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# Chapter Nine

## Between Saying and Doing: The Diplomatic Means to Implement the International Court of Justice's *Iuris Dictum*

Laurence Boisson de Chazournes and Antonella Angelini

### I. Introduction: *The Vectors of Implementation*

“It is ironic” – noted Sir Robert Jennings some years ago – “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”.<sup>1</sup> So far, the attempts to address this issue have focused on the rate of compliance with the International Court of Justice’s (‘ICJ’ or ‘the Court’) decisions as well as on the means of legal redress in cases of non-compliance.<sup>2</sup> Other facets of the post-adjudicative phase have, however, stirred less interest. In particular, only a few authors have looked at the practical means of implementation,<sup>3</sup> while barely anyone has explored the implementation of ICJ Advisory Opinions (‘AO’). To cast light on these aspects, we will analyze in particular the diplomatic means aimed at implementing ICJ pronouncements. At the outset, though, a simple question requires some reflection: what lies behind the abovementioned reticence?

<sup>1</sup> Robert Jennings, “Presentation”, *Increasing the Effectiveness of the International Court of Justice: Proceedings of the ICJ/UNITAR Colloquium to Celebrate the 50th Anniversary of the Court*, in eds. Connie Peck and Roy Lee (Hague: Martinus Nijhoff Publishers/UNITAR, 1997), at 78.

<sup>2</sup> 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* (Brussels: Bruylant, 2003) and Costanze Schulte, *Compliance with Decisions of the International Court of Justice* (Oxford University Press, 2004).

<sup>3</sup> Affef Ben Mansour, *La mise en œuvre des arrêts et des sentences des juridictions internationales* (Brussels: Larcier, 2011).

No doubt one could highlight a handful of reasons, ranging from the limited access to information on implementation initiatives to the difficulty of identifying the participants in the post-adjudicative phase, especially in the case of AOs,<sup>4</sup> and so forth. Yet the crux of the matter is that the *quid* of post-adjudication proves hard to pinpoint in view of a conceptual framework suitable for identifying follow-up actions within the bundle of conduct surrounding an ICJ judgment or an AO. And, what is more, the fall-back on notions such as compliance or execution is unlikely to resolve the deadlock. It is no coincidence, in fact, if the 'ironic' neglect hinted by Sir Robert Jennings persists for certain aspects of post-adjudication which remains distant from the familiar backyard of compliance. Indeed, the means of implementation are the object of a political choice and, as such, traditionally outside the fence of legal analysis on post-adjudication,<sup>5</sup> whereas the follow-up to AOs hardly fits with the classic understanding of compliance. Together, these observations suggest that the very notion of implementation needs some in-depth rethinking.

To begin with, it is of note that we rarely think of implementation independently from compliance. The two terms are employed almost interchangeably in connection with the 'post-adjudicative phase'. More precisely, 'implementation' is held to comprise all the actions that may facilitate or result in compliance, while compliance itself indicates the 'state of conformity or

<sup>4</sup> Jean Salmon speaks of the difficulty of identifying the 'Court's audience', see Jean Salmon, "Quels sont les destinataires des avis", *International Law, the International Court of Justice and Nuclear Weapons* in eds. Laurence Boisson de Chazournes and Philippe Sands (Cambridge University Press, 1999), at 28–35.

<sup>5</sup> 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, the matter acquires a political rather than a legal character. On this point, see Edvard Hambro, *L'exécution des sentences internationales* (Recueil Sirey, 1935), at 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; Ebran Tuncel, *L'exécution des décisions de la Cour internationale de Justice selon la Charte des Nations Unies* (Messeiller, 1960), at 16, 60; Pasquale Paone, "Considerazioni sull'esecuzione delle sentenze della Corte internazionale di Giustizia" XIV *Comunicazioni e studi* (1975), at 632; Gilbert Guillaume, "Avant-Propos" in Azar, *L'exécution des décisions de la Cour internationale de Justice*, at 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 Organization*, vol. 4, at 853.

identity between an actor's behaviour and a specified rule'.<sup>6</sup> Hence, the obligation of execution is taken as the backbone of implementation. Attention gravitates towards the *parties* and what they do *after* the pronouncement, with little interest for anything happening before or with the involvement of other subjects. Odd as it may seem, this same conception of implementation has been extended to AOs. While offering different grounds for the obligation to execute AOs,<sup>7</sup> authors unanimously equate implementation with compliance. No matter the type of pronouncement, implementation is thus seen as a function of compliance. Yet, this does not necessarily cover all scenarios. There may be acts that do not necessarily end in – or end with – compliance, but are nonetheless related to the post-adjudicative phase of an ICJ pronouncement.

This may arise, for instance, when there is no compliance notwithstanding the implementation efforts thereto. One of the parties may, in fact, refuse to engage in the conduct previously agreed upon; circumstances may change so as to alter the balance of interests among the parties or attempts to seek a different solution for their divergences and so forth. A grey area exists also when implementation produces practical and legal effects beyond the mere realization of the pronouncement. This happens particularly when implementation paves the way for the accommodation of broader issues between the parties, such as certain ICJ judgments concerning territorial disputes. In addition, one could think of conduct more remotely related to compliance and yet crucial to implementation. Examples range from the conclusion of agreements on the means to resolve frictions in the course of implementation, to the creation of organs or entities with monitoring or other implementation-related tasks.<sup>8</sup> While compliance still lies in the background, these

<sup>6</sup> See Kal Raustiala and Anne-Marie Slaughter, "International Law, International Relations and Compliance" *Handbook of International Relations* (SAGE 2002), in eds. Walter Carlsnes *et al.*, at 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, at 436.

<sup>7</sup> Some have held that the legal findings contained in AOs are binding in themselves and therefore require compliance. Paolo Benvenuti, *L'accertamento del diritto mediante i pareri consultivi della Corte internazionale di giustizia* (Giuffè, 1985). In a similar vein, Michla Pomerance, *The Advisory Function of the International Court in the League and U.N. Years* (John Hopkins University Press, 1974), at 341–367, 371. Others have found an obligation of execution to arise in case the requesting organ voluntarily accepts an AO, see Philippe Weckel, "Les suites des décisions de la Cour internationale de Justice" (1996) *XLII AFDI* 428.

<sup>8</sup> For more details concerning specific cases, see Sections II and III.

initiatives in themselves are aimed at facilitating or can lead to implementation, which is neither theoretically nor practically the same as compliance.

So how should one deal with such conduct? Even broadly conceived, compliance fails to account for their relevance in post-adjudication. Realizing the pronouncement, in fact, is not necessarily the goal they pursue. Yet, if compliance is partly insufficient, some sort of orientation is still needed to sail the vast sea of diplomatic practice potentially surrounding an ICJ pronouncement. Some help may come from the change of perspective implicit in looking at the behaviour of the parties rather than exclusively at the pronouncement. Their acts have legal relevance if taken not only for the immediate realization of the Court's legal ascertainment, but also for the effective functioning of international law. As any normative system, international law endeavours at assuring the containment and avoidance of disputes, with the term 'dispute' here broadly indicating a clash of interests between international law subjects. These two objectives are not always met concomitantly with or exclusively through compliance; however, it still seems reasonable to consider the conduct as fostering either of these goals as part of the implementation process.

