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The World Court's Jurisdictional Formalism and Its Lost Market Share: The Marshall Islands Decisions and the Quest for a Suitable Dispute Settlement Forum for Multilateral Disputes

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THE WORLD COURT'S JURISDICTIONAL FORMALISM AND ITS LOST MARKET SHARE: THE *MARSHALL ISLANDS* DECISIONS AND THE QUEST FOR A SUITABLE DISPUTE SETTLEMENT FORUM FOR MULTILATERAL DISPUTES

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ABSTRACT

On 5 October 2016, the International Court of Justice rendered three judgments declining to take jurisdiction in the *Marshall Islands* cases, in which that State alleged that India, Pakistan, and the United Kingdom violated their nuclear disarmament obligations under the NPT Treaty and customary international law. In declining to take jurisdiction, the Court further confirmed its recent shift to jurisdictional formalism, initiated in *Georgia v Russia* and confirmed in both *Belgium v Senegal* and its *Alleged Violations* judgment. What is more, the Court heightened the burden of proving the existence of a dispute by incorporating an 'objective awareness' requirement in its analysis. The present contribution critically situates the Court's judgments within the context of the law of State responsibility and global security, with particular emphasis on the broader implications going forward. It first explores the principal features of the Court's formalistic shift on jurisdictional matters in the cases, setting the stage for the subsequent discussion. The paper then turns to the broader implications of these decisions for State responsibility, taking into consideration that the 'disputes' submitted to the Court are not strictly bilateral in nature. My ambition is also to highlight the nexus between jurisdictional issues, State responsibility law, and broader questions of access to justice in multilateral disputes. By way of conclusion, the paper highlights the importance of identifying creative solutions in a post-*Marshall Islands* world, suggesting the UN General Assembly as a law-making facilitator and the UN Security Council as an alternate – albeit imperfect – dispute settlement forum to tackle multilateral disputes with global security implications.

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I. INTRODUCTION: THE MOVE FROM FLEXIBILITY TO FORMALISM

The jurisdiction of international courts and tribunals is a perennial issue in international law. To the uninitiated and perhaps to some domestic lawyers as well, the ways in which the international legal system operates might appear counterintuitive. Of course, domestic law can play some role, sometimes important, in international judicial proceedings, be it on a factual, evidentiary, or substantive level.[1] In many ways, the peculiarities of that system remain bound up with the fundamental principle of State consent, expressed critically through what some term the 'voluntarist' conception of international law.[2] Therefore, it may seem odd to those approaching this system through a different lens that international courts and tribunals must always (and sometimes painstakingly) ensure that they have jurisdiction before proceeding to the merits of a case.[3]

Whilst some scholarly accounts have demonstrated the complicated relationship between formalism and the sources of international law,[4] other aspects of the international legal system have been characterised by flexibility and pragmatism. For instance, when compared to the reality prevalent in some domestic legal orders, international law's treatment of evidentiary matters falls into that category. For example, the evidentiary practice of the International Court of Justice ('ICJ'), also known as the World Court, can only be described as flexible and pragmatic.[5]

Traditionally, the Court has also approached jurisdictional issues from a similar standpoint. Even a cursory review of its relevant jurisprudence, including that of its predecessor institution the

[1] On the role of municipal law before the World Court, see P Tomka, J Howley, and V-J Proulx, 'International and Municipal Law Before the World Court: One or Two Legal Orders?' (2016) 34 *Polish Yearbook of International Law* 11.

[2] For a critical take, see AA Cançado Trindade: *International Law for Humankind*: *Towards a New Jus Gentium* (2nd rev ed, Nijhoff 2013) 16–20; 'The Voluntarist Conception of International Law: A Reassessment' (1981) 59 *Revue de Droit International, de Sciences Diplomatiques et Politiques* 201.

[3] One critical proposition – central to the World Court's jurisprudence – entails 'that the existence of a [legal] dispute ha[s] to be established objectively and autonomously by the Court itself'. See R Kolb, *Theory of International Law* (Hart Publishing 2016) 319; S Forlati, *The International Court of Justice*: *An Arbitral Tribunal or a Judicial Body?* (Springer 2014) 122ff.

[4] See, eg, J d'Aspremont, *Formalism and the Sources of International Law*: *A Theory of the Ascertainment of Legal Rules* (OUP 2011). In a more specific context, see also idem, 'Formalism versus Flexibility in the Law of Treaties' in CJ Tams et al (eds), *Research Handbook on the Law of Treaties* (Edward Elgar 2014) 257–84.

[5] See generally P Tomka and V-J Proulx, 'The Evidentiary Practice of the World Court' in JC Sainz-Borgo et al (eds), *Liber Amicorum in Honour of a Modern Renaissance Man*: *His Excellency Gudmundur Eiríksson* (Universal Law Publishing/LexisNexis 2017) 361–82 and authorities cited therein.

Permanent Court of International Justice ('PCIJ'), reveals that it has long favoured a factually objective, context-sensitive, flexible and pragmatic jurisdictional attitude. This approach was particularly apt in addressing procedural defects and other shortcomings arising anytime between the first prospect of a dispute between parties, to the date of the institution of proceedings, to the date of the Court's judgment on jurisdictional objections. Historically, when addressing those types of defects and ascertaining whether a legal dispute had crystalized between parties, the Court brandied a recurrent mantra: substance over form.[6] Jurisdictional issues often arise in cases before the Court, which has prompted it to resort – for the most part – to flexibility and pragmatism in fulfilling its function as the principal judicial organ of the United Nations ('UN').

In recent years, however, the Court has handled several cases in which parties hold conflicting views over the existence of their would-be legal disputes, thereby inducing it (unnecessarily) to revisit its jurisprudence on the existence of a dispute. Whilst the accumulated wisdom of nearly a century of institutionalised State-to-State dispute settlement clearly suggests substance over form, a shift has apparently occurred in the Court's recent jurisprudence on contentious jurisdictional issues, arguably dating back to 2011.[7] Indeed, in April 2011 the Court handed down its decision in *Georgia v Russia* which, although ultimately held that a dispute had arisen prior to the institution of proceedings,[8] signalled a departure from the considerable flexibility that had animated its reasoning in previous instances.

The voluminous treatment the Court afforded to the first preliminary objection – raised in relation to the would-be absence of a dispute – suggested a court moving away from the idea of

[6] For relevant cases, see R Kolb, *The International Court of Justice* (Hart Publishing 2013) 165–71.

[7] See also J Morgan-Foster, G Pinzauti and P Webb, 'The International Court of Justice in the *Leiden Journal*: A Retrospective' (2017) *LJIL* 1, 4–5 <https://doi.org/10.1017/S0922156517000243> (highlighting that 'there is a perception that the Court's posture, as reflected in its recent decisions on jurisdiction, has been leaning towards formalism over flexibility', and that this 'marks a significant departure from the Court's longstanding tradition of flexibility and pragmatism in dealing with evidentiary and jurisdictional questions, such as the existence of a dispute between parties').

[8] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russia)* (Preliminary Objections) [2011] ICJ Rep 70, 120 [113]. On the existence of a dispute and for a critical take on perceived jurisdictional inconsistencies between the Court's provisional measures order and judgment on preliminary objections in that case, see P Okowa, 'The International Court of Justice and the Georgia/Russia Dispute' (2011) 11 *Human Rights Law Review* 739, 748–751.

flexibility, and into the business of formalistically scrutinising jurisdictional matters.[9] Subsequently, the Court further pursued this path of jurisdictional formalism by partially upholding objections based on the premise that a legal dispute had failed to crystallise between the parties. First, in *Belgium v Senegal* it declined to accept that a legal dispute existed over alleged breaches under customary international law at the time the proceedings were instituted, exemplified by Senegal's alleged failure to prosecute Mr Hissène Habré pursuant to customary crimes.[10] Thus, the Court stressed that '[i]n terms of the Court's jurisdiction, what matters is whether, on the date when the Application was filed, a dispute existed between the parties' on this matter.[11] More recently, the Court similarly upheld Colombia's preliminary objection in the *Alleged Violations* case, 'in so far as it concern[ed] the existence of a dispute regarding alleged violations by Colombia of its obligation not to use force or threaten to use force'.[12] In both cases, however, the Court adjudicated other aspects of the legal disputes over which it did take jurisdiction.

In October 2016, the Court delivered its judgments in the *Marshall Islands* cases ('*RMI Cases*'), thereby further buttressing its formalistic jurisdictional shift. It must be recalled that in 2014, the Marshall Islands initiated proceedings against the world's nine nuclear States (and would-be nuclear powers), alleging their non-conformity with their obligations to conduct negotiations on nuclear disarmament and the cessation of the nuclear arms race.[13] These allegations were levelled both under the Treaty on the Non-Proliferation of Nuclear Weapons ('NPT') and customary international law. Given that a potential jurisdictional basis – in these cases

[9] See *Georgia v Russia* (n 8) [23]–[114]. For a critical account on the Court's jurisdictional approach, see D West, 'Formalism Versus Realism: The International Court of Justice and the Critical Date for Assessing Jurisdiction' (2016) 5 *UCL Journal of Law and Jurisprudence* 31. On the Court's fact-finding shortcomings and treatment of evidentiary matters concerning the existence of a dispute, see AM Weisburd, *Failings of the International Court of Justice* (OUP 2016) 132ff, 236ff.

[10] Rather, bilateral exchanges between the parties prior to the seisin of the Court had centred on the UN Convention against Torture, rather than on customary international law crimes: *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (Merits) [2012] ICJ Rep 422, 444–45 [54]–[55], 462 [122(2)]. On Belgium's attempt to fit the alleged crimes under customary international law, see A Nollkaemper, 'Wither *Aut Dedere?* The Obligation to Extradite or Prosecute after the ICJ's Judgment in *Belgium v Senegal*' (2013) 4 *Journal of International Dispute Settlement* 501, 517.

[11] *Belgium v Senegal* (n 10) 444 [54].

[12] *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v Colombia)* (Preliminary Objections) [2016] ICJ Rep_ [78], [111(1)(c)] <http://www.icj-cij.org/docket/files/155/18948.pdf>.

