

Decentring the ICJ: A critical analysis of the *Marshall Islands* judgments

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1. *Introduction*

The aim of this reaction paper is to address some of the ideas raised by the masterful analysis of Professor Beatrice Bonafé, exposing them to a different method, a critical legal approach-based investigation of the discourse of the Court. Indeed, by adopting a different method, a different story can be told about the *Marshall Islands* decisions. A critical approach does not aim at depicting these decisions as a contingent error in the case law of the Court, or at finding coherence within its jurisprudence. Looking at international law from below,¹ an analysis of the judgments entails less a verification of the ‘proper’ use of international law by the jurisdiction. It rather urges an investigation into how the ICJ has used a particular legal language to achieve some aims, focusing on the historical and political role of the Court from a systemic perspective.

In these decisions, so as not to entertain, for the first time, an entire case for the absence of dispute between the parties at the time of the application, using a new concept of ‘dispute’ that the Court would have supposedly crafted following a progressive tendency started in some of its

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¹ B Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (CUP 2003).



latest case law,² the Court suggested that there are disputes that the traditional paradigm of international dispute settlement is unable to settle.³ The central claim here will be that the solution proposed by the ICJ in its judgments calls for *decentring* the ICJ in our own perspective of international justice. This claim will be demonstrated by adopting successively a diachronic and a synchronic point of view.

2. *Diachronic point of view*

A diachronic perspective suggests that the decisions of the ICJ seem to go against the current with respect to the general tendency of international dispute settlement bodies. The multiplication of international courts and tribunals is indeed strictly linked to the ‘quintessentially modernist idea of international law as a ‘complete system’, capable of giving a response to every conceivable normative problem’.⁴ The modernist faith in international law came with faith in international adjudication and with a legal discourse encouraging the jurisdictionalisation of the discipline. In a context where international courts and tribunals tend to expand their sphere of jurisdictional knowledge, it is questionable whether an ICJ that approaches one of the most fundamental concepts of international dispute settlement in this way can be considered as being at the center of the system.

² See B Bonafé, ‘Establishing the Existence of a Dispute before the International Court of Justice: Drawbacks and Implications’ (2017) 45 *QIL*-Questions Intl L 3, notably the analysis of the evolution of the ICJ case law at paras 15-27.

³ A Bianchi, ‘Choice and (the Awareness of) its Consequences: The ICJ’s ‘Structural Bias’ Strikes Again in the *Marshall Islands Case*’ (2017) *AJIL Unbound* 86 according to whom the ICJ created a strong feeling that ‘nuclear disarmament should be reserved to the political arena and not addressed by the Court for judicial determination’, contributing to the ‘progressive disempowerment of international law’.

⁴ M Koskenniemi, ‘The Silence of Law/The Voice of Justice’, in L Boisson de Chazournes, P Sands (eds), *International Law, the International Court of Justice and Nuclear Weapons* (CUP 1999) 501.



Leaving aside the debated previous case law of the ICJ, there are only two precedents that can be considered to go in the direction followed by the Court in the *Marshall Islands* judgments. The first is an old precedent, the *Di Curzio* award of 1959, where the Italian-United States Conciliation Commission considered that it lacked jurisdiction to entertain the claim submitted by Vitalina Di Curzio because she had not petitioned the Italian Government first. The Commission stressed that the defendant ‘was never placed in a position to either recognize or deny its obligation under the Treaty’.⁵ One understands that this standard, requiring that the defendant is given the opportunity to recognize or deny the international obligation before a dispute could arise, justifies itself in an epoch where international dispute settlement was at its dawn.

More recently, another decision had adopted the ‘anachronistic’ concept of a dispute, for which the ICJ also later opted. It is the case of a PCA arbitral tribunal in the *Ecuador v USA* case, which clearly used a similar *escamotage* so as to not have to decide in a rather uncomfortable situation.⁶ The inter-State tribunal was constituted after a mixed arbitral tribunal condemned Ecuador to pay damages for denial of justice to different investors in the *Chevron* saga.⁷ Contesting the standard used by the latter tribunal to interpret the meaning of the denial of justice clause inserted in the BIT, Ecuador decided to use the inter-State dispute settlement clause of the BIT to obtain a decision clarifying the meaning of the Article II(7) on denial of justice. The PCA tribunal realized how risky it would have been to decide *in abstracto* on the correct interpretation of that article, as its answer could have been used as an appellate decision on the correct application of the law by the previous tribunal. For that reason, the inter-State tribunal decided not to decide, maintaining that there was no

⁵ *Di Curzio Case*, Decision no 184 (20 January 1959) 14 RIAA 391-393.

