The Judicial Enforcement of International Obligations

Sir Robert Jennings[*]

I take it that, by international obligations, we mean international obligations deriving from public international law; and that in this first session we intend to deal with such obligations as have been established, or confirmed, by a judgment, opinion or order of a court; and we shall be thinking primarily no doubt of international courts in this connection, but by no means exclusively: for one of the most important changes in international law in recent decades has been the extent to which it falls to be applied by domestic courts. Either way, the court judgment or order is the acid test of inforcement, for in this form, the obligation then appears not as a proposition of general law, but is applied to particular parties in the circumstances of a particular case. And indeed it is strictly only in this sense – the implementation of a court order or the dispositif of its judgment – that the question of judicial enforcement of international obligations arises.

Although the problem of judicial enforcement is the constant layman's question about international law, it receives relatively little attention in professional writings. This paucity of attention is no doubt because the practical importance of the problem tends to be reduced or mitigated in several ways: the most important being the principle of international law that jurisdiction of international courts depends upon consent. Such areas of "compulsory" jurisdiction as there were, are diminishing rather than increasing; and in any event so-called compulsory jurisdiction turns out to be only another form of consensual jurisdiction. The consequence is not

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only that the amount of international litigation is relatively small, but that such cases as do arise in the courts, are, since the parties have both agreed to seek a solution by adjudication, those where problems of enforcement are least likely to arise.

There is another reason why the problem has appeared so little in practice. A quite large proportion of judgments are in effect self-enforcing, once the legal position is established. Decisions on the existence of jurisdiction are self-executory. Findings that there has been no violation of the law, or that there is no liability raise no problem. Even in the *Anglo-Norwegian Fisheries* case, the United Kingdom claim was precisely that regulations that Norway was already enforcing, were contrary to international law. The result of the Judgment was merely that United Kingdom protests were deprived of cogency and relevance. This is of course a very usual kind of situation. The Award in the *Beagle Channel* case was rejected by Argentina, and nearly led to war; but strictly there was never any problem over enforcement. The three disputed islands awarded to Chile had been in the possession of Chile for many decades. There was nothing the parties needed to do in order to execute the Award.

That problems of enforcement are thus for the most part avoided is certainly no ground for complacency. On the contrary, the relative absence of practical questions of enforcement is a symptom of the inadequacy of the machinery of international adjudication in general. To explain that enforcement does not arise much because there are so few decisions that require enforcement, will certainly not allay the layman's suspicions; though it should be remembered that international courts are not alone in finding grave problems of enforcement against sovereign States; the Supreme Court of the United States has frequently found itself in the same difficulty, and has not been unacquainted with defiance. Nevertheless, there are formidable difficulties – of principle as well as of practicalities – which stand in the way of any international judicial enforcement process. There are two main difficulties of principle, which have to be dealt with: (i) the legal limits on the existence of jurisdiction to enforce; (ii) the lack of personal or territorial competence; or, alternatively, of juridical links with domestic courts that do have such a competence. Indeed, I suspect we shall find that these difficulties of principle dominate the whole question.

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The Limits of Jurisdiction to Enforce

Judicial enforcement procedures normally require new proceedings to bring them into operation; e.g., the seizure or attachment of particular assets, garnishee orders and the like, will require a new application for a court decision. This will normally be a different proceeding from the one on the merits; and indeed involve one or more new parties. When, therefore, jurisdiction is consensual, and the relevant consent is, as will usually be the case, limited to jurisdiction over the substantive issue, it is a question how far a consent to the making of a judgment on the merits can be said to extend to proceedings for its enforcement? The answer must depend upon the terms of the consent; but the principles and the precedents are strongly against any presumed extension of jurisdiction. Not only is there the presumption against competence which must arise from the principle that all international jurisdiction depends upon there being a clear consent; but the analogy of domestic laws dealing with State immunities immensely complicates any implied jurisdiction to execute a judgment. It is arguable that execution is correlative to judgment. I believe that Swiss law tends to regard submission of a case to local arbitration as automatically comprehending submission to execution. But there are also powerful authorities the other way. Even in those jurisdictions where the commercial transaction exception is well established, there is much difference of opinion and practice about how far a court may exercise jurisdiction over State property in order to execute a judgment in respect of a commercial transaction[1]. In any event, the cases that typically come before say the International Court of Justice will not on any view fall within a commercial exception to State immunity; and even if they did, that new principle of international law could hardly take precedence over the essentially consensual basis of the Court's own Statute in Art.36.

