

SYMPOSIUM ON THE MARSHALL ISLANDS CASE

THE *MARSHALL ISLANDS* JUDGMENTS AND MULTILATERAL DISPUTES AT THE WORLD COURT: WHITHER ACCESS TO INTERNATIONAL JUSTICE?

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The International Court of Justice (ICJ) has mostly emphasized substance over form and developed a pragmatic, flexible, objective, and fact-based analytical approach to jurisdiction. That is until a recent series of judgments veering towards jurisdictional formalism. However, to truly reflect its designation as the “World” Court, the UN’s principal judicial organ must surely adjudicate some of the “big cases” with global security implications and involving important obligations *erga omnes* beyond strictly bilateral dynamics: the *Marshall Islands cases* were as good contenders as any for the Court to enhance its [legitimacy capital](#).¹ As a corollary, accepting this role might entail that the Court interpret its jurisdiction in a flexible and progressive manner, which had always been its mantra up until recently, so that the “big cases” have a chance of getting their foot in the door and being litigated.

I argue that the Court’s reasoning on jurisdiction is ill-founded but that, in any event, these cases raised complex issues related to third parties warranting further investigation. I conclude that admissibility grounds might have been a more credible avenue to avoid proceeding to the merits, prompting the need to identify alternate dispute settlement fora, particularly the Security Council.

The Failed Jurisdictional Ground and Broader Implications

To some, there might be an apparent and problematic disconnect between the seriousness of the nuclear disarmament obligations at play and the jurisdictional outcome reached in these cases. This impression might be amplified by the Court’s *Nuclear Weapons* Advisory Opinion, which stressed the importance of nuclear disarmament and emphasized that the obligation enshrined in Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) goes “beyond . . . a mere obligation of conduct” and constitutes an “obligation to achieve a precise result—nuclear disarmament in all its aspects—by adopting a particular course of conduct, namely, the pursuit of negotiations on the matter in good faith.”² However, a correlation between the importance of the relevant

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¹ Before the judgments were delivered, commentators opined that these cases would undermine the Court’s legitimacy. See Katherine Davis, *Hurting More than Helping: How the Marshall Islands’ Seeming Bravery Against Major Powers Only Stands to Maim the Legitimacy of the World Court*, 25 MINN. J. INT’L L. 79 (2016).

² [Legality of the Threat or Use of Nuclear Weapons](#), Advisory Opinion, 1996(I) ICJ REP. 226, 264 (July 8) (also cited in [Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament](#) (Marsh. Is. v. India), Preliminary Objections para. 19 (Oct. 5, 2016) [hereinafter RMI v. India]; [Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament](#) (Marsh. Is. v. Pak.), Preliminary Objections para. 19 (Oct. 5, 2016) [hereinafter

obligations and any potential jurisdictional bar to trigger the Court's handling of a particular dispute is not the relevant test.³

If anything, the disconnect in these cases was between the Court's review of the applicable jurisprudence and its actual application of it to the facts. The judgments started out on the right track by citing familiar jurisprudence defining a dispute as "a disagreement on a point of law or fact, a conflict of legal views or of interests" between parties,⁴ requiring that "[i]t must be shown that the claim of one party is positively opposed by the other," a "matter for objective determination by the Court which must turn on an examination of the facts."⁵ The Court then recalled that "substance over form" should prevail and that there is no expectation that prior negotiations be conducted prior to the Court's seizure under Article 36(2) declarations, or that a formal diplomatic protest be lodged before that time.⁶ It also underscored that the parties' pre- and postapplication conduct could be relevant to confirm or deny the existence of a dispute, or provide further context and contour to such dispute.⁷

Puzzlingly, the Court introduced a criterion of "objective awareness" in that "a dispute exists when it is demonstrated, on the basis of the evidence, that the respondent was aware, or could not have been unaware, that its views were 'positively opposed' by the applicant."⁸ The Court found that this requirement was not satisfied since the applicant had not, prior to instituting the proceedings, clearly stated its claims against the respondents.⁹ Another reading of the judgments (or at least of the evidence) might construe the subtext as follows: the applicant clearly stated its view, in different multilateral settings, that the nuclear powers were violating the relevant international obligations,¹⁰ but failed to sufficiently particularize, individualize, and "bilateralise" each distinct dispute by pinning specific accusations onto each respondent. However, the postapplication conduct and the views expressed during the jurisdictional proceedings clearly evinced the existence of a dispute between the parties. Yet, that was insufficient for the dispute to crystallize before the Court.