⁶ *Republic of Ecuador v United States of America*, PCA Case no 2012-5, Award 29 September 2012.

⁷ See Procuraduría General del Estado, *Caso Chevron: Defensa del Ecuador frente al uso indebido del arbitraje de inversión* (Diego García Carrión 2015).

dispute between the parties. That is to say, the parties were deemed not to be divided by any concrete and positive opposition. What is sure is that the concept of dispute seems to operate in these cases as a strategic tool, characterizing those decisions where the jurisdictions have preferred to reject a whole case so as to avoid the need to face particularly sensitive issues.

Apart from these few precedents, the general trends in international dispute settlement are of a different nature. In this optic, the recently-redefined concept of dispute proposed by the ICJ seems to go against the stream with respect to the tendency not to craft the fundamental concept of dispute in a way that it restricts artificially the ambit of action of the international judge. First of all, introducing a preliminary exception based on the absence of dispute has never been considered to be a promising strategy.⁸ Before the ICJ, the *Mavrommatis* mantra⁹ had led the Court to adopt an extensive understanding of the concept of dispute, adopted subsequently by other international courts and tribunals.¹⁰ This flexible approach to the object of adjudication was the basis for a permissive jurisprudence, where the court or tribunal would refuse to reject jurisdiction depending on the kind of dispute submitted to it. The ICJ has notoriously rejected arguments on the idea of a ‘political dispute’.¹¹ ICSID

⁸ C Schreuer, ‘What is a Legal Dispute?’ 21 available at <www.univie.ac.at/intlaw/95.pdf>.

⁹ *Mavrommatis Palestine Concessions* [1924] PCIJ Rep Series A No 2, 11: any ‘disagreement on a point of law or fact, a conflict of legal views or of interests’.

¹⁰ The *Mavrommatis* concept has been largely used in law of the sea litigation (see *Southern Bluefin Tuna (New Zealand v Japan; Australia v Japan)* (Provisional Measures, Order of 27 August 1999) ITLOS Reports 1999, 293, para 44) as well as in investment arbitration (see recently *Crystallex International Corporation v Bolivarian Republic of Venezuela*, ICSID Case No ARB(AF)/11/2, Award 4 April 2016, 447-450).

¹¹ *United States Diplomatic and Consular Staff in Tebran (United States of America v Iran)* Judgment [1980] ICJ Rep 3, para 37; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Jurisdiction and Admissibility) Judgment [1984] ICJ Rep 392, para 96.



tribunals did not uphold the theory of non-arbitrable ‘economic disputes’.¹² The ITLOS refused to follow the idea of ‘scientific disputes’ not suitable for jurisdictional proceedings.¹³

Adopting a larger perspective, this case law goes hand in hand with a movement in international courts and tribunals to expand the scope of matters that can be submitted to international adjudication. On the one hand, international jurisdictions have progressively broken free of the traditional dichotomy between an adjudicative phase and a political phase for the execution of the decision, embodied in Article 94 of the UN Charter. Indeed, at the WTO, the surveillance of the execution of the decision was totally judicialized *via* Articles 21-23 of the DSU and the work of the judge.¹⁴ Human rights jurisdictions have also embraced this tendency to widen the perimeter of what can be disputed before a court, to include the post-adjudicative phase. The IACtHR, for instance, included the judicial supervision of the execution of its decisions among its implied powers, starting from its *Ricardo Baena* decision.¹⁵ On the other hand, investment arbitration has extended the perimeter of what is disputable to the pre-adjudicative phase. This application of the jurisdictional momentum to a pre-preliminary phase has given birth to a real body of litigation concerning the appointment of arbitrators,¹⁶ thus anticipating the

¹² *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v Argentine Republic*, ICSID Case No ARB/03/19 (Decision on Jurisdiction) 3 August 2006 paras 33 ff.

¹³ *Southern Bluefin Tuna Cases* (n 10) paras 33 ff.

