THE ENFORCEMENT OF INTERNATIONAL JUDGMENTS

By W. M. Reisman *

"There's th' internaytional coort, ye say, but I say where ar-re th' polis? A coort's all r-right enough, but no coort's anyy good onless it is backed up by a continted constabulary."

per Mr. Dooley, An International Police Force (1899).

The world community is not on the brink of Armageddon because of a paucity of legal answers. Legal institutions exist. Moreover, any problem, without respect to the identity of the decision-maker, may be solved "legally": by impartial assessment of the facts and formulation of a decision by reference to the parties' commitments as well as to overriding community policies.1 Most frequently the real problem is not in arriving at an answer in law, but in enforcing an answer in law. In the final analysis, law is not only, as the Legal Realists contend, what the courts say2 but also what the sheriff does. Law comprises not only the verbal pronouncements of authoritative organs, but also the established patterns of behavior of the individuals composing society. In a lawfully ordered

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1 The term "legal" rather than "judicial" is used to characterize the decisions with which we are concerned in order to avoid exclusive reference to courts. In international law, in fact, the term adjudication has been used generally to refer to any process of peaceful dispute settlement. For a classic example, see 1 Moore, International Adjudications xii (1929). Professor Quincy Wright states: "Broadly defined, adjudication includes dispute settlement by a political body such as the United Nations Security Council or a national legislature in whose decision-making political interests are important; . . . All such bodies, however, are supposed to administer justice and to be guided by considerations of equity when dealing with disputes. . . ." Wright "Adjudication," Dictionary of the Social Sciences 9 (Gould and Kolb eds., compiled by UNESCO, 1964). For a comparable inclination, see Bin Cheng, General Principles of Law as Applied by International Courts and Tribunals 292 (1953).

2 "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." Holmes, "The Path of the Law," 10 Harvard Law Rev. 467, 461 (1897). "... the law consists of the rules recognized and acted on by courts of justice." Salmond on Jurisprudence 41 (11th ed., Williams ed., 1957). See also Gray, The Nature and Sources of the Law 117 (2nd ed., 1921). The legal realist position is not so much incorrect as limited to a particular phase of social development. In a highly organized society, there is a close correlation between what the court says and what, in fact, is done. A court pronouncement "triggers" enforcement; hence, to state that the law is "what the courts say" includes governmental implementation. In international law there is no such correlation, no "automatic triggering." Thus, what the courts say may have no effect on behavior. For a demonstration of the point, compare the I.C.J. Opinion, Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter), [1962] I.C.J. Rep. 151, and its subsequent disregard by Members of the United Nations.
society there is a high correlation between authoritative pronouncement and popular behavioral conformity. In a lawfully effective society policies of commonweal, clarified by authorized procedures, can be enforced in the face of a recalcitrant minority.⁸

Considering its socio-legal importance, international enforcement has enjoyed relatively meager doctrinal attention. One group of scholars has assumed that the major factor producing compliance in international law is "conscience" or "compelling morality."⁴ Clearly, the moral drive to rectitude—the ego's demand on itself for ethical behavior—can be a force towards compliance.⁶ Frequently moral or ethical drives are a result of community conditioning; rarely do they alone sustain systematic decision in a community. The United States, to cite one example, is an organized, relatively homogenous society. Is there an American lawyer, who, on informing a client that his case has been lost, has not been asked: "Do we have to abide by it?" "Can they make it stick?" In an international society in which several hostile authority systems contend, compliance for reasons of morality alone is improbable.

A second approach to enforcement simply presumes compliance. In numerous statements, the Permanent Court and the International Court of Justice have refused even to consider the possibility of non-compliance.⁶

History is replete with societies in which no attempt was made to implement "legislation." The earliest documented example appears to be Hammurabi's code: see Finkelstein, "Ammisaduqa's Edict and the Babylonian 'Law Codes,'" 15 J. Cuneiform Studies 91 (1961). In 19th-century France, the administration paid no attention to Parliamentary pronouncements: Luethy, France against Herself 40 ff. (1955). Although these societies functioned, they were incapable of adapting to rapid changes and of directing their own fate. In crisis they were paralyzed. Hence they were lawfully ineffective.


⁵ Vattel rested the entire basis of international law upon an internal "law of conscience." Friedmann, Legal Theory 34 (2nd ed., 1949), construes this to be a denial of international law. Found, "Philosophic Theory and International Law," 1 Bibliotheca Visseriana 71, 76 (1923), suggests that since classical international law was directed personally to individual sovereigns, the idea of personal conscience was not the fictitious concept which the current "state conscience" is. Even the concept of state conscience may be too broad for proper analysis. Since it is ultimately individuals who prescribe and apply international law, their personal ethics and internal demands for rectitude will clearly affect their decisions. See Corbett, Morals, Law and Power in International Relations 11, 14, 15 (1955). It may be conceded that this drive is one factor, but certainly not the only factor in compliance.

⁶ In the Case of the S.S. Wimbledon, P.C.I.J., Series A, No. 1 at 32 (1923), the British, French, Italian and Japanese Governments petitioned the Court, under the relevant provisions of the Treaty of Versailles, to find that Germany had wrongfully refused passage through the Kiel Canal to the S.S. Wimbledon. The Court found that Germany had acted wrongly and awarded the French Government damages, but refused
Yet the practice of the Courts shows a refined sensitivity to the problem. When the Court anticipated that a state was likely to impugn a judgment, it not infrequently dispossessed itself of jurisdiction. In other cases issues to consider contingent punitive interest for delay in payment: "The Court does not award interim interest at a higher rate in the event of the judgment not being complied with at the expiration of the time fixed for compliance. The Court neither can nor should contemplate such a contingency." (Ibid. at 32.) In the Readaptation phase of Mavrommatis (Judgment No. 10 (Jurisdiction)), P.C.I.J. Series A, No. 11 at 4 (1927), the Greek Government, in its reply to the British preliminary objection, contended that the United Kingdom had disregarded "its international obligations." The Court very carefully distinguished this claim from the contention that the U.K. had not complied with its previous Mavrommatis judgment: "In these circumstances, the Court does not find it necessary to consider the question whether in certain cases, it might have jurisdiction to decide disputes concerning the non-compliance with the terms of one of its judgments." (Ibid. at 13–14.) An extremely instructive case in this regard is the advisory opinion, Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, [1950] I.C.J. Rep. 229. The three defendant states had refused to appoint national arbitrators to a commission empowered to hear claims of violations of the human rights provisions in the Peace Treaties. In the first phase of the case the Court indicated that the national arbitrators should be appointed, but refused to consider contingent measures in default of appointment, presuming that a state would comply with its treaty obligations. In the interim the three states refused to comply, and in the second phase the Court held that there was no remedy in its power for this breach of international responsibility. [1950] I.C.J. Rep. 229.

The Anglo-Iranian Oil Co. Case (Preliminary Objections), [1952] I.C.J. Rep. 93, is the most instructive example of this point. In that case, the United Kingdom sought to bring Iran before the Court on the basis of an Iranian declaration of adhesion under Article 36. It was apparent that Iran would not comply with any judgment which might have ensued. By extremely restrictive interpretation, the Court found itself without jurisdiction. In a dissenting opinion, Judge Read observed that some twenty days before the Court had upheld its jurisdiction under a similar adhesion in the Ambatielos Case (Preliminary Objections), [1952] I.C.J. Rep. at 38, "... notwithstanding that a restrictive construction of the jurisdictional clause would have led, inevitably, to an opposite result." (Ibid. at 143.) In the Case Concerning the Aerial Incident of 27 July 1955 (Preliminary Objections), [1959] I.C.J. Rep. 127, in which Israel sought to bring Bulgaria before the Court for downing an Israeli civilian carrier which strayed into Bulgarian airspace, the Court dispossessed itself of jurisdiction, refusing to construe the Bulgarian declaration of adhesion of 1921 to the P.C.I.J. as operative vis-à-vis the I.C.J., under Art. 36(5) of the Statute. The Declaration of 1921 had been made when Bulgaria was a kingdom. Subsequently Bulgaria became Communist. It was highly improbable that she would have complied with a judgment. In a joint dissent, four judges, among them Sir Hersch Lauterpacht, argued that the Court's construction would cut away a good deal of its jurisdiction. Subsequently, in the Case Concerning Barcelona Traction Light and Power Company, Limited (New Application: 1962—Preliminary Objections), [1964] I.C.J. Rep. 4, the Court seized jurisdiction, overruling the majority opinion in the Aerial Incident case and adopting the minority view. The close relationship between the power of the Court and its willingness to seize jurisdiction has been noted by Schechter, in a comparison with the practice of international administrative courts: "... the liberal views of jurisdiction taken by the administrative courts... has been taken in an area where practical requirements do not demand an excessive measure of judicial restraint in deciding jurisdictional issues. The infinite delicacies of questions of infringement of state sovereignty and of effectiveness of decisions rendered without prior approval of the judicial mechanism by the state or states concerned have no reference to international
were formulated restrictively or the final judgment was almost Delphic in ambiguity. Although these prophylactic measures preserve the Court from the indignity of an impugned judgment, they expose the limited role of a tribunal not buttressed by an enforcement mechanism.

