

## SYMPOSIUM ON ZACHARY MOLLENGARDEN & NOAM ZAMIR “THE *MONETARY GOLD* PRINCIPLE: BACK TO BASICS”

### RULES ARE RULES: RECONCEIVING *MONETARY GOLD* AS A RULE OF PROCEDURE

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The Case of the *Monetary Gold Removed from Rome in 1943* is familiar to all international lawyers. Like a catechism, we are taught that the ICJ will not proceed with a case where the legal interests of a State not before the Court “would not only be affected by a decision, but would form the very subject-matter of the decision.”<sup>1</sup> Mollengarden and Zamir’s proposal that the Court should dispense with the *Monetary Gold* principle feels almost heretical.<sup>2</sup> The authors contend that the ICJ Statute sets out a framework for balancing the interests of third parties through the use of the intervention procedure, and that *Monetary Gold* “disrupts that balance.”<sup>3</sup> *Monetary Gold* is, they submit, to be treated as only a judicial decision,<sup>4</sup> entitled under Article 36(1)(d) of the Statute to little deference as a source of legal principle.<sup>5</sup> I suggest taking an altogether different approach. The best way to understand the place of the *Monetary Gold* principle is in the context of the ICJ’s rule making powers pursuant to Article 30(1) of the Court’s Statute. These rule making powers are not limited to the promulgation of formal Rules of Court but extend to the determination of appropriate procedures during the hearing of a case. These procedural rules (small r), articulated in the context of particular cases, may in time evolve into formal Rules of Court through an iterative process. *Monetary Gold* is an instance of the Court defining a small r procedural rule in a manner that is consistent with the Court’s Statute.

#### *Article 30(1) and the Court’s Rule Making Power*

The Court’s power to make rules of procedure is articulated in Article 30(1) of the Statute. It states: “[t]he Court shall frame rules for carrying out its functions. In particular, it shall lay down rules of procedure.”<sup>6</sup> The Statute of the Permanent Court of International Justice (PCIJ) provided likewise.<sup>7</sup> From the outset, the drafters of both the PCIJ and ICJ Statutes adopted the view that matters of procedure “should only be dealt with in the Statute of the

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<sup>1</sup> [Monetary Gold Removed from Rome in 1943](#) (It. v. Fr., U.K. & U.S.), 1954, ICJ REP 19, para. 32 (June 15).

<sup>2</sup> Zachary Mollengarden & Noam Zamir, [The Monetary Gold Principle: Back to Basics](#), 115 AJIL 41 (2021).

<sup>3</sup> *Id.* at 56.

<sup>4</sup> [Statute of the International Court of Justice](#) art. 38(1)(d).

<sup>5</sup> [Mollengarden & Zamir](#), *supra* note at 2, 76.

<sup>6</sup> [Statute of the International Court of Justice](#) art. 30.

<sup>7</sup> “The Court shall frame rules for regulating its procedure. In particular it shall lay down rules for summary procedure.” [Statute of the Permanent Court of International Justice](#), art. 30, 1920, 6 LNTS 390.

Court where they involve fundamental points of principle which it is desirable to settle once and for all.”<sup>8</sup> To that end, the Statute grants the Court “wide-ranging autonomy in regulating the exercise of its functions,”<sup>9</sup> including the power to fill gaps or lacunae in the Statute. The power is, however, confined by the parameters of the Statute itself: the Court cannot in applying Article 30(1) make a rule that is directly in conflict with the Statute,<sup>10</sup> a point to which we will return.

Article 30(1) is the statutory authority for the Rules of Court, which have seen several iterations over the life of the PCIJ and ICJ combined.<sup>11</sup> The PCIJ adopted its first Rules of Court in a preliminary session, prior to its first sitting. As the Court’s experience grew and as it encountered unforeseen problems in practice, so the Rules adapted and evolved. Indeed, this was a deliberate design feature.<sup>12</sup> The PCIJ Rules were silent in respect of a number of important matters,<sup>13</sup> with the intention that procedural decisions that were made by the Court in its case law would eventually be incorporated into the Rules.<sup>14</sup> The ICJ took the same approach when it adopted its first Rules of Court in 1946.<sup>15</sup>

