

Dr Milenko Kreća*

THE *RES JUDICATA* RULE IN JURISDICTIONAL
DECISIONS OF THE INTERNATIONAL
COURT OF JUSTICE

The author discusses the effects of the res judicata rule as regards jurisdictional decisions of the International Court of Justice. He finds that there exists a special position of a judgment on preliminary objection in respect to both aspects of the res judicata rule– its binding force and finality. A perception of distinct relativity of a jurisdictional decision of the Court, expressing its interlocutory character pervades, in his opinion, the body of law regulating the Court's activity. Preliminary objections as such do not exhaust objections to the jurisdiction of the Court, as evidenced by non-preliminary objections to the jurisdiction of the Court giving rise to the application of the principle compétence de la compétence understood in the narrow sense. With regard to the binding force of a judgment on preliminary objections, it does not create legal obligations stricto sensu. The author finds that the relative character of jurisdictional decisions of the Court as compared with a judgment on the merits is justified on a number of grounds.

Key words: *Res judicata. – Preliminary objections. – Binding force. – Finality.*

* Professor, University of Belgrade Faculty of Law, mkreca@ius.bg.ac.rs.

1. GENERAL CONSIDERATIONS IN RESPECT TO THE *RES JUDICATA* RULE

The expression *res judicata* has more than one meaning. It is used to mean an issue decided by a court of law;¹ a judgment which cannot be refuted by ordinary legal vehicles;² and, also, a decision which is immutable and irrevocable.³

The broad use of the expression *res judicata* could be attributed to confusion about the very quality of a judicial decision and its effects both subjective and objective. Occasionally and especially as regards some types of judgments, the difference between irrefutability and irrevocability is not taken into account. If bearing in mind the absence of the ordinary legal vehicles provided by the Statute and the Rules of Court to a dissatisfied party for overturning a judgment, it could be said that in general the judgments of the Court are irrefutable. It could not however be said that they are irrevocable as well, owing not only to the rule on revision embodied in Article 61 of the Statute, as an extraordinary legal vehicle, but also due to some other judicial vehicles that exist in the law of the Court, such as the principle of *compétence de la compétence* in regard to jurisdictional issues as well as non-preliminary objections to the jurisdiction of the Court.

Two components may be discerned in the substance of *res judicata* as provided in the Statute of the Court:

(i) Procedural, which implies that: “The judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party” (Art. 60); and

(ii) Substantive, according to which: “The decision of the Court has no binding force except between the parties and in respect of that particular case.” (Art. 59).

The primary effect of *res judicata* in the procedural sense is claim preclusion – meaning that a future lawsuit on the same cause of action is precluded (*non bis in idem*), whereas the effect of *res judicata* in the substantive sense is mainly related to the legal validity of the Court’s decision as an individualization of objective law in the concrete matter – *pro veritate accipitur* – and, also, to the exclusion of the application of the principle of *stare decisis*.

¹ Maritime Delimitation and Territorial Questions between Qatar and Bahrain, *I.C.J. Reports 2001*, para. 138.

² Corfu Channel Case, *I.C.J. Reports 1949*, pp. 244, 248.

³ Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide, *I.C.J. Reports 2007*, para. 120.

The two components of *res judicata* – procedural and substantive – do not necessarily go hand in hand in each particular case. Each decision of the Court – be it judgment or order – is binding upon the parties, although not in an identical way, but such characteristics of the decision of the Court are not necessarily followed by its finality.

The relationship between these two components of *res judicata* is not static and *a priori* defined, because it reflects the balancing power of the considerations underlying the procedural and substantive aspects of *res judicata* rule, respectively.

The considerations underlying the substantive aspect of *res judicata* essentially protect the authority of the Court as a court of law and the legitimacy of its decisions. Hence, it is possible to say that the binding force of the Court's decisions derives from the very nature of the judicial function, irrespective of the nature and content of a Court's decision. As the Court established in the *Northern Cameroons* case⁴, the effect of *res judicata* also extends to the judgment of the Court establishing the impossibility of changing the created legal situation.

Underlying *res judicata* in the procedural sense are, in fact, considerations of legal security and predictability combined with economy of the judicial process.

The distinction between the characteristics of a judicial decision and its effect derives from contrasting *res judicata* in its abstract normative meaning with its application within the body of law regulating the judicial activity of the Court, i.e. its legal meaning *in casu*.

