

## POLITIC, CAUTIOUS, AND METICULOUS: AN INTRODUCTION TO THE SYMPOSIUM ON THE MARSHALL ISLANDS CASE

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Writing in 1831 of the tragic plight of the Cherokee nation whose members had desperately sought the intervention of the U.S. Supreme Court to uphold the treaties between the United States and the [Cherokee](#) whereby the former solemnly promised to protect the latter, Chief Justice Marshall observed, “[i]f courts were permitted to indulge their sympathies, a case better calculated to excite them can scarcely be imagined.”<sup>1</sup> The plight of the people of the Marshall Islands can surely be described in similar terms. Appalling glimpses of that plight were presented by [Tony deBrum](#), a minister of the Marshall Islands, in his submissions before the International Court of Justice (ICJ).<sup>2</sup> The Marshall Islands has been the favored site for nuclear testing by the United States for some time. [More than sixty nuclear tests](#) were conducted in that part of the Pacific throughout the Cold War.<sup>3</sup> The [human consequences](#) for the Marshall Islanders were immense: as one mother stated “[w]omen of the island have given birth to babies that look like blobs of jelly. Some of these things we carry for eight months, nine months. There are no legs, no arms, no head, no nothing.”<sup>4</sup>

Initially claimed by the British, the Islands were placed under German control pursuant to a [treaty between Great Britain and Germany](#) in 1886, which divided up that area of the Pacific into spheres of influence between the two empires.<sup>5</sup> This treaty followed the negotiations that took place at the [Berlin Conference](#) of 1884–85 whose repercussions were felt as far as the Pacific.<sup>6</sup> Following the defeat of Germany, Japan took over the administration of the Islands, this by virtue of the [Mandate System of the League of Nations](#).<sup>7</sup> Like South West Africa, Papua New Guinea, and Nauru, it was classified as a “C” mandate. There are haunting ancestral connections between the [South West Africa](#) and the *Marshall Islands* cases at the ICJ,<sup>8</sup> a theme taken up in [Ingo Venzke’s](#) essay.<sup>9</sup> The Marshall Islands

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<sup>1</sup> [Cherokee Nation v. Georgia](#), 30 U.S. 1, \*15 (1831).

<sup>2</sup> See Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. UK) [hereinafter Nuclear Arms], [Verbatim Record](#), CR 2016/5 (Mar. 11, 2016).

<sup>3</sup> Robert C. Koehler, [Happy Savages: What We Did to the Marshall Islands](#), COMMON DREAMS (Feb. 15, 2012).

<sup>4</sup> Rick Wayman, [Day Five at the ICJ: Everybody’s Doing It](#), NUCLEAR AGE PEACE FOUNDATION (Mar. 11, 2016); Nuclear Arms, [Verbatim Record](#), *supra* note 2 at 9.

<sup>5</sup> [Declaration between the Governments of Great Britain and the German Empire relating to the Demarcation of the British and German Spheres of Influence in the Western Pacific](#), Ger.-Gr. Brit., Apr. 6, 1886, Marshall Islands History Sources No. 11.

<sup>6</sup> NEW WORLD ENCYCLOPEDIA, [Berlin Conference of 1884-5](#).

<sup>7</sup> See, e.g., Denys P. Myers, [The Mandate System of the League of Nations](#), 96 ANNALS AM. ACAD. POL. & SOC. SCI. 74 (1921).

<sup>8</sup> [South West Africa](#) (Eth. v. S. Afr., Liber. v. S. Afr.), 1966 ICJ REP. 319 (July 18) [Hereinafter South West Africa Cases]. (Here too the court was evenly divided and the case was decided by the casting vote of the President Percy Spender.) Uniquely, however, the Marshall Islands was characterized as a strategic trust territory.