[13] The Applicant directed its claims against China, the Democratic Republic of Korea, France, India, Israel, Pakistan, Russia, the United Kingdom, and the United States. See 'The Republic of the Marshall Islands files Applications against nine States', ICJ Press Release, 25 April 2014 <http://www.icj-cij.org/presscom/files/0/18300.pdf>.

three distinct 'optional clause' declarations under Article 36(2) of the Court's Statute – existed only in three of the nine disputes, the Court added the cases involving India, Pakistan, and the UK on its docket. Whilst the Applicant hoped to entice the other six States to join the proceedings through an extension of the *forum prorogatum* doctrine,[14] their participation did not materialise.

After holding hearings on jurisdiction and admissibility, the Court held that it had no jurisdiction to hear the merits in all three cases, given that no legal disputes existed between the parties.[15] Some judges writing separately underscored these precedents as marking a first in the course of nearly one century of State-to-State dispute settlement, namely: the unprecedented holding by the Court, or by the PCIJ for that matter, that it did not have jurisdiction because the applicant State had failed to establish the existence of a dispute at the time the proceedings were instituted.[16]

This contribution critically situates the Court's judgments within the context of the law of State responsibility ('SR') and global security, with particular emphasis on the broader implications going forward. Part II explores the principal features of the Court's formalistic shift on jurisdictional matters in the *RMI Cases*, setting the stage for the subsequent discussion. In Part III, the paper turns to the broader implications of these decisions for SR, underscoring that the 'disputes' submitted to the Court are not strictly bilateral in nature. My ambition is also to highlight the nexus between jurisdictional issues, SR law, and broader questions of access to justice in multilateral disputes. By way of conclusion, Part IV highlights the importance of identifying creative solutions in this context, suggesting the UN General Assembly ('UNGA') as a law-

[14] On *forum prorogatum*, see MN Shaw, *Rosenne's Law and Practice of the International Court*: *1920-2015*, vol I (5th edn, Brill 2016) 697–724; S Yee, '*Forum Prorogatum* in the International Court' (2000) 42 *German Yearbook of International Law* 145; M Bedjaoui and F Ouguergouz, 'Le *Forum Prorogatum* devant la Cour Internationale de Justice: Les Ressources d'une Institution ou la Face Cachée du Consensualisme' (1997) 5 *African Yearbook of International Law* 91.

[15] *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v India)* (Jurisdiction and Admissibility) [2016] ICJ Rep_ [56] [hereinafter '*RMI v India*']; *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v Pakistan)* (Jurisdiction and Admissibility) [2016] ICJ Rep_ [56] [hereinafter '*RMI v Pakistan*']; *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v UK)* (Preliminary Objections) [2016] ICJ Rep_ [59] [hereinafter '*RMI v UK*'].

[16] See Judge Tomka's Separate Opinions [1]; Dissenting Opinions of Judges Bennouna p 1 and Crawford [1] in *RMI Cases*.

making facilitator and the UN Security Council ('UNSC') as an alternate dispute settlement forum to tackle multilateral disputes with global security implications.

II. THE COURT'S CONSECRATION OF JURISDICTIONAL FORMALISM

It is unnecessary to review all the intricacies of the *RMI Cases*. The rich separate and dissenting opinions will provide any reader with both an accurate snapshot of the legal controversies that divided the Court during deliberations, and of the perceived misapplication of relevant principles by the majority. Rather, this section highlights some of the more problematic features of these decisions. The first such aspect is that the Court has produced a wealth of jurisprudence exhibiting flexibility and pragmatism on jurisdictional matters. Yet, the *RMI Cases*, whilst they cite some of this jurisprudence, stray considerably from its essence.[17] Indeed, the Court referred to the well-known *Mavrommatis* decision in reiterating the classical definition of 'dispute', observing that it manifests in 'a disagreement on a point of law or fact, a conflict of legal views or of interests' between parties.[18]

A pre-April 2011 review of ICJ jurisprudence confirms that the '*Mavrommatis* formulation has been repeated in a remarkably consistent and continuous way', although scholars recall that it 'has now and then been subjected to subtle minor variations, and also to some rather questionable additions'.[19] As one publicist observes, the 'PCIJ's and ICJ's jurisprudence offers various "definitions" of the notion [of legal dispute] – from "disagreements on points of law or fact" à la Mavrommatis to "positively opposed claims" (South West Africa)'.[20] The Court appeared to heed these jurisprudential nuances, adding that a legal dispute implies that '[i]t must be shown that the

[17] See Judge Crawford's Dissenting Opinion in *RMI v India* [10] (opining that '[t]he Court in the present case discard[ed] this tradition of flexibility'). Some commentators recently highlighted the relationship between substance and form in the *RMI Cases* and its impact on developing nations, especially by advocating that 'the ICJ does not take into regard arguments about material inequality in its procedural law'. See GRB Galindo, 'On Form, Substance, and Equality Between States' (2017) 111 *AJIL Unbound* 75–80 (also relying on GJ Simpson, *Great Powers and Outlaw States*: *Unequal Sovereigns in the International Legal Order* (CUP 2004) 25–61 for differences between formal and material inequalities).

[18] *RMI v India* and *RMI v Pakistan* [34]; *RMI v UK* [37] (citing *Mavrommatis Palestine Concessions (Greece v UK)* (Jurisdiction) PCIJ Rep Series A No 2, 11).

[19] Kolb (n 6) 302. For relevant jurisprudence tracking the evolution of the 'existence of a dispute' point, see ibid 300–19.

[20] C Tams, 'No Dispute About Nuclear Weapons?' (6 October 2016) *EJIL*: *Talk!* <http://www.ejiltalk.org/no-dispute-about-nuclear-weapons/>.

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'.[21]

In its analysis, the Court signalled that it would favour 'substance over form' and that 'optional clause' declarations do not impose a requirement of negotiations between the parties (unless expressly required), or that a formal diplomatic protest be voiced by either party, to evidence the existence of a dispute prior to the seisin of the Court.[22] It added that the conduct exhibited by parties, both before and after the date of the institution of proceedings, could become relevant to demonstrate the absence or crystallization of a dispute, or assist in better defining the substance and subject-matter of the disagreement.[23] This view also aligns with some recent scholarly understandings of the Court's jurisdiction, expressed prior to the delivery of these judgments, with commentators noting that '[t]he existence of "opposing views" is sufficient to constitute a dispute, provided that the opposing views are somehow reflected in the attitude of the parties'.[24]

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[21] *RMI v India* and *RMI v Pakistan* [34], [36]; *RMI v UK* [37], [39]. See also: *Interpretation of Peace Treaties* (Advisory Opinion) [1950] ICJ Rep 65, 74 (the existence of a dispute is 'a matter for objective determination'); *South West Africa Cases (Ethiopia v South Africa*: *Liberia v South Africa)* (Preliminary Objections) [1962] ICJ Rep 319, 328 (proving the existence of a dispute entails demonstrating that 'the claim of one party is positively opposed by the other'); *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria)* (Preliminary Objections) [1998] ICJ Rep 275, 315 [89] (these elements 'need not necessarily be stated *expressis verbis*', 'as in other matters, the position or the attitude of a party can be established by inference'); *Georgia v Russia* (n 8) 84 [30] (determining the existence of a dispute is a matter 'of substance, not of form' and 'the existence of a dispute may be inferred from the failure of a State to respond to a claim in circumstances where a response is called for'). On this last point, see also P Couvreur, *The International Court of Justice and the Effectiveness of International Law* (Brill 2017) 105. Other jurisprudence also recognises that a party's lack of response to the claims of another does not negate the existence of a dispute. See *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947* (Advisory Opinion) [1988] ICJ Rep 12, 28 [38]; *Tradex v Albania* (Decision on Jurisdiction of 24 December 1996) [2002] 5 ICSID Rep 60, 61; *AAPL v Sri Lanka* (Award of 27 June 1990) [1997] 4 ICSID Rep 251. See also R Higgins, *Problems & Process*: *International Law and How We Use It* (OUP 1994) 196–97; C Schreuer, 'What Is a Legal Dispute?' in I Buffard et al (eds), *International Law between Universalism and Fragmentation*: *Festschrift in Honour of Gerhard Hafner* (Nijhoff 2008) 959, 965. On ICSID's approach to the 'existence of a dispute', see CH Schreuer et al, *The ICSID Convention*: *A Commentary* (4th edn, CUP 2013) 93ff.

[22] *RMI v India* and *RMI v Pakistan* [35]; *RMI v UK* [38]. However, the Court underscored that whilst '"a formal diplomatic protest may be an important step to bring a claim of one party to the attention of the other, such a formal protest is not a necessary condition" for the existence of a dispute'. See ibid (citing *Alleged Violations* (n 12) [72]). But see Couvreur (n 21) 106 (observing that 'some form of negotiations will often prove to be necessary as evidence of the existence of a dispute as a matter of practical and political expediency').

[23] *RMI v India* and *RMI v Pakistan* [37]–[40]; *RMI v UK* [40]–[43].

[24] SV Busch, *Establishing Continental Shelf Limits Beyond 200 Nautical Miles by the Coastal State* (Brill 2016) 69 (also analysing the *Case Concerning Certain Property (Lichtenstein v Germany)* (Preliminary Objections) [2005] ICJ Rep 6, 17 [21], 18 [25]). For a seemingly compatible view, see VM Rangel, 'Settlement of Disputes Relating to the Delimitation of the Outer Continental Shelf: The Role of International Courts and Arbitral Tribunals' (2006) 21 *The*

However, in the *RMI Cases* the Court applied that jurisprudence in a way that can be construed as incongruent with the flexible and pragmatic driving force that animated its classical approach, thereby adding 'more than subtle variations and questionable additions', to rephrase the earlier scholarly view.[25] Therefore, the Court's posture in these cases which, in many ways, consecrates a shift towards jurisdictional formalism, carries with it profound implications on both the substance and timing of the notion of the 'existence of a dispute'.