Accordingly, implementation comprises those acts which go beyond or diverge from compliance, but contribute to the resolution of a dispute not fully resolved, whether because of the Court's limited jurisdiction or because of its reluctance to address some of the aspects relevant *in casu*. When ensuing from a diplomatic initiative, such acts will come under the scope of our analysis. The same goes for the efforts to accommodate the interests of States indirectly affected by a pronouncement, for instance in cases of territorial delimitations or of multilateral treaty interpretation. These examples also highlight the importance of implementation for the prevention of future disputes, in addition to the resolution of the existing ones. As a last point of illustration, one could recall those initiatives – like the establishment of monitoring bodies – aimed at channelling and cooling-off the persisting clashes of interest so as to prevent their escalation in a decentralized setting.

Consequently, measuring compliance with ICJ judgments and AOs will not be the core of our analysis. Rather, we will seek to identify the conduct, initiatives and mechanisms taken in conjunction with a pronouncement and which contribute to the effective functioning of international law.<sup>9</sup> This also entails a twofold shift in the focus of attention, classically centred on the actions taken after the pronouncement by those who have an obligation to execute it. On the one hand, we will in fact consider the initiatives taken

<sup>9</sup> In a similar vein, Weckel speaks of the "*suites contestées des décisions juridictionnelles*" defined as "*les comportements provoqués par ces actes*", see Weckel, "Les suites des décisions de la Cour internationale de Justice", at 436.

by the parties in collaboration with the Court and, on the other hand, we will look at the different deals concluded before the pronouncement for its implementation. Our attention will thus essentially gravitate towards the dialogue between the Court and its 'audience'.

Admittedly, such a broad approach could be criticised for being too porous or loose. Yet, concentrating narrowly on compliance is unlikely to offer a less slippery path of investigation. Several commentators have stressed the difficulty of measuring compliance with judgments owing to the complexity of most domestic processes designed to realize compliance,<sup>10</sup> to the difference between States' statements and their deeds, as well as to certain time factors.<sup>11</sup> In the case of AOs, these difficulties seem even more daunting, as suggested by the lack of empirical investigations on this issue. What is more, a sound investigation on implementation cannot ignore that the addressees of – and, more broadly, the subjects affected by – an ICJ pronouncement may pursue goals collateral to compliance. It is submitted that such acts are legally relevant for implementation if they contribute to the containment of existing tensions and avoid the insurgence of new ones. With this framework in mind, let us now turn to the implementation of the ICJ judgments first and of its AOs next.

## II. *Every Drop Makes an Ocean: The Efforts Towards Implementing ICJ Judgments*

Implementation is usually broached from the perspective of the pronouncement, rather than from that of the parties. An international lawyer would, in fact, most probably ask what is required to implement a given decision, rather than what is its surrounding context. Most classifications relating to implementation – for instance, the famous distinction between declaratory and constitutive pronouncements – rely on certain proprieties inherent to a judgment, likewise its impact on previous and future legal situations or its subject matter. Yet there may be a risk of overlooking that the course of post-adjudication is ultimately determined by the will of the parties. It is for them to embed the 'juridical component' within their

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<sup>10</sup> In this respect, Llamzon 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 Aloysius Llamzon, "Jurisdiction and Compliance in Recent Decisions of the International Court of Justice" (2007) 18 *EJIL* 815, at 845.

<sup>11</sup> Philippe Couvreur, "The Effectiveness of the International Court of Justice in the Peaceful Resolution of Disputes" *The International Court of Justice: Its Future Role After Fifty Years*, in eds. AS Muller *et al.* (Hague: Martinus Nijhoff Publishers, 1997), at 112, footnote 75.

dispute, according to what proves feasible and appropriate thereunder. The features of implementation will thus be influenced by the course of the pre-adjudicative phase and by the intervention of actors other than the parties – notably universal or regional international organizations and the Court itself.

#### A. *A Long Journey: The Role of the Parties in Implementation*

In the context of a dispute, pragmatism is central to the relationship between the parties. The quest for some form of change in the allocation of interests, coupled with the informational asymmetries to which both parties are subject, brings a certain dose of uncertainty. The pre or post adjudicative initiatives reflect the pragmatic attempt to adjust to actual, as well as potential, changes in the circumstances surrounding a dispute. By illustrating this, we will try to highlight the main features of implementation by the parties to a decision.

Upon seizing the Court,<sup>12</sup> the parties clearly know they ought to execute the decision to come. However, an express reference to implementation before adjudication can mitigate some of the hurdles potentially looming over the horizon. Clauses on implementation may figure either in the special agreements conferring jurisdiction upon the Court or in other instruments adopted prior to the proceedings.<sup>13</sup> This enhances the mutual confidence between the parties, pushing the oft-costly process of dispute resolution, as witnessed in a number of heavily charged cases, particularly delimitation

<sup>12</sup> Implementation is clearly influenced both by the thrust of the Court's competence and by the mode of conferring jurisdiction to it. In this latter respect, it is commonly held that when the Court is seized consensually, there are more prospects of successful implementation than in cases of unilateral application. For a contrary view, see Llamzon, "Jurisdiction and Compliance in Recent Decisions of the International Court of Justice", at 815.

<sup>13</sup> The cases in relation to which one can find such clauses are the following: *Case Concerning the Arbitral Award made by the King of Spain on 23 December 1906*, Judgment, [1960] I.C.J. Reports 192 ["*Arbitral Award*"]; *North Sea Continental Shelf*; *Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment, [1982] I.C.J. Reports 18 ["*Continental Shelf (Tunisia/Libya)*"]; *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, Judgment [1984] I.C.J. Reports 246 ["*Gulf of Maine*"]; *Continental Shelf (Libyan Arab Jarnahiriya/Malta)*, Judgment [1985] I.C.J. Reports, 13 ["*Continental Shelf (Libya/Malta)*"]; *Frontier Dispute (Burkina Faso/Mali)*, Judgment, [1986] I.C.J. Reports 554 ["*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 [1999] I.C.J. Reports 1045 ["*Kasikili/Sedudu*"]; *Frontier Dispute (Benin/Niger)*, Judgment, [2005] I.C.J. Reports 90 ["*Benin/Niger*"].

cases.<sup>14</sup> Conversely, absent a clearly expressed engagement, implementation may prove arduous if positive acts of cooperation are needed. In the context of the *Asylum* case, for instance, the lack of a solid framework for implementation in the Act of Lima turned to be highly detrimental for implementation.<sup>15</sup>

Practically, implementation clauses set the overall framework for the future diplomatic actions to follow the decision. To this end, they often simply foresee the initiation of negotiations and the conclusion of an agreement in accordance with the pronouncement,<sup>16</sup> 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, since the parties feared a stalemate in demarcation, they decided a precise time limit for it and asked the Court to nominate three experts in charge of this objective.<sup>17</sup>

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. Particularly recurrent in connexion with the

<sup>14</sup> For instance, the conclusion of a package-deal touching upon issues of implementation were 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. Also very tense was the situation between Burkina Faso and Mali prior to the submission of their dispute to the Court (*Frontier Dispute (Burkina Faso/Mali)*).

