Dottorato di ricerca in Ordine internazionale e diritti umani, Sapienza, Università di Roma - Intercenter, Università di Messina

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1. COMPLIANCE WITH ICJ DECISIONS: THE ROLE OF THE GENERAL ASSEMBLY

The possible involvement of the General Assembly (GA) in an institutional process aimed at ensuring compliance with decisions of the International Court of Justice (ICJ) is an issue generally neglected in international law literature (but see C. SCHULTE, *Compliance with Decisions of the International Court of Justice*, Oxford, 2004, p. 63-38). Yet the GA has been twice involved in such processes. Certainly, this practice remains limited, which could explain why it is mostly overlooked. However, when examined in its proper context it can nonetheless help in shedding light on the contours of UN principal institutions' powers concerning compliance with ICJ decisions.

The UN Charter rules governing compliance with ICJ decisions and the practice of the GA in that regard will be recalled first. Then, three aspects will be investigated: the legal foundation of the GA power to act for ensuring compliance with ICJ decisions, the character of the compliance obligation in relation to which the GA can intervene, and the relationship between the GA and the Security Council (SC) in such matters.

1. The GA and ICJ Decisions: Theory and Practice

The UN Charter addresses compliance with ICJ decisions only in Article 94 (see in general Ch. TAMS, 'Article 94', in A. Zimmermann, Ch. Tams (eds.), *The Statute of the International Court of Justice. A Commentary*, 3rd edn, Oxford, 2019, p. 234.). The factual situation envisaged in that provision is one in which the ICJ has adopted decisions in the framework of its contentious function. Paragraph 1 dictates compliance with such decisions and Paragraph 2 envisages the intervention of the SC, which may be asked to adopt measures aimed at giving effect to the Court's decisions non complied with.

Nowhere is the GA mentioned in Article 94, which leaves open the question of its possible involvement. Under the UN Charter, the GA has a very broad power which arguably includes compliance with ICJ decisions (see O. SCHACTER, 'The Enforcement of International Judicial and Arbitral Decisions', *Am. Jour. Int. Law,* 1960, p. 24; S. ROSENNE, *Law and Practice of the International Court 1920-2005*, 4th edn, Leiden/Boston, 2006, p. 248; A. AZAR, *L'exécution des décisions de la Cour internationale de Justice*, Bruxelles, 2003, p. 171; L. BOISSON DE CHAZOURNES, A. ANGELINI, 'Regard sur la mise en oeuvre des décisions de la Cour internationale de Justice', *L'Observateur des Nations Unies*, 2016, p. 75). Practice confirms

such a possibility. The GA has adopted resolutions concerning compliance with ICJ decisions in two occasions.

The first occasion is well-known. In 1986, the Court had adopted its judgment on the merits in the *Nicaragua* case (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v Unites States of America)*, Merits, Judgment, *ICJ Reports* 1986, p. 14) and the USA clearly did not comply with the decision. Instead, it kept authorizing the financing of military operations in Nicaragua. The SC could not adopt a decision under Article 94(2) because a draft resolution was vetoed by the USA (UN Doc. S/PV.2718 of 28 October 1986, concerning draft res S/18428 presented by Congo, Ghana, Madagascar, Trinidad and Tobago and the United Arab Emirates). The SC was clearly deadlocked. The issue was then brought before the GA. For four years in a row, from 1986 to 1989, the GA addressed that issue and, as a result of long debates, adopted basically the same resolution (UN General Assembly resolutions A/RES/41/31 adopted on 3 November 1986, A/RES/42/18 adopted on 12 November 1987, A/RES/43/11 adopted on 25 October 1988, and A/RES/44/43 adopted on 7 December 1989). Each time the GA urgently called «*for full and immediate compliance*» with the 1986 ICJ judgment, after having recalled the duty UN Member States have under Article 94(1), taken note of the judgment of the ICJ, considered the continuous breach of the judgment by the USA, and emphasized the duty to respect the customary international law obligation of non-intervention in the internal affairs of other States.