Although it is a rule of fundamental importance, forming part of the legal system of all civilized nations, *res judicata* is certainly not a fetish of, or seen as a *deus ex machina* by, courts of law, including the International Court of Justice.

The *res judicata* rule operates within the law that the Court applies in parallel, with other rules having an objective nature. In other words, the *res judicata* rule, just like other fundamental rules governing judicial activity of the Court, is only a part, however important it may be, of the normative milieu in which the Court operates and which, as a whole, determines the effect of a Court's decision. A possible effect that the other rules of an objective nature have upon *res judicata* might be summarized as follows: "Finality itself...is rather a plastic term that need not prohibit re-examination."⁵ It seems clear that revision in accordance with the conditions specified in Article 61 of the Statute "constitutes direct exception to the principle *res judicata*, affecting the validity of a final judgment"⁶.

⁴ *Northern Cameroons Case, I.C.J. Reports 1963*, p. 38.

⁵ M. Reisman, *Nullity and Revision*, 1974, 341.

⁶ B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, 1953, 372.

It is equally true that the operation of the principle of *compétence de la compétence* and non-preliminary objections to the affirmed jurisdiction of the Court may result in a reversal of one sort of Court judgment, i.e., judgments on preliminary objections.

In that regard, none of the legal vehicles designed to challenge or capable of challenging a matter already decided derogate the existence of the *res judicata* rule as such, for they are based on the authority of the law which the Court applies in its totality and are made operational in the form of a binding decision by which the previous decision of the Court is repudiated – *judicium posterior derogat priori*. As the effects of *res judicata* attach only to decisions brought *lege artis*, in accordance with the rules, procedural and substantive, of the law applied by the Court, it could be said that the exceptions to the finality of a Court judgment constitute a part of the substance of *res judicata*.

Consequently, the finality of the Court's judgments within the law applied by the Court may be relative or absolute. Only for the latter can it be said that finality is tantamount to *res judicata* in terms of irrevocability.

The judgment (*sententia*) and *res judicata* in the sense of a final and irrevocable decision of the Court obviously are not identical notions. The judgment as such is *res judicans* while *res judicata est causa sine finem controversiae accepit*.

As a judicial act, every judgment of a court of law has a potential of *res judicata* in terms of irrevocability which may materialize or not, depending on the outcome of procedures and weapons designed to challenge the decision of the court. So, the intrinsic quality of *res judicata* is, in fact, the end point in the development of the authority which is inherent in every judgment, the point in which *jugement passe en force de la chose jugée*, judgment becomes enforceable.

2. RES JUDICATA AS REGARDS JURISDICTIONAL DECISIONS

The full effect of the *res judicata* rule is in principle attached to “a final decision of an international tribunal”⁷. In his separate opinion in the *Fisheries Jurisdiction* case, Judge Waldock stated, “[u]nder Article 60 of the Statute the Judgment is ‘final and without appeal’. It thus constitutes a final disposal of the case brought before the Court by the Application of 14 April 1972”⁸.

⁷ Permanent Court of Arbitration (*Trail Smelter* case), *Reports of International Arbitral Awards (RIAA)*, Vol. III, pp. 1950–1951.

⁸ *Fisheries Jurisdiction Case, I.C.J. Reports 1974*, p. 125, para. 46). A.V. Freeman, *International Responsibility of States for Denial of Justice*, 1938, 975; B. Cheng, 337; G. Schwarzenberger, *International Law*, I, 1949, 454–455.

However, it does not follow *a contrario* that the Court's judgments on preliminary objections are excluded from the scope of Articles 59 and 60 of the Statute of the Court. Such an interpretation would obviously run counter to the general determination made in these Articles.

It appears that the effects of judgments on preliminary objections, or at least some types of judgment on preliminary objections, with respect to both their binding force and finality, are of a specific character distinguishable to some extent from the effects of judgments on the merits of the case.

The meaning of the characterization "final" in regard to a judgment on a preliminary objection lies solely in the fact that, after it is pronounced, all the parties are precluded from raising any preliminary objections whatsoever leading to revival or restitution of the preliminary objection proceeding, as provided for in Article 79 of the Rules of Court.

