Leiden Journal of International Law (2014), 27, pp. 309–330
 doi:10.1017/S0922156514000053

Innate Cosmopolitan Dialectics at the ICJ: Changing Perceptions of International Community, the Role of the Court, and the Legacy of Judge Álvarez

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Abstract

Traditional conceptions of the international community have come under stress in a time of expanding international public order. Various initiatives purport to observe a reconceived international community from a variety of perspectives: transnational, administrative, pluralist, constitutional, etc. The perspectives on this changing dynamic evidenced by the International Court of Justice, however, have been largely neglected. But as the principal judicial institution tasked with representing the diversity of legal perspectives in the world, the Court represents an important forum by which to understand the changing appreciation of international community. While decisions of the Court have been restrained, an active discourse has been carried forward among individual judges. I look at part of that discourse, organized around one perspective, which I refer to as innate cosmopolitanism, introduced to the forum of the ICJ by the opinions of Judge Álvarez. The innate cosmopolitan perspective reflects an idea of the international community as an autonomous collectivity, enjoying a will, interests, or ends of its own, independent of constituent states. The application of that perspective under international law is put most to test in matters of international security, in particular where the interest in a discrete, global public order runs up against the right to self-defence vested in states. The innate cosmopolitan perspective has not, in these cases, achieved a controlling position – but, over time, it has been part of a dialectical process showing a change in the appreciation of international community before the Court, and a changing perception from the bench of the role of the Court in that community.

Key words

cosmopolitanism; dialectic; discourse; ICJ; international community; international security; Judge Álvarez; minority opinions

1. Introduction

Alejandro Álvarez has been a subject of renewed attention recently, principally as a figure of historical interest.[1] Less attention has been paid to the ongoing doctrinal significance of his work as scholar and judge. His individual opinions as a judge at the International Court of Justice are not sufficiently recognized for their contributions

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1 See, e.g., volume 19 of the *Leiden Journal of International Law* (2006), dedicated to the work of Judge Álvarez.

to a discourse from the bench of the Court that explores alternative perspectives on the shape and substance of the international community, as well as the role of the Court in that community. I propose to look closely at selected aspects of that discourse, paying particular attention to elements reflecting the legacy of Judge Álvarez's opinions, which are perhaps more relevant now than ever. International law lately enjoys a wide-ranging debate about developments in the international community and a growing public order, including arguments from constitutionalism, pluralism, global administrative law, and transnational law, etc. At a time of attention to a growing international public order, it is worth also looking to the forum of the Court for the expression from its bench of competing views as to how international community and international public order may be perceived under international law.

In inquiring into the legacy of Judge Álvarez, I propose to examine one perspective in particular that has a long but unappreciated history in international law, first vigorously taken up at the Court by Judge Álvarez, and since revisited by the Court and judges of the Court in a dialectical engagement. I refer to that perspective as innate cosmopolitanism. It entails a vision of the world as a social and political whole, with interests, a will, or ends of its own, capable of sustaining universal norms and founding the basic authority of international law. As taken up by Judge Álvarez and later judges of the Court, it also entails a special role and responsibility for the Court itself, as a sort of custodian for a world collective, with a policy mandate in addition to its adjudicatory function.

Judge Álvarez's opinions made little headway during his tenure at the ICJ. In 1964, Edvard Hambro refers to Judge Álvarez as a prophet and a propagandist, but with emphasis on the latter – the former due more to the singularity of his voice from the bench than to any substantial actualization.[2] When Katharina Zobel refers in passing to prophetic aspects of Judge Álvarez's work in 2006, however, the story is different.[3] By the end of the twentieth century, Álvarez's opinions had been cited as authority by other judges of the Court, and, in its judgments and in the minority opinions of individual judges, the Court has been a forum for a reconsideration of the innate cosmopolitan perspective that he espoused.

Among the Court's judgments and opinions, a line of cases commencing in the 1980s and pertaining to international security and the use of force are particularly salient, including rulings such as *Nicaragua* and *Oil Platforms*. In some of these cases, the early, separate opinions of Judge Álvarez have been taken up as precedent by still other individual judges in their separate opinions; in one or two, his opinions hold an unacknowledged explanatory power that extends to the decisions of the Court. For the most part, however, the Court itself has eschewed the innate cosmopolitan perspective. Certainly the Court has never formally adopted it, and lately the Court appears particularly reluctant to engage it. Nonetheless, that reluctance

2 E. Hambro, 'Opinions Individuelles et Dissidentes des Membres de la Cour Internationale de Justice', (1964) 34 *Nordisk Tidsskrift for International Ret* 181, at 192.

3 K. Zobel, 'Judge Alejandro Álvarez at the International Court of Justice (1946–1955): His Theory of a 'New International Law' and Judicial Lawmaking', (2006) 19 LJIL 1017, at 1039.

https://doi.org/10.1017/S0922156514000053 Published online by Cambridge University Press

comes paired with renewed embrace of aspects of the innate cosmopolitan perspective in the separate opinions of several judges. The process, as noted, is a dialectical one, evidencing a changing appreciation from the bench of the Court of its own role and the nature of the international community it serves.

Thus, Judge Álvarez's work from the bench is a jumping-off point for the analysis here of a dialectic carried forward among the judges of the Court, who continue to develop alternative perspectives on the international community by and for which the Court serves. In addition, his opinions help to historicize and contextualize relatively recent arguments from the bench, suggesting an expansion of the Court's jurisdiction and authority – or a rejection of the same – over matters including questions of international security and the use of force. Whereas Judge Álvarez elaborated on a single, comprehensive vision across all of his opinions, subsequent arguments have largely been raised on an ad hoc, case-by-case basis. Altogether, however, an unconventional but noteworthy framework emerges, still evolving, by which to comprehend novel exercises of – or arguments for and against – the jurisdiction of the Court over controversial questions including the use of force.

2. Methodology

I give, in this inquiry, as much and more attention to individual opinions as to the decisions of the Court. I do so for several reasons. Minority opinions can serve to explain or shed light on aspects of reasoning that may otherwise remain opaque in majority opinions.[4] They are key to allowing the Court to satisfy as a forum its mandate to be representative of the principal legal systems of the world.[5] Altogether, minority opinions serve a dialectical purpose that enhances the Court's contribution to and development of international law.[6] Ijaz Hussain, whose study of minority opinions at the World Court remains the most comprehensive treatment of their content and function over time, describes the dialectic in classically Hegelian terms: constant progression towards a 'new synthesis', whereby 'the majority opinions of the Court, drawing inspiration from the new synthesis, would become the thesis, while individual opinions, especially dissenting opinions representing a more progressive and responsive vision of international law, would represent the antithesis' leading again to 'a still more perfect synthesis' and the continuation of the process'.[7]

In language more typical of classical international law, Shabtai Rosenne describes similar functions for minority opinions.[8] Additionally, the individual opinion 'may have a value of its own as a counterbalance to the majority opinion', or, going further, 'the individual opinion may in the course of time come to be seen by enlightened and informed opinion as expressive of better law'.[9]

4 I. Hussain, *Dissenting and Separate Opinions at the World Court* (1984), 3.
5 Statute of the International Court of Justice, Art. 9. See Hussain, *supra* note 4, at 2–3.
6 See Hussain, *supra* note 4, at 7, 9, 264–5.
7 Ibid., at 264–6.
8 S. Rosenne, *The World Court: What it is and How it Works* (1995), 138–9.
9 Ibid.

https://doi.org/10.1017/S0922156514000053 Published online by Cambridge University Press

I do not, however, intend to suggest that the minority opinions canvassed below represent the real position of the Court, or controlling law. Rather, I raise them as examples of competing perspectives on the shape and substance of the international community, as conceived before the bench of the world's primary tribunal for the adjudication of international law. Consequently, the function of the ICJ has two roles in this inquiry, one methodological, and one substantive. Methodologically, I treat the Court as a special forum, one purpose of which is to bring together and occasion dialogue over different perspectives on international law and the international system.