It is maybe less known that in late 2018 the GA was again involved in discussing non-compliance with another ICJ judgment, namely, that rendered in 2004 in the *Avena* case that had opposed Mexico and the United States (*Avena and other Mexican Nationals (Mexico v United States)*, Judgment, *ICJ Reports* 2004, p. 12). Mexico had tried to draw the SC's attention to the matter. It had sent three letters in 2014, 2017, and 2018, but received no response from the SC. Thus, the issue of US non-compliance was brought to the GA's attention. The GA adopted resolution 73/257 that recalled the 2004 *Avena* judgment as well as the subsequent 2009 decision of the Court on the interpretation of the *Avena* judgment; it considered that the obligations ascertained in the 2004 judgment had not been complied with by the United States; and it urgently called for «*full and immediate compliance*» with the judgment of the Court (UN General Assembly resolution 73/257 adopted on 20 December 2018).

2. The GA power to deal with ICJ decisions' compliance

One of the aspects that emerges from the debates that took place among its members both in 1986 (and the following years) and in 2018 is a general agreement on the power of the Assembly to deal with the issue of compliance with ICJ decisions despite the silence of Article 94 and, more generally, of the UN Charter. The GA power is important because the SC has acted under Article 94 (2) only exceptionally, and the Court seems quite reluctant, with the exception of provisional measures, to control the enforcement of its own decisions (see especially M. AL-QAHTANI, 'The Role of the International Court of Justice in the Enforcement of its Judicial Decisions', *Leiden Journal of International Law*, 2002, p. 781; L. BOISSON DE CHAZOURNES, A. ANGELINI, *supra*, p. 77 ff.; B. BONAFÈ, 'La Cour internationale de Justice et l'exécution de ses arrêts', *Ordine internazionale e diritti umani*, 2016, p. 365-374).

The GA power to promote compliance with ICJ decisions may have a two-fold function. On the one hand, it can be seen as an institutional safeguard because it rests on the cooperation of political, principal institution for the protection of the exercise of the judicial

function (see the reasons given by Canada for supporting the adoption of GA resolution 41/31 according to which such a vote expressed «*its full support for the Court as the highest judicial body in the United Nations system*», UN Doc. A/42/PV.68 p. 29-30). On the other hand, that power can be regarded as an essential contribution to the peaceful settlement of disputes. Therefore, the power of the GA could fall under the purview of either the broad powers conferred to it under Article 10 or the more specific powers on peaceful dispute settlement provided under Articles 14 (Chapter IV) and 35 (Chapter VI). However, practice was quite uncertain at the beginning.

The debate surrounding the *Nicaragua* case was hardly definitive in that respect. The four resolutions were adopted with a very large majority, which shows a general consensus on the power of the GA to deal with US non-compliance with the *Nicaragua* judgment. However, it is not clear whether consensus was limited to that particular case or it revealed an understanding that the GA had a general power to address *any situation of non-compliance* with ICJ decisions. The discussion mainly regarded issues already debated by the parties before the Court or the Security Council. The debate at the GA mainly focused on US withdrawal of consent from ICJ jurisdiction and the "illegality" of the US veto invoked in order to oppose the adoption of SC draft resolution S/18428 (see UN Doc. A/41/PV.53, p. 46 ff.; UN Doc. A/42/PV.68, p. 1ff., esp. the first intervention of Ghana; UN Doc. A/43/PV.36, p. 1 ff., esp. the interventions of Nicaragua and the United States. In other words, the power of the GA itself was dealt with only marginally.

Undeniably, the way in which the issue of compliance with the *Nicaragua* judgment was approached reveals a broad overlap between two functions that in principle remain separate under the Charter: that concerning the maintenance of peace and security and that aimed at ensuring compliance with the Court's decisions. This overlap had obvious consequences during the discussion of the SC. Arguably, it reduced controversy over the use of the veto power by the US in relation to that specific judgment, as the SC action could have been understood as aiming at the maintenance of peace (M. STARITA, 'L'esecuzione delle sentenze della Corte internazionale di giustizia tra l'art. 94, par. 2 della Carta e nuovi meccanismi di pressione ed assistenza', in E. Triggiani et al. (eds.), *Dialoghi con Ugo Villani*, vol. I, Bari, 2017, p. 59 ff). As far as the power of the GA was concerned, the overlap of those two functions and Article 11 could have contributed to the lack of a thorough discussion on the legal foundation of its power.

