Spring 2022

The International Court of Justice: The Quest for Neutrality in a Prejudiced Political World

Zoe Buchmann

The International Court of Justice: The Quest for Neutrality in a Prejudiced Political World

Zoe Buchmann

Political Science Honors in the Discipline Thesis

Thesis Advisor: Dr. Oya Dursun-Ozkanca

Thesis Readers: Dr. Matthew Telleen, Dr. E. Fletcher McClellan

May 03, 2022

Introduction

The International Court of Justice (ICJ), one of the primary organs of the United Nations, was created to serve as a court that handles matters between states and nations. Its purposes are to serve the international community and adjudicate general disputes in accordance with international law. The close relationship of the court to the Security Council should allow, in theory, for an unbiased legal exchange between the Court's Judges and the members of the Security Council on any international dispute between the nations subject to the Court's jurisdiction. The Court has contributed, since its creation, to establish guidelines for crucial legal questions, such as human rights, and has continued to provide the necessary legal framework to allow for a peaceful resolution of conflicts between nations. They have closely aided the Security Council with advisory opinions fulfilling their role as the primary legal body within the international sphere and promoting the UN goal of international peace and security. However, over the years the political culture in each country and between member states has become increasingly more evident, not only in the UN General Council but also in the Security Council, through the increased use of the veto powers given to the permanent member states. This trend is traceable through the International Court of Justice, as the judges for each country have voted in cases along the lines of the official policies of the governments by which they were appointed.

In order to test for the existence of a national bias within the Court, this paper will analyze past court cases pertaining to specific state matters, such as sovereignty, and how the judges decided. Further, I will compare the decisions by each judge to the position of the government of their country of representation. To provide a full position of the court and the political bias, a brief introduction to the general disposition of the Court and the Security Council is necessary. The important cases include Nicaragua v. United States (1984), India v. Portugal

(1955), and Yugoslavia v. United States (1999), as well as the advisory opinion of the Court on the legality of the Declaration of Independence of Kosovo and the newest Ukraine v. Russia case of 2022. These cases, as well as the advisory opinion, serve as the legal basis for the argument that the justices have increasingly demonstrated that their decisions strongly factor in the national interests of their respective countries. Further, these cases also provide a background of legal analysis with which the Court engages, and how these decisions are explained and justified within the international legal framework.

The paper will relate several predominant theories of International Relations to the increasing bias within the court and the Court's decisions on different topics. Specifically, Realism and Liberalism will be used to compare the initial idea of the Court's purpose in international relations, and its current trajectory within an increasingly politically biased world. World politics, especially as present in the UN, indicates that each country follows its own national interest at the forefront of every action the organization considers. This is not relatively new, but it has become a more dominant form of international policy, challenging the idea of the UN as an organization focused on international cooperation as well as equality for all member states. The question at the forefront of the research is whether the existence of a clear bias within the Court is perceivable through the distinct Judges' decisions, and if that bias can be due to their country of origin and its position on those issues.

Historical Overview

The creation of the International Court of Justice followed multiple debates on how to proceed with settling arguments between states. It was agreed that following traditional guidelines on settling disputes would appease all cultures and provide enough structure to the system to maintain a fair and unbiased court. The United Nations Charter, Article 33 was

established to provide written confirmation of the possible dispute settlement strategies: "negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, and resort to regional agencies or arrangements, to which should also be added good offices" (UN Charter, Chapter VI). This idea of establishing an international organization tasked with maintaining a unified system for international law is a predominant aspect of Liberalism – the school of thought that asserts all governments are equal within the law and everything relies on the consent of the governed (McLean, McMillan 2009).

The Covenant of the League of Nations Article 14 established an international court that would be able to not only decide on issues but also provide advisory opinions on a variety of matters ("History", n.d.). The League of Nations is regarded as the predecessor of the UN, with most of its basic structures incorporated into the UN. The Permanent Court of International Justice (PCIJ) can therefore be considered the predecessor of the International Court of justice; further, the PCIJ advanced international law to include a multitude of new jurisdictional areas and was the first permanent court that based its decisions on one common legal framework agreed to by all member states ("History", n.d). This development was crucial as it addressed several issues, such as the different legal systems, and provided a set base for future developments in international law, as it was able to set its own precedent ("History", n.d.). The International Court of Justice is based on the principles of international arbitration, which served as the initial framework for the creation of an international court centered around solving international disputes ("History", n.d.). During The Hague peace conference of 1899, the first international arbitration court, known as the Permanent Court of Arbitration, was established among the smaller states of Europe (including Russia), China and other Asian states, and Mexico, dealing predominantly with peace and disarmament agreements ("Peace Conference at

The Hague 1899..." 1907). The Conference in 1907 included the involvement of the US and resulted in further adjustments to Pacific dispute settlements through arbitration and special mediation ("History", n.d.). These conferences serve as the basis upon which the current court and law are built. They provided the international community with an existing structure that would allow nations to settle disputes, as well as establish international cooperation on matters concerning other states.

The UN Security Council

To be able to fully analyze the trend within the political world and how it influences the International Court of Justice, we must understand the Security Council and the power the permanent members hold within it. The Security Council is the enforcing organ of the UN – it is able to create, propose, and enforce resolutions. It can call upon the UN member states, via the powers granted by Article 34, to disturb economic and diplomatic relations, as well as disrupt air, sea, and radio communications with any other state (UN Charter Chapter VI). The five permanent members of the Security Council are the United States, France, Russia, Great Britain, and China as outlined by Article 23 (UN Charter Chapter V). They are granted the power of veto, which allows them to effectively block any action proposed by the other 10 members of the Security Council and can thereby limit the actions the council can take. No matter if the resolution is passed by a two-thirds majority, any veto by one of the five states halts the resolution.

