules. Implementation is typically a critical step towards compliance, but compliance can occur without any effort or action by the government.' Similarly, see also Colter Paulson, 'Compliance with Final Judgments of the International Court of Justice' (2004) 98 AJIL, 434, 436.

¹¹ Rosenne distinguishes between 'application' (voluntary execution) and 'mise en œuvre' (forced execution) of a judgment. See Rosenne, 'L'exécution et la mise en vigueur des décisions de la Cour internationale de Justice' (n 5) 532. With regard to the implementation of rules in general, see also Abi-Saab, who speaks of execution and application, respectively induced by exogenous and endogenous factors: Georges Abi-Saab, *Cours général de droit international public*, Collected Courses of the Hague Academy of International Law, vol. 207, issue VII (Martinus Nijhoff Publishers 1987) 278.

¹² Certain authors have rephrased the question of the implementation of AOs as one of following-up the recommendations of the political organs of the requesting international organization (IO) acting upon the AO. This is ultimately tantamount to avoiding the treatment of the implementation of AOs as a rubric of the more general topic of the implementation of the Court's pronouncements. In this vein, see Guillaume, 'De l'exécution des décisions de la Cour internationale de Justice' (1997) RSDIE 431, 432; Azar (n 3) 55.

advisory competence, the content of AOs would be binding in itself and, as such, require compliance.¹³ Another approach is to say that an obligation of execution arises for the requesting organ that voluntarily accepts an AO.¹⁴ In either case, implementation is again traced back to the conduct aimed at producing compliance with the AO.

As the preceding remarks show, implementation is largely conflated into or seen as a gateway to compliance. If this is so, how should one deal with conduct that, while not necessarily resulting in full or substantial compliance, is still somewhat related to the post-adjudicative phase of an ICJ pronouncement? Three main scenarios can be foreseen: first, compliance does not occur, despite the occurrence of certain acts of implementation; second, implementation goes beyond compliance; and, third, implementation itself requires certain enabling acts that give little indication as to whether compliance will eventually take place.

To begin with, implementation may fall short of full or substantial compliance.¹⁵ Even assuming that certain implementation steps have been taken, the pronouncement may not be realized for numerous reasons. For instance, one of the parties may lack the political will to fully adopt the conduct agreed upon, circumstances may change so as to alter the balance of interests among the parties or a different solution for their differences may emerge and so forth. Certainly, the opposite could also happen, in the sense that implementation may entail practical and legal effects beyond the mere realization of the pronouncement. This is likely when implementation paves the way for the accommodation of broader issues between the parties, as in the case of certain ICJ judgments concerning territorial disputes.

¹³) See Paolo Benvenuti, *L'accertamento del diritto mediante i pareri consultivi della Corte internazionale di giustizia* (Giuffè 1985). In a similar vein, Pomerance has referred to 'a feeling of obligation' and an '*opinio juris*', which have directed the actions of UN organs with respect to AOs. See, Pomerance (n 4) 371.

¹⁴) See Weckel (n 4) 431. In this respect it is important to recall that Natwi goes as far as saying that the full acceptance of the ICJ's AOs by requesting organs leads to the emergence of a 'customary rule of the judicial system' making implementation binding. Such an obligation would be different from the one of *res judicata*, which applies to judgments. See Natwi, (n 4) 73.

¹⁵) The lack of compliance in spite of the undertaking of certain acts of implementation has been investigated with reference, in particular, to environmental agreements. See, for instance, H.K. Jacobson and E.B. Weiss, 'A Framework for Analysis,' in H.K. Jacobson and E.B. Weiss (eds), *Engaging Countries. Strengthening Compliance with International Environmental Accords* (The MIT Press 1998) 4–5.

Along with these two scenarios, one could think of other conduct that is more remotely related to compliance and yet crucial to implementation. Practice is rich with examples, ranging from the conclusion of agreements on the means to resolve disagreements in the course of implementation to the creation of organs or entities with monitoring or other implementation-related tasks, amongst others.¹⁶ While compliance takes something of a backseat, these initiatives in themselves are aimed at facilitating or leading to implementation, which is neither theoretically nor practically the same as compliance.

So, the critical issue is whether this type of conduct – inasmuch as it emanates from a diplomatic initiative – should constitute part of the follow-up process. The question is whether there is any legally relevant goal other than compliance that could be pursued in following-up an ICJ pronouncement. In our view, this question should be answered in the affirmative since compliance is just one of the many objectives underlying implementation.

B. Implementation at the Juncture Between Effectiveness of the Pronouncement and Effectiveness of the System

As compliance is generally intended – the state of conformity or identity between an actor's behavior and a specified rule – one might estimate that it embraces all of the aspects related to the actualization of law, *in casu*, identified by a given pronouncement. Yet this is less obvious when one thinks about the realization of the regulatory goal underlying a certain rule, rather than the rule itself. That is to say that the effectiveness of a pronouncement is not a guarantee of its efficacy.¹⁷ For instance, certain declaratory judgments – notably, those interpreting the clauses of an agreement – while being complied with, may still need some form of action, e.g. incorporation in national legislation for their practical effectiveness.¹⁸ More generally, assuming compliance, the regulatory purpose sought in a

¹⁶ For more details concerning specific cases, see Sections III and IV.

¹⁷ On the distinction between 'effectiveness' and 'efficacy', see particularly Jean Touscoz, *Le principe d'effectivité dans l'ordre international* (LGDJ 1964) 4. The notion of 'efficacy' in law has been explored particularly from a sociological perspective, see Romano Bettini, 'Efficacité' in A.J. Arnaud (ed), *Dictionnaire encyclopédique de théorie et de sociologie du droit* (2nd edn, LGDJ 1993) 219.

¹⁸ On this point, Azar (n 3) 93.

pronouncement may be hindered or affected by the factual context surrounding it. This is most likely when the Court receives, either in contentious cases or in advisory proceedings, a limited jurisdiction over a certain dispute or situation. Henceforth, compliance can fall short of exhausting the legally relevant aspects involved in the realization of a pronouncement. Finally, in certain cases, the Court arguably may not give the parties enough of an indication for resolving their divergences, which in turn could make the very notion of compliance ill-suited to the situation.¹⁹

Having said this, two further – intertwined – reasons give us reason to look at implementation afresh. On the one hand, owing to the complexity of inter-State and societal dynamics at the international level, it should not be assumed that the subjects involved in implementation seek solely – or even principally – compliance. Compliance may well have precedence over other goals within an international lawyer's professional *ethos*, but the same does not necessarily apply to the actual behavior of the concerned actors.²⁰ On the other hand, it is theoretically inaccurate to conflate compliance with the whole gamut of conduct that might otherwise enhance the effective functioning of international law. As with any normative system, international law endeavors, in fact, to assure the containment and avoidance of disputes – the term 'dispute' here broadly indicating a clash of interests between international law subjects. These two objectives are not always met concomitantly or exclusively through compliance; yet it still seems reasonable to consider conduct fostering either of these goals as part of the implementation process.

Accordingly, if the effective resolution of a certain dispute – whether because of the Court's limited jurisdiction or because of its reluctance to address some of the aspects relevant *in casu* – requires acts going beyond or departing from effective compliance, these acts nonetheless partake in implementation and, provided they are of a diplomatic nature, shall be included in our analysis. The same goes for those initiatives aimed at accommodating the interests of States indirectly affected by a

¹⁹) In this vein, Aloysius Llamazon notes that 'there is basis to question whether the Court provided the parties [to the *Gabcikovo-Nagymaros* case] with enough guidance for effective resolution to occur, which in turn may lead one to question altogether whether compliance is the proper optic from which to evaluate the decision,' see Aloysius Llamazon, 'Jurisdiction and Compliance in Recent Decisions of the International Court of Justice' (2007) 18 EJIL 815, 845.

²⁰) On the attribution of a researcher's perspective on their investigated phenomenon, see Pierre Bourdieu, 'The Scholastic Point of View' (1990) 5 CA 380.

pronouncement, for instance in cases of territorial delimitation or of multi-lateral treaty interpretation. Incidentally, these examples highlight the importance of implementation for the prevention of future disputes, even more so than for the resolution of the existing dispute. Lastly, by way of illustration one can recall those initiatives – such as the establishment of monitoring bodies – aimed at channeling and mitigating persistent clashes of interest so as to prevent their escalation in a decentralized way.

Taken together, these observations foreshadow the highly multifaceted character of the topic at hand. Admittedly, this is not surprising given that the chosen focus of investigation – implementation through diplomatic means – necessarily entails a perpetually evolving and proteiform practice. As we have tried to show, however, our subject matter is diverse not only in its material content, but also in its functional and teleological dimension. For this reason, our discussion on implementation will not primarily aim at measuring the score of compliance with ICJ judgments and AOs, but rather at identifying the conduct, initiatives and mechanisms taken in conjunction with a pronouncement and contributing to the effective functioning of international law as discussed above.²¹ To avoid an over-descriptive listing of such initiatives, we will seek to highlight the main recurrent features and trends characterizing diplomatic interaction that takes place in connection with implementation.

Additionally, attention will not be confined to the actions taken after the pronouncement by those who have an obligation to execute it. Accordingly, we will look, on the one hand, at the initiatives taken by the parties in collaboration with the Court and, on the other hand, at the different agreements made before the pronouncement in view of its implementation. In other words, we will look at the dialogue between the Court and its ‘audience’, the latter being composed of different subjects according to the factual circumstances of the situation addressed by the Court.²² Such an approach could be criticized for being too broad, with a risk of giving only a cursory analysis of specific circumstances. Yet, concentrating narrowly on

²¹ In a similar vein, Weckel discusses the ‘*suites contrastées des décisions juridictionnelles*’ defined as ‘*les comportements provoqués par ces actes*’, see Weckel (n 4) 436.

²² The notion of the Court’s ‘audience’ has been explored with regard to the *Nuclear Weapons* AO by Jean Salmon, ‘Quels sont les destinataires des avis’ in Laurence Boisson de Chazournes and Philippe Sands (eds), *International Law, the International Court of Justice and Nuclear Weapons* (CUP 1999) 28–35.

compliance is unlikely to render a better analysis. Several commentators have stressed the difficulty of measuring compliance with judgments owing to the complexity of most domestic processes that are designed to realize compliance,²³ the difference between States' statements and their deeds, as well as to certain time factors.²⁴ In the case of AOs, these difficulties seem even more compelling, as suggested by the lack of empirical inquiries on this issue. Aside from these shortcomings, the crucial point remains that implementation could not soundly be investigated without recognizing that the addressees of – or the subjects otherwise affected by – a Court pronouncement engaged in implementation seek not only compliance, but also a handful of other goals that may still be relevant for the effective functioning of international law.

III. The Implementation of ICJ Judgments Through Diplomatic Means

A. *Means of Implementing ICJ Judgments: General Remarks*

Often, the actions pertinent to implementation are held to vary according to the *type* of judgment at stake.²⁵ The common distinction is between declaratory and constitutive judgments: while declaratory judgments – identified as those which spell out the content or recognize the existence of disputed rights – do not technically need any implementing act, the opposite applies to judgments declaring a new right, such as decisions allocating pecuniary reparation for damages. Exceptionally, it is conceded that certain declaratory judgments may require some form of implementation, e.g.

²³) In this respect, Llamazon stresses particularly the hurdle of keeping track of and inferring determinative conclusions from the domestic process aimed at compliance, notably as far as federal systems are concerned. See Llamazon, (n 19) 845.

²⁴) Philippe Couvreur, 'The Effectiveness of the International Court of Justice in the Peaceful Resolution of Disputes' in A.S. Muller et al. (eds), *The International Court of Justice: Its Future Role After Fifty Years* (Martinus Nijhoff Publishers 1997) 112, n 75.

²⁵) Guillaume, 'De l'exécution des décisions de la Cour internationale de Justice' (n 12) 434; Azar, (n 3) 91–98; Ben Mansour (n 4) 193–248. Other types of classification have been formulated for the purpose of discussing aspects other than compliance. See, particularly, Suzanne Bastid, *La fonction juridictionnelle dans les relations internationales*, Les Cours de droit, Paris, 1956–1957, 375; Michel Virally, 'Le champ opératoire du règlement judiciaire international' (1983) 87 RGDIP 285.

territorial disputes entailing changes of sovereignty over an inhabited land.²⁶ Another – recently formulated – classification identifies judgments on territorial or border disputes and judgments on responsibility-related issues.²⁷ With each of these labels follow certain legal principles that stipulate the action necessary for implementation, thereby diminishing the relevance of political discretion during the post-adjudicative phase.

It appears that, in both approaches, implementation depends on certain proprieties of a judgment. These elements, however, only partly explain the post-adjudicative phase, which is ultimately determined by the will of the parties. Indeed, it is for them to decide the place that the ‘juridical component’ should have in their dispute, according to what proves feasible and appropriate under their existing political relationship.

If the features and contours of the post-adjudicative phase are to be gauged in light of this context, an analysis of implementation cannot ignore what happens during the pre-adjudicative phase or what actors other than the parties – notably universal or regional international organizations and the Court itself – may do throughout this process.