As such, rules promulgated in case law may in time become Rules. This evolution is best illustrated by the history of the preliminary objection procedure. The first iteration of the PCIJ Rules contained no procedure for separating preliminary objections from the merits. But in *Mavrommatis*,<sup>16</sup> the PCIJ was faced with a contention by Britain that it lacked jurisdiction to proceed with the case. The PCIJ observed that:

Neither the Statute nor the Rules of Court contain any rule regarding the procedure to be followed in the event of an objection being taken *in limine litis* to the Court’s jurisdiction. The Court therefore is at liberty to adopt the principle which it considers best calculated to ensure the administration of justice, most suited to procedure before an international tribunal and most in conformity with the fundamental principles of international law.<sup>17</sup>

When the Court revised its Rules in 1926, Article 38 was amended to set out the substantive requirements of such an objection.<sup>18</sup> This was further amended in 1936, with the introduction of an entirely separate procedure for preliminary objections in Article 62.<sup>19</sup>

<sup>8</sup> *Report of the Informal Inter-Allied Committee on the Future of the Permanent Court of International Justice*, 39(1) AJIL: Official Documents Supplement 1, 23–24 (1945).

<sup>9</sup> SERENA FORLATI, *THE INTERNATIONAL COURT OF JUSTICE – AN ARBITRAL TRIBUNAL OR A JUDICIAL BODY?* 101 (2014).

<sup>10</sup> H.W.A. Thirlway, *Article 30*, in *THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY* 518 (Andreas Zimmermann et al. eds., 2019); FORLATI, *supra* note 9, at 23.

<sup>11</sup> The PCIJ *Rules of Court* were first adopted on March 24, 1922 and subsequently revised in 1926, 1931, and 1936. The ICJ’s 1946 *Rules of Court* were a reproduction of the 1936 Rules save for technical changes to refer to the new institution. These Rules were partially revised in 1972 followed by a comprehensive revision in 1978. Since then, individual Rules have been the subject of amendment in 2001, 2005, and 2019.

<sup>12</sup> Sergey M. Punzhin, *Procedural Normative System of the International Court of Justice*, 30 LEIDEN J. INT’L L. 661, 672 (2017).

<sup>13</sup> ANTONIO SÁNCHEZ DE BUSTAMANTE Y SIRVÉN, *THE WORLD COURT* 235 (1925).

<sup>14</sup> SHABTAI ROSENNE, *INTERVENTION IN THE INTERNATIONAL COURT OF JUSTICE* 54 (1993); Punzhin, *supra* note 12, at 661; Paolo Palchetti, *Making and Enforcing Procedural Law at the International Court of Justice*, 61 QUESTIONS INT’L L. 5, 7 (2019).

<sup>15</sup> Shabtai Rosenne, *The 1972 Revision of the Rules of the International Court of Justice*, 8(2) ISR. L. REV. 197, 197 (1973).

<sup>16</sup> *The Mavrommatis Palestine Concessions* (Greece v. U.K.), Jurisdiction, 1924 PCIJ (ser. A) No. 2 (Aug. 30). A similar issue arose in *Certain German Interests in Polish Upper Silesia* (Ger. v. Pol.), Preliminary Objections, 1925 PCIJ (ser. A) No. 6 (Aug. 25).

<sup>17</sup> *The Mavrommatis Palestine Concessions* (Greece v. U.K.), Jurisdiction, 1924 PCIJ (ser. A) No. 2, 16 (Aug. 30).

<sup>18</sup> *Statute and Rules of Court* art. 38 (adopted Mar. 24, 1922), 1922 PCIJ (ser. D) No. 1.

<sup>19</sup> *Elaboration of the Rules of Court* art. 62 (adopted Mar. 24, 1922), 1922 PCIJ (ser. D) No. 2.

The Court's power under Article 30(1) is not limited to the promulgation of formal Rules of Court. On the contrary, Article 30(1) empowers the Court to address matters of procedure *tout court*.<sup>20</sup> For example, in recent years, it has provided the legal basis for the Court to adopt Practice Directions.<sup>21</sup> Crucially, the power also extends to answering unforeseen questions of procedure that may arise during the conduct of a case,<sup>22</sup> and even where this requires developing procedure in a "wholly novel way."<sup>23</sup>

