Conceptualizing Justice

Time, Agency, and Disagreements at the International Court of Justice

Student Name: Daniele Balducci
Student Number: 743371
Student Email: danielebalducci00@gmail.com

Supervisor: Prof. dr. Robbert-Jan Adriaansen
Second reader: Dr. Mark Hay

Master History
Specialization Applied History
Erasmus School of History, Culture and Communication
Erasmus University Rotterdam

Master's Thesis

Conceptualizing Justice: Time, Agency and Disagreements at the International Court of Justice

Abstract

What justice is, and how we can achieve it, is a persistent academic question. Today, it seems that justice is even more contested by the appearance of all different kinds of justice: transitional justice, climate justice, criminal justice, future justice, etcetera.

The thesis, aims to uncover the processes of constructing notions of justice within the biggest international court of the world, the International Court of Justice (ICJ or Court), asking the following question: How were concepts of justice contested and deployed in key ICJ cases, and how did these contestations reflect and shape broader political transformations across different historical moments? Applying a conceptual history to the materials produced by the Court, particularly majority judgments and individual opinions, the thesis analyzes two specific cases: the *Corfu Channel* case (1949) and the *Continued Presence of South Africa in Namibia (South West Africa)* case (1971).

Within the first case, the concept of justice illuminates competing conceptions of *international* justice, shaped by individual understandings of history, perceived authority, and Cold War dynamics. International justice is particularly contested across the bench with regard to the Court's use of indirect evidence to accuse Albania. The concept implies the idea of pursuing equality among states. Advocated by Judge Alvarez, the idea of social justice also appears, having a broader scope and implications for international arbitration. In this case, the existence of two different law-making attitudes is argued: present-oriented and future-oriented. In the former perspective, international law should continually adapt to the present; for instance, given the acknowledgment of interdependence among states by Judge Alvarez, international law should entail duties towards the community of states itself. In the latter attitude, the future is embedded and taken into account in legal reasoning. In the majority judgment as well as in Judge Krylov's opinion, the law is thought to avoid an event from happening in the future.

In the *Continued Presence of South Africa in Namibia (South West Africa)* case, time plays the most prominent role in shaping the idea of justice. The majority of the Bench supports a progressive conception of justice, which argues that law should adapt to the present by rejecting discriminatory policies and supporting self-determination and decolonization. Another example of a present-oriented way of reasoning. Aligned with this idea, the position of Judge Padilla Nervo advocates social justice, which is associated with the principles of freedom, equality, and independence. On the other side, this progressive idea of justice is contested by a more static one, where a strict separation between law and politics is argued, and justice is not affected by the passing of time. In this case, the negotiation of justice reflects broader shifts within the Court itself, as its composition and authority evolved in response to global political change.

Keywords: Conceptual History, Legal History, International Court of Justice, International Law, Time, Justice, Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania), Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)

Table of contents

Chapter 1: Introduction

"Experience has shown that dealing with transitional political situations is a new era of human rights practice that poses some complex ethical, legal and practical questions".[1] It is not possible, from the transcript of a speech, to understand the tone of the speaker, but we can imagine that Jose Zalaquett, back in the late 80s, was quite concerned. Zalaquett was a Chilean lawyer and human rights advocate who was later appointed to serve the Chilean National Truth and Reconciliation Commission, established to investigate the crimes committed under the regime of Pinochet.

According to Reinhart Koselleck, how we perceive time influences the concepts we form. Each concept has a historical baggage, and the weight of this baggage is formed by different subjective perceptions. In the case of Zalaquett, confronting the novelty of the challenge of transitioning from a dictatorship to democracy, rewired the concept of justice. His considerations, along with the ones of other lawyers, scholars, and politicians, flowed into the formulation, as it has been argued, of a theoretical framework that in turn constituted the idea of *transitional justice*.[2] This theoretical framework, then, is the intertwining of different ideas and political positions, which confronted each other in debates and contestations. In that sense, within the notion of transitional justice, as well as individual perceptions, resides a political meaning.

The International Court of Justice (ICJ or Court) not only defines its aim as serving justice, but also includes 'justice' in its own name. The ICJ was established in 1945, right after the Second World War, following the Permanent Court of International Justice created by the League of Nations.[3] The Court is the principal judicial organ of the United Nations. As of January 2025, all 193 member states recognize, trust, and accept the Court as a point of reference for the resolution of international disputes.

Given the complex nature of concepts, it is natural to wonder what they mean when they talk about justice, especially considering that the ICJ is the biggest international court in the world - Is the Court's idea of justice the same as that of Zalaquett? One might even consider that question an anachronism, as the Court has been working for around 80 years, not only while Zalaquett was thinking of making justice for Chile. Indeed, time is crucial in understanding concepts.

The following thesis aims to draw the features of justice, as conceived by the ICJ, and to compare them in two different and specific moments of history. The process of justice-making

[1] Quoted in: Paige Arthur, "How 'Transitions' Reshaped Human Rights: A Conceptual History of Transitional Justice," *Human Rights Quarterly* 31, no. 2 (2009): 321–67, https://www.jstor.org/stable/20486755, 323-324.

[2] Arthur, "How 'Transitions' Reshaped Human Rights."

[3] International Court of Justice., *The International Court of Justice Handbook* (The Hague, Netherlands: Registrar of the International Court of Justice, 2021), 5.

would, therefore, benefit from that, becoming more aware. In the sense, for instance, of uncovering power dynamics or biased judgments, whether they exist. The societal relevance of this project, in turn, is to inform better justice-making processes.

1.1 Research question

The justice-making process, being political in nature and closely related to a specific historical period, needs to be studied in context. Since the ICJ has dealt with different cases over time, each case implies a different background. Discussing the background is part of the same study of the notion of justice. Given that, the research question of the dissertation is formulated as follows:

> *How were concepts of justice contested and deployed in key ICJ cases, and how did these contestations reflect and shape broader political transformations across different historical moments?*

The thesis discusses how the concept of justice is constructed. A close analysis of it aims to uncover how the concept of justice mirrors, for instance, the power dynamics of a specific historical period and how it shapes political change. Within each concept, as will be shown in the next section, there exists an individual dimension. In that sense, each concept is studied as a medium between individual perspectives, such as the judges of the Court, or more broadly, the Court itself as a singular actor, and larger political transformations. Indeed, the ICJ is a particularly suitable forum for such a study due to its international character, bringing together judges from different parts of the world, each with distinct backgrounds and perspectives.

The goal, therefore, is to address in the research question both the general - broader political changes - and the particular - individual understandings of history or international law, for instance.

At the end of the question, it is stated that it will be necessary to consider different moments in history. Having a different context and background is crucial, as in each historical moment it unfolds the political character of the concept and highlights the specific position of the Court, which is indicative of how the Court conceives justice. To answer the main research question presented, the thesis assumes a comparative perspective, comparing two specific ICJ cases. Given that, two sub-questions are formulated:

1. *How were concepts of justice contested and deployed in the* Corfu Channel *case, and how did these contestations reflect and shape broader political transformations in the post-WWII scenario?*

2. *How were concepts of justice contested and deployed in the* Continued Presence of South Africa in Namibia (South West Africa) *case, and how did these contestations reflect and shape broader political transformations in the post-colonial scenario?*

The first case to be examined is the *Corfu Channel* case, which the ICJ addressed in the late 1940s, a few years after its establishment. The second case, by contrast, took place in the 1970s. While the *Corfu Channel* case marked the early stages of the ICJ's activity, the second occurred more than twenty years later. This contrast is significant, as each case is framed within a distinct historical and political context, as noted in the research questions.

But not only time had to be considered, as the two cases are referred to as important for the very development of international law by the same Registry of the Court.[4] It is assumed that the Court aims to do justice, and it is stated in Article 38 of the Statute of the Court how it acts in accordance with international law.[5] If international law serves justice, it follows that a modification of international law implies a change in the concept of justice.[6] The *Corfu Channel* case contributed to the development of the prohibition of the use of force. The *South West Africa in Namibia* case is important for the position of the Court regarding the right of self-determination, as well as for the affirmation of basic human rights. Eventually, both cases were important in clarifying the position of the ICJ on humanitarian law in the context of armed conflict.[7]

1.2 Theoretical Framework

The main theoretical framework used to conduct the following research is conceptual history, which is the study of concepts and how they changed throughout time. According to Lucian Holscher, conceptual history is based on the idea that "language is the basic structure of the historical world".[8] Indeed, conceptual history was born tied to language and the study of it is still the dominant approach. However, contemporary developments in the field now encompass a

[4] The Registry of the ICJ is the permanent administrative organ of the Court and it also functions as an international secretariat. To have more info about the Registry, see: International Court of Justice., *The International Court of Justice Handbook*, 30-32.

[5] United Nations, "Statute of the International Court of Justice" (United Nations, 1945), https://www.icj-cij.org/en/statute.

[6] It should be noted that this does not mean justice is equivalent to international law. However, it is reasonable to view developments in international law as changes in the concept of justice.

[7] International Court of Justice., *The International Court of Justice Handbook*, 99-107

[8] Lucian Hölscher, "The Concept of Conceptual History(Begriffsgeschichte) and the ' Geschichtliche Grundbegriffe,'" *CONCEPT AND COMMUNICATION*, no. 2 (December 2008): 179–99, https://doi.org/10.15797/CONCOM.2008..2.005, 179.

variety of disciplines and methods, including visual analysis and computational techniques, among others.[9]

To trace a brief history of conceptual history, the theory was born in post-war Germany, from the intersection of different disciplines such as social history, intellectual history, hermeneutics, and historicism. We can consider the main representative work of this field to be *Geschichtliche Grundbegriffe*, published by Reinhart Koselleck between 1972 and 1992, and the main traditions, besides the one led by Koselleck, to be the French discourse analysis and the Cambridge School founded by Quentin Skinner and J.G.A. Pocock.[10] The work of Koselleck is a lexicon of social and political terms. In the project, Koselleck, along with other authors, studied and defined the historical development of several concepts, such as *crisis* or *democracy*, taking them as a part of the historical process itself. To do so, they took into account different contexts.

Before discussing in depth the relationship between a concept and its context, it is first necessary to define what a concept is. Within the wide spectrum of traditions, there exist different ideas about it: some argue that a concept is an abstract idea, such as it changes the context but the idea stays, others argue that a concept is a linguistic unit, in that sense defined by its use, but anyway is a part of a sentence.[11] The former notion is an (abstract) formulation that could be put into practice and allow the study of a concept through the second definition, but not without raising questions by social historians, arguing that men and communities are agents of history, instead of ideas, as well as the problem of how to actually study the speech - would you look at the specific words used or at how the argument is built?

To set the foundation of the research, the theoretical framework of Koselleck will be specifically used and discussed. According to Koselleck, there is a distinction between a word and a concept.[12] A word can have different meanings depending on the context; you can understand the meaning of a word by its context, making the word unambiguous. The concept is something that always brings a degree of ambiguity, in every context it appears, as it always holds the full spectrum of meanings acquired historically. A word can become a concept out of the need to articulate the full range of its meanings, derived from different contexts. For example, the word *state* became a concept once it was enriched with elements such as domination, citizenship, and taxation. In that sense, there exists a historical development in the birth of a concept and therefore every concept has a historical reality. As Koselleck writes: “The

[9] Helge Jordheim, “Conceptual History,” *Bloomsbury History: Theory and Method Articles*, 2021, https://doi.org/10.5040/9781350970878.066.

[10] Jordheim, “Conceptual History.”; Hölscher, “The Concept of Conceptual History(Begriffsgeschichte) and the ‘ Geschichtliche Grundbegriffe.’”

[11] Hölscher, “The Concept of Conceptual History(Begriffsgeschichte) and the ‘ Geschichtliche Grundbegriffe.’”

[12] Reinhart Koselleck and Michaela Richter, “Introduction and Prefaces to the Geschichtliche Grundbegriffe: (Basic Concepts in History: A Historical Dictionary of Political and Social Language in Germany),” *Contributions to the History of Concepts* 6, no. 1 (2011): 1–37, https://doi.org/10.3167/choc.2011.060102, 19-22.

meaning of words can be defined exactly, but concepts can only be interpreted".[13] Thus, because of the same influence of history on concepts, to interpret and study them, it is necessary to understand historical time more in detail, starting from the idea, according to Koselleck, that we should not talk about historical time but *historical times*.[14]

These historical times are definable as 'subjective' experiences of time as they concern individuals or communities and are a discovery of modernity.[15] According to Koselleck, each human being acts both according to a 'space of experience' and within a specific 'horizon of expectation'. The present, which is like a tension between these two, is where historical time unfolds. However, today is no longer the case. Koselleck argues that modernity marked a change in the experience of temporality, in the period that he defines as *Sattelzeit*, going from 1750 to 1850. If before that breaking of temporality, someone could have acted according to his experiences and what they were expecting to happen, in modernity the future is no longer 'expected': it is no longer possible to have an expectation based on experience; the experience is no longer sufficient to orient yourself in the future. Koselleck quotes Goethe, who states: "It is bad enough that now one can no longer learn anything for one's whole life. Our ancestors stuck to the lessons they received in their youth; we, however, have to relearn things every five years if we do not want to fall out of fashion completely".[16] According to Koselleck, this is due to the fact that modernity accelerated, being shaped by science, technology, industry, and their rapid developments.

What changes, however, is not only temporality but also the nature of the concepts themselves. Koselleck identifies four main features of modernity: democratization, which is the possibility for everyone to use the same terms; temporalization, as every concept started to express a specific understanding of time, for instance, *progress* started to indicate the future; transformability into ideologies, as concepts started to serve ideologies due to their increased abstractness; politicization, as concepts became political to the extent that the same concepts were used by different social and political classes.[17] For example, if we think of justice, it seems that every month the word justice assumes another, or additional, meaning: transitional justice, criminal justice, intergenerational justice, environmental justice, gender justice, future justice, etc. According to Koselleck, this is quite indicative of a concept: always asking for new

---

[13] Koselleck and Richter, "Introduction and Prefaces to the Geschichtliche Grundbegriffe: (Basic Concepts in History: A Historical Dictionary of Political and Social Language in Germany).", 20.

[14] Reinhart Koselleck, "Time and History," in *The Practice of Conceptual History: Timing History, Spacing Concepts*, Cultural Memory in the Present (Stanford (Calif.): Stanford university press, 2002), 110.

[15] Koselleck, "The Practice of Conceptual History."; Koselleck and Richter, "Introduction and Prefaces to the Geschichtliche Grundbegriffe: (Basic Concepts in History: A Historical Dictionary of Political and Social Language in Germany).", 9-10.

[16] Cited in: Koselleck, "The Practice of Conceptual History.", 113.

[17] Reinhart Koselleck and Michaela Richter, "Introduction and Prefaces to the Geschichtliche Grundbegriffe: (Basic Concepts in History: A Historical Dictionary of Political and Social Language in Germany)," *Contributions to the History of Concepts* 6, no. 1 (2011): 1–37, https://doi.org/10.3167/choc.2011.060102, 10-15.

formulations.[18] This highlights the political character of concepts, being part of and reflecting different political dimensions.

Following the question of what constitutes a concept and its historicity, conducting conceptual history requires engaging in both synchronic and diachronic analysis.[19] The synchronic analysis consists of contextualizing the concept under examination. That involves defining the contexts in which it appears and its meanings. The diachronic analysis, instead, is an extension of the contextualization, and it aims to put together the different layers of meaning of the concept. In that phase, a historiography of the concept is created, extracting the concept from its contexts. If the first synchronic step allows the understanding of the concept in its own time, the diachronic analysis shows the change in the meaning of the concept. In other words: first, it is necessary to establish the context of the concept and its meanings, then it is possible to trace a chronology of the concept, capable of highlighting the changes of it.

It should be noted that, on the one hand, Koselleck's theoretical position has been subject to criticism; on the other hand, conceptual history has evolved - partly in response to those very critiques. Today, conceptual history is recognized as an established academic discipline. Some criticisms of Koselleck's theory focus on his notion of *Sattelzeit* and its close link to language.[20] As already mentioned, the development of the discipline has been both methodological, for example, through the use of text mining, and theoretical.[21] Today, conceptual history is also employed in the study of emotions, and concepts are increasingly analyzed as part of broader "networks".[22] Furthermore, there is growing interest in comparative and transnational approaches.[23] As part of the current research, only some elements of the theory are considered, and it is not aimed to prove whether, for instance, the *Sattelzeit* is actually a turning point in individual experiences or not.

For this dissertation, it is not only considered temporality but historical time as such in the sense of how it is perceived as a whole. In fact, in different contexts, temporality is not the only thing that might change. Given the impossibility of designing the future, the present is a struggle, and it is aimed to study which shapes that struggle assumes. In particular, how the

---

[18] Koselleck and Richter, "Introduction and Prefaces to the Geschichtliche Grundbegriffe: (Basic Concepts in History: A Historical Dictionary of Political and Social Language in Germany).", 21.

