
**THE INTERNATIONAL COURT AND RULE-MAKING:
FINDING EFFECTIVENESS**

LEO PARK*

ABSTRACT

The International Court of Justice is often considered an aspiration. It exemplifies the struggle of international law to overcome international politics and is viewed by many as having failed to live up to its expectations. Nevertheless, its influential role in interpreting international law is far from merely academic. The weight and respect its analyses are given result in not only a better understanding of international law, but the development of international law as well. It is from this effort, intentional or otherwise, that the Court has actually found a unique and unintended mechanism of effectiveness.

This Comment argues that despite the lack of authority to do so, the Court creates international law, either by itself or with the assistance of other international bodies. These new laws and obligations, in turn, inherently affect state behavior. While the majority of the Court's criticisms center on its role as an adjudicatory body, they overlook the possibility that the Court may have an influence beyond the states that are appearing before it in any one case. Thus, by expanding the scope and understanding of how its decisions operate, the Court can regain some of the power it has

* Executive Editor, *University of Pennsylvania Journal of International Law*, Volume 38. J.D., 2017, University of Pennsylvania Law School; B.A., 2013 University of Pennsylvania. I would like to thank Professor Jean Galbraith for her invaluable feedback. I would also like to thank Professor William Burke-White, Alexander Bedrosyan, Udoaku Ihenetu, Bethan Jones, Adria Moshe, and Pinky Mehta for their support and for fostering my interest in this topic. I am also grateful to Anthony Doss, Shane Fischman, and the editorial staff at *The University of Pennsylvania Journal of International Law* for their hard work in publishing this Comment. All mistakes are my own.

lost over the years. It gives the Court a method to be effective that it can and should take advantage of.

TABLE OF CONTENTS

1. Introduction.....1068

2. Current criticisms of the International Court of Justice.....1068

3. The Court has acquired an influential role in the formation of international law by both creating and reinforcing substantive rules through its jurisprudence.1074

4. The I.C.J.'s influence on international law serves as a means of affecting state behavior.1080

 4.1. *The general creation of rules in the international realm modifies state behavior.*1081

 4.2. *The Court has the flexibility to create these rules in a manner that gives them value.*.....1084

 4.3. *The further development of rules assists in the resolution of disputes.*.....1088

5. The Court can still be effective despite the evolving nature of its role.....1090

 5.1. *The Court has a degree of inherent authority.*.....1091

 5.2. *The Court's actions can be achieved without resistance.*1093

 5.3. *The Court's more active role is supported by the influence of the other non-state entities involved.*1095

6. Conclusion.....1097

1. INTRODUCTION

The International Court of Justice ("I.C.J." or the "Court") embodies an ideal. It was to be a forum through which states could peacefully settle their disputes and where law and argument would trump war and conflict. Coming off the heels of two World Wars, such an idea had undeniable appeal. Very soon, however, its ability to do so was questioned. Time has provided little comfort to the Court; its flaws have become ever clearer. Its availability as a forum has not led to consistent or widespread use, and when utilized, it is unclear how well the Court manages to settle the disputes before it. What this comment argues below, however, is that regardless of the Court's criticisms, it nevertheless is and can continue to be effective through its ability to shape international law and the subsequent effects that it has on state behavior.

This comment first overviews the current criticisms leveled at the Court, which have culminated in the general underuse of the body. It then describes the active role the Court has played outside the realm of dispute resolution and in the development of international law. This can be seen in the Court's creation of legal principles or rules in the adjudication of a case that become directly incorporated in subsequent treaties. Additionally, the Court has played an active role in furthering the body of customary international law by announcing that certain norms have achieved the status of custom or by applying new principles which are subsequently reiterated and reapplied by itself and other bodies. Finally, this comment argues that this function and ability gives the Court a level of effectiveness because of the effect the development of law can have on state behavior. Through this, the Court has an avenue to exert influence while circumventing much of the criticism leveled against it. Thus, the Court has a demonstrable power which, if continued and used appropriately, will serve its initial aims of maintaining peace and amicably settling disputes, despite the current international climate and any flaws in the Court's inherent design.

2. CURRENT CRITICISMS OF THE INTERNATIONAL COURT OF JUSTICE.

Throughout its existence, the Court has been a frequent target of criticism for its failures and shortcomings. Debate and contro-

versy have surrounded the Court and its predecessor since their inception, with even the name unable to escape scrutiny.¹ A large body of current criticism is leveled at both what disputes it can handle and how it chooses to dispose of them. Many scholars blame the Court's underutilization, rightly or wrongly, on these points. Ultimately, however, these criticisms inherently understand the Court as an adjudicative forum, which leaves open the possibility of the Court's success in other avenues.

A major point leveled against the Court is the consent-based nature of its jurisdiction. For a dispute to be adjudicated, both parties need to consent to appearing before the Court.² Otherwise, it would stand for a usurpation of state sovereignty. Arguably, in the early years states willingly gave up some of this sovereignty in the hopes of a more ordered world, as was borne out by the relatively high levels of acceptance of I.C.J. jurisdiction at the time.³ Today, however, only 72 out of 193 UN states and 1 of the permanent members of the Security Council currently accept compulsory jurisdiction.⁴ Two salient denunciations of the Court highlighted this shift in attitude. The US withdrew its acceptance of jurisdic-

¹ See Franklin Berman, *The International Court of Justice as an 'Agent' of Legal development?*, in *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT OF JUSTICE* 7, 9 n.12 (Christian J. Tams & James Sloan eds., 2013).

² See Statute of the International Court of Justice art. 36 [hereinafter I.C.J. Statute]. Attempts were made to make universal compulsory jurisdiction part of both the Permanent Court of International Justice and the International Court of Justice but failed due to opposition from the major powers. See J. Patrick Kelly, *The International Court of Justice: Crisis and Reformation*, 12 *YALE J. INT'L L.* 342, 345-46 (1987).

³ At one point, a majority of the members in the UN had accepted compulsory jurisdiction. See Kelly, *supra* note 2, at 348 (citing 1952-1953 I.C.J.Y.B. 171-82 (1953)).

⁴ See *Declarations Recognizing the Jurisdiction of the Court as Compulsory*, INT'L CT. JUST., <http://www.icj-cij.org/en/declarations> [https://perma.cc/B55A-6ECH] (last visited Feb. 20, 2018); *States Entitled to Appear Before the Court*, INT'L CT. JUST., <http://www.icj-cij.org/en/states-entitled-to-appear> [https://perma.cc/J8AN-FW7J] (last visited Feb. 20, 2018). There is, however, some logic behind the argument that a more universal level of jurisdiction would actually be detrimental to the Court. See Francisco Orrego Vicuna & Christopher Pinto, *Peaceful Settlement of Disputes: Prospects for the 21st Century*, in *THE CENTENNIAL OF THE FIRST INTERNATIONAL PEACE CONFERENCE: REPORTS AND CONCLUSIONS* 261, 354 (Frits Klashoven ed., 2000) (noting that the Court may already be overburdened with its current caseload and the increase caused by compulsory jurisdiction would be detrimental). This overview does not consider the numerous other jurisdictional complications that exist, most notably the proliferation of reservations and conditional acceptances. See generally VANDA LAMM, *COMPULSORY JURISDICTION IN INTERNATIONAL LAW* (2014).

tion in 1986,⁵ after the Court determined that it had jurisdiction to hear and admitted Nicaragua's claims against the US for its support of contra rebels during the Nicaraguan revolution.⁶ Similarly, France withdrew its declaration after New Zealand brought suit against it for its nuclear testing in the South Pacific.⁷ Beyond merely demonstrating the decline of the Court's jurisdiction, these opportunistic withdrawals show the flaws in a system that is open to such manipulation.⁸

At the other end of the adjudicatory process, the issue of generating compliance with the Court has also been a source of debate. States are bound to abide by the decisions of the Court,⁹ but the Court possesses no inherent enforcement measures. States can turn to the Security Council to enforce judgments.¹⁰ However, the UN Charter notes that the Security Council "may, if it deems necessary" take action, not that it must,¹¹ and the power is one that, while discussed, has never been formally invoked.¹² Furthermore, resort to the Security Council comes with its own set of criticisms about the body's institutional competency.¹³ While there have been complaints filed with the Security Council about failures to

⁵ U.S. *Terminates Acceptance of ICJ Compulsory Jurisdiction*, 86 DEP'T ST. BULL. 67, 67 (1986).

⁶ *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Jurisdiction of the Court and the Admissibility of the Application, 1984 I.C.J. Rep. 392 (Nov. 26), <http://www.icj-cij.org/files/case-related/70/070-19841126-JUD-01-00-EN.pdf> [<https://perma.cc/G6YQ-LZ5Z>].

⁷ See Kelly, *supra* note 2, at 349 (citing 907 U.N.T.S. 129).

⁸ Manipulation of the consent system is far from rare. Iran attempted to withdraw its acceptance after the U.K. brought suit against it for nationalizing British oil companies. *Id.* From an alternative perspective, Portugal at one point accepted jurisdiction and then immediately commenced suit against India. See LAMM, *supra* note 4, at 45 (discussing the Right of Passage case); see also *Right of Passage Over Indian Territory (Port. v. India)*, Preliminary Objections, 1957 I.C.J. Rep. 125 (Nov. 26).

⁹ U.N. Charter art. 94(1).

¹⁰ U.N. Charter art. 94(2).

¹¹ *Id.* (emphasis added).

