The Relevance of the International Court of Justice in International Law

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I. Introduction

As Thucydides exemplifies in the Melian Dialogue[1], there is no supreme governing body in the international realm to regulate state power and mediate state-related problems. As a response, the international community established several different platforms to implement collective action in global governance through international law. The International Court of Justice (ICJ) embodies this attempt to encourage peaceful relations amongst states. In this essay, I assess the relevance of the International Court of Justice to international law. I argue that while the ICJ faces some developmental challenges, it has made a significant contribution to international law.

This essay will consist of two parts: In Part 1, I examine how the ICJ is limited in providing a meaningful contribution to international law. More specifically, I look at the potential bias that exists in the Court's composition. Then, I examine the limitations of the ICJ in regards to its jurisdiction and enforcement. Finally, I evaluate how the issue of compliance with final judgments acts as a further limitation of the ICJ.

In Part 2, I analyze the benefits of the ICJ. In particular, I outline how the ICJ encourages obedience to international law by presenting a threat to state reputations. Additionally, I look at how the advisory opinions of the ICJ have contributed to international law. Then, I outline the contributions the ICJ made to global geography and state sovereignty, particularly through the use of special agreements. Finally, I analyze how the ICJ acts as a platform for weak states to hold more powerful states accountable for violating international law.

II. The Limitations of the International Court of Justice

a. Court Composition: Judges and Intended Impartiality

The International Court of Justice has a judicial panel composed of fifteen judges, whose distribution is based on regions: Africa (3), Latin America (2), Asia (3),

[1]Rusten, Jeffrey S. *Thucydides*. Oxford: Oxford University Press. 2009.

Western Europe[2] (5), and Eastern Europe[3] (2)[4]. The division of representation for 191 countries amongst fifteen judges is striking. As such, it is reasonable to question the impartiality of judges. As Posner argues, incentives such as patriotism, re-election, and rewards from governments on basis of loyalty encourage judges to vote in favor of their home state[5]. Of course, a judge who is swayed by these incentives may not have a significant impact against the other fourteen judges alone; however, Posner and Yoo's data ascertains "judges are biased in favor of their own countries and in favor of countries that match the economic, political (and somewhat more weakly) cultural attributes of their own [countries]."[6] This bias is problematic based on economic, political and cultural similarities, and can act as an advantage that is not meant to exist. Posner and Figueiredo claim that 90% of the time, judges vote in favor of their home country.[7] The bias of judges in the ICJ can sway the outcome of cases, and in effect, destruct the intended impartiality of the Court, thereby deteriorating the original function of the ICJ in international law.

However, ICJ bias does not dismiss the potential for judges to positively affect and contribute to international law. According to Posner and Figueiredo, "when a state's own judge votes against his home state, or when judges from a given bloc vote against a part from that bloc, [that state] may take the judgment more seriously than otherwise, and be more inclined to comply with it. If so, the ICJ may play a useful role, albeit under narrow conditions and for limited purposes."[8]

b. Jurisdiction

The International Court of Justice is the principal judicial body of the United Nations. As previously mentioned, the Court's role is to settle legal disputes and give advisory opinions, in accordance with international law. However, the ICJ is limited, since its jurisdiction only covers cases by 'special agreement,' where disputing parties make an agreement to submit their case to the Court, cases authorized by a treaty outlining future disputes in regards to the treaty that is to be submitted to the Court, and finally, cases between states that have declared themselves subject to the 'compulsory' jurisdiction of the Court.[9]

The ICJ's consent-based system of voluntary jurisdiction is a limitation.[10] Posner and Yoo indicate that when the Courts have jurisdiction on cases by special agreement, there is no threat to the states because they can refuse consent to jurisdiction.[11] As for treaty-based jurisdiction, states must consent to ICJ jurisdiction at the time the treaty is formed, thus agreeing to both the use of the court and being taken to court.[12] Finally, compulsory jurisdiction poses a greater challenge for the ICJ since states can avoid adhering to international law by withdrawing from compulsory jurisdiction.[13] For instance, in the U.S. Diplomatic and Consular Staff in Tehran case (1979-81), the ICJ's ruling in favor of the United States had no influence on Iran, who refused to participate in the proceedings.[14] Additionally, the LaGrand case (1999), Germany v. United States of America, also exemplifies non-compliance with international law; the US did not abide by the stay of execution, which the ICJ had ordered.[15] Therefore, it is arguable that the voluntary consent-based jurisdiction of the Court is problematic because states can violate international law, free from any consequences.

