JUDICIAL ACTIVISM IN THE ICJ CHARTER INTERPRETATION

Lara M. Pair

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I. INTRODUCTION

Judicial activism has a wide variety of definitions, while its true content remains unclear. This paper will engage in the exercise of fashioning criteria with which to measure the decisions of the International Court of Justice (hereinafter ICJ) for the extent of their judicial activism. Once these criteria have been determined, I will methodologically analyze the decisions and come to an objective conclusion about the work of the ICJ.

This article will show that the ICJ rules in a judicially active fashion. To this end, it will first introduce the concept of national judicial activism and adjust it according to the needs of an international tribunal like the
ICJ. It will discuss the character of the United Nations Charter, subsuming it to both the treaty and the constitutional model, to show the different implications of these theoretical distinctions. These distinctions can alter the objective criteria used to evaluate the ICJ for judicial activism. Thus, the character of the United Nations Charter plays an important role in deciding how to fashion the standard of judicial activism for our purpose. The analysis will show that neither model alone is sufficient to describe the United Nations Charter. This article will then proceed to synthesize both models into a new thesis, resulting in new criteria for assessing the ICJ. It will then use these adapted norms for judicial activism to judge the work of the “World Court.”

The article will also compare the status of the ICJ to the status of national courts and the ways of these systems to remedy wrongful decisions. This comparison will help to better assess the consequences of judicial activism within the United Nations system and the possible impact of legitimacy concerns that derive from judicial activism. To assess whether the ICJ is in fact judicially active, compared to the objective criteria introduced, this article will divide the practice of the ICJ into procedural activism and substantive activism.

The assessment of procedural activism in the ICJ requires the critical refection of domestic procedural concepts, such as the political question doctrine and the advisory opinion doctrine. This article will introduce the domestic doctrines of “advisory opinion” and “political question”. These doctrines are creations governed by judicial restraint and the reaction of the judges to a doctrine of restraint will show whether they are procedurally judicially active. Considerable adjustment of these concepts for application in the ICJ is needed, and only after amending the doctrines, this paper will transfer and apply them to the international plane. Turning to the substantive United Nations Charter interpretation, this article will primarily suggest different possible outcomes and reasons for activism discovered in the ICJ. Lastly, it will consider the legitimacy of the ICJ in light of the judicial activism displayed, as well as in light of the lack of review of other United Nations organs’ actions. The analysis will conclude with some remarks referring to the necessary deference that should be afforded to the ICJ when fulfilling its task and plead for more consistency in the judges’ attitudes toward their task.

The ICJ is the principal judicial organ of the United Nations system,¹ and as such, its judges decide many disputes concerning the proper interpretation of the United Nations Charter text. The ICJ has an important role to play in international law and politics, because its

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¹. U.N. CHARTER art. 92.
decisions are the last word on matters of international law worldwide. Not all decisions I have read met my approval, and I am certain everyone who has ever read a few cases, disagrees on which ones meet their approval and for what reasons. This paper is intended to give a bird’s-eye view and some insight on consistency and activism in fifty years of United Nations Charter interpretation.

II. WHAT DOES JUDICIAL ACTIVISM MEAN?

Anglo-American legal systems commonly use the term “judicial activism,” and the early United States Supreme Court became particularly well known for its judicial activism. Civil Law jurisdictions do not often use the term, because Civil Law judges view their roles very differently from Common Law judges. Even Anglo-American jurisdictions use the term in a variety of definitions. Due to these differences (and other problems discussed below) the term shall be laid out anew in the context in this paper, to develop a better understanding of its meaning in international tribunals such as the International Court of Justice.

A. What is Judicial Activism?

Judicial activism exists in numerous definitions, originating from various scholars such as Posner, Harwood and Lewis. These and other scholars have applied the concept domestically. In order to apply it internationally, the reader must be informed about the domestic application first. This will assist the reader in appreciating both the differences between national and international application and the impact of the practice of ICJ judges.


3. A Civil Law judge will not consider [a] decision he makes to create law, merely to interpret existing law. Civil Law countries aspire to a complete law, which needs no additional rules made by judges. Although this may be true only in theory, inner convictions of judges as civil servants influence their thinking in practice. Thus, the idea of a judge effectively engaged in lawmaking is unthinkable and with it the idea of judicial activism. See Konrad Zweigert & Hein Kotz, Introduction to Comparative Law (Tony Weir, trans., 2d. ed. 1987).


Judicial activism in the United States or any national jurisdiction is separate and distinct from any meaning the term could have internationally. Judicial activism can be identified by measuring either the behavior of judges against objective criteria, or the results achieved against other possible results. Most definitions use behaviors as a focal point. However, no single definition has achieved universal acceptance and therefore, interpretations of what constitutes judicial activism vary. The most useful interpretations for our purposes employ objective criteria to identify the concept of judicial activism. Judges decide in a judicially active fashion if they (a) refuse to take an attitude of deference for legislative or executive power or judgment, (b) relax requirements of justiciability, (c) break precedent or (d) loosely construe constitutions, statutes or binding precedent. Some of the criticisms of judicial activism include non-democratic lawmaking, decision-making based on personal morals or preferences, and rewriting law under the guise of interpretation. Black also adds progressiveness to the definition. The above-mentioned criteria establish a working definition to be used throughout this paper that will suffice for our purposes.

Judicial activism can be identified not only by behavioral patterns but also by the results it can produce. The most common feature of a judicially active outcome is avoidance of an unjust result. For example, through creative reasoning, a judge can avoid letting strict application of the law lead to an unjust result. Results so achieved are mostly tailored to the case at hand rather than to the overarching system which is usually taken into account by legislators.

7. Compare supra notes 4, 5 and 6.
8. HARWOOD, supra note 5, at 2.
9. I consider criticism nothing but a negative definition of the concept in this context.
10. HARWOOD, supra note 5, at 3.
12. This working definition will suffice for the moment, because the domestic definition of judicial activism is but a starting point for this analysis.
13. HARWOOD, supra note 5, at 3.
B. Domestic Implications of Judicial Activism

The parties involved in the proceeding are primarily impacted by implications of judicial activism, and even beyond the parties concerned in a particular dispute, the overall structure of the legal system is affected by judicially active decisions. Therefore, judicial activism can lead to questions relating to legitimacy. When judges act in an activist fashion, two common paths can be taken to avoid the result achieved. The first possibility to affect an unwanted result is judicial. The second is legislative. The likelihood of access to these ways differs depending on the court involved.

The judicial possibility is through the appeals process. In lower courts, appeals to the next higher courts are possible, and will likely lead to a different result, should the judge have been too active in construing the law. In higher-level courts, such as Appellate Courts or even State Supreme Courts the possibility for appeal is much reduced, because higher courts have discretion to grant or deny certiorari. For example, the grant of certiorari in the U.S. Supreme Court is not guaranteed and thus the possibility of appeal may end at this point. Appeals from the United States Supreme Courts are naturally excluded once a judgment is rendered. In general, judicial activism in the highest court of any given

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14. It is impossible to address judicial activism in every country, so I choose the U.S. as an example the reader will be most familiar with. In the U.S. domestic context, judicial activism is a very disputed subject and therefore I must stress that concerning domestic judicial activism, I am entirely neutral and do not intend to pass judgments or conclusions. Like Cannon, "I accept judicial activism [in the domestic arena] as a fact of life." Bradley C. Cannon, Defending the dimensions of judicial activism, 66 JUDICATURE, 236, 246 (1983).

15. The individual party is affected, because they believed the state of the law to be one thing, when the judge decides it is another.

16. Different judges can make different decisions, therefore, the system is affected through lack of clarity and inconsistency of the law.

17. In the domestic context, the question of legitimacy does not seem as pressing to me because judges are elected publicly, or appointed by an elected member of the executive. Further, statutes and the Constitution offer a far better anchorage in domestic law then they offer in international law. The issue of legitimacy in the ICJ is discussed in another paragraph separately.

18. By way of example, the House of Lords can decide either to take a case, or refuse to take it. ROBIN C.A. WHITE, THE ENGLISH LEGAL SYSTEM IN ACTION: THE ADMINISTRATION OF JUSTICE 219, 221 (3d ed. 1999).


20. This is true provided there is no separate constitutional Court in the country as exists in Italy, Germany, and South Africa.
jurisdiction cannot be "corrected" through appeal.21

The legislative way to correct decisions of overly active judges is to lobby lawmakers to overturn precedent or interpretation by way of a new statute. Even the highest courts of any given jurisdiction are susceptible to legislative action.22 If a legislature does not like a decision of a Supreme Court, then it will pass a statute or regulation changing the effects of the decision.23 Legislative override is possible in both state and federal legislatures.24 The legislative path is not open at all stages; because it is quite unlikely that Congress would act on an interpretation of a lower court, whether the judgment is subject to appeal or not.25 An example of Legislature in the United States overriding the Supreme Court is Missouri v. Holland.26 In some cases, even ordinary congressional action cannot override the Supreme Court, whether activist or not.27 An American example is Marbury v. Madison,28 in which the Supreme Court declared to have exclusive right to interpret the Constitution and derived this right from the Constitution. No legislative act short of an amendment of the Constitution could overturn this decision.

Chances of action, either through appeal or legislative act, decrease with the proficiency of the judges' using "interpretive techniques."29 Neither of the two mechanisms is thus fully failsafe. The implication of judicial activism is therefore far from minimal for both the interplay of laws in any country and the dispute of the parties involved.

21. In the United States Supreme Court, many such decisions have been rendered from Marbury v. Madison, 5 U.S. 137 (1803), to Missouri v. Holland, 252 U.S. 416, 40 S.Ct. 382 (1920).

22. Ironically, the highest courts seem to be the most likely target for this kind of ramification.

23. An example of legislative override is the Miranda warnings. The U.S. Supreme Court stated they were not constitutionally mandated, so Congress enacted the protection of Miranda warnings through statute. Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966).

24. Although legislative override is specifically tailored to the U.S., the general idea is true in every democratic society.

25. It would be ineffective for the legislature to act on every magistrate court's unpopular judgment. They will most likely say there is a possibility for appeal.

