Non-Compliance of Judgments and the Inherent Jurisdiction of the ICJ

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Structured Abstract

Article Type: Research Paper

Purpose—The aim of this paper is to review the existence of an inherent jurisdiction of the International Court of Justice to settle disputes arising from the non-compliance of its judgments, which emanates from its identity as a judicial organ and the necessity to ensure the fulfillment of its judicial function. This paper also reflects on the inherent jurisdiction of the Court in regard to non-compliance with provisional measures and its similarities to non-compliance with judgments on the merits of a case; as well as the difference between the power conferred to the Security Council in regard to the enforceability of the judgments from the Court and those of the Court from its inherent jurisdiction in matters concerning to non-compliance of its own judgments. The author invites the reader to revive the most needed reflection on this point and to motivate further discussion.

Design, Methodology, Approach—The author bases his analysis on the functional approach, which provides the appropriate grounds to argue that the Court enjoys an inherent jurisdiction to settle disputes arising from the non-compliance of its own judgments. The author also refers to three relevant cases of the Court, i.e., the *Nuclear Test*, *Frontier Dispute* and the *Alleged Violations* cases.

Findings—This paper provides evidence of the potential existence of an inherent jurisdiction of the International Court of Justice to settle disputes arising from the non-compliance of its judgments on the basis of its judicial function. The paper also

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suggests that there is no conflict between the enforceability of the judgments from the Court under article 94 of the UN Charter and the inherent jurisdiction of the ICJ in cases of non-compliance of its judgments.

Originality, Value—This paper brings to the attention of the readers the most important question of non-compliance with the judgments of the International Court of Justice and the Court's inherent jurisdiction to hear such cases, which has not been subjected to sufficient analysis and legal scrutiny. This paper is one of a small number of articles that have ventured into this question, which in turn represents an invitation to continue with the analysis and study of the topic.

Keywords: *Alleged Violations* case, Article 94 UN Charter, compliance, Frontier Dispute case, ICJ, inherent jurisdiction, jurisdiction of the International Court of Justice, non-compliance, Nuclear Test case, paragraph 63, *res judicata*.

The views expressed in this paper are strictly those of the author.

I. Introduction

The question of whether the International Court of Justice ("ICJ" or "Court") has an inherent jurisdiction to settle disputes arising from the non-compliance of its judgments, is a jurisdictional question that has not been addressed sufficiently in the doctrinal studies of the ICJ, nor is it a usual jurisdictional basis sought by States in cases of non-compliance with the judgments of the Court.[1]

It was not until recently that a State directly advanced the argument that the ICJ possess an inherent jurisdiction to settle disputes arising from the non-compliance of its judgments.[2] In the *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea* (Nicaragua v. Colombia) case[3] ("*Alleged Violations case*"), the Applicant based the jurisdiction of the Court on two grounds, Article XXXI of the Pact of Bogotá and the inherent jurisdiction of the Court.[4] The case concerns the alleged violations of Nicaragua's sovereign rights and maritime zones declared by the Court in its 2012 judgment.[5] In accordance to Nicaragua's Application, the inherent jurisdiction of the Court lied in the inherent power of the ICJ to pronounce on the actions required by its Judgments of 2012, which it claimed, is the basis of alternative grounds for jurisdiction.

In support of the existence of such an alternative basis for jurisdiction, the Applicant argued that there is a clear distinction between the power conferred to the Security Council ("SC") in regard to the enforceability of the judgments from the Court under Article 94 of the United Nations Charter, and those of the Court from its inherent jurisdiction in matters concerning the non-compliance of its own judgments.[6]

Colombia, on the other hand, contested the existence of such jurisdiction and argued that there is no basis on the law and practice of the Court for Nicaragua's alternative assertion that "the jurisdiction of the Court lies in its inherent power to

pronounce on the actions required by its [previous] judgments."[7] Furthermore, Colombia claimed that if Nicaragua's argument about the inherent jurisdiction were to be taken seriously, "it would strike at the foundation of consensual jurisdiction under Article 36, paragraphs 2 and 3 [because it] ignores any conditions which States may have attached to their consent to jurisdiction."[8]

The arguments advanced by both parties are very interesting and raise important questions, which to date have not been answered by the ICJ. In its Judgment on Preliminary Objections, the Court found that it had jurisdiction over the case on the basis of the Pact of Bogotá, and thus considered that there was no need for it to deal with Nicaragua's alternative grounds for jurisdiction,[9] leaving the question of its existence unanswered.

Despite the fact that the Court did not rule on this matter, the *Alleged Violations* case touches upon certain elements that bring the question back to the attention of public international lawyers and call for a review of this point.

