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## The Ethos of the International Court of Justice Is Dependent Upon the Statutory Authority Attributed to Its Rhetoric: A Metadiscourse

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# The Ethos of the International Court of Justice Is Dependent Upon the Statutory Authority Attributed to Its Rhetoric: A Metadiscourse

H. Vern Clemons

## Abstract

This Comment argues that the Court's practice of unofficially applying precedent, contrary to actual statutory authority, negatively impacts the Court's authority. Specifically, the absence of an official doctrine of *stare decisis* diminishes the Court's ethos and the rhetorical clout imputed to the Court's decisions. 28 Part I discusses the Court's character in providing states with a consistent, statutorily authorized rhetoric to refer to in their compromissory interactions, the Court's acknowledgment of the written rules, and its subsequent use of precedent. Part I also examines the past under-utilization of the ICJ to settle treaty disputes, and the recent increasing trend in states' reliance on the ICJ as the potential interpreter of treaties. Part II analyzes the ICJ's statutory authority, and their interpretations and practices regarding that authority. Part III argues that without binding the Court statutorily the effect of precedent on later decisions of the ICJ undermines the rhetoric of the Court, thereby undermining the ethos, or authoritativeness, of the Court to decide conflicts between disputing states. Part III also argues that if the authoritativeness of the Court's rhetoric is questionable, the increased reliance on the ICJ as the adjudicator of potential treaty disputes could be reversed, causing a return to under-utilization of the Court. Part III further argues that in order to prevent a return to under-utilization of the Court, the written statute that defines the Court should reflect the Court's practices. This Comment concludes that binding the Court to its past decisions by amending the ICJ statute would increase the ICJ's rhetorical ethos, thus adding more precedential weight to the Court's decisions and authoritative use of its service.

## COMMENT

### THE ETHOS OF THE INTERNATIONAL COURT OF JUSTICE IS DEPENDENT UPON THE STATUTORY AUTHORITY ATTRIBUTED TO ITS RHETORIC: A METADISOURSE

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The law is not a universal, timeless set of rules that arises by necessity but is created, defined, and maintained by the discourse in which it is situated.<sup>1</sup>

#### INTRODUCTION

The International Court of Justice<sup>2</sup> ("ICJ" or the "Court") decides legal disputes submitted by states, and gives advisory opinions to certain international organs and agencies.<sup>3</sup> The establishment of the ICJ was a continuation<sup>4</sup> of the idea that pacific procedures for dispute settlement could be a substitute for

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1. FREDERIC GALE, *POLITICAL LITERACY: RHETORIC, IDEOLOGY, AND THE POSSIBILITY OF JUSTICE* 129 (1994).

2. U.N. CHARTER art. 7. Article 7 of the U.N. Charter establishes the International Court of Justice ("ICJ" or the "Court") as a principal organ of the United Nations. *See id.* (establishing ICJ as separate and independent organ of United Nations). The Statute of the Court forms an integral part of the Charter drawn up at the United Nations Conference on International Organization in 1945 in San Francisco. *See* SHABTAI ROSENNE, *THE WORLD COURT: WHAT IT IS AND HOW IT WORKS* 23 (1989) [hereinafter *WORLD COURT*] (discussing formation and purpose of ICJ). The drafters of the Statute used as a basis of their design the revised Statute of the Permanent Court of International Justice ("PCIJ") of 1929. *Id.* at 25.

3. *See* I.A. SHEARER, *STARKE'S INTERNATIONAL LAW* 1 (1994) (defining role of ICJ as decision maker in disputes between states).

4. *See e.g.*, ANTONIO DEBUSTAMANTE, *THE WORLD COURT* 2-6 (Elizabeth Read trans., 1925) (giving examples of various civilizations throughout history that relied on neutral system of dispute resolution). In the Roman empire, non-Roman citizens went to a special court which utilized a universal law instead of Roman law. *See id.* at 2 (presenting Roman solution to inter-citizen dispute resolution). Immediately after the fall of the Roman empire, Christian states would turn to the Popes to settle their disputes. *See id.* at 3 (discussing Papal solution to inter-state dispute resolution). The international authority of the Papacy was powerful enough to have rulers like Charles V submitted to it for dispute resolution. *See id.* at 4-5 (discussing types of rulers who willingly submitted to neutral inter-state dispute resolution). Today, American and European Republics seek international arbitration to settle their conflicts. *See id.* at 5-6 (suggesting that pattern of dispute resolution continues in same pacific resolution of disputes).

war.<sup>5</sup> Where prescribed, contracting parties regard judicial discernment as the most effective means of settling disputes that diplomacy has failed to resolve.<sup>6</sup>

International adjudication contributes to the shaping and maintenance of the infrastructure of the world community.<sup>7</sup> Commentators note that the most effective and accepted rulings of the ICJ are those that are prospective and general about the maintenance of world order.<sup>8</sup> A court's rhetoric<sup>9</sup> is concerned with persuading states to abide by its decisions.<sup>10</sup> The perceived effort by the ICJ to consider the interests of states has persuaded

5. See JOHN KING GAMBLE, JR. & DANA FISCHER, *THE INTERNATIONAL COURT OF JUSTICE 1* (1976) (discussing role of ICJ as alternative to war). The United Nations established the ICJ to decide disputes that governments set in motion as an exercise of the responsibilities states entrusted to them. See also *WORLD COURT*, *supra* note 2, at 82 (examining authority given to governments to bring cases to ICJ).

6. See *WORLD COURT*, *supra* note 2, at 9 (suggesting that judicial resolution steps in where diplomatic talks have failed to resolve issues between states).

7. See *DEBUSTAMANTE*, *supra* note 4, at 6-7 (stating that international adjudication helps sustain world order).

8. See *GALE*, *supra* note 1 (presenting rhetoric of jurisprudence as explanation of rules of interpretation for purpose of making Court's jurisprudence predictable). Aquinas addresses the need for law in the following way:

Law, properly speaking, regards first and chiefly an ordering to the common good. Now to order anything to the common good belongs either to the whole people or to someone who is viceregent of the whole people. And therefore, the making of law belongs either to the whole people or to a public personage who has care of the whole people . . . .

*SAINT THOMAS AQUINAS, ON LAW, MORALITY, AND POLITICS 15* (edited, with introduction by Richard J. Regan, S.J. and William P. Baumgarth 1988). "[W]ell-drawn laws should themselves define all the points they possibly can." *ARISTOTLE, RHETORIC 6* (W. Rhys Roberts trans., 1963).

9. See *ARISTOTLE*, *supra* note 8, at 5-8. Rhetoric is the study of persuasive discourse employed by a speaker to convey an idea to an audience. *Id.* (discussing and defining concept of rhetoric). Aristotle defines rhetoric as "that branch of discourse which concerns persuasion." *Id.* at 5. The word rhetor is Greek and means "speaker in the assembly," and referred to the practice of oratory, or formal public speaking. *Id.* at 38. Forensic or judicial rhetoric is the discourse of a court, which speaks to the justice or injustice of a past action. *Id.* Rhetoricians explain the three elements to the rhetorical speech as the ethos, which is reflective of the authority of the speaker; the logos, which illustrates the rationale of the speaker's discourse; and the pathos, which is the speaker's appeal to the perspective of the audience. See *id.* Aristotle identified these as the three means of persuasion: the appeal to the reason, which is logos; the appeal to emotion, which is pathos; and the appeal of the speaker's character, which is ethos. *Id.* at 75.

10. See *GALE*, *supra* note 1, at 8 (referring to legal interpretation as rhetoric of courts); see also *ARISTOTLE*, *supra* note 8, at 75 (referring to forensic rhetoric as discourse of court).

states to accept the ICJ's decisions readily.<sup>11</sup> These states feel that their interests lie in the maintenance of the established order and in the consistency of interpretation of their common law.<sup>12</sup> The ethos of the ICJ is dependant upon the authority attributed to its rhetoric by statute.<sup>13</sup>

Historically, states used the ICJ sparingly to settle their disputes.<sup>14</sup> Key sovereign states were hesitant to grant authority to the ICJ to settle disputes with lesser developed states.<sup>15</sup> These states felt obligated to bind themselves in compromissory agreements only with other states they felt were their equals in stature.<sup>16</sup>

During the post-World War II period<sup>17</sup> world trade grew tremendously.<sup>18</sup> Progressive developing countries<sup>19</sup> with high

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11. See GALE, *supra* note 1, at 24 (viewing rhetoric as persuasive interpretive discourse, reminiscent of Aristotle); see also ARISTOTLE, *supra* note 8, at 75 (referring to forensic rhetoric as reflective of court's ethos).

12. See e.g., Fisheries Case (Gr. Brit. and N. Ir. v. Nor.), 1951 I.C.J. 116 (Dec. 18) (demonstrating use of consistent interpretation by the Court). See also ARISTOTLE, *supra* note 8, at 38 (suggesting that congruous legal interpretations lead to consistent understandings of law, which induces predictable behavior by citizens, thereby producing societal order).

13. See GAMBLE & FISCHER, *supra* note 5, at 1-2 (establishing the statutorily authorized role of the court). See also WORLD COURT, *supra* note 2, at 82 (emphasizing importance of authority given by statute to ICJ).

14. See GAMBLE AND FISCHER, *supra* note 5, at 4-5 (discussing past inactivity of ICJ); see also THOMAS FRANCK, JUDGING THE WORLD COURT 9 (1986) (stating that ICJ was basically idle for two decades).

15. See FRANCK, *supra* note 14, at 27-31 (examining hesitation of independent nations to submit to someone else's authority).

16. See *id.* (suggesting that nations only felt obligated to submit to neutral jurisdiction when their adversary is viewed as economic equal).

17. See Gottfried Haberler, *Overview*, in TRADE STRATEGIES FOR DEVELOPMENT, 49-51 (1972) (defining post-World War II period as beginning in 1945 and continuing until roughly 1975).

18. See Haberler, *supra* note 17, at 49-51 (analyzing growth of world trade as it has expanded to include many new developing countries in trade with each other and with developed countries).