Further, the Security Council plays a crucial role within the UN and is given several key powers within the organization. Chapter II of the UN Charter gives it the power to propose new members to join the UN via Article 4, suspend any member state from taking actions against resolutions that were decided against that state through Article 5, and can recommend to the

General Assembly a complete removal of a state through Article 6. Chapter V, Article 26 gives the Security Council the power to decide armament regulations for all member states. Article 34 gives it the ability to investigate any dispute through its means and raise the issue within its assembly and the General Assembly.

The power given to the Security Council attests to the Realist assumption that disputes, conflicts, and even war animate international relations. The Security Council is the only organ of the UN that directly represents that idea within Realism: peaceful international cooperation will remain rather impossible without a form of violence, and states will continue to place their own safety above those of others. The UN in general mimics the main assumption of Liberalism, providing the world with an organization through which nations can work together and promote peace and security. However, the belief in the effectiveness of Liberalism in international relations is not as strong, as evident through the extent of the power and function of the Security Council under the current international context. In addition, no permanent member would give up their veto power (Tass 2020), whether out of fear that the others would not, or the principal idea of losing power within international affairs. This is a prime example of the beginning of a security dilemma, as outlined in Realism.

The resolutions adopted by the Security Council are considered to be Charter duties for each member; therefore, they are counted above Treaty duties for the states. This was first established as a precedent in the Lockerbie Cases (McGinley 1992). In this case, the court decided that the sanctions established by the US and the UK to counter Libya were against the Montreal Convention. However, the Security Council had previously passed a resolution calling all member states to enact sanctions against Libya on the grounds that Libya sponsored the airplane bombing over Lockerbie, UK. This case determines that states can violate their treaty

obligations in favor of their Charter obligations, effectively placing the Security Council resolutions above the decisions of the International Court of Justice (McGinley 1992).

Structure of the International Court of Justice

The International Court of Justice is the principal judicial organ of the United Nations. Its principal tasks include settling disputes between member states and providing advisory opinions to other UN organs (United Nations, "The International Court of Justices"). The Court is composed of fifteen judges that serve nine-year terms without term number restrictions. In general, the distribution follows a geographical pattern: three seats are allocated for African states, two for Latin America and the Caribbean, three for Asian states, five for Western European and other states, and two for Eastern European states (Bolorunduro n.d.). This ensures that the court can maintain its effort to support cultural diversity and be as international as possible in terms of opinions and law systems. If a case is brought before the Court involving a state that is not yet represented by a judge of that nationality, the state has the right to request a judge *ad hoc,* who can then temporarily adjudicate the case along with the rest of the sitting judges (Bolorunduro n.d.).

Since the founding of the Court, the permanent member states of the Security Council – United States, Russia, China, France, United Kingdom – have had a judge sitting on the bench, except for China from 1967 to 1985, and the UK since 2018 after their failed attempt to have one elected ("All Members" 2022). The overall goal of the Court's composition is to allow for equal treatment of all issues and nations, aligning with the UN pillar of allowing for equal sovereignty of all nations no matter their size or economic power (UN Chapter Article 2(1)). However, it is evident when regarding the trend of which national judge is elected, that some countries, namely Russia, USA, and China, have been represented with each election cycle, yet other nations have

not been. In fact, out of 193 UN member states, only 48 unique states have had a judge elected to the ICJ bench ("All Members" 2022).

The International Court of Justice has the authority, or jurisdiction, to decide a case if both parties agreed to subject themselves to the Court's ruling. The UN Chapter only requires its member states to be a party to the Court's statute under article 93 (UN Chapter). Jurisdiction is given to the Court by the states in the case. If one state is not willing to subject itself to the jurisdiction of the court, that case cannot be decided or presided over until the state agrees to the authority of the court (Bolorundo n.d.). However, states can also choose to create an Optional Clause determination, based on Article 36(2) of the Charter, which essentially establishes a pre-existing declaration that the state has given the court the authority to hear its cases, and make a ruling before the issue occurs (UN Charter). Currently, the only permanent member state under such a declaration is the United Kingdom ("Declarations recognizing the jurisdiction of the Court as compulsory" 2022) – the US retracted their declaration after the Nicaragua case.

Once a decision is made, the question remains how the Court's ruling will be enforced, and how the nations are going to be held accountable for accepting the ruling. The court's jurisdiction is further divided into two categories: advisory opinions and contentious jurisdiction. The important distinction is that when the court delivers an advisory opinion, it provides a legal analysis of any issue it was asked to examine. The findings of the court are then presented to the organ that requested a legal examination of an issue and may factor into the decision that the organ will take. Advisory opinions are legal opinions the court can write; however, they are not binding in any form, nor are they considered precedent. The court exercises contentious jurisdiction when it decides on a case brought before the court by a state against another state; those decisions are considered binding. At the founding of the ICJ, the UN included a provision

that would grant the UN Security Council the authority to enforce the ruling. According to the United Nations Charter Article 94(1)," Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party." Furthermore, Article 94(2) states, "If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment"(UN Charter, Chapter XIV). Based on these provisions, the Security Council has the authority to enforce any ruling. However, in its history, the Security Council has not once directly enforced a ruling by the Court.

Literature Review

Immanuel Kant, a German philosopher, proposed the concept that international law and domestic justice are fundamentally connected, and he pioneered the modern liberal approach to international relations. His Liberal theory promotes the idea that the individuals of the state are the primary actors within international relations and domestic policy, and that a government serves to secure liberty, its citizens, and promote peace, essentially following the social contract theory by John Locke (Tesón 1992). The theory claims that states have their powers directly derived from the individual's rights of freedom of life, liberty, and property which are the founding pillars of international law (Doyle, Recchia 2011). Locke's Law of Nature outlines his idea that all life is equal, and as such should not be endangered. If someone were to go against the social contract, it is within the law of nature that they are able to be punished for their offense (Pataraia 2017). Therefore, he outlined the initial framework for creating a system that punishes those that have offended the social contract, meaning the rules created by an organization of individuals, and in this case different State governments. The International Court of Justice is

thereby an extension of Locke's philosophy of a political society formed through the unifying of different individuals into one body. Kant expands this understanding, to include the modern understanding of Liberalism in International Relations arguing for an international community of just, democratic ideals to promote peace and prevent war (Tesón 1992). The central idea of international Liberalism is that the people control the actors within international relations, that it is of the highest importance to promote peace and security, and that it is possible and necessary to avoid war, instead of focusing on peaceful resolutions.