But a preliminary objection as such is not the only legal vehicle in the body of law of the Court designed to challenge a decision. Therefore, it is difficult to say that a judgment on the preliminary objections raised by a party to a dispute before the Court puts a final end to the issue of jurisdiction, so that the issue of jurisdiction can never be raised. In the jurisprudence of the Court, and on the basis of Article 79, paragraph 1, of the Rules, the notion of non-preliminary objection to the jurisdiction of the Court has developed, which proves, by itself, that the notion of objection to jurisdiction is broader than the notion of preliminary objection. The fundamental principle *compétence de la compétence* may also give rise to reconsideration of the jurisdictional decision taken.

As long as it is the *functus officio* in the case, the Court, as a court of law, has the inherent power to re-open and reconsider any issue of law and fact decided. That power would be devoid of substance if not accompanied by the power of the Court to reverse its earlier jurisdictional decision under special circumstances.

The uncritical ascribing of immutability to every judgment is fetishist and may find a model only in some long-abandoned decisions under Langobardic law⁹. Since the Roman Law (in the Roman Law the character of *res judicata* could be given only to final decisions *in meritis*¹⁰), the solution has been adopted that the authority of *res judicata* belongs, as a rule, only to decisions based on the merits of a case. For instance, in French law, decisions on incidental questions may not acquire the *autorité de la chose jugée*, unless that is indispensable for the inter-

⁹ Capitula 370 Edictum Langobardorum stipulated that an adjudicated case *semper in eadem deliberatione debeant permanere*, although there existed the possibility of its rejection by a higher instance. – G. Pugliese, *Giudicato civile*, Enciclopedia di diritto XVI, 1969, 158.

¹⁰ *Ibid.*, 752. M. Kaser, *Das römische Zivilprozessrecht*, MCMLXVI, 504.

pretation of the *dispositifs* of the decision in *meritum* or they are its “*soutien nécessaire*”.¹¹

The Italian judiciary also tends to perceive *res judicata* as covering the solution of the dispute which the parties submitted to the court.¹² Paragraph 322 of the German *Zivilprozessrechnung* (Materielle Rechtskraft) states that only those decisions which on the demand (*Anspruch*) which is stipulated in the accusation or counter-accusation may be effective.

In English law as well, *res judicata* indicates the final judicial decision adopted by the judicial tribunal competent for the *causa*, or the matter in litigation.¹³ Also, the existence of the competent jurisdiction is considered a condition of validity of every *res judicata*.¹⁴

Therefore, the view that the application of *res judicata* is objectively limited to the issues decided by the final judicial decision is dominant in the law of civilized nations.

In that regard three types of judgments on preliminary objections may be distinguished:

- Judgments by which a preliminary objection, irrespective of its nature, is accepted and the dispute *ipso facto* ended;
- Judgments by which the objection is rejected and the Court is declared competent to entertain the merits of the case; and
- Judgments by which a preliminary objection raised is determined to be an objection which does not possess an exclusively preliminary character.

The effects of *res judicata*, such as those characterizing a judgment on the merits of a case, are possessed only by those judgments on preliminary objections by which an objection is accepted. In contrast to the other two remaining jurisdictional decisions, which are both constituent parts of the pending case, this kind of jurisdictional decision puts an end to a case, thus assuming the full effects of the *res judicata* rule attaching to a final judgment in the case. There are certain differences as regards *res judicata* effects between the two remaining kinds of judgments on preliminary objections, on the one hand, and judgments on the merits, on the other.

The difference in finality between jurisdictional decisions, on the one hand, and decisions on the merits, on the other, is, in principle, quan-

¹¹ R. Perrot, *Chose jugée, Répertoire de procédure civile et commerciale*, 1955, 1, Nos. 8, 45, 78–87; J. Vincent, *Procédure civile*, 1978, No. 76, 98.

¹² G. Pugliese, 834.

¹³ Bower, Turner, Handley, *The Doctrine of Res Judicata*, 1969, II, 1; Walker and Walker, *The English Legal System*, 1885, Vol. 6, 589.

¹⁴ Bower, Turner, Handley, 92.

titative rather than qualitative in nature. The finality of jurisdictional decisions is more relative owing to a larger number of legal weapons by which they can be challenged. It is reflected in the fact that a jurisdictional decision may be challenged not only through a revision proceeding under Article 61 of the Statute but also in the further course of the proceedings and by a non-preliminary objection, i.e., by an objection which is raised to the Court's jurisdiction¹⁵ after the preliminary objection procedure has been completed by the delivery of the judgment.