Substantively, the particular perspective that I explore in some depth, innate cosmopolitanism, tends to be joined to a particular sense of the judicial function of the ICJ, one that entails a proactive, progressive character. That sense is distinct from the judicial function more commonly attributed to the Court, as an institution of limited powers, tracking traditional functions of adjudicatory or arbitral bodies.[10] As touched on above and revisited in greater depth below, the function espoused according to innate cosmopolitanism would vest in the Court a broad, custodial role, with a considerable policy-making potential. The Court becomes the representative and advocate of international society, not merely an adjudicatory body with powers limited according to consent, the case at hand, and the constraints of black letter international law.

Because I am looking at minority opinions alongside opinions of the Court for their contribution to a discourse exploring alternative perspectives on international community, I do not presume any one definition of what that community entails. For a starting point, however, the innate cosmopolitan perspective on international community will envision something thicker, so to speak, more comprehensive and consolidated, than a traditional idea of international community grounded in relations among states.

A full exploration of alternative perspectives on international community at the World Court, in all its manifestations, would exceed the bounds of this article.[11] Even a complete exploration of the innate cosmopolitan perspective exceeds the bounds of one article. Environmental controversies, and other controversies related to questions of global commons, are well suited to cosmopolitan argumentation, and also ripe for exploration. I focus here on questions of international security and the use of force for the special tension in imposing cosmopolitan norms against the central power vested in states, namely, the ability to use force, especially in cases of alleged self-defence. As the *Nuclear Weapons* Advisory Opinion makes clear, the prerogative of states to use force at least in the interest of survival remains the seemingly ineradicable bedrock of subjective right in the international system. Nonetheless, as even that case will demonstrate, the innate cosmopolitan perspective

10 See G. Hernández, 'Impartiality and Bias at the International Court of Justice', (2012) 1 *Cambridge Journal of International and Comparative Law* 183; L. Gross, 'Limitations Upon the Judicial Function', (1964) 58 AJIL 415.

11 It bears noting as well that I am also limiting the analysis to opinions of the ICJ and judges of the Court. I do not include potentially interesting arguments made by advocates before the Court or outside the Court.

https://doi.org/10.1017/S0922156514000053 Published online by Cambridge University Press

has contributed to the changing appreciation of that system over time, within the forum of the World Court.

Below, I will trace the relevant substance and bounds of innate cosmopolitanism, and offer a relatively close reading of Judge Álvarez's series of opinions introducing the innate cosmopolitan perspective into the discourse of the renewed World Court, with reference as well to his prior scholarship, the substance of which he drew on as judge. Thereafter, I will proceed to subsequent engagement in the Court's discourse with that perspective, although limited to matters of international security and the use of force from the *Nicaragua* case forward. Thereafter, I will offer a brief critique of aspects of the innate cosmopolitan perspective as it has developed before the Court, before returning, in conclusion, to some implications of the dialectical process as a whole.

3. Innate cosmopolitanism in brief

The innate cosmopolitan perspective represents a vision of the world as a single social or political phenomenon, with interests, a will, or ends of its own, capable of establishing authority for universal norms under international law. It is not identical with the ethical doctrine of liberal cosmopolitanism, nor with the formal aspiration to a cosmopolitan world constitution. Rather, it reflects what has been a central school of thought in modern international law, but one that has been overlooked by comparison with these other schools of cosmopolitanism. A basic and distinguishing characteristic of this other cosmopolitanism is the perception of a deep and pre-legal unity in world relations, capable of transcending subjective bounds such as those of sovereign states. Its adherents purport to recognize a fundamental condition of collectivity in the world, encompassing all of humanity at any given time.

I have described innate cosmopolitanism in greater depth elsewhere: its roots lie principally with the Spanish School of Vitoria, Suarez, and Grotius; it was resurgent with the work of James Brown Scott, among others, and is discernible throughout the work of diverse figures of the early twentieth century, from mainstream figures such as Hersch Lauterpacht, to others such as Salvador de Madariaga; its legacy can be observed in schools of thought borrowing from the sociological tradition in international law, such as the New Haven School, but also recent schools of thought relying on social constructivism and a global inter-subjective phenomenon.[12] The perspective shared by these figures would envision or discern an underlying and comprehensive collectivity, which represents a value in itself, in keeping with the basic distinction from both liberal cosmopolitanism and cosmopolitan constitutional theory. Innate cosmopolitanism proceeds from the discrete normative value of the world as a whole, in opposition to the normative individualism from which liberal cosmopolitanism proceeds. Whereas liberal cosmopolitanism emphasizes individuals in the world, innate cosmopolitanism emphasizes the individuality of the world. But, as noted, the innate cosmopolitan collective is perceived to precede

12 G. Gordon, 'The Innate Cosmopolitan Tradition of International Law', (2013) 2(4) *Cambridge Journal of International and Comparative Law* 906 (forthcoming).

https://doi.org/10.1017/S0922156514000053 Published online by Cambridge University Press

any formal expression as a matter of law. In a sense, it is proto-constitutional in nature: the world collectivity is constituted, independent of any formal legal constitution. As a proto-constitutional phenomenon, the world collectivity may support constitutional possibilities, and may overlap with constitutional theory, but is not identical with either. With respect to the discourse of the Court in the area of the use of force, this will be seen to underlie a sense of responsibility, in the perspective of select judges, for the public order of a global social or political phenomenon that is not identical with any consolidated formal expression under international law, the Charter included.

4. The opinions of Judge Álvarez

An issue bears noting at the outset. Judge Álvarez is perhaps best known for his theory of regional international law, and particularly American international law. The development of his ideas in the jurisprudence of the Court, however, principally reflects cosmopolitan and universalistic normative premises. Ultimately, there is no deep contradiction between Álvarez's theory of regional international law and the emphasis he puts on universal authority available to the World Court: Álvarez's regionalism was not intended to be to the exclusion of universalism; rather, the two are closely bound. Moreover, appreciating the complementary relationship between universal and regional norms is critical to understanding the fuller discourse that begins with him in the forum of the Court.

In his jurisprudence, Judge Álvarez conceived of a universal international law that is identical with its capacity for diverse regional expression. International law thereby attains to a universal law of world public order, capable of properly sustaining particular normative associations in an interdependent world. Liliana Obregón writes that 'Alejandro Álvarez was promoting a socially conscious and practical universal international law which took into account regional differences'.[13] He attempted, as a matter of legal doctrine, what Jens Bartelson has recently proposed to do as a matter of political theory, namely, to develop

> a theory of identity that makes it possible to regard the universal and the particular as mutually implicating rather than as fundamentally opposed – a theory of identity that also makes it possible to regard human beings and the communities that they inhabit as embedded in a more comprehensive human community than that commonly exemplified by the nation.[14]

Each would reconcile universal authority with regional normative associations on the basis of a greater social phenomenon.

