

**THE INTERNATIONAL COURT OF JUSTICE AND POLITICAL
QUESTIONS: DEFENDING THE RULE OF LAW OR A CONTINUATION
OF POLITICS BY OTHER MEANS?**

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ABSTRACT

This paper discusses the role of the International Court of Justice, often referred to as the World Court, with the regard to the politically sensitive disputes arising between sovereign states. As the 'principal judicial organ' of the United Nations, the World Court no longer rules primarily on the technical disputes concerning the territorial and maritime boundaries or the interpretation of commercial treaties. For instance, the World Court has been confronted with an increasing number of disputes regarding the legality of the use of force in armed conflict, the right to collective self-defense, and the threat or the use of nuclear weapons, et cetera. However, many legal scholars have argued that the World Court does not have legitimate authority to decide these highly political matters, and such cases should be considered non-justiciable and dismissed on the ground of a lack of subject-matter jurisdiction.

This paper seeks to challenge these arguments. First, it examines several different distinctions between legal and political disputes in both municipal law and international law. What kind of cases is capable of judicial resolution? Meanwhile, what kind of cases should be categorized as nonjusticiable and resolved by other entities of the United Nations instead? It is argued here that a dispute should be considered justiciable if it is to be resolved by the application of existing rules of international law, regardless what subject-matter the dispute refers to. All contentious cases have political characters to a greater or lesser extent, and no valid distinctions can be drawn in practice. Second, this paper also discusses the Court's judicial responsibility as a legislator in the international sphere. When the applicable legal rules are ambiguous and obscure, the World Court is empowered to fill the legal 'lacunae' in international law. In this way, the World Court has made a remarkable contribution to the development and evolution of international law. The paper stresses that, as the principal judicial entity of the United Nations, the International Court of Justice should never abstain from assisting in the resolution of highly political disputes or engaging in judicial legislation in the international community.

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INTRODUCTION

As the principal judicial entity of the United Nations, the International Court of Justice (ICJ), often referred to as the World Court, has made a remarkable contribution to the development of international law. In recent decades, more and more contentious cases arising between sovereign states have been submitted to the World Court, and these disputes have involved a much greater range of disputes than ever before. Alongside the cases concerning the territorial and maritime boundaries or the interpretation of commercial treaties, the Court is increasingly being called upon to decide more controversial issues. However, many states and legal scholars have expressed concerns with regard to the role of the World Court in highly political matters. In many Western legal systems where the judicial function of the national courts is defined by the principle of separation of powers, the national courts are often seen as an inappropriate forum to adjudicate politically sensitive cases. Likewise, many states have questioned the suitability and competence of the World Court to resolve highly political questions in the international arena.

Since its founding in 1945, the ICJ often faces the vexed question of whether the Court has jurisdiction to preside over the disputes that involve highly political matters. In fact, the bulk of work for the World Court comes from its jurisdiction in contentious cases, in which ‘[the Court] decides, in accordance with international law, disputes of a *legal nature* that are submitted to it by States’.¹ Nonetheless, the Court’s use of this concept has evoked increasing controversy concerning the Court’s jurisdiction and the admissibility of political disputes. What does the Court mean by labeling a dispute as ‘political’ or ‘legal’? What are the attributes of the questions that possess a legal nature? By contrast, what types of cases may instead have a political

¹ “Contentious Jurisdiction,” International Court of Justice, <http://www.icj-cij.org/jurisdiction/index.php?p1=5>.

character and are thus non-justiciable? These questions were raised in a number of cases heard by the World Court in the past, including the *Iran Hostages* case in 1980, the *Nicaragua* case in 1987, the Nuclear Weapons Opinion in 1996, the Bosnia genocide case in 2007, et cetera. For instance, in the *Nicaragua* case, the United States argued that ‘the use of force and collective self-defense raised in the Nicaragua case fall outside the limits of the kind of questions the Court can deal with’.² Although the ICJ ruled against this challenge to its jurisdiction, the classification of international disputes is nonetheless one of the most difficult problems faced by the ICJ today.

If we can comprehend such a perplexed relationship between the political and legal questions arising between sovereign states, we can also clarify the responsibility of many other international judiciaries regarding the settlement of inter-state disputes, and in the development of international law on the whole. The World Court, along with many other international courts and tribunals, often finds itself in a ‘legal versus political’ predicament. The function of the international judiciary in the international community has remained uncertain for decades. Where do the international tribunals stand in the international society? Where are they heading towards in the future? On the one hand, as the world’s leading judicial body, the ICJ was established after the World War II not only to provide peaceful settlement of international disputes, but also to propound ‘the possibility of substituting orderly judicial processes for the vicissitudes of war and the reign of brutal force’.³ On the other hand, the concept of state sovereignty along with the voluntary and precarious nature of their jurisdictions limits the authority and influence of these international tribunals. This explains why the United States has long had an uneasy relationship

² Case Concerning the Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America), Summary of the Summary of the Judgement of 27 June 1986, paras. 32-35, <http://www.icj-cij.org/docket/?sum=367&p1=3&p2=3&case=70&p3=5>.

³ Mohamed Shahabuddeen, “The World Court at the Turn of the Century”, in *The International Court of Justice: Its Future Role after Fifty Years*, Special Issue of the Leiden Journal of International Law, ed. A.S. Muller, D. Raic and J.M. Thuranszky (The Hague, Netherlands: Kluwer Law International), 7.

not only with the World Court, but also with other judicial bodies such the International Criminal Court (ICC). In fact, the United States and the United Kingdom were originally the strong advocates for the idea of the international judiciary in the twentieth century. Nonetheless, many American scholars view the Court as a world judicial body that infringes on the U.S. sovereignty. Hence, the work of international courts and tribunals has become one of the most complicated forms of international cooperation today. Through the examination of the ICJ's judicial function in politically controversial cases between sovereign states, this paper will shed light on the role of the international judiciary in international politics.

This paper presents two arguments. First of all, I shall argue that the ICJ should never decline to resolve any contentious cases between sovereign states purely because the disputes have occurred in political contexts or contain other political aspects. In reality, no international disputes arise in a vacuum, and each legal dispute would inevitably involve political elements to a greater or lesser degree. Hence, no politically contentious cases should be considered nonjusticiable if they can be resolved by the application of existing rules of international law. Secondly, I shall also argue that the World Court should not shy away from hearing politically sensitive cases even when there are no ascertainable rules of international law and the judges have no ready-made solutions at hand. In these cases, the Court should take on its legislative role to consolidate the legal rules that did not exist prior to the adjudication and to fill the *lacunae* in international law. The judicial function of the World Court needs to be viewed more broadly with regard to these contentious cases. Despite the fact that most municipal courts abstain from adjudicating potential political questions in order to maintain their judicial independence, international tribunals should not be held to such doctrine. Judicial reticence on highly political cases at the international level does not automatically represent judicial impartiality.

This paper is organized as follows. Section I provides a brief overview of the classical distinction between political and non-political questions. The traditional view characterizes political questions as the disputes that are of special concern to the vital national interests of the member states. This distinction contends the World Court should dismiss all cases in which the political interests of the sovereign states are put at risk. Nevertheless, such differentiation fails to capture the nature of international disputes between states and overlooks the inherent political character of all contentious cases at the international level.

Section II discusses an alternative distinction between legal and political disputes established in the U.S. jurisprudence. The political question doctrine evinced in American Constitutional Law defines a category of so-called political questions that the federal courts lack the judicial power to answer. The Supreme Court's judgment of *Baker v. Carr* identified six key characteristics that render the 'political questions' nonjusticiable and the federal courts are obligated to dismiss such disputes even if both parties consent to adjudication.

Section III analyzes the relationship between political and legal disputes in the international sphere and discusses whether the World Court should adopt a similar doctrine to test the justiciability of contentious cases between sovereign states. It is argued here that, contrary to the classical distinction between legal and political questions, a dispute is justiciable and capable of judicial resolution if it can be settled via judicial means, regardless of what the subject matter the dispute refers to. This section also examines the need for judicial legislation by the World Court in the gray areas of international law. The scarcity of precedents and the vagueness of the legal norms necessitate the World Court filling the *lacunae* of international law.

Section IV and Section V focus on two examples of the politically sensitive cases submitted to the World Court in the late twentieth century. One is the ICJ's landmark ruling in

the *Nicaragua* case, and the other is the Court's advisory opinion concerning the legality of the threat or use of nuclear weapons. In the case *Nicaragua v. the United States of America*, the ICJ decided the dispute concerning the unlawful use of force falls within the Court judicial function. Notwithstanding the political character of the dispute, the Court's decision proved that such contentious cases can be resolved effectively without overstepping its proper judicial bounds. The discussion of the ICJ's advisory opinion on nuclear weapons illustrates the Court's legislative power when the international tribunals are confronted with novel situations for which the judges have no ready-made solutions at hand.

Section VI tackles the dilemma that the World Court faces while adjudicating politically controversial disputes between sovereign states. Many courts and tribunals encounter the trade-off between the judicial impartiality and efficacy with regard to the adjudication of politically contentious cases. Given the case, the possibility of judicial biases should not be regarded as a reason limiting the judicial function of the World Court.

Section VII introduces two potential objections raised in Sir Hersch Lauterpacht's work *The Function of Law in the International Community*. One objection arises from the doctrine of *de maximis non curat praetor*, which excludes all important issues among sovereign states from judicial determination. The other objection represents a more radical view which argues the only decisive factor of justiciability of international disputes in practice is the willingness of the disputants to submit the case to the World Court. This section responds to each objection and explains how it fails to capture the nature of international disputes and the role of the World Court today.