B. The Relationship Between the Parties: the Use of Diplomatic Initiatives in Fleshing Out the ‘Letter of the Law’

At the outset, the existence of a dispute between two or more subjects attests dissatisfaction with a given situation and, eventually, the desire to reach a different allocation of interests thereto. This quest for change by both or only one of the parties renders their relationship something of a pragmatic one. It is so also because, from the inception of a dispute, both the parties lack information on numerous issues, ranging from the potential emergence of additional points of disagreement to the best way of meeting the goals respectively envisioned by the parties, and so forth. In an attempt to accommodate this uncertainty, the initiatives preceding or following adjudication will have to comprise a pragmatic attempt to adjust to actual as well as potential changes in the circumstances surrounding a dispute. Thus, it seems appropriate to identify first the aspects

²⁶⁾ In this respect, Azar also mentions judgments on the interpretation of multilateral treaties which may need implementation at the domestic level through the enactment of domestic legislation. See Azar (n 3) 93.

²⁷⁾ Ben Mansour (n 4) 193–284.

of the pre-adjudicative phase relevant for implementation (1) and next the main trends in implementation through diplomatic means adopted by the parties (2).

1. *Competence-related and Other Factors of the Pre-adjudicative Phase Influencing Implementation*

To begin with, the way in which the jurisdiction of the Court is framed has a bearing upon implementation. When the parties purposively leave certain aspects of their dispute out of adjudication, such issues – if left outstanding – will likely surface again during the negotiations on implementation. In this case, the commitment to comply with the judgment could foster a comprehensive solution of the dispute, including points not directly affected by the pronouncement or, conversely, compliance could be delayed and the process of implementation slowed down. A comparison between the aftermaths of the *Asylum/Haya de la Torre*²⁸ and the *North Sea Continental Shelf*²⁹ cases illustrates this well: while both pronouncements were fairly broad in their terms, implementation faltered in the former case but, as regards the second case, the parties overcame a stalemate that had hindered previous negotiations and subsequently reached an agreement.³⁰ To be sure, the parties can also involuntarily omit from the Court's mandate certain aspects which prove problematic only upon implementation. In order to limit the drawbacks ensuing from this, States have developed a tendency to 'learn' from past experiences. Let us take, for instance, delimitation cases: overall, when the Court has been asked to determine only the general principles pertinent to delimitation, implementation has required a greater diplomatic effort than instances where it has either delimited or indicated to the parties how to delimit their boundary. In the light of this, States have become more disposed to give the Court a comprehensive

²⁸) *Colombian-Peruvian Asylum Case (Colombia v. Peru)*, Judgment of 20 November 1950, ICJ Reports 1950, 266 [hereafter, *Asylum*] and *Haya de la Torre Case (Colombia v. Peru)*, Judgment of 13 June 1951, ICJ Reports 1951, 71 [hereafter, *Haya de la Torre*].

²⁹) *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* Judgment of 20 February 1969, ICJ Reports 1969, 3 [hereafter, *North Sea Continental Shelf*].

³⁰) Following the Court's second decision, for a long time the parties could not find a common agreement and negotiations went on unsuccessfully, with Colombia eventually bringing the case to the attention of the Inter-American Peace Commission. The parties reached an agreement in 1954, with the conclusion of the Acuerdo de Bogotá. See (1955) 2 *Revista de la Asociación Guatemalteca de Derecho Internacional* 206.

mandate over their disputes;³¹ even when asking for the mere indication of general principles, they have still required guidance on how to apply practically such principles.³²

Along with issues related to the thrust of the Court's competence, implementation can also be impacted by certain aspects concerning the modes of jurisdiction. Many fear that cases decided on the basis of the Court's compulsory jurisdiction – be that under Article 36 (2) of the Court's Statute or under a dispute settlement clause of an applicable treaty – are less complied with than cases initiated through special agreement.³³ Empirical evidence, however, only weakly supports such a conjecture: out of five cases rendered after 1986 for which implementation faced some hurdles,³⁴ three

³¹ A good example is provided by the special agreement concluded by the US and Canada in the *Gulf of Maine* case. This treaty, in fact, established that the Court should determine a single boundary – valid for both the continental shelf and the EEZs – between the two States through specific geographical coordinates (article II, 1–2). The agreement also foresaw the appointment of an expert to assist the Court's chamber in technical matters (article II, 3); see Special Agreement between the Government of Canada and the Government of the United States of America to submit to a chamber of the International Court of Justice the delimitation of the maritime boundary in the Gulf of Maine Area, at (1981) 20 ILM 1378.

³² A comparison between the delimitation cases of the Mediterranean illustrates this trend well. In the first of these cases (between Libya and Tunisia), the Court was merely asked to decide what principles and rules of international law were applicable to the delimitation of the continental shelf of the two States. On the contrary, in the latter case between Libya and Malta, the Court was also asked to decide 'how in practice such rules and principles can be applied by the Parties in this particular case in order that they may without difficulty delimit such areas by an Agreement as provided in Article III' (article I of the Special Agreement). See, respectively, *Compromis entre la République tunisienne et la Jamahiriya libyenne populaire et socialiste pour la soumission de la question du plateau continental entre les deux pays à la Cour internationale de Justice*, 1120 UNTS 103 and Special Agreement for the submission to the International Court of Justice of a difference, Malta-Libya, 1275 UNTS 192.

³³ Particularly Charney (n 4) 289, 297 and Leo Gross, 'Compulsory Jurisdiction Under the Optional Clause: History and Practice' in L.F. Damrosch (ed), *The International Court of Justice at a Crossroads* (Transnational Publishers 1987), 45–46.

³⁴ Llamazon (n 19). The five cases reviewed are: *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras, Nicaragua intervening)*, Judgment of 11 September 1992, ICJ Reports 1992, 351 [hereafter, *Land and maritime dispute (El Salvador/Honduras)*]; *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment of 3 February 1994, ICJ Reports 1994, 6 [hereafter, *Territorial dispute (Libya/Chad)*]; *Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, Judgment of 25 September 1997, ICJ Reports 1997, 6 [hereafter, *Gabcikovo-Nagymaros*]; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment of 10 October 2002, ICJ Reports 2002, 303 [hereafter, *Land and maritime boundary (Cameroon v. Nigeria)*]; *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment of 31 March 2004, ICJ Reports 2004, 12 [hereafter, *Avena*].

were instituted through special agreement and only two were decided under the compulsory jurisdiction of the Court.³⁵ Attempts to construct deductively the link between the *pre* and the *post* adjudicative phases are thus most likely doomed to failure. That notwithstanding, when the Court is seized consensually, one could expect the parties to have envisaged the possibility of implementation before adjudication and to have formulated some form of understanding in this respect.

Indeed, quite often either the special agreements conferring jurisdiction upon the Court or other dispute-related instruments concluded before the initiation of proceedings include clauses on implementation.³⁶ A specific mention of implementation fosters the mutual confidence between the parties, thereby providing an incentive for pursuing the often costly process of dispute resolution. This trust-building and cooling-off effect matters particularly in heavily charged contexts, as evidenced in a number of delimitation cases positively affected by the conclusion of implementation clauses prior to adjudication.³⁷ Conversely, absent a clearly expressed engagement, implementation may prove arduous if positive acts of cooperation are needed. This happened in the context of, amongst others, the

³⁵) Among the five cases cited above, the three initiated through special agreements are: *Land and maritime dispute (El Salvador/Honduras, Territorial dispute (Libya/Chad)* and *Gabcikovo-Nagymaros*. The two cases instituted by unilateral application are *Land and maritime boundary (Cameroon v. Nigeria)* and *Avena*.

³⁶) The cases in which one can find such clauses include the following: *Case Concerning the Arbitral Award made by the King of Spain on 23 December 1906*, Judgment of 18 November 1960, ICJ Reports 1960, 192 [hereafter, *Arbitral Award*]; *North Sea Continental Shelf*; *Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment of 24 February 1982, ICJ Reports 1982, 18 [hereafter, *Continental Shelf (Tunisia/Libya)*]; *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, Judgment of 12 October 1984, ICJ Reports 1984, 246 [hereafter, *Gulf of Maine*]; *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment of 3 June 1985, ICJ Reports 1985, 13 [hereafter, *Continental Shelf (Libya/Malta)*]; *Frontier Dispute (Burkina Faso/Mali)*, Judgment of 22 December 1986, ICJ Reports 1986, 554 [hereafter, *Frontier Dispute (Burkina Faso/Mali)*]; *Land and maritime dispute (El Salvador/Honduras)*; *Territorial dispute (Libya/Chad)*; *Gabcikovo-Nagymaros*; in passing, *Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment of 13 December 1999, ICJ Reports 1999, 1045 [hereafter, *Kasikili/Sedudu*]; *Frontier Dispute (Benin/Niger)*, Judgment of 12 July 2005, ICJ Reports 2005, 90 [hereafter, *Benin/Niger*].

³⁷) For instance, the conclusion of a package deal touching upon issues of implementation was fundamental to avoid the worsening of the dispute between Honduras and Nicaragua (*Arbitral Award* case). On this factual context, see Geneviève Guyomar, 'Affaire de la sentence rendue par le Roi d'Espagne le 23 décembre 1906', (1960) 6 AFDI 362–371. Another tense negotiation featured between Burkina Faso and Mali prior to the submission of their dispute to the Court (*Frontier Dispute (Burkina Faso/Mali)*).

Asylum case, where the lack of a solid framework for implementation of the Act of Lima turned out to be highly detrimental for implementation.³⁸ Practically speaking, implementation clauses set the overall framework for the future diplomatic action to be undertaken by the parties. To this end, they often simply foresee the initiation of negotiations and the conclusion of an agreement in accordance with the pronouncement,³⁹ while at times they even single out and establish how to deal with aspects potentially thwarting compliance. In the *Frontier Dispute (Burkina Faso/Mali)*, for instance, the parties, fearing a stalemate in demarcation, had negotiated a precise time limit for it and mandated the Court to nominate three experts to help meeting this objective.⁴⁰

In a similar vein, States have occasionally concluded agreements or clauses addressing certain aspects parallel or indirectly related to the core of the dispute under adjudication. This has been particularly recurrent where the exploitation of certain resources has been at stake. Among others,⁴¹ evidence of this practice is to be found in the context of the

³⁸) Colombia and Peru concluded an agreement, the Act of Lima of 31 August 1949, in which they agreed to submit their dispute concerning the situation of Mr. Haya de la Torre to the ICJ. The same agreement also foresaw that had the parties been unable to agree on the specific subject matter of their dispute, any of them could have introduced the case through unilateral application. This happened to be the case and the Court was finally seized by Colombia. The Act of Lima is reprinted in the Judgment of 20 November 1950, see *Asylum*, 267–268.

³⁹) For instance, *ICJ Pleadings, North Sea Continental Shelf*, Vol. 1, Danish-German Special Agreement, 2 February 1967, 6–7 and German-Dutch Special Agreement, 2 February 1967, 8–9, (common) article 1(2) (*North Sea Continental Shelf*); similarly, *ICJ Pleadings, Continental Shelf (Tunisia/Libya)*, Vol. 1, Special Agreement concluded between Tunisia and Libya in the Continental Shelf Case, 9–10; in passing, Special Agreement between the Government of Canada and the Government of the United States of America to submit to a chamber of the International Court of Justice the Delimitation of the Maritime Boundary in the Gulf of Maine Area, at (1981) 20 ILM 1378.

⁴⁰) See, particularly, article IV of the Agreement between Mali and Upper Volta concerning the submission to a Chamber of the International Court of Justice of the frontier dispute between the two States, 1333 UNTS 97. In a similar vein, see also sections 3–5 of the Special Agreement concluded between Nicaragua and Honduras in the *Arbitral Award* case, Agreement (with related documents) for submitting to the International Court of Justice their differences with respect to the Award of His Majesty the King of Spain of 23 December 1906, 277 UNTS 159.

⁴¹) The first of these cases was the *Minquiers and Ecrehos* case, where a separate agreement concerning fishing rights had been concluded before adjudication and favored the resolution of the dispute between France and the UK, with the judgment requiring little compliance *stricto sensu* owing to its declaratory nature. See, Agreement Regarding Rights of Fishery in Areas of the Ecrehos and Minquiers, 20 January 1951, 121 UNTS 97. The judgment was rendered by the Court on 17 November 1953, '*The Minquiers and Ecrehos case (France/United Kingdom)*, Judgment of November 17 1953, ICJ Reports 1953, 47 [hereafter, *Minquiers and Ecrehos*]. In a similar vein, one may also

Gabcikovo-Nagymaros dispute. In this instance, in fact, the case could be submitted to the Court only once the parties agreed to create a water management regime to remain in place until the end of the proceedings.⁴² By preventing the potential impairment of the parties' respective rights pending adjudication, the temporary mechanism was meant to contribute to building a climate favorable to future negotiations on implementation – a prospect, though, which faded away soon after adjudication.

In sum, owing to their continuous interaction the parties engage in certain diplomatic action, which impacts upon implementation even before a judgment is rendered. These actions fix a framework for cooperation after the decision. Let us now turn to the post-adjudicative phase, the locus of implementation.