As discussed in this paper, the source for inherent jurisdiction originates from the necessity to fulfill a judicial body's basic judicial functions, thus, "the scope of a court's inherent jurisdiction must necessarily be limited to the functions conferred by the judicial body's mandate."[10] In this regard, the inherent jurisdiction "can be viewed from an unique angle as a kind of a 'niche power' attached to judicial bodies only out of necessity of fulfilling the aims of international justice."[11] On the basis of functional justification, such jurisdiction may not only serve the most important principle of fair administration of justice, but also the conduct to discharge its judicial functions.[12]

To some extent, this type of jurisdiction was also addressed by the Court in the Nuclear Test case. In the realm of this case, the Court dealt with a request from New Zealand for an "examination of the situation" on the basis of paragraph 63 of its 1974 judgment. In accordance to New Zealand, paragraph 63 provided for "the right to return to the Court […] if a factor underlying the Court's Judgment of 1974 ceased to be applicable on account of future conduct by France."[13] New Zealand maintained that the Judgment expressly reserved to it the right to request an examination of the situation and "to reopen the case instituted by the Application of 9 May 1973."[14] As explained below, the ICJ did not controvert the argument advanced by New Zealand. If anything, it confirmed that such inherent jurisdiction existed if certain conditions were to be met.

There are not many papers that address the inherent jurisdiction of the Court in cases of non-compliance or the role of the Court "to ensure that [its] judgments and decisions are duly complied with."[15] The conclusion reached by most commentators has been that such inherent jurisdiction contradicts the most sacred principle of consent. Yet, the question remains—consent to do what? To solve the dispute? A request for non-compliance does not relate to a new case that will require a new basis of jurisdiction. It relates to the non-compliance of a previous judgment; over which consent has already been given, and where jurisdiction has already been established.

This paper is divided as follows; first, Section II provides general comments on

the inherent jurisdiction of the Court; Section III provides a brief reference to the Court's most relevant cases concerning inherent jurisdiction; Section IV offers an analogy with the orders of provisional measures. Finally, Section V refers to the relation between the SC (Article 94 of the UN Charter) and the ICJ as the principal judicial organ of the United Nations; and Section VI contains brief conclusions on the topic.

II. The Inherent Jurisdiction of the ICJ

According to the *Oxford English Dictionary*, "inherent" describes something which "exist[s] in something as a permanent attribute or quality; forming an element, esp[ecially] a characteristic or essential element of something; belonging to the intrinsic nature of that which is spoken of."[16] The inherent jurisdiction of the Court might thus be said to be one derived from its permanent quality as a court of law, which belongs to its intrinsic nature.

The Statute of the Court and the Rules of Court are silent regarding the jurisdiction arising from the non-compliance of its judgments. However, it is precisely the inherent nature of this type of jurisdiction which makes its expressed indication unnecessary. As pointed out by the Applicant in the *Alleged Violations* case, the ICJ's "'inherent jurisdiction' is not expressly provided for, but it stems from the very nature of the [ICJ] as a court of law and is implied in the texts determining [its own] jurisdiction […]."[17]

The roots of the functional approach concern the purpose of the Court. Thus, in order to have a proper understanding of the scope of its application, it is necessary to determine the purpose of the ICJ and what is provided for in its constitutive charter. The main purpose of the Court, as the principal judicial organ of the UN, is to settle, in accordance with international law, legal disputes submitted to it by States,[18] which makes it fundamental to clarify whether a dispute is actually settled by the issuance of a judgment or by the implementation and/or compliance with the judgment.

A judgment of the Court is not the end of a dispute, it is the end of a litigation process. Undoubtedly, the dispute can continue and its conclusion depends on the will of the parties.[19] However, it is problematic to the very purpose for which the Court was created, to assume that the Court would fulfill its fundamental function if one of the parties to a specific dispute refuses to adopt and comply with a judgment of the Court and, at the same time, the Court cannot exercise its inherent jurisdiction to hear cases of non-compliance. This would create an inescapable deadlock in the dispute, and leave the affected party without a judicial option.

The defiance of a judgment that enjoys the force of *res judicata* prevents the Court from fulfilling its function of settling legal disputes, in a way that strengthens international peace, security, and the rule of law. It is in this scenario that the functional justification could find its nest and appropriate grounds to argue that the Court could enjoy such inherent jurisdiction to settle disputes arising from non-compliance with its own judgments.

One can parallel the underlying legal justification for inherent powers to inherent jurisdiction. As has been considered by other international tribunals and courts, inherent powers are not explicitly granted in their constitutive instrument, but rather emanate as "a necessary consequence of the parties' fundamental intent to create an institution with a judicial nature."[20]

In connection to this, Judge Trindade stated in his Separate Opinion to the Order of April 2013 in the *Certain Activities* and the *Road* cases,[21] that the doctrinal construction of inherent powers "was intended to assert the powers of the juridical *persona* at issue for the accomplishment of its goals, as provided for in its constitutive charter."[22] This basically refers to two broad aspects that characterize the inherent nature of powers and jurisdiction; first, inherent means that they are not expressly stated in the constitutive instruments; and two, the source is the need of international courts to ensure the fulfillment of their judicial functions. In reflecting on these issues, Thirlway reminded us of the words of Prof. Fitzmaurice by pointing out that "[t]he true justification for an inherent jurisdiction must be […] that 'the power to exercise it […] is a necessary condition of any court of law […] being able to function at all,'[23] but…. What is meant by 'to function'"? What does this entail for an international court whose judgments are final and without appeal?[24]

