No Sword, No Purse, No Power:
The International Court of Justice in International Relations

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ABSTRACT

The power of domestic judiciaries to influence national governance has led to academic and political speculation about the role of international law in regulating international relations. This intersection between international law (IL) and international relations (IR) is a relatively new, albeit particularly relevant area of study, given that IR theories may have predictive power in identifying the ability of international courts to influence international politics. For example, in the field of international relations, realists assert that international law is not a primary factor in state behavior, whereas constructivists and liberals believe international law can temper the anarchic nature of international politics. Similarly, in international law theory, skeptics believe international law will always be subordinate to international politics; but optimists believe it can govern state behavior. Using these, and other assumptions from IR and IL theories, this thesis investigates whether the International Court of Justice (ICJ) actively influences state behavior, and under which circumstances the Court is more/les influential. Specifically, by sampling 56 ICJ cases, this thesis examines variation in the Court's influence based on the size of the litigating states, material interests of the case, norm type, and source of law. The findings suggest there is variation among these variables in terms of predicting ICJ influence; with litigant disparity and material interests being most strongly, and negatively, correlated with the influence of the Court. More research is needed before affirming the regulative role of international law in state behavior.

Chapter 1: Introduction

Judicialization is, in a nutshell, the expansion in power and scope of judiciaries. As a global movement, it "may be or may become one of the most significant trends in late-twentieth and early-twenty-first-century government" (Gibson, Caldeira, and Baird 1998, 343). The process of judicialization is already well documented at state and national levels, and most recently its influence has expanded to the international system. The extent to which supranational judiciaries and international law influence international politics remains poorly understood. Given the significant role national courts play in domestic governance, it is reasonable to believe there could be similarly powerful interactions between international law and international relations. This thesis explores this hypothetical relationship with the aim of identifying and measuring potential judicialization effects on relations between states on the international level.

In order to accurately measure the role of judicialization on state behavior, an interdisciplinary analysis that evaluates supranational judiciaries through the lenses of both international relations and international law is employed. International law is largely driven by norms that arise from custom and practice, rather than concrete legislation in domestic civil law. Additionally, unlike domestic judiciaries, international courts lack an executive branch to enforce their decisions. Owing to these two traits, 'skeptics' of international law assert that international law will not influence state behavior; 'optimists,' on the other hand, believe that it will shape international relations because states are compelled to abide by its dictates. The anarchic, norms-based structure of international law, as well as the optimist/skeptic debate, corresponds to arguments underlying international relations paradigms. Therefore, using both international relations and international law theories will provide a clearer understanding of whether international law is secondary to state material and political interests as suggested by

realists and skeptics; or, conversely, if international law is actively driving state behavior as suggested by optimists, constructivists and, to a certain degree, liberals.

Owing to the sheer breadth of international judiciaries, as well as diversity in their jurisdiction, structure, and enforcement mechanisms, it would be difficult to analyze the relationship between international law and politics on a comprehensive scale. For this reason, one court, the International Court of Justice (ICJ), will be used as a case study of the interaction between international law and international politics. The ICJ is an appropriate selection given that it is arguably the foremost authority of international law (Amr 2003), has nearly universal membership and encompasses a wide range of international law.

The underlying hypothesis of this inquiry is that international law does not play the primary causal role in driving state action. Rather, material interests principally drive state behavior as anticipated by realists in international relations and skeptics in international law theory. It would be extreme to assert that the ICJ has no effect on the international system or on state behavior. Even realists and skeptics recognize that international law can influence state behavior, but they suggest that the scope of its influence is limited and will not supersede material interests. Therefore, using approximately half of the ICJ's completed cases (56/108), I examine variation in the Court's jurisprudence based on four different criteria, which may explain differential effects on state behavior. First, I examine the relative state size of the litigants and their success at the Court. Second, I evaluate the outcome of the case and influence of the Court based on the material significance of the case. Third, I assess the sources of law used in deciding each case to see if the Court is more/less likely to base its decisions on different sources of law (i.e., general principles, customary international law (CIL), national laws, and

treaties). Fourth, I see if there is any variation in the Court's authority amongst the three different norm categories as outlined by constructivists: evaluative, regulative, and constitutive.

This thesis proceeds as follows: first, it discusses the three main international relations paradigms and the expectations that arise from them regarding international judicialization. Then, it briefly outlines the process of judicialization to demonstrate how courts function in relation to these paradigms. Next, it provides an overview of international law scholarship, which demonstrates the compatibility of international relations and international law theory. It subsequently discusses the ICJ specifically – its structure, function, and prominence in international law. Then, based on this scholarship, it outlines the hypotheses and provides a more detailed account of its methodology and measures before moving into the sampling of the ICJ cases. The cases are discussed, in turn, based on the four different criteria – state size, material interests, source of law, and norm type. This is followed by a discussion of the findings and their potential implications for international relations theory and international law.

Chapter 2: Theoretical Overview
2.1 International Relations Theory

The field of international relations is structured around three main paradigms: realism, liberalism, and constructivism. In this section, I briefly outline the three paradigms and their theoretical predictions regarding the role of the ICJ on state behavior; I discuss the literature surrounding international relations and international law in a later section.

2.1a Realism

The realist paradigm is based on six key assumptions. First, realists assert the world is anarchical, meaning there is no global government. Second, owing to the condition of anarchy, states must be self-reliant; unlike a US citizen, for example, states cannot call the police to enforce behavior. Third, states' primary goal is survival, which supersedes all other objectives. In order to survive states must acquire material resources (e.g., military or economic strength) (Mearsheimer 2008). Fourth, all states act similarly in a rational, self-interested manner, but differ in their resources or capabilities. For example, all rational firms in an economic market are profit maximizing, but an oligopolistic or monopolist firm will be more profitable than a perfectly competitive firm; in the same way that a powerful state will be more successful than a weak state. Continuing with the economic analogy, markets are defined by distribution of powerful firms within the market; thus, if there is one powerful firm, a monopoly, then that firm dictates the rules of the market. For realists, this means that the power of the states within the international system shapes the rules of that system (Waltz 2008). Fifth, states are the primary unit of analysis; realists recognize that non-state actors exist, but discount their importance or primacy in international relations. Also, since realists believe all states act similarly, they do not differentiate between the types of states, e.g., a presidential versus parliamentary state. Lastly,

realists perceive the world as zero-sum and consequently care about relative gains (i.e., one state cannot gain unless another loses).

These six tenets lead realists to have a pessimistic, Hobbesian view of the world. They believe states are reluctant to cooperate with one another. This is not to say that states should not cooperate or form alliances, but considerations of cheating, dependency, and relative gains undermine cooperation. Moreover, there is a hierarchy of state goals, which means when a state's security interests are threatened, commitments to the ideals of justice are subordinated. Regarding the ICJ, this means states are unlikely to be party to any suit that significantly concerns their security or material interests. Realists believe states always act to ensure survival and acquire power; and if the ICJ facilitates this process, or it at least does not hinder this pursuit, then states will use it and abide by its rules. If, however, the Court harms state interests, then it may be disregarded.

Insofar as states are rational, their behavior is influenced by what they can realistically achieve, which may not be what they actually or ideally want (i.e., calculated aggression) (Mearsheimer 2008). In terms of the ICJ, this implies that small, weak states are more likely to request adjudication, especially in regards to significant issues, than larger states because they lack other means of recourse. In negotiations big states have the upper hand, so remediation through the Court is a better option for small states. Since there is no enforcement mechanism though – and also small states do not have the power to enforce the Court's ruling – if the judgment were to significantly harm the interests of the larger state, it is unlikely that it would be followed. Overall, realists would expect that the ICJ would have a subsidiary role in international relations; its rulings may be followed; however, the Court will not have a primary role in state behavior because it will not change the nature of anarchy.

2.1b Liberalism

Liberals share realists' view that the world is anarchical; however, they optimistically believe anarchy can be mitigated by continuous interactions. More specifically, institutions can foster meaningful, long-term cooperation because they decrease transaction costs, increase transparency, and alter the pay off structure of interactions (Oye 2008). Thus, institutions help resolve concerns about cheating and defection, which increases trust and cooperation. Liberals further believe interdependence amongst countries is beneficial because it creates incentives for states to continue cooperating and decreases the likelihood of conflict (Keohane 2008).

States are the primary focus of international relations, but unlike the realist assumption that states are unitary actors, the state is a compilation of individual interests. This latter point is important because the kind of state (e.g., regime type) matters. Liberals also argue that all states are rational, meaning they act in their self-interest, but do not necessarily have a uniform 'self-interest.' Liberals believe preferences, not just security and power, drive state behavior (Moravscik 2001). They assume the world is positive-sum, and so are not as worried about relative gains; they are interested in absolute gains and are concerned with human prosperity. Liberals believe in the benevolence of mankind, and many variants of liberalism emphasize the importance of democratic values.

Unlike realists, who believe only states are important in the international system, liberals argue that institutions are also important because they can mitigate (but not eliminate) the effects of anarchy. In this way, the ICJ can foster cooperation by increasing transparency and altering the payoff structure (Oye 2008). One of the advantages of judiciaries is that they decrease transaction costs; for example, it is cheaper to settle a dispute in court than it is to invade the country. Moreover, liberals believe that a commitment to justice is a fundamental state interest; thus, liberals support international law because it fosters respect among states (Doyle 2008).

Therefore, liberals would anticipate that many states would welcome international litigation because it is a mutually beneficial means of conflict resolution, helps mitigate the effects of anarchy, and spreads the ideals of justice.

2.1c Constructivism

Constructivists differ from realists and liberals in their perception of anarchy and state behavior. Alexander Wendt, a constructivist scholar, asserts that anarchy is a social construct. It is unlikely the system will not be anarchical but the effects of anarchy depend on the actors within the system. International relations does not necessarily need to be Hobbesian. The consequences of anarchy are 'what states make of it' (Wendt 2008).

Rather than assume state preferences as given, constructivists argue that ideas and interactions determine state behavior. The relationship between identity, ideas and norms between two states shapes their interactions (Katzenstein 1996). For example, the US and England have a long history together and similar cultures, which is why they are allies. On the other hand, the US and Russia have historically had different, conflicting ideologies, which is why they have an antagonistic relationship. States act differently toward one another based on their identities and norms, rather than (exclusively) the condition of anarchy.

Whereas realists believe the condition of anarchy makes states act a certain way and liberals believe states can shape the international system, constructivists assert the relationship between state behavior and norms is "mutually constituting." This is important because constructivists believe that anarchy is not the primary determinant in state behavior; rather, norms and ideas dictate state behavior. This is not to say material interests are irrelevant; again, the relationship is mutually constitutive, but it demonstrates the causal role of norms in the constructivist paradigm. Changes in norms lead to changes in state behavior. Importantly,

constructivists define norms as "standards of appropriate behavior for actors with a given identity" (Finnemore and Sikkink 1998, 891). Furthermore, there are three categories of norms: evaluative, regulative, and constitutive.

Evaluative norms set the standards of appropriate behavior; they are prescriptive (e.g., what is appropriate or what one 'ought' to do), and are based on moral considerations (e.g., human rights laws). Regulative norms and evaluative norms are related; in fact many scholars do not include evaluative norms, rather they are incorporated into the regulative category (Finnemore and Sikkink 1998; Katzenstein 1996). More specifically, regulative norms are those that limit or constrain a given behavior (e.g., domestic law). Given the moral undertones of evaluative norms, as opposed to the more objective 'rules' of regulative norms, it makes sense to separate the two categories. Lastly, constitutive norms create new actors or types of behavior (Katzenstein 1996); for example, a movement against a certain type of warfare. The role of these norms in judicialization is noteworthy, as constructivists recognize a close, almost parallel, relationship between the two constructs. More specifically, international law is largely composed of norms, which implies that supranational courts are proponents of norm emergence, particularly in regards to constitutive norms. Therefore, constructivists believe the ICJ influences state behavior through the norms it establishes; and also, as will be discussed further, based on the legitimacy of international law and the compliance-pull that it creates.

The three paradigms have different interpretations of the roles of norms and material interests. Both the realist and liberal paradigms recognize the supremacy of interests over norms; but liberals acknowledge these interests do not necessarily have to be material. Therefore, a commitment to justice or democracy could be a state interest. Constructivists, however, assert that norms play a significant role in state behavior, although they recognize material interests are

still important. Realism does not assert that norms are completely irrelevant or nonexistent; rather norms do not have a causal role in state behavior. States act in their self-interest, which may or may not align with certain normative values; but states will not act in accordance with normative standards at the expense of their material interests.

With this brief overview, I now outline the basic theory of courts and process of judicialization before moving into a discussion of international law and its relation to these international relations paradigms.

2.2 Judicialization

Courts' primary responsibility is to resolve disputes; in doing so, they serve an important social function. Courts promote stability by objectively upholding standards of norms, or laws, and in doing so decrease transaction costs. When courts are effective and continuously used, they become more powerful and begin directing the behavior of the actors in their community in accordance with the court's standard of norms. This phenomenon is judicialization.

Judicialization arises partially because courts, like many institutions, are path dependent. Specifically, this implies that how courts act now is influenced by their previous decisions and conditions their behavior in the future. Courts are path dependent primarily because they rely on precedent (Stone Sweet 2002). Because of path dependency, litigants can make rationally calculated decisions about adjudication, which increases the demand for courts as dispute resolvers. In this way, path dependency is integral to the process of judicialization.

Also underlying judicialization is a positive feedback mechanism, which allows courts to exhibit increasing returns to scale, or more generally, a snowball effect. For courts, this means, "a nascent, or maturing, standard of behavior induces increasingly larger, and better networked, individuals to behave similarly, that is, in ways that adapt to, and thus reinforce, that standard"

(Stone Sweet 2002, 113). Notably, the process of judicialization mirrors the proliferation of social norms. Court decisions can reach a 'tipping point' or cascade (Finnemore and Sikkink 1998), which will lead the court to become a key contributor in society as norms upheld by the court alter behavior.

It is not guaranteed that courts will reach this tipping point. In order for a court to enjoy increasing returns and become influential, it must appear legitimate (Whittington, Kelemen and Caldeira 2008). Attaining 'legitimacy' is therefore the most fundamental necessity of any court. Judgments and verdicts will be followed insofar as they are legitimate, especially since courts lack the ability to enforce their decisions. Courts require a 'deep reservoir of goodwill' because they rely on an executive body, or some type of authoritative body, to enforce their verdicts (Gibson, Caldeira, and Bards 1998). Accordingly, it is important to describe factors that underscore this legitimacy.

In order to be viewed as legitimate, courts must be perceived as independent, neutral, and non-political (Shapiro 1981). This means that when resolving disputes, neither party to the suit feels outnumbered in a two-against-one structure, or that the court is systematically biased towards the other party. Party in this sense means a litigant, either the applicant or respondent. That said, of course, no court is truly independent; all courts are upholding some type of standard. For example, a national court is enforcing the laws of the country and as such it is not neutral.

The manner through which a court reaches its verdict allows the court to overcome the problem of non-neutrality. Courts must justify their verdicts; they must explain the reasoning and logic used in their decisions. By giving reasons for their judgments, courts conceal any political ties. Also, by justifying their decisions and/or using precedent, courts are using laws that had

already been established, meaning they did not create the law for the present case, which would undermine their neutrality. Moreover, giving reasons for decisions provides a framework for courts to arrive at conclusions in future cases, which increases their efficiency, enhances their authority and underscores their increasing returns (Stone Sweet 2002).

The reason courts can decrease transaction costs and provide stability is because they are consistent and path dependent. As discussed, courts are path dependent because they follow precedent. Precedent, or *stare decisis*, is the principle that "like cases shall be decided alike" (Stone Sweet 2002, 115). Precedent is significant because it makes courts consistent and more efficient; it would not be feasible, or expedient, for courts to treat every case as unique (Shapiro 2002). Moreover, if every case were arbitrary, courts would not be able to reduce uncertainty and litigants could not make rationally calculated decisions regarding adjudication. Without precedent, verdicts would be considered arbitrary and illegitimate (Garrett, Kelemen, and Schulz 1998). Precedent allows courts to be consistent and efficient and therefore increases the demand for adjudication. In this way, precedent is essential to courts because it underscores courts' legitimacy, path dependency, and the process of judicialization.

Although domestic courts were the inspiration for most judicial theory, the process of judicialization and legitimacy is not unique to domestic courts. In the next section, I discuss the theories of international law and its relation to domestic judicialization.

2.3 International Law Theory

International law can be described as, "a pattern of standards of conduct worked out and generally accepted by the international community through practice and express or tacit consensus" (Lissitzyn 1951, 44). International law is therefore less tangible than domestic law because it relies on a general agreement of what is the standard, rather than a concrete, written

set of laws, as is the case in many countries. International courts, like domestic courts, face the issues of legitimacy, but there are two important differences between domestic and international courts, which have implications for international courts: first, there is no enforcement mechanism; and second, the adoption of international law is voluntary.

2.3a Two Characteristics of International Law

As previously discussed, the three major international relations paradigms acknowledge the significance of anarchy in predicting state behavior. International law scholars similarly recognize the importance of anarchy. More specifically, one of the two key differences between international and domestic courts is the lack of an enforcement agency at the international level. Domestic courts do not have the power to enforce their decisions, but there is an executive body in government to ensure compliance. In the U.S., for example, it is a role of the executive branch to enforce the decisions of the judiciary; these two bodies work in tandem. International courts, though, do not share power with an executive branch; they have to rely on their legitimacy and cooperation of the litigating parties to enforce decisions.

Granted, some international judiciaries have a means of enforcement. The WTO Charter allows for retaliation when there is non-compliance. For example, in 2003, the WTO dispute resolution mechanism found that US steel tariffs were illegal; as a result the EU and other countries were allowed to impose tariffs on US goods equal to the amount of the steel tariff (BBC News 2003). Nonetheless, the enforcement mechanisms in international law are 'unofficial and decentralized' and are often purposefully designed to preserve the anarchic nature of the international system (Simmons 2001, 274).

A second distinct characteristic of international law is that participation is voluntary. By definition, international law represents standards of behavior generally accepted by states, but

not necessarily so. Thus, countries do not have to sign or ratify treaties, and non-signatories are not bound by treaty rules; for example, the United States is neither required to join – nor to enforce – the Kyoto Protocol. The voluntary nature of international law is largely a consequence of valuing state sovereignty in the international arena (Hathaway 2005). In their judgments, international courts therefore have to consider whether states were parties to the norms or standards of international law allegedly violated in the case; and if a state was not, then it did not violate international law. This is, of course, distinct from domestic law, which applies equally to everyone regardless of whether someone approves of the law. In light of these distinctions, I now examine the sources of international law because they underscore the lack of enforcement and voluntary nature of international law.

2.3b Sources of International Law

There are two main sources of international law: custom and treaty. Treaty-based international law results directly from the treaties or conventions created and signed (voluntarily) by states. Thus, treaty-based law is deliberate. It is a concrete agreement between any numbers of states and imposes legal obligations on the signatories. While treaties may be misinterpreted, they are still a more concrete source of law than custom; and the guidelines of treaties are akin to civil law systems.

Customary international law (CIL) is the other main source of international law. It is typically considered as "the collection of international behavioral regularities that nations over time come to view as binding as a matter of law" (Goldsmith and Posner 1999, 1116). Related to the ICJ specifically, CIL is understood as "international law which has been generated from a 'general practice, accepted as law'" (Schlütter 2010, 9). Thus, CIL is composed of norms that

have evolved into international law. This contrasts with treaty-based law because CIL implies a tacit understanding of what is law, whereas treaties deliberately delineate the law.

Other sources also play important, if subsidiary, roles. In particular, there are the 'general principles' of international law. Many scholars include general principles as part of CIL, but the ICJ makes a distinction between the two, which is why I discuss them separately. General principles are similar to CIL, as both are norms and are not consciously created into international law. There is substantial debate as to the origins of general principles. Some scholars assert that general principles may arise when many countries have similar laws and because of this consensus the national laws take on an international character. The dominant discourse, however, is that general principles are of a purely international character (Schlütter 2010). Specifically, general principles are considered as above state behavior. They are axioms of international law and as such need no justification; for example, human rights laws are considered general principles.[1]

It is, of course, difficult to discern when and how a custom or principle evolves into a law or standard of behavior. Fortunately, though, there is a measure in international law for the development of CIL. Judges determine whether CIL exists or not based on the presence of two elements: *opinio juris* and state practice.

Opinio juris implies that an action was conducted because there was a legal obligation (Schlütter 2010). Not all norms will develop into international law, and the only norms that are 'binding,' in a legal sense, are those that have developed into CIL. Since international law is voluntary, the only way for norms, or customs, to have any type of legal authority is through the consent and acceptance of states. Moreover, a significant number of states must recognize the

[1] It is worth noting, though, that many of the general principles have become codified in international law, e.g., the Genocide Convention; however, they are still considered general principles because of they are axiomatic in international law and would need to be respected even absent codification.

norm, not just a few powerful states. Therefore, the presence of *opinio juris* signifies that a norm has developed into CIL because states have accepted it, regard it as binding, and altered their behavior to conform to it.

State practice is when nations carry out or uphold the custom or norm. Policy statements, treaties, and legal or legislative action can be interpreted as evidence of state practice (Goldsmith and Posner 1999). This term is similar to *opinio juris*, and some scholars combine the two because state practice "serves as proof of the contents of the particular customary international law norm or of the *opinio juris* of a particular state" (Schlütter 2010, 25). So state practice may be considered as an element of *opinio juris* rather than a component of CIL. Regardless of this scholarly debate, though, state practice and *opinio juris* highlight the presence of CIL and its influence on state behavior. Therefore, it is not as important where academically state practice belongs; rather states are acting because of the norm or custom.

2.3c Interest Versus Norms Based Approaches

Given that participation in international law is voluntary, on the face of it, it may seem illogical for a rational state to willingly subject itself to laws designed to regulate or constrain its behavior. There are two fundamental justifications for state participation in international law, which parallel the paradigmatic debate in international relations: the interest-based approach and the norms-based approach.

The interest-based approach asserts that states regard international law, in terms of treaties or other agreements, only to the extent that it is beneficial and contributes to their material interests, such as wealth or power. The interest-based approach believes states follow a 'logic of consequence,' which means they act based on the perceived outcome of their actions. In fact, "it is generally assumed that international obligations are burdens which states accept for

the sole purpose of obtaining the corresponding rights and that states play games in which each attempts to assume a minimum of obligations and obtain a maximum of rights" (F. Roessler qtd. in Zimmermann 2006, 37).

Thus, states act mainly because of their material interests, and will enter agreements that require little effort or change in behavior. The surprisingly high level of compliance in international law is a result of the fact that international law is voluntary (Hathaway 2005), and states are unlikely to breach the law given that they consented to it. As quoted in *Law of Nations*, states abide by the dictates of international law because "the demands that it makes on states are generally not exacting, and on the whole states find it convenient to observe it" (J.L. Brierly qtd. in Lissitzyn 1951, 72). If, however, agreements do cause unwanted changes in behavior or undermine state interests, then they could be "ignored, modified, reinterpreted, or broken to suit the convenience of powerful states" (Keohane 1997, 107). Therefore, state participation in international law is primarily strategic and self-interested; it is not chiefly because states support the legitimacy of judicialization.

Norms-based proponents, on the other hand, claim that principles and ideas motivate state behavior. This approach does not discard the role of self-interest, but it posits that states are also motivated by the power of ideas (Hathaway 2005). International law is created by consensus and shared commitments, which make international law and judiciaries legitimate (Keohane 1997); since they are legitimate states will comply. The normative approach also believes in the 'logic of appropriateness;' meaning states act in accordance with their values based on what is ethical, moral, or acceptable (Finnemore and Sikkink 1998). Therefore, states are compliant with international law because they believe it is the correct course of action.

Moreover, the norms-based approach does not assert state interests are fixed and must be material. Thus, international law does not limit or constrain state behavior because state interests and identities are malleable. Through the creation and internalization of international law, which demonstrate a consensus and shared commitment among actors in the system, states can change. International law, in this way, drives state behavior because it alters preferences, norms and identities (Hathaway 2005).

2.3d Optimist/Skeptical Debate

The reasons states voluntarily participate in, and comply with, international law are important because they underscore arguments about international law's possible effect on state behavior. Based on these aforementioned considerations (i.e., sources of law, reasons for participation, and especially anarchy and voluntary participation) there is an ongoing debate about the role of international law in global politics. The debate is between optimists, who argue law can change state behavior, and skeptics, who claim law will always be subordinate to politics.

Optimists believe international law is significant, despite the lack of an enforcement mechanism and voluntary participation. They point to the 50,000-plus treaties as evidence that states are actively participating in global jurisprudence (Hathaway 2005). Significantly, the proliferation of international judiciaries demonstrates the increasing role of international law in global politics. There is a branch of optimist thought, 'global legalism,' which asserts that there is substantial demand for international judiciaries to solve collective action problems, such as pollution or global warming (Posner 2008). Moreover, considering domestic judiciaries exhibit increasing returns – through the process of judicialization – optimists believe international law will have an increased role in international relations. Take, for example, the success of the

European Court of Justice (ECJ) or the European Court of Human Rights (ECHR). These two courts were not always prominent players in European politics, but they have developed, in a relatively short period of time, into powerful actors. They are proof that supranational courts are significant (Helfer and Slaughter 1997).

Optimists are equally undeterred by the lack of enforcement mechanisms. For example, Louis Henkin found, "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time" (Henkin 1968, 42). Moreover, because states believe judiciaries are legitimate and fair, and voluntarily agree to the rules of international law, a 'compliance-pull' is created. This occurs when actors feel a sense of obligation to adhere to decisions – similar to *opinio juris* – which means there should be a high degree of compliance. Hence, according to optimists, international law does, and will continue to have an influential role in international politics.

Skeptics, on the other hand, doubt international law's independent influence on state behavior because it is voluntary and there is no enforcement mechanism. Specifically, because international law is voluntary, state participation may be meaningless. Since states generate international law, it is 'mere window dressing' because law is only the normative representation of material interests (Hathaway 2005). A state will not participate in any convention that could undermine its self-interest; doing so would be irrational. Take, for instance, the US's rejection of the Kyoto Protocol. Following the rigorous standards of the Protocol would impose high costs on the US, which is why the US does not participate. This example highlights the wider problem with international law. Insofar as it is inconvenient for a state to ratify a treaty, it will not, which means international agreements are unnecessary because they will not change state behavior on their own. States act in their own material self-interest.

Furthermore, skeptics argue the 50,000-plus treaties do not prove the significance of international judiciaries. One must consider whether these treaties alter the behavior of states or deter them from acting in ways that would breach the treaty since there is no enforcement mechanism. The 2003 invasion of Iraq poignantly demonstrates this shortcoming of international law. Research by Mondré and colleagues (2008) found that the legalization of international politics has not occurred; however, in the area of international trade, they found a relatively high level of judicial influence, which may be due, in part, to the WTO's policy of retaliation.

With this backdrop of international law theory in mind, I now turn to the relationship between international law and international relations theories.

2.4 International Relations and International Law

The intersection between international relations and international law is a relatively nascent area of study. Given the evident parallels between the two disciplines, though, there is a substantial body of research, addressing areas of disagreement and overlap within each of these respective fields. This section provides an overview of the developments in this interdisciplinary field by examining, in light of the three paradigms, the scholarship addressing international relations and international law as they relate to each other.

2.4a Realism

Traditionally, the realist paradigm has been most critical of international law; in fact, Hans J. Morgenthau argued in 1946, "the choice is not between legality and illegality, but between political wisdom and political stupidity" (qtd. in Simmons 2001, 272). Though all realists agree states are self-interested and materially motivated, thus minimizing the role of international law, there is a spectrum of realist literature about the possible influence of

international institutions (e.g., international courts).[2] John Mearsheimer takes the most extreme position, arguing there is little or no virtue in institutions; their influence is only in the margins (1994). Most realists, however, take a less extreme approach, acknowledging that institutions can have a role in international relations, albeit not a primary role (Simmons 2001).

Since realists believe states are selfish, rational actors, they argue that state participation in international law is interest-based. Evidence of this can be found in multiple studies. For example, a game theory simulation by Posner and Goldsmith (1999) found that creation of, and compliance with, CIL was motivated by self-interest. Additionally, Goldstein and Martin (2000) found the movement from the General Agreement on Tariffs and Trade (GATT) to the more legally stringent WTO has actually increased concerns about relative gains and selfishness in domestic trade policies. Thus, realists argue the increase in international law and agreements does not fundamentally change state behavior.

Realists also argue that international law can be a tool used by powerful states to better their position relative to other states in the system. Powerful states will try to reshape the law to benefit their interests and compel other states to follow; in this way, international law "enables rather than constrains power" (Nardin 2008, 387). This argument is similar to the Marxist conception of ideology because it suggests norms exist to better the interests of powerful states: "since the stronger nations have a preponderant influence on the development of some rules of international law, they often find it advantageous to support the observance of such rules" (Lissitzyn 1951, 6). Thus, realists claim state participation in international law is interest-based and powerful states will use international law as a political tool.

[2] The comparison between international courts and institutions is appropriate given that Mearsheimer defines institutions as "a set of rules that stipulate the ways in which states should cooperate and compete with each other. They prescribe acceptable forms of state behavior, and proscribe unacceptable kinds of behavior… they entail the mutual acceptance of higher norms, which are 'standards of behavior defined in terms of rights and obligations" (1994, 8).

Dovetailing this argument, realists further contend that international law, insofar as it is composed of norms, will not mitigate the effects of anarchy or change state behavior. As the empirical findings mentioned above demonstrate, state interests are fixed, so international institutions do not shape the preferences and identities of actors in the international system. Furthermore, realists do not believe international courts create a 'compliance-pull' or that states are swayed by the courts' legitimacy. As previously mentioned, Mondré et al. (2008) found, for instance, that states were non-compliant with international law in the areas of international security and environment. Research by Downs, Rocke, and Barsoom (1996) found that enforcement of international treaties was almost unnecessary because "most treaties require states to make only modest departures from what they would have done in the absence of an agreement" (380). Thus, realists claim that states only participate in international law when it is convenient or useful; and, like the skeptics, argue that it will not meaningfully change state behavior.

Given the realist assessment of international law, it is unsurprising that international law scholars are generally hostile to realist arguments and assertions (Nardin 2008). Martti Koskenniemi, a prominent Finnish legal scholar, criticizes the realist conception of international law and the interdisciplinary approach of international relations and international law. He claims realists, such as Morgenthau, have belittled and reduced international law scholarship to a discussion of foreign policy and American hegemony (2001). Thus, realists and proponents of international law are often hostile to each other's ideas and arguments surrounding the role of law in international relations.

2.4b Liberalism

Liberals believe international courts can alter payoff structures and foster cooperation. For example, liberals assert that the number of treaties addressing international issues suggests both that states are concerned with global collective action problems and that international law is an appropriate means to resolve these problems (Hathaway 2005). While the existence of institutions will not eliminate anarchy, liberals argue that sovereignty, though still important, is not as strong as it once was and the shape of the international arena has changed (Kennedy 2000).

Liberals acknowledge states are self-interested, but maintain that international law can still change state behavior because these interests are not necessarily material or fixed. Research by Moravscik argues domestic politics heavily shape the actions and preferences of states in the international arena (1997); thus, the desire for power cannot be the uniform objective of all states. In fact, preferences drive state behavior (Moravscik 2001); therefore, it can be in the interest of states, without being in their material interests, to participate in international law. Moreover, international institutions are beneficial to the actors in the international system and it can be in the states' best interest to participate and adhere to international law (Keohane 1997). Contrary to the findings by Posner and Goldsmith, a game theory simulation by Norman and Trachtenberg found it is in the interest of states to adhere to CIL (2005).

Further evaluations of international courts have demonstrated that international law is shaping state behavior. Slaughter found an increased judicialization of international politics and 'transjudicialism' through horizontal and vertical integration of legal systems (2004). Burley and Mattli (1993) contend that the ECJ was instrumental in transforming the EU and Treaty of Rome. Specifically, they found the legal integration of the EU (dependent variable) was a result of the

self-interested actions of EU members and actors (independent variable). This demonstrates that it is in the interests of states to abide by international law.

Unlike realists, liberals are more open and accepting of the role of international law in shaping state behavior; consequently, international law scholars are more drawn to liberalism (Kennedy 2000). For example, from the international law side, Stone Sweet (2002) outlines the efficacy of the ECJ and how it has revolutionized European politics, an international law argument that supports the research by Burley and Mattli (1993), Helfer and Slaughter (1997) and Slaughter (2004).

2.4c Constructivism

Given their focus on norms, constructivists are largely responsible for the recent upsurge of literature synthesizing international relations and international law theories (Slaughter 1998). While constructivists recognize that material interests are important, they believe norms are causal variables in state behavior (Ruggie 1998). States participate in international law because they are motivated by the power of ideas and norms, and while this may be materially beneficial, it is not exclusively materially motivated. Thus, states will participate in, and comply with, international law even if it undermines their material interests if they are committed to the normative values in question.

Constructivist scholarship highlights the importance of sociological institutionalism and its effects on state behavior (Finnemore 1996). Specifically, constructivists argue that courts are proponents of norm emergence (Finnemore and Sikkink 1998), and in this way, international law can shape international relations because norms drive behavior. Moreover, Finnemore and Toope (2001) argue that the typical international relations approach to international judicialization (i.e., realism) is misguided because it fails to appreciate the role of legitimacy in law and account for

varying degrees of legitimacy. As with domestic judicialization, legitimacy is integral to the influence of international courts and law; legitimate international law creates a compliance-pull. International law scholars similarly emphasize the importance of legitimacy and compliance in international law (Franck 1990; Koskenniemi 1992).

Constructivists believe reality is socially constructed. Therefore, if states believe the world to be Hobbesian, as realists do, then international law will not change state behavior. Granted, states do not have a uniform conception of anarchy; some states may believe anarchy can be mitigated, while others have a realist understanding of international relations (Wendt 2008). International law, then, would have varying effects on states' behavior. Nonetheless, since international law is composed of norms, and courts are proponents of norm emergence, legitimate courts should be able to influence state behavior (Franck 1990; Koskenniemi 1992; Finnemore and Toope 2001). For this reason, constructivists are optimists because they assert that, not only *can* international law change state behavior, but it already has.

See the table on the following page for a summary of international relations paradigms and theories of international law.

Table 2.1 Summary of the Synthesis of International Relations and International Law (IL)

	Realists	Liberals	Constructivists
Optimists	States respond mainly to material forces; IL is 'window-dressing'	IL will change state behavior and help mitigate the effects of anarchy	Because IL is comprised of norms, it can change state behavior
Skeptics	IL will not change state behavior or anarchic nature of IR	States are rational actors, and institutions can only help mitigate anarchy, not eliminate it	Everything is a social construct. If states believe IL is insignificant then it will be, but it does not have to be.
Norms-Based	States follow norms that correspond with their objectives; but often will not follow norms at the expense of their interests	States have a commitment to certain normative values such as human rights and welfare	Norms drive state behavior, so the ICJ will be influential
Interest-Based	States participate in IL when it serves their interests, otherwise it may be disregarded	IL can foster cooperation, which serves the interests of states. Preferences drive behavior; not just material interests	IL can serve the interests of states, but norms are a causal factor.