[19] Koselleck and Richter, "Introduction and Prefaces to the Geschichtliche Grundbegriffe: (Basic Concepts in History: A Historical Dictionary of Political and Social Language in Germany).", 16-19; Jordheim, "Conceptual History."

[20] As a reference to a critical study to Koselleck, with specific reference to the idea of acceleration, see: Falko Schmieder, "Reinhart Koselleck's Chrono-Political Crisis Theory. Actuality and Limits," *History of European Ideas* 49, no. 1 (January 2, 2023): 102–16, https://doi.org/10.1080/01916599.2021.1937889.

[21] For a broader overview of the current directions of Conceptual history, see: Jordheim, "Conceptual History."

[22] Regarding the use of the theory within emotion studies, see: Margrit Pernau and Imke Rajamani, "Emotional Translations: Conceptual History Beyond Language," *History and Theory* 55, no. 1 (2016): 46–65, https://www.jstor.org/stable/24809583.

[23] Iulian Cananau, "Toward a Comparatist Horizon in Conceptual History," *History of European Ideas* 45, no. 1 (January 2, 2019): 117–20, https://doi.org/10.1080/01916599.2018.1493307.

Court confronts problematic situations according to its perceived historical time, meant now as self-perception and the perception of the historical period, that in turn includes the discourse, either legal or political, in which the Court collocates itself.

1.3 Sources

Before discussing the sources used in this research, it is necessary to briefly outline the Court's working methodology. The Court handles two types of cases: advisory and contentious. In advisory proceedings, a legal question is submitted to the Court - for example, what obligations states have with respect to the environment. Advisory opinions may be requested only by a specific list of organizations, such as organs of the United Nations or specialized agencies like the International Monetary Fund or the World Health Organization.[24] In the second case, a contention is brought to the examination of the Court. To do so, the applicant state must be either a UN member that signed the Charter of the organization, a UN member that did not sign the Charter as long as it satisfies certain conditions, or a non-member state, after providing a declaration that meets the requirements of the Court. Each state involved in the dispute has to agree to its participation and, therefore, to accept the jurisdiction of the Court.[25]

After the acceptance of the application, the institution of the proceeding can happen through a special agreement or a unilateral application.[26] The first case is a bilateral application, which means that there is no applicant or responder; either one state or all the states involved can lodge the case with the Court. Otherwise, the application is unilateral; in the *Corfu Channel* case, for instance, Britain applied against Albania. In this case, the application must contain the object of the dispute, including the states involved, the basis of the claim, and the basis for which the Court has jurisdiction over that.

Regarding the proceedings of the Court, it can be generally said that the working method involves first written proceedings and then oral proceedings. After the proceeding, the case is brought to a conclusion either through a final judgment or due to discontinuance, which happens when the parties, jointly or separately, agree to withdraw the case.[27] The judgment of the Court reflects the opinion of the majority of its judges. In the ICJ, there are fifteen permanent judges. In contentious cases, however, each party may also appoint a judge ad hoc if it does not already have a national on the Bench.[28] Along with the judgment, each judge is free to write their own separate opinion, in the case, for instance, in which they dissent with the majority, and

[24] International Court of Justice., *The International Court of Justice Handbook*, 81-83.
[25] International Court of Justice., *The International Court of Justice Handbook*, 33-35.
[26] International Court of Justice., *The International Court of Justice Handbook*, 49-50.
[27] International Court of Justice., *The International Court of Justice Handbook*, 69.
[28] From now on, the term 'Bench' will refer to the group of judges of the ICJ.

so they can explain their argument, or if they agree with it but on the basis of another reasoning.[29]

Given that, the documents concerning the cases of the ICJ are public and published online on the website of the Court. Each case has its own website where it is possible to download all the documents related to it.[30] In that sense, the documents are reliable, official, in English, and easy to access. However, they present some limitations: due to the Court's working method, each case entails several documents, such as written proceedings, oral proceedings, judgments, press documents, letters, and other communications.[31] Each document might be up to several hundred pages, and as legal documents, they are often procedural and contain information not useful to answer the research question.

Therefore, it is reasonable to focus on the judgments of each case, that is, the judgment regarding the merits of the *Corfu Channel* case and the advisory opinion of the Court in the *Continued presence of South Africa in Namibia* case. Possible procedural parts included in the examined documents will not be taken into consideration.[32] Additionally, a selection of individual opinions for each case will be considered. These documents represent the most important documents to answer the research question presented, as they are aligned with the theoretical framework of the thesis. In the final judgment of the Court, the position of the majority is formalized. In the individual opinions, instead, it is possible on one side to deepen the position of the majority and, on the other side, to uncover dissenting voices.

Examining them is crucial, as it is in the individual dissenting opinions that a different concept of justice, contesting the majority, is presented. The selected documents will be closely and analytically examined. Additionally, within the primary sources discussed, other publications written by or including the judges will be included, as they are important to reconstruct and introduce the thought and position of a judge.

To contextualize and introduce the primary sources of the thesis, as intended by the synchronic analysis, secondary literature will be discussed, for instance, about the historical context of the case.

[29] International Court of Justice., *The International Court of Justice Handbook*, 74-76.

[30] “Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania),” accessed January 16, 2025, https://www.icj-cij.org/case/1; “Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwith,” accessed January 16, 2025, https://www.icj-cij.org/case/53.

[31] To have more info about the working procedure of the Court to what has already been mentioned, see: International Court of Justice., *The International Court of Justice Handbook*, 49-95.

[32] Even if to a lesser extent, procedural parts or additional documents may be attached to, or included with, the selected materials. For instance, in the majority judgment of the *Corfu Channel* case, a report on the circumstances surrounding the events is attached, though it will not be considered in the present research. In contrast, individual opinions primarily reflect the judge’s perspective, often expressed in a straightforward manner.

1.4 Methods

To apply conceptual history to the selected case materials, attention will be paid to several key dimensions: temporality, agency, disagreement, and the use of the word *justice*. As previously discussed, concepts present a complex structure and are informed by a mix of elements. As contested notions, their meaning varies depending on the individual experiences and perceptions of the speaker - whether an individual or a group.

The analysis of temporality addresses both how time is understood by the Court and how history is conceived more generally. In the first case, the focus is on how an individual judge's perception of time may inform their position - for example, when a judge recognizes a situation as novel or unprecedented, or refers to a historical period not directly derived from lived experience. In the second case, the analysis explores how an author understands and writes about the past. This includes the author's general philosophy of history: whether history is seen as linear, cyclical, divided into distinct periods, or driven by particular actors. Such an approach aligns with Koselleck's idea of *temporalization* - that every concept reflects a specific understanding of time.

Another key aspect of the theoretical framework is the *politicization* of the concept of justice, including its *ideological* dimensions. This involves examining the Court's agency, including its self-perception more generally, and the subjects over which the judges disagree. These two elements shed light on how the Court sees itself as a political or social actor, which in turn shapes the meaning of the concept of justice. Analyzing the specific points of disagreement in the judges' individual opinions will help uncover the underlying assumptions that inform their respective understandings of justice. Understanding why judges disagree reveals the elements shaping their conceptualization of justice. On the other hand, it also shows how the same meanings of the concept are negotiated. In fact, across the Bench of the Court, different ideas are presented and contested to construct the position that is eventually rendered in the majority judgment.

It should be noted that, while the question of temporality can be examined across cases, the topics of disagreement will necessarily vary from one case to another. In that sense, studying the agency of the Court as expressed by the judges may include how they conceive international law or politics, for instance.

Finally, the analysis is primarily guided by the explicit use of the word *justice*, as it provides a direct reference to the concept. Each time the word appears, its meaning is examined in context: its associations, discursive surroundings, and how it relates to the speaker's position within the judgment or opinion. However, the explicit use of the word might be missing. In that case, the question of temporality and self-perception will be analyzed, as well as whether

relevant disagreements are present - where the relevance is given by the fact that they concern a topic discussed across the Bench. A concept, therefore, will be studied even if not explicitly mentioned, through its framing with other positions within the same case. These other positions will work as an antithesis to prove what the features of justice are or are not.

In conclusion, this methodological approach enables a deeper understanding of what informs the concepts of justice in each case and how they are articulated and contested. This will allow the research to answer the central questions and identify points of connection between the features of justice in the two historical moments under study.

1.5 Literature review

This section discusses the state-of-the-art literature relevant to the thesis topic. It begins with examining the concept of justice and its conceptual history. The review then explores with more depth the empirical literature on conceptual history, with particular attention to the International Court of Justice. Within this part, publications related to the selected cases will also be addressed. The final section considers current developments and debates in the field of legal history.

1.5.1 Justice and its Conceptual History

The debate over the nature of justice, and what it should be, has persisted for millennia. Therefore, there is no need to specify the existence of an endless literature about it. However, to have some points of reference, D.D. Raphael published in 2001 the book *Concepts of Justice*, which is a great recollection of the main, according to the author, conceptualization of justice divided by thinkers.[33] Indeed, the book starts with the question of justice in the Bible, as well as Greek philosophers, and continues with the latest developments, such as those of John Rawls or Robert Nozick.

Even if, from that book, we might get the idea of justice as a Western philosophical phenomenon, additional literature suggests that this is not the case. For instance, the anthology *Global Justice and East Asian Philosophies* bridges the Western discussion of justice with non-Western philosophies and traditions.[34] In that sense, offering comparative and cross-cultural studies extends the debate on justice, which is discussed more by themes and global issues, such as the relation between human rights and Chinese culture or Confucianism and how it can contribute to the formulation of global justice.

[33] D. D. Raphael, *Concepts of Justice* (Clarendon Press, 2001).

[34] Janusz Salamon and Hsin-Wen Lee, eds., *The Bloomsbury Handbook of Global Justice and East Asian Philosophy*, 1st ed, Bloomsbury Handbooks Series (London: Bloomsbury Publishing Plc, 2024).

In addition, the book *What is Justice?: Classic and Contemporary Readings*, published in 1999 by Robert C. Solomon & Mark C. Murphy, engages with a broad variety of formulations of justice, since ancient times, both in philosophical context and not: the question of justice is here discussed including milestones in the history of law such as the U.S Declaration of Independence or more in general considering legal documents.[35]

The first publications mentioned offer a global overview of justice, encompassing diverse cultural perspectives, historical periods, and types of sources. However, if the changing notions of justice have been widely discussed, there is comparatively less literature on the conceptual history of justice. In that field, the focus tends to shift toward the relationship between the concept and its historical and political context. The paper *How "Transitions" Reshaped Human Rights: A Conceptual History of Transitional Justice* by Paige Arthur investigates the emergence of the field of transitional justice.[36] Paige argues that transitional justice was born in the late 80s, when its theoretical framework was shaped by various conferences, in particular the Aspen conference in 1988. The analysis of the author creates a link between the idea of 'transition' and justice, in the sense that justice was shaped by how the transition was thought: these conferences in the late 80s gathered scholars, activists, and politicians to discuss the specific transitions of Latin American countries towards democracy. The study of Paige identifies some elements of how transitional justice was conceived and its conceptual framework defined, for instance, showing that it involved more legal and institutional reforms aimed to promote democracy, such as reform of abusive institutions or prosecutions rather than other kinds of justice, as they could be distributive or social justice. In addition, the author presents some challenges to the initial conceptual framework of transitional justice: defining a point of end to the transition; applying that framework to other contexts besides Latin America, that is within different cultures and traditions as well as in contexts where there is no a clear transition; the effectiveness of the transition paradigm itself - the paradigm defined in the mentioned conferences -, given empirical situations of failed transition.

Another study is *The Conceptual History of Social Justice* by Ben Jackson.[37] The author identifies the distinctive traits of social justice in redistribution and in being a societal virtue, meaning that it applies to society as such, which in turn can be defined as just or unjust. Given that, the author wants to trace the evolving conceptualization of social justice in political theories, paying attention to the moments in which justice acquired these traits. Indeed, the paper argues that social justice, meant in the terms mentioned, is a recent development, in

[35] Robert C. Solomon and Mark C. Murphy, eds., *What Is Justice?: Classic and Contemporary Readings* (New York: Oxford University Press, 1999).

[36] Arthur, "How 'Transitions' Reshaped Human Rights."

[37] Ben Jackson, "The Conceptual History of Social Justice," *Political Studies Review* 3, no. 3 (September 1, 2005): 356–73, https://doi.org/10.1111/j.1478-9299.2005.00028.x.

particular of the late 19th century. Formulating his argument, starting from the conceptualization of Aristotle, Jackson relies mainly on the work of other scholars to identify developments in the notion of justice according to the changes of context.

The two papers presented on the concept of justice both focus on a specific “type” of justice - transitional and social. While the first one examines mainly conferences, the second paper discusses political theories. The first paper examines a specific geographical area and represents a narrower analysis of the concept of transitional justice. The second one is a broader analysis but remains within a theoretical discussion of justice and does not delve too much into what informed the concept. However, both papers examine the features of the concept.

Entering more deeply into the thesis topic, there is literature not only on the conceptual history of justice within the philosophical and political domains, but also on its relationship with international organizations and international law.

The paper *Evolving Conceptions of Justice in International Law* analyzes to what extent international law reflects the idea of cosmopolitanism, meant as being ‘citizens of the world’, that is, the idea of creating a community of equal individuals.[38] Justice is linked to international law, and shifts in international law are seen as transformations in the understanding of justice. The author, David Armstrong, writes the historical developments of international law and then focuses on cosmopolitanism and its link with international law and therefore justice. For instance, the author notes that historically, international law can be found in treaties even from ancient Babylon. However, here justice had another meaning, such as being tied to procedure, that is *procedural justice*, and related to *natural law*, an indication of the cosmopolitan character of law, since everyone is recognized as part of humankind and subject to the same laws. Later on, cosmopolitanism passed through a complexification due to religions and their legal systems. In particular, it took three main forms: natural law, canon law, and Islamic law. In their way, different communities were acknowledged, such as the Christians or the Muslims. By the 19th century, justice became primarily a matter of relations between states rather than between individuals, and it was often tied to power dynamics - for example, when law was employed as a tool to legitimize colonial ventures. Following the historical developments of the relationship between law and cosmopolitanism, the author focuses on contemporary arguments and challenges. For example, one argument is that due to the Cold War, decolonization, and globalization, international law became more cosmopolitan. In the article, cases from the ICJ are mentioned as empirical evidence for it. Cosmopolitan arguments point out *ius cogens* norms

[38] David Armstrong, “Evolving Conceptions of Justice in International Law,” *Review of International Studies* 37, no. 5 (2011): 2121–36, https://www.jstor.org/stable/41308447.

and *erga omnes* obligations as markers of cosmopolitan traits.[39] In that sense, it is important to note the changes in the actors involved in international law and how the concept of responsibility changes. Developments of human rights and climate change also played a role in cosmopolitan thinking: the former acknowledges basic rights and universal values, while the latter encourages a way of thinking that goes beyond national borders. In general, cosmopolitanism is argued based on the development of individual rights, the identification of core values, more distributive justice, and legislation. In the last part of the article, the author emphasizes the limitations, critiques, and complexities of cosmopolitanism, particularly the absence of consent in international law, the impact of power dynamics on its development, and the lack of consensus on universal values.

This last publication covers a long historical period but, on the other hand, takes a rather distant view of the developments in international law. In particular, the rulings cited are not analyzed in depth.

It is important to recall that conceptual history is a broad and diverse field. Although the papers presented are all labeled as conceptual history, they vary significantly in their methodologies. In many cases, it is not clearly indicated from which branch of the discipline the research is situated.[40] For instance, some studies examine how the notion of justice has evolved over time - an approach that focuses more on changes in meaning - while others investigate how the concept of justice is constructed, that is, what informs and shapes it. Given these distinctions, the state-of-the-art literature appears to lean, on the one hand, toward studies of specific types of justice, and on the other, toward analyses of the concept's relationship with its context. The approach of this dissertation, as it will be discussed later, blends both perspectives within the ICJ, meant as an actor that formulates justice. In addition, it will not be limited to a specific idea of justice, taken *a priori*, but rather consider justice as such. Only then, specific conceptualizations, advocated across the Bench, appear.

1.5.2 The International Court of Justice

Given the international significance of the ICJ, extensive commentaries exist on each specific case, alongside a substantial body of literature examining various aspects of its decisions. Concerning the *Corfu Channel* case, in 2012, a dedicated book was published: *The ICJ and the*

[39] *Ius cogens* is a legal term, referring to a non derogable principle. Examples are the prohibition to enslaving or the prohibition of genocide. These norms are hierarchically superior and binding on all states, regardless of whether they have consented to them. *Erga omnes* is also a legal term indicating obligations or rights towards the community of states as a whole instead of a single state. In latin, the term means “toward all” or “towards everyone”. Many *ius cogens* norms give rise to *erga omnes* obligations (e.g., the prohibition of genocide). However, not all *erga omnes* obligations necessarily qualify as *ius cogens*.

