

The ICJ's *de facto* authority and the exercise of inherent powers in the recent case of Iran v. the United States

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Abstract: This paper offers an analysis of the potential authority of the ICJ from an institutional perspective by examining two different cases in which Iran brought the U.S. before the ICJ due to sanctions imposed by the U.S. government during the Trump's administration. Firstly, it approaches to the ICJ's jurisdiction from a global governance context under the premises of the *de facto* authority and the theory of inherent powers. In the second part, it deals with the recent cases of Iran v the U.S. before the ICJ jurisdiction in order to examine if the decisions issued by the ICJ have been accepted and embraced by the two mentioned states and their respective compliance partners. Finally, it provides a conclusion about the exercise of 'intermediated' authority by the ICJ through the use of inherent powers when it issued certain relevant decisions while deciding about certain procedural incidents in the case at hand.

Keywords: International Court of Justice – authority - inherent powers - international adjudication – Iran - United States of America

(A) INTRODUCTION

Nowadays, there is an important challenge in the fields of contemporary global governance and public international law that has to do with the creation of alternative mechanisms that contribute to overcome the informality that prevails in the context of decision-making and the design of public policies. In this regard, some authors have highlighted the importance of studying the *authority* of certain international institutions to identify their role in the creation of international norms.¹

Occasionally, international agents see international institutions as a risk to the development of their interests, a threat to their individual rights or to their collective self-determination.² This situation has made the legitimacy of some international institutions to be questioned due to the concentration of power by certain international actors. Hence, to identify the exercise of international authority and the influence by certain institutions seems to be a key factor to analyze the creation or implementation of public policies and new normative mechanisms.

This paper offers an approach to this issue from the perspective of the International Court of Justice (ICJ). Indeed, the legitimacy and reception of the decisions issued by ICJ sometimes is challenged, even though it plays a relevant role for the peaceful resolution of disputes between States and the development of public international law.³ Certainly, the ICJ's role in the creation and interpretation of public international law through its jurisprudence enjoys of general acceptance by scholars and

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¹ von Bogdandy A., Dann P. & Goldmann M., 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities', 9 *German Law Journal* (2010), at. 1375-1400.

² Ba, A. and Hoffmann M. *Contending Perspectives on Global Governance. Coherence, Contestation and World Order*. (Routledge, London, 2005) at 262.

³ Rosenne, S. *Law and Practice of the international Court* (Fifth Edition by Malcolm N. Shaw, Leyden, 1965).

legal operators,⁴ in despite of some international actors put the significance of its decisions into question due to the apparent lack of receptivity.⁵ Having on mind this scenario, studying the authority of the ICJ's judgments and other relevant decisions from an institutional perspective may help to understand the contribution of this international tribunal to solve international conflicts and to the development of international norms.

The methodology used was the case study under the least likely method.⁶ The case that was chosen is Iran and the United States before the ICJ. It has been selected two lawsuits for the analysis: 'Certain Iranian Assets' (2016) and 'Alleged violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights' (2018).

The reason for choosing these cases has to do with the small probability of verifying the facto authority of the ICJ, since both States are tremendously unequal in terms of power exercise and influence in the international context. Not to mention the reserved position that the United States has with respect to the ICJ since it was found responsible in the 1986 case 'Military and paramilitary activities in and against Nicaragua.' However, the result of the analysis points out the ICJ effectively holds 'intermediate' de facto authority, through the exercise of inherent powers when it issued certain relevant decisions in the context of solving procedural incidents in the cases at hand.

(B) CONCEPT OF *DE FACTO* AUTHORITY AND INHERENT POWERS

In order to analyze the potential authority of the ICJ from an institutional perspective, this paper explores the role of this tribunal against a global governance context under the premises of the *de facto* authority⁷ and the theory of inherent powers.⁸ This dual-approach contributes to offer an approximation to study the influence of this international tribunal from a multilevel perspective, notwithstanding the sociological criterion of legitimacy. The proposal is to demonstrate whether the ICJ holds *de facto* authority with respect to other international agents in a case that is difficult to verify, which could shed light on the implementation of its decisions by the parties directly involved in a conflict, and by their compliance partners.