In terms of substance, the Court's approach has undoubtedly tacked on a new dimension to the applicable jurisdictional standard when investigating whether a genuine legal dispute exists. The irony in the Court's reasoning is that, although its well-established pre-April 2011 jurisprudence consistently promoted substance over form, the *RMI Cases* not only seemingly prioritise form over substance, but also presumably formalise the very substance of the Court's jurisdiction by considerably raising the bar to meet in establishing the existence of a dispute. Perhaps the most troubling aspect of the decisions – from a legal standpoint – resides in the majority's juxtaposition of the criterion of 'objective awareness' with the other usual considerations pertaining to the existence of a dispute.[26] In summary, this signifies 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'.[27]

In formulating its claims, the Applicant essentially sought to justify that the existence of a dispute against the three respective respondents had manifested through statements it made in multilateral conferences, accusing them of failing to comply with their obligations to negotiate nuclear disarmament and cease their participation in the nuclear arms race. The first such statement was made in 2013 by the Applicant's Foreign Minister at the UN High Level Meeting on Nuclear Disarmament, which the Court ultimately equated with 'hortatory' rhetoric, as opposed to an

International Journal of Marine and Coastal Law 347, 354 ('[a] dispute involves a clear opposition between the parties, manifesting itself with certain intensity').

[25] See n 19 and accompanying text.

[26] See Judge Crawford's Dissenting Opinion in *RMI v India* [4] (observing that the Court 'now adopt[ed] a requirement of objective awareness, but for no persuasive reasons').

[27] *RMI v India* and *RMI v Pakistan* [38]; *RMI v UK* [41].

'allegation' that the nuclear powers were 'in breach of any of [their] legal obligations'.[28] In the second instance, the Applicant's representative delivered a more substantial statement at the 2014 Second Conference on the Humanitarian Impact of Nuclear Weapons, held at Nayarit, Mexico.[29]

One would be hard-pressed to maintain that this second conference was not very much in line with the spirit of nuclear disarmament, including attendant obligations to negotiate towards that end, although the Court concluded that 'the subject of the conference was not specifically the question of negotiations with a view to nuclear disarmament, but the broader question of the humanitarian impact of nuclear weapons'.[30] To some, this line of argument might appear somewhat artificial and, in any event, it might be difficult (perhaps even disingenuous) to countenance the proposition that the UK was 'unaware' of the Applicant's allegations against it concerning its nuclear and disarmament obligations.[31] Indeed, the PCIJ declared that '[a] difference of opinion does exist as soon as one of the Governments concerned points out that the

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[28] See *RMI v India* and *RMI v Pakistan* [46]; *RMI v UK* [49] (the Applicant 'urg[ed] all nuclear weapons states to intensify efforts to address their responsibilities in moving towards an effective and secure disarmament').

[29] According to the Marshall Islands, this second statement unequivocally laid its claim against the respondents:

> [T]he Marshall Islands is convinced that multilateral negotiations on achieving and sustaining a world free of nuclear weapons are long overdue. Indeed we believe that States possessing nuclear arsenals *are failing to fulfil their legal obligations* in this regard. Immediate commencement and conclusion of such negotiations *is required by legal obligation* of nuclear disarmament resting upon each and every State under Article VI of the Non-Proliferation Treaty and customary international law (emphasis added).

See *RMI v India* and *RMI v Pakistan* [26]; *RMI v UK* [28].

[30] *RMI v UK* [50]. The Court stressed that whilst the Applicant's 'statement contain[ed] a general criticism of the conduct of all nuclear-weapon States, it d[id] not specify the conduct of the United Kingdom that gave rise to the alleged breach'. The Court further added that '[s]uch a specification would have been particularly necessary if, as the Marshall Islands contends, the Nayarit statement was aimed at invoking the international responsibility of the Respondent on the grounds of a course of conduct which had remained unchanged for many years' (ibid [50]). But see Judge Crawford's Dissenting Opinion in *RMI v India* [26] (taking a holistic approach to the evidence before highlighting that '[t]his is an appropriate multilateral context, and it does not dilute the force of what the Marshall Islands said, which was not limited to a single forgettable sentence').

[31] In *RMI v UK* [50], the Court underlined that the UK was not present at the Nayarit conference, a fact brandied by that respondent as an argument that it could not have been aware of the claims against it. See Preliminary Objections of the United Kingdom (2015) in *RMI v UK* 23 [48] <http://www.icj-cij.org/docket/files/160/18912.pdf>. Yet, that is a far cry from concluding that this State would have been 'unaware' of the ground covered at that highly subject-relevant conference, including the claimant's allegations against it. See Judge Sebutinde's Separate Opinion in ibid [27]–[28] (expounding that the UK's decision to be absent from that conference was 'tactical or deliberate' and that 'it cannot be said that the UK was totally oblivious of the Nayarit agenda or of the fact that non-nuclear-weapon States like the [claimant] would be taking a view opposed to that of the UK as far as multilateral negotiations on nuclear disarmament are concerned'). For some judges, the UK's posture was not without consequences for the question of whether a dispute existed at the critical date. For his part, Vice-President Yusuf lamented that the Court 'treat[ed] the three cases as though they were almost identical' and opined that following the Court's 1996 *Nuclear Weapons* Advisory Opinion, the UK's voting pattern in the UNGA – essentially revealing its persistent objection to commence multilateral negotiations on nuclear disarmament – evinced the existence of a dispute with the Applicant. See Vice-President Yusuf's Dissenting Opinion in ibid [2], [51]–[52].

attitude adopted by the other conflicts with its own views'.[32] Surely, a meticulous reading of the relevant statements proffered by the Applicant, along with their *whole* contexts, strongly suggests the existence of a legal dispute. After all, the leading commentator on the ICJ once observed that '[t]he diplomatic underpinnings showing the existence of the dispute are sometimes very brief – perhaps a meeting or two of the Security Council leading to a vote which the applicant finds unsatisfactory or unacceptable'.[33]

Turning to the newly introduced 'objective awareness' criterion, the Court held that the Applicant had not met this threshold, particularly since it failed to expressly (or, at least, more clearly) formulate its allegations against the respondent States before instituting the proceedings.[34] Whilst it might have been clear from the evidence that the Applicant had called out the respondent States – rather forcefully – for failing to comply with their legal obligations in the abovementioned multilateral fora,[35] one logical extension of the majority's reasoning is that the claimant failed to sufficiently 'bilateralise' or individualise the relevant disputes against the specific respondents.[36] Unsurprisingly, the respondents emphasised the fact that the Applicant had not identified them specifically by name when voicing its opposition to their nuclear policies, which they could not have construed as an invocation of their responsibility for international law violations.[37]

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[32] *Certain German Interests in Polish Upper Silesia (Germany v Poland)* (Preliminary Objections) PCIJ Rep Series A No 6, 14. See also *Interpretation of Judgments Nos. 7 and 8 (The Chorzów Factory)* PCIJ Rep Series A No 13, 11 (stating 'that it cannot require that the dispute should have manifested itself in a formal way; according to the Court's view, it should be sufficient if the two Governments have in fact shown themselves as holding opposite views in regard to the meaning or scope of a judgment of the Court'). See also Judge Crawford's Dissenting Opinion in *RMI v India* [3]; JJ Quintana, *Litigation at the International Court of Justice*: *Practice and Procedure* (Brill 2015) 58.

[33] S Rosenne, *The Law and Practice of the International Court*: *1920-2005*, vol II (4th edn, Nijhoff 2006) 507.

[34] *RMI v India* and *RMI v Pakistan* [41]–[53]; *RMI v UK* [44]–[57].

[35] One apparent shortcoming lies in the majority's failure to consider the whole context in which the Applicant's statements were made, particularly regarding the Nayarit conference. See Judge Crawford's Dissenting Opinion in *RMI v India* [24]–[28].

[36] See Judge Crawford's Dissenting Opinion in *RMI v India* [19]:

> In the present case, the Marshall Islands does not suggest that there were any of the normal indicators of a bilateral dispute, most obviously because there had not been any correspondence between the States or any bilateral discussion on the subject. Rather it argues that a dispute had arisen through statements made in multilateral fora.

But see L-A Sicilianos, 'The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility' (2002) 13 *EJIL* 1127, 1133–34; D Anzilotti, *Cours de Droit International*, Vol 1 (Recueil Sirey 1929) 467 (both suggesting that breaches of most international obligations results in bilateral or 'bilateralizable' relations).

[37] See Preliminary Objections of the UK (n 31) 22 [47] (suggesting that '[t]he statement did not specifically mention the United Kingdom, and could not in any way be viewed by the UK as invoking its responsibility under international law for any breach of the NPT or of customary international law').

When assessing the evidentiary weight of exchanges made in multilateral fora, the Court specified that it 'must give particular attention, *inter alia*, to the content of a party's statement and to the identity of the intended addressees', stopping short of requiring that such addressees be identified by name.[38] As some judges highlighted, it might be rather disingenuous to contend that the respondents had been unaware of the allegations levelled against them, as the identity of nuclear powers and the Applicant's grievances regarding nuclear disarmament were both matters of considerable notoriety.[39] The majority's approach might be a disservice to the prospect of multilateral diplomacy, which can create an informal space in which both legal claims can be expressed and friendly dispute settlement promoted. After all, the Manila Declaration on the Peaceful Settlement of International Disputes stresses that the submission of a dispute to the ICJ by a State should not be construed as an 'unfriendly' act by the respondent.[40] Nevertheless, a careful review of the case-file, including the conduct exhibited by the parties *after* the institution of proceedings – eg views expressed before the Court both in written pleadings and orally – suggests that a dispute had arisen by the date of the judgments at the latest, but likely earlier. Ultimately, the clearly opposed views expressed by the parties after the date of filing were insufficient to crystalize the dispute. For the Court, a contrary conclusion would have 'deprived [the respondents] of the opportunity to react before the institution of proceedings to the claim[s] made against [their] own conduct' and would have 'subverted' 'the rule that the dispute must in principle exist prior to the filing of the application'.[41]

This is where the question of timing becomes key, and remains inextricably intertwined with the jurisdictional issues explored above. The Court rightly indicated that the mere filing of an application instituting proceedings cannot, by itself, generate the existence of a dispute: more is needed, a proposition with which many judges agreed.[42] Hence, the essential question is 'whether enough of the dispute was in existence prior to the Application here and whether the Court has

[38] See *RMI v UK* [48].
[39] See Judge Sebutinde's Separate Opinion [29]; Judge Robinson's Dissenting Opinion [60] in ibid.
[40] Manila Declaration on the Peaceful Settlement of International Disputes, UNGA Res 37/10 (15 November 1982) UN Doc A/RES/37/10, Annex.
[41] See, eg, *RMI v UK* [43].
[42] *RMI v India* and *RMI* v *Pakistan* [40], [50]; *RMI v UK* [43], [54]. See also Judge Crawford's Dissenting Opinion in *RMI v India* [24].

enough flexibility to recognize it as a dispute'.[43] Whether this question can be answered affirmatively depends on factual appreciation (particularly of the Applicant's statements at multilateral conferences), although there is strong indication that a dispute had likely crystalized by the Nayarit conference.[44] Leaving aside the heightened burden of proving the existence of a dispute through 'objective awareness', the principal query regarding timing is as follows: should the Court have confined its examination of the existence of a dispute to the situation prevalent at the time of filing (April 2014), or, rather, at the time that it delivered its judgments in October 2016? This question, coupled with the problematic introduction of the 'objective awareness' requirement, appears to have been the most divisive, driving the very narrow majorities in all three cases.[45]

The Court sided with the former view, equating the wording in Article 38(1) of its Statute with the idea that cases brought to it require 'disputes existing at the time of their submission'.[46] Undoubtedly, this approach conflicts rather strikingly with what Judge Crawford termed the '*Mavrommatis* principle' and seminal ICJ case-law promoting pragmatism and flexibility on jurisdictional matters, 'which allows it to overlook defects in the Application when to insist on them would lead to a circularity of procedure' or to a scenario 'not in the interests of the sound administration of justice'.[47] This also appears to clash with the Court's flexible and realistic

[43] Judge Crawford's Dissenting Opinion in *RMI v India* [24].

