

**SPEECH BY H.E. JUDGE HISASHI OWADA, PRESIDENT OF THE INTERNATIONAL COURT
OF JUSTICE, TO THE SIXTH COMMITTEE OF THE GENERAL ASSEMBLY**

29 October 2010

Madame Ambassador Picco, Chairperson of the Sixth Committee,

Distinguished Delegates of the Sixth Committee,

Ladies and gentlemen,

I am delighted to address your Committee today for the second time since my election as President of the International Court of Justice (“ICJ”). The Court greatly appreciates this opportunity which enables it, through an exchange of views, to strengthen its ties to the legal committee of the General Assembly.

I congratulate Her Excellency Ambassador Isabelle Picco on her election as Chairperson of the Sixth Committee for the Sixty-fifth Session of the General Assembly.

The work of the Court is explained in detail in the Court’s Annual Report, a summary of which I provided yesterday to the General Assembly. Rather than reiterating what I stated in the General Assembly, I take up on this occasion a more specific subject, dear to the heart of so many present here: the rule of law in the international community. This is a subject that has been much talked about both within and outside the United Nations. The United Nations Secretary-General, Ban Ki-moon, decided to establish a rule of law co-ordination group in 2006 in his Report on the Rule of Law entitled “Uniting our strengths: Enhancing United Nations support for the rule of law”¹. As you are aware, this group is now in existence and is chaired by the Deputy Secretary-General, supported by its secretariat, and brings together the Department of Political Affairs (DPA), the Department of Peacekeeping Operations (DPKO), the Office of the High Commissioner for Human Rights (OHCHR), the Office of Legal Affairs (OLA), the United Nations Development Programme (UNDP), the Office of the United Nations High Commissioner for Refugees (UNHCR), the United Nations Children’s Fund (UNICEF), the United Nations Development Fund for Women (UNIFEM) and the United Nations Office on Drugs and Crime (UNODC), in order to focus on the important question of the rule of law². In addition, the Security Council held a notable special session on the “The promotion and strengthening of the rule of law in the maintenance of international peace and security” on 29 June 2010³. The heavy workload that the Court had to tackle unfortunately prevented me from participating in the debate at that time and, in light of this, I wish today to take up this subject and speak, in particular, on the issue of compliance with and implementation of the decisions of international courts and tribunals from the perspective of the International Court of Justice — an important agent of the rule of law at an international level.

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¹Report of the Secretary-General, Uniting our strengths: Enhancing United Nations support for the rule of law, doc. A/61/636-S/2006/980, 14 Dec. 2006.

²About the Rule of Law Co-ordination and Resource Group, online at http://www.unrol.org/article.aspx?article_id=6; last accessed 19 Oct. 2010.

³Security Council, 6347th meeting, 29 June 2010, “The promotion and strengthening of the rule of law in the maintenance of international peace and security”, doc. S/PV.6347.

Implementation of and compliance with the decisions of the Court is a topic which has not garnered as much attention as it deserves compared with the substantive aspects of the Court's work in individual cases. As the late Judge Sir Robert Jennings, former President of the Court, observed, "It is ironic that the Court's business up to the delivery of judgment is published in lavish detail, but it is not at all easy to find out what happened afterwards."⁴ As a court of law, it is axiomatic that the decision of the Court in a contentious case is binding. This is provided for in a straightforward manner in Article 94, paragraph 1, of the Charter of the United Nations, as well as in Articles 59 and 60 of the Statute of the Court (though in a more indirect way). There is thus no question that the Judgment of the Court is as binding as the judgment of a court of justice in the domestic legal order.

However, when the issue of the binding character of the Judgment is looked at in the specific context of how compliance with the Judgment is secured, and, if necessary, enforced, within the legal order of the system, the difference in character between the domestic legal order and the international legal order comes into stark contrast. In the international legal order — which is characteristically built within the framework of the Westphalian principles of sovereign equality of States and of voluntary submission of States to the legal order — the issue of compliance with a Judgment of the Court must be examined in the total context of the general problem of compliance of States with international legal norms.

In this regard, the specific issue of enforcement of/compliance with the Judgment of the Court is dealt with in Article 94, paragraph 2, of the Charter. This Article provides that:

"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."

