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CRITICAL EVALUATION OF JUDICIAL INDEPENDENCE QUESTION IN THE INTERNATIONAL COURT OF JUSTICE

ULUSLARARASI ADALET DİVANI'NDA YARGI BAĞIMSIZLIĞI MESELESİNİN ELEŞTİREL DEĞERLENDİRMESİ

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ABSTRACT

In view of developments in world politics in recent years, such as an upsurge in nationalism, doubts about multilateralism, the Covid pandemic, and the Russia-Ukraine war, an inquiry concerning the peaceful resolution of international disputes is in order. How capable are international dispute resolution mechanisms of satisfying demands and preserving their reputations at such a critical time? The fundamentally political entities involved are likely to remain very disparate, a fact that can only worsen their widely acknowledged poor image in this respect without instituting any remedial measures. As a judicial body, however, the ICJ would hardly be allowed such latitude. Concerns about the impartiality of ICJ judges have already been expressed on the grounds of their perceived allegiance to their home countries, an issue that the existing political zeitgeist only makes more controversial. No solutions are readily available to alleviate all concerns. The current article takes several normative assessments into consideration, arguing that these can devalue the authority of the ICJ's judgments. It then provides insight into how to recognise and deal with the persistent problem of judicial independence within the ICJ.

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ÖZET

Son yıllarda dünya siyasetine etki eden milliyetçiliğin yükselişi, çok taraflılığa dair şüphelerin artması, Covid-19 salgını ve Rusya-Ukrayna savaşı gibi gelişmeler göz önüne alındığında, uluslararası uyuşmazlıkların barışçıl çözümüne dair incelemelerin daha fazla önem kazandığı anlaşılmaktadır. Uluslararası uyuşmazlık çözüm mekanizmaları böylesine kritik bir dönemde talepleri karşılama ve itibarlarını koruma konusunda yeterli mi? Temelde politik olan ilgili oluşumların oldukça farklı kalması muhtemeldir ki bu, herhangi bir iyileştirici önlem almadan, bu bağlamda yaygın olarak kabul edilen kötü imaj sorunlarını daha da derinleştirebilecek bir gerçektir. Fakat bir yargı organı olarak Uluslararası Adalet Divanı'na (UAD) böyle bir serbestlik tanınması UAD'ın doğasına pek uygun olmayacaktır. UAD üyelerinin kendi ülkelerine olan bağlılıkları nedeniyle tarafsız kalabilmelerine dair endişeleri dile getiren bazı çalışmalar yapılmıştır. Nitekim bu, mevcut siyasi ruhun daha da tartışmalı hale getirdiği bir husustur. Bununla birlikte, tüm endişeleri ortadan kaldıracak kapsayıcı bir çözüm mevcut değildir. Mevcut çalışma çeşitli normatif değerlendirmeleri dikkate alıp, bu tür kaygıların UAD kararlarının otoritesini zayıflatabileceğine ilişkin değerlendirmelerde bulunmaktadır. Çalışma daha sonra, UAD'da süregelen yargı bağımsızlığına ilişkin tereddütlerin nasıl anlaşılması gerektiğini ele alıp nasıl aşılabileceği konusunu irdelemeye çalışmıştır.

Anahtar Kelimeler: *Tarafsızlık, UAD, Ulusal çıkarlar, Uluslararası adalet, Uyuşmazlık çözümü*

INTRODUCTION

The classical belief was that "politics could be evaded through impartial adjudication and honest legal reasoning".[1] Yet, world politics has become a highly volatile situation from which serious international law violations might arise. Although the International Court of Justice (hereinafter ICJ or the Court) has been a salutatory development toward achieving this end, the nature of international law barely allows the insulation of law from politics, as States have shown an intransigent attitude on this subject. Some states have forfeited some of their sovereign rights by recognizing the ICJ's compulsory jurisdiction. The Court's decisions have usually been respected and complied

[1] Richard H. Steinberg & Jonathan M. Zasloff, "Power and International Law" *The American Journal of International Law,* 100(1), 2006, p.70.

with.[2] But states have also endeavoured to prevent unfavourable ICJ decisions through a variety of means including reservation, submitting forged evidence, exerting influence on members, interpreting the rulings in such a way as supports their claims[3], and overtly denying the Court's competence.[4] The ICJ has thus usually been a place where sovereignty and the rule of law[5] have in one way or another been in opposition to each other.

The ICJ is not the only judicial body available for states to settle their international disputes peacefully. Since the foundation of the United Nations (UN) there has been a proliferation of judicial, quasi-judicial, implementation control and other dispute resolution bodies that operate at international and regional levels. The peaceful settlement of major international disputes is peculiar to the ICJ. Amid the upheaval in the political order and its profound global impact, in particular the ongoing conflict between Russia and Ukraine, the international community has once again recognized, though not comprehended, the importance of settling disputes through peaceful mechanisms. Although the ICJ could take a contingent role in cultivating international peace, the focus has usually been on the UN's other principal organs, the Security Council in particular. The ICJ has normally remained beyond criticism,[6] being praised using a counterfactual approach that

[2] Colter Paulson, "Compliance with Final Judgments of the International Court of Justice since 1987", *the American Journal of International Law,* 98, 2004, pp.434-61.

[3] E.g. the advisory opinion of the ICJ on the Western Sahara was interpreted differently by disputed parties in their favour. Abdeslam Maghraoui, "Ambiguities of Sovereignty: Morocco, The Hague and the Western Sahara Dispute", *Mediterranean Politics*, 8(1), 2003, pp.113-126.

[4] There may also be surreptitious means by which national interests can sway the ICJ, but this paper limits itself to the revealed means in order to avoid weakening its arguments.

[5] There has been various perspectives on the application of the rule of law at the international level. There is therefore no exhaustive definition of the international rule of law. Kostiantyn Gorobets, "The International Rule of Law and the Idea of Normative Authority", *Hague J Rule Law,* 12, 2020, pp. 227–249. For the purposes of the current article, the rule of law refers mainly to the impartiality of judges. This is one of the features of the international rule of law that is acknowledged by many, including Judge Peter Tomka, who has been a member of the Court for nearly two decades. He suggests that the Court could strengthen the international rule of law by "adjudicating disputes submitted to it with dedication, in utmost impartiality, independence, and in accordance with international law". Peter Tomka, "The Role of the International Court of Justice in the Inter-State Legal Order", *Statement to Students of the St. Petersburg State University*, 14 May 2013, https://www.icj-cij.org/public/files/press-releases/8/17448.pdf, Accessed on 22 July 2023.

[6] There have in fact been some criticisms of the ICJ, but these have mainly been made by politicians and diplomats from states that are unhappy with particular ICJ decisions. Only a

acknowledges that if states were to grant the Court compulsory jurisdiction it would work properly and fairly as if its members were impartial. Yet some studies have shown that this putative perception of the ICJ is not borne out in reality.

