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A Comparative Look at Domestic Enforcement of International Tribunal Judgments

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A COMPARATIVE LOOK AT DOMESTIC ENFORCEMENT OF INTERNATIONAL DECISIONS

This panel was convened at 9:00 a.m., Thursday, March 26, by its moderator, Paul Stephan of the University of Virginia School of Law, who introduced the panelists: Lori Damrosch of Columbia University School of Law; Andreas Paulus of the University of Göttingen; Pierre-Hugues Verdier of Harvard Law School; and Ingrid Wuerth of Vanderbilt University Law School.

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By Lori F. Damrosch[*]

Problems of compliance with international arbitral and judicial decisions have been with us for as long as such tribunals have existed. In general, the consensual foundations for the jurisdiction of international tribunals have ensured that the parties were in principle willing to have their disputes resolved by the tribunal and thus were usually prepared to carry out the resulting award or judgment. Commentators on international arbitration generally characterize the compliance record as favorable.[1]

Occasions when states refuse to carry out arbitral awards are rare, but when they do occur, states have sometimes asserted the nullity of the award on the basis of *excès de pouvoir*—that the arbitrators had gone beyond the terms of the parties' consent to submit the dispute. When the United States refused for fifty years to carry out the arbitral award in the *Chamizal Tract* dispute with Mexico, the stated reason was that the arbitrators had exceeded their authority.

From the record of nineteenth- and twentieth-century arbitrations, one can derive a rough generalization that also holds true for twentieth-century adjudication: the clearer the consent of the parties to submit their dispute to third-party settlement, the more likely they are to carry out the award or judgment. Instances of non-compliance with an award or judgment were often (though not invariably) cases in which the losing party contested the authority of the tribunal to render the challenged decision.

The consent-based jurisdiction of the Permanent Court of International Justice (PCIJ) allows us to confirm this generalization. Overall, the record of compliance with PCIJ judgments was strong. Authorities on the PCIJ maintain that there was *no* instance of a refusal to comply with its judgments, although there may have been one or two cases in which PCIJ decisions were not fully implemented. In *Socobelge*,[2] the PCIJ found Greece to be under an obligation to carry out a 1936 arbitral award; this obligation became the subject of proceedings within the Belgian domestic judicial system aimed at attaching Greek state assets within Belgium.[3]

When the PCIJ was reconstituted as the International Court of Justice (ICJ), the possibility of noncompliance was anticipated and an enforcement mechanism was envisaged in Article 94(2) of the UN Charter. From early in the Charter period, scholars began to write about

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[1] *See* A.M. Stuyt, Survey of International Arbitrations 1794-1970 (1972) (identifying only 3 out of 443 arbitrations in which the losing party refused to comply, and only 13 others in which difficulties arose).

[2] Société Commerciale de Belgique, Judgment, 1939 PCIJ (ser. A/B) No. 78 (June 15).

[3] Société Commerciale de Belgique c. État hellénique et Banque de Grèce, Brussels Civil Tribunal (1951), noted in 47 AJIL 508 (1953).

other enforcement mechanisms, in case resort to the Security Council should be unavailing. Permanent member veto is the most obvious obstacle, but other legal and political reasons could also leave the prevailing party unable to take advantage of Article 94(2).

Unfortunately, one of the ICJ's first cases—*Corfu Channel*—entailed prolonged noncompliance. The Court's judgment obliged Albania to pay compensation,[4] but Albania refused to comply. The prevailing party, even though a permanent member of the Security Council, was not able to bring about a successful enforcement action, apparently because the Soviet Union would have vetoed any resolution that the United Kingdom might have introduced against Albania,[5] which in that period of the Cold War was a Soviet client state.

The United Kingdom thus turned its attention to monetary assets of Albania that might have been available to satisfy the Court's judgment. A substantial quantity of gold belonging to Albania came under the control of the Allies at the end of World War II. A commission was convened by the United Kingdom, United States, and France to determine what to do with these assets, under a procedure that led to a separate proceeding at the ICJ known as the *Case Concerning Monetary Gold Removed from Rome in 1943*.[6] The Court dismissed this case without deciding whether the United Kingdom was entitled to a share of the gold in execution of the unsatisfied *Corfu Channel* judgment. The reason for dismissal was Albania's non-consent to the Court's jurisdiction to decide title to the gold.

