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Judicial Effectiveness or Judicial Ambiguity

Is CIL Identification an Instrument for Judicial Activism in Excess?

LEONI AYOUB

1 Introduction

Effectiveness and efficiency in judicial decision-making are the most important objectives of any court. While this concerns primarily the final decisions that are rendered, this is also relevant to the judicial process and the legal reasoning that a court or tribunal carries out to reach its decision, in order to ensure continuity and coherence. Traditional understandings of the international judiciary have seen the judges' role as one where they discover and declare the law by applying it at face value to the legal issues that have arisen within the case, thereby achieving effectiveness through what is said to be direct and clear application of the law.[1] Indeed, '[international] judges have to apply the *law* and they have to apply the *law in force*'.[2] This would seemingly contrast with the picture of the judge as one who engages in developing the law in order to administer justice. This latter understanding sees the judges' role as involving an inherent form of creativity to meet the needs of the case

[1] Traditional views of domestic judges were influenced by positivists and formalists such as Francis Bacon and Montesquieu, who saw the function of the judge as a dependent 'mouthpiece of the law'. Grafted onto the international judiciary, this has resulted in an uneasy relationship between the international and domestic judiciaries as it has led to the expectation that the two have parallel roles. See S Besson, 'Legal Philosophical Issues of International Adjudication Getting Over the *Amour Impossible* between International Law and Adjudication' in CPR Romano, KJ Alter, and Y Shany (eds), *The Oxford Handbook of International Adjudication* (Oxford University Press 2013) 413 (emphasis added).

[2] H Lauterpacht, *The Development of International Law by the International Court* (Cambridge University Press 1982) 75.

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before them,[3] while they may be accused of entering the field of law creation.

This dichotomy sits rather uneasily with the identification of customary international law (CIL), which is by its very nature unwritten and established by identifying evidence of state practice and *opinio juris*.[4] Accordingly, custom needs to be understood as 'the result of an *informal* process of rule-creation'.[5] This two-pronged approach to recognising CIL renders the degree of precision that is usually found in conventional law-making processes more difficult to achieve.[6] This is because of a paradoxical difficulty that exists between qualifying the rule as law while simultaneously seeking to apply and interpret it. This may lead to instances where courts are considered to assume the position of legislator by overstepping the powers granted to them, laying them more easily open to the reproach of engaging in judicial activism.

Although the concept of judicial activism has come to be frequently associated with the decisions of certain international courts,[7] it has particularly derogatory connotations, evoking the seemingly unorthodox judge who has taken the decision to derogate from established law and base their decision on a novel, or at least less common, interpretation of a legal principle. This raises the question of the possible role of activism in the determination of certain customary rules and the part it plays in their subsequent effectiveness or ambiguity.

[3] This approach is usually supported by what has been referred to as 'legal modernists' such as Oliver Wendell Holmes Jr, an analysis of which remains outside the scope of the present article. On judicial creativity regarding the judicial function, see generally M Kirby, *Judicial Activism: Authority, Principle and Policy in Judicial Method* (Sweet & Maxwell 2004); M Cappelletti, 'The Law-Making Power of the Judge and Its Limits: A Comparative Analysis' (1981) 8 Monash UL Rev 15.

[4] ILC, 'Draft Conclusions on Identification of Customary International Law, with Commentaries' (30 April–1 June and 2 July–10 August 2018) UN Doc A/73/10. The author recognises that this describes one methodology for recognising customary international law – namely, inductive reasoning. At the same time, there also exists a less popular method, called deductive reasoning, which is not commonly used. See M Bos *A Methodology of International Law* (Asser Institute 1984).

[5] ILA, Committee on Formation of Customary (General) International Law, Final Report, 'Statement of Principles Applicable to the Formation of General Customary International Law' (London 2000) 2 (emphasis in original).

[6] See in general ibid and ILC, 'Draft Conclusions' (n 4).

[7] On the International Court of Justice, see eg Lauterpacht (n 2); on the Court of Justice of the European Union (CJEU), see H Rasmussen, *On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policymaking* (Martinus Nijhoff 1986). See also H Rasmussen, 'Between Self-Restraint and Activism: A Judicial Policy for the European Court' (1988) 13 Eur L Rev 28.

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The aim of this chapter is to examine instances of judicial activism in the decision-making of international courts and tribunals during the determination and application of CIL and how that allows for either judicial effectiveness or ambiguity. To do this, we will first set out the foundational parameters that need to be examined. We will describe the process by which custom is created and set out the customary rule on which our analysis will focus – namely, the indispensable parties principle.[8] We will then turn to judicial effectiveness, its definition and consequence for the judicial function, and in particular how it can be identified. We will then provide a definition of, and guidelines for identifying, judicial activism in international courts. With these elements in mind, the discussion will then return to an analysis of relevant case law regarding the indispensable parties principle and the use, or not, of judicial activism in such cases. Lastly, we will evaluate whether custom has been used as an instrument for judicial activism and, if yes, enquire into how the judicial function itself has enabled this.

2 CIL and the Judicial Process

Typically unwritten, CIL is determined through state practice and acceptance as law (*opinio juris*). Nevertheless, the recognition of customary international rules remains a difficult task,[9] as it requires a particular process through which the interpreter (the judge) can arrive at a conclusion of the existence of a law or rule under custom. [10] Further, the question arises as to what extent the courts engage in the identification and determination of CIL proper or fall victim to what has been termed 'pulling a rabbit out of [their] hat' by simply asserting what they think the law is.[11]

[8] Modern international law refers primarily to the change in the perception of public international law since the end of the Second World War. The international legal system shifted from one in which states had existed alongside each other in 'cohabitation' to one characterized by cooperation between them through the creation of common structures at the end of the Second World War. See W Friedmann, *The Changing Structure of International Law* (Stevens & Sons 1964). This change also saw the creation of a new world court, the International Court of Justice (ICJ), in accordance with the Charter of the United Nations (UN Charter) and the Statute of the International Court of Justice (ICJ Statute) (adopted 26 June 1945, entered into force 24 October 1945) 892 UNTS 119, following the dissolution of the Permanent Court of International Justice (PCIJ).

[9] See Bos (n 4); ILC (n 4) 126.

[10] M Bos, 'The Identification of Custom in International Law' (1982) 25 GYIL 9.

[11] S Talmon, 'Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion' (2015) 26 EJIL 417.