¹⁴ H Ruiz Fabri, ‘Le contentieux de l’exécution dans le règlement des différends de l’Organisation Mondiale du Commerce’, (2000) 127 *Journal du droit international* 605-645; A Hamann, *Le contentieux de la mise en conformité dans le règlement des différends de l’OMC/Adjudicating Compliance in the WTO Dispute Settlement System* (Brill 2014).

¹⁵ IACtHR, *Baena Ricardo et al (270 workers) v Panama*, 28 November 2003, Series C No 104 para 132; see on the topic A C Fortas, *La surveillance de l’exécution des arrêts et décisions des Cours européenne et interaméricaine des droits de l’Homme: contribution à l’étude du droit du contentieux international* (A Pedone 2015).

¹⁶ C Giorgetti, ‘Who Decides Who Decides in International Investment Arbitration?’ (2013) *U Pennsylvania J Intl L* 431-486.

beginning of a jurisdictional dispute to the very process of the constitution of the tribunal. This *Marshall Islands* concept of dispute does not bode well within this context of widening the boundaries of jurisdictional dispute settlement.

What can be deduced from this conscious choice of the ICJ for an ‘anachronistic’ discourse? It chose not to follow the tale told by the evolution of international dispute settlement. Sacrificing the intellectual consistency of a basic notion of international procedural law for the sake of avoiding the need to answer other complicated questions that had been submitted to it, the Court adopted a posture that did not place itself at the centre of the international legal order. The coherentist discourse, placing the ICJ at the heart of the international society and seeing in the empirical coordination around its case law a possible solution to fragmentation,¹⁷ may no longer be the key to understand the evolution of our discipline.¹⁸ Are these the decisions of a Court that holds the monopoly of the interpretation of general international law? Should a Court that reshapes a fundamental concept, strictly linked to the philosophical meaning of its function, without clarifying explicitly if its ground has to be found in a customary rule (or elsewhere), be considered to dominate other courts and tribunals? Instead of wondering whether the *Marshall Islands* judgments will be followed by other international dispute settlement bodies, we should maybe change our way of looking at the system of international dispute settlement and decentre the role of the Court. We may acknowledge the decisions as an isolated case, the conscious product of a jurisdiction that was not able to react differently to this kind of situation. In this perspective, to adopt an optimistic reading, the Court may bend its jurisprudence in the future and

¹⁷ For a brilliant analysis of this type of discourse, see A C Martineau, *Le débat sur la fragmentation du droit international: une analyse critique* (Bruylant 2016) 33.

¹⁸ On the ironic discrepancy between the ICJ indifference for systemic thinking in international law and the tendency of international lawyers to constantly turn to the ICJ modes of legal argumentation to depict international law as a system, see J d’Aspremont, ‘The International Court of Justice and the Irony of System-Design’ (2017) *J Intl Dispute Settlement* 366–387.



smooth its categories. Or, more simply, we may also consider that the States will start adapting to the new requirements demanded by the ICJ and the investigations on the reformulation of the content of the new notion of a dispute will remain much ado about nothing.

3. *Synchronic point of view*

Beatrice Bonafé gave two sets of reasons to explain the criticisms generally addressed to the Court: its formalism and the political nature of the decisions.¹⁹ These two points are central and deserve to be deconstructed. The central argument here calls for a rethinking of these two grounds of criticism.

Can the Court's attitude in the *Marshall Islands* decisions be called 'political' lightly? Realism and critical legal studies literature have shown that every jurisdictional decision – particularly so in international law – is the product of a political choice of the judge, framed with a legal vocabulary.²⁰ All jurisdictional decisions are, in a way, political. Therefore, it is rather the linguistic game chosen by the Court that attracts criticism. By answering that it cannot decide because the claimant should have sent an e-mail to the respondent before the critical date to make the dispute crystallize, the ICJ is intentionally hiding behind a freshly-backed quibble in order to avoid politically disturbing considerations. Those who criticize the judgements of the Court as 'political', adopting a particular perspective on adjudication that is seen in clinical isolation from the political, are actually pointing out the fact that the Court is bending the law to political aims, so – we could reformulate – that the Court is not rigorous as its

¹⁹ B Bonafé (n 2) para 36.