A third approach to enforcement has been a counsel of despair: Enforcement, it is argued, is synonymous with social change which proceeds at the tempo of the community at large and cannot be accelerated or directed. Thus, Professor Triska avers that the problem does not lie in the conformity of social reality with law, but of law with social reality.  

administrative problems. Schechter, Interpretation of Ambiguous Documents by International Administrative Tribunals 100 (1964); accord, Lauterpacht, The Development of International Law by the International Court 91, 243 (1956).

On restrictive formulations of jurisdictional clauses, see note 7 above. In the Case Concerning Right of Passage over Indian Territory, [1957] I.C.J. Rep. 120; [1960] I.C.J. Rep. 61, a case with admittedly delicate political overtones, the Court found that Portugal had a right of passage in 1955; at the time of decision Goa had already been annexed by India! The decision did little more than confirm the status quo at two points in time. In the Case Concerning the Northern Cameroons (Preliminary Objections), [1963] I.C.J. Rep. 38, the Court refused to take jurisdiction, saying: "The Court must discharge the duty to which it has already called attention—the duty to safeguard the judicial function." In the Case of the Monetary Gold Removed from Rome in 1943 (Preliminary Question), [1954] I.C.J. Rep. 19, the Court applied an extremely restrictive and not logically exhaustive construction of the Washington Agreement in order to defeat the attachment strategy of the Three Powers (for detailed discussion, see note 73 below). In the Advisory Opinion, Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, [1950] I.C.J. Rep. 65, 221, the Court refused to apply an at res magis construction to the provisions of the Peace Treaties contemplating the arbitral commissions. It was apparent from comportment following the first phase of the case that the defendant states would not have complied.

In the Asylum Case, [1950] I.C.J. Rep. 266, the Court was asked to determine whether asylum granted to Sr. Haya de la Torre by the Colombian Embassy in Lima, Peru, was in accordance with the Havana Convention on Asylum to which both litigants were parties, and, if so, whether Peru was bound to accord safe passage to Haya out of the country. The Court held that Colombia was not qualified to make a unilateral and definitive characterization of Haya's alleged offenses as falling within the purview of the Convention, and that the grant of asylum had been prolonged beyond the period sanctioned in Art. 2(2) of the Convention. On the day on which this judgment was handed down, Colombia, invoking Art. 60 of the Statute of the Court, asked for an interpretation of the judgment: specifically, did the judgment mean that Colombia was obliged to surrender Haya to the Government of Peru? In its judgment on this matter, Request for Interpretation of the Judgment of November 20th, 1950, in the Asylum Case, [1950] I.C.J. Rep. 395, the Court refused to interpret, holding that the fact that the decision was obscure to one party, but perfectly clear to the other, did not make a dispute. But the Asylum judgment proved obscure to both parties and, in a subsequent joint submission, they asked how it was to be executed, Haya de la Torre Case, [1951] I.C.J. Rep. 71. The Court held that Colombia must terminate the asylum, but that Colombia was under no obligation to surrender Haya to Peru!


"Compliance with law depends on many things . . . and cardinally in my opinion, on the perceived distance between social reality and the respective legal norm which is designed to order that social reality. . . . This is why I would submit that it is not enough to ask how to cause compliance of social reality with law, but also how to cause
The extent to which the organized community can implement its policies presents a formidable sociological problem.12 Undoubtedly, the immediate realization of a variety of programs is unfeasible; the consumption of social values required for implementation would exceed the promised gains. However, effectuation of social programs is usually a gradual process; decisions moving towards realization can always be made. Since any decision will exhibit some degree of conformity or nonconformity with projected goals, it is inaccurate to assume that there is no possibility of enforcement. Each envisaged program will require a unique strategy, timetable and social investment for its realization.

The analytical distinction between adjudication and enforcement 13 has tended to insulate consideration of the issue from lawyers. By implication courts and lawyers—the Levites of courts—are not concerned with post-adjudicative processes.14 Although we frequently invoke Montesquieu’s tripartite distinction, no lawyer denies judge-made law or feels that case law is beyond the perimeters of his métier. The lawyer’s agility in vaulting artful distinctions must be directed to the adjudication-enforcement dichotomy. Another impediment has been the “political-legal” distinction, the core of which in international law is simply that what the organized compliance of law with social reality.”15 Triska, “Different Perceptions of Agreements and Disagreements,” 1964 Proceedings, American Society of International Law 61. The point is well taken, sed quae si this is the “cardinal” factor in compliance. It is one factor, possibly important in certain contexts. Yet given a “social reality” on a course towards self-destruction, little is gained by rearranging the law so that it sanctions destruction. In those circumstances in which the gap between “ought” and “is” is great, the challenge to lawyers and scholars is to secure a measure of compliance notwithstanding. For a reductio of Triska’s thesis see Fisher, “The Veto as a Means of Making Third-Party Settlement Acceptable,” ibid. 123. He assumes that enforcement is impossible, hence the alternatives are to have (1) no adjudicative institutions or (2) one subject to a de jure veto. But if, as this article contends, enforcement is not necessarily impossible, the proposed veto deprives enforcement of one potential base of power, the authority of the pronouncement which is to be implemented.


14 Thus, a review of a recent treatise criticized the absence of a discussion of enforcement but added apologetically that “... the problem of enforcement [is] admittedly a problem of government rather than law...” Potter, review of Friedmann, The Changing Structure of International Law (1964), 60 A.J.I.L. 130 (1966). This writer must state that he grasps neither the distinct empirical reference of “law” and “government” in this context nor the relevance of the sought distinction.
community can do is "legal," what it cannot do is "political." To assume that enforcement is "political" is to beg the question.

I

Enforcement refers to the transformation, by community means, of authoritative pronouncement into controlling reality. Organized communities enforce their authority in two ways: By direct enforcement they supervise the physical transfer of what was decreed in authoritative decision. By indirect enforcement they impose sanctions on the miscreant in order to persuade him to comply with community norms. Direct enforcement is frequently substitutive, i.e., the community arranges for the physical transfer of an equivalent in value to the original object of decision.

The community may resort to indirect enforcement because it is simply incapable of enforcing its authority directly. The assets in question may involve legal questions, which a State refuses to submit to judicial settlement either in accordance with the lex lata or de lege ferenda. . . .'' Briggs, The Law of Nations 1043 (2nd ed., 1952). ''Any conflict between States as well as between private persons is economic or political in character; but that does not exclude the possibility of treating the dispute as a legal one,'' Kelsen, "Compulsory Adjudication of International Disputes," 37 A.J.I.L. 401-402 (1943). See also, Kelsen, The Law of the United Nations 478-479 (1950); Lauterpacht, The Function of Law in the International Community 51 ff. (1933).

The traditional Austinian definition of sanctions, "the evil which will probably be incurred in case a command be disobeyed . . ." (Austin, The Province of Jurisprudence Determined and the Uses of the Study of Jurisprudence 15 (Hart Introduction, 1954)), focusing on the deprivatory effect, tends to limit attention to community treatment of criminal behavior: Lasswell and Arens, In Defense of Public Order 14 (1961); Hart, the Concept of Law 24 (1961). The spectrum of techniques by which a modern community supports its laws includes indulgences as well as deprivations, the carrot as well as the stick. See Lasswell and Arens, "Toward a General Theory of Sanctions," 49 Iowa Law Rev. 233, 234 (1964). The following definitions emphasizing function rather than the specific sanctions used in a given period, tend to assimilate direct and indirect enforcement: "Action taken by members of the international community against an infringement, actual or threatened, of the law." International Sanctions, a Report by a Group of Members of the Royal Institute of International Affairs 16 (1938); "Deprivations or indulgences of individual and group norms for the purpose of supporting the primary norms of a public order system. . . ." Lasswell and Arens, op. cit. at 14; " . . . there are ample sanctions (in international law) if sanctions be defined as implementing techniques or available base values—at the disposal of the general community of states. . . .'' McDougal, "The Impact of International Law upon National Law: A Policy-Oriented Perspective," 4 S. Dak. Law Rev. 25, 50-51 (1959). On the principle of "sanction equivalents," see Desson, "The Technique of Public Order: Evolving Concepts of Criminal Law," 5 Buffalo Law Rev. 23, 42 (1955).