To answer the first question, "to function" is to fulfill its mandate, which is to "*settle*, in accordance with international law, legal disputes submitted to it by States." In addressing the second question, the affirmation of the existence of an inherent jurisdiction of the Court does not—in any way—contradict the general principle of *res judicata*. To the contrary, it intends to strengthen the realization of justice at an international level by upholding the imperative value of the Court's judgments and by underlining the need to extend the domains of the Court to hear cases of non-compliance.[25]

As discussed below, the ICJ can act to provide for the orderly settlement of all matters in dispute and the jurisdiction to do so "derives from the *mere existence of the Court as a judicial organ* established by the consent of States […], in order that its basic judicial functions may be safeguarded."[26]

There is an important difference from the consent given by the States, in becoming parties to the Court's Statute, and the consent for the jurisdiction of the Court over a specific case. In relation to the latter, the Parties to a dispute can consent to the jurisdiction of the Court by means of a bilateral or multilateral treaties, special agreement, an optional clause or by means of *forum prorogatum*. Since this article refers to cases of non-compliance, there is an obvious assumption that the jurisdiction over the merits in the previous case is not disputed; what is controversial is the existence of an inherent jurisdiction of the Court in cases of non-compliance, and the question of temporal limitations. This paper does not provide a definitive answer to these questions, yet, it lays down legal considerations that indeed seem to support the existence of such inherent jurisdiction. It is important to reflect that the inherent jurisdiction is not a *carte blanche* for jurisdiction. The question is not about the Court enjoying enforcement powers or having a monitory function like the Inter-American Court of Justice.[27] The question concerns the inherent jurisdiction of the

Court to hear cases of non-compliance, when a party submits a request as such. As controversial as this might sound, this reflects the ultimate aim of the parties to a dispute, which should be to actually resolve the dispute.

In order to have a holistic approach to the question of consent, one has to see the legal proceedings as a whole, which begin with the application of a case and end with the settlement of the dispute. This is pivotal to ensure a good and fair administration of justice[28] and the fulfillment of the functions of the Court.[29] To illustrate the importance of the latter, one may refer to the words of Judge Pinto de Albuquerque, who in *Fabris v. France case* stated that

> it is evident that the jurisdictional nature of the Court would be dangerously at risk if the Court did not react to infringements of its judgments and, even worse, if the final word on the execution of its judgments were *de facto* dependent on the will of the first addressees of the judgments themselves: the governments. The entire system of human rights protection would be sacrificed on the altar of politics, the Court's judgments being downgraded to provisional statements on disputes in need of a subsequent political *satisfecit* to be effective.[30]

Up to this date, the *status quo* suggests that the judgments of the ICJ could indeed be mistakenly considered as a provisional statement on disputes.[31] There are no judicial enforcement organs in place in international legal orders or, to any effect, a body that monitors compliance. In face of the lack of such body, non-compliance with a judgment of the principal judicial organ of the UN becomes a complex problem that could diminish the Court's authority and undermine its most important goal of settling legal disputes. A depletion of the effectiveness of the Court's judgment could be detrimental to the Court's appeal. As has been identified in doctrinal studies, "non-compliance […] can erode a court's legitimacy, or alter the way a court makes subsequent ruling."[32]

III. Jurisprudence of the ICJ

There are two cases that shed light on the inherent jurisdiction of the Court; the *Nuclear Test* case and the *Frontier Dispute* case.

On 20 December 1974, the Court delivered two judgments on the *Nuclear Test* case. In said judgments, it concluded that the dispute between the Parties had disappeared and the claims advanced by them no longer had any object.[33] The Court based its findings "on the conclusion that the objective of Australia and New Zealand had been achieved inasmuch as France, in various public statements, had announced its intention of carrying out no further atmospheric nuclear tests on the completion of the 1974 series."[34] What is most relevant to the present article is that the Court stated in those proceedings that it possesses an inherent jurisdiction which enables "it to take actions as may be required […] to provide for the orderly settlement of all matter in dispute" and that such jurisdiction "derives from the *mere existence of the Court as a judicial organ* established by the consent of States, and is conferred

upon it, in order that its basic judicial functions may be safeguarded."[35] It continues its reasoning and observed

> that if the basis of this Judgment were to be affected, the Applicant could request an examination of the situation in accordance with the provisions of the Statute; the denunciation by France, by letter dated 2 January 1974, of the General Act for the Pacific Settlement of International Disputes, which is relied on as a basis of jurisdiction in the present case, cannot by itself constitute an obstacle to the presentation of such a request.[36]

As evidenced in this case, the Court recognizes its power to retain jurisdiction over a case, even if one of the parties denunciates the jurisdictional basis upon which the jurisdiction of the original case is based. The approach adopted by the Court in the *Nuclear Test* case seems to confirm that indeed it has an inherent jurisdiction to examine a situation of non-compliance with one of its previous judgments.

