eudaimonia

Journal for Legal, Political and Social Theory and Philosophy

No. 5 • 2021.

Published by

IVR SERBIA

Journal for Legal, Political and Social Theory and Philosophy

THE INTERNATIONAL COURT OF JUSTICE AT THE CROSSROAD BETWEEN LAW AND POLITICS – *THE EXAMPLE OF THE CASE-LAW ON NUCLEAR WEAPONS*

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Pages: 37–62

UDK 645.2:623.454.8

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THE INTERNATIONAL COURT OF JUSTICE AT THE CROSSROAD BETWEEN LAW AND POLITICS – *THE EXAMPLE OF THE CASE-LAW ON NUCLEAR WEAPONS*

The International Court of Justice is identified by Article 92 of the United Nations Charter as the "principal judicial organ of the United Nations". This definition has consecrated the International Court of Justice as the World Court, as the guardian of the application of international law.

Is this picture still actual? Is the International Court of Justice currently performing a guardian role? What does it happen when highly politically sensitive issues, like nuclear proliferation and nuclear disarmament, arrive before this Court?

To address these questions, this work will analyse the case-law of the International Court of Justice on nuclear weapons. Retracing the jurisprudence of this Court on this issue will shade a light on many characteristics of the World Court and its members, questioning its concrete role in the present international arena.

Key words: *Independence, International Court of Justice, Nuclear Weapons, Politics, World Court.*

1. INTRODUCTION

Since its foundation, the International Court of Justice (ICJ) has issued decisions and rendered advisory opinions, deliberating on a wide range of questions, from the law of the sea to diplomatic law, from the law on the use of force to the law of the treaties.

Being the World Court, ideally assigned to the titanic task of guiding States through the problems that the relationship among them might cause, is not easy. The responsibility is huge, and controversies are just behind the corner. All the decisions taken will always have

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strong supporters but also stronger critics. There will always be someone thinking that the Court is not applying the law but, rather, is oriented by political pressure, or someone thinking that the Court should not even have an opinion on issues with sovereignty implications.

One of the political issues under debate is the one relating to nuclear weapons. Nuclear weapons might be considered old-fashioned arms in a world facing the problems of drones and new technologies. However, the nuclear arsenals are still possessed around the globe by some of the most powerful States and some of them are far away from disposing of them.

Taking it as an occasion to reflect on the relationship between law, politics, and the role of International Court of Justice, this paper will analyse the case-law of the ICJ on nuclear weapons. Hence, in the first paragraph, I will deal with the cases where the International Court of Justice had to confront with the nuclear weapon issue (the so-called Marshall Island cases, the Advisory Opinion on the Legality of the threat or the use of Nuclear Weapons; and the so-called Nuclear tests cases). In the second paragraph and in light of the first paragraph's analysis, I will focus specifically on the ICJ's role, looking at its functioning and, in particular, at its members' action. I will then conclude with some general findings and an auspice about the current and future impact of the World Court.

2. TO THE MARSHALL ISLAND CASE AND BACK: THE CASE-LAW OF THE INTERNATIONAL COURT OF JUSTICE ON NUCLEAR WEAPONS

The debate on nuclear weapons regained strength due not only to the political disagreement between States (last but not least the "fight" between Iran and the U.S.), but also in connection to the submission, in 2014, to the ICJ of nine applications to proceedings against the nine nuclear powers. The submitter of these cases was the Republic of the Marshall Islands (RMI).

The RMI is not a State usually perceived as an essential player in the international community. However, it is relevant in this context because of the nuclear tests conducted by the U.S. for several years on their territory and the consequences these tests had.

Although not formally attacking the U.S. and the other eight nuclear States (Russia, the U.K., France, China, India, Pakistan, Israel and North Korea) for those tests (for whom the RMI had reached a restorative agreement), the RMI was seeking justice in front of a judicial organ, using as the reason of the claim the compliance with the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) and customary law, confident that its personal experience would be taken into account.

According to the Marshall Islands' claims, indeed, these nine states were in breach of the obligation "to pursue in good faith and bring to a conclusion negotiation leading to nuclear disarmament under strict and effective international control" (Article VI, Treaty on the Non-Proliferation of Nuclear Weapons). This provision should have been applied to a group of respondent States since they are part of the NPT, while to the remaining group of the respondent States as Article VI of the NPT, according to the applicant, qualifies to be considered customary international law.

After submitting the applications instituting proceedings, the Peace Palace's door seemed to be open for the RMI. However, those who want to enter into a palace do not always have the right key to open the door, and this was the case of the RMI.

Six of those applications did not enter in the Court's General List. Indeed, the U.S., Russia, France, China, Israel and North Korea had not accepted the compulsory jurisdiction of the International Court of Justice and, since no compromissory clause had been included in the NPT, they would have to give the consent to be judged, in this specific case, by the ICJ, in accordance with art.38 of the International Court of Justice Statute. Predictably they decided to refuse it. Even more predictably, the respondent States did not allow the *forum prorogatum*, either.

The cases against the U.K., India and Pakistan were listed and soon the proceedings started, but on the 5 October 2016 the path of these cases was blocked by the ICJ's decision.

With three almost identical judgments,[1] the ICJ dismissed the cases for lack of jurisdiction, holding one of the respondent States' objections: there was no dispute between the parties.

