

## THE *MONETARY GOLD* PRINCIPLE: BACK TO BASICS

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### ABSTRACT

*In The Case of the Monetary Gold Removed from Rome in 1943, the International Court of Justice concluded that it cannot decide a dispute in which a third party's legal interests "would form the very subject-matter of the decision." This Article argues that what has become known as the Monetary Gold principle conflicts with the Court's obligation to decide cases submitted by consenting parties and should be abandoned.*

### I. INTRODUCTION

U.S. President Donald Trump's December 2017 Proclamation recognizing Jerusalem as the capital of Israel began with a striking claim, "The foreign policy of the United States is grounded in principled realism, which begins with an honest acknowledgment of plain facts."<sup>1</sup> Plain facts for some, a violation of international law for others. On July 4, 2018, the Foreign Ministry of Palestine issued a formal notification to the U.S. State Department informing it of a dispute under Articles I and II of the Optional Protocol to the Vienna Convention on Diplomatic Relations (VCDR).<sup>2</sup> Palestine's *note verbale* had "the honour to reiterate" a letter sent to the State Department on May 14 that had warned, "any step taken by the United States to relocate its embassy to Jerusalem" would violate "the [VCDR] . . . read in conjunction with relevant United Nations resolutions." Palestine therefore "wish[ed] to be informed as soon as possible about the steps the United States is considering to ensure its actions are in line with the [VCDR]."<sup>3</sup> With its wishes still unfulfilled by late September, Palestine instituted proceedings against the United States before the International Court of Justice (ICJ).<sup>4</sup> Five days later, the United States announced that it

\* Associate, Three Crowns LLP. We would like to thank Dina Wecker for her research assistance. Thanks are also due to the anonymous reviewers and the Board of Editors of this Journal for their probing, challenging, and uniformly beneficial comments. We are also grateful for the less direct but no less important interventions of James Ashley Morrison and Allison Stanger. The opinions expressed in this Article are my own and do not reflect those of Three Crowns LLP or its clients.

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<sup>1</sup> Proclamation No. 9683, 3 CFR 204 (Dec. 6, 2017).

<sup>2</sup> Relocation of the United States Embassy to Jerusalem (Palestine v. U.S.), Application Instituting Proceedings, Annex 4 (Sept. 28, 2018). Palestine issued a Declaration Recognizing the Competence of the International Court of Justice on the same day. *Id.*, Annex 5.

<sup>3</sup> Application Instituting Proceedings, *supra* note 2, Annex 3.

<sup>4</sup> *Id.* at 12–14 (arguing that "[t]he relocation of the United States Embassy in Israel to the Holy City of Jerusalem constitutes a breach of the Vienna Convention on Diplomatic Relations of 18 April 1961," citing

would be withdrawing from the VCDR's Optional Protocol, a decision that it said was "in connection with a case brought from the so-called 'State of Palestine' naming the United States as a defendant, challenging our move of our embassy from Tel Aviv to Jerusalem."<sup>5</sup>

Legal analysts assessing the merits of Palestine's application focused not just on its sovereign status. They also drew attention to the ICJ's 1953 decision in *The Case of the Monetary Gold Removed from Rome in 1943*.<sup>6</sup> According to what is now known as the "*Monetary Gold* principle," the ICJ cannot resolve a dispute in which the legal interests of a state that is not a party in the proceedings "would not only be affected by a decision, but would form the very subject-matter of the decision."<sup>7</sup> The experts assessing Palestine's application noted that Israel's legal interest in a determination of the metes and bounds of its sovereignty over Jerusalem would no doubt "form the very subject-matter" of any ICJ decision. As one commentator concluded, Palestine's submission was "as clear a violation of the *Monetary Gold* principle as one could imagine."<sup>8</sup> Palestine's application "will just not go anywhere," another author opined, "[t]he only question is how quickly the Court shoots it down."<sup>9</sup>

We have no qualms with these assessments of Palestine's chances at the ICJ, given the Court's understanding of the *Monetary Gold* principle. This Article's challenge is instead addressed to the *Monetary Gold* principle itself. We argue that it is time for the ICJ to dispense with the principle altogether. Our proposal does not follow from concerns over the Court's at-times imprecise application of the principle. Such qualms have been voiced elsewhere, and taken alone, imply a need for reform rather than removal. This Article's proposal is more categorical because, as we explain, so are the principle's failings. We contend that the *Monetary Gold* principle is irreconcilable with the ICJ Statute's jurisdictional architecture, and that, even when assessed with a broader set of metrics, its time has come.

The Article's doctrinal claims derive primarily from four tenets in the ICJ Statute. First, Article 36(1) establishes that the Court's jurisdiction in contentious cases is premised on the

the appearance of the formula "in the receiving State" throughout the VCDR, and concluding that therefore "the diplomatic mission of a sending State must be established on the territory of the receiving State").

<sup>5</sup> White House Press Release, Press Briefing by Press Secretary Sarah Sanders, Small Business Administrator Linda McMahon, and National Security Advisor (Oct. 3, 2018), at <https://www.whitehouse.gov/briefings-statements/press-briefing-press-secretary-sarah-sanders-small-business-administrator-linda-mcmahon-national-security-advisor-100318>. This Article takes no position on the international legal personality of the political entity representing residents of the West Bank in Israel. We refer to this entity as "Palestine" in keeping with the ICJ in its press releases concerning *Relocation of the United States Embassy to Jerusalem (Palestine v. United States of America)* [2018], at <https://www.icj-cij.org/en/case/176>.

<sup>6</sup> *Monetary Gold Removed from Rome in 1943* (It. v. Fr., UK and U.S.), Judgment, 1954 ICJ Rep. 19 (June 15).

<sup>7</sup> *Id.* at 17. A word on vocabulary and scope: we will refer throughout to the "*Monetary Gold* principle" rather than the "indispensable party" principle or alternative formulations in order to underscore that our focus is the ICJ and international law. An analogous doctrine appears in some domestic jurisdictions—see, e.g., U.S. Federal Rules of Civil Procedure, Rule 19(b) ("If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed."); Geoffrey C. Hazard Jr., *Indispensable Party: The Historical Origin of a Procedural Phantom*, 61 COLUM. L. REV. 1254 (1961) (reviewing the principle's development in the UK and United States)—and although we anticipate that this Article's claims will have some bearing outside the ICJ, the statutory focus of much of the analysis precludes assuming our arguments apply *mutatis mutandis* elsewhere.

<sup>8</sup> Eugene Kontorovich, *Israel/Palestine—The ICC's Uncharted Territory*, 11 J. INT'L CRIM. JUST. 979, 989 (2013).

<sup>9</sup> Marko Milanović, *Palestine Sues the United States in the ICJ re Jerusalem Embassy*, EJIL: TALK!, at <https://www.ejiltalk.org/palestine-sues-the-united-states-in-the-icj-re-jerusalem-embassy>.

parties' consent.<sup>10</sup> At first blush, the *Monetary Gold* principle appears to be a logical corollary: the court *cannot* exercise its jurisdiction where the “very subject-matter” of its judgment would implicate a *nonconsenting* party. We argue that what appears to be straightforward inverse reasoning—“if p, then q; ergo, if *not* p, then *not* q”—masks an interpolation. Consent is required, but the Statute calls for the Court to focus on that of the “parties [that] refer [the case] to it.” The *Monetary Gold* principle privileges the consent of absent third parties, and thereby improperly directs the Court to refuse to decide cases over which it has jurisdiction.

Second, Article 62 of the Statute affords a state the right to intervene in cases in which it “consider[s] that it has an interest of a legal nature which may be affected by the decision.”<sup>11</sup> We argue that Article 62 constitutes the appropriate, statutorily designated mechanism for apprising the Court of third-party interests, that states should make greater use of it, and that the ICJ should be more liberal in assessing their applications to intervene. Regardless of whether the prescriptive components of that claim come to fruition, however, our analysis of the Statute indicates that the *Monetary Gold* principle works at cross purposes to Article 62 by compelling the Court to dispose of the case before it can be fully apprised of the interests in play.

Third, Article 59 of the Statute provides that the “binding force” of the Court’s decisions extend no further than “the parties and in respect of that particular case before it.”<sup>12</sup> The Court’s decision in a given case therefore “has no binding force” for third parties. The *Monetary Gold* principle is often described as a necessary complement to Article 59, given the provision’s inability to protect third parties from the second-order effects of the Court’s decisions. Granting that the ICJ’s influence extends well beyond the *res judicata* of a particular dispute, we argue that the *Monetary Gold* principle does not necessarily follow.

Finally, Article 38(1) of the Statute states that the “function” of the Court is “to decide in accordance with international law such disputes as are submitted to it,” and sets out a hierarchy of sources of law on which the Court must draw to do so. We argue that among those sources of law, the *Monetary Gold* principle is best understood as a “judicial decision” and therefore a “subsidiary means for the determination of rules of law.” Under Article 38(1), the principle’s merits are thus linked to its capacity to elucidate, rather than generate, international law. In sum, we contend that the *Monetary Gold* principle obscures more about the Court’s jurisdictional architecture than it illuminates.

Applying what we submit is an unjustified limitation on its obligation to decide disputes otherwise validly before it, the ICJ has declined to address two contentious cases.<sup>13</sup> Palestine’s application may meet the same fate. This tally omits the growing number of disputes in which, although the principle has been invoked, the Court has resolved the case on alternative

<sup>10</sup> “The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.” ICJ Statute, Art. 36(1).

<sup>11</sup> “Should a state consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene.” *Id.* Art. 62(1).

<sup>12</sup> “The decision of the Court has no binding force except between the parties and in respect of that particular case.” *Id.* Art. 59.

<sup>13</sup> *Monetary Gold*, *supra* note 6; East Timor (Port. v. Austl.), Judgment, 1995 ICJ Rep. 90 (June 30).

grounds.<sup>14</sup> It also fails to account for the principle's insufficiently examined uptake in other international fora.<sup>15</sup>

Yet we do not rest our thesis on the principle's inconsistency with the ICJ Statute. We also test the implications of dispensing with *Monetary Gold* against three virtues central to proponents' defense of the principle: that the principle promotes compliance with the Court's decisions; that absent the principle, third parties would be deprived of due process; and that the principle protects the Court's legitimacy. We identify and assess the assumptions underpinning these claims, arguing that these more policy-oriented justifications of the principle overlook or discount confounding factors that, once taken into account, suggest that the same three ambitions may be better achieved by implementing our thesis.

The remainder of the Article proceeds in three Parts. Part II reviews the *Monetary Gold* case and the evolution of its namesake principle in the ICJ's jurisprudence in order to lay the groundwork for the ensuing analysis. Part III develops the Article's contention that the *Monetary Gold* principle is at odds with the ICJ Statute's jurisdictional architecture. Part IV then considers the policy implications of our thesis with reference to the values of compliance, due process, and legitimacy, demonstrating that our thesis holds whether measured against doctrinal or alternative metrics. Throughout Parts III and IV, we use *Palestine v. USA* as a touchstone to illustrate and test our claims. A conclusion follows.

## II. THE ICJ'S *MONETARY GOLD* JURISPRUDENCE

This Part traces the ICJ's *Monetary Gold* jurisprudence in four sections. Section A studies the origins of the principle by juxtaposing the Court's relative silence regarding third-party interests in *Corfu Channel*<sup>16</sup> against its attentiveness five years later in *Monetary Gold*. Section B assesses the reprisal of the *Monetary Gold* principle decades later, drawing attention to the Court's initial attempts to isolate the principle from the peculiar facts of the *Monetary Gold* dispute and situate it within the Statute's jurisdictional framework. Section C considers how the Court went on to fill in some of the semantic and conceptual doubts generated by its prior discussions of the principle, and how such ambiguities took on a more concerning aspect when the *Monetary Gold* principle proved outcome-determinative once more in the *East Timor* case. Finally, in Section D, we turn to *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, and a pair of opinions in which members of the Court questioned

<sup>14</sup> Drawing on the Oxford Public International Law database, we have identified thirty-six disputes before the ICJ that discuss the *Monetary Gold* principle. That tally does not include *East Timor*, *Monetary Gold*, *Palestine v. USA*, or any of the sixteen cases currently pending before the Court. As of November 2019, this figure constituted approximately 20% of the cases entered on the Court's general list since its inception.

<sup>15</sup> See, e.g., Prosecution Request Pursuant to Article 19(3) for a Ruling on the Court's Territorial Jurisdiction in Palestine, ICC-01/18-12, para. 35 n. 60 (Jan. 22, 2020) (International Criminal Court); Panel Report, Turkey—Restrictions on Imports of Textiles and Clothing Productions, WT/DS34/R, para. 9.10 n. 249 (adopted Nov. 19, 1999) (World Trade Organization); The M/V “Norstar” Case (Pan. v. It.), No. 25, Preliminary Objections, Judgment, para. 172 (Nov. 4, 2016) (International Tribunal for the Law of the Sea); Ping An Life Insurance Company of China, Ltd. and Ping An Insurance (Group) Co. of China, Ltd. v. Kingdom of Belgium, ICSID Case No. ARB/12/29, Award, paras. 127–28 (Apr. 30, 2015) (International Centre for Settlement of Investment Disputes); see also Noam Zamir, *The Applicability of the Monetary Gold Principle in International Arbitration*, 33 ARB. INT'L 523 (2017).

<sup>16</sup> *Corfu Channel (UK v. Alb.)*, Merits, Judgment, 1949 ICJ Rep. 4 (Apr. 9).

not just the *Monetary Gold* principle but also key jurisdictional presuppositions of the Statute, including whether its bilateral presuppositions may be out of step with the increasingly multilateral features of interstate disputes and international affairs generally.

The ensuing prescription for some within the Court—and for many others outside it—is an extensive reconceptualization of the Statute’s jurisdictional architecture. Although we share many of their frustrations, we call for the opposite approach. In Parts III and IV, we explain why it is precisely by returning to the Statute, properly understood, that the Court will meet the ambitions of its founders and the demands of contemporary international affairs.

Finally, a caveat: in this Part we note some ambiguities and inconsistencies in the Court’s application of the *Monetary Gold* principle. We wish to be clear, however, that even if the Court had done a better job—or looking ahead, even if the Court could eventually “work itself pure”—we would still call for dispensing with the principle.<sup>17</sup> The textual and policy-based arguments in Parts III and IV, in other words, are sufficient grounds for the Court to leave the *Monetary Gold* principle behind.

### A. *Origins*

The *Monetary Gold* case was not the first instance in which an ICJ judgment threatened to affect the interests of a party that had not consented to the Court’s jurisdiction.<sup>18</sup> Five years prior to *Monetary Gold*, in *Corfu Channel*, the ICJ confronted a dispute that has been described as “establish[ing] the foundational rule that consent is the cornerstone of its jurisdiction.”<sup>19</sup>

On May 15, 1946, two British warships received fire from Albanian fortifications in the Corfu Channel, a narrow body of water between Albania and the Greek island of Corfu. The UK asserted that its warships did not require Albania’s consent to pass through the Channel; Albania refused the UK’s demand for an apology. British warships entered the Channel once more in October 1946, seeking to test Albania’s reaction. The UK had swept the Channel of mines in 1944 and 1945, but its warships struck mines in this instance, killing several British soldiers. Albania sent a ship into the Channel with a white flag to avert a reprisal. The UK instead sought redress through legal means.