19. See W.W. ROSTOW, THE STAGES OF ECONOMIC GROWTH: A NON-COMMUNIST MANIFESTO 7-9 (1960) (defining developing countries by economic measures). Developing countries are those states in which economic progress expands and begins to dominate society. See *id.* (describing economic effect on society in developing countries). In developing countries, "growth becomes [a] normal condition." *Id.* Status as a developing state originates from gaining independence from the colonization and suppression of capitalization. See Andre Gunder Frank, *Essays on the Development of Underdevelopment and the Immediate Enemy*, in LATIN AMERICA: UNDERDEVELOPMENT OR REVOLUTION 21-23 (1966) (explaining how colonization and suppression of capitalistic growth by developed countries affects economic health of developing countries).

growth rates in their Gross Domestic Product and volume trade are new participants in the world community,<sup>20</sup> with new voices about international laws and practices.<sup>21</sup> No longer are the pre-World War II, industrialized Western countries<sup>22</sup> the only treaty-makers and potential parties in contiguous cases brought before the ICJ.<sup>23</sup> Developing countries are trading and contracting with each other and with the developed countries of the world community.<sup>24</sup>

Due to the growing diversity of cultures comprising the world community, it is often difficult to decide which or whose cultural norm should prevail in international disputes.<sup>25</sup> The ICJ often decides whether a particular norm is becoming more important, or is losing authority.<sup>26</sup> The effectiveness of the Court's judicial rhetoric as precedent functions to provide and protect the infrastructure of the world community.<sup>27</sup>

This Comment argues that the Court's practice of unofficially applying precedent, contrary to actual statutory authority, negatively impacts the Court's authority. Specifically, the absence of an official doctrine of *stare decisis* diminishes the Court's ethos and the rhetorical clout imputed to the Court's decisions.<sup>28</sup> Part I discusses the Court's character in providing states

20. See ROSTOW, *supra* note 19, at 10 (recognizing body of independent nations that participate in international activities); see also HABERLER, *supra* note 17, at 50-51 (describing international body created of individual countries that interact with each other).

21. See HABERLER, *supra* note 17, at 50-52 (implying that new developing countries bring new types of concerns and outlooks than developed countries which were mostly similar in culture and interests).

22. See ROSTOW, *supra* note 19, at 10 (defining developed countries in context to developing countries). Industrialized Western states, or developed countries, have reached a status of maturity when society, through the political process, has "chosen to allocate increased resources to social welfare and security." *Id.* The extension of technology and industrial advances are no longer a necessary preoccupation of society. *Id.*

23. See *id.* (suggesting that prior to developing countries beginning to bring cases to ICJ, most cases were brought by similar nations with similar concerns).

24. See *id.* (describing present day economic situation and need for resolution of disputes coming from various perspectives and concerns).

25. See *id.* (discussing various social norms that appear before ICJ).

26. See *id.* (analyzing how ICJ weighs various social norms).

27. See DEBUSTAMANTE, *supra* note 4, at 6-7 (describing stabilizing effect of judicial dispute resolution between states).

28. See MORRIS L. COHEN & ROBERT C. BERRING, *FINDING THE LAW* 4-7 (1984) (defining *stare decisis* as naturally occurring). *Stare decisis* is the binding nature of precedents. *Id.* The doctrine of *stare decisis* purports the idea that people in similar situations are treated in a similar manner and judgements on their behalf be consistent,

with a consistent, statutorily authorized rhetoric to refer to in their compromissory interactions, the Court's acknowledgment of the written rules, and its subsequent use of precedent. Part I also examines the past under-utilization of the ICJ to settle treaty disputes, and the recent increasing trend in states' reliance on the ICJ as the potential interpreter of treaties. Part II analyzes the ICJ's statutory authority, and their interpretations and practices regarding that authority. Part III argues that without binding the Court statutorily the effect of precedent on later decisions of the ICJ undermines the rhetoric of the Court, thereby undermining the ethos, or authoritativeness, of the Court to decide conflicts between disputing states. Part III also argues that if the authoritativeness of the Court's rhetoric is questionable, the increased reliance on the ICJ as the adjudicator of potential treaty disputes could be reversed, causing a return to under-utilization of the Court. Part III further argues that in order to prevent a return to under-utilization of the Court, the written statute that defines the Court should reflect the Court's practices. This Comment concludes that binding the Court to its past decisions by amending the ICJ statute would increase the ICJ's rhetorical ethos, thus adding more precedential weight to the Court's decisions and authoritative use of its service.

### I. THE CONCEPT OF RHETORIC AND THE COMPOSITION OF THE INTERNATIONAL COURT OF JUSTICE

Rhetorical discourse is an attempt to persuade, which examines the speaker, the message, and the audience, in order to understand the effect the speaker's rhetoric has achieved.<sup>29</sup> The

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rather than arbitrary. *Id.* at 4. Under the doctrine of *stare decisis*, the parties to treaties may "predict the consequences of contemplated conduct by reference to the treatment afforded similar conduct in the past." *Id.* When a judicial decision settles a point of law, future disputants should adhere to that decision unless the Court deems departure from the decision necessary to vindicate principles of law or to remedy injustice. *Id.* at 6-7.

29. See ARISTOTLE, *supra* note 8, at 16 (defining rhetorical discourse as process of weighing speaker's credibility with specific audience under unique circumstances). The precedent provides future guidance and the opinion passes judgment on the past. *See id.* at 17 (suggesting that while opinions deal with rationalizing case at hand, precedent is applied to future cases as predictable measure of how ICJ would resolve similar disputes in future). The precedent is about things to be done hereafter that the Court advises, for or against. *See also id.* (discussing rhetorical direction of thought and usage of rhetorical message presented by speaker and illustrating effect of judicial opinions after immediacy of present case). Interpretive discourse is not a neutral vehicle to com-

principle task of the ICJ is to ensure respect for international law.<sup>30</sup> As developing countries entered the international community, developing countries' concerns gained equal weight in the eyes of other states and the ICJ.<sup>31</sup>

### A. *Rhetoric: Discourse and Its Relevance to the Courts*

The three rhetorical categories of oratory are political, judicial, and ceremonial.<sup>32</sup> Rhetoric's first use was in the legal forum as judicial rhetoric.<sup>33</sup> Modern judicial rhetoric has maintained its original function, using the Court's past decisions as part of the persuasive rationale for present cases.<sup>34</sup>

#### 1. The Concept of Rhetoric

Aristotle described rhetoric as an attempt to persuade the listener through knowledge of the speaker's ethos, the logos of the speaker's message, and the pathos of the audience to which the speaker directed the message.<sup>35</sup> The court's ethos may be most demonstrative of this rhetorical persuasion.<sup>36</sup> Aristotle thought that the function of rhetoric was to answer questions of

municate the law, but rather a powerful influence on its audiences' beliefs. See MICHEL FOUCAULT, *THE ORDER OF THINGS* (Alan Sheridan-Smith trans., 1970) (emphasizing persuasive impact of rhetorical discourse and suggesting that it is not just style and delivery that influence, but rather substance as decided by words chosen and choice of speaker).

30. See SHABTAI ROSENNE, *THE LAW AND PRACTICE OF THE ICJ* 74 (1991) [hereinafter *LAW & PRACTICE OF THE ICJ*] (discussing the role of the ICJ).

31. See Keith Highet, *Recent Developments in the International Court of Justice*, in *TRI-LATERAL PERSPECTIVES ON INTERNATIONAL LEGAL ISSUES: RELEVANCE OF DOMESTIC LAW AND POLICY* 340 (Michael Young & Yuji Iwasawa eds., 1996) (discussing how developing countries are more likely than developed countries to include compromissory clauses, or mutual stipulations to refer disputes to arbitration, in their treaties and conventions because of ICJ's perceived continuity).

32. See *id.* (categorizing rhetorical types into forensic, ceremonial, and political rhetoric).

33. See GALE, *supra* note 1, at 23 (discussing original uses of rhetorical discourse and how to sustain those uses in modern judicial rhetoric).

34. See *id.* at 24 (describing how original use of rhetoric continues).

35. See ARISTOTLE, *supra* note 8, at 5-7 (analyzing effects of rhetoric by examining speaker, message, and audience).

36. See GALE, *supra* note 1, at 24 (describing how ethos directly attributes to authority imputed to jurisprudence). The court's character may be considered an effective means of persuasion. See *id.* (suggesting that ethos has direct influence on how judgements are viewed and accepted).



harm.<sup>37</sup> The first question dealt with whether something happened.<sup>38</sup> If so, the second question concerned whether harm existed.<sup>39</sup> If so, the third question addressed the greatness of the harm.<sup>40</sup> Finally, if great harm is present, then the fourth question asked whether that great harm is justified.<sup>41</sup> Cicero, a great lawyer and rhetor, who used rhetoric and logic conjointly, incorporated this approach into his work.<sup>42</sup> Renaissance humanists followed Cicero's lead by attempting to join wisdom with rhetoric.<sup>43</sup> Eighteenth century rhetoricians suggested that an understanding of rhetoric reveals rhetoric's influence on man's beliefs and, from these beliefs, rhetoric's influence on the cultivation of knowledge.<sup>44</sup> Some modern rhetoricians suggest that judicial opinions are in fact interpretive discourses of the Aristotelian type, persuasive discourse.<sup>45</sup> This interpretive discourse is not a neutral vehicle to communicate the law, but rather a powerful influence on its audience's beliefs and from this it acquires its knowledge.<sup>46</sup>

## 2. Judicial Rhetoric

Judicial rhetoric can refer to two different time periods.<sup>47</sup>

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37. See ARISTOTLE, *supra* note 8, at 20 (stating that Aristotle developed theory of Stasis, describing type of questions that trier of fact must ask to determine facts of case).

38. See GALE, *supra* note 1, at 20-22 (stating which questions dealing with harm are asked); see also ARISTOTLE, *supra* note 8, at 48 (discussing stasis theory which imputes to forensic speakers concern with wrong-doing, its motives, its perpetrators, and its victims).

39. See GALE, *supra* note 1, at 20 (listing questions of harm).

40. *Id.*

41. *Id.*

42. See *id.* at 20-22 (discussing effect of stasis theory on Cicero's writings).

43. See *id.* at 23 (discussing stasis theory effect on renaissance humanists, such as Machiavelli and Thomas More). Machiavelli writes of real virtue as the true equivalent of power in *Discourses*. ANTHONY KENNY ET AL, *THE OXFORD HISTORY OF WESTERN PHILOSOPHY* 307-8 (Anthony Kenny ed. 1994). More's *Utopia* also attempts to join wisdom with rhetoric through his stature in socio-religious society and his subtle critique of Plato's *Republic*. *Id.*

44. See *id.* (stating "an analysis of rhetoric could reveal the ways in which belief is influenced and from belief Knowledge is created").

45. See *id.* at 24 (suggesting that judicial opinions are vehicles used by judges to interpret law and persuade their audience, parties to each case).

46. See FOUCAULT, *supra* note 29 (emphasizing persuasive impact of rhetorical discourse and suggesting that it is not just style and delivery that influence audiences, but rather substance, as decided by words chosen and choice of speaker).

47. See ARISTOTLE, *supra* note 8, at 17 (discussing rhetorical direction of thought and usage of rhetorical message presented by speaker).