In the practice of international courts, in particular that of the International Court of Justice, this difference assumes qualitative proportions. Reversal of judgments on the merits, as opposed to jurisdictional decisions, is unknown in the jurisprudence of the International Court of Justice, unlike that of arbitration courts¹⁶.

The question as to whether the tribunal is irrevocably bound by its preliminary objection judgment was raised for the first time in the *Tiedemann* case (1926) before the Polish-German Mixed Arbitral Tribunal.

Sedes materiae of the matter, the Tribunal explained succinctly and convincingly:

“the Tribunal considers that, in the interests of legal security, it is important that a judgment, once rendered, should in principle be held to be final.

However, the question takes on a special complexion when the preliminary judgment rendered is a judgment upholding the Tribunal's jurisdiction and the latter finds subsequently, but prior to the judgment on the merits, that in fact it lacks jurisdiction. In such a case, if it were obliged to regard itself as being bound by its first decision, it would be required to rule on a matter which it nevertheless acknowledges to stand outside its jurisdiction. And when – as in the instant case – it has in the meantime ruled that it has no jurisdiction in cases of the same nature, it would totally contradict itself by nevertheless ruling on the merits, and it would expose itself to the risk that the respondent State might take advantage of the Tribunal's own acknowledgment of its lack of jurisdiction, in order to refuse to execute its judgment . . .

In other words, in order to remain faithful to the *res judicata* principle, it would have to commit a manifest abuse of authority.”¹⁷

¹⁵ The word “jurisdiction” is used in its generic sense comprising both general, i.e., *locus standi in iudicio*, and special jurisdiction.

¹⁶ See J. L. Simpson, M. Fox, *International Arbitration – Law and Practice*, 1959, 250 *et seq.*

¹⁷ *Von Tiedemann v. Polish State*, *Rec. TAM*, t. VI, pp. 997–1003; see also CR 2006/44, Varady, translation.

The principle that a court of law hearing a case which has proceeded beyond a judgment on preliminary objections is not irrevocably bound by that judgment has also been confirmed by the jurisprudence of the Court.

In the *Nottebohm* case (Preliminary Objections) the Court rejected by its Judgment of 18 November 1953 Guatemala's preliminary objection to its jurisdiction and resumed proceedings on the Merits¹⁸. Guatemala, however, raised a number of objections to admissibility in its Counter-Memorial, in its Reply and in the course of the oral proceedings on the merits, but treated them as subsidiary to the subject of the dispute. In its Judgment of 6 April 1955, the Court accepted one of the objections, which related to the admissibility of Liechtenstein's claim given that at the time of naturalization no "genuine link" had existed between Nottebohm and Liechtenstein.¹⁹

The *Nottebohm* case can be taken as an example of reversal of the preliminary objection judgment upon a non-preliminary objection raised by the Respondent.

On the other hand, the *South West Africa* cases (Second Phase) illustrate the pattern of reversal of the judgment on preliminary objections by action of the Court *proprio motu*.

In the preliminary objections phase²⁰, the Court rejected four South African objections, among others the objection concerning the standing (*locus standi*) of the applicant as well as its interests. South Africa pointed out, *inter alia*, that:

"Secondly, neither the Government of Ethiopia nor the Government of Liberia is 'another Member of the League of Nations', as required for *locus standi* by Article 7 of the Mandate for South West Africa; Thirdly, ...more particularly in that no material interests of the Governments of Ethiopia and/or Liberia...are involved therein or affected thereby".²¹

In the merits phase the Court returned to the determination made in its 1962 Judgment and found that, in fact, the applicants did not have standing in the proceedings²². Namely, in its Judgment on Preliminary Objections of 21 December 1962, the Court established *inter alia* that:

"For the manifest scope and purport of the provisions of this Article indicate that the Members of the League were under-

¹⁸ Nottebohm Case, *I.C.J. Reports* 1953, p. 124.

¹⁹ Nottebohm Case, *I.C.J. Reports* 1955, pp. 4–65.

²⁰ South-West Africa Cases (Second Phase) *I.C.J. Reports* 1962, p. 319.

²¹ *Ibid.*, p. 327.