It will be remembered that in the *Monetary Gold* case[2], an attempt, by a Washington agreement of the three States controlling the monetary gold, to transfer to the United Kingdom, in partial satisfaction of the unpaid reparation due under the *Corfu Channel* Judgment, a parcel of monetary gold which Albania claimed to be hers, foundered before the International Court of Justice itself, on the principle of consensual jurisdiction. Admittedly the case was complicated because Italy, a party to the Washington

[1] See e.g. Crawford in The British Year Book of International Law, Vol.54 (1983), at p.116.

[2] ICJ Reports 1954, p.19.

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Agreement, had raised a possible claim against Albania, and itself raised the question whether, in the absence of Albania, the Court would have jurisdiction to decide the matter. But what in effect happened is that the Court refused to sanction the partial satisfaction of one of its Judgments, because the respondent State, over which it had already found that it had jurisdiction in the case, had made no application to appear before the Court in those resulting proceedings for satisfaction of the Judgment. Said the Court:

> "To adjudicate upon the international responsibility of Albania without her consent would run counter to a well-established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent"[3].

Of course it may be said that other parties were involved in the second case; but this will almost always be true of proceedings against assets; a garnishee order automatically affects the rights of third parties.

Indeed, President McNair in his declaration (p.35), preferred to say there was a fundamental defect in the Application itself: "I cannot see how State A, desiring the Court to adjudicate upon its claim against State B, can validly seize the Court of that claim unless it makes State B a respondent to the proceedings – however many other States may be respondents". This way of putting the objection does, it is true, leave the actual question of jurisdiction an open one.

This fundamental enforcement difficulty emanating from the principles governing jurisdiction is presumably why the World Court has even expressed the opinion that enforcement is not a matter for the Court at all. In the *Wimbledon* case[4] the Court refused to fix a rate of interest in respect of the reparation due, because it "neither can nor should contemplate such a contingency" as non-compliance with the terms of the Judgment. In the *Haya de la Torre* case[5] the International Court of Justice declined to say in what manner its Judgment in the *Asylum* case[6] should be carried out by Colombia. It was not for the Court to "make a choice amongst the various courses by which the asylum" might be terminated. There is practical wisdom here, for the alternative might, in some cases, be the need to make detailed orders, as in some United States antitrust cases, and a corresponding need for machinery for monitoring and supervising compliance; which

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[3] Ibid., p.32.
[4] 1923, PCIJ, Series A, No.1.
[5] ICJ Reports 1951.
[6] ICJ Reports 1950.

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the Hague Court has not got; and which an *ad hoc* tribunal could hardly have at all. Indeed, it is noticeable that international courts – not even the World Court – simply do not have any repertoire of enforcement procedures. There is no mention of the matter in either the Statute of the International Court of Justice or the Rules of the Court. It is of course mentioned in Art.94 of the Charter; but even this does not contemplate any kind of judicial enforcement.

The conclusions to be drawn from this initial difficulty of principle may seem rather damping; but it must also be borne in mind that a special agreement can on occasion provide expressly for execution by a tribunal of its own decision. In the *Argentine-Chile Frontier* case[7], the *compromis* provided in Art. IX:

> "The Award shall fix by whom, in what manner and the time within which it shall be executed, including any demarcation which the Award may direct, and the Court of Arbitration shall not be *functus officio* until it has approved any such demarcation and has notified Her Majesty's Government that in the opinion of the Court of Arbitration the Award has been executed".

The Award provided for a Demarcation Commission, which did permanently demarcate the boundary immediately after the Award. This, however, was made easier by the fact that the Arbitrator was Her Majesty's Government, which put the whole demarcation under its Director of Military Survey. All the Court of Arbitration had to do was to approve the work of the Demarcation Commission. This was made easier again because one of the judges was a soldier (engineer) who had already done a field survey for the Court, and who accompanied the Commission.