(1) About the *de facto* authority

The concept of de facto authority according to Alter, Helfer and Madsen implies the study of the institutional and political evolution of international courts while analyzing the impact of their decisions beyond legal mandate.⁹ It encompasses the analysis of the reception of a decision that has

⁴ Esposito C. *The advisory jurisdiction of the International Court of Justice its value in the determination of international law and in the peaceful solution of controversies* (Autonomous University of Madrid, Faculty of Law, Department of Public Law, Madrid, 1995)

⁵ Llamzon A., 'Jurisdiction and Compliance in Recent Decisions of the International Court of Justice', 18(5) *The European Journal of International Law* (2008), at. 815-852

⁶ Bannet A. & Elman C. 'Case Study Methods in the International Relations', 40(2) *Comparative Politics Studies* (2007), at. 170-195.

⁷ Alter K. et al. 'How Context Shapes the Authority of International Courts', 79 *Law and Contemporary Problems* (2016), at. 1-36.

⁸ Brown C. *A Common Law of International Adjudication* (Oxford University Press, Oxford, 2007).

⁹ Brandeis Institute for International Judges, *The Authority of International Courts and Tribunals: Challenges and Prospects* (The International Center for Ethics, Justice and Public Life of Brandeis University in partnership with iCourts, the Danish National Research Foundation's Center of Excellence for International Courts, University of Copenhagen, Faculty of Law, 2016).

been made during relevant hearings in a contentious process. This concept is based on the idea that international courts lack the possibility of enforcing their decisions through the exercise of force; therefore, its role is to issue decisions that identify violations of international legal norms and from there, create effectively legally-binding obligations for the parties in a dispute. These obligations depend to a great extent on the interaction of the States in dispute during the public hearings.¹⁰ International courts may have legal competence to settle certain disputes, but this is not necessarily translated into other international or domestic dimensions, which would eventually affect the effectiveness of the judicial decision. Hence, the parties in dispute or other international actors link the de facto authority to the effectiveness and embracement of judicial decisions. According to the mentioned authors the de facto authority can be exercised in three different levels: limited, intermediated and extended. There is limited de facto authority when the decision is embraced just by the parties to the conflict. The de facto authority is intermediated when there is a will of complying by the parties in dispute, but also by future litigants and compliance partners. There is extended authority, when a diverse and greater group of people in e.g. the civil society, lawyers associations, and scholars embraces the decision.

Additionally, there are two factors for an international court to exercise de facto authority: (i) recognition of the existence of an obligation to comply with the institution's decisions, and (ii) promotion of significant actions to give full effect to these decisions.¹¹ For determining both requirements, it is necessary to examine the practices of the relevant actors during the key hearings in a first place, and then to track the actions that are deployed once the decisions are issued by the international court. During these hearings, the ICJ has the fundamental role of deciding over procedural matters, and for this purpose, it may apply its inherent powers. Against this context, the inherent powers theory complements the de facto authority concept.

In despite of the issue of fragmentation of international law—and adjudication systems—, most scholars agree that the ICJ has the most integrated and efficient procedure in its field. Indeed, this court has remained as an 'authorized' interpreter of international law.¹² The impact of the ICJ as a jurisdictional authority has to do mainly with its ability to influence different regions through its decisions, and due to its status of main judicial organ of the United Nations.

According to Onuma, the importance of the ICJ judgments has been steadily increased since the second half of the 20th century, including advisory opinions.¹³ Furthermore, most international lawyers and scholars rely on the ICJ's judicial decisions and advisory opinions when seeking to establish an authoritative perspective on the interpretation of international law.¹⁴ However, the resolution of disputes before this court has some limitations. Some examples are the definition of competence and jurisdiction, the assessment of the amount of reparation and compensation, or the decisions over preliminary measures. To overcome these procedural impasses, it has been established that the ICJ may exercise some inherent powers in order to carry out efficiently its jurisdictional function.

