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The Perils of Judicial Restraint: How Judicial Activism Can Help Evolve the International Court of Justice

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Abstract

The article analyzes the International Court of Justice and its approach to judicial decision-making. By investigating the Court's jurisprudence over its seventy years of activity, the article seeks to outline, that if given the choice, the ICJ tends to prioritize judicial restraint over judicial activism. In fact, the Court maintains a strict adherence to judicial restraint, which stems from a fear of losing its legitimacy when facing the issue of consent-based jurisdiction. The article purports that although judicial restraint is an important facet of sound judicial decision-making, the ICJ should not be so reluctant to adopt judicial activism when it is suitable to utilize such an approach. Such a position is strengthened when analyzing the criticisms made of judgments delivered by the Court, which fail to serve the international community beneficially.

A. Introduction

When Sir Gerald Fitzmaurice published an article in memory of Hersch Lauterpacht in 1961, following the latter's recent passing, the former Senior Judge of the International Court of Justice suggested two possible approaches a judge may take when dealing with cases:

> "There is the approach which conceives it to be the primary, if not the sole duty of the judge to decide the case in hand, with the minimum of verbiage necessary for this purpose, and to confine himself to that. The other approach conceives it to be the proper function of the judge, while duly deciding the case in hand, with the necessary supporting reasoning, and while not unduly straying outside the four corners of the case, to utilize those aspects of it which have a wider interest or connotation, in order to make general pronouncements of law and principle that may enrich and develop."[1]

The two approaches discussed here are judicial restraint and judicial activism. Judicial restraint would be considered the formalist approach that is positivist in tradition, which tends to follow the precedent already established. On the other hand, judicial activism embraces a Dworkinian approach, which is open to further development of the law if required with non-legal dimensions included in the judicial decision-making process.

It is worth noting that these two approaches are not mutually exclusive, however a decision tends to be made to prioritize one or the other. This article begins the exploration of the ICJ from this standpoint, for it is the Court's decision to prioritize judicial restraint over judicial activism that is concerning for an international community seeking to tackle threats to international peace and security upholding universal values in a rapidly changing environment. Thus, the key point of exploration for this article is to highlight that the ICJ is characterized by restraint and to understand why it is that the Court has prioritized such an approach over judicial activism. This exploration of the Court's judicial restraint is best exhibited by analyzing the jurisprudence it has developed over its seventy years of activity. In turn this delineates the issues of

[1] G. Fitzmaurice, 'Hersch Lauterpacht- The Scholar as Judge', 37 *The British Yearbook of International Law* (1961) 1, 14, 15.

the ICJ's strict adherence to judicial restraint, and why the inclusion of judicial activism is such a vital factor for sound judicial decision-making.

B. The ICJ and Judicial Restraint

When analyzing the ICJ and its seventy years of practice, it becomes apparent that the court tends to "[…] lean towards a conservative or restrictive jurisprudence".[2] This embodies some of the central features of judicial restraint, which is often considered the process through which "[…] judges render decisions that conform to what an experienced lawyer, familiar with the facts of the case and the relevant legal authorities, would counsel a client would be the most likely outcome".[3] Extending this point further, it follows the spirit of a judge being highly predictable in their judicial decision-making, relying on the legal principles established either by prior case law or legislation.[4]

There are two outcomes in particular that make judicial restraint such an enticing approach for the ICJ to adopt. Firstly, it creates a level of predictability as mentioned already. Judicial restraint "[…] in this sense simply requires that the judge adhere to whatever method produces the most easily-predicted results".[5] Subjects to any legal system where judicial restraint is a central tenet of the judges in power will therefore know the outcome of the case in question. It creates a level of reliability and foreseeability that strengthens the legal system. Moreover, Thomas Merrill argues that it is not the role of the judge to develop the law. "In a democracy, innovation in law and policy is supposed to come from officials selected by the People, not from unelected judges."[6] Through this paradigm, the role of the judge is to apply the law that has already been established, and leave the development of law to those democratically elected to do so.

The secondary outcome of adopting judicial restraint is what makes such an approach distinct from judicial activism; namely that it excludes non-legal elements from the judicial decision-making process. Oreste Pollicino deduces that judicial restraint resists a perceived *degeneration* of the judicial function, which involves "[...] a judge's arbitrary intrusion into the political arena by

2 R. Kolb, *The Elgar Companion to the International Court of Justice* (2014), 404.

3 T.W. Merrill, 'Originalism, Stare Decisis and the Promotion of Judicial Restraint', 22 *Constitutional Commentary* (2005) 271, 274, 275.

4 *Ibid.*, 275.

5 *Ibid.*, 275.

6 *Ibid.*, 275.

giving priority to values other than legal ones [...]".[7] Such an approach rejects the role of politics or non-legal approaches to the judicial decision-making process, confirming "[...] the idea that by purely deductive logic the judge could ascertain the law without personal responsibility or creative means".[8]

Establishing a significant level of predictability and excluding politics or other non-legal approaches are apparent goals of the Court. Identifying the importance of article 38(1)(a)-(c) of the ICJ Statute to the Court's work illustrates the ICJ's desire to reach the aforementioned outcomes that result from adopting judicial restraint. The purpose of listing the sources in Article 38 is to remove the possibility of judicial indeterminacy.[9] "By presenting a 'closed' enumeration of sources to which the Court's judges would be allowed to turn, the hope is to unify and standardize the norms which could validly be applied by the Court."[10] This cements the notion that the primary role of the judge in the ICJ is to settle the legal dispute or question put before them. Thus "[...] the Court's judgements cannot be seen to make international law, but its decisions may be viewed as material evidence of the existence of legal rules".[11] The desired outcomes are somewhat met when judges are restricted to rely on the list of legal sources enumerated in Article 38 when making a judicial decision.

In fact, the ICJ's reliance upon article 38(1)(a)-(c) to make judicial decisions is the preliminary indication of the Court's desire to maintain a significant level of foreseeability and to pursue a strictly legal approach. Exploring the key characteristics and jurisprudence of the ICJ's work demonstrates that the Court is dedicated to the judicial restraint approach. This becomes all the more apparent when assessing the Court's adherence to *stare decisis* and its approach to the political dimensions of a legal question or when it is faced with issues of *non-liquet*. Analysing these facets of the ICJ with greater detail is therefore a necessary exercise. This exercise further strengthens the argument that the Court takes a restrictive approach in its decision-making process in order to

7 O. Pollicino, 'Legal Reasoning of the Court of Justice in the Context of the Principle of Equality between Judicial Activism and Self-Restraint', 5 *German Law Journal* (2004) 3, 283, 285.

8 *Ibid.*, 286.

9 G. Hernandez, *The International Court of Justice and the Judicial Function* (2014), 180. See also, H. Lauterpacht, *Private Law Sources and Analogies of International Law* (1927), 67, 68.

10 *Ibid.*, See also C.J.R. Dugard, *International Law: A South African Perspective* (2006), 27.

11 *Ibid.*, See also R.Y. Jennings & A. Watts (eds), *Oppenheim's International Law*, Vol I., 9th edn. (1992), 41, para. 13 and J. Crawford, *Brownlie's Principles of Public International Law,* 9th edn. (2012), 19-20.

achieve two outcomes: foreseeability and the exclusion of politics. Therefore, the forthcoming analysis develops a general image of the Court and gives some understanding as to why it is so averse to adopting judicial activism.

C. Stare Decisis

Beginning with the principle of *stare decisis* and the loyalty to such a principle, the ICJ displays its affinity with judicial restraint. *Stare decisis* applies precedent to judicial decision-making already established in prior judgments. Herman Oliphant's support for *stare decisis* is based on the notion that "[...] it makes the law applicable to future transactions certain and the future decisions of judges predictable; and again, how it gives us justice according to law and not according to the whims of men".[12] As following this principle this principle brings a level of predictability, it comes to no surprise that *stare decisis* is an established feature of the Court's work. The ICJ has always strictly adhered to precedent, thus resisting the temptation to expand or move beyond its established jurisprudence. This is indicative of the ICJ's adherence to a positivist model of international adjudication, promoting a tradition of continuity and persistence with historical practices.