2.5 The International Court of Justice

There are numerous courts in the international system, which would make an evaluation of the entire body of international law incredibly complex and prohibitively time-consuming. For this reason, I narrowed the focus of my study on the International Court of Justice (ICJ). The selection of the ICJ is warranted because almost all states are parties to its Statute, it uses an expansive body of law, and only states can appear before it in contentious cases.[3] I provide a brief overview of the ICJ, including its history, structure, and function; as well as present sample decisions to illustrate the role of international law in international relations.

[3] Though many scholars claim the ECJ is the most powerful court, the ECJ is not, in many respects, an 'international court.' True, it is an international court in the sense that it presides over more than one nation; however, the European Union is becoming a federalist entity. In this regard, the ECJ is actually "a constitutional and not an international court" (Shapiro 2002, 156). Similarly, Helfer and Slaughter make a distinction between supranational and international courts, arguing that the ECJ is a supranational court, whereas the ICJ is an international court (1997).

2.5a History and Charter of the International Court of Justice

The ICJ was established in the aftermath of World War II when the international community strongly felt that there must be a body like the United Nations to prevent similar atrocities. The creation of a world court was not a novel idea; the ICJ was based on the Permanent Court of International Justice (PCIJ). The PCIJ was created in 1922 as the judicial organ of the League of Nations, and was dissolved in April 1946. In its 18 years of activity, from 1922 to 1939, the PCIJ handled 66 cases: 38 contentious cases and 28 advisory opinions (Eyffinger 1996). Despite the League of Nations' shortcomings, the PCIJ was largely successful and served as the basis for the ICJ Statute.

According to the UN Charter and the ICJ Statute, the ICJ is the principal judicial organ of the UN (Art. 7(1) of the UN Charter; Art. 1 of the Statute of the ICJ). As such, its chief objective is "to decide in accordance with international law such disputes as are submitted to it" (Art. 38 of the Statute of the ICJ). In doing so, the Court relies on:

> (a) International conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
> (b) International custom, as evidence of a general practice accepted as law;
> (c) The general principles of law recognized by civilized nations;
> (d) Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law (Art. 38 of the Statute of the ICJ)

In this respect, the ICJ is not only the principal judicial organ of the UN, but also the foremost judicial authority on international law (Amr 2003). Insofar as the Court relies on such an expansive body of law, it is a suitable representative for the role of international law in international relations. Other international courts have a more specialized jurisdiction; for example, the dispute resolver of the WTO deals with economic law and the WTO Charter, whereas the ICJ will consider the entire body of international law in its decisions. The ICJ strives to meet all components of legitimacy as discussed in the judicialization section. The Court is objective; relies on the consent of both parties in disputes; gives reasons for its decisions; and

also, its bench is geographically distributed so that all legal systems are represented and there is no national bias. For these reasons, the jurisprudence of the ICJ is, in many ways, superior or more authoritative than other international judiciaries (Shahabuddeen 1996, 9).[4]

2.5b The Role of the Court

The Court has two main functions: to preside over contentious cases and give advisory opinions. Advisory opinions reflect the Court's attitude or opinion on legal matters. The Court must be asked to give an advisory opinion – it has been asked 26 times – and only authorized UN organs can request opinions; states cannot request an advisory opinion. Advisory opinions are non-binding, even for the requesting organ, which has led many scholars to doubt their significance. Importantly, the main justification for giving the Court this power and the primary purpose of advisory opinions is to facilitate the conduct of the UN organs and agencies by clarifying the scope of their objectives (Amr 2003); the majority of advisory opinion requests do pertain to this specific purpose (Sørensen 1960). There have also been five advisory opinions reviewing the decisions of the UN Administrative Tribunal.

Consequently, I focus on contentious cases because they apply only to states and are legally binding, which demonstrates whether states will follow international law without an enforcement mechanism. Moreover, it is argued that advisory opinions are a secondary function (Amr 2003), whereas contentious cases are the primary function – in terms of the number of cases – of the ICJ. In 64 years, from the first case in 1947 until now in 2011, the Court has overseen 124 contentious cases, almost five times greater than the number of advisory opinions. Thus, contentious cases are more substantial to the Court's jurisprudence and indicative of the

[4] From the French: « La jurisprudence de cette Court jouit d'une grande autorité auprès des autres tribunaux internationaux. »

Court's role in state behavior and the role of international law in international relations. Accordingly, I now provide a more in-depth outline of contentious cases.

2.5c Contentious Cases

Contentious cases are trials between two or more states. Individuals and non-state actors cannot submit a case to the ICJ, although, a state may file a case on their behalf; and non-state actors may contribute to the Court's proceedings. All UN members can appear before the Court in contentious cases; and states that are not UN members may still apply to be parties to the ICJ. For example, Switzerland, Lichtenstein, and San Marino signed the ICJ Statute, which meant they could appear before the Court even though they were not UN members (Sørensen 1960).

States may bring a case to the Court jointly or unilaterally file a complaint against another state or states; however, states must always consent to the proceedings; meaning a state cannot be forced to appear before the Court. The Court's commitment to consent is significant because it heightens its legitimacy and the likelihood that if a case is heard the verdict will be followed. States have a variety of channels to give consent to the Court's jurisdiction and the proceedings. After an issue has occurred, states can use a *compromis*, a special agreement, which allows the dispute to be taken to the Court. Or, included in numerous treaties are compromissory clauses, which allow for certain disputes to be automatically taken unilaterally to the ICJ. In Article 36 of the Statute is the 'Optional Clause,' in which states may give the Court compulsory jurisdiction (Art. 36 of the Statute of the ICJ); this clause is later discussed in depth. Lastly, states may simply grant consent in response to a summons or unilateral declaration by another state or states.

The Court may preside over cases regarding: (a) the interpretation of a treaty; (b) any question of international law; (c) the existence of any fact which, if established, would constitute

a breach of an international obligation; and (d) the nature or extent of the reparation to be made for the breach of an international obligation (Art. 36 of the Statute of the ICJ). In contentious cases, as well as advisory opinions, the Court determines whether it has jurisdiction (i.e., *Compétence de la Compétence*) (Eyffinger 1996). Importantly, the Court must strictly deal with cases of an international legal, not political, order; and while its cases will likely be political in nature, the Court must only consider the legal aspects.

Once it is decided the Court has the jurisdiction to hear a case based on Article 36, according to procedure, there are written proceedings conducted in secrecy; only the Court and involved states may read the written arguments. Next, in the oral proceedings, the states argue before the Court (Gill 2003). The judges then withdraw to arrive at their decision, which is publicly announced. The majority, dissenting and separate opinions are also made public. Unless new evidence is discovered, which could not have been known during the proceedings, the decision is final and there is no possibility of an appeal (Eyffinger 1996).

Article 59 of the ICJ Statute states, "the decision of the Court has no binding force except between the parties and in respect of that particular case" (Art. 59 of the Statute of the ICJ). In this way, decisions do not create a 'binding' precedent as considered in Western legal systems, nor does the Court necessarily adhere to the doctrine of *stare decisis* (Shahabuddeen 1996). Since international law is constantly evolving, though, it is preferable that the Court not be bound by *stare decisis*. This is not to say the decisions of the Court are irrelevant or fleeting; in fact, it is argued that "as the only tribunal that is truly universal, and as the principal judiciary organ of the United Nations, the Court hands down judgments that have a considerable authority" (Grisel 1984, 142).[5] Moreover, Article 38 of the Statute implies that the Court can call

[5] Translated from French: « Seul tribunal vraiment universel et principal organe judiciaire des Nations Unies, la Cour rend des arrêts qui one une autorité considérable. »

upon previous decisions as sources of international law. In practice, the ICJ is attentive to precedent, both in its own decisions and those handed down by the PCIJ.

Furthermore, Article 59 demonstrates that the Court's verdict is binding for the parties involved, but, as stated, there is no central enforcement mechanism in international law. Regarding the ICJ, states may, theoretically, seek recourse from the Security Council in instances of non-compliance, but as will be discussed, enforcement by the Security Council has not been effective. According to the ICJ Statute a state may, in instances of non-compliance, "have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment" (Art. 94(2) of the Statute of the ICJ). This demonstrates that in cases of non-compliance the Security Council does *not* have to act. In fact, redress to the Security Council has rarely been requested and never been successful (Al-Qahtani 2002).

The first request regarded the *Anglo-Iranian Oil Co*. case (UK v. Iran) where Britain requested implementation of the Court's preliminary measures; but Article 94 only applies to judgments and was consequently rejected. Another instance was in the *Military and Paramilitary Activities in and Against Nicaragua* case (Nicaragua v. US), in which Nicaragua sought enforcement because the US was non-compliant with the Court's decision. Since the US is a permanent member of the Security Council, it was able to block this request. Additionally, Bosnia-Herzegovina requested implementation of provisional measures against Yugoslavia. Though the Security Council did act on the situation in the Balkans, it did not reference or rely on the Court's ruling as its justification; its measures were largely independent of the Court (Tanzi 1995). It is therefore considered unrealistic that the Court has an enforcement mechanism; in fact, the ICJ has been called a 'toothless bulldog' (Al-Qahtani 2002).

2.5d Optional Clause

Article 36 of the ICJ Statute, also known as the 'Optional Clause,' allows for states to accept as compulsory the jurisdiction of the ICJ. The clause existed under the PCIJ as well, and was a compromise for the states that wanted the Court to have compulsory jurisdiction and those that believed in consensual jurisdiction. Accordingly, states are permitted to have reservations to the Optional Clause, meaning a state could accept compulsory jurisdiction of the Court in one policy area, but not allow the Court jurisdiction in others. For states that do have reservations, the Optional Clause relies on reciprocity; therefore, if two states have reservations, the clause is only applicable in the areas where the compulsory jurisdictions overlap (Gill 2003).

The Optional Clause is especially significant for international relations and international law scholars. Liberals would anticipate that many states, particularly democratic ones, would be parties to the Optional Clause because of their commitment to justice and belief in international law. A widespread commitment to the Optional Clause would therefore support the optimists' assumption that international law can trump international politics and state behavior. In terms of constructivism and the norms-based approach to international law, the Optional Clause signifies states' commitment to CIL and the legitimacy of international justice. Thus, states will sign the Optional Clause, even if it means material losses.

Conversely, realists would anticipate that states, especially powerful ones, would not sign the Optional Clause precisely because it has the potential to undermine state interests. Since states do not want to be subjected to international standards, one would not expect the Optional Clause to be either popular or effective. However, as previously discussed, weaker states would be more likely to accept compulsory jurisdiction because they have no other means of recourse. International justice is the best way for small states to affect the international system because they do not have the material capacities to regulate large states. Granted, realists would not

expect big states would be party to the Optional Clause and thus not bound to stand trial against smaller states.

Based on my analysis and many empirical examples, the realist assumption about the Optional Clause appears correct. Most of the states that have signed the Optional Clause have done so with reservations. These limitations may, for example, limit the ICJ's jurisdiction so that it cannot interfere during times of war, or is not applicable in cases occurring before or after a certain date. Significantly, many states, including the US, have stated the ICJ cannot have jurisdiction in cases dealing with domestic issues. The importance of this limitation is that the US reserves its right for *Compétence de la Compétence*, which in essence leaves the ICJ devoid of any compulsory jurisdiction under the Optional Clause (Gill 2003).

Other reservations have undermined the potential significance of compulsory jurisdiction, which further suggests that states' commitment to international law is subordinate to their material interests. For example, in 1994 Canada withdrew the ICJ's jurisdiction over its 'conservation and management measures,' or basically, its fishing laws. Two days later the Canadian government passed a law preventing foreign vessels from fishing in certain areas in the North American Fisheries Organization (NAFO) that extended beyond Canada's exclusive territory (Linhares 1999). Less than a year later, the Canadian government seized a Spanish ship fishing within this area. Spain tried to bring the case to the ICJ under the Optional Clause, yet the Court found it lacked jurisdiction since Canada had withdrawn compulsory jurisdiction in this area (*ICJ Reports 1998*, p. 432). This example, while singular, is not unique, and supports the skeptical, interest-based approach to international law. Since international law is voluntary, Canada withdrew itself from international laws that would harm its material interests.

Significantly, only one-third (66) of all ICJ members are signatories to the Optional Clause, and most have reservations. In fact, the UK is the only permanent member of the Security Council to be a signatory; France and the US withdrew from the Optional Clause; and Russia and China never became parties. Notably, both France and the US withdrew after facing charges by smaller states. The French case will be discussed during case sampling, but it is also significant to mention the US withdrawal from the Optional Clause.

In 1984, Nicaragua filed suit against the US for its support of the Contras – the *Military and Paramilitary Activities in and Against Nicaragua* case. Nicaragua claimed the US violated international law, and since both states were parties to the Optional Clause, the ICJ had the jurisdiction to hear the case. The US opposed the Court's jurisdiction, but the ICJ continued with the proceedings because both states had consented to compulsory jurisdiction under the Optional Clause. The US refused to participate. The Court ruled in favor of Nicaragua, and found Nicaragua was entitled to reparations of $370,200,000; however, the US blocked enforcement of the verdict through the Security Council (Gill 2003). Nicaragua then requested, in 1987, that the Court assist in negotiations because the US had been non-compliant, refused to negotiate, and not paid reparations. The US still refused to participate and in 1991, Nicaragua requested the case be removed from the Court's Docket (*ICJ Reports 1991*, p. 47).

This case, like the Canadian example, supports the skeptical, interest-based conception of international law and superiority of politics over law. It further suggests, as realists anticipate, that international law does not meaningfully change state behavior. Though the US was legally obligated to appear before the Court because it had signed the Optional Clause, it refused to participate and did not follow the verdict. These examples also undermine, though certainly do not disprove, the constructivist, norms-based approach of a compliance-pull, and the liberal

assumption that states have a commitment to democratic values and universal justice. The US is a democratic nation, and as such, according to liberals, it should be committed to international justice; yet, in this instance, it completely disregarded international justice. It is also worth noting that the US instituted reservations to the Genocide Convention in 1985, after the *Nicaragua* case (LeBlanc 1991).

These empirical examples indicate that most states do not want to be subjected to international law, and if they do, as is the case with many smaller states, it is because it is their best means of recourse. Powerful states are reluctant to sign the Optional Clause; and only do so with reservations. Thus, state support for the Optional Clause does not back the assertion that international law can change state behavior.

2.5e Examining the ICJ in International Relations and International Law

Much of the literature discussing international relations and international law uses a comprehensive, theory-based approach, rather than empirical findings of a specific judiciary or tribunal; although, as discussed, there have been studies on specific judiciaries such as the ECJ, ECHR, and dispute resolver of the WTO (Slaughter, Tulumello and Wood 1998; Stone Sweet 2002; Goldstein and Martin 2000). However, given the ICJ's functions and widely supported belief that it is the foremost judicial body of international law, the Court's role in state behavior can be useful for exploring the practical interaction between international law and international relations. Thomas Franck argues that the Court "plays the leading role in legitimating the [international legal] system by resolving its disputes in a principled manner" (1998, 346). Despite the evident parallel relationship between these two fields and significance of the Court, there is not a substantial body of literature addressing the role of the ICJ in international relations.

There have been inquiries into the role of the Court in international politics. For example, Posner and De Figueirdo (2005) examined the decisions of individual judges and found the Court is favorably biased toward states with representation on the Court's bench; but they do not focus on international relations. There is also a substantial amount of literature discussing the ICJ's decisions and enforcement (Gray 2003; Orakhelashvili 2007), which includes discussions of active enforcement by the ICJ (Tanzi 1995; Al-Qahtani 2002), and the likelihood of compliance by states (Paulson 2004; Llamzon 2008). Schneider and Müller (2007) evaluated the effect of the Court from a sociological perspective and found that a state's regime type is not indicative of its willingness to comply with the Court's decisions. There have also been studies on enforcement from an international relations perspective, but they do not focus on the influence of the ICJ (Downs, Rocke, and Barsoom 1996; Mondré, et al. 2008).

The Court is well documented in international law scholarship (Amr 2003; Shihata 1965; Akande 1997; Powell and Mitchell 2007; Koskenniemi 2002); each individual ICJ case has an accompanying plethora of literature evaluating the Court's decision. Koskenniemi and Leino (2002) argue that the increase in international tribunals and judiciaries has led to a fragmentation of international law and reduced the power of the Court. Since Koskenniemi is highly critical of international relations theories, namely realism, his paper focuses on the legal aspect of international law's fragmentation. Pieter Kooijmans, a former ICJ judge, claims the Court has been unnecessarily restrained in its decisions (2007); but he does not consider the international relations implications of the ICJ's restraint. In short, although research on the ICJ has clear implications for international politics, both theoretically and empirically, there are few studies specifically directed at the Court's role in international relations or vice versa.

This thesis aims to take a small step towards filling this gap by evaluating empirical variation in the Court's influence and its implications for international relations. Specifically, I examine possible variation in the Court's influence based on the size of the litigants, material interests, norm type, and source of law. Heretofore, there has not been a study on the role of the Court incorporating all of these variables, and only a few studies examining one of these variables and the ICJ. Previously noted, two studies evaluated the role of CIL on state behavior, though not the ICJ specifically; these had conflicting results (Goldsmith and Posner 1999; Norman and Trachtman 2005). A study by Hathaway examined the influence of treaty-based law, which incorporated multiple international judiciaries, and found that international law does shape state behavior, and that domestic politics and transnational actors are crucial for treaty observance (2005).

However, there has not been an analysis of the Court's influence and both sources of law. Additionally, though there is literature discussing the ICJ's treatment of specific constitutive norms in singular cases, there has not been heretofore a cross-sectional study of norm types in regards to the ICJ, or any international court's, influence.

These variables – state size, material interests, source of law, and norm type – are important for both international law and international relations scholars, as well as for improving the efficacy/role of international adjudication. For example, if states continually disregard verdicts that undermine their material interests, as realists contend, then international law may not actually be shaping international relations. Or, since there is no enforcement mechanism, the Court may not be influential when dealing with regulative norms, but could be important in constitutive norm emergence. Similarly, if the Court does not base its decisions on CIL or general principles, then it would suggest norms are not causal variables in state behavior.

Investigating the role of the Court based on state size, material interests, source of law and norm type will be indicative of whether the Court does shape state behavior or has the potential to influence international relations. Accordingly, I now offer my hypotheses about the role of the ICJ in the international system.

2.6 Hypotheses

In this thesis, I argue in favor of the skeptical and realist conceptions of international law surrounding state motivation for participation and the effects of international law on state behavior. Specifically, I posit that the ICJ does not have a significant influence on state behavior, because state participation in international law is primarily interest-based. This is not to say that the Court will never be influential; rather, its sphere of influence is limited to certain types of cases. The term 'influential' and how it is measured are defined thoroughly in the methodology section below; but it is worth noting here that by influence I mean whether the Court had a role in state behavior. For example, if a state followed the verdict of the ICJ, then the Court was influential.

Put another way, I hypothesize that the relative power distribution between the two litigants – litigant disparity – will be a critical determinant in the decision outcome. By litigant disparity, I mean the size difference between the two litigating parties (e.g., a small v. big state). There are varying degrees of litigant disparity; for example, a small v. big state case has a greater degree of litigant disparity than a medium v. big state case. I argue the Court will be less likely to hear cases with appreciable litigant disparity and will be even less likely to hear cases as litigant disparity increases. If the Court does hear cases with litigant disparity, it will rule in favor of the bigger state. This is because big states (i.e., states with more material capabilities) can enforce the Court's verdict if it is in their favor. Small states, however, cannot enforce the Court's

decision therefore the Court would be more likely to be disregarded if it ruled in favor of the smaller state. With relative litigant parity, on the other hand, the Court will be more likely to hear the case and it will be more likely that the verdict is followed because neither state has the upper hand in political negotiations. Thus, in cases of litigant parity, the Court is more likely to be followed and influential.

Based on the realist, skeptical and interest-driven understanding of international law, I anticipate the ICJ will not be influential in cases of material significance. By material significance, I mean a state's economic, military or political interests; the measures to assess 'significance' are discussed further in the methodology section below. Specifically, in cases where states' material interests are at stake, states are less likely to not appear before the Court for trial and are more likely to be non-compliant if the verdict is not in their favor. For these reason, the Court will likely eschew or divest itself of jurisdiction because a disregarded verdict undermines the Court's legitimacy more so than a dismissed case. Thus, in cases with significant material interests, the Court will not be influential because there will either be non-appearance/non-compliance or a dismissal of the case. Accordingly, I expect the Court will be most influential in cases with low material significance.

Furthermore, since norms are not the primary cause for state behavior, CIL and general principles should not be the basis for the Court's decisions; rather, the Court will mostly use treaties to justify verdicts. Since states deliberately ratify treaties, it is easier for the Court to find they are obligatory, whereas CIL/general principles, since they are not concrete and arise through general consensus, are less binding. Additionally, as outlined in Article 38 of the ICJ Statute, the Court will also consider verdicts by 'highly qualified' judiciaries. Based on the realist

assumption that powerful states shape the rules of the international system, I hypothesize the Court will base judgments, when applicable, on the judicial findings or laws of big states.

Finally, with regard to norm type, I hypothesize there will be variation amongst the three norm types. The Court is most likely to hear regulative norms in contentious cases; but will also see evaluative cases because of the general principles of international law. Moreover, as a proponent of norm emergence, the Court may espouse certain constitutive norms. The Court is likely to reject evaluative norms because they undermine its legitimacy; this also corresponds to my hypothesis that the Court will be reluctant to use general principles, since evaluative norms are often rooted in general principles. Courts are supposed to be wholly objective, and to furnish opinions based on moral considerations would harm the Court's reputation. In terms of regulative norms, the Court's verdict is most likely to be followed when it rules in favor of the bigger state; this is based on my hypotheses regarding state size and the realist assumption that states respond to material forces rather than the legitimacy of the Court. Large states will disregard verdicts because there is no higher authority to ensure compliance. Lastly, in terms of constitutive norms, the Court will not be progressive in cases with constitutive norms based on the way it reaches its decisions – 'progressive' meaning the Court will not find that a constitutive norm exists or is binding for the parties (e.g., it was illegal for state X to do action Y because there is an emerging norm in CIL). The term 'progressive' is discussed further in the methodology section. In order for a norm to develop into CIL there must be *opinio juris* or state practice; therefore, the Court will not be a proponent of constitutive norm emergence. Thus, my hypotheses are as follows:

State Size

H1A: The greater the litigant disparity, the less likely the Court will be influential.

H1B: If the Court does hear cases with litigant disparity, it is more likely to rule in favor of the bigger state.

Material Interests

H2A: The more significant the material costs of the case, the less likely the Court will hear the case.

H2B: If the Court does hear a case with significant material costs, it is more likely there will be non-compliance or non-appearance.

Source of Law

H3A: The Court will be most likely to base its decisions on treaties.

H3B: The Court will only base its decisions on CIL or general principles if there are no applicable treaties.

H3C: The Court will base judgments, when applicable, on the laws of big states.

Norm Type

H4A: The Court will refuse to hear cases of evaluative norms.

H4B: The Court will be influential with regulative norms insofar as it rules against the smaller state.

H4C: The Court will not be progressive in constitutive norm cases because of *opinio juris* or state practice.

2.7 Methodology

In order to test these hypotheses, I qualitatively examined a random sample of ICJ cases. The ICJ has heard 124 contentious cases; 108 are completed and 16 are still pending. From the 108 completed cases, I randomly selected 36 contentious cases (1/3). It would have been preferable to examine all cases, but due to time and manpower constraints it would have been impossible to analyze them all. For selection, the cases were numbered by date of completion, and chronologically ordered with the most recent receiving the highest number. I used a random number generator to select 36 contentious cases; duplicates were skipped until I had the desired number of cases.

Though I selected 36 contentious cases, many cases were either related or merged by the Court. For example, the proceedings by Yugoslavia/Serbia and Montenegro against NATO are listed individually as ten separate cases in the Court's registry, but they are all essentially the same case. Since I included all related/merged cases in my sample, in total I analyzed 56 cases,

which is over half of the Court's completed caseload. The selected cases are provided below, followed by a discussion of my definitions, measurements, and metrics for assessing the role of the Court in international relations.

2.7a Selected Cases

1. Corfu Channel (United Kingdom v. Albania)
2. Fisheries (United Kingdom v. Norway)
3. Protection of French Nationals and Protected Persons in Egypt (France v. Egypt)
4. Anglo-Iranian Oil Co. (United Kingdom v. Iran)
5. Minquiers and Ecrehos (France/United Kingdom)
6. Electricité de Beyrouth Company (France v. Lebanon)
7. Treatment in Hungary of Aircraft and Crew of USA (USA v. Hungary)
   Treatment in Hungary of Aircraft and Crew of USA (USA v. USSR)[6]
8. Right of Passage Over Indian Territory (Portugal v. India)
9. Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands v. Sweden)
10. Interhandel (Switzerland v. USA)
11. Aerial Incident of 27 July 1955 (USA v. Bulgaria)
    Aerial Incident of 27 July 1955 (UK v. Bulgaria)
    Aerial Incident of 27 July 1955 (Israel v. Bulgaria)
12. Sovereignty over Certain Frontier Land (Belgium/Netherlands)
13. South West Africa (Liberia v. South Africa)
    South West Africa (Ethiopia v. South Africa)
14. Northern Cameroons (Cameroon v. United Kingdom)
15. Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (New Application: 1962)
16. North Sea Continental Shelf (Germany/Denmark)
    North Sea Continental Shelf (Germany/Netherlands)
17. Fisheries Jurisdiction (United Kingdom v. Iceland)
    Fisheries Jurisdiction (Germany v. Iceland)
18. Nuclear Tests (New Zealand v. France)
    Nuclear Tests (Australia v. France)
19. Trial of Pakistani Prisoners of War (Pakistan v. India)
20. Border and Transborder Armed Actions (Nicaragua v. Honduras)
    Border and Transborder Armed Actions (Nicaragua v. Costa Rica)
21. Aerial Incident of 3 July 1988 (Iran v. USA)
22. Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)
23. East Timor (Portugal v. Australia)
24. Oil Platforms (Iran v. USA)
25. Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria)
26. Request for an Examination of the Situation in Accordance with Paragraph 63 of the Judgment of 20 December 1974 in the Nuclear Tests Case (New Zealand v. France)

[6] The additional, related cases are written in italics.

27. Kasikili/Sedudu Island (Botswana/Namibia)
28. Vienna Convention on Consular Relations (Paraguay v. USA)
    LaGrand (Germany v. USA)
    Avena (Mexico v. USA)
29. Sovereignty Over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)
30. Legality of Use of Force (Serbia and Montenegro v. Canada)
    Legality of Use of Force (Serbia and Montenegro v. UK)
    Legality of Use of Force (Serbia and Montenegro v. France)
    Legality of Use of Force (Serbia and Montenegro v. Germany)
    Legality of Use of Force (Serbia and Montenegro v. Belgium)
    Legality of Use of Force (Serbia and Montenegro v. Italy)
    Legality of Use of Force (Serbia and Montenegro v. Netherlands)
    Legality of Use of Force (Serbia and Montenegro v. Portugal)
31. Legality of Use of Force (Yugoslavia v. USA)
    Legality of Use of Force (Yugoslavia v. Spain)
32. Armed Activities on the Territory of the Congo (Congo v. Burundi)
    Armed Activities on the Territory of the Congo (Congo v. Rwanda)
    Armed Activities on the Territory of the Congo (Congo v. Uganda)
33. Arrest Warrant of 11 April 2000 (Congo v. Belgium)
34. Frontier Dispute (Benin/Niger)
35. Armed Activities on the Territory of the Congo (New Application) (DRC v. Rwanda)
36. Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)

2.7b Definitions/Metrics

Since many of the terms related to my hypotheses lack clear definitions or methods of measurement, below I provide parameters by which to judge the role of the ICJ and to qualitatively evaluate any ambiguities found in individual cases.

State Size

State size is significant because, I posit, the ICJ is likely to behave differently depending on the relative size of the litigants. States were evaluated in three categories defined by economic and military power: big, medium, and small.

I defined big states as either the G6 countries or states that have nuclear capabilities. The use of this metric ensured the exclusivity of big states and also incorporated two fundamental elements of power – military and economic. States with the biggest economies and/or states with nuclear capabilities have the potential to shape the international arena. Moreover, to have used

simply one metric rather than both would have left out many significant countries; for example, Germany does not have nuclear weapons, but it would be mistaken to claim that it is not a powerful state. By the same token, China is not a G6 country, but is one of the most important states in the international system.

'Medium' states were the 20 richest countries, defined by total GDP, which were not also 'big' states. The use of just economic strength, rather than both economic and military, for medium states is justified given the potential devastation of nuclear weapons. Nuclear weapons are arguably the ultimate deterrent. Therefore, I suggest it is more appropriate to look at a country's economic rather than military size in the absence of nuclear capabilities. This is not to say conventional military forces are irrelevant; rather, for medium states, their economies are bigger factors than their militaries; moreover, a country's wealth is indicative of its ability to pursue military power. The use of total GDP, rather than per capita GDP, is suitable because it encompasses the entire wealth of the country. Per capita GDP can be misleading based on population size. For example, assuming China lacked nuclear capabilities, it would be ranked 127th in per capita GDP, and thus a small state, whereas with total GDP it is the second largest country (CIA World Factbook 2010).

In terms of ranking the 20 richest countries based on total GDP, there were incomplete annual data. For example, UN Data, part of the UN Statistics Division only provides raw data, without GDP ranking, from 1970 – present; and similarly, the CIA World Factbook does not offer comparative data ranging from 1947 – present. Thus, medium states were categorized by 20-year segments of time. Though it would have been more precise to redefine medium states for each year, this approach is still appropriate and indicative of 'medium' sized states, especially given the large degree of overlap between the three time periods. Lastly, in terms of medium

sized states, since the introduction of the Euro in 1999, the European Union has become the largest economy in the world. Therefore, I included the EU countries that use the Euro as medium sized states after 1999.

Small states were those that did not meet the criteria for medium or large states; they were not one of the top 20 economies – defined by total GDP – and did not have nuclear capabilities. There were approximately 150 small states and for that reason I do not include a list of all the small states. The big and medium state lists are provided below.

Big states: (Kristensen 2008)

US	Italy	China (post-1964)
UK	Japan	India (post-1974)
France	Russia	Pakistan (post-1998)
Germany	Israel	North Korea (post-2006)

Medium States 1947-1970 (O'Brien 2007)

Canada	Denmark	Switzerland	Netherlands
Venezuela	Iceland	Norway	Australia
Uruguay	Belgium	Finland	New Zealand
Argentina	Luxembourg	Sweden	Mauritius

Medium States 1970-1990 (O'Brien 2007)

Canada	Luxembourg	Sweden	Austria
Venezuela	Switzerland	Netherlands	Saudi Arabia
Denmark	Norway	Australia	
Belgium	Finland	New Zealand	

Medium States 1990-2011 (CIA World Factbook 2010; O'Brien 2007)

Canada	Luxembourg	Singapore
Mexico	Switzerland	Hong King
Brazil	Norway	Iran
Indonesia	Australia	EU (post-1999)

Litigant Disparity

As previously discussed in my hypothesis section, the size disparity between the litigating parties is important. I consider three levels of disparity. First, there are cases with *absolute* litigant disparity, which is the highest level of disparity; these are either small v. big or big v. small state cases. Next, there are cases with *relative* litigant disparity; meaning there is a measurable size difference between the states but it is less pronounced than absolute litigant disparity cases. Relative litigant disparity cases are: small v. medium, medium v. small, medium v. big, big v. medium, and all special agreement cases. Lastly, there are cases of litigant parity, which means the size of both parties is roughly equivalent; these are small v. small, medium v. medium, and medium v. big state cases.

Material Interest

Material interest was analyzed by case in terms of the outcome's significance to the litigating parties and its relation to the state's resources; including economic, political, or military resources. Research by Müller and Schneider (2007) examined the performance of the ICJ from a sociological perspective; they considered the type of dispute before the Court and ranked their significance. While their categorization was from a sociological perspective rather than an interdisciplinary approach between international relations and international law scholarship, their ranking system was appropriate to use as part of my categorization of significance. They claim the most significant cases before the Court are those of 'last resort;' meaning, "there is no other remedy for a state against military intervention" (78). I, too, considered any case involving armed conflict or the potential for armed conflict as materially significant.

There were many demarcation/delimitation cases before the Court (i.e., the Court was asked to delimitate boundaries). Delimitation cases in my analysis were considered significant if

the land dispute involved armed conflict; if the land in question was vital to the economy of either litigant; and/or if the land had substantial political significance. The political and/or economic importance was assessed based on the territory's contribution to the country's GDP or livelihood, and based on the government's political statements regarding the dispute.

Cases that did not fall into these two categories were evaluated with similar parameters. Any case involving potential escalation to armed conflict, even if it was not 'last resort' or demarcation, was considered materially significant. I used secondary sources to determine if there was a 'potential escalation' to armed conflict. Similarly, any case that involved a country's vital economic interests, in terms of GDP or employment, was treated as materially significant. Cases that threatened the military interests or strengths of states (i.e., cases that sought to limit or reduce a state's military capabilities) were considered significant. Lastly, cases that were politically important to the state because, for example, they threatened government policies or sovereignty were significant. A case may be more significant to one party than the other; however, if a case was significant to either litigant, I categorized it as significant. Justifications for whether or not the case was significant are outlined within each individual case using secondary sources and/or based on statements by the litigating parties.

Norm Category and Source of Law

Constructivists outline three types of norms: evaluative, regulative, and constitutive. Norm category was assigned based on the substance of the case and rulings of the Court. More specifically, cases regarding whether a state violated international law are regulative norms. Cases pertaining to violations of general principles of international law – because general principles have moral undertones – are evaluative norms.

I considered land delimitations as constitutive norms because they were neither regulative nor evaluative norms, and they changed the borders of countries; however, it is worth noting that land delimitation cases do not change the identities of actors as argued by constructivists. In this way, the constructivist categorization of norms may not be a perfect match for the ICJ's caseload. I considered cases over new courses of action or new types of actors as constitutive norms, but ones that are distinct from delimitation constitutive norms. In the non-delimitation type of constitutive norm cases, the norm had global implications and the Court had to consider a wide body of *opinio juris* and state practice; whereas in the delimitation cases, the Court examined historical state practice between the two parties, and the norm was important for the two parties but was not meant to change the behavior of the international community. Thus, I have two categories of constitutive norms; I use a different metric for the non-delimitation norms, which is provided at the end of this section.

The source of law was also found using the Court's rulings. Since courts must give reasons for their decisions, the source of law is listed in the Court's decisions. Furthermore, since CIL rests on the existence of *opinio juris* or state practice, it was possible to assess whether state behavior changed because of norms based on the Court's rulings.

Influence of the Court in Contentious Cases

I measured the influence of the Court based on two criteria: 1) the outcome of the case, and 2) reasons for referring the issue to the Court. First, the case before the Court could either be heard or not heard. If the case was heard and the verdict was followed, then the Court was influential.[7] If the case was heard but the losing state was non-compliant, then the Court was not influential. According to the Court in the *Gabčíkovo-Nagymaros Project* case (Hungary/

[7] Slaughter and Helfer use a similar definition, although they use the term 'effective adjudication.' They define effectiveness "in terms of a court's basic ability to compel or cajole compliance with its judgments" (1997, 278).