Research[7] has soundly dismantled the illusion of the Court's impartiality.[8] Given these findings, very real concerns regarding both the independence and the competence of the Court's members have been expressed. These alleged deficiencies would not only diminish the ICJ's role in the peaceful settlement of disputes, but would endanger its reputation. Given the recently escalating tension in world politics, this could in turn stymie the nascent law-habit[9] in international law and encourage states to revert to the maintenance of absolute sovereignty and the resulting "self-help" regimes. The ICJ is vital in holding

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few international lawyers and academics are sceptical of the ICJ in general. Eric A. Posner & Miguel F. P. de Figueiredo, "Is the International Court of Justice Biased?", *The Journal of Legal Studies,* 34(2), 2005, pp.599-630, p.600.

7 For the voting pattern of members, judicial independence and impartiality of judges see: William Samore, "National Origins v. Impartial Decisions: A Study of World Court Holding" *Chicago-Kent Law Review*, *34*, 1956, pp. 193–221; Thomas R. Hensley, "National Bias and the International Court of Justice" *Midwest Journal of Political Science,* 12, 1968, pp.568–86; Il Suh, "Voting Behavior of National Judges in International Courts", *American Journal of International Law, 63*(2), 1969, pp.224-236; Arthur W. Rovine, "The National Interest and the World Court" in Leo Gross (ed.), *The Future of the International Court of Justice,* Oceana Publications, 1976, pp.313-335; Edith Brown Weiss, "Judicial Independence and Impartiality: A Preliminary Inquiry" in Lori F. Damrosch (ed), *The International Court of Justice at a Crossroads*, Transnational Pub., 1987, pp.123-154; Posner and Figueiredo, p.600. In addition, working as arbitrator alongside being a judge of the ICJ could lead judicial parsimony and ineffectiveness of the ICJ. For this discussions respectively see: Nathalie Bernasconi-Osterwalder & Martin Dietrich Brauch, "Is "Moonlighting" a Problem? The role of ICJ judges in ISDS", *International Institute for Sustainable Development,* (23 November 2017)*, https://www.iisd.org/system/files/publications/icj-judges-isds-commentary.pdf, Accessed on 22 July 2023;* Gleider I. Hernandez, "A Reluctant Guardian: The International Court of Justice and the Concept of 'International Community'", *British Yearbook of International Law*, 83, 2013, pp.13–60; David Tuyishime, "Critical Analysis on the Ineffectiveness of the ICJ in the Settlement of Disputes between States: The Example of Nicaragua Case", *E-Journal of Law*, 3(1), 2017.

8 In addition to concerns about impartiality of the ICJ, there is another drawback regarding its members that has been proposed by Robert Volterra. He criticizes their lack of proficiency, resulting in their inability even to recognize a submission containing forged evidence. Robert G. Volterra, "How to Win Cases before the ICJ in the 21st Century" (21/04/2021) Jindal Global University, https://www.barandbench.com/apprentice-lawyer/webinar-alert-how-to-win-cases-before-the-icj-in-the-21st-century-by-robert-g-volterra, Accessed on 22 July 2023.

9 The habit of adjudication in particular. Pitman B. Potter, "The Habit of International Legal Action", *World Affairs,* 111(1), 1948, pp.35–37.

back this development. But its judicial identity imposes more responsibility than other essentially political UN bodies. It would not be as easy for the international community to express disappointed expectations of the Court as of the Council. The aforesaid concerns about the members of the ICJ should not therefore be overlooked, and the Court should be subjected to critical scrutiny.[10]

In this regard, the present paper further evaluates the issue of impartiality by demystifying the relevant provisions of the ICJ Statute. It does this by taking into account the current political zeitgeist. In addition to previous investigations into the ICJ's impartiality, the present study emphasises the risks inherent in these persistent problems, risks that can harm the Court's image. It then spells out the essential dynamics of regulation, the appointment of scrupulous judges and the levels of public support. Yet these dynamics seem to be on life support, and their ability to improve the Court's impartiality is weak. The dilemma of sovereignty versus the rule of law is thus likely to persist without these factors. The study therefore acknowledges the difficulties the ICJ's members face in avoiding judgements that reinforce sovereignty. It therefore asserts that scapegoating Court members is a reductive approach. The study concludes that the most convenient option would be to pursue a balance between Herculean and Sisyphean proposals in response to these concerns, in the absence of popular support. To this end, the paper consists of three sections. The first underlines the Court's importance, initially outlining its historical evolution before describing the availability of various access mechanisms. The second section examines the statutory control mechanisms aimed at ensuring the impartiality of judges and judicial independence. It assesses their implementation in order to determine whether they ensure or merely encourage the impartiality and judicial independence of members, while emphasising the existing conflict between vision and reality. The last section discusses the dynamics that could play important roles in reducing the obstructive effects of political challenges to the rule of law.

I. THE GROWING ROLE OF THE ICJ SINCE "THE HOPE OF AGES"

States have theoretically committed themselves to "settle their international

[10] More than a decade ago Koskenniemi cogently asserted that "it is high time that "international adjudication" were made the object of critical examination". Martti A. Koskenniemi, "The Ideology of International Adjudication and the 1907 Hague Conference" in The Hague Academy of International Law (ed.), *Topicality of the 1907 Hague Conference, The Second Peace Conference*, Brill, 2008, pp.127-152.

disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered".[11] To that end, the existence of any judicial body at international level is by and large a reflection of cooperation in one way or another so as to avert disputes as much as possible. Some even see international courts as "a condition *sine qua non* for the proper functioning of a rule-based international order".[12] They are all important both politically and academically despite their deficiencies. This is all the more so for the ICJ, as its existence has proven to be an important catalyst for the peaceful settlement of disputes. The foundation of the ICJ's forerunner, the Permanent Court of International Justice (PCIJ), was considered to be the climax of the history of international law. When it was approved by the Assembly of the League of Nations, James Brown Scott[13] showed his enthusiasm: "We should fall upon our knees and thank God that the hope of ages is in process of realization."[14] In fact, the PCIJ was neither the first nor the only international court (IC).[15] Though not a worldwide court,[16] the Central American Court of Justice (CACJ) was founded in 1907.[17] Its jurisdiction, regardless of its nature and origin, covered all manner of disputes and issues. As a matter of fact, the CACJ's experience was used in determining the PCIJ's scope, particularly in providing full independence to judges.[18]

The international community has long passed the stage of exuberant acclamation of the ICJ as it did for the PCIJ[19]. It is time to recognize the Court's limitations, but without neglecting its salutary effect on the international legal system. The establishment of an IC may no longer be a novel development, several permanent international judicial systems having been inaugurated

[11] Article 2(3) of the UN Charter

[12] Avidan Kent, Nikos Skoutaris and Jamie Trinidad, *The Future of International Courts Regional, Institutional and Procedural Challenges*, Routledge, 2019, p.7.

[13] One of the founders of the American Society of International Law.