In its judgment on *The Request for an examination of the Situation in Accordance with Paragraph 63 of the Court's Judgments of 20 December 1974 in the Nuclear Test (New Zealand v. France)* case, the Court clarified that by laying down in paragraph 63 that the Applicant could request an examination of the situation in accordance with the provisions of the Statute, it did not "intend […] to limit the Applicant's access to legal procedures such as the filing of a new application (Statute, Art. 40, para. l), a request for interpretation (Statute, Art. 60) or a request for revision (Statute, Art. 61), which would have been open to it in any event,"[37] but that "by inserting the above-mentioned words in paragraph 63 of its Judgment, the Court *did not exclude a special procedure*, in the event that the *circumstances* defined in that paragraph were to arise, in other words, circumstances which 'affected' the 'basis' of the Judgment."[38]

In the realms of *Alleged Violations* case, Colombia referred to this *special procedure*, which, in accordance to it, confirms that "the Court will make such a reservation only in rare situations."[39] It is true that the Court made a reservation due to the unique situation of that case, but that is beside the point. What matters is that the Court considered that nothing in the UN Charter, its own Statute, Rules or its own settled jurisprudence prevented it from making such a reservation. Additionally, one could argue that there is no need for a reservation to be included by the Court. The parties to a dispute, and all the members of the UN, have already accepted an obligation to comply with a decision of the Court. This treaty obligation was already recognized in the early years of the PCIJ, when the Court stated that it "neither can nor should contemplate the contingency of the judgment not being complied with"[40] due to the obligations already undertaken by the members of the UN.

The fact that no provisions are made for in the principal text governing the "structure, powers, and work of the Court"[41] does not prevent the Court from exercising such jurisdiction if needed. The Special Court of Sierra Leone embraced this by stating in one of its decision that "the exercise of the inherent power of the court does not extend to an act that will be inconsistent with the express provisions of the rules. *It is a different thing where the court has jurisdiction or duty to grant a remedy*

but the rules are silent as to the procedure."[42] Similarly, the Appeals Chamber in the *Tadic* case recognized the existence of residual powers that "derive from the requirements of the 'judicial function' itself" which concerns the inherent jurisdiction of the Court "from the exercise of [its] judicial function," and "does not need to be expressly provided for in the constitutive documents of those tribunals."[43]

The latter was also addressed by a Chamber of the ICJ in the case between Burkina Faso and Mali. After the Chamber delivered its judgment on the merits, and in accordance to Article IV of a Special Agreement concluded between the Parties, it proceeded to appoint three experts to assist "the Parties in the operation of demarcation of their frontier in the disputed area."[44] This was considered to be a rare situation because the role of the experts was related to a post-adjudicate phase, i.e., implementation of a judgment. However, after some consideration the Chamber concluded that "there is nothing in the Statute of the Court, nor in the settled jurisprudence, to prevent the Chamber from exercising this power, the very purpose of which is to enable the Parties *to achieve a final settlement* of their dispute in implementation of the Judgment which it has delivered."[45] This statement clarifies the question referred above; What is meant by "to function"? If we take the approach adopted by the Chamber of the Court in the *Frontier Dispute* case, to function is to *achieve a final settlement* of the dispute submitted to it by States.

The *Nuclear Test* case and the *Frontier Dispute* case provide evidence that the Court can exercise its inherent jurisdiction, either by its own initiative or by the expressed request of the parties, and that no provision of its constitutive instruments prevent it from doing so. The fact that both cases have been considered unique does not challenge the existence of the inherent jurisdiction of the Court. On the contrary, it confirms it. Moreover, it is important to underline that there are no legal obligations that require the ICJ to have certain "court practice" to solidify the existence of its inherent jurisdiction over matter concerning non-compliance. It only takes one pronouncement from it for such jurisdiction to be proven to exist.

IV. Provisional Measures

In his Separate Opinion in the *Alleged Violation* case, Judge Trindade expressed that "[e]ven in the absence of an express provision […], international tribunals are entitled to exercise their inherent powers in order to secure the sound administrations of justice."[46] Proof of the exercise of such inherent power is manifested in cases of violation of an order indicating provisional measures.

In the landmark case between *Germany v. United States of America,* the Court acknowledged that

> Where the Court has jurisdiction to decide a case, it also has jurisdiction to deal with submissions requesting it to determine that an order indicating measures which seeks to preserve the rights of the Parties to this dispute has not been complied with.[47]

Since the judgment in the *LaGrand* case, it has become undeniable that "provisional measures indicated by the Court impose upon the party or parties to whom they are directed a binding obligation of compliance."[48] The Court has dealt on numerous occasions with requests for provisional measures, and, in many cases, the parties have failed to comply with the orders, the *Certain Activities* case between Costa Rica and Nicaragua being one example.