In the *Tacna-Arica Boundary Arbitration*[8], the Award itself provided that the compensatory payments be secured on the total revenues of a specified custom house. We also have the remarkable example of the Iranian-United States Tribunal in The Hague, which has at its disposal very large funds from which awards of reparation can be and are satisfied. This whole operation was made possible, it may be remembered, because of the United States seizure of Iranian assets abroad, as a measure of retaliation for the seizure of the diplomatic hostages; which resulted in numerous cases in the domestic courts of third States. I must resist the temptation to stray into other topics of this conference; but it has to be kept in mind that each of our separate topics of discussion are closely interwoven one with another. Indeed, it is not without significance that the wholly successful

[7] 1966, ILR Vol.38, p.10.
[8] RIAA Vol.2, p.952.

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enforcement machinery of the *Argentine-Chile Frontier* case, though under the Court's supervision, was not really "judicial" enforcement at all: the actual Arbitrator was Her Britannic Majesty's Government.

International Courts Lack Territorial Jurisdiction

International courts and tribunals by their very nature lack the territorial jurisdiction which is the first condition for effective enforcement of a judgment or order in respect of assets, or of persons, situated in the territory. The principal weapons of enforcement used by domestic courts are either restraints on the person, or restraints upon assets or real property. For these measures, a territorial competence is obviously essential.

Domestic courts themselves would not normally have jurisdiction over assets or persons outside the territory of the State to which the court belongs. Nevertheless, there do exist procedures, partly based upon treaty, partly on principles of reciprocity, partly on the principle of the territoriality of jurisdiction, whereby the assistance of courts in other territories can be sought. Is it then not possible to envisage that international courts also might be able to use domestic courts, and thus their territorial competence, for enforcement measures? If the courts of State A are prepared to assist in the enforcement of judgments of the courts of State B, might not the courts of State A and/or State B, be willing to lend a hand in the enforcement of judgments of an international court? Such a machinery does exist in the field of commercial arbitration. The New York Convention procedures, and others of the like kind, are not without their difficulties and their gaps. Nevertheless, procedures for the enforcement, through domestic courts, of the awards of international tribunals, in the field of commercial arbitration, not only exist, but are an essential element in the rapidly growing institution of international commercial arbitration.

This, however, is a field of law with peculiar characteristics. In the first place the tribunal in these cases does normally itself have a territorial character, the *lex arbitri* linking it to the domestic law, normally of the place where it sits and indeed under whose law it may itself be constituted. This is a crucial difference from the international tribunal properly so-called. Secondly, there is the fact that the commercial field is precisely where the old law of the immunity of the sovereign State from the jurisdiction even of domestic courts has broken down, and domestic courts now normally refuse jurisdictional immunity in respect of the commercial transactions of foreign sovereign States. Certainly, international commercial arbitrations are by no means confined to "commercial transactions" of the

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kind where jurisdictional immunity may apply; yet the break down of jurisdictional immunities in this related field does help to make enforcement procedures through domestic courts seem realistic and normal, and the juridical importance of this novel phenomenon, of sovereign States being made defendant in domestic courts, and their commercial property put at risk thereby, can scarcely be exaggerated. It now compares somewhat curiously with the relative absence of compulsory jurisdiction in international courts.

Nevertheless, it is probably through municipal court procedures, based upon territorial competence, that a way forward is to be found. Of course considerable and important parts of international law have long been applied and enforced by domestic courts – but to individuals and corporations, including foreign individuals and corporations: but not to sovereign States. This break down of sovereign immunity in commercial matters is a unique area of domestic-court jurisdiction. It is important to realize the significance of the fact that the liability of the sovereign State to jurisdiction and enforcement, in commercial matters, before domestic courts, is the first example of a truly compulsory international-law jurisdiction of a general kind (there are regional ones, such as the procedures under the European Convention on Human Rights); i.e. one that does not ultimately depend upon the existence of a consent.

Links between International Tribunals and Municipal Courts

Is it then possible to contemplate the forging of further links between international courts and municipal courts, with their territorial competence and enforcement powers? It will assist the examination of this question if we begin by making some distinctions. It is well to bear in mind at any rate the differences between:

(a) a municipal court recognizing the decision of an international court as an authoritative statement of a proposition of international law; that is to say, applying the principle of *stare decisis;*

(b) a municipal court recognizing the decision of an international court as *res judicata* between the parties on that issue, not only on the international plane but also for the purposes of its own municipal jurisdiction;

(c) a municipal court lending its own enforcement procedures – attachments and realizations of assets, garnishees, or perhaps even commitals for contempt – for the enforcement of the decision of an international court.

