

## CASE NOTE

# The Nuclear Disarmament Cases: Is Formalistic Rigour in Establishing Jurisdiction Impeding Access to Justice?

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Nuclear disarmament falls within the purview of the purposes envisaged in Article 1 of the United Nations Charter. The International Court of Justice (ICJ) in 1996 delivered an advisory opinion on legality of use of nuclear weapons and has stated that the states in good faith must strive towards nuclear disarmament. In the *Marshall Islands Cases*, 20 years later the ICJ had the opportunity to address questions relating to cessation of the nuclear arms race and nuclear disarmament. However, the ICJ has failed to foster nuclear disarmament within the international community. The ICJ dismissed Marshall Islands' application on jurisdictional grounds because there was no legal dispute between the parties. The ICJ in determining the existence of a dispute introduced a subjective *awareness test*. In this case note, we aim to examine the *awareness test* and its politico-legal effects in the development of international law. While doing so, we also argue that the test has further rendered the enforcement of nuclear disarmament obligations arduous.

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**Keywords:** nuclear disarmament; Legal Dispute; International Court of Justice; Nuclear Arms Race; Jurisdiction

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## Introduction

The International Court of Justice (ICJ), while discussing the role played by the United Nations in disarmament, identified three bodies having a 'role in international disarmament efforts'. These bodies are the United Nations General Assembly (UNGA), the United Nations Security Council and the Military Staff Committee.<sup>1</sup> It was notable that it omitted itself, the ICJ, from the list. The omission came at a time when the ICJ was confronted with a case brought by the Marshall Islands against states holding nuclear arsenal, on the grounds of violation of the international obligation of nuclear disarmament and cessation of the nuclear race.

Nuclear disarmament falls in line with the purpose of the UN under Article 1 of its Charter.<sup>2</sup> Article IV of the Treaty on Non-Proliferation of Nuclear Weapons (NPT), which has been signed by 191 states, provides for cessation of nuclear arms race and disarmament.<sup>3</sup> The UNGA had called for a convention on nuclear

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<sup>1</sup> *Marshall Islands v. United Kingdom (Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament), Marshall Islands v. Pakistan (Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament), and Marshall Islands v. India (Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament)* [2016] ICJ GL No 158 para 14.

<sup>2</sup> Charter of the United Nations (adopted 24 October 1945) 1 UNTS XVI, art 1 states:

'The Purposes of the United Nations are (1) To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace....'

<sup>3</sup> Treaty on Non-Proliferation of Nuclear Weapons (adopted 1 July 1968, entered into force 5 March 1970) 729 UNTS 161 art 6 states:

'Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.'

disarmament in 1954<sup>4</sup> and has repeated its call in subsequent resolutions.<sup>5</sup> The ICJ has addressed the issue of nuclear weapons in two prior judgments. In the *Nuclear Tests Cases*, it refrained from commenting on whether France had acted in contravention of international law by conducting nuclear tests in the South Pacific Ocean.<sup>6</sup> In the *Legality of the Threat or Use of Nuclear Weapons*, it held that '[t]here exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament' under Article VI of the NPT.<sup>7</sup> The then President Mohammad Bedjoui also declared that the obligation 'has acquired a customary character'.<sup>8</sup> However, the ICJ refrained from giving a decisive judgment and held that it cannot 'conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence'.<sup>9</sup> Some commentators have argued that the ICJ has been cautious in its engagement with issues relating to nuclear matters due to its fear of trespassing into 'political issues'<sup>10</sup> and antagonising powerful states.<sup>11</sup>

In the present case, the ICJ had the opportunity to address questions relating to cessation of the nuclear arms race and nuclear disarmament, including the assertion by the Marshall Islands that the obligation of nuclear disarmament is a part of customary international law.<sup>12</sup> However, the ICJ denied its jurisdiction over the case since there was an absence of a legal dispute between the parties. The ICJ held that the respondents were not aware of the existence of a dispute between the parties, hence in absence of such awareness, there cannot be any legal dispute to invoke the ICJ's jurisdiction.<sup>13</sup> It was only Judge Yusuf who sought to distinguish the case against the United Kingdom from the cases against India and Pakistan, observing that the latter states have consistently shown support for nuclear disarmament. Hence, there is no dispute between the Marshall Islands and India and Pakistan respectively.<sup>14</sup>

