



The ICJ 1945-2001: Empirical Findings about its Performance and Recommendations for an Improvement of its Efficiency

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Abstract

The article is written from a sociological perspective applying methods and theories of social science, as the crucial question of the willingness of sovereign states to recognize international jurisdiction and to comply with judgments is not so much a legal one as a (power) political one. It focuses on the objective of settling international disputes in a peaceful manner guided by the norms of International Law by utilization of International Courts, especially the ICJ. The numerous aspects of the jurisdiction of the ICJ subjected to analysis include the competences of the Court, the nature of matters in dispute and the role of parties to a dispute. Structural analysis is carried out of all 100 contentious cases before the ICJ up to 2001. The results of analysis show that states are far from possessing a positive disposition towards international jurisdiction and this is reflected in their limited willingness to comply with international law. The fact that a state is democratic does not necessarily mean it will be friendly towards international jurisdiction. Proceedings at the ICJ demonstrate that compliance with judgment does not depend on the type of political system in a state, and is not a factor of the state's power or its status within international alliances. On the basis of empirical analysis, the article argues in favour of reforming the current system of international jurisdiction. Since states frequently are not prepared to comply with international law voluntarily, the article proposes various measures to enhance the powers of International Courts in order that they may better induce states to participate in court proceedings and comply with court decisions. The authors i.a. call for the introduction of compulsory jurisdiction and the establishment of institutions capable of enforcing judgments.

Keywords *International Jurisdiction, Peaceful Conflict Settlement, International Court of Justice, Peace through Law.*

Introduction

If parties to a conflict make use of and accept decisions of international courts, these courts can contribute, as instruments of peaceful conflict resolution, to a 'civilization of conflict resolution'. The critical question therefore is under which conditions these institutions can develop positive effects. Since no effective global authority equipped with superior means of coercion that could guarantee compulsory jurisdiction exists,

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the creation of the conditions required for the establishment of a successful international jurisdiction depends to a great extent on the willingness of disputing states to voluntarily recognize jurisdiction and sacrifice a substantial part of their sovereignty. The answer to our question lies in the attitude towards international jurisdiction of sovereign states eager to maintain their interests and to avoid foreign powers or third parties (like courts) disposing over them. Hence the question is not so much a legal one as a (power) political one, which must be answered by the application of social science theories and methods. A systematic empirical 'inventory' of the system of international jurisdiction is required that explains in particular the system's deficits and thereby shows the starting point for its reorganization.

The International Court of Justice (ICJ), the United Nations' principal judicial organ, represents the most important jurisdictional institution for the peaceful settlement of international disputes on a global scale. An empirical analysis of its performance is particularly suited to demonstrating the conditions under which international jurisdiction can function successfully.¹

The following article begins with a discussion of the problems with an empirical analysis. These problems are primarily caused by the relatively limited number of cases before the ICJ, and they stand in the way of highly desirable statistical conclusions being drawn. With these problems in mind, the article turns to the central issue of the conditions under which the ICJ is able to function successfully, which fundamentally depend on the parties to a conflict and the matter of the dispute. The most important variable is consistently the willingness of state parties to refer disputes to the court, to take part in its proceedings and to comply with its judgments, a variable we call a 'court-friendly attitude'. At the end of the empirical part of this article a conclusion from the empirical findings depicted is drawn. Finally, some proposals for remedying the discovered shortcomings will be made.

Methodological Problems of a Statistical Analysis

Our empirical review and analysis of the 100 disputes referred to the International Court of Justice until 2001 cannot be equated with a strictly statistical review and

¹ Materials from the ICJ cases and other relevant documents (the statute etc.) as well as a register of ICJ-publications can be found at <http://www.icj-cij.org/>. See also: ICJ, *The International Court of Justice* (1996); International Court of Justice, *Reports of Judgments, Advisory Opinions and Orders* (1997) and previous volumes); United Nations Department of Public Information (ed.), *Yearbook of the United Nations* (1998 and previous volumes); International Court of Justice, *Yearbook* (1997-98 and previous volumes). See also: R. Bernhardt (ed.), *Encyclopedia of Public International Law* (1992), for further references. For analyses of international jurisdiction and international arbitration see P. Schneider, *Internationale Gerichtsbarkeit als Instrument friedlicher Streitbeilegung* (2003); P. Schneider et al (eds), *Frieden durch Recht* (2003). About the conflicts see F.R. Pfetsch, *Konflikte seit 1945. Daten – Fakten – Hintergründe* (1991); F.R. Pfetsch, *Globales Konfliktpanorama 1990-1995* (1995); K.J. Gantzel/T. Schwinghammer, *Die Kriege nach dem Zweiten Weltkrieg, 1945-1992: Daten und Tendenzen* (1995); Arbeitsgemeinschaft Kriegsursachenforschung (AKUF), *Das Kriegsgeschehen 2000: Daten und Tendenzen der Kriege und bewaffneten Konflikte* (2001) and previous volumes).

analysis. Among other reasons the total number of cases is relatively small, making coincidence a factor of some weight.