¹⁰ Marmor A., *An Institutional Conception of Authority* (Oxford University Press, Oxford UK, 2011)

¹¹ *Supra* n. 6.

¹² Onuma Y., 'Is the International Court of Justice an Emperor Without Clothes?', 8(1) *International Legal Theory* (2002), at. 1-28.

¹³ *Ibidem*.

¹⁴ Biehler G., *Procedures in international Law* (Springer-Verlag, Berlin Heidelberg, 2008).

(2) Inherent powers and the ICJ

International tribunals apply their respective constitutive instruments and institutional rules to exercise their jurisdiction. However, there are other sources for effectively render a decision to the dispute at hand. Besides treaties, courts also apply customary rules, rules of judicial practice, general principles of law, and inherent powers.¹⁵ The sources of international law are well known according to article 38 of the ICJ Statute, but inherent powers deserve special attention.

Inherent powers come from the capacity to decide over relevant procedural matters to move along a contentious case. There are some examples on the exercise of such faculties, as article 6 (6) of the ICJ's statute, which stands for "[i]n the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court." Another important example is the one brought in the UNCLOS, Article 288, which sets forth that "[i]n the event of a dispute as to whether a court or tribunal has jurisdiction, the matter shall be settled by decision of that court or tribunal". Similarly, the ICSID Convention also provides a clause in which "[t]he Tribunal shall be the judge of its own competence" (article 41 (1)).

Furthermore, other common clauses that provide the capacity of exercising procedural powers are the ones concerning to grant provisional measures (Art. 41 of the ICJ Statute) and the intervention of third parties (Art. 62 (2) of the ICJ Statute). Other similar procedural prerogatives are the power to give an interpretation of judgments and decisions, and the power to revise their judgments and awards (art. 60 ICJ Statute; article 33(3) of the ITLOS Statute; ICSID Convention, article 50; Inter- American Convention, art 67).

Despite the diversity of procedures hold by international tribunals, it is noticeable that there are some common principles of international jurisdiction. Most of these principles are embodied into the constitutive treaty of each international court and they deal with competence issues and incidental procedures concerns.

Concerning rules of procedure of international courts, and regardless of the procedures contained in the constitutive instruments of the international tribunals, there is a lack of detailed provisions on the suitable procedures or remedies to apply. Against this context, normally the institutional rules embodied in the constitutive treaties provide the opportunity for the tribunals to deal with general procedural rules. This prerogative was firstly set forth for the Permanent Court of International Justice, which was allowed by the Advisory Committee of Jurists in its draft statute to be free to formulate its own rules according to its needs.¹⁶

The notion of inherent powers is usually related to some institutional capacity, which by nature belongs to a subject with the power to exercise it. This attribute forms an essential characteristic of the person who holds an office, and in the case of a court.¹⁷ In the case of international courts, the idea of exercising inherent jurisdictional powers is widely used within the tradition of common law systems. Indeed, English courts have invoked their inherent jurisdiction to exercise procedural powers for some time, whereas such an idea is merely anecdotal for countries with a continental-European tradition.¹⁸ However, the application of any kind of inherent power in this context is linked to incidental procedural decisions and the grant of reparations. The exercise of these powers is then

¹⁵ *Supra* n. 8.

¹⁶ Hudson M., *The Permanent Court of International Justice, 1920–1942; A Treatise* (The Macmillan Company, New York, 2013).

¹⁷ Jacob H. 'The Inherent Jurisdiction of the Court', *CLP* (1970), at. 23-24.

¹⁸ *Supra* n. 8.

necessary for any court to guarantee a substantive decision based on due process, as this sometimes entails the need to resolve any circumstance that may occur during the procedure. In this sense, granting the ability to exercise powers over procedural matters is vital for any judicial body to successfully administrate justice.

