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Brazil and the International Court of Justice: A Necessary Reconciliation

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Abstract: In 1948, by not renovating its signature to the mandatory jurisdiction clause set out in Article 36 §2 of the Statute of the International Court of Justice (ICJ), Brazil placed itself at the margin of the most important international tribunal nowadays. This normative is recognized as an advance in international relations in its civilizing historical framework. Therefore, such an attitude denotes an incredulity vis-à-vis international law, in disagreement with the Brazilian fundamental charter of 1988. In its article 4, the Constitution includes governing principles in international relations: the solution to peaceful conflicts, the defense of peace, and the cooperation of peoples for human progress. Consequently, it is fair to think that the 1988 text is relatively receptive to international law, making Brazil's refractory position to the ICJ inconsistent with the constitutional norm. Thus, the primary purpose of this article is to demonstrate that the arguments invoked to justify the waiving of the jurisdiction clause are unfounded. Theoretically, this article is justified by the need to take a stand in favor of a school of thought that believes in the maintenance of international peace through dialogue, reason, the application of moral principles and institutionalized justice. In order to convince the Brazilian State to reconcile with the ICJ, qualitative, bibliographical, and documentary research will be carried out based on comparative and historical methodological procedures, guided by a deductive approach grounded on the case study. In this regard, the article analyzes ICJ's historical evolution, studies its role in the international system, and evaluates why the Brazilian State rejected its contentious jurisdiction. In light of the French and North American experiences, which also denounced the clause, the arguments upheld against the Court are critically examined. The conclusion is that the ICJ contributes to world peace by consolidating public international law and that Brazil should, therefore, return to the scope of the United Nations' jurisdiction.

Keywords: Article 36 §2 of the Statute, Brazil, Impartiality, International Court of Justice, Optional Clause to Compulsory Jurisdiction

1. Introduction

In 1795, Immanuel Kant dared to dream of a world where States would solve their problems through dialogue, reason and application of moral principles, relegating the use of force to oblivion. In the essay *Project for Perpetual Peace* [1], he outlined the idea of a cosmopolitan international law that would enjoy universal acceptance and provide the international community with peaceful means to resolve interstate controversies [2]. It is, therefore, not surprising that the Prussian philosopher is considered one of the intellectual inspirations to the United Nations' creation. In the preamble of the 1945 San Francisco Charter, the UN was designed to save generations to come from the scourge of war, one that exterminated many and cut down millions of lives. The international organization was thus created with the mission of settling future conflicts.

The dynamism of contemporary international society has been embodied particularly by the use of peaceful alternative instruments for the resolution of international controversies, aiming at the rule of law. According to the Brazilian author, Wagner Menezes, the phenomenon of proliferation of judicial bodies from the Second World War represents "an advance in international relations in its civilizing historical framework" [3]. It was precisely to ensure the achievement of this goal that, in 1946, the ICJ was created. With its broad competence, it is nowadays the most important international *forum* for dispute resolutions [4]. As such, it has dual

jurisdiction, which covers both the resolution of conflicts between States and the issuance of advisory opinions on subjects of international law [5], which helps to strengthen public international law [6].

However, to have a conflict settled by the ICJ, it is not enough for the states to be members of the UN. They must necessarily recognize the contentious jurisdiction of the Court of The Hague, which can be done by accepting the optional compulsory jurisdiction clause provided in Article 36 §2 of its statute. Although being an original member, and one of the countries that have had the most judges elected to sit on the Court, Brazil is no longer part of the supreme judicial body of the United Nations. Indeed, since 1948, the largest Latin American country has refused to accept the contentious jurisdiction of the Court. Such an attitude denotes an incredulity vis-à-vis international law, in disagreement with the Brazilian fundamental charter of 1988. In its article 4, the Constitution includes, among the principles that must govern the country in international relations: the solution to peaceful conflicts, the defense of peace and the cooperation of peoples for human progress. Consequently, it is fair to think that the 1988 text is relatively receptive to international law, making Brazil's refractory position to the ICJ inconsistent with the constitutional norm.

Thus, the research hypothesis proposed in this article is that "the eternal country of the future", according to the French statesman Georges Clémenceau words, was wrong in excluding itself from the most important international judicial body, and that it should immediately sign the compulsory jurisdiction clause. The social relevance of this study rests on the need to persuade the Brazilian state to correct this error by reinstating the most important court of the international system and to be again part of the list of countries which accept the compulsory jurisdiction of the ICJ, outgoing thereby on the list of those who act as "true outlaw states" [3]. Theoretically, this article is justified by the need to take a stand in favor of a school of thought that believes in the maintenance of international peace through dialogue, reason, the application of moral principles and institutionalized justice. In addition, it is necessary to fill a gap, since the textbooks of public international law, including the Brazilian ones, do not explain, or else in a succinct way, the position of disdain of the country towards the main international forum [7]. It is remarkable that we have found the majority of the explanations of the Brazilian position in the literature foreign to this country. For all these reasons, qualitative, bibliographical, and documentary research will be carried out based on comparative and historical methodological procedures, guided by a deductive approach grounded on the case study.

The essay is divided into five chapters. The first one analyzes the genesis and historical development of the ICJ intending to have a clear dimension of its role in the international system. The second chapter presents Brazil's current position to reveal the reasons for its reluctance to sign the compulsory jurisdiction clause. The third one is devoted to the contextualization of the Brazilian position, by studying the precedents of other countries, such as France and the United States, which also have abandoned the compulsory jurisdiction clause. In the fourth chapter, the position of the critics of the Court will be examined to refute their arguments. Finally, the fifth one deals with the role of the decisions and opinions of the ICJ in order to demonstrate how important it is to be a member of a body that directly contributes to the maintenance of world peace through the strengthening of public international law.

2. Genesis and Historical Development of the ICJ

2.1. XIXth Century

The ICJ took off from the first international peace conference convened by Tsar Nicholas II and held in The Hague in 1899. On this occasion, 26 States signed a treaty for the peaceful resolution of controversies, which led to the creation of the Permanent Court of Arbitration of 1902. In reality, it was not an institutionalized court: each of the member states appointed four jurists who could be called upon to sit as arbitrators in international disputes. The Court, well accepted by the international community, signed 120 arbitral conventions between states until 1914 [8].