[1] International Court of Justice. 2016. Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall

In its argumentation, the ICJ used two criteria: awareness and time.

According to these criteria, the Court affirmed that two requirements should be met for a case to proceed to the merit's stage. First, the applicant State should make sure that the respondent state is aware of the dispute's existence (i.e., it is aware that there is a disagreement on the interpretation of a certain provision). Second, that the dispute should exist at the time of the submission of the case.

In the cases at stake, the Court found that U.K., Pakistan and India were not aware, at the time of the submission of the cases to the Court, of the existence of a disagreement with the RMI on the interpretation of a point of law or fact. Hence, under these circumstances, it was not possible to proceed to the merit's stage, since, according to article 36 of the ICJ Statute, the existence of a dispute between the parties is a condition to the Court's jurisdiction.

These judgments are extremely controversial and leave the door open to a lot of questions. Indeed, it is not by chance that in the RMI v. the U.K. case the Court ruled by eight votes to eight with the President casting his vote.

Using these criteria, the Court applied the law and followed its jurisprudence or just adopted a formalistic approach? Was there more under the carpet of formalism?

Clearly, the answers to these questions were not univocal.

According to the (narrow!) majority of the Court, these two criteria are not a novelty in the Court's jurisprudence. They were also used in two previous cases: Belgium v. Senegal [2] and Georgia v. Russian Federation.[3]

However, this argument could be easily dismissed.

Islands v. United Kingdom), Preliminary Objections, Judgment*, I.C.J. Reports 2016*; International Court of Justice. 2016. Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India), Preliminary Objections, Judgment, *I.C.J. Reports 2016*; International Court of Justice. 2016. Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. Pakistan), Preliminary Objections, Judgment*, I.C.J. Reports, 2016*.

[2] International Court of Justice. 2012. Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), *ICJ Reports, 2012*.

[3] International Court of Justice. 2011. *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), ICJ Reports, 2011*.

As Bonafè (2017, 11) pointed out, referencing to these cases as a precedent is not precise. Indeed, in the Georgia v. Russian Federation's case, the specific time requirement was provided in the arbitration clause, that gave to the ICJ the jurisdiction on the case. Also, in Belgium v. Senegal's case, one claim (and not the entire dispute!) was rejected because a dispute did not exist at the time of the application. Hence, the reference to this case might appear to be more accurate, but it is only one case among a variegate jurisprudence on this matter.

More generally, the awareness criterion seems to be a paradox. The explanation of this assertation is two-folded.

First, asserting that there is an awareness requirement goes against general principles of international law. In this regard, two principles could be mentioned: judicial economy and substantive equality between states.

The principle of judicial economy appears to be violated if one considers that the awareness criterion clearly opens the door to second applications on the same dispute. Indeed, the party that sees its request blocked at the preliminary stage, by submitting the case to ICJ, has, without any doubt, made the other party aware of the existence of the dispute. In this way, it has constituted a basis for a future case to proceed to the merit.

On the side of the substantive equality between states, imposing strict requisites to establish the existence of a dispute surely will lead to difficulties for some States, especially the less powerful ones. This is even more true if we consider that, in the RMI's case, the ICJ did not consider RMI's declarations in public conferences as a way of making the counterparties aware of the disagreement. If this is not sufficient, whatever could be?

These are not the only reasons why the awareness criterion could be seen as having a paradoxical nature. Indeed, it is important to stress that the Court's jurisdiction is consensual in its nature. The consensus to be judged by the ICJ could be given on a case-by-case basis, by a compromissory clause present in an agreement or in a treaty, by *forum prorogatum* or by generally accepting the Court's jurisdiction, under article 36 of the Statute of the ICJ.

It is clear that, when the consensus is given on a case-by-case basis, the State involved will accept the jurisdiction of the Court only if it knows the terms of the question.

Oellers-Frahm (2017, 38) highlighted that the awareness criterion will give an unjustifiable advantage to the respondent state. Indeed, as soon as a State knows about the existence of a dispute with another party and before the other State submits the case to the ICJ, it could evaluate its position and decide whether it wants to be judged by the Court or not. Indeed, also in the case in which the State has given a prior consensus to the ICJ's jurisdiction (for instance, by a declaration under article 36 of the ICJ Statute), the State has always the possibility to timely withdrawn from the mandatory jurisdiction of the Court or make reservation to its declaration.

Withdrawing or changing the terms of the acceptance of the ICJ's jurisdiction is not a remote possibility. It happened with the U.S. after the Nicaragua case[4] and it also is precisely what happened in the case here at stake.

Indeed, the U.K. shortly after the ICJ's judgment decided to make a reservation to its declaration of acceptance of compulsory jurisdiction of the Court, affirming that it would not have accepted any case in which the claim was substantially the same as a claim already presented at the ICJ's attention. One other reservation regarded specifically subject related to nuclear weapons, restricting heavily the conditions under which the U.K. could be judged by the ICJ concerning this lethal type of armaments.[5]

In essence, in changing its declaration of acceptance of the ICJ's jurisdiction, the U.K. was itself implicitly sustaining that the awareness criterion violated the principle of judicial economy, as it precisely could allow the case to be presented again before the Court.

It is evident that the Court left its audience with the impression of adopting a formalistic approach and, in particular, of having decided to adopt this approach to avoid exposing itself on the nuclear subject.

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[4] International Court of Justice. 1984. Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment on jurisdiction, *ICJ Reports, 1984*.