During the ensuing case before the ICJ, the UK provided evidence that Albania had recently laid mines in the Channel, or alternatively, that Yugoslavia had done so with Albania’s approval. The UK’s memorial included affidavits from former members of the Yugoslav navy, including a petty officer who confirmed that he had recognized a “mining tender” from Yugoslavia entering the area prior to the incident.<sup>20</sup> The advocate for the

<sup>17</sup> See LON L. FULLER, *THE LAW IN QUEST OF ITSELF* 140 (1940) (“The common law works itself pure and adapts itself to the needs of a new day.”).

<sup>18</sup> We begin in the mid-twentieth century because our focus is the ICJ, but to be clear, international tribunals had been wrestling with the jurisdictional implications of third-party interests long before the Court’s establishment after World War II. See, e.g., *Costa Rica v. Nicaragua*, *CACJ, Judgment of 30 September 1916*, 11 AJIL 181 (1917).

<sup>19</sup> Michael Waibel, *Corfu Channel Case*, in *MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* VOL. II, at 792, para. 21 (2013).

<sup>20</sup> *Corfu Channel (UK v. Alb.)*, Documents Submitted by the Government of the United Kingdom, 1947 ICJ Rep. 88 (Oct. 1).

UK stressed to the Court, “I am making no charge here and no claim against the Government of Yugoslavia for what was done by them”; nonetheless, he went on to ask (and answer): “Yugoslavia had these GY type of German mines. Did her ships lay them? Suspicion about the matter is in my submission converted into certainty by the evidence which we have now placed before the Court.”<sup>21</sup>

The Court found the Albanian government liable by a vote of eleven to five. The judgment noted that “the United Kingdom Government endeavoured to prove collusion between Albania and Yugoslavia” and that the Court had been “anxious for full light to be thrown on the facts alleged.”<sup>22</sup> However that anxiety did not dissuade the Court from ruling on England’s application. Although “the authors of the minelaying remain unknown,” the Court concluded that Albania had breached its international legal obligations because it knew the mines had been laid in its territory.<sup>23</sup>

*Corfu Channel* is a valuable starting point for analyzing the ICJ’s *Monetary Gold* jurisprudence both for what the Court did and did not say. With regard to the former, the case is aptly described as establishing foundational principles regarding consent because the judgment includes an extensive discussion of the implications of Security Council referrals and associated matters. With regard to what the Court did not say, as Judge Weeramantry pointed out in his dissenting opinion in the *East Timor* case, “[i]f the proposition be correct that an application should be dismissed where the illegal act of a third party State lies at the very foundation of the claim, the Court would have indicated to the United Kingdom that this alternative claim was unsustainable in the absence of Yugoslavia and would have dismissed this aspect of the case *in limine*.”<sup>24</sup>

One might debate whether Yugoslavia’s acts lie “at the very foundation” of the UK’s claim, or were instead a factual consideration on which the Court could reserve judgment while still resolving the dispute before it—that is, whether the Court should have applied what might then have become known as the *Corfu Channel* principle. Our interest here is less in the merits of that debate than its absence from the Court’s judgment, and in particular, the juxtaposition of the Court’s silence relative to the importance that the Court assigned third party interests just a few years later in *Monetary Gold*.

In *The Case of the Monetary Gold Removed from Rome in 1943*, the ICJ confronted a dispute rightly described by Judge Schwebel as one of “exceptional singularity.”<sup>25</sup> In 1925, the Albanian government concluded a banking convention with Italian financiers that created the National Bank of Albania. The notes issued by the Bank were to be backed by gold reserves held in Rome. The Nazi government seized approximately 2,400 kilograms of these reserves in September 1943. Italian shareholders owned 88.5 percent of the Bank’s equity capital at the time, and following the German surrender in May 1945, the United

<sup>21</sup> *Corfu Channel (UK v. Alb.)*, Minutes from the Sittings Held from November 9th, 1948 to April 9th, 1949, Statement by Sir Hartley Shawcross, 1950 ICJ Rep. 240 (Mar. 25); see also *id.* (“Yugoslavia practically conducted the whole of Albania’s foreign relations . . . she had naval, military and air-force missions in Albania guiding the organization of the military arrangements in that country.”).

<sup>22</sup> *Corfu Channel (UK v. Alb.)*, *supra* note 16.

<sup>23</sup> *Id.*

<sup>24</sup> *East Timor (Port. v. Austl.)*, *supra* note 13, at 167.

<sup>25</sup> *Aerial Incident of 3 July 1988 (Iran v. U.S.)*, Order, 1989 ICJ Rep. 132, 140 (Dec. 13) (sep. op., Schwebel, J.).



States, France, and the UK convened a conference to determine the reparations Germany owed states that had been at war against the Nazis. Part III of the resulting Final Act of the Paris Conference on Reparation provided that the monetary gold found in Germany would be “pooled for distribution in proportion to [the countries’] respective losses of gold through looting or wrongful removal to Germany.”<sup>26</sup> The United States, France, and the UK were to serve as executors of the Act.

In lieu of unilaterally determining the distribution of the gold once owned by the National Bank of Albania, the three executors in a tripartite statement known as the Washington Agreement referred the question of whether the gold belonged to Albania or Italy to an arbitrator.<sup>27</sup> The arbitrator found in favor of Albania, but that did not put an end to the matter because both Italy and the UK had outstanding claims against Albania’s new communist government. Italy’s claim arose from Albania’s January 1945 expropriation of the assets of the Bank’s Italian shareholders without compensation. The UK’s claim stemmed from the £843,947 in restitution awarded in *Corfu Channel*.<sup>28</sup> The arbitrator’s award to Albania could not satisfy both claims.

In the Washington Agreement, the three executors also agreed (among themselves) that if the arbitrator awarded Albania the monetary gold, Albania “will deliver the gold to the United Kingdom in partial satisfaction of the judgment in the Corfu Channel case unless within 90 days from the date of the communication of the Arbitrator’s opinion” Albania or Italy brought a case before the ICJ.<sup>29</sup> Italy did so in May 1953, naming the United States, France, and the UK as respondents. Albania chose not to appear.

Italy’s application included two claims. First, that it was entitled to the monetary gold because of Albania’s expropriation of the National Bank of Albania’s Italian shareholders, and second, that its claim enjoyed priority over that of the UK. Five months after filing its application, Italy adopted the unusual tactic of submitting a preliminary objection to the ICJ’s jurisdiction over the first component of its own application. Italy argued that the ICJ lacked jurisdiction because resolving the dispute would require the Court to pronounce upon a nonparty’s (Albania’s) international responsibility.

Addressing Italy’s first submission, the Court unanimously concluded that “[t]o go into the merits of such questions would be to decide a dispute between Italy and Albania,” and that “[t]he Court cannot decide such a dispute without the consent of Albania.”<sup>30</sup> Deciding the

<sup>26</sup> *Reparation from Germany: Final Act and Annex of the Paris Conference on Reparation, November 9-December 21, 1945*, 24 INT’L CONCILIATION 215, 230 (1946).

<sup>27</sup> Agreement between the Governments of the French Republic, the United Kingdom of Great Britain and Northern Ireland and the United States of America for the Submission to an Arbitrator of Certain Claims with Respect to Gold Looted by the Germans from Rome in 1943, 91 UNTS 21 (1951) and 100 UNTS 304 (1951).

<sup>28</sup> *Corfu Channel (UK v. Alb.)*, Judgment, 1949 ICJ Rep. 244, 250 (Dec. 15).

<sup>29</sup> Specifically, the three states declared that they would “accept as defendants the jurisdiction of the Court for the purpose of the determination of such applications by Italy or by Albania or by both.” Statement Accompanying the Agreement, 100 UNTS 306 (1951).

<sup>30</sup> *Monetary Gold*, *supra* note 6, at 32. Judge McNair appended a “declaration” to the judgment in which he questioned the mechanics—and implicitly, the good faith—of Italy’s application: “[T]hese proceedings are not brought against Albania, nor does the Application name Albania as a respondent.” *Id.* at 35 (dec., Sir Arnold McNair, Pres.). Judge Read also filed an “Individual Opinion” in which he maintained that Italy’s application failed to meet the requirements set forth in the Washington Agreement for bringing the dispute before the Court as well as Article 40(1) of the ICJ Statute, the latter providing that “the subject of the dispute and the parties shall be indicated.” *Id.* at 37–38 (ind. op., Read, J.).

dispute notwithstanding Albania's absence "would run counter to a well-established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent."<sup>31</sup> Responding to the contention that Albania could have intervened under Article 62 of the Statute, the Court noted that Albania had chosen not to, adding, in a now-canonical formulation: "Albania's legal interests would not only be affected by a decision, but would form the very subject-matter of the decision. In such a case, the Statute cannot be regarded . . . as authorizing proceedings to be continued in the absence of Albania."<sup>32</sup>

The Court then turned to whether it could nonetheless resolve Italy's second claim concerning the priority of its entitlement over that of the UK. The Court granted that "[i]t might seem that the second claim, unlike the first, only concerns Italy and the United Kingdom, both of whom have already accepted the jurisdiction of the Court."<sup>33</sup> Yet the judgment concluded that the Washington Agreement made clear that the Court was to address priority "if this issue should arise," which "could only mean that the issue of priority would call for a decision only if the Court had already decided that Italy had a valid claim to the gold in question against Albania."<sup>34</sup> The Court concluded, 13–1, that "inasmuch as it cannot adjudicate on the first Italian claim, it must refrain from examining the question of priority" as well.<sup>35</sup>

Shortly after the publication of the judgment, Hersch Lauterpacht suggested that the case would be "confined to the interpretation of the technical clauses of the relevant instruments without providing an occasion for a decision on wider issues of international law."<sup>36</sup> Reviewing *Monetary Gold* in this journal, Covey Oliver submitted that "[s]ome of the differentiations are thin, the reasoning embraces legal metaphysics; but sirs, what would you have under the circumstances?"<sup>37</sup> Whatever the case's merits, in other words, both men believed that *Monetary Gold* would extend no further than its idiosyncratic facts.

### B. Revival

For more than two decades, that expectation held true. Third-party interests came before the Court—primarily in disputes concerning maritime or territorial delimitation—but *Monetary Gold* played a minimal role, a case to be distinguished rather than a principle to be applied.<sup>38</sup>

We pick up the narrative with a dispute that Judge Crawford has aptly described as "perhaps the most complex and intractable instance of serial litigation yet brought before the

<sup>31</sup> *Id.* at 32.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 33.

<sup>34</sup> *Id.*

<sup>35</sup> *Monetary Gold*, *supra* note 6, at 34. The lone dissenter, Judge Carneiro, argued that the Court could have addressed Italy's second claim, and that its refusal to resolve any aspect of the dispute threatened to only "aggravate the difficulties" among the parties. *Id.* at 39 (diss. op. Levi Carneiro, J.).

<sup>36</sup> HERSCH LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT* 33 (1958).

<sup>37</sup> Covey T. Oliver, *The Monetary Gold Decision in Perspective*, 49 *AJIL* 216, 219 (1955).

<sup>38</sup> *See, e.g.*, *Continental Shelf (Tunis./Libya)*, Application by Malta for Permission to Intervene, Judgment, 1981 *ICJ Rep.* 3, 15 (Apr. 14); *Case Concerning the Frontier Dispute (Burk. Faso/Mali)*, Judgment, 1986 *ICJ Rep.* 554 (Dec. 22).



International Court of Justice.”<sup>39</sup> *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)* has received attention from analysts for seemingly everything but its pronouncements on the jurisdictional implications of third party interests. Although drawing attention to this neglected aspect of *Paramilitary Activities* is an ancillary benefit, we focus on the case because it is indicative of the Court’s attempt during this period to isolate the *Monetary Gold* principle from *Monetary Gold*’s peculiar facts, and to assess how the principle fit within the Statute’s jurisdictional architecture.

The paramilitary activities at issue in the case were those of the Contras, a collection of U.S.-backed rebel groups who maintained a guerilla insurgency against the Nicaraguan government throughout the 1980s. Nicaragua argued that U.S. support for the Contras amounted to an unlawful use of force and intervention in its internal affairs. Three of Nicaragua’s neighbors—El Salvador, Honduras, and Costa Rica—responded that Nicaragua was complicit in assisting rebels in their own territory, and that U.S. aid to the Contras constituted collective self-defense.

Along with several other objections to the Court’s jurisdiction and the admissibility of Nicaragua’s application, the United States argued that the Court could not decide the dispute because “[a] determination by this Court that the United States must refrain from engaging in collective self-defense efforts in co-operation with [El Salvador, Honduras, and Costa Rica] cannot . . . be distinguished from a determination those other States are not entitled under the Charter to the exercise of those rights.”<sup>40</sup> Such a determination would contradict the “fundamental rule” that “the Court cannot determine the rights and obligations of States without their express consent or participation in the proceedings before the Court.” Because any decision by the Court would “necessarily affect the right[s] of those third States,” the Court could not proceed in their absence.<sup>41</sup>

The ICJ was unimpressed. Reciting its judgment in *Monetary Gold* to the United States, the Court began by granting that there was “no doubt that in appropriate circumstances the Court will decline . . . to exercise the jurisdiction conferred upon it where the legal interests of a State not party to the proceedings ‘would not only be affected by a decision, but would form the very subject-matter of the decision.’”<sup>42</sup> However, it continued, where “claims of a legal nature are made by an Applicant against a Respondent in proceedings before the Court, and made the subject of submissions, the Court has in principle merely to decide upon those submissions, with binding force for the parties only . . . in accordance with Article 59 of the Statute.” The Court emphasized that third states who believed they may be affected by its judgment were not without relief. Such states “are free to institute separate proceedings, or to employ the procedure of intervention [under Article 62].”

The judgment concluded by noting that “[t]he circumstances of the *Monetary Gold* case probably represent the limit of the power of the Court to refuse to exercise its jurisdiction.” Because “none of the [Central American] States referred to can be regarded as in the same position as Albania in that case,” none were “truly indispensable” to the proceedings.<sup>43</sup>

<sup>39</sup> James R. Crawford, *Military and Paramilitary Activities in and Against Nicaragua Case (Nicar. v. U.S.)*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, para. 1 (2019).

<sup>40</sup> ICJ Pleadings, *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Vol. II, 134.

<sup>41</sup> *Id.* at 134–35.

<sup>42</sup> *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Jurisdiction of the Court and Admissibility of the Application, Judgment, 1984 ICJ Rep. 392, 431 (Nov. 26).

<sup>43</sup> *Id.*

*Paramilitary Activities* presents the ICJ on the threshold between Lauterpacht and Oliver's prediction that *Monetary Gold* would remain confined to its facts and a thorough assessment of how the principle articulated therein interacts with the Statute. Leaning toward the former interpretation of the Court's approach in *Paramilitary Activities*, the single paragraph that the Court devotes to this discussion begins and ends citing the unique circumstances of *Monetary Gold*. And whatever the merits of the fact-based distinctions the judgment drew, the Court did not feel compelled to flesh them out. The Court offered only that the circumstances must be "appropriate" and the third party "truly indispensable." That El Salvador, Honduras, and Costa Rica's circumstances met neither requirement is taken as given.