To recognize interdependence on the global level, following the perspective of Judge Álvarez, requires recognizing the same phenomenon, with even stronger attachments, at the regional and local levels. But, while local and regional attachments may be stronger than world attachments, they do not allow states or regional

13 L. Obregón, 'Noted for Dissent: The International Life of Alejandro Álvarez', (2006) 19 LJIL 983, at 1015.
14 J. Bartelson, *Visions of World Community* (2009), 9.

https://doi.org/10.1017/S0922156514000053 Published online by Cambridge University Press

organizations to supersede the world unit in scope or importance. The particular and the universal do not exist in a situation of competition.[15] Rather, local norms and universal norms are twinned expressions of the one social phenomenon. Local and regional attachments will be stronger in terms of immediacy, but the world attachment is at once the broadest expression of interdependence, and also represents its most fundamental expression. The world as a whole represents the primary level of order, but not the most immediate. Accordingly, local and regional collectives enjoy normative status as part of the public order arising out of the world social phenomenon, and they are all co-constitutive of one another. The idea that emerges is that of a world condition of social interdependence giving rise to new international law, which has been inaugurated by, but is not limited to, the Charter.[16] It contemplates individuals, states, and regional organizations alike as subjects within an overarching normative community. The innate cosmopolitan perspective introduced into the discourse of the Court by Judge Álvarez holds that the authority of the ICJ flows in large measure from this fundamental condition of interconnectedness.

Innate cosmopolitanism comprehends the collective phenomenon in top-down terms: the world as a whole is the starting point for analysis. Consider Judge Álvarez's language in his dissent from the *International Status of South-West Africa* Advisory Opinion: 'organized international society ... consists not only of States, groups and even associations of States, but also of other international entities. It has an existence and a personality distinct from those of its members. It has its own purposes.'[17]

This perspective stands in opposition to the bottom-up approach of liberal cosmopolitanism, founded in normative individualism, according to which the collective is understood by reference to all of its constituent members individually. Significantly, however, the top-down approach is founded on an appreciation of historical diversity, and the world collective is taken to be a historical phenomenon: its norms must be discovered or discerned by means of observation.[18]

The emphasis on observation establishes an alternate means of norm-ascertainment in the international system. Roughly sociological observation, following the innate cosmopolitan school of thought, allows for the discovery of world norms where adequate political institutions are lacking. Accordingly, the perspective on international law advocated by Judge Álvarez defies orthodox constraints of positive international law, traditionally conceived.[19] Rather, Álvarez treated positive international law as something of a misnomer, and held his method to constitute positive science.[20] The validity of new legal norms would turn on their correspondence with the reality of the world as a whole, understood according to the

15 A. Álvarez, *Le Droit International Américain: Son Fondement – Sa Nature d'après l'Histoire Diplomatique des états du Nouveau Monde et Leur Vie Politique et Economique* (1910), 264.

16 *Competence of Assembly Regarding Admission to the United Nations*, Advisory Opinion, Judgment of 3 March 1950, [1950] ICJ Rep. 4, at 13 (Judge Álvarez, Dissenting Opinion).

17 *International Status of South-West Africa*, Advisory Opinion, Judgment of 11 July 1950, [1950] ICJ Rep. 128, at 175 (Judge Álvarez, Dissenting Opinion) (the last sentence, in the French, is 'elle a des fins qui lui sont propres').

18 A. Álvarez, 'The Reconstruction and Codification of International Law', (1947) 1 *International Law Quarterly* 469, at 479.

19 *International Status of South-West Africa* (Judge Álvarez, Dissenting Opinion), *supra* note 17, at 177.

20 Ibid., at 176.

https://doi.org/10.1017/S0922156514000053 Published online by Cambridge University Press

interactions of persons in a situation of comprehensive interconnectedness. Thus, the rules of decision available to and binding on the Court would not be limited to the rules arising out of the traditional, formal sources of international law, which have not sufficiently allowed for the full range of norms that are manifest in world collectivity as a matter of fact.[21] Notably, however, in his reliance on observation, Judge Álvarez is ambiguous as to what the announcement of international norms entails: the court or legislator tasked with articulating international legal norms sometimes appears to be responsible for creating those norms, sometimes appears merely to observe and describe them.[22]

In the broad scope of the life of the world from which new international legal norms will be observed or created, Judge Álvarez proposed to focus on psychological life in particular, suggesting that the psychological life of the world unit forms the normative bedrock of world law.[23] Moreover, he apparently assigns a unique psychology to the world social phenomenon: 'The psychological character of the law of nations, itself a consequence of the psychological character of international life, is apparent particularly in the origin and basis' of new international law.[24] Assigning the world social phenomenon a unique psychology reinforces the autonomy of the world unit, by making it distinct from the subjective psychologies of the individuals it comprises. In keeping with its autonomy, the world unit is also conceived as capable of achieving its own subjective condition.

The appeal to psychology also undergirds the phenomena to which Judge Álvarez attributes the legislative force of the innate cosmopolitan collective, which ultimately vests in the World Court for want of a capable world legislature, such as world public opinion and world juridical conscience.[25] World public opinion or juridical conscience, perceived as a sociological fact, takes on a concrete character capable of serving as grounds for law-making or interpretation.[26] Moreover, under a regime founded in world conscience or public opinion, 'all law derives from the life of the community and is developed to the extent that community life requires'.[27] Both terms, conscience and public opinion, remain touchstones in the relevant discourse of the Court.

In sum, investigation of the world is held to yield universal norms where the negotiated system of rules among equal and independent states fails to provide for an adequately comprehensive normative system. Moreover, subjective political conflict would be suppressed by roughly sociological investigation of social phenomena.

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21 See, e.g., *Anglo-Iranian Oil Co.* case, Jurisdiction, Judgment of 22 July 1952, [1952] ICJ Rep. 93, at 125 (Judge Álvarez, Dissenting Opinion).

22 Katharina Zobel also notes this ambiguity: 'Judge Álvarez's concept of the role of the Court did not become very clear here, since he maintained on the one hand that the Court "creates the law; it creates it by modifying classical law", but then said in the same sentence that it only declared what was the law.' Zobel, *supra* note 3, at 1032.

23 Álvarez, *supra* note 18, at 473.

24 Ibid., at 476.

25 A. Álvarez, 'New Conception and New Bases of Legal Philosophy', (1918) 13 *University of Illinois Law Review* 167, at 180.

26 Ibid., at 181.

27 Álvarez, *supra* note 18, at 479.