At the second peace conference in 1907, states attempted to go beyond arbitration by considering the creation of an international tribunal dedicated exclusively to the peaceful resolution of disputes through legal means. Although the idea aroused great interest, no consensus on respecting the mechanism for selecting judges was reached and the project was temporarily relegated to the theoretical level [9].

2.2. First World War: The Permanent Court of International Justice

It required the widespread carnage of the First World War for the idea of establishing an international tribunal to resolve conflicts between States to become a topic again. During the Paris Conference, the North American President W. Wilson proposed the creation of the League of Nations, one of the first worldwide intergovernmental organizations which allowed the peaceful resolution of disputes between States through dialogue and open diplomatic negotiation. When its members failed to resolve a dispute through diplomatic means, Articles 12 and 13 of the Constitutive Act of the League of Nations invited States to resort to an arbitral or judicial solution. In order to make this second option a reality, the Permanent Court of International Justice (PCIJ) was established in 1921. Located in The Hague, it was the first international tribunal of its kind. Although funded by the League, the Court was not its judicial body and its statute was not part of the treaty constituting the international organization. It was therefore possible to be a member of the League without necessarily being a member of the PCIJ. Between 1922 and 1940, the organization resolved 31 conflicts between states and issued 27 advisory opinions [5].

2.3. Second World War: The International Court of Justice

The PCIJ succumbed to the Second World War, and it was only at the San Francisco Conference that the idea of creating an international tribunal resurfaced [10]. This was achieved in 1946 when the International Court of Justice was designed to become the most important judicial body of the UN. It is made up of 15 judges from different countries and is based at the Peace Palace in The Hague, the very place where the PCIJ operated. However, the legacy of its predecessor is limited to this: "the powers, the action and the context of justice of the United Nations are different, much broader and more concrete than those which were then exercised" [3]. The Court is accessible only to States and the UN, not adjudicating disputes between individuals. It is the only true universal international court that enjoys general jurisdiction. Indeed, according to Article 92 of the UN Charter, it is "the principal judicial organ of the United Nations". Its statute was annexed to the Charter of San Francisco and is an integral part of the founding treaty of the United Nations. This means that the 193 current UN member states are also members of the ICJ [11].

However, in order for him to be included in the passive pole of a trial, the State must previously accept the competence of the "judicial armed wing of the United Nations" [12]. According to Articles 36 and 37 of its statute, this can be done in three ways: i) two countries may, by mutual agreement, decide to submit a particular dispute to the Court for it to deliberate and rule on it; ii) a treaty signed by two countries can stipulate, that in case of dispute, it will be resolved by the ICJ; and, finally, iii) the countries can accept the optional clause of compulsory jurisdiction. In the latter case, when a State accepts the clause provided for by Article 36 §2 of the Statute of the ICJ, it integrates the list of countries which may be claimants or defendants before the Court, without having to seek the prior permission of the other part. Following the invasion, in 1979, by a group of Islamist militants of the North American embassy in Tehran and the hostage-taking of American officials, the USA were able to suit Iran before the ICJ without having to obtain the prior Iranian consent as to the contentious jurisdiction of the tribunal since both countries had ratified Article 36 §2.

In summary, it can be seen that the creation of the ICJ was the fruit of a long historical process. The Court itself traces its origins to Jay's Treaty of 1794. Since the idea of creating an international tribunal of justice was proposed in 1899, it has taken half a century of history, two world wars and more than 60 million deaths for the project to become a reality. Notwithstanding this fact, for decades Brazil has refused to sign the compulsory jurisdiction clause provided by Article 36 §2 of the Statute of the ICJ. In the next chapter, we will try to understand why.

3. Brazil's Position

The Brazilian authorities have remained rather laconic as to the reasons which still lead them today to reject the compulsory jurisdiction clause. They always refer to their preference for diplomatic means, and the country requests international arbitration when necessary [13], in accordance with Article 33 §1 of the UN Charter.

In 1945, when Brazil ratified the statute of the ICJ, it signed the compulsory jurisdiction clause with a temporal reservation. The aforementioned signature was valid only for a small space of time, after which it would be renewed through a new declaration. However, this was not done after 1948, when the original declaration lost its effectiveness [14]. Since then, the country has persistently recused itself from signing the compulsory jurisdiction clause.

What is most surprising is that the optional compulsory jurisdiction clause was proposed by the Brazilian delegation during the elaboration of the statute of the Court [10]. Indeed, during the initial phase of creation, the aim was for jurisdiction to be binding on all countries that ratified its founding treaty. However, the adoption of this proposal met strong resistance from the great powerful States who preferred a system of acceptance of jurisdiction on a case-by-case basis, similar to that employed in international arbitration, in which the two countries must give their mutual consent each time through an arbitral agreement. At the San Francisco Conference, the Soviet delegation still believed that international jurisdiction was nothing more than a liberal institution in the service of capitalist countries [10, 11].

The Brazilian delegation then, led by Raúl Fernandes, proposed a compromise solution [14]. For countries reluctant to accept the compulsory jurisdiction of the Court, it could be determined on a case-by-case basis, always relying on the prior consent of the parties, as occurs with international arbitration. For other States which wished to accept the contentious jurisdiction of the Court, this could be done by means of a compulsory jurisdiction clause provided for in Article 36 §2. The essential basis of this mechanism is reciprocity since only countries that subscribed to the compulsory jurisdiction clause can avail themselves of it. Whenever a Member State brings a case before the Court against another Member State which has signed the clause, both are aware that the Court will have jurisdiction to settle a dispute, without needing to obtain the prior permission of the parties involved.

Despite this paternity, after a short period of membership, as has been said above, the Brazilian declaration of submission to the so-called "Raul Fernandes" clause lost its effectiveness in 1948. Since then, it has not been renovated. However, we can observe that since that date, the country has gone through incredible transformations. Brazil experienced three constitutions, a long period of authoritarianism and a return to democracy in the 1980s. With the fundamental norm of 1988, this country espoused the neo-constitutionalist movement by adopting a democratic constitution, valuing the primacy of international law and enshrining fundamental rights and guarantees.