While the main assumption was in favour of the GA power to deal with the issue of compliance with the *Nicaragua* judgment, some views were actually put forward that challenged the existence of such power. But the importance of both positions expressed during the debate should not be overstated. On the one hand, the denial of a GA power was basically the contention of the US (it was the very first argument advanced by the US to oppose the adoption of GA res 41/31, UN Doc. A/41/PV.53, p. 66) or a few allied States (e.g. El Salvador merely stated that the issue should have been dealt with by the Security Council with no further discussion of the legal basis of the GA power to do so, UN Doc. A/41/PV.53, p. 84-85). On the other hand, the power of the GA to deal with that situation could have been given for granted by the vast majority because the *Nicaragua* case regarded the use of force, an issue that the GA had clearly the power to address (exceptional references to a specific legal basis in the Charter were made for instance by Mexico, UN Doc. A/41/PV.53, p. 83, and Yemen, UN Doc. A/43/PV.36, p. 28). This alternative legal basis – the power to discuss issues concerning the use of force – was mentioned years later, during the adoption of the GA resolution dealing with the *Avena* case, as a justification of the GA

call for compliance with the *Nicaragua* judgment (e.g. Slovakia pointed out that «*resolution 41/31, which was recalled in resolution 73/257, was unique and of a different order given that the principles of non-intervention and the prohibition on the use of force were central in that case*», UN Doc. A/73/PV.63, p. 4).

Against the background of that precedent, the debate at the GA on (non)compliance with the *Avena* judgment gives a significant contribution to answering the question of the legal foundation of the GA power. The *Avena* judgment concerned respect of the right of consular assistance provided under the 1963 Vienna convention on consular relations and the Court's decisions had concluded that the US had to carry out the review and reconsideration of the criminal cases conducted in breach of that right. The situation before the GA was the lack of review and reconsideration mechanisms as well as the execution of some of the detainees. Therefore, there was no risk of confusion between the maintenance of international peace and security and the protection of the Court's judicial function. The power of the GA to address issues of non-compliance with the Court's decisions had to have an independent legal basis.

And this is what the debate clearly pointed at. US intervention did not go beyond a mild objection according to which the GA «*is not the appropriate venue for addressing this issue*» (UN Doc. A/73/PV.63 p. 2). Similar doubts were expressed by Romania abstaining from vote (ibid., p. 4). However, many other States emphasised that the GA was clearly competent to address the issue. Brazil considered that «*the General Assembly has an unquestionable competence to discuss situations of non-compliance with the Court's decisions*»(ibid., p. 2), and more specifically Slovakia affirmed that «*the General Assembly is empowered, under Article 10 of the Charter, to discuss any matters within its scope, including the Statute of the Court*» (ibid., p. 3). The adoption of resolution 73/257 shows that the GA considered to have the power to address cases concerning compliance with ICJ decisions.

More interestingly, the discussion of the *Avena* case sheds light on the previous one concerning the *Nicaragua* case. All taken together, the five resolutions adopted up to now by the GA do constitute a strong presumption in favour of the existence of an autonomous legal basis for the GA power to address issues of compliance with ICJ decisions and its future exercise.

The results of the voting procedures that led to the adoption of those five resolutions confirm that conclusion. In 1986 resolution 41/31 was adopted with 94 votes in favour, 3 votes against, and 47 abstentions. In 1987 resolution 42/31 was adopted with 94 votes in favour, 2 votes against, and 48 abstentions. In 1988 resolution 43/31 was adopted with 89 votes in favour, 2 votes against, and 48 abstentions. In 1989 resolution 44/31 was adopted with 91 votes in favour, 2 votes against, and 41 abstentions. In 2018 resolution 73/257 was adopted with 69 votes in favour, 4 votes against, and 66 abstentions.