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Thus Judge Álvarez proposed in place of the subjective politics of states a new politics of innate cosmopolitanism, to be represented and practised in the first instance by the ICJ.[28] To that end, Judge Álvarez held international law to be no longer divisible from politics, as it once appeared to be.[29] In this changed normative environment, the Court would bear a primary responsibility over law and politics together. Strictly political questions would remain outside of the competence of the Court, but questions of law will entail questions of politics, and resolution of the former would entail authority over the latter.[30] Thus the distinction between politics and law is collapsed, empowering the Court to enact policy in the interests of the world.[31]

Accordingly, Judge Álvarez established a role for the ICJ as chief custodian of world norms, with a responsibility for their development.[32] The normative changes and the new authority of the Court are inseparable facets of the innate cosmopolitan order perceived by Judge Álvarez. Consequently, he used his series of separate opinions to demonstrate how the Court ought to have decided the cases before it, not by reference to the narrow constraints of available positive law, but by reference to a broad spectrum of norms characterizing conditions of interdependence in an autonomous world collective, for which the ICJ was responsible.[33] In sum, the Court's unique competence with respect to international law becomes identical with a unique responsibility for world policy.

The contemporaneous reaction to the perspective Judge Álvarez took from the bench was largely skeptical. A review of his opinions in the American Journal of International Law in 1958 found 'Judge Álvarez has built a house of cards', and dismissed him for being 'an idealist masquerading as a realist'.[34] Over time, however, his perspective has found more purchase among other judges at the Court.

5. Subsequent developments

I recommence with *Nicaragua*, in which the Court, for the first time since the *Corfu Channel* case, confronted the resort to force squarely. In the case, the Court exercised authority over the underlying use of force despite weakness in the conventional grounding of the claim; the Charter was found inapplicable, and the Court grounded its ruling in an argument from customary law.[35] As far as a claim from customary law, however, the Court had reason to buttress its reasoning in novel ways, including

28 *Admission of a State to the United Nations (Charter, Art. 4)*, Advisory Opinion, Judgment of 28 May 1948, [1948] ICJ Rep. 57, at 70 (Judge Álvarez, Individual Opinion).
29 Ibid., at 69.
30 Ibid.
31 *Corfu Channel* case, Merits, Judgment of 9 April 1949, [1949] ICJ Rep. 4, at 41 (Judge Álvarez, Individual Opinion).
32 *Admission of a State to the United Nations (Charter, Art. 4)* (Judge Álvarez, Individual Opinion), *supra* note 28, at 67.
33 *Competence of Assembly Regarding Admission to the United Nations* (Judge Álvarez, Dissenting Opinion), *supra* note 16, at 13.
34 W. Samore, 'The New International Law of Alejandro Alvarez', (1958) 52 AJIL 41.
35 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment of 27 June 1986, [1986] ICJ Rep. 14, at 38, 100.

https://doi.org/10.1017/S0922156514000053 Published online by Cambridge University Press

an appeal to 'fundamental principle'.[36] The Court leveraged the appeal to principle to support customary law where other indices of customary law might not have sufficed. The Court's invocation of fundamental principle to help establish jurisdiction over the international use of force was remarkable insofar as even relatively uncontroversial questions concerning the use of force previously defied the Court's treatment (the *Fisheries Jurisdiction* case between the UK and Iceland, resolved before the Court in 1973, is illustrative).[37] But despite the historical significance of its ruling, the Court's opinion in *Nicaragua* did not squarely address the question of its role in the identification and application of fundamental principle. The separate opinions and dissents, by contrast, debate the mission and mandate of the Court, together with the powers available to it.

The separate opinion of Judge Singh, for example, understood the mandate of the Court in terms of

> a major opportunity to state the law so as to serve the best interests of the community. The Court as the principal judicial organ of the United Nations has to promote peace, and cannot refrain from moving in that direction.[38]

Thereby, Judge Singh suggested a special responsibility on the part of the Court to promote the 'best interests' of the international community, which would appear to exceed an adjudicatory mandate limited to those rules consented to between the parties before the Court. The community takes on a discrete identity and role of its own, capable of guiding the Court's judgment beyond even the rules available to the Court by consent of the parties before it.

Judge Lachs posited a different role for the Court in his separate opinion: 'The Court's primary task is to ascertain the law, and to leave no doubt as to its meaning.'[39] The Court's task arises from the reality that 'the world we live in is one where certain notions, though part of the vocabulary of law, continue to be controlled by subjective evaluations'.[40] Judge Lachs stops shy of the policy potential suggested by the opinion of Judge Singh, but for both, the authority of the Court remains paramount over the subjective interests and claims of the parties that may appear before it.

Consider, by contrast, the dissenting opinion of Judge Oda, who suggested, in keeping with the nature of voluntarily-accepted jurisdiction, that the dispute before the Court in *Nicaragua* was not necessarily a legal dispute within the meaning of Article 36(b) of the ICJ Statute. Rather, Judge Oda acknowledged the argument by the US that the dispute was 'not susceptible of decision by the application of the principles of law – or, in other words, that the sense of "legal dispute" had not evolved so far as to embrace the subject-matter of the application'.[41] International law, Judge

36 Ibid., at 100–1 (citation omitted).
37 *Fisheries Jurisdiction (United Kingdom v. Iceland)*, Jurisdiction of the Court, Judgment of 2 Feb 1973, [1973] ICJ Rep. 3.
38 See *supra*, note 35, at 153 (Judge Singh, Separate Opinion).
39 Ibid., at 168 (Judge Lachs, Separate Opinion).
40 Ibid.
41 Ibid., at 236 (Judge Oda, Dissenting Opinion).

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Oda suggested, could not cure the subjective dispute before the Court; there was no objective ground for resolution.[42] Against Judge Oda's dissent may be seen the relative allowance for the innate cosmopolitan perspective in the Court's judgment, especially according to the arguments of Judges Lachs and Singh.

Another touchstone case in the discourse of the Court pertaining to innate cosmopolitanism is *Threat or Use of Nuclear Weapons* Advisory Opinion. That case offered the Court the occasion for a relatively thorough consideration of innate cosmopolitan terms and principles. In the end, the Court's awkward negative resolution of the conflict between a common humanitarian interest and an individual right to survival vested in the sovereign state underscored a deep normative ambivalence. The Court affirmed an objective value beyond the will of states in otherwise 'intransgressible' humanitarian norms;[43] but in nonetheless acknowledging a countervailing right to survival among states, the Court recognized and was constrained by an inherited normative foundation in the sovereign state as the ultimate unit of value in a subjective international system.[44] The subjective interests of sovereign states continue to check the public interests of the world as a whole, rendering the question of nuclear weapons effectively non-justiciable – not unlike the ruling proposed by Judge Oda in his dissent in *Nicaragua*.

Select separate opinions, however, exhibit in places the innate cosmopolitan perspective. In his declaration, Judge Bedjaoui (then president of the Court) insisted that the balance of the Court's judgment does not tip in favour of a potential use of nuclear weapons; he made this argument in vividly cosmopolitan language, including a psychological assessment of the human condition, not unlike Judge Álvarez's description of a world psychology with normative repercussions. Moreover, in his treatment of what the law says, Judge Bedjaoui stressed the changed circumstances of international conduct in a globalized world, diminished the importance of sovereignty, and sought to minimize the contemporary import of the classic statement of sovereign right in the *Lotus* case.[45] In doing so, he touched on a number of familiar ideas and principles, and took them farther, including an observation that the international community, having evolved over time, had become 'subjectivized', an autonomous political phenomenon capable of asserting discrete interests and will against any one or several states.[46] The result is 'an objective conception of international law' drawn from the phenomenon of the collective whole.[47]

Judge Shahabuddeen, in his dissent, made express reference to Judge Álvarez's opinions in the *Corfu Channel* and *Conditions of Admission* cases,[48] and found credence for positions he took there in the work of other prominent jurists.[49] Judge Shahabuddeen affirmed as well an undifferentiated world 'public conscience',

42 Ibid., at 238.
43 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, [1996] ICJ Rep. 226, at 257.
44 Ibid., at 263.
45 Ibid., at 270–1.
46 Ibid., at 271.
47 Ibid.
48 See *supra*, note 43, at 394, 407 (Judge Shahabuddeen, Dissenting Opinion).
49 Ibid., at 394–5.