In other words, the founding fathers of the Charter at San Francisco established a system whereby compliance with a specific decision of the Court was not handled as an issue of its legal enforcement by the Court but rather as an issue of the enforcement of legal obligations of States under the Charter and left in the hands of the Security Council as a political organ. This mechanism for ensuring compliance which the Charter created can only be set in motion when the issue is brought by the other party to Security Council. This differs from the League of Nations structure, under which the Council could act with respect to any decision that had come before the Permanent Court which the Council felt had not been fully implemented⁵.

In the 60 year history of the United Nations, the only time that a State has invoked Article 94 and brought a question of compliance to the Security Council was the initiative taken by Nicaragua with a view to enforcing the Judgment of the Court in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*⁶. This was, however, a poor test-case for the effectiveness of this Charter provision, as the party against which Nicaragua was seeking to enforce the Judgment was a permanent member of the Security Council and was able to veto the action⁷. A party can conceivably also seek to enforce a judgment by recourse to the General Assembly, under Article 10 of the Charter, and indeed this was what Nicaragua then did⁸. Once again, this was an initiative of the party to the case that was

⁴Robert Jennings, Presentation, in *Increasing the Effectiveness of the International Court of Justice: Proceedings of the ICJ/UNITAR Colloquium to Celebrate the 50th Anniversary of the Court*, 1997, p. 81.

⁵Covenant of the League of Nations, 28 June 1919, Art. 13.

⁶K. Mosler and H. Oellers-Frahm, "Article 94", in *The Charter of the United Nations: A Commentary*, Bruno Simma (ed.), 2002, p. 1178.

⁷*Ibid.*

⁸*Ibid.*

directly affected by the Judgment. It might be added that the system provided for under the Charter and Statute also does not envisage a systemic procedure for monitoring the compliance with and implementation of judgments of the Court, as compared to the provision for the periodic monitoring of implementation of the treaty obligations carried out by the Treaty Bodies with regard to human rights treaties. There is thus very little information available with respect to the state of compliance with the Court's decisions, as the late Sir Robert Jennings lamented.

Despite the somewhat weak mechanism provided by the Charter under Article 94, paragraph 2, the overall picture that emerges is one of general compliance by the parties with a final Judgment of the Court. Let me quote one author who made a special study of the issue of "Compliance with Decisions of the International Court of Justice"⁹. In this most exhaustive study to date, which examined cases through 2004, the author concluded that in the nearly one hundred years of existence of either the Permanent Court of International Justice or the International Court of Justice, there have been only a few occasions when "states [have] openly and wilfully chosen to disregard the Court's judgments". In total, it was argued that there have been just four cases of "genuine" non-compliance, in the sense of wilful disregard of the decision, in the history of the Court. The author further noted that "[e]ven in these cases, the effects of non-compliance were mitigated to a certain extent, given eventual or partial compliance by the losing party, or changes in the law, or political scene that diminished the relevance of the original decision"¹⁰.

One could easily argue that this conclusion was based on too rosy an assessment of the past records of the performance of the Court. Nevertheless, it should be pointed out that, at the end of the day, in determining how often parties have complied with judgments of the Court, what is determinative is whether the objective of the Judgment has or has not been achieved. It is certainly true that there are extremely few examples of non-compliance in this sense in the case law of the Court, and none at all in recent times¹¹. I believe it is fair to say that this, in itself, is quite significant: it shows that States recognize that they are under an obligation to comply with the Court's decisions applicable to them, and that they intend to comply with that obligation in good faith.

In general, the most difficult aspect of compliance is not in the initial stage of accepting or rejecting the Judgment of the Court when it is given. As I have said, States generally declare at that stage their intention to comply in good faith with the decision of the Court. Rather, problems often arise at the stage of the meaningful implementation of that obligation which a State has accepted through its acceptance of the decision of the Court. This results in a failure to achieve the objective aimed at by the Judgment.

The recent case in 2004 concerning *Avena and Other Mexican Nationals (Mexico v. United States of America)* illustrates this issue of non-compliance in the form of a failure to implement the Judgment of the Court. In this case, in spite of the fact that the Parties expressed their intention to comply with it, there arose difficulties at the stage of its implementation in the domestic legal order. In that 2004 Judgment, the Court found that there had been a violation of the obligation under Article 36 of the Vienna Convention on Consular Relations and came to the following conclusion on the issue of the legal consequences which flow out of the violation of the obligation committed by the Respondent:

"the appropriate reparation in this case consists in the obligation of the United States of America to provide, by means of its own choosing, review and reconsideration of

⁹Constanze Schulte, *Compliance with Decisions of the International Court of Justice*, 2004.