The existence of a dispute is a precondition to the jurisdiction of the ICJ.<sup>15</sup> Dispute is defined as 'a disagreement on a point of law or fact, a conflict on legal views or interests'.<sup>16</sup> The judgments of the ICJ in the *Marshall Islands Cases*, marked a departure from its previous jurisprudence since it introduced a subjective element viz the respondent's awareness of the existence of a disagreement, unlike the objective criteria previously employed.<sup>17</sup> The ICJ also took a formalistic approach to assess its jurisdiction, diverging from its prior flexible approach. As pointed out in the separate opinion of Judge Tomka, the cases mark '... the first time in almost a century of adjudication of inter-State disputes in the Peace Palace, the "World" Court has dismissed a case on the ground that no dispute existed between the Applicant and the Respondent prior to the filing of the Application instituting proceedings'.<sup>18</sup> In this case note, we discuss these departures from the earlier jurisprudence of the ICJ on the question of the existence of a dispute between the parties.

## Facts

The Marshall Islands was a testing site for nuclear weapons from 1946 to 1958.<sup>19</sup> As result of the endured suffering of its people, it has shown special concern regarding nuclear disarmament.<sup>20</sup> On 24 April 2014, the Government of the Marshall Islands submitted an application to the ICJ against nine other states, for failing

<sup>4</sup> UNGA Res 808 (IX) (4 November 1954) UN Doc S/RES/808 (IX).

<sup>5</sup> UNGA Res L.41 (14 October 2016) UN Doc A/C.1/71/L.41.

<sup>6</sup> *Nuclear Tests Cases (New Zealand v France)* [1974] ICJ Rep 99.

<sup>7</sup> *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 1 para 105 (2) F.

<sup>8</sup> *Legality of the Threat or Use of Nuclear Weapons* (Declaration of President Bedjaoui) [1996] ICJ Rep 1 para 23.

<sup>9</sup> *ibid* para 105(2) (E).

<sup>10</sup> Surabhi Ranganathan, 'Nuclear Weapons and the Court' (2017) 111 American Journal of International Law Unbound 88.

<sup>11</sup> Nico Krisch, 'Capitulation in The Hague: The Marshall Islands Cases' EJIL:TALK! <<https://www.ejiltalk.org/capitulation-in-the-hague-the-marshall-islands-cases/>> accessed 18 April 2017.

<sup>12</sup> *Marshall Islands Cases* (n 1) para 1.

<sup>13</sup> *ibid* para 52.

<sup>14</sup> *Marshall Islands v. Pakistan* (Declaration of Vice-President Yusuf) 2016 <<http://www.icj-cij.org/docket/files/159/19170.pdf>> accessed 18 April 2017, para 23, 30.

<sup>15</sup> Statute of International Court of Justice (18 April 1946) art 36 para 2 states:

'The states parties to the present Statute may at any time declare that they recognize ...the jurisdiction of the ICJ in all legal disputes...'

<sup>16</sup> *Mavrommatis Palestine Concessions Judgement* (Objection to the Jurisdiction of the ICJ) PCIJ Rep Series A No 2, 11.

<sup>17</sup> *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (Advisory Opinion) [1950] ICJ Rep 221.

<sup>18</sup> *Marshall Islands v. India* (Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament) [2016] ICJ GL No 158 (Separate opinion of Judge Tomka) para 1.

<sup>19</sup> *Marshall Islands Cases* (n 1) para 15.

<sup>20</sup> *ibid* para 41.

to comply with their obligations under customary international law relating to cessation of the nuclear arms race and of nuclear disarmament.<sup>21</sup> The ICJ listed the cases against three states: India, Pakistan and United Kingdom, each of which had made an optional declaration under Article 36, paragraph 2, of the ICJ Statute. Marshall Islands requested the ICJ to order the respondents to take all the required steps to comply with their obligations under customary international law by ceasing the nuclear arms race at an early date and conducting nuclear disarmament within one year of the ICJ's judgment.<sup>22</sup>

The respondents contested the jurisdiction of the ICJ over the alleged dispute.<sup>23</sup> On 16 June 2014, the ICJ ordered that in light of the circumstances, it was first required to adjudicate on the issue of jurisdiction under Article 79, paragraph 2, of the Rules of the ICJ.<sup>24</sup>