Realism, specifically neorealism, argues that power politics is the key factor to understanding international relations. Combined with the existence of an anarchistic realm in international relations, power is what motivates states to maintain a warring posture to ensure that their nation's interests are represented and defended against counter-movements (Javis 1999; Waltz 1979). Within this school of thought, the idea of an international organization is considered not to be important, and the state's sovereignty has to be protected and preserved against the interference of other states. This can be seen in the creation of the Security Council within the United Nations, as its primary purpose is to promote peace and security while assuming that there will be situations where military actions are unavoidable. This goes partly against what Liberalism argues, and to an extent, the creation of an international organization tasked with promoting peaceful interactions between nations.

Empirical studies into the behavior of ICJ justices have revealed evidence for the hypothesis that the judges have a personal bias that can be traced back to their nation of origin (Posner, De Figueiredo 2005; Xuechan Ma, Shuai Guo 2017). Examining voting patterns among ICJ justices, these studies found evidence in favor of an existing bias within the court

considering several categories, such as the economic power of the country, as well as any potential psychological factors. In fact, most studies into the bias of any court and its justices look at the psychological implications of their actions in regard to their decision (Posner, De Figueiredo 2005; Xuechan Ma, Shuai Guo 2017; Voeten 2018).

Most studies are based on an empirical analysis of voting patterns comparing a judge's vote and how that factored into the decision. Although no study has found strong evidence in favor, I argue that national interest is a key influence on the decision of a judge. To truly identify bias within the court, it is crucial to understand why and how the decision is biased. This can be done through analyzing the political ideology of the government from which the justices stem, as well as a closer study of the foreign policy agenda of those countries. This reveals clear similarities between how the judge decides on a case that challenges a state's foreign policy and that policy.

Establishing national interest as an important and influential aspect of foreign policy reveals that Realist ideas are the driving forces behind many nations' actions within the international realm. This demonstrates how difficult it is for international organizations such as the UN and ICJ to establish a base on which all nations are considered equal and treated as such. Based on this observation, it is evident that in order for any international organization to maintain its credibility and standard it is important for its members to remain impartial. However, in a system that is inherently biased, especially politically, it is almost impossible to remain entirely neutral. Therefore, it is important to understand the circumstances and the level of bias that is present. The trend of an increase in political polarization has to be factored into the evaluation of the existence of a bias, as this can dictate the national interest, and can therefore influence a judge's decision.

At the core of international governance is the theory of supranationalism, which is defined as the state or condition of "transcending national boundaries, authority, or interests" (Merriam Webster n.d.). A form of supranationalism exists within the European Union, as it places more emphasis on the community of European states while it respects cultural and governmental differences (Ruszkowski 2009). Supranationalism takes international cooperation further than just integration; rules and existing laws are not just integrated to form a uniform set of rules. A supranational organization can also change and create new rules that count for every state equally (Leuffen et.al. 2013). This implies that there is not one nation that leads many, nor are there individual nations with individual powers. Instead, they all consolidate their sovereignty, and subsequently their power within that one organization (Leuffen et.al., 2013). This theoretical approach is therefore more Liberalist inclined, and opposes Realism completely, as it eliminates the idea of sovereignty, and by that the chance for any security dilemma situations to arise.

For an international court of law that addresses issues between states, it is important for it to not only be above statehood but also be above the influence of different governing structures, as well as respect and account for different cultural preferences. The European Court of Justice is an example of a supranational court, as it assumes compulsory jurisdiction over member states, meaning it has jurisdiction whether the individual state agrees or not, as long as they are part of the European Union (Kolcak 2014; Yusuf 2018). Important to note is that even though the states give up part of their sovereignty to the court, they still remain sovereign in any other affair.

Case Studies of Bias in the Court

<u>Advisory Opinion on the Declaration of Independence by Kosovo in 2010</u>

The 2010 advisory opinion of the International Court of Justice on the legality of the declaration of independence by Kosovo provides clear evidence of the influence of state interests on judges' decisions. The case was brought to the Court by Serbia, which sought to challenge the legality of the UN's actions in recognizing the Provisional Institutions of Self-Government of Kosovo (PISG), as well as whether the Kosovo declaration was a violation of the international legal framework (Caplan 2010). The Court found that the declaration was not in fact illegal within international law, as it was drafted by the people of Kosovo and not directly by the PISG. The definition of the responsible party for the declaration is what made it possible for the court to find that the declaration was not illegal and should therefore be recognized by the other states (Caplan 2010; International Court of Justice 2010). Had the Court found that the PISG was the author of the declaration, it would have had to apply the UN legal obligations and rule that the declaration was invalid (Caplan 2010).

The decision, however, was not entirely unanimous: "(2) By nine votes to five, [the Court] Decides to comply with the request for an advisory opinion; (3) By ten votes to four, Is of the opinion that the declaration of independence of Kosovo adopted on 17 February 2008 did not violate international law." (International Court of Justice 2010). Judge Skotnikov from Russia dissented in both sections of the opinion. The idea of absolute sovereignty, no matter what the country might have done, is a predominant trait of Russian involvement in the UN and international relations, evident through their continuous defense of Syria (Remler 2020). Under the governance of President Putin, Russia highly scrutinizes demands of territories for independence, as the Soviet Union fell apart after several former states declared their independence from Soviet control (Remler 2020). Therefore, it is not surprising that Russia would not be willing to accept the declaration, but within the system of the UN and the

International Court of Justice, the idea of following a nation's direction when judging a case goes against the idea of a neutral international legal system.