Despite the large number of abstentions, these votes show that the overwhelming majority of the GA members backed the adoption of the resolutions. Even those who abstained were careful in expressing their intention not to undermine the essential, judicial function of the Court and to reaffirm respect for the undeniable value of its decisions (see e.g. the position of Guatemala UN Doc. A/41/PV.53, p. 88, UN Doc. A/42/PV.68, p. 22; Luxembourg UN Doc. A/41/PV.53, p. 93; Costa Rica UN Doc. A/41/PV.53, p. 94; and Jordan UN Doc. A/41/PV.53, p. 98).

What remains unclear, on the other hand, is whether the issue is regarded by the GA as an important one or not, and as a result which voting procedure is to be followed under Article 18 of the UN Charter. The fact that resolutions were adopted by so wide a majority

and with almost no discussion on such procedural aspects makes it extremely difficult to know whether a two third majority was required, or a simple majority would have been sufficient.

During the debate, the "importance" of the matter was underscored by many delegates even if not explicitly for the purposes of the voting procedure (see esp. the position of Argentina, UN Doc. A/42/PV.68, p. 9-10; Cuba, UN Doc. A/42/PV.68, p. 36; Mexico, UN Doc. A/41/PV.53, p. 76-77; Nicaragua, UN Doc. A/44/PV.77, p. 29-30; Yemen, UN Doc. A/42/PV.68, p. 28; Zaire, UN Doc. A/41/PV.53, p. 87). More generally, the adoption of those resolutions was given the meaning of a collective, institutional action in support of less powerful States that were suffering from non-compliance with a decision of the most important judicial body of the organization. Together with the nature of the compliance obligation that is examined below, I would be tempted to say that the decision can be qualified as an important decision for the purposes of the voting procedure.

3. The object of GA compliance resolutions and the erga omnes *character of the compliance duty*

The debates between UN members also reveal interesting exchanges of views concerning the object of the five mentioned GA resolutions. In particular, they were the occasion to clarify that the GA was asked to focus on *compliance* with ICJ judicial decisions and not on the obligations being at the basis of such ICJ pronouncements (see A. TANZI, 'Problems of Enforcement of Decisions of the International Court of Justice and the Law of the United Nations', *Eur. Jour. Int. Law,* 1995, p. 599). Thus, a distinction was maintained, for instance, between the right to consular assistance and the breach of the Court's *Avena* judgment affirming such a right. The object of the GA resolution was not the right to consular assistance *per se* but the instrumental duty to comply with ICJ decisions. In other words, the GA focused on the compliance duty that member States have under Article 94 (1) of the UN Charter (see the views expressed by Cuba, UN Doc. A/43/PV.36, p. 22; Colombia, UN Doc. A/42/PV.68, p. 26-27; Nicaragua, UN Doc. A/41/PV.53, p. 52; and Singapore, UN Doc. A/73/PV.63, p. 5), and not on the bilateral legal relation at the basis of the Court's ruling. What is relevant is the material conduct following the decision of the Court and its consistency with that decision.

This could provide an additional confirmation of the GA power to deal with such issues. The reason is that the GA practice does not deal with the enforcement of ICJ decisions, which Article 94(2) entrusts with the SC. An underlying distinction between compliance and enforcement appears to be maintained in the division of labour between UN principal bodies, as will be discussed below. But the aspect that should retain our attention here is the special meaning that GA members seem to attach to the obligation dictating compliance with the Court's decisions. A very large number of opinions expressed during the debates considered that this was an obligation owed to the international community as a whole. Three main arguments have been put forward.