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The question, which we have called (a) above, of international court judgments being accepted by domestic courts as more or less authoritative statements of international law – or even of domestic law[9] – need not detain us long. The consideration and weighing of precedent is a necessary habit of judicial reasoning everywhere. There is, however, no question of binding precedent. Accordingly, it would be possible to expand upon existing surveys of domestic decisions, some of which have relied strongly upon a relevant decision of an international tribunal, some of which have not; and to study and perhaps to systematize, the reasons for acceptance or rejection. But this question of the use of precedent, important as it increasingly must be for the uniform and systematic development of the fabric of international law, is not one of judicial enforcement.

The question (b) above, of the acceptance by a domestic court of a relevant decision of an international court as *res judicata* of the particular issue between the particular parties (as e.g. by the effect of Art.59 of the Statute of the International Court of Justice) is very nearly related to the question of judicial enforcement of international obligations. In fact, so nearly related that it will be convenient now to consider the two aspects, (b) and (c) together, for they both lead into the same very considerable difficulties in practice. And perhaps one might begin with a stimulating quotation from Jenks, where he does tend to conflate the two aspects of *res judicata* and enforcement; and where he takes as an example the decision of the Permanent Court of International Justice in the *Lighthouses* case[10] that a contract between a French company and the Ottoman Government, was binding on the Greek Government as successor to the territory. "Such a finding", says Jenks,

> "must, it is submitted, be regarded as conclusive of the matter everywhere, and entitles the successful party to rely on the validity of the contract wherever and whenever any question concerning its validity may arise. It may not in itself suffice to secure the execution of the contract, but should be regarded as being at least equivalent to a foreign judgment relating to the contractual obligation enforceable by the municipal procedures available for the enforcement of such foreign judgment"[11].

This suggestion that a judgment of the World Court should be regarded as "at least equivalent to a foreign judgment", looks at first sight an obvi-

[9] See the *Serbian Loans* case, PCIJ, Series A, Nos.20 and 21 (1929), and its citation e.g. in *Feist* v. *Société Internationale Belge d'Electricité* [1934] A.C.161.

[10] 1934, PCIJ, Series A/B, No.62.

[11] C. W. Jenks, The Prospects of International Adjudication (1964), p.681.

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ous solution, but look closer, and, with great respect, it raises problems rather than solves them. For we must now ask how, and why, a domestic court recognizes, and even sometimes actually enforces, a foreign judgment? Such cases of recognition and enforcement are of course very familiar in domestic courts; the obvious classes of case that come to mind are decisions of foreign courts about divorce, or nullity of marriage. But not all or any foreign judgments are treated thus. And to find out what attitude to take, a domestic court consults its own, usually more or less peculiar, system of private international law.

Now the trouble with the rules of private international law about foreign judgments is that they barely serve even as an analogy for the question of the decisions of international courts. In a decision, say on marriage or divorce, the foreign court will have applied its own law of marriage or divorce, i.e. the rules of a foreign system of law, which rules an English court would require to be proved as a fact by the evidence of expert witnesses acquainted with that foreign system. But public international law is regarded, by English courts, as part of the law it itself applies, and it is assumed that the court has "judicial notice" of international law; i.e. the judges know it, just as they know English law. So the juridical situation of a domestic court faced with a World Court decision on a question of public international law, is not analogous to a domestic court faced with, say, a decision of a German court on a question of German law. So how can a court apply a decision of the World Court as "at least equivalent to a foreign judgment"; for it is essentially not equivalent. In fact one might say that private international law is not primarily concerned with the juxtaposition of courts, but with the juxtaposition of different legal systems, each with its territorial sway; and the rules of private international law regulate those cases where there is nevertheless an overlapping element. This is not the position in the relationship – if indeed there is one – between the Hague Court and a domestic court.

Moreover, there is truly no such thing as an international private international law. Even the basic principles differ between legal systems; English law looks to jurisdiction and the creation of an obligation; United States law to reciprocity; some continental laws to a notion of exequatur, unknown to common law. So, whether or not a domestic court will or will not enforce a foreign judgment is an exceedingly complicated matter; and often difficult to predict: one hardly needs to mention *Socobel* v. *the Greek State*[12], based upon a reasoning which a common lawyer finds wholly strange.