[5] Number six of the reservation of the U.K. to the compulsory jurisdiction states: "vi) any claim or dispute that arises from or is connected with or related to nuclear disarmament and/or nuclear weapons, unless all of the other nuclear-weapon States Party to the Treaty on the Non-Proliferation of Nuclear Weapons have also consented to the jurisdiction of the Court and are party to the proceedings in question".

The text of the reservation is available on the website of the ICJ at *https://www.icj-cij.org/en/declarations/gb* (last visited 19 February 2021).

Was the Court driven by the fear that also the U.K., as the other Security Council's members, would have withdrawn from the Optional Clause? Were the judges driven by their mind-set, a structural bias, that prejudicated the Court's decisions, as Bianchi highlighted (2017, 81)? Or did the fact that most of the judges came from nuclear States influenced their decision, as stressed by Krisch (2016)?

This decision made by the ICJ may have different reasons but has caused one effect: inequality. This inequality has afflicted people and States. *Ratione personae*, the Court jurisdiction does not apply to people or international organisations. Still, its decision affects the lives of the citizens of the States subjected to the Court, especially on an issue like nuclear disarmament. Indeed, it is not by chance that Galindo (2017, 78) described the RMI's application as "*actio popularis*", taking into account the nature and the subject of the dispute put forward.

On the same line of reasoning, in its dissenting opinion, judge *ad hoc* Bedjaoui defined the entire international community as a losing party in the case. In essence, while even technically the decision of the ICJ did not go against the RMI, being it only a preliminary stage decision and not a judgment on the merits, also substantially the ICJ's decisions did not hurt the RMI. At least, it did not damage the RMI alone. The whole international community was indirectly affected by it.

Of course, as the Court correctly stressed, the RMI's history should not have influenced the ICJ's decision, but its history should have reminded the world that having a World Court could matter for the international community. This applies significantly when a less powerful State goes to the Court: the ICJ must listen to all the States' voices, especially those not heard in other rooms. In this perspective, the Court's decision appears as a missed opportunity to show the cruciality of its role. What surprised the most is that the Court missed this opportunity in a context where there were powerful States involved, particularly members of the Security Council. Even if the RMI claim was originally addressed to all the Security Council members – all of them possessing nuclear weapons – among them, only the U.K. has accepted the jurisdiction of the Court. However, in any case, taking a position regarding the U.K. would have meant something to the international community: that the Court was finally ready to actively perform the guarantee role that was assigned to it.

In any case, the point is that that where justice does not come to the surface, where the law is probably not applied or at least is not well

balanced, the question of the correlation between those two entities and politics arises.

It is true that, in issues like nuclear proliferation and nuclear disarmament, politics and law overlap, it is true, as it was argued by Prolux (2017,101), that the Court is not the only institution that may face the nuclear subject, but it is also true that the Court cannot ignore or avoid such cases.

The Court has jurisdiction on a case on a State's voluntary basis: States choose itself to be subject to the Court's decisions. As stressed by Couvreur (1997, 38), in an international context, where there are other dispute settlement bodies, to be submitted to the ICJ's jurisdiction is a political act. Hence, given this assumption, it clear that every dispute brought before the ICJ presents a dual nature: legal and political. There is no opposition between disputes of legal nature and disputes of political nature: the two souls of a given conflict are intrinsically connected. There is a treaty, the NPT, that was elaborated through political exchanges. This Treaty is binding: would it have been so wrong for the Court to apply what was, at first, the State's will?

Therefore, it became visible that, in the circumstances of the RMI's claims, the Court could have done more: enacting its role, being "simply" the World Court, not being afraid of saying its opinion on a subject that falls under its jurisdiction, trying to apply justice using the law, confronting with politics.

After all, the RMI cases were just the tip of an iceberg, that, when disclosed, shows a weak and ambiguous jurisprudence of the Court on the nuclear matter: the attitude of the Court seems to be something systematic.

This assertation is confirmed by the analysis of the two 1974 sentences- so-called "Nuclear Tests" sentences – France v. Australia/ New Zealand [6]- (and linked to these sentences, a 1995 Order of the ICJ (the "Order Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of the 20th of December 1974 in the Nuclear Tests") and of the 1996 Advisory Opinion on the Legality of the Use by a State of Nuclear Weapons in Armed Conflict.[7]

[6] International Court of Justice. 1974. Nuclear Tests (Australia v. France). *I.C.J., Reports 1974*; International Court of Justice. 1974. Nuclear Tests (New Zealand v. France)*, I.C.J., Reports 1974.*

[7] International Court of Justice, 1996. Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, *I.C.J., Reports 1996.*

A weak legal reasoning is undoubtedly the one used by the Court in the two Nuclear Test cases: while Australia and New Zealand were asking for a declaratory judgment (to have a general reaction to an alleged unlawful behaviour of France), the ICJ gave binding force to some unilateral declarations of France, made outside Court's proceedings, that stated that nuclear tests would have no longer be performed on the territories in question. What is odd is that unilateral declarations are not listed among the possible legal basis of the Court's decisions (Art.38 of the Statute of the ICJ). Even more, the Court totally missed the point of the submission of Australia and New Zealand. Indeed, instead of providing a declaration, the Court simply assumed that a stop of France's conduct could have been enough: unfortunately, that was not the object of the request!