This posture seems in sharp contrast with what [Judge Crawford](#) called the "*Mavrommatis* principle" and the Court's well-established flexible and pragmatic jurisprudence, "which allows it to overlook defects in the Application when to insist on them would lead to circularity of procedure" or to a situation "not in the interests of the sound administration of justice."¹¹ The applicant could have technically re-introduced fresh proceedings immediately after its first failed attempt, which would have presumably met the threshold of the "existence of a dispute" based on the conduct exhibited by the parties *after* the initial application. Indeed, it seems that the Court completely disregarded the most important two words in its own summing up of the relevant jurisprudence: "[i]n

RMI v. Pakistan]; [Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament](#) (Marsh. Is. v. UK), Preliminary Objections para. 20 (Oct. 5, 2016) [hereinafter RMI v. UK].

³ By analogy, see [Armed Activities on the Territory of the Congo \(New Application: 2002\)](#) (Dem. Rep. Congo v. Rwanda), Jurisdiction and Admissibility, 2006 ICJ REP. 6, 31–32 para. 64, 52 para. 125 ("the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things" and the "mere fact" that a dispute involves such obligations "would not give the Court jurisdiction").

⁴ See also, Christian Tams, [No Dispute About Nuclear Weapons?](#), EJIL: TALK! (Oct. 6, 2016) ("the 'PCIJ's and ICJ's jurisprudence offers various 'definitions' of the notion [of dispute]—from 'disagreements on points of law or fact' à la *Mavrommatis* to 'positively opposed claims' (South West Africa)").

⁵ [RMI v. India](#), *supra* note 2, at paras. 34, 36; [RMI v. Pakistan](#), *supra* note 2, at paras. 34, 36; [RMI v. UK](#), *supra* note 2, at paras. 37, 39.

⁶ [RMI v. India](#), *supra* note 2, at para. 35; [RMI v. Pakistan](#), *supra* note 2, at para. 35; [RMI v. UK](#), *supra* note 2, at para. 38.

⁷ [RMI v. India](#), *supra* note 2, at paras. 37–40; [RMI v. Pakistan](#), *supra* note 2, at paras. 37–40; [RMI v. UK](#), *supra* note 2, at paras. 40–43.

⁸ [RMI v. India](#), *supra* note 2, at para. 38; [RMI v. Pakistan](#), *supra* note 2, at para. 38; [RMI v. UK](#), *supra* note 2, at para. 41.

⁹ [RMI v. India](#), *supra* note 2, at paras. 41–53; [RMI v. Pakistan](#), *supra* note 2, at paras. 41–53; [RMI v. UK](#), *supra* note 2, at paras. 44–57.

¹⁰ See RMI v. India, [Dissenting Opinion of Judge Crawford](#) paras. 24–28.

¹¹ *Id.* at paras. 7–9. See also, [Application of the Convention on the Prevention and Punishment of the Crime of Genocide](#) (Croat. v. Serb.), Preliminary Objections, 2008 ICJ REP. 412, 438, 441 (Nov. 18); ROBERT KOLB, [The International Court of Justice](#) 315 (2013).

principle, the date for determining the existence of a dispute is the date on which the application is submitted to the Court,” a point picked up by some judges (emphasis added).¹²

Particularly troubling is the Court’s heavy reliance on the *Alleged Violations* judgment, which had not been rendered at the time of the *Marshall Islands* oral hearings, to support its introduction of the “objective awareness” criterion.¹³ Therefore, rather ironically, the parties had no objective awareness of the “objective awareness” criterion at the material time or in the lead-up to the proceedings. Moreover, there is no indication that this precedent actually supports the introduction of this new criterion, especially as a formal legal requirement.¹⁴