[14] James Brown Scott, "A Permanent Court of International Justice", *American Journal of International Law,* 15(1), 1921, p.55.

[15] Ömer İlhan Akipek, *Milletlerarası Adalet Divanı,* Ankara, 1974, p.14; Kamuran Reçber, *Uluslararası Hukuk*, Dora, 2023, p. 434.

[16] ibid

[17] Manley O. Hudson, "The Central American Court of Justice", *American Journal of International Law*, 26(4), 1932, pp.759-786.

[18] ibid

[19] Martti Koskenniemi, *The Politics of International Law*, Hart Publishing, 2011, p.278.

within a century[20], but despite the significant rise in their number, the ICJ has still played a cardinal role in solving pressing international problems, promoting shared values and developing international law. Its distinguished history and its comprehensive jurisdiction over disputes among states has accordingly led it to be regarded by many as the senior IC.[21] The ICJ's Statute does not confine the Court to any region, subject matter or organization. States from any region can bring their disputes on any subject before the ICJ, encouraging references to it as the World Court. Since its foundation it has played a primary role in legitimizing the international legal system by resolving disputes in a principled manner.[22] Alongside the principal UN bodies that are essentially political in nature, the ICJ has been key to the image of international law by proving that international norms do indeed matter.

The ICJ is primarily authorised to function in two jurisdictional areas: contentious cases and advisory jurisdiction. In contentious cases, the basis for the Court's jurisdiction is the consent of states. Since there is no requisite form of such recognition, states may give their consent in various ways such as special agreements (*compromis*), the declarations made under Article 36 of the ICJ Statute (optional clause), a jurisdictional clause of a treaty (*compromissory clauses*) and the doctrine of *forum prorogatum*. The most common ways of recognizing jurisdiction in contentious cases are unilateral declarations and jurisdictional clauses of treaties.

The number of declarations deposited under Article 36(2) is only 73. This is not the only problem with the optional clause: it may be seen as signing a blank cheque.[23] States thus add various reservations to their declarations so as to limit the Court's jurisdiction. In fact, Paragraph 3 of Article 36 of the Statute, which allows such reservations, gives the impression of a limited provision in terms of the way it was written.[24] However, states that have added reservations to their acceptances of the Court's compulsory jurisdiction have in practice interpreted this paragraph in such a way that they can put

[20] Karen Alter, *New Terrain of International Law: Courts, Politics, Rights,* Princeton Univ. Press, 2014.

[21] Rosalyn Higgins, *Problems and Process: International Law and How We Use It*, Oxford University Press, 1995.

[22] Thomas M. Franck, *Fairness in International Law and Institutions*, Oxford University Press, 1995.

[23] Higgins, 1995.

[24] Akipek, p.66.

forward any terms and conditions they wish.[25] Had the only way to recognize its jurisdiction been unilateral declarations, the Court would have barely interfered in disputes between states.

The various ways of recognizing jurisdiction does, however, increase the likelihood of the Court interfering in disputes. While the number of states recognising the Court's jurisdiction by declaration is low, virtually all the world's states have declared such recognition by treaty.[26] There has been a sharp growth in the practice of inserting clauses in treaties providing for recourse to the ICJ. There are over three-hundred bilateral and multilateral treaties or conventions with a jurisdictional clause that empowers the ICJ to resolve contingent treaty disputes.[27] Treaty-based jurisdiction may in practice allow the Court to determine its jurisdiction. Many years after a state ratifies the Treaty, it could be brought before the Court against its will by another state that is party to the same treaty.[28] The ICJ's competence regarding treaty-based jurisdiction has rarely been challenged, particularly when states stand to benefit. Furthermore, *compromissory clauses* may be a good alternative for challenging intransigent states that avoids optional clauses and special agreements.[29]

The ICJ has also had a salutary effect on the international legal system by its advisory opinions on legal questions. Article 96 of the UN Charter allows the General Assembly, the Security Council or other organs and specialized UN agencies to apply the advisory procedure,[30] which also enables the Court to resolve disputes between states insofar as they concern UN activities.[31]

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[25] ibid, e.g. the terminated of declaration of USA includes a quite extreme reservation as follows: "Disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America".

[26] E.g. 173 State are parties to the United Nations Convention against Torture.

[27] The International Court of Justice, *Handbook*, https://www.icj-cij.org/public/files/publications/handbook-of-the-court-en.pdf, Accessed on 22 July 2023.

[28] Posner & Figueiredo, p.604.

[29] E.g. *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*; *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*; *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)* etc.

[30] It was proposed to include States to entitle them to ask advisory opinions. But this was not approved in San Francisco Conference. F. Blaine Sloan, "Advisory Jurisdiction of the International Court of Justice", *California Law Review,* 38(5), 1950, pp.830-859.

[31] Higgins, 1995.

Advisory opinions are technically not binding, but they are of great importance in that they describe the legal situation regarding the subject for which the opinion is requested.[32] It is usually difficult to disregard the Court's finding that an act either contravenes or conforms to international law.[33] In this regard, Thirlway rightly indicates that

if the Court advises, for example, that a certain obligation exists, the State upon which it is said to rest has not bound itself to accept the Court's finding, but it will be in a weak position if it seeks to argue that the considered opinion of the Court does not represent a correct view of the law.[34]

There is an exception to the non-binding nature of the advisory jurisdiction, as there is no rule precluding a preliminary agreement accepting a forthcoming advisory opinion as binding.[35] Some UN conventions elevate advisory Court opinions to a binding state. Although only a few conventions contain such exceptional clauses,[36] their very existence reinforces the legal weight and moral authority of the Court's advisory jurisdiction.

Nevertheless, as discussed in the following sections, there has been a risk of losing or damaging its reputation for both contentious and advisory opinions. Although states are loath to make any compromise that is not in their best interests,[37] the degree of compliance with the ICJ's rulings is high.[38] Whether powerful or weak, east or west, states have usually endeavoured to legitimize their acts, even very wrongful ones, under the guise of international law. This is mainly because of the law habit that, however weak,[39] states have

[32] ibid

[33] E.g. one of the recent and famous advisory opinion of the ICJ: *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo,* 2010.

[34] Hugh Thirlway, "The International Court of Justice", in Malcolm D. Evans (ed.) *International Law*, OUP, 2014, pp. 610-12.

[35] Ibid, 612.

[36] See the Article 8 of the Convention on the Privileges and Immunities of the United Nations; Article 9 of the Convention on the Privileges and Immunities of the Specialized Agencies of the United Nations; Article 8 of the Headquarters Agreement between the United Nations and the United States of America.

[37] John P. Grant, *Law Essentials: International Law*, Dundee University Press, 2010, p.4.

[38] Heather L. Jones, "Why Comply? An Analysis of Trends in Compliance with Judgments of the International Court of Justice since Nicaragua", *Chi.-Kent J. Int'l & Comp. Law,* 12(1), 2012, p.57.