c. Lack of Compliance and Enforcement

The Court derives its ability to enforce judgments through Article 94 (2) of the United Nations Charter, which states:

> If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.[16]

Thus, states can violate international law without any consequences. In the case of Nicaragua v. The United States of America (1986), the ICJ found the USA had violated international law by supporting the Contras in

[2] Including Canada, Australia, the United State, New Zealand.
[3] Including Russia.
[4] Eric A. Posner and Michael F.P. Figueiredo, "Is the International Court of Justice Biased?" *The Journal of Legal Studies* 34, no. 2 (2005): 603.
[5] Eric Posner, "The Politics of the International Court of Justice," *Conferences on New Political Economy* 23, no.1 (2005): 6.
[6] Eric Posner and John C. Yoo, "Reply to Helfer and Slaughter," *California Law Review* 93, no. 1 (2005): 28.
[7] Posner and Figueiredo, "Is the ICJ Biased," 625.
[8] Ibid.
[9] Posner, "The Politics of the ICJ," 5.
[10] Manley O. Hudson, "Succession of the International Court of Justice to the Permanent Court of International Justice," *The American Journal of International Law* 51, no. 3 (1957): 569.
[11] Posner and Yoo, "Judicial Independence," 604.
[12] Ibid.
[13] Ibid.
[14] Posner and Figueiredo, "Is the ICJ Biased," 606.
[15] ICJ Report 1999, 63.
[16] Mutlaq Majed Al-Qahtani, "Enforcement of international judicial decisions of the International Court of Justice in public international law," *Leiden Journal of International Law* 5, no.1 (2006): 81.

their rebellion against the Nicaraguan government and mining Nicaragua's harbors.[17] In particular, the Court found the USA was "in breach of its obligations under customary international law not to use force against another State…, not to intervene in its affairs…, not to violate its sovereignty…, not to interrupt peaceful maritime commerce [and] its obligations under Article XIX of the Treaty of Friendship, Commerce and Navigation between the Parties signed at Managua on 21 January 1956."[18] When the United States refused to comply with the Judgment of the Court, Nicaragua turned to the United Nations Security Council (UNSC) "to consider the non-compliance with the Judgment of the International Court of Justice dated 27 June 1986."[19] In response, the UNSC drafted a resolution, which the United States, being a permanent member of the Security Council, vetoed.[20] The exclusive power of veto that the UNSC's permanent five members have makes enforcement of ICJ judgments difficult, and grants some states more influence over decisions than others.

When disputes are presented to the Court through special agreement, states tend to comply.[21] Although a resolution may emerge when disputing parties have not brought their case to the Court through a special agreement, states do not always comply. The Court's inability to hold countries accountable to their actions remains a major issue that deteriorates its potential to act as a meaningful actor.

III. Contributions of the International Court of Justice to the Global Community

A. State Reputation

Mercer defines reputation as "a judgment of someone's character (or disposition) that is then used to predict or explain future behaviour."[22] State reputation is important in international relations as "states act on behalf of their reputations for the material benefits [it] may provide [later]."[23] Simply put, states seeking to expand their power presently demonstrate follow-through to secure a reputation as reliable, thus acquiring more material or economic power in the future.

Since the ICJ publishes its judgments, it creates vulnerability for states that have accepted its jurisdiction in a dispute. Published judgments can serve as precedents for states to judge the reliability of one another. If a state develops a reputation for violating international law, other states are more likely to be skeptical when entering treaties or agreements with the violator.[24] Alternatively, a state that develops a reputation for abiding by international law is more likely to be viewed as a reliable state to form an agreement or enter a treaty with.[25] Therefore, states that are parties to cases heard by the Court are more likely to comply with the judgments of the ICJ, out of fear of possible reputation loss.[26, 27]

B. Advisory Opinions

In addition to the Court's function of settling disputes between states, the Court also provides advisory opinions on legal matters.[28] Article 65 of the Court's

