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EVALUATING INTERNATIONAL COURT OF JUSTICE'S MECHANISM : NICARAGUA V. UNITED STATES AND UKRAINE V. RUSSIA

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Abstract

The International Court of Justice had imprecisely analyzed the aspect of the court's jurisdiction and collective self-defense in two cases that correlate with each, namely Nicaragua v. the United States and Ukraine v. Russia. By deviating from the several fundamental principles of International Law, the imprecisions in the court's analysis render an ineffective judgment where states repudiate to comply. Moreover, a part of the imprecise ratio decidendi is implemented as a precedent for future cases, causing the non-compliance issue to be repeated repeatedly. The core ground that causes the implementation of ratio decidendi that departs from International Law is the obsolete textual interpretation method used by the International Court of Justice. The strict use of the judicial restraint doctrine prohibits the judges from establishing any new interpretation even when it contradicts International Law. Therefore, this research will examine the International Court of Justice's inaccuracy in analyzing the Nicaragua v. United States and Ukraine v. Russia cases in the matter of the court's jurisdiction and interpretation of collective self-defense articles, including the precedent that is likely to be implemented in the ongoing Ukraine v. Russia case. By using the combination of legal and linguistic interpretation science, the core cause of the inaccurate interpretation can be found and at the conclusion of this research will suggest an interpretation method and substantive judicial approach that suits the court the most.

Keywords: collective self-defense, jurisdiction, substantive judicial approach, legal interpretation, the International Court of Justice.



A. Introduction

Since its establishment in 1945, the International Court of Justice (ICJ) has had a significant role in adjudicating disputes between sovereign states and partaking a prominent role in enforcing International Law, which is evidenced by its involvement in establishing a wide range of international dispute jurisprudence and the high number of cases, as of December 31st, 2013, 129 contentious cases and 27 advisory opinions had been processed.¹ Undoubtedly, without the ICJ's existence, states might seek another method of dispute settlement, some of which are jeopardizing the peace of the international community. For instance, in one of its successful cases, the Temple of Preah Vihear (Cambodia v. Thailand), the ICJ ordered both parties to withdraw their troops from the temple site, thereby preventing the use of force.² Nevertheless, despite its successful role in preserving the peaceful relationship between states, the ICJ had delivered several controversial judgments, which slowly drove apart from the fundamental principles and notions of International Law.

In International Law, where the fundamental basis is the consent of states, the ICJ is obliged to highly respect the consent of states to obtain jurisdiction over a particular dispute.³ However, in the case of Nicaragua v. the United States, despite the United States' non-participation, the ICJ persisted that the court had jurisdiction over the dispute between both parties, as mentioned earlier.⁴ While somehow true, in fact, the ICJ did not entirely have jurisdiction over Nicaragua and the United States. Nicaragua consented to the court's jurisdiction through Nicaragua's declaration of September 24th, 1929, under compulsory jurisdiction of the Court under **Article 36 (5)**. Meanwhile, the United States consented to the court's jurisdiction through the declaration of the United States on August 14th, 1946, under **Article 36 (2)** of the Statute of the International Court of Justice. In addition, both parties signed the Treaty of Friendship, Commerce, and Navigation in 1956, which conferred an independent basis for jurisdiction under **Article 36 (1)** of the Statute of the Court.⁵ Nevertheless, the United States argued

1 International Court Of Justice, *International Court of Justice Handbook* (United Nations, 2021).

2 Al Jazeera, "Thai, Cambodian Troops Leave Disputed Area," www.aljazeera.com, July 2012, <https://www.aljazeera.com/news/2012/7/18/thai-cambodian-troops-leave-disputed-area>.

3 Andrew T. Guzman, "The Consent Problem in International Law," *SSRN Electronic Journal* 52, no. 4 (2011), <https://doi.org/10.2139/ssrn.1862354>.

4 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, p. 392.

5 Nicaragua v. United States of America, Jurisdiction and Admissibility (1984).



that with the basis of the 1984 notification, while referring to the 1946 declaration, it “*shall not apply to disputes with any Central American State or arising out of or related to events in Central America. Any of which disputes shall be settled in such manner as the parties to them may agree*”.⁶

Notwithstanding the 1984 notification, ICJ still declared that the court had jurisdiction over the case of Nicaragua v. the United States.⁷ In this circumstance, where the United States declined to be one of the parties of the dispute, **Article 53 (1)** of the ICJ Statute applies, “*Whenever one of the parties does not appear before the Court or fails to defend its case, the other party may call upon the Court to decide in favor of its claim*”.⁸ Consequently, the United States was compelled to participate in the court proceeding, and the adjudication process continued. Due to its unwillingness to participate in the case and its claim to not consenting to the ICJ’s jurisdiction, the United States undoubtedly repudiated compliance with the court’s verdict by vetoing the Security Council’s resolution, which was to compensate Nicaragua for training, arming, and financing Contra rebels and mining Nicaraguan ports.⁹ As a result, the court’s mechanism and the interpretation method becomes questionable, especially given that the ICJ’s mechanism in indirectly forcing the US to participate resulted in nothing and solely in a useless verdict that was not even being complied with.

Therefore, to correctly analyse the core cause of the inaccuracy of the judgement, this research will utilize the combination between legal and linguistic interpretation science. The research questions are formulated to three questions: what are the imprecisions of the International Court of Justice’s analysis of the court’s jurisdiction and the interpretation of collective self-defense articles in Nicaragua v. the United States and Ukraine v. Russian Federation?; what are the implication and the inaccuracy of the precedents of the Nicaragua v. United States case in the Ukraine v. Russian Federation case?; what method of legal interpretation is utilized by the International Court of Justice in analyzing problem formulation number one and

6 Edgardo Sobenes Obregon and Benjamin Samson, *Nicaragua before the International Court of Justice : Impacts on International Law* (Cham: Springer, 2018).