Favoring the latter interpretation of the judgment's engagement with *Monetary Gold*, the Court notes, for example, that the protections afforded by Article 59 and the right of intervention under Article 62 must be considered alongside any challenge to its capacity to resolve a dispute affecting third party interests. "Considered alongside," is as precisely as we can characterize the Court's position, however, because as with its allusion to "appropriate" circumstances, the Court is only willing to say that, "in principle," Article 59 will afford a third party protection from the binding force of its decision. What facts would lead the Court to conclude that "in principle" no longer applied, such that it could no longer "merely . . . decide upon [the consenting parties'] submissions" is not discussed. *Paramilitary Activities* drew attention to these questions, but ultimately left it to future judgments to develop answers.

### C. Application

Five years after the Court's decision on jurisdiction and admissibility in *Paramilitary Activities*, the island state of Nauru filed an application with the ICJ alleging violations of international law related to the rehabilitation of former phosphate mines in its territory. Four decades prior, the UN had designated the governments of Australia, New Zealand, and the UK as joint administering authorities over Nauru.<sup>44</sup> Until Nauru's independence in 1968, the three states exercised control over one-third of the island's phosphate resources in accordance with a Trusteeship Agreement under Article 77 of the UN Charter. Nauru's application alleged, inter alia, that the administering authority was responsible for irreparable changes to its territory in breach of the Trusteeship Agreement. However, Nauru's application to the Court targeted Australia alone.

In *Certain Phosphate Lands in Nauru*, Australia responded that any decision concerning a breach of the Trusteeship Agreement would require the Court, *contra* the *Monetary Gold* principle, to simultaneously pass judgment on its two partner authorities, neither of whom was before the Court. Australia noted in its preliminary objections that "Nauru has itself recognised that it considers the legal position of New Zealand and the United Kingdom is identical" to that of Australia, even sending a diplomatic note after filing its application stating that the UK and New Zealand "in their capacity as one of the three States involved in and party to the Mandate and Trusteeship over Nauru was also responsible for the breaches of those Agreements and of general international law."<sup>45</sup>

<sup>44</sup> See GA Res. 140 (II) (Nov. 1, 1947).

<sup>45</sup> *Certain Phosphate Lands in Nauru* (Nauru v. Austl.), Preliminary Objections of the Government of Australia, Vol. I, at 143 (Dec. 1990).

The Court's judgment on preliminary objections rejected Australia's invocation of the *Monetary Gold* principle. After quoting its discussion of the principle in *Paramilitary Activities* in full, the Court noted the protections afforded third parties under Article 59 and the possibility of intervention under Article 62, observing that "the absence of such a request [to intervene] in no way precludes the Court from adjudicating upon the claims submitted to it," so long as the legal interests at issue would not comprise the "very subject-matter of the decision."<sup>46</sup>

Applying the preceding analysis to the facts before it, the Court focused on identifying what it meant for a third party's interests to constitute the "very subject-matter" of the judgment. One aspect was temporal: whereas in *Monetary Gold*, "the determination of Albania's responsibility was a prerequisite for a decision to be taken on Italy's claims," here "there would not be a determination of the possible responsibility of New Zealand and the United Kingdom previous to the determination of Australia's responsibility."<sup>47</sup> Responding to Australia's contention that a simultaneous determination of the responsibility of absent third states should also be impermissible under the reasoning of *Monetary Gold*, the Court elaborated that in *Monetary Gold* it had been unable to proceed to the merits because determining Albania's responsibility would have been not just a temporal "but also logical" precondition for resolving Italy's claim. Addressing Nauru's claims against Australia, by contrast, would merely "have implications" for New Zealand and the UK. The Court concluded that it could therefore exercise its jurisdiction over Nauru's application.<sup>48</sup>

Expanding on the Court's logical/temporal precondition interpretation of the *Monetary Gold* principle, Judge Shahabuddeen's separate opinion explained that the dispute in *Monetary Gold* entailed "a direct determination of the responsibility of the non-party, with concrete and juridically dispositive effects."<sup>49</sup> The "test to be applied" to objections such as that raised by Australia was thus "whether the absence of such a State is . . . such as to make it impossible for the Court judicially to determine the issues presented before it."<sup>50</sup>

Stepping back, we find the Court in the *Nauru* case attempting to translate *Paramilitary Activities*' allusions to the "appropriate circumstances" and relevant "principle[s]" into judicially administrable tests. Perhaps not surprisingly in light of the relatively blank slate before the Court, subtle but unmistakable variations resulted, and where further elaborations such as Judge Shahabuddeen's separate opinion sought to add clarity, they may have only obscured the answers to crucial uncertainties.

What, for example, amounts to a "concrete" effect is difficult to say. The requirement that the impossibility be of a "judicial" nature appears to beg more questions than it answers—what the Court can and cannot do *judicially* being precisely the issue raised by Australia's objection. When the majority in the *Nauru* case looked to *Monetary Gold*'s "very subject-

<sup>46</sup> Certain Phosphate Lands, Preliminary Objections, Judgment, 1992 ICJ Rep. 240, 261 (June 26)

<sup>47</sup> *Id.* (emphasis added).

<sup>48</sup> For a thoughtful explanation (and critique) of the judgment's approach, see Hugh Thirlway, *The Law and Procedure of the International Court of Justice 1960–1989: Part Nine*, 69 BRIT. Y.B. INT'L L. 1, 48–50 (1999); see also Tobias Thienel, *Third States and the Jurisdiction of the International Court of Justice: The Monetary Gold Principle*, 57 GERMAN Y.B. INT'L L. 321, 327 (2014).

<sup>49</sup> *Certain Phosphate Lands*, *supra* note 46, at 293 (sep. op. Shahabuddeen, J.) (emphasis added).

<sup>50</sup> *Id.* (emphasis added).

matter” language, it found that it could still exercise jurisdiction so long as determining the responsibility of a nonparty was neither a temporal nor logical precondition to resolving the dispute. For Judge Shahabuddeen, the same phrasing implied a “judicial impossibility” test. Judge Schwebel’s dissenting opinion in *Nauru* offered a third interpretation: “[I]f a judgment of the Court against a present State *will effectively determine* the legal obligations of one or more States which are not before the Court, the Court should not proceed to consider rendering judgment against the present State in absence of the others.”<sup>51</sup> For Judge Schwebel, it was “the intensity” rather than “the timing or logical derivation of the effects” of the decision that was decisive.<sup>52</sup>

That different jurists reach different conclusions regarding the adjudicative content of a phrase such as “very subject matter” is unremarkable. Thus, to echo our caveat at the outset of this Part, our thesis does not turn on the Court’s success or lack thereof in applying the *Monetary Gold* principle. We discuss the Court’s jurisprudence in this Part primarily for expository purposes—setting out the key tensions with respect to the principle itself and its place in the Statute’s jurisdictional architecture, rather than proving its (de)merits. With that in mind, we now look two years ahead, to the *Case Concerning East Timor (Portugal v. Australia)*, where the Court built on the *Nauru* case’s analysis, and, for the first time since *Monetary Gold*, found that a third party’s interests would indeed comprise the very subject-matter of its decision.

Portugal first took control of what would become East Timor in the seventeenth century. Its civil and military authorities did not withdraw from the Southeast Asian state’s mainland until August 1975. East Timor’s newfound independence was to be short-lived. Indonesian forces invaded in December, later annexing East Timor and asserting that its people had requested that Indonesia “accept East Timor as an integral part of the Republic.”<sup>53</sup> The UN General Assembly and Security Council condemned the annexation, the Security Council “call[ing] upon all States to respect the territorial integrity of East Timor as well as the inalienable right of its people to self-determination.”<sup>54</sup>

In January 1978, the Australian government reiterated its opposition to Indonesia’s intervention but conceded its *de facto* control over the island, noting, “This is a reality with which we must come to terms.”<sup>55</sup> Australia made good on that reconciliation in mid-December 1978, announcing that it was opening negotiations with Indonesia over the delimitation of the continental shelf between itself and East Timor and conceding that doing so “signif[icantly] de jure recognition by Australia of the Indonesian incorporation of East Timor.”<sup>56</sup> Indonesia and Australia agreed in December 1989 to establish a “Zone of Cooperation” comprising areas “between the Indonesian Province of East Timor and Northern Australia.”<sup>57</sup>

<sup>51</sup> *Id.* at 331 (diss. op., Schwebel, J.) (emphasis added).

<sup>52</sup> *Id.* at 335.

<sup>53</sup> East Timor (Port. v. Austl.), Counter-Memorial of the Government of Australia, at 90, Annex 5 at A13 (Int’l Ct. Just. June 1, 1992) (adding for good measure that “[t]he petition has been made with complete free will and with full awareness of the future of East Timor without any form of coercion from outside”).

<sup>54</sup> SC Res. 384, para.1 (Dec. 22, 1975).

<sup>55</sup> Announcement Made by the Minister for Foreign Affairs, Mr. A.S. Peacock, 20 Jan. 1978, in DIETRICH RAUSCHNING, EAST TIMOR AND THE INTERNATIONAL COMMUNITY: BASIC DOCUMENTS 333 (1997).

<sup>56</sup> *Id.* at 335.

<sup>57</sup> Treaty Between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area Between the Indonesian Province of East Timor and Northern Australia, Austl.-Indonesia, Dec. 11, 1989, 1654 UNTS 105.

Portugal filed an application with the ICJ in 1991, asserting that Australia had failed to observe its obligation to respect Portugal's rights as an administering power, and the right of the people of East Timor to self-determination.

Australia's counter-memorial—filed twenty-five days before the publication of the Court's judgment in the *Nauru* case—again turned to *Monetary Gold*. “To determine this case,” Australia argued, “the Court has to determine the rights of the people of East Timor to self-determination and, faced with asserted Indonesian sovereignty, this also requires the Court to determine the legal interests of Indonesia. The situation in this case, however characterized, falls directly within the *Monetary Gold* principle.”<sup>58</sup>

Portugal agreed that if its application required the Court to determine Indonesia's legal rights and obligations, the Court could not proceed. It disagreed, however, that its application mandated such a determination. As the Court summarized Portugal's argument: “The objective conduct of Australia, considered as such, constitutes the only violation of international law of which Portugal complains.”<sup>59</sup> Portugal also asserted that the Court's *Monetary Gold* analysis had to be weighed against the East Timorese people's right to self-determination and the fact that such rights were opposable *erga omnes*.<sup>60</sup> Pursuant to that logic, it did not matter whether Indonesia was *also* culpable, the Court must still hold Australia responsible.

The Court's 1995 judgment easily dispensed with the latter contention: “[T]he Court considers that the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things.”<sup>61</sup> The judgment's discussion of the *Monetary Gold* principle began with comments in keeping with the “temporal precondition” language of *Nauru*: “[I]n the view of the Court, Australia's behavior cannot be assessed *without first* entering into the question why it is that Indonesia could not lawfully have concluded the 1989 Treaty.”<sup>62</sup> Later in the judgment, the Court shifted into the pragmatic register of Judge Schwebel's dissent in the *Nauru* case, stating that “the *effects* of the judgment requested by Portugal would amount to a determination that Indonesia's entry into and continued presence in East Timor are unlawful.” The judgment also contained elements of the “implications” criterion that the Court explicitly rejected in *Nauru*, noting at one point that “the Court could not rule on the lawfulness of the conduct of a State when its judgment *would imply* an evaluation of the lawfulness of the conduct of another State.”<sup>63</sup>

Judge Skubiszewski's dissenting opinion in *East Timor* was not interested in such niceties. He argued that the Court was capable of addressing Portugal's application “without linking its decision to any prior [*à la Nauru*] or simultaneous [*contra Nauru*] finding on the conduct of another State (Indonesia) in the same matter.”<sup>64</sup> Judge Skubiszewski concluded that not only should the Court have resolved this dispute in light of its rules and “judicial function, as

<sup>58</sup> *East Timor (Port. v. Austl.)*, Counter-Memorial of the Government of Australia, *supra* note 53, at 97; *see also id.* at 100 (“The Court cannot judge this case without first deciding the rights and obligations, or status and competence of Indonesia in East Timor. As Indonesia is not a party to these proceedings, this case is indistinguishable from the *Monetary Gold Case*.”).

<sup>59</sup> *East Timor (Port. v. Austl.)*, *supra* note 13, at 101.

<sup>60</sup> *East Timor (Port. v. Austl.)*, Reply of the Government of the Portuguese Republic, at 206 (Int'l Ct. Just. Dec. 1, 1992).

<sup>61</sup> *East Timor (Port. v. Austl.)*, *supra* note 13, at 102.

<sup>62</sup> *Id.* at 102 (emphasis added).

<sup>63</sup> *Id.* at 105.

<sup>64</sup> *Id.* at 249 (diss. op. Skubiszewski, J.).

defined in Chapter II of its Statute and especially in Article 36,” the “demands of justice” compelled it to do so.<sup>65</sup>

In *East Timor*, the Court drew on its predecessors’ attempts to distill an administrable test from *Monetary Gold*’s general formulation. That the content of these tests were distinguishable was inconsequential—at least with regard to outcome—because under the facts before it, Portugal’s application failed them all. We also find in Judge Skubiszewski’s dissent the beginnings of a reaction that accuses the Court of missing the forest for the trees. Judge Skubiszewski’s dissent suggests that in translating *Monetary Gold*’s general proposition into an increasingly intricate test, the majority had lost sight of what the principle ultimately stood for and had to be weighed against—the proper exercise of the Court’s “judicial function.”

The final section looks to the 2014 case, *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, and in particular to two opinions in which Judge Skubiszewski’s concerns over the relationship between *Monetary Gold* and the “demands of justice” evolved into a more sweeping analysis of the Court’s bilateral jurisdictional architecture given an increasingly multilateral international sphere.

#### D. Reassessment

The Marshall Islands’ application in the *Nuclear Disarmament* case alleged that nine different states had breached their obligations under Article VI of the Treaty on Non-Proliferation of Nuclear Weapons (NPT). Pursuant to Article VI of the NPT, “Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.”<sup>66</sup> Three of the nine states—the UK, India, and Pakistan (the latter two being nonparties to the NPT)—had granted the Court compulsory jurisdiction under Article 36(2) of the Statute.<sup>67</sup>

The UK raised four principal objections: reservations to its acceptance of the Court’s jurisdiction; the lack of a dispute; the absence of indispensable parties; and the likelihood that a judgment on the merits would have no practical consequences.<sup>68</sup> Relying on the narrowest possible majority (an 8–8 tie broken by the vote of the president), the Court concluded that it lacked jurisdiction because the Marshall Islands had failed to demonstrate the presence of a dispute.<sup>69</sup> Fourteen declarations, dissents, and separate opinions accompanied the judgment. Two are of particular interest here.

