doi:10.1017/aju.2017.28

SYMPOSIUM ON THE MARSHALL ISLANDS CASE

ON FORM, SUBSTANCE, AND EQUALITY BETWEEN STATES

*George R. B. Galindo**

The International Court of Justice (ICJ)'s 2016 judgments on the three cases *Obligations concerning negotiations relating to cessation of the nuclear arms race and to nuclear disarmament* show the omnipresence of the dichotomy between form and substance in the Court's case-law.[1] Commentators and several dissenting judges have stressed that the judgments represent a landmark in the sense that the Court has radically departed from the consideration of flexible standards in applying procedural rules to the determination of the issue of identification of a legal dispute.[2] In other words, it made form prevail over substance.

The form/substance dichotomy of the cases reveals a clear pattern in the judgments of the Court. Here I explore the pattern in order to contest the idea that international procedural law can meaningfully be separated from the structural inequalities that underpin international law, including the inequalities that divide nuclear-weapon states and non-nuclear-weapon states, and those that divide developed and developing states. International law has developed in such a way that "[t]he doctrine of sovereign equality, no matter how interpreted, is compatible with an array of tolerated social inequalities."[3] However, international procedural law has not been closely scrutinized from the point of view of how it produces social inequalities.

There have been many studies—especially during the decolonization years—on the relationship between courts such as the ICJ and developing countries. From the 1970s on, a growing number of developing states started to overcome their distrust in the Court—fueled by the second phase judgments of the *South West Africa* cases, in 1966. Some became its regular clients.[4] However, there has not yet been sufficient reflection on how international

* *Legal Advisor, Foreign Relations Ministry, Brazil. Professor, University of Brasília Law School (Brazil).* *The content of this essay does not reflect the official opinion of the Brazilian Foreign Relations Ministry. Responsibility for the information and views expressed herein lies entirely with the author.*

[1] Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and the Nuclear Disarmament (Marsh. Is. v. UK), Preliminary Objections (Oct. 5, 2016); Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and the Nuclear Disarmament (Marsh. Is. v. India), Preliminary Objections (Oct. 5, 2016); Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and the Nuclear Disarmament (Marsh. Is. v. Pak.), Preliminary Objections (Oct. 5, 2016) [hereinafter Marshall Islands Cases]. Unless otherwise indicated, the references to the cases will be that of the one instituted against the United Kingdom.

[2] *See, e.g.,* Christian Tams, *No Dispute about Nuclear Weapons?*, EJIL: *Talk!* (Oct. 6, 2016) and Nico Krisch, Capitulation in the Hague: The Marshall Islands Cases, EJIL: *Talk!* (Oct. 10, 2016).

[3] Gerry J. Simpson, Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order 56 (2004).

[4] *See* Cesare P. R. Romano, *International Justice and Developing Countries (continued): A Qualitative Analysis*, 1 Law & Prac. Int'l Cts. & Tribunals 539, 574–590 (2002).

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https://doi.org/10.1017/aju.2017.28 Published online by Cambridge University Press

procedural law applied by the ICJ leaves intact the status quo of social inequalities.[5] My argument is that the assumption that procedural rules are neutral, or operate equally, is refuted by the practice of courts such as the ICJ, and that this is illustrated by the *Marshall Islands* decision.

In this short essay, I will try to sketch some criticisms of the Court's judgments in the three cases filed by the Marshall Islands by arguing that the ICJ does not take into regard arguments about material inequality in its procedural law.[6] I hope that such criticisms can stimulate a broader analysis of the whole corpus of the Court's judgments and opinions from this same perspective.

Right of Access to Justice

The language of rights certainly has many difficulties,[7] and it is true that rights do not give us an external point of reference to solve political problems. But the absence of rights impairs our ability to solve such problems. I argue that international procedural law, especially at the ICJ, should be read through the lens of rights language and its impact on such language.

The fundamental principle of the right to access to justice is widely applied by international and domestic courts to individuals. The two basic tenets of the idea, as insightfully put by Cappelletti and Garth many years ago, are: "[f]irst, the system must be equally accessible to all; second, it must lead to results that are individually and socially just."[8] Such expectations are equally valid for states when they go to international courts. Although the ICJ still works under the "consensual paradigm in international adjudication,"[9] and even taking into account the limits of the ICJ's jurisdiction, there is no plausible reason for the Court not to apply the idea of a right of states to access to justice.