7 Nicaragua v. United States of America, Jurisdiction and Admissibility (1984).

8 Statute of the International Court of Justice (1945).

9 Michael J. Berlin, “U.S. Vetoes Nicaraguan Resolution on Compliance with Court Decision,” *Washington Post*, August 1, 1986, <https://www.washingtonpost.com/archive/politics/1986/08/01/us-vetoes-nicaraguan-resolution-on-compliance-with-court-decision/ecdf20d6-cf3a-4761-ba23-5c49a9fa379a/>.



substantive judicial approach in analyzing problem formulation number two?

B. Research Methodology

This paper employs normative-doctrinal research and primary relies on secondary data, which encompasses two sources, primary legal sources, and secondary legal sources. For the research purposes of this study, the relevant secondary data is collected by utilizing internet-based data collection.

C. Results and Discussion

I. THEORETICAL FRAMEWORK

I. A. THE IMPORTANCE OF CONSENT IN INTERNATIONAL LAW

Since the modern era, the theory of state consent has served as the foundation for the existence of international law.¹⁰ Positive Law theorists argue that International Law exists and successfully binds states only with states' consent, which according to O'Connell, consent is the essential element of a court's authority.¹¹ Numerous scholars, however, have repudiated the idea and the importance of consent as the basis of International Law. Nevertheless, by implementing the social contract theory by John Locke, while the theory determines the establishment of government is created through the consent of the majority, analogically, International Law is established through the consent of the states as the primary subject.¹² When most states jointly agree on a particular norm or continuously conduct a specific action, International law is formed by cumulative consent through custom.¹³ Meanwhile, in a circumstance when solely several states aim to achieve a specific objective, International Law is established through common consent that is conveyed through treaties and other forms of international agreements.¹⁴ Following O'Connell's line of thought as mentioned above,

¹⁰ Guzman, "The Consent Problem," 5.

¹¹ Allan Munyao, "The Normative Irrelevance of Austin's Command Theory in International Law," *Mimbar Hukum - Fakultas Hukum Universitas Gadjah Mada* 28, no. 3 (October 15, 2016): 569, <https://doi.org/10.22146/jmh.16694>.

¹² Maegan Nation, "Locke's Social Contract: Is It Legitimate?," *CLA Journal* 7 (2019): 85–95, <https://uca.edu/cahss/files/2020/07/Nation-CLA-2019.pdf>.

¹³ László Blutman, "Consent and Customary International Law," *EJIL: Talk!*, August 4, 2014, <https://www.ejiltalk.org/consent-and-customary-international-law/>.

¹⁴ Shaguftha Omar, "Sources of International Law in the Light of the Article 38 of the International Court



the International Court of Justice (ICJ) can have jurisdiction in a contentious proceeding solely if the state of the dispute consented to it, which can be displayed through a special agreement, compromissory clauses in treaties and conventions, and compulsory jurisdiction.¹⁵

While states have the right to express their consent, indubitably, states can as well choose to not consent to a specific provision in a treaty, customary international law, and a world court's jurisdiction by numerous methods, such as conducting a reservation of a treaty provision if the treaty permits reservation and utilizing the persistent objector tool to object a norm of customary international law consistently.¹⁶ However, the right to repudiate International Law is an exception for *jus cogens* crimes.

As a form of respect to the sovereignty of states and a limitation of a state's sovereignty, when the state right of consent is breached, any subject of International Law that possesses legal personality and breaches that right can be sanctioned. Nevertheless, since no international enforcement body or international police exist in the international legal system, sanctions are frequently ignored which makes the existence of International Law useless. Therefore, an instrument for compliance is highly required, and this is where consent plays its role, which is to impose sanctions on states and evade ignorance of sanctions.

Additionally, based on Franck's theory of legitimacy, states' compliance in the context of International Law depends on the legitimacy level of the law itself, which is assessed based on determinacy, symbolic validation, coherence, and adherence.¹⁷ Determinacy establishes the law to be presented with more clarity and precision, allowing the subject to comprehend the positive meaning behind the law and, therefore, attract compliance.¹⁸ Symbolic validation indicates the rule's authenticity, which is derived from ritual and pedigree. In addition, the rule must be coherent, meaning that each rule can interact

of Justice," papers.ssrn.com (Rochester, NY, July 2, 2011), https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID1877123_code1438834.pdf?abstractid=1877123.

15 ICJ, *International Court of Justice Handbook*, 37-40.

16 Green James A, *The Persistent Objector Rule in International Law*, Oxford Scholarly Authorities on International Law (Oxford University Press, 2016), <https://doi.org/10.1093/law/9780198704218.001.0001>.

17 Emmanuel Roucouas, *A Landscape of Contemporary Theories of International Law* (Leiden ; Boston: Brill Nijhoff, 2019), 299-300.

18 Roucouas, "A Landscape of Contemporary," 299.



harmonically with the same rationale.¹⁹ Finally, adherence to the existing laws must exist to complete the previous factors. The first and second factors have a high linkage in manifesting benefits, meaning that legitimacy lures states to comply with International Law by showing the benefit of compliance. In correlation with consent, states will only express their consent if they find the law beneficial to satisfy their national interest, similar to the reciprocity principle. Nevertheless, despite the importance of consent in International Law, the International Court of Justice has seemingly begun to depart from the tradition of respecting consent, which will be analyzed further in this paper.

I. B. THE INHERENT RIGHT OF COLLECTIVE SELF-DEFENCE

Enshrined in **Article 51 of the UN Charter**, individual or collective self-defense is an inherent right of states if an attack occurs against a member of the United Nations until the Security Council has taken the necessary measures to preserve international peace and security.²⁰ Frequently, states invoke the inherent right of self-defense as a justification for using military force against another state, as the United States in the case against Nicaragua and Russia in the case against Ukraine. In the *Nicaragua v. United States* case, the ICJ determined three prerequisite requirements of collective self-defense: a state must have been the victim of an armed attack; a state must declare itself as a victim of an armed attack; the victim state must seek assistance.²¹ Meanwhile, necessity, proportionality, and the reporting requirement to the Security Council is the question of whether the act of self-defense is in line with International Law.²² With the aforementioned requirements, the ICJ is obliged to provide a precise analysis of the fulfillment of each of the requirements to determine whether

19 Thomas, "A Landscape of Contemporary," 299.

20 Repertory of Practice of United Nations Organs, "Chapter VII: Article 51 — Charter of the United Nations — Repertory of Practice of United Nations Organs — Codification Division Publications," Un.org (United Nations, August 23, 2016), <https://legal.un.org/repertory/art51.shtml>.