<sup>65</sup> *Id.* at 237.

<sup>66</sup> Treaty on the Non-Proliferation of Nuclear Weapons, Art. VI, July 1, 1968, 21 UST 483, 729 UNTS 161.

<sup>67</sup> In February 2007, after the *Nuclear Disarmament* case had come to a close, the UK amended its Optional Clause Declaration to exclude “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.” Sir Alan Duncan, Minister of State for Foreign and Commonwealth Affairs, *Amendments to the UK’s Optional Clause Declaration to the International Court of Justice*, HCWS489 (Feb. 23, 2017).

<sup>68</sup> *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. UK)*, Preliminary Objections of the United Kingdom (Int’l Ct. Just. June 15, 2015).

<sup>69</sup> *Marsh. Is. v. UK*, Preliminary Objections, Judgment, 2016 ICJ Rep. 833, 856 (Oct. 5).



The UK's submission argued that the ICJ could not:

rule on the conduct of the United Kingdom without *concurrently necessarily and inevitably* evaluating the lawfulness of the conduct of other States. It follows that a determination by the Court of whether the United Kingdom is in breach of its obligations would not only affect the legal interests of other NPT nuclear-weapon States but that those interests would “form the very subject matter” of the decision *and/or* that the decision would *inevitably* imply “an evaluation of the lawfulness of the conduct of another State which is not a party to the case”.<sup>70</sup>

The UK's “see what sticks” recital of potential interpretations of the *Monetary Gold* principle suggests that its advocates were cognizant of the various strands of the ICJ's jurisprudence.<sup>71</sup> Judges Tomka and Cançado Trindade also paid close attention.

To Judge Tomka's “sincere and profound regret,” he felt constrained to conclude that “the absence of other nuclear powers in the proceedings prevents the Court from considering the Marshall Islands' claims in their proper multilateral context, which is also determined by the positions taken by those other powers, and thus renders the Application inadmissible.”<sup>72</sup> Constrained because even though the case did not present “a question of ruling on the responsibility of those other States as a precondition for ruling on the responsibility of the Respondent such that the *Monetary Gold* principle would apply” (a formulation echoing the *Nauru* judgment's “temporal precondition” approach), the Marshall Islands' application was ultimately “not of a bilateral nature.”<sup>73</sup> The case thus “illustrate[d] the limits of the Court's function, resulting from the fact that it has evolved from international arbitration, which is traditionally focused on bilateral disputes.”<sup>74</sup> Judge Tomka interpreted the Statute to preclude the Court “exercising its jurisdiction fully,” notwithstanding that its inability to do so undermined “the purposes and goals of the [United Nations].”<sup>75</sup>

Judge Cançado Trindade's dissenting opinion also contemplated the Court's role given the increasingly multilateral nature of international affairs, but reached a different conclusion, and displayed substantially less remorse. “The distortions generated by the [Court's] obsession with the strict inter-State paradigm are not hard to detect,” Judge Cançado Trindade observed. Referring to the judgment in *East Timor*, Judge Cançado Trindade cited the malign implications of this “obsession”: “the interests of a third State [Indonesia] (which had not even accepted the Court's jurisdiction) were taken for granted and promptly safeguarded by the Court, by means of the application of the so-called *Monetary Gold* ‘principle’—an assumed ‘principle’ also invoked now, two decades later, in the present case concerning

<sup>70</sup> *Marsh. Is. v. UK*, Preliminary Objections of the UK, *supra* note 68, at 16, 36–37 (emphasis added).

<sup>71</sup> Although “necessarily” and “inevitably” stood on firmer ground as potential standards than “concurrently,” given the Court's rejection in *Nauru* of Australia's argument that the *Monetary Gold* principle also precluded “simultaneously” addressing the fault of third states. *See id.* at 11.

<sup>72</sup> *Marsh Is. v. UK*, Preliminary Objections, Judgment, *supra* note 69, at 899 (sep. op., Tomka, J.).

<sup>73</sup> *Id.* at 898.

<sup>74</sup> *Id.* at 899.

<sup>75</sup> *Id.*

the obligation of elimination of nuclear weapons!”<sup>76</sup> The Marshall Islands’ application afforded Judge Cançado Trindade the opportunity to:

stress that the adjudication of a case like the present one shows the need to go beyond the strict inter-State outlook. The fact that the mechanism for the adjudication of contentious cases before the ICJ is an inter-State one, does not at all imply that the Court’s reasoning should likewise be strictly inter State. In the present case concerning nuclear weapons and the obligation of nuclear disarmament, it is necessary to focus attention on peoples, rather than on inter-State susceptibilities. It is imperative to keep in mind the world population, in pursuance of a humanist outlook, in the light of the *principle of humanity*.<sup>77</sup>

Stepping back from the facts of the *Nuclear Disarmament* case, we see two members of the Court wrestling with how the ICJ’s bilateral jurisdictional framework might be reconciled with the multilateral disputes of its sovereign users. For Judge Tomka, albeit to his “sincere and profound regret,” and notwithstanding that the Statute may thereby undermine “the purposes and goals” of the United Nations, the Statute constituted a fundamental impediment to a full reconciliation. Judge Cançado Trindade recognized no such impediment, but on the basis that the Statute did not *preclude* such a reconciliation, and so allowed background normative principles to carry the day.

Focusing on one doctrinal manifestation of this discussion, the *Monetary Gold* principle, the ensuing Parts begin to articulate a third way. We believe that it is precisely *in the Statute* that the Court will find the tools to meet a multilateralizing international sphere while remaining faithful to its founding principles and purpose. The Court will find that the Statute’s bilateralism is not a relic to be lamented, nor a “mechanism” that must give way to higher norms, but rather the path forward. What the Court will not find is a rule requiring it to decline to exercise its jurisdiction when a third party’s legal interest form the very subject-matter of a prospective decision.

### III. THE STATUTORY FRAMEWORK

The ICJ Statute sets out a framework for balancing the interests of third parties against the Court’s duty to decide disputes submitted to it.<sup>78</sup> Sections A–D of this Part illustrate how the *Monetary Gold* principle disrupts that balance. At the conclusion of Section D, we provide a brief summary in order to facilitate a more holistic assessment of our claims. Even if the principle’s inconsistencies vis-à-vis a single article fall short of warranting a response, we believe that in conjunction they justify dispensing with the *Monetary Gold* principle altogether.

<sup>76</sup> *Id.* at 957 (diss. op., Cançado Trindade, J.).

<sup>77</sup> *Id.* at 958.

<sup>78</sup> The alliterative “duty to decide” is not of our own making. *See, e.g.*, *Nuclear Tests (Austl. v. Fr.)*, Judgment, 1974 ICJ Rep. 253. 454 (Dec. 20) (diss. op., Sir Garfield Barwick, J.) (“In my opinion, there is no discretion in this Court to refuse to decide a dispute submitted to it which it has jurisdiction to decide. Article 38 of its Statute seems to lay upon this Court a duty to decide”); *East Timor (Port. v. Austl.)*, *supra* note 13, at 90, 158 (diss op., Weeramantry, J.) (juxtaposing “[t]he third party principle and the judicial duty to decide”); *Case Concerning the Frontier Dispute (Burk. Faso/Mali)*, *supra* note 38, at 579 (“The Chamber therefore concludes that it has a duty to decide the whole of the *petitum* entrusted to it.”).

### A. Article 36

Judge Skubiszewski's dissenting opinion in *East Timor* describes Article 36 as setting out the "judicial function" of the Court.<sup>79</sup> Under Article 36(1), as for most international courts and tribunals, the exercise of that function is premised on the consent of the parties.<sup>80</sup> This much is clear not just from the text of the provision—"The jurisdiction of the Court comprises all cases *which the parties refer to it*"—but also the remainder of Article 36, which details the means by which states may empower the Court to resolve a dispute. The negative implication that we draw from Article 36's positive list is that if the dispute did not reach the Court by way one of these modalities, the Court may not exercise its jurisdiction—*expressio unius*, in effect.<sup>81</sup>

Proponents of the *Monetary Gold* principle add a further, negative modality, but contend that it is a corollary of the ICJ's consent-based jurisdiction. Translated into more formal logic, given the conditional statement "if consent then jurisdiction," the inverse, "if *no* consent then *no* jurisdiction" follows. The proposition is compellingly straightforward but belied by the ordinary meaning of the Article's terms. The burden therefore rests with advocates of the *Monetary Gold* principle to explain why the absence of a third party leaves the Court unable to exercise the jurisdiction otherwise afforded by Article 36.<sup>82</sup> In addition to the Article's ordinary meaning, this section reviews the *travaux préparatoires* and precedent to demonstrate that it is a burden proponents will struggle to carry.<sup>83</sup>

The Committee of Jurists, a body of experts entrusted by the Council of the League of Nations with preparing a first draft of the statute of the Permanent Court of International Justice (PCIJ), the ICJ's predecessor, advocated empowering the PCIJ with compulsory jurisdiction.<sup>84</sup> The Council, and later the Assembly of the League of Nations, disagreed.<sup>85</sup> In lieu of connecting the PCIJ's jurisdiction to a state's accession to the PCIJ's Statute—as

<sup>79</sup> *East Timor (Port. v. Austl.)*, *supra* note 13, at 241, para. 57 (diss. op., Skubiszewski, J.).

<sup>80</sup> See Thirlway, *supra* note 48, at 4 ("It is a truism that international judicial jurisdiction is based on and derives from the consent of States.").

<sup>81</sup> See *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicar. v. Colom.)*, Preliminary Objections, Judgment, 2016 ICJ Rep. 3, 19 (Mar. 17) (noting that "[a]n *a contrario* reading of a treaty provision—by which the fact that the provision expressly provides for one category of situations is said to justify the inference that other comparable categories are excluded—has been employed by both the present Court and the Permanent Court of International Justice") (internal citations omitted).

<sup>82</sup> See Thirlway, *supra* note 48, at 35 (noting that "[n]o textual warrant" for the proposition, "in the Statute or elsewhere, has however been asserted by the Court").

<sup>83</sup> See Vienna Convention on the Law of Treaties, Art. 31(1), May 23, 1969, 1155 UNTS 331 ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."); Art. 32 ("Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31 . . . .")

<sup>84</sup> Article 33 of the proposed PCIJ Statute states: "When a dispute has arisen between States, and it has been found impossible to settle it by diplomatic means, and no agreement has been made to choose another jurisdiction, the party complaining may bring the case before the Court. The Court shall, first of all, decide whether the preceding conditions have been complied with; if so, it shall hear and determine the dispute according to the terms and within the limits of the next Article." See PCIJ Advisory Committee of Jurists, *Procès-Verbaux of the Proceedings of the Committee, June 16th–July 24th, 1920*, at 726 (1920) (hereinafter *Procès-Verbaux*).

<sup>85</sup> Christian Tomuschat, *Article 36*, in *THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY* 638–39 (Andreas Zimmermann, Christian Tomuschat, Karin Oellers-Frahm & Christian J. Tams eds., 2012) (hereinafter *COMMENTARY*).

recommended by the Committee of Jurists—the opening text of Article 36 of the PCIJ Statute provides that the “jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in Treaties and Conventions in force.”<sup>86</sup>

When the ICJ’s own Committee of Jurists turned to the question of compulsory jurisdiction, they offered two alternatives. The first repeated the approach adopted in the PCIJ Statute. The second mirrored that endorsed by the PCIJ’s Committee of Jurists, providing, “The Members of The United Nations and States parties to the present Statute recognise as among themselves the jurisdiction of the Court as compulsory ipso facto and without special agreement in any legal dispute concerning [the matters detailed in Article 36(2)(a–d)].”<sup>87</sup> The subcommittee assigned with considering Article 36 weighed the two alternatives, along with a proposal from New Zealand favoring compulsory jurisdiction, and opted to retain the PCIJ’s consent-based model.<sup>88</sup>

Little in the *travaux préparatoires* supports the *Monetary Gold* principle’s extrapolation on the text of Article 36(1). The ICJ’s Committee of Jurists’ decision to forego compulsory jurisdiction suggests a preference for a consent-based model, but there is no indication that the consent of “the parties” required under Article 36(1) implicitly extended to that of third states.

The Court’s precedents are equally unavailing. In its judgment in *Monetary Gold*, the Court cites Article 36(1) in conceding that France, the UK, and the United States “have . . . conferred jurisdiction on the Court.” The Court hastens to add that it “must, however, examine whether this jurisdiction is co-extensive with the task entrusted to it.” In finding that it was not, the Court contends that proceeding with the case would “run counter” to the jurisdictional principle of consent, “a well-established principle of international law embodied in the Court’s Statute.”<sup>89</sup> The judgment’s choice to ground its conclusion on the abstraction of an “embodi[ment]” rather than the terms of the Article that directly addresses the question at hand is noteworthy. One need not question the merits of the Court’s basic proposition to appreciate that the judgment’s analysis takes place at least one level removed from the ordinary meaning of the Statute.

The judgment in *East Timor* likewise begins by stating that “the two States [Portugal and Australia] have accepted the compulsory jurisdiction of the Court under Article 36, paragraph 2, of its Statute,” and later confirms that “[t]he declarations made by the Parties under Article 36, paragraph 2, of the Statute do not include any limitation which would exclude Portugal’s claims from the jurisdiction thereby conferred upon the Court.” That the *Monetary Gold* principle cannot find its statutory justification in Article 36 is also clear from *East Timor*’s dispositive paragraph: because the Court “would have to rule, as a prerequisite, on the

<sup>86</sup> Statute of the Court, Series D, No. 1, 19, available at [https://www.icj-cij.org/files/permanent-court-of-international-justice/serie\\_D/D\\_01\\_1e\\_edition.pdf](https://www.icj-cij.org/files/permanent-court-of-international-justice/serie_D/D_01_1e_edition.pdf).

<sup>87</sup> Documents of the United Nations Conference on International Organization, UNIO Vol. XIV, 841–42 (1945).

<sup>88</sup> New Zealand’s proposal provided, in relevant part: “Save as hereinafter excepted the court shall in particular have jurisdiction to hear and determine, and the parties to this Statute agree to submit to it, any legal dispute concerning . . . .” Documents of the United Nations Conference on International Organization, UNIO Vol. XIII, at 561 (1945) (emphasis added); see also Tomuschat, *supra* note 85, at 640 (noting that “the United States and the Soviet Union were staunch opponents of compulsory jurisdiction . . . . Therefore, the draft submitted by the Subcommittee was eventually approved by a broad majority of 31 to 14, following the logic of realpolitik.”).

<sup>89</sup> *Monetary Gold*, *supra* note 6, at 32

lawfulness of Indonesia's conduct in the absence of that State's consent," the Court writes that it "cannot, in this case, *exercise the jurisdiction it has . . .* under Article 36."<sup>90</sup>

Although the burden rests with the proponents of the *Monetary Gold* principle to demonstrate its consistency with the ordinary meaning of Article 36, we will turn—here, and throughout Parts III and IV—to *Palestine v. USA* in order to test our claims.