2. *Diplomatic Means of Implementation in the Post-adjudicative Phase:* *Main Trends*

Once the judgment is handed down, the parties have to execute it by enacting the operative part thereof.⁴³ This legal implication is adjoined by less obvious political implications: the judgment marks the end of the Court's direct involvement and resumes the bilateral relationship between the parties, adding an authoritative 'juridical component' to it. Henceforth, inter-party negotiations determine not only how to execute the judgment practically, but also to what degree it is followed.

cite the agreement between Iceland, Denmark and Norway in the framework of the *Jan Mayen* case (*Maritime Delimitation in the Area between Greenland and Jan Mayen*, Judgment of 14 June 1993, ICJ Reports 1993, 38 [hereafter, *Jan Mayen*]). In this case, the parties found an agreement on allocation, protection and management of capelin stock in the waters between Greenland, Iceland and Jan Mayen. The agreement, initially to remain in place for three years but then renewed for two more years, was crucial in reducing tension between the parties, especially seeing that the case had been initiated through a unilateral application made by Denmark. See Agreement between Greenland/Denmark, Iceland and Norway on the stock of capelin in the waters between Greenland, Iceland and Jan Mayen, 12 June 1989, 1448 UNTS 170. For more details on the agreement and its role in the dispute, see Schulte (n 4) 222.

⁴²⁾ See Special Agreement for the Submission to the International Court of Justice of the Differences Concerning the Gabcikovo-Nagymaros Project, 1725 UNTS 225, article 4. A temporary agreement on the water management regime was reached on 19 April 1995. It was thereby established that the system of joint management should last for 14 days after the pronouncement. See Agreement between the Government of the Slovak Republic and the Government of Hungary about Certain Temporary Measures and Discharges to the Danube and Mosoni Danube, signed on April 19, 1995, available at <http://www.gabcikovo.gov.sk/doc/mosoni/kapitolaz.htm>.

⁴³⁾ See, among others, Azar (n 3) 30–84; Ben Mansour (n 4) 172–192.

The ensuing diplomatic practice lends itself to different analytical approaches. The most straightforward would be to make a survey of the practical means taken by the parties and then to assess case-by-case their success in compliance.⁴⁴ Alternatively, one could try to trace the main ‘patterns’ of diplomatic interaction after the pronouncement, in an attempt to see how these are related, on the one hand, with the judgment and, on the other hand, with the effective resolution of the dispute at stake. For present purposes, we will take up the latter option, which not only fits with the notion of implementation presented above, but also goes some way in understanding the relevant practice, too rich to be thoroughly treated in this article. Accordingly, we will first identify the main trends in the diplomatic interaction that takes place after adjudication. Next, we will discuss the role played by the ‘juridical component’ in such a context and the effectiveness of the parties’ implementation efforts in resolving their dispute.

At the outset, a clarification is required concerning the stances that can be taken in respect of the pronouncement. One can distinguish two main *genera*, namely consensual and non-consensual forms of follow-up. When acting consensually, the parties can accept and execute the judgment, completely or partially depart from it, or take actions exceeding the obligation to execute it. On the contrary, where agreement is lacking, the losing State may contest the judgment, but ultimately act in accordance with it or, conversely, act inconsistently with it. In response, the winning State can attempt, provided it wishes to take action, to negotiate an alternative solution or seek to enforce unilaterally the judgment notwithstanding its whole-sale rejection. Needless to say, the parties dispose of all the usual diplomatic means to reach an agreement, be that bilaterally, with the intervention of one or more third State(s)⁴⁵ or of an international entity.

Not surprisingly, most of the accessible practice falls under the first scenario, corresponding to compliance as classically understood. Hence there

⁴⁴) This is the most widespread approach. See, among others, Schulte (n 3), Charney (n 14), Llamazon (n 19).

⁴⁵) See, particularly, mediation by the US Ambassador and the Australian Foreign Ministry in the context of the *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Judgment of 15 June 1962, ICJ Reports 1962, 6 [hereafter, *Preah Vihear* case] and mediation by Algeria in the *United States Diplomatic and Consular Staff in Tehran* case, Judgment of 24 May 1980, ICJ Reports 1980, 3 [hereafter, *Hostages* case]. Third States may also contribute to implementation by providing financial support, as happened for instance in the *Frontier Dispute (Burkina Faso/Mali)* case, when demarcation was financed by the Swiss government, see Azar (n 3) 124.

is often an optimism for compliance expressed by the literature,⁴⁶ subject to some reservations around information asymmetries or long-term changes of circumstances. This caveat having been made, one can start noticing that, in line with our previous remarks, the negotiation of implementation provisions and other similar clauses before adjudication seems to have generally made the process of execution smoother, culminating either in the conclusion of a formal agreement⁴⁷ or in other forms of official endorsement of the judgment.⁴⁸ Yet, in certain instances this has hardly been the case. The *Arbitral Award* and *Gabcikovo-Nagymaros* cases serve as illustrative examples. Whereas the diplomatic difficulties following the *Arbitral Award* pronouncement were eventually resolved,⁴⁹ the same

⁴⁶) For instance, Schulte speaks of ‘a generally satisfactory compliance record for judgments’, see Schulte (n 3) 403. In a similar vein, though somewhat less optimistic, Paulson maintains that while ‘no State has been directly defiant five [judgments] have been met with less compliance than others’; see Paulson (n 10) 437.

⁴⁷) When implementation agreements or clauses on implementation have been negotiated before adjudication, the parties have reached implementation agreements relatively smoothly. For instance, in the *North Sea Continental Shelf* case, Germany concluded separate treaties of delimitation with the Netherlands and Denmark on 28 January 1971. See Treaty Concerning the Delimitation of the Continental Shelf under the North Sea, Denmark – Federal Republic of Germany, 28 January 1971, 857 UNTS 109 and Netherlands – Federal Republic of Germany, 28 January 1971, 857 UNTS 131. In the *Continental Shelf (Tunisia/Libya)* case, after the second pronouncement of the Court upon Tunisia’s request for interpretation, the parties reached an agreement implementing the pronouncement on 8 August 1988; see Jonathan Charney and Lewis Alexander (eds), *International Maritime Boundaries* (vol. II, Martinus Nijhoff Publisher 1993) 1663. In the *Continental Shelf (Libya/Malta)* case, the parties found an agreement on delimitation on 10 November 1986; see Agreement implementing Article III of the special agreement and the judgment of the International Court of Justice, Libya – Malta, (1990) 81 ILM 726–727. In the *Territorial Dispute (Libya/Chad)* case, the parties were able to reach an implementation agreement soon after the pronouncement; see Agreement on the implementation of the ICJ judgment concerning the territorial dispute, 4 April 1994, (1994) 33 ILM 619. For further details as to the implementation of the 1994 Agreement, see *infra*, part 3, on the role of IOs.

⁴⁸) For instance, in the *Gulf of Maine* case, the parties merely expressed their acceptance of the judgment, while a climate of mutual confidence was furthered by the entry into force of the Agreement on Fisheries Enforcement, making reference to the ICJ pronouncement, see Agreement on Fisheries Enforcement of 26 September 1990, 1852 UNTS 74. In the *Frontier Dispute (Burkina Faso/Mali)* case, the case was settled thanks to the nomination of the experts entrusted to demarcate the border between the two States. The *Kasikili/Sedudu* and the *Benin/Niger* pronouncements were followed-up by the official positions taken by certain members of the government, see, respectively, Kristof Maletsky, ‘Praise for Namibia on Kasikili’, Africa News Service, 16 December 1999, Westlaw 25960463 and Adrien Feniou, ‘Implementation of ICJ Border Ruling Finalises Demarcation of Benin-Niger Border’, Global Insight Daily Analysis, 19 February 2007.

⁴⁹) See *infra*, part C, paragraph 3.

cannot be said for the *Gabcikovo-Nagymaros* dispute. Negotiations have in fact been largely unfruitful,⁵⁰ with changes in the political climate after the pronouncement dwarfing the relevance of previous agreements concluded by the parties. In addition, successful implementation agreements or other diplomatic actions have proved possible in a number of cases initiated through unilateral application.⁵¹

Executing the terms of a judgment, though, is not the only option of consensual follow-up existing in practice. At times, States have agreed either to depart from the terms of the pronouncement or to take action not strictly required by it. In fact, however, only in one instance – namely, in the *Jan Mayen* case – the parties have decided to slightly modify the terms of the judgment. Conversely, States have more frequently taken action that exceeds their obligation to execute the pronouncement. For instance, the Court's *Sovereignty over Certain Frontier Land* pronouncement gave impulse to new efforts in delimiting certain areas upon which the Court had not ruled, thereby settling points of future potential conflict between the parties.⁵² Another example is provided by the international agency created by Senegal and Guinea Bissau for the joint exploitation of a disputed maritime zone, part of which had formed the object of the ICJ's *Arbitral Award* decision.⁵³ This initiative proved crucial for compliance given that it allowed certain vital economic aspects not comprised by the Court's mandate to be addressed. Other examples – though not of a purely inter-State character – can also be found in the *Land and Maritime Dispute (El*

⁵⁰) Llamazon, (n 19) 814–815.

⁵¹) For instance, in the *Corfu Channel case (United Kingdom v. Albania)*, *Judgment of 9 April 1949*, ICJ Reports 1949, 4 [hereafter, *Corfu Channel case*], the UK and Albania concluded in 1992 a memorandum of understanding setting out their unresolved issue; see Geoffrey Marston, 'United Kingdom Materials in International Law 1992' (1994) 63 BYIL 615, 781–782. In the *Ambatielos Case (Merits: Obligation to arbitrate)*, *Judgment of 19 May 1953*, ICJ Reports 1953, 10 [hereafter, *Ambatielos*], the parties negotiated with ease an agreement on implementation; see Agreement Regarding the Submission to Arbitration of the Ambatielos claim, Greece-UK, 24 February 1955, 209 UNTS 187. In the *Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment of 16 May 2001*, ICJ Reports 2001, 40 [hereafter, *Qatar v. Bahrain*], the parties positively welcomed the judgment and collaborated in several positive ways afterwards; see Schulte (n 3) 239.

⁵²) *Case Concerning Sovereignty over Certain Frontier Land (Belgium/Netherlands)*, *Judgment of 20 June 1959*, ICJ Reports 1959, 209.

⁵³) *Arbitral Award of 31 July 1989 (Guinea Bissau v. Senegal)*, *Judgment of 12 November 1991*, ICJ Reports 1991, 53, [hereafter, *Arbitral Award (Guinea Bissau v. Senegal)*].

Salvador/Honduras) case as well as in the *Pulp Mills* case,⁵⁴ which will be discussed when dealing with the role of IOs in implementation.

Leaving aside the realm of consensual execution, on several occasions the judgments of the Court have been contested by one of the concerned parties. To be precise, it is important to distinguish the cases in which parties have formally protested against the judgment, but ultimately acted in compliance with it, from those in which the judgment has been rejected and the dispute finally settled otherwise than as set out by the pronouncement. In the first category, one may include the *Hostages* case inasmuch as the Algiers Accords – which provided a comprehensive framework for settling the Iran-US dispute – ultimately helped to materialize the pronouncement made by the Court, even though the Accords hardly mentioned the pronouncement. On the contrary, in cases of wholesale rejection there is rarely even a remote echo of the ICJ's pronouncement, as is evident in the *Fisheries Jurisdiction*,⁵⁵ *Nicaragua*⁵⁶ and, for a long period, *Corfu Channel* pronouncements. Against the refusal to engage in implementation, concerned States have reacted differently. Attempts at enforcement were made in the *Corfu Channel* and *Nicaragua* pronouncements, respectively, through unilateral action and institutional mechanisms.⁵⁷ In both cases, however, the winning State could not reach any relevant result. Conversely, somewhat more successful was the strategy of the UK in dealing with Iceland's unwillingness to accept the *Fisheries Jurisdiction* decision. After several efforts at enforcement, the UK desisted from further insisting on the pronouncement and concluded a provisional agreement helping to further at least some of the UK's interests.⁵⁸

In light of this overview, a 'diplomatic' and a 'juridical' component seem to be evident in the post-adjudicative phase. The prominence of the former emphasizes the relative effects of the *res judicata*, whose content can be

⁵⁴) *Case concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment of 20 April 2010 not yet reported. [hereafter, *Pulp Mills*].

⁵⁵) *Fisheries Jurisdiction (United Kingdom v. Iceland)*, Merits, Judgment, ICJ Reports 1974, 3, [hereafter, *Fisheries Jurisdiction*].

⁵⁶) *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, ICJ Reports 1986, 14, [hereafter, *Nicaragua*].

⁵⁷) The particulars of the UK action are reported in Oscar Schachter, 'The Enforcement of International Judicial and Arbitral Decisions' (1960) 54 AJIL, 8–12. As to the attempts of Nicaragua through the UN, see below, paragraph 3, footnote 67.