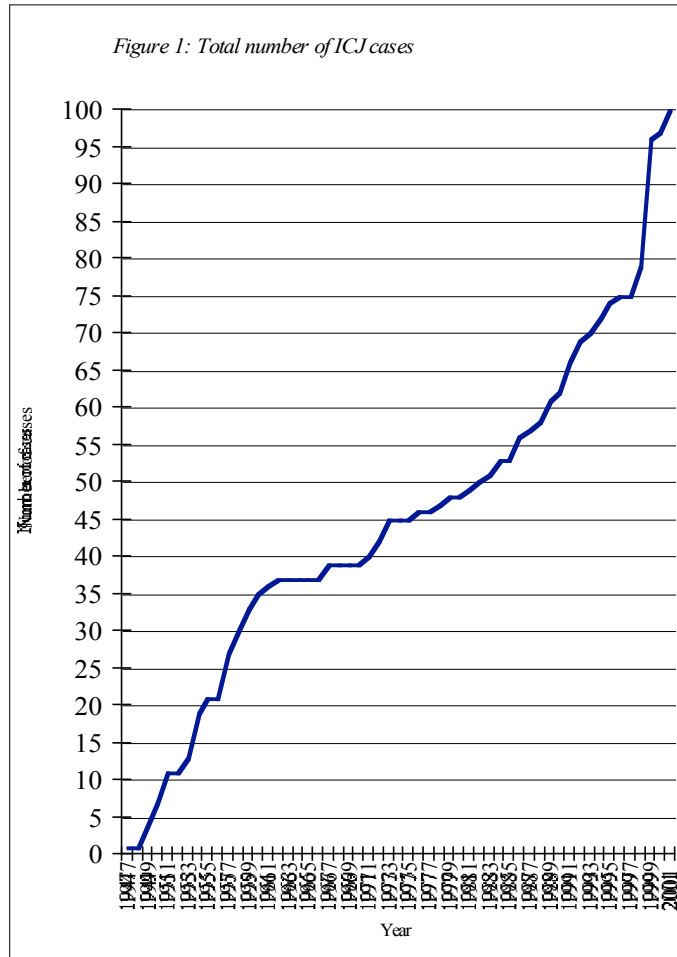
Nonetheless, certain empirical trends can clearly be discerned. These trends shall be presented with all due caution.

Functioning Conditions of the ICJ

The ICJ's prospects of success as an instrument of peaceful conflict resolution crucially depend on the behaviour of states as parties to a dispute, because the level of obligation and compulsion characterizing the international judicial system is highly insufficient. There is no ipso facto obligation for a state to take part in proceedings when one party files an application; in other words, the court enjoys no compulsory jurisdiction independent from the will of the states or the parties to its statute. Moreover, the means to execute a judgment are inadequate. If the losing party does not voluntarily comply with the judgment, the only recourse for the victorious party is to the UN Security Council, which then has complete discretion to decide whether or not it is necessary to take action (i.e. to make recommendations or to decide upon measures to give effect to the judgment). The corresponding Security Council resolution can be vetoed by its permanent members. (On the sole occasion that the Security Council considered such an application, the United States thwarted Nicaragua's demands for measures against it.²)

For these and other reasons the ICJ system depends on the 'court-friendly attitude' of states. This attitude is determined partly by the willingness of the parties to the statute to use the court at all, but more by their willingness to participate in proceedings as respondent (ad hoc in a singular case, by accepting the 'optional clause' of the ICJ statute or by signing an agreement on peaceful conflict settlement or other treaties with a corresponding arbitration clause) and their willingness to comply even with unwelcome judgments.

² We refer to the case *Military and Paramilitary Activities in and against Nicaragua* (1984-91), in which Nicaragua filed an application seeking termination of the U.S. intervention in its civil war and obtained a favourable ICJ judgment on the merits. See J. Crawford, 'Military Activities Against Nicaragua Case: Nicaragua v. United States', III *EPIL* 371 et seq. and H. Mosler in B. Simma (ed.), *Charta der Vereinten Nationen. Kommentar* (1991) 956.



As figure 1 show, the willingness of states to use the ICJ has developed very irregularly over time: Rapid growth in the number of cases (1947-60) in the court's early days was followed by a much slacker period of relative stagnation with few new cases (1961-83). In the third and so far most recent phase, the number of cases has grown almost exponentially (1984-2001). It took 35 years – from 1947 until 1982 – for the first 50 cases to come before the court. The following 50 were brought in fewer than 20 years (1983-2001).

The ICJ has thus registered a clear upwards tendency in the frequency of its use, following the end of the Cold War. In an era of low or declining international tensions,

states appear to have recourse to the court more often than in times of greater strife. On the other hand, the increasing use made of the ICJ by the world's states can be traced back to the fact that more and more areas are ceasing to be the responsibility of nation states and are becoming the concern of the international community, while growing numbers of bi- and multilateral agreements are being reached, which entitle the state parties to a treaty to submit legal disputes to the ICJ or other courts and tribunals.

The outstanding importance of the acceptance of the role of the respondent as an indicator of a 'court-friendly attitude' and adherence to the law can be best understood by applying *game theory* to the following characteristic situation. The applicant state generally articulates a claim against the respondent state or claims a judgment favorable to it. The respondent can only (the possibility of a counter-claim being excluded) try to reject the claim. The applicant in this 'zero-sum game' therefore has nothing to lose, even if the court's judgment is not the one that it hoped for. The respondent – whatever the judgment – never has anything to gain. In other words, in their best case-scenarios, the applicant will secure a victory, whereas the respondent can only avoid a loss. In the worst case-scenario for each, the applicant does not gain anything, but the respondent suffers a loss. It should come as no surprise that a 'rational actor' facing this (0/+ vs. 0/-) combination of risks and opportunities will be unlikely to play this 'game' voluntarily when it has the slightest doubt about the outcome, let alone when a defeat seems inevitable. Accordingly, it is particularly interesting to examine which states are still willing to participate in this process and under which circumstances.³ The question itself suggests the hypothesis that democracies and states under the rule of law are rather inclined to agree to this kind of peaceful conflict settlement due to the character of their social and political systems. They are generally regarded as those actors that show a strong 'respect for the law'.⁴ In addition, one could hypothesize that a state's foreign relations are of particular importance, that is to say the degree to which it is the 'enemy' or 'friend' of the other party to a conflict.