Equally troubling is the fact that the Court sought to further support its analysis on the nonexistence of a dispute by drawing—rather selectively—from *Georgia v. Russia*. That case stemmed from a compromissory clause, not an optional clause declaration, which contained peculiar in-built preconditions for the Court’s seisin, and is therefore “of limited value as a precedent given the peculiarities” of that provision.¹⁵ The fact that the two decisions cited to support the Court’s “novel” approach date from only 2011 and 2016 might suggest that “the jurisprudence prior to April 2011 does not support the Majority’s position”; this is exacerbated by the fact that “the passages cited by the Majority do not contain references to prior jurisprudence because they are, themselves, no more than factual statements.”¹⁶

The Court and Multilateral Disputes

At their core, these cases were about state responsibility (SR), multilateral disputes, and obligations, revealing a Court reluctant to take jurisdiction in politically-charged circumstances with clear legal implications. Furthermore, the Court did so rather hastily, without dealing with the other preliminary objections to jurisdiction beyond the lack of the existence of a dispute, much to the consternation of some judges.¹⁷ Whilst it might be tempting to speculate as to the Court’s motives, these judgments might have implications for broader questions of access to justice and dispute settlement in the realm of [communitarian obligations](#).¹⁸

The default mode of invocation/implementation under the International Law Commission (ILC)’s Articles on State Responsibility is through interstate, unilateral channels (read: asymmetric, uncoordinated diplomatic relations), with invocation before the international judiciary being the exception rather than the rule (and perennially subject to state consent).¹⁹ Yet, there is perhaps something inherently attractive about preferring ICJ adjudication over unilateral implementation of SR, with all its attendant dimensions such as autoqualification, self-judging, and skewed power dynamics.

¹² See RMI v. India, [Separate Opinion of Judge Tomka](#) paras. 14–16; RMI v. Pakistan, [Dissenting Opinion of Judge Robinson](#) paras. 41 ff.

¹³ [Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea](#) (Nicar. v. Colom.), Preliminary Objections para. 73 (Mar. 17, 2016).

¹⁴ See RMI v. India, [Declaration of Vice-President Yusuf](#) paras. 7–8; [Separate Opinion of Judge Sebutinde](#) paras. 30–32; [Dissenting Opinion of Judge Bennouna](#) 5; [Dissenting Opinion of Judge Robinson](#) paras. 26–27; [Dissenting Opinion of Judge Crawford](#) paras. 3–6 (this approach “effectively transforms a non-formalistic requirement into a formalistic one through the use of the term ‘awareness’”).

¹⁵ RMI v. India, [Dissenting Opinion of Judge Robinson](#) para. 38.

¹⁶ *Id.*

¹⁷ See RMI v. India, RMI v. Pakistan, RMI v. UK, [Declaration of Judge Gaja](#); RMI v. India, [Separate Opinion of Judge Bhandari](#) paras. 51 ff.; RMI v. Pakistan, [Separate Opinion of Judge Bhandari](#) paras. 16 ff.; RMI v. UK, [Separate Opinion of Judge Bhandari](#) paras. 16 ff.

¹⁸ On SR and communitarian norms, see James Crawford, [Responsibility for Breaches of Communitarian Norms: An Appraisal of Article 48 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts](#), in FROM BILATERALISM TO COMMUNITY INTEREST: ESSAYS IN HONOUR OF JUDGE BRUNO SIMMA 224 (Ulrich Fastenrath et al eds., 2011).

¹⁹ On invocation of SR involving multiple parties, see JAMES CRAWFORD, [State Responsibility: The General Part](#) 644–674 (2013).