Article 36(1) contemplates two sources of jurisdiction: "cases which the parties refer to [the Court]" and "matters specially provided for in the Charter of the United Nations or in treaties and conventions in force." Palestine asserts that the ICJ has jurisdiction over its application via the latter because the United States and Palestine have signed the VCDR's Optional Protocol Concerning the Compulsory Settlement of Disputes. The Optional Protocol provides:

Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol.<sup>91</sup>

At the time of Palestine's application, the Optional Protocol was in force between it and the United States. The ICJ therefore enjoys jurisdiction over the dispute pursuant to Article 36(1).

Compromissory clauses such as that in the VCDR are inherently forward looking. Thus the preceding should not be understood to suggest that when the United States signed the VCDR and its Optional Protocol in 1961, or ratified the same instruments in 1972, it contemplated a future dispute with a then-nonexistent political entity. But the Court's inquiry under Article 36 does not entail, much less turn on, this sort of trans-temporal analysis—neither by projecting forward from the parties' original expression of consent, nor, as the *Monetary Gold* principle compels, by reasoning backward from an as-yet-hypothetical decision on the merits.

What of Israel? Our reading of Article 36 suggests that because the "matter[] specially provided for in [the VCDR]" concerns the location of the U.S. embassy, the Court enjoys jurisdiction over the parties, *tout court*. As the Court put it in *East Timor* in assessing one of Australia's preliminary objections, "[I]t is not relevant whether the 'real dispute' is between Portugal and Indonesia rather than Portugal and Australia."<sup>92</sup> Just so here. The Statute does not ask the Court to divine the "real" rationale for Palestine's application.

Third parties such as Israel are not entirely without recourse, however. The Statute does not adopt a binary approach to third party interests—affording them all the rights of a party to the dispute under Article 36 or deprived of any voice in the proceedings. Article 62 sets out an interstitial approach, the contours of which we assess in the Section below.

## B. Article 62

The *Monetary Gold* principle instructs the Court how to respond when, despite enjoying jurisdiction over "the parties" under Article 36, a third party's interests are squarely at issue. In

<sup>90</sup> *East Timor (Port. v. Austl.)*, *supra* note 13, at 105 (emphasis added).

<sup>91</sup> Vienna Convention on Diplomatic Relations, Optional Protocol Concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, 596 UNTS 487.

<sup>92</sup> *East Timor (Port. v. Austl.)*, *supra* note 13, at 100.

the Court's phrasing: "although Italy and the three respondent States have conferred jurisdiction upon the Court, it *cannot* exercise this jurisdiction"<sup>93</sup>

Article 62 is the scalpel to the *Monetary Gold* principle's hammer. It provides, "(1) Should a State consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene. (2) It shall be for the Court to decide upon this request." We submit that Article 62 is the statutorily designated mechanism for incorporating third-party interests in contentious cases where the construction of a convention is not at issue.<sup>94</sup> The Court and third parties have not taken adequate advantage of this provision: the Court has erected too high a barrier to intervention, and third parties have failed to appreciate their capacity to influence the Court's decision making.<sup>95</sup> As a result, both the institution and its users have foregone the benefits of an ICJ better informed of the universe of relevant interests. The drafting history supports our position regarding Article 62 and its role in the Statute's broader jurisdictional scheme.

When the PCIJ's Advisory Committee of Jurists turned to the question of intervention, it confronted a variety of domestic approaches and few precedents in international law.<sup>96</sup> One Committee member suggested the formulation: "Whenever a dispute submitted to the Court affects the interests of a third State, the latter may intervene in the case."<sup>97</sup> Another recommended that a state's discretion to intervene should be matched by that of the Court to grant or refuse a request.<sup>98</sup> A third "wished to make the right of intervention dependent upon certain conditions; for instance . . . that the interests affected must be legitimate."<sup>99</sup> The text adopted by the Committee narrowed the relevant interests to those "of a legal nature."<sup>100</sup> And although Shabtai Rosenne finds the notes of the Committee's discussion "inconclusive and apparently garbled,"<sup>101</sup> it is clear that the breadth of the language that the Committee favored was meant to encourage the Court to assess each application to intervene in light of the unique features of the dispute—intervention was to "be decided in each particular case as it arises."<sup>102</sup>

James Brown Scott, secretary and director of the Carnegie Endowment for International Peace's Division of International Law, who accompanied the American representative, Elihu Root, at the Committee's meetings, submitted an article-by-article report on the

<sup>93</sup> *Monetary Gold*, *supra* note 6, at 33.

<sup>94</sup> Article 63 of the Statute grants parties to a convention the construction of which is in question in a case "the right to intervene in the proceedings," and unlike Article 62(2), does not afford the Court discretion to reject such an intervention.

<sup>95</sup> There have been fifteen requests for intervention under Article 62 of the PCIJ and ICJ Statutes over the course of nearly a century of disputes before the two courts. Of the fourteen requests made to the ICJ, six have lapsed, five have been rejected, and the Court has granted three. As Christine Chinkin summarizes, quoting an author writing three decades prior: "States have not come to 'regard intervention as a predictable contingency of international life.'" See Christine Chinkin, *Article 62*, in COMMENTARY, *supra* note 85, at 1529, 1537 (quoting TASLIM ELIAS, *THE INTERNATIONAL COURT OF JUSTICE AND SOME CONTEMPORARY PROBLEMS* 91 (1983)).

<sup>96</sup> *Procès-Verbaux*, *supra* note 84, at 592–94.

<sup>97</sup> Five Power Plan, Art. 48, para. 1, Feb. 6, 1922, 25 LNTS 202, *reprinted in Procès-Verbaux*, *supra* note 84, at 93.

<sup>98</sup> See Lord Phillimore, *Procès-Verbaux*, *supra* note 84, at 593.

<sup>99</sup> See M. Fernandes, *Procès-Verbaux*, *supra* note 84 at 593.

<sup>100</sup> *Procès-Verbaux*, *supra* note 84, at 594.

<sup>101</sup> SHABTAI ROSENNE, *INTERVENTION IN THE INTERNATIONAL COURT OF JUSTICE* 23 (1993).

<sup>102</sup> Preparation of the Rules of Court, 1922 PCIJ (ser. D) No. 3, at 349.



Committee's work to his employer. Discussing then-Article 60 of the draft PCIJ Statute, Scott's report provides useful color on how the Court would exercise its authority in assessing applications to intervene on a case-by-case basis. The report observes, "[u]ndoubtedly, the permission will be granted, provided the request set forth an interest of a legal nature, inasmuch as the court is a judicial, not a political body."<sup>103</sup> John Bassett Moore, later a judge at the PCIJ, likewise believed the Court would adopt a permissive approach to requests for intervention, predicting that the provision would "prove to be a means of inducing governments, be they great or small, to come before the Court," and through enhanced participation, increase the legitimacy of the institution.<sup>104</sup>

The Committee of Jurists that prepared the ICJ Statute did not address Article 62 in great depth, recommending only minor changes to the PCIJ Statute's formulation.<sup>105</sup> The Committee's rapporteur indicated that these changes were not intended to modify the meaning of the provision.<sup>106</sup>

The resulting text affords states and the Court considerable discretion and an underutilized tool for incorporating third-party interests into bilateral proceedings. Perhaps the most conspicuous aspect of Article 62, from a textual perspective, is its subjective phrasing and indeterminate diction. In keeping with the drafters' aims to open a relatively wide door for third-party participation, Article 62(1) requires only that a state "consider[]" that it has a "legal interest" that "may be affected." "Considers" and "may be affected" are subjective and speculative, respectively, because the intervening party is looking ahead to an uncertain decision on the merits.<sup>107</sup> Thus when the Court in *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)* noted that "it is for a State seeking to intervene to demonstrate convincingly what it asserts," it hastened to add that the intervening state "has only to show that its interest 'may' be affected, not that it will or must be affected."<sup>108</sup>

Supposing we are correct that the Statute sets low barriers to utilizing the procedure, that leaves the question: "To what end?" Turning from text to a broader assessment of doctrine, we believe that intervention is best understood through the lens of information production. Responding to Article 36's conferral of jurisdiction on the Court pursuant to the disputants' decisions, Article 62 affords third parties a mechanism to ensure that any determination is correspondingly delimited.

Discussing the potential implications of its decision regarding the land and maritime boundary between Cameroon and Nigeria for Equatorial Guinea and São Tomé and Príncipe, the

<sup>103</sup> Carnegie Endowment for International Peace: Division of International Law, 35 *Pamphlet Series*, at 131 (1920).

<sup>104</sup> John Bassett Moore, *Organisation of the Permanent Court of International Justice*, 22 *COLUM. L. REV.* 497, 507 (1922).

<sup>105</sup> The Committee recommended deleting the words "as a third party" after "to be permitted to intervene" in the ICJ Statute's English text.

<sup>106</sup> UNIO XIV, *supra* note 87, at 613.

<sup>107</sup> See *Territorial and Maritime Dispute (Nicar. v. Colom.)*, Application by Costa Rica for Permission to Intervene, Judgment, 2011 ICJ Rep. 348, 393, para. 4 (May 4) (dec., Keith, J.) (noting that the "nature of the power which the Court exercises under Article 62 . . . is of a preliminary, procedural, interlocutory character," and appropriately so, given that applications to intervene "involve[] the Court in making a future-looking, speculative assessment about the possible impact of the decision in the main proceeding on the interest asserted by the requesting State"); see also Chinkin, *supra* note 95, at 1546 ("A request to intervene is necessarily speculative.").

<sup>108</sup> *Land, Island and Maritime Frontier Dispute (El Sal. v. Hond.)*, Application by Nicaragua for Permission to Intervene, Judgment, 1990 ICJ Rep. 92, 117 (Sept. 13).

Court noted that the “mere presence of those two States, whose rights might be affected by the decision of the Court, does not in itself preclude the Court from having jurisdiction,”<sup>109</sup> adding, however, that “it must remain mindful . . . of the limitations on its jurisdiction that such presence imposes.”<sup>110</sup> Article 62 buttresses this “mindful[ness].” No state must, but every state may, provide the Court with information if it anticipates that a decision could affect its legal interests.<sup>111</sup> In doing so, the intervening state enhances the Court’s understanding of those “limitations” and ability to formulate a decision targeted to the parties before it.

Interpreting Article 62 as serving an information-producing function does not entail opening the doors of the Court to all comers. Nonetheless, Tania Licari is right to question whether this reading may be in tension with Article 36 and the sovereignty-preserving, consent-based ethos of the Statute’s jurisdictional clauses: “the consensual nature of [the ICJ’s] jurisdiction would not seem to permit it to develop into a forum for submitting views.”<sup>112</sup>

We have several responses. First, we believe that the “interest of a legal nature” requirement is adequate to police the line between “submitting views” and providing information that aids the Court in delimiting the scope of its decision to the parties before it.<sup>113</sup> Recall James Brown Scott’s distinction between a court and a “political body.” Scott was echoing the Advisory Committee’s distinction between “cases in which an interest of a legal nature can be shown” and those involving “political intervention,” or as the Court put it in addressing Honduras’ request to intervene in *Nicaragua v. Colombia* in 2011: the phrase “interest of a legal nature” excludes claims “of a purely political, economic or strategic nature.”<sup>114</sup> The applicant’s interest must be a “real and concrete claim of that [intervening] State, based on law.”<sup>115</sup>

Precisely what divides a “legal” from a “political” claim, as Gerald Fitzmaurice rightly notes, “is scarcely susceptible of any abstract answer.”<sup>116</sup> So, too, the requisite “concrete[ness].” Yet the Court has provided further guidance. In *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, the Court set one outer boundary in noting that Malta did not “base its

<sup>109</sup> Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria, Eq. Guinea Intervening), Judgment, 2002 ICJ Rep. 303, 421 (Oct. 10).

<sup>110</sup> *Id.*

<sup>111</sup> The Court is also well within its rights to encourage third parties to participate. As Matina Papadaki puts it citing *Cameroon v. Nigeria* and *Nauru*, “The Court can induce States to intervene” but it “cannot oblige States to intervene.” Matina Papadaki, *Intervention: International Court of Justice*, in MAX PLANCK ENCYCLOPEDIA OF INTERNATIONAL PROCEDURAL LAW (2018).

<sup>112</sup> Tania Licari, *Intervention Under Article 62 of the Statute of the I.C.J.*, 8 BROOK. J. INT’L L. 267, 283 (1982). But see D. W. Greig, *Third Party Rights and Intervention Before the International Court*, 32 VA. J. INT’L L. 285, 322 (arguing that a party that has submitted an application to the ICJ with clear implications for third-party interests has implicitly consented to the Court apprising itself of those states’ interests).

<sup>113</sup> See *Land, Island and Maritime Frontier Dispute (El Sal. v. Hond.)*, *supra* note 108, at 130 (“It seems to the Chamber, however, that it is perfectly proper, and indeed the purpose of intervention, for an intervener to inform the Chamber of what it regards as its right or interests, in order to ensure that no legal interest may be ‘affected’ without the intervener being heard . . .”).

<sup>114</sup> *Territorial and Maritime Dispute (Nicar. v. Colom.)*, *supra* note 107, at 434. See also *Procès-Verbaux*, *supra* note 84, at 747–49; ROSENNE, *supra* note 101, at 32 (concluding that “there is probably only one thing that can be said with any degree of confidence . . . [i]t is clear that Article 62 is not intended to open the door to ‘political intervention’ (whatever that expression could mean in the context of international litigation)”).

<sup>115</sup> *Territorial and Maritime Dispute (Nicar. v. Colom.)*, *supra* note 107, at 421, 434.

<sup>116</sup> Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice, 1951–4: Questions of Jurisdiction, Competence and Procedure*, 34 BRIT. Y. B. INT’L L. 1, 126 (1958).

request for permission to intervene simply on an interest in the Court's pronouncements in the case regarding the applicable general principles and rules of international law."<sup>117</sup> Malta's application to intervene instead failed because it exceeded the opposite—and to the Court, equally unacceptable—outer boundary. The Court concluded that Malta sought “an opportunity to submit arguments to the Court with possibly prejudicial effects on the interests either of Libya or of Tunisia in their mutual relations with one another”—arguments that would compel the Court to “prejudge the merits of Malta's own claims against Tunisia and against Libya in its separate disputes with each of those States.”<sup>118</sup> The Court believed that Malta was using Article 62 as a substitute for raising its own claims against Libya and Tunisia.<sup>119</sup> The “interest of a legal nature” was therefore, if anything, *too* concrete. These interpretations of the “legal interest” requirement are consistent with construing Article 62 as serving an information producing function, and with our call for the Court to adopt a liberal stance toward applications to intervene.

Second, in recent years the Court has also made it clear that an intervening state is not required to demonstrate a jurisdictional link to the parties in the case.<sup>120</sup> The implication that we and others draw is that the Court is coming to recognize the “protective nature of the procedure.”<sup>121</sup> Protective of third parties, of course, but also of the disputants, because it allows the Court to move forward with the case rather than refuse to exercise its jurisdiction, à la *Monetary Gold*.