21 *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* (merits) [1986] ICJ Rep 14, para 165, 195, and 199

22 Ella Schönleben, "Collective Self-Defence or Just Another Intervention?," [voelkerrechtsblog.org](https://voelkerrechtsblog.org/collective-self-defence-or-just-another-intervention/#:~:text=In%20Nicaragua%2C%20the%20Court%20identified.), 2020, <https://voelkerrechtsblog.org/collective-self-defence-or-just-another-intervention/#:~:text=In%20Nicaragua%2C%20the%20Court%20identified.>



the collective self-defense occurred or not and whether the collective self-defense is in line with International Law. In cases related to self-defense, specifically Nicaragua v. the United States and the Democratic Republic of the Congo v. Uganda case, it can be regarded that the ICJ has interpreted **Article 51** narrowly, which consequently does not allow any new type of self-defense, such as anticipatory and pre-emptive self-defense, to be justified under **Article 51**.²³ As a consequence, the court's narrow interpretation becomes obsolete, unsuitable with current development, and complicated for states to claim their inherent right of self-defense, which will be examined deeply in this paper.

I. C. LEGAL INTERPRETATION METHODS

Pursuant to Friedrich Karl von Savigny, the method of interpreting laws can be divided into four methods: literalism or textual, systematic, teleological, and historical. Textual interpretation emphasizes the written text, meaning that the law is interpreted with the literal meaning of the words written in the text.²⁴ On the other hand, systematic interpretation regards law as a fundamental unity that interacts with each other and, therefore, cannot be interpreted independently and depends on the context.²⁵ Teleological interpretation focuses on the objective or purpose of the law without disregarding the original drafters' objective.²⁶ Lastly, historical interpretation emphasizes the circumstance and the objective of the original drafters, which is a form of respect towards the original drafters.²⁷ The four legal interpretation methods mentioned above will be used to categorize and evaluate which method the ICJ used in the Nicaragua v. the United States and Ukraine v. Russia cases and which method is preferable to achieve a more accurate judgment that corresponds to current developments in International Law.

23 V. Upeniece, "Conditions for the Lawful Exercise of the Right of Self-Defence in International Law," ed. U. Berkis and L. Vilka, *SHS Web of Conferences* 40 (2018): 01008, <https://doi.org/10.1051/shs-conf/20184001008>.

24 Odile Ammann, *Domestic Courts and the Interpretation of International Law : Methods and Reasoning Based on the Swiss Example* (Leiden: Brill Nijhoff, 2019).

25 Ammann, "Domestic Courts," 195.

26 Ammann, "Domestic Courts," 208-213.

27 Ammann, "Domestic Courts," 213-219.



I. D. JUDICIAL ACTIVISM AND JUDICIAL RESTRAINT AS A BENCHMARK TO ASSESS THE ICJ'S METHOD OF IMPLEMENTING PRECEDENT

The doctrine of judicial activism provides flexibility for the judges to establish new laws in line with contemporary values.²⁸ Therefore, the judges have the authority to overturn any precedent that they find unconstitutional, illegal, or contradicting the newly developed values.²⁹ This doctrine, however, gradually disregards legislative authority and interrupts the interaction stability between each separation of power. Originated from the United States; conversely, judicial restraint is a doctrine utilized to limit the power of judges and oblige them to interpret the law in line with the original meaning made by the law's drafters.³⁰ The judges have to restrain themselves in establishing any new law with an exception if the law contradicts the constitution. With the judicial restraint doctrine, the doctrine of *stare decisis* is implemented strictly and establishes a consistent ratio of *decidendi* from one court judgment to another.³¹ While this doctrine respects the legislator's or original drafters' authority to enact laws, its obsolete interpretation of laws makes it incompatible with the new development in the society and causes infringement of rights.

Despite primarily being used in the context of the constitutional court, both doctrines of judicial activism and judicial restraint can be utilized in the context of an international court. By reflecting on the advantages and disadvantages, both doctrines can be utilized as an analysis benchmark to assess ICJ's method of implementing precedent for future cases, and in this paper, is the Ukraine v. Russia case.

28 Rahayu Prasetyaningsih, "Judicial Activism in Indonesia: Constitutional Culture by The Constitutional Court," *Petita: Jurnal Kajian Ilmu Hukum dan Syariah* 5, no. 2 (November 1, 2020): 160–77, <https://doi.org/10.22373/petita.v5i2.106>.

29 Prasetyaningsih, "Judicial Activism," 174.

30 Nilam Rahmahanjayani, "Judicial Restraint Dan Judicial Activism Dalam Putusan Pengujian Undang-Undang Di Mahkamah Konstitusi," Universitas Indonesia Library, 2018, <http://www.digilib.ui.ac.id/detail?id=20474378&lokasi=lokal>.

31 Wicaksana Dramanda, "Menggagas Penerapan Judicial Restraint Di Mahkamah Konstitusi," 2014, <https://media.neliti.com/media/publications/109636-ID-menggagas-penerapan-judicial-restraint-d.pdf>.