In 1995, New Zealand went again[8] to the Court on the basis of the 1974 Nuclear Test sentence. However, its submission was blocked by the ICJ, which stated that France, in 1974, did not commit never to perform a nuclear test again, but only a particular modality of a test. Hence all the other modalities were not in the scope of application of the previous judgment.

Again, a strict formalistic approach was used by the ICJ.

Again, the Court left "the audience" with the perception of avoiding a judgment on the nuclear matter.

This attitude is also shown in answering to the General Assembly, in 1996. In replying to the question "is the threat or use of nuclear weapons in any circumstances permitted under international law?", the Court appears focused on the issue of nuclear weapons and its sensitive implications. However, the problem of the Opinion is that all the reflections made by the Court always have a "but", coming from right behind the corner.

According to the Court, it is true that a General Assembly resolution could help in the disclosure of the existence of a customary obligation. It is true that there exists a critical General Assembly resolution (1653 (XVI)) according to which each year the General Assembly, by a large majority, adopted resolutions to achieve the prohibition of the use of nuclear weapons and this "reveals the desire of a very large section

[8] International Court of Justice, 1995. Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case- Order of 22 September 1995, *ICJ Reports*, 1995.

of the international community to take, by specific and express prohibition of the use of nuclear weapons, a significant step forward along the road to complete nuclear disarmament" (para.73 of the Advisory Opinion). However, for the Court, the fact that, in all these resolutions, the General Assembly investigated about the existence of a customary obligation to nuclear disarmament proves that this kind of obligation does not exist, even if there is a widespread intention of the States in this direction, as pointed out by the Court itself.

It is true that the Court addresses its attention to the enormous effects that the using of a nuclear weapon could have on the environment, but then concludes that "the existing international law relating to the protection and safeguarding of the environment does not specifically prohibit the use of nuclear weapons" (Para.33 of the Advisory Opinion).

It is true that the Court engages on an examination of the relationship between nuclear weapons and international humanitarian law, but it first runs into the "Lotus principle", stating that, on one side, "there is in neither customary nor conventional international law any specific authorization of the threat or use of nuclear weapons" (letter A of the Advisory Opinion) and, on the other side, that "there is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such" (letter B of the Advisory Opinion). After, the Court links the issue here at stake to Article 51 of the UN Charter. Then, however, by seven votes to seven, by the President's casting vote, the ICJ showed to the world how a "*non-liquet*" could be concrete, affirming that "the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake" (letter E of the Advisory Opinion).

Can the Court be vaguer than that? For example, as was highlighted by Kohen (1999, 293), what does the ICJ mean for "state survival" or for "extreme circumstances"?

It is true that the Court affirms that "the political implications that the opinion might have are of no relevance in the establishment of its jurisdiction to give" (Para. 11 of the Advisory Opinion) the Opinion. Still, then, in the drafting of the Opinion, the Court was driven by politics. Indeed, it avoided delivering a clear and concise opinion on the (il)legality of nuclear weapons, even if the law might have allowed,

in particular using international environmental law and humanitarian law, to affirm that the threat and, in particular, the use of nuclear weapons is not permitted under international law.

And the list could go on with many other examples, all taken from the Opinion's text. As it was stressed by Koskenniemi (2011, 199), it is clear that the Opinion does not specify any determinate regulation on this delicate subject.

In essence, the ICJ failed to deal with the political and moral dilemmas that the use of nuclear weapons poses.

3. THE INTERNATIONAL COURT OF JUSTICE: STILL (OR EVER) THE WORLD COURT?

About sixty years ago, Jaspers (1960) addressed the issue of the atomic bomb, strongly criticizing the attitude of the organs of the U.N. because – he argued – they were only apparently concerned with this fundamental problem, but in practice they did not take any significant action. If Jaspers had seen how things are going now, he would surely have had the same feelings with regard to the ICJ, questioning the impact of the ICJ on important problems and, in a broader perspective, on the international community.

Using the jurisprudence of the Court to look at the relationship between the ICJ and nuclear-related matters might have helped to shed light on the role of the ICJ: the Court was found to be in difficulty when facing highly sensitive political questions, falling into formalistic solutions or even avoiding to apply solutions left open by the law, raising questions about its independence, impartiality, its capacity to have an impact on the life of the international community.

The ICJ has earned the title of "World Court" long ago, when the UN Charter has defined it "as the principal judicial organ" of the UN (Article 92 of the UN Charter). Being the World Court makes the ICJ a fundamental institution in the UN system and the most authoritative one. On the other side, being an authoritative institution comes with expectations on the outcome of sentences and opinions: the international community might expect the World Court to be impartial, independent, to provide legal solutions, to apply the law in order to provide justice.

This is what might appear from reading a simple combination of words. The first impact when one sees in the Charter the expression "principal judicial organ" is the image of the ICJ staying on the top of the mountain looking at the States being in the plain underneath and pointing out villains and saints.

However, just a few moments after imagining this picture, the mountain will fall, and we would be left with nothing but the perception that the ICJ needs to build up that mountain itself. Indeed, a careful second reading will shed light on the fact that "the formula of "principal judicial organ" besides clearly granting the ICJ superior status among similar judicial bodies, means that the ICJ does not hold a judicial monopoly. This is in line with what applied to the Permanent Court of International Justice (PCIJ), which, pursuant to Art.1 PCIJ Statute and as specified by Zimmermann (2014, 132), was merely an addition to a potential community of courts and tribunals. State parties are thus allowed to submit disputes to other courts or tribunals or, based on State sovereignty, governing much of inter-State disputes using arbitration.