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The determination of custom has a direct relationship with the judicial function and the judicial process. As Maarten Bos has argued, proof of custom is a 'process of thought' leading to a judicial pronouncement, which thereafter forms undeniable proof of a legal relationship and indicates the existence of a legal norm or law.[12] Thus, the very identification of the customary rule can indicate the judge's state of mind and, by extension, the possible use of activism or restraint. Furthermore, this process of reasoning to identify a customary rule reflects the progress and evolution of the judicial process.[13] This is because the element of identifying custom is so intrinsically linked to the judicial process – it being a process itself – that it may shed light as to the judicial function assumed.[14]

In a similar vein, the present author considers that the interpretation of custom also reflects the state of the judge's mind and the 'process of thought' followed to arrive at its possible application.[15] Indeed, while methodology in interpretation rests beyond the confines of this analysis, interpretation is more than just deciphering what the language of a rule means; it goes further and asks: 'What law does this [rule] make? How does it fit into the rest of the *corpus juris*?'[16] By extension, if interpretation of custom comes in the form of interpretation of previous evidence of state practice and *opinio juris*, we can identify the ever-evolving judicial function and its role in the creation of the law.

As we will see in the following analysis, the method of identification and interpretation of custom grows to become a vital element in the very creation of the judicial function. By contrast, if this method is lacking, the court has fallen into the trap of 'pulling a rabbit out of its hat', contributing to inconsistency and incoherence, where the court simply 'asserts the law as it sees fit'.[17]

[12] Bos (n 4).
[13] ibid.
[14] Talmon (n 11).
[15] The author notes that Bos (n 10) had argued that there exists no interpretation of custom. However, as this paragraph will show, interpretation is, by its very nature, the act of the judge carrying out their reasoning.
[16] Play on words found in W Baude and SE Sachs, 'The Law of Interpretation' (2017) 130 Harv L Rev 1079, 1083 that refer to the interpretation of legal texts ('What law did this instrument make? How does it fit into the rest of the *corpus juris*?).
[17] Talmon (n 11).

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2.1 *The Indispensable Parties Principle and CIL*

As custom forms a broad corpus of law, the present analysis will be confined to the principle of indispensable parties, as articulated by the International Court of Justice (ICJ) in the *Monetary Gold Removed from Rome* case.[18] Aware of the difficulties surrounding the history and legal origins of this principle[19] and the objections that exist as to its nature as a rule or principle of customary international law[20] the present author nevertheless argues that it is precisely this confusion that makes it worth examining, as the role played by the international judiciary in its evolution offers ample scope for discussion. This, in turn, provides the opportunity to scrutinise the work and analysis carried out and to open a discussion on the role of activism and restraint in relation to custom in general.[21]

Recognised in international law as a governing principle and a piece of conventional wisdom,[22] this principle essentially affirms that a court or tribunal will not decide a case if the decision will affect the legal rights of a third state which is indispensable to the resolution of the dispute before it. This principle is most often framed as an absolute,[23] yet without any particular source attributed to it.[24] Considering that different principles may be derived from 'different sources of international law at different times and even the same principle may be simultaneously shaped by

[18] *Case of the Monetary Gold Removed from Rome in 1943* (Preliminary Question) [1954] ICJ Rep 19. It is recognised that this was not the first international case to have made reference to such a right. The recognition of a third state's rights was made in the 1899 *Boundary between British Guiana and Venezuela* case where the arbitral tribunal delivered its award while noting that it would be 'subject and without prejudice to any questions now existing, or which may arise, to be determined between the government of her Britannic Majesty and the Republic of Brazil, or between the latter Republic and the United States of Venezuela' (cited in M Paparinskis, 'Revisiting the Indispensable Third Party Principle' (2020) 1 RDI 49, 56).

[19] ibid 66.

[20] See eg O Pomson, 'Does the *Monetary Gold* Principle Apply to International Courts and Tribunals Generally?' (2019) 10 JIDS 88; see also D Akande, 'Introduction to the Symposium on Zachary Mollengarden & Noam Zamir "The *Monetary Gold* Principle: Back to Basics"' (2021) 115 AJIL Unbound 140; P d'Argent, 'The *Monetary Gold* Principle: A Matter of Submissions' (2021) 115 AJIL Unbound 149; J McIntyre, 'Rules Are Rules: Reconceiving *Monetary Gold* as a Rule of Procedure' (2021) 115 AJIL Unbound 144.

[21] Words inspired by Pomson (n 20) 117.

[22] T Sparks, 'Reassessing State Consent to Jurisdiction: The Indispensable Third Party Principle before the ICJ' (2022) 91 NJIL 216, 217.

[23] ibid 217.

[24] Paparinskis (n 18) 66.

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various elements of the legal order',[25] we can see how the principle can be the result of a variety of sources, one of which could arguably be CIL.[26]

As this analysis sets out to demonstrate, the indispensable parties principle has by now not only acquired general acceptance within the international legal system but is also called upon quite frequently in practice.[27] The principle affords an opportunity to analyse both its identification and its subsequent application as a customary rule: while *Monetary Gold* may or may not reflect a rule of custom that existed at the time of the ruling, subsequent international courts have allowed us to understand it as such today. Furthermore, as the principle has a procedural character,[28] this enables a direct link between judicial effectiveness and judicial activism, because the very need for effective procedures is directly linked to the effective administration of justice.[29]

3 The Judicial Function and Its effectiveness

Judicial effectiveness in international law is a controversial concept.[30] This is but a natural corollary to the diverging opinions of what the judicial function precisely entails and what the role of a judge is. Indeed, various definitions and models of effectiveness have been introduced in an attempt to define the concept of judicial effectiveness.[31] One common definition is what has been described as the goal-based rationale[32] according to which 'an action is effective if it accomplishes its specific objective aim'.[33] In other words, the court or tribunal must be fulfilling the judicial function which it was tasked to fulfil.[34] To do this, one must identify what that judicial function consists of and the desired outcomes

[25] ibid.
[26] Pomson (n 20) 117. Paparinskis also considers this possibility but rejects it: Paparinskis (n 18) 69–70.
[27] Pomson (n 20).
[28] See in general Paparinskis (n 18) 67 and McIntyre (n 20).
[29] P Gaeta 'Inherent Powers of International Courts and Tribunals' in LC Vohrah (ed), *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese* (Kluwer Law International 2003) 353.
[30] See generally Y Shany, *Assessing the Effectiveness of International Courts* (Oxford University Press 2014) ch 1.
[31] ibid 13–14.
[32] ibid.
[33] ibid.
[34] Y Shany, 'Assessing the Effectiveness of International Courts: A Goal-Based Approach' (2012) 106 AJIL 225.