The right of access to justice certainly does not eliminate the jurisdictional barriers that properly limit a court from proceeding to the merits of a case. It makes procedural law instrumental, not in the sense of making substance prevail over form, but of avoiding a situation in which procedure becomes an end in itself. The *Marshall Islands* cases show that procedure has indeed become an end in itself at the ICJ.

The Court itself states that the "determination of the existence of a dispute is a matter of substance, and not a question of form or procedure."[10] But it is unconvincing to say that the institution of a (brand new) test that turns on a state's awareness of the dispute is something related to substance rather than procedure, especially when this determination can bar the Court from proceeding on the merits of the case. Such an argument is unconvincing because it makes the existence of a dispute depend on a given form of making a state aware about a dispute. In order to prove the other states were aware of a dispute, the Marshall Islands had to prove that it acted in a certain way, and respected a specific form (e.g., notifying, voting, naming explicitly certain states in international conferences, etc.).

The fact is that the test of awareness makes form absorb substance, transforming the finding of a dispute into an end in itself; it is an artificial test that has no basis in the daily routine of the relationships between states. Such

[5] It is surprising that scholars such as TWAIL (Third World Approaches to International Law) affiliates, have not paid more attention to international procedural law at the ICJ.

[6] For the diferences between formal and material inequalities in international law, *see* Simpson, *supra* note 3, at 25–61.

[7] *See* Duncan M. Kennedy, A Critique of Adjudication [fin de siècle] 315–338 (1997).

[8] Mauro Cappelletti & Bryan Garth, *Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective*, 27 Buff. L. Rev. 181, 182 (1978).

[9] Cesare P. R. Romano, *The Shift from the Consensual to the Compulsory Paradigm in International Adjudication: Elements for a Theory of Consent*, 39 N.Y.U. J. Int'l L. & Pol. 791 (2007).

[10] Marshall Islands Cases, *supra* note 1, at 38.

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artificiality has a far greater impact on less powerful states, since they have very limited resources to contest the conduct of the most powerful ones. If they encounter even more—and dubiously constructed—difficulties in accessing international justice than currently exist, international tribunals will play a role in greatly impeding the ability of these less powerful states to contest material inequalities between states.

The Limits of the State

One of the most notable features of this case is that the issues it raises extend far beyond the specific litigants. Nuclear disarmament is an issue that affects the entire globe; the question then arises of how the interests of the larger community may be brought before the Court. Proposals for reforming the ICJ are quite numerous. Different scholars have emphasized, for decades, the need for the Court to engage in various reforms, such as to speed up the proceedings, to allow a more diverse set of international organizations to request advisory opinions, and to allow certain institutions to be admitted, in contentious cases, as *amici curiae*.[11]

The three cases under review show the limits of configuring a dispute of enormous significance to peoples as one merely between states. Judge Cançado Trindade in his powerful dissenting opinion made a similar point, that a decision on the existence of a dispute, in this kind of case, should not be restricted to the verification of the behavior of representatives of the states involved.[12]

Some may argue that there is no such possibility of invoking peoples—and especially consideration of peoples from non-nuclear-weapon states—in international judicial proceedings regarding the use of nuclear weapons: current positive international law offers no final solution to the problem. However, we must be aware that any argument about the limits of law is a way to reify it, of forgetting the struggles for recognition that, on a daily basis, constitute it.[13] Peoples are not subjects of international law (at least not in ICJ proceedings), but a complete failure to consider their demands even minimally could result in delegitimizing the international system, since states represent, in one way or another, real persons. Despite the distance between states and peoples in international procedural law, there could certainly be midterm solutions.

One possibility is to recognize that a decision on the existence of a dispute demands hearing not only from the people that live in nuclear states, but also—and especially—those of non-nuclear-weapon states. Those peoples are essentially victims of the nuclear arms race and nuclear tests. The admission of *amici curiae* could provide some voice to peoples,[14] although we should be cautious about organizations and institutions that argue that they speak on behalf of the international community as a whole, because that community features tremendous inequalities between its components, which may not find expression in a single representative.