[44] See ibid [24]–[28]. In the affirmative, the Court should not concern itself with whether 'any deficiency in that regard' has been remedied during the course of the proceedings. See Judge Crawford's Dissenting Opinion in *RMI v UK* [31].

[45] Interestingly, some underscore that the majority judges belong to nuclear-weapon powers or are nationals of countries that 'have benefited greatly from the protection offered by the nuclear weapons of the US', whilst the minority judges 'are all nationals of countries that do not possess nuclear weapons, most of them from the global South'. See Nico Krisch, 'Capitulation in The Hague: The Marshall Islands Cases' *EJIL*: *Talk!* (10 October 2016) <http://www.ejiltalk.org/capitulation-in-the-hague-the-marshall-islands-cases/>.

[46] *RMI v UK* [42].

[47] See Judge Crawford's Dissenting Opinions in *RMI Cases* [7]–[9]. The *Mavrommatis* case (n 18) 34 emphasised that:

> Even if the grounds on which the institution of proceedings was based were defective […] this would not be an adequate reason for the dismissal of the applicant's suit. The Court, whose jurisdiction is international, is not bound to attach to matters of form the same degree of importance which they might possess in municipal law. Even, therefore, if the application were premature because the Treaty of Lausanne had not yet been ratified, this circumstance would now be covered by the subsequent deposit of the necessary ratifications.

See also Judge Robinson's Dissenting Opinions in *RMI Cases* [55]. See also Kolb (n 6) 315 (reviewing relevant jurisprudence and concluding that '[i]t is … unnecessary to oblige the claimant to start again the case by a new application, for want of a dispute at the initial critical date … [t]his would be an excessively formalistic exercise, with no significant effects except to increase the administrative burden of the Court and the parties').

position espoused by the Court in *Croatia v Serbia*,[48] to invoke only one example, although in the *RMI Cases* the Court avoided untangling apparent jurisdictional inconsistencies on timing issues in its jurisprudence.[49]

What makes this line of argument particularly compelling is that in the *RMI Cases*, the Applicant was not barred from re-introducing fresh applications immediately after the Court's judgments were delivered. In such eventuality, the conditions surrounding the 'existence of a dispute' would likely have been fulfilled based on the parties' conduct *subsequent* to the initial applications, given that, *inter alia*, the respondents would undeniably have been aware of the allegations levelled against them (ie the claimant would have cured whatever procedural defect or 'unmet condition' at issue).[50] What is ironic – and in plain sight – is the Court's departure from a well-established line of cases (or, more broadly, a flexible judicial attitude), which was amplified by its own language in extrapolating the relevant rule, namely: '[*i*]*n principle*, the date for determining the existence of a dispute is the date on which the application is submitted to the Court' (emphasis added).[51]

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[48] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* (Preliminary Objections) [2008] ICJ Rep 412, 441 [85]:

> What matters is that, at the latest by the date when the Court decides on its jurisdiction, the applicant must be entitled, if it so wishes, to bring fresh proceedings in which the initially unmet condition would be fulfilled. In such a situation, it is not in the interests of the sound administration of justice to compel the applicant to begin the proceedings anew – or to initiate fresh proceedings – and it is preferable, except in special circumstances, to conclude that the condition has, from that point on, been fulfilled.

On this case, see K Oellers-Frahm, 'The Principle of Consent to International Jurisdiction: Is It Still Alive?: Observations on the Judgment on Preliminary Objections in the *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*' (2010) 52 *German Yearbook of International Law* 487; YZ Blum, 'Consistently Inconsistent: The International Court of Justice and the Former Yugoslavia (Croatia v. Serbia)' (2009) 103 *AJIL* 264.

[49] See, eg, the apparent contradiction between *Legality of Use of Force (Serbia and Montenegro v Belgium)* (Preliminary Objections) [2004] ICJ Rep 279, 327–28 [127] (declining to take jurisdiction since the Applicant did not have access to the Court at the date of filing, in apparent contravention of the '*Mavrommatis* principle') and *Croatia v Serbia* (n 48) 441–44 [85]–[92] (suggesting that the Respondent's admission to the UN in 2000 fulfilled the '*Mavrommatis* principle' by looking at the legal situation at the time of the delivery of the judgment).

[50] See, eg, Dissenting Opinions of Vice-President Yusuf and Judge Robinson in *RMI v UK* [24], [55] respectively. See also *Polish Upper Silesia* (n 32) 14 ('the Court cannot allow itself to be hampered by a mere defect of form, the removal of which depends solely on the Party concerned'); *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)* (Jurisdiction and Admissibility) [1984] ICJ Rep 392, 428–29 [83] ('[i]t would make no sense to require Nicaragua now to institute fresh proceedings based on the Treaty, which it would be fully entitled to do'). In the UK's case, the introduction of fresh proceedings might have run into potential obstacles, in light of its amended Article 36(2) declaration. See nn 106–107 and accompanying text.

[51] Several judges criticised the problematic disconnect between this general rule and the Court's application of it to the facts. See Vice-President Yusuf's Dissenting Opinion in *RMI v UK* [33]; Judge Tomka's Separate Opinion in *RMI v India* [14]–[16]; Judge Cançado Trindade's Dissenting Opinion in *RMI v UK* [27]; Judge Robinson's Dissenting

The determination of the 'critical' date for the purposes of ascertaining whether a dispute exists is not one of academic interest, but one of considerable practical relevance. Interestingly, President Abraham (then Judge) had relied on the above jurisprudence in his Separate Opinion in *Belgium v Senegal* to insist that the Court should have noted the existence of a dispute between the parties over the alleged customary law breaches at the time of its judgment, citing the Court's formalism and lack of jurisprudential consistency as key concerns.[52] Similarly, in *Georgia v Russia* he had lauded the Court's earlier pronouncements on the existence of a dispute, a line of cases he perceived as 'strictly realistic and practical … free of all hints of formalism'; he added that 'in determining whether a dispute exists, the Court does so as of the date on which it decides (i.e., generally, the date of its judgment on the preliminary objections)'.[53] By contrast, in the *RMI Cases*, President Abraham effectively reversed himself for reasons expressed in his Declarations, now apparently defending the view that a legal dispute must have crystallized at the time of filing, rather than at the time of the judgments' delivery, for the Court to take jurisdiction.[54] Unsurprisingly, some scholars exhibited perplexity regarding President Abraham's and Judge Owada's support for the majority's approach, given that they had previously been 'highly critical

Opinion in *RMI v Pakistan* [41]ff; Judge Crawford's Dissenting Opinion in *RMI v UK* [10]; Judge *ad hoc* Bedjaoui's Dissenting Opinion in ibid [34].

[52] Judge Abraham's Separate Opinion in *Belgium v Senegal* (n 10) 474–76 [13]–[20]. Judge Owada also expressed misgivings about the Court's approach, describing its methodology as relying 'upon a purely formalistic and even largely artificial logic'. See Judge Owada's Declaration in ibid 466–67 [11]–[14]. On the Court's holding on the 'existence of a dispute', see above (nn 10–11) and accompanying text.

[53] Judge Abraham's Separate Opinion in *Georgia v Russia* (n 8) 228 [14]–[15]. In ibid, he added that '[i]t is enough for the Court to find that the two parties hold opposing views on the matters referred to the Court, and this difference may be evidenced in any manner', and that 'for the Court what must matter is that the dispute exists at the date when it determines whether it has jurisdiction'. However, he appeared to temper this somewhat at 229 [16]: '[i]t is necessary and sufficient if the dispute exists when the Court is seised (which can be shown by subsequently occurring facts) and subsists on the date on which the Court determines whether the conditions for the exercise of its jurisdiction have been met'. This qualification can be understood by reference to Judge Abraham's earlier conclusion that 'the dispute, by definition, concerns facts and situations predating the seisin of the court; thus, it can be stated that as a rule the dispute already exists when the proceedings are instituted'. See ibid 228 [15].