26. The History of Missouri v. Holland, 252 U.S. 416, 40 S.Ct. 382 (1920), was as follows: Congress passed a statute concerning migratory birds. The Supreme Court ruled the statute unconstitutional. The legislature then turned around, made a treaty with Canada, and reenacted the statute as treaty. The Supreme Court then approved the piece of legislation.

27. I am referring to regular legislative action, short of amending of the Constitution.


29. This is so because the better the judge conceals the actual reason for the result, or the better he or she can employ unrelated precedent, the less likely the judge will be discovered and overturned.
Having the potential to change the law through interpreting it in any given case reflects much power, the abuse of which leads to the issue of legitimacy of judicial activism, particularly where a decision is non-reviewable. In a way the judge can make law, but should judges make law? In the tripod structure of democratic society, the role of the judiciary involves interpretation and not creation of law. In the United States, state court judges are elected, so that their beliefs and morals will likely reflect the belief and morals of the community whose disputes are affected by potential activism. When non-elected federal justices can make law, judicial activism seems to be contrary to the foundation of democratic society. We will get back to the point of legitimacy later in the discussion and will not focus on it in the context of domestic law. Just one word spoken true and wise to this subject: sometimes we do not want the majority to be able to control it all!

C. Judicial Activism Internationally

After having laid a foundation for the following discussion, the transition of the concept of judicial activism to the international plane must be made. This shift exceeds mere copying of concepts, because it involves establishing a new working definition of judicial activism adapted to the international context. Both working conditions and impact of decisions vary internationally from their domestic equivalents. The transfer made in this article is only applicable to the International Court of Justice, which is the focus of this work. This discussion is also limited in substantive considerations to the United Nations Charter interpretation.

To make a successful conversion from the domestic to the international sphere, the United Nations Charter must be considered more closely with respect to its function and purpose, because theoretical classification impacts the criteria forming our new working definition. Some have considered the United Nations Charter to be an instrument similar to a constitution while others see the United Nations Charter as

30. Judges are elected not only because of competence, but also because of personality. If the judge does not reflect the community's beliefs by ruling in a certain fashion, then he/she will not be reelected.

31. See LEWIS, supra note 6, at ch. 3, for a good discussion. In most countries, judges are not elected, so that their law making can be compared to the U.S. federal judges. The same is true for judges of international tribunals.

32. I refrain from further comments on the subject in the realm of domestic courts, because it exceeds the scope of this paper and is only included to clarify the later points concerning the ICJ.

simply a treaty." Even the ICJ displays some lack of uniformity on this question in its decisions."

1. The Constitutional and Treaty Model

In this subsection, I will discuss the arguments for and against the schools of thought that consider the United Nations Charter either constitution or treaty respectively.

The constitutional model seems appealing, but has its shortcomings. Similar to many domestic constitutions, the United Nations Charter forms the basic underpinning for the organization of the United Nations. It purports to give a purpose, allocate powers and create different organs. National constitutions usually establish branches of government, comparable to the principal organs of the United Nations, allocate powers to the organs/branches, establish a judiciary, and grant certain rights and freedoms. Many international organizations follow a comparable model with more or less similarity. The analogy of corporate charters would be more appropriate because they too have an executive body and shareholders as constituents of their power. The shareholders could also be equated with the members of the General Assembly. It is useful to consider these structural similarities more closely.


35. The Charter has been called a treaty in the Certain Expenses, Id., and a constitution in the Conditions of Admission of a state to membership in the United Nations, 1948 I.C.J. 57, 70 (May 28) [hereinafter Conditions of Admission]; to mention only two different cases. Many authors refer to constitutionalism with respect to the UN and the ICJ. See generally EDWARD MCWHINNEY & PAUL MARTIN, THE INTERNATIONAL COURT OF JUSTICE AND THE WESTERN TRADITION OF INTERNATIONAL LAW (1987).

36. U.N. CHARTER art. 1.

37. Each organ has a set of powers allocated in the Charter. The Security Council, e.g., has powers allocated in UN Charter arts. 24-26; the Economic and Social Council in U.N. Charter arts. 62-66, and so on.

38. The principal organs are enumerated in U.N. CHARTER art. 7 para. 1.

39. See e.g., Treaty of Amsterdam amending the Treaty on the European Union, the Treaties establishing the European Communities and certain related acts, 1997 O.J. (C 340) 1 [hereinafter Treaty of Amsterdam].

a. Structure of the Organization

The United Nations Charter creates four main bodies,41 which have their own allocated powers: the Security Council42, the General Assembly,43 the Secretariat,44 and the ICJ45, which, if compared to national democratic models, reveals some striking similarities to domestic constitutions. The General Assembly is a body comprising all members talking about the world and the state of affairs, very similar to legislatures. The point where the analogy to legislatures fails is that the General Assembly does not create hard law in the form of statutes; it has no legislative power in the domestic sense.46 It does, however, have the power to make statutes and rules for the bodies within its control.47 The Security Council could be said to be the executive branch of the United Nations, since substantive power comes from the Council in the form of binding resolutions.48 The Secretary General could be viewed as the head of state, representing the organization and capable of ceremonial acts.49 Unlike the American head of state, the President, the Secretary General is without true power.50 The ICJ could be viewed as the judiciary branch, the final arbiter of legitimacy.51

b. Character of the United Nations Charter

The character of the United Nations Charter may point toward a constitutional model as well. It directs powers and functions, declares a purpose, and has every possibility to provide authority for a wide variety

41. U.N. CHARTER art. 7, para. 1, establishes the main organs. Although it also creates the Trusteeship Council and the Economic and Social Council, they have little impact on this analysis.

42. Id. at ch. V is devoted to the Security Council, describing powers and duties.

43. Id. at ch. IV, describing General Assembly powers and duties.

44. Id. at ch. XV, describing Secretariat powers and duties.

45. Id. at ch. XIV, describing ICJ powers and duties.

46. This statement should be read as excluding housekeeping functions, such as the budget power.


48. The Security Council has the power to compel members. U.N. CHARTER art. 25.

49. U.N. CHARTER art. 97 makes the Secretary General the head of the Secretariat.

50. The concept of a virtually powerless Head of State is not unknown. In the Federal Republic of Germany, the president has limited power. GRUNDGESETZ [GG] [Constitution] arts. 54-61 (F.R.G.). Similarly, the Queen of England, is still head of state. Like the Secretary General, the power of these persons in office are symbolic in nature.

of "laws," due to certain ambiguities.52 These resemblances to domestic constitutions are bound to be present in many treaties that purport to form organizations, and they are essential to some international contracts.53 The ICJ has declared that the United Nations is a special kind of organization and that its character is different form any other organization due to its purpose and fundamentality,54 so that this uniqueness should elevate the United Nations Charter to the constitutional level.

The ambiguity of the United Nations Charter in certain areas could also be comparable to domestic constitutions, because constitutions are meant to survive changes in society.55 Against this point stands the argument that the world leaders would have never agreed to make a constitution, and that ambiguities result from a lack of consensus rather than foresight.56 It could be argued that they made a treaty to establish an organization of fundamental reach, but not a world constitution.

The limitless duration of the United Nations Charter gives it the character distinct from treaties.57 However, this seems rather a tribute to the effort behind succeeding to form an organization so many countries could agree on.58 The United Nations Charter is important, like a constitution is, but that is why it cannot be interpreted as a constitution. Its failing would be catastrophic. When would we be able to write a new constitution and get over 150 countries to agree to it?59 Although I find the idea intriguing in order to stress the value and gravity of the United Nations Charter by calling it a constitution, it cannot be a true constitution.

c. Pro-Treaty Arguments

Scholars have recognized the difficulty of the constitutional model and

52. An example of the ambiguity that creates problems is exhibited in the UNAT case in 1954; See Effects of Awards, supra note 47.


54. See Certain Expenses, supra note 34.

55. The U.S. Constitution, now over 200 years old, is a good example of a constitution surviving over a long period of time.


58. It is hard to imagine fifty countries agreeing on such a fundamental document now. It could be worse if this process had to be repeated time after time, whenever the "contract" came to an end.

have thus focused on the treaty model. The main points in favor of this view derive from the shortcomings of the constitutional model and from the mere fact that the United Nations Charter fits the definition of a treaty. A treaty is an instrument between subjects of international law, mostly states, purporting to deal with the objects of international law. The United Nations Charter is concluded between the oldest subjects of international law and deals with objects of international law, namely international peace and security. There is no judicial review as in domestic constitutions; there are no democratic justifications, no world elections for representation in the United Nations; there is no lawmaking in the domestic sense. Countries came together, bargained and formed a contract for the formation of an organization to achieve one purpose: international peace and security. There was no delegation of power from the people or, for that matter, from countries to give to a new government. However, contracts are not usually open-ended and do not have the power to bind third parties. The United Nations, through its United Nations Charter, has in effect the power to bind and put pressure on third parties.

\[d.\ Implications\ of\ the\ Models\]

The impacts both theories will have on the standards to be imposed are broad indeed. If the United Nations Charter is a mere contract, a treaty, it ought to be interpreted according to the Vienna Convention on the Law of Treaties. The Vienna Convention requires a more textualist approach and refers to the use of intent and purpose for interpretation only if the text leads to an absurd result. Under the treaty-based approach, no consideration would need to be given to gaps, functioning, and vitality of the United Nations system. No double-checking of purpose and intent as against other organs would be appropriate. If the United Nations Charter

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61. For a scholar arguing that there is no judicial review, see Herdegen, supra note 51.

62. U.N. CHARTER arts. 1, 2.

63. Constitutions are usually associated with the creation of a government.

64. This excludes third party beneficiaries.

65. Reparations for Injuries Received suffered in the Service of the United Nations, 1949 I.C.J. 174 (Apr. 11) [hereinafter Reparations]. (Israel had not been a member of the UN at the time, yet was bound through this opinion. In addition, sanctions can also put pressure on non-member states).

66. Although the Vienna Convention does not technically apply because it is younger than the UN Charter, the principles of interpretation are still valid.
is to be interpreted like a constitution, then a more functionalist approach is necessary.