[40] In the paper of Ben Jackson, for instance, it is explicitly made a reference to Quentin Skinner.

Evolution of International Law.[41] The book is quite comprehensive and investigates the foundational character of the case and how it affected the later developments of international law, such as the law of the sea, state responsibility, use of force, and environmental law. In the book, which gathers international lawyers and scholars, are taken into account the proceedings and the judgments of the ICJ, but they are also expanded with references to other legal documents. Within these documents, the methods used by the ICJ are analyzed, as well as the relation with the context of the time.

Concerning the case of the ICJ *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, a few years ago, Harun Koçak published an article.[42] The paper discusses the case by considering its significance for the development of the right to self-determination. On one hand, the author examines all the legal cases involving South Africa discussed by the Court; on the other hand, he traces the evolution of the right to self-determination. According to the author, it is in the case of Namibia, in 1971, that the self-determination right passed from being a political passion to having a legal ground and therefore acknowledgment by international law. The paper examines not only the case judgments but also the Court's written proceedings and the separate opinions of the judges. It aims to demonstrate how these documents shaped the Court's final judgment, highlighting the central importance of the principle of self-determination for the people of Namibia, therefore, the author looks at the topics of these documents.

In conclusion, the existing literature on the Court's cases addresses all documents involved, from written statements to individual opinions. However, these studies are primarily produced by legal scholars. Their focus is often on how a given case was significant from a historical perspective, particularly in terms of its impact on the development of international law. By contrast, the present project - as will be discussed in the *Innovative Aspect* section - proposes to examine those same documents through a different lens.

1.5.3 Legal History

To conclude the literature review, it is necessary to highlight the existing body of research regarding the current developments and directions in the field of legal history.

A first paper that is interesting to mention is the study by Daniel Siemens.[43] The author proposes to write a "new" cultural history of law, which gives more space to the "performativity of

[41] Karine Bannelier, Théodore Christakis, and Sarah Heathcote, eds., *The ICJ and the Evolution of International Law: The Enduring Impact of the Corfu Channel Case* (London: Routledge, 2013).

[42] Harun Koçak, "Development of Self-Determination Right and The Role of Icj: Statements on The South West Africa (Namibia) Advisory Opinion," *Alınteri Sosyal Bilimler Dergisi* 4, no. 1 (July 30, 2020): 47–68, https://doi.org/10.30913/alinterisosbil.732750.

[43] Daniel Siemens, "Towards a New Cultural History of Law," *InterDisciplines. Journal of History and Sociology*, December 17, 2012, Vol 3 No 2 (2012): Law and Historiography: Contributions to a New Cultural History of Law, https://doi.org/10.4119/INDI-966. For question of the performativity of law, p. 29.

law", described as how the law is enacted, which means taking into account different actors, for instance, individual judges and individual perspectives, forms of knowledge, legal regulations, and their enforcement. He argues that there exists a lack of studies within macro-historical research showing how law is performed.[44]

Another relevant publication is the article *Time, Law, and Legal History*, by Andres Thier. In this paper, the relationship between law and history is investigated.[45] The author demonstrates that time is a sense-making dimension of law and seems to be an epistemic condition of legal knowledge. Insofar as time is included in legal reasoning, as the law needs to define a past, present, and future, the law is subject to changes in the conceptions of temporality. Moreover, the law is demonstrated to be a 'medium' (at least within the European legal framework) of changing perceptions of society and nature, for instance. In that sense, different understandings of the world affect law, and indeed, law could even become a cultural practice, for example, in the case of calendar reforms. Thier, discussing how legal practice includes notions of temporality, raises the question of the autonomy of the law: there seems to be 'autonomy' in the law's use of history, which in turn defines a specific kind of history, related and linked to the law. This history refers to past events and legal knowledge, and it is used to validate a specific perspective or paradigm of law as well as to construct collective identities.

Both papers, recently published, highlight current gaps in the literature of legal history. This helps to assess the relevance and novelty of the following thesis, as shown in the first paper, individual experiences are not fully considered. In the study of Thier, instead, the question of temporality is specifically addressed, and how it opens up several questions that might reformulate the current understanding of law. In the following section, it will also be shown how the current thesis, with reference to these two articles, is collocated and aims to contribute to the field of legal history.

1.6 Innovative aspects

Given the literature presented, the novelty of the research will be argued with reference to the three domains discussed: conceptual history, the ICJ, and legal history.

Regarding conceptual history, the literature is relatively new, mainly written in the last decades - also because the discipline itself was born in the second half of the twentieth century. In that sense, the thesis aims to fill the gap in the studies of justice, within the discipline of conceptual history, with particular attention to the theory of Koselleck. It has been shown that the theory of Koselleck has not really been used as a lens in the study of justice. In fact, the

[44] Siemens, "Towards a New Cultural History of Law.", 35.

[45] Andreas Thier, "Time, Law, and Legal History – Some Observations and Considerations," *Rechtsgeschichte - Legal History* 2017, no. 25 (2017): 020–044, https://doi.org/10.12946/rg25/020-044.

thesis assumes quite a different approach in the study of the concept, which entails studying how a concept is constructed, contested, and how it changes in different historical moments. Previous studies did not explore the combination of these aspects.

In addition, the literature presented shows that, on the one hand, studies on justice tend to pay little attention to legal documents; on the other hand, within the discipline of conceptual history, the focus is typically on a specific type of justice. The project would also contribute to the existing academic study of justice and conceptual history, taking into accounts the Court as a starting point and its legal documents: justice is studied within the ICJ, this is a different approach as it does not start with a specific idea of justice, for instance, transitional justice, and then look for evidence from different fields, such as legal rulings or philosophical arguments. Using the ICJ as the sole starting point is an innovative aspect of this dissertation, as it allows for a more flexible and comprehensive exploration of the concept, particularly in terms of how it is negotiated across the Bench. In other words, it enables an analysis of how the concept is practically constructed and how conceptual history operates in practice. This also links to how the project would contribute to the literature regarding the cases of the ICJ. In fact, the documents of the Court have never been studied with a conceptual history approach, as intended in the thesis.

In conclusion, the thesis aims to contribute to the field of legal history in different ways: drawing attention to the individual experiences of the judges as well as the question of temporality. In fact, the thesis considers the individual experiences of the judges, as expressed in their individual opinion, and as discussed by Siemens, this represents novelty.[46] In taking a 'cultural approach' in the study of the judgments of the ICJ, that is reading the *individual* experience of the judges, and contextualizing them, through the synchronic analysis of each case, it is aimed to the gap in the study of how law is performed and to give an example of how to integrate law in historiography.

Concerning the question of temporality, the thesis aims to contribute to a better understanding of the question of the autonomy of law mentioned by Thier, providing empirical evidence of perceptions of time and legal traditions. It seeks to demonstrate how law engages with time and whether identifiable patterns emerge from this relationship. In addition, the design of the research aspires to show how the theory of Koselleck would contribute to legal history, which is something that, according to the author, has not yet been studied.[47]

Along with the academic relevance of the project, the thesis would contribute to understanding the reasoning of the ICJ, the biggest international court in the world. The process

[46] Siemens, "Towards a New Cultural History of Law."
[47] Thier, "Time, Law, and Legal History – Some Observations and Considerations."

of justice-making would, therefore, benefit from that, becoming more conscious. In the sense, for instance, of uncovering power dynamics or biased judgments, whether they exist.

Chapter 2: The *Corfu Channel* case

At the end of World War II, in 1949, the Bench of the Court assembled at the Peace Palace in The Hague to deliberate on its first contentious case. One of the judges, in complete disagreement, would later write the following lines in his individual opinion: “I do not believe that international justice could be content with indirect evidence of the sort that has been produced in the present case, which affects the honour of a State, a subject of international law, and its position in the community of nations”.[48]

The judge is unequivocal: the type of evidence presented in the case is unacceptable. But why is that so? Why would a higher degree of certainty be necessary? Is the judge saying that international justice must have a minimum requirement of certainty? This brief quote already offers a hint of what the judge might mean by international justice. What remains is to uncover the full reasoning behind his position - and what the concept of international justice, as presented here, implies or, more precisely, masks. In contrast, why would the majority of the Bench endorse a different conception of justice? Given that, the present chapter aims to answer the present question:

> *How were concepts of justice contested and deployed in the* Corfu Channel *case, and how did these contestations reflect and shape broader political transformations in the post-WWII scenario?*

The next section of the chapter will present the context and key characteristics of the case. This will be followed by an explanation and analysis of the majority judgment. In light of the majority’s position, the individual opinions of various judges - both concurring and dissenting - will then be examined, in order to unveil how differing conceptualizations of justice come into conflict and reveal distinct understandings of, for instance, history or the scope of the ICJ’s agency.

2.1 The *Corfu Channel* Case at the Dawn of the United Nations

The United Nations is the product of a long historical evolution, beginning with the rise of the modern state system in the 17th century.[49] Over time, European powers built a community for international cooperation, gradually expanding to include non-European states, particularly through the Hague Conferences of 1899 and 1907. These gatherings laid the foundation for

[48] Corfu Channel (Individual Opinion of Judge Krylov), I.C.J. 68 (International Court of Justice 1949), 69.
[49] Jean E. Krasno, “Founding of the United Nations: An Evolutionary Process,” in *The United Nations: Confronting the Challenges of a Global Society*, ed. Jean E. Krasno (Boulder, Colo: Lynne Rienner Publishers, 2004), 19–45.

early international institutions, such as river commissions and the International Telegraph Union, and eventually inspired the creation of the Permanent Court of International Justice and the League of Nations. Established after World War I, the League aimed to prevent future conflicts through dialogue among nations. However, it proved ineffective, especially when member states like Italy and Japan acted as aggressors, and its credibility suffered further when the U.S. refused to join. The League ultimately collapsed with the outbreak of World War II, underscoring the need for a stronger international body.

In response to this failure, and amidst the ongoing global conflict, U.S. President Franklin Roosevelt began laying the foundations for a new organization - the United Nations. His aim was to learn from the League's shortcomings, particularly by addressing its lack of enforcement mechanisms and rethinking the veto system. The structure of the United Nations was shaped through a series of key conferences - Dumbarton Oaks, Yalta, and San Francisco - though these were marked by intense debate over the organization's powers. One major issue was the trusteeship system: territories formerly under League mandates needed new international oversight to support their path to independence, raising broader questions about colonialism. This proved sensitive, as some powers, like the U.S., were reluctant to renounce control over strategic territories, while others, like Libya and Lebanon, resisted a return to colonial rule after wartime autonomy. Another point of contention was military cooperation: although the idea of mutual assistance was discussed, no state was ultimately willing to commit troops unconditionally. Some of the key issues debated during the formation of the United Nations were addressed through the introduction of the veto power. This mechanism granted greater authority to five founding members - China, France, Great Britain, the United States, and the USSR - allowing them to block any decision they deemed contrary to their interests. These powers were given permanent seats on the Security Council, one of the principal organs of the new organization. Alongside the Security Council, the United Nations was structured around several other main bodies: the General Assembly, the Economic and Social Council, the Trusteeship Council, the Secretariat, and the International Court of Justice.[50]

Eventually, during the summer of 1945, in San Francisco, the charter of the UN was signed by 51 nations, and by the end of the year, all the members ratified it, making it legally binding.[51] However, it is important to consider the political atmosphere in which the organization was established. Notably, during the San Francisco Conference, it was decided that the International Court of Justice would not be granted compulsory jurisdiction.[52] This decision reflected, among

[50] Krasno, "The United Nations."; For the allocation of seats and the founding members of the UN, see: Jussi M. Hanhimaki, "The Best Hope of Mankind? A Brief History of the UN," in *United Nations: A Very Short Introduction*, Very Short Introductions (Cary: Oxford University Press, Incorporated, 2008)., 15; For the bodies of the UN, see: International Court of Justice., *The International Court of Justice Handbook*., 16.

[51] Krasno, "The United Nations.", 42.

[52] International Court of Justice., *The International Court of Justice Handbook*., 16.

other concerns, the skepticism of the Soviet Union toward international adjudication. The USSR opposed proposals for compulsory jurisdiction in order to safeguard the interests of socialist states.[53]

In fact, the ICJ was established, as stated in its Statute and in Chapter XIV of the Charter of the United Nations, as the "principal judicial organ of the United Nations".[54] Back then, as today, all UN member states are automatically parties to the Statute of the Court, and each member undertakes to comply with the decisions of the Court.

The tension between the Soviet Union and the United States at that time should not be underestimated. Indeed, the first signs of the Cold War had already begun to surface. The use of atomic bombs on Japan, occurring during the same months, significantly influenced the political climate and the attitudes of member states.

From this brief historical account of the League of Nations and the United Nations, it becomes clear that both institutions were highly political in nature. Each was created by the victors of a global conflict. At the Yalta Conference, Roosevelt, Churchill, and Stalin agreed that membership in the new organization would be open to all "peace-loving" nations - meaning, in practice, those who had fought against the Axis powers during the war.[55] Therefore, on one side, there was the general hope of creating international cooperation and an international community; on the other side, policy making was driven by personal interests and global power dynamics.[56]

It is within this complex postwar context, just a few years after the Court began its work, that the events at the heart of the *Corfu Channel* case unfolded. The Corfu Channel is the body of water that separates the Greek island of Corfu on the west and the coasts of Albania and Greece on the East, and the details of the dispute will now be explained. The case regards mainly two events that happened there towards the end of 1946: on the 22nd of October, two British warships struck mines in the northern part of the Channel, and later, on the 12th and 13th of November, Britain led an operation of mine clearance in those same waters, known as *Operation Retail*. The context in which the events occurred is, as already discussed, post-WWII, and a further contextualization of the actors involved is needed.

In 1939, Italy began its occupation of Albania, which was liberated only in November 1944 by communist partisans. In January 1946, Albania was proclaimed a People's Republic by the newly established government. Between 1944 and 1948, Albania was allied with Yugoslavia. In

---

[53] Zigurds L. Zile, "A Soviet Contribution to International Adjudication: Professor Krylov'S Jurisprudential Legacy," *American Journal of International Law* 58, no. 2 (1964): 359–88, https://doi.org/10.2307/2196217., 365-366.

[54] United Nations, "Statute of the International Court of Justice."; United Nations, "Charter of the United Nations" (United Nations, 1945), https://www.un.org/en/about-us/un-charter.

[55] Krasno, "The United Nations.", 27.

[56] Krasno, "The United Nations.", 42.

1946, the two countries signed several political and military agreements, including a customs union. At the time, Yugoslavia, a larger communist state, sought to exert influence over Albania. In the same period, due to the treatment of a Greek minority in the south of the country, Albania was at war with Greece. Greece was helped by the UK, and these two countries also opposed Albania's application for UN membership. During WWII, in the Mediterranean Sea and the waters of northwestern Europe, hundreds of thousands of mines were laid. In 1945, an agreement between the Soviet Union, the US, France, and the UK established the International Central Mine Clearance Board to remove them. The Corfu Channel was assigned to the UK; Albania was excluded as it was considered not to have the means to carry out the cleaning. Therefore, until the accident, the Channel was considered safe for navigation, except for one event that occurred in May 1946: British ships passing through the Channel were shot at by the Albanian coast. The shooting did not cause any damage or loss, but it raised tension between Albania and the UK. Albania claimed that its authorization was necessary to cross the channel, and the UK argued the opposite because of its right to free passage, adding also that it would have returned fire if it had happened again.[57]

Given this contextualization, after the accident of October 1946, Britain filed an application to the Court in May 1947, accusing Albania of either having laid the mines, collaborating with a third state, or having knowledge of the mine-laying. As previously mentioned, the Channel had been cleared, and Britain believed it was safe to navigate. Following the incident, it sought reparations for the loss of lives and damage to its ships.

The judgment about the merits of the case will now be discussed. In fact, it has to be noted that the Court made three judgments regarding the case. In the first judgment, the validity of the case application was discussed. The UK applied at first to the UN, and the Security Council recommended the application to the ICJ. In this case, the Court dealt with the admissibility of the application and whether it could exercise its jurisdiction, as Albania raised that question. In the second case, rendered in 1949, the Court analyzed the merits of the case, and in the third one, rendered in the same year, the Court assessed the amount of compensation that Albania had to pay.

Since it is the case in which the Court directly engages with the subject matter of the dispute, the second case is the most revealing for understanding how justice is conceptualized. In the following section, its main points will be presented and analytically examined.