Related questions have also been raised over whether interpreting Article 62 as serving an informational function renders the Court's discretion under Article 62(2) “to decide upon this request” a nullity. As Judge Nagendra Singh noted discussing Italy's rejected application to intervene in *Continental Shelf (Libya/Malta)*, the judgment still expressly indicated that the Court would frame its decision on the merits to avoid impinging on Italy's interests. Thus all of Italy's goals appeared to have been achieved through its application alone.<sup>122</sup> As for Italy's goals, it seems unlikely that a state would not prefer the enhanced access available to third states whose application to intervene has been accepted.<sup>123</sup> We further note that some analysts have questioned whether the Court enjoys a residual discretion to reject an application to intervene when the applicant has concededly satisfied the low hurdles set out in Article 62(1).<sup>124</sup> As the preceding discussion suggests, we believe that the answer is “no.” The Court's discretion in such circumstances—real, but circumscribed—instead lies in delimiting

<sup>117</sup> *Continental Shelf (Tunis. v. Libya)*, *supra* note 38, at 17.

<sup>118</sup> *Id.* at 18, 19–20.

<sup>119</sup> *Id.* at 18.

<sup>120</sup> Chinkin, *supra* note 5, at 1570.

<sup>121</sup> *Id.* at 1561; *see also Territorial and Maritime Dispute (Nicar. v. Colom.)*, *supra* note 107, at 421, 434 (“The decision of the Court granting permission to intervene can be understood as a preventive one.”).

<sup>122</sup> *Continental Shelf (Libyan Arab Jamahiriya v. Malta)*, Application by Italy for Permission to Intervene, Separate Opinion of Judge Nagendra Singh, 1984 ICJ Rep. 3, 31 (Mar. 21).

<sup>123</sup> *See* Rules of Court, 1978, Art. 85 (“If an application for permission to intervene under Article 62 of the Statute is granted, the intervening State . . . shall be entitled to submit a written statement,” and “shall be entitled, in the course of the oral proceedings, to submit its observations with respect to the subject-matter of the intervention.”).

<sup>124</sup> *See* Chinkin, *supra* note 95, at 1534.

the scope of the intervention, and accordingly, the reach of any eventual decision on the merits.<sup>125</sup>

Applying this analysis to *Palestine v. USA*, Israel may apply to intervene under Article 62.<sup>126</sup> We believe that the Court should, and under its current jurisprudence likely would, accept such an application. As the Court pointed out in response to Nicaragua's invocation of the *Monetary Gold* principle in its application to intervene in *El Salvador v. Honduras*, if a party's interests could constitute the "very subject-matter of the decision," this would doubtless require the Court to accept its application under Article 62, "which lays down a less stringent criterion."<sup>127</sup> Rather than dispensing with *Palestine v. USA* via reference to the *Monetary Gold* principle, the Court could proceed, better apprised of Israel's legal interests.

Or consider the *Nauru* case once more. A Court that agreed with our critiques of the *Monetary Gold* principle, and our understanding of the purpose of Article 62, may have encouraged submissions from the UK and New Zealand—parties whose interests the Court decided were merely likely to be "implicated" in an eventual decision. Rather than having to engage in these trans-temporal leaps—i.e., from a decision that the Court had not (and in the event, never would) reach to that decision's effect on the UK and New Zealand—submissions from these states would have aided the Court in ensuring that its judgment reached Australia alone.

Much of our analysis has focused on the Court's understanding and application of Article 62, but we would be remiss to overlook that the Court can only address the applications for intervention that it receives. There is, in other words, a supply and demand side to this equation. Focusing on the latter raises important questions: with regard to the *Monetary Gold* principle, we might anticipate that it would discourage third parties from utilizing Article 62. Alternatively, might the incentive structure influencing third states' decisions include fear of an estoppel-like effect from intervening?<sup>128</sup> Whether either proposition holds in practice, or in a future in which Article 62 is used with greater frequency, is difficult to say. Here, we wish to focus on a related, intra-statutory consideration: might third parties be factoring in Article 59's ability to protect them from the consequences of an adverse judgment? Indeed, if Article 59 means what it says, why would a third party make the effort to intervene? We take up that question, among others, in the next Section.

### C. Article 59

Article 59 of the Statute states that "[t]he decision of the Court has no binding force except between the Parties and in respect of that particular case." The default rule is thus that the decisions of the Court have no binding force. An exception applies where two conditions are

<sup>125</sup> See *Territorial and Maritime Dispute (Nicar. v. Colom.)*, *supra* note 107, at 349, 358, para. 25 ("It is indeed for the Court, being responsible for the sound administration of justice, to decide in accordance with Article 62, paragraph 2, of the Statute on the request to intervene, and to determine the limits and scope of such intervention.")

<sup>126</sup> Israel signed the VCDR in 1961 and ratified the Convention in 1970. It signed the Optional Protocol on the same day in 1961, but never ratified that agreement. If the Court reaches the merits of Palestine's arguments concerning the interpretation of the VCDR, Israel may therefore have "the right to intervene in the proceedings" under Article 63 of the Statute, with the critical caveat that "if it uses this right, the construction given by the judgment will be equally binding upon it."

<sup>127</sup> *Land, Island and Maritime Frontier Dispute (El Sal. v. Hond.)*, *supra* note 108, at 92, para. 56.

<sup>128</sup> We are grateful to the reviewers for highlighting this point.

satisfied: the Court's decisions do bind (1) the parties before it (2) with respect to that particular case. The rule is a close analogue to the principle of *res judicata*.<sup>129</sup>

The prior Section concluded by asking whether the protections afforded third parties under Article 59 may undermine the utilization of Article 62. There would appear to be little impetus for a third party to inform the Court of the potential sweep of its decision if, by Statute, that decision could have no effect upon it. In this light, it is striking to find that the drafting history suggests that Article 59 was understood to be not just consistent with but implicit in the Statute's provisions addressing intervention.

A comparable article was not discussed by the Committee of Jurists to the Council of the League of Nations. This despite the fact that several states included similar provisions in their submissions to the Committee.<sup>130</sup> What became Article 59 was added by the Council of the League of Nations and debated in connection with the right of intervention. The report of the French representative to the Council, Léon Bourgeois, addressed Article 61 of the draft Statute, concerning the right of intervention of a state party to a convention subject to interpretation by the PCIJ.<sup>131</sup> Bourgeois wrote:

Article 61 of the draft lays down that: "Whenever the construction of a convention in which States other than those concerned in the case are parties is in question, the Registrar shall notify all such States forthwith. Every State so notified has the right to intervene in the proceedings: but if it uses this right, the construction given by the judgment will be as binding upon it as upon the original Parties to the dispute." This last stipulation establishes, in the contrary case, that if a State has not intervened in the case the interpretation cannot be enforced against it.<sup>132</sup>

Accordingly, Bourgeois submitted, "No possible disadvantage could ensue from stating directly what Article 61 indirectly admits. The addition of an Article drawn up as follows can thus be proposed to the Assembly: "The decision of the Court has no binding force except between the Parties and in respect of that particular case."<sup>133</sup> This proposal was later amended to the text of Article 59 of the PCIJ Statute.<sup>134</sup>

In the deliberations on the ICJ Statute, Article 59 of the PCIJ Statute did not attract much attention. The Inter-Allied Committee on the Future of the PCIJ concluded, "It is important

<sup>129</sup> There is some debate over just how close. Compare Interpretation of Judgments Nos. 7 and 8 Concerning the Factory at Chorzów (Ger. v. Pol.), 1927 PCIJ (ser. A) No. 13, 23 (Dec 16) (diss. op., Anzilotti, J.) ("[W]e have here [referring to Article 59] the three traditional elements for identification, *persona, petitum, causa petendi*." with Alain Pellet, *Decisions of the ICJ as Sources of International Law?*, in DECISIONS OF THE ICJ AS SOURCES OF INTERNATIONAL LAW, GAETANO MORELLI LECTURES SERIES, VOL. 2 (2018) (quoting JAMES CRAWFORD, BROWNIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 38 (2012)) ("The drafting history of Article 59 indicates that it 'was not intended merely to express the principle of *res judicata*, but rather to rule out a system of binding precedent.").

<sup>130</sup> See, e.g., League of Nations Advisory Committee of Jurists, Documents Presented to the Committee Relating to Existing Plans for the Establishment of a Permanent Court of International Justice 323, Draft Art. 53 (1920) (including a submission from Denmark, the Netherlands, Sweden, Norway, and Switzerland providing that the Court's decisions "shall only apply to the contesting parties, including any intervening parties, and to the particular case upon which judgment has been delivered").

<sup>131</sup> The substance of Article 61 of the draft Statute appears in Article 63 of the ICJ Statute.

<sup>132</sup> Documents Concerning the Action Taken by the Council of the League of Nations Under Article 14 of the Covenant and the Adoption by the Assembly of the Statute of the Permanent Court 50, 122 (1921).

<sup>133</sup> *Id.*

<sup>134</sup> Chester Brown, *Article 59*, in COMMENTARY, *supra* note 85, at 1420.

to maintain the principle that countries are not ‘bound’ . . . by decisions in cases to which they were not parties, and we consider accordingly that the provision in question should be retained without alteration.”<sup>135</sup> The Committee of Jurists agreed—Article 59 of the ICJ Statute is identical to its predecessor in the PCIJ Statute.

The drafters of these statutes were fallible, of course. That they believed Article 59 followed from, rather than undermined, the provisions addressing intervention, does not mean that their expectations would match how these provisions would interact in practice. Yet there is an alternative account of the interrelationship between the two provisions. This approach demonstrates the utility of Article 62 by more carefully scrutinizing that of Article 59. Citing the Court’s preeminent role in the adjudication of international disputes, judges and commentators alike have argued that the bare text of Article 59 will provide cold comfort to a third party that feels very much “bound” by the Court’s determinations notwithstanding Article 59’s guarantees to the contrary.

Of particular relevance here, one of the most common arguments made in support of the *Monetary Gold* principle is that it is a necessary safeguard for third parties given the real-world inefficacy of Article 59. As Judge Schwebel’s dissenting opinion in the *Nauru* case remarked, “[T]he protection afforded the absent States by Article 59 in the quite exceptional situation of this case would be notional rather than real.”<sup>136</sup> Judge Shahabuddeen in *East Timor* likewise argued, “International law places the emphasis on substance rather than on form,” and so the Court was obliged to recognize that “Article 59 of the Statute of the Court would not protect Indonesia.”<sup>137</sup>

Commentators have adopted this pragmatic register as well. For Rosenne, “Article 59 may be adequate to protect third-party interests in the abstract. However, litigation is not concerned with protecting the abstract.”<sup>138</sup> Christine Chinkin adopts a somewhat more strident position: “It is unrealistic and excessively formalistic to rely on Article 59 as the sole guarantee of third-party interests. While this provision formally denies that a decision is binding on nonparties, in practice both the actual decision and the reasoning will have wider repercussions.”<sup>139</sup>

We share this understanding of Article 59, and importantly, its intra-statutory implications. Thus to answer the question posed above—why would a third party make the effort to intervene under Article 62 in light of Article 59?—it would so because Article 59 does not, in and of itself, afford a third party the same extent of protection it might achieve through informing the Court of its position and interests. Indeed, we might imagine a future in which the Court (having adopted a more liberal attitude toward intervention) and third parties (having also taken up our invitation to intervene with more regularity) would interpret a third party’s choice to *not* intervene as generating an estoppel-like effect against future challenges

<sup>135</sup> William Malkin, et al., *Report of the Informal Inter-Allied Committee on the Future of the Permanent Court of International Justice*, reproduced in 39 AJIL Supp. 1, 20 (1945).

<sup>136</sup> *Certain Phosphate Lands*, *supra* note 46, at 342 (diss. op., Schwebel, J.).

<sup>137</sup> *East Timor (Port. v. Austl.)*, *supra* note 13, at 90, para. 124 (sep. op., Shahabuddeen, J.).

<sup>138</sup> SHABTAI ROSENNE, *ESSAYS ON INTERNATIONAL LAW AND PRACTICE* 154 (2007).

<sup>139</sup> C.M. Chinkin, *Third-Party Intervention Before the International Court of Justice*, 80 AJIL 495, 502 (1986); see also Tobias Thienel, *Third States and the Jurisdiction of the International Court of Justice: The Monetary Gold Principle*, 57 GER. Y.B. INT’L L. 321, 341 (2014) (“[T]he relativity of *res judicata* is ineffective in protecting the third State from the practical effects of the judgment as a matter of fact. The practical or moral authority of the judgment for the third State would be nearly the same as its legal authority for the actual parties.”).



to its decisions.<sup>140</sup> But there is no need to rely on our imagination to appreciate that the Statute affords third parties an *ex ante* opportunity to shape the scope and specifics of the Court's decisions. Judge Jennings's dissent in *Continental Shelf* confirms this point. Judge Jennings lamented the Court's decision to deny Italy's application to intervene in *Continental Shelf* precisely because he feared that absent Italy's involvement the Court might, "in its anxiety not to seem to prejudice Italian interests . . . avoid being very specific about the zones involved, or were to confine itself to a decision in very general terms about relevant principles, rules and methods."<sup>141</sup>

Proponents of the *Monetary Gold* principle derive a further implication from this understanding of Article 59's limitations—that the principle is a necessary complement to the Statute given Article 59's limitations, indeed, a wholly appropriate juridical recognition of the fact that when the ICJ speaks, the international community listens.

The *Monetary Gold* principle, however, does not necessarily follow from recognizing the limitations of Article 59. Further, this justification of the *Monetary Gold* principle appears to concede that the principle's legitimacy does not derive from its connection to statutory text so much as its capacity to mitigate the Statute's flaws. Confronted with the reality that, as Judge Weeramantry once stated, "the International Court, situated as it is at the apex of the international judicial structure, attracts special recognition to its pronouncements,"<sup>142</sup> the *Monetary Gold* principle purports to offer a procedural solution that shields third parties from those pronouncements' second order effects in a way that the Statute alone does not.

Whether a solution is needed or—even conceding as much for the sake of argument—whether the *Monetary Gold* principle is the right one, is a question requiring a more holistic assessment that incorporates not just the statutory considerations that are our focus in this Part but also the policy considerations we address in Part IV, below. For present purposes, we limit our analysis to the principle's intra-statutory bona fides and do so with reference to *Palestine v. USA* once more.

The prior Section assumed that Israel intervened under Article 62, and as a result the Court reached a judgment better apprised of the implications of its decision for Israel's legal interests. Now suppose that Israel does not intervene (as is more likely) or that it does intervene and the Court reaches the merits of Palestine's application and decides in Palestine's favor. Can we "really believe," as Judge Jennings asked in his dissenting opinion addressing Italy's application to intervene in the *Continental Shelf* case, that a third party such as Israel "will find an adequate remedy in reciting the words of Article 59?"<sup>143</sup>

The answer would seem to turn on how one measures adequacy.<sup>144</sup> If the adequacy of the remedy available to Israel under Article 59 turns on Israel's capacity to constrain decisions by other third parties who are also not formally bound by the Court's decision, then Israel would

<sup>140</sup> Though we appreciate that the discretion afforded to third parties and the Court under Article 62—"may submit a request . . . to be *permitted* to intervene"—does not suggest any sanction might follow from failing to use the procedure.