Its attachment to international law can be inferred from a series of its legal provisions. Article 4 refers, as we said in the introduction, to the following principles of Brazilian international relations: cooperation between peoples for the

progress of humanity, peaceful solution of conflicts, prevalence of human rights, right of peoples to self-determination, non-intervention, and defense of peace. Since Amendment n.° 45, Article 5 §3 of the carta *magna* elevates to the rank of constitutional amendment the treaties relating to human rights approved by a three-fifths majority, by two ballots, by each of the two chambers of the national Congress. In addition, §4 of the above-mentioned article, corroborating this idea of attachment to international law, recognizes another universal jurisdiction, the International Criminal Court created in Rome in 1998.

These novelties introduced in 2004 demonstrate the constitutional enhancement of international public law However, it is clear that they completely clash with the Brazilian position regarding the contentious jurisdiction of the ICJ. The preference given to diplomatic means and international arbitration should not invalidate, in our opinion, the judicial means, which constitutes another important modality of pacification of conflicts.

Besides being contrary to the principles of its fundamental charter, the Brazilian position concerning the ICJ stains its international image. While the member from Mercosur presents itself to the world as a regional power on the rise, has taken the lead of a peace mission in Haiti and claims a permanent seat on the UN Security Council, it adopts an incomprehensible attitude when it deals with the most important international court.

In doing so, Brazil is following the deplorable example of France and the United States of America. Formerly signatories of the compulsory jurisdiction clause, the two countries nevertheless decided to denounce it. It is important to study the reasons which founded this manifestation of their distrust vis-à-vis the ICJ to compare them with the position of Brazil

4. The Examples of France and the USA

4.1. France

Paris decided to abandon the compulsory jurisdiction clause after the lamentable conflict between New Zealand and Australia and France in 1974 [15]. The European country, a nuclear power, set up a vast program of atomic tests to study the bellicose potential of its arsenal and to develop new nuclear weapons. However, to spare its population the harmful effects of radiation, the French carried out these tests in their territories which are in the South Pacific. It was no surprise that non-nuclear nations like Australia and New Zealand protested vehemently against the French program. In 1972, after having exhausted the diplomatic channels of negotiation and not having led to any significant result with the resolutions approved by the General Assembly of the United Nations (UNGA), these countries instituted proceedings against France concerning tests of nuclear weapons [16].

The two oceanic states invoked a series of violations of international law standards by the French authorities. They ordered the court to force France to abandon its nuclear testing program in the South Pacific. Faced with the political and social fury caused by the imminent judgment of the Court and in the certainty of obtaining a sentence contrary to its interests, the European country decided to reduce its losses by fully satisfying the request of the authors of the action. While the trial was still in the initial stages, France publicly announced that it had decided to withdraw from its nuclear program, in accordance with the demands of the claimants. The Court, by two judgments of December 1974, found that the Applications of Australia and New Zealand no longer had any object and that it was therefore not called upon to give any decision thereon [17]. Finally, thanks to the ICJ, the latter made the Hexagon bend, a result which they had not succeeded in obtaining through diplomatic negotiations and political pressure exerted in particular by the UNGA.

This position taken by the ICJ, in the latter case, was a clear signal that the tribunal was able to openly thwart the interests of a permanent member of the UN Security Council (UNSC) in favor of the defense of international law, the protection of the environment and the interests of nations which had no other means to defend themselves against the harmful activities of nuclear power. Note also that this took place during the Cold War, a period in which any topic relating to nuclear technology was a hot topic of international politics. However, it is undeniable that this independent and courageous attitude of the Court came at a high cost: France in fact abandoned the compulsory jurisdiction of the ICJ in 1974 [18]. The decision of the French President was motivated by the alleged non-respect of the reservation made in his declaration of acceptance by the Court, on the basis of Article 36§2, which in its view excluded disputes relating to related activities. to national defense [19]. Some criticize the attitude adopted by the Court and blame the denunciation of the compulsory jurisdiction clause on the so-called lack of sensitivity of the court to the geopolitical interests of Paris [20].

It is not difficult to denounce the fallacy of the argument. If, in order not to provoke France, the ICJ had ignored the illegality of its actions and refused to order the paralysis of nuclear tests in its paradisiacal islands, what would have been its legitimacy? Failure to support Australia and New Zealand, while international law was the basis for their position, would have had the effect of transforming the ICJ into a bureaucratic body dedicated to making the designs of great powers appear legal, regardless of the law and its applicable principles. So, yes, it would have been impossible for any developing state to believe in the impartiality of the adjudicative body. The country which has dealt a fatal blow to the absolutist monarchies and offered the whole world its motto of “liberté, égalité, fraternité” has decided to depart from the ICJ in favor of a fratricidal technology that does not bring any benefits to humanity. And yet, this was the reason which motivated the French renunciation of the Court's jurisdiction clause. It is essential that Brazil, a signatory of the Treaty of Tlatelolco of 1967 which prohibits the use of nuclear weapons in Latin America and the Caribbean and of the Treaty on the Non-Proliferation of Nuclear Weapons of 1968, does not forget this case and adopts a critical thinking vis-à-vis the

French example.

4.2. United States of America

Following in France's footsteps, Washington also decided to denounce the compulsory jurisdiction clause after its quarrels with Nicaragua judged in 1984. To measure the complexity of a case, it is necessary to know its historical context. The history during the twentieth century of this small state of 6 million inhabitants which is located in Central America does not differ from that of other countries in the region, namely a pinch of authoritarianism mixed with social exclusion and North American interventionism. In 1979, once in power, the Sandinistas set about implementing their program of social justice, expropriating the large owners of their land and adopting the Constitutional Statute of the Rights and Guarantees of the Citizen. Following its interventionist tradition stemming from the Truman Doctrine of restraining communism [21], the US began a series of subversive operations organized by the CIA, creating a group called "Contra". It represented the interests of the authoritarian old guard who had exploited the Nicaraguan people for centuries. Since their genesis, they have been armed and funded by the United States government. Even after the US Congress canceled this program and banned the White House from continuing to fund the Contra, President Reagan continued the program in a covert and illegal manner against the Sandinista government.

It was in this context that Nicaragua, on 9 April 1984, filed an application proceedings against the US on the grounds that the Americans had openly funded and armed the Contra. The North American state was irritated by Nicaragua's action and immediately refuted the jurisdiction of the Hague Court as the US allegedly exercised its right to self-defense of a democratic state governed by the law of neighboring countries, in the name of the principles of collective security and sovereignty.

