1991

Enforcing United Nations Decisions in Domestic Courts

Mary Ellen O'Connell
Indiana University School of Law - Bloomington

Let me turn now to the mobilization of shame. By "mobilization of shame," I simply mean a technique designed to apply open peer pressure within the organization, and sometimes designed to awake the interested public, to persuade a noncomplying member government to mend its ways. A few organizations have quite sophisticated mechanisms to mobilize shame. Most do it less rigorously.

The mobilization of shame as an enforcement technique is again most highly developed in the ILO. Others use it too—for example, IMO and UNESCO, but not organizations like the IMF, where confidentiality is thought to be essential in light of sensitive international money markets. Where the mobilization of shame is used, there is at least one parallel with the direct contacts technique: it still uses professionals, such as those in national governments who report to the international organization, and those in the organizations' own secretariats, or retained by them to scrutinize the reports, like the ILO Committee of Experts. Often the mobilization-of-shame technique is used after direct contacts have failed, or when it is apparent that direct contacts are unlikely to work.

The idea is not behind-the-scenes peer pressure, as it is with direct contacts, but rather open peer pressure. Again it is important that the pressure comes from those who operate in the same universe as those being pressured—people who can command their respect. Mobilization of shame can be a rather effective deterrent. Governments generally do not like the prospect of being put in the dock in front of their peers.

A final word on the use of these informal techniques in the future: There is serious discussion these days about strengthening UN institutions dealing with the environment. That could take the form simply of reshaping the UN Environment Program, or it could involve a new UN environmental organ, or even a new environmental specialized agency. Whatever form it takes, attention should be given to informal enforcement mechanisms, taking account of the experience of existing specialized agencies with the direct contacts and mobilization-of-shame techniques.

Among other things, consideration should be given to adapting the ILO's tripartite representation system to the needs of environmental institutions. This could be done by including not only governments, but also representatives of business and of nongovernmental environmental groups in the decision-making structure, and in the enforcement structure. A tripartite system of that sort might help ensure that governments' reports are made in timely and informative fashion, and could help to bring pressure on governments to comply with environmental norms administered by the new institutions. It would be a modest way to ensure that the groups and persons likely to be affected by environmental harm are heard, when the rules are made and when they are enforced.

Remarks by Mary Ellen O'Connell*

The international law literature on enforcement is replete with the observation that national tribunals already do the primary work of enforcing international law. The reason for this is that they have unique control over persons and assets which international decision makers do not. I believe they can do even more—of an even more dramatic kind and thus make international law more efficacious.

I want to talk today about two recent problems in enforcing UN decisions: the

* Indiana University School of Law.

ICJ's *Nicaragua v. United States of America* decision and the Security Council's Iraqi sanctions.

Two years ago at the International Law Association's international law weekend, someone rose and said that the *Nicaragua* decision of 1986 finding the United States owed Nicaragua reparations was all fine and well, but it could not be enforced. I believe it can be and it can be through national tribunals.

I expressed this view in an article that appeared in the fall, *Prospects for Enforcing Monetary Judgments of the International Court of Justice*.[1] The most interesting reaction I have had to the article is not that what I propose is infeasible but rather that it might not be good for international law to have enforcement improved. The argument is the same one Judge Fitzmaurice expressed some decades ago—that states adhere to international law to the extent they do because they believe they can ultimately escape its obligations.

I doubt that this is true. Most governments—especially the U.S. Government—believe that they will obey their obligations at the time they take them on. Nor do I think governments want international law to be a system where obligations could easily be evaded. The main benefit states derive from international law is that they can rely on undertakings by other states under international law. The benefits they get from the system are because it is law. It would not be much of a system if states participated only with the view that they might find a loophole nor would the ICJ be much of a court if its decision could be easily evaded.

So how can Nicaragua prevent the decision against the United States from being evaded? Hopefully, the United States and Nicaragua will come to some mutually agreeable position. If not, Nicaragua is best advised to go to the national courts of a third state for help.

Under the ICJ's own scheme, it should go to the Security Council, but I suspect the United States will use its veto and Nicaragua will not succeed.

It could also go to the U.S. courts. Unlike third-party courts, in the United States, Nicaragua would not need to find assets to attach and that would make its task immensely easier. Nor are there legal barriers to U.S. courts enforcing an ICJ judgment. Indeed, in the case *Committee of U.S. Citizens Living in Nicaragua v. Reagan*, a federal district court suggested that Nicaragua could come to U.S. courts and get the ICJ judgment enforced. But I suggest that the judge was an optmisitic person and even if Nicaragua had the good fortune to make its claim before him, I very much doubt that our current Supreme Court would waste more than a moment before deciding that U.S. courts should invoke the prudential political question doctrine before enforcing Nicaragua's judgment.

That leaves third party courts. Here I think Nicaragua would have two problems—persuading the third party court that it has the basis to enforce an ICJ judgment, and finding appropriate assets to attach in aid of enforcement.

No domestic court has ever directly enforced an ICJ judgment. Domestic courts are, however, commonly asked to enforce three other kinds of decisions—those of their own courts, those of foreign courts and those of arbitral tribunals. In the one case where a court was confronted with the task of enforcing a Permanent Court of International Justice (PCIJ) judgment, *Socobel v. Greek State*, the Tribunal Civil de Bruxelles decided to use the procedure for enforcing a foreign judgment. Part of that procedure required a determination of whether the foreign jurisdiction would ever enforce Belgian decisions. The court decided the PCIJ

[1] 30 VA. J. INT'L L. 891 (1990).

would not and so no exequatur was issued and the judgment was not enforced. There were other reasons, but this case is important because I think it shows how courts are tempted to act when faced with an ICJ judgment.