²² South-West Africa Cases (Second Phase) *I.C.J. Reports* 1966, pp. 36–38.

stood to have a legal right or interest in the observance by the Mandatory of its obligations both toward the inhabitants of the Mandated Territory, and toward the League of Nations and its Members”,

and that:

“Protection of the material interests of the Members or their nationals is of course included within its compass, *but the well-being and development of the inhabitants of the Mandated territory are not less important*”.²³

In essence, the Court explained the reversal of its previous finding by describing the nature of the decision on preliminary objection. The Court stated *inter alia*:

“As regards the issue of preclusion, the Court finds it unnecessary to pronounce on various issues which have been raised in this connection, such as whether a decision on preliminary objection constitutes a *res judicata* in the proper sense of that term, whether it ranks as a ‘decision’ for the purposes of Article 59 of the Court’s Statute, or as ‘final’ within the meaning of Article 60. *The essential point is that a decision on a preliminary objection can never be preclusive of a matter appertaining to the merits, whether or not it has in fact been dealt with in connexion with the preliminary objection.*”²⁴

However, reasoning further about the preclusive effect of the 1962 Judgment, the Court characterized – albeit indirectly – jurisdictional decisions, finding that:

“Since *decisions of an interlocutory character cannot pre-judge questions of merits*, there can be no contradiction between a decision allowing that the Applicants had the capacity to invoke the jurisdictional clause...*and a decision that the Applicants have not established the legal basis of their claim on the merits.*”²⁵

In the merits phase the Court returned to the determination made in its 1962 Judgment and found that, in fact, the applicants did not have standing in the proceedings.²⁶

²³ South-West Africa, Preliminary Objections, Judgment, *I.C.J. Reports 1962*, pp. 343–344; emphasis added).

²⁴ South-West Africa Cases (Second Phase) *I.C.J. Reports 1966*, pp. 36–37, para. 59; emphasis added.

²⁵ *Ibid.*, p. 38, para. 61; emphasis added.

²⁶ *Ibid.*, pp. 36–38.

The legal basis for reconsideration of a preliminary objection judgment and, possibly, a reversal of an affirmative finding on jurisdiction, lies in the inherent power of the Court to determine its own jurisdiction (the principle of *compétence de la compétence*), in both its narrow and broad meanings.

In the narrow sense, as expressed in Article 36, paragraph 6 of the Statute, the Court makes jurisdictional decisions in cases of disputes between the parties as regards its jurisdiction. Jurisdictional decisions of the Court under Article 36, paragraph 6, may be either of two types: judgments on preliminary objection raised in accordance with Article 79 of the Rules of Court; and decisions taken upon non-preliminary objection. Decisions on non-preliminary objections are typically taken in phases of the proceedings other than the preliminary objection stage, generally in the phase which should be on the merits and which is determined in the practice of the Court to be a judgment on jurisdiction (*Nottebohm* case) or simply a Judgment in the Second Phase (*South West Africa* cases). The real meaning of the last expression is in fact the second jurisdictional phase, given that the judgment upon preliminary objection was adopted previously.

However, as commonly observed, the Court is bound to remain attentive to the issue of jurisdiction independently from the actions of the parties in the litigation. The Court achieves this by application of the principle *compétence de la compétence* in its wider form²⁷ as the basis for *proprio motu* action of the Court.

“Remaining attentive” as such, without proper action of the Court, has no practical effect on the fundamental question – whether the Court has jurisdiction *in casu*. The Court, bearing in mind *ex officio* its competence from the moment the proceedings are begun until their end, undertakes various decisions in that regard. Specifically, the Court’s *compétence de la compétence*:

“is not limited to verifying in each case whether the Court can deal with the merits...By extending the scope of the power in issue [*compétence de la compétence*] to all matters within the incidental jurisdiction of the Court, the Court has established this power as the most pre-preliminary function the Court undertakes.”²⁸

The very sensing of the Court as a first step of a procedural nature implies the operation of the principle *compétence de la compétence* by *proprio motu* action of the Court. The need to resort to the principle *compétence de la compétence* results directly from the fact that the seisin of

²⁷ *Nottebohm* case, *I.C.J. Reports* 1953, p. 120.