³ If actors are assumed to be guided by (egocentric) rationality, it is necessary to find an explanation for the 'enigmatic' common situations where actors accept the disadvantageous role of the respondent. Game theory offers an explanation by drawing our attention to the phenomenon of 'iterated' games, i.e. sequences of games containing repeated characteristic situations that provide the chance for actors to change roles. In the next phase of the game, the respondent may become the applicant and may expect that the original applicant will follow its example and accept the disadvantageous role of the respondent (expectation of reciprocity). Beyond game theory, other factors may encourage a state to accept international jurisdiction even in the aforementioned role. Such factors include the existence of imminent negative sanctions or the promise of positive sanctions (a 'package deal') made by the other party to the conflict, a hegemonial power or an international organization that both parties are members of. This list of possible factors is not meant to be exhaustive.

⁴ Political scientists have come to assume that democracies and states under the rule of law, being accustomed to settling internal conflicts by peaceful, e.g. judicial means, will be inclined to extend this habit to their foreign relations. See i. a. B. Russett/J.R. Oneal, *Triangulating Peace. Democracy, Interdependence, and International Organization* (2001).

As applicants, one could above all imagine smaller states. These states may tend to choose legal recourse to the ICJ, as they lack alternative means of protecting their rights.

The matter of the dispute can be identified as another important determinant of a 'court-friendly attitude'. The ICJ's rulings can work fundamentally different effects. It is one thing, for example, to be involved in a case concerning a small payment of compensation to a foreign national; it is another to put at risk a claim on a territory abundant in natural resources. That is why the degree of inclination towards international law and jurisdiction correlates significantly with the dimensions of the potential damage. This dynamic will likewise be examined in detail later.

As an interim finding, one might note that the essential parameters determining the prospects of an effective jurisdiction for the International Court of Justice have been identified, namely the jurisdictional system and its specific features, the actors and their relevant characteristics as well as the matters of dispute before the court.

Friendliness of States to International Jurisdiction

As a first indicator of their 'court-friendly attitude' one can consider the willingness of states to accept the optional clause of the statute of the ICJ (Art. 36 Para. 2) recognizing the court's jurisdiction as compulsory. The results are not very encouraging. For several decades, the ratio of parties to the statute (almost exclusively UN member states, being such parties ipso facto) subjecting themselves to the optional clause (often with reservations) has remained approximately one third. The ICJ's functional precursor, the Permanent Court of International Justice (PCIJ) of the League of Nations era, enjoyed at times over 80 percent acceptance among potential parties. (See Table 1.)

Table 1: Percentage ratio of parties to the statutes of the Permanent Court of International Justice and the International Court of Justice accepting the optional clause concerning compulsory jurisdiction⁵

Permanent Court of International Justice			
1925	64%	1935	85%
1930	69%	1940	64%
International Court of Justice			
1945	45%	1975	31%
1950	57%	1980	30%
1955	50%	1985	28%
1960	46%	1990	33%
1965	34%	1995	32%
1970	36%	2000	33%

⁵ Source: Own calculation on the basis of the data in ICJ, *The International Court of Justice* (1996), 42 and the sources in footnote 1.

At first sight, it may seem surprising that some non-democracies have also accepted the optional clause, whereas some democracies have refused to (e. g. Germany) and others have given notice of termination (e. g. USA, France). The number of democratic and non-democratic states accepting the optional clause is in fact roughly the same. Considering that real democracies have been (and still are) a minority globally, however, the ratio of democracies accepting the optional clause is greater than that of non-democratic states. The conclusion may be drawn that democracies are comparatively more inclined to international jurisdiction, so far as one accepts this specific kind of obligation as an indicator.

The ICJ's practice shows a similar pattern: non-democratic states also appear before the court as applicants and respondents. The quantitative difference between democratic and non-democratic states that have been involved in cases before the ICJ is not significant. A more precise calculation would be problematic, since the inclination of Yugoslavia and Congo to submit cases to the court (14 actions) is skewing statistics considerably. On this empirical basis, it can be stated that democracies as a whole are involved in ICJ cases proportionally more often, both as applicants and respondents.⁶ This observation does not say enough, however, about their friendliness towards international jurisdiction, as it does not say anything about their willingness to comply with a judgment. The same holds true for non-democracies. The question of compliance will be discussed below.

The question of whether major powers as well as smaller powers appear as applicants before the court must be handled even more carefully. It is not surprising that smaller powers are involved more often, both as applicants and respondents, because their number is much higher. What is really interesting and possibly surprising is that even the biggest powers often make use of the ICJ, but only those that can be described as democratic. Neither the Soviet Union resp. Russia nor the People's Republic of China has ever been involved in cases as applicants; several claims were filed against the USSR, but it always refused to accept the court's jurisdiction.⁷ Among the smaller powers, Eastern European (after the beginning of the Cold War) and to a lesser extent East Asian states avoided the court. Eastern European states' avoidance was a function of their social system and their dependence on the Soviet Union as a hegemonial power. 'Third World' states, especially African, kept away from the court, because they assumed – like the communist bloc – that the ICJ was an instrument of the West or the former colonial powers.⁸ This attitude has shifted massively in the ICJ's favour. In no

⁶ This observation also applies to the comparison between developed states and developing countries, which is not surprising, since democracies are much more likely to be found in the developed world.

