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**CONSTANZE SCHULTE, COMPLIANCE WITH DECISIONS  
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*Par Sébastien Jodoin\**

Over the past decade, the international legal system has been marked by an increase in the activities, prominence and workload of international courts and tribunals. The growth of the international justice system has attracted much scholarly attention.<sup>1</sup> This mirrors academic developments with regard to the proliferation of international norms, which have increasingly focused on the compliance debate:<sup>2</sup> now that international courts are more numerous and more active, scholars have turned their attention to the effectiveness and impact of their decisions.

*Compliance with Decisions of the International Court of Justice*<sup>3</sup> by Dr. Constanze Schulte, an attorney-at-law (admitted in Munich) with Lovells, Madrid, constitutes one such academic work. This monograph is part of Oxford University Press' International Courts and Tribunal Series,<sup>4</sup> which is edited by the Project on International Courts and Tribunals, in particular Philippe Sands, Ruth Mackenzie and Cesare Romano. The main objective of this book is to study the law, practice and prospects of compliance with the decisions of the International Court of Justice (ICJ).

After addressing issues of methodology in the first Chapter, in Chapter two, Schulte sketches out the legal framework surrounding this issue. First, the author examines the obligation of compliance found in Article 94(1) of the *UN Charter*<sup>5</sup> : while this obligation is rather broad in scope, applying to both interim measures and final judgments, and while its breach may constitute an international wrong entailing state responsibility, its utility is marred by difficulties inherent in its application:

General guidelines cannot be made to gauge compliance in every kind of judgment. For some decisions, it will not be possible to determine *in abstracto* whether there is a need for implementing action or whether mere acquiescence is sufficient. The factual context, the route by which the dispute reached the court, and the formal submissions of the parties all

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<sup>1</sup> See e.g. "Project on International Courts and Tribunals", online: PICT <<http://www.pict-pcti.org/>>.

<sup>2</sup> See Markus Burgstaller, *Theories of Compliance with International Law* (Leiden: Martinus Nijhoff, 2004).

<sup>3</sup> Oxford: Oxford University Press, 2004.

<sup>4</sup> Other books in the serie include: Shabtai Rosenne, *Provisional Measures in International Law: The International Court of Justice and the International Tribunal for the Law of the Sea* (Oxford: Oxford University Press, 2004); Cesare P.R. Romano, André Nollkaemper and Jann K. Kleffner, dir., *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia*, (Oxford: Oxford University Press, 2004); Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals* (Oxford: Oxford University Press, 2003).

<sup>5</sup> *Charter of the United Nations*, 26 June 1945, Can. T.S. 1945 No.7.

have an impact on the interpretation of the obligation stemming from the judgment.<sup>6</sup>

Second, she focuses upon the enforcement mechanisms for ICJ decisions, the importance of which is tied to their role in inducing compliance as well as to the need to disprove the claim that international adjudication is weak as it is lacking in enforcement mechanisms.<sup>7</sup> On the other hand, Schulte also warns against an exclusive focus on enforcement as it not always a relevant factor: “In many cases, states will comply voluntarily with an ICJ decision regardless of whether they might contemplate enforcement action.”<sup>8</sup> In the first instance, she looks at the enforcement of ICJ decisions through the Security Council, the General Assembly and the Secretary-General. The section bearing on the role of the Security Council is particularly interesting: among other points, the author argues that the Council’s enforcement action under Article 94(2) of the UN Charter is limited to peaceful measures,<sup>9</sup> that it should not generally, through its enforcement powers, “revise” ICJ decisions,<sup>10</sup> and suggests that rather than setting up an automatic procedure for the enforcement of ICJ decisions, it might be wiser to establish an automatic procedure for monitoring compliance with ICJ decisions.<sup>11</sup> In the second instance, she sets out a number of non-UN enforcement options, including the imposition of lawful counter-measures by aggrieved as well as third states, action taken by specialized agencies and regional organizations, and proceedings before domestic courts.

In Chapter three, the book’s main contribution to the literature, Schulte analyzes the Court’s compliance record in great detail. She scrutinizes the follow-up to all of the final judgments and provisional measures issued by the Court from 1946 to 2003. Schulte excludes interlocutory decisions and advisory opinions from her study as she claims that neither raise compliance issues: the former “do not directly affect the subject-matter of the proceedings, as it will result in automatic sanctions;”<sup>12</sup> the latter do not have binding force.<sup>13</sup> In our opinion, the lack of formal bindingness of advisory opinions does not signify that they do not raise compliance issues, broadly defined. As the Court’s advisory opinions purport to report upon the state of the law, the respect afforded to its decisions would seem to be most relevant to an analysis of its impact upon state behaviour. This is all the more true in light of the debate surrounding the recent Advisory Opinion delivered in the *Palestinian Wall Case*.<sup>14</sup> The author seems to recognize this point to some extent: “The efficiency of the

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<sup>6</sup> Schulte, *supra* note 3 at 31.

<sup>7</sup> *Ibid.* at 36-37.

<sup>8</sup> *Ibid.* at 37.

<sup>9</sup> *Ibid.* at 47.

<sup>10</sup> *Ibid.* at 48-52.

<sup>11</sup> *Ibid.* at 58-60.

<sup>12</sup> *Ibid.* at 14.

<sup>13</sup> *Ibid.* at 14-17.

<sup>14</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] I.C.J. Rep. 131.