²⁸ I. Shihata, *The power of the International Court to determine its own jurisdiction: compétence de la compétence*, 1965, 41–42.

the Court is not the automatic consequence of the proper actions of the parties to a dispute, and the seisin of the Court is not a pure fact but a judicial act linked to the jurisdiction of the Court.²⁹

Without the operation of the principle *compétence de la compétence* as a principle of general international law, it would be legally impossible to establish the competence of the Court to indicate provisional measures, since objections to the Court's jurisdiction, pursuant to Article 79 of the Rules, may be submitted by the Respondent within the time-limit fixed for the delivery of the Counter-Memorial and by a party other than the Respondent within the time-limit fixed for the delivery of the first pleading. The operation of the principle in this case results in the judicial presumption on proper jurisdiction of the Court in the form of "prima facie jurisdiction".³⁰

The special position of a judgment on preliminary objection exists in respect to both aspects of the *res judicata* rule – its binding force and finality.

A perception of distinct relativity of a jurisdictional decision of the Court pervades the body of law regulating the Court's activity. The rules regarding preliminary objections are grouped in Subsection 2 of Section D of the Rules of Court, entitled "Incidental Proceedings". Such placement of the rules on preliminary objections suggests, as the Court stated in the *South West Africa* cases (Second Phase)³¹ that a judgment on a preliminary objection is "of an interlocutory character", which implies a provisional, rather than final, character. Furthermore, Article 79, paragraph 1, of the Rules of Court, providing that "[a]ny objection . . . to the jurisdiction of the Court or to the...or other objection the decision upon which is requested before any further proceedings on the merits" (emphasis added), *per se* expresses the relative finality of a judgment on preliminary objections. Preliminary objections as such do not, however, exhaust objections to the jurisdiction of the Court. As early as the 1980s, the jurisprudence of the Court, supported by State practice, developed to the effect that the formal preliminary objection procedure is not exhaustive of the matter.³² In addition, non-preliminary objections to jurisdiction are also capable of reversing a judgment on preliminary objections, as demonstrated in the *Nottebohm* case. Non-preliminary objections to the juris-

²⁹ See *Nottebohm* case, Preliminary Objections, Judgment, *I.C.J. Reports 1953*, p.122; Case concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain, (Jurisdiction and Admissibility), Judgment, *I.C.J. Reports 1995*, p. 23, para. 43).

³⁰ Legality of Use of Force, Preliminary Objections, Judgment, *I.C.J. Reports 2004*; separate opinion of Judge Kreća, para. 1; emphasis added).

³¹ South-West Africa Cases (Second Phase) *I.C.J. Reports 1966*, p. 38, para. 61.

³² See S. Rosenne, "The Reconceptualization of Objections in the ICJ", *Comunicazioni e studi*, volume quattordicesimo, 1975, 735–761.

diction of the Court give rise to application of the principle of *compétence de la compétence* understood, as I have noted before³³ in the narrow sense.

Finally, the principle of *compétence de la compétence* understood in a general sense can be seen in the Resolution Concerning the Internal Judicial Practice of the Court in its provision stating that “the Court *may proceed to entertain the merits of the case or, if that stage has already been reached, on the global question of whether, finally, the Court is competent or the claim admissible*” (Art. 8 (ii) (b); emphasis added). It seems clear that the “global question” is “one which would normally arise only after all the previous questions and the merits have been pleaded (that is to say, the *substance of any particular phase [has] thus been decided*)”.³⁴

With regard to the binding force of a judgment on preliminary objections, it seems clear that it does not create legal obligations *stricto sensu* which parties in the proceedings are required to comply with. The party that raised a preliminary objection rejected by the Court does not suffer any legal consequences if, for instance, it decides not to participate in the proceedings for which the Court declared itself competent. An affirmative judgment in the preliminary objection procedure creates for that party a procedural burden rather than a legal duty *stricto sensu*. Moreover, the applicant has no legal obligation to proceed to plead the claim either. While an affirmative jurisdictional decision creates a procedural burden for the respondent, vis-à-vis the applicant it constitutes a pure procedural entitlement which the applicant uses with absolute discretion (*discretio legalis*) without suffering any sanctions in proceedings of failure to comply with the letter of affirmative jurisdictional decisions.

In fact, an affirmative judgment in the preliminary objections phase creates a duty for the Court only to proceed to the merits phase, but judicial action by the Court in that regard is dependent upon proper actions by the parties to a case.

In contrast to a jurisdictional judgment, a judgment on the merits of a case possesses binding effect in terms of creating legal duties for the parties, so that “neither party can by unilateral means free itself from its obligation under international law to carry out the judgment in good faith”.³⁵

³³ Legality of Use of Force, Preliminary Objections, Judgment, *I.C.J. Reports* 2004, paras. 43–50.