¹² See CONSTANZE SCHULTE, COMPLIANCE WITH DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE 39 (2004) (noting that "the Security Council has never actually founded measures to enforce I.C.J. decisions on Article 94(2)."). There was discussion at the Security Council of enforcing the *Nicaragua* judgment, but no action was taken. *Id.*

¹³ See generally Attila Tanzi, *Problems of Enforcement of Decisions of the International Court of Justice and the Law of the United Nations*, 6 EUR. J. INT'L L. 539 (1995) (analyzing the institutional capabilities of the Security Council in regard to enforcing I.C.J. judgments).

comply with judgments, these may be better characterized as negotiation tactics rather than attempts to initiate enforcement actions.¹⁴

Compliance is not an uncommon problem, but it provides a singularly unique issue for the Court. It is placed in a circular position since its method of resolving a state's demonstrable failure to fulfill its international obligations is by then creating another international obligation. The flaws in the system were illustrated by the very first case the Court faced. After the judgment in *Corfu Channel*,¹⁵ it took nearly 40 years for Albania to pay the ordered compensation.¹⁶ While many maintain that compliance has generally been good,¹⁷ instances of noncompliance persist¹⁸ and the fact that it needs defending is a problem in itself.¹⁹

Beyond its competency as a judicial body, the Court has also come under criticism as a political instrument.²⁰ The *Nicaragua*

¹⁴ See SCHULTE, *supra* note 12, at 39 (characterizing the practice of filing complaints but not following through with requests for a Council meeting as a "strategy to urge compliance").

¹⁵ The *Corfu Channel Case* (Alb. v. U.K.), Assessment of the Amount of Compensation Due from the People's Republic of Albania to the United Kingdom of Great Britain and Northern Ireland, 1949 I.C.J. Rep. 244, 260 (Dec. 15) (requiring payment of £807,580 from Albania to the U.K.).

¹⁶ See SHABTAI ROSENNE & YAËL RONEN, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT 1920-2005*, VOL. 1 *THE COURT AND THE UNITED NATIONS* 238-39 (4th ed. 2006) ("On 8 May 1992 the British and Albanian Governments reached agreement on the settlement of outstanding claims.").

¹⁷ See Aloysius P. Llamzon, *Jurisdiction and Compliance in Recent Decisions of the International Court of Justice*, 18 EUR. J. INT'L L. 815, 820 (2008) ("[D]eveloped hostility towards judgments rendered by virtue of compulsory jurisdiction is perceptible."); Rosalyn Higgins, President, Int'l Court of Justice, Speech at the United Nations University on "The ICJ and the Rule of Law" 6 (Apr. 11, 2007), http://archive.unu.edu/events/files/2007/20070411_Higgins_speech.pdf [<https://perma.cc/K4YN-RADY>] ("Out of the 91 contentious cases that the Court has dealt with since 1946, only 4 have in fact presented problems of compliance and, of these, most problems have turned out to be temporary.").

¹⁸ See Llamzon, *supra* note 17, at 825-44 (identifying five cases in which compliance was not achieved).

¹⁹ Cf. Higgins, *supra* note 17, at 6 (finding it necessary to explicitly note that the Court's decisions are legally binding and that compliance has been good despite "a widespread misconception" to the contrary); *Frequently Asked Questions*, INT'L CT. JUST., <http://www.icj-cij.org/en/frequently-asked-questions> [<https://perma.cc/B79J-APGN>] (last visited Feb. 20, 2018) (listing the binding nature of the Court's decisions as a frequently asked question).

²⁰ See Upendra D. Acharya, *ICJ's Kosovo Decision: Economical Reasoning of Law and Questions of Legitimacy of the Court*, 12 CHL-KENT J. INT'L & COMP. L. 1, 2 (2012) (illustrating that one scholar even went so far as to characterize it as "a rubber stamp for the dominant power of the Security Council and the judges' national political affiliations"); see also Shigeru Oda, *International Court of Justice: Its Myth and Reality*, 51 JAPANESE Y.B. INT'L L. 427, 428 (2008) (noting that African states

case shows the precarious political position in which the Court is placed. In many ways, the Court gained legitimacy by ruling against a world superpower,²¹ but during the process, it was further accused by that superpower of being used as a political tool.²² These concerns are not just recent, as the U.S. has had longstanding fears about the Court's political implications.²³ Going even further, some doubt whether the Court is even in an appropriate position to deal with political issues at all.²⁴ In their view, certain disputes should be left to international relations rather than international law.

Finally, there has been doubt leveled about the Court's overall impartiality. The Court is comprised of 15 judges, and, as a matter of practice, each region of the world gets a number of judges that largely mirrors the regional distributions in the Security Council.²⁵ This creates a bias in favor of the five permanent members of the Security Council who almost always have a judge present, and wealthier states are generally more likely than poorer ones to have a national on the bench.²⁶ This can be problematic since a recent study has shown that the judges have voting tendencies that favor

considered the Court a Western European body for many years).

²¹ See YUVAL SHANY, *ASSESSING THE EFFECTIVENESS OF INTERNATIONAL COURTS* 176 n. 91 (2014) (explaining that *Nicaragua* is considered by some to be a key case where the Court gained the confidence of developing states).

²² See Mary Ellen O'Connell & Lenore VanderZee, *The History of International Adjudication*, in *THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION* 40, 59 (Cesare Pr. Romano et al. eds., 2013) (in withdrawing from the I.C.J.'s compulsory jurisdiction, the U.S. said "the ICJ had been used as a political tool by Nicaragua"); *U.S. Terminates Acceptance of ICJ Compulsory Jurisdiction*, *supra* note 5, at 67.

²³ See Manley O. Hudson, *The Permanent Court of International Justice: The Independence of the Court in its Constitution, in its Jurisdiction, and in its Application of Law*, 25 AM. SOC'Y INT'L L. PROC. 92, 115-16 (1931) (discussing the resistance of the United States to advisory opinions by the Permanent Court of International Justice because of their potential use as a political instrument).

²⁴ See Gerry J. Simpson, *Judging the East Timor Dispute: Self-Determination at the International Court of Justice*, 17 HASTINGS INT'L & COMP. L. REV. 323, 330 (noting that many lawyers and diplomats feel some issues are "simply too political" for the Court to deal with). *But see* Andrew Coleman, *The International Court of Justice and Highly Political Matters*, 4 MELB. J. INT'L L. 29, 41-43 (2003) (defending the Court and exploring examples of when it was able to adjudicate controversial matters).

²⁵ See Eric A. Posner & Miguel De Figueiredo, *Is the International Court of Justice Biased?*, 34 J. LEGAL STUDS. 599, 603 (2005) (discussing the distribution of judges); Kenneth Keith, *The ICJ - Some Reflections on My First Year*, 5 N.Z. J. PUB. INT'L L. 201, 203 (2007) ("[T]he membership has for some time matched that of the Security Council . . .").

²⁶ See Posner & Figueiredo, *supra* note 25, at 603.

states that are more similar to their home state.²⁷ Furthermore, each state in a dispute has the right to have one of its nationals on the Court, whether he or she is a current member or appointed ad hoc for that proceeding.²⁸ While the practice is not without justification,²⁹ it has come to embody an intuitive understanding that those judges will vote for their home state.³⁰

These considerations culminate in a general criticism of underuse.³¹ While supporters note that the Court has become more active,³² such statements, even if true,³³ are not necessarily positive indicators. The most notable countervailing consideration is that the number of states that are party to the I.C.J. Statute has increased dramatically, with no equivalent increase in use.³⁴ And, symbolically, it remains largely underused by the major world powers.³⁵

²⁷ See *id.* at 624 (“The data suggest that national bias has an important influence on the decision making of the ICJ . . .”).

²⁸ I.C.J. Statute art. 31(2)–(3).

²⁹ The original justification for such an approach was to ensure the inclusion of someone on the bench who understood the domestic legal systems and practices of each of the states before the Court. See Charles S. Deneen, *The Permanent Court of International Justice*, 35 COM. L. LEAGUE J. 178, 180 (1930).

³⁰ See Eberhard P. Deutsch, *The International Court of Justice*, 5 CORNELL INT’L L.J. 35, 37–38 (1972) (discussing the problem of judicial impartiality in international tribunals).

³¹ See Eric Posner, *The Decline of the International Court of Justice* 12–24 (John M. Olin Program in Law and Econ., Working Paper No. 233, 2004) (attempting to explain the disuse of the Court based on a number of criticisms it has faced, including some presented above).

³² See Peter Tomka, President, Int’l Court of Justice, Lecture at the Stockholm Centre for International Law and Justice: The Rule of Law and the Role of the International Court of Justice in World Affairs 1–2 (Dec. 2, 2013), <http://www.icj-cij.org/files/press-releases/9/17849.pdf> [<https://perma.cc/F966-6F3B>]. And this is certainly true when compared to the Court’s lows in the 1970s. See Oda, *supra* note 20, at 428 (noting that at one point during the 1970s there were no cases before the Court); see also Christopher Greenwood, *The Role of the International Court of Justice in the Global Community*, 17 U.C. DAVIS J. INT’L L. & POL’Y 233, 234–35 (2011) (describing the low levels of use during the 1970s).

³³ Perceptions of these trends can be skewed by symbolic acts such as the large number of filings by Serbia and Montenegro in 1999 against the NATO members. See generally *List of All Cases*, INT’L CT. JUST., <http://www.icj-cij.org/en/list-of-all-cases> [<https://perma.cc/M75M-M4FH>] (last visited Mar. 26, 2018).

³⁴ See Posner, *supra* note 31, at 5 (discussing how raw data showing a recovery in I.C.J. usage does not take into account the large increase in the number of states that are party to the statute); Tomka, *supra* note 32, at 2 (basing his praise on the absolute number of cases).

³⁵ See Posner, *supra* note 31, at 8 (noting that the only permanent member of

The degree of influence and importance of these criticisms can be debated, and the Court still has many ardent advocates.³⁶ Nevertheless, their basic validity is compelling. However, in focusing on the Court's ability to adjudicate any given dispute, they fail to consider that the Court's current influence has spread beyond its effects on a single case. Such influence can be felt through the Court's evolving role in the development of international law.

3. THE COURT HAS ACQUIRED AN INFLUENTIAL ROLE IN THE FORMATION OF INTERNATIONAL LAW BY BOTH CREATING AND REINFORCING SUBSTANTIVE RULES THROUGH ITS JURISPRUDENCE.

The Court is a key player in the development of the rules and norms that govern international law, as evidenced by its practice and the subsequent events that follow. This effect can be seen both in the codification of the Court's legal principles in treaties, as well as in the Court's influence in forming and developing customary international law. Underlying its impact is the degree to which legal and judicial bodies take up the Court's principles, even when they are unsupported or controversial. As a result, the Court has a practical effect on the creation of international law, despite its legal inability to do so.