The ICJ, in the “Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) [22], however, was not persuaded by these arguments. Faced with the accumulation of evidence presented by the Latin American country, it not only admitted the case as it ultimately decided in favor of the applicant, by ordering the USA to pay reparation for having violated human rights, invaded Nicaraguan territory, and violated its sovereignty. It was then the moment which the greatest power on the planet, having suffered a legal rout and having been publicly humiliated by a modest Central American country, resolved to abandon the compulsory jurisdiction clause of the Court.

Some authors still question the position of the Hague tribunal in this case and believe that it committed a great ambiguity in ruling in favor of Nicaragua. In accordance with this line of thought, the Court should have recognized its political limitations and dispensed with judging the USA in this case [21]. By using the latter as a platform to carry the voice of developing countries, the Court would have angered the greatest power in the world, pushing it to leave the tribunal, as France had just done. Until the end of the trial, the US questioned the court's impartiality [23]. But once again, we reiterate the arguments presented above. If, for the reasons of not opposing the geopolitical interests of the USA, the ICJ had remained silent and passive in the face of the real violation of Nicaraguan sovereignty, what would have been the legitimacy of this tribunal? Abandoning Nicaragua, when international law worked in its favor, would have transformed the ICJ, like the UNCS, into another bureaucratic body dedicated to affixing its seal to the demands of the great powers in a servile and acritical manner.

To think that the most important tribunal in the international system could act in such a way would be blasphemy for international law and nonsense from the point of view of the concept of justice. In the Nicaraguan case, the court ruled against the US fully aware that its decision would have far-reaching political consequences. Nonetheless, it did not hesitate to defend public international law [23]. The fact remains that the US, in the name of its interventionist policy in Central America, abandoned the compulsory jurisdiction clause.

For a country that has always boasted of defending the right of peoples to self-determination, non-intervention and equality between States, principles transformed into iron law in its article 4 of the Constitution of 1988, Brazil should reflect on this other example of denunciation of the clause. The alleged preference for diplomatic means cannot be used as an escape route, to completely rule out the path of a judicial solution to international conflicts in the name of geopolitical interests, which are contrary to international law.

However, to get a picture faithful to reality, it is useful to remember that France and the USA were not the only voices that rose against the court based in Holland. Currently, of the 193 UN member states, only 74 are on the list of countries that accept the compulsory jurisdiction of the Court. This is surely due to the imprint left by the fallacious arguments about the mission of international jurisdiction, repeated to the envy of those who do not believe in cosmopolitan law. It is therefore important to know the arguments of the detractors in order to refute them, because we will see that they do not stand the test of the facts.

5. Critical Analysis of the Arguments of the Disparagers of the ICJ

During its 70 years of activity, disparagers of the ICJ criticized its jurisprudence and prophesied its next defeat. Many of these belittlers see the international system as being eminently anarchic, owing to the lack of a centralized power that imposes the application of the norms of international law [2, 11]. For them, the current international system is not different from the state of nature as described by Thomas Hobbes in his classic work, *The Leviathan* [24]. Thus, man would literally be a wolf for man, or rather, the state would be a wolf for the state. Followers of this line of thought founded a school of international relations called Realism and tirelessly set about destroying the Kantian project for the rise of international law in the face of the grim Hobbesian reality of

international politics. One of the following thinkers in this line of research is University of Chicago law professor Eric Posner [20]. According to him, the analysis of the activity of the ICJ should lead us to one final conclusion: the tribunal has failed bitterly.

compulsory jurisdiction clause: i) the court lacks impartiality and, ii) it declined frankly from the second half of the twentieth century, until it turns into an institution in decrepitude. To convince the Brazilian government to change its current posture, it is essential to expose the fragility of such arguments.

Contemptors of the caliber of the American author generally put forward two arguments to justify the waiver of the compulsory jurisdiction clause: i) the court lacks impartiality and, ii) it declined frankly from the second half of the twentieth century, until it turns into an institution in decrepitude. To convince the Brazilian government to change its current posture, it is essential to expose the fragility of such arguments.

5.1. Partiality of the ICJ

To attack the impartiality of the Court is to strike it with a fatal blow to the heart. It is commonly accepted in the legal community that the impartiality of the magistrate is a basic condition for judicial review. An impartial judge is one who remains equidistant between the parties to the trial, settling the dispute by applying the law in force to the concrete facts, without granting specific prerogatives to any of the parties involved for particular reasons of personal preference. Once the impartiality of the judge is questioned, the party who has suffered prejudice may request that it be removed and substituted to ensure a rigorous trial and justice. Independence is also a founding principle of international justice and the judiciary. The concept of independence is normally associated with the idea that the judge must exercise his functions without suffering undue influence from outside the jurisdiction, such as the interference of a State of origin or residence [25]. International doctrine that wrote the "Burgh House Principles", a project for a universal conventional instrument which establishes the guarantees necessary to establish standards equivalent to all international jurisdictions, recognizes, in the preamble of said instrument, that promoting independence and the impartiality of the international court has a direct effect on the legitimacy and efficiency of international judicial trials [26]. It is permissible to point out that the States, in 1945, accepted the creation of permanent and universal jurisdiction only after the question relating to its composition had been resolved [9]. Moreover, the requirements relating to the competence of the members of the court appear from the first articles of the statute. Although the impartiality of the judge is the cornerstone of any democratic rule of law, some question its reality within the ICJ.

According to those who criticize the Court, we cannot affirm that it is impartial when its judges tend to always take sides in favor of their home States or others close to them. By analyzing the case law produced during the first 55 years of the Court's activity, E. Posner shows that in 90% of the cases where a judge was led to vote in a trial involving his or her State of origin, the vote was in his favor. He also noted that judges from democratic states tend to vote for states with representative regimes, while judges from authoritarian states are more likely to vote for other equally authoritarian countries. Finally, judges from better-off nations tend to vote for developed states, while judges from developing states would vote more in favor of less well-off nations [18]. J. Malenovsky, drawing on his experience as a judge of the Court of Justice of the European Union, denounced the prevalence of political considerations in the methods of appointing international judges in these terms: "Governments are deeply political bodies, and, by definition, base their decisions on political considerations. The exercise of the choice of international judges cannot escape this simple logic either" [25]. *Tokyo Trial,* the Japanese four-part historical drama miniseries that depicts the International Military Tribunal for the Far East, corroborate this idea well [27].