<sup>15</sup> 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 I.C.J. 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 *Colombian-Peruvian Asylum Case (Colombia v. Peru)* Judgment [1950] I.C.J. Reports 267 ["*Asylum*"].

<sup>16</sup> 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.

<sup>17</sup> 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.

exploitation of certain resources, this practice appeared first in the *Minquiers and Ecrehos* case<sup>18</sup> and later in the *Gabcikovo-Nagymaros* case.<sup>19</sup> Overall, these agreements aim at avoiding the impairment of the parties' respective rights pending adjudication, contributing to maintain a climate as favourable as possible to future negotiations on implementation.<sup>20</sup> In sum, under their continuous interaction, the parties take certain diplomatic actions which impact upon implementation even before the judgment is rendered. These actions fix a framework for cooperating after the decision.

Turning to the post-adjudicative phase, the *locus par excellence* of implementation, we enter a phase in which inter-party negotiations come again to the fore in order to decide how to practically execute the judgment and, ultimately, to what degree it is to be upheld. After adjudication, though, the resumed bilateral relationship between the parties comprises an authoritative 'juridical component'. This blend of a 'diplomatic' and a 'juridical' component determine the main trends of implementation.

At the outset, a clarification is in place 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

<sup>18</sup> A separate agreement concerning fishing rights had been concluded before adjudication and favoured the resolution of the dispute between France and the UK, the judgment needing not much in terms of 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 the 17 November 1953, '*The Minquiers and Ecrehos case (France/United Kingdom)*, Judgment [1953] I.C.J. Reports 47 [*"Minquiers and Ecrehos"*].

<sup>19</sup> The case could be submitted to the Court only once the parties agreed on the creation of a temporary water management regime to remain in place until the end of the proceedings, 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 Concerning Certain Temporary Technical Measures and Discharges in the Danube and Mosoni Branch of the Danube.

<sup>20</sup> In a similar vein, one may also cite the agreement found between Iceland, Denmark and Norway in the framework of the *Jan Mayen* case (*Maritime Delimitation in the Area between Greenland and Jan Mayen*, Judgment [1993] I.C.J. Reports 38 [*"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 intended to remain in place for three years and then renewed for two more years, was crucial for reducing tension between the parties, especially seeing that the case had been initiated through a unilateral application 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, *Compliance with Decisions of the International Court of Justice*, at 222.

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, lacking agreement, the losing State may contest the judgment, but finally act in accordance with it or, conversely, act inconsistently with it. In response to that, the winning State can, provided it wishes to take action, try to negotiate an alternative solution or seek to unilaterally enforce the judgment notwithstanding its wholesale 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)<sup>21</sup> or of an international entity.

Not surprisingly, most of the accessible practice falls under the first scenario, corresponding to compliance as classically understood. This explains the general optimism towards compliance records.<sup>22</sup> In line with our previous remarks, the negotiation of implementation provisions and other similar clauses before adjudication has smoothed the process of execution, culminating either in the conclusion of a formal agreement<sup>23</sup> or in other

<sup>21</sup> See particularly, mediation by the US Ambassador and the Australian Foreign Ministry in the context of the *Preah Vihear* case, *Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Judgment [1962] I.C.J. Reports 6 [*Preah Vihear*] and mediation of Algeria in the *Hostages* case (*United States Diplomatic and Consular Staff in Tehran*, Judgment [1980] I.C.J. Reports 3 [*Hostages*]). Third States may also contribute to implementation by providing financial support, as it happened for instance in the *Frontier Dispute Burkina Faso/Mali* when the operation of demarcation was financed by the Swiss government, see Azar, *L'exécution des décisions de la Cour internationale de Justice*, at 124.

<sup>22</sup> For instance, Schulte speaks of "...a generally satisfactory compliance record for judgments", see Schulte, *Compliance with Decisions of the International Court of Justice*, at 403. In a similar vein, though somewhat less optimistic, Paulson maintains that while "no State has been directly defiant five [judgments] have met with less compliance than others", see Paulson, "Compliance with Final Judgments of the International Court of Justice", at 437.

<sup>23</sup> Implementation agreements were concluded relatively smoothly in several cases. 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* (Hague: Martinus Nijhoff, Vol II, 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)* the parties were able to reach and implement an agreement soon after the pronouncement, see *Agreement on the Implementation of the ICJ Judgment Concerning the Territorial Dispute*, 4 April 1994,

forms of official endorsement of the judgment.<sup>24</sup> Exceptions to that are, for instance, the *Arbitral Award* and the *Gabcikovo-Nagymaros* cases. Whereas the diplomatic difficulties following the *Arbitral Award* pronouncement were eventually resolved,<sup>25</sup> the same cannot be said for the *Gabcikovo-Nagymaros* dispute. Negotiations have largely been unfruitful,<sup>26</sup> for the changes in the political climate after the pronouncement have dwarfed the relevance of previous agreements concluded by the parties. Successful implementation agreements or other diplomatic actions have proved possible also in the absence of a pre-agreed framework for implementation.<sup>27</sup>

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 truth, only in one instance – namely, in the *Jan Mayen* case – the parties have decided to slightly modify the terms of the judgment; on the contrary, States have more frequently taken efforts that exceed the obligation to execute the pronouncement. For instance, the Court's *Sovereignty Over*

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(1994) 33 *ILM* 619. For further details as to the implementation of the 1994 agreement, see *infra*, part 3, on the role of IOs.

<sup>24</sup> 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* pronouncement were followed-up by the official positions taken by certain members of the government and other official celebrations, 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.

<sup>25</sup> See *infra*, part 3, paragraph 3.

<sup>26</sup> Llamzon, "Jurisdiction and Compliance in Recent Decisions of the International Court of Justice", at 814–815.

<sup>27</sup> For instance, in the *Corfu Channel* case (*Corfu Channel Case (United Kingdom v. Albania)* Judgment [1949] I.C.J. Reports 4 ["*Corfu Channel*"]), the UK and Albania concluded in 1992 a memorandum of understanding settling their outstanding differences, see Geoffrey Marston, "United Kingdom Materials in International Law 199" (1994) 63 *BYIL* 615, 781–782. In the *Ambatielos* case (*Ambatielos Case (Merits: Obligation to arbitrate)*), Judgment [1953] I.C.J. Reports, 10 ["*Ambatielos*"]) the parties easily negotiated an agreement on implementation, see Agreement Regarding the Submission to Arbitration of the Amatielos Claim, Greece – UK, 24 February 1955, 209 *UNTS* 187. In the *Qatar v. Bahrain* case (*Maritime Delimitation and Territorial Questions Between Qatar and Bahrain*, Merits, Judgment, [2001] I.C.J. Reports 40 ["*Qatar v. Bahrain*"]) the parties positively welcomed the judgment and took several steps of mutual collaboration afterwards, see Schulte, *Compliance with Decisions of the International Court of Justice*, at 239.