This tradition of adopting the principle of *stare decisis* dates as far back the ICJ's predecessor, the PCIJ. In the 1927 *Mavrommatis Jerusalem Concessions* case, judges saw no reason to depart from previous decisions, which were still regarded as sound judgments.[13] In the case of the ICJ, though the likes of Hernandez supports the argument that *stare decisis* is a feature of the Court's work,[14] there are dissenting voices to such a proposition. Former ICJ Judge Mohamed Shahabuddeen contends that:

> "Article 38, paragraph 1(d), was mandatory in requiring the Court to apply judicial decisions, including those of the Court itself; but nothing in the requirement, or in what he said, suggests that such decisions are to apply with the force of binding precedent."[15]

[12] H. Oliphant, 'A Return to Stare Decisis', 14 *American Bar Association Journal* (1928) 2, 71, 72.

[13] *The Mavrommatis Jerusalem Concessions* (Greece v. Great Britain), PCIJ Rep, Series A, No. 5 (1925).

[14] Hernandez, *The Judicial Function*, *supra* note 9, Chapter 6.

[15] M. Shahabuddeen, *Precedent in the World Court* (1996), 98.

On the basis that the Court has the choice to apply previously established precedent, Shahabuddeen asserts that *stare decisis* does not apply. However, the implicit application of *stare decisis* is a prevalent feature in the Court's work. The ICJ refers back to its own decisions regularly to ensure consistency of jurisprudence.[16] Regardless of whether the Statute explicitly states the use of *stare decisis*, the Court is more inclined to follow "[...] the *rationes decidendi* of past cases".[17]

It is worth noting Hart's emphasis on the meaningfulness of law is based on the uniform agreement of the law-abiding criteria. If uniform agreement is lost, so too is the meaningfulness of the legal system. For the ICJ, this is one of the principal reasons as to why the Court commits to *stare decisis* in such a stringent manner. It is an attempt to validate the international legal system and to overcome the criticisms directed towards the system as not really being a system of law; a criticism Hart has consistently made against public international law.[18] By following precedent, the Court is attempting to establish rules that are regarded, by both the subjects and objects of the system, as rules of international law, asserting meaningfulness to the legal system and establishing its normative authority. Moreover, it creates continuity and foreseeability. For "[...] respect for decisions given in the past makes for stability, which are of the essence of orderly administration of justice, and because judges do not like, if they can help it, to admit that they were previously wrong".[19] Especially in respect of international law where there is no written constitution identifying the law-abiding criteria, the Court's adoption of *stare decisis* can thus be seen as filling a void in the absence of a constitution. The Court's work is a reference point for both subjects and objects of international law to confirm the established rules.

Hence the Court's favorability towards *stare decisis* in its work relates to its reliance upon the list of sources enumerated in article 38(1)(a)-(c) of the Statute. Establishing precedent that is based on such a list of sources, seeks to achieve the anchoring of judicial decisions. This provides the necessary justification, not only for the legal order itself as Hernandez would claim,[20] but for the Court and its decisions. Thus, judicial decisions do not fall privy to "[...] idiosyncratic interests and preferences [...]", but rather follow the continuity and historical

[16] See the joint declaration of seven judges in the case of Kosovo, *Legality of Use of Force (Serbia and Montenegro v. Portugal)*, Judgment, ICJ Reports 2004, 1160, 1208.

[17] R. Cross & J.W. Harris, *Precedent in English Law*, (1991), 100.

[18] H.L.A Hart, *The Concept of Law*, 2nd ed. (1994), 214.

[19] H. Lauterpacht, *The Development of International Law by the International Court*, (1958) 14.

[20] Hernandez, *The Judicial Function*, *supra* note 9, 159.

practices of international law.[21] Therefore, establishing precedent on the legal sources of international law accepted as such by States, strengthens not only the legality of the sources of international law in question, but the very precedent itself. Moreover, by adopting such an approach to its judicial decision-making process, the Court seeks not only to retain its own authority, but to also establish stability in the international legal system by validating the legitimacy of the accepted sources of international law.

In this regard the Court's adherence to precedent can be seen as a necessity for ensuring the validity of the international legal system. This also goes some way to denounce the criticisms that it is not in fact a fully-fledged system of law. The benefits for a strict adoption of *stare decisis* are apparent when addressing the validation of such a system of law and forming a historical tradition and a degree of continuity. However, for the likes of Dworkin such an approach is flawed. Dworkin considered this to be "[...] a fruitless exercise to seek unanimity among law-applying authorities of a legal system as to the criteria for identifying law".[22] He considered judges to be an essential part of the developmental process legal systems undergo naturally and flexibility is required when reform of precedent is necessary:

> "Judges think about law, moreover, within society, not apart from it; the general intellectual environment, as well as the common language that reflects and protects that environment, exercises practical constraints on idiosyncrasy and conceptual constraints on imagination."[23]

Dworkin has focused on one of the central flaws of positivism, and consequently the Court's approach to international adjudication. If the application of precedent in specific cases does not deliver a suitable judgment, then it is the Court's responsibility to develop the law accordingly. In light of Dworkin's arguments against Hart's necessity of establishing law-abiding criteria, the Court's adoption of *stare decisis* can thus be seen as an act of judicial restraint when the development of the law is required. This is a criticism that

21 M. Koskenniemi, 'The Place of Law in Collective Security', 17 *Michigan Journal of International Law* (1996) 2, 455, 478; see also M. Koskenniemi, *The Gentle Civilizer of Nations* (2005), 494, 596.

22 J. D'Aspremont, 'Herbert Hart in Today's International Legal Scholarship', in J. D'Aspremont & J. Kammerhofer (eds), *International Legal Positivism in a Post-Modern World* (2014), 126.

23 R. Dworkin, *Law's Empire* (2003), 88 [Law`s Empire].

has been directed at the Court on several occasions when restraining themselves from veering away from the principle of *stare decisis* has led to unsatisfactory judgments. Dworkin recounts that, "[…] consistency with any past legislative or judicial decision does not in principle contribute to the justice or virtue of any present one".[24]

The 2015 *Applications of the Convention on the Prevention and Punishment of Crime of Genocide* case is indicative of the frailties of stringently adopting *stare decisis*. The case concerned Croatia and Serbia, with Croatia claiming that Serbia, as the successor of the Soviet Federal Republic of Yugoslavia, had committed an act of genocide, consequently violating the Genocide Convention 1948. Serbia submitted the counter-claim that Croatia had similarly violated the Genocide Convention in the Krajina region. Much of the case mirrored the *Bosnian Genocide* case (2007), hence there was little surprise that the Court continued to refer back to this specific case when dealing with Croatia and Serbia's claims:

> "In this connection, the Court recalls that, in its Judgment of 26 February 2007 in the *Bosnia and Herzegovina v. Serbia and Montenegro* case, it considered certain issues similar to those before it in the present case. It will take into account that Judgment to the extent necessary for its legal reasoning here. This will not, however, preclude it, where necessary, from elaborating upon this jurisprudence, in light of the arguments of the Parties in the present case."[25]

The Court did not fail to follow through with this statement as the judgment followed the precedent of the *Bosnian Genocide* case.

Both claims were considered to fall short of a violation of the Genocide Convention. This was in light of the fact that they had failed the *mens rea* test, as there was no *dolus specialis* to commit the act of genocide, even though the *actus reus* had been confirmed. It is in the dissenting opinion of Judge Cancado Trindade that the issues with such a precedent become apparent:

[24] *Ibid*., 151.

[25] *Applications of the Convention on the Prevention and Punishment of Crime of Genocide (Croatia v. Serbia)*, Jurisdiction and Admissibility, Judgement, ICJ Reports 2015, 9, 61, para. 125.