<sup>141</sup> *Continental Shelf (Libya v. Malta)*, Application by Italy for Permission to Intervene, Judgment, 1984 ICJ Rep. 3, 158 (Mar. 21) (diss. op., Jennings, J.).

<sup>142</sup> *Sovereignty Over Pulau Ligitan and Pulau Sipadan (Indon. v. Malay.)*, Application by the Philippines for Permission to Intervene, Judgment, 2001 ICJ Rep. 575, 641 (Oct. 23) (sep. op., Weeramantry, J.).

<sup>143</sup> *Continental Shelf (Libya v. Malta)*, *supra* note 141, at 158 (diss. op., Jennings, J.).

<sup>144</sup> We set to one side here whether adequacy with respect to Article 59 ought to incorporate the broader statutory scheme. For example, if adequacy should be measured with respect to principles such as due process or the

be wise to bear in mind Judge Jennings's observation that "[e]very State a member of the Court is under a general obligation to respect the judgments of the Court."<sup>145</sup> Guatemala, for example, opened an embassy in Jerusalem two days after the United States inaugurated its own.<sup>146</sup> Were Guatemala to decamp, citing the ICJ's decision, it appears unlikely that Israel would reverse that choice by informing Guatemala that under Article 59 the Court's decision only bound the United States and Palestine.

Yet Article 59 fails this measure of adequacy primarily because it demands that Israel be afforded more than it is entitled to under the Statute. Israel will not be able to prevent other third parties from responding to the Court's decisions as they see fit; but nor, for that matter, can the Court. Proponents of the *Monetary Gold* principle may respond, "Exactly, hence the need for *Monetary Gold*," but this appears to concede that the principle is, at best, *not excluded* by Article 59. The "words of Article 59" are inadequate only with reference to a standard they never sought to achieve. And insofar as the principle compels the Court to refuse its jurisdiction in anticipation of nonparty behavior over which it has no control in the first instance, *inconsistent with* Article 59 appears more fitting than *not excluded* by the provision.

Alternatively, if the adequacy of the remedy available to Israel under Article 59 is measured with respect to the Court's conclusion on the lawfulness of the location of the U.S. embassy, and any predicate determinations on the status of Jerusalem, Israel's remedy under the Statute will be limited but real. "There is," as Chester Brown has emphasized, "no question that the principle of *stare decisis* does not apply in international adjudication."<sup>147</sup> Pursuant to Article 59, Israel will have the right to appear before the Court in a future dispute and argue that the facts and/or law call for a different outcome than that reached in *Palestine v. USA*. The Court must then assess this argument *de novo* in light of the arguments presented and the hierarchy of sources detailed in Article 38(1), which as discussed below, stipulates that the Court's prior decisions play a subsidiary role.

This is not to say that Israel's prospects are good. As the Court put it in *Croatia v. Serbia*, "[t]o the extent that [its prior] decisions contain findings of law, the Court will treat them as it treats all previous decisions: that is to say that, while those decisions are in no way binding on the Court, it will not depart from its settled jurisprudence unless it finds very particular reasons to do so."<sup>148</sup> And although some analysts, including a former president of the Court, have noted that in fields such as maritime delimitation the Court has been prepared to "reconsider its jurisprudence," this has not led to reversals of discrete determinations so much as gradual shifts from prior views after taking into account what Judge Guillaume describes

right to be heard, then Israel's opportunity (even if not taken up) to intervene under Article 62 would enhance the adequacy of the remedies available to it. See also *infra* at 73–74.

<sup>145</sup> *Continental Shelf (Libya v. Malta)*, *supra* note 141, at 158 (diss. op., Jennings, J.).

<sup>146</sup> Ruth Eglash, *As Criticism of Israel Mounts, Guatemala Opens Its Embassy in Jerusalem*, WASH. POST (May 16, 2018).

<sup>147</sup> Brown, *supra* note 134, at 1437.

<sup>148</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Croatia v. Serb.*), Preliminary Objections, Judgment, 2008 ICJ Rep. 412, 428 (Nov. 18); *but see*, setting a somewhat lower standard, Land and Maritime Boundary Between Cameroon and Nigeria (*Cameroon v. Nigeria: Eq. Guinea Intervening*), Preliminary Objections, Judgment, 1998 ICJ Rep. 275, 292 (June 11) ("There can be no question of holding Nigeria to decisions reached by the Court in previous cases. The real question is whether, in this case, there is cause not to follow the reasoning and conclusions of earlier cases.")

as “changes in the law and international society.”<sup>149</sup> What legal or societal changes might lead the Court to adopt a different approach to Israel’s sovereignty over Jerusalem is well beyond the scope of this Article. But we may ask again whether the preceding demonstrates Article 59’s inadequacy or rather that *Monetary Gold*’s proponents would have the Court do more. The latter appears more likely, and thus the burden lies on proponents of the *Monetary Gold* principle to explain why a third state such as Israel *should* be protected from not just “the binding force of the decision” of the Court but also its forecasted second order effects. There is no statutory support for such an entitlement.

In sum, the question of adequacy posed in Judge Jennings’s dissenting opinion appears to be rhetorical, or if interrogative, stems less from curiosity about than exasperation with his colleagues’ views. Applied to our interpretation of Article 59, it implies that we privilege form over substance. The framing of the question forecloses a statutory counterargument. But that is precisely our point. The “substance” that the *Monetary Gold* principle mandates the Court privilege in assessing the adequacy of Article 59 derives from policy-based considerations external to the Statute. We take their measure—using proponents’ preferred metrics—in Part IV, below.

#### D. Article 38

The ICJ Statute does not include recitals or a *chapeau* expounding the Court’s purpose. The Court’s mission statement—to the extent that one may be found—instead appears in the opening passage of Article 38(1): “The Court, whose function is to decide in accordance with international law such disputes as are submitted to it . . . .” Article 38(1) goes on to list the sources of law that the Court “shall apply.” It divides the sources into two groups. The first, detailed in Article 38(1)(a)–(c), comprises “international conventions,” “international custom,” and “general principles of law.” Article 38(1)(d) then describes the second group as follows: “subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.”

The threshold question posed by Article 38(1) is therefore one of categorization. Noting the *Monetary Gold* principle’s appearance in the decisions of the ICJ and other international fora over several decades, some analysts have investigated whether the principle may have become a “general principle of law” within the meaning of Article 38(1)(c).<sup>150</sup> That classification is difficult to sustain, first, given the rarity with which the ICJ has made reference to general principles of law. Writing in 2012, Alain Pellet identified four instances in which the Court had cited the provision, noting that “each time [recourse to the general principle] has been ruled out for one reason or another.”<sup>151</sup> And although Pellet also points out that the Court has at times alluded to general principles without expressly citing Article 38(1)(c),

<sup>149</sup> Gilbert Guillaume, *The Use of Precedent by International Judges and Arbitrators*, 2 J. INT’L DISP. SETT. 5, 12 (2011).

<sup>150</sup> See, e.g., Ori Pomson, *Does the Monetary Gold Principle Apply to International Courts and Tribunals Generally?*, 10 J. INT’L DISP. SETT. 88, 111–13 (2019).

<sup>151</sup> Alain Pellet, *Article 38*, in COMMENTARY, *supra* note 85, at 833.

examples such as *res judicata* and good faith suggest that the *Monetary Gold* principle falls short of the requisite pedigree and prevalence.<sup>152</sup>

The *Monetary Gold* principle's claim to recognition under Article 38(1)(a) or 38(1)(b)—international conventions and international custom—appears even more suspect. The ICJ's discussions of *Monetary Gold* have never attempted to identify a treaty or custom-based source for the principle. We will take the Court at its word. This leaves the “judicial decisions” referenced in Article 38(1)(d). In “decid[ing] in accordance with international law,” the Court is therefore called to apply *Monetary Gold* as a “subsidiary means for the determin[ing] of rules of law.”

To better understand the implications of that conclusion, it is useful to turn briefly to the drafting history of Article 38(1). The framers of the PCIJ and ICJ Statutes understood the normative pull that the Court's judgments would have on the Court itself and other fora. They confronted, and the text of Article 38(1) reflects, a tension. On the one hand was the ambition expressed in the opening phrase of Article 38(1) that the Court play a preeminent role in the development of international law and international dispute resolution—the Court's “function” is “to decide” and do so “in accordance with international law.” Article 38(1)'s opening phrase is a product of a Chilean intervention during the drafting of the ICJ Statute. The Chilean delegation explained that its text: “would reaffirm the provision of Article 36 . . . which gives the Court jurisdiction to pass upon every dispute of a juridical nature concerning (b) ‘any question of international law[],’” as well as “point[] out to the competent organizations and the Governments the obligation of carrying out as soon as possible the reconstruction and codification of international law as one of the most effective means of ensuring peace and facilitating good relations among states.”<sup>153</sup>

On the other hand, the drafters were wary of the Court becoming an international legislator by another name. Much of the debate among the Advisory Committee of Jurists for the PCIJ addressed how the Court could respond to lacunae in the law without taking on a law-making function. The president of the Advisory Committee, Baron Descamps, submitted draft text for what would become Article 38 that instructed the Court to apply four sources of law in the order listed. Fourth on the list was “international jurisprudence as a means for the application and development of law.” Responding to Committee members' concerns about the scope of this text, the Rapporteur cites Descamps emphasizing the “auxiliary character” of jurisprudence. Descamps elaborated, “The judge's right to make use of the elements mentioned in this paragraph is not a dangerous one as it would only be for elucidating and supplementary purposes.”<sup>154</sup> Although we grant that “elucidation” in discrete cases may gradually shape the content of the underlying law, we understand the *travaux* to underscore that the judicial decisions referenced in Article 38(1)(d) serve a more functional than substantive role—“subsidiary *means* for the determination of rules of law,” rather than rules in their own right.

<sup>152</sup> *Id.* at 839.

<sup>153</sup> *Procès-Verbaux*, *supra* note 84, at 493; UNIO XIII at 493.

<sup>154</sup> *Procès-Verbaux*, *supra* note 84, at 337; *see also* MOHAMED SHAHABUDDIN, PRECEDENT IN THE WORLD COURT 77 (1996) (The argument is strong . . . that the reference to ‘the determination of rules of law’ visualised a decision which would merely elucidate the existing law, and not bring new law into being.”).

\* \* \* \*

The *Monetary Gold* principle is subsidiary to the ICJ Statute. The ensuing question is thus whether—or more charitably, how well—the principle aids in determining the rules of law set out in the Statute. We have laid out our answer to that question over the course of Part III.

In Section A, we argued that whereas Article 36(1) calls for the Court to focus on the consent of the “parties [that] refer [the case] to it,” the *Monetary Gold* principle instructs the Court to privilege the consent of absent third parties. Here, the principle appears to *depart from* the relevant rule of law in the Statute. In Section B, we noted that Article 62 contains a mechanism for apprising the Court of the legal interests of third parties, and hence also for shaping the scope and substance of the Court’s decisions without preventing it from exercising its jurisdiction. The principle here appears to *undermine* the relevant rule of law in the Statute. Section C considered Article 59 and rejected the claim that the anticipated second order effects of the Court’s decision necessitated the *Monetary Gold* principle. With respect to Article 59, the *Monetary Gold* principle appears to *import factors external to* the relevant rule of law in the Statute. We submit that the *Monetary Gold* principle obscures rather than illuminates the relevant rules of law. Under Article 38(1), therefore, it is entitled to correspondingly little deference.

In conclusion, even if our arguments with respect to a single provision fail to persuade, taken together, the *Monetary Gold* principle’s inconsistency with the Statute’s jurisdictional architecture appears plain. We are, however, cognizant that fidelity to the Statute is not the sole criterion for assessing the merits of the principle. Even for those whose interpretive commitments privilege statutory text, our argument would be incomplete without also addressing the more utilitarian or functionalist virtues cited by the *Monetary Gold* principle’s proponents. Part IV takes up this task by considering the policy justifications for the *Monetary Gold* principle, and in doing so, the implications of our call for the ICJ to dispense with it.

#### IV. POLICY IMPLICATIONS

This Part considers the policy implications of our thesis with reference to three central values advanced by the *Monetary Gold* principle’s proponents: compliance, due process, and legitimacy. Our independent variables will include the parties before the Court; third parties; and from a systemic perspective, the Court itself and the international community for whom it acts.<sup>155</sup> Our dependent variable is the necessarily subjective assessment of what on the whole yields a “better” outcome.

That assessment must also include an appropriate allocation of the burden of persuasion. We take it as uncontroversial that there should be a strong presumption in favor of the Court exercising its jurisdiction where the Statute’s requirements have been met. Part III demonstrated the *Monetary Gold* principle’s inconsistency with the Statute’s jurisdictional architecture. But even a weaker version of our claim—for example, that the principle is merely *extra-statutory*—still implies that it is incumbent on the proponents of the principle to demonstrate

<sup>155</sup> Cf. *Republic of the Philippines v. Pimentel*, 553 U.S. 851, 863 (2008) (addressing the application of the indispensable party principle to an absent sovereign, the U.S. Supreme Court noted that this principle is “consistent with the fact that the determination of who may, or must, be parties to a suit has consequences for the persons and entities affected by the judgment; for the judicial system and its interest in the integrity of its processes and the respect accorded to its decrees; and for society and its concern for the fair and prompt resolution of disputes”).

why the absence of a third party should overcome the presumption in favor of exercising jurisdiction where the Statute's requirements have been satisfied. The ensuing Sections contend that they will not be able to do so.

### A. Compliance

One of the strongest policy arguments for the *Monetary Gold* principle follows from the hypothesis that consent engenders compliance. Although the proposition has implications throughout international law, its importance in the context of dispute resolution is particularly clear. Our call for the ICJ to dispense with the *Monetary Gold* principle provokes the opposite inference: that proceeding notwithstanding the lack of consent from a third party will undermine compliance. Proponents of the *Monetary Gold* principle may argue that reaching a judgment in a dispute such as *Palestine v. USA*—a judgment that we will assume speaks directly to the status of Jerusalem, but that is unlikely to lead Israel to renounce its sovereignty over the city—undermines compliance because the Court will have spoken but the facts on the ground may remain the same.

The quantitative turn in the social sciences has brought with it a bevy of scholarship assessing the extent to which the ICJ's judgments engender real-world effects.<sup>156</sup> While informed by this literature, we do not propose to supplement it in this Article. Relying on a more qualitative approach, we first note the tension between the compliance hypothesis and the arguments raised by the *Monetary Gold* principle's proponents regarding Article 59's inability to adequately protect third-party interests.

Recall that the principle's proponents contend that a procedural tool such as *Monetary Gold* is necessary due to the failure of Article 59 to shield third parties from the second order ramifications of the Court's judgments—for example, decisions made by other nonparties to comport with the Court's judgment. But what one might call the resulting “net compliance” tally strikes us far more indeterminate than the principle's proponents appreciate.

