

## **The International Court of Justice dealing with political issue: is there a place for the rule of law?**

Since its foundation, the International Court of Justice 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 to guide State 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 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, leading the reflection on how powerful the impact of the International Court of Justice on solving the problems of the “World” could be, or if it might even have an impact at all.

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

The debate on nuclear weapons regained strength due not only to the political debate 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 International Court of Justice of nine applications to proceedings against the nine nuclear powers. The submitters of these cases were the Marshall Islands.

What is the role of this judicial organ in the regulation of highly sensitive and political issues like this one? What is, in general, the role of the International Court of Justice? Can the International Court of Justice protect the rule of law, especially when it comes to highly sensitive political issues?

These are the main questions we will try to answer in this paper, reflecting on the ICJ as World Court and its current and potential role in the international community and considering how even only the decision on one case could make the difference in the perception of the role that the International Court of Justice could perform in the protection of the rule of law.

In essence, the main thesis that will be argued is that, in the Marshall Islands case, the ICJ adopted a formalistic approach to avoid dealing with a political issue, missing a chance to solve an infringement of the rule of law. This assertion will lead to a series of more general findings and reflections on issues like background and mindset of the international judiciary, impartiality and neutrality and how neutrality is not reached in the International Court of Justice when it comes to political issues (the lack of neutrality being linked not to a voluntary act of the Court, but more to the mindset of judges). With the aim of shading a light on these aspects, we will look not only at the Marshall Island case, but also at past cases of the ICJ on nuclear weapons. The theme of nuclear weapons will be analysed under the perspective of law, politics and justice. The study of the case law of the ICJ on this topic, indeed, could potentially give us a lot of arguments that could sustain the above-mentioned thesis.

In essence, a series of argument could be the following. In the Marshall Islands cases we could see that the Court adopted a formalistic attitude, to hide the fear to be inadequate to give an answer to the quest for justice of the Marshallese people. In cases like these, politics was involved, and political pressure played a concrete role in shaping of the decisions of the Court. The same political pressure led the Court to act *ultra vires* in the Nuclear Test cases, where it preferred to “make law” to avoid an uncomfortable decision. The same political pressure led the Court, in 1996, to render an Advisory Opinion on the legality of the threat or the use of Nuclear Weapons vague and uncertain.

Another series of argument could focus more specifically on the mindset and background of the ICJ. The Court, being composed by humans, is not perceived as an independent organ. Of course, it is

understandable that judges have their own personal experiences and ideas on the law; these may as well be fruitful, being what gives a judge the knowledge of the legal tools involved in each case. However, we expect for such personal views to never 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.

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 that may seem far from the quest for justice that should orient it.