²⁰ D Kennedy, *A Critique of Adjudication (Fin de Siècle)* (Harvard UP 1997) notably 105 and 109.

linguistic game is not technically satisfactory. This is where the political criticism joins the one of formalism.

This terminology calls for particular attention to be paid. Being provocative, one could wonder whether a jurisdiction that invents formal requirements can be considered to be formalistic? To respond to this speculation, three types of formalism can be distinguished. The first one has a moral *coloratura*. Some could understand formalism as an excessively restrictive attitude that blindly privileges form over substance, the focus on a procedural quibble that leads the jurisdiction to miss the fundamental aim of the peaceful settlement of disputes. But the argument lies on hierarchizing a moral substantial consideration over the importance of a formal, procedural requirement, which is not less political than what the ICJ did.²¹

The second meaning of formalism rests on its philosophical pedigree. It refers to an intellectual stance whereby deductive logic can provide a self-executing way to move from the general to the particular.²² This implies the figure of a judge deresponsabilising its deed by attributing its reasoning to pre-existing norms; the judge constructs an image of his function as applying legal rules ‘mechanically’.²³ It is certainly not this structural functioning of dispute settlement as formalistic that is criticised in *asbtracto*, as the ICJ cannot do anything else but speak the language of international law as a ‘competent argument in the field needed to follow strictly defined

²¹ U Özsü, ‘Legal Form’, in J d’Aspremont, S Singh (eds), *Concepts for International Law: Contributions to Disciplinary Thought* (Edward Elgar 2018). As demonstrated by the author, the ‘truly pressing question today ... is not *whether* to be formalist, but *how* one ought to be a formalist’. Taking international law seriously implies both recognising that it is ‘organized in accordance with an internal architecture with distinctly formal properties’, while being innervated by ‘a complex configuration of forces that reflects concrete allocations of extra-legal power’. To use the formalist discursive structure of the discipline implies invoking, at the same time, its peculiar connections with political and economic power.

²² M Stone, ‘Formalism’, in J Coleman, S Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP 2001) 167.

²³ D Kennedy, ‘Legal Formality’ (1973) 2 *J Legal Studies* 359.



formal patterns that, nevertheless, allowed (indeed enabled) the taking of any conceivable position in regard to a dispute or a problem'.²⁴ But even from this perspective the Court was not formalistic (in the philosophical sense of the word); it did not create the image of mechanically applying a pre-existing norm, as all the criticisms to its use of the previous jurisprudence demonstrate. The Court did not seem to be particularly rigorous in the application of this formalistic linguistic scheme. What seems to be a weakness in the power of persuasion of the Court's reasoning is the lack of clarity concerning the legal ground for this new concept of a dispute.²⁵ Is the Court enunciating a new general international law concept? This discourse of the Court does not even seem to be in line with the previously articulated philosophy of Article 36(2) of the Statute, as the Court had clearly stated that 'a State accepting the jurisdiction of the Court must expect that an Application may be filed against it before the Court by a new declarant State on the same day on which that State deposits with the Secretary-General its Declaration of Acceptance'.²⁶ Here, the Court twisted this philosophy of international litigation to serve another objective.

²⁴ M Koskenniemi, *From Apology to Utopia* (CUP 2005) 563-564.

²⁵ Reading the most authoritative commentaries of the Statute, one discovers easily that 'neither general international law nor the Statute requires a potential applicant to inform the potential respondent of its intention to institute proceedings. In the absence of any such obligation and of any infringement of the respondent's corresponding rights, the respondent cannot in good faith challenge the jurisdiction of the Court on the ground that it had not received previous notice of the intention to bring the proceedings before the Court' (S Rosenne, *The Law and Practice of the International Court*, vol 1 (4th edn, Brill 2006) 1153; or that 'before the parties seise the Court, there must be at least the beginnings of a dispute. The definitive dispute can, however, crystallize later, in the course of the proceedings ... It is, however, unnecessary to oblige the claimant to start again the case by a new application, for want of a dispute at the initial critical date. This would be an excessively formalistic exercise, with no significant effects except to increase the administrative burden on the Court and the parties' (R Kolb, *The International Court of Justice* (Hart 2013) 315).

²⁶ *Right of Passage over Indian Territory (Portugal v India)* (Preliminary Objections) Judgment [1957] ICJ Rep 146.