In its final submission, Costa Rica contested that Nicaragua breached its obligations arising from the Orders of the Court indicating the provisional measures of 8 March 2011 and 22 November 2013. The Court acknowledged in its judgment on the merits that it had already ascertained the facts put forward by Costa Rica in its Order of 22 November 2013, and clarified that that statement "was only instrumental in ensuring the protection of the rights of the Parties during the judicial proceedings" and that "[t]he judgment on the merits [was] the appropriate place for the Court to assess compliance with the provisional measures." The Court then ensured that

> contrary to what was argued by Nicaragua, a statement of the existence of a breach to be included in the present Judgment cannot be viewed as "redundant." Nor can it be said that any responsibility for the breach has ceased: what may have ceased is the breach, not the responsibility arising from the breach.[49]

Under the circumstances of the case, the Court found that Nicaragua "breached the obligations incumbent upon it under the Order indicating provisional measures issued by the Court on 8 March 2011."[50] Could a breach of a judgment over the merits of a case be considered less of a breach than a breach of an Order for provisional measures? Is it not the jurisdiction of the Court to decide on the non-compliance with an Order for provisional measures the same as the one over the merits of the case? The answer to the latter is yes, and to the former is no. The fact that the statute is silent on the inherent jurisdiction in provisional measures proceedings has not precluded the Court from deciding disputes arising in such cases.[51] This confirms that the Court "can […] punish failures to respect its previous judgment,"[52] and that it has a role "to ensure that [its] judgments and decisions are duly complied with."[53]

In the *LaGrand* case, Germany advanced an argument that can easily be extrapolated and applied to disputes arising from the non-compliance of a judgment on the merits. In that case Germany argued that "[p]rovisional [m]easures indicated by the International Court of Justice [are] binding by virtue of the law of the United Nations Charter and the Statute of the Court."[54] The same applies to the judgments of the Court. Germany continued arguing its position by referring to the "principle of effectiveness," to the binding nature of provisional measures as a "necessary consequence of the bindingness of the final decision," to "Article 94 (l), of the United Nations Charter," to "Article 41 (l), of the Statute of the Court" and to the "practice of the Court."[55] All of the above apply to the merits of a case—with the clear exception of Article 41. Yet, these are not the only arguments that could support the existence of an inherent jurisdiction. It is important to include Article 60 of the Statute, the importance of *res judicata* and the need to ensure the proper and sound administration of justice. Judge Trindade reflected on this issue, when stating that "[e]ven

in the absence of an express provision thereon, international tribunals are entitled to exercise their inherent powers in order to secure the sound administration of justice" and are "endowed with inherent powers or *facultés* to take the decision that ensures compliance with the provisional measures [and to the effect of this paper, judgments] it has ordered, and thus safeguard of the right at stake."[56]

One could hardly argue that the Court *can* exercise an inherent jurisdiction to decide on non-compliance with orders of provisional measures and *cannot* enjoy the same inherent jurisdiction in cases of non-compliance with judgments on the merits of a case. It would be self-defeating to argue that the Court enjoys a more extensive jurisdiction over provisional measures, than over the merits of a case.

The above suggests that the Court has exercised its inherent jurisdiction in previous cases, not because there is an expressed provision in the Statute, but as part of its obligations as an international court to settle disputes between states and in accordance with the objectives and purposes of its own Statute. Accepting the operation of such inherent jurisdiction in cases arising from the non-compliance with its own judgments will allow the Court to enhance the pure realization of justice at the international level.

V. The Inherent Jurisdiction of the Court and Its Relation to Article 94 UN Charter

Paragraph 1 of Article 94 of UN Charter echoes the well-known general principle of international law establishing the binding nature of the decisions of the ICJ, which is also contained in Articles 59 and 60 of the Statute of the Court.

Article 94 (1) states that "[e]ach Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party." The term *decision* applies to judgment and any other decision rendered by the Court.[57]

The obligation spelled out in paragraph 1 constitutes a general obligation to all Members of the UN. However, the operation of such an obligation is activated only for those states that are part of a dispute before the ICJ. Thus, the obligation *per se* is an individual obligation for each of the parties to a dispute, which has been undertaken *a priori* by becoming a Member of the UN.[58] As a result, all the parties to a dispute before the ICJ have a treaty obligation to comply with a decision taken by the Court.[59]

Paragraph 2 of Article 94[60] on the other hand, provides an enforcement mechanism in case of non-compliance with a Court's judgments. It states that

> 2. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

It has been repeatedly stated that the role of the SC is political and corresponds to a post-adjudicate phase.[61] This was foreseen by the Washington Committee of

Jurists while drafting the Statute of the ICJ. The Committee decided not to include the question of enforcement of the Court's judgments in the Statute of the Court, because it considered that it was a political issue and not a legal one. Instead, it proposed to include it in the UN Charter.[62] The ICJ stressed this point in the *Military and Paramilitary Activities* case, where it affirmed that "the [SC] has functions of a political nature assigned to it, whereas the Court exercises purely judicial functions."[63] In this line, Rossene observed that

> the efficacy of the institutional post-adjudication process will not be determined by a judicial examination of the situation brought by the non-compliance, but will depend on immediate and even ephemeral political consideration.[64]

It is this judicial examination that will be required from the Court, and not a political consideration as the one attributed to SC. In this regard, several aspects need to be emphasized: (1) the SC is not intended to carry out a *de novo* judicial examination of the non-compliance; (2) the SC has room for flexibility in the sense that it *may*—if it deems necessary—make recommendations or decide upon *measures* to be taken to give *effect* to the judgment; (3) enforcements by the SC are *per se* of a political nature; and (4) Article 94 (2) refers only to the *enforcement* of judgments and not to the legal settlement of disputes or the performance of a judicial analysis arising from the non-compliance under international law. In accordance with the Charter and the Statute of the Court, only the ICJ has the authority to discuss substantial juridical aspects of its own judgment.