*Certain Frontier Land* pronouncement catalysed new efforts in delimiting certain areas upon which the Court had not ruled, thereby settling points of future potential contrast between the parties.<sup>28</sup> 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 made the object of the *Arbitral Award* ICJ decision.<sup>29</sup> This initiative proved crucial for compliance for it allowed addressing certain vital economic aspects not comprised by the Court's mandate. Other examples, though not of a purely inter-State character, can be found in the *Land and Maritime Dispute (El Salvador/Honduras)* as well as in the *Pulp Mills* case,<sup>30</sup> 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 prudent to distinguish between the cases in which the parties have formally protested against the judgment, but ultimately acted compatibly with it, from those in which the judgment has been rejected and the dispute finally settled otherwise than in the pronouncement. Under the first label, one may include the *Hostages* case inasmuch as the Algiers Accords – which provided a comprehensive framework for settling the Iran-US dispute – ultimately realized the actions indicated by the Court, even though the agreements hardly mentioned the pronouncement. On the contrary, not even a remote echo of the ICJ's voice can be heard in cases of wholesale rejection, such as the *Fisheries Jurisdiction, Nicaragua* and, for a long period of time, *Corfu Channel* pronouncements. Against the refusal to engage in implementation, the concerned States have reacted differently. Attempts at enforcement were made in relation to the *Corfu Channel* and the *Nicaragua* pronouncements, respectively, through unilateral action and institutional mechanisms.<sup>31</sup> In both cases, though, the overall political contingencies, added to the complete lack of cooperation on the side of the debtor State, made such attempts nugatory. On the contrary, a more successful attempt can be seen in the strategy of the UK regarding Iceland's unwillingness to accept the *Fisheries Jurisdiction* decision. After several efforts at enforcement,

<sup>28</sup> *Case Concerning Sovereignty Over Certain Frontier Land (Belgium/Netherlands)*, Judgment [1959] I.C.J. Reports, 209.

<sup>29</sup> *Arbitral Award of 31 July 1989 (Guinea Bissau v. Senegal)* Judgment [1991] I.C.J. Reports 53 [*Arbitral Award (Guinea v. Senegal)*].

<sup>30</sup> *Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment [2010] I.C.J. Reports 14 [*Pulp Mills*].

<sup>31</sup> The details of the UK's action are reported by Oschar 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.

the UK desisted from further insisting on the pronouncement and concluded a provisional agreement ensuring at least part of the UK's interests.<sup>32</sup>

In light of this global overview, a 'diplomatic' and a 'juridical' component seems to permeate the post-adjudicative phase. The prominence of the former stresses the relativity of the *res judicata*, whose content can be 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 for 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.<sup>33</sup> Additionally, the commitment to abide by the judgment may help justifying certain actions likely to raise discontent domestically, thereby reducing the political costs of dispute resolution.<sup>34</sup> 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 partiality of the *res judicata* by embedding part of its content, or at least its spirit, in the settlement of aspects not adjudicated by the Court.<sup>35</sup>

Together, these factors bring to light the manifold nuances of implementation and suggest recalibrating 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

<sup>32</sup> For more details, see Schulte, *Compliance with Decisions of the International Court of Justice*, at 151–158.

<sup>33</sup> Weckel, "Les suites des décisions de la Cour internationale de Justice", at 435. The delimitation cases in which the Court is demanded to indicate the general principles to be used in negotiation, see particularly *North Sea Continental Shelf*, *Continental Shelf (Tunisia/Libya)*, *Continental Shelf (Malta/Libya)*.

<sup>34</sup> Numerous are the examples in this respect: for instance, in 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; in *Land and maritime boundary (Cameroon v. Nigeria)* the parties soon after the judgment similarly declared their wish to comply with it, thereby cooling off an extremely tense confrontation, see United Nations Information Service, "Statement by the Secretary-General Kofi Annan following the Geneva meeting with Presidents of Cameroon and Nigeria", UN Doc. SG/SM/8495 AFR/515, 15 November 2002.

<sup>35</sup> A good example is provided by the mandate of the special commissions created in connection with the *Arbitral Award* and the *Land and Maritime Boundary (Cameroon v. Nigeria)* decisions. For more details, see below, Section B.

compliance, but also of their effectiveness in resolving the dispute existing between the parties.<sup>36</sup>

First and foremost, a clarification as to the temporal aspect of implementation is in order. Length is probably one of the first aspects which springs to mind thinking about implementation. Burdensome and long negotiations easily lower expectations of effectiveness. Yet the length of negotiations in itself tells little if merely calculated from when the decision has been handed down. One needs, in fact, considering 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 not sufficiently clear in its factual implications will most likely result in being hard to implement.<sup>37</sup> The same could be thought of a pronouncement which touches upon legal issues subject to structural change: this state of fluctuation will probably reverberate in implementation, with the most extreme case being a pragmatic settlement different from the one decided by the Court.<sup>38</sup>

In addition, the effective resolution of a dispute depends on the straightforwardness of the Court's pronouncement. Often, with a too open-ended pronouncement – take the *Asylum/Haya de la Torre* or the *Gabcikovo-Nagymaros* pronouncements – 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 cause of these hurdles, though, often resides in a lack of means, rather than of will, on the part of the concerned States. Third parties can help mitigate this deficiency 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.

<sup>36</sup> It is important to note that, according to certain authors, the very notion of execution could be stretched so 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, *L'exécution des décisions de la Cour internationale de Justice*, at 107–108.

<sup>37</sup> Weckel, "Les suites des décisions de la Cour internationale de Justice", at 439.

<sup>38</sup> For instance, *Fisheries Jurisdictions*. As recalled, the law on fishing rights was undergoing a deep change at the time of adjudication. Several States had started establishing 200-mile fishery zones in the late 70s; 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* (Hague: Martinus Nijhoff Publishers, 1986).

### B. Institutional Actors and Their Support for Implementation

Various institutional actors have occasionally intervened in the implementation of the ICJ judgments. Contrary to what one may think, IOs have for a long time been relatively timid in this respect. Emblematic is the case of the United Nations (UN), which has exhibited an inability to fully use the enforcement powers enjoyed by the Security Council under article 94(2) of the Charter.<sup>39</sup> A more active involvement has proved possible with the abandoning of a purely enforcement optic, which hardly suits the flexible and largely consensual framework of implementation.<sup>40</sup> IOs are, in fact, well-positioned to provide a framework for negotiation and cooperation, as well as to offer practical support for States engaged in implementation. The examples in this respect are numerous and concern both universal and regional IOs.

As a framework for cooperation, IOs allow for reducing the costs of communication between the parties, thereby expediting the course of negotiations vis-à-vis implementation.<sup>41</sup> In addition, IOs can be directly involved

<sup>39</sup> 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 *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*, [1996] I.C.J. Reports 595). On the ineffectiveness of Article 94(2), see among others, Llamzon, "Jurisdiction and Compliance in Recent Decisions of the International Court of Justice", at 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.

<sup>40</sup> 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, similarly to forced initiatives taken by one of the parties only, is unlikely to bring about effective compliance, especially inasmuch as domestic action is necessary to realize the judgment. In a similar vein, Weckel, "Les suites des décisions de la Cour internationale de Justice", at 438.