> "The Court cannot simply say, as is does in the present Judgment, that there has been no intent to destroy, in the atrocities perpetrated, just because it says so. This is a *diktat*, not a proper handling of evidence. This *diktat* goes against the voluminous evidence of the material element of *actus reus* under the Convention against Genocide (Article II), wherefrom the intent to destroy can be inferred. This *diktat* is unsustainable; it is nothing but a *petitio principii* militating against the proper exercise of the international judicial function. *Summum jus*, *summa injuria*. *Mens rea*, the *dolus specialis*, can only be *inferred*, from a number of factors. In my understanding, evidential assessments cannot prescind from axiological concerns. Human values are always present, as acknowledged by the historical emergence of the principle, in process, of the *conviction intime* (*livre convencimento/libre convencimiento/libero convincimento*) of the judge. Facts and values come together, in evidential assessments. The inference of *mens rea/dolus specialis*, for the determination of responsibility for genocide, is undertaken as from the *conviction intime* of each judge, as from human conscience [...]. The evidence produced before the ICJ pertains to the *overall conduct* of the State concerned, and not to the conduct only of individuals, in each crime examined in an isolated way."[26]

Although Judge Trindade is somewhat extreme in considering the Court's judgment a *Diktat*, the questioning of the high threshold for proving the *dolus specialis* for committing genocide is worth some analysis. Such a precedent makes it difficult for States to violate the Genocide Convention, raising questions as to the purpose of the convention. When the issue was brought up in the *Bosnian Genocide* case, the Court argued that although genocide had been committed in Srebrenica, Serbia was unaware of such genocidal intentions. Therefore, the Court did not address the *mens rea* elements of the crime in question. Consequently, the Court held that Serbia was not responsible for the genocide in Srebrenica.[27]

26 Dissenting Opinion of Judge Cancado Trindade, *Applications of the Convention on the Prevention and Punishment of Crime of Genocide (Croatia v. Serbia)*, Jurisdiction and Admissibility, Judgement, ICJ Reports 2015, 9, para. 468-470.

27 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgement, ICJ Reports 2007, 43, 179 [Bosnian Genocide].

Such a precedent established a standard of intent that is too difficult to reach, allowing States to evade the responsibility of such acts too easily. The Court's position on genocide is untenable because the high threshold established by the ICJ seemingly facilitates States evading responsibility for the crime of genocide. Such a high threshold required reworking and development in the law remains necessary. However, the Court avoided such measures and continues to apply pre-existing precedent. The Court referred back to the *Bosnian Genocide* case to establish that in order for the *dolus specialis* to be established:

> "The Court recalls that, in the passage in question in its 2007 Judgment, it accepted the possibility of genocidal intent being established indirectly by inference. The notion of 'reasonableness' must necessarily be regarded as implicit in the reasoning of the Court. Thus, to state that, 'for a pattern of conduct to be accepted as evidence of [...] existence [of genocidal intent], it [must] be such that it could only point to the existence of such intent' amounts to saying that, in order to infer the existence of dolus specialis from a pattern of conduct, it is necessary and sufficient that this is the only inference that could reasonably be drawn from the acts in question. To interpret paragraph 373 of the 2007 Judgment in any other way would make it impossible to reach conclusions by way of inference."[28]

What becomes apparent from analyzing the Court's stringent adoption of *stare decisis* is the pitfalls that beseeches such an approach. Analyzing the approach the Court has taken to the application of the Genocide Convention seems to validate Dworkin's argument that to always follow pre-existing precedent does not necessarily contribute to the international community in a positive manner to ensure justice or virtue.[29] Instances will arise where the law needs development, where simple application of pre-existing precedent may not be as compatible to the contextual situation of the case at hand. Moreover, the application of precedents by the Court may be to the detriment of the international community.

28 *Applications of the Convention on the Prevention and Punishment of Crime of Genocide (Croatia v. Serbia)*, Jurisdiction and Admissibility, Judgement, ICJ Reports 2015, 5, para. 148.

29 Dworkin, *Law's Empire*, *supra* note 23, 151.

The concerns arising from the Court's adoption of *stare decisis* in regard to the high threshold for a State's culpability for genocide are further justified by Dworkin's advancements for law as integrity. For Dworkin, "[…] propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice".[30] Moreover, jurisprudence must be reconcilable with political theory and political obligation, for political ideals are the moral base which influence the legislation of laws.[31] It is this urge to reconcile judicial decision-making with the political, ethical and moral facets of society, that rejects the judicial decision-making process as an exercise of pure legal science. Law "[…] as integrity does not require consistency in principle over all historical stages of a community's law […]",[32] nor does it "[…] require that judges try to understand the law they enforce as continuous in principle with the abandoned law of a previous century or generation".[33] Instead, the law should be interpreted in order to accommodate the political ideals of the community, ensuring it follows principles of justice, fairness and procedural due process. The argument can be made that judicial activism is required for an interpretation of the Genocide Convention that advances law as integrity, for the Court's high-threshold for genocide does little to represent the dominant political ideals of an international community ever more concerned with protecting the fundamental freedoms and human rights of the individual. Thus, Dworkin and his law as integrity concept advocates that a different standard for genocide would be preferable, rejecting the reapplication of a previous generation's jurisprudence.

Exploring *stare decisis* and the ICJ's strict application of such a principle, begins to paint a vivid picture of the Court's approach to judicial decision-making. It starts to outline the Court's tendency to choose judicial restraint over judicial activism. Moreover, it gives some reasoning as to why the Court has opted for judicial restraint. "The international community is […] peculiarly dependent on its international tribunals for the […] clarification of the law […]",[34] and adopting *stare decisis* ensures that international legal rules are strengthened by its constant and consistent application.

30 *Ibid.*, 225.
31 *Ibid.*, 191.
32 *Ibid.*, 227.
33 *Ibid.*, 227.
34 Fitzmaurice, 'Hersch Lauterpacht- The Scholar as Judge', *supra* note 1, 19.

D. Ex Aequo et Bono

Article 38 of the ICJ statute covers the sources of international law that the Court may apply to settle disputes brought before them. The Court has the tendency to utilize the sources prescribed in Article 38.1 when adjudicating on international legal disputes, staying true to its positivist roots.[35] Subsequently, the Court has veered away from applying the provisions set in Article 38.2 of *ex aequo et bono* given the lack of restraint such a provision administers. *Ex aequo et bono* allows the Court to utilize an equitable approach to decide cases based on "[…] which is 'fair' and 'good', acts 'outside of law' or more pejoratively 'acts notwithstanding the law'".[36] Therefore, rather than reaching decisions on the basis of the applicable law, the Court would deliberate upon non-legal elements to reach a decision that is fair and good.[37] This could see the Court use a deontological approach for example, or simply consider the political and sociological factors incumbent within the case at hand in order to reach the most equitable decision.

However, an integral pre-requisite of utilizing article 38.2, is the consent of both parties in advance. So far in the Court's relatively short history, no party has invoked the application of Article 38.2, which has been to the relief of the Court. Considering its strict adherence to *stare decisis*, it would seem that the Court would show a sense of reluctance to apply a non-legal approach. First of all, the adoption of such a principle would incur uncertainty in regard to the parties' acceptance of a judgment. The Court is constantly attempting to ensure its legitimacy. The use of *ex aequo et bono* could give rise to parties challenging the Court's jurisdiction, as the US did in the *Nicaragua* case.[38] Although it must be stressed that in this particular incident, the lack of US compliance was not due to the utilization of Article 38.2. Secondly, it would be a profound turn

35 Hernandez, 'The Judicial Function', *supra* note 9, 29-30.

36 L. Trakman, 'Ex Aequo et Bono: Demystifying an Ancient Concept', 8 *Chicago Journal of International Law* (2007) 2, 621, 622.

37 *Ibid.*, 623.