[17] ICJ Report 1988, 4.
[18] ICJ Judgment 1986, 161
[19] UN DOC. S/18415
[20] Posner and Figueiredo, "Is the ICJ Biased," 606.
[21] Al-Qahtani cites several cases of non-compliance including the Nuclear Tests cases, Australia v. France, and New Zealand v. France (France refused to comply); the Fisheries Jurisdiction cases, United Kingdom v. Iceland, Germany v. Iceland (Iceland refused to comply); the United States Diplomatic and Consular Staff in Tehran case, United States v. Iran (Iran refused to comply); the Nicaragua case, Nicaragua v. United States (the United States refused to comply); the Application of the Convention on the Prevention and Punishment of the Crime of Genocide case, Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro) (Yugoslavia refused to comply); the Land and Maritime Boundary case, Cameroon v. Nigeria (Cameroon and Nigeria refused to comply); the Breard case, Paraguay v. United States (United States refused to comply); the LaGrand case, Germany v. United States (United States refused to comply); the Armed Activities on the Territory of the Congo case, Congo v. Uganda (Uganda refused to comply); and the Land and Maritime Boundary case, Cameroon v. Nigeria: Equatorial Guinea intervening (Nigeria refused to comply). Slovakia also brought the problem of non- implementation of judgments to the Court, particularly in the Gab□íkovo-Nagymaros Project case, Hungary/Slovakia (Hungary refused to comply).
[22] Jonathan Mercer, *Reputation and International Politics* (Cornell University Press 1996), 9.
[23] Jennifer L. Erickson, "Saving Face, Looking Good and Building International Reputation in East and West," *Power in a Complex Global System* (2014): 181.
[24] Janina Satzer, "Explaining the Decreased Use of International Courts – The Case of the ICJ," *Review of Laws & Economics* 3, no. 1 (2007): 27.
[25] Ibid.
[26] Ibid., 26.
[27] While further investigation into the intentions of participatory states in the International Court of Justice is required to confirm the afore mentioned argument, there is compelling evidence of non-compliance, regardless of deterioration of a state's reputation that reposits the actuality of this claim.
[28] As per Chapter XIV of the UN Charter 96, the General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.

statute states "the Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request."[29]

As Bedjaoui outlines, the advisory function of the Court can act as "an effective instrument of preventative diplomacy or it can make a substantial contribution to resolving an existing dispute."[30] Since its emergence, the ICJ has provided twenty-six advisory opinions[31] that have made great contributions to international law. For example, the ICJ was asked to provide an advisory opinion on *Reservations to the Genocide Convention case and the Legality of the Threat or Use of Nuclear Weapons* case.[32] These advisory opinions made improvements to international law, with the former contributing to the realm of international humanitarian law, and the latter to international environmental law.

In the realm of international humanitarian law, the United Nations General Assembly referred the Reservations to the Genocide Convention case to the ICJ. The General Assembly requested the ICJ to give an advisory opinion on the circumstances under which a State can make reservations to the Convention.[33] Additionally, the General Assembly asked: if a reservation is made, and another State objects to it, could the reserving State remain part of the Convention? As Aljaghoub outlines, "the Court, in this case, [introduces] the object and purpose of a treaty as the criteria to [assessing] the admissibility of reservations to the Convention."[34] More specifically, the Court noted the Genocide Convention existed for humanitarian purposes and based itself on the common interest of all of the participating parties to the Convention, who intended to accomplish a common goal.[35] The Court's findings were important because it limited the use of reservations to international conventions with humanitarian objectives and stated the obligation and its 'inalienability' were the ingredients for the conceptualization of *jus cogens*.[36, 37] This meant that because the *Genocide Conventions* were created with humanitarian intentions, reservations could not be made to the convention that would grant any individual state an advantage or disadvantage in pursuing their own interests. Additionally, this obligation established that conventions with humanitarian intentions did not allow derogation.

In contribution to international environmental law, the ICJ provided an advisory opinion on whether the threat or use of nuclear weapons was, in any circumstance, permitted. In its findings in the 1996 *Legality of the Threat or Use of Nuclear Weapons* case, the ICJ established that states are under a duty to protect the environment. Additionally, the ICJ declared states have a duty "to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."[38]

As exemplified by two of the twenty-six aforementioned advisory opinions the ICJ has given, the reach of the ICJ extends into several branches of international law, including humanitarian law and environmental law.

C. Contributions to Global Geography and State Sovereignty

While the problem of compliance with final judgments of the ICJ exists, the success of compliance through special agreement should not be dismissed. Of the 161 cases entered in the General List[39], 134 were contentious cases, fifteen of which were submitted to the Court via 'special agreement.'[40] Of the fifteen cases,

[29] *International Court of Justice Basic Documents: Statute of the International Court of Justice.*

[30] Mohammed Bedjaoui, "The Contribution of the International Court of Justice Towards Keeping and Restoring Peace," *Conflict Resolution: New Approaches and Methods* (2000): 13.