[54] See generally President Abraham's Separate Opinions in *RMI Cases* (outlining the reversal of his earlier view in *Belgium v Senegal* and aligning his current position with the shift the Court initiated in *Georgia v Russia*). Compare with Judge Tomka's Separate Opinions in *RMI Cases* [1] (stressing that '[t]he Court seems not to be interested in knowing whether a dispute between [the parties] exists now'). See also A Anghie, 'Politic, Cautious, and Meticulous: An Introduction to the Symposium on the *Marshall Islands* Case' (2017) 111 *AJIL Unbound* 62, 65 (describing President Abraham's reversal as an 'awkward spectacle'); I Venzke, 'Public Interest in the International Court of Justice–A Comparison Between *Nuclear Arms Race* (2016) and *South West Africa* (1966)' (2017) 111 *AJIL Unbound* 68, 73 (observing that President Abraham 'was at pains to explain why in his opinion there is no dispute in [the *RMI Cases*]').

of earlier extensions of the concept [of a legal dispute]',[55] particularly in *Belgium v Senegal*.[56] However, prior to these cases other publicists had already firmly concluded that '[t]he moment at which a dispute must have existed is the date of the institution of proceedings'.[57]

More importantly, at least four judges who voted against the Court's jurisdiction in the *RMI Cases* acknowledged that a legal dispute had arisen between the parties *after* the institution of proceedings.[58] Vice-President Yusuf espoused a compatible view but only in *RMI v UK*, siding with the majority in the other two cases. In *RMI v UK*, he declared that '[t]he institution of proceedings before the Court may … result in the subsequent crystallization of a nascent dispute', and concluded that '[i]f a subjective element of a formalistic requirement such as "awareness" is to be demanded as a condition for the existence of a dispute, the applicant State may be able to fulfil such a condition at any time by instituting fresh proceedings'.[59] Ultimately, the Vice-President observed that an 'incipient dispute' had arisen between the Applicant and the UK prior to the date of filing, underscoring that this 'nascent dispute ha[d] fully crystallized during the proceedings before the Court', unlike what transpired in the two companion cases.[60]

Therefore, the question of timing becomes pivotal as the Court's rigid commitment to the date of filing as the 'critical' date undoubtedly dictated the outcomes in these cases. The jurisdictional straightjacket promoted by the Court dissuaded several judges from aligning their analysis with classical ICJ pronouncements stressing realism and flexibility, even though their appreciation of the facts was presumably more congruent with the spirit of that jurisprudence. This reality is particularly significant given that the operative clauses in both *RMI v India* and *RMI v Pakistan* were adopted on a very narrow majority, whilst *RMI v UK* was decided on the narrowest

[55] Krisch (n 45).
[56] See n 52.
[57] H Thirlway, *The International Court of Justice* (OUP 2016) 53 (citing *Alleged Violations* (n 12) [50], [52]).
[58] See Judge Owada's Separate Opinion in *RMI v UK* [21] (acknowledging that 'new Application[s] could be filed … which might not be subject to the same preliminary objection[s] to jurisdiction as upheld in the present case[s]'); Judge Xue's Declaration in ibid [4] (remarking that 'the Marshall Islands might readily come back and file a new case to the same effect, as by now the dispute is indeed crystallized'); Judge Gaja's Declaration in ibid p 1 (observing that 'disputes have clearly arisen since April 2014 as a result of the Applications and of the respondent States' reactions'); Judge Bhandari's Separate Opinion in ibid [14] (recognising that 'this Court ought to have examined the other preliminary objections' because the 're-submission of the case again would entail a waste of efforts, time and resources already spent by the Parties and the Court in adjudicating this matter').
[59] Vice-President Yusuf's Dissenting Opinion in ibid [24], [28].
[60] Ibid [60].

majority possible because of Vice-President Yusuf's conclusions. Indeed, the key clause of the *dispositif* in that case was decided by the President's casting vote, an exceptional exercise of powers invoked for only the fourth time in ICJ history (and the second time during the current presidency).[61]

III. Looking Beyond the Cases: Potential Consequences for State Responsibility and Multilateral Disputes

Beyond any strictly technical or legalistic reading of these judgments, the *RMI Cases* have potentially more broad-reaching implications. For instance, they not only mark a considerable departure from the notion of jurisprudential consistency, at least in pre-*Georgia v Russia* terms, but appear equally problematic from a methodological standpoint. A particularly intractable feature of the majority's reasoning was its heavy reliance on the *Alleged Violations* decision to bolster its imposition of the new 'objective awareness' requirement.[62] It is striking that this judgment had not been delivered by the time the oral hearings were held in the *RMI Cases*, confirming that the parties could not have sought inspiration from this jurisprudential development in their arguments, let alone have anticipated the Court's admittedly unpredictable construction of that precedent. Indeed, when read in its context, the *Alleged Violations* judgment does not support the introduction of 'objective awareness' as a formal legal requirement.[63]

Similarly, the Court's selective reliance on *Georgia v Russia* to bolster its analysis on the 'existence of a dispute' appears questionable. Surely, the fact that that litigation was triggered by the application of a compromissory clause, as opposed to Article 36(2) declarations like in the *RMI Cases*, constitutes an immediate distinguishing factor. As suggested above,[64] the portion of

[61] See *RMI v UK* [59(1)]. Both the slim majorities and the exercise of the casting vote are significant features of the *RMI Cases*: see Tams (n 20). Other instances of the exercise of the presidential casting vote at the ICJ are found in the following: *South West Africa, Second Phase* (Judgment) [1966] ICJ Rep 6, 51 [100]; *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, 266 [105(2)E]; *Questions of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v Colombia)* (Preliminary Objections) [2016] ICJ Rep_ [126(2)(b)].

[62] *Alleged Violations* (n 12) [73].

[63] See the following in *RMI v India*: Vice-President Yusuf's Declaration [7]–[8]; Judge Sebutinde's Separate Opinion [30]–[32]; Dissenting Opinions of Judges Bennouna p 5, Robinson [26]–[27], and Crawford [3]–[6] (also observing that the Court's approach 'effectively transforms a non-formalistic requirement into a formalistic one through the use of the term "awareness"'). See also, generally, V-J Proulx, 'The *Marshall Islands* Judgments and Multilateral Disputes at the World Court: Whither Access to International Justice?' (2017) 111 *AJIL Unbound* 96, 96–98.

[64] See nn 10–11, 52–56 and accompanying text.

Belgium v Senegal over which the Court declined to take jurisdiction presents more analogous content to the *RMI Cases*. Furthermore, the specific compromissory clause in *Georgia v Russia* featured inherent preconditions for seizing the Court (in particular, a precondition that attempts be made to settle the dispute by negotiation), thereby being 'of limited value as a precedent given the peculiarities' of that provision.[65] Surely, the nature of the jurisdictional basis alone affects the dynamic of the argument, considerably weakening the analytical relevance of the *Georgia v Russia* precedent for present purposes.

Even over four decades prior to *Georgia v Russia*, eminent publicists already acknowledged that a prior negotiation requirement built into a compromissory clause was 'intimement liée à celle de l'existence d'un différend'.[66] Hence, the Court's reliance on these two precedents, dating back to 2011 and 2016 respectively, to consecrate the newly introduced 'objective awareness' criterion suggests that 'the jurisprudence prior to April 2011 does not support the Majority's position', and this impression of questionable authoritativeness is reinforced by the reality that 'the passages cited by the Majority do not contain references to prior jurisprudence because they are, themselves, no more than factual statements'.[67]

More importantly, the subject-matter of the obligations at play in the *RMI Cases* must be appreciated in their broader context. Some judges underscored that nuclear non-proliferation/disarmament constitutes a fundamental global security imperative, prompting them to envisage a role for the ICJ in vindicating the UN Charter's ideals.[68] The Court itself has reiterated on more than one occasion that it can play a role in the maintenance and restoration of international peace and security, within the confines of its jurisdiction, as the UNSC's *primary* responsibility in this field does not connote *exclusivity*. Furthermore, this role remains complementary – not competitive – with the UNSC's function, and the *RMI Cases* might be a good illustration of a situation that might benefit from the involvement of both organs (although the first

[65] Judge Robinson's Dissenting Opinions in *RMI Cases* [38].
[66] G Abi-Saab, *Les Exceptions Préliminaires dans la Procédure de la Cour internationale de Justice* : *Etude des Notions Fondamentales de Procédure et des Moyens de leur Mise en Oeuvre* (Pedone 1967) 116. On the doctrinal and jurisprudential development of this requirement at that time, see ibid 118–25. See also K Wellens, *Negotiations in the Case Law of the International Court of Justice*: *A Functional Analysis* (Ashgate 2014) 87–9.
[67] Judge Robinson's Dissenting Opinions in *RMI Cases* [38].
[68] See generally Judge Bennouna's Dissenting Opinions and Judge Sebutinde's Separate Opinions [2]–[9] in *RMI Cases*.

attempt to seize the Court failed).[69] Contrary to the limitations imposed on the UNGA by Article 12(1) of the UN Charter,[70] nothing in that instrument suggests any kind of hierarchy between the UNSC and ICJ, or that they operate on some strict division of powers.[71]

Whilst the Court's jurisprudence in certain areas such as maritime delimitation has arguably arguably produced clarity, stability, and predictability in the law,[72] and it is increasingly entrusted with highly technical, scientific, and factually-dense disputes,[73] its potential role in the field of global security is also important as its docket has shown sometimes. Most recently, the Ukraine submitted the third case under a sectoral anti-terrorism convention (both *Lockerbie* cases involved the Montreal Convention), alleging various violations of the International Convention for the Suppression of the Financing of Terrorism ('Terrorist Financing Convention') by Russia.[74] There is perhaps something attractive in analysing critically the *RMI Cases* through a global security lens. As observed by Judge Bennouna,

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[69] On the functional complementarity between those two organs in global security settings and relevant jurisprudence, see V-J Proulx, *Institutionalizing State Responsibility*: *Global Security and UN Organs* (OUP 2016) 143–48.

[70] That provision states that '[w]hile the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests'.

[71] See also P Webb, *International Judicial Integration and Fragmentation* (OUP 2013) 128 (observing that both organs 'exist in a horizontal relationship within the same international system').

[72] See *Maritime Delimitation in the Black Sea (Romania v Ukraine)* (Merits) [2009] ICJ Rep 61; P Tomka, 'The Guyana/Suriname Arbitration Award of 2007' (2012) 8 *Permanent Court of Arbitration Awards Series* 1, 16–9.

[73] See, eg, *Whaling in the Antarctic (Australia v Japan*: *New Zealand intervening)* (Merits) [2014] ICJ Rep 226; *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Merits) [2010] ICJ Rep 14.