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it ought to generate:[35] international courts and tribunals are created to settle the disputes referred to them, 'to do justice' between the litigant states and render a binding judgment.[36] By contrast, judicial ambiguity reflects the judge who does not render effective decisions, one who is not able to fulfil the full spectrum of the judicial function, so that the judgment, while possibly resolving the case, also raises ancillary questions as to its effectiveness and coherence. This, of course, can only be measured by defining what that judicial function is. To be able to so define, or measure, the judicial function, three components are proposed that will allow the examination of the decision-making of the courts and tribunals at the international level.[37]

The first component is the idea that decisions serve a public, in addition to a private, function.[38] On the one hand, there exists the commonly accepted task consisting in resolving the dispute between the two parties to the case the so-called private function.[39] On the other hand, there exists the public function of an international court, which goes beyond the settlement of that dispute and extends into the realm of positively creating norms that can generate obedience among the members of the community regulated by that system of norms.[40] This latter function is linked to the proper administration of international justice by helping to create a body of coherent rules and laws and ensuring overall efficiency in judicial decision-making.[41]

This is closely related to our second component: the emergence of a 'new posture of international courts and tribunals [that] is the "spirit of systemic harmonisation"'.[42] Although the international legal system has

[35] Shany (n 30).

[36] C Brown, 'Inherent Powers in International Adjudication' in CPR Romano, KJ Alter and Y Shany (eds), *The Oxford Handbook of International Adjudication* (Oxford University Press 2013) 828.

[37] For greater detail, see L Ayoub, *Judicial Activism and Restraint in the Creation of the International Judicial Function: How Have Activism and Restraint Shaped the International Courts?* (Ridderprint 2021) ch 1.

[38] Brown, 'Inherent Powers in International Adjudication' (n 36); C Brown, 'The Inherent Powers of International Courts and Tribunals' (2006) 76 BYIL 195.

[39] Brown, 'Inherent Powers in International Adjudication' (n 36); Brown, 'The Inherent Powers of International Courts and Tribunals' (n 38).

[40] Brown, 'Inherent Powers in International Adjudication' (n 36); Brown, 'The Inherent Powers of International Courts and Tribunals' (n 38).

[41] Brown, 'Inherent Powers in International Adjudication' (n 36); Brown, 'The Inherent Powers of International Courts and Tribunals' (n 38).

[42] A Peters, 'The Refinement of International Law: From Fragmentation to Regime Interaction and Politicization' (2017) 15 IJCL 671, 671, quoting *Al-Dulimi and Montana Management Inc. v Switzerland*, App no 5809/08 (ECtHR, 26 November 2013).

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been described as fragmented, giving the impression of isolated regimes, there is a growing rapprochement[43] and the creation of common standards, as exemplified through court decisions that allow for a more unified system than that which initially meets the eye.[44] This describes the web that is gradually being woven in the international legal system through progressive collectivisation, with many components of international law being endorsed through mutual recognition and respect between states.[45] Customary international law forms part of this collectivised web.

Thirdly, while the notion of judicial law-making may be difficult to reconcile with the traditional understanding of the role of the international judiciary, it has come to be accepted that a judge's role also comprises an element of law creation through its identification, interpretation and application.[46] This is not to contradict the idea that judges must identify and apply the law at hand, but to argue that, in identifying and applying that law, they are, through the very nature of the judicial process, also creating it. In other words, through the act of judicial reasoning and interpretation, judicial law-making *ipso facto* exists, in some shape or other, under the guise of judicial interpretation.[47]

For present purposes, effectiveness reflects a combination of these three components. It should be noted that while precedent and any attention given to previous court decisions is largely denied at the international level,[48] the international judicial function nevertheless aims to create coherence and consistency through its decision-making. The ICJ ascribes considerable authority to previous decisions, over and above the habitual practice of citation.[49] In fact, it has been said that it 'commonly formulates new rules under the cover of interpretation'[50] and, further, that the 'Court's interpretation … contributes to the creation of what it finds'.[51]

[43] ibid.
[44] ibid.
[45] ibid.
[46] See the discussion in CG Weeramantry, 'The Function of the International Court of Justice in the Development of International Law' (1997) 10 LJIL 309.
[47] ibid.
[48] Sparks (n 22) 219.
[49] ibid 219–20.
[50] ibid 220, quoting A Pellet and D Müller, 'Article 38' in A Zimmermann and others (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edn, Oxford University Press 2019) 956, who characterise this as 'de facto legislative power'.
[51] ibid, quoting GI Hernandez, *The International Court of Justice and the Judicial Function* (Oxford University Press 2014) 90.

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Ambiguity, here, refers not only to judgments that are ineffective or textually unclear, but reflect a judge who deviates from this triad, rendering decisions that neither contribute to norm creation nor form a part of the collectivised web of international law but instead leave the resolution of the dispute unclear and do not necessarily fit within the overall systemised collective. Where the coherence and consistency of a decision are in question, we find ambiguity.

4 Judicial Activism and Judicial Restraint

4.1 A Definition

Before commencing the analysis, it is important that the terms 'judicial activism' and 'judicial restraint' be defined. As former CJEU judge Pescatore noted '[w]hat is described by one as activism is seen by another as a just and necessary safeguard'.[52] Therefore, the determination of a judicially activist or restraint decision will always be a matter of degree.[53] Despite its relatively widespread usage, the term 'judicial activism' has no unified meaning. Although judicial activism is commonly attributed to the law-creating nature of the role of judges, and restraint to rejection of that law-creating role, these attributions provide little as to the nature or content of these principles. Indeed, it has even been asserted that 'judicial activism is simply the label used for decisions one does not like'.[54]

International legal scholars have nevertheless attempted various definitions of judicial activism, which offer some indication as to how it might be discerned. Hugh Thirlway identified two types of activism: activism in the 'formal sense', which arises when the judge 'deals with an issue the decision on which is not essential to the resolution of the dispute before him . . . [but wishes] to "enrich and develop" the law';[55] and 'substantive activism', which arises when the judge is 'dissatisfied with existing law . . .

[52] Cited in G Conway, *The Limits of Legal Reasoning and the European Court of Justice* (Cambridge University Press 2012) 17–18.

[53] EW Thomas, *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles* (Cambridge University Press 2008) 93; also L Reid, 'The Judge as a Lawmaker' (1972) 12 J Soc Public Teachers of Law 22.

[54] Lindquist, 'Identifying Judicial Activism' in SA Lindquist and FB Cross (eds.), *Measuring Judicial Activism* (Oxford University Press 2009) 30, quoting E Chemerinsky, 'The Rhetoric of Constitutional Law' (2002) 100 Mich L Rev 2000, 2019.

[55] H Thirlway 'Judicial Activism and the International Court of Justice' in N Ando, E McWhinney and R Wolfrum (eds), *Liber Amicorum Judge Shigeru Oda* (Kluwer Law International 2002) 75.