[31] *International Court of Justice: Advisory Proceedings.*

[32] *International Court of Justice: List of All Cases.*

[33] As the 1969 Vienna Convention on the Law of Treaties defines, a reservation in international law is "a unilateral statement, however phrased or named, made by a state, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State" ((Article 2 (1)(d)).

[34] Mahasen Mohammad Aljaghoub, *The Advisory Function of the International Court of Justice*: 1946-2005 (Springer 2010), 187.

[35] Ibid.

[36] Jus cogens: refers to certain principles in international law from which no exemption can be made; also known as a 'peremptory norm,' ius cogens.

[37] Ibid., 188.

[38] Philippe Sands, *Principles of International Environmental Law* (Cambridge University Press 2003), 200.

[39] From 22 May 1947 to 25 March 2015.

[40] *International Court of Justice: List of All Cases.*

[41] The fifteen cases submitted to the ICJ via special agreement are: Frontier Dispute (Burkina Faso/Niger), Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Frontier Dispute (Benin/Niger), Kasikili/Sedudu Island (Botswana/Namibia), Territorial Dispute (Libyan Arab Jamahiriya/Chad), Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua Intervening), Frontier Dispute (Burkina Faso/Republic of Mali), Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), North Sea Continental Shelf (Federal Republic of Germany/Netherlands), North Sea Continental Shelf (Federal Republic of Germany/Denmark), Sovereignty over Certain Frontier Land (Belgium/Netherlands), Minquiers and Ecrehos (France/United Kingdom), Asylum (Colombia/Peru), Gabcíkovo-Nagymaros Project (Hungary/Slovakia).

[42] Gabcíkovo-Nagymaros Project (Hungary/Slovakia) (1993) remains pending.

fourteen were resolved, while one remains pending.[41, 42] This signifies that states that agree to take their dispute to the Court are successful in finding a resolution. Of the fifteen cases brought to the Court through special agreement, nine were border/frontier disputes, three were sovereignty disputes, one was a territorial dispute, and another was an asylum case. The final, pending case concerns a multilateral project between Slovakia and Hungary.[43] The resolution of fourteen of the fifteen disputes reinforces the importance of state sovereignty in the international community and physical geography in the world.

> **"...a state that does not have the ability or capacity to influence events and outcomes in the international realm can still gain access to assistance from the ICJ."**

Arguably, while several international courts exist which deal with international disputes, none in particular specializes in geography and sovereignty-related issues. In this manner, the ICJ's success through special agreements makes a significant contribution to international law, as it provides a platform for resolving both geography and sovereignty-related issues that no other wide-range international court provides.[44]

D. The ICJ as a Platform for the Weak

The International Court of Justice was first established to secure the national interests of the top ten economies.[45] Today, it serves as a platform for peaceful negotiations between states that seek its assistance in dispute resolution or advisory opinions, regardless of economic and military standing. This means a state that does not have the ability or capacity to influence events and outcomes in the international realm can still gain access to assistance from the ICJ. While usage of the ICJ in its early stages was dominated by powerful states,[46] their use of the Court as applicants has declined. Moreover, there has been a notable increase in the use of the ICJ by weak[47] states.

The data outlined in Table 1 shows a steady increase in developing states applying to the ICJ and a decrease in developed states applying to the ICJ.[48, 49] This gradual increase in usage of the ICJ by developing nations and decrease of usage by developed nations suggests the ICJ is gaining the trust of weak states. More specifically, the ICJ is gaining a reputation as an impartial and effective organization for states to refer their cases.

IV. Conclusion

This paper has demonstrated that while the International Court of Justice still faces some developmental challenges, it has made several contributions to international law. Challenges include the issue of jurisdiction, the impartiality of judges (and the potential bias that exists in the judicial procedure), and the problem of enforcement. Regardless, the international community trusts the International Court of Justice. Weak states have increasingly returned to the ICJ for impartial judgments, where powerful states are held accountable for violating international law. Additionally, through its publications, it threatens state reputation loss in the international community, which encourages state compliance with international law. Its advisory opinions and special agreements have played an important role in international relations, specifically regarding state sovereignty and physical geography. While the International Court of Justice does have its shortcomings, the international community should not be so quick to discredit the contributions this judicial body has made to international law, as, without it, they would not exist.