In this regard, a court lacking the power to decide for example, on the granting of provisional measures or allowing the intervention of a third party; is a tied-up judge with not sufficient tools to exercise jurisdiction.¹⁹ Moreover, the ICJ may apply its inherent powers to advance in the procedure itself by creating its own procedural rules and orders,²⁰ and by declaring its *compétence de la compétence*. The exercise of inherent powers is an important resource to correct gaps in procedural norms, and have the vocation to serve as a source of judicial exercise.²¹

Beyond the application of constitutive instruments and institutional rules, the exercise of international jurisdiction may face some procedural situations, which do not find any solution within their statutes. From a domestic perspective, these issues usually are solved by the legal system of sources and hierarchical decisions within the judicial structure. However, the international legal system dynamics go through a predominant anarchical order, so finding sources to overcome procedural situations is complex.

In this regard, procedural provisions and procedural powers of international courts sometimes may get into gaps and ambiguities, like any other legal system. Facing lacunae is one of the main challenges for international courts when it comes to procedural matters due to the difficulty to find solutions in a case-by-case context. A typical case of lacunae occurs when the intent of the parties to the instrument is not known, thus it may include ambiguities.²²

To approach this type of situation, international courts have to explore solutions brought on other instruments beyond their institutional activity. In this scenario, other sources are relevant for the jurisdictional labor. Customary rules, rules of judicial practice, the general principles of law, and the exercise of inherent powers rise as the main ways to surpass any procedural situation.²³

Gaps and *lacunae*s are present in any judicial system due to the impossibility of the legislative or regulatory powers to foretell any particular situation to happen before the court. In the same vein, the international adjudication systems display a similar situation. Indeed, negotiators and drafters of the constitutive instruments are not able to envisage all the circumstances that might arise in future occasions, especially within the dynamics of the international system.²⁴

According to the ICJ, its inherent powers -or by any other international tribunal-, have to do with functional reasons. Without procedural decisions, the most basic jurisdictional purposes would be put at risk, thus any decision on the merits would be just unviable. In this order of ideas, any jurisdictional instruction needs inherent powers to successfully render a decision.

Article 36 (6) of the ICJ Statute is set forth the inherent power of the Court to decide over its competence, specifically when stipulates that ‘in the event of a dispute as to whether the Court has

¹⁹ Jennings R. and Watts A., *Oppenheim's International Law* (Longman, Harlow, 1992)

²⁰ *Ibidem*.

²¹ Waibel-Mavrommat M., ‘Palestine Concessions (Greece V Great Britain) (1924 - 27)’ *Landmark Cases in Public International Law* (E. Bjorge and C. Miles, eds, Hart, 2017), at. 33-59.

²² Trachtman J., ‘The Domain of WTO Dispute Resolution’, 40 *Harvard International Law Journal* (1999), at. 333-340.

²³ *Supra* n. 8.

²⁴ Gordon E., ‘The World Court and the Interpretation of Constitutive Treaties’, 59 *American Journal of International Law* (1965), at. 794-805.

jurisdiction, the matter shall be settled by the decision of the Court'. However, the inherent powers of the ICJ and other international tribunals have been developed through judicial practice as well. In the *Nottebohm case* the ICJ refers to the inherent jurisdiction principle as the very essence of the arbitral function and one of the inherent requirements for the exercise of this function. In the same judgment, it concluded that '[t]he judicial character of the Court and the rule of general international law referred to above are sufficient to establish that the court is competent to adjudicate on its jurisdiction in the present case'.²⁵ This statement was of remarkable importance because it confirmed the jurisprudence brought in the Alabama Claims about inherent jurisdiction.²⁶ Hence, in the absence of any agreement to the contrary, an international tribunal has the right to decide over its jurisdiction and has the power to interpret for this purpose the instruments that govern that jurisdiction.