[39] It is weak due to fact that "the machinery necessary to enshrine this does not exist". Malcolm N. Shaw, *International Law*, CUP, 6th ed., 2008, p.12.

developed since 1945 in particular. States usually avoid non-compliance with the Court's decisions or disregarding its advisory opinions.[40] This is a very valuable development, albeit states' interpretations can be hypocritical. The ICJ does not have the luxury of losing a reputation that is important for the peaceful settlement of international disputes.[41] It is incumbent upon ICJ members to shoulder this responsibility, particularly in the current period of high international tension. If they fail to do so, states would have yet another excuse for disregarding the ICJ's authority,[42] in addition to others such as economic crises, immigration flows and the pandemic.

This section focuses on salient facets of the Court by highlighting the major features of the ICJ in resolving disputes among states. The Court has functioned actively both in contentious cases and advisory opinions. The availability of different forms of manifesting consent paves the way for increasing the number of cases brought before the Court. The Court's ability to resolve disputes is of great importance, but comes with a responsibility. Although the role of the ICJ has been useful in inter-state disputes[43] there are also growing concerns about its neutrality. The following section focuses on the Court's questionable aspects by discussing the extent to which it reflects this responsibility.

II. DILEMMA OF SOVEREIGNTY VERSUS THE RULE OF LAW: COLLISION BETWEEN THE ICJ STATUTE AND STATES PRACTICE

The existence of effective and even compulsory judicial mechanisms is necessary in order to ensure the rule of law at the international level.[44] Yet the link between politics and the international system is much closer than is the

[40] States follow the judgments of the Court with the greatest interest as they usually consider ICJ judgements as an authoritative pronouncement on the law. Higgins, 1995, p.202.

[41] For Hans Wehberg's views in that regard see: Armin von Bogdandy, Ingo Venzke, "In Whose Name? An Investigation of International Courts' Public Authority and Its Democratic Justification", *European Journal of International Law,* 23(1), 2012, pp.7–41, p.12.

[42] James Crawford & Joe McIntyre, "The Independence and Impartiality of the 'International Judiciary'" in Shimon Shetreet & Christopher Forsyth (eds.) *The Culture of Judicial Independence: Conceptual Foundations and Practical Challenges*, Martinus Nijhoff, 2012, p.202.

[43] ibid p.9.

[44] Statement by H.E. Judge Peter Tomka, President of the International Court of Justice, at the High-Level Meeting on the Rule of Law (24 September 2012) https://www.un.org/ruleoflaw/wp-content/uploads/2017/05/Statement_ICJ.pdf, Accessed on 22 July 2023.

case in municipal legal orders, and the role of power is much more obvious.[45] It follows that international judicial organizations also arise from a process in which politics is predominant.[46] They are treaty-based institutions that are by and large formed and regulated by states, on whose consent the implementation of their founding convention ultimately depends. As a result, the expectation that they exclusively hold the goals and values they are supposed to serve is both irrational and irrelevant.[47] The extent of the tension between *raison d'état* and the rule of law normally varies depending on the significance of the case for the conflicting parties. The stance of an international judicial body regarding the rule of law could therefore also vary from one case to another. As regards the ICJ, its judgements also represent epitomes of sovereignty.[48] While the ICJ Statute does not recognise political realities, states in practice vie to further their national interests in the ICJ's sphere. To this end, they try to exert influence through the members of the Court.

The ICJ is technically a body of 15 independent judges. The usual way in which states attempt to exert their influence on them is by trying to have a member from their own nationalities appointed. But this is not an easy task. First, only 15 states can hold one of the 15 slots. In addition, the practice has developed of electing one judge from each of the permanent members of the Security Council.[49] As a result, there are only ten seats for the other states. Members are elected simultaneously by the General Assembly and Security Council. A member needs to be approved by the Assembly and Council with an absolute majority.[50]

Moreover, *ad hoc* judges could be specially appointed for particular

[45] Shaw, p.12; Tayyar Arı, "Morton A. Kaplan ve Uluslararası Politikada Sistem Yaklaşımı", *Uludağ Üniversitesi İktisadi ve İdari Bilimler Fakültesi Dergisi*, 11(1-2), 1990, pp.103-118.

[46] Grant, p.4.

[47] Bogdandy and Venzke, p.8.

[48] Suh, p.225; Posner and Figueiredo. P.604.

[49] This practice has recently been challenged when the UK received a setback when its candidate did not obtain enough support from the General Assembly, though backed by the Security Council. James Landale (21 November 2017), "How the UK lost its International Court of Justice place to India" *BBC News* https://www.bbc.co.uk/news/uk-politics-42063664, Accessed on 22 July 2023. Another exception is that China did not appoint a judge between 1967 and 1985.

[50] The permanent members cannot veto elections of members to the Court, as Article 10(2) of the Statute makes no distinction between permanent and non-permanent members of the Security Council.

cases by the disputing parties.[51] This method provides for both parties to be represented on the Bench.[52] States thus have two main means of appoint a member of their nationality for the Court's bench.[53] Since it is more difficult to achieve this outcome through the process stipulated under the Article 4 of the Statute than the one under the Article 31, it is likely that majority of states would not have a judge of their nationality on the Bench if they were to use it. It follows that states are usually inclined to appoint judges *ad hoc* when they are parties to disputes.

Concerns regarding the impartiality of the Court's members have been expressed since the establishment of the PCIJ. The matter was pithily expressed in the fourth Annual Report as follows:

Of all influences to which men are subject, none is more powerful, more pervasive, or more subtle, than the tie of allegiance that binds them to the land of their homes and kindred and to the great sources of the honors and preferments for which they are so ready to spend their fortunes and to risk their lives.[54]

As a result, provisions were inserted into the Statute that sought to guarantee both judicial independence and impartiality. These provisions fall into two categories: restrictive and incentive. As regards the first category, provisions such as Articles 16, 17 and 24 distinguish between permissible activities, consistent with the status of a judge, and activities forbidden as irreconcilable with that status.[55] As for the second, provisions such as Articles 18 and 19 aim to enable members to carry out their duties independently by allowing them to hold certain important posts before being appointed to the Court, since these appointments are not lifetime ones.[56] In that respect,

[51] In addition, Article 30(2) of the Statute provides that assessors can also participate, but without voting rights.

[52] Advisory Committee of Jurists, Proces-Verbaux of the Proceedings of the Committee, 16 June-24 July 1920, p.721.

[53] Shabtai Rosenne, *The Law and Practice of the International Court*, Martinus Nijhoff Publishers, 1985, p.173.

[54] Fourth Annual Report of Permanent Court of International Justice, (June 15th, 1927-June 15th, 1928), Series E., No. 4, p.75. See also n 50 (Advisory Committee of Jurists).

[55] Robert Kolb, *The International Court of Justice*, Hart Publising, 2013, p.133.