[74] *Case concerning Terrorism Financing and Radical Discrimination in Ukraine (Ukraine v Russia)*, Application Instituting Proceedings (16 January 2017) <http://www.icj-cij.org/docket/files/166/19314.pdf>. Ukraine also filed a request for the indication of provisional measures of protection: <http://www.icj-cij.org/docket/files/166/19316.pdf>. After hearing the parties, the Court declined to indicate provisional measures relating to the obligations stemming from the Terrorist Financing Convention: *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of all Forms of Racial Discrimination (Ukraine v Russian Federation)* (Provisional Measures) [2017] ICJ Rep_ [106] <http://www.icj-cij.org/docket/files/166/19394.pdf>. Whilst the alleged violations of counterterrorism obligations are governed by one multilateral instrument, Ukraine also seeks to establish that Russia violated provisions of the International Convention on the Elimination of All Forms of Racial Discrimination ('CERD'), for which the alleged jurisdictional basis is the same as in *Georgia v Russia* (Article 22 of the CERD). The relevant compromissory clause in the Terrorist Financing Convention contains some similar (although not all identical) preconditions to that of CERD. It remains to be seen whether the Court will pursue its formalistic and thorough scrutiny of the evidence relating to the existence of a dispute. See also nn 8–9, 64–65 and accompanying text. On the broader implications of this case, see K Trapp, '*Ukraine v Russia* (Provisional Measures): State "Terrorism" and IHL' (2 May 2016) *EJIL*: *Talk!* <https://www.ejiltalk.org/ukraine-v-russia-provisional-measures-state-terrorism-and-ihl>; V-J Proulx, '"Terrorism" at the World Court: *Ukraine v Russia* as an Opportunity for Greater Guidance on Relevant Obligations?' (17 April 2017) *EJIL*: *Talk!* <https://www.ejiltalk.org/terrorism-at-the-world-court-ukraine-v-russia-as-an-opportunity-for-greater-guidance-on-relevant-obligations/>.

> International judges had a duty to be even more vigilant in the present case, which concerns a question of crucial importance for security in the world. That is another reason for the principal judicial organ of the United Nations to undertake its role fully. Indeed, how can it shelter behind purely formalistic considerations which both legal professionals and ordinary citizens would find difficult to understand, rather than contributing, as it should do, to peace through international law, which is the raison d'être of the Court.[75]

To accurately justify its title of 'World' Court, the argument presumably goes, the ICJ must not avoid tackling politically-charged disputes, which may have unpleasant political and global security implications, and multilateral dimensions (eg obligations *erga omnes*). Consequently, this requires adopting a flexible and pragmatic jurisdictional outlook, a rule of thumb in the Court's classical jurisprudence, which now stands in sharp contrast to the course followed by the *RMI Cases*. In short, it could be argued that those majorities missed an opportunity to enhance the Court's legitimacy by declining jurisdiction and motivating that decision in an overly formalistic and rigid fashion. Thus, these decisions might adversely affect the perception of the Court in some quarters although, prior to the judgments, some commentators had already predicted that the mere submission of these cases would be detrimental to its legitimacy.[76] After the decisions were handed down, other publicists underscored the consequences of the Court's choices in terms of both formalism and declining jurisdiction, suggesting that '[t]he increasing disconnect between the ICJ and the outside world may lead to the progressive disempowerment of international law as an emancipatory tool to bring about more justice and fairness in international affairs'.[77]

For some, it might be tempting to highlight the apparent contradiction between the majority's reasoning and jurisdictional outcome, on one hand, and the seriousness of the nuclear disarmament duties central to the three cases, on the other. The Court's *Nuclear Weapons* Advisory Opinion might exacerbate this temptation: indeed, the ICJ emphasised the seriousness of those duties and declared that the obligation captured by Article VI of the NPT goes 'beyond … a mere obligation of conduct', equating it with an 'obligation to achieve a precise result – nuclear

[75] Judge Bennouna's Dissenting Opinions in *RMI Cases* p 2.
[76] See KD Davis, 'Hurting More than Helping: How the Marshall Islands' Seeming Bravery Against Major Powers Only Stands to Maim the Legitimacy of the World Court' (2016) 25 *Minnesota Journal of International Law* 79.
[77] A Bianchi, 'Choice and (the Awareness of) its Consequences: The ICJ's "Structural Bias" Strikes Again in the *Marshall Islands* Case' (2017) 111 *AJIL Unbound* 81, 86. For another critical take, see also Anghie (n 54) 62–7.

disarmament in all its aspects – by adopting a particular course of conduct, namely, the pursuit of negotiations on the matter in good faith'.[78]

However, emphasising a perceived disconnect between the relevant substantive law at play – even if the alleged violations fall within the ambit of obligations *erga omnes*[79] – and an unfavourable jurisdictional decision might be difficult to countenance in legal terms. After all, in *Congo v Rwanda* confirmed that 'the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things' and that the 'mere fact' that a dispute involves such rights and obligations 'would not give the Court jurisdiction'.[80]

Undoubtedly, the *RMI Cases* had relevance for SR and stemmed from multilateral disputes over alleged violations of multilateral obligations. The Court revealed itself reluctant to take jurisdiction over these politically-loaded cases, and did so at the first available opportunity (ie determining that no legal disputes existed) without addressing the respondents' other preliminary objections.[81] The immediate casualty of these judgments is the Court's jurisprudence, given the now confirmed shift to jurisdictional formalism. More broadly, these judgments may engender important consequences for access to justice by dissuading future claimants from pursuing litigation at the ICJ (if not flat-out depriving them of that avenue, absent clear 'awareness' on part of the respondent(s)) for the purposes of enforcing communitarian obligations.[82] Let us recall that

[78] *Nuclear Weapons* Advisory Opinion (n 61) 264 (also cited in *RMI v India* [19]; *RMI v Pakistan* [19]; *RMI v UK* [20]).

[79] On obligations *erga omnes* and their enforcement, see CJ Tams, *Enforcing Obligations Erga Omnes in International Law* (CUP 2005); M Ragazzi, *The Concept of International Obligations 'Erga Omnes'* (Clarendon Press 1997) 7–12; A De Hoogh, *Obligations Erga Omnes and International Crimes* (Kluwer 1996) 49–56.

[80] *Armed Activities on the Territory of the Congo (New Application*: *2002) (DRC v Rwanda)* (Jurisdiction and Admissibility) [2006] ICJ Rep 6, 31–2 [64], 52 [125] (also citing *East Timor (Portugal v Australia)* (Judgment) [1995] ICJ Rep 90, 102 [29]).

[81] The decision not to handle the additional preliminary objections drew criticism. See Judge Gaja's Declarations in *RMI Cases*; Judge Bhandari's Separate Opinions in *RMI v India* [51]ff; *RMI v Pakistan* [16]ff; *RMI v UK* [16]ff. Aside from alleging the absence of a justiciable dispute between the parties by the time of the filing of the applications, the respondents' other principal preliminary objections advanced that (i) reservations formulated in their optional clause declarations precluded the Court's jurisdiction; (ii) the cases could not proceed to the merits in the absence from the proceedings of third parties whose essential interests were at stake; and (iii) the Court should decline jurisdiction because its judgments would be devoid of practical consequence or serve no legitimate purpose. See, eg, *RMI v UK* [23], [58].

[82] On SR for breaches of communitarian norms, see J 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 U Fastenrath et al (eds), *From Bilateralism to Community Interest*: *Essays in Honour of Judge Bruno Simma* (OUP 2011) 224–40. For related seminal accounts, see B Simma, 'From Bilateralism to Community Interest in International

the International Law Commission's ('ILC's') *Articles on State Responsibility* elect unilateral SR invocation and implementation modes as the default rule, a process typically occurring in the context of asymmetric and disparate diplomatic relations. This structure stems from the largely anarchical nature of the international society and essentially leaves injured States to their own devices, subject to the parameters set out in the *Articles on State Responsibility*, when invoking and implementing the international responsibility of wrongdoing States; consequently, autoqualification and self-judging remain central features in that process.[83] Therefore, the invocation of SR for violations of communitarian obligations before the ICJ is extremely rare, not to mention that it must accord with the principle of consensual jurisdiction.[84]

The *RMI Cases* may make the prospect of submitting 'disputes' – and that term is used loosely given those decisions – to the Court even less attractive to potential litigants, especially when their grievances relate to a network of interdependent and interrelated multilateral obligations under the global security umbrella. As noted by Judge Tomka, duties of this kind, especially those in 'disarmament treaties or treaties prohibiting the use of particular weapons', require, for their underlying objectives to be fulfilled, 'interdependent performance of obligations by all parties'.[85] Such interdependent obligations, like the relevant nuclear disarmament duties in the instant cases, 'can certainly not be brought under a bundle of bilateral relations' but 'are nonetheless dominated by a sort of global reciprocity in the sense that each state disarms because the others do likewise'.[86] As one jurist emphasised, '[t]he collective action problem in international

Law' (1994) 50 *Recueil des Cours* 217; J Crawford, 'Multilateral Rights and Obligations in International Law' (2006) 319 *Recueil des Cours* 325.

[83] For different views on this aspect of the international legal system, see D Alland, 'The Definition of Countermeasures' in JR Crawford et al (eds), *The Law of International Responsibility* (OUP 2010) 1127, 1129; R Provost, *International Human Rights and Humanitarian Law* (CUP 2002) 338 fn 2; L Gross, 'States as Organs of International Law and the Problem of Autointerpretation' in G Lipshy (ed), *Selected Essays on International Law and Organization* (Transnational Publishers 1993) 167–97; H Kelsen, *Peace Through Law* (University of North Carolina Press 1944) 13–4. For seminal accounts on anarchy in the global legal order, see the authorities cited in Proulx (n 69) 18–19 fn 17–18.

[84] On the invocation of SR in cases involving multiple parties, see J Crawford, *State Responsibility*: *The General Part* (CUP 2013) 644–74.

[85] Judge Tomka's Separate Opinions in *RMI Cases* [35] (enlisting scholarly support from Bruno Simma & Christian Tams and Linos-Alexander Sicilianos).