The decisions on the *Marshall Islands* cases increased the distance between states and people. Because of that, accusations that the Court increasingly promotes a gap between legality and legitimacy will remain salient.

[11] *See, e.g.,* Sienho Yee, *Notes on the International Court of Justice (Part 2): Reform Proposals Regarding the International Court of Justice—A Preliminary Report for the International Law Association Study Group on United Nations Reform*, 8 Chinese J. Int'l L. 181 (2009).

[12] Marshall Islands Cases, Dissenting Opinion of Judge Cançado Trindade 119–127.

[13] *See* Axel Honneth, Reification: A New Look at an Old Idea 17–96 (2008). In the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, petitions with more than three million signatures were filed in the Court. *See* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, Dissenting Opinion of Judge Weeramantry, 1996 ICJ Rep. 429, 438 (July 8) at 438. This is the kind of engagement that should not be easily disregarded in international procedural law.

[14] It seems that Article 62 of the ICJ Statute already opens the possibility of admitting *amici curiae* in the case of violations to *erga omnes* obligations. *See* Paolo Palchetti, *Opening the International Court of Justice to Third States: Intervention and Beyond*, 6 Max Planck UN Y.B. 139, 177–180 (2002).

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Actio popularis

Unlike the decision in the three cases under discussion, the Court has previously integrated form and substance in a more balanced way. In 1962, in the preliminary objections judgment of the *South West Africa* cases, the majority of the Court recognized that judicial protection was an essential part of the Mandate System, operating to protect "the sacred trust and for the rights of the Member States under the Mandates."[15]

Such a statement has at least two consequences: the first is that there are some issues where states recognize that judicial protection is necessary; the second is that states may be entitled to judicial protection even when they were not injured by the conduct of another state.

This leads us to the question of *actio popularis*. Although such issue gained prominence almost at the same time as other concepts such as obligations *erga omnes* and *jus cogens* rules, international legal scholarship has not devoted enough attention to it, as it did to both the latter issues.[16] The ICJ itself is responsible for this lack of interest, since in the second phase of the same *South West Africa* cases, it stated that a right of *actio popularis* "is not known to international law as it stands at present: nor is the Court able to regard it as imported by the 'general principles of law.'"[17]

The issue discussed in the *Marshall Islands* cases invites us to rethink the possibility of admitting an *actio popularis*. Although allowing a right for states to file an *actio popularis* would probably demand a reform of the Statute of the Court, it would also demand the Court to revise the rigid difference between form and substance in its case-law. Especially in relation to the so-called "public goods"—the issue of nonproliferation certainly being one of them—procedural aspects invariably affect the fulfillment of their substance. In fact, "[p]rocedure is not only the transmitter of substance, or protector of intrinsic procedural rights, but is co-determinative of what the law is in the first place."[18] The principle of equality between states demands that a specific mechanism be developed to make the realization of the substance of the case possible. In other words, this entails the possibility of admitting an *actio popularis* at the ICJ, which in turn means the recognition that there are certain issues that affect a large group of—or all—states; such issues tend to blur the line between form and substance. The realization of public goods depends on institutions that are open to reinterpreting them according to the needs of a society at a given time. If access to such institutions (such as courts) is denied, a gap between social needs and legal rights can emerge. Recognizing the possibility of an *actio popularis* opens the box to realize that procedural law, as it is today, can perpetuate (and sometimes foment) the inequalities between states.

Even more importantly, in allowing an *actio popularis* one is not only recognizing that other states have a legal interest in compliance with a given rule. Rather, in the current situation of international relations, *actio popularis* may be the only chance a state (or peoples)[19] have to contest the conduct of another state by means of judicial settlement.

Burden of Proof

Some dissenting opinions in the cases show a clear dissatisfaction with the way the majority treated the value of the General Assembly's resolutions confirming the existence of a legal dispute.[20] Indeed, the judgment pays lip service to

[15] South West Africa, (Eth. v. S. Afr.; Liber. v. S. Afr.), Preliminary Objections, 1962 ICJ Rep. 319, 337 (Dec. 21).