¹⁰*Ibid.*, pp. 271-272.

¹¹Aloysius P. Llamzon, "Jurisdiction and Compliance in Recent Decisions of the International Court of Justice", *The European Journal of International Law*, Vol. 18, No. 5, 2008, p. 852: "[A]s a whole, the post-Nicaragua Court has indeed seen better compliance with its final judgments (albeit sometimes taking years before substantial compliance was achieved), regardless of the manner by which jurisdiction was acquired."

the convictions and sentences of the Mexican nationals referred to in [this Judgment], by taking account both of the violation of the rights set forth in Article 36 of the [Vienna] Convention [on Consular Relations] and of paragraphs 138 to 141 of this Judgment”¹².

This Judgment was not implemented in certain state and federal circuit courts. One of the Mexican nationals who had been included in the 2004 *Avena* Judgment, Jose Ernesto Medellín, brought a *habeas corpus* petition in a United States federal court on the basis of the failure of Texas to implement the Court’s *Avena* Judgment. The United States federal court denied Medellín’s petition for *habeas corpus*, on the grounds that he had forfeited any Vienna Convention claim he may have had by not raising the issue at the trial stage (a concept in American criminal law known as “procedural default”)¹³. After a lengthy course of litigation, the Supreme Court of the United States in its opinion of 25 March 2008 in *Medellín v. Texas*, held, primarily on constitutional grounds, that the *Avena* Judgment was not directly enforceable in a state court and that thus the applicant, Medellín, could not seek a remedy in the Texas court as prescribed by the ICJ judgment¹⁴. While the United States Supreme Court did acknowledge that the *Avena* Judgment created an international law obligation on the part of the United States, it concluded that this international law obligation did not constitute automatically enforceable domestic law in the courts of the United States because none of the relevant treaty provisions, which made the Judgment of the International Court of Justice binding upon the United States — the Optional Protocol, the United Nations Charter, or the Statute of the International Court of Justice — were “self-executing” under the United States Constitution and as such enforceable as domestic law of the United States. The Supreme Court thus found that the Judgment of the International Court of Justice did “not of its own force constitute binding federal law that pre-empts state restrictions on the filing of successive habeas petitions”¹⁵.

It is obvious that this issue of the implementation of the *Avena* Judgment raised a highly complex question of compliance with the Judgment of the International Court of Justice. This case, whether or not one agrees with the legal reasoning of the Supreme Court, provides an example where — in spite of the existence of evidence of a willingness to comply with the Judgment by the State in question — internal political-juridical hurdles made it hard to bring about its implementation within the domestic legal order at the level of the state courts.

Another example where a State found it difficult to implement a judgment of the Court because of the federal structure of its government can be seen in the 2002 Judgment in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*. In that case, the Court determined that the Bakassi Peninsula in the Gulf of Guinea formed part of the territory of Cameroon¹⁶. It has been observed that although the Federal Government of Nigeria has publicly accepted certain parts of the Judgment, it argued that it was prevented from implementing the Court’s finding on the sovereignty of the Bakassi Peninsula because of the principle of federalism enshrined in its Constitution¹⁷. In particular, the Federal Government indicated that “all land and territory comprising the nation of Nigeria is specified in the Constitution” and that the federal government

¹²*Judgment, I.C.J. Reports 2004 (I)*, p. 72, para. 153 (a).

¹³Court of Appeals for the Fifth Circuit, *Medellín v. Dretke*, Opinion of 20 May 2004, Federal Third Reporter, Vol. 371, 2004, p. 281.

¹⁴United States Supreme Court, *Medellín v. Texas*, Opinion of 25 March 2008, United States Reports, Vol. 552, 2008, pp. 522-523.

¹⁵*Ibid.*

¹⁶*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, *I.C.J. Reports 2002*, p. 455, para. 325 III (B).