38 *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Merits, ICJ Reports 1986, 14. United States withdrew from the compulsory jurisdiction of the Court following their judgement. See J. I. Charney, 'Disputes Implicating the Institutional Credibility of the Court: Problems of Non-Appearance, Non Participation, and Non-Performance', in L. F. Damrosch (ed.), *The International Court of Justice at a Crossroads*, 288 [Charney, Disputes Implicating the Institutional Credibility of the Court] and C. Paulson, 'Compliance with the Final Judgements of the International Court of Justice since 1987', 98 *The American Journal of International Law* (2004) 3, 434.

from Hart's law-abiding criteria, and the continuity that it strives to achieve when adjudicating upon cases of international law. In the eyes of the Court it would betray much of the ICJ's work to create a system with established rules that both subject and objects of international have agreed to. Consequently, the Court can seek to apply such established rules without the fear of parties rejecting their judgments and no longer agreeing to the Court's jurisdiction.[39]

Yet for Lauterpacht, such a provision was purposefully drafted so that it gives the Court a legislative function, and the ability to develop the law if necessary. Such a legislative function was administered, "[...] not only in regard to a particular dispute, but also, within the purview of a general arbitration treaty, in regard to future disputes".[40] Thus the Statute has left room for the Court to develop the law if required. The Court instead has confirmed its reluctance for the use of Article 38.2, repeatedly insisting that it would make judgments purely on the basis of international law, and never *ex aequo et bono*:

> "On a foundation of very general precepts of justice and good faith, actual rules of law are here involved which govern the delimitation of adjacent continent shelves-that is to say, rules binding upon States for all delimitations; in short, it is not a question of applying equity simply as a matter of abstract justice, but of applying a rule of law which itself requires the application of equitable principles, in accordance with the ideas which have always underlain the development of the legal régime of the continental shelf in this field." [41]

Given the choice to develop the law or to fall back on existing laws, the Court has fallen back on the latter, generating further support towards the argument that the ICJ is characterized by judicial restraint. It must be stressed however, that the Court would utilize Article 38.2 if parties direct it to do so,

39 Charney, *Disputes Implicating the Institutional Credibility of the Court*, *supra* note 38, 297. Charney explored the ICJ's problems with compliance and suggested that the Court 'establish a record of success in cases where the parties would probably live up to their obligations.'

40 H. Lauterpacht, *The Function of Law in the International Community*, (1933), 313.

41 *North Sea Continental Shelf (Federal Republic of Germany v. Netherlands; Federal Republic of Germany v. Denmark)*, Judgement, ICJ Reports 1969, 3, 47, para. 85.

where it is "[...] freed from the strict application of legal rules in order to bring about an appropriate settlement".[42]

E. The ICJ's Relationship With Legal and Political Questions

During the first and second Hague Conference, Friedrich Von Martens was a prevalent figure that "[...] was emphatic that matters suitable for arbitration must be capable of judicial analysis".[43] However "[...] in all international disputes in which the political element predominates, settlement by arbitration is impossible".[44] Martens espoused the notion that it was not within the remit of international arbitration to deal with matters that maintained a greater political dimension. Moreover, the likes of Gennady Danilenko argued against the need to tend to the political dimension, for he considered non-legal phenomena as "[...] too broad for a close legal analysis of technical aspects of law-making".[45] This aligned with Hartesian propositions regarding the manner in which a purely legal system of law should be structured. For these scholars, pulling away from the political, sociological and ethical dimensions of an international dispute and thus adopting a more scientific approach to arbitration, would nurture a more efficient system of law.[46] Considering the deep tradition of positivism entrenched in the work of the Court, it is no surprise that the ICJ have followed such a position.

Since 1946 the position of the ICJ has been that "[...] whilst recognizing the distinction between legal and political aspects of a dispute, it has consistently rejected the claim that the immixture of legal and political issues was a sufficient ground to refuse to consider the legal issues in themselves".[47] This in itself follows the tradition of the PCIJ, who often decided to exclude non-legal matters in their judicial decision-making process. The *Austro-German Customs Union* case

42 *Continental Shelf (Tunisia v. Libyan Arab Jamahiriya)*, Judgement, ICJ Reports 1982, 18, 60, para. 71.

43 Lauterpacht, *Development of International Law*, *supra* note 19, 148.

44 *Ibid.*,148.

45 G.M. Danilenko, *Law-Making in the International Community* (1993), 5.

46 See also F. Rigaux, 'Hans Kelsen on International Law', 9 *European Journal of International Law* (1998), 325, 340. "[Politics does not] enter into a 'pure' theory of law [...] [it] is excluded because legal thinking must center on positive rules which rely on the hypothetical Grundnorm, a purely formal premise without any reliance on philosophical or moral considerations, without any engagement with political or social values."

47 Hernandez, *The Judicial Function*, *supra* note 9, 70.

is a prime example where the PCIJ faced a legal matter that contained a highly politicized agenda, and as a consequence, forced the Court to only partially answer the question brought before it.[48] The dispute concerned the compatibility of the customs regime with the Treaty of Saint-Germain and also Protocol 1 signed at Geneva in 1922, however, the Court only responded to the part of the question relating to Protocol 1. The application of article 88 of the Treaty of Saint-Germain required Austria to refrain from directly or indirectly compromising its independence, preventing a political or economic union with Germany. The joint dissenting opinions of Judges Adatci, Kellogg, Rolin-Jaequemyns, Jonkheer Von Eysinga and Wang thus agreed with the Court's opinion that such a matter became too political an agenda for the Court to address:

> "The undersigned regard it as necessary first of all to indicate what they believe to be the task assigned to the Court in this case. The Court is not concerned with political considerations nor with political consequences. These lie outside its competence."[49]

In light of the Court's firm exclusion of political matters in contentious cases, the ICJ has tended to use advisory opinions as *testing ground* for addressing legal issues entwined with political elements. Advisory opinions are non-binding and consequently afford the Court flexibility in exploring contentious issues within the international legal system. Absent from the concern of voluntary jurisdiction, the Court has the opportunity to move away from judicial restraint to potentially develop international law. This position has been advocated by ICJ Presidents Schwebel and Guillaume In fact, they have encouraged international courts and tribunals outside of the UN to follow the Security Council and General Assembly in referring issues that are of importance for the unity of international law[50] to the ICJ.

With such room for flexibility the Court has attempted to answer questions pertaining to international law regardless of the political dimensions to the issue

48 *Customs Regime between Germany and Austria*, Advisory Opinion, PCIJ Series A/B, No. 41 (1931), 37.

49 Dissenting Opinion of the Judges Adatci, Kellogg, Baron Rolin-Jaequemyn, Sir Hurst, Schücking, Van Eysinga and Wang, *Customs Regime between Germany and Austria*, Advisory Opinion, PCIJ Series A/B, No. 41 (1931), 153.

50 See Judge S. Schwebel's speech in 'Work of the Court in 1999-2000', 54 *Yearbook of the International Court of Justice* (1999-2000), 186, 282-288; and President G. Guillaume speech in 'Publications of the Court', 55 *Yearbook of the International Court of Justice* (2000-2001), 336, 347-357.

at hand. In the Court's first advisory opinion, *Conditions for Admission of a State*, the matter had arisen:

> "The Court cannot attribute a political character to a request which, framed in abstract terms, invites it to undertake an essentially judicial task, the interpretation of a treaty provision. It is not concerned with the motives, which may have inspired this request, nor with the considerations which, in the concrete cases submitted for examination to the Security Council, formed the subject of the exchange of views which took place in that body. It is the duty of the Court to envisage the question submitted to it only in the abstract form which has been given to it; nothing which is said in the present opinion refers, either directly or indirectly, to concrete cases or to particular circumstances."[51]

The Court continued to stress this point in advisory opinions following *Conditions for Admission of a State*. In the *Namibia* advisory opinion, South West Africa claimed that the Security Council's question "[...] was intertwined with political issues and has a political background in which the Court itself has become embroiled to an extent rendering it impossible for the Court to exercise its judicial function properly [...]".[52] The Court dismissed such claims maintaining that political pressure did not prevent it from making a decision on the matter. The ICJ reasserted this principle in the *Nuclear Weapons* advisory opinion stressing that regardless of the political nature of a question brought before the Court, it could not refuse the "[...] legal character of a question which it invites it to discharge an essentially judicial task [...]".[53]

It is important to establish that the lack of concern in regard to jurisdiction plays an important role in allowing the ICJ to utilize advisory opinions in such a manner. This factor is evident in the 2004 *Palestinian Wall* advisory opinion where the Court had "[...] indicated that Israel should forthwith cease construction of the wall, dismantle what had been so far constructed and make reparations to

51 *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)*, Advisory Opinion, ICJ Reports 1948, 57, 61.