Important to acknowledge, as well, is the fact that within international relations, and more specifically within the UN, Russia has continuously stated that they are simply following the international law as "we know it" (Remler 2020). The Russian delegates to the UN have continuously argued that accusations of Russian violations by other nations stem from the fact that the rules reflect Western ideologies and do not accurately represent what the law should be (Remler 2020; Hetherington, Noble 2018). Essentially, Russia argues that there is a sense of Western 'hypocrisy' when it comes to international law. This sentiment can be found in the dissenting opinion of Judge Skotnikov, as he writes that the Kosovo case does not match any of ICJ's previous advisory opinions. He further argues, "The majority, unfortunately, does not explain the difference between acting outside the legal order and violating it" (Skotnikov 2010). Through following the arguments present in the dissent opinion, it is evident that there are certain similarities between the argument that the international community is not following the international law specifically and has started to expand its borders beyond the current understanding.

Advisory Opinion on Legal Consequences of the Construction of a Wall by Israel 2004

In 2004, the UN General Assembly asked the Court to provide an advisory opinion on the legal consequences of Israel constructing a wall in and around East Jerusalem, which is considered to be part of Occupied Palestinian territory (International Court of Justice 2004). The ICJ assumed jurisdiction based on the fact that the opinion was requested urgently by an official UN organ, and it did not exceed that organ's responsibility as outlined by the UN Charter (International Court of Justice 2004). The General Assembly made the request as part of their

emergency special session, as the Security Council had not acted within its obligations to provide peace and security in international relations. Therefore, the General Assembly was within its given rights and responsibilities to request such an advisory opinion of the Court (International Court of Justices 2004). The main legal question discussed in this case is whether Israel failed to follow international law, i.e. whether the wall can be justified by the self-defense argument presented by the Israeli legal counsel (International Court of Justice 2004).

The court decided that Israel had violated international law by building the wall through the occupied territory of Palestine, as it impeded the right of self-determination of the Palestinian people (International Court of Justice 2004). Further, it violated the relevant provisions of the Hague Convention of 1907 and the Fourth review of the Geneva Convention (International Court of Justice 2004), which state that every person should have the right to freedom of movement through that territory. Self-defense was not considered a valid argument, as the wall did not have any security or protection value as claimed by Israel. Instead, the Court considered it a violation of human rights, as the restriction on freedom of movement and self-determination outweighed the potential security value (International Court of Justice 2004). Following the decision, the Court concluded that Israel should tear down the wall and compensate the Palestinian people for the infringement on their rights (International Court of Justice 2004; McGreal 2004).

The decision of the Court was not supported by an unanimous vote. Instead, Judge Buergenthal from the United States voted against every section other than the question of jurisdiction; the provisions included:

> By fourteen votes to one, [the Court] Decides to comply with the request for an advisory opinion; By fourteen votes to one, The construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, and its associated régime, are contrary to international law; Israel is under an obligation to terminate its breaches of international law; it is under an obligation to cease

> forthwith the works of construction of the wall being built in the Occupied Palestinian Territory, including in and around East Jerusalem, to dismantle forthwith the structure therein situated, and to repeal or render ineffective forthwith all legislative and regulatory acts relating thereto, in accordance with paragraph 151 of this Opinion; By fourteen votes to one, Israel is under an obligation to make reparation for all damage caused by the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem; By thirteen votes to two, All States are under an obligation not to recognize the illegal situation resulting from the construction of the wall and not to render aid or assistance in maintaining the situation created by such construction; all States parties to the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 have in addition the obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention" (International Court of Justice 2004).

The United States has historically been a strong supporter of Israel in the UN, especially in the Security Council (US Department of State 2021). The US has never voted against Israel within the Security Council. Therefore, the decision of the US judge is not surprising considering the long history of US support in the UN for Israel. Instead, it demonstrates the clear national interest of protecting Israel in the UN (Newton 2021). Judge Buergenthal cited that he found no evidence that the Court should have reached the conclusion it has, as there was no factual evidence for their claim of a violation of international law (Buergenthal 2004). He agrees that the wall may impede certain human rights, but he argues that the Court considered neither the importance nor necessity of security and self-defense measures (Buergenthal 2004). Essentially, Buergenthal's dissenting opinion rests on his belief that the Court did not adequately consider the Israeli position on self-defense against "deadly terrorist attacks" that may stem from Palestinian territory itself, or from outside (Buergenthal 2004). Important to point to is the fact that the United States has cited military concerns when defending Israel (US Department of State 2021; Newton 2021), demonstrating the similarities between the official US stance on Israel and Judge Buergenthal's dissenting opinion.

<u>Nicaragua v United States of America 1984</u>

In 1984 Nicaragua filed a case against the United States of America concerning military and paramilitary activity in and against Nicaragua. The US had continuously been involved in Nicaraguan politics, supporting a dictatorship for much of the 20th century (Thomas 2003). After the dictatorship fell in 1979, a socialist movement gained momentum, which the US strongly opposed. The US provided military and financial aid for an opposing movement, the so-called "contras," that aligned more with US sentiments (Bendaña 2007). The actions the US took to destabilize the government, such as mining the ports, were at the core of this case. Nicaragua alleged the US violated the idea that a state's sovereignty should always be respected and enforced, not jeopardized or in any other way compromised (Nicaragua v United States 1984).

The court decided against the US's claim of self-defense and condemned all actions the US took:

> "(1) (a) finds, by eleven votes to five, that it has jurisdiction to entertain the Application filed by the Republic of Nicaragua on 9 April 1984, on the basis of Article 36, paragraphs 2 and 5, of the Statute of the Court; (b) finds, by fourteen votes to two, that it has jurisdiction to entertain the Application filed by the Republic of Nicaragua on 9 April 1984, in so far as that Application relates to a dispute concerning the interpretation or application of the Treaty of Friendship, Commerce and Navigation between the United States of America and the Republic of Nicaragua signed at Managua on 21 January 1956, on the basis of Article XXIV of that Treaty; (c) finds, by fifteen votes to one, that it has jurisdiction to entertain the case" (Nicaragua v the United States 1984).