[12] 1951, ILR.

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We have just said that there is no such thing as an international, that is to say general and uniform, private international law; but there are necessarily important common, international elements of it, where it overlaps with rules of public international law. Thus, where a domestic court refuses to recognize a foreign judgment on the ground of exorbitant jurisdiction, we find that domestic court giving as a main reason for that rejection of recognition, that the foreign court was exceeding the jurisdiction permitted it by public international law. Such decisions are not difficult to find for instance in the antitrust field, as is well known.

Yet, this part of public international law, which is what will in fact guide a domestic court having to decide whether or not to recognize an international court decision, leans towards the rights of a State party. The domestic courts may have to consider arguments based upon the principle of State immunity from domestic court jurisdiction; and, at least in some jurisdictions, some form of Act of State doctrine; or what, to cite a famous English case, Lord Wilberforce called: "a principle of non-justiciability by English courts of a certain class of sovereign acts"[13].

But let us consider how actual decisions of the Hague Court could affect a case in a municipal court. Take, for example, the recent *Gulf of Maine* case, where the Chamber in its judgment decided the course of the single maritime boundary between Canada and the United States; and the parties, in their Agreement provided that the decision of the Chamber should be final and binding upon them. This was a decision concerning what the common lawyer would call real rights; viz. that boundary is valid *erga omnes*. Very well: should a domestic court, whether of one of the two parties, or of a third State, accept that line, for all purposes as the course of the seaboundary between Canada and the United States, after the judgment of the Chamber; and, if so, pursuant to what rules of law?

An international boundary, however, is not just a matter of international law. It is also a matter of municipal law. And a judgment, deciding the course of a seaboundary like that in the *Gulf of Maine*, must be implemented by many requisite changes in the laws of both Canada and the United States. This requires at least some little time after the judgment. Once this is done, the domestic courts faced with a question of the location of the boundary would apply the implementing local laws; though the actual judgment might conceivably be relevant to the interpretation of those implementing local laws or orders. It is difficult to imagine circumstances in which a domestic court of one of the parties would find itself

[13] *Buttes Gas and Oil Company* v. *Hammer* [1981], ILR Vol.64, at p.331.

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asked to apply the judgment, as it were, directly, and apart from its implementation in the local law; especially as in most such cases there is already in operation some temporary agreement, pending the implementation of the judgment. Even if one party rejected the judgment line and refused to implement it, the local courts would not normally be faced with applying the judgment directly. The party accepting the line would have implemented it in its local law, which is what its courts would apply directly; it could hardly be envisaged that the local courts of the party refusing to implement the judgment would attempt to apply it in defiance of the local law in which the court is constituted and from which it derives its authority.

As to the courts of third States, if the question were to come before them, they would again normally accept the effect of the local law – as in the *Buttes* case – applying some variety of Act of State doctrine. If you want to know the boundaries of Utopia, at least first ask Utopia.

Another, very instructive example of the sort of way a Hague Court decision might come before a municipal court, is one suggested by F. A. Mann, in his most recent book[14]. In the *Diplomatic Hostages* case[15], the International Court of Justice condemned the Iranian actions as being plainly a violation of international law. At that time, Iran had very large deposits in both British banks in London and in branches of United States banks in London. United States legislation, taken in effect by way of reprisal, purported to freeze those assets and to prohibit payments from them to creditors of the banks. Obviously this could have, and very nearly did, resulted in the English courts having to decide whether or not to give any effect to the United States legislation, in respect of branches of US banks, or in British banks, or both. Assuming the contracts with the banks to have been governed by English law, the courts, if they had applied their normal "conflict of law" rules, would not have applied US legislation. Yet, in Mann's opinion,

> "... it is submitted that there existed an *ordre public international* in the true and most direct sense, which would have allowed and, indeed, compelled English courts to assist in the elimination of a plain international illegality and in the interest of the world community at large to lend support to an ally's policy of retaliation. The point was not one of politics, but of law and morality. It should not have depended in any way on the attitude of the executive. It would have been a matter of judicial conscience".