52 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, 16, ICJ Pleadings 1, 425, 427.

53 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 226, 234, para. 13.

the Palestinians for all damages caused by the project".[54] Fourteen of the fifteen participating judges supported the Court's position, with the single dissenting voice being American Judge Thomas Buergenthal, "[...] who based his entire position on the failure of the ICJ to have before its sufficient evidence relating to Israel's claims of defensive necessity and security from suicide bombings [...]".[55] The Court persisted with such a judgment irrespective of the political situation and the fact that the General Assembly had acted *ultra vires* by referring this issue to the Court, even though the Security Council was in active engagement with the issue.[56] This issue surfaced again in the *Kosovo* advisory opinion. Several States proposed that the matter of a declaration of independence is a question of domestic law, as opposed to international law. These States thus asserted that the Court did not have the competence to evaluate such a question.[57] However the Court thwarted such claims re-establishing its responsibility as a judicial organ of international law:

> "Whatever its political aspects, the Court cannot refuse to respond to the legal elements of a question which invites it to discharge an essentially judicial task, namely, in the present case, an assessment of an act by reference to international law. The Court has also made clear that, in determining the jurisdictional issue of whether it is confronted with a legal question, it is not concerned with the political nature of the motives which may have inspired the request or the political implications which its opinion might have."[58]

As much as the Court's willingness to pursue the legal questions referred to it is commendable, the issue remains that it will continue to ignore the political dimensions of a dispute. For this reason, criticisms can still be directed towards its judgments for unsatisfactorily failing to grasp all the factors that are pertinent to such legal questions. A primary reason for the Court's abstinence of political

[54] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136, 197, para. 150.

[55] R. A. Falk, 'Toward Authoritativeness: The ICJ Ruling on Israel's Security Wall', 99 *American Journal of International Law* (2005) 1, 42, 43.

[56] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion, ICJ Reports 2004, 136, 148, para. 24.

[57] *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo*, Advisory Opinion, ICJ Reports 2010, 403, 415, para. 26.

[58] *Ibid.*, 415, para. 27.

factors is based on a principle of objectivity. Matters that devolve in to ethical or political discourse have the danger of being subjective, giving rise to claims of a lack of neutrality in decision-making. The principle of neutrality has been something the Court has adopted as one of its primary characteristics and the focus of ensuring objectivity is a pivotal manner in which to achieve this.[59] The Court used the *South West Africa* case to expound the principle of neutrality. It stated that it must act in a manner that is independent "[...] of all outside influence or interventions whatsoever, in the exercise of the judicial function entrusted to it alone by the Charter and its Statute".[60] The aim of such a position is to establish a system of law that is both "[...] 'technical' and 'scientific', [and] a truly neutral and objective solution to political problems".[61] The repercussions of a subjective Court can be a dangerous proposition for the principle of neutrality and international law in general. It severely endangers the scientific model of international law that is being advanced by the ICJ, inevitably moving away from the characteristic of restraint that it often displays. The Court would be forced to move away from its reliance upon the strict application of Article 38.1, betraying its positivist roots. This would not only broaden the palette of the Court and system of law in general, but it would also bring into question whether or not parties would accept the jurisdiction of the Court. Judgments would have the potential to become less predictable as the ICJ could not adopt merely the sources of international law in order to attend to matters of a political nature. For the ICJ's own livelihood, dismissing political questions would be advised.[62]

However, the likes of Koskenniemi would be sceptical of the Court's omission of political questions. Koskenniemi's view is that the legal matters of an international dispute cannot be separated from its political dimensions for "[p]olitics is focal and law secondary. Even where the latter exists, its content cannot be ascertained independently from political analyses".[63] Legal and political matters merge into one another seamlessly for the constant recourse to balance out the humanist criteria blurs the line between the two areas. The

59 S. Schwebel, 'Remarks on the International Court of Justice', 102 *Annual Meeting of the American Society of International Law* (2008), 282, 282.

60 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, 16, 23, para. 29.

61 J. D'Aspremont, 'Introduction: The Future of International Legal Positivism', in J. D'Aspremont & J. Kammerhofer (eds), *International Legal Positvism in a Post-Modern World* (2014), 6.

62 Schwebel, 'Remarks on the International Court of Justice', *supra* note 59, 282.

63 M. Koskenniemi, *From Apology to Utopia* (2005), 198.

political elements give explanation to the legal dispute and the legal matters have repercussions for the political climate in which the dispute occurs. To pull one away from the other precludes a comprehensive understanding of the dispute and may potentially result in judgments that are deemed inadequate for its resolution. A prime example would be the Court's judgment on the *Bosnian Genocide* case. The Court's finding that Serbia was not directly involved in the Srebrenica genocide, as it had not directly authorized the acts, was heavily criticized for omitting political factors that were relevant to the legal dispute. The Vice-President of the International Court of Justice, Judge Al-Khasawneh, outlined the failings of such an approach for:

> "The 'effective control' test for attribution established in the Nicaragua case is not suitable to questions of State responsibility for international crimes committed with a common purpose. The 'overall control' test for attribution established in the Tadić case is more appropriate when the commission of international crimes is the common objective of the controlling State and the non-State actors. The Court's refusal to infer genocidal intent from a consistent pattern of conduct in Bosnia and Herzegovina is inconsistent with the established jurisprudence of the ICTY. The FRY's knowledge of the genocide set to unfold in Srebrenica is clearly established. The Court should have treated the Scorpions as a *de jure* organ of the FRY. The statement by the Serbian Council of Ministers in response to the massacre of Muslim men by the Scorpions amounted to an admission of responsibility. The Court failed to appreciate the definitional complexity of the crime of genocide and to assess the facts before it accordingly."[64]

The Court's rigid tradition of positivism is responsible for the criticism laid before such a judgment, for the political elements prevalent indicated a need to develop the law. However, the Court's stance on political matters remains the same, regardless of the flaws that such a position draws out. As the Court stated in the *South West Africa* advisory opinion, "[i]t would not be proper for the Court to entertain these [political] observations, bearing as they do on the

[64] Dissenting opinion of Vice-President Al-Khasawneh, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgement, ICJ Reports 2007, 241.

very nature of the Court as the principal judicial organ of the United Nations, an organ which, in that capacity, *acts only on the basis of the law* [...]".[65]

F. Non Liquet

Another feature highlighting the ICJ's strict adherence to judicial restraint is *non liquet*, which has been a prominent criticism directed towards the ICJ. When faced with a gap or lacuna in the law, the Court has tended to gloss over such problems.[66] "The view prevailing among writers is that there is no room for *non liquet* in international law because there are no lacunae in international law."[67] Gaps in international law are considered to be logically impossible because the system is rigorously structured in a manner to prevent the opportunity for such a phenomenon to unravel. Prosper Weil suggests that the starting point of such a position on international law is founded on the basis that the sovereignty of States is the most fundamental factor within the system:

> "International law exists only to limit the states' inherent freedom of action. States, thus, are obliged to act only insofar as there exists a prescriptive rule, and they are obliged not to act only if there exists a prohibitive rule. Without any prescriptive or prohibitive rule, states may act as they want, unfettered by law."[68]

Ultimately this followed the precedent established in the PCIJ *Lotus* case, where the court held that, "[t]he rules of law binding upon States […] emanate from their own free will […]. Restrictions upon the independence of States cannot therefore be presumed".[69] Subsequently, if there is no explicit prohibition by the international legal system, such conduct is thus permitted. This realist projection of international law prescribes to the notion that States are bound

65 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, 16, 23.