Slovakia), compliance entails, "a duty to give effect to the judgment with a view to avoiding its superficial implementation or otherwise circumventing it" (*ICJ Reports 1997*, p.1). There are instances when states are initially non-compliant, but the verdict is eventually followed; in those circumstances, I consider the Court influential if the states work toward complying with the Court's decision, rather than blatantly disregarding it, and within a reasonable timeframe (i.e., anything over three years, without an effort at enacting the verdict, is considered non-compliance).

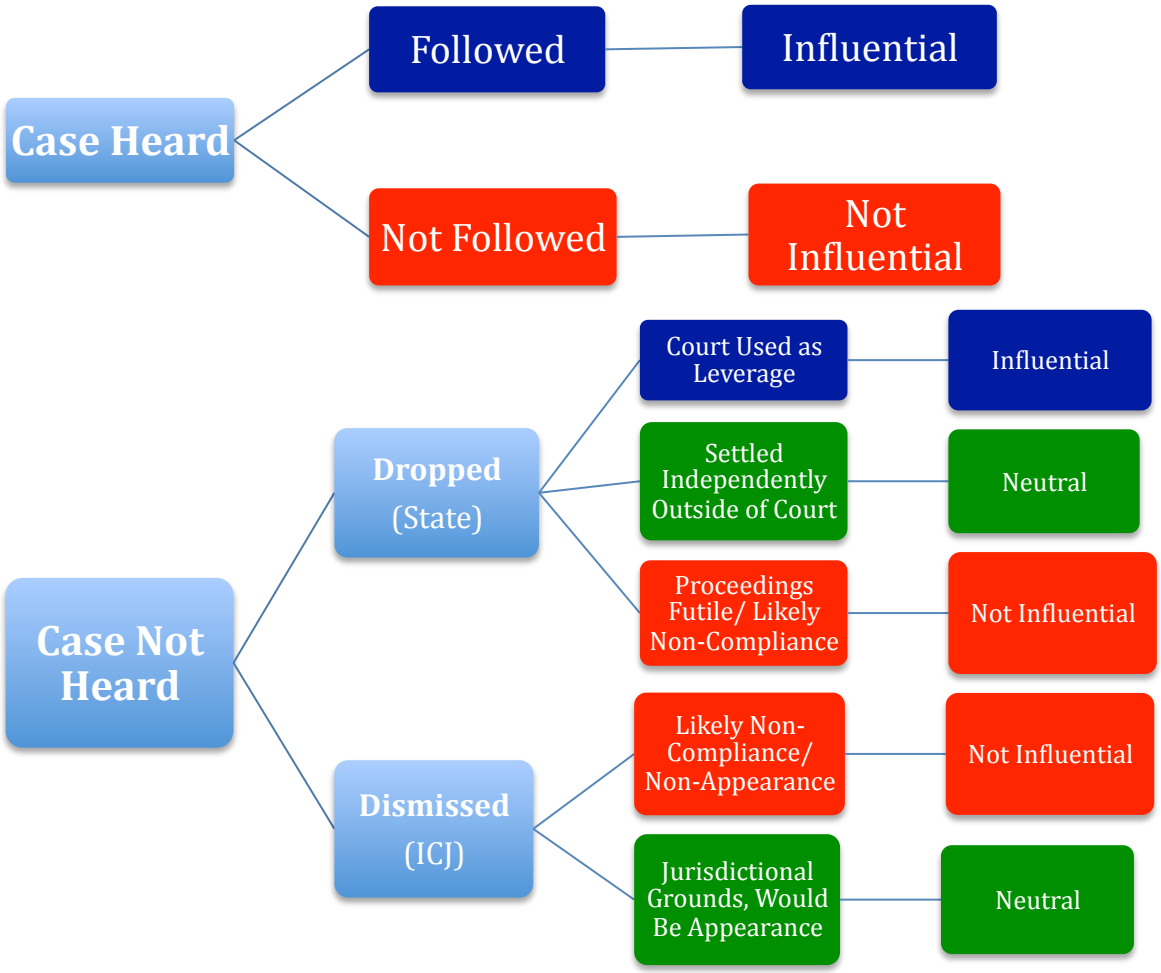
There can be two reasons cases were not heard: either the Court dismissed the case or a state requested that it be dropped. If the Court did not hear the case on purely jurisdictional grounds, then the Court was considered 'neutral' in respect to its influence on state behavior. If, however, the Court dismissed the case because the respondent would not appear or was unlikely to comply with the ruling, then the Court was not influential.[8] Because courts must give judicial reasons for their decisions, meaning all cases have some jurisdictional reasons for dismissal, I used secondary sources and the separate opinions of the ICJ judges to assess the grounds for dismissal.[9]

If the state dropped the case because it used the Court to gain political leverage in negotiations, then the Court was influential. If the state dropped the case because it resolved the issue outside of Court, and the trial had no role in the conduct or outcome of negotiations, then

[8] It is rational for the Court to dismiss cases under these circumstances because disregarded verdicts significantly undermine the legitimacy of the Court (Al-Qahtani 2002). Thus, the ICJ should, in order to preserve its legitimacy, dismiss the case rather than continue and have the verdict disregarded.
It also bears mention that, though this strategy is logical (because disregarded verdicts are more harmful to the Court's legitimacy than dismissed cases), I still consider the Court to not be influential because I am assessing the ICJ's direct influence on states in the case. While the strategy may be rational, especially considering the Court's long-term interests, a dismissal of the case does prevent the Court from influencing states in the present. Furthermore, it is outside the scope of this thesis to measure possible long-term effects of case dismissals, types of indirect influence, or to assess whether the Court's dismissal of a case was a tacit approval of the status quo.

[9] Since courts must give judicial reasons for their decisions, it is difficult to accurately assess whether the ICJ actually dismissed the case for non-judicial reasons. I do provide secondary sources, but these conjectures, albeit conjectures based on a multitude of resources, are an important consideration in my analysis.

the Court was neutral. If the state dropped the case because the proceedings were futile, meaning there would likely have been non-appearance or non-compliance and the issue would not have been resolved in Court, then the ICJ was not influential. I used secondary sources to determine if the Court was used for political leverage or if states perceived the case to be futile. All of these possibilities are represented graphically below.



Measuring Constitutive Norms: Progressive

I also use a separate metric for Court's role in constitutive norm cases that create either new actors or courses of action (i.e., non-land delimitation cases). Because constitutive norms are emerging norms, I consider the Court to be 'progressive' if it rules that the constitutive norm

exists because of *opinio juris* and/or state practice, or if the Court creates a constitutive norm. If, however, the Court fails to address the constitutive norm (e.g., by dismissing the case) or does not find the norm exists and in doing so hinders the development of the norm, I consider the Court to not be progressive. These will be assessed based on secondary sources and the separate opinions of the ICJ judges.

As I have outlined my methodology and measurements, I now analyze the sampled cases in light of each variable – state size, material interests, source of law, and norm type – and set of hypotheses in turn.

Chapter 3: State Size

In this chapter, I discuss the cases sampled based on the size of the litigating parties, outcome of the case, and influence of the Court.[10] The chapter is organized based on the relative size of the litigating parties. Since I am examining cases in the aggregate and looking at case outcomes, I provide a table summary of the cases, which includes the case name, applicant state, applicant size, respondent state, respondent size, outcome of case, winning party, whether the verdict was followed, and if the Court was influential – however, an in depth narrative explanation of each case based on the size of the litigating parties is included in my appendices. I then analyze the findings in regards to the state size hypotheses[11] and discuss possible limitations of my data.

3.1 Bigger v. Smaller States (Appendix 1)

Absolute Litigant Disparity: Big v. Small States

In my sample, there were 10 big v. small cases. Of these ten, the Court heard three, four were dropped, and three dismissed. Additionally, the Court was influential in one, neutral in two, and not influential in seven. The table summarizing the case information is shown on the following page:[12]

[10] Material interests, source of law, and norm type are discussed in subsequent chapters.

[11] H1A: The greater the litigant disparity, the less likely the Court will be influential.
H1B: If the Court does hear cases with litigant disparity, it is more likely to rule in favor of the bigger state.

[12] Shaded cases are related

Table 3.1a: Big v. Small State Cases

Case Name	Applicant	Size	Respondent	Size	Outcome	Winner	Followed	Influence
Corfu Channel	UK	Big	Albania	Small	Heard	UK	No	No
Fisheries Jurisdiction	UK	Big	Iceland	Small	Heard	UK	No	No
	Germany	Big	Iceland	Small	Heard	Germany	No	No
French Nationals	France	Big	Egypt	Small	Dropped	N/A	N/A	Neutral
Electricité Beirut	France	Big	Lebanon	Small	Dropped	N/A	N/A	Yes
Aerial Incident 27 July 1955	USA	Big	Bulgaria	Small	Dropped	N/A	N/A	No
	UK	Big	Bulgaria	Small	Dropped	N/A	N/A	No
	Israel	Big	Bulgaria	Small	Dismissed	N/A	N/A	Neutral
Anglo-Iranian	UK	Big	Iran	Small	Dismissed	N/A	N/A	No
Aircraft & Crew	USA	Big	Hungary	Small	Dismissed	N/A	N/A	No

Relative Litigant Disparity: Big v. Medium and Medium v. Small State Cases

There were two cases with relative litigant disparity: one big v. medium case and one medium v. small state case. The Court heard and was influential in one case; the ICJ dismissed and was not influential in the other.

Table 3.1b: Relative Litigant Disparity

Case Name	Applicant	Size	Respondent	Size	Outcome	Winner	Followed	Influence
Fisheries	UK	Big	Norway	Med	Heard	Norway	Yes	Yes
Barcelona Power	Belgium	Med	Spain	Small	Dismissed	N/A	N/A	No

Bigger v. Smaller Review

In my sample, there were twelve cases in which bigger states instituted proceedings against smaller states; ten involved absolute litigant disparity and two had relative litigant disparity. Of these twelve cases, four were heard, four were dropped, and four dismissed. I found that the Court was influential in two cases, had a neutral role in two and was not influential in eight cases. I discuss these findings in relation to my hypotheses at the end of this chapter. Next I outline cases where smaller states instituted proceedings against larger states, then cases of litigant parity, and lastly, special agreements; before discussing the trends of all the cases at the end of this chapter.

3.2 Smaller v. Bigger States (Appendix 2)

Absolute Litigant Disparity: Small v. Big States

Of the sampled cases, there were thirteen small v. big state cases. Two cases were dropped and eleven were dismissed. The Court was neutral in two and not influential in eleven cases. It is worth noting that ten of the small v. big cases pertained to the 1999 NATO intervention in the Balkans. I considered all the respondents as 'big' states in these cases since they were part of the NATO coalition and the cases were decided together. The states that would otherwise have been 'medium' (i.e., Netherlands, Spain, Belgium, Canada, and Portugal) have a # next to their name. The cases are shown below.

Table 3.2a: Small v. Big State Cases

Case Name	Applicant	Size	Respondent	Size	Outcome	Winner	Followed	Influence
Aerial Incident	Iran	Small	USA	Big	Dropped	N/A	N/A	Neutral
Consular Relation	Paraguay	Small	USA	Big	Dropped	N/A	No	No
N. Cameroons	Cameroon	Small	UK	Big	Dismissed	N/A	N/A	Neutral
Use of Force	Yugoslavia	Small	USA	Big	Dismissed	N/A	N/A	No
	Yugoslavia	Small	Spain	Big#	Dismissed	N/A	N/A	No
Use of Force	Yugoslavia	Small	Canada	Big#	Dismissed	N/A	N/A	No
	Yugoslavia	Small	UK	Big	Dismissed	N/A	N/A	No
	Yugoslavia	Small	Italy	Big	Dismissed	N/A	N/A	No
	Yugoslavia	Small	Portugal	Big#	Dismissed	N/A	N/A	No
	Yugoslavia	Small	France	Big	Dismissed	N/A	N/A	No
	Yugoslavia	Small	Germany	Big	Dismissed	N/A	N/A	No
	Yugoslavia	Small	Belgium	Big#	Dismissed	N/A	N/A	No
	Yugoslavia	Small	Netherlands	Big#	Dismissed	N/A	N/A	No

Relative Litigant Disparity: Medium v. Big States

There were six medium v. big state cases, of which two were heard and four were dismissed. The Court was influential in one and not influential in five cases. The table is provided on the following page.

Table 3.2b: Medium v. Big State Cases

Case Name	Applicant	Size	Respondent	Size	Outcome	Winner	Followed	Influence
Oil Platforms	Iran	Med	USA	Big	Heard	USA	Yes	Yes
Avena	Mexico	Med	USA	Big	Heard	Mexico	No	No
Interhandel	Switzerland	Med	USA	Big	Dismissed	N/A	N/A	No
Nuclear Tests	NZ	Med	France	Big	Dismissed	N/A	N/A (No)	No
	Australia	Med	France	Big	Dismissed	N/A	N/A (No)	No
(1995)	NZ	Med	France	Big	Dismissed	N/A	N/A (No)	No

Relative Litigant Disparity: Small v. Medium Cases

There were two small v. medium cases, of which one was heard and the other dismissed. The Court was influential in the heard case and not influential in the dismissed case.

Table 3.2c: Small v. Medium State Cases

Case Name	Applicant	Size	Respondent	Size	Outcome	Winner	Followed	Influence
Arrest Warrant	Congo	Small	Belgium	Med	Heard	Congo	Yes	Yes
East Timor	Portugal	Small	Australia	Med	Dismissed	N/A	N/A	No

Smaller v. Bigger State Recap

There were 21 cases where smaller states brought charges against bigger states: 13 small v. big, 6 medium v. big, and 2 small v. medium. Of these 21 cases, the Court heard 3; dismissed 16; and 2 were dropped. Moreover, of the 13 small v. big cases, the Court did not hear a single case; 2 were dropped and 11 dismissed. Since I have discussed the cases with litigant disparity, I now discuss cases with litigant parity and special agreements before providing an overall analysis of the importance of state size.

3.3 Cases With Litigant Parity (Appendix 3)

The Court had sixteen cases with litigant parity that were not special agreements. There were two cases between big states, one between medium states, and thirteen cases between small

states. Seven cases were heard, five were dropped, and four were dismissed. The Court was influential in six cases, neutral in one, and not influential nine cases.

Big States

There were two cases between big states; the Court heard one case and dismissed the other; it was not influential in either case.

Table 3.3a Big State Cases

Case Name	Applicant	Size	Respondent	Size	Outcome	Winner	Followed	Influence
Aircraft & Crew	USA	Big	USSR	Big	Dismissed	N/A	N/A	No
LaGrand	Germany	Big	USA	Big	Heard	Germany	No	No

Medium States

There was one case between medium states: *Application of the Convention of 1902 Governing the Guardianship of Infants* (Netherlands v. Sweden). The Court heard the case and was influential.

Table 3.3b: Medium State Cases

Case Name	Applicant	Size	Respondent	Size	Outcome	Winner	Followed	Influence
Infants	Netherlands	Med	Sweden	Med	Heard	Sweden	Yes	Yes

Small States

There were 13 cases between small states; of these 5 were heard, 5 were dropped, and 3 were dismissed. The Court was influential in 5, neutral in 1, and not influential in 7 small state cases. The table is provided on the next page.

Table 3.3c: Small State Cases

Case Name	Applicant	Size	Respondent	Size	Outcome	Winner	Followed	Influence
Arbitral Award	Guinea	Small	Senegal	Small	Heard	Senegal	Yes	Yes
Land Boundary	Cameroon	Small	Nigeria	Small	Heard	Cameroon	Yes	Yes
Navigation Right	Costa Rica	Small	Nicaragua	Small	Heard	Costa Rica	Yes	Yes
Indian Territory	Portugal	Small	India	Small	Heard	Portugal	No	No
Armed Activities	Congo	Small	Uganda	Small	Heard	Congo	No	No
Transborder Actions	Nicaragua	Small	Honduras	Small	Dropped	N/A	N/A	Yes
	Nicaragua	Small	Costa Rica	Small	Dropped	N/A	N/A	Yes
Pakistani POW	Pakistan	Small	India	Small	Dropped	N/A	N/A	No
Armed Activities	Congo	Small	Burundi	Small	Dropped	N/A	N/A	No
	Congo	Small	Rwanda	Small	Dropped	N/A	N/A	No
Armed Activities	Congo	Small	Rwanda	Small	Dismissed	N/A	N/A	Neutral
South West Africa	Liberia	Small	South Africa	Small	Dismissed	N/A	No	No
	Ethiopia	Small	South Africa	Small	Dismissed	N/A	No	No

Litigant Parity Recap

Of the 16 cases with litigant parity, the Court only dismissed four and heard seven, which illustrates its willingness to hear cases with parity. Moreover, the Court was influential in six cases, a high proportion in comparison to cases with disparity.

3.4 Special Agreements (Appendix 4)

Special agreements are listed separately from other contentious cases because they are brought to the Court jointly, meaning that both parties are equally instituting proceedings. Thus, there is a different dynamic between the parties, especially in cases with litigant disparity. The Court heard seven special agreements cases, all of which pertained to land and/or maritime delimitations: one between big states, one between medium states, two between small states, and three with litigant disparity. The bigger state won two of the three cases with litigant disparity. The special agreement cases are summarized on the next page.

Table 3.4a Special Agreement Cases

Case Name	Applicant	Size	Respondent	Size	Outcome	Winner	Followed	Influence
North Sea	Germany	Big	Denmark	Med	Heard	Germany	Yes	Yes
Continental Shelf	Germany	Big	Netherlands	Med	Heard	Germany	Yes	Yes
Ligitan & Sipadan	Indonesia	Med	Malaysia	Small	Heard	Malaysia	Yes	Yes
Minquiers/ Ecrehos	UK	Big	France	Big	Heard	UK	Yes	Yes
Frontier Land	Belgium	Med	Netherlands	Med	Heard	Belgium	Yes	Yes
Kasikili/Sedudu	Botswana	Small	Namibia	Small	Heard	Botswana	Yes	Yes
Frontier Dispute	Benin	Small	Niger	Small	Heard	Niger	Yes	Yes

3.5 Discussion of State Size

First Hypothesis: The greater the litigant disparity, the less likely the Court will be influential.

The evidence from the 56 sampled cases strongly supports the hypothesis that the greater the litigant disparity the less likely the Court will be influential. There were a total of 23 cases with absolute litigant disparity (i.e., big v. small or small v. big); and the Court only heard 3 (13%) of them, all of which were big v. small state cases. The ICJ did not hear a single case where a small state instituted proceedings against a big state. The Court dismissed 11 cases (84.6%), and 2 were dropped. Furthermore, of these 23, the Court was only influential in one case: *Electricité de Beirut* (France v. Lebanon), and neutral in 4: *Protection of French Nationals and Protected Persons in Egypt* (France v. Egypt), *Aerial Incident 27 July 1955 (Israel v. Bulgaria), Northern Cameroons* (Cameroon v. UK), *and Aerial Incident July 1988* (Iran v. USA). Thus, the Court was only influential in 4% of cases with absolute litigant disparity; and, surprisingly, *Electricité de Beirut* was dropped. The data are on the following page:

Table 3.5a Absolute Litigant Disparity Cases

	Heard	Dropped	Dismissed	Total	Influential
Big v. Small	3 (13%)	4 (17%)	3 (13%)	10	1 (4%)
Small v. Big	0 (0%)	2 (8.7%)	11 (47.8%)	13	0 (0%)
Total	3	6	14	23	1

Including special agreements, there were 13 cases with relative litigant disparity (e.g., big v. medium or medium v. small); of these, the Court was influential in 6 cases (46%). This is a much higher proportion than in the 23 cases with absolute disparity. Furthermore, of the 13 cases, the Court heard 7 (54%); dismissed 6 (46%), and none were dropped. Therefore, a much higher percentage of cases went to trial than with absolute litigant disparity. That none of the cases were dropped may suggest that with less litigant disparity states intend for the issue to go to trial than to try to use the Court as leverage.

It is worth noting that three of the cases with relative litigant disparity were special agreements. As stated, the Court was influential in all seven special agreement cases. This is likely because both parties agree in advance to refer the issue to the Court, which demonstrates a propensity for cooperation and that the states wanted the issue to be resolved by the Court, instead of, say, using the ICJ for leverage. Therefore, with special agreements, it is more likely the verdict will be followed so the Court does not have to consider the disparity in those cases. Consequently, excluding special agreements, there were 10 cases with relative litigant disparity. Of these, the Court was influential in 3 (30%), which is still a higher percentage than cases with absolute litigant disparity. Furthermore, of the 10 cases, the Court heard 4 (40%); dismissed 6 (60%), and none were dropped. The data are shown on the following page:

Table 3.5b: Cases by Litigant Disparity

	Heard	Dropped	Dismissed	Total	Influential
Big v. Medium	1	0	0	1	1
Medium v. Big	2	0	4	6	1
Medium v. Small	0	0	1	1	0
Small v. Medium	1	0	1	2	1
Medium/Small	1	0	0	1	1
Medium/Big	2	0	0	2	2
Total	7	0	6	13	6

The Court heard more cases with less litigant disparity, dismissed fewer, and was overall more influential. Combining both relevant and absolute litigant disparity cases there were a total of 36 cases with litigant disparity, of which the Court heard 10 (28%), dismissed 20 (55%), and 6 were dropped (17%).[13] On the other hand, there were 20 cases of litigant parity; 4 of which were special agreements. Of these 20 cases, the Court heard 11 (55%), dismissed 4 (20%), and 5 were dropped (25%). Notably, the Court was influential in two of the five dropped cases – *Border and Transborder Actions* (Nicaragua v. Costa Rica; Nicaragua v. Honduras) – which suggests the Court was used more successfully as leverage in cases of litigant parity.

Of the 20 parity cases, the Court was influential in 10 (50%); again, a much greater proportion than with litigant disparity (22%). The data are summarized below:

Table 3.5c: Parity/Disparity Comparison

Litigants	Heard	Dropped	Dismissed	Influential	Neutral	Not Influential
Parity (20)	11	5	4	10	1	9
Disparity (36)	10	6	20	7	4	25
Total (56)	21	11	24	17	5	34

Notably, though the Court was less influential as litigant disparity increased, the disparity or asymmetry between the applicant and respondent was also important. Meaning that when a

[13] Not including the special agreement cases, there were 33 cases of litigant disparity, of which, eight were heard (24.24%), 19 dismissed (57.6%), and six were dropped (18.2%).

small state filed suit against a big state the outcome was different than when a big state instituted proceedings against a small state, even though the disparity between them is equal.

There were 21 cases that were not special agreements,[14] in which smaller states instituted proceedings against bigger states. Of those, only three were heard: two were medium v. big and one was a small v. medium case. Thus, 14% of cases (3/21) were heard when smaller states instituted proceedings against bigger states. Furthermore, of the 21 cases, the Court was only influential in two (9.5%): *Oil Platforms* (Iran v. USA) and *Arrest Warrant* (Congo v. Belgium), both of which involved relative litigant disparity, and the Court ruled in favor of the big state, the US, in *Oil Platforms*.

Significantly, out of 13 applications, not a single small v. big case went to trial; nor was the Court influential, indicating that with increased litigant disparity the Court is less likely to be influential. Furthermore, this highlights that the size of the applicant state matters. While the Court is less influential in cases with litigant disparity, it is even less likely to be influential when small states institute proceedings against big states. This indicates the size of the applicant state is important, and bigger states have a higher success rate – in terms of having their case heard and the Court being influential – than smaller states. Moreover, it suggests, as argued by realists and skeptics, that big states have little or no repercussions for violations of international law and small states do not have a means of recourse.

By contrast, there were 12 non-special agreement cases where bigger states instituted proceedings against smaller states, of which four were heard (33%); this is a much higher proportion than smaller v. bigger cases. The Court was influential in four cases as well; again, a greater percentage than in cases where smaller states instituted proceedings against bigger states.

[14] I am disregarding special agreements because there is not clear applicant-respondent relationship. Since both states refer the case together, it is impossible to know, in disparity cases, which state litigated against the other.

Of the 20 dismissed cases with litigant disparity, there were only four bigger v. smaller cases (20%). Thus, 16 cases (80%) were dismissed when smaller states instituted proceedings against bigger states. Considering there were 21 cases where smaller states initiated suits against bigger states, 76% of these cases (16/21) were dismissed. Compared to 33%, (4/12), of the dismissed big v. small cases. The data for the Court's influence are shown on below based on the applicant-respondent relationship.

Table 3.5d: Influence and Litigant Disparity

Litigants	# Cases	# Times Influential
B v S	10	1
B v M	1	1
M v S	1	0
B/M	2	2
Parity	20	10
M/S	1	1
M v B	6	1
S v M	2	1
S v B	13	0
Total	56	17

The data demonstrates that the Court was less influential in cases with litigant disparity than in cases with parity. It was influential in 50% of parity cases versus 19% of cases with disparity (and only 12% if you exclude special agreements). Moreover, in cases with absolute litigant disparity the Court was only influential in one case, or 4%. This data strongly supports my first hypothesis that the Court is less likely to be influential in cases with greater litigant disparity.

Second Hypothesis: If the Court does hear cases with litigant disparity, it is more likely to rule in favor of the bigger state.

Of the ten heard cases in my sample with litigant disparity, the Court ruled in favor of the bigger state in six cases or 60% of the time. Notably, of the three big v. small cases that were

heard, the ICJ ruled in favor of the big state every time; whereas in cases where litigant disparity was not as pronounced, the ICJ did not uniformly rule in favor of the bigger parity.

For example, in the *Fisheries* case between the UK and Norway, the Court ruled in favor of Norway. The UK is a big state and Norway is a medium state, but both are affluent, Western European states and have amicable relations. In fact, though the UK unilaterally filed the suit, Norway consented to adjudication before the issue was referred to the ICJ (Gill 2003), and in this way, the case could arguably be considered a de facto special agreement. Thus, the Court ruled in favor of the smaller state, but the relative size difference and friendly relations between the countries may have promoted compliance.[15]

One of the other cases where the Court ruled in favor of the smaller state – *Sovereignty Over Pulau Ligitan and Pulau Sipadan* (Indonesia/Malaysia) – was a special agreement. Thus, as with *Fisheries*, it is likely that the good relations between the litigating countries allowed the ICJ to decide the case without worrying about compliance. Furthermore, the litigant disparity was not absolute; the case was between a small and medium state. The relations of the parties, as well as the lesser degree of litigant disparity, could account for the fact that the ICJ ruled in favor of the smaller state.

Additionally, the *Avena* case (Mexico v. USA), in which the Court ruled in favor of Mexico, had the precedent of *LaGrand* (Germany v. USA), a big v. big case.[16] Moreover, the Court was not influential in this case because the US disregarded the verdict. This case, as well as the *Fisheries* and special agreement cases, suggests the state of relations between the two litigating parties and their attitude towards adjudication are important for the outcome of the case, and likelihood the verdict will be followed. The data are summarized on the next page:

[15] It is possible, though beyond the scope of this thesis to determine, that the relations between states dictate case outcomes and likelihood of compliance.

[16] Both cases pertained to the US violation of the Vienna Convention on Consular Relations.

Table 3.5e: Big State Wins by Litigant Disparity

Litigants	Number of Cases Heard	Bigger State Won
B v S	3	3
B v M	1	0
M v S	0	--
B/M	2	2
M/S	1	0
M v B	2	1
S v M	1	0
S v B	0	--
Total	10	6

Overall, the Court ruled in favor of the bigger state the majority of the time (60%); however, the data is most striking when the degree of litigant disparity is considered. The Court ruled in favor of the big state in every heard big v. small case. With less disparity, the Court ruled in favor of smaller states. Thus, the degree of litigant disparity appears to predict whether the Court was influential, and also whether the Court ruled in favor of the bigger state.

The data support my hypotheses that 1) litigant disparity and ICJ influence are inversely related, and 2) that when the Court hears cases with litigant disparity it rules in favor of the bigger state. The data also suggest that the degree of litigant disparity matters; the Court was more likely to rule in favor of the bigger state when there was absolute litigant disparity. Furthermore, the applicant-respondent relationship is important; the Court heard more cases when big states were applicants. Thus, there was a relationship between litigant disparity and the influence/verdict of the Court, but the applicant-respondent relationship and degree of disparity underscored these findings. These findings support the realist conception of international law because the Court was more likely to hear cases brought by big states and more likely to rule in their favor.

Limitations

There are important limitations worth mentioning. First, though I categorized states into three discrete groups, it is true that there are size differences within each group. For example, the US and Italy are both big states, but the US is the global hegemon and therefore the biggest state. This intra-group variation is important to consider, and may explain outcomes in cases with litigant parity or even relative litigant disparity. Moreover, it is worth mentioning that, apart from the NATO cases, which were tried together, I do not consider alliances in my categorization of state size and litigant disparity. It is difficult to assess to what extent alliances altered the litigant disparity; but it is likely that alliances did make states more powerful than they would be on their own. For example, Albania's decision to be non-compliant in the *Corfu Channel* case may have been due to its relationship with the USSR. Therefore, alliances are important considerations for state size and may explain unexpected case outcomes.

Also, there may be selection bias in the cases brought to the Court. More specifically, it is likely, and consistent with the realist/skeptical assumptions about state behavior, that big states will not institute many proceedings against small states because they have better means of negotiation. This was demonstrated in my sample, as there were 12 cases where bigger states instituted proceedings against smaller states and 21 cases where smaller states initiated proceedings against bigger states. Thus, there may be an underrepresentation of bigger v. smaller state disputes because the cases are never referred to the Court.

Another potential confounder is that smaller states are less successful against bigger states; therefore small states may be reluctant to institute proceedings. Because small states lack the material capabilities of bigger states, they are at a disadvantage in political negotiations. The historically unsuccessful attempts by small states, though, may deter small states from

adjudication. Small states may be deterred to litigate because there is no enforcement mechanism; therefore the verdict could be disregarded if it is in their favor.

Though courts decrease transaction costs, litigation is expensive, which may also deter small states from instituting proceedings in Court, because big states, again, have the upper hand since they often have more resources to spend on associated fees.[17] These costs could also account for big states' greater success. Similarly, the ICJ, though it attempts to represent all legal systems, is largely based on the Western legal tradition (Posner and De Figuiero 2005); therefore Western states, such as the UK or US, could have an advantage in litigation.

Additionally, though the evidence in this section outlines the relationship between state size and Court behavior, I do not conclude that this, or any other correlation identified in this thesis, is a causal relationship. Rather, I am simply highlighting potential relationships between the relative size of the litigants – and in subsequent chapters, other variables – and case outcomes. Furthermore, though the data here suggest there is a relationship between litigant disparity and the influence of the Court, there also may be other factors influencing the Court's decisions, such as material interests, sources of law, and/or norm types. I discuss these variables, in turn, in the following chapters.

[17] Although, it is worth mentioning that in 1989 the UN Secretary-General created a Trust Fund to assist smaller countries with the financial burden of litigation.

Chapter 4: Material Interests

In this chapter, I examine the potential role of material interests in determining case outcomes.[18] Court heard or dismissed the case, and whether there was compliance, given the material interests of the issue. As with the previous chapter, I provide a table summary of the cases, which includes the case name, applicant state, respondent state, case outcome, material interests, winning state, and whether the verdict was followed. Included in the appendices are thorough justifications for categorizing cases as either materially significant or insignificant and summaries of the cases. In this chapter, I first outline cases that had compliance based on whether they were materially significant or not; then I discuss dismissed, and lastly non-compliant cases. I then analyze the findings in the context of my hypotheses,[19] and discuss the limitations of the analysis.

4.1 Cases With Compliance (Appendix 5)

The Court's judgment was respected in 14 cases. Four involved significant material costs and ten did not. Since the verdict was followed, the Court was influential in all these cases. First, I provide the table for the four cases with significant material costs, and then the ten without.

Table 4.1a: Compliance and Significant Material Costs[20]

Case Name	Applicant	Respondent	Outcome	Costs	Winner	Followed
Fisheries	UK	Norway	Heard	Significant	Norway	Yes
Land Boundary	Cameroon	Nigeria	Heard	Significant	Cameroon	Yes
Frontier Dispute	Benin*	Niger*	Heard	Significant	Niger	Yes
Navigational Right	Costa Rica	Nicaragua	Heard	Significant	Nicaragua	Yes

[18] Cases that were dropped are not included because I am assessing the Court's behavior and likelihood of compliance based on material interests. Though there may be a relationship with material interests and the decision to drop cases, I am examining the Court's role and whether the Court heard the case.

[19] H2A: The more significant the material costs of the case, the less likely the Court will hear the case.
H2B: If the Court does hear a case with significant material costs, it is more likely there will be non-compliance or non-appearance.

[20] In the tables, country names marked by an * are part of a special agreement.

Table 4.1b: Compliance and Insignificant Material Costs

Case Name	Applicant	Respondent	Outcome	Costs	Winner	Followed
Minquiers/Ecrehos	UK *	France*	Heard	Insignificant	UK	Yes
Infants	Netherlands	Sweden	Heard	Insignificant	Sweden	Yes
Frontier Land	Belgium*	Netherlands*	Heard	Insignificant	Belgium	Yes
North Sea	Germany*	Denmark*	Heard	Insignificant	Germany	Yes
Continental Shelf	Germany*	Netherlands*	Heard	Insignificant	Germany	Yes
Arbitral Award	Guinea	Senegal	Heard	Insignificant	Senegal	Yes
Oil Platforms	Iran	USA	Heard	Insignificant	USA	Yes
Kasikili/Sedudu	Botswana*	Namibia*	Heard	Insignificant	Botswana	Yes
Ligitan & Sipadan	Indonesia*	Malaysia*	Heard	Insignificant	Malaysia	Yes
Arrest Warrant	Congo	Belgium	Heard	Insignificant	Congo	Yes

4.2 Court Dismissed the Case (Appendix 6)

The Court dismissed a total of 24 cases. There were 20 cases with significant material costs and 4 with insignificant costs. The Court was considered neutral in 2 cases and not influential in 22 cases. I again outline the cases with significant material costs and then cases with insignificant material costs.

Significant Material Costs

Of the 20 cases with significant material costs, I considered the Court to be neutral in one case (i.e., the dismissal was on purely jurisdictional grounds) and not influential in 19 cases. The case data are provided on the following page.