I Legal and Political Questions between Sovereign States

The distinction between ‘legal’ and ‘political’ questions between sovereign states has been drawn in various ways and has provided different definitions in the past. One of the most commonly used definitions characterizes ‘political’ or nonjusticiable disputes as the cases that involve the vital national interests of the disputants. The resolutions of such disputes between nations would inevitably impinge upon the sovereignty of the states. Accordingly, legal questions refer to the disagreements which ‘do not involve the life and future fate of nations, no matter in whose favor a judicial judgment may be rendered’.⁴ Despite a theoretically clear division between legal and political issues, a valid distinction cannot be drawn by most international tribunals in practice. In terms of the ICJ’s jurisdiction in contentious cases, the Court defines an international legal dispute as a ‘disagreement on a question of law or fact, a conflict, a clash of legal views or of interests’.⁵ The reason that drawing such distinction between legal and political questions is particularly difficult for international tribunals is that all the disagreements between sovereign states essentially arise from the desire to protect their vital national interests. Even the cases concerning the territorial and maritime boundary disputes such as the delimitation of the continental shelf between Nicaragua and Colombia in 2001, albeit highly technical, would inevitably involve the clash of political interests and the long-term hostility between the two parties. Hence, if the term ‘political’ is defined as the cases in which the national interests of the state parties are threatened, none of the contentious cases on the World Court’s docket would be considered justiciable.

⁴ Thomas Willing Balch, *Legal and Political Questions between Nations* (Philadelphia, 1914), 131.

⁵ The Statute of the International Court of Justice. Art. 36.

Every sovereign state is at its core a political institution, and thus all the disagreements which affect it as a whole are therefore political.⁶ Furthermore, the disagreements between sovereign states by their very nature are very likely to occur in political contexts.⁷ The contentious cases ‘even if of a trifling origin, are important because the atmosphere of international relations, with the menacing shadow of force lurking behind a precarious recognition of the reign of law, makes them so’.⁸ In comparison with many civil cases heard by the domestic courts, the disputes between sovereign states, who have been facing each other armed to the teeth for decades, always contain more or less political significance. For example, on November 29, 1979, the United States instituted proceedings against the Islamic Republic of Iran in respect of the seizure, hostage taking, and detentions of the United States diplomatic and consular staff in Tehran. The United States contended that the government of Iran had violated international legal obligations for tolerating, encouraging, failing to prevent and punish the hostage taking conduct. In this case, the government of Iran challenged the ICJ’s jurisdiction on the ground that the dispute brought by the United States ‘only represents a marginal and secondary aspect of an overall problem, one such that it cannot be studied separately, and which involves, inter alia, more than 25 years of continual interference by the United States in the internal affairs of Iran’.⁹ Indeed, the origin of the Iran hostage crisis can be traced back to 1951 when Iran’s newly elected Prime Minister Muhammad Mossadegh planned to nationalize Iran’s oil industry, which would undoubtedly threaten the strategic interests of the United States over

⁶ Hersch Lauterpacht, *The Function of Law in the International Community* (Oxford: Oxford University Press, 1933), 142.

⁷ Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), Judgement of 24 May 1980, ICJ Reports 3, para. 37.

⁸ Lauterpacht, *The Function of Law in the International Community*, 153.

⁹ Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran) [1980] ICJ 1.

Iran's oil reserves. Anti-American sentiment had already been bubbling beneath the surface when the Shah's government came to power in August 1953. When President Carter allowed the Shah of Iran, Mohammed Reza Pahlavi, to enter the U.S. for the medical treatment of an advanced malignant lymphoma in 1979, long-held anti-American rage in Iran was triggered: a group of pro-Ayatollah students seized sixty-six US diplomats and embassy employees on November 4, 1979.

In the same way, in 1986, the government of Nicaragua brought a claim against the United States in respect of the threat or use of force against Nicaragua and the intervention in Nicaragua's internal affairs. However, this dispute also only forms one element of a broader political dispute between two states during the Nicaraguan revolution. Immediately following the overthrow of the Somoza dictatorship by Sandinistas in 1979, the Regan administration began to allocate both financial and material aids to the Contras, and later secretly and illegally train and arm the Contras in order to destabilize the Sandinista regime.

As one can see from these cases brought to the Court by the member states in the past, the concept of 'legal disputes' is a crucial but unfortunately a poorly defined term. On the one hand, it describes the exact scope of Court's judicial power and imposes proper limitations on the Court's judicial function. On the other hand, since all disputes between sovereign states arise in political contexts, how does the ICJ decide whether a question is or is not legal? As Baron Marschall von Bieberstein pointed out at the Hague Peace Conference in 1907, 'the word *legal* is the nail on which we have hung the whole system of obligatory arbitration... if this nail is not solidly fastened, everything hung on it will fall to the ground'.¹⁰ Hence, among these contentious cases brought to the ICJ by the sovereign states, a sharp line between legal and political

¹⁰ Proceedings of the Hague Peace Conference, Carnegie Endowment for International Peace, Vol.II, 50.

problems cannot be easily drawn based on the subject-matter or the factual matrix of particular cases.

Here arises the question: are these contentious cases, which all have political factors to a greater or lesser degree, justiciable? For example, in the United States, the Framers of the Constitution delegate separate powers to three different branches of the federal government: the legislative branch, the executive branch, and the judicial branch. The courts shall exercise the judicial power and decide cases and controversies arising under the Constitution and under the laws and treaties made by the political branches. Firstly, the concept of separation of powers allows the judicial branch to interpret the laws and to exercise their judicial powers without interference from Congress, the President, or powerful individuals or businesses. Secondly, such principle prevents the federal courts from abusing their constitution powers to make law or to extend the existing law beyond the limits of proper legal interpretation, which is considered a political responsibility and thus a political question. Should this doctrine also apply to the international courts and tribunals? Should the World Court be prevented from adjudicating a certain group of disputes in which highly political factors are predominant, in order to maintain the Court's judicial impartiality? Although many international disputes in which the political element predominates are often seen as unsuitable for arbitration, there has not been any established doctrines under international law that is capable of assessing the admissibility of contentious cases.

Before answering these questions, I will first provide a brief overview of the political question doctrine in U.S. jurisprudence in which the federal courts would forego their judicial authority when a question was constitutionally committed to other political branches. I will then discuss how such legal framework applies to the justiciability question in international law and

how the World Court should deal with the politically controversial cases between sovereign states.

II *Baker v. Carr* and the Political Question Doctrine in U.S. Jurisprudence

Within many municipal law systems, national courts would refuse to hear a case if it involves a *prima facie* question of a political nature. As noted by the Constitution of the United States, the federal courts shall never adjudicate controversies when a political branch would be a more proper forum to hear the case. This widely accepted criterion is referred to as the ‘political question doctrine’. As stated in the Article III of the Constitution, the federal courts are required to dismiss such political questions as nonjusticiable even if all parties consent to adjudication. For instance, the conduct of foreign relations is committed by the Constitution to the executive and legislative branches of the government, and the propriety of what may be done in the exercise of their political power is not subject to judicial inquiry or decision.¹¹ The U.S. Supreme Court made it very clear in the landmark case *Baker v. Carr* in 1962, in which the redistricting of state legislative districts is not a political question and thus can be resolved by the federal courts. In this case, the Supreme Court detailed six factors that should be considered in order to define whether the existing question present is justiciable. The Supreme Court held:

‘Prominent on the surface of any case held to involve a political question is found:
(1) a textually demonstrable constitutional commitment of the issue to a coordinate political department;
(2) or a lack of judicially discoverable and manageable standards for resolving it;
(3) or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion;
(4) or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government;
(5) or an unusual need for unquestioning adherence to a political decision already made;

¹¹ Oetjen v. Central Leather Co., 246 U.S. 297 (1918).

(6) or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.¹²

The U.S. Supreme Court did not consider this case unsuitable for judicial resolution based on the nature of the disagreement. In fact, many questions involving the distribution of political strength for legislative purposes has already been brought to the Supreme Court on numerous occasions in the past.¹³ Instead, the Court explained that the fundamental difference between legal and political issues is contingent upon the fact that whether the question brought to the Court is capable of judicial resolution.

In *Baker v. Carr*, the Supreme Court provided a legal framework by identifying six key characteristics that classify cases as political and thus nonjusticiable. First of all, the courts should defer to the political branches of government when the text of the Constitution makes a ‘demonstrable’ commitment to one or both of those branches.¹⁴ For example, in the case of *Nixon v. United States et al.*, the Supreme Court held that the question of whether the Senate violated the procedure for impeachment proceedings was nonjusticiable because the Impeachment Clauses have committed to the Senate to have the sole power to try all impeachments. Second, the claim is political and therefore nonjusticiable when, within the exclusive competence of the courts, there is no existing law nor corresponding judicial methods for the courts to resolve the issue. For example, the questions concerning foreign relations or the conduct of war are the sole responsibility of the executive branch. This also explains why ‘there [often] exists no standard ascertainable by settled judicial experience or process by reference to which a political decision affecting the question at issue between the parties can be judged’.¹⁵

¹² *Baker v. Carr*, 369 U.S. 186 (1962).

¹³ *Baker v. Carr*, 369 U.S. 186 (1962), 369.

¹⁴ Kattie Palms, “A Missed Opportunity to Exercise ‘Passive Virtue’: Applying the Political Question Doctrine to *Bosnia v. Serbia*,” *University of California, Davis*, vol. 15: 2 (2009), 252.

¹⁵ *Baker v. Carr*, 369 U.S. 186 (1962), 282.