[57] Aristoteles Constantinides, “The Corfu Channel Case in Perspective: The Factual and Political Background.,” in *The ICJ and the Evolution of International Law: The Enduring Impact of the Corfu Channel Case*, ed. Karine Bannelier, Théodore Christakis, and Sarah Heathcote (London: Routledge, 2013), 41–60, 41-47.

2.2 The Majority Judgment

Following the introduction to the historical context and the description of the case, this section will present the reasoning behind the Court's judgment, specifically the majority decision. First, the judgment will be summarized; then, selected passages will be examined and discussed. After addressing the majority view, the analysis will turn to the individual opinions of other judges, highlighting the alternative positions they put forward.

As already written, the case is presented by Britain, claiming that the mines were laid by Albania or with either the knowledge or connivance of it. For Britain, the passage was innocent; in that sense, within the regulations of territorial waters, they could have passed in the Channel.[58] For Albania, the passage was not innocent, and they could have restricted the passage.[59]

In discussing the first hypothesis, the Court assessed the type of mines and also stated that the field was recently laid. The mines were collected by the UK in November, during *Operation Retail*. That was the mine clearance operation organized by the UK after the incident. The mines were assessed by the Court as German GY type and coming from the specific mine field in which the incident happened. Basically, the Court examines the hypothesis of the UK and considers the different arguments presented during the proceedings. In fact, given that, the UK claims that Albania had these mines and laid them, or that Yugoslavia laid the mines for them, as they had an alliance. The Court argues that it has not been proven that Albania possessed the mines or that there was collaboration between the two states. In that sense, the Court started considering whether Albania knew, or could have known, about the minefield. To find out that, the Court bases its argument on two aspects: the attitude of Albania and the feasibility of noticing the mine-laying process. In that sense, it is important to underline that the accusation of Albania, that is the proof of its responsibility, is constructed on indirect evidence.

From Albania's statements, the Court argued that Albania was having a jealous watch over the channel.[60] The court mentions that they did not immediately protest against the mine laying, which was a violation of their sovereignty, once the UK raised the case to the ICJ, but rather they claimed that Britain should not have passed through the Channel at all. To address the question of the visibility of the mine laying, the Court relied on a report produced by a group of experts.

---

[58] Innocent passage is a concept in the law of the sea. It can allow for the passage of ships in a restricted body of water. For the passage to be innocent, there must be some conditions. Some of them will be discussed later, when the Court actually assesses that the passage was innocent.

[59] Corfu Channel, I.C.J. 4 (International Court of Justice 1949).

[60] The Court's inference is based on Albania's own statements, such as a declaration made by an Albanian delegate at the Security Council on 19 February 1947. In that meeting, the delegate explicitly stated that Albania was closely monitoring the Channel due to the heightened tensions with Greece at the time, see: Corfu Channel, I.C.J., 19; United Nations Security Council, *Security Council official records, 2nd year: 109th meeting* (New York: UN, 1947), https://digitallibrary.un.org/record/634893.

Given that, the Court accused Albania of being responsible under international law for the incident, as they knew about the minefield, and there is no scenario in which they would not have had enough time to warn the British ships. In that sense, they are responsible for not having reacted and warned the ships, which was their responsibility. It is the duty of the state to alert about events on its own territorial space. After the question of Albania's responsibility, the Court dealt with the question of whether the UK violated Albania's sovereignty.

The Court recalled the shooting against British ships back in May of 1946. Albania, at that moment, claimed the right to regulate the passage as it was not an innocent passage. First, Albania claimed that the UK had to notify of the passage because it is a strait, and it has different regulations compared to an international strait, where the passage is free. Then, Albania claimed that the passage was not innocent, as they were warships. Regarding these questions, the Court stated that the Corfu Channel is an international strait, for which no regulation is possible, even if it acknowledged that Albania was in conflict with Greece. Additionally, the passage was demonstrated as innocent. For instance, the position of the ships was not in a war setting, and the guns were not loaded.

The Court examined the intention of the UK, as after the shooting of May, Britain said that it would have returned fire. However, Britain refused to provide the documents clarifying their reasons to navigate the channel again in October. Anyway, the Court refused to consider the intention and the approach of Britain. The argument of claiming the channel as an international strait was enough to not accuse Britain of violating Albania's sovereignty in the case of May and the incident of October. This is not the case, however, for *Operation Retail*. It is stated by the Court that the UK violated Albania's sovereignty as they claimed the right to clean and collect the mines in Albania's territorial waters, without asking anything to Albania. The Court refused the argument of Britain, which argued it was an operation of self-defence and aimed to help the Court in its investigation.

The same position of the Court regarding the measures taken by Britain, found in the closing paragraph of the decision, is the most insightful to understand how the majority thinks of justice, and will now be deepened. A passage from the judgment is reported:

> The Court cannot accept such a line of defence. The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law. Intervention is perhaps still less admissible in the particular form it would take here; for, from the nature of things, it would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself.[61]

[61] Corfu Channel, I.C.J., 34.

The first element of importance here is the denial of the self-claimed right of Britain to sweep the Channel. In particular, the argument of the Court is based on the past, in the sense that the "most serious (past) abuses" constitute the argument for which the position of Britain cannot be accepted. Therefore, the majority's perception of the past legitimizes the judgment of the Court. The second point of attention is the last sentence. The Court explicitly mentions the concept of *international justice*. Justice is administered, and this is a crucial passage as it suggests a sort of formal or methodological way to deal with justice. Indeed, the sentence implies that, at least regarding power imbalances, international justice must guarantee the same rights and positions for the states involved. In general, therefore, justice is associated with the notion of equality among states.

The next paragraph of the judgment is now reported:

> The United Kingdom Agent, in his speech in reply, has further classified "Operation Retail" among methods of self-protection or self-help. The Court cannot accept this defence either. Between independent States, respect for territorial sovereignty is an essential foundation of international relations. The Court recognizes that the Albanian Government's complete failure to carry out its duties after the explosions, and the dilatory nature of its diplomatic notes, are extenuating circumstances for the action of the United Kingdom Government. But to ensure respect for international law, of which it is the organ, the Court must declare that the action of the British Navy constituted a violation of Albanian sovereignty.[62]

In the quote, there is one point that needs to be highlighted to understand how the concept of justice is informed, and that is the self-perception of the Court. If it has been discussed how the Court intends justice as administered, in this passage, it states itself as the "organ" of international law. This claim suggests that the Court is entitled, or better, entitles itself, to represent international law and, therefore, to shape it. In that sense, the administration of international justice is a duty of the Court. How the Court defines itself, with that specific character of being the actor of international law, affects its agency. This statement implies a claim for authority and, if linked with the perception of the past, the duty to formulate international law in the present. In the past, as it is possible to read in the first paragraph reported, violations led to abuses, but in the present, the Court, as the organ of international law, can intervene and claim the authority to define what cannot be permitted.

This last remark also suggests the idea of the law as assuming a function that is almost eschatological. The law is thought out and formulated to avoid the repetition of specific events in the future. This discussion, along with the broader question of what it means to administer

[62] Corfu Channel, I.C.J., 35.

justice, will return in the following sections. In particular, the individual opinion of Judge Alvarez will now be examined, followed by the dissenting opinions of Judges Krylov and Azevedo.

2.3 Judge Alvarez

The first individual opinion worth examining is that of Judge Alvarez. Although he agreed with the majority's reasoning, he chose to append a separate opinion in which he expressed personal views that require some introduction.

Judge Alvarez had served on the ICJ Bench since its establishment in 1946 and remained there until 1955. At the time of his appointment, he was 78 years old, and his age raised concerns among some who questioned whether he was fit for the position.[63] On the other side, he brought with him a distinguished background as both a diplomat and a legal scholar. By 1949, when the Court was deliberating the *Corfu Channel* case, Judge Alvarez had already authored hundreds of publications.

The ideas and concepts expressed in Judge Alvarez's opinion were consistent with those found throughout his broader body of work. According to Liliana Obregón, one way to understand his contributions is by considering his social legal consciousness.[64] For Alvarez, the socio-legal perspective involved a contextualized approach to law, taking into account the dynamics of international life in the development of new legal norms.

Judge Alvarez was Chilean, but he studied in Europe and defended his doctoral thesis in Paris in 1899. His dissertation focused on an interdisciplinary study of the modern family.[65] Even in this early work, Alvarez emphasized the importance of studying law as a product of social, economic, and political transformations - that is, in context. It was also during this period that he began formulating the idea of a *new international law*.[66] From his doctoral thesis, where he already argued against individualism and encouraged solidarity, in 1931, he published an article where he discussed his suggestion for an innovative approach to law-making. He argued, for instance, for an order of interdependence between states and of the existence of a general interest, higher than the single interest of the states.[67]

These same concepts reappear in Judge Alvarez's individual opinion, the opening paragraph of which is quoted below:

---

[63] Katharina Zobel, "Judge Alejandro Álvarez at the International Court of Justice (1946–1955): His Theory of a 'New International Law' and Judicial Lawmaking," *Leiden Journal of International Law* 19, no. 4 (2006): 1017–40, https://doi.org/10.1017/S0922156506003736., 1018.

[64] It should be noted that this is not the only lens through which the author interprets Judge Alvarez's work. Another perspective she develops is that of creole legal consciousness, a concept she herself theorized; Liliana Obregón, "Noted for Dissent: The International Life of Alejandro Álvarez," *Leiden Journal of International Law* 19, no. 4 (2006): 983–1016, https://doi.org/10.1017/S0922156506003724.

[65] Obregón, "Noted for Dissent.", 995.

[66] It should be noted that Alvarez only began referring to his ideas as a "new international law" later, in 1929.

[67] Zobel, "Judge Alejandro Álvarez at the International Court of Justice (1946–1955).", 1021-1022.

> The cataclysm through which we have just passed opens a new era in the history of civilization; it is of greater importance than all those that preceded it: more important than that of the Renaissance, than that of the French Revolution of 1789 or than that which followed the first World War; that is due to the profound changes which have taken place in every sphere of human activity, and above all in international affairs and in international law.[68]

The passage contains all the key elements from which Judge Alvarez's argument and position can be developed. His stance is particularly noteworthy for its detailed formulation, especially in comparison to those of other judges, and it offers valuable insight for assessing the Court's overall judgment. The first aspect to consider is temporality. The period through which humankind had just passed is described as a "cataclysm," a term that marks a profound transformation. It is also interesting to notice that Alvarez refrains from assigning any moral judgment to this past. Whereas the majority judgment frames the past as something negative, that is something that must not be repeated, Alvarez treats it as a reference point to highlight the exceptional nature of the present - not its negativity.

Linked to this understanding of a "new era" is a new situation for international life. Within this situation, the judge refers to his *new international law* and social interdependence. As already mentioned, these concepts are not new in the judge's understanding of international law. The innovative approach described by the judge reflects precisely his social understanding of law. For him, law is not separate from politics, as it once was. Instead, law must adapt to its own times, and it is indeed described as the "effect of politics".[69] This is why he advocated for and supported the study of law in context, considering economic, social, political, psychological, and comparative aspects. Indeed, this *new international law* is characterized by social interdependence. Essentially, the current scenario of international law and life is one in which every state is interconnected, and law must adapt to this reality.

In the present case, this translates into the absence of absolute individual rights for states. For this reason, the judge agrees in accusing Albania of failing to fulfill its duty to oversee the channel. According to the judge, there exists a global system of interconnected states, where each state has rights but, more importantly for the present case, duties toward the community.[70]

This conception affects the ideas of sovereignty and responsibility. Sovereignty is described in his individual opinion as an "international social function of a psychological character", meaning that it is something to consider when formulating international law, as it represents an

[68] Corfu Channel (Individual Opinion of Judge Alvarez), I.C.J. 39 (International Court of Justice 1949), 39.
[69] Corfu Channel (Individual Opinion of Judge Alvarez), I.C.J., 41.
[70] It has to be noted that, according to the judge, there exist rights but not *absolute* ones.

aspect that shapes international life.[71] Again, this ties back to the judge's social legal consciousness. Responsibility, on the other hand, must also be respected toward the community of states. In this case, Albania is responsible for what happened in its territorial waters. Given the rejection of individualism, the judge also mentions the existence of a general interest of the community.[72]

With regard to justice, this *new international law* is specifically described by the judge as "the realization of social justice".[73] In that sense, the judge associates social justice with an idea of equality among states, due to their social interdependence. Social justice is advocated by the judge, as Albania had the responsibility toward the community of states to oversee the channel. The concept of justice held by Judge Alvarez, therefore, could not exist detached from how he understands his historical period.

Given the overview of the position of Judge Alvarez, it is necessary to return to the first passage reported. There, a "cataclysm" is mentioned. It has been shown that the ideas presented in the individual opinion were already present in the writings of the judge, including the idea of the cataclysm. Indeed, according to the judge, the one marking WWII is a second cataclysm, and he was writing about it even during the war. The first cataclysm, described in other writings, occurred with the discovery of the Americas.[74] The second one, born from the experience of WWII. The new cataclysm defines a new order that, in turn, affects international law, as expressed in the idea of *new international law*. This idea of cataclysms, however, from the perspective of the experience of temporality, demonstrates the judge's understanding of periods in history that are not necessarily the ones acknowledged by historiography. Reflecting on temporality, the judge does not seem to use the past to legitimize his legal reasoning, as it happens in the majority judgment. Instead, he seems more focused on the present. In fact, as mentioned, he does not give any moral connotation to past events. There are simply periods in history, and the law should reflect them.

Eventually, it must be discussed how the ideas of the judge translate into his conception of the agency of the ICJ. The judge explicitly writes that the Court has a "new mission": elucidating existing law, modifying outdated provisions, and creating and formulating new precepts for both old and new problems.[75] For the judge, the Court is the mediator between states: as the individual interests of states conflict, the duty of the Court is to resolve these disputes. In the Corfu Channel case, for instance, the Court is tasked with banning any policy of force.

---

[71] Corfu Channel (Individual Opinion of Judge Alvarez), I.C.J., 43; Regarding the idea of the judge of psychological aspects in international life, see: Obregón, "Noted for Dissent.", 1010.
[72] Corfu Channel (Individual Opinion of Judge Alvarez), I.C.J., 43.
[73] Corfu Channel (Individual Opinion of Judge Alvarez), I.C.J., 40.
[74] Obregón, "Noted for Dissent.", 1010-1011.
[75] Corfu Channel (Individual Opinion of Judge Alvarez), I.C.J., 40.

In conclusion, the judge's opinion expresses a specific understanding of time and international law. The law must reflect international life, which is understood by the judge as being marked by interdependence. These ideas, which the judge supported for almost all of his life, inform his concept of social justice. Given that, it is legitimate to use indirect evidence and claim the responsibility of Albania, including the evaluation of its attitude. Implicitly, the ICJ is acknowledged to have the authority to shape the law and the duty to do so. Comparing the idea of international justice presented in the majority decision with the social justice of Judge Alvarez, both share the idea of treating states as equals.

2.4 Judge Krylov

In this section, the individual opinion of Judge Krylov will be considered. The judge disagreed with the ruling of the majority, and the reason for this disagreement helps in understanding the features of the concept of international justice.

Judge Krylov was a Russian judge, representing the Soviet Union at the ICJ at the time. In fact, when the Bench was created, he was assigned to it as the representative of one of the permanent seats of the Security Council.[76] The judge worked at the Court until 1952. The background of the judge warrants more attention, especially when we consider that in the same year he joined the ICJ, he also became a member of the Communist Party.

According to Zigurds L. Zile, Judge Krylov shifted from objectivity, in the early stages of his career as a scholar of international law, to becoming a partisan of his party.[77] In the period following the Russian Revolution, Judge Krylov faced criticism for not aligning with and for opposing communist ideas. At one point, he even stopped publishing and chose to remain silent. Later, during the period under examination, he fully aligned himself with the ideas of the Soviet government, and his views on judicial arbitration and international law reflected those of the state. In particular, at the time of the Court's foundation, the Soviet Union exerted pressure to reduce its jurisdiction, as it was skeptical of the impartiality of non-communist governments. These governments made up the majority of the seats on the Court.

Judge Krylov was the judge mentioned in the introduction of this chapter, sharply dissenting from the majority. That same statement is crucial to understanding the relationship between the Soviet Union and the judge's position, as well as how this influences his concept of justice. As mentioned, the judge contested the use of indirect evidence to prove Albania's responsibility.[78]

[76] As noted in the introduction of the chapter, the Soviet Union, France, Britain, the US, and China were given permanent seats on the Security Council. It was also decided to assign a judge from each of these countries to the Bench of the Court, while the other judges were elected; Zobel, "Judge Alejandro Álvarez at the International Court of Justice (1946–1955).", 1018.