A constitution has to function, because it builds the foundation of the rule of law, unlike a mere treaty. Intent or purpose might be the only bases of interpretation. If a mere contract is silent on a point, legal norms already in existence will be applied to the contract. In the constitutional context, that is not possible. If the United Nations Charter were a constitution, it would mean that similar standards apply as in the interpretation of domestic constitutions and similar standards as in constitutional law would be appropriate. It would also mean that the interpretations given by the ICJ must adhere to a higher standard, results reached would always have to be weighed against the spirit of the United Nations Charter, short of hyper-textualism and political decisions. The ICJ would have to be able to review the actions of the other organs of the United Nations to their conformity with the United Nations Charter and imply that the ICJ could annul the acts of other organs as *ultra vires*. In short, the constitutional model would require both more freedom for the judges to aid the organization in functioning and more deference to other organs with respect to the same goal. The treaty model would require more restraint of interpretive freedom and less deference to the other organs, because the ICJ would be limited by the pure text.

e. New Model: Consensual Constitution

The United Nations Charter is no constitution; however, the treaty model has its shortcomings as well. It is certainly a mixture between the two models. The United Nations Charter is a "consensus constitution." A consensus constitution is a contract forming the basis of an organization, one that exceeds the original consensus but remains limited by its original form. This model gives greater leeway for interpretation, without allowing the filling of blatant gaps in the law. The United Nations Charter does not stand alone and customary international law as well as *jus cogens* norms can be utilized when gaps are apparent to help bridge them. This implies, that the objective criteria one has to use for evaluating the decision of the ICJ for activism have to be sensitive to both textual and teleological possibilities. The "consensual constitution" model affords deference to the other organs of the United Nations and interpretive freedom to the ICJ to make the organization work, while it restrains deference and interpretive freedom at the same time, through the knowledge that the text and overall

67. See Sloan, supra note 53.
scheme are paramount and may not be compromised for the sake of convenience or function.64

2. Legal Systems

The "consensus constitution" model alone is not adequate to provide a standard for ICJ judge. Knowing what kind of instrument is to be interpreted, the status of the court within the system needs to be discussed to find the appropriate level of scrutiny. Besides the institutional differences between national and international system, there are variances in the specific legal structure between courts that influence the transition of the judicial activism doctrine.69

In the United Nations' court system, a structure comparable to that of the domestic plane is lacking. In domestic courts, various steps of appeal are possible, whereas the in United Nations system the ICJ is sole tribunal.70 Although there are other international tribunals, such as the European Court of Justice (ECJ) or the World Trade Organization boards, these tribunals are unconnected with each other and do not form a coherent system comparable to domestic judiciaries.71 Tribunals that are more closely connected to the United Nations structure, such as the UNAT,72 the ICTY,73 or the ITR,74 however, do not fall under one coherent structure.75

68. See McWhinney, supra note 35, at 143, 144. He accepts the law-making role of the ICJ more readily, and considers the ICJ even less drastic than the U.S. Supreme Court. He states that the ICJ only does as is necessary for the maintenance of the organization.

69. This will be explained in this section more closely.

70. Unlike the U.S. Constitution, the Charter does not provide for the creation of additional courts. U.S. CONST. art. 3; U.N. CHARTER art. 92.

71. Unlike a domestic judiciary, there are different statutes making these courts, and all follow different rules of procedure.


75. The ICJ served for a brief period as appellate body to the UNAT in special circumstances, but got tired of the task. Under consensus circumstances, the ICJ serves as appellate board for ICA decisions if countries agree. These circumstances are, however, extraordinary and not relevant for this discussion. Although they are connected to the UN, they have independent jurisdiction and their decisions are not subject to appeal in the ICJ. The exception is the UNAT, where appeal is possible. One could argue that state courts are separate from the federal system as well, and that the lower federal courts had not been established expressly by the Constitution either. These arguments must fail. The UNAT is established by the General Assembly and has it's own statute and not the same subject matter or personal jurisdiction that the ICJ has. The ICTY and ITR were established by the Security Council and have their own statutes and jurisdiction different from the ICJ.
Thus, the ICJ is the sole judicial organ deciding matters arising between states or the organs of the United Nations in the United Nations system. No appeal, i.e., no judicial correction, is possible. This fact gives the ICJ the status of a Supreme Court or a Constitutional Court for the purpose of measuring the impact of activism.

The impact of the unique role as interpreter of the United Nations Charter in case of conflict is intensified because the possibility of legislative action to remedy a wrongful decision is virtually lacking the context of United Nations Charter interpretation. The only possibility of overriding an interpretation is United Nations Charter amendment. The United Nations cannot overrule an interpretation of the ICJ by mere statute. First, there is no power to make a statute. Second, as the basic instrument of the organization, the United Nations Charter has somewhat the status of a constitution as discussed supra. A United Nations Charter amendment has occurred only thrice since its entry into force, and it is very unlikely to occur again. This gives the ICJ much more influence than even the Supreme Courts or Constitutional courts of nations possess. In turn, this power consequently requires both more regard to the overall scheme of the United Nations when making decisions in order to let it serve its function, and more judicial restraint than a domestic court would have to exercise to avoid being too judicially active. A wrong decision cannot be remedied as easily, if at all. The following section will identify the criteria applied to the ICJ for judicial activism with regard to the differences in the systems.

3. Objective Criteria for ICJ

Oriented on the prior domestic working definition of judicial activism, this section identifies a new working definition for the concept to evaluate the ICJ.

Some of the domestic criteria for judicial activism do not neatly fit in the international setting. Non-democratic lawmaking is one of the

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76. There have been only 3 sets of amendments, not adding any paragraphs, merely changing the Charter; the latest came into force in June 1968. They are quite similar to the U.S. constitutional amendments but even more difficult in practice. In practice, the ICJ cannot compel action in accordance with its decisions. It would have to rely on the Security Council and thus an interpretation might be ignored, specifically as requested in advisory opinions. See Herdegen, supra note 51.

77. There is no provision in the UN Charter that gives power to legislate. Compare U.N. CHARTER.

78. This is true at least in theory, but in practice, the ICJ is not always obeyed. See Certain Expenses, supra note 34. France and Russia still refused to pay their dues.
examples: there is no democratic process involved in international law.\footnote{See generally ANTHONY D’AMATO, INTERNATIONAL LAW COURSEBOOK, TO ACCOMPANY INTERNATIONAL LAW ANTHOLOGY, ch. 8 (1994).}

One could substitute “non-democratic” for “progressive.” If there is no law on the subject or sufficiently close to it, such as custom or treaty, the ICJ cannot give an opinion without progressing international law. This progress would create law without direct participation of the subjects of international law and could be compared with non-democratic lawmaking domestically, matching one of Black’s points of reference.\footnote{See BLACK ET AL, supra note 11.}

Breaking of precedent is an aspect I will fully strike as an objective criterion, because precedent is an Anglo-American concept. In international law, there is no formal precedent, although in practice, prior decisions can be of importance and are often quoted by the ICJ judges.\footnote{See, e.g., Certain Expenses of the UN, supra note 34, at 156, (citing with approval Conditions of Admission of a State to Membership in the United Nations Article 4 of the Charter, 1947 I.C.J. 61). For more information on precedent in the ICJ, see generally MOHAMED SHAHABUDDIEEN, PRECEDENT IN THE WORLD COURT (1996).}

This criterion should be abandoned for another reason: there are simply not enough cases in comparison to domestic law to create a gapless net of precedent. In addition, because the ICJ is the only court, it can only break its own precedent,\footnote{One more precedent-possibility exists: the prior Permanent Court of International Justice. But for the purpose of this statement, the courts ought to be considered one for successor reasons. Id.} an act which domestically is not considered overly activist.

The criterion of relaxation of justiciability requirements ought to be modified, but it remains in substance, because the ICJ does not have extensive justiciability criteria. Issues like political questions,\footnote{This will be discussed infra.} mootness, and ripeness have different implications.\footnote{I will not go into detail concerning the differences and ask the reader to bear with me in accepting that there are differences.}

The ICJ has not frequently applied the mootness doctrine,\footnote{The only case I can think of was Nuclear Test (N.Z. v. Fr.) 1974 I.C.J. 457 (1974).} and ripeness issues can easily be avoided by phrasing a question for advisory opinion or request for (preliminary) measures. The concept of justiciability is better-served in the international arena under the heading of deference to political decisions.

Lack of deference to decisions of other United Nations organs is a definite criterion for activism. How much deference is required and how little mandated by the structure of the United Nations Charter as “consensual constitution” is another question. The rough concept is that...
the court needs to afford deference to other organs of the United Nations, unless there is an apparent United Nations Charter violation or a violation of object and purpose of the United Nations Charter. Deferral need only be afforded in areas where the particular organ has absolute jurisdiction to decide; in particular I am referring to examples like the Article 39 determinations of the Security Council or the budget approval power of the General Assembly.\(^8\) Review of actions taken should be limited to the criteria laid out in the United Nations Charter for the specific action and the general purpose of the United Nations Charter. Deferral should be broad enough to exclude only what specifically violates either the text or the intent and purpose of the United Nations Charter as they are stated in Articles One and Two. Where concurrent jurisdiction is given to two or more United Nations organs, the ICJ should be mindful of who is posing a request and whether that party would be injured in case of infringement of powers.\(^8\)

Loose construction of the United Nations Charter remains as a criterion. We now add another aspect, tailored to the ICJ: loose construction of questions put before the court in advisory opinions as well as rephrasing the questions beyond the necessary to retain jurisdiction. This criterion is very important indeed, because it can give the court a power to address issues almost \textit{sua sponte}. This power has not been conferred on the court by any treaty, and no other court has such power either domestically\(^9\) or internationally.\(^9\) In addition, its use might create a discrepancy between practice and decision.\(^9\)