<sup>9</sup> Ingo Venzke, [Public Interests in the International Court of Justice—A Comparison between Nuclear Arms Race \(2016\) and South West Africa \(1966\)](#), 111 AJIL UNBOUND 68 (2017).

were inevitably devastated in the Pacific War; and then placed under the trusteeship of the United Nations through the [Trusteeship Agreement](#) which succeeded the Mandate Agreement.<sup>10</sup> The United States, appointed by the United Nations, replaced the defeated Japan, thus assuming the role of trustee, protector of the people of the Marshall Islands as it was once was the protector of the Cherokee. It was in [these circumstances](#) that the United States proceeded to conduct nuclear tests in the Islands, despite protests from many quarters and serious questions as to how such testing was compatible with the obligations the United States had undertaken pursuant to the Trusteeship System.<sup>11</sup> Now, the Marshall Islands offer a case study of yet another global crisis that international law is battling to address; they are in danger of [disappearing](#) as a consequence of climate change.<sup>12</sup> All this is simply to say that the Marshall Islands have been profoundly affected by many of the great events that shaped the history of international law and that often occurred on the other side of the world. It is hardly likely that the decision makers involved in those events knew very much about the people whose lives and futures they were basically determining.

Called upon to enforce the treaties his government had entered into, [Chief Justice Marshall](#), pointing to the colonial origins of U.S. sovereignty, asserted “Conquest gives a title which the Courts of the conqueror cannot deny.”<sup>13</sup> Versions of this implacable and admirably forthright position have been articulated by the [British courts](#) when approached by various island peoples who have been the victims of grave injustice at the hands of the British Empire—whether in the case of the [Banabans](#) whose home was mined out for phosphates<sup>14</sup> or the [Chagos Islanders](#).<sup>15</sup> But international law is different. It prevails against domestic law and is precisely the mechanism by which dependent and colonized people could seek a remedy against exploitation and dispossession. This after all was [the goal of the Trusteeship System](#).<sup>16</sup> Given this background, given the great burdens of history, and the continuous failures of international law—or the law more generally—to afford protection to those who are most vulnerable, the cases brought by the [Marshall Islands](#) against India, Pakistan, and the United Kingdom could scarcely [be more important](#).<sup>17</sup> Now, suddenly, thanks precisely to international law, the Marshall Islands were no longer a distant, tiny, unimportant collection of atolls, but a sovereign state—the Trusteeship System achieved at least this much—asking the ICJ to rule on some of the most crucial issues confronting the global community: nuclear weapons, war and peace, and perhaps “the fate of the earth.” The Republic of the Marshall Islands (RMI) was seeking to enforce the provisions of the Non-Proliferation Treaty (NPT) which requires all nuclear member states to engage in good faith negotiations towards disarmament. In return, the non-nuclear signatory states had undertaken not to develop nuclear weapons.

<sup>10</sup> [International Trusteeship System](#), UNITED NATIONS.

<sup>11</sup> See Myres S. McDougal & Norbert A. Schlei, [The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security](#), 64 YALE L. J. 648 (1954) (outlining a famous argument in support of the testing, influenced very much by the Cold War).

<sup>12</sup> Coral Davenport, [The Marshall Islands Are Disappearing](#), THE NEW YORK TIMES (Dec. 1, 2015).

<sup>13</sup> [Johnson v. McIntosh](#), 21 U.S. 543, \*40.

<sup>14</sup> See [Tito v. Waddell \(No.2\)](#) 3 All ER 129 [1977]; 1977 Ch 106; Julia B. Edwards, [Phosphate Mining and the Relocation of the Banabans to Northern Fiji in 1945: Lessons for Climate Change-Forced Displacement](#), 1 JOURNAL DE LA SOCIÉTÉ DES OCÉANISTES 121 (2014).

<sup>15</sup> See [R \(On the Application of Bancoult\) v. Secretary of State for Foreign and Commonwealth Affairs](#) [2008] UKHL 61 (Eng.) (especially regarding Lords Carswell and Rodger’s discussions); see also, Thomas Poole, [United Kingdom: The Royal Prerogative](#), 8 INT’L J. OF CONST. L. 1, 146 note 32 (2010); see generally, STEPHEN ALLEN, [THE CHAGOS ISLANDERS AND INTERNATIONAL LAW](#) (2014) (discussing the greater intricacies of the Chagos Islanders’ situation).