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[and] . . . will be ready to indulge in something close to open law-creation in order to base his decision'.[56] Former ICJ judge Kooijmans objected to both activism and restraint before the ICJ, steering away from the 'destructive trap' of activism and the ineffectiveness of restraint, 'which closes windows',[57] and introducing instead the concept of 'proactive judicial policy'.[58] To him, the judicial role is 'to utilise those aspects of the case which have a wider interest or connotation in order to enrich and develop the law'.[59] Lara Pair considered the 'ultimate criterion for judicial activism'[60] to be the focus on 'avoidance of an unjust result' and 'creative reasoning rather than strict application of the law'.[61]

Judicial restraint has been even more illusory, yet some helpful definitions can also be found. Lauterpacht described a court that exercises restraint as one which 'refrains from explaining rules in detail'[62] as it 'may create . . . the impression the court was laying down new rules of law'.[63] Judge Kooijmans similarly qualified restraint as the court that 'wilfully abstain[s] from using the opportunity . . . to provide clarification on a matter which [. . .] is highly controversial'.[64]

Former ECtHR judge Mahoney defined the two concepts in parallel. He did not approach activism and restraint as two 'conflicting theories as to how judges should go about decision-making'.[65] Instead, he referred to 'making interpretation choices', with judicial activism being 'neutralised' by the exercise of judicial self-restraint.[66] Therefore, activism involves '[modifying] the law from what it previously was or was stated to be in the existing legal sources',[67] while restraint is a technique necessary in order to move 'proceedings forward by incremental steps in specific contexts rather than by dramatic leaps in the dark'.[68] These two forces ultimately

[56] ibid.
[57] P Kooijmans, 'The ICJ in the 21st Century: Judicial Restraint, Judicial Activism, or Proactive Judicial Policy' (2007) 56 ICLQ 741, 746.
[58] ibid.
[59] ibid.
[60] L Pair, 'Judicial Activism in the ICJ Charter Interpretation' (2001–02) 8 ILSA J Intl Comp L 181.
[61] ibid.
[62] Lauterpacht (n 2) 89.
[63] ibid.
[64] Kooijmans (n 57) 746.
[65] See generally P Mahoney, 'Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin' (1990) 11 HRLJ 57.
[66] ibid.
[67] ibid.
[68] ibid.

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work together within judicial decision-making in a 'coherent path of continuity'.[69] Activism and restraint are 'two sides of the same coin',[70] both aimed at giving the law a coherent structure.

Judge Mahoney's description seems to be the one best suited to the nature of the international judicial function and the legal system within which it acts. Viewing the two notions in terms of their complementarity is an effective way of understanding activism and restraint, transcending traditional black-and-white definitions to better reflect the true nature of the judicial process. After all, 'rules are not picked from trees':[71] even if the legal principles are clear and the law is clearly enunciated, 'someone' will have had to develop them – a competent law-determining agency, a court.[72]

4.2 Identifying Activism and Restraint within the Overall Context of International Law

With the above in mind, identifying activism and restraint remains a difficult exercise, as observed through the lack of any such theoretical framework within the literature on international law.[73] Further, identifying activism and restraint must be placed within the overall context of the international legal system, whose characteristics are inseparably linked to how and why certain decisions may or may not be considered instances of judicial activism.

One must first recall that the international legal system is considered to be a system of states:[74] the settlement of disputes remains largely dependent on the consent of the states involved,[75] and the exercise of jurisdiction by international courts and tribunals is not integrated into an institutionalised and mandatory legal system as at the domestic level.[76] It must also be recalled that states have the upper hand by choosing whether to create a court in the first place, by deciding on the nature of the

[69] ibid.
[70] ibid.
[71] Weeramantry (n 46) 312; BN Cardozo, *The Nature of the Judicial Process* (Yale UP 1939) 103.
[72] See generally Weeramantry (n 46).
[73] Only two exceptions (an insufficient number) can be found: F Zarbiyev 'Judicial Activism in International Law: A Conceptual Framework for Analysis' (2012) 3 JIDS 247 and Pair (n 60).
[74] A Cassese, *International Law* (2nd edn, Oxford University Press 2004) 3.
[75] ibid 4.
[76] Gaeta (n 29).

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agreement that will institute a court or tribunal[77] and the substantive law which will apply[78] and, in most instances and particularly important here, by choosing to be a party to a case.

As a result, the first indisputable factor pointing to judicial activism would be a ruling that explicitly goes against the will of the parties and the principle of state consent. Ruling against the accepted law in force would be an example of this, but so too would be deciding against what states have previously explicitly accepted as the law, be it in treaties and conventions, statements, public opinions or judicial proceedings.[79] Next, and flowing from this first factor, judicial activism involves modifying the law from what it was previously accepted to be. The focus here would be on the legal rules or principles themselves and their amendment, as opposed to the will or the consent of the state. It could involve departing from previous interpretations of a principle that were already accepted as law in such a way as to create incoherence or uncertainty. These are all indications of a judge who is 'making sense'[80] of new law, possibly due to dissatisfaction with existing law, the law which was, by and large, already recognised and accepted by that system of states. A third indication of activism, which is somewhat related to the former two, would consist in changing a judicial process or procedure in flagrant opposition to accepted customary practice.

Another characteristic of the international legal system, which leads to our next criterion, is the material incompleteness of international law.[81] This is the presumption that international law, by its very nature, has not evolved or become detailed enough to be seen as a complete system of laws, rules or norms,[82] thus leaving huge gaps in legal regulation. Despite this, legal certainty through judicial decisions is required. The act of deriving legal reasoning from abstract ideas or principles without any necessary legal certainty as to their true definition could reflect judicial activism but also restraint, as it might lead the judge to refrain from deciding.[83] However far-fetched they may be, judicial decisions are

[77] Cassese (n 74) 170.
[78] ibid.
[79] ILC, 'Draft Conclusions (n 4) 10.
[80] Mahoney (n 65).
[81] This plays on the words of Lauterpacht, who in H Lauterpacht, *The Function of Law in the International Community* (Oxford University Press 2011) ch 5, referred to 'the formal and material completeness of international law'.
[82] This is in fact an idea put forward in HLA Hart *The Concept of Law* (2nd end, Clarendon 1994).
[83] Talmon (n 11) 434.

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expected to ensure certainty, and coherent reasoning is needed to support the ultimate decision rendered. Equally, a clearly result-oriented decision, either lacking in judicial interpretation or pulling a rabbit out of its hat, can be a characteristic of both activism and restraint, since the result sought could indicate the mental state of the court in taking the decision and its intention to either expand or retract the law. Finally, refusing to interpret or expand upon a legal point raised by the parties or to even carry out any interpretation would be an indication of judicial restraint, as Lauterpacht and Kooijmans noted.