Undoubtedly, we stumble upon murky terrain when dealing with potential obligations *erga omnes*, with “the question of standing, *locus standi*, an issue that is yet to be developed in international law.”²⁰ The applicant likely qualified as an “injured State” or a state “specially affected” by the respondents’ alleged wrongdoing given its historical proximity to nuclear testing under ILC Article 42, or as a third state acting on behalf of the international community given the very nature of the customary obligations at play, pursuant to ILC Article 48.²¹

This latter proposition entails that every state has an interest in ensuring timely compliance with the obligations owed to all, meaning that it can invoke the responsibility flowing from their violation on behalf of all: similar reasoning informed *Belgium v. Senegal*’s treatment of the prohibition against torture and related duties, albeit within the confines of a conventional scheme.²² To the more cynical observer, therefore, the Court’s judgments signaled a missed opportunity to advance a more proactive dispute settlement approach to global security issues and a more coherent legal framework to adjudicate alleged violations of communitarian obligations.

This does not mean that the cases would necessarily have proceeded to the merits, had they crossed the jurisdictional Rubicon of the “existence of a dispute,” as further obstacles—likely on admissibility grounds²³—might have dissuaded the Court from pushing them through. Some of these admissibility issues are discussed in the next section. Nor does it mean that the applicant would have prevailed on the substance of its claims, or that its arguments would have passed muster—these were questions for the merits. But surely, to throw out the cases at such an early stage, on an unprecedented ground, and without further judicial engagement with the additional preliminary objections,²⁴ could be perceived as a setback in the cause of international justice for proponents of “using the system” to address global security challenges. At the very least, it might send a bad message to the international community about a court that is overly formalistic about its jurisdiction over politically-charged disputes. The case appears all the more compelling as, in its memorial, the applicant recalled that it “is a small island State whose only power is the power of the law.”²⁵

Surely, the Court could have reviewed the applicant’s statements through the prism of the *South West Africa* case, which recognized that opposing legal views can be exchanged in multilateral fora and that a dispute involving multiple states can crystallize in that setting (provided that it must then be “bilateralised” for the purposes of the Court’s jurisdiction).²⁶ Turning to the claimant’s attempt to submit the disputes to the Court under ILC

²⁰ RMI v. India, RMI v. Pakistan, RMI v. UK, [Declaration of Judge Xue](#) para. 8.

²¹ See also, RMI v. India, [Dissenting Opinion of Judge Crawford](#) para 21. For the applicant’s arguments, see RMI v. Pakistan, [Memorial of Marsh. Is.](#) paras. 31–39 (Jan. 12 2015) (invoking these provisions); RMI v. Pakistan, [Application Instituting Proceedings](#) para. 35 (Apr. 24, 2014) (ascribing an *erga omnes* character to the relevant obligations).

²² The Court concluded that the Convention against Torture enshrines obligations *erga omnes inter partes*. [Questions relating to the Obligation to Prosecute or Extradite](#) (Belg. v Sen.), 2012 ICJ REP. 422 paras. 67–68.

²³ See Judge Tomka’s persuasive discussion of admissibility in RMI v. India, RMI v. Pakistan, RMI v. UK, [Separate Opinion of Judge Tomka](#) Part II.

²⁴ See RMI v. India, RMI v. Pakistan, RMI v. UK, [Declaration of Judge Gaja](#); RMI v. India, [Separate Opinion of Judge Bhandari](#) paras. 51ff.; RMI v. Pakistan, [Separate Opinion of Judge Bhandari](#) paras. 16 ff.; RMI v. UK, [Separate Opinion of Judge Bhandari](#) paras. 16 ff.

²⁵ RMI v. Pakistan, [Memorial of Marsh. Is.](#) para. 35.