For three decades, *Corfu Channel* stood practically alone as a case in which a losing party failed to comply with a final ICJ judgment. This exceptional case inspired attention to problems of enforcement. Scholars have considered that a prevailing party would be able to execute ICJ judgments calling for payment of compensation against assets of the losing party. The possibility of enforcement in third-country courts has also been considered. In the event of an enforcement action, issues such as sovereign immunity would have to be addressed under international and domestic law.

Another notorious case of non-compliance was *Tehran Hostages*, where Iran flouted both the provisional measures order entered by the ICJ in late 1979 and the final judgment rendered in May 1980.[7] The hostage crisis was resolved with the Algiers Accords of January 19, 1981, which included provisions requiring discontinuance of the ICJ case.

Another well-known instance of non-compliance with an ICJ final judgment is *Military and Paramilitary Activities in and Against Nicaragua*.[8] The fact that the case involved an ongoing military conflict and implicated the national security concerns of a permanent member of the Security Council was relevant to the U.S. stance not only at the jurisdictional phase, but also in resisting enforcement at the Security Council (by exercising the veto) and later in U.S. courts. When a private group tried to enforce the judgment, the U.S. Government succeeded in having the local case dismissed.[9]

In a larger number of cases, provisional measures of protection ordered under ICJ Statute Article 41 have been rejected or ignored. These include *Tehran Hostages*; Bosnia-Herzegovina's genocide case against Serbia; and cases brought by Paraguay and Germany against the United States under the Vienna Convention on Consular Relations, among others. The

[4] Corfu Channel (U.K. v. Albania), Merits, 1949 ICJ REP. 4 (Apr. 9); *Id.*, Judgment, at 244 (Dec. 15).

[5] CONSTANZE SCHULTE, COMPLIANCE WITH DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE 95 (2004).

[6] Monetary Gold (Italy v. France, U.K., U.S.), Judgment, 1954 ICJ REP. 19 (June 15).

[7] Tehran Hostages (U.S. v. Iran), Provisional Measures, 1979 ICJ REP. 7 (Dec. 15); Tehran Hostages (U.S. v. Iran), Judgment, 1980 ICJ REP. 3 (May 24).

[8] Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. U.S.), 1986 ICJ REP. 14 (June 27).

[9] Committee of U.S. Citizens Living in Nicaragua v. Reagan, 856 F.2d 929 (D.C. Cir. 1988).

instances of non-compliance with provisional measures typically include several overlapping factors:

– In some (but not all) cases, the respondent contested the Court's jurisdiction. In *Anglo-Iranian Oil Company*, that position was vindicated when the Court upheld respondent's preliminary objections.

– Most addressees of interim orders denied that the ICJ Statute gave the Court authority to enter binding orders at the provisional measures stage. Finally, in *LaGrand*, the ICJ decided that provisional measures orders are binding.[10]

– Some (but not all) provisional measures cases entailed a contention that respondent's vital interests and national security were at stake, as with the U.S. refusal to abide by the provisional measures order in *Nicaragua*. Other states have made similar claims.

Concern over enforcement of international decisions is thus not new but has increased in importance with the expansion of the numbers of tribunals and of cases brought to them. A proliferation of specialized tribunals collectively hears hundreds of cases each year. International criminal tribunals have turned to states for the purpose of giving effect to internationally binding orders and have asserted authority to address binding demands to states. The International Criminal Court (ICC) Statute contains elaborate obligations for national cooperation with international procedures. Now that the ICC is operational, national courts will encounter this type of international decision for enforcement. The treaties creating some newer tribunals explicitly require enforcement of international judgments on the same basis as national judgments.