⁷ Cf. J.A. Frowein, 'The International Court of Justice' in R.-J. Dupuy (ed.), *Manuel sur les organisations internationales/A Handbook on International Organizations* (1998) 165; H.-J. Schlochauer, 'International Court of Justice', II *EPIL* 1093, and I. Seidl-Hohenveldern, *Völkerrecht* (1997) 337.

⁸ For more on these and other causes, see H. Neuhold, 'Das System friedlicher Streitbeilegung der Vereinten Nationen' in F. Cede/L. Sucharipa-Behrmann (eds), *Die Vereinten Nationen. Recht und Politik* (1999) 62; K. Oellers-Frahm, 'International Court of Justice', II *EPIL* 1104 et seq.

small part, the change is explicable by a change in the understanding of state sovereignty. State sovereignty as previously understood hindered states from applying to the ICJ or accepting its jurisdiction, because participation was associated with 'subjection' to an alien jurisdiction.

Table 2 shows that the most powerful democratic states stand atop the 'ICJ charts', measured by the frequency of their involvement into cases before the ICJ. (The fact that Yugoslavia managed on practically a single day to endanger the positions that they had achieved over decades shows the power of coincidence and illustrates the precarious character of such a ranking.) A plausible explanation for the fact that major powers are more often involved in ICJ proceedings is that they are more often involved in international political conflicts than other states. (Put bluntly, you are more likely to be engaged in disputes if you are a global political player than if you are, say, Switzerland.)

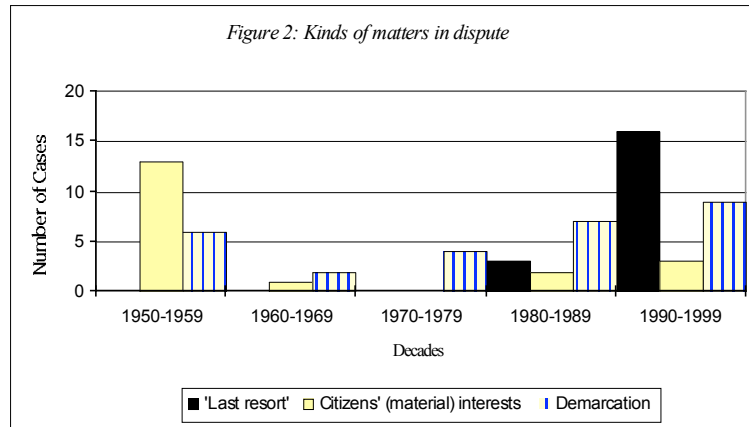
Table 2: States most frequently involved in ICJ cases

	Rank	Total number of cases	As applicant	As respondent	By special agreement
USA	1	20	9	10	1
UK	2a	13	6	6	1
Yugoslavia	2b	13	11	2	-
France	3	11	5	5	1
Libya	4a	6	2	1	3
Germany	4b	6	2	2	2
Nicaragua	4c	6	5	1	-

The matters of dispute and their subjective meaning to those concerned are an important indicator of a 'court-friendly attitude'. There is a broad range of matters, from disputes of a fundamental importance to relatively marginal matters. Quantitatively speaking, disputes about the delimitation of land or maritime frontiers or boundaries (continental shelf, exclusive economic zones and fishery zones) are highly represented among cases. Likewise, since the commencement of Yugoslavia's action against ten NATO States during the air-strikes of 1999, the number of cases that we would characterize as 'last resort' increased (Nicaragua, Bosnia and Herzegovina, Yugoslavia). 'Last resort' means that there is no other remedy for a state against military intervention, e. g. because no action is taken by the UN Security Council.⁹

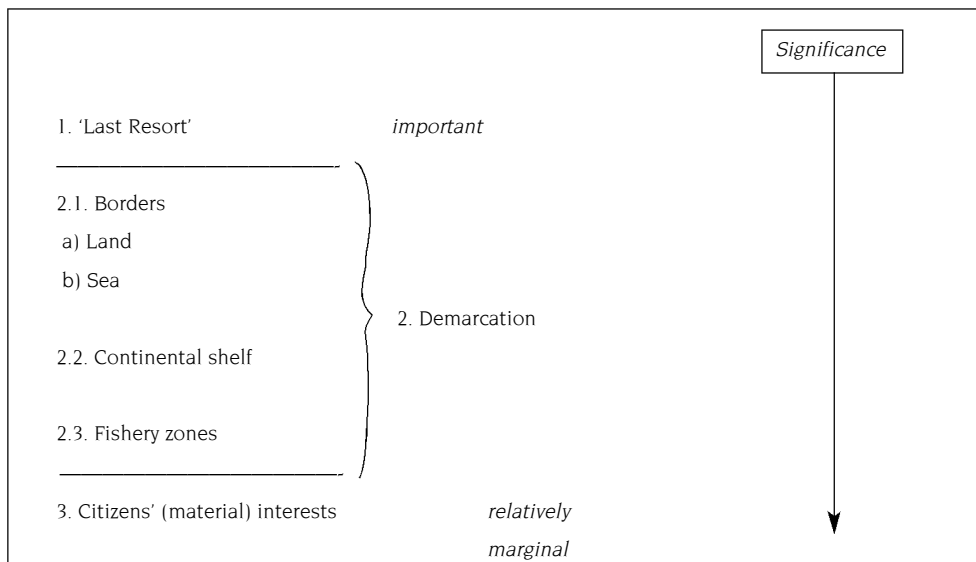
⁹ See the cases listed in Table 5. Nicaragua sought aid and protection against an armed intervention by the United States in its civil war during the 1980s; Bosnia and Herzegovina was confronted with attacks directed by the Yugoslavian government during the war of secession, conducted by Bosnian Serbs; Yugoslavia in turn demanded the termination of NATO air strikes in 1999; and the Republic of Congo tried to stop African states from providing military support to opposition forces in its civil war. In all these cases, resort to the ICJ was the last and only chance to get an authoritative decision ordering the termination of the hostile acts of adversaries.