II. CONSENT AS THE BASIS OF THE INTERNATIONAL COURT OF JUSTICE'S MECHANISM FOR THE COURT'S JURISDICTION

Despite the importance of consent as elaborated above and the claim to respect the consent of states tremendously, the ICJ has issued judgments in which a portion of its *ratio decidendi* contradicts states' right to provide consent. For instance, as has been stated before in the introduction, the core cause of the non-compliance in the Nicaragua v. United States case was due to ICJ's mechanism in determining its jurisdiction as contained in **Article 36 and Article 53 of the ICJ Statute**. Before questioning the relevance of the discussion regarding **Article 53**, it must be notified here that **Article 53** has a direct relation to the court's jurisdiction, as explicitly mentioned in paragraph 2 of the article, which will be elaborated further below.

Regarding the implementation of **Article 36**, the court has failed to implement it accurately, given the fact that **first**, not only did the court contradict its notion as “[a] court that’s consent-based,” but it also contradicted its notion that the court “has no jurisdiction to deal with essentially political matters.”³² Not to mention that there is a Vandenberg reservation, as mentioned in the introduction, indicating that the court should have respected the United States’ right of reservation. If the court was so persistent in claiming that it had jurisdiction, it could have invited other states that the United States claimed to be affected by the decision, namely El Salvador, Honduras, and Costa Rica. With this, it will not leave any room for the United States to disprove the court’s jurisdiction over the case because inviting the affected states was in line with the United States’ reservation which provides an exception for “disputes arising under a multilateral treaty unless all parties to the treaty affected by the decision are also parties to the case before the Court.”³³

While it is superficially true that the United States did infringe customary international law on the prohibition on the use of force, right of non-intervention, state’s sovereign right, and peaceful maritime

32 International Court, *The International Court of Justice Handbook*. (The Hague, Netherlands: Registrar Of The International Court Of Justice, Maubeuge, France, 2016).

33 D. W. Greig, “Self-Defence and the Security Council: What Does Article 51 Require?,” *The International and Comparative Law Quarterly* 40, no. 2 (1991): 366–402, <http://www.jstor.org/stable/759729>.



commerce, the reality was not as simple as it may appear.³⁴ Implicitly, the military activities in Nicaragua involve a political problem; where according to Roger Miranda, a former senior officer in the Nicaraguan Army, Nicaragua has received a massive stockpile of Soviet arms and military equipment.³⁵ This argument is also evidenced by a statistical record of Soviet Bloc military aid delivered to Nicaragua that shows the value of the military aid rose from 10 million US dollars in 1980 to 515 million US dollars in 1988, indicating that the Soviet Union as the leader of the Soviet bloc was interfering in Nicaragua's internal government affairs and attempting to gain more political power.³⁶

Second, the court refers to **Article 53 (2)** of the ICJ Statute, which obliged the court to satisfy itself, not only that it has jurisdiction under **Articles 36** and **37** but ensuring that the applicant's claim is "*well-founded in fact and law*."³⁷ The aforementioned article denotes an obligation of the ICJ not only to prove the validity of the ICJ's jurisdiction, which has already been established in the early stages of the court but also to satisfy itself that the claim of the Plaintiff case, which in this case is Nicaragua, is **well-founded in fact and law**.³⁸ As a consequence of the implementation of **Article 53(2)**, the United States was obliged to participate as one of the parties in the case, and the court proceeding continued. Regarding the examination of the shreds of evidence, the court had to enforce the principle of *jura novit curia* and, therefore, had to implement any laws and pieces of evidence that it found relevant to satisfy the claim of the applicant. While this implementation might work in the domestic legal system to evade any party from benefiting from its absence intentionally, however, it did not suit the international legal system. The ICJ is not delegated with any power from the states' sovereign power, unlike the court in the domestic legal system that is delegated with power commonly written in the constitution as delegated from the

34 Greig, "Self-Defence and the Security Council," 398.

35 Marjorie Miller, "Nicaragua Gets More Soviet Arms : Copters, Missiles Boost Arsenal for War with Contras," Los Angeles Times, October 28, 1986, <https://www.latimes.com/archives/la-xpm-1986-10-28-mn-8021-story.html>.

36 Soviet Bloc Military Equipment Supplied to Nicaragua (1989).

37 Statute of the International Court of Justice (1945).

38 Keith Highet, "Between a Rock and a Hard Place - the United States, the International Court, and the Nicaragua Case," *International Lawyer* 21, no. 4 (January 1, 1987): 1083, <https://scholar.smu.edu/til/vol21/iss4/6/>.



people. Consequently, it does not have any investigating institution or body that has the authority or capability to seek any relevant evidence directly from disputing parties, which establishes unbalance evidence that most likely only favors the existing party or, in this case, is, Nicaragua.

Undergoing a similar jurisdiction issue and with the application of **Article 53**, in Ukraine v. Russia case, the ICJ still continues the adjudication process despite Russia not consenting to the court's jurisdiction.³⁹ Pursuant to the Order of March 16th, with the application of **Article IX of the Genocide Convention**, ICJ has jurisdiction over the case un. The issue here relates to the interpretation of the Genocide Convention, where according to **Article 31 (1) of the 1969 Vienna Convention on the Law of Treaties**, “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”⁴⁰ Consequently, in line with the aforementioned article, the Genocide Convention is supposed to be interpreted in compliance with the ordinary meaning as enshrined in **Article II of the Genocide Convention**, which is that crimes that are regarded as genocide are those acts performed with the intent to destroy a national, ethnical, racial, or religious group, in whole or in part. However, in this case, it is somewhat unclear whether the dispute falls under the definition of genocide as aforementioned.

Pursuant to Russia's claim, Ukraine had committed genocide in a region where the population contains a Russian-speaking population, namely Luhansk and Donetsk.⁴¹ Meanwhile, Ukraine denied and claimed that the genocide allegation was false, in which Russia intentionally made a false claim of genocide to invoke **Article I of the Genocide Convention** that permits Russia to use force against Ukraine.⁴² The inquiry is whether or not Ukraine committed genocide in Luhansk and Donetsk. To respond, the ICJ argues that it did have jurisdiction over the provisional measures proceeding under **Article**

39 Allegations of Genocide under The Convention on The Prevention And Punishment of The Crime of Genocide Order (Ukraine v. Russian Federation), 2022.