This rereading will show us that the ICJ is only one of the means to resolve a "fight" in the international community and – above all and unlikely others international Courts – only States (and, hence, a small part of the international community, as in its current composition) could submit a dispute to it. Even only this consideration would open up to a reconsideration of the role of the ICJ.

What are the other possible components of this reconsideration? Besides what seems to have truly happened with regard to nuclear weapons, to what extent, in a general perspective, might these doubts on the "real" role of the Court prove to be concrete problems?

As said, one fundamental characteristic of a truly "world court" is undoubtedly the independence and impartiality of its judges. Hence, this could be a starting point of analysis in order to answer these questions.

Independent, of high moral character, qualified: this is the identikit of a judge of the ICJ, according to Article 2 of the Statute of the ICJ. Even if, in theory, this provision was always put into practice by the General Assembly and the Security Council when choosing who to appoint as a judge of the ICJ, many question the compliance with Article 2 of the Statue by international judges, in particular with reference to the independence requisite.

Independence in the international judicial settlement framework cannot be assessed using the same categories of a national judicial settlement context, where the fundamental fear is the one related to personal relationships. What does matter in the international environment is that, as affirmed by Schwebel (2011, 21) "every judge is a prisoner of his or her own experience". Judges are people and, as people, they see things with their own eyes. This is not a physical consideration, but a substantive one. Indeed, judges' eyes are shaped by cultural and social factors (nationality, education, origins) that have inevitably informed their peculiar vision of life and law.

The scheme provided for the ICJ judges' election implies that the Security Council and the General Assembly appoint judges from a list of potential candidates presented by the Permanent Court of Arbitration. National groups contribute to the drafting of this list. When deciding on these names, "each national group is recommended to consult its highest court of justice, its legal faculties and schools of law, and its national academies and national sections of international academies devoted to the study of law" (Article 6 of the Statute of the Court) Indeed, as stressed by Bianchi (2013, 462), judges will be, of course, people with previous experiences, that have formed their mindset and background and have led them to become the people they are today.

Gordon (1987, 402) has also highlighted this perspective, affirming that, even though judges represent different schools of law, have different ideas about law and justice, have different backgrounds, they sit on the bench to apply to facts.

This is exactly one side of the concept of judicial independence in this context: understandably, judges might have specific ideas on international issues, but to correctly exercise their duties, they must put their ideas aside and stick to what the law tells them to do, showing in this way to be independent.

Of course, it is not an easy task to provide objectivity. As said by Schwebel (2011, 21), "perfect objectivity is unattainable". However, sufficient objectivity could be reached, for example, appointing judges with a more diverse background, representing different cultures. This could create a dialogue among different ideas of justice.

It is easier – at least in theory – to guarantee the other side of judicial independence: freedom from any political interference.

Let's consider a hypothetical case. An Italian judge is sitting on the ICJ bench while Italy decides to submit a case to the Court, asking

the Court to adjudge and declare that another State violated its rights. The idea of judicial independence does not implicate that the Italian judge should not rule in favor of Italy no matter what. He should carefully evaluate all the issues at stake. An easy task for a person who holds the characteristic stated by Article 2 of the Court's statute and who is not there to represent its State of birth, as diplomats or politicians do in the political U.N. organ. This independence is even more necessary if we consider that – unlike other international courts, where every State part of the Court has a seat (such, for instance, the European Court of Justice) - the ICJ is composed only by 15 judges.

However, the election procedure has often shaded unreasonable doubts on the presence of implicit blackmail. As pointed out by Keith (2017, 146), the idea is that a State that invested enormous resources to promote the election of one of its citizens will always pretend the gratitude of that judge, not in an abstract way, but in a practical one: the judge will always be implicitly bound by the interest of those States that have contributed to its election. Terris, Romano and Swigart (2007, 196) similarly affirmed that "states are more comfortable with a judicial proceeding when one of their own nationals is on the bench".

This cannot be considered a correct perspective. Having a citizen as an ICJ judge is of great prestige, but it only implies the possibility to exhort a different way of seeing things to the Court. The political pressure a judge might feel is something that will come, more probably, from the historical context in which the judges are operating or from other factors such as, for example, the specific issue at stake or the possible impact of a specific decision on the international community. As reported by Schwebel (2011, 22) and Posner and Figuerido (2005, 599), cases where a judge of the nationality of one of the parties of the case voted against his or her own State are present, but rare.

Therefore, political pressure is present, but not in the form of an individual "blackmail."

With regard to the question of supposed political pressure on the ICJ, the most famous example is the one of the U.S. government officers in the case Nicaragua v. U.S. (1986). During the proceedings of the case, the U.S. doubted the independence of the World Court, affirming, as it was reported by Gordon (1987, 398), that the Court – like the other organs of the U.N. – was "infected with anti-Western" virus. Oddly, it was precisely to avoid the accusation of being too western-sided, that the Court was alert on the matter. After all, this was

exactly the idea of the less powerful States: the Court would have ruled in favour of the most powerful State, hence, in this case, the U.S. This strange contraposition of views shows how the competing parties were not focusing on which side the law would have led the "win", but on the political pressure that the ICJ could have felt during that period. The Court also perceived this. Indeed, as it was argued by Gordon (1987, 417), the ICJ's members were aware of the fact that, given the political pressure and political nature of the dispute involved, every decision could have damaged- in one way or another- the Court's reputation in terms of independence.