¹⁷Colter Paulson, “Compliance with Final Judgments of the International Court of Justice since 1987”, *American Journal of International Law*, Vol. 98, 2004, p. 450.

could not give up the Bakassi Peninsula unless the national and state assemblies voted to amend that Constitution¹⁸. Here again the Federal President of Nigeria made his Government's position clear: Nigeria as a State was under an obligation to comply with the Judgment of the Court, but for political and jurisdictional reasons it could not officially accept or reject it¹⁹. Thus the matter went beyond the purview of the Court as a judicial institution. Through the intervention of the Secretary-General of the United Nations, a United Nations Commission — the Cameroon-Nigeria Mixed Commission — was created to “consider all the implications of the International Court's decision, including the need to protect the rights of the affected populations in both countries”²⁰. A technical team of Nigerian, Cameroonian, and United Nations officials worked together to demarcate the border using satellite imagery in accordance with the Court's Judgment²¹. The two States eventually entered into a comprehensive agreement for the full implementation of the Judgment in question, which included the transfer of the Bakassi Peninsula to Cameroon as the Court had decided in its Judgment²². While here again there were constitutional difficulties in the implementation of the Judgment within the domestic legal order, Nigeria was ultimately able to implement the Judgment of the Court.

Against this background, it has to be pointed out that the issue of compliance with the Court's final Judgment should be looked at also in the broader context of how one assesses the role of the Court as an organ for the peaceful settlement of disputes within the international community of States. It is true that the Court, as the principal judicial organ of the United Nations, is to settle disputes in accordance with international law. In this sense, compliance with Judgments of the Court constitutes a key element in bringing about the rule of law in the international community. At the same time, the Court, as an organ of the United Nations, must fulfil its tasks while achieving the purposes of the Organization as a whole, as stipulated in Article 1 of the Charter. In this context, the settlement of disputes by the Court can also be seen in the context of how it has contributed to the maintenance of international peace and security, the development of friendly relations among nations, and the achievement of international co-operation. In assessing the effectiveness of the Court, therefore, it is important to assess the issue of compliance in the larger context of these purposes of the Organization. Even in the few cases of non-compliance with the Court's Judgments that have been identified, the authoritative statement of the law provided by the Court in the case has very often clarified the legal situation involved and the law to be applied to settle the dispute, thus contributing to the lessening of the political tension and through this process eventually to the promotion of the purposes of the United Nations.

By way of an example, the co-operation between El Salvador and Honduras increased with the submission of the case concerning *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua Intervening)* to the Court. Upon delivery of the Judgment by the Court in 1992, both States immediately announced that they would accept this Judgment, assigning about 300 sq km of land to Honduras and 140 sq km to El Salvador²³. It is true that efforts to demarcate the actual border in accordance with that Judgment have been long and protracted, and some military conflicts on the border have continued to occur sporadically²⁴. Nevertheless, there has been no return to the large-scale conflicts that had existed prior to the

¹⁸Colter Paulson, “Compliance with Final Judgments of the International Court of Justice since 1987”, *American Journal of International Law*, Vol. 98, 2004, p. 450.

¹⁹*Ibid.*

²⁰*Nigeria, Cameroon Sign Agreement Ending Decades-Old Border Dispute: Sets Procedures for Nigerian Withdrawal from Bakassi Peninsula*, United Nations Press Release, doc. AFR/1397, 12 June 2006.

²¹Llamzon, *supra*, p. 837.

²²*Ibid.*, p. 838.

²³*Commander in Chief Rules out Possible Conflict with El Salvador*, BBC News, 18 Sep. 1992; *President of El Salvador on ICJ Ruling on Border Dispute*, BBC News, 14 Sep. 1992.

²⁴Paulson, *supra*, pp. 437-438.

submission of the case to the Court, such as the 1969 “Soccer War” between the two countries and the outbreak of hostilities in 1976.

I might also refer to the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*²⁵. This case is often cited by commentators as one typical example of non-compliance. There is no denying that it had some disappointing aspects, such as the intentional absence of the Respondent from the oral proceedings on the merits, and the Respondent’s subsequent withdrawal of its declaration accepting the compulsory jurisdiction of the Court. In spite of all these set-backs, it remains true that this Judgment of the Court has enunciated and clarified certain important principles in the law of armed conflict and consolidated the law involved. It has come to be accepted as an authoritative statement of the law and thus has come to serve the cause of the rule of law at the international level. Also, it has been observed that official aid to the Contras was halted during the entire course of proceedings, a period of over two years, and as a result the Contras never again constituted the same level of serious threat to peace and security as before the submission of the case²⁶. Moreover, it has been argued that the pronouncement of the law by the Court in this case helped the Security Council and the General Assembly in their consideration of the issue, and may have contributed to the achievement of restraint, preventing the situation from devolving into a full-scale armed conflict²⁷. I tend to agree with the comments of a scholar who studied the issue of compliance as follows: “Focusing solely on the question of how compliance should ideally have happened ignores the important question of the extent to which the rights of an applicant would have been violated without a judgment.”²⁸