First and foremost, compliance with the decisions of the principal judicial body of the UN has been regarded as a matter of concern of all States in view of the importance of the ICJ judicial function. As put forward by Colombia, «*we believe that non-compliance with a judgement, any judgement, not only entails a refusal to restore respect for the law, but also promotes the belief that the body which handed down the judgement did not have the authority to impose it. In either case, the result is a matter of concern for the international community*» (UN Doc. A/44/PV.77, p. 19-20). This position was echoed by Cuba affirming that «*The United States Government must comply with [the ICJ's*

judgment] provisions, not only because that is its obligation to the Nicaraguan people by virtue of that Judgment, but also because its compliance is a commitment to the international community as a whole» (ibid., p. 27).

The second aspect that received ample support was the institutional role that the GA was to play in fostering international justice. Debate and passing of resolutions at the GA were seen as forms of necessary institutional cooperation between the UN judicial and political bodies. Resolutions asking for compliance with ICJ decisions were regarded as expressing the "collective conscience" of the international community (UN Doc. A/42/PV.68, p. 14-15). And the breach of such GA resolutions was considered to display «*contempt for* […] *the expressed views of the international community*» (ibid., p. 12-13).

Last but not least, a recurring argument for supporting the action of the GA was the exclusion of the bilateral character of the obligation to comply with ICJ decisions. The point is well summarised by Mexico: "Non-compliance with judgments issued by the International Court of Justice — the principal judicial organ of the Organization — is not merely a concern at the bilateral level but, rather, a violation of the rule of international law that has a profound impact on the United Nations system as a whole" (UN Doc. A/73/PV.63, p. 1, but see also UN Doc. A/41/PV.53, p. 75-76). The position of Colombia explains why "this is a question of principle going beyond bilateral disputes": «*It refers to the guarantees that all States must have that the international legal order shall prevail in the international community and not the law of might is right*» (UN Doc. A/41/PV.53, p. 91; for a similar view of Brazil see UN Doc. A/73/PV.63, p. 2). Correspondingly, States that voted against or abstained explained that their position was – at least in part – due to the fact that the adoption of GA resolutions was regarded as an (inappropriate) intervention in a bilateral dispute (see infra).

A fourth aspect can be taken into consideration. Each and every resolution adopted by the GA included a preambular clause recalling that: «*under the Charter of the United Nations, the International Court of Justice is the principal judicial organ of the United Nations and that each Member undertakes to comply with the decision of the Court in any case to which it is a party*».

All things considered, it seems reasonable to conclude that the GA regarded the obligation set in Article 94(1) of the UN Charter as an *erga omnes* (*partes*) obligation to comply with ICJ decisions (for the imperative character of that obligation see the position of Cameroon, UN Doc. A/42/PV.68, p. 18). This special character played a role in justifying the power of the GA – a body that sees itself as representing the international community as a whole – to act in furtherance of compliance with ICJ judicial decisions.

In addition, that character may have other legal consequences. In particular, it could broaden legal standing before the Court. Assuming that the obligation to comply with ICJ decisions is of concern of all states, its *erga omnes* (*partes*) character should imply that "all States can be held to have a legal interest" in its respect (*Barcelona Traction, Light and Power Company, Limited*, Judgment, *ICJ Reports* 1970, p. 3, para 33). This seems fairly consistent with the recent case law of the Court. Thus, the Court should be able to recognise that any UN member State is entitled to bring a dispute properly defined in terms of breach of Article 94(1) of the Charter and concerning compliance with a previous judgment before the Court. The definition of the dispute would be essential for the Court to retain jurisdiction (see *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v Colombia)*, Preliminary Objections, Judgment, *ICJ Reports* 2016, p. 3, para. 109), but the main obstacle arguably remains the identification of the jurisdictional basis for a dispute having such a subject-matter.