In primitive phases of commercial development, irreplaceable value is attached to specific objects, e.g., a bailment of coins to a money-lender requires return of precisely those coins. As concepts of value become more sophisticated, scales of equivalence permit substituted performance and, hence, freer commercial flow. Thus, in the development of common law, the trend has been from debt to detinue and from specific performance to substitutive performance.
be out of jurisdiction or intangible, hence not subject to seizure and transfer. They may have been consumed in delicto; hence sanctions demonstrate community opprobrium prospectively. In other instances direct enforcement is possible, but the community chooses indirect instrumentalities for other reasons. They may be more economical, more expeditious or may encounter less resistance.

International enforcement theories were forged when the interaction between nations was relatively low. The assets of any one state were usually found within its territorial bounds. Since direct enforcement would have required physical intervention, indirect enforcement alone seemed feasible. Massive changes in the international context have rendered this line of thinking anachronistic. As the level of international interaction has risen and as governmental programs have broadened, an enormous quantity of state assets is found abroad. Contemporary enforcement theory should concentrate on the hitherto neglected possibilities of direct and substitutive enforcement.

In an organized community the expectation of the effectiveness of enforcement mechanisms is a factor inducing compliance. Enforcement becomes a "self-fulfilling prophecy." In an unorganized polity, in which the record of enforcement is erratic, active measures are required in a larger number of cases. If these measures are successful, expectations of effectiveness are generated, permitting enforcement machinery subsequently to fulfill its function by symbolic presence rather than by active intervention. If the measures are unsuccessful or equivocal, voluntary compliance will remain low. The impact of success or failure on expectations of future effectiveness emphasizes the exigency of care in the very choice of cases for enforcement.

In a well-organized community power is concentrated in an authorized and centralized enforcement agency: the sheriff, and, on the macronational scale, the executive branch. Jeremiads about the unenforceability and "non-law" quality of international law stem, in great part, from the fruitless search for a comparable centralized, organic international sheriff. Such an institution does not exist. This does not mean that international law must remain sanctionless:

In neither document is there express mention of direct means of enforcement, an oversight which appears to stem from anachronistic thinking in this area.

Since enforcement does not take place in a vacuum, but cuts directly into the warp and woof of the social fabric, the anticipated responses of the entire community or of that section of the community affected by the decision are a major factor in choosing direct enforcement or a particular weapon from the "sanction arsenal" in indirect enforcement. See Landis, The Administrative Process 90-91 (1938).

See Austin, op. cit. note 16 above, at 12, 127, 142, 201; Patterson, Jurisprudence: Men and Ideas of the Law 175-178 (1953).

For discussion of the putative role of the Security Council under Art. 94(2) of the Charter, see below at p. 14.
The real difference in this respect between municipal and international law is not that the one is sanctioned and the other is not, but that in the one the sanctions are organized in a systematic procedure and that in the other they are left indeterminate. The true problem for consideration is therefore not whether we should try to create sanctions for international law, but whether we should try to organize them in a system.3

The creation of an organic, international sheriff is a long-range goal. In the interim a functional system24 of international enforcement can be an instrument for preserving current minimum order and for laying the groundwork for future institutionalization of the world community.

A functional system is based on the political-legal elements at play in an enforcement process: community authority and effective power. The relevant social context is scrutinized and combinations of authority and effective power, which can act functionally as an enforcement system, are arranged. From the spectrum of possible relationships, that combination which can enforce most economically, yet poses the least jeopardy to international peace, is chosen.

The functional system is applied, almost intuitively, by the lawyer seeking to gain judgment execution in another jurisdiction. The lawyer who has gained a judgment in province A, but cannot execute there, will seek execution in a province having control over the assets of the judgment debtor. If provinces B, C and D each have control of adequate assets, the choice of an enforcing forum will turn on other factors: attitudes toward foreign judgments, complexity or simplicity of procedure, bond requirements, geographical distance, etc. One province will present the most attractive opportunities for enforcement. International enforcement is more complex. Many of the factors which were predictably stable in a municipal arena manifest heightened variability and sensitivity to political crisis in international law.25 Hence numerous factors which municipal counsel need not consider must be scrutinized systematically by international lawyers.

A functional method of enforcement which adapts and systematizes the intuitive approach of the municipal lawyer in extra-jurisdictional enforcement is presented here. The subject for enforcement is a hypothetical

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24 "Functional" is used to refer to the components of the act of enforcement, rather than to the organ which is supposed to perform the act. Due to the absence of a centralized international enforcer, a conventional "organic" approach is of limited utility.

25 To cite the most obvious case, if we assume that nation-state A is capable of enforcing an award or judgment most effectively and economically, we may discover that while A is willing to enforce P's award against D, it is unwilling to enforce it against D₁. This may be because the basis of enforcement is a commercial treaty which does not extend to D₁ or because D₁ is a member of the same political bloc. For further discussion of this aspect of enforcement, see below at p. 9.
Primary attention is given to direct and substitutive enforcement, though the possibilities for indirect enforcement are examined cursorily. This model has two objectives: to secure compliance with I.C.J. judgments and at the same time to generate expectations of an effective international enforcement system, favorable to the ultimate creation of a centralized international enforcer.

The functional model of enforcement comprises four elements: the target state, which has lost the judgment, the enforcers, the power bases of enforcers applicable to the enforcement problem at hand, and the strategies to be employed.

1. Enforcers: Potential enforcers include general international organizations, functional agencies, regional organizations, nation-states acting jointly or severally and non-official groups of individuals. Not all of these entities have direct control over the assets of the target state. Nevertheless, a state with control will frequently find it easier to act if it is “directed” by an authoritative organization. A strategy of enforcement may co-ordinate a controlling state and a non-controlling but highly authoritative organization. For example, if certain assets of the target state are in republic X, its government might find it inexpedient to transfer these assets to state Y, the judgment creditor, solely on the basis of Y’s request. The target state would interpret the act as hostile and might retaliate. It is recommended that Y move that an international organization “enjoin” X to transfer the assets, thereby permitting X to participate in enforcement without bearing primary responsibility. If the target state or its ally were capable of vetoing an injunction in a general organization, Y is urged to seek a regional or specialized organization in which the target does not enjoy a veto power.

The model may be applied, mutatis mutandis, to the enforcement of any other international decision, e.g., arbitral awards, Security Council decisions, etc. In a number of senses, an I.C.J. judgment is easier to enforce. The concept of the finality of a res judicata tends to augment the authority of judicial decisions. An arbitral award may be vitiated by a claim of nullity in international law, see Balasko, Causes de Nullité de la Sentence Arbitrale en Droit International Public (1938). Similarly, the decisions of any international organization, operating under the regime of an international treaty, may be challenged for being in excès de pouvoir or ultra vires the instrument: see Certain Expenses, loc. cit. note 2 above. I.C.J. judgments, on the other hand, are allegedly immune from such lateral attacks. In the Awards of the Administrative Tribunals, [1954] I.C.J. Rep. 47, the Court stated that the awards of a permanent tribunal, functioning under a special statute and within an organized legal system, were not susceptible to nullity (ibid. at 55-56). This holding would appear to include judgments of the Court. In an individual opinion, Judge Winiarski took exception to this point (ibid. at 65).