⁵⁸) For more details, see Schulte (n 3) 151–158.

modified by the parties either fully consensually or as the result of a pragmatic accommodation of interests imposed by one party's rejection of the pronouncement. Yet, this does not deprive the 'juridical component' of any relevance in implementation; rather, it calls for reflection on its role in directing the process of dispute resolution. In this vein, the pronouncement first of all offers a sort of authoritative benchmark for measuring the legitimacy of each party's claim during negotiations on implementation.⁵⁹ Additionally, the commitment to abide by the judgment may help in justifying certain actions likely to result in domestic controversy, thereby reducing the political costs of dispute resolution.⁶⁰ Finally, with regard to implementation efforts going beyond compliance, the pronouncement can also provide a framework for diplomatic initiatives addressing the overall dispute between the parties. In this way, the 'diplomatic component' compensates for the partial scope of the pronouncement by embedding part of its content, or at least its spirit, in the settlement of aspects not adjudicated by the Court.⁶¹

Taken together, these factors bring to light the manifold nuances of implementation and suggest refocusing our attention from the result of execution *stricto sensu* to the process of negotiation related thereto. From this perspective, implementation efforts are to be assessed not only in terms of compliance, but also as regards their effectiveness in resolving the dispute existing between the parties.⁶²

First, it is important to clarify the temporal scope of implementation. The time required for implementation is probably one of the first aspects of

⁵⁹ Weckel, (n 4) 435. For example, in the delimitation cases in which the Court has been asked to indicate the general principles to be used in negotiation, see, particularly, *North Sea Continental Shelf*, *Continental Shelf (Tunisia/Libya)*, *Continental Shelf (Malta/Libya)*.

⁶⁰ There are numerous examples in this respect: for instance, the *Kasikili/Sedudu* case, see the declaration of the Namibian President in the early aftermath of the decision, Christof Maletsky, 'Kasikili KO,' The Namibian 13 December 1999, (1999) Westlaw 10594387; *Land and maritime boundary (Cameroon v. Nigeria)*, similarly, the parties soon after the judgment declared their wish to comply with it, thereby dissipating a tense confrontation, see Statement by the Secretary-General Kofi Annan following the Geneva meeting with the Presidents of Cameroon and Nigeria, Press Release, SG/SM/8495 AFR/515.

⁶¹ A good example is provided by the mandate of the special commissions created in connection with the *Arbitral Award* and *Land and maritime boundary (Cameroon v. Nigeria)* decisions. For more details, see below, 83–87.

⁶² It is important to notice that, according to certain authors, the very notion of execution could be so broad as to comprise not only cases of compliance *stricto sensu*, but also cases in which a negotiated solution – though different from the one envisaged by the Court – has finally resolved the dispute. See, for instance, Azar (n 3) 107–108.

concern when considering implementation. Burdensome and long negotiations may diminish the parties' expectations of effectiveness. Yet, the length of negotiations in itself reveals little if merely calculated from when the decision is handed down. One needs, in fact, to consider at which stage the pronouncement enters the relationship between the parties and, more generally, what is the broader legal context at the time of adjudication and after. In this vein, a pronouncement on a situation that is not sufficiently clear in its implications will most likely be harder to implement.⁶³ The same could be said of a pronouncement that touches upon legal issues subject to structural change: the state of fluctuation will probably be echoed in implementation, and perhaps require a settlement different from the one indicated by the Court.⁶⁴

In addition, the effective resolution of a dispute depends on the straightforwardness of the Court's pronouncement. Often, with a pronouncement that is too open-ended (such as in the *Asylum/Haya de la Torre* or *Gabcikovo-Nagymaros* pronouncements for example), the 'juridical component' has only marginally directed the expectations and claims of the parties. This having been said, one cannot but admit the contingent character of the very concept of effective resolution, as conflict over a certain issue can always resurge, notwithstanding any previous effective resolution thereof.

The presence of these hurdles, however, is often the result of a lack of means, rather than of will, on the part of the concerned States. Third parties can help in mitigating this cause and therefore have a role in implementation. Effective implementation will then have to be assessed looking at actors other than States, notably IOs and the Court itself.

C. *The Role of IOs in the Implementation of ICJ Decisions*

International organizations, while variously contributing to the implementation of the conventional obligations negotiated under their aegis, have been somewhat reserved in dealing with the implementation of ICJ judgments. Paradigmatic is the case of the United Nations (UN), whose political

⁶³) Weckel (n 4) 439.

⁶⁴) As in *Fisheries Jurisdiction*. There, the law on fishing rights was undergoing a profound change at the time of adjudication. Several States had started establishing 200-mile fishery zones in the late 1970s; incidentally, the EEC Council approved a resolution in this sense on 6 November 1976. This practice coalesced into an emerging consensus during the Third UN Conference on the Law of the Sea. For a more detailed account of practice, see, among others, R.S. Smith, *Exclusive Economic Zone Claims: an analysis and primary documents* (Martinus Nijhoff Publishers 1986).

organs have scantily explored the potentials of their Charter based powers pertaining to this ambit. On the one hand, Article 94 (2) of the Charter, which allows a State to seek enforcement of the judgment through the Security Council (SC), has never found application in practice: very few claims have been formulated on such a basis and, even when that has been the case,⁶⁵ the Council has failed to realize compliance with the decision.⁶⁶ On the other hand, the General Assembly (GA) has been relegated to the rank of a second-best substitute for a paralyzed Council, as is evidenced by the aftermath of the *Nicaragua* case.⁶⁷

This might suggest that IOs can only marginally influence the course of post-adjudication, which is true as long as one remains confined within the optic of enforcement enshrined in Article 94 (2) and implicitly transposed to the AG.⁶⁸ Yet, there is reason to doubt that implementation can best be achieved through this lens. Indeed, the unilateral character of enforcement measures clashes with the margin of appreciation left to the parties in the implementation of a judgment and an imposed solution, as with unilateral

⁶⁵ Article 94 (2) was invoked first by the UK after the indication of provisional measures in the *Anglo-Iranian Oil* case (1951) and later after the *Nicaragua* decision (1986). Recourse to this article has also recently been threatened by Honduras in the *Land and maritime dispute (El Salvador/Honduras)*. Honduras has in fact sent a letter to the SC alleging that El Salvador had unduly delayed the pursuance of demarcation according to the judgment; see letter dated 22 January 2002 from the Chargé d'Affaires ad interim of the Permanent Mission of Honduras to the United Nations Addressed to the President of the Security Council, UN Doc. No. S/2002/108. Other post-adjudicative phases have been on the agenda of the Security Council aside from those concerned with Article 94 (2): *Right of Passage, Fisheries Jurisdiction, Hostages case, Application of the Genocide Convention (Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgment of 11 July 1996*, ICJ Reports 1996, 595).

⁶⁶ On the ineffectiveness of Article 94 (2) see, among others, Llamazon (n 19) 846–848; Attila Tanzi, 'Problems of Enforcement of Decisions of the ICJ and the Law of the United Nations' (1995) 6 EJIL 539. Article 94 has been dormant also with respect to the execution of provisional measures indicated by the Court. In this respect, see Laurence Boisson de Chazournes, 'Les ordonnances en indication de mesures conservatoires dans l'affaire relative à l'application de la Convention pour la prévention et la répression du crime de génocide' (1993) 39 AFDI 514, 537–538.

⁶⁷ When it became clear that Article 94 (2) would have remained inoperative, Nicaragua merely sought the adoption of resolutions calling for compliance with the judgment by the GA. The GA adopted two resolutions calling for compliance, GA Res. 41/31 of 3 November 1986; GA Res. 42/18 of 12 November 1987; GA Res. 43/11 of 25 October 1988.

⁶⁸ Magid, for instance, makes reference to the GA resolutions adopted in the aftermath of the *Nicaragua* case and advocates for a wider application of these tactics, along the lines of SC enforcement action under Article 94 (2); see Per Magid, 'The Post Adjudicative Phase', in Connie Peck and R.S. Lee (eds), *Increasing the Effectiveness of the International Court of Justice* (Martinus Nijhoff Publishers 1997) 331.

initiatives taken by one party, is unlikely to bring about effective compliance, especially inasmuch as action at the domestic level is necessary to realize the parameters of a judgment.⁶⁹ Also, it is worthwhile stressing that the enforcement mechanism provided under Article 94 (2) may not be the most appealing option for States seeking the enforcement of a pronouncement. On the one hand, there is no real guarantee that the SC will take any action, since its intervention upon the request of a State is merely discretionary;⁷⁰ on the other hand, the threat of having recourse to the SC may be enough to overcome a stalemate in negotiations, without needing any action of actual enforcement.⁷¹

If IOs are thus unlikely to have a major role in enforcing ICJ decisions, they are better suited to providing a framework for negotiation and cooperation as well as offering practical support for States engaged in implementation. The examples in this respect are numerous and concern both universal and regional IOs.

1. *The Role of International Organizations in Fostering Negotiation and Cooperation Between the Parties*

IOs can ‘facilitate’ implementation in different ways. To begin with, they can provide a framework for cooperation between the parties. In this case, reliance on the organization’s institutional machinery allows avoiding the costs of establishing a new setup for communication and exchange. The ready availability of this solution can, in turn, expedite the course of negotiations over implementation, as witnessed in the aftermath of the *Pulp Mills* case. A few months after the pronouncement, in fact, the two parties succeeded in establishing a joint environment monitoring program to be pursued under the framework of the Administrative Commission of the River Uruguay (CARU).⁷²

⁶⁹) In a similar vein, Weckel (n 4) 438.

⁷⁰) In this respect, it has been stressed that the relationship between the SC general enforcement powers and those under Article 94 (2) is not completely clear. In particular, it is doubtful whether the Council can take armed measures or measures short of force under Article 94 (2) lacking a prior qualification of a situation according to Article 39. If that would be the case, for Michael Reisman the United Nations would be ‘an international enforcer on the juridical level’; see Michael Reisman, ‘The Enforcement of International Judgments’ (1969) 63 AJIL 1, 14–15.

⁷¹) Llamazon (n 19) 848, citing the above-mentioned Honduras case (n 42).

⁷²) On the 30 of August 2010, Argentina and Uruguay concluded an agreement fixing the guidelines for a joint monitoring regime over the River Uruguay, see *Acuerdo Argentina-Uruguay: Intercambio de notas reversals. Directivas para el monitoreo conjunto de Botnia-UPM y el Río*

Along with this, IOs can also be directly involved in implementation, playing a role somewhat in between that of a conciliator and mediator *vis-à-vis* the parties. Of this type, first chronologically is the intervention of the Organization of American States (OAS) in the context of the territorial dispute between Honduras and Nicaragua. Having followed the situation since its inception,⁷³ the OAS, through its Inter-American Peace Committee, interceded in the post-adjudicative phase to help overcome the stalemate in demarcation due to pending issues of nationality and of acquired rights. The Committee proposed the constitution of a mixed commission, tasked to decide upon these and other related matters; all other residual issues fell under the competence of the Committee itself.⁷⁴ The work of the Committee was successfully completed in 1963 with the complete retreat of Nicaragua from all the territories that had been attributed to Honduras and the demarcation of the land boundary between the two States.⁷⁵ Interestingly, the mixed commission – composed of one representative for each government and headed by the chair of the Committee – had a fairly broad mandate, comprising issues such as ensuring the choice of nationality for the persons living in the territory, assisting in the relocation of those opting for Nicaraguan citizenship and supervising the establishment of landmarks.

A similar scenario, this time seeing the involvement of the UN, has more recently appeared in connection with the *Land and Maritime Boundary*

Uruguay, available at <http://www.dipublico.com.ar/?p=6157>. This first agreement has been completed by a later agreement (15 November 2010) setting the details for the joint monitoring system, see *Monitoreo del Río Uruguay: planes específicos de la Planta Orion, y de la desembocadura del Río Gualaguaychú en el Río Uruguay*, available at <http://www.caru.org.uy/prensa.html>.

⁷³ The Council of the OAS became active in the situation from 1 May 1957, upon Honduras's request. The OAS had appointed an investigation committee which had been able to broker a cease-fire between the two States and had suggested recourse to the ICJ. For more details, see OAS/OEA, Secretaría General, *Tratado Interamericano de Asistencia Reciproca* (1973) Vol. 1, 1948–59, 5th edn, 233–306.

⁷⁴ Schulte (n 3) 129–132.

⁷⁵ Concerning the maritime boundary, Nicaragua filed an application in 1999, referring to the fact that, since its withdrawal from the territories attributed to Honduras by the *Arbitral Award* decision, it had persistently claimed that its maritime Caribbean border with Honduras has not been determined; see *Maritime Delimitation between Nicaragua and Honduras in the Caribbean Sea* (Nicaragua v. Honduras), *Application instituting proceedings filed in the Registry of the Court on 8 December 1999*, 4. The Court ruled on this issue in 2007, *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* (Nicaragua v. Honduras), *Judgment of 8 October 2007*, ICJ Reports 2007, 659 [hereafter, *Maritime Delimitation* (Nicaragua v. Honduras)].

(*Cameroon v. Nigeria*) case.⁷⁶ After the pronouncement, given that implementation promised to be particularly arduous,⁷⁷ the UN Secretary General (SG) immediately convened a meeting with the parties.⁷⁸ On that occasion, the heads of state of the two countries decided to establish a mixed commission, principally in charge of implementing the judgment, but also competent for demarcating the land and maritime boundary and for protecting the rights of the populations affected by the verdict.⁷⁹ Akin in composition to the Honduras-Nicaragua commission, the Nigeria-Cameroon Mixed Commission (NCMC) has witnessed the mushrooming of several sub-commissions and working groups as new points of friction have emerged from the implementation of the judgment or of the Commission's broad mandate, finalized during its first meeting.⁸⁰ All the meetings of the NCMC were chaired by a Special Representative of the SG (SRSG), who was also responsible for setting the agenda of such meetings, for leading the deliberations of the sub-commissions and of the working groups as well as for proposing the reports and the projects of decisions to be submitted to the Commission. Overall, the Commission met with good results on most questions,⁸¹ except the thorny one concerning Nigeria's retreat from the Bakassi peninsula. This matter, in fact, could only be solved through a bilateral agreement finally concluded in 2006,⁸² also thanks to the climate of mutual trust nurtured by the Commission.