[77] Zile, "A Soviet Contribution to International Adjudication."

[78] Corfu Channel (Individual Opinion of Judge Krylov), I.C.J., 69.

His critique underscores the idea, suggested in the majority opinion, that international justice is meant as a type of justice that concerns the methodology employed by the Court.

It has to be discussed, then, what informs this understanding of justice. In the opinion of the judge, different aspects of the ruling are discussed, but there are no indications about a specific understanding of temporality. Perhaps, the judge confined himself to the mere writing of the matters of the case. As Zile argues, in international settings, Judge Krylov assumed a more restrained language and cogent reasoning, while "at home" he used to write more freely.[79] What seems to fund his position are indeed, as mentioned in the opening of the section, the ideas of the Soviet Union; the judge himself once wrote that the ICJ was a tool in the hands of the imperialist powers.[80] In that sense, the judge appears to act as the spokesperson of the Soviet government at the Court, and his individual opinion seems to be *individual* to a very reduced extent. In fact, the judge argues for a limited agency for the ICJ, restricting its jurisdiction, aligning with the general skepticism of the Soviet Union towards the ICJ - and the UN more in general. International justice, as meant by Judge Krylov, draws the perimeter of the Court's agency and embeds political considerations.

In conclusion, comparing Judge Krylov's opinion with the majority decision, in both cases, justice is treated as a matter of method. In the present opinion, the historical context unfolds within the same reasoning of the judge: the ICJ should have a restricted scope, and for this same reason, the use of indirect evidence is not possible. In the majority decision, it is implied enough authority to justify the use of indirect evidence and to establish the Court as the administrator of justice.

2.5 Judge Azevedo

The last opinion that will be considered is the opinion of Judge Azevedo. Like Judge Krylov, Judge Azevedo disagreed with the reasoning of the Court. Azevedo was a Brazilian judge and was elected to the ICJ at its foundation in 1946. The judge is known for his philosophical approach to the interpretation of law, which will be discussed later in the section. In his individual opinion for the *Corfu Channel* case, the judge expresses a specific idea of justice, in particular, international justice. In the present section, it will be shown what informs the judge's position and understanding of international justice.

A first passage is reported:

> [...].The minesweeping should have been done under the auspices of the United Nations, impartially and swiftly, in order to forestall any change in the state of the Channel.

[79] Zile, "A Soviet Contribution to International Adjudication.", 367.
[80] Zile, "A Soviet Contribution to International Adjudication.", 386.

> If international justice does not yet possess satisfactory machinery, the responsibility rests on the Powers, the majority of whom do not consider the moment arrived to invest the Court with compulsory jurisdiction.
>
> The Court cannot be blamed for the limited means at its disposal, nor for provisions such as that which allows a State to refuse to produce a document, as has happened in the present case.[81]

This passage contains a personal reflection, a remark of the judge. The judge was saying that Britain should have referred to the United Nations for the mine clearance instead of organizing *Operation Retail*, which he acknowledged as a violation of Albania's sovereignty. In the last paragraph, the judge was referring to the refusal of Britain to provide the document clarifying their intention to navigate the channel again in October, when the accident happened.[82]

Besides the fact that in the sentence "international justice" is written as if it were a subject, which could possibly be replaced with "International Court of Justice", the concept of justice is once again grounded in a very practical discourse about how it should work. In the case of Azevedo, a limit to international justice is recognized: it does not have compulsory power and therefore has restricted agency. It would even be possible to imagine that here Judge Azevedo was thinking of the Soviet Union and the opinion of Judge Krylov. In fact, for Judge Krylov, the concept of international justice entails, or better, masks, the political intention of restricting the scope of the Court, which in turn does not allow the Court to rely on indirect evidence. For Judge Azevedo, the same lack of cooperation between the states involved in a case and the same limitations of the Court, such as not having compulsory jurisdiction, serve as a justification for the use of indirect evidence.

The idea of the ICJ, placed between states as a regulator of them, is linked to other topics discussed by the judge that need to be mentioned to expand how the judge conceives the agency of the Court. First, there is the idea of the judge, close to that of Judge Alvarez, that international law should reflect the international life of its period. But this period is marked by a sort of general interest. There is an explanatory example in the opinion: the judge argues for replacing the theory of risk with the theory of *culpa*, as the latter is more in line with the "conscience of humanity".[83] In the present case, the theory of risk was discussed with reference to the responsibility of Albania. This theory refers to holding someone responsible merely for the risk that they might have made a mistake - for instance, if Albania committed a fault that caused the explosion. Therefore, it should be noted that, for the judge, periods in history might be characterized by a different international life.

---

[81] Corfu Channel (Dissenting Opinion of Judge Azevedo), I.C.J., 111.

[82] It is briefly recalled that Britain had navigated the channel in May 1946. In that situation, British ships were shot at by the Albanian coast. A few months later, in October 1946, the ships, passing through the channel a second time, struck the mines.

[83] Corfu Channel (Dissenting Opinion of Judge Azevedo), I.C.J., 85.

The idea of replacing that theory with another approach, dictated by international life, is conceptually significant and links with the philosophical formulation of Judge Azevedo concerning the interpretation of treaties. In other individual opinions, the judge presents a "teleological" approach to treaties.[84] A passage is cited here from the individual opinion of Judge Azevedo in a case dealt with by the ICJ in 1950, one year after the deliberation on the *Corfu Channel* case.

> [...] the interpretation of the San Francisco instruments will always have to present a teleological character if they are to meet the requirements of world peace, cooperation between men, individual freedom and social progress. The Charter is a means and not an end. To comply with its aims one must seek the method of interpretation most likely to serve the natural evolution of the needs of mankind. 'Even more than in the applications of municipal law, the meaning and the scope of international texts must continually be perfected [i.e. by interpretation], even if the terms remain unchanged.[85]

The passage explains the approach of Judge Azevedo to the interpretation of the UN Charter. The teleological approach, according to Fitzmaurice, is one of the schools of thought among judges regarding the theory of treaty interpretation.[86] With this approach, less weight is given to the intention of the drafters, an aspect central to other schools of thought, and a treaty is considered as an end in itself, an "existence on its own".[87] It is therefore important, in interpreting a treaty, to consider the objects and aims of the treaty, as well as the context in which it was made, including the international life of the moment.

The perspective of Judge Azevedo, therefore, seems to be aligned with that of Judge Alvarez. For both of them, the concept of justice is informed by an understanding of history in which different periods are characterized by different international lives. In that sense, international law should adapt to it. Moreover, within international life, a major actor is acknowledged, such as the international community for Alvarez and, quoting the passages reported, "humanity" or "mankind" for Judge Azevedo.

It is interesting to note that both judges have Latin American origins, and it has been argued that it is characteristic of Latin American judges at the ICJ to conceive a close relationship between international law and global societal developments.[88] In that sense, they could be interpreted in light of the Hispanic international legal tradition. The question of interpreting a

---

[84] G. G. Fitzmaurice, "Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points," *British Year Book of International Law* 28 (1951): 1–28, https://heinonline.org/HOL/P?h=hein.journals/byrint28&i=7.

[85] Quoted in: Fitzmaurice, "Law and Procedure of the International Court of Justice.", 13.

[86] Fitzmaurice, "Law and Procedure of the International Court of Justice."

[87] Fitzmaurice, "Law and Procedure of the International Court of Justice.", 2.

[88] Alan Leonhard, "Regional Particularism: The Views of the Latin American Judges on the International Court of Justice," *University of Miami Law Review* 22, no. 3 (May 1, 1968): 674, https://repository.law.miami.edu/umlr/vol22/iss3/7.

regional particularism in Latin American judges has, however, also been questioned, for instance, in the case of Judge Alvarez.[89]

In Judge Azevedo, it is not elaborated further what the features of these periods are. However, the aspect of temporality needs further attention. For Judge Azevedo, a treaty seems to be understood as suspended in time, and therefore applied out of its context. What matters is its aim, and above all, what dictates and drives its interpretation is the international life of the present moment. Giving more weight to the present moment affects the formulation and interpretation of law. For instance, Judge Krylov, arguing that international justice should be limited to direct evidence, shows a way of thinking concerned with the future. In fact, it is aimed at avoiding repercussions for the Soviet Union. In the majority judgment as well, when it is stated that a policy of force can no longer be accepted, the law is thought to prevent the repetition of a specific event, precisely, the use of force as a policy.

In conclusion, for Judge Azevedo, the weight of international life affects the agency of the Court, which is more flexible in its activity; for instance, it is allowed to use indirect evidence. This is due to a lack of international cooperation, as shown in the quote. On one side, Judge Azevedo acknowledges international life and a sort of will of humankind, which allows for a flexible application of law, for example, in replacing the theory of risk with that of *culpa*. On the other side, the judge agrees with the use of indirect evidence because of a lack of international cooperation, which seems contradictory. However, it can be said, in more general terms, that international life is a crucial aspect in the reasoning of the judge, informing his conceptualization of justice, either as a lack of cooperation or as an expression of a general interest.

2.6 Conclusion

In conclusion, the *Corfu Channel* case presents different conceptualizations of justice, shaped by individual understandings of history and global political developments. From the majority judgment, international justice is framed as an administrative form of justice. As shown earlier, this conception is closely linked to the use of indirect evidence in the accusation against Albania. It also assumes the premise that all states are to be treated as equals. In that sense, the Court claimed the authority to issue a judgment. The majority opinion, in its reference to time, addresses the past with the aim of preventing future violations. Indeed, the Court emphasizes the need to ban any policy of force, stating that Britain violated Albania's territorial sovereignty, in order to avoid repetition in the future.

In Judge Alvarez's opinion, it is not international justice but the notion of social justice that is foregrounded. However, the two are not necessarily in conflict. Both rely on the principle of

[89] Obregón, "Noted for Dissent."

equality among states. For Judge Alvarez, this principle stems from the emergence of a *new international law*, characterized by the interconnectedness of states and new responsibilities toward one another. Accordingly, Albania is recognized as responsible for the accident in its territorial waters. Additionally, Judge Alvarez applies a present-oriented reasoning, arguing that international law must reflect contemporary international life. The ICJ, in this view, also assumes a “new mission”, which implies a recognition of its authority.

Judge Krylov, by contrast, approaches the concept of international justice through its methodological underpinnings. For him, indirect evidence is unacceptable, and international justice should be much stricter, at least regarding the gathering of evidence. In that sense, insofar as the Court does not reach the maximum degree of certainty, it should refrain from rendering any judgment. As shown, his opinion is heavily informed by his political involvement beyond the ICJ. His view can be read as a product of the historical moment in which the case took place, marked by tensions and mutual suspicion between the United States and the Soviet Union.

In Judge Azevedo’s conception of international justice, the Court’s agency is acknowledged as limited, but this limitation does not justify reducing its role. Furthermore, international life, or more broadly, the present moment, is understood as a key factor in the formulation and interpretation of law.

The debate on justice, within this case, mainly regards its method - the question of evidence -, making temporality a secondary aspect that fuels the negotiation, but an additional note still needs to be made. The case features different temporal orientations: in the majority judgment and in Judge Krylov’s opinion, the future is central, as both seek to prevent the recurrence of specific events, whether the use of force or political consequences for the Soviet Union. In contrast, for Judges Alvarez and Azevedo, international law is grounded in the present. This contrast reflects two opposing approaches: law as an agent shaping the future versus law as a product of the present historical context.

Answering the research question of the chapter, the case reveals two primary conceptualizations of justice: social justice and international justice. While the former is only advanced by Judge Alvarez, the latter is contested across the Bench. The two concepts, however, coexist to the extent that Judge Alvarez aligns with the majority judgment. In fact, they are both employed to advocate the same principle, namely equality among states. In a way, it could be said that they share the same (present) *meaning*, but a completely different construction: Judge Alvarez does not question the evidence used by the Court at all; across the Bench, no one else argues for a *new international law*.[90] It has to be discussed whether, at this

[90] By "present” meaning, what is meant is the meaning of the concepts as they appear in the case under examination. Even if they share some features and partially overlap in the *Corfu Channel* case, this does not imply that the same would occur in other contexts.

point, Judge Alvarez was not understanding international justice as a form of social justice. Given the fact that a concept has a historical baggage, as theorized by Koselleck, the concepts overlap in their implications for the present case, but they must be distinguished. They differ if analyzed from a historical perspective.[91] However, it can be said that, in the present case, international justice, as meant by the majority, can be understood as a sub-category of social justice, as conceived by Judge Alvarez. This is because the concept of social justice developed by Judge Alvarez, due to its characteristics, has broader implications for international relations, and not only the acceptance of the use of indirect evidence to regulate international disputes.

Regarding the concept of international justice, from the discussion of the case, it is possible to see how it is shaped both by individual judicial understandings, such as Judge Azevedo's view of law as a product of its time, and by broader political realities, as in Judge Krylov's alignment with Soviet foreign policy.

[91] The concept of social justice, as advocated by Judge Alvarez, includes considerations such as the reformulation, for instance, of the concept of sovereignty. According to the judge, there exist new duties towards the community of states. In the concept of international justice, this idea is not present, and the discussion merely regards the methodology employed by the Court.

Chapter 3: The South African Occupation of Namibia

In 1971, while rendering the judgment for the *South West Africa (Namibia)* case, a group of judges dissented with the majority, saying that “justice needs to be seen to be done”. Literally, the group of judges used this same expression. But what does it mean that justice needs to be seen? What is the link with the “visibility” of justice and the same concept of justice?

The position of the judges becomes even more relevant and interesting if we think that it was not the first time that the ICJ dealt with South West Africa. The case of 1971, as it will be shown, marked the culmination of what have been described as the “most explosive and politically controversial cases in the history of the International Court of Justice”.[92]

To understand how the concept of justice is constructed throughout the case, the present chapter aims to answer the following question:

> *How were concepts of justice contested and deployed in the* Continued Presence of South Africa in Namibia (South West Africa) *case, and how did these contestations reflect and shape broader political transformations in the post-colonial scenario?*

To answer the question, the case will first be contextualized, highlighting political changes and the characteristics of the historical period surrounding the case. Later, the majority opinion will be discussed in detail, followed by the individual opinion of Judge Padilla Nervo. In conclusion, the dissenting voices of the group of judges mentioned here will be discussed to underscore how the concept of justice is contested and informed by individual understandings.

3.1 South Africa and the United Nations

It has already been discussed in the previous chapter how problematic the discussion was about how to deal with the mandate system of the League of Nations in the creation phase of the United Nations. Namibia was one of the territories placed under the mandate system. Having been initially colonized by Germany, it entered the program at the end of World War I, with the League of Nations appointing South Africa as the administrator of the territory.[93] To briefly recall how the mandate system works, the mandator has the duty to supervise the territory in order to encourage the “well-being” and “development” of the people living there, and

[92] Victor Kattan, “Decolonizing the International Court of Justice: The Experience of Judge Sir Muhammad Zafrulla Khan in the *South West Africa* Cases,” *Asian Journal of International Law* 5, no. 2 (2015): 310–55, https://doi.org/10.1017/S2044251314000125., 311.

[93] Motee Persaud, “Namibia and the International Court of Justice,” *Current History* 68, no. 405 (1975): 220–25, https://www.jstor.org/stable/45313294., 220.

that formed a “sacred trust of civilization”.[94] In addition, the mandators had to provide an annual report regarding the conditions of their territories. The terms and the features of the mandate system mentioned here were stated in the Covenant of the League. However, as soon as South Africa assumed control of the territory, it began implementing segregation policies. At this point, a long struggle for the well-being of the Namibians started. Reconstructing this struggle within the UN discourse will constitute the following part, as it is not only a background of the case that will be discussed, but explicitly discussed in the ruling.

Once the trusteeship system was created, the mandators were asked to sign an agreement to submit the territories they were administering under the oversight and control of the new organization.[95] In 1946, South Africa was the only country that refused, arguing that it owned the territory and therefore had the right to incorporate it. Due to the system's ambiguous features, it was indeed thought possible to claim this right. As a response to their dismissal, in 1949, the UN General Assembly asked the ICJ to define the international status of South West Africa. The ruling of the Court, in 1950, defined that, even if the League had collapsed, the Union of South Africa still had to respect the features of the mandate - “well-being”, “development”, and annual reports. The Union was stated not to have any right other than that. The decision was accepted by the General Assembly, which urged the Union to comply with it, but it did not produce any real result. In fact, South Africa just dismissed the positions of the UN. Following the first case, in a few years, in 1955 and 1956, the ICJ dealt with two other questions regarding the territory. In the former case, the voting system for questions involving South West Africa was established. In the latter, it was granted permission to have oral hearings for petitioners about the conditions in Namibia.