In the *Alleged Violation* case, the Applicant considered that there is a clear distinction between enforcement power on the one hand and competence with regard to compliance with judgments on the other. Such distinction reflects the difference between the power conferred to the Security Council regarding the enforceability of the judgments of the ICJ and those of the Court emanating from its inherent jurisdiction over matters concerning non-compliance. The argument advanced by Nicaragua seems to be plausible, but clearly it does not settle the matter. Indeed, by finding its jurisdiction in the Pact of Bogotá, the Court left the question of its inherent jurisdiction unanswered.

Finally, the fact that there has not been a single instance in which positive action has been taken by the SC under Article 94 (2)[65] gives, in turn, more importance to the clarification of the existence of an inherent jurisdiction of the Court in cases of non-compliance. It has been suggested that cases of non-compliance are not referred to the SC, in part because such cases "regularly involved a permanent member either on the applicant or the respondent side, reinforcing the institution's Cold War stasis,"[66] or if not directly involved in the case, a permanent member most likely will have an interest in one party prevailing over the other. Ultimately, the practical use of the inherent jurisdiction of the ICJ, and its legal value, will have to be determined by the States themselves.

VI. Conclusion

The ICJ is the principal judicial organ of the United Nations, whose main purpose is to settle legal disputes submitted to it by States. The inherent jurisdiction referred to in this paper emanates from its identity as a judicial organ and the necessity to ensure the fulfillment of its judicial function.[67] The Court's judgments are final, binding, and without a means of appeal. These characteristics together with the original basis of jurisdiction and the judicial nature of the Court, provide the fertile ground for an inherent jurisdiction in situations of non-compliance. If a State seizes the Court with a request over a non-compliance, it would not be doing so in order to argue a new case or to bring new elements to the dispute that could affect the principle of *res judicata*, but to request the Court to settle the unresolved dispute between the parties.

The Court would have to first determine if indeed there is a situation of non-compliance and, if the request does not constitute a new case, before it can decide whether it can or cannot exercise inherent jurisdiction described in this paper. The necessary condition for it to have jurisdiction depends on the non-compliance *per se* and additional considerations the Court has to determine on a case by case basis. The position expressed in this paper is not definitive, and the Court has to clarify its inherent jurisdiction through its own jurisprudence. It is important to reiterate in these conclusions that the non-compliance of judgments not only violates and diminishes the authority of the Court and its decisions, but also threatens the maintenance of peace and international security. Such impunity should not have a place in the international legal order.

For all the reasons expressed above, it seems not only plausible, but also desirable to recognize the inherent jurisdiction of the Court to settle disputes arising from non-compliance with its own judgment, and thus, allow it to fulfill its utmost important function. This topic is indeed fascinating and one can only hope that this article motivates further research and discussion on it.

Notes

1. In accordance to recent data, there has only been 4 occasions, in which States have openly chosen to disregard a judgment of the Court; i.e., Corfu Channel, Fisheries Jurisdiction, Tehran Hostages, and Military and Paramilitary Activities case. See C. Schulte, *Compliance with Decisions of the International Court of Justice* (Oxford, 2004), p. 271, https://doi.org/10.1093/acprof:oso/9780199276721.001.0001. However, this number might be far from the real number of cases in which a party has not complied with a judgment of the Court, be it partially, fully, or temporarily. There are studies that suggest that between 1987 and 2004 compliance with the ICJ decision was 60 percent. C Paulson, "Compliance with Final Judgments of the International Court of Justice Since 1987," AJIL 98 (2004) pp. 434–61, https://doi.org/10.2307/3181640. These data should be treated with great caution, and be the subject of further analysis.

2. Written Statement of the Republic of Nicaragua to the Preliminary Objections of the Republic of Colombia, in the case concerning *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, April 20, 2015, p. 61, para. 5.9.

3. This case is still pending before the ICJ at the time of the submission of this article.

4. In its Judgment on Preliminary Objections, the Court found its jurisdiction on the basis

of Article XXXI of the Pact of Bogotá, and thus considered that there was no need for it to deal with Nicaragua's claim of inherent jurisdiction. See *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia)* (Preliminary Objection), Judgment of March 17, 2016, para. 104, p. 39.

5. Nicaragua's Application, *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea*, 26 November 2013, p. 22, para. 18.

6. See *supra Note 3*, p. 68, para. 5.25.

7. Preliminary Objections of the Republic of Colombia, December 19, 2014, para. 1.16. This article does not intend to settle the divergence of opinion between Nicaragua and Colombia, but to address the general legal argument that refers to the existence of such inherent jurisdiction.

8. Preliminary Objections of the Republic of Colombia, December 19, 2014, para. 5.3.

9. See *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia)* (Preliminary Objection), Judgment of March 17, 2016, para. 104, p. 39.

10. J. Liang, "The Inherent Jurisdiction and Inherent Powers of International Criminal Courts and Tribunals: An Appraisal of Their Application," *New Criminal Law Review*, 15(3) (2012), p. 389, https://doi.org/10.1525/nclr.2012.15.3.375.