40 V Andreias, “Anticipatory Self-Defense in International Law: Legal or Just a Construct for Using Force?,” 2020, <https://arno.uvt.nl/show.cgi?fid=122935#:~:text=Anticipatory%20self%2Ddefense%20implies%20the>.

41 Ukraine v. Russian Federation, para. 37 (2022).

42 Ukraine v. Russian Federation, para. 31 (2022).



IX of the Genocide Convention.⁴³ The court will consider whether or not the use of force in Ukraine falls within the scope of the Genocide Convention *ratione materiae* at the examination of the merits stage.⁴⁴ With the binding force of the provisional measures under **Article 41 of ICJ Statute**, the court has the authority to order Russia to seize military operations in Ukraine.⁴⁵ Nevertheless, Russia repudiated the withdrawal of its troops and continued military action in Ukraine.⁴⁶ Conclusively, this illustrates how ineffective is the ICJ's mechanism in handling cases when one of the parties of the dispute is not participating.

While it is understandable that the court was focusing on implementing consistent *ratio decidendi* from one judgment to another and providing the proper interpretation of the law as the main objective of jurisprudence, it will be troublesome when the implemented *ratio decidendi* is ineffective in solving a case of a non-participating party.⁴⁷ This ineffectiveness is evidenced by several arguments. **First, Article 53 of the ICJ Statute** is initially rooted from civil law' practices.⁴⁸ Unlike common law countries that, in the context of criminal law, commonly prohibit trial *in absentia*, civil law countries generally permit trial in absentia.⁴⁹ The subject of civil and common law courts are *natuurlijk persoon* and *rechtspersoon*, where the state has jurisdiction over those subjects as an exercise of its sovereignty and the power to enforce the law through law enforcement agency.

Conversely, ICJ's jurisdiction *ratione personae* are states.⁵⁰ While it claims to produce binding judgments in contentious cases, in reality, it does not have any sovereign power to exercise its judgment, and as a matter of fact, no international enforcement body and no international police exist. **Second**, as illustrated in both cases

43 Ukraine v. Russian Federation, para. 48 (2022).

44 Ukraine v. Russian Federation, para. 43 (2022).

45 Ukraine v. Russian Federation, para. 84 (2022).

46 Sasha Petrova and Mersiha Gadzo, "Russia Hits Military Targets in Ukraine's East, South," ed. Dalia Hatuqa, *www.aljazeera.com*, 2022, <https://www.aljazeera.com/news/2022/5/21/russia-ukraine-live-news-moscow-intensifies-push-for-dombas>.

47 Peter Wahlgren, "The Purpose and Usefulness of Jurisprudence," 2005, <https://www.scandinavianlaw.se/pdf/48-30.pdf>.

48 Geert-Jan G J Knoops, *An Introduction to the Law of International Criminal Tribunals a Comparative Study* (Leiden Nijhoff, 2014).

49 https://www.hrw.org/sites/default/files/related_material/Letter%20Cambodia-HRW-ECCC%20Rules%2011.17.06_0.pdf

50 ICJ, *International Court of Justice Handbook*, 34.



above, forcing a state to be one of the parties in the court proceeding indicates that no consent of the respective state exists, which causes non-compliance to the judgment or any other sanctions imposed.

Third, as mentioned by Judge Oda in the dissenting opinion on Nicaragua v. the United States, “[n]icaragua presented a great amount of evidence to the Court...[and] it would certainly not have been expected to provide evidence unfavorable to itself”.⁵¹ Hence, it can be comprehended that in the case of non-appearance, cross-examination does not exist, and the appearing party’s evidence is not challenged, which causes a one-sided evidentiary process that favors the appearing state only and, therefore, diminish the objectiveness of the evidence examination. While it is true that the non-participating state should not be permitted to profit from its absence, nothing from Article 53 prohibits the court from discovering facts *proprio motu*.⁵² Therefore, the court should not rely on untrustworthy evidence due to the questionable credibility of the shreds of evidence.⁵³

IV. THE INTERNATIONAL COURT OF JUSTICE’S IMPRECISIONS IN ANALYSING THE MATTER OF COLLECTIVE SELF-DEFENCE IN NICARAGUA V. UNITED STATES CASE

Despite the importance of the interference of the victim state, the court declared El Salvador’s intervention to repudiate the court’s jurisdiction over Nicaragua’s application as inadmissible.⁵⁴ With a minimum number of paragraphs in the court’s statement on rejecting El Salvador’s intervention, the court was barely clarifying nor providing sufficient legal reasoning for the rejection of El Salvador’s intervention. However, the court implicitly claims that El Salvador introduced an issue related to the merits phase, where El Salvador reserves its right to participate in the merits phase if the case moves to that phase.⁵⁵ The court deemed so

51 Nicaragua v. United States (1986) (Judge Oda, dissenting).

52 Nicaragua v. United States (1986) (Judge Oda, dissenting).

53 Nicaragua v. United States (1986) (Judge Oda, dissenting).

54 Declaration of Intervention of the Republic of El Salvador Concerning Military and Paramilitary Activities in and Against Nicaragua (1984).

55 William D. Rogers, James A. Beat, and Christopher Wolf, “Application of El Salvador to Intervene in the Jurisdiction and Admissibility Phase of Nicaragua v. United States,” *American Journal of International*



because El Salvador did not invoke any provisions related to the question of jurisdiction and admissibility, which according to the court, is related to the merits phase. Instead, El Salvador invoked provisions from the UN Charter, the Organization of American States Charter, the Montevideo Convention on Rights and Duties of States, and the Havana Convention on the Rights and Duties of States in the Event of Civil Strife.⁵⁶

However, the court's reasoning for the intervention's rejection is highly obscure. **First**, no provisions in the ICJ Statute require the questions of admissibility to be processed in the merits phase.⁵⁷ According to Judge Schwebel, the term "*whenever*" in **Article 63** indicates that the intervention does not have to be done in a specific phase of the court proceeding; therefore, any phase of the proceeding will be acceptable.⁵⁸ **Second**, when the subject of the dispute has a relation to the interpretation of a convention, the court is obliged to accept the interference if the interfering state is also a part of the convention. As a matter of fact, the interference is an absolute right of the interfering state.⁵⁹ Quoted by the United States in a letter to support El Salvador's interference, the Advisory Committee of Jurists stated that regarding **Article 63**,

"[T]here is one case in which the Court cannot refuse a request to be allowed to intervene; that is in questions concerning the interpretation of a Convention in which States, other than the contesting parties, have taken part; each of these is to have the right to intervene in the case."