³⁴ S. Rosenne, *Procedure in the International Court. A Commentary on the 1978 Rules of the International Court of Justice*, 1983, 232; emphasis added.

³⁵ *Société Commerciale de Belgique*, Judgment, 1939, *P.C.I.J., Series A/B, No.* 78, p. 176.

The more relative character of jurisdictional decisions of the Court as compared with the finality of a judgment on the merits of the case is justified on a number of grounds.

Jurisdictional issues are not, as a rule, core issues of cases before the Court, nor are they the *raison d'être* of recourse to the Court by the parties to a dispute. Cases, such as the *Appeal Relating to the Jurisdiction of the ICAO Council*³⁶, in which the Court acts as a court of appeal, are the only exceptions.

The parties to a dispute turn to the Court to protect a subjective right or interest in the sense of substantive law, not because of the issue of jurisdiction as such. An affirmative judgment on jurisdictional issues establishes only the necessary prerequisite for resolving the main issue and it concerns substantive law in terms of conferring or imposing upon the parties a legal right or obligation of a positive or negative nature. In this sense, a judgment on jurisdictional issues is of “a purely declaratory nature and it can never create a right i.e., bestow on the Court itself a jurisdiction which is not supported by applicable rules of law either general or particular”.³⁷

In other words, a judgment on jurisdictional issues is adjective rather than substantive in its nature and, consequently, in its effects as well. It does not create a new legal situation in terms of substantive law nor gives an order to perform an act as it does not state how the law disputed between the parties is to be applied.³⁸

The reversal by a court of law acting within its judicial prerogatives of the jurisdictional judgment in a pending case does not substantially, if at all, affect stability and predictability as the *rationale* of finality of the judgment. This is because the subject matter here is not substantive rights and obligations of the parties. As an affirmative jurisdictional decision merely confers entitlement to have a claim entertained and decided by the court, it is hard to say that its reversal may result in disturbing jural relations under substantive law. The only disturbance that can be spoken of in case of a reversal of an affirmative jurisdictional decision is the disturbance in the procedural relationship established by the jurisdictional decision, a disturbance which is a matter of the subjective expectations of the parties to a dispute rather than a matter of public policy underlying the finality of the Court's decision.

³⁶ Case concerning the Appeal relating to the jurisdiction of the ICAO Council, *I.C.J. Reports 1972*.

³⁷ Certain German Interests in Polish Upper Silesia, Jurisdiction, Judgment No. 6, 1925, *P.C.I.J., Series A, No. 6*, dissenting opinion of Judge Rostworowski, p. 32).

³⁸ For classification of international judgments, see *Encyclopedia of Public International Law*, III, 1997, 33–34.

On the contrary, if, after adopting a jurisdictional decision and before handing down its judgment on the merits, the Court found that its decision was erroneous for any reason, it would commit a manifest abuse of its power if it were to abide by the *res judicata* rule. Thus, rather than strengthening the *res judicata* rule, an insistence on the finality of jurisdictional decisions in all circumstances would be to its detriment, paralyzing, and even nullifying, the activity of the Court as a court of law and justice, for, besides the intrinsic, constituent elements of the *res judicata* rule, there exists the fundamental extrinsic condition, the requisite validity of the Court's decision in terms of substantive and procedural law.

3. SHORT CONCLUSION

The more relative character of jurisdictional decisions, as regards finality, results or may result from the operation of the principle of *compétence de la compétence*. Specifically, the principle of *compétence de la compétence* operates exclusively in respect of jurisdictional issues.

In practical terms, the relativity of jurisdictional decisions, especially judgments on preliminary objections as a formal type of jurisdictional decision, might result from balancing two considerations which differ by nature:

- (i) Special circumstances forming an objective element deriving from legality which dictate reversal of the jurisdictional decision; and
- (ii) A subjective element, which implies the readiness of a court of law to address the matter.

As regards this element, while somewhat pathetic, the warning is essentially correct that the “future of international adjudication, if not global peace, may paradoxically depend on the capacity of our supreme judicial organ to say *mea culpa*”³⁹.

³⁹ W. M. Reisman, “Revision of West South Africa Cases – An Analysis of the Grounds of Nullity in the Decision of 18 July 1966 and Methods of Revision”, *The Virginia Journal of International Law*, 1966, Vol. 7, No. 1, 4.