[16] *See* François Voeffray, L'*actio popularis* ou la défense de l'intérêt collectif devant les jurisdictions internationales (2004).

[17] South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.), 1966 ICJ Rep. 487 (July 18).

[18] André Nollkaemper, *International Adjudication of Global Public Goods: The Intersection of Substance and Procedure*, 23 Eur. J. Int'l L. 769, 785 (2012).

[19] Voeffray, *supra* note 16, at 368.

[20] *See, e.g.* Marshall Islands Cases, Dissenting Opinion of Judge Cançado Trindade 31–56.

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the importance of resolutions of international organizations, which has already been affirmed by the Court in previous cases.[21] For the Court, states' votes on these resolutions may be evidence of a legal dispute only in

> some circumstances, particularly where statements were made by way of explanation of vote. However, some resolutions contain a large number of different propositions; a State's vote on such resolutions cannot by itself be taken as indicative of the position of that State on each and every proposition within that resolution, let alone of the existence of a legal dispute between that State and another State regarding one of those propositions.[22]

The majority's position seems to contradict what the Court stated in the preliminary objections to the *South West Africa* cases: "In cases where the disputed questions are of common interest to a group of States on one side or the other in an organized body, parliamentary or conference diplomacy has often been found to be the most practical form of negotiation."[23] The need for a state to make an explanation of its vote was not a prerequisite to confirm the existence of a dispute.

The ICJ's new position also contradicts the so-called prevalence of substance over form stated by the majority in the three cases, since the following of a specific form—explanation of vote—is required in the assertion of a legal dispute. But such a position also brings consequences in terms of the allocation of the burden of proof in litigation before the Court in at least two ways.

First, if applicants have the burden of proof to show there was a dispute at the time of the filing of a case, the states' votes in the General Assembly will become almost completely useless in asserting the existence of a dispute if not accompanied by an explanation of vote. It will be extremely hard for an applicant state to provide evidence of what motivated a respondent state while voting for a resolution. This is a situation where the burden of proof produces unfair consequences for the litigating parties. And this is more deleterious to developing states, since many of them use the General Assembly as the main—if not the only—stage to articulate their political positions internationally.

Second, the position consolidates the idea that the burden of proof has nothing to do either with the issue under discussion in the case or with the contending states. If the Treaty on the Non-Proliferation of Nuclear Weapons itself urges "general and complete disarmament under strict and effective international control,"[24] the burden of proof for the nonexistence of a dispute should be on nuclear powers. If the use of nuclear weapons is, for the ICJ itself, an exception in international law,[25] nuclear powers should have—at least—more complex duties under international procedural law.

Reimagining the criteria for understanding the burden of proof is completely up to the ICJ, in the sense that this is more a matter of interpretation than of statutory constraints, since the Court's jurisprudence regarding the burden of proof has generally flowed from the Permanent Court of International Justice's position that "a party asserting a fact bore the burden of proving it."[26]

[21] *See, e.g.*, Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. US), 1986 ICJ Rep.14, 72 (June 27).

[22] Marshall Islands Cases, *supra* note 2, at 56.

[23] South West Africa, *supra* note 15, at 346 (Dec. 21).

[24] Treaty on the Non-Proliferation of Nuclear Weapons preamble, July 1, 1968, 729 UNTS 161.

[25] This can clearly be inferred from the controversial (and unfortunate) Paragraph 97 of the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, since the doubts on the legality (or illegality) of the use of such weapons arise only in "extreme circumstance of self-defence." *See* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 ICJ Rep. 226 (July 8).

[26] Caroline E. Foster, *Burden of Proof in International Courts and Tribunals*, 29 Austl. Y.B. Int'l L. 27, 27–28 (2010).

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Conclusions

The *Marshall Islands* cases show a strong reliance by the Court on form rather than substance. The implications of this are not only that formalism went back to the Peace Palace, but also in effect to suggest that material inequalities between states have nothing to do with international procedural law.

I try here to show that the *Marshall Islands* cases offer an opportunity to think about how form and substance are constantly reprioritized and reinscribed, and how developing and less powerful states are affected by that. If the case results are frustrating to a number of international lawyers, they may at least refocus attention on the problems and possibilities in the idea that peace is also made through procedure.

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