5 Recognition of the Indispensable Parties Principle

Although the indispensable parties principle has come to be accepted as a governing principle or conventional wisdom in international law, its true origins remain controversial.[84] The introduction of the principle in its current state occurred in the case of *Monetary Gold*, where the ICJ held that it 'will not exercise its jurisdiction where the legal interests of a third State "would not only be affected by a decision, but would form the very subject-matter of the decision"'.[85] In its reasoning, the ICJ turned to the principle of consent to explain its rationale, holding that 'to adjudicate . . . would run counter to a well-established principle of international law *embodied* in the Court's statute, namely, that the Court can only exercise jurisdiction over a State with its consent'[86] In other words, the ICJ found that even in a duly constituted bilateral contentious case it would not have jurisdiction if it appeared that the principal issue to be decided affected a third state which was not a party to the proceedings.[87] Even though that third state would not be bound by the court's decision,[88] it nevertheless considered that state's interests with such regard that it was precluded from exercising jurisdiction.[89] Arguably, in its attempt to protect the interests of unaware third states, the ICJ assumed a function that sought to protect the interests of the general international community.

[84] Paparinskis (n 18) 217.
[85] *Monetary Gold* (n 18) 17.
[86] ibid (emphasis added).
[87] S Rosenne, *The Law and Practice of the International Court, 1920–2005* (Brill 2006) ch 9.
[88] ICJ Statute (n 88) art 59 states: 'The decision of the Court has no binding force except between the parties and in respect of that particular case.'
[89] Pomson (n 20) 88.

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A closer look at the language used by the ICJ is required. This is because while the ICJ alluded to an interpretation of the ICJ Statute, a reading of both the text of the Statute and the decision do not evidence such a link. In fact, even the use of the word 'embodied' seems problematic. Firstly, the term is technically unclear[90] and lacks any legal meaning. Further, the fact that the ICJ Statute is silent with regard to third parties[91] and their consent leaves it unclear as to where the court identified this principle so 'embodied'. Notably, Article 36 of the ICJ Statute that deals with consent focuses on the consent of the 'parties that refer the case to it', not that of third states.[92] Furthermore, a survey of other decisions from the same era fails to provide any indication as to the meaning of the word, even though the ICJ had proven itself capable of expanding upon legally unclear terms at the time.[93] Additionally, if the court meant to derive the *Monetary Gold* principle from the overarching principle of consent alone, it could have done so without the reference to the ICJ Statute and certainly without using the word 'embodied'. Worthy to note, at this stage, is also the previous ICJ decision in the *Corfu Channel* case, where neither the court nor the parties seemed to have had any issue with addressing the dispute in the absence of a third state, Yugoslavia.[94]

This ICJ's ambiguous language, presented with little explanation and confined to one paragraph in a nineteen-page decision, provides little understanding as to the true source of the indispensable parties principle.[95] While the court used the words 'principle of international law', it certainly does not appear to be interpreting the issue of *audi alteram partem*, a general principle of law,[96] as it did not mention the case law of the Permanent Court of International Justice or other tribunals to support its reasoning.[97] In truth, the lack of justification by the court can

[90] Paparinskis (n 18) 63.
[91] With the exception of the right to intervene under ICJ Statute (n 8) art 62.
[92] See generally Z Mollengarden and N Zamir, 'The *Monetary Gold* Principle: Back to Basics' (2021) 115 AJIL 41, 57.
[93] Paparinskis (n 18) 68, such an example being *Nottebohm (Liechtenstein v Guatemala)* (Preliminary Objection) [1953] ICJ Rep 111.
[94] *The Corfu Channel Case (United Kingdom v Albania)* (Merits) [1949] ICJ Rep 4. See discussion of the case in Paparinskis (n 18) 82 and Pomson (n 20) 93.
[95] Paparinskis (n 18) 66.
[96] Pomson (n 20) 96.
[97] For example, it could have mentioned the advisory opinion of the PCIJ in *Status of Eastern Carelia*, holding that: 'It is well established in international law that no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement.' *Status of Eastern Carelia* (Advisory Opinion) [1923] PCIJ Rep 6.

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only be interpreted as pure assertion, as pulling a rabbit out of its hat. In applying our judicial activism or judicial restraint criteria to this case, the situation gets even more complex. As already noted, a lack of justification is usually an indication of judicial restraint – something supported by Hersch Lauterpacht, who noted the 'degree of caution' with which the court decided this case.[98]

The approach taken by the Court is also result-orientated, which supports a clear activist judgment. It introduced a new abstract principle, which it claimed it found in the Statute, but did so without legal certainty since the Statute itself is silent. It ultimately transformed the issues before it into a question of third-party legal interests and introduced the 'essential parties' concept, yet unclear as to where it applied it from, which could imply a change in judicial process of the court. On the one hand, the court created a principle of protection for states not parties to a dispute; on the other, it did so by ignoring the dispute before it, rendering an ineffective judgment.

The first case of interest to have followed *Monetary Gold* was *Nicaragua,*[99] where the indispensable parties principle was pleaded by one of the parties to the dispute as one of numerous grounds for objecting to the court's jurisdiction.[100] In this instance, the court rejected the plea; dedicating a paragraph to the matter, it remarked that the 'circumstances of the *Monetary Gold* case probably represent the limit of the power of the Court to refuse to exercise its jurisdiction',[101] making it necessary for the third party to be 'truly indispensable to the pursuance of the proceedings'.[102] One may wonder whether the wording 'the limit of the power' constitutes a reaffirmation of the principle of *Monetary Gold*[103] or rather reflects the discontent of the court, at the time, with the usefulness of this principle. Due to the lack of any reasoning, as an attempt to clarify the principle in substance, a restraint approach can be detected. However, considering the numerous other matters decided upon in the *Nicaragua* decision, the issue of the non-application of the *Monetary Gold* principle would seem inconsequential.

[98] Lauterpacht (n 2).
[99] *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v United States of America*) (Jurisdiction and Admissibility) [1984] ICJ Rep 392.
[100] ibid 8–9.
[101] ibid [88].
[102] ibid.
[103] Pomson (n 20) 100.