### The Judgment of the ICJ

The majority opinion of the ICJ observed that the existence of a legal dispute is a precondition to its jurisdiction under Article 36, paragraph 2 of the ICJ Statute.<sup>25</sup> The respondents argued that there was no dispute between the parties since Marshall Islands had not initiated bilateral negotiations or given prior notice of the claim that formed the subject matter of the application.<sup>26</sup> The ICJ held that the respondent does not have to be notified of the applicant's intention to file a claim for a legal dispute to arise.<sup>27</sup>

The ICJ, relying on its earlier jurisprudence, held that for a dispute to exist, the parties should hold views in opposition to each other on the question of certain international obligations<sup>28</sup> before the application is filed in the ICJ.<sup>29</sup> The statements made in multilateral fora may establish such opposing views.<sup>30</sup> The ICJ observed that there should be sufficient clarity for the statement's intended addressee to identify that there is a dispute.<sup>31</sup> The Marshall Islands relied on a statement made by its Minister of Foreign affairs on 26 September 2013, at the High-level Meeting of the General Assembly of Nuclear Disarmament, 'urg[ing] all nuclear weapons states to intensify efforts to address their responsibilities in moving towards an effective and secure environment'.<sup>32</sup> The ICJ held that the content of the statement did not mention the failure of the respondents specifically to meet their obligations, but rather called for a general intensification of efforts.<sup>33</sup> The statement could not be construed as an allegation against the respondents of a violation of their international obligations.<sup>34</sup> The Marshall Islands relied on another statement made at the Nayarit conference on 13 February 2014 that, 'States possessing nuclear arsenals are failing to fulfil their legal obligations'.<sup>35</sup> The ICJ held that the statement contained a general criticism of nuclear weapon states, however did not specifically target the respondents' conduct, giving rise to an alleged violation. The subject matter of the conference was also not on the question of nuclear disarmament. Hence, absence of any reaction from the respondents at the conference with respect to the statement made by the Marshall Islands cannot be inferred as the existence of opposing views on the question of nuclear disarmament.<sup>36</sup>

The Marshall Islands contended that though the respondents had expressed verbal support for negotiation on nuclear disarmament in international fora, they had maintained and upgraded their nuclear arsenals, which established the existence of a dispute.<sup>37</sup> The ICJ observed that the conduct of the parties can indicate the existence of opposing views.<sup>38</sup> However, the statements made by the Marshall Islands in multilateral

<sup>21</sup> *ibid* para 1.

<sup>22</sup> *ibid* para 11.

<sup>23</sup> *ibid* para 4.

<sup>24</sup> *ibid* para 5. See also, The Rules of the ICJ art 79 para 2 states that:

'...following the submission of the application and after the President has met and consulted with the parties, the ICJ may decide that any questions of jurisdiction and admissibility shall be determined separately.'

<sup>25</sup> *ibid* para 33.

<sup>26</sup> *ibid* para 32.

<sup>27</sup> *ibid* para 42.

<sup>28</sup> *ibid* para 34

<sup>29</sup> *ibid* para 49.

<sup>30</sup> *ibid* para 36.

<sup>31</sup> *ibid* para 45.

<sup>32</sup> *ibid* para 26.

<sup>33</sup> *ibid* para 46.

<sup>34</sup> *id.*

<sup>35</sup> *ibid* para 26.

<sup>36</sup> *ibid* para 41.

<sup>37</sup> *ibid* para 51.

<sup>38</sup> *ibid* para 37.

settings had never made the respondents *aware* of their alleged breach of obligations since it did not offer any specificities regarding the respondents' conduct. Considering these facts, the conduct of the respondents could not be inferred to give rise to a dispute.<sup>39</sup> The dissenting opinions observed that the introduction of the criteria of *awareness* conflicted with the jurisprudence of the ICJ, as the existence of a dispute is to be determined by an objective assessment.<sup>40</sup>

## Analysis

The ICJ's dismissal of the application submitted by Marshall Islands is significant as it is founded on a subjective conception of establishing a legal dispute. The ICJ in determining the existence of a dispute has relied on the respondents' awareness of the applicant's positive opposition to its views.<sup>41</sup> This section aims to comprehend and examine the aforementioned conception and its politico-legal effects in the development of international law. In doing so, the section examines the *awareness test*, the jurisprudence on determining a dispute and the impact of the judgment.