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86. See U.N. CHARTER art. 39.
87. U.N. CHARTER art. 17, para. 1.
88. In addition, I think it would not be a bad idea to steal some of the concepts of domestic variable scrutiny for a variety of different scenarios, depending on how important the action taken by another organ are.
89. This is to be read to exclude issues of justiciability, which can and in some instances have to be raised by the court. I am here referring to substantive issues. I am not referring to dictum either, because it does not have the same effect nationally form internationally.
90. With the exception of the International Criminal Court [hereinafter ICC], which has an almost \textit{sua sponte} aspect. The prosecutor of the ICC can initiate proceedings. Since he is a part of the ICC, one could say there is some \textit{sua sponte} possibility.
91. As an example, I am speaking about the voting procedure in the Security Council: Although the court approved of the practice despite the words of the Charter, Legal Consequences of the continued presence of South Africa in Namibia notwithstanding Security Council Resolution 1971 I.C.J. 16 (June 21) [hereinafter Namibia]; had the court raised this question and answered it negatively when the other organs did not believe it to be a problem, there could have been a world of trouble. \textit{Compare} Marcella David, \textit{Passport to Justice, Internationalization of the Political Question Doctrine for Application in the World Court}, 40 HARV. INT'L L.J. 81, 121 (1999).
Decision-making based on personal morals or preferences and rewriting law under the guise of interpretation is the ultimate criterion for judicial activism. This includes focusing on results in avoidance of an unjust result—for example, through creative reasoning rather than strict application of the law. Also included is narrowing the question to exclude aspects that the requesting organ anticipated to be answered. This factor must hence be altered for the international setting. Advisory opinions, for example, require the court to make a statement for the overall structure of the United Nations, so that creative reasoning becomes necessary in the face of a lack of narrow grounds. In the case of contentious proceedings, the matter changes, because narrow grounds are available for limiting the decision and should be utilized. This leads to a two-fold approach. Stricter scrutiny for review is required for contentious proceedings than for advisory opinions. For the ICJ, this ties into the remarks about deference. Personal preference not to review certain actions of the Security Council not only qualifies as judicial activism, but also raises a question of legitimacy, because personal preferences change with the set of judges on the court.

In summary, the new working definition includes: a) progressing of international law as defined above; b) lack of deference; c) loose or overly narrow construction of queries; and d) decision-making based on personal preferences with focus on a result rather than in light of the United Nations Charter as consensual constitution.

III. INTERPRETATIONS OF THE UNITED NATIONS CHARTER IN THE ICJ

The above-mentioned forms of judicial activism are used in this section to evaluate the ICJ decisions. It will be proposed that ICJ jurisprudence in reference to activism cannot be subdivided into phases;92 however, I will subdivide the analysis in two categories: procedural issues and substantive United Nations Charter interpretation.

A. Procedure Evidencing Activism

In every legal system, courts exercise some form of restraint when asserting their power to adjudicate,93 and the ICJ is not an exception. Doctrines like ripeness or mootness have been applied in the ICJ as in


many courts across the globe. This section will discuss the Political Question doctrine more closely.

The ICJ does not recognize the Political Question doctrine in the domestic sense, because use of the Political Question rhetoric is incompatible with the mission of the ICJ. Although the court can only consider legal questions before it, in the international arena hardly any question does not involve political decision-making. In the domestic area, the Political Question doctrine describes behavior of self-restraint exercised by the courts when decisions of political branches are involved and when these branches are expressly granted absolute discretion over the area the decision affects. This doctrine of self-restraint could be adapted to the United Nations system. The ICJ could review other organs' actions for the apparent compliance with the United Nations Charter when requested, yet refrain from criticizing once there is no apparent violation; or, in the alternative, when the organ that is subject to the inquiry had absolute discretion in the matter. The ICJ would lose importance and most likely many cases if the Political Question doctrine were fully applied, because international law is made by political decisions and the court made clear that those could be used to evaluate new political decisions made prior in time. Although the ICJ never rejected the doctrine as such, much impact has been taken from it, and the court has reduced the substance of the Political Question doctrine to insignificance. Hence it is fair to say the ICJ has rejected the doctrine.

94. The mootness question was asserted in Nuclear Tests (N.Z. v. Fr.), 1974 I.C.J. 457 (Dec. 20). There a unilateral declaration of France not to conduct more tests was considered sufficient to render the dispute moot.

95. The division is the same as the above-mentioned behavior and result separation. The procedural analysis equals the behavior part of the definition; the substantive analysis, the result part.

96. See David, supra note 91, at 145.

97. Statute of the International Court of Justice art. 65 [hereinafter ICJ statute].

98. This issue is explained further in the text.


100. See David, supra note 91, at 132.

101. The Security Council is the only organ deciding whether a threat to the peace exists. This decision would not be reviewable; actions taken under the powers of Chapter VII however would be reviewable, to see if they violate the charter or the object and purpose of it (e.g., SC ordering genocide). Cf. id. at 133 (believing considerable adaptation is needed).

102. See Conditions of Admission, supra note 35, at para 24 saying it is a political question.

103. Already in Conditions of Admission, the court stated:
Rejecting the Political Question doctrine is not judicially active in the ICJ, although it would be in any other domestic court. Measured against our definition of judicial activism, the rejection of the doctrine makes sense. As stated above, every decision that ICJ can make would only hold new political decisions against other commitments entered into through prior political decisions. These commitments take the form of legal rules despite their political character. *Pacta servanda sunt* has always been a recognized principle. In order to answer questions of political nature, the ICJ has often interpreted the questions given to it, to transform them into issues that can be legally analyzed. In doing so, the ICJ exercises discretion and judgment. Unlike domestic legal instruments, such as the United States Constitution, the United Nations Charter is more concerned with function of its organs than with substance, so that an allocation of powers that grants discretion exclusively to one organ hardly exists.

The *Certain Expenses* case makes clear that the responsibility for international peace and security is not only in the Security Council’s hands alone but also in the General Assembly’s hands. This example makes

When a question is referred to the Court, the latter therefore must decide whether its dominant element is legal, and whether it should accordingly deal with it, or whether the political element is dominant and, in that case, it must declare that it has no jurisdiction. In the questions, which it is called upon, to consider, the Court must, however, take into account all aspects of the matter, including the political aspect when it is closely bound up with the legal aspect. It would be a manifest mistake to seek to limit the Court to consideration of questions solely from their legal aspect, to the exclusion of other aspects; it would be inconsistent with the realities of international life. It follows from the foregoing that the constitutional Charter cannot be interpreted according to a strictly legal criterion; another and broader criterion must be employed and room left, if need be, for political considerations.

Conditions of Admission, *supra* note 35, at 70.

104. *Id.*

105. Assuming they do not overstep their boundaries.

106. Since international law is made by states that decide as political entities every decision and every act has political implications, regardless of discretion. Every country has full authority over their affairs, so that with a full political question doctrine no legal review would be possible.


108. The articles entitled functions and powers only number 17 of 111 articles. Compare U.N. CHARTER.

109. There are instances, but in general, the main functions are allocated between two organs, e.g. Maintenance of international peace and security. See McWHINNEY & MARTIN, *supra* note 35, at 143 (agreeing that the organs have little exclusive power).

110. See Certain Expenses, *supra* note 34.
clear that little true separation of powers exists. Without a clear separation of power, a basic underpinning of the Political Question doctrine is missing in many cases before the court. No one organ can claim absolute discretion necessary in one sector to claim a right to be free from scrutiny.111 The Court cannot refuse to decide a case because one organ is vested with absolute discretion, so that review would be outside justiciable limits. Also, in terms of advisory opinions discussed below, the Court cannot, without compelling reasons, refuse to answer a question.112 A certain level of flexibility is required for the ICJ because, unlike the United States government, the Security Council may not intervene in any contentious proceedings.113 The following paragraph will determine whether the ICJ was judicially active when accepting political questions.

1. Transforming Inquiries Into Legal Issues

According to the ICJ statute, the Court can only answer questions of a legal nature.114 One example of the court transforming an inquiry is the first on the Court's docket: the Conditions of Admission case in 1948.115

In that case, the General Assembly requested an advisory opinion concerning additional criteria to the admission of new members process of the United Nations Charter. The question was political in nature: Can sovereign states be bound to consent to admission without the bargaining process usually involved in state action?116 Holding the question justiciable, the judges stated that there was more than political will involved in affairs of the United Nations Charter and that states would be bound to the rules they had agreed to without much leeway.

The ICJ initially made clear that it did not intend to pass judgment on the internal decisions that prompted a vote for or against membership.117

111. There are some rare exceptions, like the presence of the article 39 situations by the Security Council, but a review of the actions taken under article 39 situations are still possible against purpose and intent of the Charter.

112. See Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, para. 14 (July 8 [hereinafter Nuclear Weapons]).

113. Compare David, supra note 91.

114. ICJ Statute art. 65.

115. See Conditions of Admission, supra note 35.

116. What I am trying to get at is that states usually do not do favors for another state without gaining an advantage, or worsening their collective position. The states could not accept that the Charter would be able to take precedence over the political will of the states that created it.

117. See Conditions of Admission, supra note 35, at 60. That issue would have been political to decide.
While the substance of the interpretation stated the obvious, the second interpretation cut precisely into the heart of the inquiry. Considering the circumstances, the General Assembly wanted to know what, if any, kind of condition can the members require for an affirmative vote while still fulfilling their obligations under the United Nations Charter. The Court cleverly limited the question by expressing the opinion: "The Court is not called upon either to define the meaning and scope of the conditions on which admission is made dependent, or to specify the elements which may serve in a concrete case to verify the existence of the requisite conditions."

While the General Assembly wanted to know what kind of conditions can be imposed other than those purely internal to the state decision making process, the ICJ only wanted to answer that internal processes were of no importance. In doing so, the Court refused to declare openly that it was unwilling to pass judgment on internal decision-making processes, but declared rather that the question was not asked. This limitation served only one function, namely to disguise that the Court was not willing to answer the second part of the question. The Court reduced the question of the General Assembly from one of entitlement to add conditions into a question of the mere interpretation text of Article Four of the United Nations Charter. This interpretation transformed the question into a purely legal analysis of a textual provision rather than into a problem of interplay of politics.

Measuring this decision on the working definition of judicial activism, the judges neither acted progressively nor lacked deference. Nevertheless, they construed the question posed loosely. In doing so, the judges did not act in a judicially active fashion, because the construction was not overly loose. The judges remained neutral. Holding parties to what they have

118. It is impossible for the organization to control the reasons why a member passes its vote. If it did, it would infringe on the principle of sovereignty. Each country can do with its vote whatever it chooses. And is precisely not subject to legal standards.