11. *Ibid.*

12. *Ibid.* See also El-Sayed (Decision on Jurisdiction and Standing), at 148.

13. *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand V. France)* Case, ICJ, Reports 1995, p. 288, para. 32.

14. *Ibid.*, p. 288, para.32.

15. Separate Opinion of Judge Cancado Trindade, *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia)* (Preliminary Objection), Judgment of March 17, 2016, p. 67, para. 72.

16. *Oxford English Dictionary* (1933 ed.), vol. V, p. 293.

17. *See Supra* note 3, p. 62, para. 5.11.

18. *See* Article 38 of the Statute of the Court.

19. For more on compliance see C. Schulte, *Compliance with Decisions of the International Court of Justice* (Oxford, 2004).

20. Decision Ruling on Request for Revision by Iran, July 1, 2011, *Iran V. United States*, Decision n° 134-A3/A8/A9/A14/B61-FT, para. 59, citing D. Caron, L. Caplan and M. Pellonpää (ed.), *The UNCITRAL Arbitration Rules: A Commentary*, 2006, p. 915, https://doi.org/10.1093/law:iic/9780199297597.book.1, and C. Brown, "The Inherent Powers of International Courts and Tribunals," *BYbIL*, Vol. 76, 2005, p. 228, https://doi.org/10.1093/bybil/76.1.195.

21. In said Order the Court decided to join both procedures.

22. Separate Opinion of Judge Cancado Trindade, in the case concerning *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica V. Nicaragua) Proceedings Joined with Construction of a Road in Costa Rica Along the San Juan River (Nicaragua V. Costa Rica) on 17 April 2013***,** [2013] ICJ Rep. 166, at 174, para. 6.

23. H. Thirlway, "The Law and Procedures of the International Court of Justice 1960–1989: Part Nine," 69 *British Yearbook of International Law* 1 (1998), p. 21, https://doi.org/10.1093/bybil/69.1.1.

24. *See* Article 59 and 60 of the Statute of the Court. For more see A. Zimmermann et al. (ed.), *The Statute of the International Court of* Justice, Second Edition (2012), https://doi.org/10.1093/law/9780199692996.001.0001; H. Thirlway, *The Law and Procedure of the International Court of Justice, Fifty Years of Jurisprudence*, Vol. I and II (2013), https://doi.org/10.1093/law/9780199673384.001.0001.

25. See Separate Opinion of Judge Cancado Trindade, *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia)* (Preliminary Objection), Judgment of March 17, 2016, p. 67, para. 72.

26. *Nuclear Tests (Australia v. France*), Judgment of December 20, 1974, [1974] ICJ Rep. 1974, 253, at 259–260 (*italic added*). *Nuclear Tests (New Zealand v. France*), Judgment of December 20, 1974, [1974] ICJ Rep. 1974, 457, at 463.

27. See for example the Inter-American Court of Justice. Article 65 of the Convention states that "[t]o each regular session of the General Assembly of the Organization of American States

the Court shall submit, for the Assembly's consideration, a report on its work during the previous year. It shall specify, in particular, the cases in which a state has not complied with its judgments, making any pertinent recommendations."

28. Decision on Appeal of Pre-Trial Judge's Order Regarding Jurisdiction and Standing of November 10, 2010, para. 45.

29. The integrity of proceedings was acknowledged by ICSID Tribunal in the *Hrvatska Elektroprivreda V. Slovenia* case. In this case ICSID recognized that "as a juridical formation governed by public international law, the Tribunal has an inherent power to take measures to preserve the integrity of the proceedings […] independently of any statutory reference." See *Hrvatska Elektroprivreda V. Slovenia,* ICSID Case No. ARB/05/24, Ruling (May 6, 2008), para. 33.

30. E.C.H.R., Grand Chamber, February 7 2013, *Fabris V. France*, Application no. 16574/08, Concurring Opinion of Judge Pinto de Albuquerque, *Rec.*, p. 31.

31. For example, in discussing the 2012 judgment of the Court in the *Territorial and Maritime Dispute (Nicaragua V. Colombia)*, the President of Colombia stated that "All these [the Judgment] are omissions, errors, excesses, inconsistencies, we cannot accept them," See https://colombiareports.com/icj-ruling-on-san-andres-a-serious-judgement-error-santos/. Another striking example is the 2008 Judgment of the Supreme Court of the United States in *Medellin v. Texas*, which declared that the 2004 decision of the International Court of Justice (ICJ) in *Mexico v. United States (Avena)*, "requiring the United States to provide further 'review and reconsideration' of the convictions of petitioner Medellin and 51 other Mexican nationals on death row in the U.S., was not binding federal law and was therefore, absent an implementing statute, not enforceable by federal courts against Texas," Medellin v. Texas: Supreme Court Holds ICJ Decisions under the Consular Convention Not Binding Federal Law, Rejects Presidential Enforcement of ICJ Judgments over State Proceedings, ASIL Insight vol. 12, issue 6; and Medellin v. Texas [2008], 552, U.S. 491.

32. H. Alexandra, "Compliance with Judgments and Decision," in C. Romano et al., *The Oxford Handbook of International Adjudication* (Oxford, 2015), p. 442 (reference omitted).