When looked at from the bench, the practice of the GA also raises the question of the value the ICJ should recognise to GA resolutions, that all ascertain – more or less directly – the breach of ICJ judgments (see G. GAJA, 'The Impact of Security Council Resolutions on State Responsibility', in G. Nolte (ed.), *Peace through International Law. The role of the International Law Commission*, Dordrecht, 2009, p. 53-60). The *Nicaragua* resolutions include a preambular clause according to which, since the judgment was rendered, the US «*continued financing* […] *military and other activities in and against Nicaragua". The Avena resolution "considered that, to date, neither revision nor reconsideration has been granted to the Mexican nationals included in the Judgment of 31 March 20*04». These are not judicial precedents binding for the Court, as they regard questions of fact. However, in case the Court were seized of a dispute concerning the breach of obligations affirmed in a previous judgment it is difficult to see how the Court would not duly take into account the position of the vast majority of the international community as reflected in the GA resolution when addressing the related legal issue of compliance with the previous judgment.

4. The relation between the GA and the SC

The practice of the GA concerning compliance with ICJ decisions is also interesting from the standpoint of the relation between the GA and the SC and the way in which it should be conceived in connection with the issues covered by Article 94. Two main aspects will be analysed concerning the existence of a possible coordination – both substantive and procedural – between the GA and the SC.

a) Substantive coordination: compliance v. enforcement

The first question is whether there is substantive coordination between the two UN main bodies and especially whether practice reveals a division of labour concerning paragraph 1 and paragraph 2 of Article 94 of the UN Charter. One possibility is that the different role that the GA and the SC can play rests on the distinction between compliance (paragraph 1) and enforcement (paragraph 2) of ICJ decisions. Substantive coordination would allow both the GA and the SC to exercise their powers to ensure compliance with ICJ decisions, whereas the SC would have exclusive competence to adopt enforcement measures. This criterion of substantive coordination is suggested by the practice of the GA.

The debates that led to the adoption of the five resolutions examined above can be read as premised on the distinction between the collective character of the duty to comply with ICJ decisions – which fell under the competence of the GA – and the bilateral character of the legal relation arising under the Court's decisions – which could be the object of enforce measures by the SC alone. True, GA members did neither explicitly say that the GA was not empowered to adopt enforcement measures, nor did they posit a rigid distinction between compliance and enforcement of ICJ decisions. However, a certain division of labour between the SC and the GA – according to which only the SC could adopt enforcement measures that directly affect the bilateral legal relationship between the parties to the dispute before the Court, on the one hand, and the GA could call for compliance with the ICJ decision in the interest of the entire international community, on the other – can be read between the lines of the debates at the GA.

First, the understanding that the legal relations underlying the draft GA resolutions had a bilateral character was invoked by States that either voted against or abstained. The

message they intended to convey seemed to be that the GA should not have dealt with such issues because they could only prompt the intervention of the SC. Israel, for instance, explained that it «*voted against resolution 73/257 because Israel does not want to intervene in what we regard as a bilateral issue that should be resolved between the two sides. Therefore, we believe that recourse to the General Assembly is inappropriate and unwarranted in such circumstances*» (UN Doc. A/73/PV.63, p. 4; see also the explanation given by Namibia for its abstention, UN Doc. A/73/PV.63, p. 5).

Second, the majority of States emphasised the fact that the object of those resolutions was compliance with the Court's judgements and indirectly with the international law rules applied by the Court. The interventions pointing out the collective character of the duty to comply with ICJ decisions have been recalled above. This shows that the concern of the GA basically was the protection of the ICJ judicial function, the UN legal framework, and more generally of the international legal order rather than the bilateral legal relation between the two States that had appeared before the Court (see *supra* Paragraph 3, and UN Doc. A/43/PV. 36, p. 32-33; and UN Doc. A/44/PV.77, p. 21).

Third, the very narrow focus of GA resolutions was criticised. Especially, the Netherlands justified its abstention from vote with the incomplete character of GA resolutions. In its opinion, the GA should have done more, in particular it should have called for acceptance by States of the ICJ compulsory jurisdiction. While the distinction between compliance and enforcement or between bilateral and collective relations was not further elaborated, the Netherlands expected the GA to go beyond a mere call for compliance and to adopt measures that would have fostered respect with the ICJ decision (UN Doc. A/43/PV. 36, p. 37). A similar call for a wider recognition of the Courts' compulsory jurisdiction was made by Colombia (UN Doc. A/44/PV.77, p. 18). This may reveal *a contrario* that consensus among GA members could only be found on the power of the GA to ask for respect of the collective obligation on compliance.