Within the limits of this article, only a truncated version of the model can be presented. A comprehensive system of functional enforcement would comprise (1) Enforcers and Targets; (2) Their Perspectives; (3) Potential Enforcement Arenas; (4) Bases of Power of both Enforcers and Targets; (5) Strategies of Modalities of Enforcement; (6) Enforcement Outcomes; (7) Post-Outcome Effects, i.e., trends toward or away from the institutionalization and centralization of international enforcement. The four phases which are not discussed expressly in the text have been assimilated to the other three.
The subjectivities of the elites in potential enforcing polities are of major significance. Do elites tend to identify themselves with the target or the creditor state? Do they commit themselves to an international program which favors peaceful resolution of disputes? Does the judgment in question offend their own public policies? These factors are indicators of the willingness (as opposed to capacity) of third-party states to participate in enforcement.

2. Power Bases: Power bases of enforcers divide into authority and effective power. The latter is expressed in military and economic might. A community authorizes its sheriff to implement pronouncements and vests in him enough effective power for the task. The felicitous conjunction of authority and control is rarely found in one entity in international law. Certain organizations enjoy a general mandate to enforce, but have neither direct control over assets nor the capacity to acquire it. Effective power is primarily vested in states. In exceptional cases it is found in functional organizations. Ideally, enforcement is compounded of both authority and effective power; consequently entity combinations must be forged.

The conventional combination consists of a directive from an authoritative organization to a controlling organization or state. Unfortunately, applications for enforcement directives in the United Nations can be blocked. Directives from regional or functional organizations have a higher probability of success, though their judgment-enforcement authority is more tenuous. Where recommended combinations are unfeasible, joint or unilateral action must be pursued. Depending upon the context, such actions may acquire an ad hoc authority.

28 Thus, the Security Council under U.N. Charter, Art. 94, par. 2, and the Council of the League of Nations under the Covenant, Art. 13, par. 4.

29 Notably the International Monetary Fund, the International Bank for Reconstruction and Development and the Inter-American Development Bank. For discussion of their potential enforcement rôle, see below at p. 16.

30 U.N. Charter, Art. 27, par. 3. Rosenne, The International Court of Justice 107-108 (1957), is of the opinion that the veto will not be used against action under Art. 94(2), for "... the Security Council is unlikely to set about wilfully destroying the power of the Court ..." There is little to support this optimism. Moreover, it is difficult to imagine that the U.S.S.R., which doctrinally antipathetic to international adjudication, is anxious to maintain or to extend the power of the Court. After the I.C.J. had indicated interim measures in the Anglo-Iranian Oil Co. Case, [1951] I.O.J. Rep. 89, the United Kingdom lodged the question of the decision's enforcement on the agenda of the Security Council under Arts. 35 and 94 (U.N. Security Council, Official Records, Supp., 1951, Doc. S/2357). Although the extended procedural discussions were superseded by events, the verbatim record indicates that the U.S.S.R. would have vetoed any enforcement measure against Iran.

31 The phenomenon of state officials acting functionally as international decision-makers has been termed dédoublement fonctionnel; for an exposition by the coiner of the term, see Scelle, "Le Phénomène juridique du dédoublement fonctionnel," in Schützel and Schlochauer, Rechtsfragen der Internationalen Organisation: Festschrift für Hans Wehberg 324 (1956). For a comparable description, see Kelsen, Principles of International Law 19-14, 21, 25 (1952). For a critique of the doctrine, see Friedmann, The Changing Structure of International Law 148 (1964). The concept is of
3. Strategies: The Charter sets out a spectrum of sanctions for indirect enforcement, but there is no comparable enumeration of techniques for direct or substitutive enforcement. In fact, the world community’s arsenal is well stocked with such techniques: attachment, garnishment, liens, freezing of assets, restrictive licensing, dumping, termination of aid, etc. Sovereign immunity, which is likely to be invoked as a defense, is subservient to the duty to comply. It is not an absolute right; utmost importance to a functional system of international enforcement. Coercive acts which would ordinarily be considered delictual become lawful if the community employs them for a valid purpose, e.g., judgment enforcement. If the community has no enforcer and individuals undertake the task, their coercive acts may become lawful since they are employed for a valid community purpose. (This concept is broader than the traditional doctrine of self-help, which is concerned only with the personal aspect rather than the community aspect of the implementation of legal rights.) Thus, for example, if state X refused to honor the immunity of judgment-defaulting state Y and transferred its assets to the judgment creditor, Y could not claim that X had acted unlawfully. This line of reasoning, it is submitted, is sounder than a formulation of ex delicto non ortur jus. The Corfu Channel Case has been adduced as contrary authority. There, the United Kingdom petitioned the International Mine Clearance Board to sweep the straits after the accident had occurred. The Board ordered a sweep subject to Albanian consent. When Albania refused, the U.K. swept the mines over her protest and subsequently presented them to the Court as evidence. The mines were treated as admissible, but the Court ruled that the U.K. had violated Albanian sovereignty in collecting them. However, the Court refused to sanction the U.K.; the only satisfaction tendered Albania was the declaration of breached sovereignty: The Corfu Channel Case (Merits), [1949] I.C.J. Rep. 4.

32 See Arts. 41 and 42. Art. 5, dealing with suspension of membership rights of a state against which enforcement action is being taken, is also an instrument of indirect enforcement. Expulsion, a similar instrument (Art. 6), is generally deplored as an inappropriate and ineffective sanction. See Jenks, “Some Constitutional Problems of International Organizations,” 22 Brit. Yr. Bk. Int. Law 1 (1945); Sohn, “Expulsion or Forced Withdrawal from an International Organization,” 77 Harvard Law Rev. 1381 (1964). For the minority doctrinal view that suspension and/or expulsion are appropriate sanctions, see Friedmann, op. cit. note 31 above at 88-94.

33 Only the briefest reference can be made to the vexed problem of sovereign immunity in this article. Sovereign immunity generally refers to the self-imposed bar of a domestic court to impleading a foreign state before it. Hence the judicial doctrines developed regarding sovereign immunity do not apply to most of the instances which are discussed in this article. Not only is there no authority against executive attachments, but state practice clearly demonstrates that it is held to be a lawful form of self-help in international law (for citation of instances, see note 74 below). In regard to the bar as applied in courts, it may be noted that it refers to impleading but not to enforcing. Enforcement may be taken against immovable property and commercial property if it is not used for diplomatic or consular purposes: “Competence of Courts in Regard to Foreign States,” Harvard Research in International Law (Jessup, reporter), 26 A.J.L.L. Supp. 707 (1932), and see the survey of cases and state practice there. This is essentially the jus gestionis—jus imperii test, applied with varying degrees of conformity in most national jurisdictions. See Lauterpacht, “The Problem of Jurisdictional Immunities of Foreign States,” 28 Brit. Yr. Bk. Int. Law, 220, 262 (1951); Sucharitkul, State Immunities and Trading Activities in International Law, passim (1959). The doctrine has been given overt application by American courts since the “Tate Letter”: Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354 (2d Cir., 1964). The restrictive construction of
munity is granted to members of the international community who evidence capacity and willingness to fulfill their obligations. Just as immunity from execution is not, *semble*, granted to an unrecognized state, it should not be accorded to a delinquent state. Much of the doctrine and practice of immunity hinges upon implications of reciprocity and retaliation. Therefore, immunity should be pierced in [* fora * insusceptible to retaliation]. If the judgment creditor, for example, pursues a strategy of indirect enforcement aimed at a state-owned ship of the target, attachment proceedings should be initiated in a port of call of a state which does not send its own ships to the target state.

The contemporary problem in indirect enforcement is the lawfulness of strategies. The unilateral *guerre d’exécution* was lawful, under certain circumstances, until 1945. The subsequent effect of Charter Article 2(4) is ambiguous. If it is *not* construed as an absolute prohibition, then only unlawful use of force is proscribed. Given the Charter’s commit-

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34 As in the preceding note, the immunity discussed here is to judgment enforcement rather than to impleading. It is venerable precedent that an unrecognized state, as well as one enjoying *de jure* or *de facto* recognition, cannot be impleaded against its will in American courts: Nankivel v. Omsk All-Russian Government, 142 N.E. 569, 23 N.Y. 150; United States v. New York Trust Co., 108 F. Supp. 769, *rev’d* on other grounds, 75 S.Ct. 423, 248 U.S. 356. However, there would appear to be no bar to enforcement against an unrecognized state. Such a state is one which, by definition, cannot maintain an accredited embassy or consular mission. Hence, in theory at least, any of its property within the territory of the enforcing state would be subject to judicial attachment. Despite the absence of a formal bar, it is probably good policy to accord a *de facto* immunity to that property which is actually being used for diplomatic and/or consular purposes, though even this property might be seized if no other were available or if the repudiation of the international judgment were especially gross.