[56] Sometimes members can be appointed to important positions in their countries after their appointment to the Court. For example, Awn Shawkat Al-Khasawneh, a sitting judge between 2000 and 2011, left the ICJ on the ground that he was appointed as Prime Minister of Jordan

Articles 16 and 17 identify absolute and relative incompatibilities that limit the functions any member can exercise.[57] Article 24 additionally provides a recusal mechanism despite the unclear demarcation between it and Article 17(2).[58] Article 24 technically requires a consensus between the president of the Court and the concerned member.[59] If there is a dispute between the two, then the Court makes the final decision. In any event, most of the 26 recusals have been the result of self-recusation.[60] Both the practice of the Court[61] and Article 34(2) of the Rules of the Court[62] also allow also states to challenge the composition of the Court by informing the President of the Court.[63] The limited liability of states to request recusals of judges is reasonable, as they could otherwise abuse an absolute right of recusal requests with the result that all members of the Court might become vulnerable to arbitrary disqualification by states under the guise of administration of justice.[64]

Another mechanism by which independence is safeguarded is the involved procedure of dismissing a member of the Court. Neither a UN body nor appointed states can impeach or recall Court members.[65] Article 18 provides that this can only be done by the unanimous opinion of the other members.

in October 2011.

[57] Kolb, pp.133-134.

[58] Andreas Zimmermann & others, *The Statute of the International Court of Justice: A Commentary,* OUP, 2019.

[59] For example, Sir Hersch Lauterpacht could not participate in the *Nottebohm* case because he had previously given advice to Liechtenstein. Stephen M Schwebel, "Judge Sir Hersch Lauterpacht's Report on the Revision of the Statute of the International Court of Justice" in David D. Caron and others (eds), *Practising Virtue: Inside International Arbitration*, OUP, 2015, pp.158-166, p.158.

[60] See for examples: Chiara Giorgetti, "The Challenge and Recusal of Judges at the International Court of Justice" in Chiara Giorgetti (ed.) *Challenges and Recusals of Judges and Arbitrators in International Courts and Tribunals*, Brill, 2015, p.25; Kolb, 2013, p.137.

[61] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p.18*, paras. 8-9; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I. C. J. Reports,* 2004, p. 142*,* para.8.

[62] "If a party desires to bring to the attention of the Court facts which it considers to be of possible relevance to the application of the provisions of the Statute mentioned in the previous paragraph, but which it believes may not be known to the Court, that party shall communicate confidentially such facts to the President in writing."

[63] Kolb, 2013, p.137.

[64] ibid, p.136.

[65] Zimmermann and others, 2019.

Ensuring such judicial tenure weakens the capacity of states to interfere with judicial independence.[66] Article 19 is another important provision that safeguards the independence of members: it gives them diplomatic privileges and immunities throughout the period in which they perform their duties. Finally, it is important to note that the President of the Court has a casting vote in the event of a tie. This would not be just if the President of the Court were a national of one of the parties in a case. Article 32(1) of the Rules of the Court does not allow the President to exercise his or her functions in such cases.[67] Overall, the Statute recognizes almost all conceivable scenarios.

However, neither the ICJ Statute nor the UN Charter provides an independent mechanism for monitoring the implementation of these articles, which is left to the discretion of the Court's members by Articles 16(2) and 17(3). For example, the Member of the Court of Russian nationality, Vice-President Gevorgian, did not recuse himself from *Ukraine v. Russia* concerning the Genocide Convention[68] (although he did not take part in the *Ukraine v. Russia* decision concerning Allegations of Racial Discrimination and Terrorism Financing).[69]

The two provisions of the Statute regarding the impartiality and independence of members appear to be tautological, both stating that every member of the Court that exercises his powers impartially ought to exercises his powers impartially. As a result, there could be legal justification for serving the interests of the appointing states. In the absence of any universally

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[66] ibid

[67] For example, because the President of the Court was a national of one of the Parties in the following cases, the Presidency was therefore transferred to the Vice-President: *Ambatielos case (jurisdiction), Judgment of July 1st, 1952: I.C. J. Reports 1952, p.32; Anglo-Iranian Oil Co. case (jurisdiction), Judgment of July 22nd, I952: I.C.J. Reports,* 1952, p.97.

[68] *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Request for the Indication of Provisional Measures, Order*, 16 March 2022, General List No. 182. But it was not first time, as the Member of the Court of Russian nationality did not recuse in Georgian case as well.

[69] He informed the President of the Court that he should not take part in the decision of the case by referring to Article 24, paragraph 1, of the Statute. As a result, the Russian Federation appointed a judge ad hoc, Leonid Skotnikov, in the case pursuant to Article 31 of the Statute and Article 37, paragraph 1, of the Rules of Court. *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2019, para.7 p. 565.* https://www.icj-cij.org/public/files/case-related/166/166-20191108-JUD-01-00-EN.pdf, Accessed on 22 July 2023.

credible procedures for determining facts, the effort to establish whether a judge is independent and impartial under the Statute could be stymied by contradictory allegations of fact by the parties to a dispute. Given that both the PCIJ and the ICJ have developed a broadly liberal approach in practice, the abovementioned provisions are implemented differently.[70] Though the allowance of too many exceptions to these rules may sound trivial, it can arouse legitimate suspicions[71] as well as eviscerating the rules. The question of the extent to which these provisions could encourage members to reflect the rule of law therefore persists.

It is not appropriate, however, to prejudge the impartiality of the ICJ by assuming that all members of the Court have uniformly supported the national interests of the states that appointed them. That is to say, the fact that a member of the Court is a citizen of a state party to the case should not disqualify them from that membership.[72] In this context, it is worth noting the key views of Lauterpacht and Schwebel.[73] Lauterpacht considers conscious bias at international level as a serious breach, seeing "the difference between a *judex corruptus* and a judge breaking his judicial oath on account of conscious bias in favour of his country [a]s only one of degree."[74] He recognizes the possibility that an international judge may subconsciously be influenced by his or her home country to vote in its favour.[75] Yet, he says, they can still adjudicate impartially if the necessary external regulation is provided. Schwebel observes that ICJ members may have mostly voted in favour of their countries.[76] Like Lauterpacht, he agrees that judges may be subject to external influences, as it is more difficult for them to maintain their impartiality in the international

[70] See for examples: Giorgetti, 2015, p.25; Kolb, 2013, pp.135-136.

[71] Kolb, 2013, p.136.

[72] Akipek, 1974, p.45; Stephen M. Schwebel, "National Judges and Judges Ad Hoc of the International Court of Justice", *The International and Comparative Law Quarterly,* 48(4), 1999, pp.889–900; Hersch Lauterpacht, *The Function of Law in the International Community*, OUP, 2011, pp.223-232.

[73] He previously served as an ICJ judge of the ICJ for two decades. He was also elected to President of the Court after one term as Vice-President.

[74] Lauterpacht, 2011, p.223. Article 20 of the ICJ Statute: "Every member of the Court shall, before taking up his duties, make a solemn declaration in open court that he will exercise his powers impartially and conscientiously."