Ironically, the U.S. saw the presence of the opposite kind of pressure and took the opportunity to withdraw from the compulsory jurisdiction of the Court.

The reflection on the ICJ's independence let the link between law, justice and politics come to the surface.

International law and politics are intrinsically related. This is expressed by theory, in particular by the Critical Legal Studies, that claimed that "law is politics", as specified by Bianchi (2016, 136) not only "acknowledging the role of power politics in shaping legal relations", but fundamentally expressing the criticism of the alleged objectivity and neutrality of law": "politics is in the very structure of the law".

This is self-evident in the cases that arrived to the ICJ. Even those cases, that have not been under a wide discussion among international experts, show this link: there is politics in a treaty, there is politics in the choice to submit an advisory opinion (on every matter it could be) to the ICJ, there is politics in the delimitation of the boundaries of a State, there is politics in the declaration of independence of a State, there is politics in the choice to use force against a State.

Where there is international law, there is politics, but also the opposite applies: there are always legal shades in a political question.

A controversy had emerged with regard to the opportunity for the Court to express its opinion or its decisions on a politically related matter: the so-called "justiciable dispute doctrine". According to this doctrine, which was thoughtfully analysed by Lauterpacht (2011, 3-25) and that was even recalled by the U.K. in the RMI cases – the Court should not engage with political questions. This is because there are two types of disputes: one is political, and the other is legal, and these two types of disputes should not be mixed.

However, applying this idea would lead to a nullification of the Court's role, for the reasons expressed above. The Court itself has affirmed that it would not refrain from expressing its view on legal questions related to political ones. Still, the outcome of the decisions or opinion on the matters did not show that its words come true, as we have demonstrated with regard to the Advisory Opinion on the Legality of threat and the use of Nuclear Weapons. Indeed, what should matter in this context is not the need to avoid the Court to rule on political questions (on the contrary, the need is that the ICJ rules on international matters, intended in the shown way), but the perception that the Court is ruling free of conditioning.

As affirmed by Crawford and McIntyre (2012, 190), gaining the parties' trust is a crucial part of the process of adjudication. It is paramount that parties feel confident that no "hidden reasons" (Crawford, McIntyre 2012, 190) have influenced the decision. Otherwise, compliance with it will probably not be granted. In this perspective, the trust that different actors reserve to an institution is not shaped by a single act, but by its general attitude, by the patterns that it follows, by the reasons that it provides for following those patterns.

Perception is something that matters.

One might think that the Court – an institution created for States and that, as highlighted by Bianchi (2013, 465), operates for that particular audience – could never reach individuals different from academic and could only have consequences on the life of States.

This opinion can be shared (people cannot, indeed, directly address the ICJ), but not to the fullest. As long as the ICJ will directly impact Nations and international organisations' lives, its impact could be felt as concrete also by people. After all, States are often seen as abstract entities that hold the reins of our life, sometimes with no alleged legitimacy. Knowing that a World Court regulates this situation will certainly make people feel part of a wider and just community.

Let's put things this way: how could someone believe that the Marshallese population would not have been happy and felt part of a community after a hypothetical Court's decision stating that the Nuclear States must negotiate the disarmament?

With the presence of Article 59 of the Statute of the Court, the absence of the compulsory jurisdiction, the existence of a lot of specialized international tribunals and less and less cases and requests for

an advisory opinion arriving on the table of the ICJ, it could be argued that it is difficult for the Court to have a direct impact on the life of people.

Moreover, as Berman (2013, 20) highlighted, the ICJ cannot be compared, in its position, with national courts, since it does not receive applications for cases regularly and it rarely has the occasion to shape its jurisprudence on the same matters.

How should the Court act in this tangled picture?

The answer might be that the Court shoul take every given occasion to take a step forward in regaining the trust and confidence of the States, that have created it as the "legal guardian" of the U.N. Because of its prominent position, the outcomes of its sentences will be discussed among academics and diplomats of many States, not only of those involved in that particular case.

It is true that judgments are only binding on parties and that advisory opinions are not legally binding. Still, all the outcomes of these acts – if convincing – are culturally binding for the international community, in the sense that they are still seen as authoritative guidelines.

However, the Court – even when it reaches desirable outcomes – uses confusing reasoning, as it is demonstrated by the fact that, as affirmed by Bianchi (2013, 361) often "different perceptions emerge among the judges about how the Court should reach the desired outcome in a particular case". Showing the opposite behaviour and transparency, the Court could come to useful conclusions and collaborations, such as, for example, the one with the International Law Commission (Schwebel 2011, 66 highlighted that).

As long as the Court will provide authoritative and consistent interpretations and constructions, it will contribute to the development of the international system (hence, of international law) and have a clear impact on the international community's life and functioning.

To wrap up the discussion on the ICJ's role, it is useful to draw some guidelines that emerged from the present reflection.

The ICJ is placed in a picture that includes, as other players, U.N. organs, U.N. specialized bodies and international organisations, States and people.

All these actors have a relation with the Court, some a strong one, some a less obvious one, but all have expectations coming from the prominent position in which the UN Charter has placed the ICJ.