Hence, the courts must dismiss these cases for a lack of jurisdiction and judicial capacity. Third, a political question also exists when the court's judicial resolution would require the courts to overstep their proper judicial bounds. The political question doctrine in *Baker v. Carr* serves as 'a means to avoid passing on the merits of a question when reaching the decisions would force the [Supreme] Court to compromise an important principle or would undermine the Court's authority'.¹⁶ If a federal court is asked to make new laws or to extend existing legal rules beyond proper interpretation, the court would inevitably transgress the bounds of its constitutional limitations.

The judgment of *Baker v. Carr* provides a valuable legal framework for the controversial questions which may arise in the future. A meaningful political question doctrine allows to the national courts to decide whether another political branch would be a more proper forum to hear the case. In addition, abstention from judicial review of political questions also aims to protect the federal courts' authority and the integrity of the separation of powers. Following this approach, as the principal judicial entity of the United Nations, should the ICJ admit an international variant of the political question doctrine to ensure the Court's judicial independence and impartiality? Should the Court be allowed to defer its judgment on certain issues to the UN's political organs? Are the General Assembly and the Security Council better suited to resolve these contentious disputes?

In the next section, I will apply the political question doctrine evinced in the U.S. jurisprudence to the justiciability question confronted by the World Court, particularly the ICJ's jurisdiction in contentious cases in which it helps the court to deal with politically sensitive questions effectively and credibly. It is very important to bear in mind that 'a system of

¹⁶ Marcella David, "Passport to Justice: Internationalizing the Political Question Doctrine for Application in the World Court", 40 Harv, 81 (1999), 129.

constitutional government build on the separation of powers' varies significantly from the political as well as judicial structure of the United Nations.¹⁷ Hence, even though the political question doctrine offers invaluable guidance for international tribunals, it is unreasonable to fully embrace such principle without considerable adaptation and label all such cases as 'beyond judicial cognizance'.

III The World Court and Political Questions

Every dispute between sovereign states inevitably involves political elements to a greater or lesser degree. Many legal scholars have found the traditional distinction between legal and political issues unsatisfying. As Hans Kelson put it, 'the legal or political character of the dispute does not depend, as the traditional doctrine seems to assume, on the nature of the dispute, that is to say, on the subject matter to which the dispute refers, but on the nature of the norms to be applied in the settlement of the dispute. A dispute is a legal dispute if it is to be settled by the application of legal norms, that is to say, by the application of existing law'.¹⁸ In reality, a number of politically controversial matters do not always fall outside of the scope of the judicial power of the courts. For instance, questions concerning redistricting, gerrymandering, and the illegal use of campaign funds and resources are undeniably legal questions, despite their subject matter and political significance. As stated by the political question doctrine in *Baker v. Carr*, the true differentiation comes down to whether the absence of 'judicially discoverable and manageable standards' would inhibit the courts from reaching a final decision. In this way, the presence of national interests should not invalidate the efficacy of the rules of international law.

¹⁷ Louis Henkin. "Is There a 'Political Question' Doctrine?" *The Yale Law Journal*, vol. 85, no. 5 (1976), 597.

¹⁸ Hans Kelson and Robert W. Tucker, "Principles of International Law," (*Holt, Rinehart and Winston*, 1966), 525.

In fact, political interests and judicial settlement are not mutually exclusive. It is not hard to see that disputes in which the states' political interests are at stake could also fall within a category of issues in relation to which relevant legal rules do exist.¹⁹ Along these lines, the true distinction between legal and political disputes becomes 'the distinction between a political method and a legal method of solving disputes', regardless the nature of the disagreement between states.²⁰

Legal and Political Methods

Suppose, for any legal dispute, a technical procedure or a legal method can reduce the given dispute into a form which renders it manageable and thus justiciable²¹, what counts as 'a legal method' or 'a technical procedure'? A central question in such classification of international disputes is, then, whether there is law. If the ICJ considers legal disputes as such differences between the sovereign states that are capable of judicial resolution by 'the application of existing and ascertainable rules of international law', what are these existing and ascertainable rules? What about the disputes of those areas where the law is unclear or is in need of developments and modifications? Are there any contentious cases in respect of which international rules do not exist, and thus which no legal judgment can therefore be given?²²

A common *a priori* assumption is that there exists an objective standard to determine whether or not there are applicable rules to resolve a particular dispute.²³ Certainly, for most national courts, it is not hard to determine the existence of ascertainable rules. The legislative branch of a constitutional government exercises its legislative power through an established

¹⁹ Rosalyn Higgins, 'Policy Considerations and the International Judicial Process,' *The International and Comparative Law Quarterly*, Vol. 17 (1968), 74.

²⁰ *Ibid.*

²¹ *Ibid.*

²² Higgins, "Policy Considerations and the International Judicial Process," 67.

²³ *Ibid.*

legislative process. For example, in the United States, the legislative process is prescribed by the Constitution and enforced by the Congress. After a bill is introduced by a member of Congress, it must be approved by the committees before being debated and voted by the House of Representative and the Senate. If the President decides to either sign the enrolled bill or take no actions for ten days while the Congress is still in session, the bill becomes the law. In contrast, as for international law, such common assumption can be dangerously misleading. There is no central law-making body or established legislative process in international law. Treaty-making, the formation of customary international law, and other ‘general principles’ of law are much less centralized and hierarchical. Besides, there is no written constitution of international law which regulates the nature, principles and interrelation of sources of international law. As a result, what becomes tricky especially for many international tribunals is the absence of a fixed set of neutral rules that the judges can directly apply to the disagreement between the states.

Another difficulty of identifying the ‘legal method’ stems from the constant changes and development of international law. According to the Article 38 of the International Court of Justice Statute, the Court shall apply:

‘a. international conventions, 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. ... 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.’²⁴

Even though there is widely accepted agreement regarding the sources of international law and these sources are explicitly spelled out in the statute of ICJ, there is not always agreement in terms of whether a particular decision can be validly derived from these sources.²⁵ The

²⁴ The Statute of the International Court of Justice, Art. 38.

²⁵ Anthony H. Lesser “H.L.A. Hart on International Law”, Volume 11, April-September (2014), <http://intertheory.org/HartandInternationalLaw-AHLesser.htm>.

international law-making process is dangerously uncertain and ambiguous. For instance, customary international law can be established by widespread and consistent state practice or *opinio juris*, which refers to the belief that an action is carried out in conformity with the international legal obligations. Nevertheless, in order to amount to ‘a general practice accepted as law’, there is no set proportion of the states in the world that must confirm the existence of a rule. The state practice does not need to be absolutely uniform. Certain deviations of individual states do not necessarily lead to the conclusion that no relevant rule has been consolidated. The inherent obscurity of the legislative process of international law renders the common *a priori* assumption problematic. One difficulty with current legal accounts of the sources of international law is their relative blindness to the important changes.²⁶ The judicial decisions made by the World Court not only involve the reference to a predetermined collection of objective rules or the impartial application of past decisions to the settlement of the dispute, but also necessitate ‘a continuing process of making authoritative decisions’.²⁷ The adjudication of contentious cases entails a continuous process of fifteen elected judges at the World Court making authoritative decisions in response to claims which various parties are pressing upon them, in respect of various views and interests.²⁸ As illustrated by the second characteristic of the political question doctrine in *Baker v. Carr*, what the ICJ must do while deciding the justiciability of a contentious case is to first decide the availability of judicially manageable standards. However, in contrast to *Baker*, justiciability is a much less static concept in international law. The formation of judicially discoverable and manageable standards encompasses ‘the making of decisions by a multitude of

²⁶ Samantha Besson, “Sources of International Law”, in *The Philosophy of International Law*, ed. by Samathan Besson and John Tasioulas (Oxford: Oxford University Press, 2010), 164-165.

²⁷ Higgins, “Policy Considerations and the International Judicial Process,” 74.

²⁸ *Ibid.*

nations, on an infinite number of questions, and in greatly varying circumstances'.²⁹ The number of useful legal standards for the ICJ has been continuously growing, and more applicable rules have been established to assess the questions between sovereign states. Therefore, a contentious case between the sovereign states can *become* justiciable, even though it may not have been capable of judicial solutions due to the lack of judicially manageable standards in the past.

Briefly put, the true distinction between legal and political disputes does not refer to the nature of the dispute itself. Rather, it illustrates the decision-making process which shall be employed in respect of the disputes between states.

Hart-Dworkin Debate: What if there are no laws? Law-interpretation or law-creation?

At this point, to assess the justiciability of contentious cases in relation to the specific areas in which the law is unclear or even outdated, it helps to introduce the famous 'Hart-Dworkin' debate. What determines the existence of these rules of international law? Is the existence of international law determined by social facts alone or by the contents of moral law as well? In this section, I shall argue for H.L.A. Hart's legal positivism that the availability of legal methods is governed by social practice rather than the existence and content of the moral law.