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The principle was examined again in the case of *Certain Phosphate Lands in Nauru.*[104] Here, the ICJ held that while a decision in the case might have implications for a third party, 'no finding in respect of that legal situation will be needed as a basis of the Court's decision'.[105] This was in contrast to *Monetary Gold*, where determination of the legal interests of the third party would have been a prerequisite to decide upon the dispute.[106] In order to create a distinction, the court seems to have treated the issue in the *Nauru* case as one of *degree* of the possible implications for the third State,[107] expanding the principle of indispensable parties through an interpretation alone and without even having applied it, and despite the claim in *Nicaragua* that those were the limits of its application. This idea was clarified in the separate opinion of Judge Shahabuddeen, who noted that 'the test is not merely one of sameness of subject-matter, but also one of whether . . . the Court is making a judicial determination of the responsibility of a non-party State'.[108] Here, there seems to be an allusion to the principle of consent, rather than an interpretation of the Statute as was alluded to in *Monetary Gold*, yet the court makes no such direct reference. In any event, a comparison of the facts of the two cases, *Nauru* and *Monetary Gold*, and their inherent similarities make it difficult to understand the resulting decision in each case.[109]

The question that preoccupied the court seems to have been the *intensity* of the effect of the judgment on the legal interests of an absent state.[110] This shows a court attempting to translate *Nicaragua*'s allusions to 'appropriate circumstances' and 'limits' into a more judicially administrable test,[111] as suggested by Judge Shahabuddeen's explanation. Accordingly, it would seem that the court borrowed its reasoning from

[104] *Certain Phosphate Lands in Nauru* (*Nauru v Australia*) (Preliminary Objections) [1992] ICJ Rep 240.
[105] ibid.
[106] *Nicaragua* (n 99) [88]; N Zamir, 'The Applicability of the *Monetary Gold* Principle in International Arbitration' (2017) 33 Arb Int'l 523, 527 n 14, quoting Bola Ajibola; Pomson (n 20) 100.
[107] H Thirlway, *The Law and Procedure of the International Court of Justice* (Oxford University Press 2013) ch 1; Mollengarden and Zamir (n 92) 52, quoting, in particular, Judge Schwebel.
[108] *Certain Phosphate Lands in Nauru* (n 104) Separate Opinion of Judge Shahabudeen 270, 296.
[109] Mollengarden and Zamir (n 92) 52.
[110] ibid 52; *Certain Phosphate Lands in Nauru* (n 104) Separate Opinion of Judge Schwebel 329, 335.
[111] Mollengarden and Zamir (n 92) 52.

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domestic law,[112] possibly through normative deduction,[113] by introducing a form of joint and several responsibility into the reasoning of international law: while the breach was committed jointly by different states, it does not preclude the admissibility of the claim against one of those responsible actors.[114] This is arguably to protect the public function the court wishes to fulfil. The court's judgment is an analysis, not of the ICJ Statute but instead of the practice of the court's previous decision, an indication that it was interpreting its very own practice to reach a conclusion in the present case.

In considering the activism or restraint criteria, we can see this as a clearly result-oriented decision through borrowing principles from other legal systems, which indicates a proactive tendency on the part of the court. Arguably, in 'clarifying' the principle, the court seems to have caused, nevertheless, further confusion as to when the indispensable parties principle is applied, opening the door to future inconsistency, which can possibly imply a modification of the law or the procedure in question. This is furthered through the four dissenting opinions to the judgment, including both the president and the vice-president of the ICJ at the time,[115] one of whom noted that 'the protection afforded the absent States by Article 59 in the quite exceptional situation of this case would be notional rather than real'.[116]

Despite its activism, the *Nauru* case failed to establish an 'administrable test' for the principle,[117] as became evident in the case of *East Timor*,[118] where the ICJ attempted to build on its *Monetary Gold* analysis by changing the narrative yet again. In contrast to the treatment of the matter as one of degree seen in the *Nauru* case, the case of *East Timor* considered a temporal precondition instead[119] – namely, by holding that it would first have to decide on that third state's actions (or inactions), it could 'not make such a determination in the absence of the consent of [the third party]'.[120] In determining that the treaty-making capacity of

[112] See the discussion on joint and several jurisdiction in Paparinskis (n 18) 83.
[113] Description of normative deduction can be found in Bos (n 4) and Talmon (n 11).
[114] Paparinskis (n 18) 83.
[115] Dissenting Opinions by President Jennings, Vice-President Oda, Judge Ago and Judge Schwebel.
[116] *Certain Phosphate Lands in Nauru* (n 104) Separate Opinion of Judge Schwebel 329, 342.
[117] Mollengarden and Zamir (n 92).
[118] *East Timor* (*Portugal v Australia*) [1995] ICJ Rep 90.
[119] Mollengarden and Zamir (n 92) 54.
[120] *East Timor* (n 118) [28].

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the third, absent, state would form an integral part of its decision, it effectively put a stop to the trend of rejecting the *Monetary Gold* principle. It ultimately delivered a narrow interpretation of the *Monetary Gold* principle, without any reasoning as to why it considered the issue in temporal terms rather than as a matter of degree.[121]

This is clearly a result-oriented approach, whereby the decision itself can be regarded as a decision not to decide, turning the reasoning back to one of assertion. Although the court did engage in some analysis of the submissions of the parties, it rejected them without providing an explanation. It based its rejection on consent rather than on the ICJ Statute, which indicates an interpretation of an unwritten principle (though without any clear indications from the court, this remains speculation on the part of the present author). This case drew reactions from within the court in the form of two dissenting opinions,[122] which brought up the unresolved issue of the *erga omnes* nature of the subject matter.[123] By again modifying the process whereby the indispensable parties principle is identified, the ICJ went around its *Nauru* decision and returned to *Monetary Gold*, which resulted in greater lack of coherence regarding the principle.[124] The refusal of the court to decide on *erga omnes* rights, which involve a public concern, leaves questions as to the role of the court in this matter.[125] The principle was used to limit the possible public function the ICJ could have assumed as the principal judicial organ of the UN,[126] considering its widespread jurisdictional powers.[127] The court furthermore elaborated the principle abstractly and without any legal certainty, which was a further indication of the restraint with which it acted. The lack of interpretation and any indication as to the source of the temporal element increased the already existing ambiguity over when the *Monetary Gold* principle applies or does not apply. Finally, this refusal to rule on a highly controversial matter shows judicial restraint par excellence.

[121] Zamir (n 106) 527.
[122] *East Timor* (n 118) Dissenting Opinion of Judge Weeramantry 139, 224.
[123] ibid; Kooijmans (n 57).
[124] See discussion of case generally in Mollengarden and Zamir (n 92).
[125] It is beyond the purpose of this paper to speculate as to why it wished to leave these questions unanswered.
[126] ICJ Statute (n 8) art 1; UN Charter art 92.
[127] ICJ Statute (n 8) art 36(1): 'The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.'

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6 Indispensable Parties and Other International Tribunals

6.1 *The Principle Applied*

As we have seen, one measure of judicial effectiveness is to consider whether the decisions of international courts are harmonised at a systemic level, meaning that principles of law accepted and endorsed by some courts become accepted as applying to other judicial institutions across the international stage. Telling, in this regard, are the decisions concerning the indispensable parties principle before other tribunals and courts.