The precedent is concerned with the future and the opinion is concerned with the past.<sup>48</sup> The precedent is about things to be done hereafter that the court advises, for or against.<sup>49</sup> The precedent aims at establishing the expediency or the harmfulness of a proposed course of action.<sup>50</sup> If the court urges the acceptance of the action, the court does so on the ground that the action will do good.<sup>51</sup> If the court urges rejection of the action, the court does so on the ground that the action will do harm.<sup>52</sup> The opinion refers to things already done.<sup>53</sup> The opinion aims at establishing the justice or injustice of some action.<sup>54</sup>

### B. *The International Court of Justice*

Article 1 of the U.N. Charter created the ICJ.<sup>55</sup> The ICJ is the only permanent judicial organ of the United Nations and its principal task is to ensure respect for international law.<sup>56</sup> The ICJ has litigious and advisory jurisdiction,<sup>57</sup> and applies the

48. *See id.* at 17 (emphasizing difference in usefulness of judicial opinion from their immediate use to their later application). Aristotle believed that:

[t]he [speaker] aims at establishing the expediency or the harmfulness of a proposed course of action; if he urges its rejection, he does so on the ground that it will do good; if he urges its rejection, he does so on the ground that it will do harm; and all other points, such as whether the proposal is just or unjust, honorable or dishonorable, he brings in as subsidiary and relative to this main consideration. Parties in a law-case aim at establishing the justice or injustice of some action, and they too bring in all other points as subsidiary and relative to this one. Those who praise or attack a man aim at proving him worthy of honor or the reverse, and they too treat all other considerations with reference to this one.

*Id.*

49. *See id.* (illustrating effect of judicial opinions after immediacy of present case).

50. *See* ARISTOTLE, *supra* note 8, at 20 (discussing long range effects of precedent).

51. *See id.* (stating a judge's belief in its own good faith efforts).

52. *See id.* (describing role of judge's discourse).

53. *See id.* (describing role of opinion).

54. *See id.* (illustrating immediacy of effect of opinions).

55. U.N. CHARTER art. 33 (directing members of U.N. to seek peaceful resolution). Judicial settlement is peaceful as laid out in Article 33 of the Charter. *See* S.A. WILLIAMS & A.L.C. DE MESTRAL, AN INTRODUCTION TO INTERNATIONAL LAW 1, 56 (1979) (describing U.N. directive forming ICJ and defining international law as system of law containing principles, customs, standards, and rules to govern relations among states and other international persons).

56. *See* LAW AND PRACTICE OF THE ICJ, *supra* note 30, at 74-75 (discussing role of ICJ); *see also* WORLD COURT, *supra* note 2, at 23-24 (examining purpose of ICJ).

57. *See* WORLD COURT, *supra* note 2, at 81 (defining jurisdiction as power or authority of Court to issue decisions based on substance or merits of cases placed before it); *see also id.* at 81-88 (describing categories of jurisdiction of ICJ).

sources of law enumerated in ICJ Statute Art. 38.<sup>58</sup>

### 1. Establishment of the ICJ

In the 19th century, a peace movement sought the creation of a permanent international court as a way of resolving disputes between states and preventing those disputes from escalating into war.<sup>59</sup> At a conference at the Hague in 1899, the participants formed the Permanent Court of Arbitration ("PCA").<sup>60</sup> Under the covenant of the League of Nations,<sup>61</sup> in 1921 the framers established a Permanent Court of International Justice ("PCIJ"), replacing the PCA.<sup>62</sup> The PCIJ existed, along with the League of Nations, until 1945.<sup>63</sup>

Article 1 of the U.N. Charter proposes the settlement of international disputes in conformity with the principles of justice and international law.<sup>64</sup> The U.N. Charter created the ICJ as a replacement for the PCIJ.<sup>65</sup> The PCIJ dissolved along with the League of Nations that created it.<sup>66</sup> The U.N. Charter annexed,

58. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, art. 38, *reprinted in* DOCUMENTS ON THE INTERNATIONAL COURT OF JUSTICE 79 (Shabtai Rosenne, ed. 1991) [hereinafter ICJ STATUTE]. The ICJ was created to decide disputes in accordance with international law as enumerated below:

- a. international conventions and treaties, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

*Id.*

59. See DEBUSTAMANTE, *supra* note 4, at 41-43 (discussing role of peace movement); see also WORLD COURT, *supra* note 2, at 11-18 (describing inception of permanent international court).

60. See DEBUSTAMANTE, *supra* note 4, at 41-44 (describing origination of PCA).

61. See WORLD COURT, *supra* note 2, at 11-13 (discussing formation of League of Nations).

62. See *id.* at 41-45 (describing origination of PCIJ).

63. See *id.* (describing termination of PCIJ).

64. U.N. CHARTER art. 33 (directing members of U.N. to seek peaceful resolution). Judicial settlement is pacific settlement as laid out in Article 33 of the Charter. See WILLIAMS & DE MESTRAL, *supra* note 55, at 56 (describing U.N. directive forming ICJ).

65. See WILLIAMS & DE MESTRAL, *supra* note 55, at 56 (describing origination of PCIJ); see also WORLD COURT, *supra* note 2, at 23 (describing origination of PCIJ).

66. See WILLIAMS & DE MESTRAL, *supra* note 55, at 57 (discussing dissolving of League of Nations and PCIJ); see also WORLD COURT, *supra* note 2, at 23 (discussing dissolution of League of Nations and PCIJ).

but did not incorporate, the Statute controlling the ICJ.<sup>67</sup> The U.N. Charter designates the ICJ as the principal judicial organ of the U.N. body.<sup>68</sup> The ICJ Statute and the ICJ Rules govern the proceedings before the Court.<sup>69</sup>

A majority of the Security Council and the General Assembly elect fifteen judges to the ICJ.<sup>70</sup> Each judge serves a nine year term.<sup>71</sup> The Statute of the Court does not require a judge from a state that is party to a case before the Court to recuse himself or herself.<sup>72</sup> Instead, the other party may add a judge of their choice to the bench.<sup>73</sup>

## 2. Function of the ICJ

The Court is the only permanent judicial organ for the world community, and its principal task is to ensure respect for international law.<sup>74</sup> The Court is neither a constitutional<sup>75</sup> nor a supreme court.<sup>76</sup> The mandatory language of the ICJ Statute confers upon the ICJ a duty to acknowledge and apply international law and thereby settle disputes among nations.<sup>77</sup> The

67. ICJ STATUTE, *supra* note 58, art. 1, at 61 (annexing the ICJ to U.N. Charter); *see also* WILLIAMS & DE MESTRAL, *supra* note 55, at 57 (referencing ICJ Statute and inception based on U.N. Charter).

68. U.N. CHARTER art. 92 (designating ICJ as principal organ of United Nations); *see* WILLIAMS & DE MESTRAL, *supra* note 55 (describing ICJ as principal organ of U.N. body).

69. ICJ STATUTE; Rules of the International Court of Justice, *reprinted in* DOCUMENTS ON THE INTERNATIONAL COURT OF JUSTICE (Shabtai Rosenne ed., (rev. Apr. 14, 1978)) [hereinafter ICJ RULES].

70. ICJ STATUTE, *supra* note 58, arts. 3-4, at 61 (describing number and selection of judges of ICJ).

71. ICJ STATUTE, *supra* note 58, art. 13, at 67; *see also* FRANCK, *supra* note 14, at 7 (discussing nine year election term for ICJ judges).

72. ICJ STATUTE, *supra* note 58, art. 31, at 73, 75 (allowing judges to serve in cases involving their home state).

73. *Id.*

74. *See* LAW AND PRACTICE OF THE ICJ, *supra* note 30, at 74-75 (establishing goal of ICJ); *see also* WORLD COURT, *supra* note 2, at 23-24 (examining purpose of ICJ).

75. WORLD COURT, *supra* note 2, at 35. A constitutional court has the judicial authority to determine the constitutionality of the actions of other organs or branches of a constitutionally based organization or government. *Id.* The ICJ does not have the power of judicial review to determine the constitutionality of the actions of other organs of the United Nations. *Id.*

76. *Id.* A supreme court has authoritative influence over lower courts in its judicial structure. *Id.* The ICJ does not exercise superior jurisdiction over other international tribunals or courts. *Id.*

77. ICJ STATUTE, *supra* note 58, arts. 34-38, at 75, 77, 79; *see* WORLD COURT, *supra* note 2, at 35 (defining duties of ICJ). *See also* LAW & PRACTICE OF THE ICJ, *supra* note

Court provides judicial guidance and support for the work of other U.N. organs.<sup>78</sup> The authoritative character of the Court, as defined within its Statute, directly empowers the Court's rhetoric to settle disputes.<sup>79</sup>

Cases may commence either by notification to the Court of a special agreement between the states, or by both states filing an application to the Court.<sup>80</sup> The choice is a matter for the states concerned, because the Statute does not state when one method or the other should be employed.<sup>81</sup> The Court requires two distinct phases for presenting each case.<sup>82</sup> These phases are written pleadings,<sup>83</sup> prepared in either English or French, and publicly<sup>84</sup> held oral pleadings, in either language.<sup>85</sup> The ICJ conducts internal deliberations in complete secrecy.<sup>86</sup> The judgement rendered must specifically mention the rationale of the opinion,<sup>87</sup> including the legal reasons for the decision.<sup>88</sup>

### 3. Jurisdiction

The ICJ has litigious and advisory jurisdiction.<sup>89</sup> There are

30, at 49 (stating Court's duty is owed both to parties in dispute and to international community at large and suggesting ICJ had no discretionary power to disregard terms of ICJ Statute); see WILLIAMS & DE MESTRAL, *supra* note 55, at 1 (confining role of ICJ to stipulations of its statute).

78. See WORLD COURT, *supra* note 2, at 35 (discussing auxiliary functions performed by ICJ).

79. See *id.* (defining goal of ICJ's discourse).

80. ICJ STATUTE, *supra* note 58, art. 40(1), at 79 (stating how cases are brought before ICJ); see WORLD COURT, *supra* note 2, at 115.

81. ICJ STATUTE, *supra* note 58, art. 40, at 79; see WORLD COURT, *supra* note 2, at 115 (reiterating that states decide which issues are brought before Court).

82. ICJ STATUTE, *supra* note 58, art. 43(1), at 81 (stipulating written and oral procedures of ICJ); see WORLD COURT, *supra* note 2, at 113 (discussing requirements of ICJ procedures).

83. ICJ STATUTE, *supra* note 58, art. 43(2),(3), at 81 (stating requirements of written proceedings and communications of ICJ).

84. ICJ STATUTE, *supra* note 58, art. 46, at 81. The ICJ hearing is public, unless decided otherwise. *Id.*

85. *Id.* art. 43(5) (stating requirements of oral proceedings of ICJ).