66 "[…] in international law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise, whereby the level of armaments of a sovereign State can be limited […]", *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, ICJ Reports 1986, 14, 135, para. 269.

67 P. Weil, '"The Court Cannot Conclude Definitively…" Non Liquet Revisited', 36 *Columbia Journal of Transnational Law* (1998) 1&2, 109, 110.

68 *Ibid.*, 112.

69 The Case of the SS Lotus, PCIJ Series A, No. 10 (1927), 18.

by a rule of law only because, and to the extent that they had consented to it.[70] The freedom for States to act continues to exist as a basic principle under such an approach to international law. The denial of the issue of *non liquet* is another mechanism to ensure that States remain the primary object and subject of international law.[71]

Accepting the existence of lacunae in international law creates an issue for the ICJ. If gaps are discovered, the remedy to such problem is the development of law, which would go against the principle of *stare decisis*. Thus, accepting instances of *non liquet* would consequently force the Court to consider moving away from a strict application of Article 38.1, and its positivist traditions. *Non liquet* would force parties away from the accepted norms of international law and into the territory of the unknown. The decision to develop the law may impact States that have not accepted the Court's jurisdiction, violating the basic principle of State sovereignty.

Thus, it is due to the protection of the Lotus principle; that *non liquet* has been disregarded by the ICJ. When the ICJ has faced instances where there is no law for the matter in question, the attitude of the Court has been to look over the problem and provide weak judgments. This is apparent in the *Nuclear Weapons* advisory opinion:

> "any specific authorization. […][nor] any comprehensive and universal prohibition of the threat or use of nuclear weapons as such. [...][T]he threat or use of nuclear weapons would generally be contrary to the rules of international law [...] and in particular the principles and rules of humanitarian law; However, in view of the current state of international law, and of the elements at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defense, in which the very survival of a State would be at stake."[72]

The Court provided an advisory opinion with a less than satisfactory conclusion which discards *non liquet* and the requirement to develop international

70 M.J Aznar-Gomez, 'The 1996 Nuclear Weapons Advisory Opinion and Non Liquet in International Law', 48 *International Comparative Law Quarterly* (1999) 1, 3, 8.

71 *Ibid*.

72 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 226, 266, para. 105.

law. As much as the Court seeks to adhere to its positivist principles, a relatively young system that is regulating an arena that is constantly changing and revealing new and distinctive problems, will have instances where there are no legal rules to cover unique events.

However, the Court has indicated its intention to commit to judicial restraint by predicating that there is no issue of *non liquet*. This is because "[...] the State as sovereign is free to do, providing for those issues which are not within the exclusive competence of the State [...]".[73] In this way, the Court has steered itself clear of the responsibilities it may have of developing the law.

G. The ICJ and The Issue of Jurisdiction

By providing a lucid account of the ICJ's adherence to judicial restraint, the objective is to move a step further and to understand why it is the Court has opted to adopt such an approach. Assessing the Court's decision at critical points in the various cases over its seventy years of activity, it seems the ICJ has been ushered into such norms of behavior due to the position of States in international law; as the primary object and subject of the international legal system. Even if the Court does wish to develop international law, and move beyond judicial restraint, it is chained by its own fear of losing legitimacy within the international community. This fear is rooted in the Court's jurisdiction based on consent. Judge Higgins stated that the Court requires State consent in order to establish jurisdiction, "[…] even if one might regret this state of affairs as we approach the twenty-first century […]".[74] Judge Kooijmans stated that the provisions outlined in Article 36.2 of the ICJ Statute could be considered a "[...] serious setback [...]" for the functioning of the Court. If the ICJ is compared to courts such as the European Court of Human Rights or the European Court of Justice that maintain automatic jurisdiction, the ICJ is somewhat lacking in judicial activism. This difference it has with the likes of the ECHR and ECJ means "[…] that before dealing with the merits, the Court always has to analyze in a meticulous way whether the heads of jurisdiction invoked provide the Court with jurisdiction in all those cases which are brought unilaterally

73 Aznar-Gomez, 'The 1996 Nuclear Weapons Advisory Opinion and Non Liquet in International Law', *supra* note 70, 8. See also Nationality Decrees Issued in Tunis and Morocco, Advisory Opinion, PCIJ Series B, No.4 (1923), 24.

74 Separate Opinion of Judge Higgins, *Legality of the Use of Force (Serbia and Montenegro v. Belgium)*, Provisional Measures Order, ICJ Reports 1999, 124, 161, 168, para 26. See also Separate Opinion of Judge Higgins, *Legality of the Use of Force (Yugoslavia v. Spain)*, Provisional Measures Order, ICJ Reports 1999 761, 798, 805 para 26.

[…]".[75] Furthermore the ICJ is concerned that if the Court is too ambitious in its judgment it may "[...] endanger its position [...]" for States may show reluctance to comply with such a judgment and subsequently revoke its consent.[76]

From this perspective it becomes clearer as to why the ICJ maintain such a strict adherence to *stare decisis*. Following precedent ensures predictability. States will be more willing to accept the Court's jurisdiction knowing more or less the direction the ICJ will take with its judgment. Similarly, the Court's hesitance to apply Article 38.2 and decide cases *ex aequo et bono* is grounded in the same desire to ensure predictability. This is because States may revoke consent if the Court goes beyond and develops the law away from what the primary objects have established as rules of international law. Furthermore, this same fear of losing jurisdiction and legitimacy has made the Court reluctant to delve into non-legal matters pertaining to a case or remedy instances of *non liquet*. The ICJ is constantly walking a tightrope when carrying out its judicial functions, for it is wary of the negative consequences it would have upon its judicial function, and more importantly the international legal system as a whole, if States persistently revoked their consent to the Court's jurisdiction. It is attempting to stay relevant as well as legitimate. This highlights the Court's focus on appeasing States in an effort to maintain relevancy, justifying claims that the Court may have a judicial function but no judicial power. Such a capacity derives from the ability to decide disputes irrespective of whether the parties accept its authority.[77]

The *Armed Activities in the Congo* case, between the Democratic Republic of Congo (DRC) and Rwanda, illustrates the Court's preoccupation with consent deftly. Although Rwanda had established a reservation to Article IX of the Genocide Convention,[78] the DRC contended that such a reservation was incompatible with the purposes and uses of the convention, rendering it "null and void." However, the Court held that "[…] the fact that a norm having such character may be at issue in a dispute cannot in itself provide a basis for the

75 P. Kooijmans, 'The ICJ in the 21st Century: Judicial Restraint, Judicial Activism, or Proactive Judicial Policy', 56 *International Comparative Law Quarterly* (2007) 4, 741, 743.

76 *Ibid*.

77 A. Orakhelashvili, 'The Concept of International Judicial Jurisdiction: A Reapraisal', 2 *The Law and Practice of International Court and Tribunals* (2003) 3, 501, 504-505.

78 Article IX of the Genocide Convention (1948) stipulates that: "*Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in Article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute*."

Court's jurisdiction to entertain that dispute — Court's jurisdiction always based on consent of the parties".[79] Several judges such as Kooijmans, Higgins, Simma and Owada criticized the Court's formalist position, positing the argument in their Joint Separate Opinion that:

> "It is a matter for serious concern that at the beginning of the twenty-first century it is still for States to choose whether they consent to the Court adjudicating claims that they have committed genocide. It must be regarded as a very grave matter that a State should be in a position to shield from international judicial scrutiny any claim that might be made against it concerning genocide, […] one of the greatest crimes known."[80]

They concluded the Joint Separate Opinion by stating that "[...] it is thus not self-evident that a reservation to Article IX could not be regarded as incompatible with the object and purpose of the Convention and we believe that this is a matter that the Court should revisit for further consideration".[81] Nevertheless the Court stuck to its initial judgment and displayed the problems such a formalist approach can have upon the legal system.