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borrowed from the Martens Clause, as a global presumption by which to measure the particular will of states.[50] His opinion would have the positive rules and standards of international law understood in conformity with the public conscience of the world, barring express contradiction or exception.

Notably, following Judge Shahabuddeen's opinion, the state apparently remains the primary law-making entity in the international system, despite the elevation of innate cosmopolitan terms. The expression of international law by states, however, would be presumed to conform with the interests and will associated with the public conscience of the world, barring express conflict. By this line of reasoning, the innate cosmopolitan perspective imposes a constraint on the law-making prerogative of states, in the form of a principle of interpretation by which the Court would be able to give effect to the normativity of the world collectivity. In sum, state will is retained in its foundational role, but subjugated to the will of the world public, such that the unitary, public conscience of the world – as comprehended by the Court – may dictate how to interpret the will of states.

Judge Ranjeva shared aspects of Judge Shahabuddeen's method: orthodox, positive law tenets of international law are not overthrown; rather, they are constrained and made subject to a different normative mandate. Judge Ranjeva identified those constraints with reference to a 'minimum of ethical requirements' (*d'exigences éthiques*) expressive of the values of 'the members of the international community as a whole', representative of 'the great issues of mankind' (*les grandes causes de l'humanité*), undivided.[51] In doing so, he adopts the perspective of a world collective coextensive with an undivided humanity, and attributes to it moral interests capable of effective normative authority under international law. He would affirm an authority vested in the Court to announce law conforming to the ethical interests of the world collective, even absent effective positive law or traditional customary law expression by states in their individual capacities.[52]

The final opinion from the *Nuclear Weapons* case to exhibit, in parts, an innate cosmopolitan perspective, is the dissent of Judge Weeramantry. Like Judges Shahabuddeen and Ranjeva, he purported to remain within the *lex lata*,[53] (echoing as well as the insistence of Judge Álvarez that his new international law was good law, rather than anything more speculative). Judge Weeramantry's opinion would expand the body of international law by reference to the aims of the Charter captured in its Preamble, although the Preamble contains no binding articles or terms, and thereby would have the collective will of the peoples of the world take on a normative authority. His language demonstrates a relatively straightforward argument from the innate cosmopolitan perspective:

> The Charter's very first words are 'We, the peoples of the United Nations' – thereby showing that all that ensues is the will of the peoples of the world. Their collective will and desire is the very source of the United Nations Charter and that truth should

50 Ibid., at 403.
51 See *supra*, note 43, at 296 (Judge Ranjeva, Separate Opinion).
52 Ibid., at 297.
53 Ibid., at 439–40 (Judge Weeramantry, Dissenting Opinion).

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> never be permitted to recede from view. In the matter before the Court, the peoples of the world have a vital interest, and global public opinion has an important influence on the development of the principles of public international law.[54]

By contrast, arriving at a different conclusion about the contents and means of ascertaining the *lex lata* of international law, Judge Guillaume rejected anything beyond the position that '[i]nternational law rests on the principle of the sovereignty of States and thus originates from their consent'.[55] The court and judges are empowered solely according to the traditional terms of state consent in a subjective international system. Accordingly, Judge Guillaume rejects the turn to policy and law-making authority that is bound up with the custodial role suggested by the innate cosmopolitan perspective.[56] Judge Schwebel echoed Judge Guillaume's sentiment, identifying an 'antinomy between practice and principle', and finding it therefore 'the more important not to confuse the international law we have with the international law we need'.[57]

Against the ambivalence of the *Nuclear Weapons* case, the next case of interest, *Oil Platforms*, is noteworthy for the Court's unusual and even proactive procedure: first rejecting the defence, and then rejecting the complaint. A meritless complaint does not ordinarily entail a defence. In passing judgment on an unnecessary defence, the Court exceeds a narrow mandate for dispute resolution. Rather, the Court's unnecessary ruling demonstrates what might be called juridical opportunism, recalling Judge Singh's opinion in favour of the Court's seizing a 'major opportunity to state the law so as to serve the best interests of the community'.[58] Moreover, the Court acknowledged its interest, on behalf of the international community, in addressing 'important' questions of the use of force and self-defence.[59]

Judge Higgins, in her dissent, took issue with allowing the importance of an issue to drive the exercise of the Court's jurisdiction: '"importance" of subject-matter cannot serve to transform a contingent defence into a subject-matter that is "desirable" to deal with in the text of the Judgment and in the dispositif'.[60] Judge Parra-Aranguren stated the objection plainly: 'the Court should have considered Article XX, paragraph 1(d), as a defence to be examined only in the event of its having previously established that the United States had violated Article X, paragraph 1, of the 1955 Treaty'.[61] Judge Kooijmans, in a separate opinion, made clear the unorthodox nature of the Court's opinion:

> The operative part does not immediately respond to the claim as formulated by the Applicant, but starts with a finding not essential to the Court's decision on that claim. . . . I have checked the operative parts of all judgments of this Court and its predecessor,

54 Ibid., at 441–2.
55 Ibid., at 291 (Judge Guillaume, Separate Opinion).
56 Ibid., at 293.
57 Ibid., at 311 (Judge Schwebel, Dissenting Opinion).
58 See *supra*, note 38, at 153 (Judge Singh, Separate Opinion).
59 *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment of 6 November 2003, [2003] ICJ Rep. 161, at 181.
60 Ibid., at 230–1 (Judge Higgins, Separate Opinion).
61 Ibid., at 244 (Judge Parra-Aranguren, Separate Opinion).

> the Permanent Court of International Justice, in contentious cases and none of them starts with a finding that is not determinative for the Court's disposition of the claim.[62]

The irregularity that Judge Kooijmans emphasized underscores an apparent expansion of the Court's practice, in keeping with its *Nicaragua* judgment: the Court acted with notable resolve to rule on a question pertaining to international security and the use of force, where once such questions were conspicuously absent from its jurisprudence.