35 In the Preferential Treatment of Claims of Blockading Powers Against Venezuela, 1904 (Germany, Great Britain and Italy v. Venezuela, Belgium, Spain, United States, France, et al.), 9 U.N. Reports of Int. Arb. Awards 99, the Permanent Court of Arbitration upheld the lawfulness of a blockade of Venezuela for non-payment of debts, and gave priority to the costs of the blockade. Even more in point is the Cerruti case, in which Venezuela impugned an award, whereupon Italy bombarded her and Venezuela complied, 11 *ibid.* 377. The Porter Convention of 1907 aimed at limiting the use of force in the collection of contract debts. Art. 1 *in fine* provided, however, that the Convention did not apply ‘‘... when the debtor state refuses or neglects to reply to an offer of arbitration, or, after accepting the offer, prevents any compromis from being agreed on, or, after the arbitration fails to submit to the award.’’ Scott, Reports to the Hague Conferences 1899 and 1907, pp. 499, 491 (1917). Under the League of Nations Covenant, Arts. 12, 13 and 15, resort to war was limited to certain contingencies, but a *guerre d’exécution* in the face of recalcitrant default was lawful.

36 Art. 2(4) provides: ‘‘All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.’’ But see Arts. 51 and 52.

37 Professor Waldock argues that Art. 2(4) constitutes an absolute prohibition of the use of force: Waldock, ‘‘The Regulation of the Use of Force by Individual States in International Law,’’ 81 Hague Academy, Recueil des Cours 455, 492 (1962). In
ment to adjudication,\textsuperscript{38} coercive judgment enforcement might be lawful. The criteria of a valid \textit{guerre d’exécution} would be (1) exhaustion of all possibilities of direct enforcement, (2) use of force commensurate with the objective, (3) compliance with the laws of war, (4) a context showing little likelihood of escalation. Use of the military strategy should, of course, come under the aegis of an authoritative organization whenever possible.

Some of the disillusionment with economic sanctions\textsuperscript{39} can be traced to a failure to clarify objectives. The economy of the target is rarely so dependent upon external economies that such sanctions could strike its industrial base with the decisive impact of strategic bombing.\textsuperscript{40} Not infre-
quently indiscriminate economic sanctions have strengthened rather than weaken the target. Economic strategies must be sharply honed to a particular purpose. If, for example, political-economic analysis of the target reveals that a wealth elite, with access to political power, can be severely damaged by a particular sanction, that sanction alone should be used in order to motivate the elite to pressure its government to comply. Carefully planned sanctions may bring about compliance without the dysfunctional results of the total embargo.

II

Five possible applications of the proposed enforcement system will be briefly sketched. Attention is focused on the range of enforcers rather than on the target. Potential combinations of authority and effective power are designated where appropriate.

1. General Organizations: Article 94(2) of the Charter of the United Nations provides that, in case of non-compliance with an I.C.J. judgment,

... 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.

At the United Nations Conference on International Organization in San Francisco, Cuba had proposed that the Statute be amended to allow a judgment creditor to appeal total or partial non-compliance to the Council; the Council would then be obliged to adopt measures necessary for execution. Opponents of the amendment argued that a state would have recourse to the Council even without the amendment, in accordance with Chapters VI and VII of the Charter. This argument failed to dissuade Cuba and its supporters, since it conditioned enforcement action on a finding of threat to or breach of the peace; this circumstance, however defined, need not follow non-compliance. A compromise solution, Article 94(2), permitted recourse to the Council but made its subsequent enforcement action discretionary.

The fundamental ambiguity of Article 94 lies not in itself but in its than the economic features of the target-economy, he concludes that even states which are highest on the vulnerability scale can draw upon other tangible and psychological resources in order to mitigate the effects of the sanctions.

41 Taubenfeld, loc. cit. at 191. For a prediction of a like occurrence in South Africa if sanctions are applied, see Marvin, "Sanctions against South Africa: the Impact and the Aftermath," in Segal, op. cit. note 39 above, at 234-241.

42 Doc. 2, G/14 (g), WD 41, 13 U.N.C.I.O. 507 (Committee IV/I). The Cuban delegate subsequently amended the proposal but in its amended form it remained substantially the same. The problem of enforcement had originally been raised by the Committee of Jurists in Washington, which had suggested that some provision be made for it in the proposed Charter. 14 U.N.C.I.O. 209, 210, 853.

43 ibid. 461.

44 Ibid. The vote was 26-5; the voters are not cited in the record. Subsequently, in the co-ordinating committee, the discretionary, as opposed to mandatory, enforcement role of the Council was reinforced. Ibid.
relationship with the rest of the Charter. Security Council decisions may commission armed force or measures short of such force only if peace is threatened. Clearly not every act of non-compliance constitutes an imminent threat to the peace. Were Article 94(2) an independent form of action, by-passing the need for a finding of a threat to the peace, it would have enormous constitutional and enforcement significance; on the juridical level, at least, it would make the United Nations a real international enforcer. The matter has not been clarified by doctrine or practice. These as yet inextricable difficulties and the inordinate power

45 A frequent criticism of Art. 94(2) and one which was raised by supporters of the Cuban amendment, was that the discretionary element in enforcement tended to undermine the authority of the Court. In fact, enforcement agents in any polity must have a wide discretion in choosing which cases to enforce and what means to employ. See note 20 above. Art. 13(4) of the Covenant, it may be noted, fixed a mandatory duty to enforce; the League Council in the Hungarian-Rumanian Optants Case treated the article as discretionary and did not enforce. 8 League of Nations Official Journal 1379 ff. (1927).

46 See U.N. Charter, Ch. 7.

47 Paradoxically, it is the U.S.S.R., adamantly opposed to international adjudication, which has consistently argued that Art. 94(2) is a separate form of action; the United States has construed the article as contingent on a threat to the peace. At the U.N. Conference in 1945, the Russian representative, Golunsky, commenting on the final draft of the provision, said it “... made a considerable change in the functions of the Security Council. Formerly, the Security Council had jurisdiction only in matters concerned with the maintenance of peace and security. This Article would give the Council authority to deal with matters which might have nothing to do with security.” 17 U.N.C.I.O. 97. The American representative, Dr. Pasvolsky, countered that there was a “... close connection” between the enforcement provision and what is now Ch. VII, and he wondered if there was a necessity for duplication. Ibid. at 98. Subsequently, as the State Department’s representative before the Senate Committee on Foreign Relations, Pasvolsky said in regard to Art. 94(2) that “The Council may proceed, I suppose, to call upon the country concerned to carry out the judgment, but only if the peace of the world is threatened, and if the Council has made a determination to that effect.” Hearings before the Committee on Foreign Relations, United States Senate, on the Charter of the United Nations, 79th Cong., 1st Sess., July 9–13, 1945 (Revised) at 286. Green Hackworth took the same position, ibid. at 331–332. The Russian position, as stated by Professor Korovin in 1946, is that “Execution of the decisions of the tribunal are guaranteed by the Security Council with all the means at its disposal.” Korovin, “The Second World War and International Law,” 40 A.J.I.L. 742 (1946).