In the 2011 *Application of the CERD Convention* case, between Georgia and Russia, the Court reiterated the approach to consent, for it declined jurisdiction on the basis of a restrictive interpretation of the precondition to negotiate embodied in the compromissory clause of CERD. Georgia claimed that Russia had violated Articles 2, 3, 4, 5 and 6 of the Convention on the Elimination of All Forms of Racial Discrimination, however the Court held that it lacked jurisdiction under Article 22 of the CERD thus upholding Russia's preliminary objections. The ICJ had determined that Georgia had not exhausted the procedural preconditions required to activate the Court's jurisdiction on the matter. The Court stipulated that Georgia "[…] did not attempt to negotiate CERD-related matters with the Russian Federation […]"[82] and that Georgia had not "[…] used or attempted to use the other mode of dispute resolution contained

79 *Armed Activities on the Territory of the Congo (New Application: 2002)(Democratic Republic of Congo v. Rwanda)*, Judgment, ICJ Reports 2006, 6, 7, para 5.

80 Joint separate opinion of Judges Higgins, Kooijmans, Elaraby, Owada, and Simma, *Armed Activities on the Territory of the Congo (New Application: 2002)(Democratic Republic of Congo v. Rwanda)*, Judgment, ICJ Reports 2006, 6, 65, 71, para 25.

81 *Ibid.*, 72, para 29.

82 *Application of the International Convention on the Elimination of all forms of Racial Discrimination (Georgia v. Russian Federation)*, Judgment, ICJ Reports 2011, 70, 73.

at Article 22, namely the procedures expressly provided for in CERD".[83] The Court linked the applicant's duty to negotiate with the limits of consent given by States, referring back to the *Armed Activities in the Congo*. The Court were stressing that any conditions that affect State consent "[…] must be regarded as constituting limits thereon".[84]

An earlier case that delineates the problems incumbent within establishing jurisdiction based on consent was the *East Timor* case of 1995. Portugal had instigated proceedings against Australia over the administering power capacity it had over East Timor. In 1989, Australia had concluded a treaty with Indonesia, who had occupied East Timor since 1975, on the delimitation and exploitation of part of the continental shelf between Australia and East Timor.[85] Portugal contended that such a treaty had led to Australia infringing the rights of the people of East Timor, in particular the right to self-determination. Portugal affirmed itself as the administering power of East Timor, therefore establishing the argument that such a right was exclusively entitled to be exercised by them.

Though the Court's jurisdiction had been activated by the declarations of both Parties, the fact that the conduct in question was centered around whether Australia had lawfully entered into an agreement with Indonesia, made the matter of jurisdiction problematic for the Court. As the Court sought to also analyze the lawful conduct of Indonesia, they expressed the fact that such an undertaking could only be done with the consent of Indonesia. "The Court applied the so-called Monetary Gold doctrine according to which the Court cannot exercise jurisdiction if the rights and obligations of a third State constitute the very subject-matter of the case before it, in the absence of that third State's consent."[86] There were several problems with such a restrictive judgment. Firstly, East Timor was a non-self governing territory that was entitled to the right of self-determination. Secondly, the General Assembly had continued to refer to Portugal as the administering power of East Timor after rejecting Indonesia's claim that East Timor had been incorporated into its territory.[87] For these reasons of which the Court had expressly touched upon, it could "[...] perfectly well have ruled on that issue without having to pass a

83 *Ibid.*, 140, para 183.

84 Hernandez, *The International Court of Justice and the Judicial Function*, *supra* note 9, 49.

85 *Treaty on the zone of cooperation in an area between the Indonesian province of East Timor and Northern Australia (with annexes). Signed over the zone of cooperation, above the Timor Sea*, 11 December 1989, Australia and Indonesia, 1654 UNTS 105.

86 Kooijman, 'The ICJ in the 21st Century: Judicial Restraint, Judicial Activism, or Proactive Judicial Policy', *supra* note 75, 744.

87 *East Timor (Portugal v. Australia)*, Judgment, ICJ Reports 1995, 90, 96-97.

verdict on the legality of Indonesia's conduct. Portugal was claiming that its own right as administering power, acting on behalf of a non-self-governing people, had been violated by Australia".[88] The Court had unnecessarily refrained from investigating the contentious case in fear of the repercussions it may have upon its own legitimacy to settle the dispute. The greater concern was that "[...] basic principles and values of the international community were an issue, namely the rights of non-self-governing people and their right to self-determination".[89] The issue of compulsory jurisdiction has created obstacles for the Court to address matters that require assessment for the sake of the international community.

This outlines the fundamental flaw in the composition of the Court. The ICJ's work is dictated by the primary position States enjoy in the international legal system. If the Court did desire to develop international law, it is unable to do so for it is not within its remit to extend beyond what is consented for by States. Although the Court receives much criticism for its judicial restraint, it is apparent that there is pressure to adopt such an approach, for if the Court were to lose its legitimacy; the repercussions for the international legal system of law would be greater. However, it can also be argued that the Court's judicial restraint undermines its legitimacy. Such a characteristic is concerning for an international community seeking to uphold universal values and dealing with threats to international peace and security accordingly.

H. A Cry for Judicial Activism

It must be made clear that the intention here is not to dismiss the need for judicial restraint. Judicial restraint is a necessary tool for strengthening the international legal system by affirming the weight of the international laws already established. To solely decide the case at hand by applying pre-existing laws that are functioning effectively is an imperative component for a strong legal system. Continuity and foreseeability are essential proponents of a legal system for they define acceptable behavior in which the community is regulating.[90]

However, continuity and foreseeability should not overshadow the importance of making sound judicial decisions that would impact the community in a positive manner. Judicial proactivity is vital for this very reason, so that mere application of pre-existing laws do not result in unsatisfactory judgments

[88] Kooijman, 'The ICJ in the 21st Century: Judicial Restraint, Judicial Activism, or Proactive Judicial Policy', *supra* note 75, 744.

[89] *Ibid*.

[90] Hart, *The Concept of Law*, *supra* note 18, 51.

that would have negative implications upon the community. It is why Dworkin urges the judge to be part of the legal process, articulating how important it is that the judge continues to develop the law:

> "The practice of precedent, which no judge's interpretation can wholly ignore, presses towards agreement; each judge's theories of what judging really is will incorporate by reference, through whatever account and restructuring of precedent he settles on, aspects of other popular interpretations of the day."[91]

Citing such an approach as legal pragmatism, he contended that it "[...] offers a very different interpretation of legal practice: one where judges do and should make whatever decisions seem to them best for the community's future, not counting any form of consistency with the past as valuable for its own sake".[92] It entrenches the role of the judge to be that of serving the community that it works within in a manner that nurtures its environment positively.[93] Therefore, if the case at hand requires judicial restraint for the sake of impacting international community in a positive manner, then such an approach should be encouraged. Likewise, if judicial activism is the suitable approach, it should not be discouraged. Thus, the ICJ should not shy away from moving beyond the pre-existing laws, particularly if the overall implications of such an approach ensure international peace and security or uphold universal values.