Figure 2 gives an impression of the development over time.



The importance of the category 'frontiers' should not require further explanation in light of the remarkable number of wars that have been waged over the course of border lines and territorial delimitations. The continental shelf possesses a remarkably high economic importance. (It is in this zone, for example, that more than 90 percent of the world's off-shore oil reserves are believed to be located.) Fishery cases do not in general lead to armed conflict, but they can provoke severe political strife, such as during the 'Cod War' between the United Kingdom and Iceland in the 1970s. (Iceland's economy at the time was vitally dependent on its fishing industry.)

Figure 3: Matters in dispute and their significance



Of minor political significance are other issues and cases, e.g. regarding the protection of economic and other rights of citizens of applicant states (cf. figure 3). States' willingness to appear and to take part in the proceedings before the ICJ cannot, however, be presumed even in these minor cases. Even friendly countries and allies do not hesitate to file preliminary objections that aim at questioning especially the court's jurisdiction. If a state of enmity exists between the parties, the prospects of participation tend to zero.

The really decisive question each court is confronted with, is the question of compliance with its judgments and rulings. As will be shown, the most interesting judgments are judgments on the merits in the sense of decisions on the matter in dispute, implying legal consequences for the parties. According to the ICJ's own figures, there have been 45 judgments on the merits until the year 2001, which amounted to more than merely rulings on preliminary objections or applications to intervene by third states. Frequently, however, these judgments simply stated the impossibility of reaching a substantive decision on the disputed matter. This approach is unsuitable to act as the basis of a *realistic political analysis* of the ICJ's performance: When a judgment does not bind at least one disputant to a particular course of action (whether this is acceptance of the status quo that it was one party's desire to change, or an obligation to accept a real loss of territory, resources, freedom of action etc.), their *compliance with the ruling* – in particular, that of the respondent – is not *ascertainable* on the basis of their later actions. They (and analysts) only know that the court considers itself unable to decide, and they receive no guidelines for their further conduct. Hence, rulings of this kind cannot serve as indicators of a positive disposition towards international jurisdiction. The criterion 'compliance with the court's rulings', an essential aspect in determining the existence of such a disposition, is not available in these cases. These rulings are therefore worthless for the purposes of political analysis, however interesting they may be for legal studies.

According to the stringent criteria applied here, in the 100 cases brought until the end of 2001, the ICJ has given a judgment on the merits 32 times. In 45 cases, proceedings were either terminated, ended without a ruling that decided the matter in dispute, or never opened (in 16 cases following withdrawal of the application, in 19 cases by the ICJ itself owing to lack of jurisdiction or inadmissibility; in ten cases no proceedings were instituted). In 23 pending cases, a judgment on the merits had not yet been reached.

Table 3: Judgments on the merits

Total number of cases	100
Judgments on the merits issued	32
Cases not opened, terminated or concluded without judgment on the merits	45
Cases pending	23

Of the 32 judgments on the merits issued, 26 have been complied with and six have not been complied with (since 1986 none of the court's decisions has been disregarded): The court's rulings have thus been complied with in 81 per cent of cases. A closer look reveals that in cases where the parties appeared by special agreement (this has occurred in 14 cases, 12 of which had already resulted in a judgment on the merits) judgments on the merits have been complied with 100 per cent. Excluding these 12 from the 32 judgments on the merits given so far leaves 20 cases, with a compliance rate of 70 per cent. This rate falls to 50 per cent, however, in cases which were not brought by special agreement and in which the respondent lost.

In addition, the ICJ indicated 14 interim measures of protection (provisional measures), none of which were complied with.

Table 4: Compliance with rulings

Interim measures of protection	14 %
of which obeyed	0 %
Judgments on the merits issued	32 %
Of which obeyed (all judgments on the merits)	81 %
Compliance with rulings in cases submitted to the ICJ by special agreement	100 %
Compliance with other rulings	70 %
Compliance by the respondent when ruling unfavourable	50 %

The blanket assumption that the ICJ's rulings usually are complied with can now be evaluated more precisely. In the final instance, the only truly revealing statistic is the compliance of respondents who receive unfavorable rulings: Respondents who win their cases are of course happy to follow a ruling that does not obligate them to do anything, but rather gives them the right to continue behaving as before or to consider their previous actions as vindicated. An applicant whose action is defeated, on the other hand, is in a position that is neither more nor less favourable than before. Such a party will therefore find it easier to accept a disappointing judgment than will a respondent against whom a ruling is passed, and who is required to accept a relative deterioration of his position: Six of the 12 judgments on the merits that went against the respondent were flagrantly violated. They account for *all* violations of ICJ rulings.