48 The only instance in which Art. 94(2) was invoked is an interjudicial phase of the Anglo-Iranian Oil Co. Case. Pursuant to a request by the United Kingdom, the Court had indicated interim measures, enjoining Iran to postpone implementation of its nationalization until the case was heard on the merits. [1951] I.C.J. Rep. 89. Iran ignored the ruling and proceeded with the nationalization: Ford, The Anglo-Iranian Oil Dispute of 1951–1952, p. 277 (1954). The U.K. responded by lodging the matter in the Security Council under Arts. 33, 36 and 94(2). U.N. Security Council, 6th Year, Official Records, Supp., Doc. 8/2357 (1951). The prolonged and inconclusive procedural discussion which followed permitted Iran to flout irredeemably the prescribed interim measures. Subsequently the U.K. submitted a revised draft resolution, with no direct reference to Art. 94(2). Speaking for the U.K., Sir Gladwyn Jebb said: “... there is not much point in our now suggesting that the Government of Iran should be called upon ‘to act in all respects in conformity with the provisional measures by the Court’ ... , they have, unfortunately, and to some extent now been over-
of the permanent members of the Council suggest that the United Nations cannot function as the world's sheriff.49

2. Functional Organizations: Functional agencies linked to the United Nations have committed themselves to assist the Security Council in the execution of Chapter VII of the Charter.50 The reluctance of many of the agencies to obligate themselves is reflected in their qualified duty to support as expressed in many of the Special Agreements.51 In certain instances, a directive from the Council does initiate automatic sanctions within the agency’s operational arena.52 The economic agencies, which have control over assets of states and which hence can enforce by direct substitution, retained a discretion as to whether and by what means they will implement Security Council directives.53

A Council directive would accord a high authority to agency enforcement and, at the same time, shift the onus of primary responsibility. It

49 The potential enforcement role of the General Assembly, exercising its "secondary responsibility" for keeping the peace and acting under the "Uniting for Peace Resolution" (General Assembly Res. 377 (V)), requires an examination which is beyond the scope of this paper. Should one of the veto Powers block action under Art. 94(2) in the Council, it is not unlikely that the Assembly will arrogate an enforcement role. For discussion of Assembly jurisdiction in such circumstances, see Reisman, "Revision of the South West Africa Cases," 7 Virginia J. Int. Law 4, 26-38 (1966).

50 Art. 48(2) of the Charter envisaged a network with other international agencies for enforcement purposes "... by including in the agreement with each specialized agency an undertaking to assist the Security Council, upon its request, in the application of measures envisaged in Article 41 of the Charter." Report of the Preparatory Commission of the United Nations, Ch. III, sec. 6(19) (1946). For a discussion of the problems involved in the negotiation of these agreements, see Sharp, "The Specialized Agencies and the United Nations: Progress Report I," 1 International Organization 460, 467 (1947), and idem, "Progress Report II," 2 id. 247 (1948).

51 Thus, the Universal Postal Union wanted no links whatsoever with the U.N. and acceded to a nexus only under strong diplomatic pressure. Coddington, Universal Postal Union 218-220 (1964). In a number of other cases, the agency in question succeeded in retaining total discretion as to response to a Security Council directive. Thus, while I.C.A.O. "... agrees to cooperate ... in rendering such assistance to the Security Council as that Council may request, including assistance in carrying out decisions of the Security Council for the maintenance or restoration of international peace and security" (8 U.N. Treaty Series 324, 330), the Special Agreement with the I.M.F. does no more than take note of the obligations of its component members under Art. 48(2) and state that the Fund will "... have due regard for decisions of the Security Council under Articles 41 and 42 ..." Art. 6(1), Agreement between the United Nations and the International Monetary Fund, 16 U.N. Treaty Series 328, 332 (1945).


may also be possible to by-pass the Council and undertake enforcement directly through the agencies. In the economic agencies, for example, every member state has a "current account" in gold and national currency. The judgment creditor might move the agency to attach these funds or to transfer target funds to the account of the creditor. Such a strategy can anticipate resistance from the agencies. From their point of view, national currency is their working capital. Under certain circumstances, however, they might be persuaded to view the matter otherwise. If, for example, the target state announced that it intended to withdraw, the currency would change character; the agency might be less reluctant to transfer it to the account of the judgment creditor. It might also be persuaded to co-operate if it were probable that mere preliminary moves to attach would impel the target to comply voluntarily. The agencies have an aversion to the politicization of their activities, hence they might be exhorted to initiate an interpleader by paying the money into Court. Finally, although the agencies enjoy a strong procedural immunity, there may be some possibility of municipal court action against the funds they hold.

3. Regional Organizations: The political interdependence which frequently precedes the constitution of regional organizations makes a regional state quite vulnerable to the concerted action of its neighbors. Thus, in the recent Honduras-Nicaragua border war, peripheral pressure from other O.A.S. Members brought the disputants to The Hague and ultimately secured voluntary compliance. In the Algeria-Morocco border war of 1963, efforts of the Organization of African Unity brought the parties to arbitration and continued until there was compliance with the


55 Thus, under Art. 9(2), Articles of Agreement of the International Bank for Reconstruction and Development (loc. cit. at 172), the Bank must repurchase the shares of a withdrawing member.

56 On the possibility of an international interpleader action through the I.C.J., on the analogy of the Monetary Gold Case, see note 73 below.

57 Art. 9(3), and (4), Articles of Agreement of the International Monetary Fund, loc. cit. 74; Art. 7(4), Articles of Agreement of the International Bank, loc. cit. 180. For a survey of such immunities in practice, see Jenks, International Immunities (1961).


award. Thus, judgment creditors may initiate diplomatic activity within a regional organization with the specific aim of mobilizing its aid in enforcement.

Fundamental international norms recognize the primary security right of regional organizations. A judgment creditor planning an enforcement action alone or in concert with other states may seek to gain a preliminary authorization from the relevant regional organization. This strategy is particularly desirable when an authorization procedure will be blocked in the United Nations.

4. Nation-states: Nation-states, the primary repositories of effective power, are the most promising candidates for functional enforcement. Although a disinclination to become involved in the affairs of others prevails, the duty to aid in enforcing community decisions is a "general principle of law." The Treaty of Washington and the Alabama award are clear holdings that failure to prevent another's non-compliance with international law is, itself, a delict against the state suffering the original breach. Subsequent American practice is consonant with this principle.

Judicial Action: If assets of the target state are found in state X, it may be possible to employ X's courts to enforce the international judgment. Certain writers have asserted that national enforcement of I.C.J. judgments is a principle of customary international law. Yet the lead-
ing case is somewhat equivocal. In Socobelge, an award gained by a Belgian company against the Greek Government was subsequently upheld by the Permanent Court. In 1950, Socobelge instituted garnishment proceedings against moneys owing to the Greek Government in Belgium, on the basis of the international judgment. The Belgian Tribunal Civil assimilated the P.C.L.J. judgment to all other foreign judgments, refusing execution de plano. Municipal judicial enforcement is not excluded by this holding, neither is it facilitated by it.

Joint Executive Action: The co-ordinated action of several national executives may be an effective enforcement strategy. The impact of freezing assets, attachment, cessation of aid, severance of diplomatic relations and trade blockades can be compounded if undertaken multilaterally. Moreover, co-ordinated enforcement augments the authority of the action. The authority of a specific enforcement program can be further increased by the incorporation of an extant organization. Thus, several states might initiate an interpleader action with the International Court of Justice. The Statute makes no express provision for such procedure and the Court will probably disesea jurisdiction if the target state refuses to join issue.

Therefore, the joint interpleader must be expressly obligated is eminently logical, but there is, unfortunately, no international authority for the rule. In the Chorzów Factory (Merits) case, the Permanent Court held that a municipal court did not have the power to invalidate an international judgment. Series A/No. 17 at 33. From this one may infer that a municipal court may not act contrary to an I.C.J. judgment, but it is difficult to deduce that it must act.


68 Société Commerciale de Belgique, P.C.I.J., Series A/B, No. 78.

69 The Court held: "De lege ferenda such an exemption from exequatur seems conceivable or even legitimate. However, at the present time, no international arrangement has introduced such a principle into the Belgian legal system. The plaintiff Company claims that the Permanent Court is not a 'foreign tribunal,' but a 'superior tribunal,' common to all states which have accepted its Statute, and that as such its decisions do not require exequatur. However, in the absence of an independent power of execution belonging to that Court, which would enable litigants before it to execute its decisions de plano, these decisions are not exempt from the servitude imposed on Belgian territory on decisions of other than Belgian tribunals." Ibid. at 4. A more extreme negative position was taken by the court of appeal of the International Tribunal of Tangier in Mackay Radio and Telegraph Co. v. Lal-la Fatma and others, 21 Int. Law Rep. 136 (1954). The plaintiff sought to derive municipal rights from the I.C.J.'s judgment in Rights of United States Nationals in Morocco, [1953] I.C.J. Rep. 176. The Court refused to derive such, holding that "... such decisions [of the I.C.J.] might at best provide inspiration and guidance, although not because its judgments have any binding force in municipal courts"; ibid. at 137. For a purportedly different municipal treatment of the same case, see Administration des Habous v. Deal, 19 Int. Law Rep. 342 (1952) (Morocco, Court of Appeal).