The Court's judgments often influence the course of later treaties on the same topic. For example, the drafters of the Vienna Convention on the Law of Treaties took heed of the Court's jurisprudence in regards to treaty interpretation. Article 31 requires that treaties be interpreted in accordance with their "ordinary meaning . . . in the light of [their] object and purpose."³⁷ As the commentary to earlier drafts shows, there was debate as to whether focus should be put on the treaty's text or purpose.³⁸ The decision to favor the text was supported in large part because of "the

the Security Council to accept general compulsory jurisdiction is the U.K.); *see generally* *Declarations Recognizing the Jurisdiction of the Court as Compulsory*, *supra* note 4.

³⁶ *See, e.g.,* Llamzon, *supra* note 17, at 852 (arguing that criticism is unwarranted if expectations are managed).

³⁷ Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 332 art. 31(1).

³⁸ *See* Draft Articles on the Law of Treaties, [1966] 2 Y.B. Int'l L. Comm'n 187 art. 27, cmt. 2, U.N. Doc. A/CN.4/191 (noting that while a majority of jurists place primacy on the text of the treaty, some allow for more liberal interpretations based on the intention of parties).

jurisprudence of the International Court [which] contains many pronouncements . . . that the textual approach to treaty interpretation is regarded by it as established by law.”³⁹ Although largely considered a codification of established custom,⁴⁰ the Convention was under no obligation to follow settled law since it is an independently binding instrument. Consequently, the Court’s decisions can be seen as providing a legal framework to guide future treaty developments and negotiations.⁴¹

Even when not codified, the Court’s pronouncements often exert significant influence on the development of customary international law. Most directly, the Court frequently announces that certain principles have achieved the status of custom. In *Nicaragua*, for example, the Court announced that Common Articles 1 and 3 of the Geneva Convention were, at that point, customary international law.⁴² Relatedly, the Court stated in its advisory opinion on the *Legality of Nuclear Weapons*, that the principles codified in the foundational treaties of humanitarian law embodied custom.⁴³ In that same opinion, the Court noted that the doctrine of transboundary harm—which requires states to ensure respect for the environment of other states—was also customary international environmental law.⁴⁴ These declarations are noteworthy in that they were all

³⁹ *Id.* art 27, cmt. 11.

⁴⁰ See Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. Rep. 16, 46–47 (June 21) (describing the provisions relating to termination that were being applied in that case as codifications of custom).

⁴¹ See Markus W. Gehring, *Litigating the Way Out of Deadlock: the WTO, the EU and the UN*, in DEADLOCKS IN MULTILATERAL NEGOTIATIONS 96, 104 (Amrita Narlikar ed., 2010) (arguing that the I.C.J.’s decision in the *Nuclear Weapons* case was an effort to provide legal principles around which countries could negotiate a nuclear non-proliferation treaty); Jonathan I. Charney, *Progress in International Maritime Boundary Delimitation Law*, 88 AM. J. INT’L L. 227, 228 (1994) (remarking that developments in maritime law have had an impact on subsequent delimitation agreements between states).

⁴² See *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Merits, 1986 I.C.J. Rep. 14, 113–15 (June 27) [hereinafter *Nicaragua*]. At least one commentator suggests that this case was the turning point for the Court to a more active rulemaking function in its jurisprudence. Vicuna & Pinto, *supra* note 4, at 350 (citing G. Abi-Saab: De l’évolution de la Cour Internationale: Réflexions sur Quelques Tendances Récentes, *Revue Generale de Droit International Public* (1992) No. 2, 295).

⁴³ See *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. Rep. 226, 257–59 (July 8).

⁴⁴ *Id.* at 241–42.

made with little to no support, relying mostly on principles derived from its own jurisprudence and not the inquiry into state practice and *opinio juris* that custom requires.⁴⁵

In addition to their announcement, many consider the Court's application of novel principles as a signal of their status and importance. This occurs regardless of the frequently unsupported nature of those rules. For example, in *Nicaragua*, the Court laid down the groundwork for the doctrine of effective control for the attribution of the actions of non-state actors.⁴⁶ Interestingly, the Court provided no background or explanation.⁴⁷ Nevertheless, the rule has become a solidified pillar of customary international law, as reflected in the Articles on Responsibility of States for Internationally Wrongful Acts⁴⁸ and the Court's choice to reaffirm the rule in the *Genocide* case when its applicability was directly challenged.⁴⁹ Additionally, the doctrine has been cited by numerous other tribunals, including the American Court of Human Rights,⁵⁰ the European Court of Human Rights,⁵¹ and arbitral tribunals,⁵² and has been the subject of much literature.⁵³

⁴⁵ See generally *Nicaragua*, *supra* note 42, at 97 ("to consider what are the rules of customary international law . . . [the Court] has to direct its attention to the practice and *opinio juris* of States").

⁴⁶ See *id.* at 65.

⁴⁷ See *id.*

⁴⁸ See *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, 2001 Y.B. INT'L L. COMM'N 26 art. 8, U.N. Doc. A/CN.4/SER.A/2001/Add.1 [hereinafter *Draft Articles on State Responsibility*].

⁴⁹ See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro)*, Judgment, 2007 I.C.J. Rep. 43, 209-11 (Feb. 26).

⁵⁰ See *The "Mapiripán Massacre" v. Colombia, Merits, Reparations, and Costs*, Judgment, Inter-Am. Ct. H.R. (ser. C) ¶ 97(d)-(e) (Sept. 15, 2005) (finding that there was no effective control by the state).

⁵¹ See *Behrami v. France*, App. No. 71412/01, Eur. Ct. H.R. ¶¶ 30-31 (May 2, 2007), <http://hudoc.echr.coe.int/eng?i=001-80830> [<https://perma-archives.org/warc/5MCH-ADSW/20180404172943/http://hudoc.echr.coe.int/eng?i=001-80830>]; *Al-Jedda v. U.K.*, App. No. 27021/08, Eur. Ct. H.R. ¶ 56 (July 7, 2011), <http://hudoc.echr.coe.int/eng?i=001-105612> [<https://perma-archives.org/warc/A5QY-6YRD/20180404173421/http://hudoc.echr.coe.int/eng?i=001-105612>].

⁵² See *White Industries Australia Ltd. v. The Republic of India*, Final Award, ¶ 5.1.27 (Nov. 30, 2011), <http://arbitration.org/sites/default/files/awards/arb2811.pdf> [<https://perma.cc/TR7F-TVJ7>].

⁵³ See e.g., Kjetil Mujezinovic Larsen, *Attribution of Conduct in Peace Operations: The 'Ultimate Authority and Control' Test*, 19 EUR. J. INT'L L. 509, 514 (2008);

Similarly, in *The Gabčíkovo-Nagymaros Project* (“*Gabčíkovo*”), the Court was tasked with determining the lawfulness of the diversion of a river as a possible countermeasure.⁵⁴ The Court cited three sources in defining countermeasures; however, it then noted that countermeasures had to be reversible in nature, a requirement absent from any of these sources.⁵⁵ This was soon explicitly incorporated by the International Law Commission (“ILC”) in its Draft Articles on State Responsibility,⁵⁶ which cites the *Gabčíkovo* case,⁵⁷ and is often mentioned when countermeasures are defined.⁵⁸ This is even more compelling because the Court only passingly mentions the requirement without analyzing or applying it in any way.⁵⁹

This effect has occurred even when the Court’s reasoning is directly contradictory to the requirements needed to establish custom. In *The Arrest Warrant of 11 April 2000* (“*Arrest Warrant*”), the Court determined that foreign ministers received immunity, *ratione personae*.⁶⁰ By looking at the functions of the foreign minister as

Vassilis P. Tzevelekos, *Reconstructing the Effective Control Criterion in Extraterritorial Human Rights Breaches: Direct Attribution of Wrongfulness, Due Diligence, and Concurrent Responsibility*, 36 MICH. J. INT’L L. 129, 137 (2014); Tom Dannenbaum, *Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeepers*, 51 HARV. INT’L L.J. 114, 153 (2010).

⁵⁴ See *The Gabčíkovo-Nagymaros Project* (Hung./Slovn.), Judgment, 1997 I.C.J. Rep. 7, 55 (Sept. 25).

⁵⁵ *Id.* at 56–57.

⁵⁶ Draft Articles on State Responsibility, *supra* note 48 art. 49(3). The article uses slightly different wording, indicating that the countermeasure must “as far as possible . . . permit the resumption of performance of the obligation.” *Id.*

⁵⁷ See *id.* art. 49, cmt. 9; see also James Crawford (Special Rapporteur), *Third Report on State Responsibility*, ¶¶ 330–31, UN Doc A/CN.4/507 and Add. 1–4 (Mar. 15, June 15, July 10, July 18, Aug. 4, 2000) (citing the *Gabčíkovo* case when recommending to the commission the inclusion of this article).

⁵⁸ See Patricia Tarre Soser, *Non-Recognition of State Immunity as a Judicial Countermeasure to Jus Cogens Violations: The Human Rights Answer to the ICJ Decision in the Ferrini Case*, 4 GOETTINGEN J. INT’L L. 809, 817, 819 (2012) (noting that the definition of countermeasures was announced by the Court and furthered by the Draft Articles on State Responsibility and include a reversible element); Michael N. Schmitt, “*Below the Threshold*” *Cyber Operations: The Countermeasures Response Option and International Law*, 54 VA. J. INT’L L., 697, 714 (2014) (defining countermeasures as requiring reversibility and also citing the *Gabčíkovo* decision).

⁵⁹ *The Gabčíkovo-Nagymaros Project*, *supra* note 54, at 56–57 (“It is therefore not required to pass upon one other condition, namely . . . that the measure must therefore be reversible.”).