Raising preliminary objections against the court's jurisdiction and an application's admissibility has become a habit. Disdain of provisional measures resp. interim measures of protection ordered by the court is a common principle. Non-compliance with judgments on the merit may sometimes have only been avoided because the judgments were not delivered for various reasons

Table 5: 'Court-hostile attitude': indicators and cases

Case	Preliminary objections**	Non-compliance with	
		Provisional measures	Judgment on the merits
United Kingdom / Albania (<i>'Corfu Channel'</i> 1947-49)	√	*	√
United Kingdom / Iran (<i>'Anglo-Iranian Oil Co'</i> 1951-52)	√	√	*
Cambodia/Thailand (<i>'Temple of Preah Vihear'</i> 1959-62)	√	*	√
United Kingdom / Iceland (<i>'Fisheries Jurisdiction'</i> 1972-74)	√	√	√
Germany / Iceland ('Fisheries Jurisdiction', 1972-74)	√	√	√
Australia / France (<i>'Nuclear Tests'</i> 1973-74)	√	√	*
New Zealand / France (<i>'Nuclear Tests'</i> 1973-74)	√	√	*
USA / Iran (<i>'U.S. Diplomatic and Consular Staff in Tehran'</i> , 1979-81)	√	√	√
Burkina Faso / Mali (<i>'Frontier Dispute'</i> 1983-86)	√	√	-
Nicaragua / USA (<i>'Military and Paramilitary Activities in and against Nicaragua'</i> 1984-91)	√	√	√
Bosnia and Herzegovina / Yugoslavia (<i>'Application of the Convention on the Prevention and Punishment of the Crime of Genocide'</i> 1993-)	√	√	*
Cameroon / Nigeria (<i>'Land and Maritime Boundary between Cameroon and Nigeria'</i> 1994-2002)	√	√	*
Paraguay / USA (<i>'Vienna Convention on Consular Relations'</i> , 1998)	-	√	*
Germany / USA (<i>'La Grand'</i> , 1999-2001)	-	√	-
Congo/Burundi, Rwanda (<i>'Armed Activities on the Territory of the Congo'</i> , 1999-2001), Uganda (1999-)	√	√	*

¹⁰ Source Analysis of the information contained in the sources cited in footnote I.

- * = no provisional measures indicated or until the end of the period examined no judgment on the merits implying legal consequences passed on the respondent
- ** = raised in a formal or informal way
- ✓ = yes
- = no

Table 5 shows that the habit of raising preliminary objections is common to both non-democratic states and democracies as well as to both small and big powers. Furthermore, it is evident that democracies can be quite stubborn even with each other (e.g. Iceland and France vs. the United Kingdom and Germany or Australia and New Zealand, respectively), even if they are essentially friends or allies. This aversion to participating in judicial proceedings or complying with orders and judgments is even stronger when the respondent state is faced with a severe infringement of coercive statutes of international law (e.g. an armed attack or genocide) that is liable in compensation.

In contrast to the legal device of preliminary objections, the disdain of provisional measures and judgments of the ICJ is a flagrant contempt of court resp. a grave breach of law. The picture drawn above does not, however, change in these categories. Even states proclaiming the rule of law do not differ from notorious 'rogue states' in their conduct: self-interest comes before morality.¹¹ The ultimate conclusion to be drawn is that in cases concerning a really relevant matter, acceptance of international jurisdiction is avoided wherever possible. If objections fail and the proceedings continue, states will refuse to appear or participate and will ignore the court's subsequent rulings and judgments.

This gloomy picture is, however, incomplete. Several counter-examples of successful conflict settlement before the ICJ prove that parties to a conflict can develop a sense of settling their disputes on important matters peacefully. This is so even if the parties had been waging wars over the matter before or even during ICJ proceedings. In other cases, (renewed) armed conflicts have very likely been avoided by the appeal to the ICJ. This latter category includes among others the cases *Honduras v. Nicaragua* (1958-60), *El Salvador / Honduras* (1986-92), *Burkina Faso / Mali* (1983-86) and *Chad / Libya* (1990-94):

1. Since the 19th century, Honduras and Nicaragua have been involved in a dispute over an area of border territory approximately 9,000 square kilometres in extent. When oil was discovered there in 1957, the importance of the area was greatly increased for both states. This led to military clashes, which ended following the intervention of the Organisation of American States (OAS). Subsequently, the dispute was taken to the ICJ, where it was resolved.

¹¹ The information compiled in Table 5 demonstrates the validity of this statement very clearly. Among the states that did not comply with judgments on the merits are Iceland and the United States on one hand and Albania, Thailand and Iran on the other. The information also demonstrates that even pretty small countries will dare to disregard binding decisions of the UN's principal judicial organ.