119. The question was phrased as follows:
In particular, can such a Member, while it recognizes the conditions set forth in that provision to be fulfilled by the State concerned, subject its affirmative vote to the additional condition that other States be admitted to membership in the United Nations together with that State?

Conditions of Admission, supra note 35, at 58.

120. Id.

121. In fact it was not asked, but the way the court limited the scope of its decision at the outset makes it seem like they thought it was. If it had been asked, the limitation would not have been necessary, but rather a declaration that these matters are not legal.

122. U.N. CHARTER art. 4.
promised to do is a universal principle, the application of which did not overstep any boundaries or advance the general understanding; therefore progressiveness cannot be implied here. A lack of deference is not evidenced, because there was no body to afford deference to. The General Assembly was requesting advice because it was split over the question, and individual members' actions do not require the Court to extend the privilege of deference. No act requiring deference occurred, regardless of the loose construction. The Court did not overstep its bounds.

The Nicaragua case in 1984 was politically very charged and provided for another opportunity to test for the Political Question doctrine: Is a country answerable before a court if it engages in military activity that it considers vital to its interest? Each political leader is bound to act as is best for his/her country in order to maintain approval in that country. Is survival of the state as entity in international law not the ultimate issue of sovereignty, a sovereignty that the United Nations had accepted? The ICJ held: No. The Court rephrased this highly emotional question into a question of fact that was to be held against the word of the United Nations Charter. States could not engage in aggressive behavior unless in self-defense, a question of fact before a clear rule. The obligation not to act in violation of another State's sovereignty and its exceptions was an obligation that the United States entered into and could be held to abide by.

This opinion was not judicially active in the issues we are presently discussing. The Court did not progress the law on the subject of the Political Question doctrine with this case, going beyond narrow boundaries already drawn. It would not make sense to have international law condemn aggression without the ICJ's ability to find that a country commits this

123. The political spiel of the members does not need to concern the deference considerations as to the organization as a whole.  
124. See Nicaragua, supra note 107.  
125. This is true for democratic regimes. In totalitarian regimes, the goal is to stay in power of something, and thus the state interest becomes the personal interest.  
126. I am hopelessly exaggerating the U.S. position and I am aware of it, but it is necessary to illustrate the point.  
127. This answer changed slightly in the face on the Threat of nuclear weapons opinion in 1996, see Nuclear Weapons, supra note 112 (when the justices refused to answer a similar point for lack of law on the subject).  
129. Again I am hopelessly simplifying, because the court had a huge amount of difficulty defining the actual law, but to that later. The court determined there was law and that each act could be held against it.  
130. See Nicaragua, supra note 107.
aggression. In order to hold a State to the promise not to commit aggression, the question had to be within the Court’s justiciability standards.

Very closely intertwined with the concept of Political Question and the transformation of questions is the issue of advisory opinions.

2. Transforming Non-Political Advisory Opinions

This subsection presents a related and yet different aspect of the issue of transforming inquiries of political nature into legal ones. We have determined that the Court has to engage in some rephrasing and limiting, in order to be able to answer the questions at all. This subsection is concerned not with the political implications of the questions, but with the tendency of the ICJ to rephrase questions to suit the judges’ answers, a phenomenon limited to advisory opinions.

An advisory opinion is an opinion that judges are requested to render on an abstract legal question. Usually, no factual background and no actual controversy are involved. The concept is in place to help the other branches of government to interpret existing law in an area, either in order to tailor new laws and regulations to the existing ones, or to end an interpretive dispute before it rises to the level of an actual controversy before the courts. Some countries are familiar with the concept of advisory opinions. The ICJ often follows the practice of interpreting the questions posed to it so drastically that the actual question is altered to an extent the asking body did not intend. The next section will lay out the practice in domestic courts and then draw parallels to the ICJ practice.

3. Domestic Advisory Opinions

Most courts do not recognize a doctrine of advisory opinion, yet some countries and some states in the United States permit their Supreme Courts to render advisory opinions. To take an example of one of the United States’ states, the Rhode Island Supreme Court shall render advisory opinions.

131. Some of these countries are India, and South Africa. Internationally, the ECJ recognizes a similar doctrine.

132. It could be the Supreme Court or the Constitutional Court depending on the system. Some of the national courts include the Canadian Supreme Court, and the English and the Indian Supreme Courts; See DRAHM Pratap, ADVISORY JURISDICTION IN THE INTERNATIONAL COURT, 263 (1972) as well as the South African Constitutional Court, CONSTITUTION OF THE REPUBLIC OF S. AFR., Act 108 of 1996 S 167 (6). Islamic law incorporates the concept of advisory opinions as well.

133. I am using the example of Rhode Island, because it is similar to many others in respect of the statutory or constitutional underpinnings of the doctrine. For analysis of states allowing
opinions upon written request by either of the coordinate branches but not jointly.134 Where allowed, advisory opinions are limited in scope. States vary in their limitations; the range extends from, "any question of law" to "important questions of law" or "solemn occasions."135 Courts differ in their opinion as to the bindingness of advisory opinions.136 In general, domestic judges tend to reject and disagree with the doctrine.137

State court judges have put additional limits on the issuance of advisory opinions not found in the original grant of power to render the opinion, such as prohibiting requests dealing with private interests.138 Even in states where issuance of an advisory opinion is mandatory, the Supreme Courts have imposed limits, such as the relatedness to the constitution.139 Some more common general restrictions are the refusal to entertain an advisory opinion if litigation is pending in a matter directly or indirectly related to the advisory opinion.140

Judges often rephrase questions posed to them in order to either fit the restrictions or fit their standards. An example of the common trait of rephrasing the question is tellingly in a multilateral court: the ECJ commonly rephrases questions submitted to it by the national courts to fit the interpretive standard imposed on the Court.141 National courts follow the same practice if they feel that a question does not fit the requirement, but nevertheless believe the query ought to be answered.142


134. Id. at 215.

135. Id. at 216.

136. Id.

137. Id. at 231, 232.


139. See e.g., Opinion to the Governor, 96 R.I. 358, 191 A.2d 611 (1963).

140. See Topf, supra note 133, at 236.

141. I am referring here specifically to the Case 26/62, Van Gend en Loos v. Nederlandse, 1963, 1 C.M.L.R. 105 (1997) [hereinafter Van Gend], where the court rephrased the question in this manner. The ECJ can take questions referred to it by national courts, if these questions only deal with an abstract matter of law. The Treaty of Amsterdam amending the Treaty on the European Union, Nov. 10, 1997 OJ C 340 art. 234 (1997), makes these referrals of interpretive questions possible and sometimes mandatory. They can be considered an advisory opinion as well, because they do not decide a case as such, but help the courts in interpreting a provision that is necessary to decide the case. In the area of treaties, the ECJ can give a purely advisory opinion as well, but Van Gent, Id. does not arise out of such a pure advisory opinion.

142. See generally Topf, supra note 133.
4. Practice of the ICJ

The ICJ also has certain requirements attached to its advisory jurisdiction set out in Article 65 of the Statute of the Court. The proper organ has to request an opinion and the question must be a legal one. There is no restriction such as "important," but "any" legal question should be answered. The judges believe they are vested with discretion, but they have hardly declined any requests. This section discusses the practice of the ICJ with regard to phrasing of the question by the requesting organ. Advisory opinions pose a query to the Court that the Court is supposed to answer. One aspect of this is the fitting of a question into legal terms; the second aspect is interpreting the legal question to mean one thing rather than the other.

A case thirty-two years after the Conditions of Admission case, when the Political Question doctrine was well settled, illustrates the difference. Although the ICJ used to attempt to separate context and query, it now required context. In the WHO v. Egypt case, an advisory opinion was requested, but instead of ignoring the actual circumstance to answer an abstract question in a legal fashion, the Court stated: "if a question put in the hypothetical way in which it is posed in the request is to receive a pertinent and effectual reply, the Court must first ascertain the meaning and full implications of the question in the light of the actual framework of fact and law."

143. ICJ Statute art. 65.
144. Id. at para. 1. See also Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 66 (July 1996).
145. U.N. CHARTER art. 96 para. 1.
147. Although the court considers itself to have discretion whether to answer an inquiry, U.N. CHARTER, supra note 145, it has only refused to do so in two cases. There has been no refusal, based on the discretionary power of the Court, to act upon a request for advisory opinion in the history of the present Court; in the case concerning the Legality of the Use by a State of Nuclear Weapons in Armed Conflict, the refusal to give the World Health Organization the advisory opinion requested by it was justified by the Court's lack of jurisdiction in that case. See supra note 111, at para. 14.
148. The fitting of the question into legal terms is not limited to advisory cases, but I will rely in this second on advisory opinions as a matter of example. This issue has been amply addressed above.
149. See Conditions of Admission, supra note 35.
150. See Interpretation of an Agreement of 25 March 1951 between WHO and Egypt, 180 I.C.J. 73 (Dec. 20) [hereinafter WHO and Egypt].
151. Id. at 76.
The Court still contended that the inquiry was a legal one, although admitting that it had political implications.\textsuperscript{152} The ICJ declined to take motives leading to the request into consideration.\textsuperscript{153} It re-articulated a question regardless of its already abstract character. The original inquiry was this:

Are the negotiation and notice provisions of Section 37 of the Agreement of 25 March 1951 between the World Health Organization and Egypt applicable in the event that either party to the Agreement wishes to have the Regional Office transferred from the territory of Egypt?

2. If so, what would be the legal responsibilities of both the World Health Organization and Egypt, with regard to the Regional Office in Alexandria, during the two-year period between notice and termination of the Agreement?\textsuperscript{154}

This inquiry would have required nothing but an interpretation of a treaty between the World Health Organization (WHO) and Egypt. Nevertheless, the World Court transformed the inquiry into: “What are the legal principles and rules applicable to the question under what conditions and in accordance with what modalities a transfer of the Regional Office from Egypt may be effect?”\textsuperscript{155}

In changing the question, the Court effectively addressed the issue of whether international organizations have to comply with their agreements; therefore the ICJ ruled judicially actively. Measured against the working definition, the ICJ clearly construed the request given in a fashion designed to raise issues unnecessary to fully answer to the original request. Both the almost \textit{sua sponte} raising of an issue and the lack of limitation to the necessary for a satisfying answer make the case a landmark decision.