Mann puts it so strongly that one begins to suspect that he fears an

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[14] Foreign Affairs in English Courts (1986), at pp.157–158.

[15] ICJ Reports 1980, p.3.

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English court might well have taken a different view. At any rate, it would have been a new point, and no one could confidently predict whether the court would have been persuaded, because of the Hague decision, not to apply its normal rule about foreign legislation purporting to affect an English-law contract to be performed in England. Either way, however, it is an excellent example of our problem.

Obviously one could speculate further on the many different ways in which domestic courts might decide this kind of question. What is clear is that it could not be simply a question of the status of the international judgment. A municipal court would be compelled, if only by the arguments presented to it by the parties, to consider the relevance of the foreign legislation and law, in the light of its own local rules of private international law. These rules would not normally be concerned with the relevance of a Hague Court judgment; at least directly.

In fact the conclusion we seem to be driven to is that there is no structured system of rules for resolving questions that may arise for municipal courts, from the existence of more or less relevant decisions of international courts – one has to say, more or less, relevant because the precise relevance is the crucial question for which there are no clear, juridical criteria. Some marginal assistance may be found in certain principles emanating from public international law, and even in the local variety of private international law – which after all is itself local, and international only in the sense that it is dealing with questions with an international element – but the assistance will indeed be marginal because the rules will be mainly about the decisions of other local courts having co-ordinate jurisdiction but in another territory; and not with the decisions of the International Court of Justice which, by Art.34, is limited to the international plane and having no territorial locality.

It is, in my submission, pointless to say, therefore, that municipal courts should recognize and apply a relevant decision of the International Court of Justice. The question will seldom if ever be so simple. There are many distinctions and complexities for a municipal court. What is needed is a reasonably elaborate, properly structured, system of principles and rules – complementary to those of a system of private international law – for answering the many complex questions that arise. There is, moreover, not infrequently an important difference between the way a public international lawyer will approach and answer some of these questions, and the approach of the private international lawyer. And a municipal court may have to consider both; it will certainly not be in a position to ignore the private international approach.

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How can such a structured system of legal relationships between international and local courts be created? Where some such position has been achieved – e.g. with decisions of the courts at Luxembourg and even at Strasbourg – this has been done by treaty. Any comparatively ambitious scheme for the Hague Court is at the present time visionary; though one thinks with sympathy of a scheme once mooted in the United States for enabling municipal courts to refer questions of international law to the Hague Court for an advisory opinion, thus creating at any rate some kind of formal link between that Court and some local courts.

But what could be done now is more basic research on this whole question; and especially a thorough analysis and classification of the different ways in which decisions of international tribunals may come before local courts, and of the distinctions and choices that need to be made.

Conclusions

1. There is a large and important class of cases where enforcement by an international court does not, or should not, arise; and where indeed the Court's task is completed the moment it has declared the law. This class includes the cases where the special agreement thus limits the function of the Court; where the decision simply declares the legality of the existing practical situation; or indeed where negotiated extrication from an unlawful situation is the only practical solution – in this latter case the Court could only help if it had the competence to issue elaborate and complex orders, and powers of supervision and modification of the orders.

2. An important, though still relatively restricted, part of the obligations arising from public international law – particularly since the recent changes in the rules of sovereign immunity – come directly before domestic courts. Such rules are regularly applied and enforced directly by domestic courts using their normal enforcement procedures.

3. Further extension of the competence of an international tribunal – and of the International Court of Justice in particular – comes up against the principle of consensual jurisdiction at the outset. It is perhaps just arguable that consent to jurisdiction over the merits of a dispute must comprehend jurisdiction over relevant enforcement; but there are powerful arguments of both theory and practicalities to the contrary.

4. A further difficulty is the absence of developed international court procedures for enforcement.

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5. Yet it is also true that a special agreement can provide for enforcement, and the procedures for it. This of course depends upon the parties accepting such a plan.

6. A major problem for international courts, however, is that they do not, and indeed cannot, possess that territorial sway which is essential to effective enforcement. The obvious solution is to use the competence and procedures of municipal courts to enforce international decisions. But this raises questions of great complexity – and it should be said of great interest – involving comparative law and private international law, as well as public international law. This calls for a new study aimed at distinguishing and analyzing the many different situations and relationships that could be involved.

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