The ICJ has substantially diverged from its past jurisprudence, which had demonstrated a consistent approach commencing with the decisions<sup>42</sup> of the Permanent Court of International Justice (PCIJ) and culminating in recent cases such as *Croatia v Serbia*.<sup>43</sup> As noted in the dissenting opinion of Judge Robinson and the separate opinion of Judge Sebutinde, the aforementioned cases have illustrated a preference for an objective and flexible approach that consciously steers away from procedural firmness and formal rigour.<sup>44</sup>

In the present case, the ICJ referred to an established understanding of a dispute as 'a disagreement on a point of law or fact, a conflict of legal views or of interests'.<sup>45</sup> While relying on the *Nicaragua v Columbia*<sup>46</sup> case, the ICJ also observed that 'whether a dispute exists is a matter for objective determination by the ICJ which must turn on an examination of the facts'.<sup>47</sup> However, while determining the existence of a dispute between Marshall Islands and the respondent states, the majority of the ICJ introduced a 'subjective physical criterion',<sup>48</sup> namely the requirement of the respondents being aware that 'Marshall Islands was making an allegation that India [respondent] was in breach of its obligations'.<sup>49</sup> This required Marshall Islands to prove that it has expressed its indictment of the respondents in a particular form, making them aware of the dispute, for instance by explicitly naming them in an international conference.

This is not the first time that the awareness test has been employed by an international dispute resolution body. It was adopted by the Italian-United States Conciliation Commission in the *De Curzio* case.<sup>50</sup> In the *De Curzio* case, while adjudicating on the issue of jurisdiction, the Commission conceptualized the respondent's awareness of the dispute as the opportunity to recognise or deny an international obligation.<sup>51</sup> If the same standard was applied in the present case, it could have been observed that the respondents had the opportunity to both recognise and deny their international obligations at the High-level Meeting of the General Assembly on Nuclear Disarmament, on 26 September 2013<sup>52</sup> and at the Nayarit conference on 13 February 2014.<sup>53</sup>

<sup>39</sup> *ibid* para 52.

<sup>40</sup> *Marshall Islands v. India (Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament)* [2016] ICJ GL No 158 (Dissenting opinion of Judge Cancado Trinade) para 5–15.

<sup>41</sup> *Marshall Islands v. India (Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament)* [2016] ICJ GL No 158 (Dissenting Opinion of Judge Robinson) para 4.

<sup>42</sup> *Mavrommatis Palestine Concessions* (n 12) 14.

<sup>43</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* (Preliminary Objections) [2008] ICJ Rep paras 80–85; see also *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)* (Preliminary Objections) [2011] ICJ Rep I para 30.

<sup>44</sup> *Marshall Islands v Cases* (Dissenting Opinion of Judge Robinson) (n 41) para 4; *Marshall Islands Cases* (Separate Opinion of Judge Sebutinde) 2016 <<http://www.icj-cij.org/docket/files/158/19154.pdf>> accessed at 09 April 2017, para 16.

<sup>45</sup> *Mavrommatis Palestine Concessions* (n 12) 11.

<sup>46</sup> *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v Colombia)*, (Preliminary Objections) [2012] ICJ Rep 624 para 50.

<sup>47</sup> *ibid* para 36.

<sup>48</sup> Andrea Bianchi, 'Choice and (the Awareness of) its Consequences: The ICJ's "Structural Bias" Strikes again in the Marshall Islands case' (2017) 111 American Journal of International Law Unbound 81, 83.

<sup>49</sup> *ibid* paras 48, 52.

<sup>50</sup> *Di Curzio Case* [1959] Decision No 184 Rep of International Arbitral Awards Vol XIV, 391–393.

<sup>51</sup> The Commission stated that the defendant 'was never placed in a position to either recognize or deny its obligation under the Treaty', *ibid*.

<sup>52</sup> *ibid* para 46.

<sup>53</sup> *ibid* para 47.