86. ICJ STATUTE, *supra* note 58, art. 54(3), at 83. The ICJ deliberates in private and their deliberations remain secret. *Id.*

87. ICJ STATUTE, *supra* note 58, art. 56, at 85. The judgement states the rationale of the decision and the judges who participated. *Id.*

88. ICJ RULES arts. 94-95 *supra* note 69, at 267 (outlining requirements of ICJ judgements).

89. See WORLD COURT, *supra* note 2, at 81-88 (defining jurisdiction as power or authority of Court to issue decisions based on substance or merits of cases placed before it and describing categories of jurisdiction of ICJ).

two primary ways to bestow jurisdiction in cases.<sup>90</sup> The first type is consent by bilateral or multilateral agreement, by way of a specific agreement between states to submit their treaty specific conflicts to the Court.<sup>91</sup> The second type is a state's unilateral declaration accepting the jurisdiction of the Court for specific types of disputes.<sup>92</sup>

### a. Types of Jurisdiction

The ICJ can exercise two types of jurisdiction, litigious and advisory.<sup>93</sup> Litigious jurisdiction is available to states for their disputes.<sup>94</sup> This type of decision is binding on the parties to the dispute and enforceable, when necessary, through the U.N. Security Council.<sup>95</sup> Advisory jurisdiction is available for international organizations and yields an unenforceable advisory opinion prior to litigation.<sup>96</sup>

### b. Consent to Article 36(1)

The Court's jurisdiction extends to all cases that the states refer to it and all matters specially provided for in the U.N. Charter.<sup>97</sup> Once a state grants the ICJ jurisdictional power over specific matters, that state is bound to comply with the decision of

90. *See id.* (discussing ways to acquire jurisdiction of ICJ); *see also id.* at 84 (stating primary avenues to ICJ adjudication).

91. *See id.* at 84 (describing way states gain ICJ jurisdiction by consent via ICJ Statute art. 36(1)).

92. *See id.* (describing way to acquire ICJ jurisdiction by declaring submission to ICJ Statute art. 36 (2)). Although unilateral declaration is sometimes called compulsory jurisdiction, this reference is misleading because the act of consent to the Court's jurisdiction is still voluntary in nature. *Id.* Compulsory jurisdiction exists when a treaty, either multilateral or bilateral, pertaining to a specific topic or activity, contains a compromissory clause referring disputes of that treaty to the Court unilaterally. *Id.*

93. *See* WORLD COURT, *supra* note 2, at 81-88 (defining jurisdiction as power or authority of Court to issue decisions based on substance or merits of cases placed before it and describing categories of jurisdiction of ICJ).

94. *See id.* (stating that states may bring litigation before ICJ).

95. *See id.* (stating conditions of bringing litigious cases before ICJ).

96. *See id.* (discussing ICJ jurisdiction to give advisory opinions prior to litigation).

97. ICJ STATUTE, *supra* note 58, art. 36(1), at 77 (stating conditions under which jurisdiction of ICJ may take place); *see also* WORLD COURT, *supra* note 2, at 81 (defining jurisdiction under ICJ Statute art. 36(1)). The type of matters specially provided for in the U.N. Charter are advisory opinions for the Security Council, the General Assembly of the United Nations, and specialized Agencies of the United Nations. U.N. CHARTER art. 96 (authorizing ICJ to give advisory opinions).

the Court on that matter.<sup>98</sup> Jurisdiction becomes compulsory when a provision of a bilateral or multilateral treaty stipulates that the ICJ will resolve disputes.<sup>99</sup> The availability of the ICJ to a state, via U.N. membership, does not necessarily oblige that state to have the ICJ decide its disputes with other states.<sup>100</sup> If a dispute arises as to whether the Court has jurisdiction, the ICJ will settle the matter.<sup>101</sup>

### c. Unilateral Declarations Under Article 36(2)

Art. 36(2)<sup>102</sup> is only one of the ways to generate compulsory jurisdiction.<sup>103</sup> Some states simply refused to bind themselves to the ICJ through Article 36(2).<sup>104</sup> These states would, however, sometimes create provisions in their treaties that technically created an equally compulsory jurisdiction.<sup>105</sup>

## 4. Sources of Law

### The Court applies the rules of law as enumerated in ICJ

98. ICJ STATUTE, *supra* note 58, art. 36(1), at 77 (discussing jurisdiction of ICJ via bilateral or multilateral treaty).

99. *Id.* (stating that jurisdiction of ICJ comprises all cases which parties refer to it and all matters specially provided for in U.N. Charter, in treaties, or in conventions in force).

100. ICJ STATUTE, *supra* note 58, art. 36, at 77 (stating ways states choose to submit to jurisdiction of ICJ); *see also* DEPARTMENT OF PUBLIC INFORMATION, THE INTERNATIONAL COURT OF JUSTICE 7 (1983) [hereinafter PUBLIC] (explaining that once states submit to jurisdiction, it no longer can withdraw for lack of agreement with ICJ decisions).

101. *See* PUBLIC, *supra* note 100, at 6 (noting that ICJ will decide disputes over its jurisdiction).

102. ICJ STATUTE, *supra* note 58, art. 36(2), at 77. Art. 36(2) states that:

The parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

- a. the interpretation of a treaty;
- b. any question of international law;
- c. the existence of any fact which, if established, would constitute a breach of an international obligation;
- d. the nature or extent of the reparation to be made for the breach of an international obligation.

*Id.*

103. ICJ STATUTE, *supra* note 58, art. 36, at 77 (discussing compulsory jurisdiction).

104. *Id.* (declaring unilateral submission to jurisdiction of ICJ).

105. *See* FRANCK, *supra* note 14, at 48-50 (analyzing how states can create compulsory jurisdiction under ICJ Statute art. 36(1), through irrevocable treaties, that is just as binding as ICJ Statute art. 36(2)).

Statute Art. 38.<sup>106</sup> Treaties<sup>107</sup> are a deliberate method that contracting state parties employ to bind themselves in international agreements,<sup>108</sup> and as such, treaties serve as one of the enumerated sources of international law stipulated in Art. 38.<sup>109</sup> Customary international law carries evidence of general practices that have become recognized as law and enumerated as a source of international law recognized by the ICJ.<sup>110</sup> The ICJ utilizes judicial decisions, which are enumerated as only subsidiary sources, as material sources of international law.<sup>111</sup>

The international conventions,<sup>112</sup> or treaties, referred to in Art. 38(1)(a) of the ICJ Statute lead to the formation of international law.<sup>113</sup> Law-making treaties have the general effect of guiding states in their future international conduct.<sup>114</sup> The ICJ uses Art. 38(1)(a) as a guiding source of interpretive law when the parties in dispute have a written agreement outlining the

106. ICJ STATUTE, *supra* note 58, art. 38, at 79. *See also, supra* note 58. (describing that ICJ was created to decide disputes in accordance with international law). In the alternative, the ICJ may decide a case *ex aequo et bono*, if both parties agree to this approach. *See* WORLD COURT, *supra* note 2, at 145 (defining *ex aequo et bono* as means ICJ may use to decide case based on what is just and good, and not be required to base its decision on established law and stating *ex aequo et bono* has not been utilized).

107. *See* WILLIAMS & DE MESTRAL, *supra* note 55, at 14 (differentiating between treaties as either law-making treaties or as treaty contracts). Law-making treaties lay down general rules that are binding on a majority of states and are a direct source of law. *Id.* Treaty contracts are made between two or more states, and address matters that are of specific concern to the parties involved. *Id.* Synonyms for treaty include: conventions, protocol, agreement, arrangements, statutes and declarations. *Id.*

108. *See* MALCOLM SHAW, INTERNATIONAL LAW 77-78 (1986) (defining treaties as written agreement outlining series of conditions and arrangements agreed upon by parties to contract and serving as binding upon parties to agreement).

109. *See id.* at 79 (discussing ways treaties may contribute to wealth of international law sources).

110. *See* SHEARER, *supra* note 3, at 31-32 (defining customary international law as utilized by ICJ as source of law, i.e. regional trade practices that are recognized as traditional and multicultural).

111. *See* SHAW, *supra* note 108, at 86 (stating "[a]lthough these are, in the words of article 38, to be utili[s]ed as a subsidiary means for the determination of rules of law rather than as an actual source of law, judicial decisions can be of immense importance").

112. *See* WILLIAMS & DE MESTRAL, *supra* note 55, at 14 (defining international conventions as treaties).

113. *See id.* (discussing types of treaties and distinguishing between law-making and contract treaties); *see also* SHEARER, *supra* note 3, at 37 (stating "[t]he effect of any treaty in leading to the formation of rules of international law depends on the nature of the treaty concerned").

114. *See* SHAW, *supra* note 108, at 79 (discussing effect treaties can have on developing international law).



conditions and arrangements they agree to uphold.<sup>115</sup> More states are including conditions and arrangements in their treaties than in past use,<sup>116</sup> and, therefore, the use of treaty law as a source for international legal dispute resolution is increasing.<sup>117</sup>

Art. 38(1)(b) lists customary international law as a material source to be utilized in deliberations by the ICJ when evaluating whether a general practice of the states in dispute is in fact accepted law.<sup>118</sup> Customary international law has evolved generally through recognition by the international community of the practices of several of its states as the law.<sup>119</sup> Multilateral treaties may also serve as a source of customary international practice which, after time and volume, may evolve into customary international law.<sup>120</sup>

Art. 38(1)(d), along with Art. 59, of the ICJ Statute designates the past decisions of the ICJ as subsidiary sources for determining the rule of law the Court should apply.<sup>121</sup> The ICJ, in an attempt to provide consistency in the body of international law, examines previous decisions and references them as guidelines toward choosing the applicable law in similar circumstances.<sup>122</sup> While the Court will review its previous decisions,<sup>123</sup> it meticulously distinguishes cases that it feels are non-applicable to a present case.<sup>124</sup> The Court also examines whether or not the legal position of a past case is relevant to the circumstances

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115. See *id.* at 77-78 (defining treaties as written agreement outlining series of conditions and arrangements agreed upon by parties to contract and serving as binding upon parties to agreement).

116. See Highet, *supra* note 31, at 339-40 (describing and analyzing current increasing trend in ICJ activity).

117. See SHEARER, *supra* note 3, at 37 (examining increase in ICJ activity).

118. See SHAW, *supra* note 108, at 61 (describing essence of customary international law as "evidence of a general practice accepted as law").

119. See SHEARER, *supra* note 3, at 31 (defining customary international law and discussing it as source of international law); see also SHAW, *supra* note 108, at 61 (stating "customary law is founded upon the performance of state activities and the convergence of practices" and that there exists subjective belief that this behavior is law).

120. See SHEARER, *supra* note 3, at 36 (explaining how multi-lateral treaties can also lead to established rules of customary international law).