In the \textit{Competence of the General Assembly} case of 1950,\textsuperscript{156} the Court was faced with the question of whether the General Assembly could \textit{sua sponte} accept members without a positive or negative recommendation of the Security Council.\textsuperscript{157} The inquiry was directed at the issue of how to interpret a vetoed resolution for acceptance or denial of acceptance—in

\textsuperscript{152} Id.

\textsuperscript{153} Id. at para. 33.

\textsuperscript{154} Id. at para. 1.

\textsuperscript{155} See WHO and Egypt, supra note 149, at para. 35.

\textsuperscript{156} Competence of the General Assembly for the admission of a state to the United Nations, 150 I.C.J. 4 (Mar. 30) [hereinafter General Assembly].

\textsuperscript{157} Id. at 5
short, whether a vetoed decision was a decision at all for the purposes of acceptance.

The ICJ instead interpreted the question as follows: "The Court is, therefore, called upon to determine solely whether the General Assembly can make a decision to admit a State when the Security Council has transmitted no recommendation to it."\footnote{158}

The court here used "no recommendation" rather than what had been described by General Assembly\footnote{159} as "negative recommendation."\footnote{160} This rephrase predetermined the outcome, because when "vetoed recommendation" became "no recommendation" at all, only textualism was needed.

This interpretation of the question here was not true\footnote{161} to the query; nevertheless, it was not judicially active. Although the ICJ changed the issue and avoided interpreting the true question of the General Assembly, the judges gave the United Nations a sufficient answer, by refusing to analyze whether a vetoed recommendation was sufficient, and rather assuming that this was the case. Since this assumption fits within the natural interpretation, the Court was not judicially active in this case.

In the Certain Expenses case, the Court decided whether cost incurred during peacekeeping operations were expenses of the organization that had to be paid by all its members.\footnote{162} The World Court again stressed that it could only answer legal questions.\footnote{163} It concluded that all it was asked to decide was the interpretation of the specific United Nations Charter provision, namely Article 17.\footnote{164} In the interpretation of this article however, the Court extended the inquiry further.\footnote{165} Claiming that nothing but the query itself was relevant for a discussion under the advisory opinion, the ICJ formally dismissed the French amendment to the inquiry that had been rejected by the General Assembly.\footnote{166} The ICJ still reserved

\footnotesize
\begin{itemize}
\item 158. Id. at 7.
\item 159. Id. at 9.
\item 160. Id. at 7.
\item 161. See General Assembly, supra note 156 at 21 (Judge Azevedo, dissenting, contends, that the court left out an important part of the inquiry, namely the question whether a vetoed recommendation would count as a negative recommendation).
\item 162. See Certain Expenses, supra note 34.
\item 163. Id. at 155.
\item 164. Id.
\item 165. Id. at 199 (Judge Fitzmaurice concurring, agrees that the court went into more detail than required, see also id. at 235, Judge Basedevant, dissenting).
\item 166. Id. at 155.
\end{itemize}
the right to comment on the particular amendment, namely the question of the appropriateness of incurring the cost.\textsuperscript{167}

The judges of the 1962 Court in fact remained with the original problem; however, in the decision, it inserted language justifying the actions of the General Assembly by giving it the Court's seal of appropriateness.\textsuperscript{168} The ICJ could have stopped at page 162 of its opinion. Everything after page 162 refers to the problem of appropriateness, which the General Assembly specifically ruled out of the inquiry.\textsuperscript{169} The Court specifically addressed that the General Assembly has an independent power over international peace and security, and thereby declared the peacekeeping operations legitimate.\textsuperscript{170} The judges even went as far as to make the inference explicit.\textsuperscript{171} Judge Spiropoulos made clear that he viewed the Court as exceeding the boundaries in his declaration following the opinion.\textsuperscript{172}

The Court in this case clearly overstepped the limits to judicial activism, because of the result achieved and the fashion in which it was achieved. As measured against our working definition, the Court clearly lacked deference to the inquiry posed to it and took it upon itself to solve a question that the General Assembly had explicitly taken out of the equation for the ICJ to discuss. There was no ambiguity as to the General Assembly's wishes.\textsuperscript{173}

While the inquiry was evidently a legal one, the ICJ changed the inquiry to add dictum. With this dictum the Court entered into \textit{sua sponte} considerations that are not within the scope of advisory opinions. The World Court was faced with a question of interpretation technically not in dispute; the task of an advisory opinion is to engage into an analysis that answers the question narrowly so as to avoid possible conflict with a standing practice.\textsuperscript{174} Here, the Court engaged in an analysis the requesting

\textsuperscript{167} See Certain Expenses, supra note 34 at 156-57.

\textsuperscript{168} What I am referring to here is the language: "It is a consistent practice of the General Assembly to include in the annual budget resolution, a provision for expenses relating to the maintenance of peace and security." Id. at 160.

\textsuperscript{169} Id. after page 162 (the court turns to limitation on the budgetary power, which is discussed in far more detail and in a direction not necessary for the immediate question at hand).

\textsuperscript{170} See General Assembly, supra note 156, at 163.

\textsuperscript{171} Id. at 176-77.

\textsuperscript{172} Judge Spiropoulos, supra note 160, at 180-81 (Judge Spender also agrees on this point, concurring, at 182-83).

\textsuperscript{173} Since, as mentioned before, the General Assembly voted against the expansion of the very question.

\textsuperscript{174} The same comments apply as mentioned before, regarding the possible difference between practice and theory.
organ wanted to avoid, causing a lack of deference, which alone renders the opinion judicially active.175

The inquiry posed to the court in the Namibia Case176 was rather simple: "What are the legal consequences for States of the continued presence of South Africa in Namibia, notwithstanding Security Council resolution 276 (1970)?"177

The broadness of the question allowed and forced the Court to go into many details and into considerations beyond the immediately necessary.178 Surprisingly, the Court refused to take advantage of the full scope of the inquiry. The actual outcome of the question is hardly as interesting as some of the statements going along with the opinion. The Court could have reviewed the legality of the resolutions made by the General Assembly and the Security Council, as it had done previously in the Certain Expenses179 case with less authority to do so.180 Instead the Court states,

Undoubtedly, the Court does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations organs concerned. The question of the validity or conformity with the Charter of General Assembly resolution 2145 (XXI) or of related Security Council resolutions does not form the subject of the request for advisory opinion.181

In the Namibia182 decision we find one of the rare instances in which the Court under-uses the power conferred upon it. The question to be answered here is whether this action amounts to judicial activism as

175. I feel the need to express that I do agree with the outcome of the case, and I am relieved that the court decided as it did. Nevertheless, the task of this paper is to analyze the jurisprudence of the court, and assess the attitude the court takes to its task. The evaluation of their performance will be discussed later.
176. See Namibia, supra note 91
177. Id. at 27, para. 42.
178. The question whether this particular resolution of the Security Council was justified, and what consequences would arise, are only examples.
179. See Certain Expenses, supra note 34.
180. Again, this touches on the issue of deference and the obligation to review to maintain legitimacy in the UN.
181. See Certain Expenses, supra note 34, at para. 89. It would have been possible to review the power to make this decision and the foundations of the decision of the other organs of the UN, to assess whether South Africa's presence was indeed valid and the resolution without effect. Although the court goes into some of these issues, not all are addressed. The selectivity with which the court here operates is striking.
182. See Namibia, supra note 91.
defined in this paper. From the decision that was handed down, the Court stayed well within the boundaries of the inquiry, the Court also afforded deference to the other organs of the United Nations and did not seem to interpret in a lax fashion.

Nevertheless, not engaging in some kind of review concerning the substance of the other organs' actions appears to be another form of activism, namely decision based on personal preference. The refusal to go into some of South Africa's concerns regarding voting patterns in the Security Council might not have altered the query so to render the opinion activist in the procedural sense, but changed the result. By refusing review of other organs' actions, the Court was only concerned with the case, not the overall scheme of the United Nations Charter. In the future, this action might have consequences harmful to the United Nations system.


This paper will now turn to address decisions of the ICJ relating to the substantive analysis of the United Nations Charter interpretation. In the Conditions of Admission case, the Court was faced with the interpretation of a narrow article of the United Nations Charter. The ICJ engaged in a by-the-book textual analysis: what the meaning of the words were, whether they were exclusive or by way of example. The court was here guided by plain meaning of the text. The court stated: "To warrant an interpretation other than that which ensues from the natural meaning of the words, a decisive reason would be required which has not been established."

The ICJ engaged in an analysis of the results of an opposite decision in order to justify a result already reached and concluded that a different decision would violate the spirit of Article Four of the United Nations Charter. Here, the Court was certainly not willing to compromise the text of the United Nations Charter for political necessities of the member States. It interpreted the United Nations Charter true to the text and did not engage in loose interpretation. Thus, from a substantive point of view, the Court did not rule in a judicially active fashion.

183. The court effectively decided that there could not be a review of UN organ action, a striking view, which could well be further discussed in a different paper.
184. See Conditions to Admission, supra note 35, at 57.
185. Id. at 62.
186. Id. at 63.
187. Id.
In the early phase of interpretation of the United Nations Charter and a time when legal positivism was a preferred form of interpretation, the Court would have been unlikely to decide otherwise. The Court had not yet established enough strength to rule on the basis of purpose and intent alone, not only because of its own weakness and inexperience, but also because of the credibility of the organization and its purpose. The organization had been formed to create a body that supervised the rule of international law in the form of peace and security; how could its principal organ rule on any other basis than the written rule of law? The text of Article Four is quite clear, so that it would have asked too much of the Court to decide otherwise. The conclusion here must therefore be that the court did not rule judicially actively.

In the *Competence of the General Assembly* case, the Court proceeded in the same pattern, not only because the query was made only two years later, but also because the same Article Four was involved and the surrounding reasons had not dramatically changed.

In the *Effects of Awards of the UNAT* case in 1954, the Court was faced with a request for advisory opinion that was in part too far remote from an actual provision of the United Nations Charter for the World Court to operate on a purely textual basis. The opinion can be separated into two parts. The Court held that the findings of the UNAT were binding upon the organization and that the General Assembly had the right to establish the UNAT. In the first part of the decision, the ICJ analyzed the language of the statute of the tribunal and found it to be a judicial body. Then the Court proceeded to infer all characteristics of a judicial body, so the tribunal could fulfill its purpose.