⁷⁶) *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment of 10 October 2002, ICJ Reports 2002, 303.

⁷⁷) As to the implications of the pronouncement for the local populations, see Gbenga Oduntan, 'Straddling Villages in Accordance with the International Court of Justice Jurisprudence: The Cameroon-Nigeria Experience' (2006) 5 Chinese JIL 79, 80–82.

⁷⁸) For an account of the SG's efforts, see Report of the Secretary General on the work of the organization, A/59/1, para. 29.

⁷⁹) The summit took place in Geneva on 15 November 2002. For the documents concerning the summit and the work of the Mixed Commission, see www.un.org/UNOWA.

⁸⁰) The mandate of the Commission was defined in the communiqué published after the first meeting of the Mixed Commission held in Yaoundé, 1–2 December 2002.

⁸¹) For a detailed account of the achievements of the Commission, see M.M. Salah, 'La Commission mixte Cameroun/Nigeria, un mécanisme original de règlement des différends interétatiques' (2007) LI AFDI 162.

⁸²) Green Tree Agreement, concluded on 12 June 2006 between Nigeria and Cameroon. For an assessment of the overall situation after the conclusion of the agreement, see Mashood Issaka and K.Y. Ngandu, 'Pacific Settlement of Border Dispute: Lessons from the Bekassi Affair and the Green Tree Agreement. Meeting note' in Adam Lupel (ed) Peace, *Pacific Settlement of Border Dispute: Lessons from the Bekassi Affair and the Green Tree Agreement* (International Peace Institute, 2008) 1–7. On 11 March 2010 the parties also concluded an agreement for the joint development of

Looking conjointly at these examples, one can identify certain recurrent features characterizing the intervention of IOs in the implementation of ICJ judgments. First of all, in the above-mentioned cases, the diplomatic initiatives taken by the concerned parties and organizations went beyond compliance, notably because certain issues not touched by the judgment needed to be addressed for effectively resolving the dispute at stake. In truth, such issues, while potentially fuelling conflict between the parties, could hardly have been the object of adjudication. In this respect, it suffices to mention the matter of the relocation of straddling villages or that of the choice as to nationality. Alternatively, reliance on diplomatic means offers a greater prospect for success. The interaction between two different categories of actors – the States concerned by the judgment and IOs – has produced hybrid mechanisms for negotiations, if compared with the classical means of diplomatic dispute settlement. For instance, let us take the NCMC in the *Land and Maritime Boundary (Cameroon v. Nigeria)* case: on the one hand, the UN played a role far beyond that of a conciliator, as demonstrated by the manifold and pervasive functions performed by the SG and the Special Representative; on the other hand, the latter does not act as a mediator among the parties either, since negotiations are subject to the constraints imposed by the mandate of the Commission, notably including respect of the ICJ judgment and of international law in general.

Thus, when IOs participate in implementation, the ‘juridical’ and the ‘diplomatic’ components are mutually supportive: while the decision of the Court has a triggering effect and provides a framework of reference, diplomatic negotiation is necessary to handle issues which, if not to risk hampering the effectiveness of the pronouncement, could still be detrimental to its efficacy. What is more, these two components are also likely to influence one another. Leaving aside the ICJ for the moment, in the work of the NCMC one can notice certain tendencies – for instance, the invocation of ‘precedents’ when dealing with the relocation of villages – of a quasi-juridical character. To be sure, this does not entail any real implication on the legal nature of the Commission, but rather tells us to what extent the

several oil and gas fields located along their maritime boundary south of the Bakassi peninsula, see Chika Amanze-Nwachuku, ‘Nigeria, Cameroon Plan Joint Oil Exploration in Bakassi,’ *This Day Live.com*, 14 March 2011; ‘Addax Petroleum likely candidate for Cameroon, Nigeria, oil deal,’ Emmanuel Tumanjong, *Dow Jones Newswires*, 13 March 2011.

association of a 'juridical' and a 'diplomatic' component impacts on its very functioning.

All in all, the intervention of IOs has positively contributed to negotiations on implementation. In particular, the presence of IOs reduces the costs of cooperation, correlatively making free-riding or defection by one party more burdensome. This is important in the first stages of interaction, especially if there is a lack of mutual trust between the parties.

2. *The Practical Support Offered by International Organizations with the Aim of Furthering Implementation*

Often, implementation can prove difficult due to the parties' lack of financial, logistical or technical means to carry it out. IOs are well positioned to supply this deficiency, thanks to their fund-raising capacities and their technical and logistical expertise.

Concerning the financial aspect, aside from *ad-hoc* contributions, IOs have put in place more articulated mechanisms for assisting States in implementation. A good example is the UN Trust Fund, established in 1989 with the aim of ensuring financial support for States bringing a dispute before the ICJ on a consensual basis.⁸³ Finance from the Fund can be demanded to cover the costs sustained either during the proceedings or in the implementation of the judgment, for instance, in cases of demarcation of boundaries. The final decision on allocation is taken by the SG, upon recommendation by a committee of experts due to examine the requests addressed to the Fund. Unfortunately, this mechanism has been relatively underused⁸⁴ which, in turn, gives little incentive for States to support it. Its potential, nevertheless, remains, as proved by the fact that the OAS has recently set up a similar mechanism at the regional level.⁸⁵ Differently than the UN Trust Fund, the OAS Peace Fund is only available for delimitation

⁸³) The Terms of Reference, Guidelines and Rules are annexed to the Report: Secretary-General's Trust Fund to Assist States in the Settlement of Disputes through the International Court of Justice: Report of the Secretary-General, 7 October 1992, UN Doc. A/47/444. The terms of reference were revised in 2004; see Secretary-General's Trust Fund to Assist States in the Settlement of Disputes through the International Court of Justice: Report of the Secretary-General, 21 September 2004, UN Doc. A/59/372.

⁸⁴) *Qatar v. Bahrain, Territorial dispute (Libya/Chad), Frontier Dispute (Benin/Niger)*.

⁸⁵) The Permanent Council of the OAS adopted the guidelines for the Fund for Peace on 13 November 2000. See OAE/Ser.G CP/INF 4453/00, available at <http://www.oas.org/consejo/Docs/cp07664e04.doc>.

cases, to provide either financial or technical support – the latter through the Pan-American Institute of Geography and History. Up to now, the Fund has sponsored implementation activities only in one case, namely the *Land and Maritime Dispute (El Salvador/Honduras)*.

Passing on to a more political sort of assistance, a rather unique example is that of a UN observer mission – UNASOG – created to monitor the withdrawal of Libyan troops from the Aouzou Strip.⁸⁶ It had already been envisaged in the Agreement concluded by the parties that a UN body would act with a joint team of officials from both countries to ensure compliance with the judgment. Acting upon this basis, the SG had proposed the deployment of an observer unit, to remain in place until Libya's complete withdrawal from the Aouzou Strip.⁸⁷ Quite tellingly, the creation of UNASOG is the only instance in which a UN political organ has taken action in view of facilitating implementation. The absence of enforcement action as envisaged by the Charter has in fact turned into a general passive attitude on the part of political organs. Particularly regrettable in this respect is the General Assembly's inability to exploit in a constructive way the broad powers entrusted to it by Article 10 of the UN Charter.⁸⁸

D. The Role of the Court: Influence over and Involvement in Diplomatic Means in View of Implementation

The ICJ is rarely involved in implementation. And not surprisingly so given the political character generally ascribed to this aspect.⁸⁹ The Court, while at times recalling the parties' obligation to execute its judgments,⁹⁰ has refrained from deciding the means of implementation, holding that doing

⁸⁶ SC Res. 915 of 4 May 1994.

⁸⁷ Report concerning the agreement on the implementation of the ICJ judgment concerning the territorial dispute between Chad and Libya, 27 April 1994, UN Doc. S/1994/512.

⁸⁸ On the GA powers under Article 10, see Stéphane Doumbé-Bille, 'Article 10' in J.P. Cot, Alain Pellet and Mathias Forteau (eds), *La Charte des Nations Unies. Commentaire article par article* (3rd edn Economica 2005) 641–654.

⁸⁹ Rosenne, *The Law and Practice of the International Court of Justice (1920–2005)* (n 6); see also Magid (n 68) 326.

⁹⁰ For instance in the *Frontier Dispute (Burkina Faso/Mali)*, 649, para. 178. Incidentally, the Permanent Court of International Justice has also recalled the obligation to execute its pronouncements; see for instance *The 'Société Commerciale de Belgique', Judgment of 15 June 1939, Series A/B* 78, p. 176. It is also important to recall that, according to Article 61 of its Statute, the Court 'may require previous compliance with the terms of the judgment before it admits proceedings in revision.'

so '[w]ould depart from its judicial function'.⁹¹ Such reluctance notwithstanding, the Court has nevertheless played a role in the context of implementation. To begin with, the parties themselves have occasionally bestowed upon it certain tasks in implementation, as already seen in the *Continental Shelf (Tunisia/Libya)* case, in the *Frontier Dispute (Burkina Faso/Mali)* case, as well as in the *Gabcikovo-Nagymaros* case.⁹² Additionally, the Court has also called upon the parties to undertake negotiations – whether by asserting an explicit obligation or by merely recommending to do so – in view of implementing its pronouncement.

As it appears, the Court may not only seek to influence the diplomatic interaction among the parties, but also directly participate in implementation, thus potentially playing a role either upon rendering its decision or afterwards. Any actual involvement in implementation stems from the will of the parties and is, therefore, amenable to their own strategy for dealing with potential threats against compliance. Instead, the Court's *motu proprio* reference to diplomatic means opens up new space for it to have an impact upon the latter process. And indeed, when referring to negotiations, the Court has not refrained from providing clues as to the content of these. This is, admittedly, nothing special if the parties are under a legal obligation to negotiate or engage in other forms of diplomatic cooperation, and the Court refers to the general principles relevant thereto.⁹³ At times, though, the Court has taken a less conventional approach by suggesting the main

⁹¹ *Haya de la Torre*. There the Court stated that it was 'unable to give any practical advice as to the various courses which might be followed with a view to terminating the asylum, since, by doing so, it would depart from its judicial function,' *Haya de la Torre*, 83. See also B.A. Ajibola, 'Compliance with Judgments of the International Court of Justice' in Mielle Bulterman and Martin Kuijer (eds), *Compliance with Judgments of the International Courts* (Martinus Nijhoff Publishers 1995) 9, 12.

⁹² In the *Continental Shelf (Tunisia/Libya)* case, the parties had agreed – under Article 3 of the special agreement – to return to the Court for binding clarifications if they had not been able to reach an agreement within three months from the decision. In the *Frontier Dispute (Burkina Faso/Mali)*, the parties had asked the Court to nominate three experts to assist them in the operation of demarcation, see Article IV of the special agreement conferring jurisdiction upon the Court. Finally, in the *Gabcikovo-Nagymaros* case, the parties had agreed that, were they to fail in coming to an agreement within six months of the decision, 'either Party may request the Court to render an additional judgment to determine the modalities for executing its judgment', see Article 5(3) of the special agreement.

⁹³ See, for instance, *North Sea Continental Shelf*, 47–48, paras. 85–86; *Fisheries Jurisdiction*, 34–35 (UK) and 205–206 (FRG); *Maritime Delimitation (Nicaragua v. Honduras)*, 763, para. 321. In a similar vein, see also *Pulp Mills*, at 70, para. 281, referring to the parties' obligation to cooperate under CARU.

lines of the ideal outcome to be sought by the parties through negotiation.⁹⁴ The latter move has been criticized by some because the court should not deal with considerations extraneous to the Court's judicial function.⁹⁵ And yet, more than an issue of propriety, the Court's tendency to recommend and, eventually, seek to influence negotiations raises a question of judicial strategy: when and why has the Court adopted such a course of action?

At the forefront, one can notice that the somewhat 'transactional' logic recalled above has always been accompanied by the more classical one of '*juris dicere*'; in other words, the pragmatic solutions proposed by the Court have added to, rather than superseded, the legal findings made by it. This suggests a multiplicity of goals in the Court's approach towards its function at the international level and, more precisely, indicates the interplay between the goal of effectively resolving a certain dispute and that of stipulating the law. In the latter respect, it is notable that the Court tends to emphasize one or other objective depending on the context of adjudication: if it perceives that the terms of its own pronouncement may spur further frictions between the parties or that its findings fall short of addressing some relevant aspects of the dispute at stake, it will likely be proactive in directing the course of post-adjudicative activity.⁹⁶

Seen through the lenses of our topic, such a dynamic reveals a further facet of the diplomatic interaction related to implementation, namely the Court's potential role in 'preventive' or 'remedial' diplomacy.⁹⁷ Diplomatic means are, in fact, called upon either to prevent new disputes or to remedy somehow the Court's impossibility to address and resolve some important

⁹⁴ In *Land and Maritime Boundary (Cameroon v. Nigeria)* the Court took note of the commitment undertaken by the Republic of Cameroon at the hearings to remain 'faithful to its traditional policy of hospitality and tolerance'. This formulation has been commented upon in doctrine for being quite unusual, especially seen that neither of the parties had further mentioned it. Hélène Ruiz-Fabri and J.M. Sorel, 'Chronique de jurisprudence de la CIJ (2002)' (2003) 134 JDI 858, 886.