A similar observation could be made with respect to cases which were brought before the Court but later withdrawn. The fact that they were withdrawn often indicates a successful resolution of the case. In many cases, the very submission of the case to the Court facilitates the negotiating process through increased dialogue, leading to the ultimate resolution of the differences separating the two States. Mohammed Bedjaoui, a former President of the Court, has pointed to the pacifying effect that the submission of certain cases to the Court may have had²⁹. As evidence of his point, he has noted certain cases which were ultimately withdrawn, such as, among others, the cases concerning *Maritime Delimitation between Guinea-Bissau and Senegal (Guinea-Bissau v. Senegal)*³⁰ and the case concerning *Aerial Incident of 3 July 1988 (Islamic Republic of Iran v. United States of America)*³¹. One could also refer in this same context to the recent diplomatic episode resulting in the case between Honduras and Brazil which was brought in the past year³² but later (Spring this year) withdrawn.

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In light of the above, the following conclusion may be in order:

²⁵*Merits, Judgment, I.C.J. Reports 1986*, p. 14.

²⁶Schulte, *supra*, p. 209.

²⁷*Ibid.*, p. 210.

²⁸*Ibid.*

²⁹Mohammed Bedjaoui, Presentation, in *Increasing the Effectiveness of the International Court of Justice: Proceedings of the ICJ/UNITAR Colloquium to Celebrate the 50th Anniversary of the Court*, 1997, p. 23.

³⁰*Order of 8 November 1995, I.C.J. Reports 1995*, p. 423.

³¹*Order of 22 February 1996, I.C.J. Reports 1996 (I)*, p. 9.

³²See speech by H.E. Judge Hisashi Owada, President of the International Court of Justice, to the Sixty-fifth Session of the General Assembly of the United Nations, 28 Oct. 2010.

1. The record of compliance with the Court's decisions may be said in general to have been positive and encouraging.
2. The Court has been particularly effective in settling disputes concerning border and maritime delimitations, and State responsibility.
3. In the situations where it appeared that States would not comply with the Court's decisions, such perceptions were not always accurate, if one looks at the situation in a long-range context.
4. Most importantly, the overall activities of the Court in contentious proceedings have proven that the Court is offering an effective means of resolving international conflicts, or preventing their escalation. Even in the few cases of non-compliance with the Court's Judgments that are commonly identified, or in those cases which were brought but later withdrawn, the degree of co-operation and dialogue between States that came about as a result of this process was improved, which testifies to the fact that the Court is making a positive contribution to the maintenance of international peace and security.

By contrast, in the case of non-compliance resulting from the impossibility to implement a Judgment of the Court in the domestic legal order for political-juridical reasons, the situation can be said to be serious, as it affects the process of the rule of law in the context of the world legal order which comprises the domestic as well as the international legal order. While a State may announce its intention to comply following a decision by the Court at the international level, full implementation of the Judgment at the national level has been hindered in a number of cases due to domestic legal and structural hurdles within the State's legal order. This conflict between the international and domestic legal order is bound to increase against the background of the growing permeation of the international legal order into the domestic legal order in such areas as the protection of human rights, protection of the environment, and judicial co-operation, which traditionally have belonged to the exclusive "domain reservé" of sovereign States but which are increasingly the subject of international regulation. When a dispute arises between States relating to the interpretation and application of such international convention, which constitutes part of the domestic legal order, compliance with the Judgment of the Court on such disputes can only be achieved through implementation within the domestic legal order. This is an inevitable result of the universalization of international norms in the form of "international legislation". This problem of non-implementation of the judgments of international courts and tribunals is a new type of compliance problem to which the international community must pay much more attention.

Madame Ambassador Picco,

Distinguished Delegates,

Thank you for this opportunity to address you today on this important question facing the Court and all United Nations Member States. I wish you a productive session of the Sixth Committee, and it is my hope and sincere belief that our two institutions will continue to benefit from each other's work on international legal issues.