[75] As he states that "the subconscious element of sentiment and national solidarity may prove stronger than a legal declaration." ibid, p.223.

[76] Schwebel, 1999, p.893.

sphere as opposed to the municipal one.[77] But he disagrees that they have served the interests of their states in all cases, because their judgments may have been right and they have mostly voted with the majority of the Court. In other words, voting in favour of their countries does not necessarily mean that their judgements were incorrect, because the two positions are not necessarily incompatible. Both authors also point to several cases where national judges voted against their states.[78]

While their analysis may be cogent, they are too sanguine about ICJ judges. It follows that their comments are not sufficient to alleviate concerns about the impartiality of ICJ members. These concerns need to be taken cautiously. If enough scepticism emerges about the lopsided judgements of the ICJ,[79] it would affect not only the Court's image but that of the other international judicial bodies. This is the result of the ICJ's reputation as being in the van of international adjudication. In this sense, every ICJ judgement and advisory opinion is important, while dissenting or separate opinions could have a detrimental effect on the Court's reputation.[80]

In fact, concerns about the Court's image are not new, as dubiousness about the future of the Court was expressed as early as the 1960s and 1970s.[81] In this regard, it is important to recall the 1966 South West Africa cases. The Court's controversial and indeed counterfactual stance in this case was criticised[82] and it caused a detrimental effect on the reputation of the Court among developing countries in particular.[83] The critical response to the Court's ruling in this

[77] ibid, p.894-895.

[78] Lauterpacht, p.226; ibid, p.893.

[79] This broadly refers to a judge's unconscious restrictions on what to take into account when reaching a decision that he or she instinctively favours. Higgins, 1995, p.6.

[80] Ijaz Hussain, *Dissenting and Separate Opinions at the World Court*, Martinus Nijhoff Publishers, 1984; Lyndell Prott, "Role, Consensus and Opinion Analysis at the International Court of Justice", *Netherlands Yearbook of International Law*, 14, 1983, pp.69-85; Farrokh Jhabvala, "The Scope of Individual Opinions in the World Court", *Netherlands Yearbook of International Law,* 13, 1982, pp.33-59; Robert Jennings, "The International Court of Justice after Fifty Years", *American Journal of International Law,* 89(3), 1995, pp.493-505.

[81] Thirlway, 2014, p.613.

[82] Richard A. Falk, "The South West Africa Cases: An Appraisal, International Organization", *International Organization,* 21(1), 1967, pp.1-23; Victor Kattan, "Decolonizing the International Court of Justice: The Experience of Judge Sir Muhammad Zafrulla Khan in the South West Africa Cases", *Asian Journal of International Law,* 5, 2015, pp.310–355.

[83] Ibid, 613-614, Jennings, 1995.

case should not be overlooked. Reservations were expressed not only about the Court's decision the Court itself. As a Court, reaching an unsatisfactory decision could naturally provoke criticism.[84] But the excessive criticism of the Court, as if it had never done anything worthwhile, was actually a reflection of the expectations of that institution rather than the wrongfulness of its decision – which, it should be noted, was hardly unanimous: it was reached by a casting vote of the President after an equal seven-seven split of the members.[85] However, this did not prevent the Court from being considered a complete disappointment, so reducing confidence in it. It is thus quite possible that the Court's reputation could be imperilled by a single decision based on one ill-considered judgement. Although the Court improved its reputation after some time, the ICJ's propensity for being "very much subject to the winds of world politics and the whims of member governments"[86] makes such a recovery potentially very problematic in the current climate of political tension and fragility.

The dramatic shift in international relations includes a growing propensity for far-right political movements around the world, including EU countries. The escalation in the global political sphere gives states more latitude to adopt nationalistic policies that conflict contingently with international law.[87] Traumatic international events such as the Cold War and two World Wars have resulted in the proliferation of new organizations and codifications of international law, fundamental changes that can be viewed as advances in international adjudication. Yet if necessary measures are not taken, the effect of the present resurgence of populism may be to take the legitimacy and authority of the ICJ two steps back.[88] The question, then, is how to preserve

[84] Jeffrey L. Dunoff and Mark A. Pollack, "The Judicial Trilemma", *American Journal of International Law,* 111(2), 2017, p.274.

[85] All judges who voted against the final decision also appended their dissenting opinions.

[86] Karen A. Mingst, Margaret P. Karns, and Alynna J. Lyon, *The United Nations in the 21st Century*, Routledge, 2022, p.2.

[87] Gregory Shaffer, "Legal Realism and International Law" in Jeffrey L. Dunoff & Mark A. Pollack (eds.) *International Legal Theory: Foundations and Frontiers*, Cambridge University Press, 2022, pp.82-100.

[88] See Alter's discussion about how critical junctures could affect the future of international courts. She also argues that "the minefield that current international judges face today, especially compared to past eras, is formidable...The political zeitgeist is currently different compared to the end of the Cold War and the end of WWII.": Karen J. Alter, "Critical Junctures and the Future of International Courts in a Post-Liberal World Order", in Avidan Kent, Nikos Skoutaris and Jamie Trinidad (eds.) *The Future of International Courts Regional,*

the reputation of the ICJ in the midst of the resurgence of ethnonationalism and populist regimes.

III. BALANCING BETWEEN A HERCULEAN AND SISYPHEAN TASK: POSSIBLE BUT DIFFICULT

Before making any recommendations, it is important to recognize the symbiotic relationship between law and politics in their interaction at various levels.[89] Accordingly, even though it was adumbrated in early judgments of the PCIJ,[90] international law is barely appropriate to ensure full and equitable application of the legal maxim *nemo iudex in causa sua* in relations between states. This is most evident in those disputes in which states see their vital interests involved.[91] Home-country bias is, in other words, particularly strong in politically sensitive cases.[92]

On a related note, it is important to stress that the current political climate has put the ICJ under a pressure regarding recent serious violations of international law. Alter argues that there has been a growing expectation that ICs condemn states for their internationally wrongful actions. She is further of the view that ICs' room to avoid particularly controversial issues by adopting certain tactics such as reliance on gatekeepers, stalling for time and procedural dodges has recently been made more difficult.[93] Such expectation is likely to restrain the ICJ too. It will thus be difficult for the ICJ to keep itself aloof from highly controversial matters that place the Court in difficult situations.

For example, the ICJ has been able to keep some cases pending list for years without taking any action, but it could not resist the international community's demands by introducing provisional measures shortly after the Ukraine submitted a request for the institution of provisional

Institutional and Procedural Challenges, Routledge, 2019, pp.8-33.

89 Martin Loughlin, *Sword and Scales: An Examination of the Relationship between Law and Politics*, Hart Publishing, 2000.

90 Statement by H.E. Judge Peter Tomka, President of the International Court of Justice, at the High-Level Meeting on the Rule of Law (24 September 2012) https://www.un.org/ruleoflaw/wp-content/uploads/2017/05/Statement_ICJ.pdf, Accessed on 22 July 2023.