In summary, based on rulings from 106 cases decided by the international court over a period of approximately 50 years, E. Posner concluded that judges do not resolve cases impartially, because they are directly influenced by their nationality and by other characteristics relating to their State of origin. However, the same author admits that other researchers have called this thesis unfounded [28]. Let us then examine some arguments which relativize these conclusions.

When the ICJ was created in 1946, it was decided that the highest judicial body of the international order would be composed of 15 magistrates, all appointed by the member states of the UN. According to the statute, judges must be elected from among persons enjoying the highest moral standing and meeting the conditions required to exercise, in their respective countries, the highest judicial offices or to be jurists of recognized competence in international law. They are elected by a double ballot in the UNGA and the UNSC [29]. This power of co-decision was designed to appeal to both the small and medium powers, which represent the majority in the General Assembly, and the great powers, permanent members of the Security Council. It was also planned that each magistrate would be elected for a renewable period of 9 years and a third of the court renewed every three years, to ensure continuity of case law. In order to ensure better international representativeness, the possibility of having more than one judge of the same nationality serving the Court has been expressly prohibited.

Unlike most other organs of international organizations, the Court is not composed of representatives of governments. Once elected, a member of the Court is not the delegate of the government of his country or of any other state: his role is to apply and interpret international law and not to defend the interests of his homeland. A judge is an independent magistrate whose first duty will be, before taking office, to make a solemn commitment to exercise his powers in full and perfect impartiality. Finally, the members of the Court may not engage in any other occupation of a professional nature during their mandate. They may not exercise any political or

administrative function or be agents, advisers or lawyers in any matter. In case of doubt in the matter, it is the Court that has the competence to decide.

As for the geographical criterion for the selection of judges, the same distribution system used for the UNSC prevails. In this way, the five permanent members are always represented within the ICJ and the other judges are chosen as follows: two judges for Latin America, three for Africa, two for Asia, one for Eastern Europe and two for Western Europe (including Canada, Australia and New Zealand). Although China, France, Russia, the United Kingdom and the USA have permanent representation in the ICJ, their privilege is not excessive since they do not have a right of veto in this body (art. 10 of the Statute). In other words, the decisions pronounced by the Court are taken by an absolute majority of the magistrates, each vote having the same weight. It is important to observe that once two states have agreed to submit their dispute to the ICJ, they abdicate the possibility of resorting to other means to resolve their dispute. This kind of limitation of state sovereignty was only possible if the ICJ was created in such a way that states could advance their interests within it. It was for this reason that the great powers obtained permanent representation in the organization. However, this does not mean that the Court is a bureaucratic body serving the imperial interests of certain nations. Even if in a concrete case a judge from a particular state decides to vote in favor of his national interests, he will have to convince at least seven other judges of the most diverse nationalities to follow his line of thought so that the ICJ can vote in its favor.

If one studies the current composition of the Court [30], one accepts that it clearly favors representatives of Western legal thought to the detriment of other legal families. It is significant that the concept of "equitable geographical distribution", on which the composition of the Court is based, does not appear in the Statute which merely refers, in Article 9, to the need to ensure "in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world". There are other international jurisdictions such as, for example, the International Tribunal for the Law of the Sea (ITLOS), in which the "peripheral countries" enjoy proportionately more seats [3]. But, even if a certain judge decides to vote in favor of his home state regardless of the legal arguments involved, the composition of the tribunal is sufficiently heterogeneous to overcome this type of individual bias. Although the ICJ gives the victors of World War II permanent representation, it also has mechanisms to counterbalance this special prerogative, by allowing other states in different parts of the world to be heard as well. In accordance with Article 31 of its Statute, whenever a State is a party to a trial and none of its nationals sit there, it may appoint an *ad hoc* judge to compose the Court. However, this *ad hoc* judge, once designated, enjoys the same prerogatives and obligations of a "permanent" judge: he can take a stand against the state of his nationality because he is not legally spoken its representative. The authors M.-P. Brichambaut and J.-F. Dobelle [19] admit, however, that experience shows that the *ad hoc* judge, in order to better understand national problems and its legal system, normally adopts a position favorable to the claims of the State which named him. International Judge J. Malesnovsky [25] speaks of "kinship of spirit" or "union of opinions" between a judge and the state of his nationality. However, other authors cite several cases where the judge did not defend the position of the country of his nationality [8, 9].

We insist that this is a mechanism, although imperfect, which aims to combat the risk of partiality of judges from certain States, by offering undeniable equal treatment to all parties to the trial. Therefore, it is not correct to say that the Court is biased because it has several tools at its disposal to avoid the occasional favoritism that some judges may possibly demonstrate in benefit of their home States.

We can also note that Brazil, although not a member of the ICJ, can be proud of having provided the universal Tribunal with eminent jurists such as Filadelfo de Azevedo (appointed in 1946), Levi Carneiro (1951), José Sette Câmara (1979), José Francisco Rezek (1997) and Antônio Augusto Cançado Trindade (current member since 2009). Under these conditions, could the country still use the argument of the Court's lack of impartiality to legitimize its refusal to sign the compulsory jurisdiction clause?

5.2. Decline of the ICJ

The second argument used to justify the alleged decline of the Court is the alarming fact that the great powers make less and less use of its services. Analyzing the activities of the Court between 1946 and 2004, E. Posner divides this period into three phases. Between 1946 and 1965, states in a dominant position appear as accused and plaintiffs in 60% of the actions of the ICJ. Between 1965 and 1985, this number fell to 50%. Finally, between 1985 and 2004, they acted as perpetrators of only 13% of actions, but were accused in almost 100% of cases [20]. Based on this data, he concludes that the five permanent members of the UNSC have gradually lost interest in the Court, which would be a glaring signal of its decline. But we can challenge this position on three points.