While this interpretation of the debates remains subjective, the resolutions adopted by the GA clearly show that their content was limited to a call for compliance and that no concrete measures aimed at ensuring respect of the bilateral obligations between the parties to the dispute were included therein.

To reach a conclusion concerning substantive coordination is therefore a delicate matter. While it could be tempting to say that the GA seems to act according to an implicit division of labour with the SC, future adoption of measures by the GA going beyond mere calls for compliance cannot be totally ruled out. The fact is that even modelled on Article 11(2) of the Charter the division of labour between the GA and the SC remains uncertain and the practice of the SC does not provide a real confirmation of this division either.

Indeed, when searching for criteria of substantive coordination between the GA and the SC, one would immediately think of Article 11(2). As interpreted by the ICJ, Article 11(2) reserves exclusive power to the SC for the adoption of "coercive action" (*Certain expenses of the United Nations (Article 17, paragraph 2 of the Charter)*, Advisory Opinion, *ICJ Reports* 1962, p. 163-164), while the GA remains empowered to adopt any other type of measures. First, it is unclear whether this model can be applied to coordinate the action of the GA and the SC in the different context concerning compliance with ICJ decisions. Substantive coordination under Article 11(2) is limited to the maintenance of international peace and security. A resolution calling for compliance with ICJ judgments might, but does not necessarily involve, the maintenance of peace and security. Second, if the model of substantive coordination under Article 11(2) is based on the notion of "coercive action", there is disagreement on the

type of measures the SC can adopt under Article 94(2). As a consequence, the model of Article 11(2) would lead to different results when applied to the context of Article 94(2). Two situations can be envisaged. On the one hand, if action the SC can take under Article 94(2) is always regarded as enforcement action, using Article 11(2) as a model for substantive coordination between the GA and the SC risks to exclude any type of action by the GA that is not confined to compliance measures. On the other hand, SC's action under Article 94(2) can be understood as covering both "coercive" and other types of measures. In this case, the model of Article 11(2) would not prevent the GA from taking more concrete enforcement "action" but would certainly exclude "coercive action". Arguably, this second scenario is more in line with the decisions the GA may take under Articles 5 and 6 of the Charter or the measures it may recommend under the *Uniting for peace* resolution.

Unfortunately, the practice of the SC offers no clear indication on the type of measures that can actually be adopted under Article 94(2). As a consequence, it hardly confirms a division of labour between the GA and the SC. Only in two occasions did the SC adopt measures "in connection with" Article 94. In 1993, resolution 819 established a safe area in Srebrenica. The sole connection with the parallel ICJ judicial activity was mention made in a preambular clause to the adoption by the Court of an order on provisional measures in the proceedings that opposed Bosnia and Serbia (FRY at that time). The resolution made reference to Chapter VII as its legal basis. Therefore, it remains doubtful whether the resolution was a measure aimed at enforce the ICJ order under Article 94(2) (see Ch. TAMS, *supra*, para. 53). In 1994, the SC adopted resolution 915 which regarded measures «*to assist the parties in implementing the judgment of the International Court of Justice concerning their territorial dispute*». But those measures were based on the agreement concluded by the parties and not directly on the Court's delimitation judgment (*Territorial Dispute (Libya/Chad)*, Judgment, *ICJ Reports* 1994, p. 6).

b) Procedural coordination: priority v. subsidiarity

The second question is whether there is procedural coordination between the two main bodies when they act to ensure compliance with ICJ decisions, and especially whether practice reveals a priority of the SC's action and a corresponding subsidiarity of the GA intervention.