⁹⁵ Criticizing the Court in this respect, see Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice* (Cambridge University Press 1993) 558. Also commenting on the 'persuasive' nature of these sorts of recommendations, see Brigitte Stern, *20 ans de la jurisprudence de la Cour internationale de Justice (1975–1994)* (Martinus Nijhoff 1998) 591.

⁹⁶ Azar, (n 3) 127. In this respect, see also the remarks of Georges Abi-Saab, 'De l'évolution de la Cour internationale: réflexions sur quelques tendances récentes' (1992) 96 RGDIP 273, 291–293.

⁹⁷ As to the role of the function of 'preventive diplomacy' exercised by the Court, see also Judge Jennings with regard to the *Great Belt* case; Robert Jennings, 'Speech made the 15 October 1993 at the 48th session of the General Assembly' ICJ Yearbook 1992–1993, 265.

aspects of the dispute, be that because of its limited competence or because the applicable law was in flux. Clearly, whether the Court's suggestions will find any resonance in practice shall finally depend on the subsequent behavior of the parties. Still, there is reason to believe that the Court's directions will not completely remain a dead-letter owing to the degree of authority they enjoy for being contained in the Court's decision. The implementation by the parties of the Court's suggested course of action is a function of its being perceived as a 'fair actor,' strengthened by the perception of its giving directions to both parties rather than privileging one over the other.⁹⁸

IV. The Implementation of ICJ Advisory Opinions Through Diplomatic Means

A. *The Implementation of ICJ Advisory Opinions: A General Framework of Reference*

If much ink has been spent in literature on the nature of the advisory competence of the ICJ, the same cannot be said of implementation. Save for certain peripheral references in studies about compliance with the decisions of the ICJ, a large indifference surrounds this topic.⁹⁹ Yet, it has been noticed that the implementation of AOs is a 'field where the Court's suasion powers face an even greater test'¹⁰⁰ than in the case of judgments. And rightly so, since AOs insert within the institutional framework of an IO a 'juridical component' which, while generally lacking binding force,¹⁰¹ nonetheless entails a full-fledged legal ascertainment akin to that exercised by the Court under its contentious jurisdiction.¹⁰² As such, AOs may bear upon the legal situation not only of the requesting organ, but also of the member States of the organization *qua* individual subjects or of non-member States, depending on the factual context of the object of the demand.

⁹⁸) In a similar vein, see also Magid (n 68) 343.

⁹⁹) Natwi (n 4) 159–162; Charney (n 4) 297–299.

¹⁰⁰) Cesare Romano, 'General Editors' Preface' in Schulte (n 3) viii.

¹⁰¹) In certain cases, primarily in certain headquarters agreements or in certain general instruments setting forth the privileges and immunities of the UN or of its specialized agencies, the AOs given by the ICJ are binding upon the parties. On this topic, see Roberto Ago, 'The "Binding" Advisory Opinions of the International Court of Justice' (1991) 85 AJIL 439.

¹⁰²) Among others, Pomerance (n 4); Benvenuti (n 13) and Mahasen Aljaghoub, *The Advisory Function of the International Court of Justice 1946–2005* (Springer 2006).

For the purposes of implementation, this means that AOs could trigger action by a handful of subjects, with the risk of further blurring what should count as follow-up. Intuitively, one can expect this hurdle to be less serious when it comes to the implementation of AOs on narrow and specific questions, rather than with AOs on broad questions of principle. However, this is still too vague a parameter to guide the observation of the implementation process. More on point would be focusing on the participants in the legal audience of a given AO,¹⁰³ or, to put it differently, on the web of legal interests involved at the ‘institutional’ as well as at the ‘relational’ level of the life of IOs.¹⁰⁴ Starting from the position of the requesting IO as the initial point of reference, two main scenarios are possible. The requesting IO can either have a direct interest in the question posed by the Court – because the conduct of one of its organs is at stake¹⁰⁵ or because it holds a right or an obligation towards one or more of its member States¹⁰⁶ – or it can be a ‘third

¹⁰³) Salmon, (n 22) 29.

¹⁰⁴) For this classical distinction, see, in general, R.J. Dupuy, *La Communauté internationale entre le mythe et l'histoire* (Economica/UNESCO 1986) 41.

¹⁰⁵) For instance, *Admission of a State to the United Nations* (Charter, Art. 4), *Advisory Opinion of 28 May 1948*, ICJ Reports 1948, 57 [hereafter, *Admissions*]; *Reparation for injuries suffered in the service of the United Nations*, *Advisory Opinion of 11 April 1949*, ICJ Reports 1949, 174 [hereafter, *Reparations*]; *Competence of the General Assembly regarding admission to the United Nations*, *Advisory Opinion of 3 March 1950*, ICJ Reports 1950, 4 [hereafter, *Competence*]; *Reservations to the Convention on Genocide*, *Advisory Opinion of 28 May 1951*, ICJ Reports 1951, 15 [hereafter, *Reservations*]; *Effect of awards of compensation made by the U.N. Administrative Tribunal*, *Advisory Opinion of July 13th, 1954*, ICJ Reports 1954, 47 [hereafter, *Effect of Awards*]; *South-West Africa–Voting Procedure*, *Advisory Opinion of 7 June 1955*, ICJ Reports 1955, 67 [hereafter, *Voting Procedure*]; *Admissibility of hearings of petitioners by the Committee on South West Africa*, *Advisory Opinion of 1 June 1956*, ICJ Reports 1956, 23 [hereafter, *Admissibility of Hearings*]; *Judgments of the Administrative Tribunal of the ILO upon complaints made against the UNESCO*, *Advisory Opinion of 23 October 1956*, ICJ Reports 1956, 77 [hereafter, *ILO Tribunal*]; *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization*, *Advisory Opinion of 8 June 1960*, ICJ Reports 1960, 150 [hereafter, *Maritime Committee*]; *Certain expenses of the United Nations* (Article 17, paragraph 2, of the Charter), *Advisory Opinion of 20 July 1962*, ICJ Reports 1962, 11 [hereafter, *Certain expenses*].

¹⁰⁶) *International Status of South-West Africa*, *Advisory Opinion of 11 July 1950*, ICJ Reports 1950, 128 [hereafter, *South West Africa*]; *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, *Advisory Opinion of 20 December 1980*, ICJ Reports 1980, 73 [hereafter, *WHO-Egypt*]; *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, *Advisory Opinion of 26 April 1988*, ICJ Reports 1988, 12 [hereafter, *PLO Mission*]; *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, *Advisory Opinion of 15 December 1989*, ICJ Reports 1989, 177 [hereafter, *Mazilou*]; *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission*

party' inasmuch as the legal ascertainment by the Court has no direct bearing on the IO, but touches upon the legal position of its member States or of non-member States.¹⁰⁷

Why are these different scenarios likely to impact on implementation? Fundamentally, because they allow predictions of its main dynamics, particularly as far as the potential role of the institutional machinery of the IO is concerned. Indeed, when the requesting IO has an interest of its own in the AO, implementation will primarily take place at – and be shaped by – the institutional dimension. On the one hand, in fact, the ascertainment made by the Court will identify the law applicable to a situation where the organization is directly concerned, e.g. saying whether certain conduct is legal or not, whether certain rights exist or not. On the other hand, the organization will be able through its institutional machinery to take autonomous action. If it so wishes, the AO can fully be complied with. The requesting organ, in fact, can either decide to take certain implementing actions itself or it can impart another organ(s) to do so. Somewhat different, though, is the situation of quasi-contentious cases, i.e. those in which the organization holds a right or an obligation *vis-à-vis* its member States. The presence of one or more individual States with their own interests calls for attention to be focused on both the institutional and relational dimensions, since action or inaction could take place in either of them, and it is the interplay between the two that will finally shape implementation.

This 'duality' inherent to the position of States within an IO – being both a member thereof and an independent subject – is even more prominent in

on Human Rights, *Advisory Opinion of 29 April 1999*, ICJ Reports 1999, 62 [hereafter, *Immunity from jurisdiction*].

¹⁰⁷) *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *Advisory Opinion of 21 June 1971*, ICJ Reports 1971, 16 [hereafter, *Namibia*]; *Western Sahara, Advisory Opinion of 16 October 1975*, ICJ Reports 1975, 12 [hereafter, *Western Sahara*]; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996*, ICJ Reports 1996, 226 [hereafter, *Nuclear Weapons*]; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004*, ICJ Reports 2004, 136 [hereafter, *Wall*]; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion of 22 July 2010*, not yet reported [hereafter, *Kosovo*]. A case *sui generis* is that of the *Peace Treaties* AO: although the main dispute concerned certain UN and non-UN members, the SG might also have played a role (under item III of the question submitted by the GA), thus entailing an institutional component of follow-up; see *Interpretation of Peace Treaties (second phase)*, *Advisory Opinion of 18 July 1950*, ICJ Reports 1950, 221 [hereafter, *Peace Treaties*].

the implementation of those AOs that do not determine either the legality of the conduct of the organization, or the existence of a right or an obligation of its own. This situation is different from the previous one in two main respects. First, the AO will not *per se* have binding force for the requesting IO, simply because the Court's legal ascertainment will not concern – at least not immediately – its legal position. This means, in turn, that the AO will entail some form of obligation for the organization only if the organization upholds, acknowledges or decides to act according to the pronouncement. Secondly, and even more importantly, the IO will not have the capacity to ensure compliance autonomously, some forms of action being always necessary on the part of one or more individual State(s). In other words, whereas the IO can take steps towards implementation, the effectiveness thereof will ultimately depend on the independent initiatives of the member States. In similar situations, one may expect the relational and institutional aspects to be deeply entrenched within one another, up to the point of diluting implementation in the continuous relationship between the institutional machinery of the IO and its member States *qua* individual subjects.

Having this framework in mind, we will first look at the main features of implementation within each of these two dimensions in turn. Next, we will discuss them jointly, as far as it is possible without entering into the details of any specific AO. A rich – eminently institutional – practice will be brought to light and discussed as a whole for the purposes of implementation. This is meant to pierce the widespread disenchantment over the effectiveness of AOs due to their inadequate or insufficient implementation. To be sure, trying to persuade one that AOs have indeed been complied with more often than it is commonly perceived is only part of our objective. The other part consists of showing that the process of implementation has, if not always, often triggered institutional dynamics and mechanisms aimed at pursuing the legal position upheld by the Court, thereby fostering the effective functioning of the legal system as broadly envisaged at the outset of this article.

B. Implementation of Advisory Opinions Within the Institutional Dimension: An Engine for Change

Despite the common reference to compliance, the conduct of the organ requesting an AO – which would seemingly be closest to execution – has

given a modest relevance when discussing follow-up issues. Indeed, the web of legal interests involved in a certain AO is most probably not extinguished at this stage,¹⁰⁸ as the action of the requesting organ rather triggers a chain of reactions by other organs of the concerned IO or by its member States. Let us concentrate, for the time being, on the first of these aspects. Whereas the requesting organs have always taken action in relation to the Court's pronouncement – mainly in the adoption of resolutions endorsing it¹⁰⁹ – the conduct of the other organs of the IO do not conform to such a uniform pattern. Accordingly, implementation at the institutional level will be more or less effective depending on the specific features of such a dynamic.

In light of the organic structure of IOs, one can envisage three types of relations: between political organs, between a political and an administrative organ and, finally, between a political and a judicial organ. Not surprisingly, the relations between political organs allow little room for generalization, since the orientations respectively prevailing in the concerned organs are not necessarily unanimous towards the AO. This is why, in the chain of actions related to the AOs, examples of mutual support are concurrent with instances of disguised avoidance. For instance, a collaborative approach underpinned the implementation of the *Namibia* AO. Not only did the SC and GA uphold the Opinion and take prompt follow-up actions,

¹⁰⁸) Quite exceptional is the case of the *Maritime Committee* AO, which was complied with by the Assembly of the organization upon the adoption of Res. A. 21 (II) of 6 April 1961; see Repertory of Practice of United Nations Organs, Chapter XIV, Article 96 (1959–1966) 20.