[86] Sicilianos (n 36) 1135. See also Tams (n 79) 53–8, 80. The breach of such obligations 'by one party prejudices the treaty regime between all'. See Crawford, 'Responsibility' (n 82) 227; ILC, 'Draft Articles on the Law of Treaties with Commentaries' [1966] I(2) *Yearbook of the ILC* 216, para 8 fn 117.

law is not solved by prematurely turning collective obligations into bundles of bilateral obligations, in the manner of early modern attempts at multilateral treaty-making'.[87]

From the standpoint of SR, there is an apparent contradiction between the Court's rhetoric and its application of law to the facts. Whilst it rightly observed that 'notice of an intention to file a case is not required as a condition for the seisin of the Court', and that ILC Articles 43 and 48(3) only require a 'notice of claim' of SR without addressing the jurisdiction of courts or admissibility of disputes,[88] the 'objective awareness' criterion arguably introduces a 'pre-notification requirement'.[89] Interestingly, some ICJ judges and scholars trace back the 'prior notice of claim' requirement for the Court's seisin to *Georgia v Russia*, casting that development in a critical light.[90]

Whilst some might sympathise with Judge Xue's view that 'surprise litigation' should not be encouraged,[91] the Applicant fulfilled the only relevant notification requirement in these cases by launching the proceedings, namely the obligation to give notice of a claim under SR law. But assuming that a 'pre-notification requirement' applied here, surely the very existence of the parties' Articles 36(2) declarations would satisfy it.[92] Indeed, the very purpose of such declarations is to signal to the international community the signatory States' willingness to submit to the Court for the adjudication of their legal disputes, subject to any limiting statements in their declarations. Since standing and the existence of a dispute are distinct features, absent any limitation in an optional clause declaration, a claim for *erga omnes* breaches would undoubtedly fit within the scope of such declaration and be justiciable before the Court.[93]

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[87] Crawford, 'Responsibility' (n 82) 226. See also K Marek, 'Contribution à l'Étude de l'Histoire du Traité Multilatéral' in E Diez and R Bindschedler (eds), *Festschrift für Rudolf Bindschedler* (Stämpfli 1980) 17–39.
[88] *RMI v India* [35]–[42]; *RMI v UK* [38]–[45].
[89] The language is borrowed from Judge Crawford's Dissenting Opinions in *RMI v India* and *RMI v Pakistan* [22] (also underscoring that 'Article 43 is not a pre-notification requirement, it is a notification requirement'). See also Judge Tomka's Separate Opinions in ibid [29].
[90] Joint Dissenting Opinion of President Owada, Judges Simma, Abraham and Donoghue and Judge *ad hoc* Gaja in *Georgia v Russia* (n 8) 143 [3] ('the Court … has never before required prior notice of the claim and rejection by the respondent'); President Owada's Separate Opinion in ibid 174–75 [11]–[13] (characterising it as 'a new stringent requirement'); Wellens (n 66) 90.
[91] Judge Xue's Declarations in *RMI Cases* [6].
[92] Whilst not directly on point, see Judge Tomka's Separate Opinions in *RMI v India* and *RMI v Pakistan* [29].
[93] See Tams (n 79) 160 fn 8.

Granted, the law governing interdependent nuclear disarmament duties, which might qualify as obligations *erga omnes*, is not completely settled since 'the question of standing, *locus standi*, [is] an issue that is yet to be developed in international law',[94] although leading commentators have long accepted the invocation of responsibility concerning communitarian obligations and that the Court can adjudicate claims involving their violation.[95] Given its experience with, and proximity to, nuclear testing, the Applicant would presumably have attracted the designation of 'injured State' or 'specially affected' State under ILC Article 42,[96] or that of non-directly injured State under Article 48, calling out the respondents' violations on behalf of the international community as a whole.[97]

Indeed, obligations *erga omnes* empower all States to invoke responsibility stemming from their breach since they are owed to all, given that all players in the system have an interest in imposing timely compliance with those undertakings.[98] Whilst couched at the level of *erga omnes inter partes* because of the specific conventional framework at play, this type of rationale drove the Court's reasoning regarding the obligation to extradite or prosecute under the UN Convention against Torture in *Belgium v Senegal*.[99] Presumably, this thinking might have also seeped into the *RMI Cases*, had they crossed the admissibility threshold. In this spirit, the Applicant emphatically recalled that it 'is a small island State whose only power is the power of the law'.[100] Seen through this prism, the Court's judgments appear to have missed the mark in advancing more robust dispute settlement avenues to enforce communitarian obligations, or in creating a more hospitable jurisdictional culture for multilateral disputes with global security implications.

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[94] Judge Xue's Declarations in *RMI Cases* [8].
[95] See L Oppenheim et al, *Oppenheim's International Law*, vol I (9th edn, Longman 1992) 5; Tams (n 79) 158–92; J Crawford, 'The Standing of States: A Critique of Article 40 of the ILC's Draft Articles on State Responsibility' in M Andenas (ed), *Judicial Review in International Perspective* (Kluwer 2000) 23–43.
[96] One might wonder if the Court's own language leads to that conclusion. See, eg, *RMI v UK* [44] ('the Marshall Islands, by virtue of the suffering which its people endured as a result of it being used as a site for extensive nuclear testing programs, has *special reasons for concern about nuclear disarmament*' (emphasis added)). See also ibid [16].
[97] See also Judge Crawford's Dissenting Opinion in *RMI v India* [21]. For the Applicant's arguments on *locus standi*, see Memorial in *RMI v Pakistan* <http://www.icj-cij.org/docket/files/159/18902.pdf> [31]–[39] (also invoking these two provisions); Application Instituting Proceedings in ibid [35] <http://www.icj-cij.org/docket/files/159/18294.pdf> (defining the obligations at issue as *erga omnes*).
[98] For a more progressive construction, see Institut de Droit International (Rapporteur Giorgio Gaja), 'Obligations *Erga Omnes* in International Law', Resolution adopted at the Krakow Session 2005, Arts 1(a), 5 <http://www.justitiaetpace.org/idiE/resolutionsE/2005_kra_01_en.pdf>.
[99] *Belgium v Senegal* (n 10) 449–50 [67]–[70]. On this point in relation to SR, see Crawford, JR, 'Third Report on State Responsibility' (2000) UN Doc A/CN.4/507 and Add. 1–4, paras 106–07, Table 1.
[100] Memorial in *RMI v Pakistan* (n 98) [35].

However, some degree of candour is needed, despite the persuasive reasoning advanced in the dissenting opinions, in particular by Judge Crawford. The above arguments do not necessarily imply that the *RMI Cases* would have made it to the merits phase, had the Court found that genuine legal disputes existed. For instance, there is some indication that the Applicant's cases might have run up against obstacles on the admissibility front given the interdependent nature of the obligations at issue, as argued convincingly by Judge Tomka.[101] For him, 'it is unrealistic to expect that a State will disarm unilaterally', which means 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'.[102]

Since the Court would not be called upon to pronounce on the responsibility of third States as a basis for adjudicating the respondents' alleged wrongdoing, Judge Tomka excluded the application of the *Monetary Gold* principle in this context. His position was rather that the Court would not be able to rule on a single respondent's behaviour without an understanding of the views of other nations with which that respondent was obligated to negotiate in seeking nuclear disarmament.[103] Along perhaps compatible lines, Judge Xue expressed regret that the Court did not address the respondents' other preliminary objections to the Marshall Islands' applications, which she saw as 'not merely defective in one procedural form'.[104] Conversely, Judge Crawford concluded that the Court could take jurisdiction, construing the *Monetary Gold* principle as potentially limitative of the 'consequences that can be drawn' from the conduct of the respondent States; however, he later emphasised that the Court might ascertain that 'a third State could breach an obligation to negotiate by its own conduct' on the merits.[105]

[101] See Judge Tomka's Separate Opinions in *RMI Cases* Part II.
[102] Judge Tomka's Separate Opinion in *RMI v India* [35], [38].
[103] See Judge Tomka's Separate Opinion in *RMI v UK* [38]–[39].
[104] See, eg, Judge Xue's Declaration in *RMI v UK* [9]–[11].
[105] Judge Crawford's Dissenting Opinion in *RMI v UK* [33]–[34]. For a critical interpretation of the *Monetary Gold* principle and the 'strict inter-State outlook', see Judge Cançado Trindade's Dissenting Opinion in *RMI v UK* [128]–[131].

Similarly, there is no guarantee that the Applicant would have succeeded on its substantive claims, had it cleared the admissibility hurdle, not to mention possible jurisdictional limitations enshrined in the parties' respective 'optional clause' declarations. Interestingly, the UK revised its Article 36(2) declaration in 2014 in anticipation of the Court's judgment, thereby excluding from its purview future disputes which are 'substantially the same as a dispute previously submitted to the Court by the same or another Party'.[106] In February 2017, the UK amended its optional clause declaration again, building into it two principal features of the arguments it advanced before the Court in *RMI v UK*: (i) imposing a minimum 6-month prior notification of claim requirement for disputes or claims submitted against it before the Court; and (ii) excluding from its acceptance of the Court's jurisdiction '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 [NPT Treaty] have also consented to the jurisdiction of the Court and are party to the proceedings in question'.[107]

One possible avenue would have been for the Court to assess the Applicant's statements delivered at multilateral conferences whilst keeping the *South West Africa* case firmly in mind, which acknowledged that multilateral disputes can arise and crystallize in such settings (although they would then have to be 'bilateralised' to accord with ICJ jurisdictional requirements).[108] Whilst the Court recognised that multilateral exchanges can serve as evidence of a dispute, it centred its analysis on 'whether the statements invoked by the Marshall Islands [were] sufficient to demonstrate the existence' of 'clearly opposite views' between the parties.[109] It ruled in the negative. Therefore, for the Applicant's claim that its 'disputes' be entertained by the Court under

[106] Ironically, there was no guarantee that this amendment would shelter the UK from further litigation on the nuclear disarmament issue, since the holding in *RMI v UK* was that there was not justiciable 'dispute' before the Court. See Krisch (n 45). Unsurprisingly, the UK amended its declaration again in 2017, now excluding 'any *claim* or dispute which is substantially the same as a claim or dispute previously submitted to the Court' (emphasis added).
[107] The prior notification requirement excludes from the UK's Article 36(2) declaration 'any claim or dispute in respect of which the claim or dispute in question has not been notified to the United Kingdom by the State or States concerned in writing, including of an Intention to submit the claim or dispute to the Court failing an amicable settlement, *at least six months* in advance of the submission of the claim or dispute to the Court' (emphasis added). The text of the updated declaration is available at <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3&code=GB>.
[108] *South West Africa* (n 21) 346. See also Judge Crawford's Dissenting Opinions in *RMI v India* and *RMI v Pakistan* [20]–[21] (also highlighting that '[t]his does not require the Court to treat the underlying relations as bilateral *ab initio*'). Interestingly, in 1987 Damrosch hypothesised that 'the two-party, zero-sum dispute may well already be the exception rather than the rule'. See LF Damrosch, 'Multilateral Disputes' in idem (ed), *The International Court of Justice at a Crossroads* (Transnational Publishers 1987) 376, 376.
[109] *RMI v India* and *RMI v Pakistan* [36], [45]; *RMI v UK* [39], [48].