<sup>41</sup> For instance, a few months after the *Pulp Mills* pronouncement the parties succeeded in establishing a joint environment monitoring program to be pursued under the framework of the Administrative Commission of the River Uruguay (CARU). On the 30 of August

in implementation, playing a role somewhat in between that of a conciliator and a mediator as regards 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,<sup>42</sup> the OAS, through its Inter-American Peace Committee, interceded in the post-adjudicative phase to help overcoming the stalemate in demarcation due to pending issues of nationality and of acquired rights.<sup>43</sup> More recently, the UN ushered a similar intervention in connection with the *Land and Maritime Boundary (Cameroon v. Nigeria)* case.<sup>44</sup> After the pronouncement, the UN Secretary General (SG) alertly convened a meeting with the parties.<sup>45</sup> In that occasion, The Heads of States 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.<sup>46</sup> Overall, the Commission met with good results on most questions,<sup>47</sup> except the thorny one concerning Nigeria's retreat from

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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 Uruguay*. Available at <http://www.dipublico.com.ar/?p=6157> (last accessed 14 December 2011). 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 desemboadura del Río Gualaguaychú en el Río Uruguay*. Available at <http://www.caru.org.uy/prensa.html> (last accessed 14 December 2011).

<sup>42</sup> The Council of the OAS became active on the situation since 1 May 1957, upon Honduras's request. The AOS had appointed an investigation committee, which had been able to broker a cease-fire between the two States and had suggested to have recourse to the ICJ. For more details, OAS/OEA, Secretaría General, *Tratado Interamericano de Asistencia Reciproca* (1973) Vol. 1, 1948–59, 5th edn, 233–306.

<sup>43</sup> 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. The work of the Committee was successfully completed in 1963, with the complete retreat of Nicaragua from all the territories which had been attributed to Honduras and the demarcation of the land boundary between the two States. See, Schulte, *Compliance with Decisions of the International Court of Justice*, at 129–132.

<sup>44</sup> *Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea Intervening)*, Judgment [2002] I.C.J. Reports 303.

<sup>45</sup> For a detailed account of the SG's efforts, see *Interview of Kofi Annan, Former Secretary General of the United Nations by Nicolas Michel* in this volume.

<sup>46</sup> 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](http://www.un.org/UNOWA) (last accessed 14 December 2011).

<sup>47</sup> 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" (2006) LI *AFDI* 162.

the Bekassi peninsula. This matter, in fact, could only be solved through a bilateral agreement finally concluded in 2006,<sup>48</sup> also thanks to the climate of mutual trust nurtured by the Commission.

In both these cases, the diplomatic initiatives taken in the post-adjudication period went beyond compliance, with the aim of resolving certain issues crucial to extinguishing the respective disputes. In truth, these points could hardly have made the object of adjudication strictly speaking; it suffices to think about the question of nationality, or that of straddling villages and the relocation thereof. On the contrary, reliance on diplomatic means seemed more promising. Interestingly, the means produced for smooth implementation exhibit certain hybrid traits if compared with the classical means of diplomatic dispute settlement. For instance, in the *Land and Maritime Boundary (Cameroon v. Nigeria)*, the UN acted more pervasively than a conciliator, but lacked the complete freedom of a mediator, since negotiations had to be carried in accordance with the ICJ judgment and of international law in general. This hints at the mutual supportiveness between the 'juridical' and the 'diplomatic' component. While the decision of the Court provides a framework of reference, diplomatic negotiation is necessary to handle issues which could be detrimental for the efficacy of the pronouncement. 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.

In addition to supporting negotiation, IOs have also supplied financial and logistical assistance. A few, yet quite articulated, standing financing mechanisms exist both at the universal and the regional level. The most prominent one is the UN Trust Fund, established in 1989 to ensure financial support for States bringing a dispute before the ICJ on a consensual basis.<sup>49</sup> A financing

<sup>48</sup> Green Tree Agreement, concluded the 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" *Pacific Settlement of Border Dispute: Lessons from the Bekassi Affair and the Green Tree Agreement* in ed. Adam Lupel (International Peace Institute, 2008), 1–7. On 11 March 2010 the parties have also concluded an agreement for the joint development of 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; Emmanuel Tumanjong, "Addax Petroleum likely candidate for Cameroon, Nigeria, oil deal" *Dow Jones Newswires*, 13 March 2011.

<sup>49</sup> 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 have been revised in 2004, see Secretary-General's Trust Fund to Assist

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 the demarcation of boundaries. Unfortunately, very few demands have been addressed to the Fund.<sup>50</sup> Yet this has not discouraged the AOS from setting up a similar mechanism at the regional level.<sup>51</sup> Differently than the UN twin, the AOS Peace Fund can be utilized only for delimitation 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 the *Land and Maritime Dispute (El Salvador/Honduras)*.

Passing on to a more political kind 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.<sup>52</sup> A UN presence to act with a joint team of officials from both countries had already been envisaged in the Agreement concluded by the parties to assure 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.<sup>53</sup> 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 failure to take enforcement actions as envisaged by the Charter has turned into a deadlock for political organs. Particularly regrettable is, in this respect, the AG's inability to exploit creatively the broad powers entrusted to it by Article 10 of the UN Charter.

While IOs have variously contributed to implementation, the ICJ has also not completely abstained from the implementation process. The Court, while at times recalling the parties' obligation to execute its judgments,<sup>54</sup> has refrained from indicating the means of implementation, since doing so

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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.

<sup>50</sup> *Qatar v. Bahrain Territorial dispute (Qatar v. Bahrain), Frontier Dispute (Benin/Niger)*.

<sup>51</sup> The Permanent Council of the OAS has adopted the guidelines for the Fund for Peace on the 13 November 2000. See OAE/Ser.G CP/INF 4453/00, available at <http://www.oas.org/consejo/Docs/cp07664e04.doc> (last accessed 14 December 2011).

<sup>52</sup> Security Council Resolution 915 of 4 May 1994.

<sup>53</sup> 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.

<sup>54</sup> For instance in the *Frontier Dispute (Burkina Faso/Mali)*, 649, § 178. Incidentally, also the Permanent Court of International Justice had recalled the obligation to execute its pronouncements, see for instance *The 'Société Commerciale de Belgique'*, Judgment [1939] P.C.I.J. Reports, Series A/B 78, at 176. It is important also 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".

'[w]ould depart from its judicial function'.<sup>55</sup> Such reluctance notwithstanding, the Court has indeed played a role in the context of implementation. To begin with, the parties themselves have occasionally bestowed upon it certain tasks in implementation.<sup>56</sup> 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, any actual involvement in implementation is down to the will of the parties and is, therefore, subject to their own strategy for dealing with potential threats against compliance. Instead, the Court's *motu proprio* reference to diplomatic means hints at a different way of supporting the latter process. When referring to negotiations, the Court has indeed provided clues as to the content thereof. This is, admittedly, nothing special if the parties are found to have a legal obligation to undertake negotiations or other forms of diplomatic cooperation and the Court expounds on the general principles relevant thereto.<sup>57</sup> On the contrary, less orthodox is the case of recommendations indicating some sort of practical approach to be sought during negotiations<sup>58</sup>

<sup>55</sup> *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", *Compliance with Judgments of the International Courts*, in eds. Mielle Bulterman and Martin Kuijer (Hague: Martinus Nijhoff Publishers, 1995), at 9, 12.