Table 4.2a: Dismissals and Significant Material Costs

Case Name	Applicant	Respondent	Costs	Outcome	Followed	Influence
Barcelona Power	Belgium	Spain	Significant	Dismissed	No	No
Anglo-Iranian Oil	UK	Iran	Significant	Dismissed	N/A	No
South West Africa	Liberia	South Africa	Significant	Dismissed	No	No
	Ethiopia	South Africa	Significant	Dismissed	No	No
Interhandel	Switzerland	USA	Significant	Dismissed	N/A	No
Nuclear Tests	New Zealand	France	Significant	Dismissed	N/A (No)	No
	Australia	France	Significant	Dismissed	N/A (No)	No
(1995)	New Zealand	France	Significant	Dismissed	N/A (No)	No
East Timor	Portugal	Australia	Significant	Dismissed	N/A	No
Use of Force 1	Yugoslavia	USA	Significant	Dismissed	N/A	No
	Yugoslavia	Spain	Significant	Dismissed	N/A	No
Use of Force 2	Yugoslavia	Canada	Significant	Dismissed	N/A	No
	Yugoslavia	UK	Significant	Dismissed	N/A	No
	Yugoslavia	Italy	Significant	Dismissed	N/A	No
	Yugoslavia	Portugal	Significant	Dismissed	N/A	No
	Yugoslavia	France	Significant	Dismissed	N/A	No
	Yugoslavia	Germany	Significant	Dismissed	N/A	No
	Yugoslavia	Belgium	Significant	Dismissed	N/A	No
	Yugoslavia	Netherlands	Significant	Dismissed	N/A	No
Armed Activities 2	Congo	Rwanda	Significant	Dismissed	N/A	Neutral

Insignificant Material Costs

There were four cases with insignificant material costs that were dismissed; of these, I considered the Court to be neutral in one and not influential in three.

Table 4.2b: Dismissals and Insignificant Material Costs

Case Name	Applicant	Respondent	Costs	Outcome	Followed	Influence
Treatment of	USA	Hungary	Insignificant	Dismissed	N/A	No
Aircraft & Crew	USA	USSR	Insignificant	Dismissed	N/A	No
Aerial Incident	Israel	Bulgaria	Insignificant	Dismissed	N/A	No
Cameroons	Cameroon	UK	Insignificant	Dismissed	N/A	Neutral

4.3 Cases With Non-Compliance/Non-Appearance (Appendix 7)

There were seven cases of non-compliance and/or non-appearance. Five cases had significant material costs and two had insignificant material costs. Because these cases had non-compliance or non-appearance, the Court was not influential.

Table 4.3a: Non-Compliance/Non-Appearance and Significant Material Costs

Case Name	Applicant	Respondent	Costs	Outcome	Winner	Followed
Corfu Channel	UK	Albania	Significant	Heard	UK	No
Indian Territory	Portugal	India	Significant	Heard	Portugal	No
Fisheries Jurisdiction	UK	Iceland	Significant	Heard	UK	No
	Germany	Iceland	Significant	Heard	Germany	No
Armed Activities	Congo	Uganda	Significant	Heard	Congo	No

Table 4.3b: Non-Compliance/Non-Appearance and Insignificant Material Costs

Case Name	Applicant	Respondent	Costs	Outcome	Winner	Followed
LaGrand	Germany	USA	Insignificant	Heard	Germany	No
Avena	Mexico	USA	Insignificant	Heard	Mexico	No

4.4 Discussion of Material Interests

First Hypothesis: The more significant the material costs of the case, the less likely the Court will hear the case.

Of the 45 cases discussed in this chapter, 29 involved significant material costs and 16 were materially insignificant. Of the 29 materially significant cases, the Court heard 9 (31%) and dismissed 20 (69%). Of the 16 materially insignificant cases, the Court heard 12 (75%) and dismissed 4 (25%). Therefore, given that a case was materially significant, the Court was less likely to hear the case and more likely to dismiss it than if it were materially insignificant. This supports my hypothesis that the Court is less likely to hear cases that are materially significant. The data are shown on the following page:

Table 4.4a: Material Costs and Case Outcomes

	Heard	Dismissed	Total
Significant MC	9	20	29
Insignificant MC	12	4	16
Total	21	24	45

Table 4.4b: Material Costs and Court's Influence

	Influential	Neutral	Not Influential	Total
Significant MC	4	1	24	29
Insignificant MC	10	2	4	16
Total	14	3	28	45

Of the 24 dismissed cases, 20 (83%) involved significant material costs. While the other 4 cases had insignificant costs, they were notable in other regards. The two *Treatment Aircraft and Crew* cases (USA v. Hungary; USA v. USSR)[21] were not materially significant because the US was not seeking substantial reparations and it was unlikely the case would go to trial – even the US recognized this improbability when filing the case. It was a feeble political tool, but given that it was filed in 1954, it was symbolic of the US-USSR relations, and therefore important in a different sense. *Northern Cameroons* (Cameroon v. UK)[22] was the first case pertaining to decolonization, and dealt directly with a General Assembly Resolution, which may have underscored the Court's decision (Gill 2003). Thus, in these cases, the wider international system was also a consideration in the Court's decisions.

In regards to the ICJ's influence, which is related to my hypothesis that the more significant the material costs of the case, the less likely the Court would hear it, there were 29

[21] The cases are described in depth in the appendices; however, it is worth mentioning that in the cases the US filed charges against Hungary and the USSR for the mistreatment of US personnel and shooting of a US airplane in Hungarian airspace. When filing the case the US knew that it would not go to trial, which is a key reason the case was materially insignificant.

[22] *Northern Cameroons* regarded the UK and UN's decision to divide the territory of Northern Cameroons between Cameroon and Nigeria (again, it is described in detail in the appendix). Cameroon believed that the UK did not have the right to divide the land, and in doing so, it violated its obligations under the Mandate System. However, Cameroon was not asking the Court for the territory and therefore there was no substance to the case.

materially significant cases, of which the Court was only influential in 4 cases, or 14% of the time. The Court was not influential in 24 cases, or 83% of the time, and its role was neutral in one case, or 3% of the time. On the other hand, the Court was influential in 10 of the cases with insignificant material costs (63%), neutral in 2 (13%), and not influential in 4 (25%). The ICJ was therefore less influential, and more likely to not be influential, in cases with significant material costs.

This analysis of cases with significant material interests suggests that, as anticipated by realists and skeptics, the Court was less likely to hear cases when significant material interests were involved and less likely to be influential. The ICJ heard 9 cases with significant material costs, but was only influential in 4 (44%). Thus, the Court only heard 31% (9/29) of cases that were materially significant, and was influential in less than half of them. By comparison, the Court heard a greater proportion of insignificant cases – 12/16 – and was influential in 10 (83%). Notably, the Court's influence was neutral in only one case with significant material costs, *Armed Activities* (Congo v. Rwanda) *(New Application)*,[23] which suggests that the Court's dismissal of 20 significant cases was not based on purely jurisdictional grounds. This also suggests that, as hypothesized, there is a relationship between material costs and the ICJ's willingness to hear the case, as well as a relationship between material significance and compliance, both of which underscore the Court's influence.

[23] The Congo reinstituted proceedings against Rwanda, for its role in attempting to overthrow the Congolese government, on different jurisdictional grounds; but the case was dismissed.

Second Hypothesis: If the Court does hear a case with significant material costs, it is more likely there will be non-compliance or non-appearance.[24]

The Court heard 9 cases with significant material costs, but was only influential in 4. This is due to the fact that states were non-compliant with the Court's ruling in the other 5 cases. These data are shown below.

Table 4.4c: Material Costs and Compliance

Ruling Given	Compliant	Non-Compliant	Total
Significant MC	4 (29%)	5 (71%)	9
Insignificant MC	10 (71%)	2 (29%)	12
Total	14	7	21

The data for compliance/non-compliance illustrates that the majority of cases with non-compliance involved significant material costs, and the majority of cases with compliance were materially insignificant. If there was non-compliance, then it was more likely the case involved significant material costs (71% or 5/7). Similarly, if there was compliance, it was more likely the case involved insignificant material costs (71% or 10/14). Thus, it was as likely that a state was compliant when there were insignificant costs as it was non-compliant when there were significant costs. That these percentages are the same suggests insignificant material costs are equally correlated with compliance as significant material costs are with non-compliance. This supports my hypothesis that when the Court hears a case with significant material costs there is more likely to be non-appearance/non-compliance; and also illustrates that insignificant material costs are strongly, and equally, correlated with compliance.

Most cases with insignificant material costs had full compliance; in fact, there were only two cases with insignificant material costs and non-compliance: *LaGrand* (Germany v. USA)

[24] 'Non-appearance' means that the respondent state would not appear before the Court in the proceedings.

and *Avena* (Mexico v. USA).[25] These cases did, however, require a substantial change in behavior on the part of the US, which is consistent with the realist/skeptical conception of international law. Moreover, it suggests that international law is not creating a compliance-pull because states disregarded verdicts and were not, therefore, swayed by the Court's legitimacy. States will abide by international law when it is in their interest and requires little change in behavior; but when it requires effort, it is less likely to be followed. The US could not easily implement the decision, which is why it withdrew itself from the compulsory jurisdiction of the Vienna Convention. Thus, even the two cases with insignificant material costs support the assertion that states may not participate in international law if it undermines their interests or requires a substantial change in behavior.

There were four cases that were materially significant and had compliance: *Fisheries* (UK v. Norway), *Dispute Regarding Navigational and Related Rights* (Costa Rica v. Nicaragua), *Land and Maritime Boundary* (Cameroon v. Nigeria), and *Frontier Dispute* (Benin/Niger). However, in two of these cases the Court was reluctant to rule against the party with the greater material interests, which may explain why the data does not directly support my hypothesis. In *Fisheries*, the Court ruled in favor of Norway, the country whose material interests were most at stake. The UK's economic interest was to have access to fishing waters, but this was not nearly as significant as Norway's;[26] in fact, the Court noted Norway's reliance on fishing in its decision (*ICJ Reports 1951,* p.116 at 133).

[25] The two cases pertained to the US disregard for the Vienna Convention on Consular Relations and execution of German and Mexican Nationals. The Court ruled against the US in both cases, and said that the Vienna Convention must be respected and implemented.

[26] In 1949, British fishing vessels trawled 605,077 demersal landings off the Norwegian coast; in total, British ships landed 12,571,093 landings (4.8% of demersal landings). Comparatively this is an insignificant amount. British fishing vessels trawled 3,880,862 off of the Barents Sea, 2,259,205 off the Icelandic coast (Ministry of Agriculture and Fisheries 1950).

Similarly, in the *Dispute Regarding Navigational and Related Rights* case,[27] the Court ruled in favor of Nicaraguan sovereignty, while also upholding the core economic interests of Costa Rica. Costa Rica wanted the right to use the river for its tourist industry, and subsistence fishing for its citizens along the San Juan River; these were vital economic interests. Nicaragua, on the other hand, wanted sovereignty over the River, and the ability to monitor Costa Rican vessels (Foley Hoag LLP 2009). In courts, such as the ICJ, which lack enforcement mechanisms and require the specific consent of the parties, "it is possible for [the judge] to propose a dichotomous solution – one in which party A wins all and B loses all. But for obvious reasons [the judge] is unlikely to do so" (Shapiro 1981, 7). In this case, unlike many of the others, it was possible (and rational) for the Court to provide a non-dichotomous decision that appeased the interests of both parties;[28] which explains compliance.

In contrast to the *Navigational and Related Rights* case, the Court's ruling in *Land and Maritime Boundary* did negatively affect the material interests of Nigeria.[29] While Nigeria was initially non-compliant with the ruling, there was compliance once the UN and other big states became involved and pressured Nigeria. Thus, without the material backing of these powerful actors, it is likely that Nigeria would not have been compliant.

The *Frontier Dispute* case is a notable example of the Court successfully handling a dispute of significant material interests and providing a dichotomous decision. Benin and Niger had almost gone to war over the land 1960 after gaining independence from France; however, each state recognized it would be more cost-effective to have the Court settle the issue – even if it lost – than to continue disputing over the lands. Thus, even though Benin had to give up Lété

[27] The case pertained to Costa Rica's right to free/unimpeded navigation along the San Juan River.
[28] It is also possible for the Court to provide non-dichotomous decisions in land delimitation cases; but most cases before the Court are not structured so that the Court can appease, at least in part, both litigants.
[29] The ICJ declared that most of the disputed land did not belong to Nigeria.

Island, it was compliant. Moreover, it was a special agreement case indicating that the two parties would likely be compliant with any decision.

Taking into account the Court's actions in these cases, it is evident the ICJ is careful when formulating its decisions so that its verdict will be respected; this is a common tactic used by courts when they fear non-compliance or do not have an executive to enforce their decision (Shapiro 1981). Again, this does not imply that the rulings are any less meaningful in these cases, but in two of the four cases – *Fisheries* and *Navigational and Related Rights* – the Court helped ensure compliance by upholding the vital material interests at stake. Also, considering many materially significant verdicts were disregarded, these findings suggest that, contrary to constructivist/optimist assertions, international law does not necessarily create a compliance pull.

Limitations of the Findings

Given that the Court is less likely to hear cases with significant material costs, and less likely to be influential in these cases, there could be a selection bias in the cases of the Court. Though it is true that the majority of the cases discussed in this section involved significant material costs; given the Court's relatively unsuccessful performance, states, especially small states, may be reluctant to refer significant cases to the Court. Moreover, given that courts are greatly affected by precedent, a continuously poor performance in a certain area may deter states from referring cases in the future, although it difficult to measure this hypothetical argument since the cases were never referred to the Court. Nevertheless, a similar phenomenon occurred after the *Fisheries Jurisdiction* cases (UK v. Iceland; Germany v. Iceland) when Iceland's non-compliance and non-appearance initiated a string of ignored ICJ decisions (e.g., *Nuclear Tests* (Australia v. France; New Zealand v. France) and *Trial of Pakistani Prisoners of War* (Pakistan v. India)) (Elkind 1984). As noted above, it is also unlikely that states will refer many trivial

issues to the Court, given the costs of litigation; thus, one would expect to find cases that are neither materially significant nor completely insignificant.

Furthermore, though I have outlined a rubric for material significance in the methodology section, which was based, in part, on the rubric provided by Müller and Schneider (2007); and further justified my reasons for defining the material interests of each case; it is, to a certain extent, a subjective metric. For example, it could reasonably be argued that the *Treatment of Aircraft and Crew* cases (US v. Hungary; US v. USSR) were materially significant because they were indicative of the wider Cold War struggle. Moreover, each of the examined cases could have varying degrees of significance. For example, the *Guardianship of Infants* case between the Netherlands and Sweden is 'insignificant,' as is the *LaGrand* case (Germany v. US), but for entirely different reasons. Thus, even though these labels were justified in light of the circumstances of each case, they demonstrate the subjective nature of defining significance.

Chapter 5: Sources of Law

This chapter examines the ICJ based on the source of law used in its decisions. My hypotheses pertain to the Court's treatment of source of law;[30] therefore, I only discuss the 21 cases the Court heard since the ICJ was able to make a pronouncement on the source of law. Of these 21 cases, 10 used a single source of law: 8 treaties, 1 CIL, and 1 based on a previous tribunal decision (Appendix 8). Since there were no competing sources of law in these cases, I focus on the 11 cases with multiple sources of law, which provide better insight into my hypotheses. I first provide a table of cases based on treaties and then CIL. The Court used treaties exclusively in six of the eleven cases with multiple sources of law and CIL twice. Moreover, of the eleven cases with multiple sources of law, there were three in which the Court used different sources of law for different aspects of the decision; the data for these are provided after the treaty and CIL-based decisions. At the end of this chapter, I examine the role of different sources of law in regards to my hypotheses.

To frame the discussion the rest of this chapter, an overview of the sources of law is provided and presented in order of analysis. Treaty-based law includes written and ratified agreements among states. The Vienna Convention on Consular Relations, for example, is a treaty, as is the UN Charter. Customary international law (CIL) is the standard of behavior or norms that constitute international law; unlike treaties, these are not typically written down, but are acknowledged as international law. General principles are similar to CIL, but are understood as axioms of behavior, and typically have a moral underpinning (e.g., human rights). Lastly, laws from other states or rulings by other judiciaries – both national and international – may contribute to international law.

[30] H3A: The Court will be most likely to base its decisions on treaties.
H3B: The Court will only base its decisions on CIL or general principles if there are no applicable treaties.
H3C: The Court will base judgments, when applicable, on the laws of big states.

Table 5.1a: Treaty-Based Decisions *(Appendix 9)*[31]

Case Name	Applicant	Respondent	Sources of Law	Winner	Influence	Primary Source
Minquiers & Ecrehos	UK*	France*	Treaty & CIL (SP)	UK	Yes	Treaty
Frontier Land	Belgium*	Netherlands*	Treaty & CIL (SP)	Belgium	Yes	Treaty
Oil Platforms	Iran	USA	Treaty & CIL	USA	Yes	Treaty
Kasikili/Sedudu	Botswana*	Namibia*	Treaty & CIL	Botswana	Yes	Treaty
Indian Territory	Portugal	India	Treaty & CIL (SP)	Portugal	No	Treaty
Arrest Warrant	Congo	Belgium	Treaty, CIL, & NL	Congo	Yes	Treaty

Table 5.2a: Customary International Law Decisions *(Appendix 10)*

Case Name	Applicant	Respondent	Sources of Law	Winner	Influence	Primary Source
Pulau Ligitan & Sipadan	Indonesia*	Malaysia*	Treaty & CIL	Malaysia	Yes	CIL
Frontier Dispute	Benin*	Niger*	Treaty & CIL	Niger	Yes	CIL

Table 5.3a: Decisions with Multiple Sources *(Appendix 11)*

Case Name	Applicant	Respondent	Sources of Law	Winner	Influence	Primary Source
North Sea	Germany*	Denmark*	Treaty, CIL, & NL	Germany	Yes	Treaty/NL
Continental Shelf	Germany*	Netherlands*	Treaty, CIL, & NL	Germany	Yes	Treaty/NL
Armed Activities	Congo	Uganda	Treaty, CIL, & GP	Congo	No	Treaty/GP

5.4 Discussion of Source of Law

First Hypothesis: The Court will be most likely to base its decisions on treaty-based law.

Of the 11 cases with multiple sources of law, the Court relied on treaties exclusively six cases (55%), and used treaties for part of the verdict in nine cases (82%). Considering there were 21 heard cases overall, and the Court used treaties to justify 17 of its decisions (81%), there is strong evidence that the Court is most likely to use treaty-based law in its decisions. This is likely because states consciously, and voluntarily, sign treaties; therefore, it is easier for the

[31] In the table, (SP) is state practice and NL is national law.

Court to rule the treaty was binding. Furthermore, of the 21 heard cases, there were 2 cases in which there was no relevant treaty-based law: *Fisheries* (UK v. Norway) and *Arbitral Award* (Guinea-Bissau v. Senegal). It is worth noting that in the *Fisheries* case, which depended exclusively on CIL, the Court found that Norway was not bound by CIL because Norway had consistently rejected the standard, CIL method of maritime delimitation, which is consistent with the voluntary nature of international law. This means 19 cases had relevant treaty-based laws, and of those 19, the Court used treaties to justify 17 of its decisions (90%). Overall, the data support the hypothesis that the Court will most likely use treaty-based law in its decision.

Second Hypothesis: The Court will only base its decisions on CIL or general principles when there is no applicable treaty-based law.

The Court only used CIL to justify two of its decisions with multiple sources of law (18%), which suggests states are not bound by the normative component of international law, as mentioned in the *Fisheries* case. Notably, the two multi-law cases based on CIL were special agreements. As discussed, all special agreement cases had complete compliance; therefore the Court may have had more freedom to use CIL rather than treaties, given there were no compliance concerns.[32]

It is also notable that the special agreement cases all pertain to land disputes. Since precedent heavily influences courts, they are more likely to become influential as they acquire precedent through the process of judicialization. Similarly, since the ICJ had been successful in prior special agreement cases and in land disputes, the Court should be less concerned about possible non-compliance, and could therefore use CIL. Moreover, in the two land dispute cases where the Court used CIL, the Court first examined treaties before considering the relevant

[32] By contrast, in *Barcelona Traction* (Belgium v. Spain), which had a more tenuous applicant-respondent relationship, the Court explicitly stated it could not rule against Spain under the current standards of CIL.

components of CIL. Even though the ICJ ultimately used CIL, it only referred to CIL once it had exhausted treaty-based law resources. Again, this supports the hypothesis that the Court will rely predominately on treaties and use CIL as a secondary source.

There was one case in which the Court used the general principles of international law in its decision, *Armed Activities on the Territory of the Congo* (Congo v. Uganda).[33] Though treaty-based law was part of the submissions, Uganda had to pay reparations for breaches of the general principles of international law. This was the only case to employ general principles; therefore, it is difficult to argue the Court will use general principles as a secondary source behind treaties, as it does with CIL. Nonetheless, it is noteworthy that 19 cases referred to the ICJ included general principles.[34] Of those only this case was heard (5%); 16 were dismissed (84%), and 2 were dropped (11%). It is likely the Court was reluctant to hear cases with general principles because of their relationship to evaluative norms and morality. General principles are axioms of international law and, as such, believed to be above the voluntary nature of international law. For these reasons the Court should be reluctant to hear cases with general principles; but the evidence is not indicative of the Court's willingness to base its decision on them since there is only one case.

Third Hypothesis: The Court will base judgments, when applicable, on the laws of big states.

The ICJ used national laws from the US in the two *North Sea Continental Shelf* cases (Germany/Netherlands; Germany/Denmark). The Court based part of its ruling on treaty, as discussed; but in order to find the method of delimitation, the ICJ refrained from suggesting methods from drawn from CIL, and instead based its decision on methodology found in a US

[33] In the case, the Congo sought reparations and instituted proceedings against Uganda surrounding its role in overthrowing the Congolese government.

[34] Ten Yugoslavia v. NATO cases, *East Timor, Armed Activities, South West Africa* cases, and *Nuclear Test* cases

law from 1945 (*ICJ Reports 1969,* p.3). This supports the hypothesis that the Court will use the laws of powerful states when applicable, based on the realist/Marxist argument that powerful states dictate the rules of the international system. However, since there were only two cases, the finding is inconclusive.

Notably, the Court cited judicial findings from France and the UK in the *Arrest Warrant* case (Congo v. Belgium) but did not base its decision on them.[35] The French Court of Cassation ruled that Muammar Gaddafi did not enjoy diplomatic immunity for the 1989 bombing of a French airliner in Nigeria (BBC News 2000).[36] Unlike in the Belgium case, where there was no link between the Congolese Minister and Belgium, there was a strong link between France and Gaddafi. Similarly, in Britain, the House of Lords ruled that Augusto Pinochet could be extradited to Spain to face charges for crimes against humanity and torture (BBC News 1999). However, the US was strongly opposed to the practice of universal jurisdiction (Paulson 2004). Since the US is the global hegemon, it is not contrary to my hypothesis that, despite these precedents from two big states, the Court did not base its ruling in *Arrest Warrant* on the judicial rulings of France and the UK.

Limitations/Cautions of the Findings

Given the small number of cases that used general principles and national laws, it would be premature to draw any conclusions about their role in the source of law. The Court only heard one case with general principles and two cases that incorporated national laws. It is also beyond the scope of this thesis to accurately assess when there were 'applicable' laws/rulings from big states; and in this way it is difficult to know if there were many cases in which the Court could

[35] *Arrest Warrant* dealt, indirectly, with the issue of universal jurisdiction because Belgium issued a warrant, through Interpol, for the arrest of the former Congolese Minister of Foreign Affairs, even though none of the offenses took place in Belgium nor had the Minister ever been to Belgium.

[36] The decision was purely symbolic since France could not extradite Gaddafi.

have used laws from big states or if these two cases were the only examples. Accordingly, although the Court used the laws of the US in these two cases, it is insufficient evidence for the hypothesis that, when applicable, the Court will use the laws of powerful states. Similarly, there were only 11 cases with competing sources of law, which is an insufficient number on which to base any conclusions.

Additionally, there may be a selection bias in the cases referred to the Court. As discussed, many treaties include *compromissory clauses,* which mechanize referrals to the Court when there is a disagreement. Therefore, more treaty related cases may be brought to the ICJ given these clauses. Similarly, the voluntary nature of international law implies that CIL is not binding for states; thus, states may be reluctant to refer cases to the Court that depend on CIL. For example, the PCIJ famously stated in the *Lotus* case:

> International law governs relations between independent states. The rules of law binding upon states therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between theses co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of states cannot therefore be presumed… every state remains free to adopt the principles which it regards as best and most suitable (*PCIJ Reports 1927, Series A, No. 10*, p.18-19)

More recently, in my sampled cases, the ICJ continued with the logic of the PCIJ's decision and demonstrated in the *Fisheries* case that it will uphold states' prerogative to participate in CIL. For these reasons, there may be an underrepresentation of disputes relying on CIL, which – along with the small sample size of heard cases – must be considered.

Chapter 6: Norm Type

This chapter discusses the influence and behavior of the Court as they relate to the three different norm types: evaluative, regulative, and constitutive. At the beginning of each norm sub-section I provide a short definition of the norm and summarize the cases; however, in order to better understand compliance of regulative norms and treatment of non-delimitation constitutive norms I outline these cases more thoroughly, rather than offering a brief table. At the end of this chapter I discuss all norm categories in relation to my hypotheses,[37] as well as the limitations of the findings.

6.1 Evaluative Norms (Appendix 12)

Evaluative norms are prescriptive; they advise what one ought to do in a moral sense. As previously discussed, the ICJ should reject cases of evaluative norms because they would undermine the Court's objectivity. There were seventeen cases brought to the Court pertaining to evaluative norms; of these, the Court only heard one case. Two cases were dropped and fourteen were dismissed, demonstrating that the Court was reluctant to hear cases of evaluative norms. Case descriptions and my reasoning for categorizing cases and norms are provided in the appendices. The table for cases with evaluative norms is shown on the following page.

[37] H4A: The Court will refuse to hear cases of evaluative norms.
H4B: The Court will be influential with regulative norms insofar as it rules against the smaller state.
H4C: The Court will not be progressive in constitutive norm cases because of *opinio juris* or state practice.

Table 6.1a: Evaluative Norm Cases

Case Name	Norm Type	Applicant	Respondent	Jurisdiction	Outcome	Winner	Influence
South West Africa	Reg & Eval	Liberia	South Africa	Yes	Dismissed	N/A	No
	Reg & Eval	Ethiopia	South Africa	Yes	Dismissed	N/A	No
East Timor	Reg & Eval	Portugal	Australia	No	Dismissed	N/A	No
Use of Force	Reg & Eval	Yugoslavia	USA	No	Dismissed	N/A	No
	Reg & Eval	Yugoslavia	Spain	No	Dismissed	N/A	No
Use of Force	Reg & Eval	Yugoslavia	Canada	No	Dismissed	N/A	No
	Reg & Eval	Yugoslavia	UK	No	Dismissed	N/A	No
	Reg & Eval	Yugoslavia	Italy	No	Dismissed	N/A	No
	Reg & Eval	Yugoslavia	Portugal	No	Dismissed	N/A	No
	Reg & Eval	Yugoslavia	France	No	Dismissed	N/A	No
	Reg & Eval	Yugoslavia	Germany	No	Dismissed	N/A	No
	Reg & Eval	Yugoslavia	Belgium	No	Dismissed	N/A	No
	Reg & Eval	Yugoslavia	Netherlands	No	Dismissed	N/A	No
Armed Activities	Reg & Eval	Congo	Burundi	No	Dropped	N/A	No
	Reg & Eval	Congo	Rwanda	No	Dropped	N/A	No
	Reg & Eval	Congo	Uganda	Yes	Heard	Congo	No
	Reg & Eval	Congo	Rwanda	No	Dismissed	N/A	Neutral

6.2 Regulative Norms

Regulative norm cases are those in which the Court is asked to decide whether a state's action was in accordance with international law. The majority of the cases before the Court are regulative norms. There were 31 cases with (exclusively) regulative norms; of these, twelve were heard (39%), ten were dismissed (32%) and nine were dropped (29%). The Court was influential in nine cases (29%); six of which were heard and three were dropped. The Court was not influential in 20 cases (64.5%): six were heard, nine were dismissed, and five were dropped; and neutral in one dismissed (3%) and one dropped case (3%) (Appendix 13). The data for cases with exclusively regulative norms are provided on the following page.

Table 6.2a: Exclusively Regulative Norm Cases

	Heard	Dropped	Dismissed	Total
Influential	6 (19%)	3 (9%)	0 (0%)	9 (29%)
Neutral	0 (0%)	1 (3%)	1 (3%)	2 (6%)
Not Influential	6 (19%)	5 (13%)	9 (29%)	20 (65%)
Total	12 (39%)	9 (29%)	10 (32%)	31

In addition to the 12 heard cases with only regulative norms, there was one heard case that had multiple norm types: *Armed Activities on the Territory of the Congo* (DR Congo v. Uganda).[38] Thus, there were a total of 13 heard cases, which involved regulative norms. The 13 heard cases are appropriate for testing the hypothesis that the Court will be influential insofar as it rules in favor of the bigger state. More specifically, of these 13 cases, 6 were between equally-sized litigants; thus, there were 7 regulative cases with litigant disparity. The Court ruled in favor of the bigger state four times (57%) and in favor of the smaller state three times (43%) (Appendix 14). Unlike in the previous chapters, I provide a short summary of the case and outline the manner of compliance in order to better understand the Court's influence. I first discuss the four cases where the Court ruled in favor of the big state and then the three cases where the smaller state won.

Ruled in Favor of the Bigger State

In *Oil Platforms* (Iran v. US), Iran claimed the destruction of three offshore oil platforms by the US Navy was a violation of the Treaty of Amity, Economic Relations, and Consular Rights. The Court, however, decided that the destruction did not violate the Treaty and consequently Iran was not entitled to reparations. Though the verdict was followed, the ruling in

[38] There are a total of 48 non-exclusive regulative norm cases; here I focus on all heard regulative norm cases, exclusively or not.

this case required no further action or enforcement; the ICJ found the US did not owe reparations.[39] Therefore, while the Court was influential, and did rule in favor of the bigger state as hypothesized, the power of the US compared to Iran was likely not the reason there was compliance; although, per my state size hypothesis, it may have been the reason the Court ruled in favor of the US.

In *Corfu Channel*, the ICJ ruled in favor of the UK, stating that Albania must pay £843,947 in reparations for the destruction of two British ships; however, Albania was non-compliant.[40] Despite Albania's non-compliance with the verdict, Britain was able to receive compensation. In a future case, pertaining to gold Germany looted from Rome during WWII, an arbiter declared the gold belonged to Albania and must be returned. Using creative diplomatic channels, the UK, as part of a tri-party committee with the US and France, successfully circumvented the arbiter's decision and retained the gold for itself as compensation for the ICJ's ruling in *Corfu Channel* (Maher 2005). Though Britain was able to receive compensation, I do not consider the Court influential because the compensation was obtained independent of the Court's ruling; in fact, the issue was not fully resolved until the 1990s after the break-up of the Soviet Union. This example does, however, demonstrate that big states can ensure compliance.

In the *Fisheries Jurisdiction* cases (UK v. Iceland; Germany v. Iceland), the ICJ ruled in favor of the UK and Germany, stating that Iceland could not extend its fisheries jurisdiction to

[39] It would perhaps be pertinent, though outside the scope of this thesis, to consider the types of compliance necessary in cases. For example, in this case, the US did not have to do anything to be compliant with the decision, whereas other cases require more active levels of compliance.
Furthermore, it is worth noting that this type of ruling – one that requires no further action – would be an easy way for the Court to build precedent and strengthen its legitimacy since it is furnishing a ruling; and, importantly, it is furnishing a ruling in a case between two hostile countries. Again, while I have a specific definition of 'influence,' and consider only direct influence on the parties; rulings like this, that require no further action and are essentially impossible not to obey (unless the US chose to pay reparations) are an excellent way for the Court to enhance its legitimacy.

[40] Albania's non-compliance may have been due, in part, to its alliance with the USSR and the rise in Cold War tensions.

50-nautical miles from shore. Iceland, however, did not appear at trial and was non-compliant. As with the *Corfu Channel* case, the issue was eventually resolved: eight years later, the 1982 Convention on the Law of the Sea affirmed the 12-mile limit (Gill 2003). In the end, the big states were able to receive what they wanted, a 12-mile limit, which does suggest that powerful states can enforce decisions. Again, though, I do not consider the Court influential since it took so long for closure.

These four cases suggest there should perhaps be a distinction between regulative norm verdicts, which may be independent of state size; however, given there are only four cases these are tentative assertions. In the *Oil Platforms* case, the Court ruled the US did not owe reparations; meaning the verdict required no further action for either party. The Court did not try to regulate US behavior for the future or force it to take any further actions. In the other three cases though, the Court actively tried to regulate state behavior. The ruling required action and there was non-compliance. Thus, the compliance in the case required different actions by the losing states, which may explain why there was compliance in one case but not in the others.

Though the type of decision may be suggestive of compliance, it is true that big states were able to enforce the decision in all three non-compliance cases even though the Court was not influential. As anticipated by realists, big states used non-judicial means to enforce the verdict in their favor, which is still consistent with my hypotheses. This also suggests that international law does not create a compliance pull, because the verdicts were disregarded; but, material resources, such as those used by Britain in *Corfu Channel*, are effective.

Ruled in Favor of the Smaller State

In *Avena* (Mexico v. US), the ICJ ruled in favor of Mexico, claiming the US had to follow the rules of the Vienna Convention. The US was non-compliant, as it had been in

LaGrand (Germany v. US) and *Consular Relations* (Paraguay v. US). These cases are examples of the Court's inability to states to be compliant. The US was a respondent in three cases pertaining to the Vienna Convention on Consular Relations, and did not abide by the ruling for any case. Moreover, the US disregarded the verdict and preliminary measures when Germany, a big state, was the applicant in the *LaGrand* case.[41] Accordingly, it is unlikely state size was the only factor in the US decision to disregard the verdict in the case against Mexico, a medium state. Still, the Court was not influential in this case because the US did not abide by the ruling.

The Court was influential in two cases when it ruled in favor of the smaller state. The UK was compliant with the Court's decision, and respected Norway's maritime delimitations in the *Fisheries* case. In *Arrest Warrant*, the ICJ decided in favor of the Democratic Republic of Congo and ruled that Belgium had to withdraw its arrest warrant. Belgium complied with the ruling, withdrew the arrest warrant, and also retracted its national law that allowed for compulsory jurisdiction. As such, the Court was influential in this case.

These three cases also suggest the type of compliance necessary in regulative norm cases is important; again though, these are preliminary assertions given the few number of cases. In *Fisheries*, the Court's decision did not require further action on the part of the UK, which may explain compliance, similar to the *Oil Platforms* case. In *Avena*, however, the Court tried to regulate US behavior by ruling it must follow the Vienna Convention; hence, similar to *Corfu Channel* or *Fisheries Jurisdiction*, compliance in this case required an actual change in behavior. Notably, *Arrest Warrant* was the only decision mandating a change in behavior that had compliance. This may suggest the type of decision is more indicative of compliance than state

[41] The US also disregarded the interim measures in the Paraguay case.

size. However, as mentioned, the US pressured Belgium to repeal its law on universal jurisdiction; therefore, state size may have been a factor in this case.

6.3 Constitutive Norms

Constitutive norms create new identities, actors, or courses of action. The constructivist assertion that courts are proponents of norm emergence is strongly related to constitutive norms, since these norms alter state behavior by dictating how states can act; rather than judging whether or not an action was legal, as is the case with regulative norms. There were eight cases land delimitation cases, which are categorized as constitutive norms; and there were eighteen constitutive norm cases pertaining to new actors or courses of action. The Court was influential in all land delimitation cases (Appendix 15).[42] Notably, of these eight cases, seven were special agreements.