Formalism can also have a third meaning, which can be reconducted to what has been called ‘the culture of formalism’.²⁷ This kind of formalism lies in the capacity of legal norms to be an important tool for the protection of the weakest: ‘Formalism is precisely about setting limits to the impulses – ‘moral’ or not – of those in the decision-making positions in order to fulfil general, instead of particular, interests’.²⁸ Procedural law is particularly designed to comply with this fundamental function of settling obstacles to power. Judicial review in public law courts, because of its historical and philosophical underpinnings, is supposed to be a tool to scrutinize power and to avoid that this power reifies the subjects of a legal order.²⁹ In this case, the Court interpreted the consensual justice principle in light of the intention to protect the respondent, the powerful in this case, voiding the culture of formalism of its ontological function. This conclusion is confirmed looking at the deliberation process,³⁰ colouring the language of the decision in a way that gives the impression that ‘the Court created by an organization whose existence is founded by that empire [of nuclear weapons] cannot question it’.³¹ This TWAIL analysis recalls what Justice Pal’s³² dissenting opinion condemned about the Tokyo tribunal, which

²⁷ M Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (CUP 2001) 494-509.

²⁸ M Koskenniemi, ‘The Lady Doth Protest Too Much – Kosovo and the Turn to Ethics in International Law’ (2002) 65 *Modern L Rev* 174.

²⁹ A Gaillet, *L’individu contre l’Etat - Essai sur l’évolution des recours de droit public dans l’Allemagne du XIXe siècle* (Daloz 2012) 26.

³⁰ N Krisch, ‘Capitulation in The Hague: The Marshall Islands Cases’ *EJIL:Talk!* (10 October 2016) <www.ejiltalk.org/capitulation-in-the-hague-the-marshall-islands-cases>: ‘among the eight judges who find a dispute lacking, no less than six are nationals of nuclear-weapon states (France, the US, the UK, Russia, China and India); the remaining two come from countries (Japan and Italy) that have benefitted greatly from the protection offered by the nuclear weapons of the US. The eight judges in the minority are all nationals of countries that do not possess nuclear weapons, most of them from the global South’.

³¹ AT Anghie, ‘Politic, Cautious, and Meticulous: An Introduction to the Symposium on the Marshall Islands Case’ (2017) *AJIL Unbound* 38.

³² Particularly interesting on Justice Pal is T Nakajima, パール判事: 東京裁判批判と絶対平和主義 (*Justice Pal: Criticism of the Tokyo Trial and Absolute Pacifism*), (Hakusuisha 2007) 309.



claimed to operate in the name of the ‘universal’ while forgetting the perspective of the periphery, with the risk that it ended up reproducing the imperial rhetoric that had served to institute it.³³

The ICJ was therefore not formalistic, in any of the three possible senses of the word. The Court did not focus on chiseling its technical discourse, creating the impression that ‘everything seems to be a matter of technique’ to the point that it made the exercise appear futile.³⁴ It did not even use a culture of formalism, knowing that ‘for the voice of justice to be heard, law must sometimes remain silent’.³⁵ Following a trend common to nuclear cases submitted to it,³⁶ it simply chose to hide behind its professional authority not to decide, not to risk to give voice to the sensitive questions raised by the merits and by some other preliminary objections. This leads again to the conclusion that it is necessary to decentre the ICJ when thinking about international dispute settlement today, perhaps in so far as its discourse keeps on hammering home that *Nicaragua* may remain the exception and *Marshall Islands* the rule.

³³ A Hasan Khan, ‘Inheriting a Tragic Ethos: Learning from Radhabinod Pal’ (2016) *AJIL Unbound* 25.

³⁴ A Bianchi (n 3) 82.

³⁵ M Koskenniemi (n 4) 489 according to whom that option was the best suited as ‘for the meaning of the massive killing of the innocent is conveyed neither by applying technical rules or principles nor by deferring to professional authority. Instead of the calculable and the rational, it pertains to the realm of the incommensurate and the emotional’ (508).

³⁶ E Stoppioni, ‘The ICJ Decisions in the Marshall Islands Cases or the Unintended Consequences of Awareness’ *SIDIBlog* (24 November 2016) <www.sidiblog.org/2016/11/24/the-icj-decisions-in-the-marshall-islands-cases-or-the-unintended-consequences-of-awareness>.