As Hart noted in *The Concept of Law*, international law has not yet sufficiently developed to be regarded as a legal system, but a set of primary rules. Hart's theory introduced a fundamental differentiation between primary and secondary rules. According to Hart, primary rules contain a collection of rules that stipulate agents to engage in or abstain from certain activities. That is to say, these primary rules impose duties, regardless whether the agents wish to or not. Secondary rules, on the other hand, are parasitic upon the primary rules, and they control

²⁹ Shahabuddeen. "International Criminal Justice at the Yugoslav Tribunal: A Judge's Recollection", 82.

the operation of primary rules. Secondary rules are often referred to as the rules about rules, as they provide how primary rules are can be established, replaced, modified, or annulled. In contrary to primary rules, secondary rules confer powers and privileges in both public and private spheres.³⁰ With respect to the international legal order, almost all legal rules are generated from the basic contractual agreements between sovereign states or from *jus cogens* norms such as the prohibition of the use of force or the prohibitions against genocide and slavery. Compared to the hierarchical structure within many municipal legal systems, the law-making mechanism in the international sphere bears more uncertainty. The international judiciary is constantly constrained by the lack of secondary rules. The scarcity of secondary rules at the international level undermines the ICJ's capability to authoritatively identify or modify the rules, or to determine and enforce obligations in a dispute among its members.³¹ Following this line of arguments, if international law contains only rules, and once the rules 'run out', so must the law.³² International law is 'law' but not a 'legal system'. Legal obligations can only be created from fixed legal rules, and when legal rules are inapplicable, legal obligations do not exist. In order to remedy the problem of uncertainty, Hart's positivistic theory believes that 'if a case is not clearly covered by an existing legal rule, either because there seems to be no applicable legal rule or because the rule contains vague or ambiguous terms, the deciding judge cannot apply the law but must exercise his or her own discretion to resolve the case'.³³ To put it in another way, when the legal rules are found inapplicable, judges by necessity must look beyond the law to decide the case. The rule of recognition empowers the courts and judges to

³⁰ H.L.A. Hart, "The Concept of Law," *Clarendon Law Series*, (Oxford: Oxford University Press, 1963), 79.

³¹ Mehrdad Payandeh, "The Concept of International Law in the Jurisprudence of H.L.A Hart," *The European Journal of International Law*, Vol. 21, no.4 (2011), 973.

³² Scott J. Shapiro, "The 'Hart-Dworkin' Debate: A Short Guide for the Perplexed," *University of Michigan Law School, Public Law and Legal Theory Working Paper Series*, Working Paper No. 77 (March 2007), 15.

³³ Shapiro, "The 'Hart-Dworkin' Debate: A Short Guide For The Perplexed," 8.

make the authoritative determination with regard to a violation of a primary and to formulate new primary rules.

Nonetheless, many Dworkinians would find Hart's discretion thesis and the World Court's law-creation power implausible. According to Ronald Dworkin's theory on the nature of law, the existence of law and its content are not determined by social facts but are governed by the moral law. For him, Hart's legal positivist thinking overlooks the fact that, even though no rules are clearly applicable in many cases, legal principles are often binding on judges because of their intrinsic moral properties.³⁴ Dworkin theory highlighted a fundamental difference between legal principles and legal rules. Rules are usually applied in an 'all-or-nothing' fashion, and they necessitate a particular decision.³⁵ However, even though principles do provide justificatory support during the course of judicial activity, they are not conclusive and they do not necessitate a particular decision.³⁶ The notion of principles and the distinction between legal rules and principles are crucial in Dworkin's theory: 'once we identify legal principles as separate sorts of standards, different from legal rules, we are suddenly aware of them all around us. Law teachers teach them, law books cite them, legal historians celebrate them'.³⁷ With reference to Dworkin's theory, if these legal principles are binding, either explicitly or implicitly on the judges, they must be law and so the cases which can be resolved by the application of such principles should be considered justiciable. Hence, international law comprises not only the fixed legal rules that have been laid down by legislators but also the wider principles and norms behind those legal rules. Contrary to Hart's legal positivism, even as the rules run out, there could be other applicable principles or norms within the international legal system. International judges are

³⁴ Shapiro, "The 'Hart-Dworkin' Debate: A Short Guide For The Perplexed," 14.

³⁵ Ronald M. Dworkin, "The Model of Rules," *The University of Chicago Law Review*, Vol. 35:14 (1967), 25.

³⁶ Dworkin, "The Model of Rules," 9.

³⁷ Dworkin, "The Model of Rules," 29.

undoubtedly bound by such law because of its moral content and what the judges are required to do is not to create new rules of law but to apply legal principles. Therefore, most Dworkinians believe that the primary judicial function of the World Court is not to create new rules or to fill the legal gaps in international law, but to only interpret the existing rules and make them the ‘best possible example of the form or genre to which it is taken to belong’, namely the ‘constructive interpretation’.³⁸

In my opinion, in spite of the fact that Dworkin’s theory does offer some invaluable insights into the roles of legal norms and principles, the rules of international law lean towards Hart’s legal positivist theory. Whereas these wider legal principles and norms behind the legal rules permeate the international community, they are constantly put in jeopardy by the concept of state sovereignty which, as Lauterpacht put it, ‘deduces the binding force of international law from the will of each individual member of the international community’.³⁹ No sovereign states are bound by any legal principles unless the states either expressly or tacitly accepted them. The World Court does not derive its judicial function from the moral law, but from the consent of individual states to delegate their judicial power to a third party. This is especially true for the international adjudication system today, where an increasing number of highly specialized international tribunals and even regional bodies are capable of resolving disputes between states. In this way, sovereign states have obtained more much power to decide and choose which international tribunal mechanism would provide them a favorable judgment and best serve their national interests. Furthermore, what becomes problematic, especially on the subject of wider legal norms and principles in the international sphere, is that individual states may interpret the

³⁸ Ronald Dworkin, *Law’s Empire*, (Cambridge, Massachusetts: Belknap Press of Harvard University Press, 1986), 51.

³⁹ Lauterpacht, *The Function of Law in the International Community*, B2.

content of the exactly same legal principles in completely different ways. For instance, the principle of proportionality, which entails the belligerent parties in armed conflict to not inflict collateral damage which is excessive for their legitimate military objection, is widely accepted by states. Nonetheless, this principle is dangerously vague. The absence of absolute standards allows many states argue their military objectives are ‘legitimate’ and their use of weapon is ‘proportionate’ to these objectives. In a word, owing to the doctrine of sovereignty, the absence of consensus among states, along with the indefiniteness of substantive rules, such wider principles behind the legal rules can hardly be incorporated into the realm of international law. Rather, in accordance with the positivist doctrine at the international level, such deficiencies and inconsistencies constitute the *lacunae* in international law.

Following this line of argument, what kind of role should the ICJ play in the gray areas of international law? Suppose a dispute arising between states is only considered justiciable if it can be resolved by the application of ascertainable rules, should the World Court still look beyond the law to decide the dispute and fill the unequivocal discrepancies in international law? Should the Court categorize such contentious cases as nonjusticiable and then defer the decision-making power to other organs of the UN on the grounds of a lack of jurisdiction?

In order to answer these questions, it is very important to keep in mind the various roles the World Court performs. In addition to its dispute settlement role as an adjudicator, the ICJ also performs the legislator role as well as the supervisory role in many cases. In regards to the existence of gaps in international law, the World Court is obligated to fulfill its judicial duty to pronounce the law. A frequently overlooked source of international law is the judicial decisions in addition to ‘the teachings of the most highly qualified publicists of the various nations’⁴⁰,

⁴⁰ The Statute of the International Court of Justice, Art. 38.

which serve as a subsidiary source of the international legal framework. In other words, although the World Court does function as a technical device for the settlement of legal disputes between states, its role is much bigger and is in need of a broader view of its judicial responsibilities. In recent years, the World Court has had a quite busy docket as more hard cases were being referred to it, and its rulings have acquired more weight and authority. Facing the exigencies of novel cases, the Court's principal function is to provide clear and coherent principles and rules for the routine ordering of a society governed by the rule of law.⁴¹ Whilst the World Court should not sacrifice its very legal character as the principal judicial entity of the United Nations, the Court has been urged to engage in judicial legislation in recent decades. As Hart suggested in the discretion thesis, judges do indeed have the law-making power and should exercise their discretion in the cases that cannot be decided merely by interpreting and applying the law. Accordingly, the World Court is empowered with the quasi-legislative authority to render judgment *sub specie legis ferendae*, to create or to consolidate rules that did not exist prior to the adjudication. The Court's law-making role and the function of filling legal gaps have become increasingly noticeable, especially in the field of maritime delimitation. Contentious cases concerning maritime boundaries are distinguished by their unusual technical complexity and political relevance.⁴² These cases often involve states' strategic interests in terms of the economic potential of living marine resources. However, in a world where the approximately 60 percent of maritime boundaries are still to be defined, the number of precise rules that could be applied to inter-state maritime delimitation were troublingly limited. The World Court along

⁴¹ Robert Y. Jennings, "The Proper Work and Purposes of the International Court of Justice," in *The International Court of Justice: Its Future Role after Fifty Years*, Special Issue of the Leiden Journal of International Law, ed. A.S. Muller, D. Raic and J.M. Thuranszky (The Hague, Netherlands: Kluwer Law International), 42.

⁴² Jorge Antonio Quindimil Lopez. "Maritime Delimitation", Oxford Bibliographies, Last Modified on 15 January 2015, <http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0119.xml>.

with other international tribunals have put forward a number of fundamental norms and concepts which are essential to the law of maritime delimitation today, such as the notions of ‘equitable principles’, ‘natural prolongation’, ‘relevant circumstances’, ‘the test of proportionality’, and ‘costal configuration’, et cetera.⁴³ The Court’s position was given clear expression in the case *North Sea Continental Shelf* in 1969. The ICJ held that equidistance had not acquired the status of customary International law and was inapplicable at the time, because the existence of the required *opinio juris* had not yet been proved. Notwithstanding the absence of specific norms of customary international law governing maritime delimitation, the World Court did not disclaim jurisdiction or considered the disputes as unregulated by the existing rules of international law. Confronted with this novel situation, the judges exercised their judicial discretion by bridging the discrepancy of delimitation based on equitable principles which were indirectly covered by existing international law. The process of progressive definition and the development of the fundamental rules governing maritime delimitation has been mainly undertaken by international tribunals. As one can see, the predominance of broad principles coupled with the lack of detailed rules necessitate the World Court’s law-creating role.