### *Monetary Gold as a Rule of Procedure*

While the Court made no explicit reference to its Article 30(1) powers in *Monetary Gold*, the rule it promulgated functions as a rule of procedure and should be conceived as such.<sup>24</sup> It is not a general principle of law. Mollengarden and Zamir suggest this is because it "falls short of the requisite pedigree and prevalence."<sup>25</sup> I would rather argue that it is because principles and rules are separate concepts.<sup>26</sup> Principles "express general truth,"<sup>27</sup> while a rule is the practical and binding articulation of a broader principle or principles. A rule of procedure represents a choice, by a Court, to control how proceedings develop,<sup>28</sup> made either in advance in the formal Rules, or spontaneously during a case. As expressed by S.I. Strong, rules "reflect but one way to implement a particular principle, and the underlying concept may be given effect through a variety of different means."<sup>29</sup>

The *Monetary Gold* rule gives effect to the principle that "no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement."<sup>30</sup> Additionally, it concretely applies the Court's duty to "uphold the sound administration of justice,"<sup>31</sup> insofar as application of the rule contributes broadly to the prevention of multiplicity of proceedings, and ensures that any judgment the Court renders is capable of practical effect.<sup>32</sup> Importantly, the rule applied by the Court in *Monetary Gold* was not a foregone conclusion. Although on the facts it is difficult to see what other decision the Court could have reached, the Court was not compelled by substantive law to proceed as it did. As Mollengarden and Zamir point out, the Court was ostensibly vested with jurisdiction in respect of the parties before it.<sup>33</sup> But the

<sup>20</sup> Lauterpacht has argued that Article 30(1) is also the source of the Court's "inherent powers"; see Elihu Lauterpacht, *"Partial" Judgments and the Jurisdiction of the International Court of Justice*, in FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE – ESSAYS IN HONOUR OF SIR ROBERT JENNINGS 465, 477 (Vaughan Lowe & Malgosia Fitzmaurice eds., 1996). *Contra* Chester Brown, *The Inherent Powers of International Courts and Tribunals*, 76(1) BRIT. Y.B. INT'L L. 195 (2005). A discussion of the Court's inherent powers is beyond the scope of this piece, save for noting that Brown does not consider *Monetary Gold* to have been an exercise of the Court's inherent powers (*Id.* at 237).

<sup>21</sup> FORLATI, *supra* note 9, at 26; Palchetti, *supra* note 14, at 11.

<sup>22</sup> *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Merits, 1986 ICJ REP. 14, para. 38 (June 27).

<sup>23</sup> Lauterpacht, *supra* note 20, at 476.

<sup>24</sup> The Court's decision in *Monetary Gold* has been referred to as a "rule" in other fora, see also *M/V "Norstar"* (Pan. v. It.), Case No. 25, Preliminary Objections, Judgment of Nov. 4, 2016, ITLOS Rep. 172.

<sup>25</sup> Mollengarden & Zamir, *supra* note 2, at 41–77, 70.

<sup>26</sup> Michael Bayles, *Principles for Legal Procedure*, 5 LAW & PHIL. 33, 35 (1986); S.I. Strong, *General Principles of Procedural Law and Procedural Jus Cogens*, 122 PA. ST. L. REV. 347, 370 (2018).

<sup>27</sup> BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 370, 376 (1987).

<sup>28</sup> André Nollkaemper, *International Adjudication of Global Public Goods: The Intersection of Substance and Procedure*, 23(3) EJIL 769, 774 (2012).

<sup>29</sup> Strong, *supra* note 26, at 387–88.

<sup>30</sup> *Status of Eastern Carelia*, Advisory Opinion, 1923 PCIJ (ser. B) No. 5, at 27 (July 23).

<sup>31</sup> FORLATI, *supra* note 9, at 78.

<sup>32</sup> See also Fleming James, *Necessary and Indispensable Parties*, 18(1) U. MIAMI L. REV. 68 (1963).

<sup>33</sup> Mollengarden & Zamir, *supra* note 2, at 56–59.