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[43] *International Court of Justice: List of All Cases.*
[44] Wide range meaning involving a lot of states.
[45] Satzer, "The Decreased Use of the ICJ," 25.
[46] By "powerful states," I am referring to Satzer's collective data of "top-ten economies" from 1946-2005 using the ICJ.
[47] For the purpose of this argument, weak states are states that are referred to by the World Bank as 'developing,' while powerful states are 'developed.'
[48] While the respondents columns are also present, they are not as striking because states who are parties to the Court have the ability to submit cases to the Court, but also be taken to Court as respondents.
[49] From 1947-1962, while 22% of applicants were developing nations, 78% were developed; from 1967-1984, while 44% of applicants were developing nations, 56% were developed; from 1986-2003, while 73% of applicants were developing nations, 27% were developed; from 2004-2014, while 85% of applicants were developing nations, 15% were developed.

Table 1 – Data presenting the percentage of cases in which developing nations and developed nations were applicants or respondents.

Range (in years)	Total Cases	Developing Nation as Applicant	Developing Nation as Respondent	Developed Nation as Applicant	Developed Nation as Respondent
2014-2004	26	22	14	4	12
(as percentage)		85%	54%	15%	46%
2003-1986	52	38	24	14	28
(as percentage)		73%	46%	27%	53%
1984-1967	16	7	7	9	9
(as percentage)		44%	44%	56%	56%
1962-1947	37	8	21	29	16
(as percentage)		22%	57%	78%	43%

Table 2 – Data presenting the number of times from 1947-1962 developing/developed nations were the applicants/respondents to a case.

Year	Total Number of Cases	Cases not Included	Developing Nation as Applicant	Developing Nation as Respondent	Developed Nation as Applicant	Developed Nation as Respondent
1962	1	0	0	0	1	1
1961	1	0	1	0	0	1
1960	2	0	2	2	0	0
1959	3	0	1	3	2	0
1958	3	0	1	2	2	1
1957	6	0	0	3	6	3
1955	6	0	0	3	6	3
1954	2	0	0	0	2	2
1953	2	0	0	1	2	1
1951	4	0	0	2	4	2
1950	3	0	2	2	1	1
1949	3	0	1	2	2	1
1947	1	0	0	1	1	0
	37	0	8	21	29	16

Data

Table 3 – Data presenting the number of times from 1967-1984 developing/ developed nations were the applicants/ respondents to a case.

Year	Total Number of Cases	Cases not Included	Developing Nation as Applicant	Developing Nation as Respondent	Developed Nation as Applicant	Developed Nation as Respondent
1984	2	0	2	1	0	1
1983	1	0	1	1	0	0
1982	1	0	1	0	0	1
1981	1	0	0	0	1	1
1979	1	0	0	1	1	0
1978	1	0	1	1	0	0
1976	1	0	0	1	1	0
1973	3	0	1	1	2	2
1972	2	0	0	0	2	2
1971	1	0	1	1	0	0
1967	2	0	0	0	2	2
	16	0	7	7	9	9

Table 4 – Data presenting the number of times from 1986-2003 developing/ developed nations were the applicants/ respondents to a case.

Year	Total Number of Cases	Cases not Included	Developing Nation as Applicant	Developing Nation as Respondent	Developed Nation as Applicant	Developed Nation as Respondent
2003	3	0	3	0	0	3
2002	3	0	3	3	0	0
2001	3	0	2	1	1	2
2000	1	0	1	0	0	1
1999	17	0	13	6	4	11
1998	4	1	3	2	0	1
1996	1	0	1	1	0	0
1995	2	0	0	0	2	2
1994	1	0	1	1	0	0
1993	2	0	1	1	1	1
1992	3	0	3	3	0	0
1991	4	0	1	1	3	3
1990	1	0	1	1	0	0
1989	3	0	2	1	1	2
1988	1	0	0	0	1	1
1987	1	0	0	0	1	1
1986	3	0	3	3	0	0
	53	1	38	24	14	28

Table 5 – Data presenting the number of times from 2004-2014 developing/developed nations were the applicants/respondents to a case.›

Year	Total Number of Cases	Cases not Included	Developing Nation as Applicant	Developing Nation as Respondent	Developed Nation as Applicant	Developed Nation as Respondent
2014	5	0	5	4	0	1
2013	4	0	4	2	0	2
2011	2	1	1	1	0	0
2010	3	0	2	2	1	1
2009	3	0	1	2	2	1
2008	6	1	4	1	1	4
2006	3	0	3	0	0	3
2005	1	0	1	1	0	0
2004	1	0	1	1	0	0
	28	2	22	14	4	12

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