121. ICJ STATUTE, *supra* note 58, arts. 38, 59, at 79, 85.

122. See SHEARER, *supra* note 3, at 41 (examining ICJ's use of its own prior decisions as source of law). See also SHAW, *supra* note 108, at 86 (discussing Court's use of its own past decisions as material source of international law).

123. See *supra* note 108, at 86 (describing practice of ICJ in presenting rationale of Court).

124. See *id.* (examining ability of ICJ to differentiate between cases that are applicable and non-applicable to present case).

of its present case.<sup>125</sup>

### C. *States' Uses of the ICJ*

From the mid-1950s to the mid-1970s, states submitted to the jurisdiction of the ICJ irregularly.<sup>126</sup> During the late 1980s, states began to bring more cases before the ICJ.<sup>127</sup> As developing countries became equal members of the international community, developed countries and the ICJ began to give equal weight to developing countries' concerns and customs.<sup>128</sup>

#### 1. Pre-1975 Use of the ICJ

Until the 1980s, developed countries were generally unwilling to take matters of international importance to the ICJ.<sup>129</sup> Even among the states that had initially recognized the compulsory jurisdiction of the ICJ, there was a tendency to refuse to appear before the Court or to adhere to the Court's decisions.<sup>130</sup> Most states did not accept the Court's compulsory jurisdiction under Article 36(2).<sup>131</sup> Of the five permanent members of the U.N. Security Council, only the United States<sup>132</sup> and the United Kingdom submitted to the Court's compulsory jurisdiction under Article 36(2).<sup>133</sup>

Many states did not take compulsory jurisdiction seri-

125. See LAW AND PRACTICE OF THE ICJ, *supra* note 30, at 620-21 (applying discretion of ICJ to each particular case).

126. See FRANCK, *supra* note 14, at 9 (discussing Franck's perception of under-utilization of ICJ).

127. See *id.* (discussing level of activity of ICJ).

128. See Highet, *supra* note 31, at 340 (discussing how developing countries are more likely than developed countries to include compromissory clauses or mutual stipulations in their treaties and conventions to refer disputes to arbitration, because of ICJ's perceived continuity).

129. See FRANCK, *supra* note 14, at 47 (commenting on developed countries unwillingness to submit to ICJ jurisdiction).

130. See *id.* at 47-48 (illustrating lack of respect for ICJ by developed countries).

131. See FRANCK, *supra* note 14, at 48 (describing lack of submission of cases to ICJ jurisdiction from the 1950s to the 1970s).

132. See *id.* The U.S. terminated this compulsory jurisdiction October 7, 1985. See *id.* at 85 n.39 (announcing the termination of U.S. acknowledgment of compulsory jurisdiction).

133. See *id.* at 48 (discussing process of submitting dispute to ICJ jurisdiction). The United States has since withdrawn its submission to Article 36(2). *Id.* The United States announced its decision to terminate compulsory jurisdiction of the ICJ under Art. 36(2). *Id.* When President Truman accepted the ICJ's optional compulsory jurisdiction in 1946, the United States expected other states to act similarly. *Id.* Few other states followed the United States' example. *Id.* Less than one-third of the developed

ously.<sup>134</sup> Although the Court has not been able to secure acceptance by most developed countries for its compulsory jurisdiction, quite a few developing countries have embraced both Article 36(1) and 36(2) compulsory jurisdiction.<sup>135</sup> These developing countries are beginning to participate in shaping the institutions and norms of the international legal system.<sup>136</sup>

## 2. Post-1975 Use of the ICJ

From its inception until 1975, the ICJ handed down forty judgements and advisory opinions.<sup>137</sup> Since 1975, the ICJ has addressed, or is currently addressing, eighty-eight cases, which is more than twice as many cases than in the previous era.<sup>138</sup> Eighteen of these cases have come up within the past decade.<sup>139</sup>

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and developing states have accepted the ICJ's compulsory jurisdiction, and the former Soviet Union and its allies were never among them. *Id.*

134. See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1984 I.C.J. 392 (Nov. 26) (illustrating how United States did not take its compulsory jurisdiction seriously in Nicaragua's claim against it and thereby failed to protect itself); see SHAW, *supra* note 108, at 527, 529 (examining value of judicial clout where states refuse to abide by it); see also *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1980 I.C.J. 3 (May 24) (describing Iran's refusal to obey ICJ); *WORLD COURT, supra* note 2, at 206; *Corfu Channel (Gr. Brit. and N. Ir. v. Alb.)*, 1948 I.C.J. 15 (Mar. 25) (illustrating Albania's disregard for ICJ and refusal to appear as respondent in early stages of case); *Monetary Gold (Italy v. Fr., Gr. Brit., N. Ir., and U.S.)*, 1954 I.C.J. 19 (June 15) (demonstrating Albania's refusal to appear before ICJ at any time during case); see also FRANCK, *supra* note 14, at 50 (demonstrating how states responded to jurisdiction by ICJ).

135. See FRANCK, *supra* note 14, at 50-51 (noting that by 1984, developing states submitting to Art. 36 jurisdiction included Barbados, Botswana, Colombia, Costa Rica, the Dominican Republic, Gambia, Haiti, Honduras, India, Kenya, Liberia, Malawi, Mauritius, Mexico, Nigeria, Pakistan, Panama, the Philippines, Somalia, Sudan, Swaziland, Togo, Uganda, and Uruguay). Some states submitted to Art. 36 with similar stipulations as those entered by the United States, accepting Art. 36(1) unconditionally and expressing reservations and conditions to Art. 36(2). See *id.* at 50-51 (referencing U.S. stipulation to ICJ Statute art. 36(2)).

136. See *id.* (demonstrating influence of developing countries).

137. See GAMBLE AND FISHER, *supra* note 5, at 32 (stating that between 1948 and 1975, ICJ handed down twenty-six contentious cases and fourteen advisory opinions).

138. See Highet, *supra* note 31, at 339-41 (examining ICJ workload through 1994 and noting that ICJ has rendered fifty-[six] decisions in contentious cases, handed down twenty-one advisory opinions, and currently has ten contentious cases and one advisory opinion before Court).

139. See *id.* (emphasizing that eighteen cases came within last decade). Through 1996, the cases currently before the ICJ include *Airbus (Iran v. U.S.)*; *East Timor (Port. v. Austl.)*; *Guinea-Bissau (Guinea-Bissau v. Sen.)*; *Qatar-Bahrain (Qatar v. Bahr.)*; *Lockerbie (Libya v. Gr. Brit.)* (*Libya v. U.S.*); *Oil Platforms (Iran v. U.S.)*; *Genocide (Bos. and Herz. v. Serb. and Mont.)*; *Danube; Land and Maritime Boundary (Cameroon v. Nig.)*; *Nuclear Weapons (Advisory)*; and *NATO (Serb. and Mont. v. NATO members)*. *Id.*

The states that choose to utilize the ICJ to resolve their disputes govern the Court's current direction toward complete utilization.<sup>140</sup> This new trend in ICJ utilization may be identified by the fact that most of the present cases the Court has in its jurisdiction have been brought by application under the optional clause of Article 36 or under a compromissory clause of a bilateral or multilateral treaty.<sup>141</sup> Also, the new trend in utilization specifically identifies the constituency of the ICJ.<sup>142</sup> During the past decade the constituency of the Court has grown to include many developing countries.<sup>143</sup> These developing countries, by definition, require the additional strength and protection of the

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Through 1996, the cases recently decided by the ICJ included Nicaragua Intervention (El Sal. v. Hond.), 1990 I.C.J. 92 (Sept. 13); Arbitral Award (Guinea-Bissau v. Sen.), 1991 I.C.J. 53 (Nov. 12); El Salvador/Honduras (El Sal. v. Hond.), 1992 I.C.J. 351 (Sept. 11); Nauru (Nauru v. Austl.), 1992 I.C.J. 240; Jan Mayen (Den. v. Nor.), 1993 I.C.J. 38 (June 14); Libya-Chad (Libya/Chad), 1994 I.C.J. 6 (Feb. 3); and Maritime Delimitation and Territorial Questions between Qatar and Bahrain, 1994 I.C.J. 112 (July 1). *Id.*

140. See Highet, *supra* note 31, at 344 (discussing influence states have on direction of ICJ's current trend).

141. See *id.* at 346-47 (suggesting that ICJ workload has increased due to willingness of states to enter pre-determined jurisdiction of ICJ). Much of the tendency to pre-commit to the jurisdiction of the ICJ is owed to the use of bilateral treaty provisions in treaties of friendship, commerce, and navigation. *Id.* Iran was able to hold the United States to the jurisdiction of the ICJ based on the multilateral treaty provisions of the Chicago Convention of 1944, the 1971 Montreal Convention, and the 1955 Treaty of Amity, Economic Relations, and Consular Rights between the United States and Iran. See *Airbus (Iran v. U.S.)* (demonstrating how U.S. jurisdiction was based on consent); see also Highet, *supra* note 31, at 347 (discussing U.S. jurisdiction). Libya is also able to proceed against the United Kingdom and the United States under the Montreal Convention because they are both parties to the same multilateral treaties. See *Lockerbie (Libya v. Gr. Brit.) (Libya v. U.S.)* (demonstrating how U.S. jurisdiction was based on consent, via convention or treaty); see also Highet, *supra* note 31, at 347 (discussing U.S. jurisdiction). A compromissory clause can create ICJ jurisdiction based on each of the parties in the case agreeing to jurisdiction at the conception of their treaty. See *Genocide (Bos. and Herz. v. Serb. and Mont.)* (demonstrating how U.S. jurisdiction was based on pre-treaty perceptions); see also Highet, *supra* note 31, at 347 (discussing U.S. pre-treaty determination). The East Timor and the Guinea-Bissau cases, however, are based on declarations of adherence to the optional clause of Art. 36. See *East Timor (Port. v. Austl.)* (demonstrating how jurisdiction was based and discussing determination of jurisdiction by state); *Guinea-Bissau (Guinea-Bissau v. Sen.)* (demonstrating how jurisdiction was established); Highet, *supra* note 31, at 347.

142. See Highet, *supra* note 31, at 346-47 (distinguishing those states that proscribe to the ICJ for dispute resolution).