In this section, I discuss the eighteen cases regarding new actors or courses of action. This is because the Court acted differently depending on the type of constitutive norm, and had a different effect on state behavior. These norms are more indicative of the Court's role as a proponent or norm emergence because they had global implications and are similar to the typical constructivist understanding of constitutive norms. Moreover, these cases are relevant for my hypotheses because they depended on global *opinio juris* and state practice.

Before discussing the cases and constitutive norms, it is worth mentioning again that I use a slightly different metric to measure the Court's role in these constitutive norm cases. Rather than examining the Court's influence in the case, I consider the Court to be 'progressive' if it found that an emerging constitutive norm existed and states had to abide by it; or if the Court created a constitutive norm. I consider the Court to not be progressive if it refused to address the

[42] Though, in the one non-special agreement case, *Land and Maritime Boundary*, there was initial non-compliance.

constitutive norm, or if the Court impeded the progression of the norm by upholding the status quo even though CIL was evolving. These are evaluated using secondary sources and the separate opinions of the ICJ judges. Accordingly, I will now outline the eighteen cases, based on the substance of the constitutive norm, and discuss the Court's use of *opinio juris* and state practice.

Constitutive Norms: *Opinio Juris* and State Practice (Appendix 16)

Rights of Shareholders

The Court dealt with the rights of shareholders in the *Barcelona Traction* case (Belgium v. Spain). This case is considered a setback in international investment law because the Court failed to recognize the rights of shareholders, which was a growing international trend (Weiler 2005). The Court found Belgium had no *jus standi* because the Barcelona Traction Company was incorporated in Canada; meaning that Canada could file a claim on behalf of the company, but Belgium could not on behalf of its shareholders. In this sense, the Court refused to recognize the rights of shareholders in international law, and instead focused on the notion of a corporate entity. The ICJ's ruling implies that only corporations have rights under international law.

The ICJ did recognize, however, that international law is ever evolving and there was a growing trend in international law, which supported the rights of shareholders. Nonetheless, the ICJ asserted, "in the present state of affairs, such a right could only result from a treaty or special agreement" (*ICJ Reports 1970,* p.3 at 84). It is argued that the Court likely dismissed the case because it did not want to make a pronouncement on the rights of shareholders (Lillich 1971). Moreover, three of the judges – Judges Gros, Tanaka, and Jessup – objected to the Court's decision and its intent not to adjudicate on the issue of shareholders' rights in CIL (*ICJ Reports 1970*, p.3). Thus, the Court failed to support an evolving international norm because it could not find *opinio juris* or state practice; and in doing so it hindered the development of a nascent norm.

It is noteworthy that international law no longer shares the view of the ICJ (Weiler 2005). In fact, even the Court has moved away from its position in the *Barcelona Traction* case; in 1987, the Court allowed the US to file a claim on behalf of shareholders of the Italian company, Elettronica Sicula. Given that international law was changing and the Court's decision is considered a setback in international investment law, I do not consider the Court to be progressive in the development of the constitutive norm.

Obligations Erga Omnes

The Court's ruling in the *South West Africa* cases created a new category of international norms: obligations *erga omnes*. Obligations *erga omnes* are those that the entire international community has an obligation to defend and interest in being defended, for example, genocide.[43] There were four other cases referred to the Court with obligations *erga omnes*: *Barcelona Traction*, *East Timor* (Portugal v. Australia), and *Nuclear Tests* (New Zealand v. France; Australia v. France).

In *South West Africa*, Ethiopia and Liberia brought the case to the Court because South Africa disobeyed the Mandate System created under the League of Nations. The Court dismissed the case because Ethiopia and Liberia, as individual states, could not file suit since the issue was of an "international character" (*ICJ Reports 1970,* p.6 at 41). Individual states could not enforce an obligation incumbent upon the entire international community, or specifically in this case, the entire League of Nations (*ICJ Reports 1970,* p.6). Thus, the Court created a new category of norm, which it used to dismiss the *South West Africa* cases; however, by creating a norm, the Court was progressive.

[43] Granted, states are legally or normatively obliged to defend, but practically and realistically norms *erga omnes* are not always (or arguably even often) defended.

The Court expounded on the issue of obligations *erga omnes* in the *Barcelona Traction* case; in fact, the Court repudiated its initial position regarding *erga omnes*. The Court held that an individual state should be allowed to bring forth a claim regarding obligations *erga omnes* if the international community fails to act. Although the Court used obligations *erga omnes* to refuse to hear the case – the ICJ declared that Belgium's claim was not an issue *erga omnes* – in rejecting Belgium's claim the Court contributed greatly to the development of international law by outlining what constitutes an obligation *erga omnes*:

> An essential distinction should be drawn between the obligations of a state towards the international community as a whole, and those arising vis-à-vis another state in the field of diplomatic protection. By their very nature the former are the concern of all states. In view of the importance of the rights involved, all states can be held to have a legal interest in their protection; they are obligations *erga omnes***.** Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination (*ICJ Reports 1970,* p.6 at 77).

Accordingly, since the ICJ contributed to the development of obligations *erga omnes*, I consider it progressive, although the Court was not progressive in the case's other constitutive norm, the rights of shareholders.

In *East Timor*, Portugal contended that East Timor's right to self-determination – which had been violated by Indonesia's invasion and annexation – was a norm *erga omnes*. The Court agreed, under the Charter and practice of the UN, that this claim of *erga omnes* was 'irreproachable.' Nonetheless, the ICJ dismissed the case because "the character of a norm and the rule of consent to jurisdiction are two different things" (*ICJ Reports 1995,* p.90 at 102). Accordingly, since Indonesia was not a party the Court could not proceed.

The ICJ's verdict arguably implies that though states have obligations *erga omnes*, the Court is not obliged to uphold them if doing so would interfere with its legal obligation; thus, it cannot break from its procedure by hearing a case without the respondent's consent. Still, in *East Timor*, the Court continued to develop the notion of obligations *erga omnes* even while

dismissing the case. It is true that norms of state sovereignty and self-determination are well established and engrained in the UN Charter; but it is noteworthy the Court categorized these norms as *erga omnes* because it was expanding their scope; and, as such, I consider the Court to be progressive.

Australia and New Zealand raised the issue of obligations *erga omnes* in the *Nuclear Tests* cases, since it was of interest to the international community that nuclear testing be prohibited. However, the Court dismissed the case because France issued public statements promising to cease testing. By dismissing the case, the Court failed to address the issue of the legality of nuclear testing, which was a core component of the Australian and New Zealand applications, and the primary basis for their contention of an obligation *erga omnes*: "Further, they [the parties] were, and still are, in difference as to the lawfulness or unlawfulness according to customary international law of the testing of nuclear weapons in the atmosphere" (*Dissenting Opinion of Judge Sir Garfield Barwick, ICJ Reports 1974,* p.391 at 393). The majority dissenting opinion of the Court stated:

> We fully recognize that… "The Court, as a court of law, cannot render judgment *sub specie legis ferendae,* or anticipate the law before the legislator has laid it down" *(ICJ Reports* 1974, at pp. 23-24 and 192). That pronouncement was, however, made only after full consideration of the merits in those cases. It can in no way mean that the Court should determine in *limine litis* the character, as *lex lata* or *lex ferenda,* of an alleged rule of customary law and adjudicate upon its existence or non-existence in preliminary proceedings without having first afforded the parties the opportunity to plead the legal merits of the case (*ICJ Reports 1974,* p.253 at 367).

Therefore, the Court cannot find constitutive norms before there is evidence the norms existed; the ICJ cannot rule that a norm is binding until there is international consensus. This quotation, however, highlights that the Court should not decide whether a norm exists in the preliminary proceedings, which it did by dismissing the 1974 *Nuclear Tests* cases. Thus, in this case, the Court failed to develop norms *erga omnes* in regards to nuclear testing, a failing that was

criticized by international scholars and the dissenting judges.[44] For this reason, I do not consider the Court to be progressive in the *Nuclear Tests* cases.

Humanitarian Intervention

In the *Legality of the Use of Force* cases, the Court had the opportunity to contribute to the developing international law concerning humanitarian interventions (Gill 2003). As discussed, NATO's intervention was morally appropriate, but it was neither justified on legal grounds, nor by CIL standards. There was not a firmly rooted international norm with which to base the intervention (Sofaer 2003). It is likely that because the judges supported the intervention for non-judicial reasons, but could not legally justify it – as there was no established humanitarian intervention norm – the ICJ divested itself of jurisdiction and dismissed the case (Gray 2003). The fact that NATO may have acted due to a moral obligation is not *opinio juris* in a legal sense; and though the Court dismissed the case, it could not find, for legitimacy reasons, that *opinio juris* existed because of moral obligations. Thus, the Court dismissed the case and did not rule on the legality of humanitarian interventions in international law.

Because the Court supported the intervention but failed to declare that humanitarian interventions are legitimate, I do not consider the Court to be progressive; especially given that it would have had the support of the NATO members had it declared humanitarian interventions are legal.[45] Though I consider the Court to not be progressive, because it dismissed the case

[44] "It may be that a layman, with no loyalty to the law might quite reasonably think that a political decision by France no longer to exercise what it claims to be its right of testing nuclear weapons in the atmosphere, when formally publicized, might be treated as the end of the matter between Australia and France. But this is a court of justice, with a loyalty to the law and its administration. It is unable to take the layman's view and must confine itself to legal principles and to their application" (*Dissenting Opinion of Judge Sir Garfield Barwick, ICJ Reports 1974,* p.391 at 392).

[45] In the context of my definition, I do not consider the Court to be progressive because it failed to address the issue; however, it is true that by dismissing the case the Court allowed the intervention to go on unimpeded. Similarly, the 'responsibility to protect' norm has since become prominent/engrained in the international system; but it is outside the scope of this thesis to know whether the Court's dismissal was meant to further the developing humanitarian intervention norm.

rather than endorsing interventions, it is worth mentioning that, by dismissing the cases, the Court may have contributed to, or tried to contribute to, the development of humanitarian intervention laws. The Court's dismissal, I have argued, is a tacit approval of the intervention; and likewise, it could be argued that the case dismissals are also ostensible endorsements of the emerging humanitarian intervention norms.[46] Nonetheless, because the Court refused to adjudicate and make a pronouncement on the legitimacy of humanitarian interventions, I do not consider it progressive.

Non-State Actors

In the *Armed Activities on the Territory of the Congo* case (Congo v. Uganda), the Court dealt with issues regarding the use of force, specifically by non-state actors. In the case, the ICJ specifically, and intentionally, failed to address the legitimacy or legality of defense against non-state actors, even though many of the attacks within the region were by non-state actors; and, even though the US had begun its War on Terror. In its decision, the ICJ held that, "the Court has no need to respond to the contentions of the parties as to whether and under what conditions contemporary international law provides for a right of self-defense against large-scale attacks by irregular forces" (*ICJ Reports 2005,* p.168 at 223). In failing to address this issue, the Court refrained from contributing to the development of international law regarding the role of non-state actors. For this reason, I do not think the Court was progressive.

Universal Jurisdiction

The *Arrest Warrant* case (Congo v. Belgium) pertained to the emerging norm of universal jurisdiction. It is argued that there is a growing international trend in favor of universal

[46] It is worth noting that in 2007 the ICJ ruled, in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case (Bosnia and Herzegovina v. Serbia and Montenegro) that Serbia had *not* committed acts of genocide, nor was it complicit in the genocide, but Serbia had violated its obligation to prevent genocide. The ICJ also ruled in this case, though, that failure to prevent is not a criminal act; rather, it is a violation of an international obligation (*ICJ Reports 2007,* p.43).

jurisdiction (Turns 2002). In the case, the ICJ considered whether there was *opinio juris* or state practice. As mentioned, the Court looked at the judicial rulings of both the British House of Lords and the French Court of Cassation; and, it is also worth noting there is international precedent for universal jurisdiction, such as the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). Nonetheless, the ICJ could not find substantial state practice or *opinio juris* to adjudicate on the issue:

> While none of the national case law to which we have referred happens to be based on the exercise of a universal jurisdiction properly so called, there is equally nothing in this case law which evidences an *opinio juris* on the illegality of such a jurisdiction. In short, national legislation and case law – that is, state practice – is neutral as to the exercise of universal jurisdiction (*ICJ Reports 2002,* p.3 at 76).

Since the Court did not want to adjudicate the legality of universal jurisdiction, it simply assumed, for the purposes of the case, Belgium had the jurisdiction to issue the warrant (Turns 2002). Then, based on this assumption, it assessed whether Belgium violated the immunities of foreign ministers. The Court's verdict, therefore, did not address the legality of universal jurisdiction, which was criticized by many of the ICJ judges. In a separate opinion, three judges stated that, "in our opinion it was not only desirable, but indeed necessary that the Court should have stated its position on this issue of jurisdiction" (*ICJ Reports 2002,* p.3 at 64). Given that the Court intentionally decided not to address the issue, even though there was a growing trend, I do not consider the Court to be progressive.

6.4 Discussion of Norm Type

First Hypothesis: The Court will refuse to hear cases of evaluative norms.

As hypothesized, the Court refused to hear most cases with evaluative norms. It only heard one case out of 17 applications (6%). Two cases – *Armed Activities* – were dropped, likely because the Court was not going to find jurisdiction to hear the case; and fourteen were dismissed. Moreover, the Court rejected state contentions based on evaluative norms, as

demonstrated in the *South West Africa* cases. It is notable that there was not a single case before the Court that was exclusively comprised of evaluative norms.

The Court divested itself of jurisdiction in cases that would have been based on evaluative norms (i.e., *Legality of Use of Force*). Granted, the Court dismissed the *Legality of Use of Force* cases using evaluative norms and moral discourse, which does undermine its legitimacy, but not as much as a ruling based on evaluative norms would have harmed the Court's legitimacy. A decision in favor of NATO in the *Use of Force* cases, unlike the heard *Armed Activities* case, would have been rooted largely in evaluative norms because there was no norm in international law allowing for humanitarian intervention.[47] In *Armed Activities*, notions of state sovereignty and human rights, while still general principles, are established norms and have become codified. For these reasons, the Court likely decided to dismiss the *Use of Force* cases, rather than hear the case and use evaluative norms as it did in *Armed Activities*.

Overall though, regardless of the reasoning, the Court dismissed fourteen of seventeen cases with evaluative norms (82%), which supports the hypothesis that the Court will refuse to hear cases with evaluative norms.

Second Hypothesis: The Court will be influential with regulative norms insofar as it rules against the smaller state.

The sampled cases did not support the hypothesis that the Court's influence in regulative norm cases depends on whether it rules in favor of the bigger state. There were only seven heard cases of regulative norms with litigant disparity; the Court ruled in favor of the bigger state four times and was influential in one case (25%); and ruled in favor of the smaller state three times

[47] It is worth noting that the 'responsibility to protect' norm has since become more prominent/engrained in the international system; though it was outside the scope of this thesis to examine if this is a result of the Court's actions.

and was influential in two cases (67%). It would be premature to assert the Court is more influential when it rules against bigger states, given the small number of cases.

Moreover, as discussed, the type of verdict may explain variation in compliance. In the four cases where the big state won, three of the rulings required active compliance by small states, whereas in *Oil Platforms* it was not possible for there to be non-compliance. Similarly, the one case where the small state won with non-compliance required a change in state behavior. Thus, the type of compliance necessary in a case may be more important for regulative norms than the size of the winning party; but again, given the small number of cases, this is a tentative assertion.

Significantly, though the Court was less influential when it ruled in favor of big states, as discussed, big states have other means of recourse (i.e., political or military means) in instances of non-compliance. The *Corfu Channel* case, for example, demonstrates the means available to powerful states. Considering resolution outside the Court, big states always ensured adherence to the ICJ's ruling when it was in their favor. Conversely, in the one case where a big state was non-compliant, *Avena*, neither the Court nor the other litigating party could compel the US to abide by the verdict. Granted, the US had disregarded the Court's verdict in two other cases; therefore, it was not necessarily because Mexico was a smaller state that the US was non-compliant. Nonetheless, the seven cases illustrate that, contrary to my hypothesis, the Court's influence in exclusively regulative norm cases is not strongly correlated with the size of the winning party.

Overall, the Court was not very influential in regulative norm cases, regardless of state size. It was influential in nine (29%) of exclusively regulative norms. This proportion is much smaller when including cases with multiple norm types. In addition to the 31 exclusively

regulative norm cases, there were 16 cases of regulative and evaluative norms and one case with regulative and constitutive norms, a total of 48 regulative norm cases. Of these 48, the Court heard 13 (27%), dismissed 24 (50%), and 11 were dropped (23%). Furthermore, the Court was influential in 9 (19%), neutral in 3 (6%) and not influential in 36 (75%) cases. Thus, proportionately, the Court heard fewer, and dismissed more cases with regulative norms if there was more than one norm type. The significant drop in the percentage of heard and influential cases is due to the incorporation of evaluative norms. The majority of mixed norm cases included evaluative norms; as discussed, there was not a single case based solely on evaluative norms. The case outcome and influence data for exclusively regulative norm cases and mixed norm cases are shown below:

Table 6.4a: Court's Influence in Cases With Exclusively Regulative Norms

Regulative	Heard	Dropped	Dismissed	Total
Influential	5 (17%)	3 (10%)	0 (0%)	8 (27%)
Neutral	0 (0%)	1 (3%)	1 (3%)	2 (7%)
Not Influential	6 (20%)	5 (17%)	9 (30%)	20 (67%)
Total	11 (37%)	9 (30%)	10 (33%)	30

Table 6.4b: Court's Influence in Cases With Mixed Regulative Norms

Mixed Norms	Heard	Dropped	Dismissed	Total
Influential	6 (13%)	3 (6%)	0 (0%)	9 (19%)
Neutral	0 (0%)	1 (2%)	2 (4%)	3 (6%)
Not Influential	7 (15%)	7 (15%)	22 (46%)	36 (75%)
Total	13 (27%)	11 (23%)	24 (50%)	48

Third Hypothesis: The Court will not be progressive in constitutive norm cases because of opinio juris and state practice.

In regards to constitutive norms that were land delimitations, the Court was always influential. However, in cases where the Court was in a position to be a proponent of norm emergence, it was less influential and progressive. The Court was influential in one of 18 cases (6%), but did not base its decision on the constitutive norm once. In terms of the Court being progressive, it was progressive in 3.5 of 18 cases (19%); I consider the Court to be 'half' progressive – for lack of a better metric – in the *Barcelona Traction* case because it progressively contributed to obligations *erga omnes*, but it did not contribute to the developing rights of shareholders.

The Court did create obligations *erga omnes*, and in this way, was a proponent of norm emergence; however, in the cases regarding *erga omnes* the Court failed to adjudicate the issue. In fact, the Court used obligations *erga omnes* to dismiss the *South West Africa* and *Barcelona Traction* cases; and it did not recognize nuclear testing as an obligation *erga omnes*. Thus, the creation of these norms *erga omnes* did not strengthen the Court's influence; but the Court was 'progressive.' However, the ICJ did assert this constitutive norm without state practice and *opinio juris*, which demonstrates that the Court *can*, but is, for the most part, reluctant to uphold or create constitutive norms.

Apart from norms *erga omnes,* the Court was, as hypothesized, reluctant to find that a constitutive norm existed without *opinio juris* or state practice. In the *Barcelona Traction* case the Court rejected the claim that shareholders had rights, a decision that went against the emerging CIL. Consequently, the Court has since deviated from its decision. In *Arrest Warrant*, the ICJ noted the growing trend and decisions of other countries regarding universal jurisdiction, but still found it insufficient to adjudicate the norm. In the *Use of Force* cases, the ICJ refrained

from addressing the legality of humanitarian interventions. Similarly, in the *Armed Activities* case the Court abstained from discussing the importance of non-state actors, which may have been because the US had started its global war on terrorism and made the issue internationally important (Gathii 2007).

The Court's role as a proponent of norm emergence rested largely on constitutive norms, since regulative norms are institutionalized in international law and evaluative norms are supposed to be incompatible with judicial functions, and many evaluative norms are axiomatic in international law. However, the findings of the 18 cases where the Court's ruling pertained to the creation of a constitutive norm support the hypothesis that the Court is often not progressive and will not be a proponent of norm emergence because of *opinio juris* and state practice. Apart from the establishment of norms *erga omnes* – which is significant – the Court was not progressive in asserting constitutive norms in international law. In fact, the Court was reluctant to uphold emerging constitutive norms in 14.5 of the 18 cases (81%).[48] Examining it another way, there were six different constitutive norms before the Court: obligations *erga omnes*, nuclear testing, rights of shareholders, humanitarian intervention, universal jurisdiction, and non-state actors; the Court was 'progressive' in one constitutive norm: obligations *erga omnes* (17%). Thus, the Court's treatment of constitutive norms in these cases undermines the constructivist assertion that courts are proponents of norm emergence.

Limitations of the Findings

Given that courts are supposed to be objective, the ICJ should not, based on my analysis and judicial theory, hear many cases with evaluative norms. In fact, the ICJ should dismiss cases with evaluative norms, which may mean states will refrain from referring evaluative norm cases

[48] *Legality of Use of Force, Nuclear Tests, Barcelona Traction* – rights of shareholders*, Arrest Warrant,* and *Armed Activities*

to the Court. Accordingly, there is likely an underrepresentation of evaluative norm cases because of a selection bias regarding norm type.

Additionally, though I use the term 'progressive' to assess the Court's treatment and role in the development of constitutive norms, this is a subjective metric. I used secondary sources and the writings of ICJ judges, but many of these sources have the benefit of hindsight; and therefore it is difficult to accurately assess whether the Court was actually too conservative in asserting a constitutive norm. Similarly, it is impossible to know to what extent the Court hindered/furthered the progression of a norm, especially in more recent cases such as *Legality of Use of Force* and *Arrest Warrant*. Lastly, as discussed, it is reasonable to argue that not addressing a norm may be a tacit approval of the status quo. However, it is outside the scope of this thesis to measure whether the Court's dismissal was intentionally meant to promote the norm's status quo; and if states understood the dismissal as an endorsement of the status quo.

While certain trends have been highlighted in this chapter, this does not mean that norm type has a causal role in the influence or behavior of the Court; it is beyond the scope of this thesis to find causation. Lastly, given that there were only eight heard cases with regulative norms and litigant disparity, there was an insufficient number of cases upon which to base conclusions about the Court's influence in regulative norms. Thus, there must be caution when accepting these findings.

Chapter 7: Cross-Case Comparisons and Conclusions

7.1 Cross-Case Comparisons

The 56 sampled cases represent slightly more than half (52%) of the Court's completed contentious cases. Of these, the Court heard 21 cases (38%); 11 cases were dropped (20%) and 24 were dismissed (43%). Additionally, the Court was influential in 17 (30%), neutral in 4 (7%), and not influential in 35 (63%). A summary is provided below:

Table 7.1a: All Cases

	Influential	**Neutral**	**Not Influential**
Heard (21)	14 (25%)	0 (0%)	7 (12%)
Dropped (11)	3 (5%)	1 (2%)	7 (12%)
Dismissed (24)	0 (0%)	3 (5%)	21 (38%)
Total (56)	17 (30%)	4 (7%)	35 (63%)

Most of the hypotheses were supported by the case examples presented within each chapter, albeit to varying degrees. In terms of state size, there was an inverse relationship between litigant disparity and the influence of the Court; the Court was more likely to rule in favor of the big state, especially as litigant disparity increased. The findings also suggested the applicant-respondent disparity was more important than litigant disparity by itself; the Court was less likely to hear the case when small states instituted proceedings against bigger states than vice versa.

There was a strong correlation between material interests and the influence of the Court. The Court heard fewer cases with significant material costs, and most of the cases with non-compliance and/or non-appearance were materially significant. The inverse relationship between material costs and the influence of the Court is even starker when one considers that the Court often framed its verdict in order to protect the material interests of the litigants.

As hypothesized, the Court based the majority of its verdicts on treaties rather than CIL. The Court used CIL to justify its decision in only two cases where treaty-based law was applicable. Moreover, these cases were special agreements, and the Court used CIL only after looking to treaty-based law. The ICJ also used general principles once, and they were used in conjunction with treaties; thus, treaty-based law was the foremost source of law. The Court used national legislation twice in its verdicts, which also supports my hypothesis; but is insufficient to constitute a trend or form any valid conclusions.

The data supported my hypothesis that the Court would refuse to hear cases with evaluative norms; the ICJ only heard one case out of the 17 applications. In regards to regulative norm cases, the Court was *not* more influential when it ruled in favor of the bigger state, which was contrary to my hypothesis. Smaller states were less likely to comply than bigger, although, as discussed, the bigger states used other means of recourse. It is worth noting that even though data does not support my specific hypothesis, upon closer examination, it is evident that powerful states are still able to resolve the issue if litigation fails, which is consistent with the realist/skeptical conception of international law.

Lastly, there were eight cases in which the Court dealt with delimitation constitutive norms; the Court was influential in all eight cases. In the cases where the constitutive norms created new actors or courses of action, had more global implications and required *opinio juris* and/or state practice, the ICJ was, for the most part, not progressive. It was only progressive in 3.5 cases (19%),[49] and all these cases pertained to the same norm: obligations *erga omnes*. Put another way, the Court was only progressive in one of six possible constitutive norms (17%). In the other cases, the Court's ruling either purposefully neglected to address the relevant

[49] Again, I use a 'half' case because the ICJ dealt with two constitutive norms in the *Barcelona Traction* case (Belgium v. Spain). The Court was progressive in finding obligations *erga omnes* but was not progressive in forwarding the rights of shareholders.

constitutive norm or took a conservative, perhaps even backwards, stance on an emerging constitutive norm. Interestingly, though I hypothesized the Court would not be progressive because it must find that *opinio juris* and state practice existed before asserting a constitutive norm, the Court created obligations *erga omnes* without either *opinio juris* or state practice. Overall, the ICJ was not progressive in asserting nascent constitutive norms.

Since there may be interactions between the variables discussed – state size, material interests, source of law, and norm type – and the outcome of the case, or, some of the variables may have stronger associations with Court decisions than others, I now discuss the four variables together. My analysis will be ordered by heard, dropped and dismissed cases. At the end of this section, I discuss the consistent trends in the Court's role and conclude with the relation of the findings to international relations and international law theories.

Heard

There were a total of 21 heard cases. Of these, 14 cases were heard and influential, 8 had litigant parity; the other 6 had relative litigant parity; and there were 7 special agreements. Eight cases were delimitation constitutive norms and six were exclusively regulative. Three of the cases relied on CIL, eleven used treaties, and two used national laws in conjunction with treaties. Four cases had significant material costs and ten did not.

The seven heard cases in which the Court was not influential were all regulative norms. Three involved parity and four involved disparity (including three big v. small cases). All involved treaties, although one also included general principles. Five of the cases involved significant material costs and two were insignificant. The data is shown on the following page, with the statistics for primary sources of law:[50]

[50] In the table: 'Par' is litigant parity, 'Dispar' is disparity; 'Sign' is significant material costs; 'Not' is insignificant material costs; 'TR' is treaty-based law; 'NL' is national law; and 'PJD' is a previous judicial decision.

Table 7.1b: Heard Cases by Variables and Influence

Heard Cases	Par	Dispar	Sign	Not	Reg	Con	Eval	TR	CIL	GP	NL	PJD
Influential (14)	8	6	4	10	6	8	0	10	3	0	2	1
Not (7)	3	4	5	2	7	0	1	7	0	1	0	0
Total (21)	11	10	9	12	13	8	1	17	3	1	2	1

For many of the categories in the table there is not a significant difference between cases that were followed versus those that were not. However, there are noteworthy trends. First, though, it is significant that of the 21 heard cases 7 were disregarded; meaning that the Court's verdict was followed 67% of the time. Given that there was litigant parity, a greater proportion of cases were followed than not, and in cases where the costs were materially *in*significant, a higher proportion of states followed the verdict. Cases with delimitation constitutive norms were always influential, whereas regulative norms were both influential and not; and there was not a single heard, influential case with evaluative norms. All of the non-influential cases involved treaty-based law, although, 10 of the influential cases involved treaty-based law. This could be because treaty-based law, like regulative norms, constituted the majority of cases.

It is also noteworthy that the Court's interim protection measures were disregarded in four cases: *Anglo-Iranian Oil Co.* (UK v. Iran)*, Nuclear Tests* (Australia v. France; New Zealand v. France) and *Consular Relations* (Paraguay v. US). In *Anglo-Iranian Oil* the Court ordered that Iran refrain from any actions that could exacerbate tensions or harm the Company's employees; but Iran rejected these measures. In *Nuclear Tests*, France continued testing in the region, which led to New Zealand's reapplication in 1995. In *Consular Relations* the US continued with the execution despite the interim measures. Also, though the Court did not institute interim measures or decide on the *South West Africa* contentious cases (Ethiopia v. South Africa; Liberia v. South Africa), the ICJ gave four advisory opinions regarding the issue, which South Africa ignored.

The two *Nuclear Tests* and *South West Africa* cases, as well as the *Anglo-Iranian Oil Co.* case, had significant material costs. If one considers that the Court's ruling was not followed 12 times (5 interim measures and 7 verdicts), then there is a noticeable trend regarding material costs and compliance.

Table 7.1c: Ruling's Influence and Material Costs

	Sign. Cost	**Insign. Cost**	**Total**
Ruling Influential	4 (15%)	10 (38%)	14 (53%)
Ruling Not Influential	9 (35%)	3 (12%)	12 (47%)
Total	13	13	26

This presents a clearer relationship between material costs and compliance/influence. Given that the case was materially significant, the decision was more often disregarded than not. Similarly, if a case had insignificant material costs it was more likely to be followed. The three cases that did not have significant material costs and were not influential all pertained to the US adherence to the Vienna Convention on Consular Relations. The Court ruled that the US had to implement and respect the Convention, similar to Miranda Rights for US citizens. It was, however, difficult for the US to implement the decision. It was not materially significant for the US, but it would require a change in behavior, which is why it was disregarded. The fact that the US disregarded the verdicts may suggest it perceives itself as above international law; the US Supreme Court has repeatedly rejected decisions made by the ICJ. The US was a respondent in four cases that went to trial; it won one case and disregarded the three cases that it lost – all of which were materially insignificant. Thus, while material interests have a clear relationship with the Court's influence, state size may also be a factor.

It is also worth mentioning that in all twelve cases where the verdict and/or interim measures were disregarded, the respondent state was non-compliant. The applicant won in the

seven completed cases with non-compliance, and the respondent violated the interim measures. By contrast, in cases with compliance that were not special agreements, the respondent won four times and the applicant won three. The three cases in which the applicant won and there was compliance were: *Arrest Warrant* (Congo v. Belgium), *Land and Maritime Boundary* (Cameroon v. Nigeria), and *Navigational and Related Rights* (Costa Rica v. Nicaragua). The *Land and Maritime Boundary* case would not have had compliance if the powerful states – the US, UK, UN, and France – did not pressure Nigeria to comply. In the *Navigational and Related Rights* case, the Court produced a non-dichotomous verdict pleasing to both parties; and may potentially have non-compliance depending on the ongoing case between Nicaragua and Costa Rica. The *Arrest Warrant* case is arguably the only case in which the applicant won and there was total compliance.

This suggests that, contrary to the liberal/constructivist arguments, international law is *not* creating a compliance-pull. Respondent states were not swayed by the legitimacy of the Court's proceedings; nor do they find it in their interest to adhere to the Court's ruling. Based on this data, it is unlikely that international law is improving the relations and negotiations between states, mitigating the effects of anarchy, or reducing the likelihood/ concerns of defection to the extent that optimists argue it is.

Dropped

There were 11 dropped cases; all of which were regulative norms. It is unlikely, though, that this is a causal relationship (i.e., the case was dropped because it was a regulative norm) given that regulative norms were the overwhelming majority of the Court's cases (all but eight included regulative norms).

There was not a clear trend between source of law and dropped cases. All but two of the dropped cases involved treaties; three were exclusively treaties, and six cases had multiple sources of law. Therefore it seems unlikely that the case was dropped because of its source of law. Moreover, since the Court did not make a decision on the case, it is difficult to analyze the relationship between the Court's influence and source of law.

The Court was influential in three dropped cases, neutral in two, and not influential in six. This suggests that states may not believe they can use the Court as leverage in negotiations, rather the cases were dropped because the proceedings were likely futile; although, the Court was used for leverage in three cases. In the cases where the Court was used as leverage, one was big v. small and had insignificant material costs; the other two cases had significant material costs and were between small states. Notably there were five dropped cases between small states and all of them involved significant material costs; whereas the other six cases had absolute litigant disparity and were of insignificant material costs.

These figures suggest that small states are more apt to use the Court for leverage in important situations, whereas larger states are not. In the one big v. small case that was used for leverage, *Electricité de Beirut* (France v. Lebanon), France filed the case on behalf of a company. Thus the case was immaterial for the state of France, and did not merit political negotiations, but it was worth it to refer the case to the Court because it forced Lebanon to reach an agreement with the company instead of facing trial at Court. Since big states presumably have the advantage in negotiations given their material strength, they are not likely to use the Court against small states when there are significant material costs. It would be better for them to resolve the dispute outside of Court. It would therefore make sense that big states use the Court as leverage in insignificant cases rather than cases with significant costs.

Table 7.1d: Dropped Case Outcomes

Dropped Cases	Influential (3)		Neutral (2)		Not Influential (6)		Total
	Sign.	Insign.	Sign.	Insign.	Sign.	Insign.	
Small v. Small	2	0	0	0	3	0	5
Small v. Big	0	0	0	1	0	1	2
Big v. Small	0	1	0	1	0	2	4
Total	2	1	0	2	3	3	11

There is a noticeable trend when examining the six cases in which the Court was not influential; in five of the six cases, the case was dropped because the proceedings would be futile. The other case, *Aerial Incident 27 July 1955* (USA v. Bulgaria) was dropped because the US did not want to set a precedent against its Connally Amendment. The case was likely not going to go to trial anyway since the Israeli case was dismissed, but the US dropped the case in order to protect its long-term interests. This may suggest the ICJ is actually powerful and the US would feel compelled to appear before the Court in the future had it not protected its reservation to the Optional Clause in this case. The other dropped cases, though, suggest that the Court cannot compel states to trial; in fact, the US has since not appeared before the Court, and removed itself from the Optional Clause.

Overall, the findings suggest that futility of the proceedings is the arguably biggest factor in the decision to drop the case – futility meaning the likelihood that the Court would not be influential in resolving the issue. It is unlikely that regulative norms contribute to perceived futility, since most cases were regulative norms. Additionally, source of law was likely not a factor, since the Court did not decide on the case. State size, however, may have contributed to the futility of the case. Given that the Court has not been influential in many cases of absolute litigant disparity, states may have decided to drop the case because of the improbability of trial or success. On the other hand, material significance may have been a factor; the cases of small state parity all had materially significant costs. This would suggest that the decision to drop the

case hinges on the perceived futility of the case, which is a function of both litigant disparity and material costs.