The ICJ in this case, however, has adopted a relatively restrictive and narrow understanding of the awareness test, when compared with the *De Curzio* case. This requirement has entrenched the importance of procedure and has made the judicial process comparatively inaccessible. Such procedural firmness and formal rigour was deliberately reduced in the preceding cases. For instance, the ICJ has held that the establishment of a dispute is a question of substance and not a matter of form or procedure.<sup>54</sup> However, the requirement of making the respondents aware of the dispute, especially in an individualised bilateral form, is a procedural prerequisite rather than one of substance.<sup>55</sup> The ICJ has also held that the prior negotiation is not a *sine qua non* requirement for the existence of a dispute.<sup>56</sup> In the *Nicaragua v Colombia* case the ICJ held 'although 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.<sup>57</sup>

In the present case the ICJ has obscured the distinction in the aforementioned cases between a procedural lapse and the existence of a dispute. Though the ICJ in the present case clarified that there is no requirement of a notification to the respondent before the filing of the case to establish the existence of a dispute, the novel requirement of the awareness of the respondent of the existence of a dispute prior to filing of the application comes dangerously close to the requirement of a notification.

As highlighted in Judge Tomka's separate opinion, the ICJ recognises that nuclear disarmament cannot be achieved through unilateral acts of the state and advocates the need for collective action and cooperation.<sup>58</sup> However the ICJ refrains from acknowledging the multilateral nature of the issue and continues to construct an understanding of same that falls within the ambit of bilateralism. The ICJ's focus on bilateral relations fails to consider the changing contours of international law and the growing need to address multilateral issues. The ICJ while addressing the statements made by Marshall Islands in the multilateral fora, held that the statements must address the respondents directly.<sup>59</sup>

The jurisprudential shift towards multilateralism has been sidelined in the process. The ICJ's decision in cases such as the *South West Africa*<sup>60</sup> case has emphasised the increasing formulation of disputes in multilateral fora including a plurality of states. Judge Crawford in his dissenting opinion has referred to the same and held that 'No doubt any multilateral dispute must ultimately be fitted within the bilateral mode of dispute settlement. But this does not require the ICJ to treat the underlying relations as bilateral *ab initio*'.<sup>61</sup>

It may be pertinent to note that Judge Tomka and Judge Xue differed from Judge Crawford by remaining reluctant to exercise jurisdiction over multilateral disputes. Judge Tomka considered the nature of the ICJ and its jurisdictional structure as an impediment to adjudicating multilateral disputes.<sup>62</sup> Judge Tomka in his separate opinion further stated that the ICJ cannot adjudicate on matters regarding a single state's conduct in the absence of an explication of 'the positions taken by the other States with which that State (the Respondent in the case at hand) would need to have negotiated, ...in order to achieve the overall goal of nuclear disarmament'.<sup>63</sup> Judge Xue adopted a congruent approach, and distinguished the disagreement between non-nuclear weapon states and nuclear weapon states from the existence of a dispute.<sup>64</sup> On the contrary Judge Crawford construed the aforementioned conceptualisation of a dispute as a limiting principle and aimed to accommodate the multilateral trends within the existing juridical framework.

<sup>54</sup> *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)* (Preliminary Objections) [2011] ICJ Rep I para 30; see also *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów) (Germany v Poland)* (Judgment No. 11) [1927] PCIJ Series A No 13. 10–11.

<sup>55</sup> George R B Galindo, 'On Form, Substance, and Equality Between States' (2017) 111 American Journal of International Law Unbound 75, 76.

<sup>56</sup> *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria)* (Preliminary Objections) Case [1998] ICJ Rep 275 para 109.

<sup>57</sup> *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea* (n 42) para 72.

<sup>58</sup> Federica Paddeu, 'Multilateral Disputes in Bilateral Settings: International Practice Lags Behind Theory' (2017) 76 Cambridge Law Journal 1.

<sup>59</sup> *Marshall Islands Cases* (n 1) para 47.

<sup>60</sup> *South-West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*; Second Phase (1966) ICJ Rep 6.

<sup>61</sup> *Marshall Islands v. India (Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament)* [2016] ICJ GL No 158 (Dissenting Opinion of Judge Crawford) para 20.

<sup>62</sup> *Marshall Islands v. India (Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament)* [2016] ICJ GL No 158 (Separate opinion of Judge Tomka) para 40.

<sup>63</sup> *ibid* para 38.

<sup>64</sup> *Marshall Islands v. India (Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament)* [2016] ICJ GL No 158 (Declaration of Judge Xue) para 15.