Perhaps for many U.S. courts and jurists, the proposition that the judges shall decide a controversial case *primaie impressionis* by creating new rules in the exercise of discretion is inconceivable and even unreasonable. In adherence to the doctrine of separation of powers, the federal courts frequently display a 'political question mentality' by disclaiming jurisdiction and refusing to rule on certain disputes because they are ‘political’.⁴⁴ Nevertheless, the ICJ tends to

⁴³ Juan Jose Quintana. “The ICJ and the Formulation of General International Law,” in *The International Court of Justice: Its Future Role after Fifty Years*, Special Issue of the Leiden Journal of International Law, ed. A.S. Muller, D. Raic and J.M. Thuranszky (The Hague, Netherlands: Kluwer Law International), 374.

⁴⁴ Forsythe, “The International Court of Justice at Fifty,” 389-390.

display a 'legal question mentality' by developing arguments to allow the Court to rule on these disputes on the basis of a law that did not exist at the time the disputes arose.⁴⁵ In reality, the ICJ has never refused to adjudicate on the disputes simply because either they only represent one aspect of a broader political question or there is an alleged deficiency in the legal rules. One important reason is that, in many cases, the Court's refusal to rule on the dispute can lead to undesirable political consequences. In recent years, the World Court has taken on more responsibilities to develop jurisprudence, and to provide a forum in which all the sovereign states would appear as equals before the law regardless their relative economic or military power. For instance, in the *Nicaragua* case, had the ICJ ruled in favor of the U.S. motion to dismiss the case for lack of jurisdiction or to defer the decision-making power to the Security Council, it would have inherently worked to the political advantage of the United States.⁴⁶ As one of the permanent member the United Nations Security Council, this would be a satisfactory situation for the United States since it has the veto power and can simply dismiss any Security Council action. Nonetheless, the United States does not have the superpower to bring its political weight to bear in the World Court, where the parties appear on the basis of equality, and where legal considerations play a dominant role in the outcome.⁴⁷ To push this point further, when the ICJ refuses to rule on the merits of a dispute, its inaction does not necessarily make the World Court become a more judicially independent and thus more judicially impartial at resolving disputes. Quite the opposite, the World Court's non-participation can also render a 'political' act in favor of the states that stand to benefit from the status quo.⁴⁸ If the Court chose to not to give a

⁴⁵ Ibid.

⁴⁶ Forsythe, "The International Court of Justice at Fifty," 389.

⁴⁷ Andronico O. Adede. "Judicial Settlement in Perspective," in *The International Court of Justice: Its Future Role after Fifty Years*, Special Issue of the Leiden Journal of International Law, ed. A.S. Muller, D. Raic and J.M. Thuranszky (The Hague, Netherlands: Kluwer Law International), 56.

⁴⁸ Forsythe, "The International Court of Justice at Fifty," 389.

substantive ruling regarding the U.S. mining of the harbors and attacks on ports against the government of Nicaragua, this would automatically work to the political advantage of the Reagan administration supporting the *contras* as well as other military activities in the region. Hence, in this case, the World Court played a properly active role and had not, as the United States argued earlier, exceeded its prudent limitations. The confidence in the World Court's competence of dealing with the legal issues reached a high peak after the Court's landmark ruling on the merits of *Nicaragua* case.⁴⁹

Nonetheless, nothing I have discussed in this paper is meant to deny any forms of judicial restrictions imposed upon the judicial function of the World Court, nor the Court has jurisdiction to hear any contentious cases arising between the sovereign states, irrespective of their subject matters or the status of applicable legal rules. Even though there is no established political question doctrine at the international level, this does not indicate that there is no limitation on the judicial activity of the Court in relation to the contentious cases involving highly political matters.⁵⁰ Without a doubt, not all contentious cases brought to the World Court are justiciable and thus are capable of judicial resolution. It is a mistake to regard the exercise of discretion as unrestrained judicial power through which the judges of the World Court can create whatever legal rules they like, regardless of their underlying norms and principles which are widely recognized and accepted by the international. As Judge Thomas Bingham noted, 'the rule of law does not require that official or judicial decision-makers should be deprived of all discretion, but

⁴⁹ Adede, "Judicial Settlement in Perspective," 56.

⁵⁰ Takane Sugihara, "The Judicial Function of the International Court of Justice", in *The International Court of Justice: Its Future Role after Fifty Years*, Special Issue of the Leiden Journal of International Law, ed. A.S. Muller, D. Raic and J.M. Thuranszky (The Hague, Netherlands: Kluwer Law International), 138.

it does require that no discretion should be unconstrained so as to be potentially arbitrary. No discretion may be legally unfettered.’⁵¹

In the next section, I will examine two politically sensitive questions brought to the International Court of Justice in the past. One contentious case focuses on the question of the use of force, and the other is on the legality of the threat or use of nuclear weapons. Both of these questions have proved to be extremely controversial, either because of its substantive nature or because of the scarcity of legal rules in international law. Nevertheless, in both cases, the World Court did not refuse to deal with them on the ground of either the controversial subject-matter of the dispute or the absence of any applicable law.

IV The World Court’s Ruling in the *Nicaragua* Case as an Example

In recent decades, the World Court has played an irreplaceable role in the development of international law with regard to the use of force. The World Court’s decision in the *Nicaragua* case has become one of the most prominent decisions the Court has ever made. Among all the politically sensitive issues concerning the collective self-defense or the use of force has brought to the World Court, only few contentious cases had received the Court’s judgments on the merits until 1986 and the Court has only quite recently become engaged in the disputes in relation to the use of force.

In the *Case Concerning Military and Paramilitary Activities In and Against Nicaragua*, the World Court faced the vexed question of how to distinguish between legal and political issues in a claim that ‘the unlawful use of force, breach of the peace and acts of aggression’ by the United States against the Nicaraguan government violated the customary international law.

⁵¹ Thomas Bingham, *The Rule of Law*, (England: Penguin Books, 2011), 48.

On April 9, 1984, the Nicaraguan government initiated proceedings against the United States, charging the United States with the violations of customary international law through the use of military force against the left-wing government, the mining of Nicaraguan harbors, and the intervention in its internal affairs in violation of its sovereignty, territorial integrity and political independence.⁵² On May 10, 1984, the ICJ ordered that the case would proceed in two separate stages. First of all, the ICJ would consider the admissibility of the Nicaraguan application and decide whether the Court had jurisdiction to hear the case. Second, if the ICJ indeed have jurisdiction, the Court would continue to hear the merits of the case: had the United States acted in violation of Article 2, paragraph 4 of the United Nations Charter and of a customary international law obligation to refrain from the threat or the use of force against another state? Did the U.S. breach the customary international law obligation by intervening in the internal affairs of Nicaragua and training and financing its Contra forces? Did the U.S. violate the national sovereignty of Nicaragua?

Despite the U.S.'s consent to the compulsory jurisdiction of the ICJ under Article 36(2) Optional Clause of the Statute, the Court faced a strong opposition to its jurisdiction and to the admissibility of Nicaragua's claims. The United States advanced two main arguments against the Court's jurisdiction over this dispute on the ground that the subject matter was not suitable for the Court.⁵³ On the one hand, according to the United States, the World Court was not designed to become involved in ongoing military conflicts or the collective self-defense, but to resolve more technical issues such as the disputes over fishing rights, interpretation of commercial

⁵² Case Concerning the Military and Paramilitary Activities In and Against Nicaragua (*Nicaragua v United States of America*) [1986] ICJ 1, Jurisdiction of the Court and Admissibility of the Application, Judgement of 26 November 1984.

⁵³ Christine Gray. "The ICJ and the Use of Force", in *The Development of International Law by the International Court of Justice*, ed. Christian J. Tams and James Sloan (Oxford: Oxford University Press, 2013), 5.

treaties, and determining territorial and maritime boundaries between states.⁵⁴ Therefore, the disagreement concerning an ongoing armed conflict involving the unlawful use of force is one with which the ICJ cannot deal effectively without overstepping proper judicial bounds.⁵⁵ On the other hand, an allegation of unlawful use of armed force is matter committed by the United Nations Charter and by practice to the ‘exclusive competence’ not of the International Court of Justice, but of the United Nations Security Council.⁵⁶ In fact, these two arguments are not completely separate. The absence of ‘judicially discoverable and manageable standards’ for resolving the dispute strengthens the U.S.’s second conclusion that there is a textually demonstrable commitment to another branch of the United Nations. Hence, according to the United States, Nicaragua’s claims concerning the unlawful use of force that involve highly political questions were thus not susceptible of judicial resolution.⁵⁷

As stated in the article 36(6) of the Statute, ‘in the event of a dispute as to whether the court has jurisdiction, the matter shall be settled by the decision of the Court’.⁵⁸ In other words, the World Court does have the decision-making power to become involved in any kinds of questions that the judges consider as justiciable. On November 26, 1984, by a vote of 15 to 1, the ICJ rejected both of these arguments and decided that Court had jurisdiction to hear the case brought by Nicaragua. The Court held that:

‘... in the circumstances of the dispute now before the Court, what is in issue is the purported exercise by the United States of a right of collective self-defense in response to an armed attack on another State... Accordingly the Court can at this stage confine itself to a finding that, in the

⁵⁴ Ibid.

⁵⁵ Case Concerning the Military and Paramilitary Activities In and Against Nicaragua (*Nicaragua v United States of America*) [1986] ICJ 1, Merits, Judgement of 27 June 1986.

⁵⁶ Case Concerning the Military and Paramilitary Activities In and Against Nicaragua (*Nicaragua v United States of America*) [1986] ICJ 1, Merits, Judgement of 27 June 1986.

⁵⁷ Theodore M. Lieberman. “Law and Power: Some reflections on Nicaragua, the United States, and the World Court”. *MD. Journal of International Law & Trade*, Vol 10 (1986), 298.