Dismissed

There were 24 dismissed cases; of which the Court was not influential in 21 (88%) and neutral in three (13%). This is important because it suggests that when the Court dismisses a case, its justification is not purely jurisdictional. In only three of the cases can the dismissal be justified on judicial grounds: *Armed Activities on the Territory of the Congo (New Application)* (Congo v. Rwanda)*, Aerial Incident 27 July 1955* (Israel v. Bulgaria) and *Northern Cameroons* (Cameroon v. UK). It is therefore important to consider why the Court would dismiss 21 cases, or approximately 1/5 of its contentious case load, for non-jurisdictional reasons. I now consider whether source of law, norm type, state size, and material costs contributed to the non-judicial reasons for the Court's dismissal.

Source of law was a factor in one case: *Barcelona Traction* (Belgium v. Spain).[51] The Court justified the dismissal because there was not a treaty between Belgium and Spain, and it could not find support for Belgium's contentions under CIL (*ICJ Reports 1970,* p.3). Apart from this case, however, source of law was neither a determining factor in, nor correlated with, the Court's decision to dismiss the case.

Norm type was a factor in 13 of the dismissed cases, all of which involved evaluative norms; these 13 were multi-norm cases, part evaluative and part regulative. It is likely that the presence of evaluative norms contributed to the Court's decision to dismiss the case. Although, the Court used evaluative discourse to reject interim measures in the *Legality of Use of Force* cases. The Court supported the NATO campaign for moral reasons, but legally the intervention

[51] In the case, Belgium sought reparations from Spain on behalf of Belgian shareholders in the Barcelona Traction Company.

was not justified; thus, rather than decide a case for evaluative reasons the ICJ dismissed the case.[52] Lastly, considering that there was only one heard case with evaluative norms, they were likely a factor in the decision to dismiss the case.

Considerations of non-compliance/non-appearance were likely factors in the Court's decision to dismiss at least eight cases. In *South West Africa* the Court likely dismissed the cases because its advisory opinion had already been disregarded. In fact, South Africa refused to abide by General Assembly and Security Council Resolutions; therefore, it was unlikely the Court's verdict would be followed. Similarly, in the *Anglo-Iranian Oil Co.* case, Iran completely ignored the interim measures and refused to take part in the preliminary proceedings. In the *Treatment of Aircraft and Crew* cases, both Hungary and the USSR refused to appear before the Court, which is why those cases were dismissed. In *Nuclear Tests*, France rejected the Court's jurisdiction and withdrew from the Optional Clause, which is partially why the Court could not hear New Zealand's reapplication. These eight cases illustrate considerations of non-compliance and/or non-appearance contributed to the Court's decision to dismiss cases.

Material costs and state size/litigant (dis)parity were also relevant factors. Of the 21 dismissed, not influential cases, 19 involved significant material costs (91%). There were 18 cases of litigant disparity, including 12 cases with absolute litigant disparity (57%). The data for dismissed, non-influential cases is shown on the following page.

[52] Granted, since the cases were against ten NATO members, state size was likely a major factor in the decision to dismiss these cases.

Table 7.1e: Dismissed, Not Influential Cases

	Sign. MC	Insign. MC	Total
Cases with Parity	2 (10%)	1 (5%)	3 (14%)
Cases with Disparity	17 (81%)	1 (5%)	18 (86%)
Total	19 (90%)	2 (10%)	21

The one case with litigant parity and insignificant material costs was *Treatment in Hungary of Aircraft and Crew* (US v. USSR). This case was insignificant because the US knew the proceedings were futile and the substance of the case was not materially significant. Nonetheless, since the case was between the US and USSR, there were significant hostilities between the parties. The same is true of the case between the US and Hungary, a Soviet satellite. The other two parity cases, *South West Africa*, had significant material costs, as previously discussed, and the Court's advisory opinion had been disobeyed, which is likely why they were dismissed.

The data suggest there is a strong relationship between dismissals and material costs, and dismissals and litigant disparity. It is not possible to know whether material costs or litigant disparity have a powerful predictive capacity. It may be that greater litigant disparity and/or material significance contribute to the Court's fear of non-compliance, just as they contributed to the perceived futility of dropped cases, which could lead the case to be dismissed. Thus, it is not necessarily the presence of significant material costs and/or litigant disparity that causes the Court to dismiss the case; rather, it could be their relationship to non-compliance. As suggested earlier, the cases of non-compliance involved significant material costs; therefore, the Court may seek to protect its reputation by avoiding cases it believes will have non-compliance.

This assertion is supported by the observation that in six cases, the Court found it had jurisdiction to hear the case, but nevertheless dismissed it: *Interhandel* (Switzerland v. US),

South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, Barcelona Traction* (Belgium v. Spain)*,* and *Nuclear Tests* (Australia v. France; New Zealand v. France). Four of the cases involved litigant disparity, although none had absolute litigant disparity. All six cases, however, did involve significant material costs, which may suggest material costs' primacy over state size; but this cannot be concluded definitively. For example, in the *Nuclear Tests* cases, the Court dismissed the cases once France issued a public statement promising to cease testing that resulted in fallout. The Court justified the dismissal by saying that the applicants' objectives had been met, but as discussed, this was an unsatisfactory decision. The fact that France was a big state may have contributed to the dismissal.

There is another notable trend in five of the dismissed cases where the Court had jurisdiction: they all involved non-delimitation constitutive norms. Significantly, the Court dismissed all the cases pertaining to norms *erga omnes*. In *South West Africa*, the Court claimed that states could not file cases when there was an obligation *erga omnes*. Then, in *Barcelona Traction*, the Court recanted its original position and said individual states must act on obligations *erga omnes*, but that this was not a case *erga omnes*. In *Nuclear Tests*, both New Zealand and Australia argued that nuclear testing is an obligation *erga omnes*, but the Court dismissed the case without addressing that issue. It is not possible to claim whether it was material significance, state size/litigant disparity, or constitutive norms that caused the Court to dismiss the cases even though it had jurisdiction. It may be a combination of all three variables and/or their contribution to perceived non-compliance. Nonetheless, there is a relationship between these variables and the decision to dismiss. The data are shown on the following page.

Table 7.1f: Dismissed Cases by Jurisdiction

Dismissed Cases	Parity	Disparity	Reg.	Con.	Eval.	Sign. MC	Insign. MC
Yes Jurisdiction (6)	2	4	6	5	2	6	0
No Jurisdiction (18)	2	16	18	11	10	14	4
Total (24)	4	20	24	16	12	20	4

Material Interests and State Size

The findings suggest state size (i.e., litigant disparity) and material interests were important considerations in the decision to dismiss, drop, or hear the case; as well as the likelihood that the Court would be influential. The data for both state size and material interests for all cases are shown below.

Tables 7.1g and 7.1h: Case Outcomes, Influence, Material Interests, and Litigant Disparity

All Cases	Insignificant (21)		Significant (35)		Total
	Parity	Disp.	Parity	Disp.	
Heard	5	6	6	4	21
Dropped	0	6	5	0	11
Dismissed	1	3	3	17	24
Total	6	15	14	21	56

All Cases	Insignificant (21)		Significant (35)		Total
	Parity	Disp.	Parity	Disp.	
Influential	4	6	6	1	17
Neutral	0	4	1	0	5
Not Influential	2	5	7	20	34
Total	6	15	14	21	56

The Court was least likely to dismiss/most likely to hear cases with litigant parity and insignificant material costs; one case was dismissed and the Court heard five of six the applications (83%). Conversely, the Court was most likely to dismiss/least likely to hear cases with litigant disparity and significant material costs; it dismissed 17 of these cases (81%) and only heard 4 of 21 (19%). Similarly, the Court was most likely to be influential in cases with insignificant material costs and litigant parity; it was influential in four of six cases (67%). The

Court was by far the least likely to be influential in cases with significant material costs and litigant disparity; it was influential in one – *Fisheries* (UK v. Norway) – of 21 cases (5%).

There were inverse relationships between litigant disparity and heard cases, litigant disparity and influence, material interests and heard cases, and material interests and influence. There were also direct, positive relationships between material costs and non-compliance; and between disparity and non-compliance. Thus, the data strongly suggests the Court's influence was strongly related to material significance and litigant disparity.

7.2 Findings and International Relations/International Law Theories

Material significance and state size had the strongest relationship with case outcomes and the influence of the Court. In terms of state size, there was not a single small v. big state case that went to trial, and there were 13 case requests. To further illustrate this point, of the sampled 56 cases 21 were heard; but of these 21, only 3, or 14%, involved smaller applicants and bigger respondents;[53] and none were – in absolute terms – a small v. big state case. This supports the realist argument that big states essentially dictate the rules of the system since they were not brought to trial or held accountable for their actions.

Moreover, the ICJ was only influential in 17 or 30% of its total cases; and of these, only 7, or 13%, of the cases has materially significant costs to the states involved. This suggests that the Court is not creating a substantial compliance-pull in heard cases, because states were often non-compliant when their interests were at stake. States were compliant when there were not high costs or when it was not difficult to be compliant. These findings suggest that, as realists and skeptics argue, international law is not meaningfully changing the nature of international relations.

[53] Not including special agreements because the applicant-respondent relationship is different.

The Court's influential cases were predominantly characterized by litigant parity and insignificant material costs, which suggest that international law is not altering the payoff structure, or that it is in the states' best interests to participate in international law as liberals contend. Furthermore, since these cases were materially insignificant, it is hard to accept the optimist, liberal and constructivist argument that international law does, or will, alter state behavior. Similarly, in cases that may have had global implications (i.e., cases with non-delimitation norms), the Court was not progressive. International law will not affect the condition of anarchy by dismissing cases of importance and refraining from decisions – through constitutive norms – that have global consequence. It is written in the ICJ's Statute that cases are only binding for the litigating parties; still, many of the Court's influential cases would not have far-reaching implications absent that rule (e.g., *Guardianship of Infants* or *Electricité de Beirut*). Thus, even when the Court is influential, the issue itself may not be important or alter state behavior.[54]

Overall, the Court's ineffectiveness, and states' non-compliance, in cases with significant material costs undermines the liberal assertion that international law is in the best interest of states and can improve cooperation. There were many instances of non-compliance, which suggests that international law, absent an enforcement mechanism, will not change state behavior; nor did the ICJ create a compliance-pull, as indicated by states' disregard for the Court's findings. Similarly, the voluntary nature of international law made it so that the Court had to dismiss many cases because the proceedings would be futile, which would inherently undermine its legitimacy. Thus, international law failed to account for, or largely influence state behavior; and the optimist's belief in the judicialization of politics cannot be substantiated.

[54] This is arguably due to my narrow definition of 'influential.' It was beyond the scope of this thesis to assess the global impact of every heard, dismissed or dropped case.

Limitations

While I have used stringent methods to categorize and analyze cases, there are certain limitations that warrant mention. First, based on my findings, and rooted in theory, I posit that material interests and state size are important; however, it was beyond the scope of this thesis to establish causation despite evident relationships and correlations.

Second, though I provided my definitions and metrics for labeling variables, many of the terms used are subjective and open-ended. For example, big states do not necessarily have to be the G6 countries or nuclear powers; nor do medium states have to be the top 20 economies based on total GDP. Moreover, the US is the global hegemon and it could therefore be argued that it should be in its own category of state size. There are numerous ways to code these variables, and while I believe my methodology is sound, it is possible that coding these variables differently would have led to different findings. The same is true for material significance. While I provided a thorough justification for my coding, there is a spectrum; some may argue, for example, the costs of the *Interhandel* case were not significant given the size of the US GDP. As there is no definitive classification for either material significance or state size, this must be considered when evaluating these findings.

Third, as discussed, there is likely selection bias in terms of the cases referred to the Court. Given that the Court was predominately not influential in cases with materially significant costs, litigant disparity, and evaluative norms, states may refer these types of cases less frequently to the Court. Accordingly, the cases from which I could draw my sample may be different than all potential issues.

Fourth, though the cases were initially selected using a random number generator, I included related cases in my analysis. For example, I initially selected for my sample the Yugoslavia v. US, and Serbia and Montenegro v. Canada *Use of Force* cases; however, these

two cases were part of a series of cases between Yugoslavia and ten NATO countries. Thus, I included the other eight NATO cases in my analysis. My initial sample was 36 cases, but there were 20 cases that were connected to my initial sample; so overall I analyzed 56 cases. While it is true the additional 20 cases were not a result of random sampling, they were integral to understanding my selected cases. These case samples represent a greater proportion of the Court's caseload, and were added without prejudice.

Implications for Future Research

My findings support the realist/skeptical assertion that international law is subordinate to international politics based on material interests, state size, source of law, and norm type. There has not previously been a significant inquiry combining these variables and there should be more research on these variables and other international courts. Similarly, based on my findings, there should be further examination into the ICJ's reluctance to use CIL; and if it is only ICJ demonstrates this trend on an international scale. Given that international law has two main sources: custom and treaty, the ICJ's reluctance to use CIL has significant implications for international law scholarship.

Though this thesis did not establish causation, it is possible to use more sophisticated mathematical models to determine which, if any, variables were statistical significant in the outcomes of cases, in particular, material significance and state size. Additionally, an assessment of the Court's entire caseload using this framework would be more conclusive. The ICJ's advisory opinions could be further analyzed in light of these variables to see if the Court exhibits the same trends, especially in regards to constitutive norms. This framework could also be applied to other courts of international law, including, the ICC, international trade courts, or the ECJ. The ECJ, in particular, is an important court for international law given that it has become a

powerful actor in European politics; therefore, in addition to an examination of the ECJ using these variables, a comparative study on the ECJ and ICJ aimed at improving the ICJ's efficacy would be beneficial. As mentioned, Slaughter and Helfer (1997) conducted a thorough study of the ECJ, with the intent to improve the efficacy of other supranational courts, which would form a strong foundation for inquiry into assessing/improving the efficacy of the ICJ.

As discussed, the process of judicialization exhibits increasing returns, which optimists argue implies that international law will become increasingly influential in international politics. Consequently, it would be prudent to trace whether the Court and international law have become more influential as time has progressed. This type of longitudinal study would be important for international relations theory, and especially crucial for the optimist-skeptic divide. Given that international law is distinct from domestic law, a longitudinal study may suggest that international courts are not path dependent and do not exhibit increasing returns, as skeptics anticipate. Or perhaps, that international courts have acquired more power and can be expected to have an increasingly prominent role in international politics in the future, as optimists expect. Thus, while this thesis supports the realist/skeptic conception of international law, given its limitations and the breadth of international law, more research must be done addressing the influence of international law on state behavior. The jury is still out – pun intended – as to whether the judicialization of international politics will occur.

APPENDICES

APPENDIX 1: Bigger v. Smaller State Cases

Absolute Litigant Disparity: Big v. Small State Cases

In my sample, there were 10 big v. small cases. Of these ten, the Court heard three, four were dropped, and three dismissed. Additionally, the Court was influential in one, neutral in two, and not influential in seven.

Heard

The Court heard three big v. small cases: *Corfu Channel* (UK v. Albania) and *Fisheries Jurisdiction* (UK v. Iceland; Germany v. Iceland). In the *Corfu Channel* case, the UK brought charges against Albania for laying mines in the Corfu Strait. The mines damaged two British ships and caused numerous fatalities and injuries. The UK declared that Albania violated international law and must pay reparations. Albania, however, claimed it did not lay the mines nor did it know they were in the channel. The Court heard the case and ruled in favor of the UK, stating that Albania violated international law and the UK was due reparations for the damages (*ICJ Reports 1947-48*, p. 15). Albania, however, refused to comply and pay reparations (Elkind 1984).[55] Since Albania was non-compliant with the ruling, the Court was not influential.

Similarly, in the *Fisheries Jurisdiction* cases, the UK and Germany filed separate proceedings against Iceland regarding its fishery jurisdiction. Iceland had extended its exclusive fishing zone from 12 miles to a distance of 50 nautical miles away from its coast (*ICJ Reports 1973*, p.3.). Iceland refused to be present in the proceedings, claiming it would not confer jurisdiction. Nonetheless, the Court continued with the proceedings and ruled in favor of the UK and Germany; stating that Iceland could not extend its fisheries jurisdiction to 50 miles from

[55] As will be discussed in the 'material interests' chapter, Albania's non-compliance is partially a result of Cold War tensions and its alliance with the Soviet Union.

shore. Iceland, however, refused to comply with the Court's decision. Thus, again, the Court was not influential.

Dropped

Four big v. small state cases were dropped: *Electricité de Beirut* (France v. Lebanon), *Protection of French Nationals and Protected Persons in Egypt* (France v. Egypt), and *Aerial Incident 27 July 1955* (UK v. Bulgaria; US v. Bulgaria).[56] *Electricité de Beirut* was the only case between a big and small state in which the Court was influential. France brought this case to the Court on behalf of the Electricité de Beyrouth Company, a French company, because the Lebanese government placed the company's electricity concessions under its control. The ICJ did not hear the case because the issue was resolved outside of the Court, and France requested that it be discontinued (*ICJ Reports 1954,* p.13). France initiated the proceedings because Lebanon refused to enter into arbitration with the company; therefore, by bringing the issue to trial, France was able to use the Court as leverage (Schwebel 1966; Gill 2003).

The Court was neutral in one case: *Protection of French Nationals and Protected Persons in Egypt*. France brought this case before the Court, claiming that Egypt illegally detained 40 French nationals and sequestered their property. France was seeking reparations for the sequestered property and compensation for the detained French nationals (*ICJ Reports 1950*, p. 59). The Court did not hear the case because approximately four months later France requested it be removed from the Court's docket. Egypt had released the French nationals, and France was content that the issue had been settled.

Despite being settled outside of Court, it is not argued that the ICJ was used as leverage or that it improved the bargaining position of France (Gill 2003; Mango 2003). In the *Electricité*

[56] Israel also filed a claim, but the case was dismissed and is not counted in this section.

de Beirut case, both France and Lebanon arranged for the case to be dropped once the issue was resolved,[57] whereas in this case, Egypt was not cooperative with France in the Court proceedings. In fact, Egypt did not even respond to the Court's request for discontinuance (*ICJ Reports 1954,* p.13). Consequently, the role of the Court in this case was neutral because it did not contribute to the negotiations.

In the two other dropped cases, *Aerial Incident*, the Court was not influential. The UK and US – along with Israel – brought charges against Bulgaria for shooting down an Israeli civilian plane, which had British and American citizens on board. The countries contended that the Court had jurisdiction under the Optional Clause (*ICJ Reports 1959,* p.6, 264; *1960*, p.146). The Court heard the case between Israel and Bulgaria first; and found on May 26, 1959, that the Optional Clause did not bind Bulgaria; therefore it dismissed the case. Accordingly, the UK requested that its case be dropped on May 27, 1959 (*ICJ Reports 1959,* p.264); thus, the dismissal of Israel's case caused the UK to drop its case (Gros 1962). Since the UK believed the proceedings would be futile, the Court was not influential in this case.

The US originally planned to proceed with the case, noting that the Court's ruling was binding only for Israel and Bulgaria. Bulgaria contended, owing to the conditions of reciprocity in the Optional Clause, that this case was inadmissible under the Connally Amendment. The Connally Amendment states the ICJ cannot have compulsory jurisdiction over US domestic matters; it is the US reservation to the Optional Clause. The reservation essentially allows the US to avoid compulsory jurisdiction in cases that could undermine its material interests. Therefore, the invocation of the Connally Amendment by Bulgaria was important to the US because if the

[57] The correspondence states: "It was agreed between the Lebanese and French Governments that, as soon as the settlement was made, the French Government would discontinue the proceedings which it had instituted against the Lebanese Government before the International Court of Justice" (*ICJ Reports 1954,* p.13 at 108).

Court were to find that it had jurisdiction it could undermine the US ability to use the Connally Amendment in the future. For this reason, the US dropped the case (Gros 1962).

The US, UK, and Israel settled the issue outside the Court after these failed proceedings (Gill 2003). I consider the Court's role in the Israeli case to be neutral and not influential in the other two cases because the Israel verdict caused the UK to drop the case, and the US dropped the case so as to avoid precedent against the Connally Amendment.

Dismissed

The Court dismissed three big v. small state cases: *Anglo-Iranian Oil Co.* (UK v. Iran), *Treatment in Hungary of Aircraft and Crew of United States of America* (US v. Hungary),[58] and *Aerial Incident 27 July 1955* (Israel v. Bulgaria). As discussed, the Court was neutral in the Israeli case.

In the case between the US and Hungary, the US brought charges against Hungary, as well as the USSR, because a US plane had been shot down and forced to land in Hungary in 1951. The detained personnel were treated in ways, the US contended, which violated international law (*ICJ Reports 1954,* p.99). Hungary, however, refused to appear before the Court and the case was dismissed. This was part of a larger Cold War strategy by the US to bring the Soviet Union and its satellites to trial, but the strategy was futile and harmed the reputation of the Court. In fact, in 1978, the Court decided cases cannot be placed in its general list unless the respondent state has consented (Gill 2003); largely because the strategy by the US wasted Court resources and undermined its legitimacy. Consequently, since the Court dismissed the case because of Hungary refused to appear, and the Court later amended its rules so that its legitimacy

[58] The US also filed charges against the USSR, but that case is listed under the 'Litigant Parity' section.

would not be undermined by the US strategy any further, I consider the Court to not be influential.

The *Anglo-Iranian Oil Co.* case (UK v. Iran) arose after Iran nationalized its oil industry in 1951. The UK filed charges, on behalf of the Anglo-Iranian Oil Co., against Iran because the nationalization rescinded the company's right to drill for and export Iranian oil. The UK filed an urgent request for interim measures to protect the company, which the Court granted; however, Iran refused to take part in these proceedings, claiming the Court lacked jurisdiction. Moreover, Iran completely rejected the Court's interim measures and expelled all remaining British staff in Iran (Elkind 1984).

Britain argued that the Court could hear the case because of a treaty between the Anglo-Iranian Company and Iran; however, the Court found that the agreement between the company and Iran did not constitute a treaty between two states since Britain was not a party to the treaty and did not have the legal right to trial. Consequently, the Court dismissed the case (*ICJ Reports 1951*, p. 89). It is likely that Iran's complete disregard of the interim measures caused the dismissal because disregarded verdicts are detrimental to the legitimacy of courts (Elkind 1984; Al-Qahtani 2002) and because the Court has found jurisdiction in other cases filed on behalf of companies (e.g., *Elettronica Sicula*, *Barcelona Traction,* or *Interhandel*). Because the interim measures were completely disregarded, and because it is likely that the Court dismissed the case for fear of non-compliance, I find that the ICJ was not influential.

Relative Litigant Disparity: Big v. Medium and Medium v. Small State Cases

There was one big v. medium case: *Fisheries* (UK v. Norway). In this case, the UK claimed that Norway's method of maritime delimitation violated standards of CIL. Though the case was filed unilaterally by the UK, Norway knew the issue would be referred to the Court and

had consented to the proceedings before the UK officially filed the issue with the Court (Gill 2003). In this way the case can be considered a de facto special agreement, although it is listed with the other contentious cases. The Court, however, found the Norwegian methods of delimitation were within the scope of the law (*ICJ Reports 1951*, p. 116). The verdict was followed; therefore, the Court was influential.

There was one medium v. small state case: *Barcelona Traction, Light and Power Company, Limited* (Belgium v. Spain). Belgium sought reparations on behalf of the Belgian shareholders of the Canadian Barcelona Traction Company. The Court dismissed the case during the merits because there was no *jus standi*; meaning Belgium did not have the right to file suit on behalf of its shareholders (*ICJ Reports 1970*, p.3). The Court's ruling during the merits indicates that it had jurisdiction to hear the case but deemed it inadmissible.[59] It is likely the Court dismissed the case because it did not want to make a pronouncement on the legal rights of shareholders (Lillich 1971). In fact, three of the Judges – Judges Gros, Tanaka, and Jessup – condemned the Court's decision and its intent not to adjudicate on the issue of shareholders' rights in CIL (*ICJ Reports 1970*, p.3). Finally, the decision is considered a setback in international law, and the Court has since repudiated its decision by allowing states to file cases on behalf of shareholders (Weiler 2005). For these reasons, I do not consider the Court influential.

APPENDIX 2: Smaller v. Bigger States

Small v. Big States

Of the sampled cases, there were 13 small v. big cases. Two cases were dropped and eleven were dismissed; the Court was neutral in two and not influential in eleven cases.

[59] In proceedings, the Court first declares whether it has jurisdiction; which it did in this case; and then the case moves into the merits. Therefore, the Court found, in the merits phase of the proceedings, that Belgium lacked *jus standi* but the ICJ still had the jurisdiction to hear the case.

Dropped

There were two dropped cases: *Aerial Incident of 3 July 1988* (Iran v. US) and *Vienna Convention on Consular Relations* (Paraguay v. US). In the *Aerial Incident* case, the US accidentally shot down an Iranian civil aircraft flying over Iranian national airspace. Iran immediately instituted proceedings before the Council of the International Civilian Aviation Organization (ICAO) requesting a condemnation of the acts and reparations for the 290 victims and destruction of property. The ICAO, however, issued a statement deploring the 'tragic accident,' and instituted no other measures. Iran brought the case to the ICJ and asked the Court declare the ICAO decision erroneous, and petitioned for the requests previously stated (*ICJ Reports 1992*, p.225).

Before the Court could decide on jurisdiction and the merits of the case, the US and Iran entered into negotiations. In 1996, Iran requested that the Court remove the case from its list. Since the issue was resolved outside the Court and had previously been referred to a tribunal, the Court was not used as leverage and is therefore neutral.

In the *Consular Relations* case, the US failed to give Angel Francisco Breard, a Paraguayan citizen being tried for murder in Virginia, his rights under the Vienna Convention. Breard was convicted and sentenced to death. Paraguay filed charges against the US and requested interim measures to postpone the execution, which were granted (*ICJ Reports 1998*, p.426). However, the state of Virginia continued with the execution. Paraguay subsequently requested the case be removed from the Court's docket since there was no longer any substance to the case (because Breard had been executed). Because the US disregarded the Court's interim measures and Paraguay dropped the case because the proceedings were futile, the Court was not influential.

Dismissed

There were 11 dismissed cases: *Northern Cameroons* (Cameroon v. UK) and ten *Legality of Use of Force* cases, regarding the 1999 NATO intervention in the Balkans. The *Northern Cameroons* case pertained to the issue of Mandates and decolonization. The region of Cameroons was formally a British colony, but following a plebiscite, was divided between Cameroon and Nigeria. The General Assembly enacted a resolution terminating the Trusteeship of Northern Cameroons; and implemented the results of the plebiscite by splitting up the territory between Cameroon and Nigeria. Cameroon was upset with this decision because it wanted the territory of Northern Cameroons, which went to Nigeria. Cameroon requested a special agreement with the UK to bring the matter to Court, but the UK refused (Gill 2003). Cameroon then filed a unilateral claim against the UK for violation of the Trusteeship Agreement regarding the territory of Cameroon.

The ICJ dismissed the case before even reaching a decision on its jurisdiction. The ICJ claimed that Cameroon, as a party to the Statute has the right to bring cases to the Court, but this does not mean that the Court must hear the cases. Since Cameroon was not disputing the legitimacy of the resolution, and recognized a Court decision could not overturn the resolution, there was no substantive issue at hand. Cameroon argued it merely sought a statement claiming the UK violated the guidelines of the Trusteeship. But the Court asserted there would be no practical implications of such a decision and therefore saw no reason to continue (*ICJ Reports 1963*, p.15). The Court stated in its opinion:

> The function of the Court is to state the law, but it may pronounce judgment only in connection with concrete cases where there exists at the time of adjudication an actual controversy involving a conflict of legal interests between the parties. The Court's judgment must have some practical consequence in the sense that it can affect existing legal rights or obligations of the parties, thus removing uncertainty from their legal relations. No judgment on the merits in this case could satisfy these essentials of the judicial function (*ICJ Reports 1963*, p.15 at 33).

Even though the ICJ did not dismiss the case on purely jurisdictional grounds – the case was dismissed prior to an evaluation of jurisdiction – I consider the Court to be neutral because there would have been no practical purpose of adjudication.

The other ten dismissed cases all pertain to the NATO intervention in the Balkans. Yugoslavia/Serbia and Montenegro[60] instituted proceedings against ten members of NATO – UK, US, Canada, Germany, France, Italy, Netherlands, Belgium, Portugal, and Spain – regarding their actions and intervention in the region in 1999. Yugoslavia claimed the Court had jurisdiction under the compulsory jurisdiction of Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide. Yugoslavia signed the compulsory jurisdiction of the Genocide Convention on April 25, 1999; but included a reservation so that it could not be compelled to appear before the Court for any events prior to that date (Gray 2003). Yugoslavia then requested interim protective measures to stop the NATO intervention, which were rejected. The Court declared that it could not institute interim measures because it did not find it had *prima facie* jurisdiction to hear the case. Moreover, the NATO campaign started on March 24, 1999, before Yugoslavia signed the Genocide Convention.

In examining its jurisdiction, the Court found the US and Spain were not bound by compulsory jurisdiction, nor would they consent to the case; thus, the US and Spain cases were immediately dismissed (*ICJ Reports 1999,* p.916). In the US/Spain decision, the Court had no authority to hear the case because neither state consented nor would appear. The Court wrote in its rejection of interim measures, "The United States observes that it 'has not consented to jurisdiction under Article 38, paragraph 5, [of the Rules of Court] and will not do so'" (*ICJ*

[60] The applicant in these proceedings is referred to as either Serbia and Montenegro or Yugoslavia

Reports 1999, p.916 at 925). Spain, as well, would not consent to the proceedings, which is why the cases were dismissed.

For the other eight NATO members, the Court could not immediately remove the cases, although some judges did support immediate termination. Nonetheless, the Court first had to determine whether it had jurisdiction; in doing so, the ICJ ruled that at the time the case was filed, Serbia and Montenegro was not authorized to appear before the Court (*ICJ Reports 2004,* p.429). Therefore, the ICJ had no authority to hear the claims. The Court's dismissals have been criticized for their lack of objectivity and consideration of the gravity of events in the Balkans (Sofaer 2003). In fact, one scholar argued, "the Court seems to have been swayed by a determination not to let Yugoslavia use the Court" (Gray 2003, 880).

I do not consider the Court as influential in these ten cases. This is because the Court's ruling regarding the US and Spain significantly influenced the decision to dismiss the other cases. More importantly, the ICJ's rejection of interim measures essentially ended any hopes of Yugoslavia's claims (*ICJ Reports 1999,* p.916).[61] Furthermore, the Court's eagerness to terminate the cases demonstrates the decision to dismiss was not purely jurisdictional, but rather, as many scholars argue, because the ICJ supported the intervention (Gray 2003; Sofaer 2003) and did not want to rule against the ten NATO members. Therefore, I find the Court was not influential.

Medium v. Big States

There were six medium v. big state cases, of which two were heard and four were dismissed. The Court was influential in one case, and not influential in five.

[61] Judge Oda's Separate Opinion states: "The Court's findings at this stage of the present cases that there is not even a prima facie basis of jurisdiction in all eight of the cases mentioned above should be interpreted as a ruling that it has no jurisdiction whatsoever to entertain the Applications, without leaving any room to retain these cases and to deal with the issue of jurisdiction in the future" (*ICJ Reports 1999,* p.849 at 864)

Heard

In *Oil Platforms* (Iran v. US), Iran sought reparations for the destruction of three oil platforms by the US Navy in 1987 and 1988. Iran claimed this was a violation of the Treaty of Amity, Economic Relations and Consular Rights signed in 1955 (*ICJ Reports 2003*, p.161). The treaty stated, "between the territories of the two High Contracting Parties there shall be freedom of commerce and navigation" (*ICJ Reports 2003*, p.161 at 174). The Court found the US had not violated the treaty because at the time there was no commerce between the two countries; therefore Iran was not entitled to reparations. Since the Court furnished a ruling, and it was followed, the Court was influential.[62]

The *Avena* (Mexico v. US) case is similar to the *Consular Relations* case. In fact, *Avena* was the third case brought to the ICJ regarding the failure of the US to uphold the Vienna Convention. Mexico filed the suit over the execution of José Medellín and the US Supreme Court Decision, Médellín v. Texas, because the Supreme Court ruled that international treaties were not binding for domestic laws. Mexico contended the US had violated the Convention by not granting both Médellín and dozens of other Mexican nationals their rights under the Convention.[63] The Court found the US violated the Convention and must notify foreign nationals of their rights in the same manner as Miranda Rights for US citizens (*ICJ Reports 2004,* p.12).

The US federal government stated it believes the Convention should be upheld, but it is difficult to implement. For the most part, the ICJ rulings pertaining to the Vienna Convention

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[62] Admittedly, it would be difficult for the verdict to not be followed in this case; however, the fact that the verdict was not disregarded meets the criterion to be influential. As discussed, it would be valuable to consider different types of compliance (e.g., active compliance or passive compliance) and the Court's influence; as well as the use of verdicts that require no further action, and their role in increasing the Court's legitimacy. Decisions such as this one would be an easy way for the Court to build precedent and strengthen its legitimacy since it cannot really be disregarded.

[63] The Vienna Convention states, among other things, that all detained foreign nationals have the right to speak with a consular and that the consulate most be notified of all arrests.

have been disregarded by the US judicial system (Paulson 2004). In 2005, after *Avena*, the US withdrew its participation in the Optional Protocol of the Vienna Convention (Crook 2005).[64] Since the US repeatedly violated the guidelines of the Convention, and removed itself from compulsory jurisdiction rather than change its behavior, I do not consider the Court influential.

Dismissed

The *Interhandel* case between the US and Switzerland pertained to the assets of the Interhandel Company, which owned approximately 90% of the shares of the General Aniline and Film Company (GAF). In 1942, the US vested all shares of GAF under the Trading with the Enemies Act because the US believed the shares belonged to a German company, I.G. Farbenindustrie. The Swiss claimed, however, Interhandel was not German-owned at the time. In 1948, Switzerland demanded the release of all Interhandel's assets in the US. The US refused, and Switzerland referred the issue to the ICJ under the Optional Clause (*ICJ Reports 1959,* p.6.)

The US objected both to the Court's jurisdiction because of the Connally Amendment and the admissibility of the case since the US Supreme Court readmitted Interhandel's suit; meaning Switzerland had not exhausted other means of resolution. The ICJ did not address the US arguments about jurisdiction and instead upheld the US objection to admissibility and dismissed the case. This is unusual because the Court should, based on procedure, decide on admissibility in the merits phase of the proceedings. The Court's procedural irregularity demonstrates its reluctance to force the US to trial using the Optional Clause when there is a reservation (Elkind 1984).

The Court has been criticized for its decision to dismiss the case. Notably, Judge Kooijimans' separate opinion concerning the *Legality of Use of Force* cases condemns the

[64] The Optional Protocol confers compulsory jurisdiction to the Court, similar to the Optional Clause in the ICJ's Statute.

Court's decision: "There have been earlier occasions when the Court shied away from thorny questions and chose to decide a case on other grounds which were judicially preferable albeit not logically defensible. The most famous example is the *Interhandel* case" (*ICJ Reports 1999,* p.878 at 885). Since the Court dismissed the case, not on jurisdictional grounds, but because it was inadmissible and allowed US courts to proceed, I do not consider the Court influential.