Judge Simma, writing in support of key aspects of the Court's ruling, offered perhaps the most compelling rationale by which to understand the Court's opinion. He described his concurrence with the Court's judgment as a matter of *Rechtspolitiek*, which recalls the inseparable relationship of law and politics described by Judge Álvarez.[63] Judge Simma explained his act of *Rechtspolitiek* as follows:

> I welcome that the Court has taken the opportunity, offered by United States reliance on Article XX of the 1955 Treaty, to state its view on the legal limits on the use of force at a moment when these limits find themselves under the greatest stress.[64]

In arguing in favour of the Court's role in international politics, Judge Simma's language is worth quoting at length:

> Everybody will be aware of the current crisis of the United Nations system of maintenance of peace and security, of which Articles 2 (4) and 51 are cornerstones. We currently find ourselves at the outset of an extremely controversial debate on the further viability of the limits on unilateral military force established by the United Nations Charter. In this debate, 'supplied' with a case allowing it to do so, the Court ought to take every opportunity to secure that the voice of the law of the Charter rise above the current cacophony. After all, the International Court of Justice is not an isolated arbitral tribunal or some regional institution but the principal judicial organ of the United Nations. What we cannot but see outside the courtroom is that, more and more, legal justification of use of force within the system of the United Nations Charter is discarded even as a fig leaf, while an increasing number of writers appear to prepare for the outright funeral of international legal limitations on the use of force. If such voices are an indication of the direction in which legal–political discourse on use of force not authorized by the Charter might move, do we need more to realize that for the Court to speak up as clearly and comprehensively as possible on that issue is never more urgent than today? In effect, what the Court has decided to say – or, rather, not to say – in the present Judgment is an exercise in inappropriate self-restraint.[65]

The broad responsibilities that Judge Simma attributed to the Court exhibit the cosmopolitan perspective of a world understood as an autonomous collectivity, with interests and a will of its own, capable of opposing the will and interests asserted by the individual actors it comprises. The Court's custodial responsibility to and for that greater collectivity is not only a matter of law, but 'a matter of principle',[66] and its role apparently includes advocacy as well as adjudication, with a responsibility to

62 Ibid., at 247 (Judge Kooijmans, Separate Opinion).
63 Ibid., at 325 (Judge Simma, Separate Opinion).
64 Ibid.
65 Ibid., at 327–8.
66 Ibid., at 327.

https://doi.org/10.1017/S0922156514000053 Published online by Cambridge University Press

seize an opportunity to expound on norms of public order as they exist under stress. Moreover, absent a more orthodox way to understand why and on what authority the Court decided a question that was never properly asked as a matter of law, Judge Simma's separate opinion indicates an instance of the innate cosmopolitan perspective at play in the decision of the Court. The relationship between the Court's majority opinion and Judge Simma's opinion resembles the relationship between the Court majority and Judge Álvarez in the *Fisheries* case decided in 1951,[67] as described by J. H. W. Verzijl: 'The Court has evidently hesitated to openly follow the lead given to it by the Chilean Judge, Alejandro Alvarez. … But what else, in reality, has the Court done?'[68] The *Oil Platforms* Court rendered judgment on its own motion, in a sense, to adjudicate a question not properly before it, doing so in defence of a world collective and world public order that was vulnerable as a matter of international law.

The tacit engagement of the Court with the innate cosmopolitan perspective was short-lived, although that perspective persists in the opinions of individual judges. The next example is the *Armed Activities on the Territory of the Congo* case, which demonstrates the swift retreat by the Court as a whole from the position staked out in *Oil Platforms*. The *Congo* Court, before proceeding to the questions of law before it, expressly raised its own role in resolving the case. Acknowledging in this case a 'complicated and tragic situation', the Court nonetheless made clear a narrow role:

> the task of the Court must be to respond, on the basis of international law, to the particular legal dispute brought before it. As it interprets and applies the law, it will be mindful of context, but its task cannot go beyond that.[69]

The Court's language cuts against the notably broader self-understanding of its mandate arguably conveyed in *Oil Platforms*. Having limited itself to a narrow answer for the question before it, the Court produced a ruling on the resort to force and self-defence that was closely tailored to the complex facts of the case and somewhat ambivalent as a matter of law, putting to one side questions raised concerning the right to self-defence against other parties and non-state actors.[70]

Judge Elaraby, while concurring with the Court's finding that Uganda violated the prohibition on the use of force, forcefully criticized the Court for not holding that Uganda's use of force amounted to unlawful aggression.[71] Aggression represented for Judge Elaraby a heightened violation of Article 2(4), rising to the level of an international crime. Thus he would have used the Court to establish norms conducive to the development of international criminal law. He acknowledged that the Court enjoyed no criminal jurisdiction, but favoured the expansion of the Court's authority

67 *Fisheries* case *(United Kingdom v. Norway)*, Judgment of 18 December 1951, [1951] ICJ Rep. 116 (Judge Álvarez, Individual Opinion).

68 J. H. W. Verzijl, 'Publicity or Secrecy of the Deliberations in the Permanent Court of International Justice', in *The Jurisprudence of the World Court*, (1965), Vol. II, at 114.

69 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment of 19 December 2005, [2005] ICJ Rep. 168, at 190.

70 Ibid., at 223.

71 See *supra*, note 69, at 327 (Judge Elaraby, Dissenting Opinion).

https://doi.org/10.1017/S0922156514000053 Published online by Cambridge University Press

on the basis of potential benefits for the international community.[72] Moreover, in arguing on behalf of the interests of an international community sufficiently cohesive to support the development of criminal law sanctions for violations of public order principles, Judge Elaraby invoked a progressively disappearing distinction between law and politics in the jurisprudence of international security.[73]

His argument, mixing appeals to law and politics in favour of establishing and trying international criminal law from the bench of the World Court, represents a radical appeal to expand the Court's role and authority. As such, Judge Elaraby's proposal appears to be one of the more remarkable appeals since Judge Álvarez to the world as a social and political collective capable of sustaining discrete normative authority, broadly administered by the Court.

Judge Simma concurred with the opinion of Judge Elaraby. In his own opinion, Judge Simma lamented the Court's failure to confront an issue of importance, as it had done in its *Oil Platforms* case, irrespective of formal limitations. His language is noteworthy:

> By the unnecessarily cautious way in which it handles this matter, as well as by dodging the issue of "aggression", the Court creates the impression that it somehow feels uncomfortable being confronted with certain questions of utmost importance in contemporary international relations.[74]

If, then, Judge Simma's separate opinion in *Oil Platforms* made clear a high-water mark of the innate cosmopolitan perspective before the forum of the World Court, Simma's separate opinion in the *Congo* case makes clear the Court's relative retreat.

Since then, two further cases fall in line with the *Congo* opinion, namely, the *Questions Relating to the Obligation to Prosecute or Extradite* case and the *Application of CERD* case. In each, the Court has distanced itself from the innate cosmopolitan perspective by narrowly disposing of controversies on technical grounds, the latter case representing a particularly stark repudiation. Still, as noted, the discourse proceeds before the forum of the Court in the opinions of individual judges, especially the opinions of Judge Cançado Trindade.

In the *Obligation to Prosecute or Extradite* case,[75] the Court considered Senegal's responsibilities under the Convention Against Torture with respect to Hissène Habré, who had been in Senegalese custody. In an order of 2009, the Court denied Belgium's request for provisional measures. In its decision on the merits in 2012, the Court found that Senegal was in breach of the Convention Against Torture for its failure to prosecute Habré in a timely fashion, but not in breach of any norm of customary international law.