91 Alexander Orakhelashvili, *Akehurst's Modern Introduction to International Law*, 8th ed., Routledge, 2019, p.545.

92 Clifford J. Carrubba and Matthew Gabel, "International Courts: A Theoretical Assessment", *Annual Review of Political Science*, 20, 2017, p.68.

93 Karen, 2019, p.8.

measures concerning the Genocide Convention[94] and Allegations of Racial Discrimination and Terrorism Financing.[95] The case concerning the former in particular has received an unprecedented level of support among states. After a joint statement of 43 states on supporting the Ukraine in its proceedings against Russia at the ICJ, all EU members except Hungary also filed applications to intervene alongside New Zealand, the United Kingdom, the USA, Australia, Canada and Norway, pursuant to Article 63 of the Statute.[96] In addition, the EU, as a public international organization, furnished information under Article 34(2) of the Statute and Article 69(2) of the Rules of Court to support the Ukraine's claims in its initiative.[97] Such a rare amount of support that represents the united stance of the international community could conceivably bring further pressure to bear on the Court's decision one way or another.[98]

In view of this ambivalence, eliminating the problem of the impartiality of judges at the international level becomes a daunting though not impossible task. There are three particular dynamics at play in this regard: regulation, the appointment of conscientious judges and public support.[99] However, whether these are advanced enough to be helpful is a moot point.

States have not usually shied away from their obligations under the

[94] N 68 (*Allegations of Genocide*).

[95] *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Provisional Measures, Order of 19 April 2017, I.C.J. Reports,* 2017, p. 104, https://www.icj-cij.org/public/files/case-related/166/166-20170419-ORD-01-00-EN.pdf, Accessed on 22 July 2023.

[96] Albania, Andorra, Iceland, the Marshall Islands, Japan, Moldova, Monaco, Montenegro, North Macedonia, Palau, and San Marino are part of the joint statement but did not intervene. EEAS Press Team, "Joint Statement on Supporting Ukraine in its Proceeding at the International Court of Justice", (13.07.2022) https://www.eeas.europa.eu/eeas/joint-statement-supporting-ukraine-its-proceeding-international-court-justice_en, Accessed on 22 July 2023; Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation) – Intervention, https://www.icj-cij.org/en/case/182/intervention, Accessed on 22 July 2023.

[97] International Court of Justice, Information furnished by the European Union, 18 August 2022, https://www.tandfonline.com/doi/epub/10.1080/14623528.2022.2143528, Accessed on 22 July 2023.

[98] Iryna Marchuk & Aloka Wanigasuriya, "Beyond the False Claim of Genocide: Preliminary Reflections on Ukraine's Prospects in Its Pursuit of Justice at the ICJ", *Journal of Genocide Research,* 25(5), 2022, p.2.

[99] Lauterpacht, 2011; Ronald Dworkin*, Taking Rights Seriously*, Harvard University Press, 1978; Karen, 2019.

provision requiring abstention from voting.[100] As discussed above, the Statute's provisions intended to ensure the impartiality of members are barely sufficient for their purpose. But the problem is not so much their content but the means of their implementation. This is not a vital issue for the ICJ, as no single member can either make deliver or prevent a decision. Bias could, however, be an issue for all the Court's members. If a Russian member were to abstain from the voting, there is no guarantee that members from the US or EU countries would adjudicate independently of their home countries' strategic interest.

Two factors could impede the appointment of conscientious judges. The first is that the quality of the rule of law varies significantly between states.[101] Postwar decolonisation has seen many political entities becoming states, at least theoretically.[102] It follows that various types of state have developed or are in the process of development, however nascent. Not all of some 190 states have robust and independent judicial systems. A judge from a state whose government's commitment to international law is only half-hearted can become a member of the ICJ. It also follows that not all the Court's members may be well-qualified lawyers experienced in the sound administration of justice.[103] Secondly, states have a propensity to select candidates compatible with their national interests.[104] They would thus not appoint judges who might be expected to make rulings that did not reflect the interests of their appointing governments.[105]

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[100] For example, Article 27 (3) of the UN Charter stipulates that "a party to a dispute [before the UNSC] shall abstain from voting". Yet subsequent practice has seen this provision largely ignored by the permanent Council members. Frederic L. Kirgis, "The Security Council's First Fifty Years", *Am. J. Int'l L.,* 89, 1995, p.507.

[101] Schwebel, 1999, p.895.

[102] Lawrence Freedman, "Weak States and the West", *Society,* 32, 1994, p.18; Thomas G. Weiss, *What's Wrong with the United Nations and How to Fix It*, Polity, 2009, p.29.

[103] However, it goes without saying that not all judges from developed countries are to be regarded as conscientious.

[104] For example, the permanent five of the UNSC favour a neutral and passive candidate for the UN Secretary-General because of the post's power and functionality. Rosemary Righter, *Utopia Lost: The United Nations and World Order*, The Century Foundation, 1995.

[105] See for theoretical debates about whether judges on international courts are not generally activist: Carrubba and Gabel, p.68; Michael Malecki, "Do ECJ Judges All Speak with the Same Voice? Evidence of Divergent Preferences from the Judgments of Chambers", *J. Eur. Public Policy,* 19(1), 2012, 59–75; Erik Voeten, "The Politics of International Judicial Appointments: Evidence from the European Court of Human Rights", *International Organization,* 61(4), 2017, pp.669-701; Erik Voeten, "The Impartiality of International Judges: Evidence from the European Court of Human Rights", *American Political Science*

This leads to something of a double-edged sword in which the Court's members have to choose between jeopardising either the Court's reputation or their own futures when deciding cases involving their own countries' interests. Ignore the cost of making partisan judgments risks the Court's reputation because there would be neither administrative nor pecuniary repercussions, but rather international criticism. If they do not decide in favour of their home countries, they make themselves vulnerable to pressures from their home states after their terms expire, with possible repercussions also on their families and relatives. As a result, the role of judges is intrinsically constrained by the consent of states.

A further challenge is the tension between law and politics. States may repudiate decisions justified by solid legal arguments but that fail to consider political sensitivities. For example, the Court, by thirteen votes to two, ordered Russia to immediately suspend military operations in the Ukraine and to ensure that any military or irregular armed actors that may be directed, controlled or supported by Russia cease such operations.[106] However, the Russian Federation has not complied with these provisional measures. Had the Russian member of the Court voted against Russia, it would have made no difference. A judge might therefore legitimately question why they should put themselves at risk in such a situation. In this sense, some scholars aptly argues that an international judicial body should not be overly concerned with contravening states' preferences by over-scrupulous legal positions that might promote compliance with international law, but could also encourage dissent from or non-compliance with the dispute settlement mechanism.[107] It follows that maintaining a bench of fifteen truly independent judges is not the only issue, given that states endeavour to protect their national interests

Review, 102(4), 2008, pp.417-433; Posner and Figueiredo, p.605.