Before moving to the next cases of the Court, it is necessary to clarify the difference between the General Assembly, the Security Council, and the ICJ. They are all organs of the UN but with different roles and functions. The General Assembly is the main policy-making body of the UN and cannot pass legally binding resolutions. The Security Council is the executive body, can pass legally binding resolutions and, to some extent, enforce decisions. For instance, the Security Council can authorize sanctions or the use of force. The ICJ is the judicial body that solves disputes and makes advisory opinions. It is important that advisory opinions of the ICJ are not legally binding in the sense that they are not directly enforceable by the ICJ. Another important point of distinction that will unfold later is that the first two bodies are *political*, while the Court is a *judicial* organ. The problem relies on the difficulties of actually separating the two spheres.

---

[94] Covenant of the League of Nations, quoted in: Persaud, “Namibia and the International Court of Justice.”, 220.

[95] Persaud, “Namibia and the International Court of Justice.”, 221.

During the 1960s, the ICJ continued to address South Africa's administration of Namibia, as the legal status of the territory remained unresolved. Liberia and Ethiopia brought a case against South Africa, accusing it of failing to safeguard the welfare of the Namibian people.[96] The two African states opposed the apartheid policies implemented by South Africa and hoped the Court's ruling would result in legally binding measures. While the ICJ did not have jurisdiction to rule on apartheid within South Africa itself, it could address the issue in South West Africa, as the territory had been under a League of Nations mandate. Furthermore, banning apartheid policies in South West Africa could have served as a legal basis to challenge similar policies in South Africa, especially given that, at the time, the illegality of racial discrimination under customary international law was not yet clearly established.[97]

Regarding the application, the ICJ produced one judgment in 1962 and another one in 1966. In the first situation, the Court had to deal with the preliminary objections of South Africa, which was opposing the jurisdiction of the Court and the right of the two African countries to institute contentious proceedings. The Court ruled that the objections were not valid. However, in 1966, the Court reversed the previous judgment. In fact, the whole case lasted for different years, and during them, the Bench of the Court changed. In 1962, the ruling was passed by 8 votes to 7, but the majority was not reached in 1966.

The reversal of the judgment rendered by the Court deserves particular attention, as it reveals specific internal dynamics of the Court.[98] At the time, the Bench was more conservative. Indeed, the President of the Court, Percy Spender, supported a slower approach to decolonization. Another judge, Muhammad Zafrulla Khan, who had previously advocated for decolonization and the right to self-determination within the UN, particularly in the General Assembly, was pressured by the President to recuse himself from the cases brought by Ethiopia and Liberia. Judge Zafrulla had been appointed by the applicant states as a judge *ad hoc*, but he did not attend the deliberations.[99]

The composition of the Bench also changed during the proceedings, for instance, due to the death of Judge Badawi.[100] As a result, the vote was evenly split (7 to 7). In such cases, the President of the Court holds the casting vote, which in this instance resulted in a decision favoring South Africa.[101] In addition to this, Judge Zafrulla Khan was not only pressured not to participate in the proceedings, but his very election had previously been opposed due to his

[96] Persaud, "Namibia and the International Court of Justice.", 221-222.
[97] Kattan, "Decolonizing the International Court of Justice.", 328.
[98] Kattan, "Decolonizing the International Court of Justice."
[99] It should be recalled that in contentious cases, if a party does not already have a judge of its nationality on the Bench, it is entitled to appoint a judge *ad hoc*.
[100] Kattan, "Decolonizing the International Court of Justice.", 345.
[101] The casting vote of the President means that, in the event of a tie, the President's vote decides the outcome - it counts as two votes. As mentioned, at the time, the President of the Court, who held more conservative views, opposed the application submitted by Liberia and Ethiopia.

political positions. For instance, Judge Fitzmaurice, aligned with British interests, had opposed his appointment. At the time, Britain had significant economic interests in South West Africa. These dynamics highlight how the election of judges to the Court was shaped by political pressure.[102]

The 1966 recusal provoked widespread outrage for several reasons. A ruling against South Africa's policies had been expected, in line with the Court's earlier judgments.[103] However, in 1966, the Court refrained from addressing the substantive issue of racial policies and limited itself to declaring a lack of jurisdiction. In effect, it reverted to its 1962 position rather than engaging with the merits of the case.[104] Further criticism was fueled by Judge Zafrulla Khan's public statement that he had been asked to refrain from participating in the proceedings. This episode also contributed to the perception that the ICJ is ineffective.

Therefore, following the Court's ruling, which declared it lacked jurisdiction, the General Assembly, frustrated by the outcome, adopted Resolution 2145, revoking South Africa's mandate over South West Africa and placing the territory under UN administration.[105] Once again, South Africa refused to comply with the decision, prompting the General Assembly to refer the matter to the Security Council. The Council, produced a series of resolutions: Resolution 264, in March 1969, which recognized the General Assembly measures - the revocation of the mandate; Resolution 276, in January 1970, that stated as the presence of South Africa in Namibia was illegal and encouraged states to refrain from supporting South Africa in Namibia; Resolution 283 and 284, decided on the same meeting in July 1970, remarked with a strong wording Resolution 276 and asked the opinion of the ICJ.[106]

With Resolution 284, the case under analysis in this chapter was initiated. The escalation of resolutions and measures by the UN stemmed from South Africa's dismissal. It is important to keep in mind the long duration of the struggle to prohibit violations in Namibia, which can be traced back to the 1920s with the Covenant of the League of Nations. At this moment, the UN had been working for half a decade to end violations in Namibia, and the ICJ had already addressed the issue in five decisions, including both advisory opinions and contentious cases.

Throughout this period, international law experienced its limits, and it shows how it became intertwined with politics. Basically, if the ICJ makes a ruling, the General Assembly and the

---

[102] Kattan, "Decolonizing the International Court of Justice."

[103] Kattan, "Decolonizing the International Court of Justice."

[104] The first phase of the case, in 1962, dealt with the question of jurisdiction, while the second phase was supposed to address the merits, that is whether South Africa was applying apartheid policies.

[105] Persaud, "Namibia and the International Court of Justice.", 222-223.

[106] United Nations Security Council, "Security Council Resolution 284 (1970)" (New York: United Nations, 1971), https://digitallibrary.un.org/record/90763.,United Nations Security Council, "Security Council Resolution 283 (1970)" (New York: United Nations, 1971), https://digitallibrary.un.org/record/90763.,United Nations Security Council, "Security Council Resolution 276 (1970)" (New York: United Nations, 1971), https://digitallibrary.un.org/record/90763.,United Nations Security Council, "Security Council Resolution 264 (1969)" (New York: United Nations, 1970), https://digitallibrary.un.org/record/90763.

Security Council can strengthen their positions, taking more measures or applying restrictions, as happened with the ruling of 1950. The Security Council, asking for an advisory opinion, had already placed politics in the premises of the case - as it is a *political* organ of the UN.

It is now possible to deepen the majority judgment of the current case, that is, the ruling of the ICJ made in 1971: *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276*. First, the content of the majority judgment will be examined, followed by an analysis of certain aspects through the lens of conceptual history. Later, different individual opinions will be discussed.

3.2 The Majority Judgment

To understand the conceptualization of justice by the Court, it will not be necessary to deepen all the judicial details and arguments of the judgment, but only a few aspects. A summary of the content of the judgment will now be presented, followed by a more in-depth analysis.

In the first part of the judgment, the Court dealt with the objections of South Africa.[107] The state claimed that the Court should have refused to deliver an advisory opinion as subject to political pressure. South Africa also requested the refusal of the case by the Court, claiming that South Africa was involved in a dispute.[108] In addition, given the argument that a contentious situation existed, South Africa claimed the right to appoint a judge *ad hoc*. Moreover, the participation of three members of the Bench in the proceedings was questioned, as they had played a role in drafting the General Assembly resolutions. The Court refuses these objections, considering them not valid.

After the objections, the Court proceeded to discuss the merits of the case. In this part, the Court reviews the past cases concerning South West Africa with which it had dealt and clarifies some aspects of them. For instance, the nature of the mandate in Namibia is argued to be misunderstood by South Africa. The Court mentions the developments of international law and

[107] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), I.C.J. 16 (n.d.).

[108] South Africa argued that the existence of an ongoing dispute would render the case contentious in nature. In support of this position, it cited a precedent from the Permanent Court of International Justice, in which the Court had refused to issue an advisory opinion due to the presence of a live dispute. According to South Africa, the contentious nature of the case could be established in two ways: either through the continued dispute between the applicants of the 1962 advisory opinion - Ethiopia and Liberia - or through a broader dispute between South Africa and other states opposing its occupation of Namibia, extending beyond the UN framework. In the latter argument, South Africa contended that the occupation of Namibia had become such a significant and widely contested issue at the interstate level that it constituted a legitimate international dispute. See: Michla Pomerance, “The Admission of Judges Ad Hoc In Advisory Proceedings: Some Reflections in the Light of the Namibia Case,” *American Journal of International Law* 67, no. 3 (1973): 446–64, https://doi.org/10.2307/2199141. 449-452.

how they affect the nature of the Covenant of the League and specifies the “sacred trust of civilization” mentioned in it. In particular, the legal value of the Covenant is stressed.[109]

Then, the Court discusses how and why the UN can revoke the mandate and justifies how the collapse of the League does not mean the collapse of the duties of the mandator. In this part, the Court argues that the UN is the successor of the League. In that sense, they have the authority to revoke the mandate, which can indeed be revoked. The UN also has the right to supervise the South African administration of Namibia. Eventually, the Court justified and claimed validity for Resolution 2145 of the General Assembly, which revoked the mandate, and Resolution 276 of the Security Council, which stated that the occupation of South Africa in Namibia was illegal. Both Resolutions were claimed as valid.

In conclusion, the ruling of the Court, answering the question of the case, includes three points: South Africa has to withdraw from Namibia; member states of the UN has to recognize illegality of South Africa in Namibia and refrain from acts supporting it; non-member states have to give assistance for the measures taken by the UN, as the acknowledgment of the illegality of the situation, as violation of international law, is stated as an *erga omnes* obligation.

As shown in the introduction of the chapter, the case has a long history, going back to the same Covenant of the League of Nations. This history has to be thought of as an amount of time that constitutes the reasoning, the arguments, and the position of the present ruling, as the past is constructed and addressed in every aspect of the ruling. Again, the past UN Resolutions, the ICJ cases, in general, the ones concerning South Africa, and the Covenant of the League are meant here. This same construction of the past suggests first the existence of a narrative and then that this time is quite the raw material of the Court’s reasoning. In that sense, the element of time has to be carefully considered. A passage from the judgment is reported:

> 53. [...]. Mindful as it is of the primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion, the Court is bound to take into account the fact that the concepts embodied in Article 22 of the Covenant - "the strenuous conditions of the modern world" and "the well-being and development" of the peoples concerned - were not static, but were by definition evolutionary, as also, therefore, was the concept of the "sacred trust". The parties to the Covenant must consequently be deemed to have accepted them as such. That is why, viewing the institutions of 1919, the Court must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law. Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system

[109] In explaining how South Africa misunderstood the nature of the mandate, the Court writes: “The acceptance of a mandate on these terms connoted the assumption of obligations not only of a moral but also of a binding legal character”; Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), I.C.J., 29.

> prevailing at the time of the interpretation. In the domain to which the present proceedings relate, the last fifty years, as indicated above, have brought important developments. These developments leave little doubt that the ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned. In this domain, as elsewhere, the *corpus iuris gentium* has been considerably enriched, and this the Court, if it is faithfully to discharge its functions, may not ignore.[110]

In the passage, first of all, the Court is making an operation of self-reflection, explicitly evident from the expression “mindful” that opens the quote. Here, the Court interprets the Covenant of the League of Nations, translating it in its time. The product of the past fifty years is the evidence that “self-determination” and “independence” are the aims that the mandator has to pursue. In this regard, the international instrument of the mandate, which can be understood as “time-less”, is interpreted again and again at every time, and the Court must do that. On one side, from the quote, the law is explicitly understood to have an “evolutionary” character, and on the other side, the agency of the Court is to reinterpret the law, and more generally, the Court must take into account the “changes” that happen throughout time.

These points and that same reading of the past are *cumulative* regarding the law and of *continuity* regarding the relationship between the League and the UN. That serves as a basis for nearly all the arguments discussed by the Court in the present case, as well as in past rulings, such as the Resolutions of the General Assembly. In fact, in this very ruling, by interpreting the intentions of the drafters of the mandate system, it is argued that the UN has the right to revoke the mandate, as well as the ongoing duty of the mandators to fulfill the purpose of the “sacred trust”. In this sense, there is a relationship of continuity from the League to the UN, where the UN appropriates the functions of the League and justifies its position by discussing and explaining how it represents the successor of the League.

In the last sentence, the *corpus iuris gentium* is referred to, that is “the entirety of the rules of international law, both substantive and procedural”.[111] In this *corpus*, for instance, flows the Universal Declaration of Human Rights, which had been used by the UN as an argument against the policies of South Africa in Namibia, as well as mentioned in the present case.[112] In that sense, the law is ‘cumulative’, and this accumulation inevitably includes political positions and legal developments, making these two intertwined. In conclusion, the majority judgment highlights a reading of a dynamic past, affirming the Court’s freedom to interpret it.

---

[110] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), I.C.J., 31-32.

[111] Aaron X. Fellmeth and Maurice Horwitz, “Corpus Iuris Gentium” (Oxford University Press, 2011), https://doi.org/10.1093/acref/9780195369380.013.0450.

[112] In fact, the Universal Declaration of Human Rights was adopted in 1948 by the UN General Assembly. In that sense, it was created later than the mandate system and incorporated in the *corpus iuris gentium*.

In the following sections, various individual opinions will be examined. This will allow for a deeper understanding of how the Court conceptualizes justice, beginning with the opinion of Judge Padilla Nervo, and later turning to the dissenting views.

3.3 Judge Padilla Nervo

Judge Padilla Nervo was a Mexican diplomat and politician whose involvement with the UN began at its foundation. He represented Mexico at the San Francisco Conference in 1945. Later, he served as Mexico's ambassador to the UN, participating in both the General Assembly and the Security Council. He went on to serve as a judge at the International Court of Justice from 1964 to 1973.

In the present case, the judge fully agreed with the majority and decided to write his individual opinion to express his individual views.[113] Judge Padilla Nervo's opinion is particularly interesting to analyze because his participation in the ruling was questioned by South Africa during the preliminary objections, on the grounds that he had taken part in General Assembly debates that eventually led to the case.[114] In that sense, similarly to Judge Zafrulla Khan, who had been asked to refrain from sitting in the South West Africa cases during the 1960s, Judge Nervo can be seen as representing a counter-voice within the Court. Moreover, his opinion is notable for advancing a specific understanding of justice: that of social justice.

To understand the position of the judge, it is useful to quote a passage in which he directly addresses the preliminary objections raised against the Court, objections that sought to undermine the Court's authority by emphasizing the political dimensions and background of the request.

> The full impact upon the Court of those changes is found in the activities of the General Assembly and the Security Council. Whatever conclusions might be drawn from these activities, it is evident that their far-reaching significance lies in the fact that the struggle towards ending colonialism and racism in Africa, and everywhere, is the overwhelming will of the international community of our days.[115]

A few sentences before this quote, the judge writes that "the line between political and legal questions is often vague".[116] However, eventually, as it is implied in the quote, it does not matter whether there actually is political influence or not - as long as the "international community"

[113] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Separate Opinion of Judge Padilla Nervo), I.C.J. 101 (n.d.).

[114] Kattan, "Decolonizing the International Court of Justice.", 319, note 43.

[115] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Separate Opinion of Judge Padilla Nervo), I.C.J., 103.

[116] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Separate Opinion of Judge Padilla Nervo), I.C.J., 103.

wants something. In fact, the changes mentioned in the first sentence are those to which international society, the application of international law, and the organ responsible for its application are subject in contemporary times. Therefore, given the general international context and contemporary developments, according to the judge, the “will” of the community might override political questions. In addition, the struggle against colonialism and racism is explicitly recognized as a distinctive feature of the contemporary period. This extends and further contextualizes the interpretation of the past in the majority judgment: the new application of international law is rooted in this struggle.