(C) THE ICJ'S *DE FACTO* AUTHORITY IN THE IRAN V. U.S. RECENT CASES

As mentioned above, this paper explores the *de facto* authority and inherent powers exercised by the ICJ in two relevant hearings against the context of two cases before the ICJ that involve Iran and the U.S.: The *Certain Iranian Assets* case,²⁷ and the *Alleged Violations* case.²⁸

The *Certain Iranian Assets* case is about the petition filed by Iran in June of 2016 before the ICJ, in which it claimed that the United States must unblock certain Iranian assets in the U.S. territory that were affected by the Executive Order 13599 of 2012. Furthermore, they claimed the U.S. must pay the respective compensation. Additionally, Iran requested that the ICJ should emphasize that the domestic courts of the United States cannot bring Iran and its companies to trial due to the principle of State Immunity. Iran based its claims on the violation of the Treaty of Amity signed in 1955, and in force since 1957 between both nations.²⁹

On the other hand, in 2018 Iran brought a claim against the U.S. once again in the *Alleged Violations* case. In this opportunity, Iran claims to the ICJ to order the U.S. to lift the economic sanctions imposed for allegedly, failing to comply with the obligations derived from the 'Joint and Complete Action Plan'- the Iranian Nuclear Agreement 5+ 1-. This request aggravated relations between both States, and in particular, since the execution of the foreign policy of the former president of the U.S., Donald Trump.

The ICJ rendered two crucial decisions in both processes in public hearings based on the exercise of its inherent powers. In the *Certain Iranian Assets* case, it resolved the preliminary objections brought by the U.S. In the *Alleged Violations* case, it resolved the request for provisional measures filed by Iran on 4 October 2018. Both procedural decisions allowed the normal course of the process, and they still do not constitute the final decision on the matter. Nevertheless, legal and political consequences emanate from the two decisions between the parties, and to other international actors.

In a public hearing on 3 October 2018, the ICJ addressed the Iranian request regarding ordering the United States not to re-impose the sanctions, as indicated by the United States Government on 8

²⁵ *Nottebohm Case (Liechtenstein v. Guatemala)*, ICJ Reports (1953), at 120.

²⁶ *Alabama claims of the United States of America against Great Britain (United States of America v. Great Britain)*, Reports of International Arbitral Awards (1871) 127, at 134.

²⁷ *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, ICJ Reports (2019) 164, at 8.

²⁸ *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America)*, ICJ Reports (2018) 175, at 3.

²⁹ Amity, Economic Relations, and Consular Rights (adopted 15 August 1955, entered into force 16 June 1957) 4132 UNTS 284.

May of the same year. After deciding that it had the competence to decide on the matter, it determined that the United States would have to remove any impediment to free trade due to the potential of an imminent and irreparable damage that could put the life and health of the Iranian population at risk. The ICJ emphasizes on removing the impediments that are generated with respect to the free trade of three types of goods in particular: (i) medicines and medical devices, (ii) food products and agricultural products, as well as goods and services required for the security of civil aviation, and (iii) spare parts, equipment and associated services necessary for civil aircraft. Although Iran's request was much broader, the ICJ focused on these points in particular. The ICJ avoided any type of pronouncement regarding sanctions on other assets such as hydrocarbons, or financial services that were not directly linked to the already described.

This decision was welcomed by Iran, as the Minister of International Affairs, Mohammad Javad Zarif, stated that this ICJ measure was 'another failure for the US government addicted to sanctions and a victory for the rule of law'.³⁰ For his part, just hours after the reading of the decision in The Hague, Michael R. Pompeo, in his role as former Secretary of State of the United States, held a press conference in which he stressed that the ICJ decision was a defeat for Iran. He emphasized that the court had rejected the other Iranian requests, regarding the lifting of the broader sanctions. He also announced that they were working closely with the Treasury Secretariat so there were no inconveniences in the transaction of goods that could lead to potential humanitarian problems for the Iranian population.