In this case, El Salvador was one of the parties to the multilateral treaties that Nicaragua relies on, namely the UN Charter, the Organization of American States Charter, the Montevideo Convention on Rights and Duties of States, and the Havana Convention on the Rights and Duties of States in the Event of Civil Strife.⁶⁰ By following the

Law 78, no. 4 (October 1984): 929–36, <https://doi.org/10.2307/2202215>.

56 Oscar Schachter, Christopher C Joyner, and American Society Of International Law, *United Nations Legal Order* (Cambridge: American Society of International Law, 1995).

57 Jerzy Sztucki, "Intervention under Article 63 of the ICJ Statute in the Phase of Preliminary Proceedings: The 'Salvadoran Incident,'" *The American Journal of International Law* 79, no. 4 (1985): 1005–36, <http://www.jstor.org/stable/2201835>.

58 *Nicaragua v. United States* (1986) (Judge Schwebel, dissenting).

59 Sztucki, "Intervention under Article 63," 1029.

60 *Nicaragua v. United States of America, Jurisdiction and Admissibility* (1984).



interpretation of **Article 63** by the Advisory Committee of Jurists, El Salvador's intervention should have been accepted. **Third, Article 84 paragraph 2 of the rules of court obliges ICJ to** “*hear the State seeking to intervene and the parties before deciding*” when a party of the case is objecting to the interference of another state. However, applying the article mentioned above was complicated due to the complexity of Nicaragua's acceptance of El Salvador's interference. While explicitly declaring its acceptance, Nicaragua was providing arguments that essentially rejected El Salvador's interference, “[*n*]icaragua suggests that **Article 63** intervention is inapposite to the jurisdictional phase of the proceeding even if conventions to which the intervenor is a party are centrally at issue in that stage”. Seemingly, this is Nicaragua's strategy to avoid the court's automatic acceptance of El Salvador's request for a hearing as a consequence of the fulfillment of **Article 84**.⁶¹ Unfortunately for El Salvador, this strategy worked. Not considering Nicaragua's rejecting arguments of the interference, the court takes into account Nicaragua's explicit acceptance of El Salvador's interference, which consequently rejected El Salvador's right to a hearing.

Concerning the collective self-defense discussed in this section, the court's approximate reasoning that led to its rejection of El Salvador's intervention results in an incorrect analysis of the fulfillment of the collective self-defense requirements. In order to correctly analyze the requirements of collective self-defense, the victim state should have been permitted to intervene in the case. The court cannot obtain any legitimate and reliable information if it is not from the source on whether the victim state did request assistance from the United States or not. Furthermore, when the ICJ relies solely on evidence from the applicant, Nicaragua undoubtedly did not provide evidence that contradicted their argument as had been mentioned in the previous section, rendering their evidence untrustworthy.⁶² While it is arguable that El-Salvador's request for intervention was solely to repudiate the court's jurisdiction, if only the court interpreted Nicaragua's written observations on the

61 Application of El Salvador to Intervene in the Jurisdiction and Admissibility Phase of Nicaragua v. United States.

62 Nicaragua v. United States (1986) (Judge Oda, dissenting).



intervention as rejecting El Salvador's intervention; therefore, **Article 84** would have been applied automatically and El Salvador would have been able to proceed to a hearing proceeding. As a consequence, the court might obtain sufficient evidence on the debatable question of whether or not the victim state was indeed requesting the United States for assistance against Nicaragua in El Salvador's hearing proceeding.

III. THE FUTURE IMPLICATION OF NICARAGUA V. UNITED STATES CASE IN UKRAINE V. RUSSIA CASE ON THE UNCOVERED ASPECT OF COLLECTIVE SELF-DEFENCE

Since the aspect of consent as the basis of the court's jurisdiction has been analyzed by the court in the provisional measures and discussed in section III, this section will solely focus on the implications of the Nicaragua v. United States case in the aspect of collective self-defense that the court has not been analyzed in the ongoing case of Ukraine v. Russia case.

In Ukraine v. Russia case, Russia was also invoking **Article 51** and claiming to act in collective self-defense on behalf of Luhansk and Donetsk, which was the underlying reason for its recognition of both regions as sovereign states. Technically, a state does not infringe or interfere with another state's sovereignty if that state willingly invites another state to act in self-defense. This was an obvious tactic for Russia to obtain legal ground for its military activities in Ukraine.

In correlation with the Nicaragua case, due to the similarity of invoking **Article 51**, the precedents relating to the analysis of collective self-defense have a high probability of being implemented in the Ukraine v. Russia case. While it is true that precedent does not remain constant and evolves as new cases are decided, the number of collective self-defense cases submitted before the court has decreased significantly since Nicaragua's case. The United States is one of the primary actors that uses the claim of collective self-defense to fulfill its goal of fostering democracy and defending other states in the United States' era of political supremacy.⁶³ The assaulting state, which the United States claims to be attacking, is typically a rogue state heavily involved in ter-

⁶³ William I. Robinson, "What to Expect from US 'Democracy Promotion' in Iraq," *New Political Science* 26, no. 3 (September 2004): 441-47, <https://doi.org/10.1080/0739314042000251351>.



rorist activity. On the other hand, these rogue nations are exceedingly uncooperative with the UN and its instruments, notably the International Court of Justice. Seemingly, despite claiming that the United States' act of collective self-defense was unlawful, rogue nations were reluctant to bring the case to the ICJ, just like the invasion of Iraq in 2003, which is highly unproportionate and infringed international law, yet never brought to the ICJ. Consequently, only a small number of judgments can set a precedent for the court in deciding collective self-defense cases, indicating that the court will most likely depend on the Nicaragua v. the United States decision in constructing the judgment in the Ukraine case.