This theme is central to Judge Padilla Nervo’s reasoning and can be found both in his individual opinion as well as in earlier interventions at the General Assembly.[117] Closely linked to this is the idea that the will of the international community rests on moral and philosophical foundations, that is, the community of states is understood as expressing shared moral and philosophical commitments. This perspective is also not only evident in his separate opinion, but, for example, in one address at General Assembly in 1957, where, he was not yet part of the Bench and stated: “The appeal of conscience may technically lack the binding force of legal instruments subject to ratification, but they nevertheless possess a moral force that in the long run cannot be resisted”.[118]

Other points of discussion concerning Judge Padilla Nervo’s position relate to his vision of a new international order and his advocacy for social justice. The following passage, taken from his individual opinion, illustrates his interpretation of the Covenant of the League of Nations and how it applies to present-day circumstances:

> The relentless will of self-assertion in search of new horizons has created new conditions where freedom and social justice could flourish; sometimes a new order has been established through violent and dramatic struggles, sometimes by peaceful processes of collective parliamentary action in national and international forums. This struggle has created conditions, principles, rules and standards of international behaviour, which have found expression in the works of thinkers, writers and philosophers. "Equality before the law", or in the words of the Charter: "International co-operation in the promotion and respect of

[117] As a reference to speeches of the judge, where he specifically addresses the question of racism and colonialism, see: United Nations General Assembly, *Official Records of the General Assembly*, 18th Sess., Plenary, 1214th Mtg. (New York: United Nations, 1963), https://digitallibrary.un.org/record/731685. ; United Nations General Assembly, *Official Records of the General Assembly*, 17th Sess., Plenary, 1153rd Mtg. (New York: United Nations, 1964), https://digitallibrary.un.org/record/732932.

[118] United Nations General Assembly, *Official Records of the General Assembly*, 12th Sess., Plenary, 699th Mtg. (New York: United Nations, 1957), https://digitallibrary.un.org/record/730460.; In his individual opinion in the 1971 case, the judge, referring to the ideas and principles embodied in the Covenant of the League of Nations, writes: “They were intended to survive and prevail to guide the political conduct of governments and the moral behaviour of men”, see: Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Separate Opinion of Judge Padilla Nervo), I.C.J., 123.

> human rights and fundamental freedoms for all without distinction as to race . . ."[119]

The first point to highlight is Judge Padilla Nervo's reference to social justice, which he closely associated with the principles of freedom, equality, and independence. A second, related element is his invocation of a "new order", an order through which social justice can be meaningfully realized. Both concepts had already featured prominently in the judge's earlier political engagements. Years before the case under consideration, he consistently linked social justice with the right to self-determination, international cooperation, and the protection of human rights.[120] In the present case, this notion of social justice is concretely expressed through the judge's opposition to South Africa's occupation of Namibia.

The related idea of a new order, which makes this notion of justice possible, is defined by the judge as the international order inaugurated with the founding of the UN, an idea also reflected in the quoted passage.[121]

To summarize the position of the judge: in the present opinion, he expresses ideas that have been central to his political involvement at the UN since its foundation in 1945. For the judge, a new order was created by the United Nations, and this order represents a community. International law is guided by the will of this community, which carries a moral authority, for instance, in its opposition to colonialism. In the present ruling, this translates into the rejection of South Africa's racial policies and support for Namibian self-determination. Social justice, as advocated by the judge, means equality, self-determination and seeks to reduce power imbalances.

In that sense, the judge is primarily concerned with doing what is right according to the will of the international community, an approach that necessarily involves a political dimension. It can be said that, for the judge, what truly matters is the politics of the community. This overrides other considerations, such as South Africa's objections, and should guide the development and application of international law.

The politics of the international community play a crucial role in both the broader context of the case and the internal dynamics of the ICJ. In the Namibia case, it has been argued that the

---

[119] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Separate Opinion of Judge Padilla Nervo), I.C.J., 126.

[120] United Nations General Assembly, *Official Records of the General Assembly*, 17th Sess., Plenary, 1153rd Mtg.; United Nations General Assembly, *Official Records of the General Assembly*, 18th Sess., Plenary, 1239th Mtg. (New York: United Nations, 1963), https://digitallibrary.un.org/record/731825.

[121] As a reference to the judge's position, advocating for equality among states and committed to reducing power imbalances at the UN, it is worth noting his opposition to Western powers as early as 1945, see: "Twelfth Meeting of Committee 8 (General Purposes) of the Preparatory Commission of the United Nations," quoted in: Olga Touloumi, "Cultures of Assembly," in *Assembly by Design*, The United Nations and Its Global Interior (University of Minnesota Press, 2024), 79–134, https://www.jstor.org/stable/10.5749/jj.7514499.6. , 84-85.

right to self-determination evolved from a primarily political principle into one with legal value.[122] This transformation was made possible through the emphasis placed on the concept during the proceedings. In fact, as already mentioned in this section, it is the struggle against colonialism and racism that informs the interpretation and application of international law, a struggle that is expressed by the international community as a whole. Moreover, this underscores the political dimension underlying the case, including the fact that the right to self-determination initially existed within the realm of political discourse.

This political element is incorporated into the Court's reasoning, in the sense that it informed the legal interpretation that ultimately provided a legal foundation for the right to self-determination. Indeed, as Victor Kattan notes, "the Namibia opinion marked the moment the ICJ went through decolonization".[123] This was the first time the Court explicitly referred to the right of self-determination, and it reflected the voice of Third World countries. As already discussed, since the 1966 judgment, the ICJ had undergone an internal political struggle. Indeed, the 1971 case marked the moment when Judge Zafrulla was finally able to express his views, after previously being asked to refrain from participating. In addition, the case may also be seen as the realization of the principles of equality among states and individuals that Judge Padilla Nervo had been advocating since 1945.

The final point to highlight in Judge Padilla Nervo's individual opinion, one that aligns with the reasoning of the majority judgment, concerns temporality. The judge interprets time as dynamic and evolving, using it as a basis to justify and authorize a reformulation of international law. In fact, the reasoning of both Judge Padilla Nervo and the majority appears to be present-oriented, in the sense that contemporary conditions shape how the law should be interpreted and applied. It can be said that the judge's opinion emphasizes the moral and philosophical underpinnings of the majority's argument. Time, starting from the Covenant of the League of Nations, guides and supports the reasoning of both the majority and the judge, demonstrating that self-determination reflects the will of the international community. On this basis, South Africa's policies are deemed unacceptable.

In that sense, both the judge and the majority can be understood to embrace a progressive conception of law and justice, grounded in the belief that the law must be continuously applied and adapted to present realities. This perspective aligns with the broader political shift that characterized the Court's activity during that period, marking a departure from a more conservative approach.

In the next section, these positions will be questioned and critically examined through the dissenting opinions of a group of judges.

[122] Kattan, "Decolonizing the International Court of Justice."; Koçak, "Development of Self-Determination Right and The Role of Icj."

[123] Kattan, "Decolonizing the International Court of Justice.", 353.

3.4 The 'Visibility' of Justice

After the majority opinion and the individual opinion of Judge Padilla Nervo, it is now necessary to consider some of the dissenting voices of the Bench. In particular, this section will examine the opinions of Judges Onyeama, Dillard, and Petrén. These three judges share a common position, and for this reason, they will be analyzed as a group. This analysis will not focus on the specific background of each judge but rather on the general and shared concept of justice expressed in their dissenting opinions. Notably, all three judges refer to a particular understanding of justice that originated in a judicial case from 1923. This case will now be explained, along with its relevance to the 1971 ICJ decision.

The case regards an accident that happened in England in 1923. Mr. McCarthy was driving his motorcycle when he suddenly crashed with another motorcycle, where Mr. Whitworth and his wife, who was in the sidecar of the motorcycle, were travelling. Everyone survived with few injuries, and the police instituted criminal proceedings against Mr. McCarthy. In addition, the couple hired a firm of solicitors. The hearings were held at the court of Sussex, but unfortunately, one member of the firm hired by Mr. Whitworth also worked as a clerk and participated in the judgment made by the bench of the court of Sussex. McCarthy was found guilty, convicted, and ordered to pay a fine. Since McCarthy did not consider it fair that one member of the firm, who therefore had personal interests in the case, took part in the judgment in Sussex, appealed before the decision.[124]

The case now passed to the King's Bench, presided over by Lord Hewart, who asked the lower court for an affidavit.[125] The declaration of the judges stated that, even though the clerk, hired by Mr. Whitworth, attended the ruling, they reached the judgment unbiased, as he abstained from any discussion. In conclusion, Lord Hewart, even though accepting the statements of the court of Sussex, quashed the conviction, stating that "It is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done".[126] Lord Hewart stated that it is not sufficient to make justice, but justice also has to appear to have been done. The mere appearance of a bias is enough to overturn a judicial decision.

From this event, the idea that "justice must be seen to be done" became a recurrent aphorism within law. That's important for the current case of the ICJ under analysis, as judges

[124] Arvind Datar, "The Origins of 'Justice Must Be Seen to Be Done,'" Bar and Bench - Indian Legal news, April 18, 2020, https://www.barandbench.com/columns/the-origins-of-justice-must-be-seen-to-be-done.

[125] In the English legal system, back in the time of the case as well as today, cases are first discussed in a lower court, where a (first) judgment is made. However, if contestations are raised, concerning legal issues, such as a biased decision, the first judgment can be challenged by a higher court. This is what happened in the case of McCarthy, where the case started in a lower court in Sussex, and later passed to the King's Bench.

[126] Quote from the case Rex v. Sussex Justices (1924), as mentioned in: Datar, "The Origins of 'Justice Must Be Seen to Be Done.'"

Onyeama, Dillard, and Petrén explicitly mentioned it.[127] Two passages are reported here. The first passage is from the individual opinion of Judge Onyeama, and the second one from the Opinion of Judge Petrén.[128]

> I am of the opinion that the circumstance of South Africa's special interest in the present request should have prevailed with the Court, and, so that justice may not only be done but manifestly be seen to be done, the discretion of the Court should have been exercised in favour of the application by South Africa to choose a judge ad hoc.[129]
>
> The old saying that not only must justice be done but that it must be seen to be done would to my mind have required a stricter application of Article 17, paragraph 2, of the Statute, prohibiting Members of the Court from participating in the decision of any case in which they have previously taken part in any capacity whatsoever.[130]

Both judges recall the saying addressing the decisions of the Court: Judge Onyeama comments on the unfair choice of excluding the request to have a judge *ad hoc* by South Africa; Judge Petrén questions the participation of some judges on the Bench of the Court, after having taken part in drafting the General Assembly resolution. As already mentioned, both points were addressed by the Court as part of the initial objections raised, and some points need to be noted.

The present case was the first one where the Court was asked for the appointment of a judge *ad hoc* for an advisory opinion.[131] When the judges voted against the application of South Africa, in the beginning, they did not explain their reasons; they did so only in their individual opinions regarding the majority (final) judgment.[132] This is important because, according to Michla Pomerance, they were afraid of undermining the whole judgment of the Court; in fact, the arguments to refuse the same application might have been used against, and affected, the

---

[127] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Separate Opinion of Judge Petrén), I.C.J. 127 (n.d.).; Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Separate opinion of Judge Dillard), I.C.J. 150 (n.d.).; Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Separate Opinion of Judge Onyeama), I.C.J. 138 (n.d.).

[128] Judge Dillard's position is not discussed here because, with regard to the reference to the aphorism, it aligns with that of Judge Onyeama, namely, that South Africa's request to appoint a judge *ad hoc* should have been accepted.

[129] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Separate Opinion of Judge Onyeama), I.C.J., 140.

[130] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Separate Opinion of Judge Petrén), I.C.J., 130.

[131] Pomerance, "The Admission of Judges Ad Hoc In Advisory Proceedings."

[132] To answer the question of the composition of the Bench and the application of the judge *ad hoc*, the Court issued several Orders. These documents are formal decisions of the Court but they do not constitute the final judgment.

jurisdiction of the Court regarding the case. Basically, they were afraid of the risk of invalidating the request of the case by using their same arguments.

According to Pomerance, the judges, given the Court's previous years of inactivity, did not want to be left without a case; rather, they sought to assert their authority and reaffirm the Court's relevance.[133] As already mentioned, the (reversal) decision of 1966 was not expected and created disillusionment towards the effectiveness of the ICJ, for instance, among African states. In that sense, according to Pomerance, the case proves that the Court, throughout the time, made a kind of separation between contentious cases and advisory opinions, where in the latter situation, the Court tends and assumes the political positions of the other organs of the UN. That happens because of the Court's new status of "principal judicial organ of the UN", which underlines its duty, and the desire, to serve and cooperate with the political organs of the organization.[134]

The analysis of Pomerance first underlines the perceived duty of the Court to render a judgment and therefore to interpret and develop international law - due to the anxiety of defending the authority of the ICJ. Then, it suggests that the self-perception of the Court is the cause of its political involvement.

However, in the majority opinion as well as Judge Padilla Nervo's opinion, self-perception is shaped by a specific understanding of time, both past and present. The Court's sense of agency emerges from this temporal framing: from the past, as it is interpreted in a way that enables the Court to render a judgment, for instance, stating to be the successor of the League of Nations; and from the present, as the urgency to end racism and colonialism is recognized and articulated by the broader international community.

It is now possible to go back to and discuss, to further assess the stances of the majority judgment, the opinions of the judges who dissented. It is not important here who said what or tracing the differences between the judges, but drawing the general underlying ideas about justice and temporality that found their reasoning.[135]

The statement of Lord Hewart implies a specific idea of justice: one that is impartial and unbiased. The fact that, after fifty years, the judges of the ICJ were still referencing it proves that it is not merely a saying but rather a concrete idea of justice that the judges are indeed reiterating. This suggests a kind of tradition of thought within law, where impartiality and methodological rigor are seen as ontological features of justice. In particular, it is interesting to notice that the statement was made in the 20s, in the same period where the Covenant of the

[133] Pomerance, "The Admission of Judges Ad Hoc In Advisory Proceedings.", 453.
[134] Pomerance, "The Admission of Judges Ad Hoc In Advisory Proceedings.", 463-464.
[135] As mentioned, in the following part, the arguments of the judges are not discussed. Briefly, their argument for disagreeing is the acknowledgment of a dispute involving South Africa. To have more info about their arguments, see: Pomerance, "The Admission of Judges Ad Hoc In Advisory Proceedings.", 458-460.

League of Nations was created: this same amount of time, from the 20s to the 70s, unfolds in different ways in the judges of the Court.

From the quotes reported in the present section, and their opinions more generally, for these judges, justice shows to be more *static* and their position more *conservative*. Therefore, it is not surprising that those judges also disagreed with the Court's ruling, particularly regarding the political aspects of the majority decision. In fact, they argue that the Court should not have adopted the Resolutions, or the positions of the General Assembly or the Security Council, but should have conducted its own investigations. The Court, they contend, should have maintained a critical and impartial perspective.

Comparing the disagreements with the opinion of Judge Padilla Nervo, the latter has a more flexible understanding of the past that is indeed related to his own understanding of (social) justice. In fact, the judge believes in continuously applying the law and adapting it to new circumstances, which implies a more dynamic approach. For the judges who disagree, justice and the past are elaborated in a more conservative and static way. Given the timeless nature of justice understood by the judges, the agency of the Court is merely restricted to the judicial sphere - and should be detached from politics. The present does not affect the nature of justice. This underlines how the position expressed in the majority judgment is informed by a specific understanding of temporality and justice. Indeed, as already mentioned, the advisory opinion of 1971 is argued to have marked a shift in the approach of the ICJ - having the Court “decolonized itself”.

3.5 Conclusion

In conclusion, in the present case, it is important to focus on how time unfolds in the reasoning of the judges. In the majority judgment and in Judge Padilla Nervo’s opinion, there exists a close relationship between time and law. The past, which brings developments of international law and is reconstructed in a distinct way, along with the understanding of the present situation, including the will of a community of states, affects the law. The Covenant of the League and the mandate, as a judicial instrument, are reinterpreted and applied in light of an acknowledged struggle to end colonialism. For this reason, the law is flexible and needs a new formulation to fit contemporary demands and situations. In turn, this affects the agency of the Court. The concept of justice, therefore, implies a political component and, more generally, a malleable content. This allowed the Court to render a judgment despite the objections regarding the political involvement of the Court.

In the dissenting opinions, instead, a different idea of justice is presented. If social justice, for Judge Padilla Nervo, results from the contemporary times and is specifically associated with the struggle against colonialism, the present situation does not seem to affect justice and, in turn,

law. Justice is defined as a-political. In fact, the judges stress how the Court should be impartial, not assuming the work of other political bodies of the UN.

Answering the research question posed in the chapter's introduction, it is now possible to state that in the present case, two main conflicting ideas of justice emerge. One, expressed in the majority judgment, where the idea of social justice supported by Judge Padilla Nervo can be included, is more present-oriented, reflecting the transformations of its time. The other, immutable in nature, escapes both past and present developments. Both ideas influence and shape a different role for the ICJ.

On one hand, it has to be noted that mainly the first progressive idea of justice contains the signs of its own historical period, where ending racism and colonialism are understood as priorities for the international community. On the other hand, political transformations are reflected in the case within the same internal dynamics of the Bench, which changed during the 60s and rendered a judgment that expressed the voices of what had been marginalized countries at the ICJ.