143. See *id.* at 348-49 (stating that constituency of ICJ has grown as new members of world community bring cases). The world community now includes Eastern Europe and the Balkans, as demonstrated by Danube and Genocide cases, and includes Central West Africa, as demonstrated by Land and Maritime Boundary case. *Id.*

Court<sup>144</sup> to bring the developed countries to the table to compromise and resolve disputes.<sup>145</sup> Neither China nor Russia has litigated a case before the ICJ.<sup>146</sup> France, the United Kingdom, and the United States have been involved most frequently as respondents.<sup>147</sup>

## II. JUDICIAL AUTHORITY OF THE ICJ

Past decisions of the ICJ are not binding, but the ICJ sometimes does refer to its past opinions when deciding new cases.<sup>148</sup> Article 38(1) of the ICJ Statute states which sources of law the ICJ may use to decide cases.<sup>149</sup> The Court rationalizes its reference to its past decisions as a means of maintaining continuity.<sup>150</sup>

### A. Statutory Authority of the ICJ: Article 59 and Non-Binding Precedent

The ICJ Statute defines who is bound by the decisions of the ICJ, when they are bound, and what they are bound to do.<sup>151</sup> The Court gathers its ethos, or authority, from these guidelines.<sup>152</sup> ICJ opinions are binding only on the parties<sup>153</sup> to each

144. See *id.* at 346-47 (suggesting that developing countries need special help).

145. See *id.* (implying that developed countries hesitated to bind themselves with developing countries because it levels political and economic playing fields).

146. See Highet, *supra* note 31, at 346-47 (discussing limited participation); see also FRANCK, *supra* note 14, at 8-9 (discussing Russia's and China's hesitation to participate in ICJ adjudication).

147. See Highet, *supra* note 31, at 346-47 (describing France's, Great Britain's and United States' limited interaction with states under jurisdiction of ICJ).

148. See *id.* at 339 (suggesting that ICJ used its past decisions as rationale for present decisions).

149. ICJ STATUTE, *supra* note 58, art. 38(1), at 79 (discussing applicable law of ICJ). These sources include: a. international conventions and treaties; b. international custom; c. the general principles of law recognized by civilized nations; and d. judicial decisions. *Id.*

150. See THE REGISTRY OF THE COURT, THE INTERNATIONAL COURT OF JUSTICE, 62-63 (1979) [hereinafter THE REGISTRY] (referencing consistency of ICJ's decisions); see also Highet, *supra* note 31, at 339 (discussing continuity between PCIJ and ICJ).

151. ICJ STATUTE, *supra* note 58, art. 59, at 85 (binding only parties of each instant case to decision of ICJ in that case). "The decision of the Court has no binding force except between the parties and in respect of that particular case." *Id.* The language of Art. 59 reflects the negative nature of this guideline. See LAW AND PRACTICE OF THE ICJ, *supra* note 30, at 618 (stating authoritative scope of ICJ decisions); see also ICJ STATUTE, *supra* note 58, art. 38, at 79. See also, *supra* note 58 (describing limits of ICJ's decisions).

152. See GALE, *supra* note 1, at 8 (suggesting that courts get their authority from within parameters of who, what, and how they bind states to its decisions).

particular dispute.<sup>154</sup> The ICJ's jurisprudence carries a binding force because of the authoritative character of the Court's decisions.<sup>155</sup> An ICJ judgement binds parties on the day the Court reads the decision in open Court.<sup>156</sup>

The ICJ's past decisions do not bind it, but, in the ICJ's discretion, it may refer to its past opinions when rendering new decisions.<sup>157</sup> The ICJ frequently refers to its past decisions when interpreting international laws and treaties, or when formally acknowledging new customary international law.<sup>158</sup> States do not know whether the past decisions of the Court will serve as precedents<sup>159</sup> in potential disputes, or will be ignored.<sup>160</sup> Some states rely on past interpretations of the ICJ pertaining to customary laws,<sup>161</sup> local practices, or trade customs.<sup>162</sup> Other states specifi-

153. ICJ STATUTE, *supra* note 58, art. 34, at 75 (describing ICJ as Court for states). Only states may be parties in contentious cases before the Court. *Id.* Intergovernmental organizations and individuals are excluded as parties to litigation before the ICJ. *See* WORLD COURT, *supra* note 2, p. 82 (stating, "Art. 34 originated from the notion that only states have personalities"). The Court, however, may issue advisory opinions to the Security Council, the General Assembly of the United Nations, and Specialized Agencies of the United Nations. ICJ STATUTE arts. 65-68, *supra* note 58, at 87, 89; ICJ RULES arts. 102-109, *supra* note 69, at 271, 273, 275.

154. ICJ STATUTE, *supra* note 58, art. 59, at 85. ICJ decisions have no binding force except between the parties and in respect to that particular case. *Id.*

155. *See* LAW AND PRACTICE OF THE ICJ, *supra* note 30, at 49-50 (discussing authoritative weight of judicial decisions).

156. ICJ Rules *supra* art. 94, note 58, at 267.

157. *See* Hight, *supra* note 31, at 339 (discussing ICJ's references to past decisions when issuing rulings).

158. *See* LAW & PRACTICE OF THE ICJ, *supra* note 30, at 611-12 (stating that referring to past decisions by ICJ is not out of ordinary practice).

159. *See id.* (implying uncertainty of Court's action whether to apply precedent or not); *see also* SHAW, *supra* note 108, at 87 (defining precedent as application of past decisions).

160. *See* SHAW, *supra* note 108, at 86-87 (discussing available uses of past judicial decisions).

161. *See id.* at 6 (defining customary international law). Customary international law includes texts of international instruments and decisions of international courts. *Id.* Customary international law may also include decisions of national courts and national legislation. Diplomatic correspondence and opinions of national legal advisors, with reserve to No. 4 of Article 38 (1), are sometimes considered in the formalizing of customary international law. *Id.* The practice of international organizations, certain types of resolutions of United Nations organs and of the Specialized Agencies, reports of the International Law Commission, and correspondence between the Registry of the Court and the party-states are also included as contributors of customary international law. *Id.*

162. *See* LAW & PRACTICE OF THE ICJ, *supra* note 30, at 611-13 (discussing ICJ choice in relying on precedent).

cally disregard all past decisions of the ICJ pertaining to interpretations of customary laws, local practices, and trades.<sup>163</sup> Problems arise when states in dispute approach possible resolution of the problem with differing philosophies toward the ICJ's past decisions.<sup>164</sup>

The framers of the ICJ Statute feared that the Court's observers would misinterpret and misapply its rulings if allowed to refer to them as precedent.<sup>165</sup> The framers' decision not to incorporate a rule of *stare decisis* was an attempt to allow this new institution the appropriate room to develop.<sup>166</sup> The framers thought that the judicial decisions would be too sparse to develop a complete reservoir of precedents and a method or philosophy of employing those precedents.<sup>167</sup>

### B. ICJ Issuance of Opinions

Article 38(1) of the ICJ Statute lays out the sources of law the ICJ uses when deciding cases.<sup>168</sup> The Court references past decisions to maintain continuity of tradition, case law, and methods of work.<sup>169</sup> The Court places great importance in finding and applying international law consistent with its prior decisions.<sup>170</sup>

#### 1. Court's Interpretation of Article 38

Article 38(1) of the ICJ Statute enumerates the sources of law the ICJ applies when deciding disputes.<sup>171</sup> Early attempts to set out the international rules of law for nations placed great

163. *See id.* (illustrating literal meaning of Art. 59, which does not hold past decisions of ICJ as precedent).

164. *See id.* at 611-12 (demonstrating how different states choose to view ICJ decisions in varying manners in pursuit of their self-interest).

165. *See* DEBUSTAMANTE, *supra* note 4, at 239-41 (discussing intent of framers of ICJ Statute to limit application of PCIJ decisions to prevent misinterpretation and misuse).

166. *See* LAW & PRACTICE OF THE ICJ, *supra* note 30, at 611-13 (explaining intent of framers of ICJ Statute to give the early Court proper opportunity to fine tune its application of law without being bound by its first attempts).

167. *See id.* at 611-13 (suggesting rationale of framers for excluding *stare decisis*).

168. ICJ STATUTE, *supra* note 58, art. 38(1), at 79 (stating applicable law of ICJ).

169. *See* THE REGISTRY, *supra* note 150, at 62-63 (referring to how ICJ attempts to maintain continuity of PCIJ and ICJ opinions); *see also* Hightet, *supra* note 31, at 339 (discussing how ICJ rules on cases with attention to consistency of its judicial voice).

170. *See* Hightet, *supra* note 31, 337-39 (discussing ICJ's practices).

171. ICJ STATUTE, *supra* note 58, art. 38(1), at 79 (discussing applicable law of ICJ).

emphasis on the enumerated list.<sup>172</sup> A framer of the PCIJ<sup>173</sup> submitted a proposal that became the motivating essence of the present day Article 38,<sup>174</sup> designating the rules of law applied by the PCIJ, and later by the ICJ.<sup>175</sup>

The rule setting forth international law as recognized by civilized nations created problems because the Court could not agree on the general law it would apply in the absence of a conventional or universal customary rule.<sup>176</sup> The framers of the Statute intended for the Court to be representative of civilization and major legal systems by adopting the conventions and customary rules of party states.<sup>177</sup> Critics of the framers argued, however, that as long as every country had its own public international law on certain questions, those countries would not consent to submit to a judicial authority that had power to apply international law as interpreted by some other nation.<sup>178</sup> Others discussed the possibility of creating a legislature to prepare world codes, but the framers dismissed this idea because it would not have the sanction of the individual governments and would, therefore, have a negative impact on national sovereignty.<sup>179</sup> Still others considered the possibility that, in the absence of a

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172. See DEBUSTAMANTE, *supra* note 4, at 239 (discussing ICJ enumerated jurisprudence and arguing observers of ICJ place great emphasis upon it).

173. See DEBUSTAMANTE, *supra* note 4, at 95 (defining framers as appointed creators of PCIJ). The League of Nations appointed an Advisory Committee of Jurists, or framers, to prepare a plan for establishing the Permanent Court of International Justice. See DEBUSTAMANTE, *supra* note 4, at 95.

174. See *id.* (describing formation of Article 38 during creation of PCIJ).

175. See *id.* at 239-40 (describing process of PCIJ creation). An early proposal of Art. 38 suggested:

[t]he following rules are to be applied by the judge in the solution of international disputes; they will be considered by him in the order given below:

1. Conventional international law, whether general or special, being rules expressly adopted by the states;
2. International custom, being a practice between nations accepted by them as law;
3. The rules of international law as recognized by the legal conscience of civilized nations;
4. International jurisprudence as a means for the application and development of law.

*Id.*

176. See DEBUSTAMANTE, *supra* note 4, at 240 (discussing dilemma faced by Court).

177. See SHEARER, *supra* note 3, at 29 (describing PCIJ creation and suggesting framers' intent).

178. See DEBUSTAMANTE *supra* note 4, at 240 (criticizing framers' intent).

179. See *id.* (proposing substitute for framers' design).



treaty or custom, the Court should refuse to decide questions, leaving the states without a solution to their dispute.<sup>180</sup>

After a series of amendments, the framers created a new proposal for the designated sources of law under Art. 38.<sup>181</sup> The first change in this proposed text added at the beginning of Art. 38(4), a phrase by which decisions would be binding only on the parties to the case decided.<sup>182</sup> Framers of the proposal believed that decisions of the Court could serve as a source of reference for the Court during its decision-making, but not as a future source of applicable law relied on by states.<sup>183</sup>

As this proposal passed through several stages of evolution, it underwent alterations which helped to shape the current interpretation of the rules of law that the Court applied.<sup>184</sup> One alteration was the removal of the provision requiring application of the four sources of law, in the order they are listed.<sup>185</sup> Another alteration was the addition of a new paragraph stipulating that provisions about the applicable law should not prevent the Court from attempting to decide a case *ex aequo et bono*, if the parties agree to it.<sup>186</sup> These alterations in fact changed the defi-

180. *See id.* (suggesting alternatives to framers' design).