⁵⁸ The Statute of the International Court of Justice. Art. 36.

*circumstances of the present case, the issues raised of collective self-defense are issues which it has competence, and is equipped, to determine.*⁵⁹

The World Court rejected the United States' non-justiciability argument on two grounds. First of all, the Court has never refused to perform its judicial function simply because the dispute brought to the Court has occurred in a political context or it has been part of a wider and long-standing political dispute between two sovereign states. The ICJ made it very clear in the *Iran Hostages* case back in 1979, the Court held that 'no provision of the Statute or Rules contemplates that the Court should decline to take cognizance of one aspect of a dispute merely because that dispute has other aspects, however important'.⁶⁰ From the Court's perspective, the dispute did take place in a political context, and the Islamic Revolution of Iran was indeed a matter 'essentially and directly within the national sovereignty of Iran'.⁶¹ Nevertheless, 'the seizure of the United States Embassy and Consulates and the detention of internationally protected persons as hostages' is not a political question. The dispute itself involves the interpretation or application of multilateral conventions codifying the international law governing diplomatic and consular relations, is one which by its very nature falls within the international jurisdiction. In the same way, in the *Nicaragua* case, the World Court had no intention to assess an ongoing armed conflict and underlying diplomatic considerations, which do indeed entail political considerations that are not susceptible of judicial resolution.⁶² As a principal judicial body comprised of trained personnel, the World Court is competent to reduce

⁵⁹ Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America) 1986 ICJ Rep. 14, Merits, Judgement of 27 June 1986.

⁶⁰ United States Diplomatic and Consular Staff in Tehran (United States of America v Iran) (Provisional Measures), Order, 1979 ICJ Rep. 7, 15.

⁶¹ United States Diplomatic and Consular Staff in Tehran (United States of America v Iran) (Provisional Measures), Order, 1979 ICJ Rep. 7, 16.

⁶² Theodore M. Lieberman, "Law and Power: Some reflections on Nicaragua, the United States, and the World Court," *MD. Journal of International Law & Trade*, Vol 10 (1986), 298.

or to refine a political dispute into questions of facts and law. The judges of the ICJ are capable of identifying and isolating the justiciable issues from their political contexts, only addressing the legal questions, and exercise purely judicial functions without sacrificing the legal character of the World Court. The political matters involved in the disputes do not constitute an impediment to the judicial settlement of contentious disputes. With regard to the use of force and collective self-defense in the *Nicaragua* case, the Court identified the established *opinio juris* regarding the prohibition of the use of force and the right of self-defense, with reference to the previous General Assembly resolutions, such as ‘the Declaration on Friendly Relations and the Definition of Aggression’.⁶³ The U.S. contended that its support for the Contras in their rebellion against the Nicaraguan government as well as its mining of Nicaragua’s harbors constitutes a special form of self-defense. The U.S. military and paramilitary activities in the region were carried out in response to the requests from El Salvador, Honduras and Costa Rica for assistance against armed aggression by Nicaragua. Nevertheless, based on the United Nations Charter and the Charter of the Organization of American States, nations are prohibited from intervening directly or indirectly in the internal affairs of other nations, and nations shall not resolve their dispute with other nations through a resort to war or the use of armed force.⁶⁴ Article 51 of the U.N. Charter specifically states that the use of armed force is permitted only when an armed attack occurs. In this case, it was public knowledge that the Reagan administration was engaged in covert activities to remove the Sandinista government. However, the United States had difficulty proving that the Sandinistas were substantially involved in subversion after 1981. In fact, there were even no Nicaraguan troops fighting in the United States or massed on the United States

⁶³ Christine Gray, “The ICJ and the Use of Force,” in *The Development of International Law by the International Court of Justice*, ed. Christian J. Tam and James Sloan (Oxford: Oxford University Press, 2013), 7.

⁶⁴ Liberman, “Law and Power: Some reflections on Nicaragua, the United States, and the World Court,” 303.

borders.⁶⁵ Therefore, the United States' support for the contras and mining of harbors could not amount to a special form of self-defense of an 'instant and overwhelming necessity'.⁶⁶ As one can see, the political character of the ongoing armed conflicts between the United States and Nicaragua, the question brought to the World Court was evidently justiciable and capable of an answer by the application of established legal rules.

In response to the United States' claim that the World Court must defer the decision-making power pertaining to the legitimacy of armed actions and collective self-defense to the U.N. Security Council, the Court decided that:

*'The Court is not asked to say that the Security Council was wrong in its decision, nor that there was anything inconsistent with law in the way in which the members of the Council employed their right to vote. The Court is asked to pass judgment on certain legal aspects of a situation which has also been considered by the Security Council, a procedure which is entirely consonant with its position as the principal judicial organ of the United Nations.'*⁶⁷

Unlike the U.S. constitutional principle of separation of powers, the Security Council does not preempt the jurisdiction of the World Court to decide the legal issues in a dispute, even though the same case can be simultaneously under consideration by the Security Council. The participation of the Security Council does not constitute a reason for the World Court to voluntarily refrain from exercising that jurisdiction.⁶⁸ For instance, in the *Bosnia v. Serbia* case, in which Bosnia and Herzegovina brought against Serbia and Montenegro for the alleged violation of the Genocide Convention, the Security Council and the World Court exercised their independent functions concurrently. The relationship between the two entities of the United Nations is coordination and cooperation rather than mutual exclusion.

⁶⁵ Liberman, "Law and Power: Some reflections on Nicaragua, the United States, and the World Court," 304.

⁶⁶ Ibid.

⁶⁷ *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America) (Jurisdiction and Admissibility)*, 1984 ICJ Rep. 392: 436.

⁶⁸ Lieberman, "Law and Power: Some reflections on Nicaragua, the United States, and the World Court," 299.

In sum, the World Court's landmark ruling in the case *Nicaragua v. The United States of America* illustrates both the perplexed relationship between legal and political questions arising between states and the Court's standpoint on the justiciability of the highly political matters. The political character of such contentious cases has never prevented the Court from exercising its judicial function. The World Court has persistently held that these politically sensitive cases are suitable for judicial determination on the condition that they can be resolved by the application of established legal rules in international law.

V The Legality of the Threat or Use of Nuclear Weapons in International Law as an Example: Should the World Court Take a Step Forward?

In August 1945, during the final stage of the World War II, the Boeing B-29 Superfortress of the United States Army Air Force dropped two uranium atomic bombs over Hiroshima and Nagasaki. These two bombings, which wiped out almost two entire cities in Japan and killed at least 120,000 civilians, remain the only use of nuclear weapons in the history of warfare. Seven decades later, a number of international agreements have been accepted to constrain the development, possession, and use of nuclear weapons, such as the Treaty on the Non-Proliferation of Nuclear Weapons (1970), the Treaty Banning Nuclear Tests in the Atmosphere, in Outer Space and Under Water (1963), et cetera. Despite the consistent attempts to limit the testing of nuclear weapons and to reduce the risks of a global nuclear war, these treaties and agreements establish only a partial, patchwork quilt of legal regulation of nuclear weapons.⁶⁹ These agreements have dangerously narrow focuses, and no treaties has explicitly or implicitly prohibited the possession of nuclear weapons. In 2017, five nuclear-weapons states,

⁶⁹ Richard B. Bilder, "Nuclear Weapons and International Law," in *Nuclear Weapons and Law*, ed. Arthur Selwyn Miller and Martin Feinrider (Connecticut: Greenwood Press, 1984), 5.

including China, France, Russia, the United Kingdom, and the United States, possess approximately 15,000 nuclear warheads in total. However, these nuclear states have never agreed either explicitly by treaty or implicitly through conduct evidencing customary international law that their possession or use of nuclear weapons contravened the rules of international humanitarian law. As a matter of fact, many nuclear powers chose to 'opt out' the agreements that could place rigid restrictions on their freedom to develop and deploy their nuclear strategies. Among nine nuclear powers, only three are committed to the no-first-use agreement, and agree to not to deploy nuclear weapons unless first attacked by an adversary launching nuclear weapons. As one can see, in spite of the growing attention to the prohibition and elimination of nuclear weapons, there is no explicit rule under the existing international law against either the use or possession of nuclear weapons. A central question in terms of the prohibition of the threat or the use of nuclear weapons is, then, whether the World Court should proceed as a legislator to fill these discrepancies in the course of its judicial activity.

On July 8, 1996, upon the request by the United Nations General Assembly and the World Health Organization, the ICJ issued an advisory opinion concerning whether the threat or use of nuclear weapons in any circumstances should be permitted under international law. The legality of the threat or use of nuclear weapons is undoubtedly one of the most controversial and highly political matters that has ever brought to the World Court. According to Judge Schwebel, the legal uncertainty of the threat or use of nuclear weapons in the international community was a problem of 'titanic tension between State practice and legal principle'.⁷⁰ Similar to the Court's jurisdiction in contentious cases, the World Court is only allowed to render advisory opinions on legal questions and not on political questions. Even though a number of opponents argued that

⁷⁰ Advisory Opinion for the Threat or Use of Nuclear Weapons, 1 ICJ Rep 226 (1996), 311 (Dissenting Opinion of Judge Schwebel).

the legality of threat or use of nuclear weapons is at its core a political question, the Court decides to comply with the request for an advisory opinion. Regardless of its political background, the request by the General Assembly undoubtedly raised questions of the established rules of international law. Its political aspects do not suffice to ‘deprive the Court of a competence expressly conferred on it by its Statute’.⁷¹ The World Court’s attitude to depoliticize and make political debates justiciable received wide acclamations among legal scholars. This was the first time ever that an international tribunal had openly addressed this ‘gravest, unresolved threat to the future of humanity’.⁷² The World Court’s decision broke the fifty-year legal silence on the legitimacy of nuclear weapons.