²⁶ *South West Africa* (Eth. v. S. Afr.; Liber. v. S. Afr.), Preliminary Objections, 1962 ICJ REP. 319, 346 (Dec. 21). In fairness, the Court acknowledged that a dispute can be identified through multilateral exchanges, but insisted on the positive opposition of claims. See [RMI v. India](#), *supra* note 2, and [RMI v. Pakistan](#), *supra* note 2, at paras. 36, 45; [RMI v. UK](#), *supra* note 2, at paras. 39, 48; RMI v. India, RMI v. Pakistan, [Dissenting Opinion of Judge Crawford](#) paras. 20–21 (stressing that “[t]his does not require the Court to treat the underlying relations as bilateral *ab initio*”). Interestingly, in 1987 Damrosch suggested that “the two-party, zero-sum dispute may well already be the exception rather than the rule.” See Lori Damrosch, [Multilateral Disputes](#), in *THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS* 376, 376 (Lori F. Damrosch ed., 1987).

Article 48, a more progressive stance on jurisdiction would have been apposite: “[t]he importance of the *South West Africa* cases lies in the recognition that a multilateral disagreement can crystallize for adjacent purposes as a series of individual disputes coming within the Statute.”²⁷

Looking Beyond the Court to Address Breaches of Interrelated Obligations

A candid reading of the Court’s judgments and dissenting opinions suggests that it wanted to steer clear of these “hot potato” cases—the term “exploding” potato might be more fitting—and, in so doing, might have failed to articulate its reasons in a convincing fashion. Undoubtedly, the Court ventured down the path of heightened formalism in deciding jurisdictional questions, a point underscored by many judges: these judgments heeded and bolstered the recent rise in jurisdictional formalism at the Court, arguably dating back to *Georgia v. Russia*.²⁸ In contrast to the positions advanced by Judge Crawford, however, it is possible that the Court might not be a suitable forum to engage with a network of interrelated and interdependent obligations.

As emphasized by [Judge Tomka](#), the Court’s jurisdictional makeup and judicial function might be ill-suited to handle these types of multilateral global security disputes.²⁹ This position seems largely informed by the nature of the relevant obligations: these duties—particularly those stemming from “disarmament treaties or treaties prohibiting the use of particular weapons”—require, for their underlying aim to be fulfilled, “interdependent performance of obligations by all parties.”³⁰ According to Judge Tomka, “it is unrealistic to expect that a State will disarm unilaterally,” suggesting that

[i]t is only with an understanding of the positions taken by other States that the Court can stand on safe ground in considering the conduct of any one State alone, which necessarily is influenced by the positions of those other States, and whether that State alone is open to achieving ... nuclear disarmament through *bona fide* negotiations.³¹

Judge Tomka did not equate this view with applying the *Monetary Gold* principle, as the Court would not pronounce on the responsibility of third states as a predicate for ruling on the respondents’ alleged violations. Rather, he considered it impossible for the Court to adjudicate a single nation’s conduct in the absence of an understanding of the positions of other states with which that respondent was required to negotiate and identify nuclear disarmament measures.³² [Judge Xue](#) espoused a seemingly compatible view, lamenting the Court’s nontreatment of the respondents’ additional preliminary objections which, in her view, revealed that the claimant’s “Application [was] not merely defective in one procedural form.”³³ By contrast, positing that the Court could accommodate the disputes, Judge Crawford construed the *Monetary Gold* principle as a potentially limiting factor regarding

²⁷ RMI v. India, RMI v. Pakistan, [Dissenting Opinion of Judge Crawford](#) para. 21.

²⁸ See RMI v. India, RMI v. Pakistan, [Declaration of Vice-President Yusuf](#) para. 12, [Separate Opinion of Judge Tomka](#) paras. 20, 26, [Dissenting Opinion of Judge Bennouna](#) 1–4, [Dissenting Opinion of Judge Cañado Trindade](#) paras. 11–13, 21–22, 30–32, 318, [Separate Opinion of Judge Sebutinde](#) paras. 1, 10, 13, 16, 26, 31–32, [Dissenting Opinion of Judge Robinson](#) paras. 27, 39, 53 (implicitly), [Dissenting Opinion of Judge Crawford](#) paras. 5, 18, [Dissenting Opinion of Judge ad hoc Bedjaoui](#) paras. 9, 11, 24, 48, 51, 77. *But see* RMI v. India, RMI v. Pakistan, [Separate Opinion of Judge Tomka](#) para. 17 (rejecting the idea that *Georgia v. Russia* marked the “beginning of a more formalist approach”).