Notable is the case of *Larsen* v. *Hawaiian Kingdom,*[128] which is the only case in which the principle was applied in such a manner as to prevent an international tribunal from exercising its jurisdiction.[129] The arbitral tribunal, constituted under the auspices of the Permanent Court of Arbitration (PCA), ultimately dismissed the case for lack of authority to 'exercise jurisdiction over a State unless that State has given its consent to that jurisdiction'.[130] It upheld this test because the tribunal 'operates within the general confines of public international law',[131] thus extending the application of the principle beyond the ICJ's mandate and beyond what the ICJ had pronounced on the principle. The tribunal can be said to have added to the definition of the *Monetary Gold* case, going beyond what the ICJ had previously considered to be a matter of the ICJ Statute, in a hint of judicial activism. Another possible consideration to take into account here is the fact that the parties' real motive may have not been to resolve the dispute between them but rather to raise publicity for the cause of the Hawaiian nationalist movement by having the tribunal render an opinion on the legal status of Hawaii.[132] The tribunal's choice to uphold the principle may have been heavily influenced by the need to reject the case in any way possible.

The indispensable parties principle was also raised in the *South China Sea Arbitration (Philippines/China)*,[133] where an intervening third state, Malaysia, asked the tribunal to reject jurisdiction on the basis that it might affect its rights and obligations as an absent third state. Without

[128] *Lance Paul Larsen v The Hawaiian Kingdom* (Final Award) (2001) PCA.
[129] Pomson (n 20) 104.
[130] *Larsen* (n 128) [11.17].
[131] ibid.
[132] Pomson (n 20) 104.
[133] *The South China Sea Arbitration* (*The Republic of Philippines v The People's Republic of China*) (Final Award) (2016) PCA.

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providing any explanation beyond the decision of the ICJ in *Nicaragua*, the tribunal took the view that Malaysia 'overstated' the *Monetary Gold* principle, as the 'more expansive reading would impermissibly constrain the practical ability of courts and tribunals to carry out their function'.[134] Remarkably, in contrast to the narrow interpretation the ICJ applied in *East Timor*, this tribunal saw an expansive reading as *limiting* the judicial function. Clarifying that the relevant issues in the case concerned 'areas to which Malaysia makes no claim',[135] it held the latter's interests were not affected. Interestingly, the difference in reasoning between the ICJ's shaping of the rule as we know it today and the tribunal's approach to is suggestive of activism, leading to dis-harmonisation and, by consequence, ambiguity.

Mention must also be made of the *M/V Norstar* case before the International Tribunal for the Law of the Sea (ITLOS),[136] where the tribunal 'acknowledge[d] that the notion of indispensable party is a well-established procedural rule in international judicial proceedings'.[137] It nevertheless refrained from applying the principle in that specific case,[138] leaving an unexplained reference to the principle, insufficient for deeper examination.

6.2 *Lack of Relevance of the Principle*

Although the indispensable parties principle has, by and large, been accepted as well established, the role of the ICJ in creating a new rule of law remains questionable, as its role as a rather reluctant lawmaker arises. This is particularly pertinent when one considers that certain other international courts have rejected the relevance of the principle. In this vein, we can see the complete rejection of the principle in the opinion of Advocate General Wathelet in the *Western Sahara Campaign* v. *United Kingdom*[139]case before the Court of Justice of the European Union (CJEU), who rejected its application as it would allegedly automatically preclude the possible examination or review of international agreements

[134] ibid [640].
[135] ibid.
[136] *M/V 'Norstar' (Panama v Italy)* (Preliminary Objections, Order of 15 March 2016) ITLOS Rep 2016, 44.
[137] ibid [172].
[138] ibid [173].
[139] C-266/16 *Western Sahara Campaign UK* Opinion of Advocate General Wathelet [2018] ECLI:EU:C:2018:1.

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between the EU and third states.[140] The Advocate General's lack of analysis suggests that he was exercising judicial restraint. Prior to that, a World Trade Organization (WTO) panel also held that there is no concept of 'essential parties' in WTO law,[141] despite examining the case law of the ICJ and using it as evidence to elaborate on the content of the principle.[142] Most recently, in 2021, the International Criminal Court refused to apply the principle when requested, on the grounds that its jurisdiction did not concern inter-state disputes but dealt instead with natural persons.[143] Without a doubt, these decisions indicate the failure of the *Monetary Gold* principle to achieve support within the international judicial community both in terms of fostering harmonisation and as a new rule of international law.

The European Court of Human Rights (the ECtHR) has also taken a differentiated approach to this principle. In the case of *Bankovic*[144] the ECtHR ruled out any need to decide on an objection raised that was based explicitly on the *Monetary Gold* principle[145] as it declined jurisdiction over other issues in the case that apparently took precedence over any rights deriving from the absent third state principle. Similarly and maybe particularly tellingly is the fact that the same court has had no difficulty providing detailed consideration of the conduct of states not parties to its proceedings or sometimes not even members of the Council of Europe.[146] This, for instance, occurred when the facts of the case pointed to a possible violation of the Convention, as most famously occurred in *Soering*,[147] where the court decided against the extradition of the applicant to a third state because it was quite possible that that absent third state would violate the Convention. Interestingly, the question of the essential third party was not even raised, despite the court having explicitly taken decisions in that regard. It is thus evident that this

[140] ibid [57].
[141] WTO, *Turkey: Restriction on Imports of Textiles and Clothing Products – Report of the Panel* (31 May 1999) WT/DS34/R [9.10].
[142] ibid [9.8]–[9.11].
[143] *Situation in the State of Palestine*, Decision on the 'Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine' (5 February 2021) ICC-01/18 [58]–[60].
[144] *Banković and ors v Belgium and ors*, App no 52207/99 (Admissibility) (ECtHR, 12 December 2001).
[145] ibid [83].
[146] Paparinskis (n 18) 77.
[147] *Soering v United Kingdom* App no 14038/88 (ECtHR, 7 July 1989).

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was a result-oriented decision made with the intention of solidifying the law and as such is indicative of judicial activism.

7 Effectiveness or Ambiguity?

7.1 *Consolidation of the Indispensable Parties Principle*

As seen in the Introduction, the interaction between the use of certain principles of customary international law and judicial activism can yield an uncomfortable relationship. This is one where the inherent tension between custom's recognition of unwritten law through the identification of state practice and *opinio juris* and judicial activism's 'creative reasoning rather than strict application of the law' seek to co-exist.[148] An analysis of whether the indispensable parties principle as identified in *Monetary Gold* qualifies as custom lies outside the confines of the present discussion. However, it is interesting to note the overlap between custom and activism in the judicial process that enables the principle to be characterised as one of customary law. Although the principle had appeared in international decisions prior to *Monetary Gold*, the ICJ seems to have pulled a rabbit out of its hat when applying it in that case. The existence of prior references to the rule, of which the court made no mention, makes its approach a form of continuity in the judicial interpretation of this principle rather than a new apparition altogether. However, its vague terminology left the source of the rule open[149] and gave way to its subsequent evolution – a clear lack of coherence and consistency in the decision.