Next, in the two *Nuclear Tests* cases, New Zealand and Australia instituted proceedings against France regarding its nuclear testing in the South Pacific. They both stated the radioactive fallout from the tests violated international law and requested there be no further testing resulting in radioactive fallout. The countries requested, and were granted, interim protection to prevent further testing until the case was decided.

France refused to take part in any of the proceedings and believed the case should be removed from Court's docket (*ICJ Reports 1974*, p.253).[65] The Court did not see it fit to remove the case and found, instead, that it had jurisdiction to hear the case. Concurrently, and independently of the Court's decision, France announced it would exclusively do underground testing in the region (Gill 2003). Consequently, the Court found the issue resolved, and dismissed the case. If France were to continue tests with fallout in the region, though, then the case could be re-opened (*ICJ Reports 1974*, p.253).

New Zealand tried to re-open the case in 1995 when France announced it would conduct eight underground tests; but the ICJ denied this application under the rules of the 1974 decision. The underground tests were outside scope of the original decision and the reapplication was denied (*ICJ Reports 1995*, p.288). France also removed itself from the Optional Clause after the

[65] France stated in a correspondence with the Court on May 16, 1973: « … Il n'a, en conséquence, pas l'intention de désigner un agent et demande respectueusement à la Cour de bien vouloir ordonner que cette affaire soit rayée de son rôle… De ce fait, de l'avis de mon gouvernement, la question de la désignation d'un juge *ad hoc* par le Gouvernement australien ne se pose pas, non plus que celle de l'indication de mesures conservatoires. »

initial case, which eliminated the possibility of a new trial. Finally, though the Court failed to reach a verdict in the first case, France's continuance of nuclear testing demonstrates defiance, albeit indirect, of its prescribed behavior. Moreover, France would have refused to appear if the case had gone to trial,[66] and it ignored the interim measures. For these reasons I do not consider the Court influential.

Small v. Medium Cases

There were two small v. medium cases, of which one was heard and the other dismissed.

Heard

In the one heard case, *Arrest Warrant of 11 April 2000*, the Congo instituted proceedings against Belgium regarding an arrest warrant for Abdulaye Yerodia Ndombasi, the Congolese Minister for Foreign Affairs. Belgium passed a law granting national courts universal jurisdiction for crimes against humanity and violations of international humanitarian laws;[67] and in 1999, a Belgian judge issued a warrant for Yerodia's arrest. Under the law, the court could still issue the warrant through Interpol even though Yerodia had no link to Belgium nor was he in Belgium (Gill 2003). The Congo claimed the warrant violated the immunities of foreign ministers and requested it be withdrawn. The ICJ agreed with the Congo and ruled that Belgium must cancel the arrest warrant and notify the authorities to which it was circulated (*ICJ Reports 2002,* p.3).

In addition to withdrawing the arrest warrant, a Brussels appellate court ruled that Belgium's law is only applicable if the person is in Belgium. Thus, Belgium moved away from its position on universal jurisdiction. It is worth noting, though, that the US heavily pressured

[66] France stated in a correspondence with the Court on May 21, 1973: « J'ai l'honneur de vous faire savoir que le Gouvernement français ainsi qu'il l'a indiqué dans sa lettre du 16mai n'a pas l'intention de se faire représenter dans ces affaires pour lesquelles la Cour n'a pas compétence. En conséquence n'étant pas partie à cette affaire il ne saurait donner un avis sur la base de l'article 48, paragraphe 3, du Règlement de la Cour.»

[67] *Loi relative à la répression des violations graves du droit international humanitaire* [Law Concerning the Punishment for Serious Violations of International Humanitarian Law]

Belgium to move away from universal jurisdiction (Paulson 2004). The Court's ruling was therefore influential in this case.

Dismissed

The Court dismissed the *East Timor* (Portugal v. Australia) case. East Timor was a Portuguese colony that had been invaded and annexed by Indonesia. The international community condemned this action; but shortly thereafter, Australia began negotiating a treaty over the delimitation of the continental shelf surrounding East Timor with Indonesia (*ICJ Reports 1995*, p.90). Portugal had refused to negotiate a treaty with Australia, which is why, when Indonesia took over the territory, Australia began the negotiations. Portugal initiated proceedings against Australia over the treaty's legitimacy under the Optional Clause. It tried to file suit against Indonesia but could not as they were not a party to the Clause.

Australia contended, and the Court agreed, that the true issue was between Portugal and Indonesia; thus, any ruling made by the Court about the treaty would necessarily be a ruling on the validity of Indonesia's legitimacy over East Timor. Since Indonesia was not party to the case, the Court would not proceed; and dismissed the issue. As will be discussed in the next chapter, this was an incredibly charged political issue (Gill 2003). Accordingly, since the ICJ dismissed the case because a verdict in either direction would likely have been disregarded, the Court was not influential.

APPENDIX 3: Litigant Parity Cases

Big States

Heard

The *LaGrand* case (Germany v. US) was similar to both the *Avena* and *Consular Relations* cases, but it was the US second case related to the Convention. The US arrested two German nationals in Arizona for robbing a bank, killing a man, and severely injuring a woman.

The two men were convicted and sentenced to death under Arizona law. The authorities failed to grant the men their rights under the Vienna Convention. Germany brought the case to the ICJ and requested interim measures to prevent their execution, which were granted. The US, however, ignored the interim measures – as it had done in the Paraguay case – and executed both men (*ICJ Reports 2001*, p.466).

Unlike Paraguay, Germany proceeded with the case. The Court ruled that the Vienna Convention was the supreme law and the US must abide by it. However, less than two years later, the *Avena* case was brought to the Court; this demonstrates that, in addition to disregarding the *LaGrand* interim measures, the US was also non-compliant with the final verdict. For these reasons the Court was not influential.

Dismissed

The *Treatment in Hungary of Aircraft and Crew of United States of America* (US v. USSR) case was dismissed because the USSR refused to appear before the Court. As previously discussed in the Hungary case, these proceedings were futile and harmed the ICJ's reputation. Consequently, I do not consider the Court influential.

Medium States

There was one case between medium states: *Application of the Convention of 1902 Governing the Guardianship of Infants* (Netherlands v. Sweden). The Netherlands brought charges against Sweden because the Swedish government had placed a Dutch National under the protective custody of the Swedish government. The Netherlands claimed this violated the Convention of 1902 Governing the Guardianship of Infants, and requested the child be given to the Netherlands. The Court, however, found that the Netherlands' argument was beyond the

scope of the treaty and, therefore, unfounded (*ICJ Reports 1958,* p.55). The decision was respected and the Court was influential.

Small States

Heard

The *Dispute Regarding Navigational and Related Rights case* (Costa Rica v. Nicaragua) pertained to Costa Rica's right to free and unimpeded navigation on the San Juan River. Costa Rica claimed that Nicaragua was illegally denying it free and unimpeded navigation on the river for, amongst other things, fishing vessels and tourist ships. The Court ruled Costa Rica had the right to free travel, but Nicaragua had sovereignty over the river, and could setup checkpoints (*ICJ Reports 2007,* p.829). Currently, as of April 2011, the ICJ is presiding over another case regarding the San Juan River.[68] Since the Court has not yet decided this case, it would be unfair to claim that Nicaragua was non-compliant. For this reason, I consider the Court influential.

The *Arbitral Award of 31 July 1989* case (Guinea-Bissau v. Senegal) pertained to the validity of another international tribunal's land delimitations. The Court upheld the tribunal's decision, but recommended that Guinea-Bissau and Senegal enter into independent negotiations because both countries where displeased with the delimitations (*ICJ Reports 1991*, p.53). Guinea-Bissau initially rejected the Court's decision, but two years later accepted an offer for bilateral negotiations and finalized a treaty in 1993 (Paulson 2004). Despite initial non-compliance, the Court's ruling was followed and therefore influential.

In *Land and Maritime Boundary* (Cameroon v. Nigeria), the Court was asked to delimitate boundaries between Cameroon and Nigeria. The Court's decision favored Cameroon, which led Nigeria to be non-compliant. While Nigeria did not blatantly disregard the verdict, it

[68] It is alleged that Nicaraguan military forces entered Costa Rican territory along the river; and that a canal being built by Nicaragua in the river is a violation of Costa Rican sovereignty. Moreover, the canal may effectively prohibit Costa Rica's right to free navigation.

was sufficiently non-compliant such that the UN Secretary-General issued a Special Envoy to enforce the decision. Furthermore, Britain, France, and the US pressured Nigeria to comply (Paulson 2004). The Court's delimitations were eventually respected, which is why I consider the ICJ influential despite initial non-compliance and the UN/powerful states' interference.

In *Armed Activities in the Territory of the Congo*, the DR Congo instituted proceedings against Uganda surrounding its role in overthrowing the Congolese government. The Court had jurisdiction to hear the case because both Congo and Uganda were parties, without reservation, to the Optional Clause. The ICJ ruled that Uganda violated the principles of non-intervention and human rights laws; requested both parties enter into negotiations and ruled that Uganda pay reparations (*ICJ Reports 2005,* p.168). The DRC requested US$6 billion, but Uganda refused, and there have not been any improvements in the negotiations (King 2010). The Court stated if the two parties failed to reach an agreement, then it would reassess the reparation amount; but it has not been asked to do so despite the failed negotiations. For these reasons, I do not consider the Court influential.

In the *Right of Passage Over Indian Territory* case, Portugal filed charges against India claiming that India was unlawfully preventing Portugal from accessing its territory of Damâo, and enclaves, Dadra and Nagar-Avelia. The Court found Portugal possessed the right of passage over Indian Territory for civilians, civil officials, and non-military goods; but not for armed forces, ammunition, and police (*ICJ Reports 1960,* p.6). The case is considered a "Pyrrhic victory for Portugal;" (Gill 2003, 154) however, less than a year after this decision, India annexed the Portuguese territories,[69] meaning there was non-compliance, which is why I do not consider the Court to be influential.

[69] The reasons for annexation are discussed further in the next chapter.

Dropped

There were five dropped cases between small states: *Armed Activities on the Territory of the Congo* (DR Congo v. Rwanda; DR Congo v. Burundi), *Trial of Pakistani Prisoners of War* (Pakistan v. India), and *Border and Transborder Actions* (Nicaragua v. Costa Rica; Nicaragua v. Honduras). Of these cases, the Court was influential in two.

In *Armed Activities*, the Democratic Republic of Congo instituted proceedings against Burundi and Rwanda related to their role in attempting to overthrow the Congolese government, as it had against Uganda. However, Rwanda and Burundi were not obligated under the Optional Clause, and refused to appear before the Court. The Congo, therefore, requested a discontinuance of these two cases (*ICJ Reports 1999,* p.1018, 1025), and because of that I do not consider the Court to be influential insofar as the proceedings were futile.

In the *Trial of Pakistani Prisoners of War* case, Pakistan filed suit against India for the detainment of 195 POWs. The POWs were in Indian custody, and were to be tried by Bangladesh and India for crimes of genocide. Pakistan claimed it had exclusive rights to the POWs and requested they be transferred back to Pakistan (*ICJ Reports 1973*, p.347). In a correspondence with the Court, India refused to appear if the case were to go to trial, and did not appear for the hearing on interim measures (Elkind 1981). Pakistan requested the Court postpone judgment on interim measures in order to facilitate negotiations between the countries. Shortly thereafter Pakistan requested the case be dropped. Since Pakistan asked the Court to abstain from judgment, thus implying the ICJ would have impeded negotiations; and also because India refused to appear had the case continued, the Court was not influential.

The *Border and Transborder Actions* cases were similar to the *Military and Paramilitary Activities in and Around Nicaragua* case between the US and Nicaragua. Nicaragua brought

charges against the countries and sought reparations because they had provided sanctuary to the Contras since the early 1980s. These two cases, however, were dropped because Nicaragua effectively used the Court as political leverage in negotiations with Costa Rica and Honduras (Gill 2003). Since the Court was used for leverage, I consider it influential.

Dismissed

The Court dismissed three cases between small states: *Armed Activities on the Territory of the Congo (New Application: 2002)* (DR Congo v. Rwanda), and *South West Africa* (Liberia v. South Africa; Ethiopia v. South Africa). The Court was neutral in one case and not influential in two.

In *Armed Activities,* the DRC reinstituted proceedings against Rwanda for attempt to overthrow the Congolese government. Though the initial application was dropped because Rwanda would not appear, the Congo requested a new application using different grounds (*ICJ Reports 2006,* p.6). The application was denied on purely jurisdiction grounds – because Rwanda was not bound by compulsory jurisdiction – and for this reason the Court was neutral.

The *South West Africa* cases represent some of the Court's most controversial and prolonged. While dealing with the issue of South West Africa, the Court gave four advisory opinions and heard two contentious cases. The issue pertained to the continuance of the Mandate System, created under the League of Nations, in South West Africa. The region received a 'C' Mandate, which meant it was incorporated as a Trust Territory in the United Nations. South Africa, however, refused to convert the Mandate. Sharp divisions between the General Assembly and South Africa arose, which led the General Assembly to ask Ethiopia and Liberia to submit the case to the Court (Gill 2003). The ICJ found it had jurisdiction, but then dismissed the case

during the merits because Liberia and Ethiopia, as individual states, did not have the right to file the claim, nor was there legal 'necessity' for them to seek adjudication (*ICJ Reports 1966,* p.6).

The Court's reputation was harmed considerably for its decision to dismiss the cases, in part because, based on the ICJ's reasoning, the Court should have dismissed the case during the preliminary hearings. It is often believed the ICJ dismissed the case because of likely non-compliance and the hostile atmosphere surrounding the issue (Gill 2003; Sørensen 1960; Al-Qahtani 2002). South Africa also completely disregarded the Court's advisory opinions.[70] In light of these considerations, the Court was not influential.

APPENDIX 4: Special Agreements

All special agreements pertained to land and/or maritime delimitations; and the Court was influential in all seven cases. There was one case between big states: *Minquiers and Ecrehos* (France/UK); one case between medium states: *Certain Frontier Land* (Belgium/Netherlands); two between small states: *Kasikili/Sedudu Island* (Botswana/Namibia) and *Frontier Dispute* (Benin/Niger). Finally, there were three special agreement cases with litigant disparity *North Sea Continental Shelf* (Germany/Netherlands and Germany/Denmark), *Sovereignty Over Pulau Ligitan and Pulau Sipadan* (Indonesia/Malaysia).

The two *North Sea Continental Shelf* cases involved big/medium states. In the cases, the Court was asked to decide the components of international law relevant for the delimitation of the continental shelf surrounding the countries, but it was not asked to determine the actual delimitation. Specifically, the Court had to consider whether the 1958 Convention on the Continental Shelf was applicable to Germany because it had signed, but not ratified the Convention (*ICJ Reports 1969*, p.3). The ICJ found the Convention did not apply to Germany,

[70] The advisory opinion stated that South Africa was bound by the rules of the League of Nation's mandate system.

which is why I consider Germany the winning party. The Court declared the parties should adhere to the principle of equitable distribution in their negotiations. The parties resolved the issue and the Court was influential.

In the other case with litigant disparity, Indonesia and Malaysia, a medium and a small state, asked the Court to decide which nation owned Pulau Ligitan and Pulau Sipadan based on the arguments submitted in the proceedings. The Court held that neither party satisfactorily proved its sovereignty over the areas, but nonetheless decided Malaysia had a more convincing argument (*ICJ Reports 2002,* p.625). The verdict was followed and therefore the Court was influential.

APPENDIX 5: Cases With Compliance (By Material Costs)

Significant Material Costs

In *Fisheries* (UK v. Norway), the Court specifically cited in its ruling the importance of the fishing industry to Norway. In its judgment, the Court states: "there is one consideration not to be overlooked, the scope of which extends beyond purely geographical factors: that of certain economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage" (*ICJ Reports 1951*, p. 116 at 133). In fact, in 1950, the primary sector constituted 26% of Norway's economy (Denham 2011) and 30% of the population's employment (Flora 1986). Thus, if the Court were to rule against Norway it could severely undermine its economic interests. Therefore, given the economic importance to Norway, I consider the case to be materially significant. Furthermore, the Court's ruling in favor of Norway because of the material interests is an ostensible recognition of the relationship between material interests and compliance. The Court ruled in favor of the state with significant material interests

involved. Though the UK was negatively affected by the verdict, the economic interests were not as significant, which may explain compliance.

Cameroon brought the *Land and Maritime Boundary* case against Nigeria about the sovereignty and standing of the Bakassi Peninsula. Cameroon also asked the Court to determine the sovereignty of Lake Chad and delimitate maritime boundaries. There were numerous armed incidents in the disputed area, and Cameroon contended that Nigeria violated its sovereignty by conducting excursions and permitting Nigerian civilians to move into Cameroon (*ICJ Reports 2002*, p. 303). Given the political tensions, breadth of the boundaries it was asked to delimitate, and armed conflicts over the disputed land, I consider the case to have significant material costs.

As discussed, the ICJ awarded the majority of the land to Cameroon, which angered Nigeria who was initially non-compliant with the decision, likely because of the material costs and political significance of the case (Paulson 2004). In fact, most of the civilians living in the region were Nigerian (Gill 2003). There was eventual compliance with the delimitations; although it is worth mentioning that the UN, Britain, France, and the US heavily pressured Nigeria to respect the decision. In this regard, there may have been complete non-compliance without the pressure from powerful states (Paulson 2004).

The *Frontier Dispute* case was a special agreement between Benin and Niger. The two states asked the Court to delimitate the boundary between them along the River Niger and the River Mekrou; and also discern ownership of the islands within the River Niger, in particular, the Lété Island. Lété is an agriculturally profitable island with approximately 2,000 seasonal residents; it is the most valuable island in the River Niger (Gill 2003). After gaining independence from France in 1960, the two countries almost went to war over the island, but instead tried to resolve the dispute peacefully, which is why I consider the material costs of the

case significant. Moreover, Benin and Niger are two of the world's poorest countries; thus Lété is significant to these countries (UN OCHA 2005).

The verdict, in Niger's favor, was respected in this case, as were all the verdicts of special agreement cases. However, it is notable that despite both countries' risk for material loss, they nonetheless entered into a special agreement. Given this, it is not surprising that the ICJ was effective. In this way, the Court was able to reduce the transaction costs for the two parties, and it is likely that it was more beneficial for the states to have the issue resolved regardless of the outcome than to continue disputing ownership.

In *Dispute Regarding Navigational and Related Rights*, Costa Rica claimed it had the right to free passage on the San Juan River; and the inhabitants along the river have the right to subsistence fishing. Costa Rica further requested reparations and assurance from Nicaragua that it would not interfere with Costa Rican vessels in the future. The river is especially significant for Costa Rica's eco-tourism (*ICJ Reports 2007,* p.829), which is a major contributor to the Costa Rican economy (CIA World Factbook 2010). Tourism has steadily increased since the 1990s, and is projected to comprise 13% of Costa Rica's GDP in 2011 (World Travel and Tourism Council 2011). For this reason, the case is materially significant.

The Court ruled in favor of Nicaragua's sovereignty over the river and found that Nicaragua did not have to pay reparations. The Court also stated that Costa Rica had a right to passage for tourists and the purposes of commerce, but official police vessels or commerce of police equipment did not have a right to free passage (*ICJ Reports 2007,* p.829). In this way, the judgment favored Nicaragua, but still permitted Costa Rica to use the river for its tourism, which comprised most of its material interests involved. Though there was compliance with the case, likely because the verdict suited both parties, Costa Rica has instituted further proceedings

related to the San Juan River. These proceedings may undermine the compliance of the Court's ruling, but that is yet to be determined.

Insignificant Material Costs

There were 10 cases with compliance that involved insignificant material costs. Six of the cases were special agreements regarding land/maritime delimitations in which the boundaries were not of significant material interests to the states: *Minquiers and Ecrehos* (France/UK), *Certain Frontier Land* (Belgium/Netherlands), *North Sea Continental Shelf* (Germany/ Netherlands; Germany/Denmark), *Kasikili/Sedudu Island* (Botswana/Namibia), and *Sovereignty Over Pulau Ligitan and Pulau Sipadan* (Indonesia/Malaysia). In *Minquiers and Ecrehos*, the islands were used for fishing by both countries, but especially fisherman in Jersey (Gill 2003), but there were no permanent residents on the islands and the material worth of the land was insignificant compared to the material resources of both the UK and France. In *Certain Frontier Land*, the disputed territories between Belgium and the Netherlands were numerous scattered plots of land that were small in size, separated from one another, and isolated from the mainland. There were few inhabitants; the Court notes, "in 1906, some houses were erected upon part of the plot" (*ICJ Reports 1959,* p.209 at 228). Given the few number of inhabitants and the small amount of scattered land, the disputed areas were not economically important.

The *North Sea Continental Shelf* cases did involve economic interests, as the continental shelf is rich in resources; however, the interests of the cases were not significant (Müller and Schneider 2007). Compared to the economies of Germany, Denmark, and the Netherlands, the resources were not significant, especially considering that other European countries surrounding the shelf had also taken a share of the resources, and that the Court was not asked to actually delimitate the boundaries. In the *Kasikili/Sedudu Island* case, the disputed island is flooded for

the majority of the year, has no permanent residents, and almost no economic value (Paulson 2004). Similarly, in the *Pulau Ligitan and Sipadan* case, the disputed territories were not valuable; they were mostly sand, with some low-lying vegetation and trees and no permanent residents (*ICJ Reports 2002,* p.625). None of these six cases posed the threat of armed conflict (*ICJ Reports 1953,* p.47; *2002,* p.625; *1969*, p.3; *1959*, p.209; *1999*, p.1045), and for all of them the territories in question were not significant relative to the GDP of the interested countries. All of the six cases were special agreements; demonstrating that, for the most part, special agreement cases are materially insignificant, which may be why they are referred to the Court.

The other four cases were not special agreements. In *Arbitral Award of 31 July 1989*, Guinea-Bissau and Senegal had brought an issue of delimitation to an Arbitration Tribunal, but neither country was satisfied with the outcome. Therefore Guinea-Bissau brought the issue to the Court requesting that the ICJ find that the verdict was not legitimate, but not invalidate the decision (*ICJ Reports 1991,* p.53). Given that the Court would not delimitate the boundaries or affect the original verdict, the material costs were insignificant.

The *Application of the Convention of 1902 Governing the Guardianship of Infants* (Netherlands v. Sweden) case was materially insignificant for both parties. There were no political or economic interests at stake; rather, it was a family dispute that could not be resolved independently. This case is often criticized as being trivial and beneath the ICJ (Gill 2003).

The *Oil Platforms* case could have been of significant material interest since it involved the destruction of Iranian oil platforms. However, the Court found that the platforms were of no significant economic interests since they had been previously destroyed, were not in use, and not contributing to commerce between Iran and the US (*ICJ Reports 2003,* p.161). While the case occurred during the Iran-Iraq war, the application in 1992 was four years after the attack;

therefore it was unlikely the case would escalate to further conflict. Moreover, Iran was not contesting the US actions in light of international law and armed conflict; instead it argued the US violated the Treaty of Amity, Economic Relations and Consular Rights. Finally, the judgment of the case did not occur until November 2003, 11 years after the application and 15 years after the destruction of the platforms. Therefore, given that the destruction did not harm Iran's oil industry, violate the treaty, or reasonably risk escalation to armed conflict, the material costs of the case were not significant.

The *Arrest Warrant* case between Nigeria and Belgium regarded the legitimacy of a Belgian arrest warrant for a Nigerian diplomat. This case was of international significance because the ruling had implications for universal jurisdiction. However, the material costs to Belgian and Nigeria were not significant. The Court rejected Nigeria's request for interim measures because there was no urgency; and the Nigerian diplomat was also no longer the Foreign Minister and therefore not in danger of being arrested (*ICJ Reports 2002,* p.3). The Belgian law that allowed for universal jurisdiction was not materially important to Belgium and was also not politically significant (Paulson 2004). So, though there was significant international pressure to comply, the material interests of the case to both parties were low.

APPENDIX 6: Cases the Court Dismissed (By Material Significance)

Significant Material Costs

Of the 20 cases with significant material costs, 10 were related to the 1999 NATO intervention in the Balkans. Among the many claims, Yugoslavia charged NATO with environmental damage, violating state sovereignty, its obligation not to use force, attack civilians, and genocide (*ICJ Reports 2004,* p.429). Yugoslavia asked the Court to prevent further intervention in the region and for the Court to assess the amount of reparations for NATO's

offenses. These cases were of significant material costs given the degree of NATO bombings and intervention, impact on the war in the Balkans, severity of the charges and reparations, and overall importance of unrest in the region.

The second application of *Armed Activities on the Congo* between the Democratic Republic of Congo and Rwanda also had significant material interests. The case involved substantial and prolonged military engagement. Rwanda was charged with attempting to overthrow the Congolese government and with violating state sovereignty and human rights laws. This case did not go to trial; but in the identical case against Uganda, the Congo requested US$6 billion in reparations for these offenses. Therefore, in addition to the military and political significance of the case, the amount of reparations would have been economically significant.

The *Anglo-Iranian Oil Co.* (Iran v. UK) case was economically and politically important for Iran, given the significance of its oil industry. There were increased tensions between the two countries, as a result of Iran's nationalization of its oil industry. Britain threatened to send troops to the region, but, instead, decided to file charges with the Court, which did not halt the tenuousness of the situation. Iran completely rejected the proceedings and expelled all British staff in Iran (Elkind 1981). Thus, the issue could amount to armed conflict, which, in conjunction with the economic and political importance, demonstrates its significance. The Court dismissed the case on jurisdictional grounds, but, as discussed, it is likely the significance of the case and refusal of Iran to take part in the proceedings contributed to the dismissal (Elkind 1984).

The *Interhandel* case between the US and Switzerland regarded the assets of the Interhandel Company, which the US refused to release in 1948. Interhandel owned over 75% of the shares of the General Aniline and Film Company (GAF), and GAF shares comprised approximately 90-95% of Interhandel's assets (*ICJ Reports 1959,* p.6). GAF was a corporation

created under the state laws of Delaware, and was one of the biggest producers of "photographic supplies, polyvinyl ethers, dye-stuffs and textile auxiliaries" in the US (Simmonds 1961, 495). Its assets were worth over US$100 million (Briggs 1958), and GAF products were important for US defense and military industries prior to and during WWII (Simmonds 1961). In the Swiss request for interim protective measures against the selling of the vested shares, Switzerland included its correspondence with the US State Department, which stated, "A sale is desirable in the national interest of the United States, based in part upon considerations of national defense " (*ICJ Reports 1959,* p.6 at 69). Lastly, the case was politically significant in the US, as it went through numerous appeals, including a Supreme Court decision. For these reasons, the case was materially significant.

Barcelona Traction, Light and Power Company, Limited (New Application) (Belgium v. Spain) involved the economic interests of Belgian shareholders. The Barcelona Company, incorporated in Canada, was the main provider of electricity for the Catalonia region in Spain, which was subject to 'corporate hijacking' by the Spanish state (Weiler 2005). The Company declared bankruptcy in 1948, which, Belgium contested, was a direct result of the Spanish government's ban on foreign currency transfers for company bonds. The Company was bought in 1952 for less than US$1 million, but Belgium estimated the 1948 value to be $116,220,000 (Weiler 2005). Belgium had referred the issue to the Court once before, but dropped the case because of ongoing negotiations. There were also numerous suits in lower courts: "According to the Spanish Government, 2,736 orders were made in the case and 494 judgments given by lower and 37 by higher courts before it was submitted to the International Court of Justice" (*ICJ Reports 1970,* p.3 at 76).

After Spain's refusal to allow foreign currency transfers to fund the company and its bankruptcy, Belgium brought the case to the ICJ, and requested 88% of the 1948 value (*ICJ Reports 1970,* p.3),[71] which is approximately $100,000,000 in compensation (Patel 2002). Additionally, at the time of the case, Belgium was experiencing a significant recession, in part due to foreign markets (National Bank of Belgium 1959). Combining all these factors, the case was materially significant.

The Court dismissed the case because Belgium did not have *jus standi.* Given the material interests involved, Spain may have refused to abide by the Court's decision, especially because it vehemently contested the new application to the Court. Thus, by dismissing the case, the Court may have protected itself from non-compliance. It is worth noting that the Court was severely criticized for its actions, as the case was not adequately addressed in light of the law (Gill 2003). Moreover, the ruling was a setback for international investment law (Weiler 2005); the Court has since deviated from its decision in this particular case.

The issues surrounding the *South West Africa* cases (Ethiopia v. South Africa; Liberia v. South Africa) spanned over three decades; they were of significant material interests to South Africa and were internationally important. The cases involved South Africa's sovereignty over South West Africa; the people of South West Africa's (now Namibia) fight for independence; and continuation of the Mandate System. Ethiopia and Liberia also contested the legality of South Africa's practice of Apartheid (*ICJ Reports 1966,* p.6). Thus, for South Africa, the case was of significance both economically and politically. The Court dismissed the case because Ethiopia and Liberia did not have the legal right to file suit. As in the *Barcelona Traction* case,

[71] Belgium's application to the Court states: « Le Gouvernement belge constate que cette cause révèle une situation anormale, à savoir une procédure de faillite qui a entraîné la liquidation des biens d'une compagnie étrangère, d'une valeur de plus de 100 millions de $, alors que la contestation relative à la validité même du jugement de faillite est toujours en suspens. »

the reputation of the Court was undermined by its decision to dismiss the South West Africa cases (Falk 1967); it is likely the Court dismissed the case out of fear of non-compliance[72] and because of the immense international pressure of the case.

The three *Nuclear Tests* (Australia v. France; New Zealand v. France (1973, 1995)) cases pertained to France's nuclear testing in the Pacific. The first two cases in 1973 were especially important for France's military capabilities. Moreover, France's response to the proceedings highlight the cases' significance; France informed the ICJ it believed, "the Court was manifestly without jurisdiction to hear and determine the Application, and that France did not propose to participate in the proceedings before the Court" (*Dissenting Opinion of Judge Sir Garfield Barwick, ICJ Reports 1974,* p.391 at 400). As discussed, the issue was not brought to trial because the Court dismissed the case after France publicly stated it would stop testing in the region – although it did not. In 1995, New Zealand again brought the issue back to the Court, but the case was dismissed in part because France removed itself from the Optional Clause in 1974 immediately after this case, as it did not want the Court to interfere in matters of national defense (*ICJ Reports 1995,* p.288).[73] Since the cases were militarily important to France – nuclear weapons are one of the two criteria for big states – they were of significant material costs.

East Timor between Australia and Portugal was a politically charged and tenuous case. In 1975, Indonesia invaded and annexed East Timor, a Portuguese colony. The General Assembly passed a resolution condemning the invasion, which Australia initially supported (Chinkin 1993). However, Australia then started negotiating the delimitations of the continental shelf surrounding

[72] As mentioned, the Court's advisory opinion about the issue was disregarded.

[73] France stated in its Correspondence: « J'ai l'honneur, a nom due Gouvernement de la République française, de rappeler que la compétence de la Cour internationale de Justice est fondée sur le consentement des Etats á se soumettre á sa juridiction. Or, par sa déclaration du 20 mai 1966, le Gouvernement de la République a exclu de don acceptation de la juridiction obligatoire de la Cour les « différends concernant des activités se rapportant á la défense nationale » (déclaration, paragraphe 3). »

East Timor with Indonesia (Gill 2003); an ostensible recognition of Indonesia's authority over East Timor. Australia was anxious to negotiate a treaty over the delimitations because there were economically valuable hydrocarbon resources within the negotiated territory, and these were threatened by over-exploitation (Chinkin 1993). Therefore, the material interests to Australia were significant. However, the case was also significant to Portugal because if the Court were to rule in favor of Australia it would be a tacit recognition of Indonesia's legitimate occupation and rule over East Timor, and vice versa if it ruled in favor of Portugal. Thus, the case was of political and economic significance to the parties.

Insignificant Material Costs

There were four cases with insignificant material costs that were dismissed: *Treatment in Hungary of Aircraft and Crew of United States of America* (US v. Hungary; US v. USSR); *Aerial Incident 27 July 1955* (Israel v. Bulgaria) and *Northern Cameroons* (Cameroon v UK). In the *Treatment in Hungary of Aircraft and Crew* cases, the US tried, unsuccessfully, to bring Cold War political issues to the Court. Though, the issues of the Cold War were politically significant, the attempts were completely futile; in fact, the US initiated proceedings against the USSR and its satellites in five other cases, all of which were dismissed (Mango 2003). The US knew, while instituting proceedings, that it was unlikely the cases would be brought to the Court (Gill 2003). Moreover, the US was only asking for $637,894.11 in reparations (Patel 2002). Accordingly, the issues before the Court were materially insignificant.

The *Aerial Incident 27 July 1955* case between Israel and Bulgaria was one of three cases against Bulgaria – the other two cases were filed by the US and UK – and the only case to be dismissed. The case involved the destruction of a commercial Israeli aircraft and the deaths of all on board. However, the case was unlikely to escalate further given that Bulgaria apologized for

the destruction and the demands of the litigating parties were relatively modest; Israel requested US$2,658,144 in damages (*ICJ Reports 1960,* p.146). The UK and US requested much smaller reparations; the US requested US$257,875 and the UK £58,869.11 (*ICJ Reports 1959,* p.6). The issue was eventually settled outside of Court, but since these amounts are not economically significant, nor were the political and/or military interests important, the case was not materially significant.

Northern Cameroons dealt with the UN's decision to make the territory of Northern Cameroons part of Nigeria. Cameroon contended that the UK violated its obligations under the Trusteeship Agreement regarding the territory. The ICJ, however, argued there was no substance to the case because Cameroon was not requesting the Court overturn the decision to make Northern Cameroons part of Nigeria; rather Cameroon sought acknowledgment that the UK should not have done so. The Court asserted there were neither practical implications nor utility in such a decision; therefore, it saw no reason to continue (*ICJ Reports 1963,* p.15). Accordingly, the case was not materially significant.

APPENDIX 7: Cases With Non-Compliance/Non-Appearance (By Material Significance)

Significant Material Costs

The Court ruled in favor of the UK in the *Corfu Channel* case, and found that Albania must pay £843,947 in reparations (*ICJ Reports 1948,* p.15). Albania, however, was only willing to offer the UK £40,000 (Elkind 1984); thus, the reparations were 21 times greater than Albania was willing to pay. Apart from the economic costs, it is likely that Albania was non-compliant with the case because of the political significance. By the time *Corfu Channel* was decided, the Cold War had significantly escalated, and the East-West tensions were enormous (Maher 2005). Unlike the *Treatment of Aircraft and Crew* cases, which were never realistically going to be

adjudicated, this case actually went to trial and was therefore politically important. Moreover, the Albanian dictator, Enver Hodja, described the trial in a meeting with Stalin as, "a concoction of the British from start to finish in order to provoke our country and to find a pretext for military intervention in the town of Saranda" (Hodja 1947). Given the perceived threat of war, economic costs, and political importance, the *Corfu Channel* case was materially significant.