²⁹ RMI v. India, [Separate Opinion of Judge Tomka](#) paras. 39–41.

³⁰ RMI v. India, RMI v. Pakistan, RMI v. UK, [Separate Opinion of Judge Tomka](#) para. 35.

³¹ RMI v. India, [Separate Opinion of Judge Tomka](#) paras. 35, 38.

³² RMI v. UK, [Separate Opinion of Judge Tomka](#) paras. 38–39.

³³ RMI v. UK, [Declaration of Judge Xue](#) paras. 9–11.

“consequences that can be drawn” from the respondents’ conduct, but opined that the Court might determine that “a third State could breach an obligation to negotiate by its own conduct” on the merits.³⁴

Looking to the future, one thing is self-evident: another forum is needed to tackle these types of claims and the ICJ might lose some market share over genuine legal disputes through its own formalist inclinations. Whilst imperfect, the Security Council’s dispute settlement function (Chapter VI) is often overlooked as a potential way forward, not as a comprehensive or effective nuclear disarmament mechanism, but as a locus in which alleged international law violations can be voiced and consequences imposed. Indeed, the [Council has applied SR logic and implemented responsibility](#) in different global security contexts, thereby making it perhaps a better candidate for the adjudication of multilateral disputes and enforcement of the underlying obligations.³⁵

Perhaps anticipating the inevitable “veto problem,” Article 27(3) of the UN Charter provides that “in decisions under Chapter VI . . . a party to a dispute shall abstain from voting.” Of course, this does not prevent any of the P5 or other concerned states from forming strategic alliances to block a certain course of action, not to mention other potential problems endemic to the Council’s decision-making process. On the flipside, this approach would compensate for the Court’s jurisdictional impediments and bring more players to the table.

This might be one way forward in some cases, not all. Interestingly, the judgments do not mention [Security Council Resolution 984](#).³⁶ In it, the Council exhibited a willingness to apply international law rules, particularly SR remedial norms, in the event of an NPT party’s breach of nuclear nonproliferation obligations. It “[e]xpresse[d] its intention to recommend appropriate procedures, in response to any request from a non-nuclear-weapon State party” to the NPT “that is the victim of such an act of aggression, *regarding compensation under international law from the aggressor for loss, damage or injury sustained as a result of the aggression.*”³⁷

Admittedly, the prospect of a threat, or act, of nuclear aggression is a rather extreme scenario. But, lowering the bar, there is no principled reason to exclude the Council’s potential quasijudicial role in less severe scenarios, for instance to handle alleged violations of the obligation to negotiate with respect to nuclear disarmament. Granted, this might sometimes result only in declaratory relief and prove unsatisfactory as a compliance monitoring mechanism, but it might provide one potential avenue of partial redress. In apposite circumstances, this proposal might palliate the ICJ’s trepidation to take jurisdiction over the “big cases” lying at the intersection of law and politics.

³⁴ RMI v. UK, [Dissenting Opinion of Judge Crawford](#) paras. 33–34. For a critical take on *Monetary Gold* and the “strict inter-State outlook,” see RMI v. UK, [Dissenting Opinion of Judge Cançado Trindade](#) paras. 128–131.

³⁵ See Vincent-Joël Proulx, [Institutionalizing State Responsibility: UN Organs and Global Security](#) Part II (2016); Vincent-Joël Proulx, [An Incomplete Revolution: Enhancing the Security Council’s Role in Enforcing Counterterrorism Obligations](#), J. INT’L DISP. SETTLEMENT (July 5, 2016).

³⁶ *But see* RMI v. India, RMI v. Pakistan, RMI v. UK, [Declaration of Judge Xue](#) paras. 12–13 (citing the preamble via the *Nuclear Weapons* Advisory Opinion).

³⁷ [SC Res. 984](#) para. 6 (11 April 1995) (emphasis added).