Unfortunately, the World Court did not adhere to such proactive attitude throughout its advisory opinion, and there are still legal gaps left to be filled. The World Court expressly declined to state a view on the legality of the policy of nuclear deterrence or the use of nuclear weapons as belligerent reprisals. The judges’ opinions were sharply divided on the crucial question of whether the threat or use of such weapons would, in fact, be consistent with the rules of international law applicable in situations *in extremis* that the survival of the nation-state is at stake.⁷³ By a vote of seven-seven, the ICJ held:

‘It follows from the above-mentioned requirements that the threat or use of nuclear weapon would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law; However, in view of the current state of international law, and the of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defense, in which the very survival of a State would be at stake.’⁷⁴

⁷¹ Advisory Opinion for the Threat or Use of Nuclear Weapons, 1 ICJ Rep 226 (1996), 234.

⁷² Richard A. Falk, “Nuclear Weapons, International Law and the World Court: A Historic Encounter,” *The American Journal of International Law*, Vol. 91, No. 1 (Jan., 1997), 64.

⁷³ Michael J. Matheson ‘The Opinions of the International Court of Justice on the Threat or Use of Nuclear Weapons.’ *American Journal of International Law* (1997), 418.

⁷⁴ Advisory Opinion for the Threat or Use of Nuclear Weapons, 1 ICJ Rep 226 (1996), para. 105 (2).

Even though the Court clarified some of the important aspects of international law and fulfilled its advisory obligation, for judges who favored a stronger legal condemnation of nuclear weaponry, the majority decision could be seen as a step backward, running away from the responsibility of law-creation and undermining the continuous efforts to close the legal gap on the use or possession of nuclear weapons. The Court held unanimously that ‘there is in neither customary nor conventional international law any specific authorization of the threat or use of nuclear weapons’.⁷⁵ This is the key legal *lacunae* that needs to be filled by the World Court. Critics of the World Court’s legislative role believe that had the Court pronounced the law before the legislator has laid it down, it would have been wholly unwarranted and a departure from its legal character, and regardless of the view about the direction in which the law should head towards, the job of the World Court is to apply the law as it is. Even if international law is insufficient, what the World Court is required to do is to reveal such flaws to the international community for it to make the necessary changes rather than to consolidate the rules on its own.⁷⁶ Similarly to the Court’s decision in the *Nicaragua* case, for the World Court to have done so, however, would have inherently worked to the political advantages of nuclear powers. The extent to which the legality of nuclear weaponry is covered by the established rules of international law is extremely low. The uncertainty of its legal status of nuclear weaponry has proven to be problematic. For instance, the government of United States believes that any weaponry can be used in armed conflict unless its use is expressly prohibited by international law. According to the Article 613 of the Law of Naval Warfare in the United States:

‘There is at present no rule of international law expressly prohibiting a state from the use of nuclear weapons in warfare. In the absence of any express prohibition, the use of such weapons against enemy combatants or other military objectives is permitted.’⁷⁷

⁷⁵ Advisory Opinion for the Threat or Use of Nuclear Weapons, 1 ICJ Rep 226 (1996), 105 (2)A.

⁷⁶ Andrew Coleman, “The ICJ and High Political Matters”, *Melbourne Journal of International Law* (2009), fn 164.

⁷⁷ Law of the Naval Warfare, Art. 613.

Just like many other cases and novel situations that the World Court has been confronted with, the Court quite often has had no ready-made solutions at hand, but the alleged absence of legal rules does not constitute an obstacle to the judicial settlement of international disputes in practice.⁷⁸ Under these circumstances, in order to deal with the cases *primae impressionis*, the judges must look beyond the established rules of law and exercise their own discretion to solve the ambiguity. In this case, the World Court is empowered to perform its legislator role to supplement the current legal framework and to fill the legal *lacunae* left out by the sovereign states. To fill the existing legal gap regarding the threat or use of nuclear weapons, the Court is not asked to overthrow the current international legal regime, but rather to scrutinize the broad principles of international jurisprudence as well as the legal norms and maxims behind the established legal rules. Even though the existing international law does not explicitly prohibit the use of nuclear weapons, it indicates important legal instruments to control the methods of warfare in the *jus ad bellum*, which shall be taken into account in the context of the implementation of a legal regime for nuclear weapons.

VI The World Court's Judicial Impartiality and Jurisdiction in Highly Political Matters

The concepts of judicial independence and impartiality inhere in the initial assumption behind the creation of the international judiciary in the twentieth century. While undoubtedly a mixture of law and politics is unavoidable for most international disputes, the ICJ's jurisdiction in contentious cases prompts another set of important questions moving forward. Law is commonly believed as a set of neutral rules, and the judiciary's work is to interpret fixed

⁷⁸ Lauterpacht, *The Function of Law in the International Community*, 105.

principles rather than to make the rules. On the one hand, with regards to the third-party dispute resolution, the concept of judicial impartiality necessitates a neutral body of arbitrators whose views shall not be colored by any particular interests of states or groups.⁷⁹ However, on the other hand, the ICJ has always been expected to serve as a problem-solving device to effectively de-escalate or to resolve the conflicts between states. To retain the influence and efficacy as the principal judicial entity of the United Nations, the World Court must play an instrumental role to gain the confidence of states and to encourage states to make better use of its legal procedure. However, are these two different goals compatible? Is there a trade-off between the Court's efficacy and its judicial impartiality? Should the ICJ sacrifice its very identity and judicial independence or should it only remain on the periphery of the international order?

In most municipal law systems, the national courts are only obligated to decide legal questions and must regard all the political considerations as a hindrance that undermines the courts' judicial authority and legitimacy. For instance, the federal judges in the United States are kept insulated from the influence of the other governmental branches, and such isolation renders the judges' decisions unbiased. Thus, the judicial independence, underpinned by the principle of separation of powers, is essential to the role of the federal courts in the United States, and it is recognized to be a crucial factor in maintaining the courts' credibility and legitimacy. In the same way, in international law, the third-party dispute resolution also offers many attractions for sovereign states, especially the involvement of a neutral body of arbitrators and the publicity of its proceedings. Nonetheless, at the international level, the efficacy and legitimacy of the international judiciary becomes less tied to its judicial independence. As a matter of fact, the World Court is constantly confronted by the dilemma of 'efficacy versus impartiality'.

⁷⁹ Martin Shapiro. "Courts: A Comparative and Political Analysis". (Chicago: University of Chicago Press, 1986).

As an initial matter, the efficacy of the World Court hinges on two indicators: one is compliance, which shows whether the states would comply with the Court's judgments in practice. Is there any corresponding mechanism to enforce the decisions of the World Court? The other one, which will be discussed here, is usage. How often do the states bring their disputes with other member states to the World Court? It is evident that the Court's jurisdiction is based on the consent of the states. Even though there are currently seventy-two sovereign states which have expressly recognized the jurisdiction of the World Court as compulsory, the ICJ derives its judicial function from the consent of individual states to delegate their adjudicating power to a third party. Thus, as noted by American scholars Eric A. Posner and John C. Yoo, international tribunals are more likely to be considered inefficient when the Court '[neglects] the interests of the state parties and, instead, make decisions based on moral ideals, the interests of groups or individuals within a state, or the interests of states that are not parties to the dispute.'⁸⁰ In contrast to the jurisdiction of the federal courts in the United States, the member states of the World Court are free to accept, reject, or even withdraw from its compulsory jurisdiction. If the World Court fails to address the politically contentious cases arising between states or neglects the vital interests of the states, fewer states will submit their cases to the Court and its judicial function will then become meaningless. In this section, I will discuss two dimensions of the judicial impartiality of the World Court: one quandary arises from the process of election and reelection of international judges, and the other is the Court's relationship with the five permanent members of the U.N. Security Council.

The judicial impartiality of the World Court entails judges' disinterest in the outcome of politically contentious cases. Nevertheless, the adherence to the idea of representation of national

⁸⁰ Eric A. Posner and John C. Yoo, "Judicial Independence in International Tribunals," *California Law Review*, Vol. 93 (Jan. 2005), 7.

interests would ineluctably endanger the impartiality of the third-party arbitration. In many municipal legal systems, the law requires that the disputants are unknown to the judges to ensure the emotional detachment as well as the unbiased judgment.⁸¹ However, most international tribunals do not show such disposition to appoint only disinterested judges. As a matter of fact, the General Assembly and the Security Council have a disproportionate influence over the composition of the ICJ.⁸² The elections and re-elections of judges are often funded by their national governments. Undoubtedly, such electoral system would undoubtedly negatively affect the independence of the judges bearing in mind that they will face their re-election voting in the General Assembly.⁸³ In addition to such potentially conscious biases, nationality would also influence the way judges decide subconsciously. As the political interdependence among sovereign states has become increasingly high in recent decades, the involvement of a national judge often changes the fundamental character of the deliberations of the Court. The adjudication of many politically sensitive cases has '[ceased] to be a contest between the various aspects of the impersonal claims of justice; they tend to degenerate into a contention between the conflicting claims of the parties.'⁸⁴ Unquestionably, many states will become reluctant to use international tribunals unless they have control over the judges. In other words, in contrast to the position held by most national courts, judicial impartiality threatens the effectiveness of the international judiciary and hinders its contribution to the peaceful settlement of disputes arising between sovereign states. Furthermore, with regards the relationship between the Court and the Security Council, the five permanent members of the UN Security Council wield great power in

⁸¹ Lauterpacht, *The Function of Law in the International Community*, 225.