During the debates at the GA, this argument was put forward only once. After having admitted that the GA was empowered to discuss compliance with ICJ decisions, Slovakia added that: "The subsidiary nature of that competence is underlined by the Charter, which, in Article 12, paragraph 1, provides that recommendations by the General Assembly may be made only provided that the Security Council is not exercising its functions in respect of a given situation" (UN Doc. A/73/PV.63, p. 3). This was an isolated position before the GA. And the evolutive interpretation given by the ICJ to Article 12 as a limit to the action of the GA is well-known (*Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, *ICJ Reports* 2010, p. 403, paras. 23-24 and 41-42; Article 12 is not seen as an obstacle to GA's action to ensure compliance with ICJ decisions by Schulte, *supra*, p. 67).

Therefore, caution is again recommended. On the one hand, the Charter does not explicitly establish priority in SC intervention (see J.J. QUINTANA, *Litigation at the International Court of Justice. Practice and Procedure*, Leiden/Boston, 2015, p. 612). On the other hand, the practice examined above was adopted in two different situations. In connection with the

Nicaragua case, the intervention of the GA was indeed requested only after having failed to obtain the adoption of a resolution by the SC. Nevertheless, the more recent debate concerning compliance with the *Avena* judgment shows that the GA can address cases in which intervention of the SC has not been tested, and its inaction is the most likely scenario. Whether this is enough to confirm reliance on a legal criterion of procedural coordination remains a conjecture.

5. Conclusions

The foregoing analysis prompts three main conclusions.

First, the GA is empowered to address compliance with ICJ decisions and to adopt resolutions in that respect, despite the silence of Article 94. This power appears to be understood as part of the broader institutional role the GA plays in discussing matters of concern of the entire international community and in ensuring an institutional balance at the UN level. It is not to be excluded that in the future the involvement of the GA in similar matters could become more frequent, especially if other UN main bodies would not exercise their powers in that respect.

Practice examined above is especially significant because it unveils the reasons used to justify this power of the GA. Among early commentators, it was hard to find views more articulated than those giving for granted such power on the basis of the political nature of the GA, as opposed to the judicial nature of the ICJ. Premised on the existence at the international level of a separation of powers between judicial and political bodies, this idea considered enforcement of judicial decisions as naturally entrusted with political bodies (O. SCHACTER, *supra*, p. 24; S. ROSENNE, *supra*, p. 248). Apart from the difficulty to apply such a separation of powers at the international level, the debates among GA members reveal a different approach which is rather based on the collective interest involved in compliance with a judicial decision, a collective interest that would justify the intervention of the GA.

Second, the foregoing analysis shows the importance of a methodological distinction between three aspects: 1) the bilateral obligations arising under ICJ decisions, 2) the collective duty to comply with such decisions, and 3) the measures that can be taken to implement those decisions. They may correspond to different powers of action accorded to different bodies and thus deserve to be examined separately. The power of the GA has been in practice limited to compliance with ICJ judgments. The GA has generally adopted enforcement measures of advisory opinions only (see M.M. ALJAGHOUB, *The Advisory Function of the International Court of Justice 1946-2005,* Berlin/Heidelberg, 2006, p. 228-235).

However, the distinction between compliance and enforcement should be accorded a purely descriptive function, not a prescriptive one. The practice of the GA reveals that what matters more than a rigid distinction between compliance and enforcement is the distinction between situations involving purely bilateral relationships and situations of a collective concern. The latter ones are regarded as falling under the purview of its powers even though they are the object of ICJ judgments. Thus, although judgments adopted by the Court regard purely bilateral matters, the GA can nevertheless urge that they be complied with because of the multilateral structure of the Charter and the collective interest of all Members in effective compliance, and ultimately respect of the law. It is not excluded that in the future the GA would adopt measures going beyond mere calls for compliance with ICJ decisions.

A much more hesitant conclusion can be advanced concerning the precise division of labour between the GA and the SC on such matters. Although a possible coordination –

with certain types of measures possibly reserved to SC action and with a relative priority accorded to SC action – can be discerned from the examined practice, the latter remains too limited to indicate a clear line of conduct on the part of the UN main bodies when action is required to ensure compliance with ICJ judgments. The matter calls for further analysis.

BEATRICE I. BONAFÉ