ILC Article 48 to succeed, a more forward-looking and flexible jurisdictional approach would have been necessary. As noted by Judge Crawford, '[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'.[110]

IV. Conclusion: Alternate Avenues to Uphold Interrelated Obligations

The Court's judgments have generated considerable criticism. Some might say that in terms of outcome, they constitute a sequel to *South West Africa*.[111] A cynical observer might also ponder whether the Applicant was ill-advised by its legal team which could not make 'the required legal arguments at the level of quality that was necessary', with 'a small group of NGO-based lawyers who are passionate about nuclear disarmament law [that] convinced a small, developing country to leverage its tragic history with nuclear weapons testing' to no avail.[112] For one thing, there was every indication that the six cases that were not included on the Court's docket would have been 'dead on arrival'.[113]

Surely, the Applicant could have engaged in 'strategic' bilateral exchanges to hedge its bets and particularise each individual dispute prior to its filing. Perhaps it would have been wiser to lobby an international organization to bring an advisory opinion request on the issue of nuclear disarmament.[114] But that is missing the point. What is clear from both the judgments and separate opinions is that the Court further exacerbated its recent turn to jurisdictional formalism, which can be traced back to *Georgia v Russia*, perhaps sending a bad message about the Court's legitimacy and unwillingness to tackle politically-charged multilateral disputes.[115] As a result, publicists have

[110] Judge Crawford's Dissenting Opinions in *RMI v India* and *RMI v Pakistan* [21].
[111] For a comparison between that decision and the *RMI Cases*, see Venzke (n 54) 68–74. The ramifications of *South West Africa* are well known: the Court lost the confidence of the developing world after its ruling, lived through a long period of minimal judicial activity, and 'got its groove back' when Nicaragua prevailed over the United States in the famous 1986 case.
[112] Daniel Joyner, 'My Reaction to the Dismissal of the Marshall Islands Cases by the ICJ', *Arms Control Law* (5 October 2016) <https://armscontrollaw.com/2016/10/05/my-reaction-to-the-dismissal-of-the-marshall-islands-cases-by-the-icj/>.
[113] Ibid; Davis (n 76) 79.
[114] See DH Joyner, *International Law and the Proliferation of Weapons of Mass Destruction* (OUP 2009) 230–33.
[115] Several judges criticised the Court's formalism. See in *RMI v India* and *RMI v Pakistan*: Vice-President Yusuf's Declarations [12]; Judge Tomka's Separate Opinions [20], [26]; Dissenting Opinions of Judges Bennouna pp 1–4 and Cançado Trindade [11]–[13], [21]–[22], [30]–[32], [318]; Judge Sebutinde's Separate Opinions [1], [10], [13], [16], [26], [31]–[32]; Dissenting Opinions of Judges Robinson [27], [39], [53] (implicitly), Crawford [5], [18], and Judge

recently chronicled the Court's reluctance and disappointing history in dealing with nuclear weapons from a legal perspective.[116] Obviously, this is not an isolated case or phenomenon: in the past, the ICJ has avoided dealing with certain sensitive matters through its characterization of the underlying disputes.[117] In this particular context, it was not my ambition to argue that multilateral disputes involving interrelated obligations should necessarily lead to a more flexible interpretation of jurisdictional requirements by the Court. Rather, the point is that the Court's reasoning on jurisdiction was misguided for reasons explored above but, at any rate, the instant cases also involved complicated questions pertaining to third parties, which were left unexplored.

As discussed in Part III, the *RMI Cases* illustrated that the Court's jurisdictional framework is ill-equipped to accommodate multilateral disputes involving interrelated obligations with global security implications.[118] Nevertheless, the Court's decisions not to proceed to the merits might have been more persuasively defended on admissibility grounds. Consequently, the international community must devise creative, 'outside-the-box' solutions to handle these types of disputes, suggesting that the ICJ might in fact miss out on adjudicating genuine legal disputes because of its recent formalistic leanings. For its part, the UNGA can play a limited role if we imagine it 'enlisting the *rhetoric* of law, engaging the legal *process*': indeed, as noted in the wake of the *Nuclear Weapons* Advisory Opinion, 'in realpolitical terms a legal decision [by the ICJ] prohibiting the use of nuclear weapons seems, if anything, less likely to achieve their elimination than a General Assembly resolution'.[119] Surely, the resulting resolution would be of limited import given its non-binding character: it 'will never be law in any strong sense, but might shame or mobilise or deter'.[120] Nevertheless, the UNGA has been active on nuclear disarmament and

ad hoc Bedjaoui [9], [11], [24], [48], [51], [77]. But see Judge Tomka's Separate Opinions in ibid [17] (rejecting the idea that *Georgia v Russia* marked the 'beginning of a more formalist approach').

[115] See Judge Tomka's Separate Opinion in *RMI v India* [39]–[41].

[116] See, eg, S Ranganathan, 'Nuclear Weapons and the Court' (2017) 111 *AJIL Unbound* 88 (arguing that the *RMI Cases* form 'part of a longer trend of the Court using formalistic reasoning to decline cases concerning nuclear weapons').

[117] See, eg, Bianchi (n 77) 85–6 (discussing the 1999 provisional measures request before the ICJ to compel NATO States to cease their bombings against the Federal Republic of Yugoslavia).

[118] See Judge Tomka's Separate Opinion in *RMI v India* [39]–[41]. In a different context, see Judge Weeramantry's Separate Opinion in *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (Merits) [1997] ICJ Rep 7, 117–18 (remarking that the ICJ's inter-State dispute settlement function fails to do justice to the *erga omnes* character of certain obligations). See also Crawford, 'Responsibility' (n 82) 238–40.

[119] D Kennedy, 'The *Nuclear Weapons* Case' in L Boisson de Chazournes and P Sands (eds), *International Law, the International Court of Justice and Nuclear Weapons* (CUP 1999) 462–72, 465.

[120] Ibid.

recently adopted a resolution in which it decided to 'convene in 2017 a United Nations conference to negotiate a legally binding instrument to prohibit nuclear weapons, leading towards their total elimination', and encouraged all Member States to take part in that conference.[121] And there likely stops the UNGA's potential role in nuclear disarmament: at best, it is confined to the function of law-making facilitator. But that can lead to 'hard law' down the line.

Whilst not an ideal solution, one viable avenue to enforce the relevant obligations might be through the UNSC's dispute settlement function, pursuant to Chapter VI of the UN Charter. Indeed, the UNSC has drawn from SR rationale – sometimes very plainly – and implemented international responsibility in various situations involving global security issues.[122] This suggests that the UNSC can play a role in inducing compliance with certain international legal obligations in apposite circumstances. Detractors of this proposal might invoke the unavoidable 'veto challenge', but is should be stressed that Article 27(3) of the UN Charter provides that 'in decisions under Chapter VI … a party to a dispute shall abstain from voting'. Granted, this would not preclude the possibility of the Permanent Members (or other 'targeted' countries) from erecting obstacles through strategic alliances, nor would it palliate the systemic shortcomings of the UNSC's structure and process. More importantly, this solution would certainly not serve as an effective or comprehensive vehicle for nuclear disarmament, but could offer a forum in which violations of the international legal order can be levelled and, in some cases, consequences imposed. On the plus side, however, this option obviates the need to confront the ICJ's jurisdictional limitations and brings more States – both nuclear powers and non-nuclear nations – into the fold than what is permitted by the ICJ framework.

This might be one potential solution in appropriate cases. UNSC Resolution 984, which is nowhere referenced in the judgments,[123] confirmed that organ's intention to apply SR remedial norms if confronted with an NPT party's violation of certain nuclear duties related to nuclear

[121] UNGA Res 71/258 (23 December 2016) UN Doc S/RES/71/248 [8]–[14]. The resolution was adopted by a majority of 113 UN Member States voting in favour, with 35 States voting against and 13 abstaining.
[122] For a full-fledged argument, see Proulx (n 69) esp Part II; V-J Proulx, 'An Incomplete Revolution: Enhancing the Security Council's Role in Enforcing Counterterrorism Obligations' (2017) 8 *Journal of International Dispute Settlement* 303.
[123] But see Judge Xue's Declarations in the *RMI Cases* [12]–[13] (only drawing from the preamble through a reference to the *Nuclear Weapons* Advisory Opinion).

aggression. Granted, it addressed a different topic than the obligation to negotiate nuclear disarmament in good faith, but it nonetheless demonstrated the UNSC's engagement with nuclear issues whilst contemplating *legal* remedies. In that resolution, the UNSC '[e]xpressed 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*' (emphasis added).[124]

Whilst the eventuality of a threat, or act, of nuclear aggression is a remote and unlikely possibility, one hopes, the underlying principle still holds: there is no *a priori* rationale justifying the exclusion of the UNSC's 'quasi-judicial' role in handling disputes characterised by a mix of legal, political, and global security dimensions, against a multilateral backdrop. The *RMI Cases* are as good as any: the UNSC's role could encompass disputes over alleged violations of the duty to negotiate towards nuclear disarmament. Undoubtedly, this option might only lead to partial remedies, such as declarations of wrongdoing without much follow-through, and turn out to be a less-than-comprehensive compliance monitoring mechanism. However, it is nonetheless one available option, to be used in conjunction with other means of diplomatic, political and legal pressure in pursuing global nuclear disarmament. Moreover, it can become a powerful platform to issue messages of deterrence, shame wrongdoing States, and use international law's evocative language to induce behavioural change in those States. Ultimately, this alternate forum – albeit imperfect in many ways – might be an attractive avenue to compensate for the World Court's formalistic inclinations, move the nuclear disarmament agenda forward, and hold wrongdoing States to account even if only by way of declaratory relief.

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[124] UNSC Res 984 (11 April 1995) UN Doc S/RES/984 [6].