[106] N 66 (*Allegations of Genocide*), para 81.

[107] Mark A. Pollack, "International Relations Theory and International Courts and Tribunals", *SSRN*, 2020, https://ssrn.com/abstract=3634791, Accessed on 22 July 2023.; Leslie Johns, *Strengthening International Courts: The Hidden Costs of Legalization*, University of Michigan Press, 2015; Laurence R. Helfer, "Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash against Human Rights Regimes", *Columbia Law Review,* 102(7), 2002, pp.1832-911; Mortimer N.S. Sellers, "The Authority of the International Court of Justice", *International Legal Theory* 8, 2002, pp.41-48; Carrubba and Gabel, p.70. Posner and Yoo likewise suggest that independent adjudication is not a desirable outcome at the interstate level, since there is lack of political unity. They therefore believe that international judges should not neglect requests from their appointing governments to encourage states to comply with decisions. Eric Posner & John C. Yoo, "Judicial Independence in International Tribunals", *California Law Review,* 93, 2005, p.66.

at the expense of the rule of law. This has resulted in a remarkable number of exceptions that have impaired that rule through distortion or evisceration. On the one hand, a strong emphasis on the rule of law may underestimate the political context and hence risk irrelevance. On the other, tolerating too many exceptions erodes the rule of law. There is therefore a need readjust expectations of the circumstances and the extent to which members of the ICJ can realistically go beyond the wishes of their appointing states. In other words, those expectations should meet both what judges can do and what states can approve. A balance between two would better serve the ICJ's current reputation.

Public awareness is one catalyst for the rule of law. If a court has the legitimacy of solid public trust, it becomes difficult for governments to flout adverse court rulings.[108] The quality of public awareness plays a primary role in the disposition and timing of the rulings of national courts.[109] By the same token, it is difficult to make government compliance with international courts more likely without public support.[110] The popular will could be key to maintaining the rule of law at the international level by exerting pressure on intransigent governments. Along with increasing the level of compliance, popular support would also make it less risky for international judges to perform their functions impartially. The question is whether the ICJ can obtain the level of public support that would free its members from the double-edged sword conundrum described earlier. The current political zeitgeist is not favourable to engendering public support given significant developments such as ongoing civil wars, the continuing growth of international migration, the pandemic and the war between Russia and the Ukraine. Populations are thus open to exchanging the rule of law for nationalist glory or economic opportunity.[111] Public support as the third pillar of the independence of ICJ

[108] Carrubba and Gabel, p.71

[109] See for discussions about the importance of public support for judicial decisions and the needed means (such as media and transparency) to build public support: Georg Vanberg, *The Politics of Constitutional Review in Germany*, CUP, 2005, p.49; Jeffrey K. Staton, "Constitutional Review and the Selective Promotion of Case Results", *American Journal of Political Science,* 50(1), 2006, p.110; James Cavallaro & Stephanie E. Brewer, "Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court", *American Journal of International Law*, 102(4), 2008, pp.768-827.

[110] Staton and Moore suggest that mobilization of public support by the media is also necessary. Jeffrey K. Staton & Will H. Moore, "Judicial Power in Domestic and International Politics", *International Organization,* 65(3), 2011, p.566.

[111] Karen, 2019, p.33.

judges thus remains weak.

CONCLUSION

The contribution of the ICJ to the development of international law and peaceful resolution cannot be overlooked. It is still the only ICs that can adjudicate international disputes between states. The Court's contribution to the development of international law and the peaceful settlement of disputes in one form or another is undeniable. It provides a ground on which states, even those what recklessly infringe international law, to discuss the legality of their actions. For example, the custom of appointing members from the permanent five can be criticised. But without this measure the ICJ would hardly have a Russian representative in legal cases between the Ukraine and Russia, in particular the one regarding the Genocide Convention. The various forms of manifesting consent encourage even sworn enemies to make applications against each other. States can communicate, however reluctantly, under the auspices of the ICJ, and thus not completely lose their connection with international law. Therefore, although challenges to the Court's impartiality are serious, preserving that mechanism should be the priority.

The escalating tension between states and the surge of the far right in Europe[112] have encouraged states to contravene international law on the pretext of maintaining their security. The current political zeitgeist has a profound impact on the rule of law. This in turn complicates the preservation of the ICJ's authority, since states are readier to insist on their national interests before those of international law as embodied in the ICJ. Yet the traditional basis of state consent barely justifies those ICJ judgements that are overtly raison d'état. If concerns about the Court's impartiality continue to grow, it will diminish its reputation, with the possible consequence that it could become a dormant body.[113] It is true that its members do not have the luxury of acting in isolation from their states, and that their international adjudication is subject to the systemic and structural constraints of an order rooted in state sovereignty.[114] But for the Court to be credible and respected in the eyes of world, its members should endeavour to demonstrate independence from their

[112] Higgins, 1995.

[113] Alter argues in a softer manner that "ICs might enter "Sleeping Beauty" mode." Karen, 2019, p.26.

[114] Gleider I. Hernandez, "Impartiality and Bias at the International Court of Justice", *Cambridge J Int'l & Comp L*, 1(3), 2012, pp.199-200.

states, embraced but not suffocated by them. Rather than a myopic failure to go beyond the concerns of disputing parties, it is incumbent upon members to consider how their treatment of each case affects the habit of adjudication.[115] The Court must be more concerned to safeguard its prestige and the authority that comes from it.[116] They should avoid any practice that might entangle the Court in situations that undermine its reputation for independence as the highest authority on public international law.

Since the essential dynamics are still fairly embryonic, it is not possible to establish a sustainable coordination between the three pillars to develop a sound monitoring mechanism to ensure judicial independence and the impartiality of members. This suggests that the discretion of members continues to play the central role in this regard. An expectation that ICJ members enforce international law in an entirely disinterested way seems to be a Sisyphean task. Since "there seems little alternative to leaving matters as they stand",[117] any conscientious members may by a herculean effort check the erosion of the ICJ's reputation. Only popular support would relieve the pressure on members and untie the Gordian knot.

The current study contributes to the literature by providing more insight into this largely ignored topic. The previous studies picture deficiencies of the ICJ by evaluating the voting pattern of members in particular. To the best of author's knowledge, they neither address how these deficiencies could endanger the reputation of the Court, nor take into account the political climate that gridlocks the situation. The study endeavours to fills that gap. Future research might focus on the issue of members' incompetence that can also have a detrimental effect on the Court's image.

[115] Potter, 1948.

[116] Kolb, 2013, p.996

[117] D. W. Bowett, James Crawford, Ian Sinclair & Arthur D. Watts, "Efficiency of Procedures and Working Methods: Report of the Study Group Established by the British Institute of International and Comparative Law as a Contribution to the UN Decade of International Law", *International & Comparative Law Quarterly,* 45(S1), 1996, p.30.

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