<sup>56</sup> 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 finding agreement within six months from 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.

<sup>57</sup> See, for instance, *North Sea Continental Shelf*, at 47–48, §§ 85–86; *Fisheries Jurisdictions*, at 34–35 (UK) and 205–206 (FRG); *Maritime Delimitation (Nicaragua v. Honduras)*, at 763, § 321. In a similar vein, see also *Pulp Mills*, at 70, § 281, referring to the parties' obligation to cooperate under CARU.

<sup>58</sup> See particularly, *Gabcikovo-Nagymaros*, 81, § 153. In a similar vein, even though not in an order on provisional measures, see also *Great Belt case, Case Concerning Passage Through the Great Belt (Finland v. Denmark)*, Provisional Measures, [1991] I.C.J. Reports 19, at §§ 31, 34. Alternatively, the Court refused to provide any practical indication as to the content of the recommended negotiation in the *Haya de la Torre* case, see particularly at 83.

or exhorting one or both parties to take a certain course of action.<sup>59</sup> The latter approach has been criticized by some for being extraneous to the Court's judicial function.<sup>60</sup> Moreover, the Court's tendency to recommend and, eventually, seek to influence negotiations raises a question of judicial strategy: why and when should the Court adopt such a course of action?

First and foremost, it is important to recall that this somewhat 'transactional' logic has always featured alongside the more classical logic 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 stratification of goals in the Court's approach towards its function at the international level and, more precisely, interplay between the goal of effectively resolving a certain dispute and that of laying down the law. In the latter respect, it has been noticed that the Court tends to lay more emphasis on either objective according to 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-adjudication.<sup>61</sup> This suggests the Court may engage in 'preventive' or 'remedial' diplomacy.<sup>62</sup> Diplomatic means are, in fact, invoked either to prevent new differences arising or to somehow remedy the Court's inability to address and resolve certain important aspects of the dispute, be that because of its limited competence or because the applicable law was in flux.

<sup>59</sup> In *Land and Maritime Boundary (Cameroon v. Nigeria)* the Court took note "of the commitment undertaken by the Republic of Cameroon [...] 'faithful to its traditional policy of hospitality and tolerance'". This formulation has not passed unnoticed in doctrine for being quite unusual, since the Conclusions of the Parties were silent on this issue. Hélène Ruiz-Fabri and J. M. Sorel, "Chronique de jurisprudence de la CIJ (2002)" (2003) 134 *JDI* 858, at 886.

<sup>60</sup> On the negative side, Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice* (Cambridge University Press 1993), at 558. Also commenting on the 'persuasive' role of this sort of recommendations, see Brigitte Stern, *20 ans de la jurisprudence de la Cour internationale de Justice (1975-1994)* (Hague: Martinus Nijhoff, 1998), at 591.

<sup>61</sup> Azar, *L'exécution des décisions de la Cour internationale de Justice*, at 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, at 291-293.

<sup>62</sup> 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 on the 15 October 1993 at the 48th session of the General Assembly" *ICJ Yearbook 1992-1993*, at 265.

### III. *Overlapping Layers: The Institutional and Relational Dimensions of the Implementation of ICJ Advisory Opinions*

While much has been said about the nature of the advisory competence of the ICJ, implementation is a less discussed topic among international lawyers.<sup>63</sup> Yet it has been noticed that the implementation of AOs is a “field where the Court’s suasion powers face an even greater test”<sup>64</sup> than in the case of judgments. And understandably so, since AOs insert within the institutional framework of an IO a ‘juridical component’ which, while generally lacking binding force,<sup>65</sup> nonetheless entail a full-fledged legal ascertainment akin to that exercised by the Court under its contentious jurisdiction.<sup>66</sup> 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 particular demand.

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 be followed-up. To mitigate this hurdle, one should focus on the web of legal interests involved at the ‘institutional’ as well as at the ‘relational’ level of the life of IOs.<sup>67</sup> 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

<sup>63</sup> Implementation is only sparingly mentioned in certain studies about compliance with ICJ decisions, see E. K. Natwi, *The Enforcement of International Judicial Decisions and Arbitral Awards in Public International Law* (Sijthoff-Leyden 1966), at 159–162; Jonathan Charney, “Disputes Implicating the Institutional Credibility of the Court: Problems of Non-Appearance, Non-Participation and Non-Performance” *The International Court of Justice at a Crossroads*, in ed. L. F. Damrosch (New York: Transnational Publishers 1987), at 297–299.

<sup>64</sup> Cesare Romano, “General Editors’ Preface”, in Schulte, *Compliance with Decisions of the International Court of Justice*, at viii.

<sup>65</sup> In certain cases, notably in headquarters agreements or in general instruments setting forth the privileges and immunities of the UN or of its specialized agencies, the AO given by the ICJ is binding upon the parties. On this topic, see Roberto Ago, “The ‘Binding’ Advisory Opinions of the International Court of Justice” (1991) 85 *AJIL* 439.

<sup>66</sup> Among others, Benvenuti, *L’accertamento del diritto mediante i pareri consultivi della Corte internazionale di giustizia* and Michla Pomerance, *The Advisory Function of the International Court in the League and U.N. Years*, as well as Mahasen Aljaghoub, *The Advisory Function of the International Court of Justice 1946–2005* (Springer, 2006). It is important to recall that a similar position had already been taken by the Permanent Court of International Justice (PCIJ) in its Eastern Carelia pronouncement, *Status of Eastern Carelia*, Advisory Opinion [1923] P.C.I.J. Reports, Series B, No. 5, at 29.

<sup>67</sup> For this classical distinction, see in general R. J. Dupuy, *La Communauté internationale entre le mythe et l’histoire* (Economica/UNESCO, 1986), at 41.

the conduct of one of its organs is at stake<sup>68</sup> or because it holds a right or an obligation towards one or more of its member States<sup>69</sup> – or it can be a ‘third party’ where 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.<sup>70</sup>

Why are these different scenarios likely to impact on implementation? Fundamentally, because they allow for the prediction of its main dynamics, particularly as far as the potential role of the institutional machinery of

<sup>68</sup> For instance, *Admission of a State to the United Nations (Charter, Art. 4)*, Advisory Opinion [1948] I.C.J. Reports 57 [“Admissions”]; *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion [1949] I.C.J. Reports 174 [“Reparations”]; *Competence of the General Assembly Regarding Admission to the United Nations*, Advisory Opinion, [1950] I.C.J. Reports 4 [“Competence”]; *Reservations to the Convention on Genocide*, Advisory Opinion, [1951] I.C.J. Reports 15 [“Reservations”]; *Effect of Awards of Compensation Made by the U.N. Administrative Tribunal*, Advisory Opinion, [1955] I.C.J. Reports 47 [“Effect of Awards”]; *South-West Africa-Voting Procedure*, Advisory Opinion, [1955] I.C.J. Reports 67 [“Voting Procedure”]; *Admissibility of Hearings of Petitioners by the Committee on South-West Africa*, Advisory Opinion [1956] I.C.J. Reports 23 [“Admissibility of Hearings”]; *Judgments of the Administrative Tribunal of the ILO Upon Complaints Made Against the UNESCO*, Advisory Opinion, [1956] I.C.J. Reports 77 [“ILO Tribunal”]; *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization*, Advisory Opinion, [1960] I.C.J. Reports 150 [“Maritime Committee”]; *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion, [1962] I.C.J. Reports 11 [“Certain Expenses”].