Several of the relevant precedents that are likely to be implemented are **first**, the definition of armed attack that can be utilized as an excuse for collective self-defense must be in line with **Article 3, paragraph (g)** of the Definition of Aggression that was annexed to General Assembly Resolution 3314 (XXIX),

“[a]n armed attack must be understood as including not merely action by regular armed forces across an international border, but also the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries.”⁶⁴

According to the court, the aforementioned definition reflected customary international law, which means that the court will define an issue based on a treaty, convention, or any other sources of International Law that are regarded as customary international law.⁶⁵ **Second**, the scale of the use of force must be a significant amount that's in line with the court's interpretation of what constitutes an armed attack. **Third**, the court repudiated the idea of Nicaragua's armed supplies delivery to El Salvador's guerrilla groups as an armed attack, which implicitly implies that a non-direct attack cannot be classified as an armed attack. **Fourth**, although the dispute did not fall in the commercial context, the court had jurisdiction over the Nicaragua case over the Treaty of Friendship, Commerce, and Navigation. This

64 General Assembly Resolution 3314 (XXIX).

65 Zia Modabber, "Collective Self-Defense: Nicaragua v. United States," 1988, <https://digitalcommons.lmu.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1139&context=ilr>.



implies a precedent that the court has a jurisdiction regardless of the actual objective and context of the treaty as long it contains a compromissory clause that refers to interpretation. The previous precedents, however, as argued above in Nicaragua's case, have flaws in analyzing the fulfillment of collective self-defense requirements, rendering an inaccurate judgment that vamooses from International Law.

First, with the development of high-tech military weapons that can be controlled remotely and are lethal even in small quantities, a non-direct attack may be more damaging than a direct attack.⁶⁶ Hence, this precedent is not accurate anymore to be implemented in the Ukraine case. Mainly because it is possible that the form of genocide conducted by Ukraine was utilizing high-tech military weapons, which constitutes a non-direct attack.

Second, as predicted, the court applies the precedent from the Nicaragua case on expanding the court's jurisdiction based on the compromissory clause in an **Article IX of the Genocide Convention** regardless of the context of the treaty that's supposedly solely for matters related to genocide, which in this case had not been determined whether genocide had occurred or not. The issue is that expanding the court's jurisdiction essentially contradicts **Article 31(1) of the 1969 Vienna Convention on the Law of Treaties**, which according to the International Law Commission, is classified as customary international law.⁶⁷ This suggests that the court is contravening customary international law without explanation and on an ambiguous legal basis. Furthermore, by following the court's strict method on defining armed attack as written in a document that presumably reflects customary international law in the Nicaragua case, therefore, in the Ukraine case, the term genocide will also be strictly defined by using the definition in the Genocide Convention, which claimed to reflect the norms of customary international law.⁶⁸ Therefore,

66 Paul Bracken, "The Risk of New Military Technologies Must Be Properly Assessed," The Hill, March 18, 2021, <https://thehill.com/opinion/national-security/543023-the-risk-of-new-military-technologies-must-be-properly-assessed/>.

67 "Chapter IV SUBSEQUENT AGREEMENTS and SUBSEQUENT PRACTICE in RELATION to the INTERPRETATION of TREATIES," accessed June 17, 2022, <https://legal.un.org/ilc/reports/2013/english/chp4.pdf>.

68 "UNITED NATIONS OFFICE on GENOCIDE PREVENTION and the RESPONSIBILITY to PROTECT GUIDANCE NOTE 1," n.d., <https://www.un.org/en/preventgenocide/rwanda/assets/pdf/Guidance-Note-When%20to%20refer%20to%20a%20situation%20as%20genocide.pdf>.



in short, the court permits the expanding interpretation of a treaty that is not in line with its original meaning but, at the same time, does not permit any expanding interpretation of genocide's definition other than contained in the written text of codified customary international law.

This indicates that the court's logical thinking is inconsistent and repeatedly contradicts one another. As a result, not only did it establish an inaccurate precedent for future cases and judgment, but it also hampered the rights of states that should have been guaranteed by international law, which in this context is the right to self-defense under Article 51 of the UN Charter.

IV. LEGAL INTERPRETATION AND SUBSTANTIVE JUDICIAL APPROACH METHOD IN NICARAGUA V. UNITED STATES AND UKRAINE V. RUSSIA

Based on the examination above, it can be concluded that in both cases, the court primarily employed one legal interpretation method. The use of textual interpretation causes it to interpret the relevant article with the literal meaning of the words in both cases. Several points of fact evidence this; **first**, when interpreting **Article 53** of the ICJ Statute in the jurisdiction and admissibility of the application phase, the court enforce the literal meaning of **Article 53** that obliges the court to ensure that the applicant's claim is well-founded in fact and law. On the other hand, despite not being explicitly mentioned in the statute, the respondent was assured not to gain any benefit from its absence, meaning that anything implicit was regarded as irrelevant and inapplicable. **Second**, the court did not consider the other substance of Nicaragua's acceptance of El Salvador's intervention. In Judge Oda's dissenting opinion, he admitted that the majority of the court judges viewed Nicaragua's acceptance of El Salvador's intervention from the statement that is explicitly mentioned only; it did not regard any further statements by Nicaragua in its acceptance letter, whereas if viewed from the substance of the acceptance letter, it substantially repudiates El Salvador's intervention and not accepting it as explicitly written. **Third**, regarding



the interpretation of **Article 84**, while nothing in the rules of the court prohibits the court from granting a hearing to the interfering party, the court persisted in not granting El Salvador a hearing. The court might grant a hearing only if any of the other parties objected to the intervention as explicitly ordered in the provision, which as a consequence of its textual interpretation of Nicaragua's acceptance of El Salvador's intervention as mentioned in point number two, it did not grant any hearing because of the unfulfillment of **Article 84. Fourth**, by utilizing the definition of aggression annexed to General Assembly resolution 3314 (XXIX), the court defined armed attack only as an attack conducted by armed groups.⁶⁹ However, it did not regard assistance to insurgents in the form of weapons or other support as an armed attack, which once again indicated that it did not consider anything unwritten or implicit.