71 In emphasizing the consensual nature of their jurisdiction, both the P.C.L.J. and the I.C.J. have been reluctant to assert jurisdiction in the absence of one of the parties in interest. In the Status of Eastern Carelia case (P.C.L.J., Series B, No. 5 at 7), the Council of the League requested an advisory opinion on the disputed boundary
contingent on the target’s submission to jurisdiction. If the target submits, the other states agree to abide by the decision. If the target refuses to submit, the other parties will transfer the attached assets to the original judgment creditor. There is a rough-hewn precedent for this procedure. After Albania impugned the Corfu Channel judgment, the Allied Powers asked the Court to determine whether monetary gold taken from Rome was Albanian. If it were, the parties agreed to transfer it to the United Kingdom in fulfillment of the Corfu judgment.

Unilateral Executive Action: Many of the strategies discussed above may be taken unilaterally. The fact that they are employed in judgment enforcement will probably render them lawful.

between the U.S.S.R. and Finland. The U.S.S.R. was neither a Member of the League nor did it consent to the advisory opinion. Theoretically consent was not necessary in this case, since the opinion would have constituted no more than an advisory opinion to the Council. Nevertheless, the Court construed the request as a de facto contentious submission and refused to seise jurisdiction in the absence of Russian agreement. In the first phase of the Peace Treaties case (loc. cit. note 8 above), the defendants had sought to invoke Eastern Carelia as a precedent for the rule that there can be no judicial proceeding (contentious or advisory) without the consent of the states involved. The Court rejected this objection, holding that consent was not required in advisory proceedings. Nevertheless, in the second phase of the case, the Court refused to sanction appointment of the national arbitrator by the Secretary General, an outcome which is, in terms of effect, indistinguishable from a denial of jurisdiction. For a discussion of the Monetary Gold case, see note 73 below.

72 This case arose out of an incident in which British warships passing through the Straits of Corfu struck mines, resulting in serious loss of life and damage to the ships. Subsequently the U.K. swept the straits and discovered mines, which had apparently been laid recently. In its decision on the merits, the Court held that Albania was responsible under international law for the loss of life and damages sustained by the British ships, but that in sweeping the straits the U.K. had violated Albanian sovereignty.

73 Monetary gold, taken from Rome by the Germans in 1945, became part of the Allied Gold Pool. According to the Paris Reparation Agreement of 1946, it was to be distributed to states entitled to it. The Tripartite Commission, created by Part III of the Agreement, could not resolve the competing claims of Albania and Italy to the Roman gold. The Washington Agreement of April 25, 1951, and the accompanying Washington Statement (T.I.A.S., No. 2252) concluded by the Three Powers, referred the claims to an arbitrator and provided that, should he rule in favor of Albania, the gold would be transmitted to the United Kingdom unless either Italy or Albania, within ninety days of the award, requested the I.C.J. to adjudicate its rights. Italy, but not Albania, submitted to the Court, and followed its own submission with an objection to jurisdiction. Italy averred that the suit was directed against Albania, which was not a party before the Court. The Court accepted the Italian objection—incorrectly, it is believed—and disseised itself of jurisdiction. Case of the Monetary Gold Removed from Rome in 1943 (Preliminary Question), [1954] I.C.J. Rep. 19.

74 Attachment of assets and freezing foreign assets for future claims is a frequent international occurrence. The Peace Treaties of 1947 gave the Allies the right to seize enemy property in their territory, liquidate it and apply the proceeds to claims brought by them and their nationals against the enemy. See Fitzmaurice, "The Juridical Clauses of the Peace Treaties," 73 Hague Academy, Recueil des Cours 324 (1949). The United States and the United Kingdom froze a total of some $470,000,000
subject to retaliation in kind, a danger minimized in joint action. Unilateral force should, when possible, be sanctioned by an organization prior to application.

5. *Private Action:* The automatic responses of individuals to an impugned judgment may conceal a sanction potential. Expectations of stability, upon which international economic interaction depends, are shaken by a challenge to global authority. Transnational commerce tends to flee from instability. Thus, the effect of non-compliance may be an instinctive commercial and economic withdrawal, which imposes a serious deprivation upon the impugning state. The aggregate international securities market is a rather reliable index of investor perspectives. When the U.S.S.R. arranged a patently corrupt arbitration award against Jordan Petroleum of Israel, the international credit status of Russia fell. The U.S.S.R. was subjected to a short-term sanction. Private sanctions may be intensified and sustained by publicly communicating an intention to pursue enforcement action. This, in turn, may engender voluntary compliance.

III

Functional enforcement is not an end in itself but a means for (1) securing present compliance with international law and (2) generating expectations of effectiveness ultimately crucial to the formation of a centralized enforcing authority. To this dual end the following five principles should be brought to bear upon every enforcement move.

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76 For a survey of the reaction of the general and business community as related in the international press, see Domke, "Arbitration of State-Trading Relations," *loc. cit.* above, at 324, note 57.
1. **Substitutive Enforcement.** The objects of numerous international disputes often remain in the control of the losing party. Seizing and transferring them may require a degree of force which is impractical. In an increasingly interdependent world, control over other assets of any state is often divided among a number of other states. Given a scale of equivalence, such as that of international commerce, substitutes can be found in lieu of the original object of the dispute. Substitution should be sought insofar as it reflects the subjective valuation of the litigants.

2. **Anticipatory Enforcement.** Although fixed-and-flow resources may be valued, they enjoy a primacy among nation-states which does not admit of substitution. Moreover, in certain non-territorial disputes, the winning litigant may gain substitutive enforcement, yet the loser, by retaining the subject of litigation, frustrates the attempted resolution of the conflict. Hence provision should be made for anticipatory enforcement. Administrative control of the territory in dispute could be transferred to an international authority while the matter was *sub judice*. On a more modest scale the forces of the occupying litigant could be evacuated during proceedings. Provisions such as these must be made in the *compromis*. In non-territorial disputes earnest may be prepaid into court. Where liquidity problems or restricted monetary policies make this unfeasible, the *compromis* may make elaborate provision for garnishment; third-party debtors should be privy to a separate protocol. Alternatively, protocols can arrange liens on national funds held by international banks and development organizations.77

3. **Expeditious Enforcement.** An enforcement system is ultimately grounded upon the expectation that the system works. A lag between judgment and enforcement tends to diminish this expectation and to increase resistance to voluntary compliance. Enforcement strategies, devised *pendente lite*, should be launched promptly. If only moderate resistance to compliance is anticipated, the preferred strategy may be one which, though not optimum, is the quickest demonstration of intention. Dispatch can also prevent domestic politicization of compliance decisions.78


78 A corollary to principle 3 is that exacerbating enforcement should be avoided. Excessive haste in setting an enforcement program in operation may backfire. The law generally presumes good faith; the manifest intention to enforce implies a suspicion of the *bona fides* of the loser. The loser may dismiss such a communication as a gross indiscretion. However, resentments may be aroused which will impede compliance or cool subsequent relations. The decision to reveal an enforcement program should be preceded by an assessment of the loser’s attitude. If it leans toward compliance or if divulging enforcement intention will strengthen the hands of a domestic anti-compliance faction, the plan should be suppressed. The revelation or suppression of an enforcement plan is, in itself, a strategy and should be employed only when conditions are auspicious.

79 In the *Alabama* award (loc. cit. note 64 above), the British Government was anxious to comply, but the time lag between judgment and compliance permitted the domestic opposition to stoke popular passions against the award. 2 Moore, International Arbitrations 664 ff.
4. Avoid Coercive Indirect Enforcement. Enlightened self-interest as well as humanitarianism militates against coercive strategies. It is a commonplace that violence is contagious. Moreover, unilateral military action can trigger escalation. Coercion rarely resolves disputes; more often it deepens the rancor and hostility of both parties. Paradoxically, proponents of peace, who genuinely abhor violence, must at times resort to it in order to protect the principles and institutions they cherish. There will undoubtedly be instances in which highly coercive strategies alone promise success, but they should be employed only as a last resort.

5. Community Participation. Although international self-help measures are not inherently unlawful, an enforcement program, particularly one coercive in nature, should draft as wide a participation as possible. A united community tends to isolate the defaulting party, to magnify its unlawful act and to lend a corporate sanction to any indirect action. It emphasizes responsible commitment to the validity of judgments and creates an image of integrated enforcement.