<sup>69</sup> *International Status of South-West Africa*, Advisory Opinion, [1951] I.C.J. Reports 128 [“South West Africa”]; *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, [1980] I.C.J. Reports 73 [“WHO-Egypt”]; *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, Advisory Opinion, [1988] I.C.J. Reports 12 [“PLO Mission”]; *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, Advisory Opinion, [1989] I.C.J. Reports 177 [“Mazilou”]; *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion [1999] I.C.J. Reports 62 [“Immunity from Jurisdiction”].

<sup>70</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion [1971] I.C.J. Reports 16 [“Namibia”]; *Western Sahara*, Advisory Opinion, [1975] I.C.J. Reports 12 [“Western Sahara”]; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, [1996] I.C.J. Reports 226 [“Nuclear Weapons”]; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] I.C.J. Reports 136 [hereafter, *Wall*]; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, [2010] I.C.J. Reports [hereafter, *Kosovo*]. A case *sui generis* is that 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 posed by the GA), thus entailing an institutional component of follow-up; see *Interpretation of Peace Treaties (second phase)*, Advisory Opinion [1950] I.C.J. Reports 221 [“Peace Treaties”].

the IO is concerned. Indeed, when the requesting IO has an interest of its own in the AO, implementation will primarily take place – 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 a certain conduct is legal or not, or whether a certain right exists or not. On the other hand, the organization will be able, through its institutional machinery, to take some autonomous action. The AO can fully be complied with, since the requesting organ can either decide to take certain implementing actions itself or it can prompt 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 a focus on both the institutional and the relational dimension, since action or inaction could take place at any of them, and it is the interplay between the two that will finally shape implementation.

The ‘duality’ inherent in the position of States within an IO – being as they are both members of the IO and independent subjects – is even more prominent in the implementation of AOs which do not determine either the legality of a 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 autonomously ensure compliance, some forms of action always being necessary on the part of one or more individual States. 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 the institutional aspect to be deeply entrenched with 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 at each of these two dimensions in turn. A rich and eminently institutional implementation practice will be brought to light, challenging the common skepticism about the implementation of AOs. Again, this hints at a new perspective to assess the effectiveness of IOs beyond *stricto sensu* compliance.

A. *Implementation of Advisory Opinions at the Institutional Dimension: An Engine for Change*

The organs requesting an AO have always taken action in relation to the Court's pronouncement – mainly in the adoption of resolutions endorsing it.<sup>71</sup> The conduct of the other organs of the IO, on the contrary, demonstrate a less uniform pattern. Accordingly, implementation at the institutional level will result 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 relation between political organs allows 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 come along with instances of disguised avoidance. For instance, a collaborative approach underpinned the implementation of the *Namibia* AO. Not only the SC and the GA upheld and took prompt follow-up actions, but they also showed support for each other's initiatives taken before and immediately after the pronouncement.<sup>72</sup> Noteworthy, this collaboration proved lasting, as witnessed by the numerous cross references to be found in the relevant

<sup>71</sup> 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 *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: *Competence of the GA* (495 V of 4 December 1950).

<sup>72</sup> 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 GA previous resolution 2145 (XXI) to complete the legal regime envisaged by the Court, see §§ 5–6, 11 and 12 of SC Res. 301 of 20 October 1971.

GA and SC resolutions expressly following-up the AO.<sup>73</sup> An effective dialogue between the two political organs has not always taken place. In the situation leading to the *Admissions* and the *Competence* AOs the Council simply ignored the GA's recommendations for implementation,<sup>74</sup> implicitly exercising its power of auto-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*, *Nuclear Weapons* and *Wall* AOs being good examples – notwithstanding their relevance for peace and security issues.<sup>75</sup> Predictably, a lack of any clear strategy has either delayed the resolution of the organs' differences in views motivating the recourse to the Court,<sup>76</sup> or weakened the institutional response to those pronouncements touching upon inter-State issues. Yet this has not meant a complete paralysis of political organs. Both or at least one of them have taken independent steps

<sup>73</sup> 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, for 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, are 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).

<sup>74</sup> 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 meeting 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 neither acted upon the GA invitation to recommend new members nor referred to the pronouncement.

<sup>75</sup> 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 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 to its obligations under the AO; see *Repertoire of Practice of the Security Council*, 15th Supplement Chapter VIII (2004–2007) at 10, 23.

<sup>76</sup> 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 *Admissions* AO.

in furtherance of the cited AOs or otherwise referred to them. For instance, the GA created monitoring procedures,<sup>77</sup> in charge of certain aspects of follow-up,<sup>78</sup> and eventually established a diplomatic channel with regional actors to counter resistance over implementation.<sup>79</sup>

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.<sup>80</sup> The conferral of implementation tasks to administrative bodies has not only obviated the limited operational capacity of political organs, but also made the process of follow-up receptive to changes in the political context surrounding a pronouncement. The practice of the UN offers broad evidence of this.

<sup>77</sup> 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, § 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" (§ 4).

<sup>78</sup> A good example of these kinds of follow-up actions 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).

<sup>79</sup> For instance, the GA invited the Organization of African Unity to take action to find an equitable settling of the question of *Western Sahara* and to report the results to the UN SG, see Res. 33/31 of 13 December 1978, at §§ 3, 5.

<sup>80</sup> 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 French citizens involved in the incident; see United Nations Yearbook (1950) 864–865); *Reservations* (the SG changed his 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 that the AO was only partially complied with.

It suffices to think of the negotiating powers<sup>81</sup> and information gathering competences often given to the SG,<sup>82</sup> not to mention the more complex follow-up mechanisms occasionally set up by the GA.<sup>83</sup> 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.<sup>84</sup> One may wish to focus on the reasons underlying the recourse to the Court's advisory competence,<sup>85</sup> to discuss the appropriateness of AOs when 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. Yet, considerations of the latter kind tend to perceive the Court somewhat indirectly, neglecting its potential role as a player in the phase of implementation. This is why we will leave these aspects aside, while concentrating on the dynamic interaction between the political organs of the requesting IO and the Court. Interestingly, political organs have, *inter alia*, asked for advice on the legality of certain practices taken in the follow-up to previous AOs. This has allowed the Court not only to enter more profoundly into the life of the requesting organization, but also to address certain fundamental issues of international law outside of its contentious competence. The

<sup>81</sup> See, for instance, GA Res. 365 (IV) of 3 December 1949, § 2 (*Reparations*); GA Res. 1059 of 26 February 1957, §§ 1–3 (*South West Africa*); GA Res. 2871 of 20 December 1971, §§ 16–20 and SC Res. 309 of 4 February 1972, § 1 (*Namibia*); GA Res. 3458 of 10 December 1975, § 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, § 13) and also to States, see below in this section, § 3.