Some might argue that textual legal interpretation is more suitable to be used in the court due to its simplicity which diminishes debate among the court judges. That argument is accurate only if the judges have comprehended the word with the same meaning. If they understand it differently, it will render multiple interpretations, which results in confusion and no meeting point of the interpretation among the judges. Textual interpretation is unsuitable for interpreting statutes that were made decades ago, given that if it is interpreted solely based on the written text, the interpretation will be rigid and unable to adapt to newly-developed legal norms and customary international law. For instance, the term genocide was invented by a Jewish named Raphael Lemkin, who experienced the Nazi's ruthlessness, indicating that his definition of genocide is highly influenced by the Nazi's severity which, if correlated with the present circumstances, will undoubtedly be unfit. During the era of the Nazis, human rights were not a topic of discussion, and the Universal Declaration of Human rights, as the first widely-recognized human rights convention, was not stipulated yet, which caused the Nazi holocaust incident to be more severe than the current understanding of the genocide. If the court were to interpret genocide with the literal meaning attached to the highly severe holocaust incident, it would be

⁶⁹ Nicaragua v. United States (1986).



troublesome for the victim state to prove the existence of genocide, especially with the development of technology that can make genocide invisibly less severe. Therefore, to adapt to new practices and norms, teleological interpretation will be more suitable. Not only does it provide flexibility for judges to consider new circumstances, but it also accommodates the drafters' original intent, which provides flexibility for the judges to filter and select the purpose that suits current development.

With regard to the substantive judicial approach, the court strictly applied the judicial restraint doctrine. While it can be argued that the use of the *stare decisis* principle in a world court had been perished since 1922, in *Croatia v. Serbia* case, ICJ stated that despite the non-binding nature of the previous judgment to the court, it would utilize *stare decisis* principle if it finds necessary to do so.⁷⁰ In practice, the court frequently implements the same *ratio decidendi* when analyzing the same facts rather than establishing new ones, as what the court did in the *Ukraine* case with *ratio decidendi* from the *Nicaragua* case, as elaborated in section V. Occasionally, the court even stated the exact wording, for instance regarding the non-participating party in both *Nicaragua* and *Ukraine* cases, "... *such a decision obviously has a negative impact on the sound administration of justice*".⁷¹ Despite establishing a consistent judgment, this doctrine will be disadvantageous if the implemented *ratio decidendi* substantially contradicts International Law and even more disbenefit if it deviates from the most crucial element that constructs International Law, namely the principle of consent. If *ratio decidendi* that disadvantages state and causes the non-compliance of the court judgments to continue to be implemented in future cases, states that have not accepted the court's jurisdiction will be reluctant to accept it, and states that have accepted the court's jurisdiction might even withdraw its compulsory jurisdiction or other types of jurisdiction acceptance.

Consequently, the court will gradually lose its jurisdiction over states completely. For that reason, judicial activism provides the right of the judges to overturn any unjust precedent and deviate from states'

70 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Croatia v. Serbia*), Preliminary Objections, 2008 ICJ Reports. 412, at [53].

71 *Nicaragua v. Unites States* (1986); *Ukraine v. Russia* (2022).



inherent rights and International Law without disregarding the previous judgments. For instance, as mentioned above, when Russia was indirectly forced to participate as the party of the case due to the implementation of the same *ratio decidendi* from the Nicaragua case, with judicial activism, the judges can easily revoke the unjust *ratio decidendi* and replace it with a new precedent that permits Russia to not participate in the case or even dismiss the case without infringing ICJ's procedural law. While the previously mentioned argument might be doubtful, it must be reiterated that instead of forcing a non-participating state to be adjudicated that ultimately refuses to follow the court's decision, it is better for the court to dismiss the case and spend time adjudicating another case. If the court still persists in adjudicating over the non-participating state, it shall seek an enforcing power to force compliance that is delegated from the sovereign power of the states, meaning that the ICJ's system has to be reformulated.

D. CONCLUSION

From both Nicaragua v. United States and Ukraine v. Russia cases, it can be concluded that the ICJ had imprecisely analyzed several legal matters related to the court jurisdiction and collective self-defense, which in essence disrespect states fundamental right to consent to the court's jurisdiction and the right to defend itself under **Article 51 of the UN Charter**. Due to the imprecision of the court analysis, it renders an ineffective judgment where states refuse to comply and, therefore, makes the whole adjudicating process become useless. Additionally, the ICJ's inaccurate interpretation of the ICJ Statute, Rules of Court, and other relevant law materials, as a consequence, establishes an unsuitable precedent for future cases that contradicts International Law, which eventually reiterates the issue of non-compliance with the judgment similar to the previous cases. This becomes an indication that the ICJ's interpretation method is starting to get obsolete and irrelevant to be implemented in the present time, mainly because of the emergence of new world problems that require states to engage and interact more and, therefore, boost the development of new international law through custom. For



that reason, teleological interpretation can provide a more accurate analysis by granting a flexibility to the court judges to filter which objective that requires to be prioritized, but not overlooking the original drafters' purpose of the law. Moreover, to legally overturn any *ratio decidendi* that contradict with international law and adapt with new circumstances in the international scale, the ICJ should not excessively stick with its legal positivism nature, but rather utilize the judicial activism doctrine that fill in legal gaps.

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