But times have changed and I would urge domestic courts faced with an ICJ judgment not to compare them with foreign domestic judgments but rather with international decisions—those of international arbitral tribunals. We now have a host of enforcement treaties with basically similar requirements for easy enforcement of these international decisions. Issues such as reciprocity are not a criterion for enforcement; the judgment must simply be a final decision of an international tribunal that the parties agreed to be bound by. And most of these treaties do not permit review—which is inappropriate in the ICJ's case, too. In the *Nicaragua* case if the United States wants review it should go back to the ICJ.

The leading enforcement treaty is the New York Enforcement Convention. The United States is a party, but it would not be applicable in the United States to the *Nicaragua* case because we have limited its application to commercial decisions. A commercial decision, such as *Elettronica Sicula S.p.A.* (ELSI), however, might have been enforceable because the Ninth Circuit has said regarding a case from the Iran-United States Claims Tribunal that decisions made on the territory of another signatory to the Convention—Holland—could be enforced. The ICJ is also in Holland.

Another country following this reasoning might also enforce decisions under the New York Convention. Professor Schachter, who helped draft the New York Convention, said it was not intended for the ICJ, but I can find nothing in the language of the Convention that would make it less applicable to the ICJ than to the Iran-United States Claims Tribunal. Neither are arbitral tribunals, *stricto senso*.

A country like Germany, moreover, would not have to find the New York Convention strictly applicable. In Germany, because of its constitutional provision elevating observance of international law as a required part of government policy, the courts could look at the adoption of the network of enforcement treaties and conclude that there is a general principle of enforcement in international law. The vast majority of states and states from all legal systems and all geographical regions have acknowledged by treaty the importance of aiding enforcement of international decisions. The *Nicaragua* case is an international decision.

Would Germany have an obligation to enforce the decision? I think not. Only the United States is under a direct obligation to obey and honor the decision. I have not found sufficient evidence of a duty to aid in enforcement.

Nevertheless, even if Germany felt it was best for international law that the decision be enforced, Nicaragua would still have to find appropriate U.S. assets for enforcement. The treaties do rely on the presence of assets in the third party court when seeking enforcement. In the case of enforcement against a sovereign state, the sovereign immunity laws of many countries, including the United States, United Kingdom and Germany, restrict enforcement to commerical assets. The United States law restricts it to commercial assets related to the claim.

The United States does not have many commercial assets in countries which might feel secure enough to enforce against the wishes of the United States. But a Commerce Department exhibit at a trade show or a geological survey ship or World Bank funds might suffice. And the need for further development of international law might be the argument to persuade a German court to order such enforcement.

On 6 August 1990, the Security Council called on all states to prevent the import

or export of goods from their territories to or from Iraq or Kuwait and to forbid their nationals from selling products to anyone in Iraq or Kuwait. It also called on all states "To take appropriate measures to protect assets of the legitimate Government of Kuwait and its agencies." In response, the European Community adopted Regulation 2340/90 of 8 August 1990 which has direct application to the twelve member states, though it primarily calls on members to prevent trade. The United Kingdom separately ordered a comprehensive freeze of Kuwaiti and Iraqi assets. The United States adopted four presidential orders also forbidding trade and freezing assets.

According to newspaper accounts, British and American intelligence passed on to the German Government information about numerous German companies continuing to do business with Iraq despite the sanctions. The *Financial Times* of March 25 mentioned investigations into 110 companies. Prosecutions have gone forward in eleven cases. These sanctions cases should be distinguished from the twelve cases of individuals recently indicted for helping Iraq develop chemical weapons. The chemical cases have been under investigation for more than three years and may or may not include counts for violating the Iraqi sanctions. Basically they are indictments for violations of Germany's law against trade in weapons, para. 7(2) of the Foreign Trade Law.

The sanction violations, on the other hand, arise from the Community regulations, though the *Frankfurter Allgemeine Zeitung* states that any penalties for violations will be drawn from para. 34 of the Foreign Trade Law which contains penal provisions for up to fifteen years for violations of the trade law. The Foreign Trade Law itself would permit Germany to implement the UN sanctions under para. 7(1) but this was not done because of the EC regulations.

So far this is very much like the American law. One very interesting and potentially far-reaching distinction is that in Germany, if the government had failed to carry out these prosecutions, the Government of Kuwait or another interested party could have gone to court to bring an administrative action for failing to carry out Article 25 of the German Constitution: "The General rules of public international law shall be an integral part of federal law. They shall take precedence over the laws and shall directly create rights and duties for the inhabitants of the federal territory."

In the United States, despite the fact international law is part of our law and treaties are the supreme law of the land (presumably including the UN Charter) no one can bring a suit forcing the Executive Branch to carry out its obligations under international law, according to *Diggs v. Richardson*. The political question doctrine would prevent the enforcement through our courts.

Both U.S. law and German law would protect Kuwaiti property which might show up in national courts. Such protection is also required by the Security Council sanctions. The UK law would not. In the United States, the Foreign Sovereign Immunities Act allows courts to apply international law in determining title to property. German courts would do the same. If, for example, a shipment of oil originating from Kuwait turned up in the United States or Germany, and Kuwait wished to enjoin its sale, Kuwait could claim that under international law, it had title, not Germany or the United States. Kuwait passed a decree nationalizing all Kuwaiti property which would give it the ability to carry out such claims.

This is appropriate and allows both Germany and the United States to carry out their obligations under the sanctions. Contrast these legal regimes with the United Kingdom which would grant Iraq immunity in such a title case under para. 6 of the State Immunity Act.