Judge Crawford further stated that 'The importance of the *South West Africa* cases lies in the recognition that a multilateral disagreement can crystallise for adjacent purposes as a series of individual disputes coming within the Statute'.<sup>65</sup> Thus in a multilateral forum it seems absurd to address the defendant individually and directly. In the case of *Cameroon v Nigeria*<sup>66</sup> it was held that 'a disagreement on a point of law or fact, a conflict of legal views or interests, or the positive opposition of the claim of one party by the other need not necessarily be stated *expressis verbis* . . . [T]he position or the attitude of a party can be established by inference, whatever the professed view of that party'.<sup>67</sup> The statements made in the multilateral fora by Marshall Islands considered alongside the subsequent conduct of the parties, clearly establishes a dispute.

The judgment has streamlined a dangerous trend in international law by increasing the threshold for admissibility of a dispute and by crystallising a standard without any legal basis. In the Separate Opinion, Judge Sebutinde stated that the *awareness test* has increased the evidentiary burden on the applicant and has done so without any jurisprudential or statutory basis.<sup>68</sup> This has a catastrophic effect as no guidelines or criteria for establishing the subjective element have been laid down. This also contributes to rendering justice and judicial adjudication inaccessible. While there is a dispute that has unfolded before the ICJ, the ICJ has remained reluctant in addressing it. The judgment acknowledged the suffering the people of Marshall Islands have endured 'as a result of it being used as a site for extensive nuclear testing programs' and accepted that Marshall Islands 'has special reasons for concern about nuclear disarmament'.<sup>69</sup> In his dissenting opinion Judge Cancado Trindade stated that 'in my perception, it unduly creates a difficulty for the very access to justice (by applicants) at international level, in a case on a matter of concern to the whole of humankind. This is most regrettable'.<sup>70</sup>

Judge Robinson, in his dissent, defined a dispute as 'a question of the nature and character, determined objectively, of the claim presented to the ICJ. It is not about mandating that an applicant State jump through various hoops suggesting a formal approach before it can appear in the Great Hall of Justice'.<sup>71</sup> The formalistic approach of the majority opinion does not merely possess legal consequences. It furthers political hindrances within the international legal regime. The ICJ since the advisory opinion delivered in 1996, 20 years prior to this decision, has failed to foster nuclear disarmament within the international community. The rigid interpretation of the existence of a dispute, focus on bilateralism and the inaccessibility advanced in this case has turned the clock back and has made the enforcement of nuclear disarmament and other pressing international issues onerous.

Andrea Bianchi has suggested that the ICJ's adoption of formalist reasoning is indicative of its structural bias, and the judges' choice of reasoning merely gives the face of neutrality to an otherwise biased outcome.<sup>72</sup> She elucidates that the bias results from the 'government-lawyering mindset' of the judges, since most of them have previously acted as government counsel, diplomats or agents of the state. Such a mindset seeks to preserve the state-centric power structure of international law rather than addressing injustices to the people, in this case the inhabitants of Marshall Islands.<sup>73</sup> Galindo has argued that the ICJ has often employed formalist reasoning to defeat the claims of less powerful smaller states, despite the strong jurisprudential basis of such claims.<sup>74</sup> However, the authors believe that international law still remains a tool of resistance in the hands of weaker states, as evidenced by Marshall Islands' decision to use litigation as a strategy to bring light to the issue of nuclear disarmament. The power relations are unequal, however 'resistance comes first, and resistance remains superior to the forces of the process; power relations are obliged to change with the resistance'.<sup>75</sup>

## Competing Interests

The authors have no competing interests to declare.

<sup>65</sup> *Marshall Islands Cases* (Dissenting Opinion of Judge Crawford) (n 61) para 21.

<sup>66</sup> *Land and Maritime Boundary between Cameroon and Nigeria* (n. 50) para 89.

<sup>67</sup> *id.*

<sup>68</sup> *Marshall Islands Cases* (Separate Opinion of Judge Sebutinde) (n 44) 7 para 31.

<sup>69</sup> *ibid* para 41.

<sup>70</sup> *Marshall Islands Cases* (Dissenting Opinion of Judge Cancado Trindade) (n 40) para 32.

<sup>71</sup> *Marshall Islands Cases* (Dissenting Opinion of Judge Robinson) (n 41) para 5.

<sup>72</sup> Bianchi (n 48) 84.

<sup>73</sup> *ibid* 81, 85.

<sup>74</sup> Galindo (n 55).

<sup>75</sup> Michel Foucault, 'Sex, Power, and the Politics of Identity', In: Rabinow, P, (ed.), *Essential Works of Foucault 1954–1984, vol. 1. Ethics, Subjectivity and Truth* (Routledge 1997) 167.

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