⁶⁰ See *The Arrest Warrant of 11 April 2000* (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J. Rep. 1, 2, 22–23 (Feb. 14). The Court has typically been inconsistent in its use of state practice. See generally, A. Mark Weisburd, *The Interna-*

opposed to taking any formal legal approach, the Court settled the uncertainty in the field by adapting a practical approach to interpreting immunity.⁶¹ This directly contradicts the definition of custom, which requires an affirmative showing of state practice and *opinio juris*. Despite this and the controversy surrounding the rule,⁶² the ILC adopted this position via the same reasoning used by the Court.⁶³

The influence of these developments is underscored by the general enduring impact of I.C.J. judgments. The Court itself relies heavily on its own jurisprudence in the adjudication of cases and does so even though its decisions are not meant to be afforded any weight in the future.⁶⁴ Acknowledging this, the Court has stated that it would rely on its past decisions unless there were good reasons not to do so.⁶⁵ Reiterating certain principles serves another important function since the citation of even well-established principles “serve[s] usefully to affirm or clarify certain fundamentals of the law”⁶⁶

tional Court of Justice and the Concept of State Practice, 31 U. PA. J. INT'L L. 295 (2009).

⁶¹ See The Arrest Warrant of 11 April 2000, *supra* note 60, at 22–23 (“In order to determine the extent of these immunities, the Court must therefore first consider the nature of the functions exercised by a Minister for Foreign Affairs.”).

⁶² See generally Dapo Akande, *Should the International Law Commission Overrule the ICJ in Its Articles on Immunity of State Officials from Foreign Criminal Jurisdiction?*, BLOG EUR. J. INT'L L. (Aug. 5, 2013), <http://www.ejiltalk.org/should-the-international-law-commission-overrule-the-icj-in-its-articles-on-immunity-of-state-officials-from-foreign-criminal-jurisdiction/> [https://perma.cc/GD4K-7L5D].

⁶³ Int'l Law Comm'n, Draft Rep. on the Work of Its Sixty-Fifth Session, art 3, cmt. 5, U.N. Doc. A/68/10 (June 20, 2013) [hereinafter ILC Draft Articles on Immunity of State Officials From Foreign Criminal Jurisdiction].

⁶⁴ See I.C.J. Statute art. 59.

⁶⁵ See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serb.), Preliminary Objections, 2008 I.C.J. Rep. 412, 428 (Nov. 18) (“To the extent that the decisions contain findings of law, the Court will treat them as it treats all previous decisions: that is to say that, while those decisions are in no way binding on the Court, it will not depart from its settled jurisprudence unless it finds very particular reasons to do so.”); Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections, 1998 I.C.J. Rep. 275, 292 (June 11) (“There can be no question of holding Nigeria to decisions reached by the Court in previous cases. The real question is whether, in this case, there is cause not to follow the reasoning and conclusions of earlier cases.”); see also Tomka, *supra* note 32, at 7 (noting that the Court “relies liberally” on its past case law); Manley O. Hudson, *The Permanent Court of International Justice*, 35 HARV. L. REV. 245, 256–57 (1921) (remarking that, as a practical matter, the Court would likely follow its own precedent).

⁶⁶ Roger O'Keefe, *Jurisdictional Immunities*, in THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT OF JUSTICE 107, 107 (Christian J.

Other international bodies also rely heavily on the Court's determinations. For example, in the 2012 dispute between Bangladesh and Myanmar in the International Tribunal on the Law of the Seas, the Court was cited forty-five times in the tribunal's decision.⁶⁷ Similar influence can be seen in other regional courts and tribunals.⁶⁸ The increased use of permanent regional and international tribunals has, in many ways, given the Court an additional audience to whom its jurisprudence has value. Moreover, there is the unsurprising citation of the Court's jurisprudence by the states participating in I.C.J. proceedings,⁶⁹ as well as the respect afforded to it more generally by states and private actors.⁷⁰

Tams & James Sloan eds., 2013).

⁶⁷ See *Dispute Concerning Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal (Bangl./Myan.)*, Case No. 16, Judgment of Mar. 14, 2012, ITLOS Rep. 4. To be clear, this number includes citations in the opinion when the tribunal was explaining the two sides' arguments as well as its own position. Nevertheless, it still demonstrates the large influence that the I.C.J.'s jurisprudence had in the proceeding.

⁶⁸ See, e.g., *Vasiliauskas v. Lithuania*, App. No. 35343/05, Eur. Ct. H.R., ¶ 105-08 (2015), <http://hudoc.echr.coe.int/eng?i=001-158290> [https://perma.cc/85GC-WZJU]; *Case C-162/96, A Racke GmbH&Co. v. Hauptzollamt Mainz*, 1998 E.C.R. I-03655 ¶ 50 (June 16), <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61996CJ0162&from=EN> [https://perma.cc/WC6Y-72BC]; *Case Stated No. 1 of 2014, Attorney General of the Republic of Uganda v. Tom Kyahurwenda* ¶ 33 (E. Afr. Ct. of Justice, Arusha App. Div. July 31, 2015), <http://eacj.org/wp-content/uploads/2015/08/Democratic-Party-vs-2c-SG-REVISED-Draft-2-FINAL-31-07-2015.pdf> [https://perma.cc/BS74-EGKP]; *Prosecutor v. Milutinovic et al.*, Case No. IT-05-87-PT, Decision on Motion Challenging Jurisdiction, ¶ 32 (Int'l Crim. Trib. for the Former Yugoslavia, Mar. 22, 2006), <http://www.icty.org/x/cases/milutinovic/tdec/en/060322.htm> [https://perma.cc/EA79-QBGH].

⁶⁹ See, e.g., *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, Judgment, 2004 I.C.J. Rep. 12, ¶ 123 (Mar. 31), <http://www.icj-cij.org/files/case-related/128/128-20040331-JUD-01-00-EN.pdf> [https://perma.cc/3FGA-UM53] (noting Mexico's citation of previous I.C.J. case law in support of its position).

⁷⁰ See Tomka, *supra* note 32, at 7 (stressing how much the Court's jurisprudence is relied upon by various actors); see also Hovhannes Nikoghosyan, *International Court of Justice Ruling on Kosovo and the Ultimate Power of Precedence*, CAUCASUS EDITION (Sept. 15, 2010), <http://caucasusedition.net/analysis/international-court-of-justice-ruling-on-kosovo-and-the-ultimate-power-of-precedence/> [https://perma.cc/DME2-LYFL] (arguing that even if the I.C.J.'s decision on Kosovo's independence is not binding, it would encourage similar secessionist acts based on its precedential value); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 103, cmt. b (1987) (noting that the decisions of the I.C.J. "are accorded great weight"); TIMO KOIVUROVA, INTRODUCTION TO INTERNATIONAL ENVIRONMENTAL LAW 78, n. 23 (Routledge, 2014) (showing a scholar's use of the Court's language in the *Nicaragua* case to explain

While the Court has become influential in its own right, in many ways it owes its authority to the ILC who relies on its decisions. As evidenced above, the ILC frequently cites I.C.J. opinions in the texts they produce.⁷¹ In turn, the ILC both promotes binding treaties and creates nonbinding codifications of the law, which are highly respected. By one author's count, as of 2013, the Articles on State Responsibility have been cited in over 150 international tribunals.⁷² Thus, the ILC provides an important avenue through which the Court's decisions can exert considerable influence.

The above is just a small sampling of areas which have felt the Court's impact.⁷³ There is disagreement about the ultimate degree and nature of the Court's influence.⁷⁴ But in the long term, the Court's judgments often do cause some change to the greater body of legal jurisprudence. This ability creates a valuable opportunity for the Court to exert influence on states and their behavior.

4. THE I.C.J.'S INFLUENCE ON INTERNATIONAL LAW SERVES AS A MEANS OF AFFECTING STATE BEHAVIOR.

Intuitively, the furtherance of international law is a positive development, but much of the focus is placed on the doctrinal influence of those developments and not on the larger significance of

an international legal principle).

⁷¹ The relationship is reciprocal as well, with both groups reiterating each other's positions. See Rosalyn Higgins, President, Int'l Court of Justice, Keynote Address at the Sixtieth Anniversary of the International Law Commission 1-2 (May 19, 2008), <http://www.icj-cij.org/files/press-releases/8/14488.pdf> [<https://perma.cc/TA67-3ZXX>].

⁷² James Crawford, *The International Court of Justice and the Law of State Responsibility*, in *THE DEVELOPMENT OF LAW BY THE INTERNATIONAL COURT OF JUSTICE* 71, 81 (Christian Tams & James Sloan eds., Oxford University Press, 2013).

⁷³ For a more complete accounting of other fields that the Court's jurisprudence has developed, see generally *THE DEVELOPMENT OF LAW BY THE INTERNATIONAL COURT OF JUSTICE* (Christian Tams & James Sloan eds., 2013).

⁷⁴ Some scholars, skeptical of the Court's influence, note that the Court's pronouncements have little effect without subsequent action, whether it be reiteration or codification. See Berman, *supra* note 1, at 9 (arguing that examples of the Court's influence should actually be analyzed by looking at the other organizations and bodies that promoted the Court's jurisprudence). On the other end of the spectrum, some have said the fact that the Court "even deal[s] with [a] principle *arguendo* lends credence to it . . ." Robert P. Barnidge Jr., *The International Law of Negotiation as a Means of Dispute Settlement*, 36 *FORDHAM INT'L L.J.* 545, 569 (2013).

the court as an international legal regime.⁷⁵ In elaboration of this point, this Section demonstrates that the Court's law-making and influencing ability is desirable because it gives the Court, as a practical matter, a level of effectiveness through its ability to shape state behavior. The further development of international law is an opportunity for the Court to lay down rules that states can follow. This has value in the largely unlegislable field and consent-based system that is international law, and it both guides state behavior directly and makes dispute settlement more attainable. Further, the inherent nature of the method by which the Court's determinations become law allows the Court to create legal principles that command the authority of the rule of law. While the level of that authority and influence is debatable, it does garner a degree of respect from states and further encourages their compliance. Thus, the level of the Court's effectiveness as it shapes state behavior is impacted by both its ability to create law and the manner in which that law is created.