5.2.1. Emergence of States Resulting of Decolonization

However, this thesis only seems credible to us if we ignore the great historical transformations that took place in the world during this period [31]. In 1946, the UN had 51 original members, but by 2004 the number had risen to 193. The decolonization process that took place after World War II transformed almost all of the former European colonies in Africa and Asia into Independent states. The geopolitical transformation was such that, in 1965, the UN decided to expand its Security Council to include 15, and no longer just 10, States. Consequently, the emergence of more than a hundred independent states in less than a century would logically affect the profile of users of the ICJ's services, for three reasons. In the first place, because of the higher number of States in the international system, one could logically expect that the referral to the Court by the great powers would be diluted.

5.2.2. Focus on Territorial Disputes

Secondly, it is necessary to recall that a large number of independent States, still in their early stages of development, had to resolve problems that were not necessarily of interest to the permanent members of the UNSC. For example, unlike China, USA, France, UK and Russia, many newly created nations, especially in Africa, faced a series of disputes over their territorial boundaries. Paradoxically, E. Posner himself acknowledges that of the 105 cases analyzed by the ICJ up to 2004, 33 - corresponding to 31% of those - referred to territorial disputes, thereby constituting the number of cases more frequently resolved by the court [20].

5.2.3. The Effectiveness of the Right of Peoples to Self-determination

Third and lastly, it is not surprising that between 1985 and 2004, the great powers only appear as plaintiffs in only 13% of the actions but appear as defendants in almost 100% of the cases. From the moment that the right of peoples to self-determination, expressly provided in the founding treaty of the United Nations, no longer remained a dead letter, peoples of all parts of the world had the opportunity to begin to form their own states. Small countries, like Djibouti, have been able to take Court action against a powerful state, like France, in 2006, to seek a solution through the courts, for their otherwise insoluble problems [32]. Note that France, a permanent member of the UNSC, although not a signatory of the compulsory jurisdiction clause of the ICJ, voluntarily accepted the jurisdiction of the tribunal in this case, as in 2003, when it was accused by the Democratic Republic of the Congo, an African country which challenged its criminal law of universal jurisdiction [33]. It was the first time, since the adoption of Article 38, §5, of the Rules of Court in 1978, that a State thus accepted the invitation of another State to recognize the jurisdiction of the Court to entertain a case against it. From our point of view, this should be interpreted not as the decline, but on the contrary, as a clear signal of the success of the ICJ and of its capacity to adapt to the new geopolitical realities of the world, by conceding to the historically oppressed peoples and by situation of weakness an opportunity to confront incomparably stronger States.

This process has also been accompanied by the democratization of access to international justice. For example, in 1983, Burkina Faso complained to international justice against Mali over an unresolved border issue. In 1986, El Salvador sued Honduras over a maritime territorial boundary issue, and in 1994 Cameroon took legal action against Nigeria for a border matter as well [34]. Colonial issues that had plagued developing countries for decades or even centuries could now be settled by an international tribunal, where they would be resolved through a judicial process and no longer through war.

It is therefore not difficult to understand why the great powers have gradually lost their interest in the Court. From the moment that the tribunal ceased to be an organ mastered by the interests of States in a dominant position and became a body engaged in the solution of the most diverse questions raised by developing countries, the club of five lost little to little its interest in the use of the court. It is natural that the great powers like France and the United States are resistant to the new role of the Court, because the democratization of international justice causes a gradual lessening of the influence of the most powerful States, but this should be in the least contrary, in our opinion, approved.

Unlike the UN / CS, the ICJ has managed to adapt to the geopolitical transformations that took place during the second half of the twentieth century. Although China, the USA, France, the United Kingdom and Russia retain, it is true, a permanent seat in the ICJ, they do not have the power of veto as it still takes place within the UNSC. While a single country in a dominant or hegemonic position can stand in the way of the functioning of the UN, it will not be able to exercise the same control over the gears of the ICJ. As we have just seen, the decisions of the Court are taken by an absolute majority of the votes cast by its 15 judges, without any of them having the power of veto. Unable to control the ICJ in the same way they control the UNSC, some permanent members opted to block its path and proclaim an alleged rout of the institution.

5.3. Sovereignty V. ICJ

The final argument that could legitimize Brazil's resistance is its government's concern to preserve its sovereignty [35]. Indeed, this country, like some of its neighbors [36], is forging turbulent relations with international and regional jurisdictions. When the Inter-American Commission on Human Rights (IACHR) request in 2011 that Brazil adopt precautionary measures - the suspension of the licensing process for the Belo Monte Hydroelectric Plant project and stop any construction work from moving forward until the indigenous peoples affected by the dam were properly consulted, in fulfillment of its international obligations - [37], the Latin American country strongly protested by recalling its ambassador from the Organization of American States (OAS), by suspending the payment of its annual quota to the body, by no longer presenting a candidate to the election of the presidency of the IACHR and, finally, by taking the initiative to create a working group to suggest a reform of the international jurisdiction, with the aim of reducing its powers to question governments on violations of rights of man. These retrograde retaliatory measures by the Brazilian government provoked a reaction from intellectuals, human rights specialists and civil society, both national and international, who convinced it to re-establish its relations with the body in question [38].

Likewise, after four years of procrastination, Brazil finally resolved to sign and ratify the Rome Statute of 1998 which created the International Criminal Court (ICC) [39], a permanent universal tribunal competent to try individuals who have committed international crimes. However, the incorporation of one of the main international instruments for the defense of human rights into its national legal order does not mean a completely peaceful relationship with the international organization: in January 2015, the ICC decided to suspend the main Latin-American country for non-payment

of its contribution, which therefore prevents the State from voting, for example, in the choice of new judges, without mentioning the political embarrassment that this means [40].

What ultimately appears inconsistent in Brazil's position is that it refuses to be a member of the ICJ, while it is a member of other international jurisdictions which, potentially, are much more subversive on the issue of the direct interference in internal matters of the country, such as the IACHR or the ICC.

Finally, in favor of signing the compulsory jurisdiction clause of the ICJ, it is relevant to note that Brazil indirectly recognizes its jurisdiction, given that it is provided for as a means of resolving controversies in more than 260 bilateral conventions and multilateral organizations [19], many of which have been signed and ratified by Brazil, on themes as diverse as war, peace and terrorism, the protection of human rights, the fight against drug trafficking and copyright [41].

Putting aside the arguments of critics of the ICJ, let us now look at those in favor of the return of Brazil to the fold of the main international jurisdiction of the United Nations.