Judge Cançado Trindade dissented from the Court's order against awarding provisional measures, on the basis of the perceived urgency of doing justice for the victims of the Habré regime in Chad in the 1980s, and in keeping with a perceived

72 Ibid., at 332–3.
73 Ibid., at 330.
74 Ibid., at 338 (Judge Simma, Separate Opinion).
75 *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Merits, Judgment of 20 July 2012, [2012] ICJ Rep. 422.

https://doi.org/10.1017/S0922156514000053 Published online by Cambridge University Press

progression of international law away from a voluntary system founded on the consent of states.[76] In its place, he observed a system of obligations that 'transcend the individual consent of States, heralding the advent of the international legal order of our times, committed to the prevalence of superior common values, in the ongoing construction of the international law for humankind'.[77] That system is expressive of a 'universal juridical conscience'.[78] On the basis of that conscience, and in the interests of justice, Judge Cançado Trindade would have awarded provisional measures, which, he argued, would likewise bring the Court's ruling in line with the dictates of 'the *civitas maxima*, the legal community of the whole of humankind'.[79] Recalling the custodial role envisioned by Judge Álvarez, he would further hold the Court to be the guarantor of the expression of that *civitas maxima* under law.[80]

Subsequently, on the merits, Judge Cançado Trindade approved of the Court's results, but not of its reasoning, insofar as the Court's decision reflected 'a characteristic voluntarist reasoning, focused on the will of States within the confines of the strict and static inter-State dimension'.[81] Against that position, Judge Cançado Trindade identified his opinion with the perceived mandate of the universal juridical conscience, holding that '[h]uman conscience stands above the will of States'.[82] Accordingly, the law as he would have applied it would have been drawn from 'the *universalist* international law', or 'the new universal *jus gentium* of our times'.[83]

In the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* case (the *CERD* case), Georgia had brought the Russian Federation before the ICJ with regard to the treatment of ethnic Georgians in contested territories, including Ossetia and South Abkhazia.[84] The case was at heart a contest over the use of force and humanitarian issues, brought before the Court under the terms of the Convention on the Elimination of All Forms of Racial Discrimination. The Court, however, declined jurisdiction without meaningfully engaging the substance of Georgia's claims, holding instead that Georgia had not exhausted the possibility of negotiations called for in the compromissory clause between the parties.[85] Following the retreat marked by the *Congo* case, the Court's denial of jurisdiction in the *CERD* case stands as a still more stark repudiation of innate cosmopolitanism, and a turning away from cases, including *Nicaragua*, in which the Court was inclined to take on questions bearing directly on the use of force.

Judge Cançado Trindade argued in dissent in favour of 'the expansion of international jurisdiction'.[86] He would have heard Georgia's claims, with the twin aims

76 *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Provisional Measures, Order of 28 May 2009, [2009] ICJ Rep. 139, at 175 (Judge Cançado Trindade, Dissenting Opinion).
77 Ibid., at 190.
78 Ibid., at 191.
79 Ibid., at 199.
80 Ibid., at 191.
81 See *supra*, note 75, at 553 (Judge Cançado Trindade, Separate Opinion).
82 Ibid.
83 Ibid., at 558 (emphasis in original).
84 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment of 1 April 2011, [2011] ICJ Rep. 70.
85 Ibid., at 134–40.
86 Ibid., at 298 (Judge Cançado Trindade, Dissenting Opinion).

https://doi.org/10.1017/S0922156514000053 Published online by Cambridge University Press

of 'the realization of justice',[87] as well as 'the progressive development of international law'.[88] He argued in the first place from grounds of principle, relying in part on Judge Álvarez's dissent in the *Anglo-Iranian Oil Co.* case for precedent.[89] Judge Cançado Trindade set the principle on which he relied in opposition to fundamental principle invoked by the Court: where the Court's principle represented state consent, Judge Cançado Trindade's principle represented the innate cosmopolitan perspective of a comprehensive social and political phenomenon, founded in common values and transcending the limitations of states.[90]

To close this brief look at the discourse since Judge Álvarez, it bears noting that Judge Cançado Trindade's opinions show a substantive consistency reminiscent of Judge Álvarez's separate opinions. But the situation is not the same, and Judge Cançado Trindade, although also something of an iconoclast on the bench, is not operating there in the relative vacuum, so to speak, as did Judge Álvarez. Instead, the likeness underscores change over time in the discourse of the Court as a whole, while also indicating further impetus for the innate cosmopolitan perspective in the give and take of the Court's dialectics.

6. Critique

Currently, the Court itself appears to be in retreat from the innate cosmopolitan perspective with respect to international community and the Court's responsibility to it as a matter of international law. Moreover, the Court has been content to rely on technical means of disposing of questions in such a way as to avoid engaging with alternate perspectives of individual judges. Likewise, in other individual opinions, judges tending to affirm traditional constraints of international law and the international system do not squarely confront alternative conceptions of international community. At the same time, however, in the individual opinions of Judges Simma, Elaraby, and Cançado Trindade, can be seen aspects of the innate cosmopolitan perspective taken up more forcefully than at any point since Judge Álvarez's tenure on the bench.

The cumulative expression of the innate cosmopolitan perspective from the bench describes a Court that is vested with a unique responsibility for the progressive development of a comprehensive international community, which exceeds the subjective limitations of states on the basis of global norms drawn from the experiences of all the world's people. That responsibility flows from an appreciation of principle and historical ends, and is tantamount to a potential for right policy. As observed in the opinions of Judge Álvarez and his successors, however, the theoretical underpinnings for that policy potential are founded in controversial and even contradictory ways.

87 Ibid., at 321.
88 Ibid., at 240.
89 Ibid., at 308.
90 Ibid., at 322.

https://doi.org/10.1017/S0922156514000053 Published online by Cambridge University Press

Judge Álvarez's juridical theory consistently resolves into an argument that universal norms will flow from a proper observation and appreciation of phenomena associated with interrelationship and interdependence in the world. Likewise, the cosmopolitan opinions to follow from the bench of the Court consistently refer to some observed demonstration or expression of interests or will manifest by the world collective. The grounds for observing world norms, however, inevitably reproduce issues of political contestation, which reference to a unified world collectivity is supposed to suppress: in light of the vast field of observation contemplated for determining world norms, the method itself becomes the contested field of politics. There is too much data and too many ways to interpret it. Any given set of methodological choices by which to arrive at norms that arise out of the world as it is comes to look like a particular policy and discrete political agenda. Thus Judge Álvarez, for instance, has been understood in terms of promoting Latin American interests, rather than anything more cosmopolitan.[91]

Furthermore, putting to one side the transferal of contestation from political confrontation to methodological controversy, the nature of the function of the ICJ following the innate cosmopolitan perspective suggests an authority that is enhanced as responsibility is diminished. The ICJ's authority is enhanced by being the institution best situated to articulate world norms. Among other things, the Court's bench – representative of diverse legal systems and political cultures around the world – and its professional sensitivity to questions of normativity, lend the Court a presumptive capacity to discern the interests of the world as a whole as a matter of law, as well as other relevant phenomena such as an international juridical conscience and related expressions of world public opinion.[92] Likewise, the same characteristics enhance the custodial potential of the ICJ because they ostensibly attest to the capacity of the Court to look to sources of norms and law in the interest of the world, beyond those derived strictly from negotiated rules of conduct among states. These qualifying characteristics of the ICJ, however, may also be understood to distance it from subjective political contestation in two ways. First, the diversity of the World Court is manifest in the body of a small number of privileged colleagues, rather than any more confrontational situation.[93] Second, those judges proposing to pronounce on law in the interests of the world as a whole have uniformly proposed to discern the proper norm in some manifestation of the nature or will of the world as a whole, rather than any more creative process for which they might be personally responsible. Recourse to arguments of historical and natural or sociological fact, alongside appeal to other purportedly cognitive phenomena such as world public opinion and juridical conscience, compounds the failure of responsibility. The forum of the Court comes to resemble a pass-through for a normative process occurring

91 See, e.g., A. B. Lorca, 'Alejandro Álvarez Situated: Subaltern Modernities and Modernisms that Subvert', (2006) 19 LJIL 879, at 928.