4.1. *The general creation of rules in the international realm modifies state behavior.*

The creation of any rule or law has inherent downstream effects on the actions of states. There can be little doubt that laws have, in some way, an influence on behavior. In the earliest days of international legal scholarship, laws were viewed as higher order obligations that required adherence by the laws of man and nature.⁷⁶ While grandiose views of international law have been

⁷⁵ See Laurence R. Helfer, *The Effectiveness of International Adjudicators*, in OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 464, 476–80 (Karen J. Alter et al. eds., 2014) (analyzing the effectiveness of the Court by, in part, focusing on its ability to influence legal norms); see generally THE DEVELOPMENT OF LAW BY THE INTERNATIONAL COURT OF JUSTICE, *supra* note 66 (describing the effects that the Court has had on multiple fields of international law); Dr. Jorge E. Viñuales, *The Contribution of the International Court of Justice to the Development of International Environmental Law: A Contemporary Assessment*, 32 FORDHAM INT'L L.J. 232 (2008) (analyzing how influential the Court has been, and may continue to be, in developing International Environmental Law).

⁷⁶ See HUGO GROTIUS, PROLEGOMENA TO THE LAW OF WAR AND PEACE 11 (Francis W. Kelsey trans., The Liberal Arts Press New York 1957) ("Herein, then, is another source of law besides the source in nature, that is, the free will of God, to which beyond all cavil our reason tells us we must render obedience.") (internal footnote omitted); see also EMER DE Vattel, THE LAW OF NATIONS OR PRINCIPLES OF THE LAW OF NATURE APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND

pushed aside,⁷⁷ states continue to repeatedly reaffirm their desire to adhere to the law.⁷⁸ With this regard, statements are often made—in extravagant terms—concerning the need for law for the orderly functioning of society.⁷⁹ While the degree of their effect can be disputed, the mere addition or clarification of a rule changes a state's mindset or attitude about a particular activity.

This issue is compounded by the inherent nature of the international law. The baseline of the system is that all activities are legal, and this Lotus Principle requires a rule to the contrary arise for an action to be deemed unlawful.⁸⁰ Thus, if no such rule exists, a state is given free reign. When combined with the already scant amount of laws and rules in the international arena,⁸¹ this doctrine gives importance and influence to a body that can provide necessary guiding principles.

In many ways, this parallels a behavioral bias favoring compliance.⁸² The idea of behavioral biases that shift state activity has

SOVEREIGNS 56, § 5 (1797) (“As men are subject to the laws of nature, . . . the entire nation, whose common will is but the result of the united wills of the citizens, remains subject to the *laws of nature*, and is bound to respect them . . .”).

⁷⁷ See E.H. CARR, *THE 20 YEARS CRISIS: 1919-1939*, 163 (Palgrave Macmillan, 2001) (criticizing the conception of natural law since it can be cited to obey good laws or disobey bad laws, and thus a theoretical analysis of compliance based on a law being good or natural is unsustainable).

⁷⁸ See *2005 World Summit Outcome*, G.A. Res. 60/01, ¶ 134(a), U.N. Doc. A/Res/60/01 (Oct. 24, 2005) (reaffirming a commitment to international law); *Draft Declaration on the Rights and Duties of States* art. 14, 1949 Y.B. INT'L L. COMM'N 287 (“Every State has the duty to conduct its relations with other States in accordance with international law . . .”); U.N. Gen. Assembly, Request for the Inclusion of an Item in the Provisional Agenda of the Sixty-First Session: The Rule of Law at the National and International Levels, U.N. Doc A/61/142 (May 22, 2006).

⁷⁹ See U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 2, U.N. Doc. S/2004/616 (Aug. 23, 2004) (the maintenance of peace “cannot be achieved [without] . . . legitimate structures for the peaceful settlement of disputes and the fair administration of justice.”); *2005 World Summit Outcome*, *supra* note 79, ¶ 134(a); see also Deutsch, *supra* note 30, at 37 (describing the statements of Dag Hammarskjöld to this effect).

⁸⁰ See *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7) (a state's freedom to adopt the principles it deems the most suitable is “only limited in certain cases by prohibitive rules . . .”). As an additional matter, the iteration of this principle is a further demonstration of the Court's large influence on legal jurisprudence.

⁸¹ See Tomka, *supra* note 32, at 3 (noting that the unlegislated nature of the field makes rules unclear).

⁸² The use of behavioral economic theories to understand state behavior has become more common as of late. See generally Jean Galbraith, *Treaty Options: Towards a Behavioral Understanding of Treaty Design*, 53 VA. J. INT'L L. 309 (2013) (using behavioral economic principles to analyze treaty options and differing levels of

been promoted by many. Of relevance is the behavioral economic idea of anchoring, which involves the creation of a reference point that decision makers unknowingly shift their behavior toward.⁸³ As some have noted, such biases can influence treaty design by affecting the way in which treaty negotiators debate and the positions that negotiators take.⁸⁴ In an analogous way, the creation of a new international rule anchors state mindsets toward behaviors which—even with deviance—converge on that anchor.

Ultimately, the degree of any given rule's influence can be disputed,⁸⁵ but the mere addition or clarification of a rule, at the very least, changes a state's mindset or attitude about a certain activity. Inherent in the often quoted⁸⁶ and criticized⁸⁷ idea that "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time"⁸⁸ is the premise that law has some uncertain influence. Thus, the additional creation of law by the I.C.J. does shift state behavior toward it, even if not to full compliance.

formal commitment to treaties).

⁸³ See Anne van Aaken, *Behavioral International Law and Economics*, 55 HARV. INT'L L.J. 421, 429–30 (2014) (discussing the benefits and challenges of extending the behavioral law and economics approach to public international law).

⁸⁴ See *id.* at 457–58.

⁸⁵ See Hurd, *supra* note 85, at 391 (discussing the use of international law as a "legitimizing discourse"). In addition to the above influences of law, the managerial model assumes that states have "a propensity to comply." Kal Raustiala & Anne-Marie Slaughter, *International Law, International Relations and Compliance*, in HANDBOOK OF INTERNATIONAL RELATIONS 538, 542–43 (Walter Carlsnaes et al. eds., 2002). Constitutionalism does so as well in broad strokes, noting that international law takes a position of hierarchy that functions as an imperative norm that guides daily activities. See Ian Hurd, *The International Rule of Law and the Domestic Analogy*, 4 GLOBAL CONSTITUTIONALISM 365, 391 (2015) (analogizing international law to constitutional law). Under rational choice, compliance depends on the benefits and costs. See Alex Geisinger & Michael Ashley Stein, *Rational Choice, Reputation, and Human Rights Treaties*, 106 MICH. L. REV. 1129, 1131–34 (2008); see generally ANDREW T. GUZMAN, *HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY* (2008).

⁸⁶ See, e.g., Dale G. Stephens, *Coalition Warfare: Challenges and Opportunities*, 82 INT'L L. STUD. 245, 252 (2006); Mattias Kumm, *International Law in National Courts: The International Rule of law and the Limits of the Internationalist Model*, 44 VA. J. INT'L L. 19, 23 (2003).

⁸⁷ See, e.g., Rolf H. Weber, *Future Design of Cyberspace Law: Laws are Sand (Mark Twain, the Gorky Incident)*, 5 J. POL. & L. 1, 7–8 (2012); Wade Mansell, *One Law for All (Except for the United States of America)*, 9 Y.B. N.Z. JURIS. 1, 3 (2006).

⁸⁸ LOUIS HENKIN, *HOW NATIONS BEHAVE* 47 (1979).

4.2. *The Court has the flexibility to create these rules in a manner that gives them value.*

Beyond creating substantive law, the Court has flexibility to craft rules in a legitimate or authoritative manner, furthering its influence on state behavior. While the mere existence of law has beneficial effects, the nature of that law can also embody principles to which states are motivated to adhere. There is support for the idea that rules are followed not just because of their substance, but also because of the respect garnered by them. In line with this idea, one study has shown that a state's compliance with international law is correlated with its domestic emphasis on the importance of the rule of law.⁸⁹ Thus, a state's attitude towards the law plays a key factor in its decision to comply. This focus on the quality of the law, as opposed to its substance, is by no means new. Immanuel Kant urged for the creation of an international world governed by the rule of law.⁹⁰ This eventually evolved into a line of thinking advocating that nations obey the law because to do so is morally and ethically correct.⁹¹

In furtherance of this, the Court can develop laws in a way that is respected under various theories of the law's influence.⁹² Franck advocates that a rule does not create compliance in and of itself but that the legitimacy of the rule determines its level of authority.⁹³ He bases his notion of legitimacy on four factors: the clarity of the rule, its symbolic value, its conceptual background, and its conformity with the international system.⁹⁴ The first three, the Court

⁸⁹ See Beth A. Simmons, *International Law and State Behavior: Commitment and Compliance in International Monetary Affairs*, 94 AM. POL. SCI. REV. 819, 829 (2000) (examining patterns of commitment to and compliance with international monetary law).

⁹⁰ See Karol Kuźmicz, *The Kantian Model of the State Under the Rule of Law*, 19 STUDS. LOGIC, GRAMMAR & RHETORIC 13, 23 (2009) (summarizing Kant's philosophy and examining his ideals).

⁹¹ See Harold Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2611 (1997) (examining the history of scholarly efforts to answer the question of why nations obey international law, and arguing that the reason is closely related to the managerial and fairness approaches).

⁹² Some have praised the use of the Court for this function. Leo Gross, *Underutilization of the International Court of Justice*, 27 HARV. INT'L L. J. 571, 571 (1988).

⁹³ See THOMAS FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 24-26 (1990) (arguing that nations comply with rules "[b]ecause they perceive the rule and its institutional penumbra to have a high degree of legitimacy.").

⁹⁴ See *id.* at 52, 92, 152-53, 184.

can navigate easily. First, the clarity of the rule is in the Court's complete control.⁹⁵ Second, the symbolic value can be achieved by the inherent nature of the Court as a permanent and universal institution.⁹⁶ As Judge Greenwood has advocated, the Court is in many ways one of the most universal international legal bodies.⁹⁷ Even discounting the inherent symbolism of the Court, it is merely an impetus for a larger process. It is with further codification, citation, and reiteration that the rule then solidifies. Thus, the symbolism comes not just from one body announcing a rule at one instance. Instead, it is the result of a collective understanding that develops among states, scholars, and the ever-widening number of judicial tribunals.