Consider a scenario in which, on the one hand, Israel responds to an adverse decision in *Palestine v. USA* by refusing to renounce its claim to Jerusalem, and on the other, all but a few states respond to the same decision by declaring that they will not move their embassies to Jerusalem because the ICJ has settled the matter. Does Israel's (noncompliant) refusal outweigh the (compliant) actions of the rest of the international community? Is net compliance negative, positive, or unchanged relative to the status quo ante? There would appear to be valid arguments on all sides; and of course, the answer will differ depending on how one constructs the calculation. If the relevant cohort includes only Israel, Palestine, and the United States, then proceeding absent Israel hazards at least a 33 percent noncompliance rate.<sup>157</sup> If we add the nearly two hundred member states of the United Nations, and even if we weight them by some measure that reflects their importance to the matter at hand, the net compliance figure might be rather different.

<sup>156</sup> E.g., CONSTANZE SCHULTE, COMPLIANCE WITH DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE (2004); Aloysius P. Llamzon, *Jurisdiction and Compliance in Recent Decisions of the International Court of Justice*, 18 EUR. J. INT'L L. 815 (2007); Colter Paulson, *Compliance with Final Judgments of the International Court of Justice Since 1987*, 98 AJIL 434 (2004).

<sup>157</sup> The United States might also refuse to comply with the decision due to Israel's absence from the proceedings.



Second, we note that the compliance hypothesis relies on an implicit assumption about the outcome of cases in which the *Monetary Gold* principle is at issue that may not hold. Namely, the principle's proponents assume that the absent third party is absent because it fears a *negative* outcome. Yet the *Monetary Gold* principle is not only triggered when the "very subject-matter of the decision" would harm the legal interests of an absent third party. Suppose, for instance, that the Court in *East Timor* had proceeded to the merits, and the subject-matter of the decision was that Indonesia was blameless. Would it then be appropriate to characterize Indonesia's ensuing behavior as promoting compliance?<sup>158</sup>

Our aim is not to debate the likelihood of these scenarios. Just the opposite: the preceding indicates that what is offered as one of the chief virtues of the *Monetary Gold* principle is premised on a predictive exercise whose methods appear undertheorized and expectations correspondingly suspect.<sup>159</sup> The strong presumption that the Court should exercise its jurisdiction when the Statute's requirements have been met seems intact.

### B. Due Process

Proponents of the *Monetary Gold* principle may also contend that when the Court reaches a judgment that directly affects the interests of a third party it deprives that party of its right to due process, or what is often discussed in this context as the rule *audi alteram partem*.<sup>160</sup> Some members of the Court have considered the *Monetary Gold* principle in just these terms.<sup>161</sup>

We submit that concerns for due process instead support dispensing with the *Monetary Gold* principle. Putting aside whether the rule *audi alteram partem* applies to entities beyond the parties to the case, we first note that under *Monetary Gold* the due process rights of one party (the absent state) trump those of two (the disputants).<sup>162</sup> And if proponents object to this accounting on the grounds that the due process claims of the absent third party and the disputants are different, this raises issues of incommensurability. The due process impediment that is purportedly suffered by the absent third party is tied to the merits of the outcome; *viz.*, even if it has chosen not to intervene under Article 62, it has *arguendo* been denied the right to submit its views on a potentially adverse result. By contrast, the due process impediment that is suffered by the disputants is linked to the very resolving of the dispute—where the *Monetary Gold* principle is applied, they are deprived of due process because their chosen method of dispute resolution is no longer available. The upshot of these differing due process interests is not quite incommensurability of the "comparing apples and oranges" form. But it is enough to raise questions not just over whether *Monetary Gold's* proponents have taken

<sup>158</sup> See generally Beth A. Simmons, *Compliance with International Agreements*, 1 ANN. REV. POL. SCI. 75 (1998).

<sup>159</sup> See *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, *supra* note 42, at 425, para. 75 ("[I]t is only when the general lines of the judgment to be given become clear that the States 'affected' could be identified . . . obviously the question of what States may be 'affected' by the decision on the merits is not in itself a jurisdictional problem.").

<sup>160</sup> See Rosalyn Higgins, *Policy Considerations and the International Judicial Process*, 17 INT'L & COMP. L. Q. 58, 75 (1968).

<sup>161</sup> *E.g.*, *Certain Phosphate Lands*, *supra* note 46, at 293 (sep. op., Shahabuddeen, J.) (citing the "cardinal principle of judicial organization which forbids a court from adjudicating in violation of the *audi alteram partem* rule").

<sup>162</sup> See, e.g., Pomson, *supra* note 150, at 124–25 ("[T]he principle *audi alteram partem* does not seem to provide a strong enough basis for the *Monetary Gold* principle, considering the application of *audi alteram partem* in international law appears to be confined to the relationship of the actual parties to a case vis-à-vis the court or tribunal.").

adequate account of both sides of the scale, but also over whether they have set out a cogent framework for weighing the relevant interests in the first place.

In addition, a party anticipating that its legal interests may be affected by a given dispute is already afforded an opportunity to present its views through intervention under Article 62. Any party whose interests are so central to the dispute as to potentially implicate the *Monetary Gold* principle ought to easily satisfy that Article's requirements for permission to intervene to be granted. And a third party that chooses not to utilize this mechanism cannot at the same time complain that it has been deprived of the right to articulate its interest; or, it is at least difficult to find that deprivation so concerning that it should outweigh the presumption in favor of the Court exercising its jurisdiction.<sup>163</sup> In the context of *Monetary Gold* disputes, such an argument would threaten to transform *audi alteram partem* from a shield into a sword.

### C. Legitimacy

The central premise of the legitimacy-based argument on behalf of the *Monetary Gold* principle is straightforward: consent to the exercise of power confers legitimacy; its absence entails illegitimacy. Per this reasoning, the Court should discount whatever (presumptively small) losses in legitimacy it suffers by dispensing with disputes otherwise validly before it in order to avoid the (presumptively larger) harms to legitimacy that will result from decisions directly affecting nonconsenting third parties.

Many of the observations above apply to legitimacy-based concerns with equal weight. For example, it is not clear that the Court's legitimacy will suffer more by adjudicating a dispute that directly affects a third party's interests than if it dispenses with a dispute it would otherwise decide. To cite a familiar example, the hackles of illegitimacy are likely to be just as loud if the Court refuses to address Palestine's application as if it proceeds to the merits.<sup>164</sup> Nonetheless, our larger concern here is temporal: following the counsel of *Monetary Gold*'s proponents may preserve the Court's legitimacy in the short run in exchange for a longer-term decline.

We have noted the tensions between the bilateral presuppositions of the Statute and the increasingly multilateral nature of international affairs and international disputes. Shabtai Rosenne reflected on the tension as well. Writing nearly a decade prior to Judge Tomka and Judge Cançado Trindade's opinions in the *Marshall Islands* case, Rosenne observed:

The conceptual underpinnings of the Statute is that normally there are only two parties to a given legal dispute . . . . That approach—carefully articulated in Article 59—was certainly appropriate in nineteenth century arbitration—and indeed in all arbitration. But

<sup>163</sup> See also Katherine Florey, *Making Sovereigns Indispensable: Pimentel and the Evolution of Rule 19*, 58 UCLA L. REV. 667, 680 (2011) (“[In U.S.] cases in which the absent party has the opportunity to intervene but has chosen not to, courts frequently discount the factor of prejudice to the absent party, reasoning that, if the possibility of prejudice was substantial, that party could have chosen to participate in the litigation.”).

<sup>164</sup> Compare Alina Miron, *Palestine's Application to the ICJ, Neither Groundless nor Hopeless. A Reply to Marko Milanović*, EUR. J. OF INT'L L. BLOG (Oct. 8, 2018), at <https://www.ejiltalk.org/palestines-application-the-icj-neither-groundless-nor-hopeless-a-reply-to-marko-milanovic> (“[T]he *Monetary Gold* principle should not be used as a pretext to evade highly debated issues, especially if the Court's jurisdiction is established. It is not a Joker to avoid deciding when the decision is difficult and politically significant.”) with Milanović, *supra* note 9 (“The case should thus be seen simply as one more example of Palestinian strategic litigation which pursues all possible legal avenues to exert pressure on Israel . . .”).

the unforeseen expansion in the employment of the multilateral treaty on the one hand, the ever increasing complexity and multilateralization of international relations in general, must give rise to doubts whether a dispute settlement mechanism based on the single assumption that disputes exist only between two parties is adequate or even appropriate for modern needs.<sup>165</sup>

*Monetary Gold's* proponents offer the principle as a functional necessity given this state of affairs. Preserving the Court's legitimacy, they contend, requires the Court to stand down when addressing the merits of a dispute would touch directly upon the interests of an absent third state. By this logic, if the Statute did not already contain a tool giving the Court this power, the Court was right to forge it.

We submit that those who cite an existential discrepancy between the Statute and the multilateralization of international affairs in order to justify the *Monetary Gold* principle misjudge the dual mission of the Court, how it achieves it, and thus the appropriate means of protecting its legitimacy. The Court's mission, per Article 38(1) of the Statute, is both "to decide" and to advance the development of international law through its decisions.<sup>166</sup> It does so through what Judge Buergenthal has referred to as "normative accretion," such that what began as a "subsidiary means" becomes sufficiently infused into the consciences and behaviors of key actors that it is fixed in international conventions, customs, and general principles of international law. This accretion, however, presupposes judicial determinations on the merits, and in an increasing number of disputes, the *Monetary Gold* principle may require that the Court do the opposite. The bilateral presuppositions of the Statute—properly understood and applied—are therefore not an ill but rather the prescription for a progressively more multilateral sphere.<sup>167</sup>

In addition, the legitimacy defense of the *Monetary Gold* principle also appears to present a false choice: that the Court must either refuse to address such disputes or undermine its integrity. We understand the exchange differently, but will focus here on a temporal variable that appears to be missing from the discussion—namely, that the *Monetary Gold* principle threatens to trade inoffensiveness in the short run for a declining relevance in the future. To be clear, the principle does not pose an imminent threat to the Court's jurisprudence or its standing as the preeminent forum for inter-state dispute resolution. We would not be a Cassandra, prophesying that the "very-subject matter" test alone portends institutional desuetude. But nor ought we be a Pollyanna, as the number of cases touching on multilateral subjects grows and states seek out a forum able and willing to resolve them. The Court's legitimacy, from this perspective, is predicated not only on conformity to a set of rules and principles, but also whether they are applied in a manner consistent with the Court's mission and the needs of its stakeholders. Incorporating the latter into the assessment of the Court's legitimacy indicates that the *Monetary Gold* principle's proponents have again failed to carry their burden.

We concluded Part III with a holistic assessment of our claims. We now present the same for this Part's assessment of policy-based considerations. With respect to compliance, we have maintained that the contention that the *Monetary Gold* principle enhances compliance with

<sup>165</sup> ROSENNE, *supra* note 138, at 158.

<sup>166</sup> See also *id.* at 30–31.

<sup>167</sup> See *id.* at nn. 14–15 (documenting the growing number of instances in which the *Monetary Gold* principle has been cited before and by the ICJ and other fora for interstate dispute resolution).

the Court's decisions rests on oversimplifications and unproven assumptions about the relevant sphere of actors and their behaviors. The due process considerations discussed in Section B likewise present an at best incomplete picture of the relevant interests in play; the weights they should be assigned; and indeed, whether those interests can be cogently weighed against each other in the first place. Finally, we have argued that legitimacy-based arguments for the principle are unduly focused on the potential reputational damage the Court may suffer in discrete cases, relative to the longer-term harms the Court's legitimacy may suffer from refusing to address a growing portion of interstate disputes. In sum, the policy-based arguments for the *Monetary Gold* principle are dubious in their own right, and so fall well short of overcoming the presumption that the Court should exercise its jurisdiction where the Statute's requirements have been met.

## V. CONCLUSION

What are the odds that the Court will agree and act upon this Article's claims? Our thesis is likely to confront the same hurdle articulated by the Court in *Croatia v. Serbia*: “[W]hile [prior] decisions are in no way binding on the Court, it will not depart from its settled jurisprudence unless it finds very particular reasons to do so.”<sup>168</sup>

This Article has developed the “very particular reasons” that the Court should dispense with the *Monetary Gold* principle. In Part II, we reviewed the origins and evolution of the principle, noting uncertainties in its articulation and application that may lead the Court to question the extent to which its jurisprudence addressing the implications of absent third parties has truly “settled.” Part III considered the *Monetary Gold* principle's consistency with the ICJ Statute. Focusing on Articles 36, 62, 59, and 38, we indicated where and how the *Monetary Gold* principle is in tension with the Statute's jurisdictional architecture. Part IV then explored the implications of dispensing with the principle with reference to three principal virtues cited by its proponents—that the principle enhances compliance with the Court's decisions; promotes due process for third parties; and bolsters, or at least protects against, the diminution of the ICJ's legitimacy. At every turn, we argued that the case for the *Monetary Gold* principle fell short.

We have spilled a great deal of ink on *Monetary Gold Removed from Rome* but arguably left the most important question unanswered: what happened to the gold? After the ICJ concluded that it could not reach the merits of Italy's claim, the gold at issue returned to the Tripartite Commission.<sup>169</sup> Although controlled from the Commission's base in Brussels, the gold likely sat in the vaults of the Federal Reserve Bank of New York and the Bank of England for the ensuing four decades.<sup>170</sup> Pursuant to a 1992 Memorandum of Understanding, the UK provided Albania with 1674 kilograms of gold that it had withheld in exchange for Albania's payment of USD \$2 million stemming from the *Corfu Channel* judgment.<sup>171</sup> It was another four years before the *International Herald Tribune* could report

<sup>168</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serb.)*, *supra* note 148, at 428.

<sup>169</sup> See DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 723 (1980).

<sup>170</sup> Final Report, Tripartite Commission for the Restitution of *Monetary Gold*, Brussels (Sept. 13, 1998).

<sup>171</sup> Geoffrey Marston, *United Kingdom Materials on International Law*, 63 BRIT. Y.B. INT'L L. 615, 781–82 (1992).

that Emrys T. Davies, secretary general of the Tripartite Commission, would be “hand[ing] a document this week [to Albania] authorizing them to take delivery of 1.5 tons of Nazi gold by the Bank of England.”<sup>172</sup> The “final settlement was delayed because Italy and Albania presented conflicting claims to some of the same gold.”<sup>173</sup>

Delayed indeed. One lesson we might draw from this post-script would echo Gladstone’s aphorism that “justice delayed is justice denied.”<sup>174</sup> Nevertheless, from a more optimistic perspective, even if it took the better part of a half-century, the monetary gold was eventually returned to Rome. It is not too late for the Court to dispense with the *Monetary Gold* principle as well.

<sup>172</sup> Barry James, *A Final Settlement for 7 Tons of Nazi Gold*, INT’L HERALD TRIBUNE (Oct. 28, 1996).

<sup>173</sup> *Id.*

<sup>174</sup> See Fred Shapiro, “You Can Quote Them,” YALE ALUMNI MAG. (2010) (discussing the origin of the phrase); see also WILLIAM PENN, SOME FRUITS OF SOLITUDE 78 (1682) (“Our Law says well, to delay Justice is Injustice.”).