IV

Securing enforcement of a particular decision in the contemporary international arena depends ultimately upon the ingenuity, resourcefulness and energy of the winning party. A functional orientation to the problem does not create the need for self-reliance; it merely underlines its catalytic value and suggests means for achieving the desired end. Self-interest—enlightened or otherwise—is the motive force in international law. Demonstrations of the inclusive community interest in the enforcement of judgments will receive verbal assent. But such demonstration alone will not draft the collaboration of others in a particular enforcement program. In bilateral disputes, non-involvement is often the most expedient and economical course of action. One of the key practical problems of functional enforcement, then, is how to facilitate the drafting of other participants and their resources in an enforcement action.

Given the grid of potential enforcers, sketched earlier, a number of minor institutional changes can facilitate functional enforcement. Draftsmanship promises greatest success when it avoids the glorious but unrealizable and concentrates on tooling available resources in order to maximize their public order effect. Two areas present themselves as fertile for the formal agreement process: the International Court of Justice and the network of national, territorially-based courts.

The authority of the International Court could be extended into the post-judicial phase by a number of minor amendments to the Statute and Rules. In its current form, the Statute gives the Court no explicit role in the enforcement process. In fact, as was noted earlier, the Court's

81 But Art. 60 of the Statute, after stating that the "judgment is final and without appeal," continues: "In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party." One can assume, without violence to the express language of the provision, that many problems
practice indicates a refined sensitivity to the problem of subsequent compliance. Consideration of the post-adjudicative phase is permitted by general judicial practice and not prohibited by the language of the Statute. Yet reluctance to play an active rôle in this phase can be traced to the absence of express authorization. This could be supplied by a minor, declaratory amendment to the Statute.

By additions to Articles 56 and 60 of the Statute, the Court could be empowered, in its discretion, to include a specific time-limit or a general guideline for compliance. After the expiration of such time or on the initiative of the winner, the winning party could reapply unilaterally for a declaration of non-compliance. It would be possible to the losing party to (1) claim compliance, (2) aver reasons for delay and request an extension, (3) as a counter-claim seek permission for substitutive compliance. A finding by the Court of non-compliance would tend to undermine the position of the loser, emphasize the finality of the judgment and expedite coercive enforcement. A finding by the Court of justification of delay would tend to lower the crisis level of the dispute and maximize the possibility of a just settlement acceptable to both parties. An allowance for substitutive compliance would have a similar effect.

Among the more general effects of such amendments would be the additional room for maneuver allowed the Court. The possibility of reconsidering the operative part of its judgment and its effects would permit the Court to act initially with more confidence and carry through its judgment with more flexibility. It might also increase resort to the Court, since states, generally doubtful of the Court's appreciation of the complex political problems involved in complying with a judgment, could make these the subject of a separate phase of adjudication. The amendment would also tend to depoliticize the post-adjudicative phase by keeping it "in court" until resolution had been achieved.

in regard to compliance or enforcement would be included here. See, in this regard, Request for Interpretation of the Judgment of November 20th, 1950, in the Asylum Case, [1950] I.C.J. Rep. 395, involving a sequence of the dispute in large part concerned with the appropriate manner of execution of a previous judgment. See also Chorzów Factory (Merits) case, A/17, and compare with the jurisdictional phase: A/9. Insofar as one accepts impossibility of performance as a classic ground for revision, Art. 61 of the Statute can be said to serve a parallel function of allowing the Court to intervene in phases subsequent to judgment.

82 See notes 6 and 7 above.

83 In the Corfu Channel Case, the International Court rejected an Albanian objection to jurisdiction to determine damages, by holding that its initial finding of jurisdiction in the first phase of the case extended to all aspects of the adjudication. [1949] I.C.J. Rep. 244, 248. In this regard see also Case Concerning Certain German Interests in Polish Upper Silesia, Series A/6 at 21, and Series A/7 at 34-35. Note should be taken of any earlier formulatory style in international compromis, which expressly empowered international tribunals to resolve enforcement difficulties. See, in this regard, Art. 9 of the "Agreement Between France, Great Britain, Spain and Portugal for the Arbitration of Claims relating to Religious Properties," July 13, 1913, 8 A.J.I.L. Supp. 165-168 (1914), and "General Arbitration Treaty Between the Republic of Colombia and the Argentine Republic," Jan. 20, 1912, ibid. 86-88.
A consideration of the emendation of the Statute and Rules in this manner is a project eminently suited to the International Law Commission. The Court itself could consider it in accord with Article 70 of the Statute. A working draft of the proposed amendments is given in an appendix to this article.

The enforcement rôle of municipal courts could also be facilitated by a declaratory formal agreement. It is surprising, to say the least, that the municipal status of an international judgment should have remained in doubtful ambiguity. Although doctrinal writers manifest a general consensus, the Socobelge case, discussed earlier, indicates the continuing confusion. Sustained efforts at securing the national enforcement of foreign arbitral awards have not extended to international judgments. Article 51 of the Convention on the Settlement of Investment Disputes is an appropriate model for rendering judgments of the International Court enforceable eo ipso in municipal courts. According to this provision, awards of the International Center for Settlement of Investment Disputes are automatically enforceable in domestic courts. The measure could be further facilitated by appropriate internal implementing legislation by each contracting state. This is another matter appropriate for consideration by the International Law Commission. A recommended draft is appended to this article.

International enforcement is neither impossible nor so difficult and uneconomical as to be unfeasible. Even were it so, the lawyer could not claim discharge from the burden of dealing with it. Law, in any socially
significant sense, requires that there be, at the bare minimum, an expectation of effectiveness, if not a point-for-point correlation between decision and allocation. Creating and sustaining that expectation is a basic legal function.

Effective law does not depend exclusively on operating enforcement mechanisms. In the most fundamental sense, it depends upon predispositions among an effective majority of participants towards compliance with authority. Any developmental enforcement program must number among its principal aims the inculcation of such perspectives. But in order to overcome the conditions which will be encountered in transnational periods, the international lawyer requires a comprehensive grasp of legal and social process as well as consideration, in the performance of each legal function, of its relation to and impact on all the others. Thus, for example, the adjudicative phase will not produce a highly unenforceable decision; the prescriptive phase will consider an appropriate timetable for its programs and, hence, avoid ineffectiveness and so on. Yet, the crucial rôle of enforcement must be accepted, its concern to the lawyer confirmed and the inadequacies of its current conceptualization conceded.

The development of a viable enforcement system will be a delicate, complicated process which will require a long and arduous period of application before a high degree of conformity with international law can be expected as a matter of course. But it must be undertaken. A right without a remedy, as Justice Holmes said, is no right at all. An international law system which deems itself so incapable of effective decision that it must retreat from the most critical cases cannot meet the requirements of a world community increasingly in need of legal order.

APPENDIX 1

A. Article 56 of the Statute, in its present form, states:

1. The judgment shall state the reasons on which it is based.
2. It shall contain the names of the judges who have taken part in the decision.

The proposed amendment will add subsection 3, as follows:

3. The Court, on its own motion or upon application of any party, may, if it deems necessary, specify principles to govern compliance or execution of its judgments. These may include a period for compliance, a time-table for compliance, general principles of compliance or any other directive which the Court may deem appropriate.

B. Article 59 of the Statute, in its present form, states:

The decision of the Court has no binding force except between the parties and in respect of that particular case.

The proposed amendment will add:

But for purposes of enforcement, a judgment is deemed to create an actionable right in any domestic organ of a State party to the Statute as well as in any international organ.
C. Article 60a which will be added after Article 60, will state:

In the event of any dispute as to the fact or manner of compliance, either party may apply to the Court.

APPENDIX 2

Draft Protocol for the Enforcement of I.C.J. Judgments

1. The undersigned States parties to this protocol, in the interests of ensuring enforcement of the judgments of the International Court of Justice, declare that

a. The enforcement of an international judgment is the obligation of all States parties to the Statute.

b. A judgment of the International Court creates rights and duties, automatically enforceable under international law and, without any incorporation, reception or such procedure, in municipal law.

c. No claim of sovereign immunity can avail against the execution, in any forum, of a judgment of the International Court of Justice.

2. Accordingly, signatories to this protocol undertake

a. to take all general or particular measures which are necessary and appropriate for the enforcement of international judgments, in all cases in which such enforcement is sought in State organs;

b. to enact such internal legislation as is necessary to require domestic courts and tribunals to enforce international judgments, and rights arising thereon, solely and exclusively upon certification of the authenticity of said judgment.