The only judge voting against each section was Judge Schwebel of the United States, clearly following US official sentiments concerning this case.

Judge Schwebel argued in his dissenting opinion that the ICJ had no jurisdiction in this case over the United States or Nicaragua because he argues that neither country gave jurisdiction under the Optional Clause. He further stated that the basis of the jurisdiction was merely a "commercial agreement" not a treaty (Schwebel 1984). Most of the dissenting opinion was centered around the claim that the court had overstepped its jurisdiction, more importantly, is that the United States revoked its standing declaration of being subject to the Court's jurisdiction

after this case was decided (Mulligan 2018). This highlights how bias presents itself within a decision or opinion by a judge, depending on the nation in question.

Portugal v India 1955

The Rights of Passage over Indian territory case of 1955 between India and Portugal is another key example to demonstrate how national interest can influence a judge's voting pattern. Portugal requested the Court to consider the right of passage through Indian territory, which it had previously controlled (India v Portugal, 1955). The main question was if the two enclaves belonged to Portugal's sovereignty or if they fell within the sovereignty of India. At that time, Portugal still controlled two territories in India, Dadra and former Nagar-Aveli (Prakash 2017). Portugal argued that the government of India hindered their exercise of the Rights of Passage in the enclaves, as they wanted to move people as well as military equipment through that region (Prakash 2017). The Honorable Judge Abdul Badawi Pasha from Egypt and Honorable Judge Bohdan Winiarski from Poland dissented from the decision by the Court to allow Portugal passage over Indian territory on the basis that they disagreed with the Court's assumption of jurisdiction (Badawi, Winiarski 1960). Important to note, again, is that this case was a question of sovereignty, and how far the concept goes. In the 1950s and 1960s Egypt had begun to demand more independence from Western influences (Crowcroft 2016). Poland was dealing with the rise of communism and joined the Warsaw Pact along with other eastern European nations at the time ("Brief History of Poland" n.d.). This was when most colonies were liberated and experienced sovereignty within their territory for the first time, especially Poland, which had previously been occupied by Germany during World War II. At this time in history, these two nations were actively advocating for their own independence, as well as the right to control their territory. Therefore, it was not surprising to see this sentiment within individuals from those

nations. At the same time, however, it speaks to the fact that the judges in this case followed their respective national interests.

Ukraine v Russia 2022

Over the years the political atmosphere at the UN has changed to be more biased, more challenged, and more influential. Since the founding of the UN, the United States has exercised great influence within the confines of the organization. In general, the US has always been considered to be the leading nation, or hegemon, considering its economic power (Hama 2016). However, the rise of China's economy in the 21st century challenged US economic dominance, and therefore the strength of the US influence within international relations, as well as within the UN. Tensions increased between the two countries. Moreover, China is not part of the Western block and is considered to be aligned with Russia. Thus, the US finds itself challenged for the first time since the Cold War, which is still an important conflict point between the US and Russia.

The newer wave of national interest has also started to take root within the International Court of Justices. From 2005 to 2016 there has been an increase in national interest (Xuechan Ma, Shuai Guo 2017). This has become far more relevant in recent developments, as the newest case the International Court of Justices deals with is about the Russian actions against Ukraine. Notably, the Chinese Judge voted with Russia against the majority decision in favor of Ukraine.

Ukraine is accusing the Russian military and government of violating the Convention on Genocide, after Russia launched its military invasion of the country in late February 2022. Ukraine alleges that Russia is engaging in genocide and that Ukraine should not be subjected to another State's military operations on its territory (Convention on the Prevention and Punishment

of the Crime of Genocide 1947). The ICJ found there was enough legal ground to establish jurisdiction and ordered the Russian Federation to suspend all military actions, halt any advances by Russian military officials, and stop any actions that could further aggravate the situation until the court decides the case (Brem 2022).

Although the Court was able to deliver this order, there are clear lines on which the judges fell depending on their nationality. The judges from Russia and China both argued against the order of the court, stating that the jurisdiction should not be assumed under the Genocide Convention. They do not believe that there was sufficient evidence to establish jurisdiction and that the international community should not stretch the fabric of the Genocide Convention to fit into the political aspect of the war (Xue 2022; Gevorgian). The argument is based on the interpretation that the convention cannot and should not be used to take legal action against a state using force.

The Western judges all voted in favor of the order, with the important distinction that the President of the Court, Judge Donoghue from the United States, did not write a declaration on the case, as most presidents have done in previous cases. This aligns with the approach the US government has taken refraining from making any comments beyond the necessary. Judge Nolte, from Germany, took a completely different approach than Judges Xue and Gevorgian. He argued that not only does the court have the jurisdiction to hear and oversee this case, but also that the circumstances are different from the other genocide cases (Nolte 2022). A highly crucial element is that this exact question was already dealt with in Court before, in the 1999 Yugoslavia case. The main difference is that the positions are now reversed, and each has taken on the other side's argument from that case.

Yugoslavia v United States of America 1999

The 1999 case between the former Yugoslavia and the United States concerning the use of force by the US in then-Yugoslav territory established the contrast between predominantly Western and Eastern judges, mostly American and Russian. The case arose after the NATO alliance started a bombing campaign against the former Yugoslavia during the Kosovo war (Gilbert 2017). Yugoslavia insisted it was the victim of genocide, but NATO argued its actions were taken to end the military conflict between Yugoslavia and Kosovo, and they suspended their actions in 1999 after Yugoslavia agreed to withdraw their troops from Kosovo territory (Gilbert 2017). This case was dismissed by the ICJ, stating that it had no jurisdiction on the basis of the Geneva Convention on the Prevention and Punishment of the Crime of Genocide (International Court of Justices 1999).