¹⁰⁹) The requesting organs have for instance: taken note of the AO in *Admissions* (GA Res. 197 A and B of 8 December 1948 also 'recommending that each member of the GA and the SC "should act in accordance with the advisory opinion"'), *Interpretation of peace treaties* (GA Res. 385 of 3 November 1950), *Reservations* (GA Res. 598 of 12 January 1952), *PLO* (GA Res. 43/232 of 13 May 1988) and *Nuclear Weapons* (GA Res. 51/45 M of 10 December 1996); taken note with satisfaction in connection with *Western Sahara* (GA Res. 3458 of 10 December 1975); *Namibia* (in the latter also 'sharing' the position of the Court) (SC Res. 301 of 20 October 1971); welcomed the AO in *Mazilu* (ECOSOC Res. 1990/43 of 25 May 1990); expressed appreciation in *Immunity from jurisdiction* (ECOSOC Res. 1999/64 of 30 July 1999); accepted in *Certain expenses* (GA Res. 1854 A (XVII) of 19 December 1962); accepted and urged action to give effect to the AO in *Status of South West Africa* (GA Res. 449 A–B V of 13 December 1950); acknowledged and called upon member States to act according to the AO in *Wall Case* (GA Res. ES-10/15 of 2 August 2004); accepted in principle and created organs to study the subject matter in *Effect of awards* (Res. 888 of 17 December 1954); authorized action of other organs in accordance with the AO in *Reparations* (GA Res. 365 (IV) of 3 December 1949), *Wall Case* (GA Res. ES-10/15 of 2 August 2004); adopted and endorsed in *Voting procedures* (GA Res. 934 of 3 December 1955), *Admissibility of hearings* (GA Res. 1047 of 23 January 1957); in one case it has not mentioned the AO but recommended action in conformity with it in *Competence of the GA* (495 V of 4 December 1950).

but they also showed support for each other's initiatives taken before and immediately after the pronouncement. So, the SC first adopted resolution 301 (1971), which endorsed the AO, dictated a number of binding measures in line with the obligations set forth in the AO, and further recalled the GA's previous resolution 2145 (XXI) to complete the legal regime envisaged by the Court.¹¹⁰ Later the same year, the GA adopted two resolutions, *inter alia*, reiterating the endorsement of the AO, inviting the SC to take effective steps to ensure the withdrawal by South Africa,¹¹¹ and establishing a UN Fund for Namibia.¹¹² It is noteworthy that this collaboration proved lasting, as witnessed by the numerous cross references to be found in the relevant GA and SC resolutions expressly following-up on the AO.¹¹³ An effective dialogue between the two political organs has not always taken place. In the disagreement leading to the *Admissions* and the *Competence* AOs, the Council simply ignored the GA's recommendations for implementation,¹¹⁴ implicitly exercising its power of self-interpretation so as to reject the GA's own interpretation of the AOs. At times, the Council failed to act upon certain pronouncements – the *Western Sahara*, the *Nuclear Weapons* and the *Wall* AOs being good examples – notwithstanding their relevance for peace and security issues.¹¹⁵ Predictably, the lack of a synergetic strategy has

¹¹⁰⁾ The AO and GA Res. 2145 (XXI) are mentioned in paras. 5–6, 11 and 12 of SC Res. 301 of 20 October 1971.

¹¹¹⁾ GA Res. 2871 (XXVI), of 20 December 1971, particularly paras. 6–7. In the same resolution, the GA also asked the SG to enter into consultations with the permanent members of the SC to provide for the enlargement of the Council on Namibia, see para. 16.

¹¹²⁾ GA Res. 2872 of 20 December 1971.

¹¹³⁾ After 1971, the SC made several references to the AO, see particularly SC Res. 323 of 6 December 1972, 366 of 17 December 1974. The SC also attempted a diplomatic strategy, through the mediation of the SG, to implement the AO, SC Res. 309 of 4 February 1972. The GA, on its part, reiterated its reference to the AO in GA Res. 3295 (XXIX) of 13 December 1974. This latest resolution, as well as Res. 3399 (XXX) of 26 November 1975, is referred to in SC Res. 385 of 30 January 1976, which contains the last express reference to the ICJ AO (the last resolution on the situation in Namibia was adopted in 1989, SC Res. 643 of 31 October 1989).

¹¹⁴⁾ In this context, the SC failed to act according to the GA's recommendation for implementation. In the case of the *Admissions* AO, the Council referred to the AO during its 444th and 445th meetings of 15 and 16 September 1949, but did not endorse the pronouncement nor the legal view previously expressed by the GA in its Res. 197 A and B (III) of 8 December 1948 and 296 K (IV) of 22 November 1948; see *Repertoire of Practice of the Security Council (1946–1951)*, Chapter VII, 285–286. Concerning the *Competence* AO, the Council did not act upon the GA invitation to recommend new members nor did it otherwise refer to the pronouncement.

¹¹⁵⁾ The failure to act upon the pronouncement is not to be taken as total neglect. The Council, in fact, at times made reference to several of the cited AOs during its meetings. For instance, after

either delayed the resolution of the inter-organs' contrasting views motivating recourse to the Court,¹¹⁶ or weakened the institutional response to those pronouncements touching eminently upon inter-State issues. Yet, this has not meant a complete paralysis of political organs. Both, or either one, took independent steps in furtherance of the cited AOs or otherwise referred to them. For instance, the GA created monitoring procedures,¹¹⁷ assigned responsibility for specific aspects of follow-up,¹¹⁸ and eventually established a diplomatic channel with regional actors to tackle resistance over implementation.¹¹⁹

Alternatively, the relationship between the political and the administrative organs of the requesting IO has consistently proven successful. Most of the resolutions adopting an AO foresee some form of action by the Secretariat or the highest administrative body of the concerned IO, and this has been the gateway *par excellence* to realize acts of *stricto sensu* compliance.¹²⁰

the *Western Sahara* AO, the SC held several meetings in connection with the 'green march' into Western Sahara announced by King Hassan II of Morocco. During such meetings, both Spain and Morocco relied on the AO to support their opposite claims. The Council adopted three resolutions with respect to the 'green march' crises; none of these, though, make reference to the AO; see United Nations Yearbook (1975) 178–181. Also the *Wall* AO was mentioned during a number of SC meetings (the 5019th and 5039th meetings of 11 August and 17 September 2004 and the 5230th meeting of 21 July 2005) for calling upon Israel to abide by its obligations under the AO; see Repertoire of Practice of the Security Council, 15th Supplement, Chapter VIII (2004–2007) 10, 23.

¹¹⁶) This applies particularly to membership cases. The GA repeatedly referred to the *Admissions* AO to support its position as to the criteria for admission (see, particularly, GA Res. 506 (VI) of 1 February 1952). None of its attempts proved successful and the stalemate on this issue could only be resolved in 1955, with a package admission, contrary to the letter of the *Admission* AO.

¹¹⁷) For instance, since 1996, the GA has regularly included the item 'Follow-up to the advisory opinion of the International Court of Justice on the Legality of the Threat of Nuclear Weapons' in its agenda. This item was first included through GA Res. 51/45 of 10 December 1996, Item M, para. 6, in which the Court urged the initiation of multilateral negotiations for the conclusion of a 'nuclear-weapons convention prohibiting the development, production, testing, deployment, stockpiling, transfer, threat or use of nuclear weapons and providing for their elimination.' (para. 4).

¹¹⁸) A good example of this kind of follow-up action is the registry for damages established in connection with the *Wall* AO (see GA Res. ES-10/15 of 15 August 2004 and A/ES-10/L.20 of 16 December 2006).

¹¹⁹) For instance, the GA invited the Organization of African Unity to take action to find an equitable solution for the situation in *Western Sahara* and to report the results to the UN SG, see Res. 33/31 of 13 December 1978, paras. 3, 5.

¹²⁰) The joint action of a political and an administrative organ has enabled compliance with the following pronouncements: *Reparations* (in Res. 365 (IV) of 3 December 1949 the GA authorized the SG to ask for compensation and to negotiate with the national States of the victims to avoid overlapping claims. The SG acted accordingly, asking compensation for the death of Count Folke Bernadotte and negotiating with France the damages to be claimed for the death of certain

Besides obviating the limited operational capacity of political organs, the conferral of implementation tasks to administrative bodies has made the process of following-up adaptive to changes in the political context surrounding a pronouncement. The practice of the UN offers broad evidence of this. It suffices to think of the negotiating powers,¹²¹ of the information gathering competences often given to the SG,¹²² not to mention the more complex follow-up mechanisms occasionally set up by the GA.¹²³ The margin of discretion left to administrative organs has thus made up for the necessarily limited scope of the Court's legal analysis by placing the pronouncement within the operational milieu of the organization.

Against this backdrop, the relationship between the political organs of the requesting IO and the Court is open to numerous observations.¹²⁴ One may wish to focus on the reasons underlying the recourse to the Court's advisory competence¹²⁵ to discuss the appropriateness of AOs when

French citizens involved in the incident; see United Nations Yearbook (1950) 864–865; *Reservations* (the SG changed its prior practice as depositary of the Genocide Convention in accordance with the AO, as envisaged in GA Res. 598 of 12 January 1952); *Effect of awards* (the GA accepted in Res. 888 of 17 December 1954 to establish, *inter alia*, a fund for special indemnity under the administration of the SG, who acted accordingly); *ILO Tribunal* (the UNESCO Executive Board authorized the Director-general to pay the awards granted by the ILO Tribunal at the New Delhi Session of 1956, UNESCO 45 EX/Decisions, 14, item 11.1). See also *Interpretation of Peace Treaties*: whereas the SG refrained from creating a Treaty Commission without the members appointed by Bulgaria, Hungary and Romania, in accordance with the AO, the concerned States did not comply with their obligation to appoint such members, so the AO was only partially complied with.

¹²¹ See, for instance, GA Res. 365 (IV) of 3 December 1949, para. 2 (*Reparations*); GA Res. 1059 of 26 February 1957, paras. 1–3 (*South West Africa*); GA Res. 2871 of 20 December 1971, paras. 16–20 and SC Res. 309 of 4 February 1972, para. 1 (*Namibia*); GA Res. 3458 of 10 December 1975, para. 8 (*Western Sahara*). Negotiating powers have also been attributed to *ad-hoc* entities, such as the Committee on South-West Africa (GA Res. 749 (VIII) of 28 November 1953, para. 13) and also to States, see below section 3.

¹²² For instance, GA Res. 51/45 M of 10 December 1996, mandated the SG to collect information on member State efforts in the field of nuclear disarmament.

¹²³ For instance, see the Special Indemnity Fund created under GA Res. 888 of 17 December 1954, para. 7 (*Effect of Awards* AO) or the Registry for Damages, which is to be managed by a special office under the authority of the SG; see GA Res. A/ES-10/L.20 of 16 December 2006 (*Wall* AO).

¹²⁴ We will not consider specifically the relationship between judicial organs. It suffices to mention that the Court has issued several AOs reviewing the judgments of the UN Administrative Tribunal, always upholding the judgments of the Tribunal; see *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal, Advisory Opinion*, ICJ Reports 1973, 166; *Application for Review of Judgment No. 273 of the United Nations Administrative Tribunal, Advisory Opinion*, ICJ Reports 1982, 325; *Application for Review of Judgment No. 333 of the United Nations Administrative Tribunal, Advisory Opinion*, ICJ Reports 1987, 18.

¹²⁵ For a comment on this point, see Rosalyn Higgins, 'A comment on the current health of Advisory Opinions' in Vaughan Lowe and Malgosia Fitzmaurice (eds), *Fifty Years of the International*

political organs lack a shared intention to act in accordance with them or notwithstanding the prospect of having a marginal impact upon a situation through implementation, and so forth. As pertinent and relevant as they are, these considerations still tend to neglect the Court's potential role as a player in the phase of implementation. In an effort to tackle this part of the analysis, we will thus concentrate on the dynamic interaction between the political organs of the requesting IO and the Court. In this respect, it is interesting to notice that political organs have, *inter alia*, asked advice on the legality of certain practices used in following-up on previous AOs. This has allowed the Court not only to enter deeper into the life of the requesting organization, but also to address certain fundamental issues of international law outside its contentious competence. The requests made by the GA in connection with the situation in South Africa well illustrate this point. The first of such requests provided the occasion to frame the powers of the UN under the system of mandates (1950), the second and third requests (1955–1956) enabled the endorsement of certain UN practices stretching the organization's powers beyond its original limits, while through the last request (1970) the Court could lay down the main features of the right of self-determination and the UN powers related thereto.¹²⁶

As it appears, the follow-up to AOs has been an engine for change in the functioning of the requesting organization *vis-à-vis* its member States and non-member States. On the one hand, the process of implementation has triggered the development of new practices;¹²⁷ while, on the other hand, it has paved the way for certain contested practices to enter fully the organization's *modus operandi* once having received the imprimatur of legality by the Court. It is noteworthy that the requesting organs have routinely relied on AOs to win the resistance of recalcitrant third States. So, in the context of the South-West Africa dispute, the GA referred to the relevant AOs to

Court of Justice (Cambridge University Press 1996) 567–579.

¹²⁶⁾ In chronological order, *Status of South West Africa, Voting Procedure, Admissibility of Hearings, Namibia*.

¹²⁷⁾ Several more examples could be cited. After the *Reparations* AO, the SG developed a series of principles for the exercise of functional protection by the UN, see Report A/1347 presented to the fifth session of the GA of 1950 (summarized in *United Nations Yearbook* (1950) 863–864); following the *Reservations* AO, the SG modified his previous practice of the SG as depositary of the Genocide Convention; in connection with the *South-West Africa* AO, the GA created an *ad-hoc* committee (GA Res. 570 A (VI) of 19 January 1952, later Committee on South Africa) with the task of receiving reports and petitions from the territory (GA Res. 749 (III) of 28 November 1953, paras. 12–13).

sustain the legality and opposability of certain aspects of its dubious conduct – simple majority voting, hearings of individual petitions *sine altera parte*, and unilateral termination of the mandate agreement without consulting South Africa.¹²⁸

Additionally, the availability of flexible institutional machinery has enabled follow-up actions tailored to the broad factual context of a pronouncement. Often, this has ended up ‘blurring’ implementation in the continuum of the organization’s policy towards a given issue. For instance, the GA inserted compliance with the *Namibia* AO within a broader program of action, comprising the appointment of an *ad-hoc* committee tasked to review member State treaties with South Africa potentially incompatible with the AO. Similarly, on the basis of the *Nuclear Weapons* AO, the GA established within its first Committee an annual session on the progress towards the abandonment of nuclear weapons, including the review of the engagements made by States under regional as well as universal negotiating *fora*.¹²⁹

As it appears, AOs have played in the life of IOs a role far beyond the mere clarification of the applicable law. The follow-up phase has spurred a cross-fertilization process among organs, leading both to the confirmation of practice taken before the request and to the development of completely new practices.