33. *Nuclear Tests (New Zealand* v. *France*), Judgment of December 20, 1974, [1974] ICJ Rep. 457, at 476, para. 59. *See* also *Nuclear Tests (Australia* **v.** *France)*, Judgment of December 20, 1974, [1974] ICJ Rep. 253, at 271, para. 56.

34. http://www.icj-cij.org/en/case/59, accessed August 22, 2019.

35. *Supra* note 27, 259–260 (*italics added*).

36. *Ibid.*, p. 476, para. 63 and p. 272, para. 60.

37. *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand V. France) Case*, ICJ Reports 1995, p. 288, para. 52.

38. *Ibid.,* p. 288, para. 53 (*italics added*).

39. Preliminary Objection of the Republic of Colombia, in the case concerning *Alleged Violations of Sovereign Rights and Maritimes Spaces in the Caribbean Sea (Nicaragua v. Colombia*), December 19, 2014, p. 137, para. 5.17.

40. *Factory at Chorzow, P.C.I.J., Series A, No. 17,* p. 63.

41. R. Mackenzie et al., *The Manual on International Courts and Tribunals* (Oxford University Press, 2010), p. 5.

42. Decision on Prosecution Appeal Against the Trial Chamber's Decision of August 2, 2004, Refusing Leave to File an Interlocutory Appeal, Case No.SCSL-04-14-T, Samuel Hinga Norman, Moinina Fofana, Allieu Kondewa, January 17, 2005 (*italics added*).

43. ICTY, *The Prosecutor V. Dusko Tadić,* IT-94-1-AR72, Appeals Chamber, Decision, October 2, 1995, para. 14 and 18.

44. *Frontier Dispute*, Nomination of Experts, Order of April 9, 1987, Z.C.J. Reports 1987, p. 5.

45. *Ibid.* (*italics added*).

46. *Supra* note 26, p. 51, para. 19.

47. *LaGrand* (Germany v. United States of America), Judgment, ICJ Reports 2001, para. 45, pp. 483–4.

48. H. Thirlway, *Provisional Measures* (Springer, 2018), https://doi.org/10.1007/978-3-319-62962-9_17, p. 401, in E. Sobenes and B. Samson, *Nicaragua Before the International Court of Justice* (Springer, 2018).

49. *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*

and *Construction of a Road in Costa Rica Along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, ICJ Reports 2015, p. 665, Operative Part, para. 126.

50. *Ibid.*, Operative Part, para. 229 (3).

51. *Supra* note 3, p. 64, para. 5.15.

52. Robert Kolb, *The International Court of Justice* (Hart Publishing, 2013), p. 830.

53. Separate Opinion of Judge Cancado Trindade, *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia)* (Preliminary Objection), Judgment of March 17, 2016, p. 67, para. 72.

54. *LaGrand (Germany* v. *United States of America*), Judgment of June 27, 2001, [2201] ICJ Rep. 466, at 498, para. 93 (quoting the Memorial of Germany).

55. *Ibid.*

56. *Supra* note 26, p. 51, para. 20.

57. *LaGrand (Germany v. United States of America*), Judgment of June 27, 2001, [2201] ICJ Rep. 466, at. 506, para. 108.

58. Other options are (a) acceding to the Statute of the Court [without signing the UN Charter] on conditions to be determined by the General Assembly upon recommendations of the SC (Article 93[2] UN Charter) or; (b) when a State is not a party to the Statute of the Court, by lodging a declaration with the Registry of the Court that meets the requirements established by the SC (Article 35[2] Statute of the Court).

59. *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua* v. *United States of America*), Jurisdiction and Admissibility, Judgment of November 26, 1984, [1984] ICJ Rep. 392, pp. 437–438, para. 101.

60. See E. Sobenes, "Recourse to the Security Council under Article 94 (2) of the United Nations Charter," *Max Planck Encyclopedia of International Procedural Law* [MPEiPro].

61. S. Rosenne and Yaël Ronen, *The Law and Practice of the International Court, 1920–2005* (Brill, 2006) 242. *See* also K. Skubiszewski, "The International Court of Justice and the Security Council, in V. Lowe and M. Fitzmaurice," *Fifty Years of The International Court of Justice* (Cambridge, 1996) 607.

62. Documents of the United Nations Conference on International Organization San Francisco 1945 ('UNCIO') vol. 14, 209, 853. See also See E. Sobenes, "Recourse to the Security Council under Article 94 (2) of the United Nations Charter," *Max Planck Encyclopedia of International Procedural Law*" [MPEiPro], para. 3.

63. *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America*), *Jurisdiction and Admissibility*, Judgment, November 26, 1984, *Reports 1984*, p. 435, para. 95.

64. *Supra Note* 62*,* 240 (Rosenne).

65. See E. Sobenes, "Recourse to the Security Council under Article 94 (2) of the United Nations Charter," *Max Planck Encyclopedia of International Procedural Law* [MPEiPro], para. 6.

66. C. Schulte, *Compliance with Decisions of the International Court of Justice* (Oxford, 2004), p. 417.

67. *Supra* note 21, 228–9 (C. Brown).

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