Third, the conceptual background is again something in the Court's control. By ensuring that the rules it lays out are well reasoned and grounded properly,⁹⁸ it can, at the very least, create the appearance of conceptual validity.⁹⁹ This can be seen in the Court's jurisprudence in the *Arrest Warrant* case. As described above,¹⁰⁰ it extended a customary international legal principle to provide immunity for heads of foreign ministries. While such a rule was not supported by affirmative state practice or *opinio juris*, the Court came to its conclusion via a conceptual analysis of immunity and the principles underlying it. Thus, the Court gave the rule validity

⁹⁵ The lack of clarity is often a criticism leveled at the Court. See KAREL WELLENS, *NEGOTIATIONS IN THE CASE LAW OF THE INTERNATIONAL COURT OF JUSTICE: A FUNCTIONAL ANALYSIS* 320–21 (2014) (noting the problems that arise in implementing the Court's judgments when its determinations are unclear); MICHAEL C. DORF, *NO LITMUS TEST: LAW VERSUS POLITICS IN THE TWENTY-FIRST CENTURY* 195 (2006) (describing the uncertainty as to what degree the I.C.J.'s decision in the *Arrest Warrants* case gives foreign ministers immunity). Inherent in these criticisms is the belief that the Court can be able to perform better in this regard.

⁹⁶ See Berman, *supra* note 1, at 20 (explaining that the creation of the Court as a permanent international legal body meant that it embodies a qualitative change to the system).

⁹⁷ See Christopher Greenwood, *The Role of the International Court of Justice in the Global Community*, 17 U.C. DAVIS J. INT'L L. & POL. 233, 241–42 (2011) (discussing the characteristics that set the I.C.J. apart from other international legal bodies).

⁹⁸ Much of this argument proceeds under the assumption that the Court would not aggressively radicalize its jurisprudence. The incremental nature of its changes is an important part of retaining legitimacy and avoiding resistance from states. See *infra* Part V.

⁹⁹ See generally Niels Petersen, *Lawmaking by the International Court of Justice – Factors of Success*, 12 GERMAN L.J. 1295 (2011) (describing that in different situations, different amounts of justification are needed).

¹⁰⁰ See *supra* notes 60–61 and accompanying text.

that it may or may not have deserved.

Finally, conformity with the international system is more difficult. The entire benefit of the Court's creation of legal rules is that it does so in spite of the international system that has held it back. In many ways, the rules it creates without state consent are usurpations of state sovereignty. If done properly, however, the Court can avoid the ire of states and promulgate rules without, or at least before, state resistance becomes apparent.¹⁰¹

Distinct from Franck's notions of legitimacy, many scholars have attempted to analogize domestic theories of the rule of law to the international plane.¹⁰² These theories have numerous facets and implications, but the ultimate point of relevance is that a system governed by a prescribed set of laws would follow those laws. One scholar summarized the necessary elements for establishing the rule of law as: 1) the rules should be stable; 2) they should apply equally to the governed and the individual; and 3) and they should be applied indiscriminately.¹⁰³

Working under this paradigm, the Court can achieve all of these ends. The rules the Court promulgates become stabilized as it and other tribunals repeatedly cite them. This is bolstered by the fact that it would be hard-pressed to find a substantive field in which the Court has overruled itself,¹⁰⁴ which in some ways makes

¹⁰¹ See *infra* Part V.

¹⁰² See Hurd, *supra* note 86, at 366–67 (stating “[t]he rule of law is central to both the conception of the modern state and to the study of international law and international politics.”); Higgins, *supra* note 17, at 2 (looking to the definition of rule of law for a domestic lawyer to define rule of law in the international context).

¹⁰³ See Hurd, *supra* note 86, at 369. Hurd, analyzing numerous different conceptions of the rule of law, considers the differences to be minor. *Id.*

¹⁰⁴ There are certainly procedural fields in which the Court has been inconsistent. For example, as the Court has some flexibility in determining the Standard of Proof, there has been inconsistency in these outcomes. See Rosalyn Higgins, President, Int'l Court of Justice, Speech to the Sixth Committee of the General Assembly 4 (Nov. 2, 2007), <http://www.icj-cij.org/files/press-releases/3/14123.pdf> [<https://perma.cc/QVR6-596S>]. It has only on one occasion definitely addressed the standard of proof to be applied in that case. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* note 49, at 129. In other instances, the language it has used has often been contradictory, even when dealing with similar topics. For example, the Court mentioned “clear evidence” to prove attribution in *Nicaragua* but then “balance of evidence” to prove it in the *Oil Platforms* case. Compare *Nicaragua*, *supra* note 42, at 62, with *Oil Platforms (Iran v. U.S.)*, Judgment, 2003 I.C.J. Rep. 161, 189 (Nov. 6). Nevertheless, these procedural rules before the Court are of little relevance in affecting state behavior in the greater international field, which is where this paper focuses.

the Court's jurisprudence more stable than most domestic systems. In regard to the final two points, the Court certainly can promulgate rules that apply to all states regardless of status or power. And while the Court may only be applying the law to the two parties before it (who are admittedly from a limited group), a rule's importance is less embedded in the nature of any one case; it is in its eventual solidification as custom, which, by definition, applies equally to all.

Beyond these conceptualizations, others have noted that it is not just the validity of the rule but also its adaptability and applicability to the current world that gives it value.¹⁰⁵ In some ways, their argument mirrors that of Franck; a rule that is outdated and inapplicable has no legitimacy. From that perspective, the Court's ability to create rules that are pertinent in the moment has extreme significance. It is here that the Court's adjudicatory function actually serves it. By dealing with factual disputes before it, the Court's decisions are inherently impugned with a sense of applicability and currency. And when faced with a novel situation, the Court has not shied away from making practical decisions adapted to the scenario instead of doctrinally stagnant ones.¹⁰⁶ When combined with the Court's already universal nature,¹⁰⁷ its decisions can embody those principles of adaptability that give them added worth.

Accordingly, the Court's pronouncements of law, if crafted well, can affect state behavior by possessing legitimacy and relevance. This is by no means intended to say that these rules will then be complied with unwaveringly. It can be debated to what degree a rule, even if legitimate, would be followed.¹⁰⁸ And, fur-

¹⁰⁵ See Sompong Sucharitkul, *The Role of International Law Commission in the Decade of International Law*, 3 LEIDEN J. INT'L L. 15, 16 (1990) (describing "current state of international law must reflect the existing needs and prevailing conditions of the contemporary world which is admittedly pluriform"); see also Jacob Katz Cogan, *Noncompliance and the International Rule of Law*, 31 YALE J. INT'L L. 189, 205 (2006) (arguing that certain situations of noncompliance are beneficial to update rules that are out of date).

¹⁰⁶ See *supra* notes 60–61 and accompanying text.

¹⁰⁷ See *supra* notes 97–98 and accompanying text.

¹⁰⁸ For example, the managerial model assumes that states have "a propensity to comply." Raustiala & Slaughter, *supra* note 86, at 542–43. Constitutionalism does so as well, in broad strokes, by noting that international law takes a position of hierarchy that functions as an imperative norm that guides daily activities. See Hurd, *supra* note 102, at 391. Rational choice would depend on the benefits and costs. See Alex Geisinger & Michael Ashley Stein, *Rational Choice, Reputation, and Human Rights Treaties*, 106 MICH. L. REV. 1129, 1131–34 (2008); see generally

ther, this is not to say the Court has necessarily always created law in the proper fashion. In the views of some the Court has long been “an instrument for applying Euro-centered inherited international law.”¹⁰⁹ However, what this and the above Sections are meant to illustrate is not necessarily that the Court has been perfect in execution. Instead, it demonstrates that it has the capacity to be effective as an institution despite the structural and design criticisms mentioned earlier. Thus, the Court need not be constrained by those criticisms as it moves forward and tries to achieve its original goals and mandate.

4.3. *The further development of rules assists in the resolution of disputes.*

Furthermore, the creation of laws by the Court serves the additional purpose of encouraging the settlement of disputes when they arise. Legal claims made in both public and private are an essential part of international relations and politics. As one author puts it, “[t]he use of international law as a legitimating discourse is pervasive”¹¹⁰ The law serves a key role in the negotiating process. Mark Weller, who participated in the negotiation process between Serbia and Kosovo, noted that international law was “a background and structural factor that sets the conditions as to how negotiations are approached.”¹¹¹ Illustrative of this, Marieke Wierda, while analyzing peace negotiations in Afghanistan and Uganda, noted that the rise of international criminal, humanitarian, and human rights law did or could have had a positive impact on those negotiations and the possibility of reaching sustainable settlements.¹¹²

While the weight in any given negotiating setting will often

ANDREW T. GUZMAN, *HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY* (2008).

¹⁰⁹ *Vicuna & Pinto*, *supra* note 4, at 351 (internal quotations omitted).

¹¹⁰ Hurd, *supra* note 86, at 391.

¹¹¹ Veronica Glick, *The Role of International Law in Negotiating Peace*, ASIL (Apr. 10 2015), <https://www.asil.org/blogs/role-international-law-negotiating-peace> [<https://perma.cc/J5DA-ZQSP>]; see also WELLENS, *supra* note 96, at 22 (describing that the prospects of legal success affect the nature of negotiations).