U.N. organs and –to some extent- also U.N. specialized bodies frequently see their role shaped by the Court and have a privileged relation with it, coming from the fact that, in theory, they could always ask the Court for advice using the request for an Advisory Opinion.

States' expectations mostly concern the cases submitted to the ICJ. Indeed, as Jennings (1998, 40) argued, the parties expect from the judges a balanced decision, based on the application of the existing law and not the idea that those sitting on the bench have of justice.

This evaluation also applies to those States that are not part of the on-going procedure, as, as stressed by Jennings (1998, 39) each decision of the Court has an authoritative character and as, as well highlighted by Simma (2009, 1014), there is a perception of universality of the law.

Moving to international organisations and (implicitly) people, first, they expect the Court could influence U.N. organs and State's work in a positive way, giving a perception of a fair and just world. As a second instance, the ICJ matters to them because, as pointed out by Higgins (2009, 1014) its rulings of the ICJ are the first source "to which it may be expected that a national court will turn if it is called upon to determine a matter of customary international law".

However, all of this is probably very far from reality.

As we have stressed, the Court is currently unable or unwilling to perform the role ideally assign to it. Therefore, it is clear to actors in the international community that their ideal expectations will likely be unmet.

For instance, most powerful States were (and still are) reluctant to submit cases to the Court. They consider the Court neither impartial nor effective and, thus, want to avoid any interference with their interests. However, also those less powerful States -although they at least try to "use" the Court- do not see the Court as acting in pursuing justice, hence, as pointed out by Obrégon (2017, 200) surely not as an "an advocate for the Third World".

U.N. Organs, such as the Security Council, are increasingly unwilling to collaborate with the Court and ask for opinions since the Court's role is mostly seen as interfering with their prerogatives.

During the years, international organisations actively pushed States to submit important cases to the ICJ (the RMI cases are an example), hoping to restore a sense of justice among the general public.

However, the Court had always shown to be restrained on going more in-depth on the submitted matters.

For these reasons, the ICJ is currently not seen as authoritative as it should and could be.

4. CONCLUSIONS

All the implications mentioned above have at least demonstrated that the perception of the Court is not unambiguous.

After all, as Crawford and McIntyre affirmed (2012, 189), "for most of its history, international law has been a law applied in the absence of its own institutions". Hence the idea that a World Court is useless is not so confined. For instance, this is shared by Burton (1968, 222) that has affirmed that the parties of a dispute might- if they wish to-solve their conflict without any imposition. In this perspective, it is not the law that resolves conflicts but the will of the parties, which decide to remove the reason for the disagreement. This is due to the fact that law is something static, whereas the will of the parties involved could be flexible and adapt to a new balancing of different instances at stake.

In the same line, others (like Proulx, 2017, 101) believe that political institutions –and not judicial institutions– must deal with sensitive political issues.

The idea of the uselessness of having a World Court is-of course-not shared by all the international law experts. However, among those who used to believe in the judicial power's ability to settle disputes, some international lawyers, like Carreau and Marella (2018, 742), now think that the ICJ has a minor role in the international picture. Among them, Scobbie (2012, 1082) has argued that the ICJ could not realistically contribute to "a linear development of international law", considering the fact that cases are presented to it in a non-systematic way (both in terms of number of cases, timing and subjects involved).

Among those believing that the Court could still play a great role, not everyone thinks that the Court could survive with the current regulation. Indeed, reform of the Court's system was proposed, in particular on some critical points, such as the representativeness and impartiality of the judges, the transparency of the Court, the need for

a wider audience, the existence of a judgment only in connection with the parties' consent.

In this perspective, Cassese (2012, 239-249) provided a proposal for reforming the Court's rules. In particular, he proposed: the elimination of the ad hoc judge and the automatic recusal of a national judge sitting on the bench while a case regarding its nation is pending; the simplification of the system of intervention of third parties, allowing amici curiae to submit memorials and participating in the proceedings; clarification of the impact of the advisory opinion; strengthening of the role of the international organisations, giving them broader possibilities to participate in the procedure; simplification and implementation of some technical aspects (like, for example, the creation of a fact-finding body), clarification of the language of the Court to let the judgments and the advisory opinion became accessible to everyone.

Some of these proposals clearly touch raw nerves of the Court. It is undeniable that the Court –constructed as it is- is not totally adherent to the social community nowadays. However –as we have shown in these pages- this is not only a structural and procedural problem. In most cases, the Court has the tools to provide impactful and strong decisions, but it is unwilling, more than unable, to use them.

Assuming that this reform could be implemented (and this far away from realizable in certain cases, due to the rules of the UN Charter and of the Statute of the Court), more than a structural reform – that, of course, will force the Court to act in a certain way, but, still, it would not solve all the problems, like for example, the mindset of the judges - what is needed is that the Court become aware again of the fact that the World is watching and has expectations. After all, even with a fact-finding body, even with the influence of international organizations (that had a significant role in pushing forward the cases regarding nuclear weapons), even without the participation of judges of the nationality of the State involved in the case, the Court would have probably continued to rule that the dispute between the U.K. and the RMI did not exist.

In the 1932, from Potsdam, Albert Einstein wrote a letter to Sigmund Freud, trying to tackle a question still unresolved: why war?