⁸² S. Gozie Ogbodo, "An Overview of the Challenges Facing the International Court of Justice in the 21st Century," *Annual Survey of International & Comparative Law*, Volume 18 Issue 1 (2012), 106.

⁸³ Ibid.

⁸⁴ Lauterpacht, *The Function of Law in the International Community*, 223.

the Court's decisions. All five permanent members have a representative judge on the bench.

Alongside the presence of national judges, the five permanent members play a dominant role as a chief enforcer of the decisions of the ICJ.⁸⁵ According to the Article 94 (2) of the U.N. Charter:

*'If any party to a case fails to perform the obligations incumbent upon it under a judgement rendered by the Court, the other party may have recourse to the Security Council which may, if it deems necessary, make recommendations, or decide upon measures to be taken to give effect to the judgement.'*⁸⁶

Thus, the five permanent members of the Security Council can exert tremendous influence on the enforcement of the Court's decisions. Their disproportionate influence on the judicial activity of the ICJ would undoubtedly endanger the judicial impartiality of the World Court.

The quandary is not limited to the World Court only. All the international courts and tribunals face some trade-offs between the judicial impartiality and efficacy. As a matter of fact, the possibility of judicial biases is not confined to the World Court only. Even in many national courts, especially with regards disputes in relation to controversial questions such as birth control and abortion rights, religious freedom, immigration, and the legal recognition of same-sex marriage, the judges' views are often directly or indirectly influenced by their cultural and education background, personal experiences, and political attitudes. Nonetheless, the possibility of judicial biases has not been regarded as a reason limiting the competence of national courts. Indeed, the choice between the judicial impartiality and efficacy is a tricky one, but there is no reason why the World Court should not be given certain latitude with regards to the judicial independence and the potential political biases of national judges. As Judge Lachs noted in his separate opinion in the *Lockerbie* case, 'the diving line between political and legal disputes is blurred, as law becomes ever more frequently an integral element of international controversies. The Court ... is thus called upon to play an ever greater role'.

⁸⁵ Ogbodo, "An Overview of the Challenges Facing the International Court of Justice in the 21st Century," 106-107.

⁸⁶ U.N. Charter art. 94, para. 2.

VII Potential Objections and Responses

In Hersch Lauterpacht's work, *The Function of Law in the International Community*, he introduced a number of different approaches held by many jurists in the past which would raise potential objections to the discussion in this paper. I will include two potential objections in this section: one is the doctrine of *de maximis non curat praetor*, and the other is a more radical view which argues the only decisive factor of justiciability of international disputes in practice is the willingness of the disputants to submit the case to the World Court. I will respond to each objection and explain how it fails to capture the nature of international disputes and the role of the World Court today.

Objection One: Test of justiciability based on the doctrine of *De Maximis Non Curat Praetor*.

A predominant view regarding the distinction between legal and political disputes focuses on the importance of the subject matter involved. Thomas Willing Balch, in his book *Legal and Political Questions between Nations*, defined political disputes as the disagreements which would affect the independence, honor, and the vital interests of nations.⁸⁷ He concluded that the fundamental distinction between legal and political disputes is not determined by whether there is a widely recognized rule of international law applicable to the case. Instead, the proper test should be 'whether the award of the judge may have the effect of seriously lessening the power of either of the parties to the dispute'.⁸⁸ In fact, similar views were held by a great number of jurists and legal scholars in the nineteenth and twentieth century. For example, Friedrich Heinrich Geffcken, a well-known German jurist, argued that 'a state will not lightly

⁸⁷ Lauterpacht, *The Function of Law in the International Community*, 142.

⁸⁸ Lauterpacht, *The Function of Law in the International Community*, 164.

submit to arbitration questions relating to its position of power and honor. Arbitration is possible only when the opposing claims can be formulated juridically. Such cases, however, are the least frequent and the least important.⁸⁹ Therefore, from the standpoint of jurists like Balch and Geffcken, whether a dispute is justiciable or not is dependent upon the magnitude of the issues involved. All disputes that could affect the vital interests of states and the structure of international relations should be seen as non-legal disputes and thus nonjusticiable. The World Court, as the judicial organ of the United Nations, should shy away from answering such non-legal questions.

Response to Objection One: Are there any non-political/non-important disputes between states?

The doctrine of *de maximis non curat praetor* is implausible under international law on two grounds. First of all, the vast majority of the legal disputes between sovereign states do occur in political contexts. States are political entities and they have the intrinsic desire to protect their national interests. As a result, every decision made by the ICJ does inevitably have political ramifications on the states. If the line between legal disputes and political disputes is drawn based on the doctrine of *de maximis non curat praetor*, this distinction will taken away the World Court's judicial power of all important issues among states. In fact, the World Court's jurisdiction in contentious cases will be called into question because none of these cases between states would satisfy the 'non-political' criterion. Secondly, following this line of thinking, if the judicial decisions given by the Court should have no tangible impact on the disputants, why would states submit these disputes to the World Court in the first place? The consent of states is particularly essential to the judicial function of the ICJ, and voluntary jurisdiction is often seen as

⁸⁹ Lauterpacht, *The Function of Law in the International Community*, 140.

the greatest weakness of the World Court. If no state had brought any disputes to the Court, the Court would have no judicial power.

Objection Two: Legal or political? It is all up to the states.

Alongside the classical view which considers the relative importance of the subject-matter of the dispute as the decisive factor for imposing judicial restraints on the World Court, Lauterpacht noted another perspective held by many jurists,

*‘there has been a persistent undercurrent of opinion expressive of the view that there is no fixed limit to the possibilities of judicial settlement; there is no fixed limit to the possibilities of judicial settlement; that all conflicts in the sphere of international politics can be reduced to contests of a legal nature; and that the only decisive test of justiciability of the dispute is the willingness of the disputants to submit the conflict to the arbitrament of the law’.*⁹⁰

In this way, the relation between legal and political disputes become much simpler. Regardless of the political significance of the dispute or the clarity of applicable legal rules, ultimately, the difference between the two comes down to the willingness of states to bring their contentious cases to the World Court.

Response to Objection Two: The willingness of the states is not enough.

Without any doubt, the consent of states to submit disputes to the ICJ is crucial to the Court’s judicial power. However, the willingness of the states alone cannot render a dispute justiciable. Firstly, when there are no applicable rules of international law or any existing legal norms for judges to use their discretion, the dispute should be categorized as nonjusticiable regardless the willingness of states.

As a matter of fact, the World Court has abstained from adjudicating contentious cases between states on many other grounds. For instance, in 2016, the ICJ refused to hear the case

⁹⁰ Lauterpacht, *The Function of Law in the International Community*, 140.

brought by the Marshall Islands against the United Kingdom, India, and Pakistan for their alleged breach of obligations regarding the cessation of the nuclear arms race and nuclear disarmament. Notwithstanding their recognition of the compulsory jurisdiction of the World Court, the Court held that it does not have jurisdiction over the case due to the absence of a dispute. In order to constitute a dispute, two parties must hold explicitly opposite views with regard to the questions of the performance and non-performance of legal obligations under international law. In this case, the Court found no evidence of opposition of views between the two sides. Therefore, the acceptance of the compulsory jurisdiction of ICJ alone does not automatically make the contentious case justiciable.

CONCLUSION

As the principal judicial entity of the United Nations, the International Court of Justice has taken on more responsibilities in the international community in recent decades. Until recently, the ICJ ruled primarily on the technical disputes concerning territorial and maritime boundaries. As more and more politically controversial cases have been submitted to the Court by states, the Court's fundamental role as a neutral arbiter has often been put into question. Is the World Court still a judicially independent entity of the United Nations? Or has it become a tool of politics by powerful nations? On the one hand, the ICJ along with many other international tribunals which were created throughout the twentieth century were expected to play a central role in adjudicating disputes between States. On the other hand, the ICJ was also expected to serve as a neutral arbiter, remain its judicial independence without being contaminated by any political biases. Hence, the ICJ faces this long-standing dilemma between its efficacy and judicial independence, and its role has become increasingly ambiguous and controversial in recent years.

My goal in this paper has not been to provide a comprehensive political question doctrine for the World Court or to draw a clear-cut distinction between legal and political disputes between sovereign states. As many jurists argued, 'in every international dispute there will be political issues that loom threateningly over the legal questions'.⁹¹ Instead, what I was hoping to offer in this discussion is a broad view of different roles played by the World Court and the remarkable contribution the Court has made to the peaceful resolution of highly political questions between states. There is no reason to think that the presence of mixed legal and

⁹¹ Andrew Coleman, "The ICJ and High Political Matters", *Melbourne Journal of International Law* (2009), Conclusion.

political aspects of international disputes should prevent the World Court from deciding on the legal issues through legal means. As one can see from the advisory opinion on the threat or use of nuclear weapons, the ICJ is also a developer of rules of international law with great potential. The World Court can also serve as a legislator to fill the legal gaps in international law. In the course of legal development, the reality of controversial disputes between states provides a unique opportunity for the World Court to fulfill its great potential both as an adjudicator and as a developer of international law.

Nevertheless, as previously mentioned, the distinction between political and legal disputes is one of the most difficult questions faced by the World Court today. This paper has only discussed a few aspects of the politically contentious cases brought to the Court. There are many important questions that I have not been able to explore here, such as the states' compliance with the World Court's decisions and their enforcement. Interestingly, the enforcement of the Court's decision does not take place in the world of law but of politics. For instance, in 1987, Nicaragua indeed won a judgment in its favor, but how should the ICJ enforce this decision? If there is no sanction that the Court can enforce against the United States, is the Court's decision meaningful at all? In order to fully understand the position of the World Court's in the international society, many directions for future research concerning the judicial authority of the World Court and its role in highly political matters remain to be studied and explored.

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