2. During 1969, El Salvador and Honduras fought the conflict known as the 'Football War', which cost some 2,000 lives. The catalyst and trigger of these events were football matches between the two countries' national sides. As well as the then acute problem of illegal immigration, the object of the conflict was a more than 100-year-old border dispute. Even after the cease of hostilities proper, there were still occasional frontier incidents. In the 1980s, the two parties agreed to submit the dispute to the ICJ, which ruled on the case.
3. Burkina Faso had a long-standing conflict with Mali over a strip of border territory some 5,000 square kilometres in area and notable for the richness of its mineral resources. Following repeated border clashes during the 1970s, the case was taken to the ICJ. New clashes broke out while the case was before the court, leading to the conflict known as the 'Christmas War', which left over 600 people dead. After this short interlude, both states accepted the ICJ's ruling.
4. The legal resolution of the territorial conflict between Libya and Chad over the 'Aouzou Strip' – an area of territory as large as Germany and considered rich in mineral resources – is particularly astonishing. With seizure of this territory one of its aims, Libya had for years played a major role in the civil war in Chad. After the ICJ ruled against it, Libya removed its troops from the disputed territory under UN supervision.

All cases related to border or territorial disputes over areas of strategic or economic importance that were the focus of armed conflict, which was on the verge of recurring, continued briefly or seemed about to break out.¹² It is true that given the military weakness of most of the states involved there was no threat of a major war. Nonetheless, it cannot be denied that the ICJ has had an impact on preventing or terminating wars and thus has acted as a peacemaker. The court's success in helping to delimit the continental shelf between Libya on one hand and Tunisia or Malta on the other (1978-82 and 1982-85, respectively) should not be underestimated either.

Moreover, it is an intriguing aspect of these cases that none of the parties involved could be described as a model democracy.

Empirical Conclusions

From the preceding empirical findings one can draw the following conclusion:

Both democratic states and non-democratic states make use of the International Court of Justice for authoritative dispute settlement or are involved in ICJ proceedings, albeit with different intensity.

1. With the qualifications listed above, this holds true for major and smaller powers.
2. The more important the matter of dispute the less inclined states are to settle it

¹² The territorial disputes terminated by this process had sometimes dragged on for decades, originating in the insufficient or incomplete delimitation of borders in colonial times, be it between colonies of different states or within a colony between administrative units, which later became the frontiers of independent states.

judicially, regardless of the characteristics of the parties: even states under the rule of law show contempt for the law, often flagrantly. Nonetheless, the ICJ has enjoyed some success in settling significant matters of dispute.

The 'brilliance and misery' of the ICJ are ultimately determined by the parties to the dispute, i.e. the states of the world, in the context of an outdated international system that lacks an effective global authority in respect of jurisdiction. Its main deficits in turn lie in the absence of compulsory jurisdiction on one hand and an insufficient means of enforcing judgments on the other. Another problem lies in the strict limitation of the right to be a party before the ICJ.

Remedying these deficits is of the utmost importance. Therefore we will make some proposals concerning measures for an improvement of the ICJ's performance in the next section.

Minimal Desiderata for Effective Jurisdiction

As experience has proven, the mere existence of a court is not in itself sufficient to ensure that access is provided to all groups and institutions that require legal redress. When a court does not have compulsory jurisdiction, its jurisdiction has no teeth. When it is unable to enforce its decisions, there is a risk that its decisions will be ignored. Several *minimal desiderata* for effective jurisdiction arise from the need to correct these deficits.

Capacity to Be a Party

The capacity to be a party to proceedings should be extended to include not only states but also international organisations and – where appropriate – substate groups and minorities, taking into account the fact that nowadays the vast majority of (armed) conflicts do not take place between states but rather between internal entities and their national authorities.

It could likewise be considered whether, with regard to advisory opinions, access to the ICJ should be possible for those international organisations that, alongside sovereign states, play an increasingly important role in international relations and yet do not possess appropriate rights.

The *UN Secretary General* should also be entitled to request an advisory opinion, especially to clarify the legal aspects of disputes in which the Secretary General is requested to mediate or to use his good offices. Granting an equivalent right to the *state* parties to the ICJ statute should also be considered.

With regard to the capacity to be a party to contentious cases, international organisations should generally be able to manage in the same way as states by bringing their own complaints as applicant. A different situation may hold in the case of *substanti-*

ties, such as national *minorities* in particular, which should be provided with a right of action on the obvious grounds that the contemporary conflict landscape is characterized more by domestic disputes than by confrontations between states. These may also include situations where state authority is used to prevent a substate group from exercising its will.

To enable a minority that suffers under discrimination or oppression to have recourse to an international court even in cases where extreme repressive measures make it impossible for the group to articulate its case the implementation of various options involving the 'representation' of such groups by third parties is essential. These could be called the '*patronage solution*', the '*ombudsman model*' and the '*advocate variant*'. What they all have in common is the feature that an institution would act as a proxy on behalf of a group that is in need of recourse to the court but has its hands tied. A third-party representative of this kind could act either on request from an injured party or on its own initiative.

The role of *patron protector* (in the sense of the protector or guarantor of human rights, not as a ruler of a protectorate), would best be filled by a state that has a particularly close relationship to and is trusted by the ethnic group in question, for example, owing to an ethnic affinity. The legal basis for the power of patronage would be established via a contract under international law between the patron state and the home state of the ethnic group. This contract would also define the rights of the ethnic group, on behalf of which the protector could initiate a legal action before an international court, if necessary. Under this arrangement, an infringement of the rights of the minority group would be equivalent to an infringement of the rights of the protector state, as this state would have received a guarantee that a certain legal standard would be upheld. The patron state would thus have to be treated as a *party to the proceedings*, as the infringement of the rights of the ethnic group under its protection would be considered an infringement of the protector state's own rights. Furthermore, the designation 'patron' or 'protector' should signal that the state should be seen as the champion of its protégé's interests, even if it has not necessarily been granted a formal mandate to do this by the ethnic group itself. The fact that, despite all this, the patron state does not have the right to use force on behalf of its 'protégé' is self-explanatory.