92 See, e.g., *Admission of a State to the United Nations (Charter, Art. 4)* (Judge Álvarez, Individual Opinion), *supra* note 28, at 69.

93 Cf. Hernández, *supra* note 10.

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elsewhere – occurring 'out there', so to speak, independent of any consolidated and accountable policy-making agency, including the Court itself.

Coupled with the failure of responsibility, there is also a possibility that innate cosmopolitanism is problematically invested in the status quo. In identifying the world as a whole as the proper basis of universal norms, innate cosmopolitanism is intended to achieve a more adequate grounding for international law as a matter of doctrine and historical reality.[94] For that reason, universal norms are tied to an appreciation of historical reality, but in so doing, the aspiration to universality is rendered contingent on historical conditions. In a separate but related point, Arnulf Becker Lorca finds Alvarez to 'attribute universality to a historically contingent discourse of international law'.[95] Informal indices of collective judgment and perceived patterns of behaviour under conditions of interdependence define the norms appropriate to the world as a whole. In sum, as a matter of innate cosmopolitanism, normative authority becomes bound up with the perceived historical reality of the world. Thereby, innate cosmopolitan jurisprudence exhibits a character deeply tied to historical circumstance: the Court, in its custodial capacity, is supposed to represent the interests of the world collectivity as it actually exists in history. In so doing, the Court appears to represent status quo material and historical conditions in the world.

To close this critique, I turn to a point raised by Hans Kelsen in his criticism of natural law appeals, for normative authority, to a pre- or extra-legal community – such as the innate cosmopolitan world collectivity as Álvarez and subsequent judges appeal to it, beyond any provision under positive law. Kelsen disapproved of the appeal at law to a pre-legal community for the tendency of such appeals, in common with appeals to natural law, to allow law-makers and magistrates to observe or discover law, rather than to make or administer law by means of a more clearly volitional process.[96] The critique remains current, in light of the engagement with a natural law idiom taken up lately by Judge Cançado Trindade in the discourse. Kelsen rejected the unique competence vested in elite individuals and institutions tasked with the appreciation and interpretation of natural law. Special competence, in such systems, becomes a surrogate for popular agency. The consequence that Kelsen observed is that 'the doctrine which denies that the positive law-makers really are what they pretend to be – the creators of the law – has the effect, if not the purpose, of strengthening their authority'.[97] The innate cosmopolitan perspective, and the unique function it would attribute to the Court on the basis of its special competence, may serve to amplify or entrench the powers of individuals and institutions already in positions of authority, without acknowledging that amplification. Thus the cosmopolitan jurisprudence that has been developed from the bench of the Court, however progressive in theory and intent, theoretically shows the

94 *International Status of South-West Africa* (Judge Álvarez, Dissenting Opinion), *supra* note 17, at 176.
95 Lorca, *supra* note 91, at 914.
96 H. Kelsen, 'Law, State and Justice in the Pure Theory of Law', (1947) 57 *Yale Law Journal* 377, at 386.
97 Ibid.

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potential to reinforce status quo distributions of power, without any commensurate acknowledgment of responsibility for the same.

7. Conclusion

The ICJ remains a unique institution in the international legal system. Its mandate renders it an important forum for legal discourse. Its contribution to the development of international law extends to the competing perspectives manifest at its bench, and the dialectical progression of competing ideas brought together there as a matter of purpose. The present inquiry has explored aspects of one perspective – the innate cosmopolitan perspective – that goes to the foundations of international law and the nature of international community, as well as the role of the Court itself. That perspective is especially relevant in a time of debate over the normative consequences of a growing international public order. The innate cosmopolitan perspective, however, is not new. Its theoretical antecedents extend to origins of modern international law. Its expression from the bench of the ICJ goes back to the new Court's first bench, in the opinions of Judge Álvarez. Although the perspective that Judge Álvarez brought to the Court's discourse has remained the province of the separate opinions of individual judges, a proper appreciation of innate cosmopolitanism demonstrates that it is neither entirely subversive, nor perfectly progressive. It is one of several diverse perspectives adopted by elite international jurists by which to appreciate the international community as it may be conceived to exist.

The innate cosmopolitan perspective exhibits a distinctly top-down character, and would vest unusually broad authority in the body of the Court. Its adherents contemplate a comprehensive political phenomenon comprising all the people and peoples of the world at any given time. Individuals are not prioritized above discrete collectivities, but are elevated alongside them, as part of the global collective. The consequence establishes the possibility for what are typically called universal norms, but with one constraint: these universal norms remain historically contingent, and will vary with changing material conditions and experiences in the world. The unique responsibility for these norms that jurists from Álvarez forward have vested in the ICJ contains a considerable policy potential. The Court is envisioned as both a policy court and a policy advocate, responsible for the progressive development of norms appropriate to a consolidated, historical international community, properly conceived.

That vision does not square with the mandate of the Court, traditionally understood. It also is at odds with other competing visions of international community, including those perspectives that continue to observe the international society of states and other atomized collectives aspiring to similar subjective agency in world affairs. Between the poles of innate cosmopolitanism and an orthodox affirmation of equal and independent sovereigns, the Court's decisions have at points suggested a principled and professional belief, once perhaps ascendant – though never more than cautiously so – that the international community represents interests or ends capable of sustaining select, objective norms, which norms the Court is mandated to administer and develop, beyond the prerogative of any one or several subjective

states or agents. Decisions suggesting such a position have done so in the form of novel technical manoeuvres, within the limitations imposed by a system still defined by subjective powers as a matter of law, and can only be so understood by reference to more expansive or forthcoming minority opinions.

But whether or not the Court was ever really prepared to understand itself in an innate cosmopolitan perspective, however moderate, with respect to questions of international security, it has in any event distanced itself from that position lately, at least from the *Congo* opinion forward. Even as the Court's decisions have minimized its potential, however, aspects of the innate cosmopolitan perspective have been resurgent in individual opinions. Those opinions propose to recognize in the Court a tacit or quasi-law-making authority that elides traditional constraints of legislative process, political contestation, and formal constraints of international law, as well. These powers invite critique, which has too long gone underdeveloped. Nonetheless, they are put forward in leading arguments for the progressive development of international law, by jurists recognized for their competence with respect to the appreciation of international law and the international community. And they evidence movement – though not unidirectional – in the self-conception entertained by the judges of the Court with respect to the Court's role and the exercise of its jurisdiction over matters that challenge the limits of a subjective system of international law. In that light, the development of innate cosmopolitan ideas in the discourse and ongoing dialectical practice of the Court bears sustained attention, as part of the Court's contribution to the development of international law, and its conception of a changing international legal system.