181. *See id.* at 240-41 (describing how framers created draft of sources of applicable law). The draft proposed by the framers suggested that:

[t]he Court shall, within the limits of its jurisdiction . . . apply in the order following:

1. International conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
2. International custom, as evidence of a general practice which is accepted as law;
3. The general principles of law recognized by civilized nations;
4. Judicial decisions and the teachings of the most highly qualified publicists and of the various nations, as subsidiary means for the determination of rules of law.

*Id.*

182. ICJ Draft art. 38. This non-precedent phrase references the original form of the present day Article 59 of the Statute of the Court. *Id.* While the provisions of Art. 59 bind only the parties of the case, the provisions of Art. 38 restrict the decisions even more by referring to judicial decisions and the teachings of the most highly qualified publicists as only a subsidiary means for the determination of rules of law. *Id.*

183. *See* DEBUSTAMANTE, *supra* note 4, at 236-37 (suggesting that laypersons could not properly apply past decisions and therefore only ICJ judges could properly reference past decisions).

184. *See id.* at 240-41 (presenting rules of law currently applied).

185. *See id.* (discussing development of sources of applicable law).

186. ICJ STATUTE, *supra* note 58, art. 38(2), at 79; *see* DEBUSTAMANTE, *supra* note 4, at 241 (granting parties right to authorize ICJ to decide case outside of established law).

dition of the Court itself, from simply a court of arbitration to a judicial power defining the breadth of the interpretive sources, as well as being the interpreter of predetermined sources.<sup>187</sup>

The addition of *ex aequo et bono* diminished the obligatory force of international jurisprudence to an auxiliary method of determining the rules.<sup>188</sup> This emancipation of the Court, from the severity of Article 38(1) enumerations, has permitted the first steps toward the Court's consideration of constituent elements<sup>189</sup> of the concrete dispute referred to the Court even if not germane to the legal issues.<sup>190</sup> The ICJ has not utilized the option of deciding a case *ex aequo et bono*.<sup>191</sup> Applying the sources of law presented in Article 38(1) to the concrete problems before it, the Court's statements are always directed toward the specific problem.<sup>192</sup> The framers' intention was to prevent an observer of the Court from mistakenly reading more into those statements than the Court ever intended.<sup>193</sup>

## 2. The Court's Use of Precedent

The Court references past decisions to maintain continuity in its work.<sup>194</sup> The Court often cites previous cases<sup>195</sup> in support

187. See DEBUSTAMANTE, *supra* note 4, at 241 (describing way alterations changed role of ICJ from neutral conductor of law to effectual interpreter of law).

188. See *id.* (discussing effect of *ex aequo et bono* on international jurisprudence).

189. See *id.* (defining constituent elements). Constituent elements include unique geographical factors and economic interests peculiar to the region affected by the dispute as to sovereignty. *Id.*; see also Fisheries Case (Gr. Brit. and N. Ir. v. Nor.), 1951 I.C.J. 116 (Dec. 18) (demonstrating use of constituent elements in deciding case).

190. See DEBUSTAMANTE, *supra* note 4, at 241 (illustrating freedom of ICJ to operate outside of sources of law); see also LAW AND PRACTICE OF THE ICJ, *supra* note 30, at 605 (discussing options of ICJ in deciding cases).

191. See DEBUSTAMANTE, *supra* note 4, at 241 (stating that *ex aequo et bono* has not been used to date).

192. See LAW & PRACTICE OF THE ICJ, *supra* note 30, at 613 (stating that sources of law are applied to issue at hand in present case).

193. See *id.* (explaining framers' intentions and reasoning for omitting any form of *stare decisis*). The ICJ, in the Anglo-Iranian Oil Co. Case, stated that Art. 38 is mandatory and the Court must apply judicial decisions only as a subsidiary means for determination of rules of law. See Anglo-Iranian Oil Co. Case (Gr. Brit. v. Iran), 1952 I.C.J. 93 (Preliminary Objection of July 22) (emphasizing that ICJ must follow rules of law stipulated in its Statute).

194. See THE REGISTRY, *supra* note 150, at 62-63 (describing ICJ's motivation for continuity).

195. See Highet, *supra* note 31, at 339 (describing previous cases which include caseload of both PCIJ and ICJ).

of its reasoning, resulting in unity of precedent.<sup>196</sup> All ICJ decisions flow from and are built upon past decisions,<sup>197</sup> although the ICJ has been careful to refrain from indicating that reliance on precedent was mandatory.<sup>198</sup>

The Court gives great weight to finding and applying international law consistent with its prior decisions.<sup>199</sup> This practice guides the development of future international law<sup>200</sup> which preserves continuity in the ICJ's decisions.<sup>201</sup> Following precedent allows the Court to influence the attitude of states toward questions that the ICJ has already addressed.<sup>202</sup> Accordingly, the Court may find itself compelled to apply an international custom, to which it may have contributed, in deciding a case before it.<sup>203</sup>

### III. THE ICJ'S FAILURE TO FOLLOW ITS STATUTORY MANDATE UNDERMINES ITS RHETORICAL AUTHORITY

The Court's actions encourage states to treat its judicial

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196. See THE REGISTRY, *supra* note 150, at 62-63 (stating that ICJ has inherited benefits of jurisprudence of its predecessor PCIJ). Legal scholars and practitioners alike tend to assimilate the case law of the ICJ with the case law of the PCIJ. HIGHET, *supra* note 31, at 339; WORLD COURT, *supra* note 2, at 23-25.

197. See Highet, *supra* note 31, at 339 (discussing nature and use of past ICJ decisions).

198. See THE REGISTRY, *supra* note 150, at 62-63 (emphasizing that ICJ does not acknowledge any requirement on its part to utilize its past decisions).

199. See Highet, *supra* note 31, 337-39 (discussing ICJ's practices).

200. See *id.* (discussing affect of ICJ's practice on development of international law). The Court's use of precedent sends the message to outside parties that this is consistent with the accepted interpretation of past treaties and this consistent interpretation is thereafter applied by those outside parties, creating a multinational practice which leads to new international law. See *e.g.* Fisheries Case (Gr. Brit. and N. Ir. v. Nor.), 1951 I.C.J. 116 (Dec. 18) (illustrating ICJ's use of precedent which established world community practice).

201. See *id.* (describing contribution of effect of ICJ's practice to continuity in understanding of international law as ruled upon by ICJ). The *Fisheries* case provides an example of the Court establishing a method of delimiting territorial waters which the Court continues to utilize. Fisheries Case (Gr. Brit. and N. Ir. v. Nor.), 1951 I.C.J. 116 (Dec. 18) (illustrating ICJ's use of same approach to determine boundaries in similar cases).

202. See THE REGISTRY, *supra* note 150, at 62-63 (illustrating effect of ICJ precedent on states in future disputes).

203. See *id.* at 63 (suggesting that because ICJ opinions influence states' behavior, that behavior may become international custom and thereby become one of sources of law applied to decide cases).

rhetoric with authority,<sup>204</sup> and therefore require that the Court's rhetoric be legitimately authoritative, with statutory support.<sup>205</sup> While there is no doctrine of *stare decisis* guiding the Court,<sup>206</sup> it has still tried to ensure consistency by taking into account its earlier judgments and examining them closely when rendering new decisions.<sup>207</sup> Therefore, the Court's practice should be clarified by statute.

#### A. *The Court's Use of Precedent Violates Its Own Statute*

Despite the written rules addressing the framers' fears that the judicial decisions would be too sparse, the ICJ has developed a complete reservoir of precedents and a method of employing those precedents.<sup>208</sup> The contradiction between written rule of the statute and actual practice of the ICJ is the heart of each state's dilemma.<sup>209</sup> The Court's reasoning for what it regards as the correct legal position and the rationale of why that position is correct contribute to the reservoir of public international law.<sup>210</sup> While the Court closely examines its previous decisions,<sup>211</sup> it carefully distinguishes cases that it feels are non-applicable to a present case.<sup>212</sup> The Court distinguishes between the binding effect attributed to the decision for continuity and the statement of what the Court considers to be the correct legal position.<sup>213</sup> The Court also examines whether or not the legal position of a past case is relevant to the circumstances of its pres-

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204. *See supra* notes 4, 55 and accompanying text (discussing ability of ICJ to decide cases without referencing past decisions).

205. *See id.* (suggesting that ICJ should have proper authority attached to its decisions).

206. *See supra* note 154 and accompanying text (stating limitations of ICJ decisions binding effect).

207. *See supra* notes 31-55 and accompanying text (describing sources and system of international law that ICJ applies).

208. *See id.* at 611-13 (suggesting rationale of framers for excluding *stare decisis* and present day method of applying precedent).

209. *See supra* notes 159-161, 163-165 (analyzing ICJ's violation of its own statute regarding precedent).

210. *See id.* (discussing valuable use of past decisions in explaining rationale of present opinion).

211. *See supra* note 108, at 86 (describing practice of ICJ in presenting rationale of Court).

212. *See id.* (examining ability of ICJ to differentiate between cases that are applicable and non-applicable to present case).

213. *See supra* note 30, at 620 (distinguishing between opinion and precedent).

ent case.<sup>214</sup>

The Court's willingness to allow states to attribute authoritative value to its rhetoric requires the Court's rhetoric to be legitimately authoritative, with statutory support.<sup>215</sup> The decisions of the Court are usually accepted in later decisions and formulations of international law, although there is occasional opposition.<sup>216</sup> The degree of respect accorded the Court's decisions make them an essential factor in the growth and exposition of international law.<sup>217</sup> The Court should strive to follow its previous judgments because states are inclined to defend their side of a dispute by citing the Court as an authoritative source, even though precedent does not formally exist in international law.<sup>218</sup>

Although the framers believed that the tendency to recognize that judicial decisions have some precedential value is a natural one which does not require doctrines of binding precedent,<sup>219</sup> they failed to realize that judicial precedent is not the indirect by-product of judicial decisions. Rather, judicial precedent is the direct by-product of the Court's permanent and authoritative nature, interpreting and restating international law.<sup>220</sup> This contribution has made the decisions of the ICJ one of the most important sources of the rules of international law and one of the law's most powerful vehicles for adapting to the constantly changing international scene.<sup>221</sup>

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214. *See id.* at 620-21 (applying discretion of ICJ to each particular case).