The only two sitting judges dissenting were the Chinese Judge Shi Jiuyong and the Russian Judge Vladen Veresjtsjetin. The Honorable Judge Shi voted against the matter because he felt that the court had a role and obligation under the UN Charter to provide dispute resolution options outside its judicial purpose. He argued that though the court might not have jurisdiction, it has the opportunity and responsibility to provide an urgent advisory statement dissolving the tensions between the two sides (International Court of Justices 1999). The Honorable Judge Veresjtsjetin dissented because he believed that the court had failed to uphold its Charter obligations to prosecute a violation of international law by the United States. Important to analyze is that during this time the relations between Russia, China, and the US were no longer as friendly or close as they had been soon after the end of the Cold War. Aggravating these tensions was the fact that US and NATO actions were performed without the consent of the other UN members, namely China and Russia (Snyder 2017). Both Russia and China had at this point

condemned any military action in the Kosovo-Yugoslavia conflict, but the allies under NATO initiated several military strikes, which led to this case.

The cases highlight the trend of Judges' votes following their nations' interests. The more recent cases demonstrate that national interest has continued to influence judicial opinions and decisions within the International Court of Justice. We can relate this back to Realist theory: a nation's interest will always lie within its territorial power, and cooperation in the international realm is based on the need for self-preservation, as illustrated by the Security Dilemma. The opinions of Judges demonstrate that self-preservation prerogative, such as an American judge opposing an ICJ ruling against the United States. Not only do judges represent the political climate and national interests of their respective countries, but also the interests of allies. For examine, witness the Chinese and Russian Judges being the only two sitting judges to dissent on a case concerning military actions taken by the US in another nation.

Implications of Bias for Global Governance and International Law

The purpose of an international legal organization is to provide the international community with a framework in which they can operate and hold each other accountable. The basis of any court of law is that the law is neutral and nondiscriminatory, allowing for equal treatment of any participant. A judge is obligated to maintain that neutrality and the integrity of the court and the law, thus being responsible for interpreting it in every case based on the facts not the opinions of the parties involved. In our world, the bias in politics and the interests among different states has increasingly become stronger, more visible, and more influential as seen by the increased tensions between states in the UN. This all relates back to the initial theory that our world system is not based on Liberalism, but instead on Realism. This idea can be extended to the ICJ, as the judges appear to place more value on their countries' sentiments and national

interests in certain cases, compared to the intended neutral sentiments they are supposed to apply.

The ICJ cases we have examined highlight the differences in the interpretation of the law, especially when it does not strictly align with the national interest of the different states. The behavior of judges from the US, Russia, and China illustrate the influence of national interest. Furthermore, the parties represented in most cases of have ties to either of the three countries. The Yugoslavia case involved a country that was considered to be closely aligned with the East and the US, which conducted military actions in Europe and closer to the Russian border, which challenged the idea of territory and sovereignty. At the same time, we have continuously seen Russian actions against Western involvement in any state close to the Russian border, most recently in Ukraine. Both Russia and the US have followed a foreign policy agenda that seems to focus on containing the other side from spreading too far into the other's area of influence, seen also in Middle Eastern countries such as Syria (Badran 2019; "US Relations with Syria" 2021).

However, when given a similar scenario as to the one present in the former Yugoslavia case, with Russia considered to be the defendant, the argument was changed to include a rationale for intervening and granting the court the jurisdiction to hear the case. In fact, analyzing the legal basis for this case reveals that the facts of the two cases are quite similar, especially considering the legality of force used. The decision rests on the definition of when the Genocide Convention can be used to justify the Court accepting jurisdiction. In the 1999 case, it was argued that there was not enough evidence of genocide to establish jurisdiction, as the convention allows for reservations that the US had invoked, meaning they were not going to give the court permission to exercise jurisdiction over the US; further, the Court argued that since Yugoslavia did not oppose the reservation when it was declared, it will not and cannot enforce

jurisdiction prima facie (Yugoslavia v United States, 1999). The Court did not give this explanation in the 2022 order in Ukraine v Russia. Instead, the ICJ argued that it had jurisdiction to hear the case based on the Geneva Convention. The Court did not consider any reservation, and instead focused on the language of the Convention, to which both judges from China and Russia respectfully dissented.

Conclusion

It is important to consider that judicial bias is not based on the personal preference of the Judges. Instead, decisions are influenced by the judges' nation of origin. This is evident through the similar behavior of different Judges from the same countries. The cases selected for this paper are far enough apart to have entirely different Judges sitting on the bench at that time. This allows us to control personal bias in the Court and allows for a better analysis of the national interest as bias in the court. Thus, we can conclude that bias in the court is based on the national interests of the states from where the Judges are elected. National interests are triggered when the cases pertain to certain fundamental issues within that nation's political ideology, as well as general alliances between nations, such as the Eastern alliance between Russia and China, and the political alliance between the US and Israel (US Department of State 2021). Further, it is evident through the cases that there seems to be a relatively equal spread of decisions to which Russian, Chinese, and American judges vote along with the national interest.

After reviewing the case law, it is clear that there is bias in the ICJ. For the most part, the dissenting opinions of judges provided legal analyses that were similar to that of the respective governments. For instance, the Palestine v Israel advisory opinion of 2004 highlighted the US judge's inclination to support the US stance on Israel, especially his argument on the validity and importance of the self-defense of Israel. Similarly, the order of the Court on the Ukraine v Russia

case of 2022 demonstrates the biases of the Russian and Chinese judges. The trend is not only confined to those three nations, as indicated by the 1955 Portugal v India case, but the US, Russia, and China carry a lot more importance within the UN, especially the Security Council as they are considered permanent members and are granted special powers. In this analysis, we have to consider the power structure of the UN, as that can help determine the strength of judicial bias.