6. The ICJ and the Strengthening of the International Public Law

6.1. ICJ: A Wide and Universal Jurisdiction

Based on what has been discussed so far, it would be reckless to justify waiving the compulsory jurisdiction clause to an alleged defeat of the Court. In fact, the 70 years of activity of the Court symbolize the rise of international justice, together with the progressive development of public international law. After the fall of the Berlin Wall in 1989, the ICJ, according to Brichambaut e Dobelle [19], on the contrary, has recovered its prestige. His moral authority today is unmatched. Reading the decisions of the Court is a journey through the diplomatic history of the world. It has settled disputes relating to territorial disputes resulting from the decolonization of Africa; to the delimitation of fishing zones or airspace; to kidnappings or attacks; to the environment or to genocide.

Today, there are 17 trials awaiting trial or deliberation at The Hague Tribunal [42], which may not seem like much. “The fact that a relatively small number of international disputes are settled by justice or by arbitration, have underlined G. Distefano e G. P. Buzzini, in no way diminishes the importance of judicial or arbitral decisions for the purposes of identifying and clarifying the rules of international law. One might even be tempted to say that the impact of judicial and arbitration decisions is proportionate to their rarity” [15]. However, the fact remains that it is an unprecedented situation which contrasts with that of the 1970s-1980s, during which the Court was accused as much by the periphery countries of being "conservative" as by the Western countries which condemned its tendencies "Third-World", using a terminology of yesteryear. It is significant that the parties to the lawsuits come from all the regions of the globe, including Latin America. In addition, they aptly recall that the Court was involved in some of the most serious political and diplomatic crises of recent decades: armed conflicts between African countries in the Great Lakes region; between peoples of the former Yugoslavia in the 1990s; between Russia and Georgia (2008); between Russia and Ukraine in (2021) or between Iran and United States of America (2021). The ICJ is therefore a universal instrument to end a crisis, overcome an impasse or prevent a conflict, as pointed the last annual report of the ICJ:

> The pending contentious cases concern eight States from the Group of Asian and Pacific States, eight from the Group of Latin American and Caribbean States, six from the Group of African States, four from the Group of Eastern European States, and two from the Group of Western European and other States. The diverse geographical spread of cases is illustrative of the universal character of the jurisdiction of the United Nations’ principal judicial organ. Cases submitted to the Court involve a wide variety of subjects, such as territorial and maritime disputes; diplomatic missions and consular offices; human rights; international responsibility and compensation for harm; interpretation and application of international treaties and conventions; environmental protection, and air law. This diversity of subject matter illustrates the general character of the Court’s jurisdiction [43].

6.2. Litigation and Advisory Role of the ICJ

The decisions of the Court are binding on the parties to the dispute, final and not subject to appeal. Article 94 of the UN Charter provides that if one of the parties does not fulfill its obligations under a judgment rendered by the Court, the other may have recourse to the UNSC which has to its disposal many instruments to sanction and put pressure on the recalcitrant State. In practice, almost all decisions are respected by the parties. The doctrine identifies a single attempted referral to the UNSC, on the basis of Article 94, by Nicaragua, the day after the 1986 judgment, but the United States opposed the adoption of the ruling resolution. However, in general, there are few decisions whose execution has created difficulties. Recently, for example, the court in question put an end to a secular maritime territorial conflict, fruit of the war in the Pacific between Peru and Chile from 1879 to 1883. In its judgment of January 27, 2013, the Court drew up a new line of the maritime boundary in order to obtain a “fair result”, a solution accepted by both parties [44]. Another current example of the role of the Court in pacifying international relations is as follows: Japan finally obeyed, after nearly 30 years of violation of the International Convention for the Regulation of Whaling, to the injunction of the international tribunal, seized by Australia, to immediately stop its so-called Jarpa research program on cetaceans in the Antarctic Ocean [45]. Finally, on February 3, 2015, the main United Nations court ruled that neither Serbia nor Croatia committed genocide during the 1991-1995 war [46]. This decision, which ends a long and memorable legal battle between Zaghreb and Belgrade, did not have the fortune to please the Croatian government; nevertheless, the prime minister, Zoran Milanovic, declared "to accept it in a civilized

manner" [47].

Recently, on the 3 November of 2020, Judge Abdulqawi Ahmed Yusuf, President of the ICJ, addressed the UNGA on the occasion of the presentation of the Court's Annual Report for the period from 1 August 2019 to 31 July 2020 and pronounced a *satisfecit* to the only one of the six principal organs of the UN not based in New York: the Court "stands ready, more than ever before, to continue its efforts to contribute, within the bounds of its Statute, to the protection and advancement of the international rule of law and to the peaceful settlement of disputes among States". He pointed out that, during the period under review, "the Court's docket ha[d] remained full, with 15 contentious cases currently on its List, involving States from all regions of the world and touching on a wide range of issues". He indicated that, like other United Nations organs, in March 2020, the Court had "suddenly found itself having to deal with the restrictions arising from the COVID-19 pandemic", adding that the Court had "reacted very quickly to this exceptional situation" by adapting its working methods to the new circumstances [48]. Japan welcomed these recourses to the "legal wisdom" of the Court, with Mexico adding: if the role of the Court is "less visible in the media" than that of the Security Council, it is because its decisions are reasoned and fair, without leading to an escalation of tensions. The ICJ, reckoned up France, remains an "essential institution for peace and international legal order". It congratulated the Court, as did Spain, for adapting to the health crisis we are going through collectively, in order to move the pending proceedings forward [49].

Original member, entitled to appear before the Court, but who have not recognized the compulsory jurisdiction of it, Brazil added its voice to the praise addressed to the ICJ:

> Mr. JOSÉ LUIS FIALHO ROCHA (Brazil) declared that by encouraging dialogue in the common language of international law, the ICJ is an effective channel for preventive diplomacy and Cooperation. He commended the Court and its members for the efforts made in the face of an increasing caseload, despite all the restrictions resulting from the COVID-19 pandemic. He also praised the awareness-raising efforts of the Court, which thus contributes to the dissemination of international law. The representative welcomed, as good examples of effective outreach activities, internships, multimedia platforms, the use of social media and the Court's participation in events organized by universities. He applauded the efforts of the ICJ to promote the geographic and linguistic diversity of jurists through its Scholarship Program for students from all over the world.