> *"As one immune from nationalist bias, I personally see a simple way of dealing with the superficial (i.e., administrative) aspect of the problem: the setting up, by international consent, of a legislative*

> *and judicial body to settle every conflict arising between nations. (…) But here, at the outset, I come up against a difficulty; a tribunal is a human institution which, in proportion as the power at its disposal is inadequate to enforce its verdicts, is all the more prone to suffer these to be deflected by extrajudicial pressure. This is a fact with which we have to reckon; law and might inevitably go hand in hand, and juridical decisions approach more nearly the ideal justice demanded by the community (in whose name and interests these verdicts are pronounced) in so far as the community has effective power to compel respect of its juridical ideal. But at present we are far from possessing any supranational organization competent to render verdicts of incontestable authority and enforce absolute submission to the execution of its verdicts"* (Eistein, 1932)

More than discussing the reasons behind war, Einstein enumerated some solutions to avoid it. One of this –the principal one– is creating a World Court, an organ that could issue authoritative decisions for the States, that would have to lose part of their sovereignty in exchange for international security.

Einstein was not thinking about the International Court of Justice, which, at the time, did not even exist. However, reading his assessment of all the likely problems of creating a World Court, it might seem that the letter was written to describe the current situation. The potential World Court, indeed, was seen by Einstein as a "human institution", "inadequate to enforce its verdict", potentially pushed from "extrajudicial pressure". This is the conclusion we have reached in this work.

The International Court of Justice, created to provide a guidance for States and U.N. organs and bodies, founded to be the independent and impartial World Court, is now performing an entirely different role. These are points that emerged in our journey through its jurisprudence on nuclear weapons.

In the Marshall Islands cases, we have seen that the Court adopted a formalistic attitude to hide the fear to be inadequate to answer the Marshallese people's quest for justice. From the very beginning, we have seen that politics was involved in cases like these, and political pressure played a concrete role in shaping the Court's decisions. The same political pressure led the Court to act *ultra vires* in the Nuclear Test cases, where preferred to "make law" to avoid an uncomfortable

decision. The same political pressure led the Court, in 1996, to render an Advisory Opinion vague and uncertain.

The fact is: politics is internal to international law. Therefore, the World Court cannot just affirm – as it was done[9] – that dealing with political issues does not constitute a problem. It must coherently deal with it, especially when fundamental concerns, like nuclear non-proliferation and disarmament, are at stake. It must prove to be independent from such "extrajudicial pressure".

Then, our journey has shifted from the jurisprudence of the Court as the object of analysis to the use of the Court's jurisprudence as a tool for analysis. Looking at past sentences and advisory opinions, together with technical regulations, we have taken a closer look at the ICJ's role. What has emerged upholds what was pointed out with regard to the nuclear weapons issue.

The Court, being composed by humans, is not perceived as an independent organ. Of course, we cannot expect that in the future the Security Council and the General Assembly will decide to elect fifteen robots as ICJ judges. Also, it is understandable that judges have their personal experiences and ideas on the law; these may as well be fruitful, being it what gives a judge the knowledge of the legal tools involved in each case. However, we expect such personal views never to prevail, no matter what. A coherent and well-constructed legal reasoning is something that requires an open-minded judge that is willing to step back from his own biases to embrace new legal approaches. Unfortunately, the proliferation of separate opinions shows that the Court is currently acting differently from what we hope.

In addition, as a World Court, the International Court of Justice has its own specific place in the international community: it is not isolated, but it has to deal with a number of actors, U.N. organs and bodies, States, international organisations and people. Today, such players do not see the Court as a place where legal disputes can find a clear, fast and effective solution.

The real issue is that the Court has not taken any step to change these views: it follows contorted lines of reasoning, it systematically avoids any pronouncement on sensitive matters, it takes decisions

[9] As already stressed, in the *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, (above note 4) and in the *Advisory Opinion on the Legality of Threat or the Use of Nuclear Weapons,* (above note 8).

that may seem far from the quest for justice that should orient it. The described perception of the Court by the States and international bodies and organisations is only a natural outcome from the Court's attitude. An emblematic example of this is the Marshall Island case. In that instance, the Marshall Islands, pushed by international organisations and, hence, people, showed confidence in the Court's role and submitted all the cases to it. Given how things went, who knows whether the Marshall Island will rely on the Court again – at least in the near future?

In this work, we have gone from Islands far away in the Pacific Ocean to the rooms of the Peace of Palace and, thanks to the analysis of technical and substantive regulations, we have understood what the role of the Court is today. What will be the role of the ICJ in the future?

The World Court exists and still will as long as States give importance to it and believe in it. To gain the trust and confidence of States – and, more generally, of the international community – the Court must prove to be totally aware of its role and the potential ramifications of its actions. Situations like those described in this work did not foster the perception that the Court can do something "helpful" in a context where applying the law and providing justice means dealing with politics. Acting shyly and hiding behind formalism would only lead the Court to be relegated as an old institution, far away not only from the spotlight but even from the stage, incapable of playing an active part in the international community.

The World is now facing and continues to face challenging situations: it needs a guide more than it seems. If the Court will rely on its privileged position, providing coherently and well-constructed judgments and opinions, not being afraid of open the door to new ways of seeing the world, it will –probably– earn back that authority in the international community that it was given at its foundation and is now maybe present only on the books.

Sands (2016, 887) once said that "our international court are delicate and fragile creatures".

The present article showed that the ICJ makes no exception. However, hopefully, it could get stronger.

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