¹¹² See Marieke Wierda, *The Positive Role of International Law in Peace Negotiations: Implementing Transitional Justice in Afghanistan and Uganda*, in *LAW IN PEACE NEGOTIATIONS* 281, 283–284 (2d ed. 2010).

depend on the nature of the rules and context, there are certain underlying principles that a more robust legal framework promotes. With more rules in place, a state's violation becomes more definitive. They lose their ability to make an argument in good faith that they believe they are complying with international law. Thus it can limit "the positions [states] may credibly take during negotiations by devaluing those that would be untenable"¹¹³ Therefore, it is clear that a victim state's rights are being infringed.¹¹⁴ This hurts the state's overall legitimacy and the public sentiment towards that state,¹¹⁵ and more directly, it puts the state in an instantly worse negotiating position.¹¹⁶ Additionally, the victim state would then become more willing to utilize countermeasures if it has a viable legal argument to justify these measures.¹¹⁷ The importance of this avenue is readily apparent. Negotiation serves as one of the principal avenues of dispute resolution in today's international climate, and any influence the Court can exert on improving this process will have profound effects.¹¹⁸

That said, when considering the role of the Court from this international relations standpoint, the Court has the ability to influ-

¹¹³ Charney, *supra* note 41, at 228. Charney was speaking of the effect of the law on treaty negotiations, but the situation is analogous in that it similarly affects the manner in which negotiators try to reach a resolution.

¹¹⁴ See Julia Bedell, Field Report, *On Thin Ice: Will the International Court of Justice's Ruling in Australia v. Japan: New Zealand Intervening End Japan's Lethal Whaling in the Antarctic?*, COLUM. J. ENVTL. L. 1, 8-9 (2015) (describing how I.C.J. decisions provide incentives for states to comply and prevent future disputes with other countries in the region and providing, as an example, the *Sipadan-Ligitan* case); see also WELLENS, *supra* note 95, at 79 (remarking that resolution of certain "test cases" makes it easier to negotiate and settle subsequent similar cases).

¹¹⁵ Bedell, *supra* note 116.

¹¹⁶ See Greenwood, *supra* note 32, at 249 (discussing the analogous situation of the *Tehran Hostages* case, whereby the judgment played a role in rousing international sentiment against Iran). The analogy of course has its limits, since in that case there was a judgment and it was well after the Court proceeding that a resolution was reached. Nevertheless, the resolution of that dispute seems less like a situation about compliance and more akin to a larger negotiation between two parties that implicated I.C.J. jurisprudence. See also SCHULTE, *supra* note 12, at 172 (noting the importance of the judgment in generating support and pressure against Iran).

¹¹⁷ Countermeasures are an omnipresent element of international relations, underlying state behavior as regards their international obligations. See BARNIDGE, *supra* note 74, at 562 (noting that countermeasures are meant to assist, rather than to impede, negotiation and settlement of disputes).

¹¹⁸ See Tomka, *supra* note 32, at 8 (describing the importance of negotiations and stating that the Court already plays a role in managing tensions to avoid escalation of disputes).

ence the outcomes of disputes by facilitating information transfers. Relations between states are, ultimately, interactions with imperfect information.¹¹⁹ One of the utilities of an international legal regime is to facilitate mutual understandings of norms and information.¹²⁰ This can facilitate agreements among states,¹²¹ and more generally, help guide behavior by allowing states to better understand each other and the decisions they are likely to make.¹²² Consequently, the Court's ability to set down a more clear and robust legal framework may aid more generally in information transfer because it provides a baseline notion of legality to which state actions can be compared. The reasoning, or lack thereof, that states use to comply with or defy a law forces them to provide information about their beliefs and motivations. As a result, when looking at international law as one of the means by which states may better resolve their disputes with each other, the Court's ability to further that body of law provides a use that is independent of its ability to actually force compliance with those laws.

As demonstrated above, the Court's creation of law is a method through which it can affect state behavior. Most certainly, the rules it has announced have already had an effect. If the Court can continue to create rules in the proper fashion as to guarantee their legitimacy, it can take further advantage of this opportunity and expand its influence.

5. THE COURT CAN STILL BE EFFECTIVE DESPITE THE EVOLVING NATURE OF ITS ROLE.

All of this, of course, puts the Court in a slightly precarious place. The Court has no inherent authority to do this and has explicitly denounced its function as a law developing body.¹²³ The

¹¹⁹ See Robert O'Keohane, *The Demand for International Regimes*, 36 INT'L ORG. 325, 338 (1982) (citing imperfect information as a reason why international regimes are valuable).

¹²⁰ See *id.* at 341–45.

¹²¹ See *id.* at 349.

¹²² See JAMES D. MORROW, *ORDER WITHIN ANARCHY: THE LAWS OF WAR AS AN INTERNATIONAL INSTITUTION* 16–17 (2014) (describing international law from a game theory perspective as an equilibrium that states can use to understand other states' behaviors).

¹²³ *Fisheries Jurisdiction (U.K. v. Ice.)*, Judgment, 1974 I.C.J. Rep. 3, ¶ 53, http://www.worldcourts.com/icj/eng/decisions/1974.07.25_fisheries1.htm

history of the I.C.J. Statute also shows a desire to avoid giving the Court the power to create law as opposed to merely apply it. Article 59 of the Court's statute was not originally present in the draft statute for the Permanent Court of International Justice ("P.C.I.J.").¹²⁴ The Council of the League of Nations inserted such language because it wanted to emphasize that the Court is not a law-making or law-creating body.¹²⁵

But can the Court do this? And, moreover, should it? The Court, by overstepping its authority, is taking inherent risks. While any individual judgment would still have binding effect,¹²⁶ there is the possibility of undermining the Court's authority as a whole. This may cast doubt on the legitimacy of the Court's rulings and further discourage states from utilizing the Court.¹²⁷ While these concerns are understandable, they are unwarranted or overstated, since the Court will better achieve its larger goals and state resistance is likely to be minimal or ineffectual.

5.1. *The Court has a degree of inherent authority.*

The Court's authority should not be read so narrowly as to preclude an expanding role. The I.C.J. and the P.C.I.J. were influenced by the arbitral proceedings from which its roots are laid.¹²⁸ At the same time, however, the Court was given a qualitatively different function with the inclusion of its advisory capability to answer "any legal question." It would be hard-pressed to expect that such a power would not, in some way, start to expand into the realm of

[<https://perma.cc/7NK8-56G4>] ("In the circumstances, the Court, as a court of law, cannot render judgment *sub specie legis ferendae*, or anticipate the law before the legislator has laid it down.")

¹²⁴ See Rudolph Bernhardt, *Article 59*, in *THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY* 1231, 1233 (Andreas Zimmermann et al. eds., 2006).

¹²⁵ See *id.*; see also I.C.J. Statute art. 38 (listing the authorities that the Court can apply and not mentioning any authority to create law).

¹²⁶ See U.N. Charter art. 94(1).

¹²⁷ See Deutsch, *supra* note 30, at 39-40 (recounting the opinion of the Soviet representative to the U.N. in 1970 who believed that the underuse of the Court at that time was due to the Court's "erroneous decisions"); see also Weisburd, *supra* note 60, at 370-71 (criticizing the Court's methodology for finding custom and attributing to it the Court's decreased use).

¹²⁸ Berman, *supra* note 1, at 9 (noting that a "continuous line of development" can be seen from the Permanent Court of Arbitration).

the progressive development or crystallization of customary international law, at least at the fringes.¹²⁹ This notion of the Court's function has its supporters. Lauterpacht, for one, advocated significantly for an expanding role of the Court.¹³⁰ Even those who find that the Court's role is to settle disputes do not deny that the Court has a role in the development of law in the process.¹³¹

Further, the Court's statute may have envisioned a restrained role, but the Court, more generally, was intended to create order and peace.¹³² Records from the San Francisco Conference specifically indicate that the Court was to "play an important role in the new Organization of nations for peace and security."¹³³ Its ability to do so has been severely hampered by the nature of the international system that it was meant to function within and the lack of a legislative body whose rules it was supposed to interpret and apply. To better achieve that goal, the Court should have the authority to expand its mandate, at least to a degree.

As Lauterpacht noted, bodies "set up for the achievement of definite purposes grow to fulfill tasks not wholly identical with those which were in the minds of their authors at the time of their

¹²⁹ See Russell D. Greene, *The Permanent Court of International Justice*, 7 B.U. L. REV. 181, 189 (1927) (remarking in 1927 that the P.C.I.J. was already beginning to develop a large amount of international law); see also Hudson, *supra* note 65, 256-57 (reasoning that the same judges ruling on similar cases would be likely to gradually create a body of law).

¹³⁰ See HERSCH LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT* 6-7 (1958); *The Barcelona Traction, Light and Power Company (Belg. v. Spain)*, Separate Opinion of Judge Sir Gerald Fitzmaurice, 1970 I.C.J. Rep. 65, 78-80 (Feb. 5), <http://www.icj-cij.org/files/case-related/50/050-19700205-JUD-01-04-EN.pdf> [<https://perma.cc/JHT9-YESJ>] (advocating that international law in regards to corporate entities is deficient and the Court should not prevent a broader principle to be applied in that case); see also *The Corfu Channel Case (Alb. v. U.K.)*, Individual Opinion by Judge Alvarez, 1949 I.C.J. Rep. 39, 40 (Apr. 9) (arguing that the Court has gained the role of actively developing international law).

¹³¹ See Berman, *supra* note 1, at 11; see also Deneen, *supra* note 29, at 180 (explaining his opinion in 1930 that the Court would likely develop precedent); Higgins, *supra* note 71, at 1 (remarking on the I.C.J.'s position developing law while settling disputes); Tomka, *supra* note 32, at 10, 12 (noting the influence of the Court's decisions on developing law).

¹³² It serves the same overarching functions as the UN it is a part of. See Gunther Doeker, *International Politics and the International Court of Justice*, 35 TUL. L. REV. 767, 773-774 (1960).

¹³³ Shabtai Rosenne, *On the Non-Use of the Advisory Competence of the International Court of Justice*, 38 BRIT. Y.B. INT'L L. 1, 32 (1963) (citing Report of Committee IV/1 of the San Francisco Conference).

creation.”¹³⁴ The Court’s own jurisprudence advocates for this as well. It has recognized that international bodies possess certain implied powers or abilities to better achieve their ends,¹³⁵ one notable example of which was the *Reparation* case where it found that the UN had international legal personality.¹³⁶ Although slightly self-serving, applying a similar understanding to the Court buoys its expanding role in developing international law. By providing guidance on the law, even if in a different manner than intended, the Court has an opportunity to reposition itself to serve its original and ultimate function better.