A salient accomplishment of the mid-twentieth century was the adoption of treaties on enforcement of foreign and international arbitral awards. The Algiers Accords establishing the Iran-United States Claims Tribunal provide for enforcement of its awards in national courts under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and U.S. courts have enforced such awards at the request of Iranian parties. The UN Convention on the Law of the Sea provides that the decisions of the Sea-Bed Disputes Chamber "shall be enforceable in the territories of the States Parties in the same manner as judgments or orders of the highest court of the State Party in whose territory the enforcement is sought."[11]

Other tribunals produce rulings that are not necessarily binding in a formal sense, though their authority may be considerable. The legal effect of decisions of human rights treaty bodies is debated, by contrast to judgments of regional human rights courts empowered to enter binding judgments. The European Court of Human Rights is generally considered to be the most effective judicial organ for enforcement of international human rights law; even so, the issue of how its judgments are to be implemented receives different treatment in the constitutional systems of European states.

In the implementing legislation for the World Trade Organization (WTO), the U.S. Congress reserved to itself the prerogative of deciding whether and how to implement adverse WTO decisions and ruled out the possibility of private lawsuits to enforce them. Nonetheless, emanations from the WTO dispute settlement system influenced the reasoning of the Supreme Court in *Crosby v. National Foreign Trade Council*, where it held that the Massachusetts

[10] LaGrand (Germany v. U.S.), Judgment, 2001 ICJ REP. 104 (June 27).

[11] U.N. Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3, Annex VI, art. 39 (UNCLOS).

law imposing sanctions against Burma was unconstitutional, even though the international procedure invoked by the European Union and Japan had been suspended.[12]

Another recent development is the judgment in *Arrest Warrant (Yerodia)*,[13] which required Belgium to cancel an arrest warrant that had been issued by Belgian authorities against the foreign minister of the Democratic Republic of the Congo. Because this international judgment had to be implemented within the Belgian legal system, issues of the role of Belgian courts in carrying out an ICJ decision were involved.[14]

All participants in international adjudication have a stake in ensuring compliance with international judgments. The United States well understood this proposition when Iran rejected the ICJ's provisional measures order and final judgment in the *Tehran Hostages* case. The United States was then prepared to maintain that third-country courts should give collateral effects to the ICJ's ruling as evidence of the *erga omnes* nature of the underlying obligations, in litigation challenging extraterritorial application of U.S. economic sanctions in response to Iran's unlawful actions.

States differ markedly in the constitutional mechanisms by which international obligations are implemented, as well as in their readiness to take measures in enforcement of international judgments. The United States has a complex approach to these questions, marked by a common-law system, a written constitution, and a large body of judicial decisions. Other states also have to grapple with problems similar to those that courts in the United States confront, including:

– *Federalism*: Who has authority within a federal system to bring about compliance with international law and international judgments, on the part of subfederal units?

– *Parliamentary involvement*: What is the role for the legislature in setting the framework for national participation in international adjudication? What obligations are "self-executing," and what consequence attaches to that characterization?

– *Executive prerogatives and responsibilities*: Does the Executive have authority to decide whether to comply with an international judgment?

– *Judicial role*: How much choice do national courts have concerning the matters covered by an international judgment? Must they accept without question a treaty interpretation rendered by an international court, or a treaty remedy ordered by such a tribunal?

– *Democratic values; constitutional rights*: Is it compatible with values of constitutionalism and the rule of law for an international organ to establish rules of decision for national courts?

A Comparative Look at Domestic Enforcement of International Tribunal Judgments

By Andreas Paulus[*]

I. Introduction

After the European Court of Justice, in its *Kadi* judgment,[1] required the European Commission to give reasons for the listing of terrorists, Jack Goldsmith and Eric Posner answered

[12] Crosby v. National Foreign Trade Council, 530 U.S. 363 (2000).

[13] Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belgium), 2002 ICJ 3.

[14] For details on Belgian implementation of *Arrest Warrant*, see Schulte, *supra* note 5, at 269-271.

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[1] Joined Cases C-402/05 P & C-415/05 P, Kadi & Al Barakaat v. Council of the European Union and EC Commission, 3 C.M.L.R. 41 (2008).