The bias in the court perfectly demonstrates that Realism is the predominant theory in international relations, as most states follow their own agenda to ensure that they obtain the most favorable outcome. The UN and the International Court of Justice are based on Liberalism's idea that international cooperation is possible. To facilitate cooperation, a court of law has to be at its very core a neutral, impartial organization in order to allow every party to be judged fairly and accurately according to the law. The theory of supranationalism would support the authority of the ICJ, as it would ensure that the Court is considered above the state organization. However, the President of the International Court of Justice explained in a 2018 speech that the court cannot function as a supranational court. It cannot assume immediate jurisdiction over a state, as that would directly question the sovereignty of that state (Yusuf 2018).

Although we consider the UN to be a Liberal institution, its authority is based on Realist foundations, as the UN has no direct power to intervene or create rules that would have states surrender some of their sovereignty. Realism emphasizes the importance of sovereignty to the states, and sovereignty is embedded in the UN Charter. Therefore, it is arguable that the presence of bias in the International Court of Justice is not surprising, but rather a consequence of the power structure and foundation of the United Nations, as national interests are indirectly emphasized through the underlying Realist structure.

Bibliography

"All Members", *International Court of Justice*, 2022. https://www.icj-cij.org/en/all-members

Badawi, Abdul Pasha, Bohdan Winiarski "Dissenting Opinion of Judges Winiarski and Badawi", *International Court of Justice* 1960 https://www.icj-cij.org/public/files/case-related/32/032-19600412-JUD-01-07-EN.pdf

Badran, Tony. "Strategic Geography of the Middle East." Hoover Institution, 2019, https://www.hoover.org/research/strategic-geography-middle-east.

Bendaña, Alejandro. "The Rise and Fall of the FSLN." *NACLA*, 2007, https://nacla.org/article/rise-and-fall-fsln.

Bolorunduro, Faith-Lois. "Scope and Operational Mechanisms of the International Court of Justice", *Academia.edu*, n.d. https://www.academia.edu/32430489/SCOPE_AND_OPERATIONAL_MECHANISM_OF_THE_INTERNATIONAL_COURT_OF_JUSTICE

Brem, Hannah. "ICJ Orders Russia to 'Immediately Suspend' Invasion of Ukraine." *Jurist*, - JURIST - News, 18 Mar. 2022, https://www.jurist.org/news/2022/03/icj-orders-russia-to-immediately-suspend-invasion-of-ukraine/.

"Brief History of Poland", *Institute of National Remembrance*, n.d., https://ipn.gov.pl/en/brief-history-of-poland

Buergenthal, Thomas. "Declaration of Judge Buergenthal." *International Court of Justice*, 2004, https://www.icj-cij.org/public/files/case-related/131/131-20040709-ADV-01-03-EN.pdf.

Caplan, Richard. "The ICJ's Advisory Opinion on Kosovo." *United States Institute of Peace -- Peacebrief*, 2010, https://www.usip.org/sites/default/files/CRRPDstatute_2006en.pdf.

Crowcroft, Barnaby, “Egypt’s Other Nationalists and The Suez Crisis of 1956”. *The Historical Journal,* 2016, https://www.cambridge.org/core/journals/historical-journal/article/egypts- other-nationalists-and-the-suez-crisis-of 1956/0C35FA1FA5A92491568487DCBB29C255

Convention On The Prevention and Punishment of the Crime of Genocide, January 12, 1951, 260A, U.N.T.S. https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.1_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf

Doyle, Michael. Recchia Stefano, “Liberalism in International Relations”, *International Encyclopedia of Political Science,* 2011. http://www.stefanorecchia.net/1/137/resources/publication_1040_1.pdf

“Declarations recognizing the jurisdiction of the Court as compulsory”, *International Court of Justice,* 2022, https://www.icj-cij.org/en/declarations

Gevorgian , Kirill. “Declaration of Vice-President Gevorgian.” *International Court of Justices*, 2022, https://www.icj-cij.org/public/files/case-related/182/182-20220316-ORD-01-02-EN.pdf.

Gilbert, Kimutai. “The NATO Bombing of Yugoslavia.” *WorldAtlas.* 2017 https://www.worldatlas.com/articles/the-nato-bombing-of-yugoslavia.html

Hama, Hawre Hassan. “Is the United States Still a Global Hegemonic Power?” *Research Gate*, International Journal of Social Sciences and Educational Studies, 2016,

https://www.researchgate.net/publication/314042054_Is_the_United_States_Still_a_Global_Hegemonic_Power.

Hetherington, Phillipa. Noble Ben. "Russia Doesn't Just Violate International Law – It Follows and Shapes It Too." *The Conversation*, 4 Mar. 2022, https://theconversation.com/russia-doesnt-just-violate-international-law-it-follows-and-shapes-it-too-92700.

"History." *History | International Court of Justice*, https://www.icj-cij.org/en/history.

International Court of Justice. *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*. 2010, https://www.icj-cij.org/public/files/case-related/141/141-20100722-ADV-01-00-EN.pdf.

International Court of Justice. *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*. 2022, https://www.icj-cij.org/en/case/182.

International Court of Justice. *Case Concerning Legality of Use of Force (Yugoslavia v. United States America)*. 1999, https://www.icj-cij.org/public/files/case-related/114/14129.pdf.

International Court of Justice . *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*. 1984, https://www.icj-cij.org/en/case/70.

International Court of Justice. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Palestine v. Israel)*, 2004, https://www.icj-cij.org/public/files/case-related/131/1677.pdf

International Court of Justice. *Right of Passage over Indian Territory (Portugal v. India)*. https://www.icj-cij.org/en/case/32.

Javis, Robert. "Realism, Neoliberalism, and Cooperation: Understanding the Debate." JStor.org, MIT Press, 1999, https://www.jstor.org/stable/2539347? s eq=1#metadata_info_tab_contents

Kolcak, Hakan. “The Sovereignty of the European Court of Justice and the EU's Supranational Legal System.” *Inquiries Journal*, Inquiries Journal, 1 Apr. 2014, http://www.inquiriesjournal.com/articles/883/2/the-sovereignty-of-the-european-court-of-justice-and-the-eus-supranational-legal-system.