When the court proceeded to consider whether the General Assembly had the power to create a tribunal rendering decisions binding on the Organization, the analysis was further removed from any text. Article 101 provided the basis from which to infer the power of the General Assembly

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189. *See* General Assembly, *supra* note 156.

190. *See* Effects of Awards, *supra* note 47.

191. *Id.*

192. *Id.*

193. *Id.* at 53. The court found that a judicial organ was established and that the nature of a judicial organ includes binding decisions and independence. It therefore refused to let the General Assembly have the right to review without alternation of the statute.
to create the tribunal, however, the article is hardly detailed. The Court had to infer intent and purpose to even be able to rule on the question whether the General Assembly had the power to create the UNAT. Without a strong background of a rather clear United Nations Charter provision, the ICJ was left with intent and purpose of the provisions and, frankly speaking, common sense. Although this decision was only four years after the Competence of the General Assembly case, it seems the Court was more comfortable with departing from the actual text. There appear to be several reasons for this departure: first, there was hardly any applicable text; second, it made logical sense; third, principles common to many legal systems in the world suggested this result; fourth, the departure only briefly touched upon the subject of the inquiry; and fifth, the ICJ cannot refuse a proper request for an advisory opinion.

The court did not overstep the bounds to activism in the result. The argument that articles 101(1) and 101(3) were a basis to infer that the General Assembly had authority to even create the tribunal is hardly convincing. The Court attempted to conceal the lack of text (and thus of law) by pointing to remotely applicable portions of the United Nations Charter. The judges did not directly admit to the United States constitutional language, that the creation of the UNAT was a "necessary and proper" use of powers, to fulfill the task given to the General Assembly, but did not fall very short of the statement. Measured against the working definition, I cannot find activism regardless of the apparent lack of text. The Court showed deference to the General Assembly, by conceding that there was a need and the possibility to create the tribunal.

The standard of deference applied seems most appropriate in this instance, first because the General Assembly agreed and second it seemed logical to proceed in this fashion. There was no danger threatening basic principles of the United Nations, because the creation of the UNAT did not violate any express term of the United Nations Charter and rather fostered the principles therein. Holding the General Assembly to the statute of the tribunal, as they had created it, was based on textualism. In interpreting the statute of the tribunal narrowly based on text and function, the ICJ did

194. U.N. CHARTER art. 100.

195. The language of the text of the Charter in the relevant provisions is as follows: "the Security Council under regulations established by the General Assembly shall appoint the staff." U.N. CHARTER art. 101, para. 1. See also U.N. CHARTER art. 101, para. 3 ("the paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency.")

196. See General Assembly, supra note 156.

197. U.N. CHARTER art. 100, paras. 1, 3.
neither interpret the statute in a loose fashion, so as to bring them into the definition of activism nor progressed international law. The decision was very narrow in scope and did not affect international law in general, so as to progress it.

Another example of this approach is the Certain Expenses case. Although this case has been discussed in an earlier section under the heading of procedural activism, the value of this case for the section on substance will become evident. The Court employed analysis of the text of the United Nations Charter, discussing the issue whether an expense had to be administrative or other, to introduce the issue of maintenance of peace and security into the discussion. In deciding the case, the ICJ introduced the distinction between enforcement and non-enforcement action. Since the United Nations Charter seems to give the General Assembly and the Security Council concurrent jurisdiction over the matter of international peace and security, the World Court had to find a way to make sense of the United Nations Charter and transform it into a workable form. By making the distinction, the ICJ introduced a new concept into the United Nations Charter. The dividing line between the Security Council’s competence and the General Assembly’s competence is ICJ made. The use of purpose and intent as interpretive guidelines becomes more evident in this case, compared to the cases of the earlier decisions.

Through its procedural activism, the Court increased the difficulty for itself and ruled in a judicially active fashion. The Court did not allow deference to the creators of the United Nations Charter, trusting that concurrent jurisdiction was feasible without a line drawn, so as to give room for practice. The ICJ progressed the law of the United Nations Charter by introducing a new concept creating the modern peacekeeping missions, which were not originally in the United Nations Charter. For these reasons, the Court was judicially active in the substance of this case. Recalling the deadlock in the Security Council, the ICJ was, more likely then not, concerned with the possibility of the United Nations being able to fulfill its purpose and thus generated this result. However, it should not have gotten politically involved. The Court was not forced to decide on an

198. See Certain Expenses, supra note 34.
199. Id. at 160.
200. Id. at 163.
201. U.N. CHARTER art. 24, para. 1; art. 11, para. 1.
202. See Certain Expenses supra note 34, at 197 (Judge Spender, in a separate opinion, expresses his discontent with the approach of the majority, and warns the court not to engage into political considerations rather than legal ones).
infringement of powers, and no substantive violation of principles of the United Nations Charter was evident as to invite review.

In the Reparation for Injuries case, the ICJ conferred upon the organization international legal personality. Loosely tying this privilege to the text of Article 100 of the United Nations Charter, the ICJ implied that an opposite decision would violate the text of this Article, nevertheless plainly stating:

The Charter does not expressly confer upon the Organization the capacity to include, in its claim for reparation, damage caused to the victim or to persons entitled through him. The Court must therefore begin by enquiring whether the provisions of the Charter concerning the functions of the Organization, and the part played by its agents in the performance of those functions.

The Court here had no choice but to use a positivist approach, because of the simple lack of text. Does this make the decision activist by definition? Not by itself. The Court here exhibited great deference to the makers of the United Nations Charter as well as to the personnel involved. What was implied did in fact progress the law, but not to an extent that was surprising or unforeseeable. The judges pointed to the uniqueness of the United Nations Charter and of its function, thereby limiting the possible extent of the decision. Nothing in the United Nations Charter made its legal personality express; giving the organization international personality was a novelty in international law.

Our prior discussion concerning the character of the United Nations Charter is of help here to evaluate the ICJ decision.

As adequate for a "consensual constitution," the judges were under the obligation to bridge gaps in international law. This case marks a paramount measure for the difference between creating law and bridging the gaps. The former is improper, while the latter is proper. Whether this decision is activist or not, this case illustrates the closest possible scenario between proper bridging and improper creation. Giving the United

203. See Reparations, supra note 65.
204. U.N. CHARTER, art. 100.
205. See Reparations, supra note 65, at 182.
206. Id. at 190 (Judge Alvarez, concurring in the result, is even of the opinion that the court has the legitimate power to progress the law in the face of new situations).
207. Up to this point only states had had international legal personality.
208. I must be clear that I refuse to express my opinion, whether this case is activist or not, in an absolute fashion. It is a close call and reasonable people can differ.
Nations legal personality was necessary for the functioning of the organization. But does the end justify the means? Although the judges attempted to limit their ruling by stating that the United Nations has special status, politicians are unlikely to have considered the theoretical implications of what they intended to create. If they had known that it would take actual legal personality, and what leap this would entail for international law, to create the United Nations, they might have denied this status to their creation. No international institution had had legal personality before, so that the leap the ICJ took crosses the line to activism.209

In the Namibia case,210 the Court again interpreted the United Nations Charter in a purposivist fashion. Over South Africa's objection, the ICJ condoned the voting procedures of in the Security Council, although they violated the actual text of the United Nations Charter.211 The Court did not want to allow South Africa to invoke an issue it felt that only the permanent members of the Security Council had standing to raise. By refusing to let South Africa raise the issue, the Court again overstepped its limits. The considerations that probably went into the decision were more focused on a just result, namely that South Africa leave Namibia, than law. This result orientation fits neatly in the definition of judicial activism. A consideration outside the law was to regain the trust of Third World Countries, after the devastating South West Africa decision series.212

The court ruled in an activist fashion by construing the text of the United Nations Charter so loosely and letting practice alter the United Nations Charter's express terms. The ICJ could have declined to decide the issue raised by South Africa based on standing or through interpretation of the question, rather than to decide the issue.

In the Threat of Nuclear Weapons case,213 The ICJ decided the question posed, but refused to decide an issue imbedded in it, namely the question whether self-defense would trump the prohibition against use of

209. See Reparations, supra note 65, at 197-98 (Judge Hackworth dissenting, agrees, that there was nothing suggesting this kind of power for an international organization). Cf. id. at 205 (Judge Pasha, dissenting).

210. See Namibia, supra note 91.

211. Id. In this case, the ICJ decided that an abstention was equally valid as a vote form a permanent member of the Security Council. The text of the Charter however requires an affirmative vote: "Decisions of the security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members." U.N. CHARTER art. 27, para 3.

212. The court had been immediately criticized for its decisions and, in the aftermath, the court changed its views. See McWhinney, supra note 188, at 14.

213. See Certain Expenses, supra note 34.
force.\textsuperscript{214} The ICJ alleged the reason of insufficiency of the law in order to avoid deciding the issue.\textsuperscript{215}

The World Court did not overreach beyond normal judicial limits in this case. By admitting to a lacuna the Court did not stretch the limits of the question in abuse of discretion, nor did it display a lack of deference. This was the first time in the history of the Court that the judges decided to take a query, but returned a decision that did not give a full answer, because of a lacuna. In the overall structure, it could not harm the United Nations to admit to certain gaps in the law. No one organ needed deference in this regard because they were likely not to be involved in such issues. The question had been: "Is the threat or use of nuclear weapons in any circumstance permitted under international law?"\textsuperscript{216} The Court did its best not to alter the question and refrained from trying to legislate.

After the aforementioned examples of ICJ jurisprudence that established some cases of judicial activism, this paper will consider whether the Court legitimately exercises this activism, thereby excusing the activism exhibited.

C. Legitimacy of the ICJ

The ICJ is the principal judicial body of the United Nations.\textsuperscript{217} As the principal judicial organ, its task is to interpret the United Nations Charter and to resolve disputes between the organs of the United Nations and its member States. The ICJ has on several occasions exceeded the task given to it by the United Nations Charter, by ignoring a question, by adding to it, or by interpreting the United Nations Charter loosely. Where does the ICJ obtain its legitimacy, if it is judicially active?