C. The Relational Dimension in the Implementation of ICJ Advisory Opinions

A pronouncement of the Court inevitably sparks interest among the member States of the requesting organization. Complete neglect is hardly an available option, no matter what a State’s specific legal interest in the context might be. Owing to the authoritative position of the Court, its voice will most probably trigger some sort of reaction, be it one of acceptance

¹²⁸) Similarly, in connection with the *PLO* AO, the ICJ endorsed the SG’s previous finding as to the existence of a dispute in the application of the headquarters agreement.

¹²⁹) Implementation acts have blurred into the IO’s overall policy on a given instance in other cases. For instance, in connection with the *Effect of Awards* AO and the *Application for review* (1982) AO, the UN took steps towards revising the regulation of UN personnel, respectively, by setting up an *ad-hoc* committee to study a review mechanism for the judgments of the Administrative Tribunal (GA Res. 888 of 17 December 1954 and 957 (X) of 8 November 1955) and to amend the Staff Regulations (GA Res. 37/235 of 21 December 1982). On budgetary issues, after the *Certain Expenses* AO, the GA took action to establish special forms of contribution concerning peace-keeping missions, see GA Res. 1874 S-IV of 27 June 1973.

or of contestation, from its most immediate audience, i.e. member States sitting in the IO's organs. For this same reason, a position of complete rejection will be strategically burdensome, especially for one isolated State seeking to avoid the possible consequences of a pronouncement.¹³⁰ Hence, a group of more or less fragmented claims is likely to coagulate around the pronouncement.

The follow-up to AOs becomes, in a sense, the moment of confrontation among the different claims raised by member States. In this context, the pronouncement will most probably be hijacked by States in an attempt to support their claims through the legal authority of the Court. This is no novelty in the life of political organs and, as in other instances, it may result in a stalemate if none of the legal views expressed with regard to the pronouncement ultimately succeeds over the other competing view(s). Notably, a deadlock happened in the context of the *Western Sahara* case. Spain and Morocco, in fact, relied persistently on sharply different interpretations of the AO making any reference to it nugatory, both in their bilateral talks and before the UN organs involved in mediation.¹³¹ Such a fate is, though, not inevitable. In certain cases, AOs have proven successful to obtain a change of conduct or to return to a previously reached understanding. For instance, during the early discussions on the admission of new members to the UN, the SC members had conceded taking a single vote on multiple candidatures. At the time of the *Admission* AO, the political situation between the US and the USSR had started deteriorating, making the previous voting practice on admission disadvantageous for the Western front. To avoid this, the Western coalition maintained that, since the Court had ruled out single voting on multiple candidatures, the previous practice ought to be changed.¹³² Ultimately, the rejection of the USSR-sponsored draft resolution qualifies as an instance of follow-up, as an action taken in connection with the pronouncement. Yet, the independent initiative of

¹³⁰⁾ There have only been a few cases in which an ICJ AO has openly been rejected. These include the case of South Africa, towards the *Namibia* AO, see United Nations Yearbook (1971) 548–549. Israel also rejected the *Wall* AO, but it announced its willingness to abide by the ruling of its own High Court in respect of sections of the wall still to be built (*International Legality of the Security Fence and Sections near Alfei Menashe*, Israel High Court Ruling Docket H.C.J. 7957/04, Judgment of September 15, 2005), see United Nations Yearbook (2004) 477.

¹³¹⁾ See United Nations Yearbook (1975) 179–184.

¹³²⁾ For a detailed account of the respective positions of the USSR and of the western coalition, see Repertoire of Practice of the Security Council, (1946–1951) Chapter 7, 285–286.

member States seems to play a much more central role than the IO institutional machinery here. If this is the case, should one expect any significant difference in terms of effectiveness?

A tentative answer to this question may be that, in fact, decentralized forms of follow-up tend to pursue a pragmatic accommodation of interests as in the case of judgments. But, admitting they might facilitate the effective resolution of a certain situation, efforts by member States *qua* individual actors have turned out to depart from the letter of the AO, doing little to enhance the effectiveness of the pronouncement itself. To illustrate this point, one may take some of the diplomatic *inter-partes* initiatives taken in connection with certain AOs. The Good Offices Committee, created to overcome the stalemate in the situation of South-West Africa,¹³³ represents one of the best examples of *inter-partes* follow-up initiatives. In this case, the process of follow-up could have led to an outcome different from the letter of the AO. The Good Offices Committee had in fact suggested the annexation of a portion of Namibia by South Africa in sharp contrast to the position taken by the Court. Ultimately, the UN quashed the proposed annexation.¹³⁴ Overall, the active involvement of the IO may be crucial to balance out the actual or potential results of *inter-partes* diplomatic initiatives.

D. *The Interplay Between the Institutional and the Relational Dimensions in the Implementation of ICJ Advisory Opinions*

All instances of follow-up clearly entail some interplay between the ‘institutional’ and the ‘relational’ dimensions. It could not be otherwise, given that the life of the organization itself constantly evolves at both levels. At times, though, these two dimensions seem more profoundly intertwined with one another during implementation. It is so when there is a quasi-contentious situation between an IO and a State, i.e. either the IO or the State tries to assert one of its alleged rights against the other.¹³⁵ The same holds true also when the IO is a third party to the object of the AO, which then concerns either global policy issues¹³⁶ or an inter-State dispute.¹³⁷

¹³³) The three members of the Good Offices Committee were mandated to negotiate with South Africa, Res. 1143 of 25 October 1957.

¹³⁴) GA Res. 1243 of 30 October 1958.

¹³⁵) *South West Africa, PLO, Mazilu, Immunity from Jurisdiction*.

¹³⁶) *Nuclear Weapons, Wall*.

¹³⁷) *Western Sahara, Kosovo*.

When it comes to AOs touching on ‘global policy’ issues, individual States have to find some means of collaboration.¹³⁸ The follow-up initiatives taken by the organization will, in this case, help in maintaining a high awareness of the issue.¹³⁹ Clearly, such initiatives cannot help but have an indirect impact on the actions of member States, owing to the prominence of the relational dimension.

Moving on to inter-parties disputes indirectly touched by the AO, the influence of the relational dimension can primarily take two forms: either there will be opposite claims by the parties involved in the situation of conflict, or one party will contest the content of the AO before the organization and its members. As to the first case, if both parties resolve to act on the basis of the AO, the follow-up thereto has the potential to be quite difficult. As already mentioned, in the *Western Sahara* case the parties involved made opposite claims on the basis of their respective unilateral interpretation of the AO. Not surprisingly, the pronouncement was barely mentioned during the discussions at the SC since it would have been, at any rate, of little help in resolving the opposition of legal views between the parties. *In casu*, implementation proved to be even more faltering due to the lack of a shared and mutually reinforcing strategy on the part of the UN political organs. Whereas the GA took several actions towards the situation of Western Sahara at large, the Council remained confined to the immediate threat posed by Morocco’s maneuver of occupation, the so-called ‘green march.’

A conflict of views will exist also when a State considers itself not to be bound by the pronouncement.¹⁴⁰ In this case, the effectiveness of follow-up will mainly repose on the conduct of the recalcitrant State, notwithstanding the implementation efforts eventually taken by the IO. At times, the effects of rejection may be serious enough to threaten the very functioning of the requesting IO, as witnessed in the budget crisis of the 1960s.¹⁴¹ This will most probably trigger a pragmatic strategy of reply on the part of the organization. When the organization is less directly affected by the effects of rejection, certain creative forms of follow-up have been put into place, such as the

¹³⁸) On this point, see also Laurence Boisson de Chazournes, ‘Advisory Opinions and the Furtherance of the Common Interest of Mankind’ in Laurence Boisson de Chazournes, Cesare Romano, Ruth Mackenzie (eds), *International Organizations and International Dispute Settlement – Trends and Prospects* (Transnational Publishers 2002) 105–132.

¹³⁹) For instance, annual session for the *Nuclear Weapons* AO.

¹⁴⁰) *South Africa, Certain Expenses, PLO, Wall* case (Israel).

¹⁴¹) The ICJ addressed part of the quarrel on peace-keeping expenses in its *Certain Expenses* AO.

above-mentioned register of damages in connection with the *Wall* case. The effectiveness of these initiatives in the short run is, however, tenuous, if the attitude of the concerned States does not evolve. Expecting implementation to be more efficacious would probably be misplaced in these sorts of cases. Certainly, it may well be that the follow-up initiatives taken at the institutional level present flaws of their own, which will make them more of a façade than genuine implementation efforts.¹⁴² Yet, in the end, the follow-up to AOs could not reasonably be seen as the moment to accommodate all the legal, let alone the practical, interests involved in the complex contexts often addressed by the Court in its advisory competence.

V. Concluding Remarks

Sir Robert Jennings made a point of noticing the irony of the neglect of post-adjudication as compared to the in-depth scrutiny given to the Court's decisions.¹⁴³ So far, the attempts to fill this lacuna have invariably tended to address compliance with ICJ judgments. This has not only prolonged the neglect given to the post-adjudicative phase of AOs, but it has also detracted from asking what is ultimately the gist of implementation. Incidentally, giving greater attention to the implementation of both judgments and AOs is also likely to bring some fresh thinking into debates that are traditionally more narrowly focused on compliance with ICJ judgments.

In this vein, we have tried to present the relationship between compliance and implementation, in an effort to see whether the two are always coexistent with one another or not. Indeed, the lack of an immediate practical and theoretical link with compliance does not render the notion of implementation futile. The aims of effective resolution of a dispute as well as the prevention of future disputes can equally be pursued during the post-adjudication phase, with or without compliance. This allows a consideration of a diverse range of follow-up practices, not only in substance, but also in their effectiveness for pursuing the goals of the participants in imple-

¹⁴²⁾ For a critical comment on the UN Registry on Damage for the Wall, Al-Haq, *The UN Registry on Damage for the Wall. Al-Haq's Legal Analysis of the Proposal of the Secretary-General* (2008), available online at http://www.diakonia.se/sa/node.asp?node=1243&sa_template_url=%2Ftemplates%2Fihl%2Fprint.asp.

¹⁴³⁾ R. Jennings (n 2) 78.

mentation. Indeed, implementation often involves a range of subjects broader than its immediate addressees. Both in the case of judgments and in the case of AOs, an institutional component can be present in addition to an *inter-partes* one.

Institutional actors have a clear stake in the implementation of AOs, which are meant to be a tool at the disposal of an IO's organs. But they have also played a role, even if only occasionally, in the implementation of judgments. In the latter context, IOs have only recently started developing creative mechanisms of implementation. This tardiness is partly the price paid through the optic of enforcement, as epitomized by Article 94 (2) of the Charter, meant to ensure compliance with the ICJ's pronouncements. The utter inappropriateness of this approach is no surprise. IOs have nonetheless been slow in moving towards a more consensual and gradual approach, akin to the one developed in the implementation of AOs. So far, little of this latter implementation practice has been used by IOs in the context of judgments. Yet, the few cases of intervention in support of States for the resolution of their disputes have proven largely successful. On the contrary, the efforts to implement AOs have been dwarfed by the limited capacity of IOs to influence States as bearers of a legal interest in the matter.

While highlighting the relevance of the *inter-partes* component to implementation, this also suggests that the latter may have a different impact depending on the context in which it exists. More precisely, the close relationship between the parties in connection with a judgment provides the framework and facilitates the negotiating process for implementation. Where there is no collaboration, the parties will still probably try to bargain for a pragmatic solution to further as many of their interests as possible as they are affected by the dispute. Conversely, in the case of AOs, the existence of an *inter-partes* component may be detrimental for implementation, especially if the requesting IO has no interest of its own at stake. The States concerned by the pronouncement, in fact, may indulge in 'free-riding' assuming the web of interests around the pronouncement will be too fragmented to seek redress for conduct at odds with the pronouncement. Clearly, this blurs the effectiveness of the AO, in spite of any genuine implementation effort on the part of the IO.

These are some tentative observations, contingent upon the evolution of implementation practices. Indeed, any serious inquiry into this topic is to be nourished by a continuous observation of State and institutional

practices, coupled with an adjustment of the theoretical categories to apprehend implementation. International scholars have so far been reluctant to engage especially in the latter task, being strongly focused on compliance with judgments. This also hides a certain malaise in defining implementation without escalating it into compliance. Yet, the old backyard risks turning from the well-known and familiar to one of constraint. On the one hand, the more in-depth the post-adjudicative phase analysis is, the less the compliance itself may be understood in a straightforward and definitive way. On the other hand, as an awareness of the stakes of implementation is rising in other judicial and non-judicial contexts, it will soon appear urgent to fill the gap with regard to the AOs of the ICJ. This contribution was intended to put forward and start a discussion of some of these issues. We hope the seeds we have planted will grow and contribute to this end.