Additionally, it cannot be denied that, despite not having been applied by tribunals, the rule has been relied on repeatedly by states, which indicates its acceptance as law and in practice.[150] Indeed, it has also been argued that the lack of objections to a string of judicial decisions

[148] Pair (n 60).

[149] On the possible sources of the principle, see Paparinskis (n 18); Pomson (n 20).

[150] See Special Tribunal for Lebanon, *In the Matter of El Sayed*, Decision on Appeal of Pre-Trial Judge's Order Regarding Jurisdiction and Standing, Appeals Chamber (10 November 2010) CHIAC/2010102 [47], where the tribunal examined how a lack of objection could be deemed acceptance as law and existence of practice. Further examples of ICJ cases referring to the indispensable parties principle include *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)* (Verbatim Record CR 2000/12) [25]; *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v Pakistan)* (Jurisdiction and Admissibility) (Counter-Memorial of Pakistan, 1 December 2015).

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may signify support for a positive customary rule.[151] What this analysis has shown is a judicial process of thought which, through activism and restraint, has been able to create what can best be described as a principle of customary *procedural* law.

7.2 The Judicial Function and the Indispensable Parties Principle

Returning to the effectiveness or ambiguity of international courts in the application of the indispensable parties principle, and since its re-introduction in international legal discourse through the *Monetary Gold* case, there are several observations that can be made.

There is a very important distinction that need to be drawn between, on one hand, the cases where the principle was applied, and, on the other, the cases where the principle was recognised but not applied. In *Monetary Gold* we saw that the ICJ sought to uphold an indisputable public function, which was to protect the interests of third states not parties to the proceedings. It did so, even if this meant rejecting the entire case and despite the parties having consented to its jurisdiction. We must also consider the utility of leaving dispute unaddressed. A case in point is *East Timor*, where questions of *erga omnes* and self-determination arose. As former ICJ judge Kooijmans established, restraint is reflected in instances where the court refuses to decide on a matter which is highly controversial, as happened in this case. The ICJ did not even attempt to provide an answer to these long-standing questions, which would have benefitted the international legal scene – something it was perfectly qualified to do, given its wide jurisdictional powers. Even though reference was made to Article 59 of the ICJ Statute, according to which the decision would be binding only upon the states parties to the proceedings, the ICJ was nonetheless unwilling to decide upon the legal interests of any third state. The refusal to decide was clearly a policy decision, as it was also for the PCA tribunal in *Larsen*, where a decision would have promoted the wrong political gains.

By contrast, and quite interestingly, we can also see a public function in deciding on the dispute, as was apparent in *Nicaragua* and *Certain Phosphates of Nauru*, so much so that in this latter case the court considered that even though other states could also be held liable, it was sufficient that liability arose for that one state party alone. This was an interesting reasoning, outside the bounds of what had been previously

[151] See Paparinskis (n 18) 220.

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accepted. Notable also are the approaches taken in other courts. Advocate General Wathelet's comment in *Western Sahara* was indicative of the very bounds of the principle, yet also demonstrates the restraint implicit in a refusal to decide. What if a dispute arising out of a convention with a third party only affects the legal interests of a member state of the EU? Similarly, the rejection of the principle in the *South China Sea* arbitration and by the ECtHR in *Bankovic* show a public function quite different from the one assumed by the ICJ in those two cases in accepting the indispensable party principle. In truth, we can see how the reasoning of the tribunals alluded to greater public benefit in deciding rather than not deciding the cases.

As already observed, judicial effectiveness also calls for systemic harmonisation at the international level – something the indispensable party principle also fails to meet. If there is any consistency in the decisions examined, it ironically lies in their disharmony, for the manner in which the principle is applied, whether within a single court or across several courts. This is evidenced, for example, in the lack of coherent or continuous reasoning across the decisions of the ICJ. At the same time the principle was openly accepted by most international courts and tribunals as an established rule of international law, despite not being applied. If we come back to the utility of the principle and its effectiveness at the international level, the lack of its use could be indicatory of its lack of any effectiveness. If the idea is to create a form of 'transnational public order'[152] whereby all the courts and tribunals share a set of principles, even at the procedural level, creating predictability and coherence at the international level, then the indispensable party rule certainly does not meet this standard.

Turning finally to the judge's role as reluctant lawmaker, the question arises as to whether, in adjudicating *Monetary Gold,* or even *East Timor*, the ICJ has made law. The wording of the *Monetary Gold* judgment alludes to a principle already accepted in international law – something that could be reflected in previous decisions of international courts and tribunals, as seen above, despite the fact that the court did not mention any. Conceivably, the principle may have existed as one of custom, without further substance as to its content. Going beyond the acceptance of the principle, whatever its source might be, subsequent ICJ cases attempted to create a methodology through which this principle would be applicable. However, this methodology, or 'law', has been rejected

[152] Peters (n 42) 696, referring to *'ordre public transnational'*.

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repeatedly by other international courts and on most occasions by the ICJ itself. This is where the question of methodology in custom becomes even more important: does the occasional recognition, but not application, of a rule, make law?

8 Conclusion

Coming back to the use activism and restraint to drive customary international law forward to yield effectiveness, there are numerous questions posed within this analysis in that regard. Going back to the elements of the judicial function, the preceding paragraph has indicated the very inability of the *Monetary Gold* principle to create judicial effectiveness.[153] Instead, what can be seen is ambiguity, lack of coherence and a clear rejection of the principle by several courts.

The lack of certainty over both the source and true application of the indispensable third party principle leaves much to be desired. The ICJ's assertion that the principle exists as embodied in the ICJ Statute and the subsequent recognition and evolution of its methodology raise questions about the relationship between customary norms and the use of activism to identify them. The lack of judicial reasoning points to the principle being used to avoid larger questions of law raised by the facts of a particular case. Such reticence is by and large an ingredient of judicial ambiguity and ineffectiveness. Although effectiveness may arguably have made an appearance in the original *Monetary Gold* case, depending on one's perspective it appears to have been short-lived.

In conclusion, while a clear answer certainly cannot be provided through the examination of just one principle, the use of mere assertion, often under the guise of CIL, certainly alludes to the use of custom as a tool by which judicial activism manifests itself in excess.

[153] This would be in line with what Mollengarden and Zamir (n 92) argue, in particular when they support the idea that 'that the Monetary Gold principle is irreconcilable with the ICJ Statute's jurisdictional architecture'.

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