Court elected to create a procedural rule that places an objective and fundamental limit on the exercise of its jurisdiction, one which, as Amerasinghe observes, “*must* be applied when the appropriate circumstances are present, leaving no room for a discretionary decision not to apply it.”<sup>34</sup> To that end, as Tams observes, the *Monetary Gold* rule “should not be seen as a necessary implication of consensualism, but as a deliberate extension.”<sup>35</sup>

So, *Monetary Gold* can be reconceived as a rule of procedure, enacted pursuant to the Court’s statutory authority in Article 30(1) in order to give effect to broader principles that the Court has determined to uphold. The content of the rule is quite simple. The applicant State must bring their action against the necessary party or parties, and where there is a contention that this has not occurred, the Court must decide whether the case is able to proceed. In this respect, the *Monetary Gold* rule can be viewed as part and parcel of the obligations for applicant states under Article 38 of the present Rules of Court<sup>36</sup> and Article 40 of the Statute, that cases brought to the Court must identify in the application or special agreement both the subject of the dispute and the parties involved. Judge Read identified this issue in his individual opinion in *Monetary Gold* when he observed that, “as Albania was a necessary and indispensable party to the proceedings . . . there was a fundamental defect in the Application by which these proceedings were commenced.”<sup>37</sup> Sometimes the Court’s lack of jurisdiction or another defect in the application is obvious,<sup>38</sup> but in *Monetary Gold* this was not immediately apparent.

#### *A Rule Consistent with the Statute*

The Court’s power under Article 30(1) is subject to one inherent limitation: rules of procedure cannot conflict with the Statute. Mollengarden and Zamir imply that the ICJ Statute neatly triangulates all aspects of jurisdiction, and *Monetary Gold* undermines this structure, or is at least “in tension” with it.<sup>39</sup> But the Court’s attitude to procedure has generally been that whatever is not expressly forbidden by the Statute is permitted.<sup>40</sup> Moreover, the Statute very much requires states to submit applications that are not defective, and are capable of resulting in an effective judgment.<sup>41</sup>

The simple fact is that the drafters of the Statute did not foresee all possibilities, and nor did they expect to, or even want to, attempt such a feat. Instead, they empowered the Court through Article 30(1) to address procedural difficulties. As the Court stated in the *Nottebohm* case, the “seising of the Court is one thing, the administration of justice is another. The latter is governed by the Statute, and by the Rules.”<sup>42</sup> *Monetary Gold* is a prime example of this distinction.

<sup>34</sup> CHITTHARANJAN F. AMERASINGHE, [JURISDICTION OF SPECIFIC INTERNATIONAL TRIBUNALS](#) 235–36 (2009). See also Robert Kolb, [General Principles of Procedural Law](#), in THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY, *supra* note 10, at 812, 897 (“the Court can act on the merits only if certain objective and peremptory conditions are met”).

<sup>35</sup> Christian J. Tams, [The Contentious Jurisdiction of the Permanent Court](#), in THE LEGACY OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE 11, 31–32 (Malgosia Fitzmaurice & Christian J. Tams eds., 2013).

<sup>36</sup> Article 32 in the 1946 Rules applicable at the time *Monetary Gold* was decided.

<sup>37</sup> [Monetary Gold Removed from Rome in 1943](#) (It. v. Fr., U.K. & U.S.), 1954 ICJ REP. 19, para. 38 (June 15) (Read, J.).

<sup>38</sup> See also Juan J. Quintana, [Procedure Before the ICJ: A Note on the Opening \(or Not\) of New Cases](#), 9 LAW & PRAC. INT’L CTS. & TRIBUNALS 115 (2010) and examples therein.

<sup>39</sup> [Mollengarden & Zamir](#), *supra* note 2, at 41–77, 76.

<sup>40</sup> H.W.A. Thirlway, [Procedural Law and the International Court of Justice](#), in FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE – ESSAYS IN HONOUR OF SIR ROBERT JENNINGS, *supra* note 20, at 389, 394.

<sup>41</sup> [Northern Cameroons](#) (Cameroon v. U.K.), Preliminary Objections, Judgment, 1963 ICJ REP. 15, para. 103 (Dec. 2).

<sup>42</sup> [Nottebohm](#) (Liech./Guat.), Preliminary Objections, Judgment, 1953 ICJ REP. 111, para. 122 (Nov. 18).

*Conclusion*

If *Monetary Gold* is reconceived as a rule of procedure, any contention that it lacks normative authority falls away.<sup>43</sup> Rather than perceiving it as a general principle of law or simply a judicial decision, it should be considered a small r procedural rule made in the exercise of the Court's authority pursuant to Article 30(1) of its Statute. It sits alongside, with equal authority to, the Court's jurisdictional architecture. All that remains to be seen is whether *Monetary Gold* will be incorporated in future iterations of the Rules of Court.

<sup>43</sup> [Mollengarden & Zamir](#), *supra* note 2, at 41, 71.