For cases that do not concern minority rights as *collective* rights but rather individual human rights, a general right to submit a case to an international court could be established for all states parties to a corresponding global convention (on the model of the European and American Human Rights Conventions). For this purpose, the establishment of a *World Court of Human Rights* could be considered, to which individuals and civil society groups should also have access.

Within the scope of human rights protection, the *ombudsman principle* appears to be more appropriate than the patronage solution, as it would guarantee the objectivity of the 'applicant' (in contrast to the subjectivity in the case of a patronage state). The

institution of ombudsman would not be a party to the proceedings and would remain impartial, because it would be established and granted its competencies by an international organisation or a multilateral treaty and, because – in accordance with the established ombudsman principle – it would have no obligation towards any party or group (or their subjective interests) but only towards objective legal principles and the public interest. In addition to the ombudsman principle, this model draws upon features embodied in international (regional) human rights commissions, which are all obliged, before becoming involved in a case, to carry out an objective evaluation of all potential infringements. At the same time, there is a duty to take action if a state party to a relevant treaty has infringed the rights of a third party in an area that is within the ombudsman's area of competence. Even in this case, the ombudsman does not act as the advocate of a particular party, but is solely engaged as the advocate (or guardian) of the law, thereby fulfilling a public function as the defender of the public interest within an international community established on the rule of law. (Hence, it would also be appropriate to speak of this model as the *advocate variant*)

Ideally, this institution would not only take action when approached or appealed to by parties who believe that their rights have been infringed but also on its own initiative, i.e. *ex officio*. This provision would establish a de facto right to initiate proceedings for failure to fulfil an obligation.

Before initiating legal proceedings, however, the ombudsman should endeavour to reach an out-of-court settlement of the issue with the state in question. Given that the threat of legal action tends to encourage the making of concessions, this is likely to succeed in many cases.

Compulsory Jurisdiction

To guarantee the effective functioning of the court mechanism, it is necessary to establish its *compulsory* jurisdiction. This would entail the creation of a legal obligation to appear before the court. It goes without saying that even in a case of non-appearance the court would have the right to pass a binding judgment on the merits.

Strategies that could help reach this goal include the following:

1. Revision of the ICJ Statute and/or the UN Charter;
2. Adopting a *global* agreement containing appropriate provisions;
3. Acceptance of compulsory jurisdiction via the voluntary accession of preferably all states to the optional clause of the ICJ Statute while waiving the reciprocity clause and reservations;
4. Authorizing the United Nations Security Council, where an international dispute is considered a threat to peace – on application by one party or on its own initiative – to order the parties to submit the case to the ICJ, in the event that the disputants do not accept the Security Council's recommendations for resolving the conflict.

Powers of Enforcement

To ensure that its decisions are implemented, any court must be provided with appropriate implementation capacities, irrespective of the fact that the law is frequently obeyed even where no threat of sanctions exists.

Implementing legal decisions requires capacities that can compel the 'immoral minority' to respect the law. There must be, in other words, an authority with the power of compulsion and appropriate instruments of compulsion.

To this effect, the United Nations Security Council could be – in contrast to the current discretionary arrangement – obliged to *act independently* to take appropriate measures to ensure compliance with court rulings. To ensure that the Security Council would not be prevented from fulfilling its obligations, it would be necessary to remove the veto right of the permanent members at least in such instances.

Another variation is for the Security Council to act *on order*. In a case of non-compliance with a decision, the ICJ itself could order the enforcement of the decision, thereby obliging the Security Council to take action. In both cases, the court decision would be executed on request of the prevailing party.

In general, the application of *economia* measures of enforcement, such as the seizure of funds held in foreign banks and other assets, should prove sufficient. In particularly serious cases, however, the application of physical force may prove unavoidable, in accordance with the principle of commensurate means. Given the far-reaching consequences of such a course of action, it would be advisable to restrict its use to cases where non-compliance with a court decision simultaneously represents a breach of the peace in the sense of the Charter of the United Nations. With regard to compulsory enforcement, the possibility should also be examined of bypassing the potentially deadlocked Security Council by, first, enhancing the role of the *Secretary General* to make enforcement his responsibility and duty.

Alternatively, a 'democratic' element could be introduced by involving the *General Assembly*. In a case of non-compliance, this body could adopt measures aimed at ensuring implementation; these would therefore have the greatest possible legitimacy. The operational implementation of the adopted measures in this scenario would also be the responsibility of the Secretary General. The problems with this scenario are the unwieldiness of the General Assembly and the fact that its resolutions have so far only a recommendatory character.

When enforcement is carried out by executive authorities – whether as a result of a court order or not – the court must provide *legal supervision* to ensure, for example, that there is no infringement of the principle of commensurate means.

Concluding Remarks

These proposals may seem ambitious – and indeed they are. The authors are well aware of this fact, and they know, that such considerable changes may – if at all – only be realized step by step on a long-term basis. Choosing the alternative of doing nothing would mean resignation, it would mean to take a fatalistic position with the consequence, that things never get changed.

This is why the authors prefer a strategy, which is in accordance with an old Chinese proverb: 'Even the longest journey begins with a single step.'