Finally, the President assured the General Assembly that the Court "[stood] ready, more than ever before, to continue its efforts to contribute, within the bounds of its Statute, to the protection and advancement of the international rule of law and to the peaceful settlement of disputes among States". Noting a decline in the inclusion in recently adopted international instruments of clauses providing for recourse to the Court, he called on the General Assembly to "take once again a leadership role in advocating for the continued inclusion, particularly in multilateral treaties, of such compromissory clauses".

It is not legal theory that would deny the essential role of jurisprudence in the formation of law. The set of judgments and opinions of the ICJ constitute, according to the Egyptian professor of International Law and former international judge, Georges Abi-Saab, an extremely important tool for the construction, identification, and consolidation of international standards [50]. Theorists recognize that jurisprudence can also become a powerful engine for the evolution of the rules of law, which makes essential the presence of all the States of all the legal systems in the jurisdiction so that they can influence its decisions which will serve as *opinio juris* in matters of international law [15].

The exercise of the advisory competence of the ICJ is a perfect illustration of this phenomenon, since it also contributes considerably to the maintenance of international peace through the delivery of opinions on public international law [4]. These opinions help to clarify the rules of coexistence of the international system and contribute to the maintenance of peace. The famous Folke Bernadotte opinion, issued in 1948, granting international legal personality to the international organization, perfectly corroborates this point [51].

Through an advisory opinion like this one, the ICJ participates directly in the development of international law. A country like Brazil which claims to become an essential regional leader, which wants to act actively in all international forums, which participates in peacekeeping operations, which possesses coveted natural resources, which militates in favor of multilateralism, may continue to remain outside the main tribunal for settling international controversies? The diplomatic and political clashes between Brazil and Italy, which began with the decision of the South American government, in 2009, to grant political asylum to the former Italian terrorist Cesare Battisti, could they have been avoided if the ICJ had been asked to resolve the conflict of interpretation of the bilateral extradition convention? Brazilian recognition of the compulsory jurisdiction clause could signify a strong demonstration of the Brazilian commitment to the democratization of international justice, the peaceful solution of conflicts and the strengthening of public international law.

6.3. ICJ and Brazil: A Necessary Reconciliation

We invite Brasilia to join the last States that accepted the jurisdiction of the Court as compulsory, namely Greece in 2015, Equatorial Guinea, Netherlands, Pakistan and United Kingdom in 2017, Republic of Latvia and India in 2019 [52]. But we can't deny that the recognition of the clause accepting the optional compulsory jurisdiction provided in Article 36§2 of the ICJ Statute is not a priority of the current Brazilian government. Upsetting its Article 4 of the Constitution, the solution peaceful conflicts, the defense of peace and the cooperation of peoples for human progress don't appear anymore the principles that must govern the country in its international relations. The update of the National Defense

Police presented by the government of Jair Bolsonaro to Congress at the end of August 2020 sparked, for the first time since 1999, the alert about the possibility of using the Brazilian Armed Forces in possible conflicts in the "strategic environment of Brazil", which, of according to the Ministry of Defense, headed by General Fernando Azevedo e Silva, it covers South America, Antarctica and the Atlantic Ocean to the west coast of Africa. Since the rise of Temer and Jair Bolsonaro's governments, hostilities have begun in the bilateral relationship with Venezuela. First, the president began to recognize the ambassador appointed by deputy Juan Guaidó, as a legitimate Venezuelan authority in Brazil and organized military exercises by the Brazilian troops in the Amazon Region, in September 2020 [53]. He then supported the activation of the Inter-American Treaty of Reciprocal Assistance (TIAR) firmed in 1947 [54] against Venezuela [55], suggesting that the country would be a regional threat. In March of that year, the government decided to close all diplomatic offices in Venezuela and tried to expel Venezuelan officials, appointed by President Nicolás Maduro. This attitude towards a neighboring country, a long-standing ally and economic partner "can be opening a door to justify participating in a military intervention under the pretext that we are helping to resolve a conflict, which is totally contrary to the Brazilian Constitution", said diplomat Celso Amorim, who was Minister of Foreign Affairs during the governments of Itamar Franco and Luiz Inácio Lula da Silva and Minister of Defense under Dilma Rousseff [56]. But we are convinced that Brazil will return soon to its diplomatic traditions and will submit to the compulsory jurisdiction of the ICJ.

7. Conclusion

The International Court of Justice, in 70 years of practice, has proven its worth. Despite this fact, Brazil continues to refuse, since 1948, to recognize the compulsory jurisdiction clause of the Court.

There are many contradictions that overwhelm the Brazilian position on the issue. The country is reluctant to accept the clause which was originally designed by its own delegation during the drafting of the Statute. Moreover, what is the point of a democratic constitution, highly receptive to international law, if the country sticks to its positions of not recognizing the contentious jurisdiction of the Court on the pretext that it prefers to conduct its conflicts through diplomatic channels? The latter is not, moreover, exclusive of the former.

In doing so, Brazil is following the anachronistic example of France and the USA. Formerly signatories of the compulsory jurisdiction clause, the two countries decided to denounce it. Therefore, it is essential that the South American giant does not unite with the chorus of voices that incessantly attack the Court. Because of its position of defending international law, even in the presence of the geopolitical interests of powerful states, the ICJ has made enemies throughout these years. Voices from all sides rebelled against the Court, the victim of virulent attacks from several fronts that could empty the institution and undermine its activity.

However, the arguments used to justify waiving the compulsory jurisdiction clause lack merit. As for the alleged impartiality of the Court, we have seen that the ICJ has many mechanisms to overcome the individual partiality that certain judges show, possibly, towards their States of origin. As for the alleged decline due to the gradual detachment of the great powers, this thesis only holds if we ignore the process of decolonization that took place after the Second World War.

As for Brazil, while presenting itself both as a country that would be a regional power on the rise, which leaded a peace mission in Haiti and claiming a permanent seat on the UN Security Council, it adopts a reluctant attitude towards the most important current international court, which indicates an inconsistent attitude with regard to its position vis-à-vis other international jurisdictions. However, it is essential that this country reconciles with the ICJ and deposits its instrument of accession with the Secretary-General of the United Nations.

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