Court's advisory jurisdiction is certainly a matter deserving analysis; yet, it is beyond the scope of the present study."<sup>15</sup>

In her study, Schulte adopts a contextual approach to the issue of compliance:

A discussion post-adjudicative phase of these cases will certainly be an important aspect. Yet the discussion avoids a shortsighted approach that would merely examine whether the subsequent action of the parties squares with the formula contained in the operative part of the respective decision. A contextual examination is preferable in that it is not often possible to determine the scope of the obligation to comply and the action necessary for the decision's implementation without considering the concrete circumstances of the case. [...] Indeed, only a contextual analysis, which takes into [consideration] a variety of factors – such as the origins of the dispute, the relationship between the parties, the competing interests involved, and the route by which the case reached the court – will enable general conclusions to be drawn as to the reasons for a decision's (non-) implementation.<sup>16</sup>

In her study, Schulte finds that the record of compliance with final judgements is on the whole positive. Schulte rejects a finding of non-compliance in cases where there have been verbal commitments but where it is not clear whether these have been translated into action, where there is a lack of sufficient evidence, where the dispute remains unresolved, not having reached the stage of decision on the merits, where an actor whose actions are not attributable to the state challenge of the Court's decision, where the parties have reached an agreement modifying their legal relations following a judgement by the Court and where the implementation of ICJ decisions is delayed due to the difficulties raised by the situation at issue.<sup>17</sup> This leaves Corfu Channel, Fisheries jurisdiction, Tehran hostages and Nicaragua as instances of strict non-compliance, cases involving bad faith and outright defiance on the part of the non-complying states. "Even in these cases," writes Schulte, "the effects of non-compliance were mitigated to a certain extent, given eventual or partial compliance by the losing party, or changes in the law, or political scene that diminished the relevance of the original decision."<sup>18</sup>

In regards to provisional measures, the record is not as positive: out of the eleven cases examined, only one involved compliance.<sup>19</sup> Schulte draws a distinction between cases involving outright defiance, cases where the controversy centered not on the legal but factual application of the provisional measures, and cases where the legal bindingness of the measures was contested.<sup>20</sup> She also points out the following:

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<sup>15</sup> Schulte, *supra* note 3 at 15.

<sup>16</sup> *Ibid.* at 7.

<sup>17</sup> *Ibid.* at 272-275.

<sup>18</sup> *Ibid.* at 271-272.

<sup>19</sup> *Ibid.* at 399.

<sup>20</sup> *Ibid.* at 400-401.

“Interim orders in most cases fulfilled some useful purpose for the litigant, irrespective of actual compliance.”<sup>21</sup>

Finally, Schulte concludes by underlining the main ideas to be gleaned from her study. Schulte sees the Nicaragua case as a turning point: since this case, there have been no instances of outright defiance or non-appearance, or no direct attacks on the Court’s authority. The chief reasons of this change would seem to be the political cost associated with such tactics and the renewed faith in the authority and impartiality of the Court.<sup>22</sup> Moreover, delays and difficulties in implementation are not primarily due to bad faith on the part of states, but rather are deemed inevitable: “They may arise as a result of the subject-matter of the respective decision – be it a matter of a broad character of the underlying legal rules, the features of the specific decision, or practical circumstances.”<sup>23</sup>

Schulte also rejects a number of factors as having a doubtful or non-measurable impact on compliance: relations between the parties and form of government, UN membership, the Court’s voting patterns and the Court’s constitution as a Chamber as opposed to the full Court.<sup>24</sup>

A final set of conclusions explains the weaker record for provisional measures firstly by making reference to the circumstances behind each case of non-compliance: the unilateral institution of the proceedings, the attitude of the parties towards the proceedings, the highly political nature of the circumstances, the use of such measures beyond compliance, and the expectation of Security Council non-involvement.<sup>25</sup> Other factors are inherent to the nature of provisional measures: such measures often come at a time when the jurisdiction of the court has not been fully determined, when time pressures and lack of expertise are significant. These factors are supported by brief reasons, which did not always address the apprehensions of partiality; there is uncertainty as to the recovery of potential losses and injuries; and these measures are often imprecise leading to conflict over their application.<sup>26</sup>

*Compliance with Decisions of the International Court of Justice* is an important contribution to the scholarship bearing on international courts and tribunals. Its comprehensive treatment of the political and legal follow-up to the decisions of the ICJ make it a useful reference tool. By eschewing a formal and narrow approach and examining the Court’s compliance record in a contextual manner, Schulte will hopefully advance the compliance debate in the field of international justice. Her analysis of the Court’s compliance records forms a strong rebuke to sceptics who bring into doubt the efficiency and relevance of the ICJ, though it is likely that such sceptics would, based upon positivist or realist grounds, attack Schulte’s approach as either too broad or too focused on attitudinal factors.

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<sup>21</sup> *Ibid.* at 401.

<sup>22</sup> *Ibid.* at 403-404.

<sup>23</sup> *Ibid.* at 404-405.

<sup>24</sup> *Ibid.* at 414-417.

<sup>25</sup> *Ibid.* at 419-422.

<sup>26</sup> *Ibid.* at 422-428.

This book's main flaw is its failure to engage with some of the theoretical issues raised by its analysis of the Court's compliance record. Some of her observations on the inevitable character of non-compliance and the inherent difficulties of implementation would have benefited from references to the managerial school of thought.<sup>27</sup> As well, her approach to compliance could be broadly characterised as constructivist or ideational in nature, focusing as it does on the normative commitment of states to the ICJ.<sup>28</sup> That being said, this book represents a rigorous analysis of state practice bearing on the efficacy of the ICJ's decisions, one which will no doubt form the starting point for many other scholarly reflections on the compliance debate, both with regards to international adjudication and international law generally.

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<sup>27</sup> See Abram Chayes et Antonia H. Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge, Mass.: Harvard University Press, 1995).

<sup>28</sup> See e.g. Jutta Brunnee and Stephen J. Toope, "Persuasion and Enforcement: Explaining Compliance with International Law" (2002) XIII Finnish Yearbook of International Law 1.