Leuffen, Dirk, et al. “Supranationalism .” *Research Gate*, 2013, https://www.researchgate.net/publication/311317171_Supranationalism.

McGinley, Gerald P. “The I.C.J.’s Decision In the Lockerbie Cases”. Georgia Journal of International and Comparative Law, 1992, https://digitalcommons.law.uga.edu/cgi/viewcontent.cgi.referer=&httpsredir=1&article=1523&context=gjicl

McLean, Ian; McMillan, Alistair, *The Concise Oxford Dictionary of Politics*, Oxford Press, Third Edition, 2009

McGreal, Chris. “World Court Tells Israel to Tear down Illegal Wall.” *The Guardian*, Guardian News and Media, 9 July 2004, https://www.theguardian.com/world/2004/jul/10/israel3.

Merriam-Webster. “Supranationalism Definition & Meaning.” *Merriam-Webster*, Merriam-Webster, https://www.merriam-webster.com/dictionary/supranationalism.

Mulligan, Stephen P. “The United States and the 'World Court'.” *Congressional Research Services*, 2018, https://sgp.fas.org/crs/row/LSB10206.pdf.

Newton, Creede. “A History of the US Blocking UN Resolutions against Israel.” *Israel-Palestine Conflict News | Al Jazeera*, Al Jazeera, 9 Nov. 2021, https://www.aljazeera.com/news/2021/5/19/a-history-of-the-us-blocking-un-resolutions-against-israel.

Nolte, Georg. “Declaration of Judge Nolte .” *International Court of Justice*, 2022, https://www.icj-cij.org/public/files/case-related/182/182-20220316-ORD-01-05-EN.pdf.

“Nicaragua Profile - Timeline.” *BBC News*, BBC, 31 May 2018, https://www.bbc.com/news/world-latin-america-19909695.

Pataraia, David. “John Locke and International Relations”, *Academica.edu*, 2017 https://www.academia.edu/32430489/SCOPE_AND_OPERATIONAL_MECHANISM_OF_THE_INTERNATIONAL_COURT_OF_JUSTICE

Posner, Eric A., de Figueiredo, Miguel F.P. “Is the International Court of Justice Biased?” *University of Chicago Law School.* 2004. https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1289&context=law_and_economics

Prakash, Priyali. “India at the International Court of Justice: Past instances” *India Times* 2017 <https://timesofindia.indiatimes.com/india/india-at-the-international-court-of-justice-past-instances/articleshow/58774822.cms> [Accessed 2 May 2022].

“Peace Conference at the Hague 1899: General Report of the United States Commission.” *Avalon Project - Documents in Law, History and Diplomacy*, 1907, https://avalon.law.yale.edu/19th_century/hag99-04.asp.

Remler, Philip. “Russia at the United Nations: Law, Sovereignty, and Legitimacy.” *Carnegie Endowment for International Peace*, 22 Jan. 2020, https://carnegieendowment.org/2020/01/22/russia-at-united-nations-law-sovereignty-and-legitimacy-pub-80753.

Ruszkowski, Janusz. “Supranationalism between the Nation-State and International Cooperation.” *Research Gate*, 2009, https://www.researchgate.net/publication/237254236_Supranationalism_between_the_nation-state_and_international_cooperation.

Schwebel, Stephen. “Dissenting Opinion of Judge Schwebel.” *International Court of Justice*, 1984, https://www.icj-cij.org/public/files/case-related/70/070-19841126-JUD-01-07-EN.pdf.

Skotnikov, Leonid. “Dissenting Opinion of Judge Skotnikov.” *International Court of Justice*, 2010, https://www.icj-cij.org/public/files/case-related/141/141-20100722-ADV-01-00-EN.pdf.

Tass, “UN Security Council Permanent Member Must Retain Veto Power, says Putin”, *International Affairs Review*. 2020, https://internationalaffairsreview.com/2020/09/22/un-security-council-permanent-member-must-retain-veto-power-says-putin/

Tesón, Fernando R. “The Kantian Theory of International Law”, *Florida State University College of Law*. 1992. https://ir.law.fsu.edu/cgi/viewcontent.cgi?article=1036&context=articles

United Nations, *Charter of the United Nations*, 24 October 1945, 1 U.N.T.S XVI,

https://www.un.org/en/about-us/un-charter/chapter-6

United Nations, “The International Court of Justices”, n.d., *United Nations* https://www.un.org/en/model-united-nations/international-court-justice

US Department of State. “U.S. Relations with Israel - United States Department of State.” *U.S. Department of State*, U.S. Department of State, 18 Aug. 2021, https://www.state.gov/u-s-relations-with-israel/.

"U.S. Relations with Syria - United States Department of State." U.S. Department of State, U.S. Department of State, 15 Apr. 2021, https://www.state.gov/u-s-relations-with-syria/.

VOETEN, ERIK. “The Impartiality of International Judges: Evidence from the European Court of Human Rights.” *American Political Science Review*, vol. 102, no. 4, 2008, pp. 417–433., doi:10.1017/S0003055408080398.

Waltz, Kenneth N. *Theory of International Politics.* Waveland Press, 2010.

Xuechan Ma, Shuai Guo, "An Empirical Study of the Voting Pattern of Judges of the International Court of Justice (2005-2016)", Erasmus Law Review, 3, (2017):163-174 http://www.erasmuslawreview.nl/tijdschrift/ELR/2017/3/ELR_2017_010_003_004#content_ELR_2017_010_003_004.ELR-D-17-00011_0000

Xue, Hanqin. “Declaration of Judge Xue.” *International Court of Justices*, 2022, https://www.icj-cij.org/public/files/case-related/182/182-20220316-ORD-01-03-EN.pdf.

Yusuf, Abdulqawi Ahmed. “The Strengths and Challenges for Supranational Justice: the Growing Role of the International Court of Justice .” *The Royal Academy of Belgium*,

2018, https://www.icj-cij.org/public/files/press-releases/0/000-20181112-PRE-01-00-EN.pdf.