The *Right of Passage Over Indian Territory* case pertained to Portugal's right to pass over Indian land in order to reach the its territories of Damâo and enclaves, Dadra and Nagar-Avelia. India had been trying to annex these territories and remove all remnants of colonial rule; there had been many uprisings in the territories and a successful revolt against the Portuguese authorities. India would not allow Portuguese passage in order to rearm and reestablish its authority, which is why Portugal referred the issue to the Court. The Court ruled Portugal had the right to pass through Indian Territory for civilian purposes; but India could prevent passage for military goods. Thus, the issue was significant for both Portugal and India; moreover, the relations between the two countries were exceedingly hostile during the case and continually deteriorated afterward. In 1961, India annexed the disputed territories (Gill 2003). Portugal unsuccessfully sought recourse from the Security Council, and severed all diplomatic relations with India for over a decade. The case was important for both countries, which is likely why India was non-compliant and Portugal tried to force India into compliance.

In the *Fisheries Jurisdiction* cases, Iceland extended its exclusive fishing zone from 12 nautical miles to 50 nautical miles away from its coast. The Court instituted interim protections for both the UK and Germany; stating that Iceland could not take any further measures to enforce the new 50-mile limit, and capped the catch of the three countries in the disputed zone. Iceland refused to comply with the measures because fishing was vital to its economy; Iceland's

economy was almost entirely dependent on its fishing industry (Müller and Schneider 2007). In its correspondence with the Court, Iceland stated, "[the Government of Iceland] will not consider this Order by the Court binding in any way. The Government will firmly carry out its decision to extend the fisheries jurisdiction to 50 nautical miles" (*ICJ Reports 1973,* p.371 at 399). Iceland further refused to appear before the Court during the proceedings and was non-compliant with the ruling; in fact, there was an ensuing 'cod war' between Iceland and the UK during 1972-1975 (Elkind 1984). Therefore, the case was materially significant for the countries, which is why Iceland refused to appear or abide by the Court's ruling.

In *Armed Activities on the Territory of the Congo*, the Court found that Uganda had violated the principles of non-intervention and human rights laws, and must pay reparations. The Democratic Republic of Congo requested US$6 billion, but Uganda refused and there have not been any improvements in the negotiations (King 2010). Given that, in 2008, Uganda's total GDP was estimated at US$36.76 billion (CIA World Factbook 2010), the requested amount is approximately 1/6 of its total GDP, which is likely the reason Uganda refused to cooperate. Additionally, as previously discussed, the case involved the attempted overthrow of the Congolese government and armed conflict. Therefore, the case was economically, politically, and militarily significant.

Insignificant Material Costs

The *LaGrand* and *Avena* cases were brought against the US because it failed to uphold the Vienna Convention on Consular Relations. The cases were of mild political significance (Paulson 2004) and were not economically or militarily important. Nonetheless, the US was non-compliant, likely because the internal government structure made the verdict hard to implement. In fact, the official position of the US federal government was that the Convention should be

upheld, but the federal judicial system made enforcement difficult; this is why the US removed itself from the compulsory jurisdiction of the Vienna Convention (Crook 2005). Thus, in these cases, the US was non-compliant because it would have required a substantial amount of internal effort or change in behavior to comply, not because the material costs were significant.

APPENDIX 8: Cases With Single Sources of Law[74]

Since these cases have already been discussed and do not have a competing source of law, I just provide a table of the cases.

Case Name	Applicant	Respondent	Source of Law	Winner	Influence	Primary Source
Corfu Channel	UK	Albania	Treaty	UK	No	Treaty
Fisheries Jurisdiction	UK	Iceland	Treaty	UK	No	Treaty
	Germany	Iceland	Treaty	Germany	No	Treaty
Land Boundary	Cameroon	Nigeria	Treaty	Cameroon	Yes	Treaty
LaGrand	Germany	USA	Treaty	Germany	No	Treaty
Avena	Mexico	USA	Treaty	Mexico	No	Treaty
Infants	Netherlands	Sweden	Treaty	Sweden	Yes	Treaty
Navigational Right	Costa Rica	Nicaragua	Treaty	Costa Rica	Yes	Treaty
Fisheries	UK	Norway	CIL	Norway	Yes	CIL
Arbitral Award	Guinea-Bissau	Senegal	PJD	Senegal	Yes	PJD

APPENDIX 9: Treaty-Based Law

The Court based its decision on treaties in six cases with multiple sources of law: *Minquiers and Ecrehos* (France/UK), *Certain Frontier Land* (Belgium/Netherlands), *Oil Platforms* (Iran v. USA), *Kaskili/Sedudu* (Botswana/Namibia), *Passage Over Indian Territory* (Portugal v. India), and *Arrest Warrant* (DR Congo v. Belgium).

In *Minquiers and Ecrehos*, the Court was asked to declare ownership over Minquiers and Ecrehos, two islands in the British Channel between France and the British Isle of Jersey based

[74] In the table, PJD is a previous judicial decision.

on the parties' submissions. Both nations provided evidence of ownership dating back to 1066, including historical treatment of the islands in regards to taxation and legislation, and cultural influences. The case included both state practice and treaty-based law. Of these multiple arguments, the ICJ found Britain had stronger administrative and legislative claims to the islands. Britain had treaty-based claims that were centuries old; for example, the Court cited a Charter of January 14, 1200, a Charter of 1203, the Truce of London 1471, a Papal Bull of January 20th, 1500, and a Convention of August 2nd, 1839 (*ICJ Reports 1953,* p.47). Accordingly, the Court granted ownership to Britain. The legislative and governmental evidence submitted by Britain was more compelling than France's cultural influence (e.g., shared language), and historical state practice of overseeing the islands.

In *Certain Frontier Land*, Belgium and the Netherlands claimed ownership of land based on two negotiations (i.e., Minutes) from 1836 and 1841, and the Convention of 1843. The land is referred to as "parcels shown in the survey and known from 1836 to 1943 as Nos. 91 and 92, Section A, Zondreygen" (*ICJ Reports 1959,* p.209). The Netherlands separated from Belgium in 1839, which led to the 1841 Minute and subsequent confusion. The Netherlands claimed the treaties implied it owned the territories. Furthermore, even if the Court did not believe the treaties gave the Netherlands possession, Belgium had not exercised sovereignty over the lands, whereas the Netherlands had traditionally regulated them.

Despite this, the Court found Belgium had ownership over the territories based on the treaties. Per the state practice argument, though the Netherlands conducted administrative procedures over the territories (e.g., recording births, deaths and marriages), the Court declared Belgium had not sufficiently relinquished its sovereignty since it included the plots of land on

official maps (*ICJ Reports 1959,* p.209). Therefore, the Court found the Conventions, and inclusion of land in official maps, were stronger evidence than state practice.

The *Kasikili/Sedudu Island* case was submitted by Botswana and Namibia as a special agreement. The countries asked the Court to determine the boundary between the two states along the Chobe River and decide which country owns the Kasikili/Sedudu Island under the Anglo-German Treaty of 1 July 1890, and in accordance with CIL. The Court claimed the 1890 Treaty was the primary source of law, and it would be interpreted in light of CIL and the Vienna Convention on the Law of Treaties. Historically, Namibia had administratively overseen the island and its citizens inhabited the island when it was not flooded; meaning there was state practice. The Court, however, argued that Namibia failed to concretely establish its claim over the island on the basis of CIL and state practice. The ICJ then ruled, in regards to the original intent of the treaty, that the boundary surrounding the island, along the Chobe River, 'follows the line of deepest soundings' and belongs to Botswana (*ICJ Reports 1999,* p.1045). Thus, the Court considered state practice and CIL, but based its decision on the treaty.

In *Oil Platforms*, Iran instituted proceedings against the US in 1992 for the destruction of three offshore Iranian oil platforms by the US Navy in 1987 and 1988, which was a violation of the Treaty of Amity, Economic Relations and Consular Rights signed in 1955 (*ICJ Reports 2003,* p.161). The Treaty states there should be free commerce between the two countries. Iran also argued that the US actions were a violation of CIL; the US, on the other hand, contended its actions were in self-defense. The case, therefore, deals with both CIL and treaty-based law.

In regards to the CIL aspect of the case, the US asserted that Iran's claim was illegitimate because the US had only destroyed the platforms after an Iranian missile hit a Kuwaiti tanker, and after a mine struck the USS Samuel B. Roberts in international waters. Hence, the US was

entitled to use force against Iran. The Court rejected the argument that these incidents were 'attacks on the US;' thus the Court found the US violated CIL because it was not acting in self-defense. However, the ICJ ruled the US did not violate the Treaty because at the time of the attack the two countries were not trading. Therefore, the destruction of the platforms did not impede commerce and the US was not at fault. This meant Iran was not entitled to reparations even though the US acted contrary to the customs of international law. Thus, the Court based its decision strictly on the aspects of the Treaty; the US was at fault in regards to CIL, but it did not violate the treaty and did not need to pay reparations to Iran.

In the *Right of Passage Over Indian Territory* case, Portugal claimed India was unlawfully preventing passage to Portuguese territories. Portugal stated the 1779 Treaty of Poona granted Portugal the right of passage through Indian Territory to these areas. India, however, rejected the validity of that treaty. In deciding the case, the Court considered the Treaty of Poona and state practice (i.e., the historical Portuguese practice of passing through the Indian Territory). According to the treaty and state practice during both the British and post-British periods of Indian rule, Portugal possessed the right of passage for civilians, civil officials, and non-military goods. The Court found, however, that Portugal did not have the right of passage for armed forces, ammunition, arms, and police because it was not explicitly written in the treaty. At the time, Portugal was seeking to rearm its territories and regain control after an Indian revolt. Therefore, passage of armaments was at the heart of the case. Though Portugal had the right of passage for civilians, the Court declared that India was not in violation of international law when it prohibited the Portuguese passage because it still retained sovereign power and regulation (*ICJ Reports 1960,* p.6).

While the Court explicitly considered state practice as a source of CIL, and recognized Portugal's right to passage for civilians and goods as a legitimate and accepted state practice, it found that India still retained sovereignty over its land. Therefore, state practice was an insufficient source of law compared with the explicit guidelines of the Treaty of Poona; and state sovereignty, which is firmly rooted in both the ICJ Statute and UN Charter. Consequently, I consider the Treaty to be the primary source of law in this case because the Court's decision emphasized the Treaty of Poona more than state practice, and also because notions of sovereignty are explicitly expressed in the UN Charter and ICJ Statute.

In the *Arrest Warrant* case, the Democratic Republic of Congo instituted proceedings against Belgium related to the issuance of an arrest warrant for the Congolese Minister of Foreign Affairs. Belgium passed a law in 1999 granting universal jurisdiction for crimes against humanity and violations of international humanitarian law. The Congo alleged that Belgium's arrest warrant violated the immunity of foreign ministers under the Vienna Convention on Consular Relations.

The Court ruled the issuance of the arrest warrant violated the Minister's rights under the Convention. Also, to rectify the situation, Belgium was required to cancel the arrest warrant and notify the authorities to which it was circulated (*ICJ Reports 2002,* p.3). Though this was a treaty-based decision, the Court examined the nascent CIL and rulings of other judicial bodies – both national and international[75] – but the Court was not satisfied that crimes against humanity were an exception to diplomatic immunity. Thus, treaty-based law trumped CIL and Belgium's national laws. In this case, treaty-based law also trumped the judicial findings of France and the

[75] National precedent includes the UK's House of Lords decision regarding Augusto Pinochet and French Court of Cassation's ruling regarding Gaddafi; international precedent includes ICTY and ICTR.

UK, two big states. However, as discussed, the US was opposed to universal jurisdiction, which may have underscored the Court's reticence to use the judicial findings of France and the UK.

APPENDIX 10: Cases Based on CIL

There were two cases with multiple sources of law in which the Court based its decision on CIL. In *Sovereignty Over Pulau Ligitan and Pulau Sipadan*, Indonesia and Malaysia filed a joint claim requesting that the Court decide to which nation the lands belonged based on their respective arguments submitted in the proceedings. The claims involved treaties, agreements, and CIL. After reviewing the submissions and pleadings of both parties, the Court found that neither party satisfactorily proved its sovereignty over the areas; nor did the treaties they submitted adequately delimitate the boundary. Nonetheless, the Court held that both belonged to Malaysia as it had a more convincing claim based on a longer history of *effectivités* (i.e., activities of the former powers) (*ICJ Reports 2002,* p.625). Therefore the Court decided to base the ruling on CIL rather than treaty or any other submission from the states.

In the *Frontier Dispute* case, Benin and Niger co-filed a special agreement requesting that the Court delimitate the boundary between them, and decide ownership of the islands within the River Niger, in particular, the Lété Island. The parties requested that the Court reach its verdict based on the delimitations inherited during colonization (i.e., on the principle of *uti possidetis juris*). Both states were colonies of France; thus the Court must decide the boundaries set out by France. Nonetheless, the Court added that administrative acts over the territories, maps, and other practical considerations must also be considered when evaluating the boundaries. The Court found that neither party offered substantial claim on the basis of administrative acts. It then looked to *effectivités* to discern ownership.

The Court ultimately ruled that the Island Lété belongs to Niger (*ICJ Reports 2005,* p.90). It demarcated the River Niger along the line of deepest sounding, and in the boundary in the River Mekrou sector follows the median line. The Court was asked to consider many sources of international law, but decided, as it had in the *Sovereignty Over Pulau Ligitan and Pulau Sipadan* case, to base its decision on *effectivités* and CIL.

APPENDIX 11: Cases Decided With Multiple Sources of Law

There were three cases in which the Court used different sources of international law for different aspects of the case. In *Armed Activities on the Territory of the Congo*, the Democratic Republic of Congo claimed that Uganda's actions violated numerous treaties, including the UN Charter and Organization of African Unity, as well as standards of CIL and general principles of international law. The Court ruled that Uganda violated the principles of non-intervention and human rights laws and must pay reparations. The Court found also that Uganda did not follow the provisional measures. However, the Court upheld one of Uganda's counter-claims, and ruled that the Congo's attack on a Ugandan embassy and maltreatment of employees violated the Vienna Convention on Consular Relations (*ICJ Reports 2005,* p.168). Thus, the Court based its decision regarding Uganda's actions on the general principles of international law; but ruled the Congo violated the Vienna Convention.

In the *North Sea Continental Shelf* cases, the Court was asked to declare the components of international law relevant to the delimitation of the continental shelf surrounding the Germany, Denmark and the Netherlands. In deciding the case, the Court had to consider whether the 1958 Convention on the Continental Shelf was applicable to Germany because it had signed, but not ratified the Convention. Denmark and the Netherlands acknowledged that Germany was not truly a party in this sense; but Germany acted as a party (i.e., there was state practice). The

Court nonetheless declared that Germany could not be considered a party to the Convention despite its 'state practice;' implying the prominence of treaties over CIL in the ICJ's decisions. The Netherlands and Denmark further asserted there was a recognized international norm of equidistance in delimitation; they cited Article 6 of the Convention as proof. In regards to this Article, the Court noted it is possible for a state to have reservations to this Article. This inferred that equidistance was not a recognized norm under CIL or general principles. Therefore, the implications of the treaty were not binding for Germany because it had not ratified the Convention (*ICJ Reports 1969,* p.3).

Consequently, the principles of equidistance and the 1958 Convention were not applied while delimitating the shelf. However, in finding the rules of international law that were applicable, the Court cited legislation passed by the US in 1945, which stated that the principles of equitable division should be employed, and negotiations should take place between the interested parties. This practice was the basis of the Court's decision; the parties must enter negotiations that would ensure equitable distribution (*ICJ Reports 1969,* p.3). Thus, the Court used treaty-based law to decide whether Germany was bound to the agreement, and then used a US law to determine the methodology by which the states should use to delimitate the area.

APPENDIX 12: Evaluative Norms

There were seventeen cases brought to the Court containing evaluative norms; of these, the Court only heard one case. Two cases were dropped and fourteen were dismissed, demonstrating that the Court was reluctant to hear cases of evaluative norms.

Heard

Armed Activities (DR Congo v. Uganda) was the only case involving evaluative norms the Court heard. The Democratic Republic of Congo claimed that Uganda had committed

"serious violations of essential rules of international humanitarian law committed on those occasions," and violated the conventions and principles of international law concerning human rights and prohibition of the use of force (*ICJ Reports 2005*, p.168 at 237). Human rights laws and the prohibition against the use of force on another sovereign are considered general principles of international law (Schlütter 2010). As discussed, general principles are morally obliging, meaning states *morally* must adhere to them; they are axiomatic in international law and not necessarily rooted in treaties – although it is worth noting that many general principles have been codified in international law, but are still considered general principles. For these reasons, general principles of international law are evaluative norms.

Notably, the Congo filed three other cases, two against Rwanda and one against Burundi, for their respective role in attempting to overthrow the Congolese government. The DRC dropped the cases against Burundi and Rwanda, and the Court dismissed the other Rwandan case.[76] The ICJ could not dismiss the case against Uganda because both states were parties, without reservation, to the Optional Clause. The Court ruled in favor of the Congo, citing that Uganda violated the principles of non-use of force, non-intervention; its obligations under international humanitarian and human rights laws, including torture, attacks on civilians, and use of child soldiers (*ICJ Reports 2005*, p.168 at 280).

Though the Court only heard one case with evaluative norms, it did base its rulings on them and the general principles of international law. This demonstrates that, although general principles and evaluative norms are rooted in moral considerations, the Court recognizes their legitimacy in international law and will condemn states that violate them. This may suggest that evaluative norms, such as those in this case, are no longer considered moral; or perhaps that the

[76] Since the cases against Rwanda and Burundi comprise all of the dropped, evaluative norm cases, I do not include a 'Dropped' section.

Court is less concerned about objectivity when there is compulsory jurisdiction. Nonetheless, it is significant that the Court based its decision on evaluative norms.

Dismissed

There were fourteen dismissed cases with evaluative norms: *Armed Activities (New Application* (DR Congo v. Rwanda); *South West Africa* (Ethiopia v. South Africa; Liberia v. South Africa); *East Timor* (Portugal v. Australia); and *Legality of Use of Force* (Yugoslavia v. NATO). The *Armed Activities* case against Rwanda was dismissed because Rwanda was not bound by compulsory jurisdiction. Since the premises of the case were discussed in the previous section, I do not outline it further here.

In the *South West Africa* cases, Ethiopia and Liberia asserted the Mandate guidelines represented a 'sacred trust of civilization;' and thus, as members of the League, they had the authority to bring suit. The ICJ, however, rejected this claim because a 'sacred trust' does not have a legal character; it is a "moral or humanitarian ideal" (*ICJ Reports 1966,* p.6 at 70). Therefore the Court explicitly rejected their argument because it was an evaluative norm.

Similarly, in the *East Timor* case, Portugal contended that East Timor's right to self-determination was an issue *erga omnes*,[77] and the case should proceed to trial given the gravity of the issue. While the Court agreed East Timor's right to self-determination was 'irreproachable,' this did not permit the Court to bypass its rules of procedure (*ICJ Reports 1995*, p.90). The Court could not adjudicate on the issue without the consent of Indonesia, despite the gravity of the situation, which is why the case was dismissed.

The Court's decision to dismiss the *Legality of Use of Force* cases has been widely criticized as a moral, rather than legal decision because, at the time, the NATO intervention was

[77] Obligations *erga omnes* are those that the entire international community has the obligation to defend. They are discussed more in depth in the constitutive norm section

illegal under international law (Koskenniemi 2002). Granted, there were strong moral reasons for the intervention, given that there was alleged ethnic cleansing of Kosovar Albanians; but legally humanitarian interventions were not recognized under CIL or considered a general principle. Thus, the Court's dismissal is seen as an ostensible approval of the intervention (Gray 2003). In fact, the Court's rejection of interim measures, particularly the opinions of the individual judges, was heavily inundated with moral discourse and evaluative norms rather than strictly legal reasoning. Judge Oda's individual opinion states, "I also believe that there should be some means of excluding from the Court's jurisdiction applications which may not have bona fide intentions or motives" (*ICJ Reports 1999,* p.849 at 856).

Thus, unlike *East Timor* or *South West Africa*, the Court dismissed these cases by using evaluative norms. It is better for the Court's legitimacy, though, to dismiss a case using evaluative norms than to *decide* a case based on them, which explains the Court's actions. Moreover, while the Court decided the heard *Armed Activities* case using evaluative norms/general principles, the norms in that case (e.g., non-intervention or non-use of force) are codified in international law, whereas humanitarian intervention norms are not, which likely contributed to the Court's decision to dismiss the cases.

APPENDIX 13: Exclusively Regulative Norm Cases

There were 31 cases with (exclusively) regulative norms; of these, twelve were heard (39%), ten were dismissed (32%) and nine were dropped (29%). The Court was influential in nine cases (29%); six of which were heard and three were dropped. The Court was not influential in 20 cases (64.5%): six were heard, nine were dismissed, and five were dropped; and neutral in one dismissed (3%) and one dropped case (3%). The table is provided on the following page.

Case Name	Norm	Applicant	Respondent	Outcome	Winner	Followed	Influence
Fisheries	Reg	UK	Norway	Heard	Norway	Yes	Yes
Electricité Beirut	Reg	France	Lebanon	Dropped	N/A	N/A	Yes
Infants	Reg	Netherlands	Sweden	Heard	Sweden	Yes	Yes
Transborder	Reg	Nicaragua	Honduras	Dropped	N/A	N/A	Yes
Actions	Reg	Nicaragua	Costa Rica	Dropped	N/A	N/A	Yes
Arbitral Award	Reg	Guinea	Senegal	Heard	Senegal	Yes	Yes
Oil Platforms	Reg	Iran	USA	Heard	USA	Yes	Yes
Arrest Warrant	Reg	Congo	Belgium	Heard	Congo	Yes	Yes
Navigation Rights	Reg	Costa Rica	Nicaragua	Heard	Nicaragua	Yes	Yes
French Nationals	Reg	France	Egypt	Dropped	N/A	N/A	Neutral
N. Cameroons	Reg	Cameroon	UK	Dismissed	N/A	N/A	Neutral
Corfu Channel	Reg	UK	Albania	Heard	UK	No	No
Anglo-Iranian	Reg	UK	Iran	Dismissed	N/A	N/A	No
Aircraft & Crew	Reg	USA	Hungary	Dismissed	N/A	N/A	No
	Reg	USA	USSR	Dismissed	N/A	N/A	No
Barcelona Power	Reg	Belgium	Spain	Dismissed	N/A	N/A	No
Indian Territory	Reg	Portugal	India	Heard	Portugal	No	No
Aerial Incident	Reg	USA	Bulgaria	Dropped	N/A	N/A	No
27 July 1955	Reg	UK	Bulgaria	Dropped	N/A	N/A	No
	Reg	Israel	Bulgaria	Dismissed	N/A	N/A	No
Aerial Incident '88	Reg	Iran	USA	Dropped	N/A	N/A	No
Fisheries	Reg	UK	Iceland	Heard	UK	No	No
Jurisdiction	Reg	Germany	Iceland	Heard	Germany	No	No
Interhandel	Reg	Switzerland	USA	Dismissed	N/A	N/A	No
Nuclear Tests	Reg	NZ	France	Dismissed	N/A	N/A (No)	No
	Reg	Australia	France	Dismissed	N/A	N/A (No)	No
(1995)	Reg	NZ	France	Dismissed	N/A	N/A (No)	No
Pakistani POW	Reg	Pakistan	India	Dropped	N/A	N/A	No
Consular Relations	Reg	Paraguay	USA	Dropped	N/A	No	No
LaGrand	Reg	Germany	USA	Heard	Germany	No	No
Avena	Reg	Mexico	USA	Heard	Mexico	No	No

APPENDIX 14: Heard Regulative Norm Cases With Litigant Disparity

Case Name	Norm	Applicant	Size	Respondent	Size	Winner	Big State Win?	Followed
Arrest Warrant	Reg	Congo	Small	Belgium	Med	Congo	No	Yes
Avena	Reg	Mexico	Med	USA	Big	Mexico	No	No
Fisheries	Reg	UK	Big	Norway	Med	Norway	No	Yes
Barcelona Power	Reg	Belgium	Med	Spain	Small	Spain	No	Yes
Oil Platforms	Reg	Iran	Med	USA	Big	USA	Yes	Yes
Corfu Channel	Reg	UK	Big	Albania	Small	UK	Yes	No
Fisheries	Reg	UK	Big	Iceland	Small	UK	Yes	No
Jurisdiction	Reg	Germany	Big	Iceland	Small	Germany	Yes	No

APPENDIX 15: Land Delimitation Constitutive Norm Cases

Case Name	Norm	Applicant	Respondent	Winner	Followed	Influence
Minquiers/ Ecrehos	Con	UK*	France*	UK	Yes	Yes
Certain Frontier Land	Con	Belgium*	Netherlands*	Belgium	Yes	Yes
North Sea	Con	Germany*	Denmark*	Germany	Yes	Yes
Continental Shelf	Con	Germany*	Netherlands*	Germany	Yes	Yes
Land Boundary	Con	Cameroon	Nigeria	Cameroon	Yes	Yes
Kasikili/Sedudu	Con	Botswana*	Namibia*	Botswana	Yes	Yes
Pulau Ligitan & Sipadan	Con	Indonesia*	Malaysia*	Malaysia	Yes	Yes
Frontier Dispute	Con	Benin*	Niger*	Niger	Yes	Yes

APPENDIX 16: Constitutive Norm Cases

Case Name	Con Norm	Applicant	Respondent	Jurisdiction	Influence	Progressive
South West Africa	Erga Omnes	Liberia	S. Africa	Yes	No	Yes
	Erga Omnes	Ethiopia	S. Africa	Yes	No	Yes
East Timor	Erga Omnes	Portugal	Australia	No	No	Yes
Nuclear Tests	Nuke Tests/ Erga Omnes	NZ	France	Yes	No	No
		Australia	France	Yes	No	No
Barcelona Power	Shareholders	Belgium	Spain	Yes	No	No
	Erga Omnes	Belgium	Spain	Yes	No	Yes
Use of Force	Interventions	Yugoslavia	USA	No	No	No
	Interventions	Yugoslavia	Spain	No	No	No
Use of Force	Interventions	Yugoslavia	Canada	No	No	No
	Interventions	Yugoslavia	UK	No	No	No
	Interventions	Yugoslavia	Italy	No	No	No
	Interventions	Yugoslavia	Portugal	No	No	No
	Interventions	Yugoslavia	France	No	No	No
	Interventions	Yugoslavia	Germany	No	No	No
	Interventions	Yugoslavia	Belgium	No	No	No
	Interventions	Yugoslavia	Netherlands	No	No	No
Arrest Warrant	Univ. Juris.	Congo	Belgium	Yes	Yes	No
Armed Activities	NSA	Congo	Uganda	Yes	No	No

Case Name	Norm	Applicant	Size	Respondent	Size	Sources of Law	Material Costs	Jurisdiction	Outcome	Winner	Followed	Influential
Corfu Channel	Reg	UK	B	Albania	S	Treaty	Sign	Yes	Heard	UK	No	No
Fisheries	Reg	UK	B	Norway	M	CIL	Sign	Yes	Heard	Norway	Yes	Yes
Protection of French Nationals	Reg	France	B	Egypt	S	Treaty	Insign	N/A	Dropped	N/A	N/A	Neut
Anglo-Iranian Oil Co.	Reg	UK	B	Iran	S	Treaty	Sign	No	Dismissed	N/A	No Interim	No
Minquiers and Ecrehos	Con	UK*	B	France*	B	Treaty & CIL (SP)	Insign	Yes	Heard	UK	Yes	Yes
Electricité de Beyrouth	Reg	France	B	Lebanon	S	Treaty	Insign	N/A	Dropped	N/A	N/A	Yes
Treatment of	Reg	USA	B	Hungary	S	Treaty & CIL	Insign	No	Dismissed	N/A	N/A	No
Aircraft & Crew	Reg	USA	B	USSR	B	Treaty & CIL	Insign	No	Dismissed	N/A	N/A	No
Passage Over Indian Territory	Reg	Portugal	S	India	S	Treaty & CIL (SP)	Sign	Yes	Heard	Portugal	No	No
Guardianship of Infants	Reg	Netherlands	M	Sweden	M	Treaty	Insign	Yes	Heard	Sweden	Yes	Yes
Interhandel	Reg	Switzerland	M	USA	B	NL & NJD	Sign	Yes	Dismissed	N/A	N/A	No
Aerial Incident 27 July 1955	Reg	USA	B	Bulgaria	S	CIL	Insign	N/A	Dropped	N/A	N/A	No
	Reg	UK	B	Bulgaria	S	CIL	Insign	N/A	Dropped	N/A	N/A	No
	Reg	Israel	B	Bulgaria	S	CIL	Insign	No	Dismissed	N/A	N/A	No
Certain Frontier Land	Con	Belgium*	M	Netherlands*	M	Treaty & CIL (SP)	Insign	Yes	Heard	Belgium	Yes	Yes
South West Africa	Reg Eval	Liberia	S	S. Africa	S	Treaty, CIL, & GP	Sign	Yes	Dismissed	N/A	N/A (No)	No
	Reg Eval	Ethiopia	S	S. Africa	S	Treaty, CIL, & GP	Sign	Yes	Dismissed	N/A	N/A (No)	No
N. Cameroons	Reg	Cameroon	S	UK	B	Treaty	Insign	N/A	Dismissed	N/A	N/A	Neut

Case Name	Norm	Applicant	Size	Respondent	Size	Sources of Law	Material Costs	Jurisdiction	Outcome	Winner	Followed	Influential
Barcelona Power Company	Reg	Belgium	M	Spain	S	CIL & PJD	Sign	Yes	Dismissed	N/A	N/A	No
North Sea Continental Shelf	Con	Germany*	B	Denmark*	M	Treaty, CIL, & NL	Insign	Yes	Heard	Germany	Yes	Yes
	Con	Germany*	B	Netherlands*	M		Insign	Yes	Heard	Germany	Yes	Yes
Fisheries Jurisdiction	Reg	UK	B	Iceland	S	Treaty	Sign	Yes	Heard	UK	No	No
	Reg	Germany	B	Iceland	S	Treaty	Sign	Yes	Heard	Germany	No	No
Nuclear Tests	Reg	New Zealand	M	France	B	Treaty, CIL (SP), & GP	Sign	Yes	Dismissed	N/A	No Interim	No
	Reg	Australia	M	France	B	Treaty, CIL (SP), & GP	Sign	Yes	Dismissed	N/A	No Interim	No
Examination of Nuclear Tests	Reg	New Zealand	M	France	B	ICJ Decision	Sign	No	Dismissed	N/A	N/A	No
Trial of Pakistani POW	Reg	Pakistan	S	India	S	Treaty & CIL	Sign	No	Dropped	N/A	N/A	No
Border Transborder Actions	Reg	Nicaragua	S	Honduras	S	Treaty & CIL	Sign	Yes	Dropped	N/A	N/A	Yes
	Reg	Nicaragua	S	Costa Rica	S	Treaty & CIL	Sign	Yes	Dropped	N/A	N/A	Yes
Aerial Incident 3 July 1988	Reg	Iran	S	USA	B	Treaty & PJD	Insign	N/A	Dropped	N/A	N/A	Neut
Arbitral Award 31 July 1989	Reg	Guinea-Bissau	S	Senegal	S	PJD	Insign	Yes	Heard	Senegal	Yes	Yes
East Timor	Reg	Portugal	S	Australia	M	CIL & GP	Sign	No	Dismissed	N/A	N/A	No
Oil Platforms	Reg	Iran	M	USA	B	Treaty & CIL	Insign	Yes	Heard	USA	Yes	Yes
Land & Maritime Boundary	Con	Cameroon	S	Nigeria	S	Treaty	Sign	Yes	Heard	Cameroon	Yes (Partial)	Yes

Case Name	Norm	Applicant	Size	Respondent	Size	Sources of Law	Material Costs	Jurisdiction	Outcome	Winner	Followed	Influential
Kasikili/Sedudu Island	Con	Botswana*	S	Namibia*	S	Treaty & CIL	Insign	Yes	Heard	Botswana	Yes	Yes
Consular Relations	Reg	Paraguay	S	USA	B	Treaty	Insign	N/A	Dropped	N/A	No	No
LaGrand	Reg	Germany	B	USA	B	Treaty	Insign	Yes	Heard	Germany	No	No
Avena	Reg	Mexico	M	USA	B	Treaty	Insign	Yes	Heard	Mexico	No	No
Pulau Ligitan & Pulau Sipadan	Con	Indonesia*	M	Malaysia*	S	Treaty & CIL	Insign	Yes	Heard	Malaysia	Yes	Yes
Use of Force	Reg Eval	Yugoslavia	S	USA	B	Treaty, CIL, & GP	Sign	No	Dismissed	N/A	N/A	No
	Reg Eval	Yugoslavia	S	Spain	B	Treaty, CIL, & GP	Sign	No	Dismissed	N/A	N/A	No
Use of Force	Reg Eval	Yugoslavia	S	Canada	B#	Treaty, CIL, & GP	Sign	No	Dismissed	N/A	N/A	No
	Reg Eval	Yugoslavia	S	UK	B	Treaty, CIL, & GP	Sign	No	Dismissed	N/A	N/A	No
	Reg Eval	Yugoslavia	S	Italy	B	Treaty, CIL, & GP	Sign	No	Dismissed	N/A	N/A	No
	Reg Eval	Yugoslavia	S	Portugal	B#	Treaty, CIL, & GP	Sign	No	Dismissed	N/A	N/A	No
	Reg Eval	Yugoslavia	S	France	B	Treaty, CIL, & GP	Sign	No	Dismissed	N/A	N/A	No
	Reg Eval	Yugoslavia	S	Germany	B	Treaty, CIL, & GP	Sign	No	Dismissed	N/A	N/A	No
	Reg Eval	Yugoslavia	S	Belgium	B#	Treaty, CIL, & GP	Sign	No	Dismissed	N/A	N/A	No
	Reg Eval	Yugoslavia	S	Netherlands	B#	Treaty, CIL, & GP	Sign	No	Dismissed	N/A	N/A	No

Case Name	Norm	Applicant	Size	Respondent	Size	Sources of Law	Material Costs	Jurisdiction	Outcome	Winner	Followed	Influential
Armed Activities in Congo	Reg Eval	Congo	S	Burundi	S	Treaty, CIL, & GP	Sign	No	Dropped	N/A	N/A	No
	Reg Eval	Congo	S	Rwanda	S	Treaty, CIL, & GP	Sign	No	Dropped	N/A	N/A	No
	Reg Eval	Congo	S	Uganda	S	Treaty, CIL, & GP	Sign	Yes	Heard	Congo	No	No
Armed Activities in Congo 2	Reg Eval	Congo	S	Rwanda	S	Treaty, CIL, & GP	Sign	No	Dismissed	N/A	N/A	Neut
Arrest Warrant 11 April 2000	Reg	Congo	S	Belgium	M	Treaty, CIL, & NL	Insign	Yes	Heard	Congo	Yes	Yes
Frontier Dispute	Con	Benin*	S	Niger*	S	Treaty & CIL	Sign	Yes	Heard	Niger	Yes	Yes
Navigational & Related Rights	Reg	Costa Rica	S	Nicaragua	S	Treaty	Sign	Yes	Heard	Costa Rica	Yes	Yes

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