<sup>82</sup> For instance, GA Res. 51/45 M of 10 December 1996 mandated the SG to collect information on MS efforts in the field of nuclear disarmament.

<sup>83</sup> For instance, see the Special Indemnity Fund created under GA Res. 888 of 17 December 1954, § 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*).

<sup>84</sup> 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, [1973] I.C.J. Reports 166; *Application for Review of Judgment No. 273 of the United Nations Administrative Tribunal*, Advisory Opinion, [1982] I.C.J. Reports 325; *Application for Review of Judgment No. 333 of the United Nations Administrative Tribunal*, Advisory Opinion, [1987] I.C.J. Reports 18.

<sup>85</sup> For commentary on this point, Rosalyn Higgins "A comment on the current health of Advisory Opinions", *Fifty Years of the International Court of Justice* in eds. Vaughan Lowe and Malgosia Fitzmaurice (Cambridge University Press 1996), at 567–579.

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), while the second and third requests (1955–1956) enabled the endorsement of certain UN practices stretching the organization's powers beyond the pre-Charter framework, while through the last request (1970) the Court could lay down the main features of the right of self-determination and of the UN powers related thereto.<sup>86</sup>

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;<sup>87</sup> while on the other hand, it has paved the way for certain contested practices to fully enter 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 counter the resistance of recalcitrant third States. So, in the context of the South-West Africa dispute, the GA referred to the relevant AOs to sustain the legality and opposability of certain of its (somewhat dubious) conduct, i.e. simple majority voting, hearings of individual petitions *sine altera parte*, unilateral termination of the mandate agreement without consulting South Africa.<sup>88</sup>

Additionally, the availability of a 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 programme of action, comprising the appointment of an *ad hoc* committee tasked to review member States' treaties with South Africa that were 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

<sup>86</sup> In chronological order, *Status of South West Africa, Voting Procedure, Admissibility of Hearings, Namibia*.

<sup>87</sup> 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 the *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, §§ 12–13).

<sup>88</sup> Similarly, in connection with the *PLO* AO, the I.C.J. endorsed the SG's previous finding as to the existence of a dispute in the application of the headquarters agreement.

progress made towards the abandonment of nuclear weapons, including the review of the engagements made by States under regional as well as universal negotiating *fora*.<sup>89</sup>

As it appears, AOs have played in the life of IOs a role far beyond the mere clarification of the applicable law. The phase of follow-up 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 ones.

### B. *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 option available for any of them, no matter what their 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 acceptance or contestation, in its most immediate audience, i.e. member States of 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.<sup>90</sup> Hence, a collection of more or less fragmented claims is likely to coagulate around the pronouncement.

The follow-up on 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 the 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

<sup>89</sup> Implementation acts have blurred into the IO's overall policy on a given instance in other cases also. 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 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.

<sup>90</sup> There have been only a few cases of the rejection of an ICJ AO. These include the case of South Africa, regarding the *Namibia* AO, see *United Nations Yearbook (1971)* 548–549. Israel also rejected the *Wall* AO, although 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 15 September 2005), see *United Nations Yearbook (2004)* 477.

in a stalemate if none of the legal views expressed with regard to the pronouncement ultimately succeeds over the other competing one(s). As was very evident, a deadlock occurred in the context of the *Western Sahara* case. Spain and Morocco, in fact, relied so persistently on sharply different interpretations of the AO as to make any reference to it nugatory, both in their bilateral talks and before the UN organs involved in mediation.<sup>91</sup> 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 to take a single vote on multiple candidatures. At the time of the *Admissions* 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.<sup>92</sup> Ultimately, the rejection of the USSR sponsored draft resolution qualifies as an instance of follow-up, as a conduct taken in connection with the pronouncement. Yet the independent initiative of member States seems here to play a much more central role than the IO institutional machinery. If it is so, should one expect any significant difference with 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. However, it is important to bear in mind that piecemeal efforts at implementation, which are more concerned with the immediate interests of the parties, can risk undermining 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,<sup>93</sup> offers some 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 Office 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

<sup>91</sup> See *United Nations Yearbook* (1975) 179–184.

<sup>92</sup> 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), at Chapter 7, 285–286.

<sup>93</sup> The three-member Good Offices Committee was mandated to negotiate with South Africa, Res. 1143 of 25 October 1957.

annexation.<sup>94</sup> Overall, the active involvement of the IO may be crucial to balance out the actual or potential results of *inter-partes* diplomatic initiatives.

#### IV. *Concluding Remarks*

We started this survey with the proposition that much had yet to be explored in the implementation of ICJ judgments and advisory opinions through diplomatic means. Indeed, the very notion of implementation needed clarification, covering both judgments and AOs. Finding some sort of 'minimum common denominator' was not only dictated by the scope of research we chose, but was also necessary to select the diplomatic actions which ought to be considered part of the process of implementation, notwithstanding the lack of an immediate practical and theoretical link with compliance. This allowed us to cover follow-up practices highly diverse not only in substance, but also in their effectiveness for pursuing the goals of the participants in implementation. Indeed, implementation often involves a range of subjects broader than its immediate addressees. Both in the case of judgments and of AOs, an institutional component can feature along with an *inter-partes* one.

Admittedly, international organizations are at the forefront when it comes to the implementation of AOs. But they have also played a role in the implementation of binding decisions. In the latter context, IOs have only recently started developing creative mechanisms of implementation, although exploiting little of the rich potential developed throughout the follow-up to AOs. Yet the few cases of intervention in support of States for the resolution of their disputes have proven largely successful, whereas the efforts to implement AOs have been dwarfed by IOs' limited capacity to influence States having a legal interest in a particular matter. While highlighting the relevance of the *inter-partes* component in implementation, this also suggests that the latter may have a different impact, according to the context in which it is embedded. More precisely, the close relationship between the parties in connection with a binding decision provides the framework for, and arguably facilitates, the negotiating process of implementation. Even lacking collaboration, the parties will still most probably try to bargain for some pragmatic solution to secure as many as their interests affected by the dispute as possible. On the contrary, 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 free-ride on it without retribution, since the web of interests

<sup>94</sup> GA Res. 1243 of 30 October 1958.

around the pronouncement will seem too fragmented for triggering demands of redress by other States. Clearly, this dilutes the effectiveness of the AO, in spite of any genuine implementation effort on the part of the IO.

An inquiry into the topic of the implementation of ICJ pronouncements is to be nourished by a continuous observation of State and institutional practice, coupled with an adjustment of the theoretical categories, in order to fully comprehend implementation. International scholars have so far been reluctant to engage in the latter task, being focused on compliance with binding decisions. This also hides a certain malaise in defining implementation without conflating it with compliance. Yet the old backyard risks turning from well-known and familiar to constraining. On the one hand, the more in-depth the post-adjudicative phase is analyzed, the less compliance itself may be apprehended in a straightforward and definitive way. On the other hand, as awareness of the parameters of implementation is rising in other judicial and non-judicial contexts, the gap concerning the ICJ AOs will soon be necessary to bridge. This contribution was intended to put forward and start a debate on some of these issues. We hope the seeds we have planted will grow and contribute to this end.