Chapter 4: Conclusion

In conclusion, the thesis has shown how justice is conceptualized in two key cases at the ICJ, across two specific moments in history. Summarizing the key points of these cases will help in answering the main research question of the dissertation.

In the *Corfu Channel* case, right after the end of WWII and in the first contentious issue that the Court had to deal with, two ideas of justice are present, supported by different, more or less individual positions. Social justice was endorsed by Judge Alvarez, placing every state on the same level and advocating for interdependence among them. For this reason, Albania was held responsible, as it had a duty toward the community of states to oversee the channel. Within the idea of social justice, the concept of international justice - as discussed by the other judges - can be included, as both share the principle of equality among states. International justice is understood as a matter of method, and it is contested across the Bench; in their individual opinions, judges question whether the Court should rely on indirect evidence. The opinion of Judge Krylov, spokesperson for the Soviet Union, reflected the political tensions of the period: the ICJ should have a restricted agency, for which international justice requires the maximum level of certainty. For Judge Azevedo, the same limits of the ICJ justify the use of indirect evidence. As shown, the concept of justice is informed by different ideas regarding time or history. For judges Alvarez and Azevedo, international law should reflect the international life of the moment, which can have different features. In the majority judgement as well as in Judge Krylov, an idea of justice that implies an expected future is supported, where an action is aimed to be banned or avoided. For instance, international justice for Judge Krylov should be limited in its methodological tools in order to avoid repercussions for the Soviet Union. Drawing the features of the concept of justice as presented in the case, and given that the two concepts can, to some extent, be considered overlapping, justice is understood as equality, specifically, equality among states. It concerns states and includes aspects that regulate their interactions. Justice is administered, implying the existence of a regulating actor, one that can make inferences about state behavior and rely on indirect evidence. The underlying assumption behind the existence of such a regulator of international disputes is that states tend to pursue their own interests.

In the case that regarded South West Africa, in 1971, a different context surrounded the activities of the ICJ, but still, power dynamics shaped the concepts of justice presented. In fact, the debate, the contestation of the judgment of the Court, revolved around politics and to what extent the ICJ should be involved in it. Both internally at the ICJ, where, for instance, the participation in the Court's work of some judges was questioned and limited, and externally, where some states exercised greater power on its functioning. In the opinion of the majority, it is

not presented an explicit idea of justice but the decision of the Court is argued on a flexible interpretation of the past, to the extent that it is recognized a mutation in international law: the words of the Covenant of the League of Nations acquired a new meaning, such as in the present day, colonization cannot be accepted anymore. In Judge Padilla Nervo, social justice is advocated, and the position of the judge is in line with the majority decision, to the extent that social justice means self-determination and ending colonialism, that is, more balance in power dynamics. In the selection of judges that dissented, instead, there is present an idea of justice that is more static, immutable. Justice is more *ideal*, in a sense, and must be apolitical. For this reason, the Court should not have assumed the findings and decisions of other political organs of the UN. In the majority judgment and for Judge Padilla Nervo, South Africa should leave Namibia, and self-determination should be granted to the Namibians. For the group of judges, justice concerns quite another question. Even though they might condemn apartheid policies, in their opinions, they focus on another aspect of justice, that is, according to them, impartiality. In summary, the implications and assumptions entailed in the concepts of justice follow the same of the *Corfu Channel* case, where the purpose is to have more equality. In that case, equality in respect to power imbalances, for instance. The ICJ is thought of as an administrator of disputes. Indeed, as in the first case discussed, the Court is addressed by an actor to deal with a question. The Court does not start any investigation or case by itself, but only once a request is presented. Indeed, the Court mitigated the (strategic) interest of states for the sake of equality among an acknowledged broader community of states.

Going back to the research question of the thesis, it was assumed that the contestations of justice would have implied reflecting and shaping broader political transformation. However, it is difficult to separate to what extent law does so, as sometimes it seems to be thought of more as a product of political transformation rather than an agent that shapes it. For instance, when the law is thought to reflect the international life of its period. For instance, in both the majority positions, as well as Judge Alvarez and Judge Padilla Nervo. In those cases, however, the judgment rendered by the Court also had implications for the global political scenario, in particular in the South West Africa case, where it was given voice to Third World countries, and the right of self-determination acquired a legal basis.

Regarding the state-of-the-art literature existing on the topic, the thesis has shown how the concept of justice is constructed within the legal proceedings of the ICJ. In doing so, it represented a practical study of conceptual history, not focusing on one specific idea of justice but taking the ICJ as a starting point and analyzing the negotiation of the concept in deliberating on the cases. In addition, it involved the study of how a concept is informed by individual understanding. Both aspects are lacking in the current literature. In particular, regarding the latter point, it highlighted how law is “performed”, that is, how, from individual experiences, in the

case of the thesis, for instance, individual understanding of time, the law is formulated and affects a global political context. In turn, it has been shown how Koselleck could benefit legal history. On one side, his theory had never been applied to legal studies; on the other side, the study of the relationship between law and time needed further research, in particular concerning the "autonomy" of law, that is, whether law uses and creates its own history.

It is therefore necessary to finally reflect on the theoretical framework adopted in conducting the research. Koselleck's theory has indeed been beneficial for the study of concepts, as time, agency, and the disagreements among judges have emerged as effective analytical criteria. The specific concept of justice, when examined in relation to law, revealed multiple dimensions, highlighting that law and justice are not the same. There is a difference between justice and law. The theory of Koselleck was useful to uncover how the relation between the two is thought. Sometimes, justice is indeed employed to advance the law, and so the concept of justice, as an abstract idea, sought a legal formulation. That happened in the majority of the documents analyzed. Other times, such as in the opinion of Judge Krylov, the concept of justice is used to slow down the formulation of law, instead of advancing or encouraging new developments.

In the field of legal history, however, the specific question of time, more than agency or self-perception, assumes a different character, as the law is closely related to it. Further theoretical tools are needed to engage with the experience of time in legal texts.

In particular, it has been shown how the interpretation of treaties seems to be indicative of a specific understanding of temporality. For instance, in the teleological approach of Judge Azevedo or in the understanding of the mandate system as timeless, therefore requiring continuous application, as it happened in the majority judgment of the South Africa case. Additionally, law is sometimes formulated based on the present and other times more future-oriented. In that sense, the idea of a *Sattelzeit*, which regards a past shift in the experience of time, is not enough to gather the complexities of historical time within legal texts.

Finally, addressing the question of the autonomy of law, mentioned by Thier, within the cases analyzed in the dissertation, law indeed has its own temporal references.[136] In the sense that each case presented more or less important moments in history. To make a few examples: In the *Corfu Channel* case, Judge Alvarez advocated a new role for the ICJ given a new period in history, based on his own individual perception; In the case of South West Africa, the range of time going from the Covenant of the League of Nations unfolds differently for the judges, for some of them, it is a proof that international law should pursue self-determination.

Going back to Jose Zalaquett, the Chilean lawyer who developed, among others, the idea of transitional justice, we can only imagine how important the features of his historical time must have been in marking his experience and informing his idea of justice.

[136] Thier, "Time, Law, and Legal History – Some Observations and Considerations."

Bibliography

Primary sources

International Court of Justice

Corfu Channel, I.C.J. 4 (International Court of Justice 1949).

Corfu Channel (Dissenting opinion by Judge Badawi Pasha), I.C.J. 58 (International Court of Justice 1949).

Corfu Channel (Dissenting Opinion of Judge Azevedo), I.C.J. 78 (International Court of Justice 1949).

Corfu Channel (Individual Opinion of Judge Alvarez), I.C.J. 39 (International Court of Justice 1949).

Corfu Channel (Individual Opinion of Judge Krylov), I.C.J. 68 (International Court of Justice 1949).

"Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)." Accessed January 16, 2025. https://www.icj-cij.org/case/1.

International Court of Justice. *The International Court of Justice Handbook*. The Hague, Netherlands: Registrar of the International Court of Justice, 2021.

"Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwith." Accessed January 16, 2025. https://www.icj-cij.org/case/53.

Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), I.C.J. 16 (n.d.).

Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Separate opinion of Judge Dillard), I.C.J. 150 (n.d.).

Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Separate Opinion of Judge Onyeama), I.C.J. 138 (n.d.).

Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Separate Opinion of Judge Padilla Nervo), I.C.J. 101 (n.d.).

Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Separate Opinion of Judge Petrén), I.C.J. 127 (n.d.).

United Nations

United Nations. "Charter of the United Nations." United Nations, 1945. https://www.un.org/en/about-us/un-charter.

———. “Statute of the International Court of Justice.” United Nations, 1945. https://www.icj-cij.org/en/statute.
United Nations General Assembly. “Official Records of the General Assembly, 12th Sess., Plenary, 699th Mtg.” New York: United Nations, 1957. https://digitallibrary.un.org/record/730460.
———. “Official Records of the General Assembly, 17th Sess., Plenary, 1153rd Mtg.” New York: United Nations, 1964. https://digitallibrary.un.org/record/732932.
———. “Official Records of the General Assembly, 18th Sess., Plenary, 1214th Mtg.” New York: United Nations, 1963. https://digitallibrary.un.org/record/731685.
———. “Official Records of the General Assembly, 18th Sess., Plenary, 1239th Mtg.” New York: United Nations, 1963. https://digitallibrary.un.org/record/731825.
United Nations Security Council. “Security Council official records, 2nd year: 109th meeting”. New York: UN, 1947. https://digitallibrary.un.org/record/634893.
———. “Security Council Resolution 264 (1969).” New York: United Nations, 1970. https://digitallibrary.un.org/record/90763.
———. “Security Council Resolution 276 (1970).” New York: United Nations, 1971. https://digitallibrary.un.org/record/90763.
———. “Security Council Resolution 283 (1970).” New York: United Nations, 1971. https://digitallibrary.un.org/record/90763.
———. “Security Council Resolution 284 (1970).” New York: United Nations, 1971. https://digitallibrary.un.org/record/90763.

Secondary sources

Armstrong, David. “Evolving Conceptions of Justice in International Law.” *Review of International Studies* 37, no. 5 (2011): 2121–36. https://www.jstor.org/stable/41308447.
Arthur, Paige. “How ‘Transitions’ Reshaped Human Rights: A Conceptual History of Transitional Justice.” *Human Rights Quarterly* 31, no. 2 (2009): 321–67. https://www.jstor.org/stable/20486755.
Cananau, Iulian. “Toward a Comparatist Horizon in Conceptual History.” *History of European Ideas* 45, no. 1 (January 2, 2019): 117–20. https://doi.org/10.1080/01916599.2018.1493307.
Constantinides, Aristoteles. “The Corfu Channel Case in Perspective: The Factual and Political Background.” In *The ICJ and the Evolution of International Law: The Enduring Impact of the Corfu Channel Case*, edited by Karine Bannelier, Théodore Christakis, and Sarah Heathcote, 41–60. London: Routledge, 2013.
Datar, Arvind. “The Origins of ‘Justice Must Be Seen to Be Done.’” Bar and Bench - Indian Legal news, April 18, 2020. https://www.barandbench.com/columns/the-origins-of-justice-must-be-seen-to-be-done.
Fellmeth, Aaron X., and Maurice Horwitz. “Corpus Iuris Gentium.” Oxford University Press, 2011. https://doi.org/10.1093/acref/9780195369380.013.0450.

Fitzmaurice, G. G. “Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points.” *British Year Book of International Law* 28 (1951): 1–28. https://heinonline.org/HOL/P?h=hein.journals/byrint28&i=7.

Hanhimaki, Jussi M. “The Best Hope of Mankind? A Brief History of the UN.” In *United Nations: A Very Short Introduction*. Very Short Introductions. Cary: Oxford University Press, Incorporated, 2008.

Hölscher, Lucian. “The Concept of Conceptual History(Begriffsgeschichte) and the ‘ Geschichtliche Grundbegriffe.’” *CONCEPT AND COMMUNICATION*, no. 2 (December 2008): 179–99. https://doi.org/10.15797/CONCOM.2008..2.005.

Jackson, Ben. “The Conceptual History of Social Justice.” *Political Studies Review* 3, no. 3 (September 1, 2005): 356–73. https://doi.org/10.1111/j.1478-9299.2005.00028.x.

Jordheim, Helge. “Conceptual History.” *Bloomsbury History: Theory and Method Articles*, 2021. https://doi.org/10.5040/9781350970878.066.

Kattan, Victor. “Decolonizing the International Court of Justice: The Experience of Judge Sir Muhammad Zafrulla Khan in the *South West Africa* Cases.” *Asian Journal of International Law* 5, no. 2 (2015): 310–55. https://doi.org/10.1017/S2044251314000125.

Koçak, Harun. “Development of Self-Determination Right and The Role of Icj: Statements on The South West Africa (Namibia) Advisory Opinion.” *Alınteri Sosyal Bilimler Dergisi* 4, no. 1 (July 30, 2020): 47–68. https://doi.org/10.30913/alinterisosbil.732750.

Koselleck, Reinhart. “Time and History.” In *The Practice of Conceptual History: Timing History, Spacing Concepts*. Cultural Memory in the Present. Stanford (Calif.): Stanford University Press, 2002.

Koselleck, Reinhart, and Michaela Richter. “Introduction and Prefaces to the Geschichtliche Grundbegriffe: (Basic Concepts in History: A Historical Dictionary of Political and Social Language in Germany).” *Contributions to the History of Concepts* 6, no. 1 (2011): 1–37. https://doi.org/10.3167/choc.2011.060102.

Krasno, Jean E. “Founding of the United Nations: An Evolutionary Process.” In *The United Nations: Confronting the Challenges of a Global Society*, edited by Jean E. Krasno, 19–45. Boulder, Colo: Lynne Rienner Publishers, 2004.

Leonhard, Alan. “Regional Particularism: The Views of the Latin American Judges on the International Court of Justice.” *University of Miami Law Review* 22, no. 3 (May 1, 1968): 674. https://repository.law.miami.edu/umlr/vol22/iss3/7.

Obregón, Liliana. “Noted for Dissent: The International Life of Alejandro Álvarez.” *Leiden Journal of International Law* 19, no. 4 (2006): 983–1016. https://doi.org/10.1017/S0922156506003724.

Pernau, Margrit, and Imke Rajamani. “Emotional Translations: Conceptual History Beyond Language.” *History and Theory* 55, no. 1 (2016): 46–65. https://www.jstor.org/stable/24809583.

Persaud, Motee. “Namibia and the International Court of Justice.” *Current History* 68, no. 405 (1975): 220–25. https://www.jstor.org/stable/45313294.

Pomerance, Michla. “The Admission of Judges Ad Hoc In Advisory Proceedings: Some Reflections in the Light of the Namibia Case.” *American Journal of International Law* 67, no. 3 (1973): 446–64. https://doi.org/10.2307/2199141.

Raphael, D. D. *Concepts of Justice*. Clarendon Press, 2001.

Salamon, Janusz, and Hsin-Wen Lee, eds. *The Bloomsbury Handbook of Global Justice and East Asian Philosophy*. 1st ed. Bloomsbury Handbooks Series. London: Bloomsbury Publishing Plc, 2024.

Schmieder, Falko. “Reinhart Koselleck’s Chrono-Political Crisis Theory. Actuality and Limits.” *History of European Ideas* 49, no. 1 (January 2, 2023): 102–16. https://doi.org/10.1080/01916599.2021.1937889.

Siemens, Daniel. “Towards a New Cultural History of Law.” *InterDisciplines. Journal of History and Sociology*, December 17, 2012, Vol 3 No 2 (2012): Law and Historiography: Contributions to a New Cultural History of Law. https://doi.org/10.4119/INDI-966.

Solomon, Robert C., and Mark C. Murphy, eds. *What Is Justice?: Classic and Contemporary Readings*. New York: Oxford University Press, 1999.

Thier, Andreas. “Time, Law, and Legal History – Some Observations and Considerations.” *Rechtsgeschichte - Legal History* 2017, no. 25 (2017): 020–044. https://doi.org/10.12946/rg25/020-044.

Touloumi, Olga. “Cultures of Assembly.” In *Assembly by Design*, 79–134. The United Nations and Its Global Interior. University of Minnesota Press, 2024. https://www.jstor.org/stable/10.5749/jj.7514499.6.

Zile, Zigurds L. “A Soviet Contribution to International Adjudication: Professor Krylov’s Jurisprudential Legacy.” *American Journal of International Law* 58, no. 2 (1964): 359–88. https://doi.org/10.2307/2196217.

Zobel, Katharina. “Judge Alejandro Álvarez at the International Court of Justice (1946–1955): His Theory of a ‘New International Law’ and Judicial Lawmaking.” *Leiden Journal of International Law* 19, no. 4 (2006): 1017–40. https://doi.org/10.1017/S0922156506003736.