215. *See supra* notes 30, 108, 150, 154 and accompanying text (analyzing acceptance of ICJ's past decisions). *See, e.g., Temple of Preah Vihear Case* (Cambodia v. Thail.), 1962 I.C.J. 6 (June 15) (illustrating principles of ICJ Statute art. 59 and referring to ICJ decision in *Aerial Incident* case, stating that by reason of Article 59 of ICJ Statute, decision produced in *Aerial* was only binding on parties to that case and had no effect on parties of *Temple*).

216. *See id.* (suggesting ICJ should have proper authority attached to its decisions).

217. *See supra* note 108, at 87 (stating how essential ICJ's decisions are in growth and development of international law).

218. *See id.* (suggesting ICJ follow its own precedent in order to provide authority for states to reference).

219. *See supra* note 30, at 612 (stating ICJ did not believe it needed to specifically recognize precedent, because precedent carried natural amount of clout by itself).

220. *See id.* (suggesting nature of precedent carried with it responsibility to attach proper authority to rhetoric of judicial discourse).

221. *See id.* (suggesting judicial precedent is vital to continued, consistent international law).

B. *The Court Must Apply Precedent In Order to Maintain Its  
Credibility*

States are heavily influenced by the positions previously taken by the Court, therefore the authoritative value attributed to its rhetoric requires the Court's rhetoric to be legitimate and based on statute.<sup>222</sup> The credibility of the Court's rhetoric, as an authoritative source, is dependent upon its consistency when finding and applying international law.<sup>223</sup> Consistency in the meaning and action of the Court and its statutorily authorized rhetoric will inspire confidence in the Court's decisions.<sup>224</sup>

Judicial decisions do not equal State customs or traditions, therefore, the Court must make its character appear authoritative regarding future application of the precedents created by the decisions it has made.<sup>225</sup> State customs and traditions are what the international community equates with customary international law.<sup>226</sup> Accordingly, because judicial decisions do not equate to customary international law in consideration by the Court as a source of law, judicial decisions are relegated to the last enumeration of consideration by the Court.<sup>227</sup> In the absence of a covenant or treaty, and without customary international law or general principles of civilized law to guide them, states will seek out the next enumerated guideline to follow, namely how the Court has dealt with this issue in its past decisions.<sup>228</sup>

In an attempt to preserve the respected ethos of the Court,

222. See *supra* note 31 and accompanying text (discussing authoritative value of Court's rhetoric and examining effect of Court's judicial rhetoric).

223. See *supra* note 8 and accompanying text (discussing ethos of ICJ). "Persuasion is achieved by the [Court's] personal character when the speech is so spoken as to make us think [it] credible." ARISTOTLE, *supra* note 8, at 7. See also *supra* note 4 and accompanying text (discussing credibility of ICJ's rhetoric).

224. See *supra* note 8 and accompanying text (suggesting consistency is important to character of ICJ).

225. See *id.* at 75 (stating importance of judicial discourse in its context as precedent).

226. See *supra* note 31 and accompanying text (discussing judicial precedent as source of law applicable in ICJ).

227. See *id.* (explaining why judicial decisions are relegated to subsidiary status as source of applicable law in ICJ).

228. See *supra* note 58 and accompanying text (discussing when judicial decisions of ICJ are employed by states).

it is necessary for the Court to strive not to contradict itself.<sup>229</sup> The Court presents its past decisions as essential factors in its rationale and interpretation of the applicable international law,<sup>230</sup> yet it refrains from indicating that doing so was obligatory for it.<sup>231</sup> However, States in disputes cite the Court as an authoritative source, according the Court's decisions respect.<sup>232</sup> The value of the Court's decisions is at once treated with high regard by the states<sup>233</sup> and formally dismissed by the Court itself.<sup>234</sup> This contrast between the priority given by the states to the Court's jurisprudence and the priority given by the Court itself undermines the ethos of the Court. Accordingly, the Court must acknowledge the precedent set by its past decisions in order to maintain its credibility.

C. *To Protect the ICJ's Authority, the Statute of the ICJ Should Reflect the Practice of the Court to Use Precedent*

The Court's practice should be clarified by statute. *Stare decisis* should formally bind the ICJ to give credence to the Court's jurisprudence.<sup>235</sup> States rely heavily on the past decisions of the Court as indications of how the Court will possibly rule in the future.<sup>236</sup> The Court relies heavily on its past decisions as a powerful element in the consistency of its interpretations and appli-

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229. See e.g., *Anglo-Iranian Oil Co. Case (Gr. Brit. v. Iran)* (arguing that despite non-binding effect of decisions, ICJ's ethos depends on it not contradicting itself).

230. See *supra* note 30 and accompanying text (discussing ICJ's referencing of past decisions in its explanations and rationales for present cases). In the *Anglo-Norwegian Fisheries case* in which the Court's statement of criteria for the recognition of baselines from which to measure the territorial sea boundaries was incorporated in the 1958 Geneva Convention on Territorial Sea and Contiguous Zone. See *WORLD COURT, supra* note 2, at 86 (illustrating how ICJ used past decisions as rationale for present case).

231. See *supra* note 4 and accompanying text (discussing non-binding nature of ICJ's past decisions). Judge Read in the *Anglo-Iranian Oil Co. case* said that the Court was not obligated to apply the principles of past decisions to present disputes. *Anglo-Iranian Oil Co. Case (Gr. Brit. v. Iran)*, 1952 I.C.J. 93 (July 5) (illustrating that ICJ is not required to reference past decisions).

232. See *supra* note 4 and accompanying text (suggesting that state use of judicial opinions as direction in that state's understanding of law and precedent create clout in those judicial opinions).

233. See *supra* note 3 and accompanying text (discussing usage of precedent by states).

234. See *id.* (discussing usage of precedent by ICJ).

235. See *supra* note 28 (discussing the value and legitimacy that *stare decisis* adds to judicial decisions.)

236. See *id.* (illustrating use of ICJ precedent by states).

cations of international law.<sup>237</sup> By formally reducing a judicial decision to writing, the Court implies that judicial decision is the rational application of law for the issue at dispute. In addition to deciding a case, the Court develops a reasoned system of general guidelines which reduces uncertainty about future deliberations on similar issues in future disputes.<sup>238</sup>

Without binding the Court, the mere option of the Court to reference its past decisions undermines the perceived legitimacy of the Court's rhetoric. Without substantiating the ethos of the Court, states cannot rely on the past interpretations despite the presentation of those interpretations as authoritative in nature.<sup>239</sup> Even when a judicial decision goes against a party to a suit, that party should be able to rely on the fact that when the shoe is on the other foot, the Court will apply the same principles to its benefit.<sup>240</sup> It is reasonable to suppose that, where the ICJ has decided a case, it would have to have serious reasons for thereafter deciding a similar case by adopting a different approach.<sup>241</sup> If the ICJ recognizes the expectation of continuity by states, international law as interpreted and applied by the Court will become normative and predictable.<sup>242</sup> Each time the ICJ resolves a dispute, it will reinforce a habit of state behavior.<sup>243</sup>

Binding the Court to its past decisions would serve to increase the authoritative value of its rhetoric without unduly limiting the flexibility of the Court to make new or innovative law. The ICJ can examine its previous decisions and, when necessary and appropriate, distinguish those cases which should not be applied to the problem at hand. Binding this Court through *stare decisis* will not hamper its interpretive or creative authority. *Stare decisis* will simply serve as the starting point, or anchor, for the

237. *See id.* (illustrating use of precedent by ICJ).

238. *See supra* note 14 and accompanying text (suggesting that ICJ use of precedent eliminates uncertainty by states of future rulings).

239. *See supra* note 31 and accompanying text (arguing that without proper authority substantiating judicial discourse of ICJ, there exists no value to rhetoric of ICJ that states can rely on).

240. *See supra* note 14 and accompanying text (suggesting that states rely on consistent application of its rationale).

241. *See supra* note 150 and accompanying text (explaining that Court does not arbitrarily decide cases).

242. *See id.* (discussing international benefits of consistent application of law).

243. *See id.* (illustrating how state behavior is reinforced by consistent application of law by ICJ).



Court in providing legal guidance for the expanding law of the world community.

Furthermore it rests with the supreme authority of the Court to give authoritative decisions with respect to disputes between members of the world community.<sup>244</sup> The Court's rhetoric exists to affect the giving of decisions,<sup>245</sup> therefore, the Court must not only make their decisions logical and fair, but also make their character appear consistent and statutorily empowered. Sound, consistent, and authoritative character, or ethos, enhances the Court's influence.<sup>246</sup> Accordingly, the statutorily authorized application of precedent by the Court contributes to its ethos.<sup>247</sup> If the Court's judicial rhetoric fails to be effective, then the utilization of the Court may decline and return to the under-utilization of the past.<sup>248</sup>

The Court is, in part, responsible for the international legal order of the world community,<sup>249</sup> therefore, the Court must look to its role in this new era as the reconciler of interests between the developing states and the developed states. Only through the Court's fair, consistent, and statutorily credible guidance will developed countries and developing countries meet at the table of peaceful compromise and dispute resolution. The effectiveness of the Court's judicial rhetoric functions to provide the infrastructure required of the growing and culturally diverse international community. The ICJ's ethos, or character, determines the trust imparted to the Court, either via compromissory clauses or optional clauses.<sup>250</sup>

### CONCLUSION

Implementing a doctrine of *stare decisis* will bestow great credence upon the decisions coming from the ICJ. A statute

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244. See *supra* notes 1, 8 and accompanying text (discussing influence of court's rhetoric to affect disputes).

245. See *supra* notes 1, 2 and accompanying text (defining role of [c]ourt in dispute settlement).

246. See *supra* note 30 (arguing value of strong, authoritative ethos of ICJ).

247. *Id.* (illustrating that statute backing authority of ICJ would make ethos of ICJ stronger).

248. See *supra* note 17 and accompanying text (suggesting that continued use of precedent by states depends on strong judicial authority).

249. See *supra* note 2 (stating ICJ's responsibility to settle disputes between states).

250. See *supra* notes 1, 8 (discussing various methods employed by states to submit disputes to ICJ).

binding the Court will simply allow the Court to say what is written is actually what is done. Binding the Court to its past decisions would serve to increase the rhetorical ethos of the Court. This practice should be reflected in the written statute that defines the Court. Thereafter, the authority vested by states in the jurisprudence of the Court will no longer be built upon that false sense of security called unofficial practice. The jurisprudence of the Court will have a foundation built of statutory and judicial practice, reflecting positively upon the character of the ICJ.