Like many federal judges, ICJ judges are not elected by common ballot among the people in their community. They are nominated by the Permanent Court of Arbitration and then elected by the General Assembly and the Security Council.\textsuperscript{218} The judges represent the major legal systems and cultures of the world.\textsuperscript{219} This representation is not formal and the


\textsuperscript{215} Id.

\textsuperscript{216} See Nuclear Weapons, supra note 112.

\textsuperscript{217} U.N. CHARTER, art. 92.

\textsuperscript{218} ICJ Statute art. 4, para. 1.

\textsuperscript{219} E.g., no two judges of the same nationality are allowed on the court. ICJ Statute art. 3, para. 1. See also Liz Heffernan, \textit{The Nuclear Weapons Opinions Reflections on the Advisory Procedure of the International Court of Justice}, 28 STETSON L. REV. 133, 135-36 (1998).
judges do not serve as agents of their countries, but are neutral.\textsuperscript{220} Since they are not representatives, do they have the legitimacy to make law? In international law, countries make law by either treaty or custom.\textsuperscript{221} If the judges do not represent the will of the countries, they cannot make law with democratic legitimacy.\textsuperscript{222} There has been some writing on democratic legitimacy on the international law community, without a conclusive result. International law is not based on democratic legitimacy and does not need to be. International law is a separate legal system, as explained many times in this paper, and therefore, the rules of what constitutes legitimacy are different from the domestic context and legitimacy must be derived from a different source. The basic legitimacy of the ICJ derives from the instrument creating it, but if the scope of the power conferred is exceeded by judicial activism, there is little that can offer legitimacy. Of course it is difficult for any judge to proclaim the law without coloring the words and adding to the flavor, but this coloring may not exceed the scope of bridging gaps in the law.\textsuperscript{223}

If judges in the World Court continue to actively make law,\textsuperscript{224} their legitimacy will be lost. Judicial activism in the ICJ can take not only the form of active creation of law, but also of (passive) refusal to act in fulfillment of their judicial function in accordance with the United Nations Charter. When the World Court refuses, for example, to pass judgment on or review certain actions of other United Nations organs, it cannot fulfill its functions fully, namely to protect the object and purpose of the United Nations Charter.\textsuperscript{225} If judges do not fulfill their functions, they loose legitimacy and put the credibility of the United Nations and the ICJ at risk.\textsuperscript{226}

\textsuperscript{220} ICJ Statue art. 2.

\textsuperscript{221} See Certain Expenses, supra note 34.

\textsuperscript{222} I will not go into detail as to the democratic legitimacy of international law in general, first because it will exceed this paper's scope, and second because it has been hotly debated among scholars.

\textsuperscript{223} Talim Elias argues that the General Assembly took cognizance of the rule making powers of the ICJ, and that this action, taken in resolution 3232 (XXIX) of 12 November 1974, is sufficient. He also argues that the court cannot declare a non liquet. See TALIM ELIAS, INTERNATIONAL COURT OF JUSTICE AND SOME CONTEMPORARY PROBLEMS, 216-17 (1983). I cannot agree fully with this argument for several reasons. First, the General Assembly cannot by resolution itself make hard law, so it cannot authorize the ICJ to do so. Second, the resolution itself is not as unambiguous as portrayed.

\textsuperscript{224} They may not since the Nuclear Weapons case showed the newly coming reluctance and preference to admit to a lacuna.

\textsuperscript{225} Cf. David, supra note 91.

\textsuperscript{226} It is, in my view, hypocritical to let the 880-pound Gorilla do whatever it pleases. There is a limit. Articles 1 and 2 of the Charter and the ICJ should be there to watch over this
I do not mean to imply that Article 39\textsuperscript{277} determinations are reviewable, but rather only measures blatantly against the text of the United Nations Charter. Since the World Court has, on numerous occasions, refused to review the other organs' actions for their compatibility with principles of the United Nations,\textsuperscript{228} this paper has not even reached the question on how much review should be in place. First, there must be review in the first place.\textsuperscript{229} The ICJ has virtually rejected the Political Question doctrine and has no excuse to reject a review of other organ's actions. In the Namibia case the judges refused review, in the Certain Expenses case they undertook review. There are more examples on both sides; some review engaged in for right or wrong reason and in the proper or improper way, some review refused for the right or wrong reasons, in a proper or improper way. Lack of consistency in deciding will not help to establish legitimacy and credibility.

IV. CONCLUSION

Procedurally, the Court used to be more active than it is now. Concerning substantive activism, the actions of the Court can be tied to the existence of text to guide the interpretation.\textsuperscript{250} When there is clear text, the Court usually does not ignore the plain meaning. When no clear text is involved, the Court has proven to be quite active in creating law.

In the early stages of the ICJ, the justices were trained mostly in Europe or were themselves European.\textsuperscript{251} This resulted in a strong tendency toward legal positivism. The judges wanted to separate particular issues totally from their social context.\textsuperscript{252} Unfortunately over time, the judges were not able to separate the issues form their social context and fell victim to the apparent need to create law. When clear text is involved, the judges

\begin{itemize}
\item 227. U.N. CHARTER art. 39.
\item 228. Compare Namibia, supra note 91.
\item 229. I think I have made clear how much review I would apply in through the standard of deference I have suggested as measure for judicial activism.
\item 230. Cf. Bodie, supra note 92. Bodie subdivides the courts activism in two phases, before and after 1966. I disagree, due to the reasons shown in this paper. Concerning the substance before 1966, the ICJ stripped the inquiry to its textual essentials. \textit{Id.} at 64. In the period after 1966, the ICJ turned to more evaluative reasons and became more conscious of the charter's background, purpose, and intention. \textit{Id.} at 62.
\item 231. \textit{Id.} at 61.
\item 232. EDWARD McWHINNEY, JUDICIAL SETTLEMENT OF INTERNATIONAL DISPUTES xvii, 1990.
\end{itemize}
used to rule for the plain meaning, and when no clear text was available, purpose and intent of the United Nations Charter ruled the decision. In later cases, with a new set of judges, the World Court took great liberty with which issues were decided and which chosen to be left at rest, once any inquiry or conflict had been presented to them. This liberty falls within the working definition of judicial activism. Although not every case warrants this label, the analysis above shows that the Court in procedural liberty throughout the years of jurisprudence displays a great deal of activism that is not part of a grand scheme.

Another factor in this assessment, however, has to be the need for activism. It has been said that every judicial body makes law and that indeed, lawmaking is an essential function of the adjudicative role. The role of the judges is to state the law, and in doing so, judges necessarily add color or flavor to the rule, thereby adding and making new law. Judges necessarily advance the law minimally by their interpretation and their application. It is also clear that the position of the ICJ as only arbiter increases pressure on the judges to reach the right result, while they are still trapped with a strong need for restraint because their decisions cannot be remedied like domestic decisions. Nevertheless, the ICJ often went beyond the “flavoring” of the law by deciding issues not in question or avoiding them. The unique role of the Court, as it has been described supra, makes its decisions uniquely important and restraint on its side is desirable. Although the judges found the right measure at times, the lack of consistency, traceable to different panels at different times with different morals and cultural backgrounds, shows that judicial activism in the ICJ is less a creed and more a creature of personal preference.

Although the intent of the judges to progress the law and heal the international machinery is commendable, where it occurred, medicine applied the wrong way can still harm the patient. Consistency is necessary for the ICJ. Doctrines of ripeness and mootness have their place in international and domestic law, so that the decision of questions not within the inquiry should, more often than not, not be an issue. Similar to the ripeness doctrine, an issue not on the agenda should not be decided in a sterile setting, removed from a problem situation. It could result, and at times has resulted, in a fundamental decision with the ability to cause more


234. See Reparations, supra note 65, at 190 (Judge Alvarez, concurring in the result, states that he cannot even see the line that separates law making from development of law).
harm than use. The World Court has said in the Asylum case it ought to consider the question asked and ignore those not asked. This is also known as the non-ultra petita rule. The judges should stick to this rule. If the ICJ were less active procedurally, it would be less hard-pressed in some substantive decisions.

The ICJ has a unique task in the international plane, which calls for consideration of the judges' positions as to the basics of the structure of the United Nations, the position of the Court in the organization, and their own roles. Once these factors are clearer in the minds of the judges, the activism exhibited by ICJ may be directed into a more controlled and consistent manner that does justice to the important role played in international law. If consistency is reached beyond one set of judges or one set of circumstances, the ICJ will receive more leeway for being judicially active. Unfortunately, over the fifty-year period the Court has been in place, the personal attitudes of the judges varied so strongly that no coherent trend can be identified, and the Court at times resembles an ad hoc panel rather than a standing Court with fifty years of decisions to guide it.

Judicial activism is certainly not “evil” for international law, nevertheless, everything can be overdone. The judges in the World Court can be compared with Supreme Court justices in the United States. To a degree judicial activism is inherent in their function as the court of last resort. The judges have to be active. In international law, the ideal would be comparable to domestic law: legislators come together and create law where there is a need for it. Unfortunately, international law is always behind its time. If we do not want more non-decisions of the ICJ as in the Threat of Nuclear Weapons case, then we have to live with an active Court from time to time.

The United Nations Charter must be interpreted first on its face, and the result so achieved must be weighed against the object and purpose of the United Nations Charter. The object and purpose must then be construed broadly to exclude only those results, which would offend its purpose blatantly in order to afford sufficient deference to the other organs of the United Nations. Nevertheless, consistency in this review is necessary to afford legitimacy to both the court and to the United Nations.

235. See Asylum (Colom. v. Peru), 150 I.C.J. 266, 402 (Nov. 20). Although this was a contentious case, the rephrasing of questions remains, and the doctrine administered by the court should also stay consistent.

236. See BODIE, supra note 92, at 65.


238. See Nuclear Weapons, supra note 112.
If that takes some activism from time to time, the author is willing to accept that. But not everyone shares this view, as some say: "[A] proactive court is as dangerous as a proactive council."239 One cannot help but feel a swell of pity for the ICJ judges, stuck with the need for deference and review—stuck with a whipsaw.

239. See David, supra note 91, at 149.