Revisiting *Nicaragua* in light of this argument is ideal for outlining that when judicial restraint falls short of ensuring sound judgments, it gives ground for applying judicial activism. The Court contended that the reapplication of the effective control test in the Bosnian Genocide case, which was established in Nicaragua, "[...] substantially coincided with the standards required by the International Law Commission (ILC) in Article 8 of the ILC Articles on State Responsibility which, according to the Court […] reflects customary international law".[94] However, Cassese raised concerns on whether the effective control test was based on "[...] either customary law […] or, absent any specific rule of customary law, on general principles on state responsibility or even general

91 Dworkin, *Law's Empire*, *supra* note 23, 88.
92 *Ibid.*, 95.
93 *Ibid.*, 88.
94 A. Cassese, 'The Nicaragua and Tadić Tests Revisited in the Light of the ICJ Judgment on Genocide in Bosnia', 18 *European Journal of International Law* (2007) 4, 649, 650.

principles of international law".[95] Cassese outlines a void of legal provisions in regards to this area of international law, thus supporting the suitability of adopting legal activism. However, the Court referred back to the ILC articles, instead of seeking to develop the law in a manner where the necessary political and ethical considerations are incorporated within the assessment of the issue at hand. It is important to consider that although the US most likely did not order Nicaraguan rebels to assassinate, rape or torture, "[...] such operations had been carried out by individuals acting under the authority and with the (financial, logistical, operational, etc.) support of US organs".[96] Therefore, for the ICJ to establish such a high threshold for State responsibility for international crimes committed with a common purpose, the argument can be made that such a decision can incur a negative implication for the international community going forward.

This supports Dworkin's argumentation that "[...] sometimes lawyers must deal with problems that are not technical...and there is no general agreement on how to proceed. One example is the ethical problem that is presented when a lawyer asks, not whether a particular law is effective, but whether it is fair".[97] Occasions arise where a move beyond technical considerations is required and what is beneficial for the international community, both on a legal and political basis. Thus, judicial activism is a pivotal tool for judges to move beyond the law if necessary, in order to focus on establishing rules that will positively impact the international community by tackling threats to international peace and security effectively and upholding universal values.

In fact, though some would scorn the use of judicial activism,[98] and the criticism that the term's meaning has become unclear is somewhat persuasive,[99] what cannot be denied is that judicial activism can play an important role in ensuring justiciability in judicial decisions.[100] Oreste Pollicino contends that judicial creativity has the potential to transform the role of law in the modern

95 *Ibid.*, 653.

96 *Ibid.*, 655.

97 R. Dworkin, *Taking Rights Seriously* (1978), 1.

98 F. H. Easterbrook, 'Do Liberals and Conservatives Differ in Judicial Activism?', 73 *University of Colorado Law Review* (2002) 4, 1401, 1401. Speaking in a symposium, Judge Frank Easterbrook stated that: "Everyone scorns judicial activism, that notoriously slippery term." See also K.D. Kmiec, 'The Origin and Current Meanings of "Judicial Activism"', 92 *California Law Review* (2004) 5, 1441, 1442.

99 K.D. Kmiec, 'The Origin and Current Meanings of "Judicial Activism"', 92 *California Law Review* (2004) 5, 1441, 1443.

100 *Ibid.*, 1442.

"[...] welfare [...]" of societies.[101] Therefore, the use of judicial activism, and by extension judicial creativity, can ensure the judicial decision not only maintains relevancy to the contemporary environment of society, but the relevance and legitimacy of the legal system itself.

> "The interpretation of the rule should, therefore, not only be guided by textual and historical arguments: elements of the system and of purpose will have to come into play. These elements can be found by consulting tradition, case law and literature, and by rethinking the cohesion of the different chapters of the legal system."[102]

Incidentally, judicial activism inspires the judicial decision-making process to be better attuned to the aims and purpose of legal sources, then to merely apply the strict letter of the law without understanding its teleology.

It is in this sense that international law could learn from the work of the European Court of Justice and how it adopts a teleological approach to remain "[...] perfectly consistent with the dynamic and evolving nature of the European Community".[103] Thus, the ECJ "[...] reinterpret[s] and adapt[s] the original meaning of the Treaty dispositions in accordance with the new values and aims that are becoming part of the European dimension".[104] This teleological approach is apparent in the *CILIFIT* case, where it held that "[...] every provision of Community law must be placed in its context and interpreted in the light of the provisions of E.C. law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied".[105] This approach is precisely what is required for in the work of the ICJ, which would permit judicial activism to be adopted when appropriate. Currently, a strict use of judicial restraint does little to modify law in order to meet the changing circumstances of the international law community[106] or

[101] Pollicino, 'Legal Reasoning of the Court of Justice in the Context of the Principle of Equality between Judicial Activism and Self-Restraint', *supra* note 7, 286.

[102] T. Koopmans, 'The Theory of Interpretation and The Court of Justice', in D. O'Keeffe & A. Bavasso (eds), *Judicial review in European Union law*: Liber Amicorum in Honour of Lord Slynn of Hadley Vol. I (2000), 45, 48.

[103] Pollicino, 'Legal Reasoning of the Court of Justice in the Context of the Principle of Equality between Judicial Activism and Self-Restraint', *supra* note 7, 289.

[104] *Ibid*.

[105] *Cilfit v. Italian Ministry of Health*, Case No. 283/81, Judgment of 6 October 1982, [1982] ECR 3415, 3430.

[106] Kolb, *The Elgar Companion to the International Court of Justice*, *supra* note 2, 404.

meet the "[...] objective need to chart new lands".[107] Furthermore, the teleological approach qualifies and justifies when judicial activism should be utilised in the ICJ's work. Indeed, a teleological approach supports the argument that both judicial restraint and judicial activism should both be used as and when necessary. For often the sources of law utilized to make a judicial decision correlates with its aims and purposes justifying the use of judicial restraint. However, it is in those situations when these two factors do not correlate that the use of judicial activism is required. Hence, "[...] being unsatisfied with existing law [...]" and subsequently then "indulg[ing] in something close to open law-creation in order to base [their] decision,"[108] is justified, as it is the aims and the purposes of international law that are of prime focus. This paper has contended that the aims and purposes of international law is both to maintain international peace and security and to uphold universal values. Though a significant level of discretion can be considered of how such aims and purposes can be interpreted and achieved, what can be surmised here is when and what qualifies the legitimate use of judicial activism in the ICJ's judicial decision-making process. Indeed, understanding fully the teleology of international law requires a complete research study of its own. However, what can be advanced in this paper is that the aims and purpose of international law justify the selective use of judicial activism, for it can be a powerful tool in preserving the welfare of international society.

I. Conclusion

International lawyers purport a firmly positivist view of the international legal system when "[t]hey assume that a sovereign state is subject to international law but, on the standard account, only so far as it has consented to be bound by that law [...]".[109] Therefore, international law is "[...] grounded in what nations – or at least the vast bulk of those that others count as 'civilized' […] have consented to its provisions being law for them just by their signatures".[110] The ICJ seeks to carry on such a firmly positivist tradition given its strict adherence to judicial restraint. Certainly, the aim of this article was not to dispel such an approach to judicial decision making as judicial restraint strengthens the

107 *Ibid*.

108 H. Thirlway, 'Judicial Activism and the International Court of Justice', in N. Ando, E. McWhinney & R. Wolfrum (eds), *Liber Amicorum Judge Shigeru Oda*, (2002), 75, 76.

109 R. Dworkin, 'A New Philosophy for International Law', 41 *Philosophy of Public Affairs* (2013) 1, 2, 5.

110 *Ibid*., 6.

international legal system and furnishes the boundaries of acceptable conduct within the international community.

However, the international community is an ever-changing environment that has new and unseen matters that require dealing with in a manner that has not been dealt with before. For example, was environmental law an urgent matter that the international community was prepared to deal with in 1945? Or take the matter of modern warfare, with technologically advanced weaponry and the issue of Non-State actors; was the international legal system established in 1945 taking into account such matters? It seems unlikely that this was the case, and such a predicament supports the argument that judicial activism is an approach that the ICJ should adopt when a suitable situation arises. On one hand there are gaps in the law that need filling, and on the other there are pre-existing laws that require fine-tuning. It seems fitting that the judges of the ICJ attend to such responsibilities. If judges can move away from a stringent use of judicial restraint, the further development of international law through the application of judicial activism can benefit the international community considerably.