However, in addition to the approach to the consequences derived from the ICJ decision on the foreign policy of the United States, this decision seems to have had an effect on the creation of the INSTEX (Instrument in Support of Trade Exchanges) of the European Union. In a statement of January 31, 2019, the ministers of France, the United Kingdom and Germany announced the creation of this instrument that will allow European companies to trade with Iran in relation to goods of humanitarian need. The intention is, they remarked, eventually to open this mechanism to other types of goods and services.³¹

On the other hand, while deciding about the preliminary objections in the Alleged Violations case in 2019, the ICJ determined its own jurisdiction to hear the case when it discarded the exceptions of Abuse of Process and Unclean Hands brought by the United States, but also it dismissed the Iran's argument on States' Immunity. Then, the White House Spokesman released a statement in which they saw as a triumph that the ICJ has accepted the objection regarding not accepting its jurisdiction to decide on the principle of state immunity, and again he emphasized on the Iran's 'sponsor of terrorism' status. Regardless of the political impressions around this decision, the relevance of this act revolves on the ICJ exercise of *de facto* authority.

In the first place, as the White House spokesman announced, the fact that the ICJ has accepted the objection of lack of jurisdiction to decide on the principle of state's immunity implies that there will be no eventual order to the US courts to stop bringing to trial Iran –or any other state- in its jurisdiction. It is a legal victory for the United States in bringing sovereign states to their domestic courts; despite the fact that this is an activity prohibited by public international law. However, in this particular case, the jurisdictional function of the ICJ was directly subject to the interpretation of the Treaty of Amity, in which there is no legal basis to extract any clause regarding the state's immunity principle. The

³⁰ Bourse & Bazaar, [UN Court Tells US to Ease Iran Sanctions in Blow for Trump](#) (2018).

³¹ More information available [here](#).

ICJ in this scenario apparently refused to mention the principle of state's immunity as one of customary order. Nevertheless, the fact that the ICJ has not abrogated the competence to rule on this issue - since there was no legal basis within the treaty to do so— does not imply that the United States is not acting against public international law.

The second legal consequence that derives from this decision is about the admissibility and jurisdictional objections brought by the United States and Iran over highly political arguments. This implies that by dismissing the admissibility objections of Abuse of Process and Unclean Hands, the Court was forced to rule on the alleged role of Iran as a state sponsor of terrorism, or the apparent abuse of the United States to impose its national interest over public international law within its territory. This remains as a point of inflection in the already cracked political relations between both States for 40 years, and it represents a challenge to Joe Biden's administration in reaching a new deal with Iran regarding its nuclear program.

(D) CONCLUSION

The ICJ holds intermediate *de facto* authority in the case study under analysis. Moreover, the ICJ exercised its inherent powers in the public hearings in both contentious cases while it decided over its own competence to hear the cases and by ordering preventive measures. Indeed, there is an influence of the ICJ on the behavior of Iran, the U.S. and other compliance partners. It was evident the will to comply with the preventive measures ordered by the ICJ in 2018 when the United States, Germany, France, the United Kingdom and the European Union took relevant actions on the matter.

Regarding the decision over preliminary objections in 2019, the ICJ exercised *de facto* authority and inherent powers when it rendered its decision within the framework of political motivations brought by the parties when addressing the issue of the admissibility objections of Abuse of Process and Unclean Hands. In addition, the ICJ also discarded the Iranian argument of state immunity, while avoiding any mention to this principle from the customary international law perspective. This decision contributed to the development of public international law. Moreover, it places some important expectation on the judgment on the merits.

In despite of the verification in the deployment of intermediate *de facto* in the case under study, it was not possible to verify the extended authority of the ICJ, since the methodology used was a limit for this purpose. For a better acknowledgement of the ICJ as an international authority, it is necessary for future research to use a methodology that combines the case study with other variables that will permit to *objectify* the role of this institution in an international context. This could be done by complementing the criterion of *de facto* authority with Von Bogdandy's public international law concept and under the research design that they propose from the Max Planck Institute.