5.2. *The Court’s actions can be achieved without resistance.*

Even if the Court’s development of international law would be viewed negatively by the states it was trying to help, pursuit of this path would, if crafted correctly, be unnoticeable or at least unresisted. The nature of the Court’s rule-making lends itself to go on unnoticed. The Court could avoid much criticism since it would not necessarily be its job to completely and unequivocally establish a rule of law. Instead, it would merely lay the groundwork for other bodies, such as the ILC and other tribunals, to further solidify its presence. The rules that it would be establishing, in order to be well grounded in logic and reasoning, could not be extreme in any event. Thus, there would be an inherent avoidance of drastic and noticeable.

Moreover, if the Court were to establish these rules strategically, it could further avoid the resistance of the majority of states; it could limit its determinations to more discrete cases between two parties that do not readily appear to have larger implications. For example, the Court, when faced with treaty interpretation issues, frequently expounds on the underlying general principles of customary international law before delving into the treaty itself.¹³⁷

¹³⁴ LAUTERPACHT, *supra* note 131, at 5.

¹³⁵ See MOHAMED SAMEH M. AMR, *THE ROLE OF THE INTERNATIONAL COURT OF JUSTICE AS THE PRINCIPAL JUDICIAL ORGAN OF THE UNITED NATIONS* 130 (2003).

¹³⁶ See *id.*; *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, I.C.J. Rep. 174, 177-79 (Apr. 11, 1949), <http://www.icj-cij.org/files/case-related/4/004-19490411-ADV-01-00-EN.pdf> [<https://perma.cc/CK8K-AGCR>].

¹³⁷ See Michael Wood, Special Rapporteur, First Report on Formation and Evidence of Customary International Law, ¶ 35, U.N. Doc. A/CN.4/663 (May 17,

And even if the Court were to use a more widely known case as a vehicle, it could avoid attention by making pronouncements of law unrelated to the controversy at hand. For example, the Court, in its *Nuclear Weapons* advisory opinion, noted that the doctrine of transboundary harm was a part of customary international law regarding environmental damage.¹³⁸ While certainly related to the use of nuclear weapons and the radiation they create, that was by no means the issue of greatest concern.

Ironically, what this also means is that the Court's advisory function, as a general matter, is actually a poor vehicle from which to pronounce new principles of law. The generalized nature of the opinions means that they will have implications on major world powers¹³⁹ or the interaction between the Court and the other bodies of the UN.¹⁴⁰ Furthermore, they are often on some of the more political issues, such as the Israeli-Palestinian conflict¹⁴¹ or Kosovo's declaration of independence.¹⁴² Thus, the nature and subject matter of the Court's advisory opinions have a tendency to generate much more attention.¹⁴³ While there are exceptions,¹⁴⁴ this means that those opinions are generally less susceptible to this law-making approach, and the Court should focus more on individual disputes.

The use of these disputes is all underscored by the fact that for

2013) (describing the different ways customary laws can be used in a situation even when there is a treaty present).

¹³⁸ *Supra* note 43–44 and accompany text.

¹³⁹ See Legality of the Threat or Use of Nuclear Weapons, *supra* note 42 (analyzing the general legality or illegality of nuclear weapons). In fact, this is likely the only way the Court directly affects the rights and obligations of the major powers not subject to I.C.J. jurisdiction.

¹⁴⁰ See Reparation for Injuries Suffered in the Service of the United Nations, *supra* note 136 (finding the UN had legal personality).

¹⁴¹ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136 (July 9, 2004), <http://www.icj-cij.org/files/case-related/131/131-20040709-ADV-01-00-EN.pdf> [<https://perma.cc/TK3B-HFK6>].

¹⁴² Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. Rep. 403 (July 22, 2010), <http://www.icj-cij.org/files/case-related/141/141-20100722-ADV-01-00-EN.pdf> [<https://perma.cc/83B3-XNKD>].

¹⁴³ As evidenced by the great amount of literature written about the *Palestine Wall* opinion. See David Breau, *The World Court's Advisory Function: "Not Legally Well-Founded,"* 14 U. MIAMI INT'L & COMP. L. REV. 185, 185–86 (2006) (chronicling the various criticisms leveled at the Court's opinion in that case).

¹⁴⁴ See *supra* note 43–44 and accompany text (noting the Court's pronouncement of transboundary harm as custom in its *Nuclear Weapons* advisory opinion).

a Court's pronouncements to be invalidated, it would require the active resistance of states. As an example of this, one member of the ILC adopted the immunity for foreign ministers mentioned above,¹⁴⁵ not because he or she thought that the Court's decision made the rule customary international law, but because no state had opposed the rule after its announcement and they felt it was thus appropriate to include as progressive development.¹⁴⁶ In many ways it turns the paradigm on its head, requiring state action for disapproval and allowing inaction to be a tacit sign of approval.

When analyzing this situation under the different models of state behavior, these factors support the efficacy of such an approach. The incremental change in jurisprudence directly reflects a historical institutionalist theory through which change happens over time without anyone noticing. Furthermore, the lack of state action needed supports acceptance under a liberalism model, since the intricacies of domestic coordination are made irrelevant, and under a behavioral model, which biases in favor of the Court's rules being accepted because the status quo from the state's perspective is not resisting.

Finally, under a rational choice model, a state, having assumed it noticed the rule being formed and overcame its inactivity bias, would also have to realize that the rule would be detrimental to it. Unless a state were actively involved in an endeavor that the rule made problematic, the state would likely not resist unless it could actively and accurately predict its future problems. Thus, the state would only want to resist the rule when a dispute arose, and if the rule has firmly solidified by that time, it would be difficult for the state to claim the rule never existed in the first place.

5.3. *The Court's more active role is supported by the influence of the other non-state entities involved.*

Even if state resistance is present, it is blunted by the changing audience the Court is now addressing. As described above, the influence of much of the Court's jurisprudence is not through the independent affirmations of states. Instead, it is through other courts, legal bodies, and scholars, whom states interact with tan-

¹⁴⁵ See *supra* note 63 and accompanying text.

¹⁴⁶ See ILC Draft Articles on Immunity of State Officials from Foreign Criminal Jurisdiction art. 3, cmt. 5.

gentially. In many ways, these bodies are less concerned with whether the Court has usurped a state's sovereignty and are instead focused on the nature of the rule and principle. This is evidenced by the fact that they have been willing to include and further principles created by the Court that had little or no support from state practice, such as the effective control doctrine. What this demonstrates is the symbiotic relationship that these bodies have with each other and the benefits that can be gained from it.¹⁴⁷ Having different bodies, like the I.C.J., the ILC, and regional courts, with different functions and mandates all promoting the same rule helps create an understanding and support for that law without any need for direct state involvement. And while the multiple bodies also create risks of fragmentation within the law, that becomes the lesser of two evils, since it, at the very least, means the law is progressing and adapting instead of stagnating.

This is not to say that states are to be disregarded. After all, without states bringing cases before the Court, this is all for naught. Nevertheless, such a situation seems unlikely. First are the considerations described above, whereby states are not likely to notice the Court's changes until it is too late. But, furthermore, the Court has already been engaging in this endeavor. It has already been creating law, and the judges have even made public statements to that effect.¹⁴⁸ Nevertheless, the Court's docket is still burgeoning to a degree,¹⁴⁹ if not to the extent many had envisioned originally. Thus, the steady stream of cases which the Court can adjudicate shows that risks related to the further loss of the Court's legitimacy should not be overstated.

The interplay of these factors and the Court's ability to withstand institutional evolution has already been previously demonstrated by it and its predecessor. When the P.C.I.J. was first created, its competency to provide advisory opinions was questioned.¹⁵⁰ Despite authority from Article 14 of the Covenant of the League of Nations, strong opposition to its advisory function, especially from

¹⁴⁷ See Higgins, *supra* note 71 (applauding the relationship between the ILC and the I.C.J., as each promotes the others work).

¹⁴⁸ See Higgins, *supra* note 71, at 1; Tomka, *supra* note 32, at 10, 12.

¹⁴⁹ See Tomka, *supra* note 32, at 2 (stating that the Court "has delivered more judgments over the last 23 years . . . than during the first 44 years of its existence").

¹⁵⁰ See MAHASSEN M. ALJAGHOUB, *THE ADVISORY FUNCTION OF THE INTERNATIONAL COURT OF JUSTICE 1946-2005*, 19 (2006) (discussing opposition to granting the PCIJ any right to give advisory opinions).

the United States, prevented its inclusion in the Court's statute.¹⁵¹ Nevertheless, the Court was undaunted, laying down twenty-seven advisory opinions in its eighteen-year life, including its very first case.¹⁵² With its ability to play such an established role, when the I.C.J. Statute was being drafted at the San Francisco Conference, most parties, including the US, did not oppose such a function,¹⁵³ even though they had a clean slate to work with.

6. CONCLUSION

The Court has an opportunity. By creating international laws, it has a means to influence state behavior, and it has found, whether inadvertent or otherwise, a method by which it has and can continue to be effective. This leaves unanswered, however, whether this is the "right" thing to do. The Court is largely overstepping states' original vision of it, creating the law instead of just applying it. But the Court was also meant to have an important influence on the international world, both symbolically and practically. It has not been able to do that, however, falling victim to the stagnation which is, unfortunately, the norm rather than the exception in international law. When a body so significant finds a way to gain the effectiveness that it lost (or maybe never had) it seems better to err on the side of progress rather than restraint, even if that means the Court that was meant to uphold the law, now has to bend it.

¹⁵¹ See *id.*; The Covenant of the League of Nations art. 14, http://avalon.law.yale.edu/20th_century/leagcov.asp#art14 [<https://perma.cc/N9EC-WP2U>] (last visited February 25, 2018).

¹⁵² See ALJAGHOUB, *supra* note 151 at 22.

¹⁵³ See *id.* at 28 ("Even the US, despite its previous attitude towards the advisory opinions of the PCIJ, consented to such a function . . .").