<sup>16</sup> See, e.g., [Certain Phosphate Lands in Nauru](#) (Nauru v. Austl.), Preliminary Objections, 1992 ICJ REP. 240 (June 26).

<sup>17</sup> See [Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament](#) (Marsh. Is. v. U.K.; Marsh. Is. v. Pak; Marsh. Is. v. India), Preliminary Objections (Oct. 5, 2016); Ankit Panda, [No Luck for Marshall Islands in Nuclear Disarmament Case Against India, Pakistan, and UK](#), THE DIPLOMAT (Oct. 6, 2016).

India and Pakistan had rejected the NPT and were never members of it; and so, it was the case that the RMI brought against the United Kingdom, a signatory to the NPT, that was of the greatest interest and importance, although crucial issues remain as to whether the provisions of the NPT had become customary international law. The Marshall Islands had suffered uniquely as a result of nuclear weapons—and it is surely both telling and damning that civilians experienced the terrible agonies of nuclear radiation while ostensibly under the protection of the United Nations—but the case they brought was of truly global significance. In this way, it raised the issue of how the case could be viewed in terms of an *actio popularis*. This theme is examined, in somewhat different ways, by both Ingo Venzke and [George Galindo](#).<sup>18</sup> People and the global community cannot argue before the Court, only states have this right. And yet, in this instance, the case brought by the RMI was in effect a case that reflected the concerns of the global community and which suggested the need for the Court to be especially responsive to the questions raised. As [Andrea Bianchi's](#) eloquent essay points out, this was the case in which the ICJ could have asserted itself and demonstrated the importance of the law in resolving crucial global issues and indeed, proven to be worthy of its appellation—the International Court that administers Justice.<sup>19</sup>

The history of the Court with regard to nuclear issues was not propitious. As [Surabhi Ranganathan](#) argues in her detailed account of the Court and nuclear issues,<sup>20</sup> the Court has been reluctant to engage with nuclear related questions on previous occasions, when Australia and New Zealand challenged [nuclear testing](#) in the Pacific and when the Court was asked to provide an advisory opinion on [the legality of the threat or use of nuclear weapons](#).<sup>21</sup> In each of these controversial cases, the Court seemed to flinch at the prospect of engaging in “political issues” or issues presented as best left for the political process. Indeed, Ranganathan points out, this was made explicit by the Judges in the controversial Advisory Opinion decision of 1996—the central issue of the legality of the threat or use of nuclear weapons was also decided by the President’s casting vote—who referred to the NPT as the best approach to the nuclear problem.<sup>22</sup> In the Marshall Islands case then, it was the NPT itself that was finally and squarely in question. The Court was not trespassing on the political process because it was the political process that had created the legal regime of the NPT in an effort to ensure that states did engage in disarmament. The NPT after all was a legal instrument that the global community had devised to address this problem, and the Court was being asked to rule on the obligations it contained. It appeared only fair that nuclear states worked in good faith towards disarmament, given that nonnuclear states had undertaken not to develop nuclear weapons. Moreover, as both Ranganathan and Venzke point out, there is little reason to believe that the political process would advance the goal of disarmament.<sup>23</sup> The arena was open for the law to play the role prescribed for it.

Despite all this, the Court, for reasons explored in detail by the authors of this Symposium, dismissed the RMI cases on jurisdictional grounds. Equally divided 8-8, it held, thanks to President Abraham’s casting vote, that there was no “dispute” between the parties as the Respondents were not made properly aware of the fact that a dispute existed between them and the RMI regarding the former’s NPT obligations. The ICJ had never dismissed a case on these grounds before. And in order to do so on this occasion, it devised an entirely new criterion. [Vincent- Joël](#)

<sup>18</sup> Venzke, *supra* note 9, at 68 & George R. B. Galindo, *On Form, Substance, and Equality Between States*, 111 AJIL UNBOUND 75 (2017).

<sup>19</sup> Andrea Bianchi, *Choice and (the Awareness of) its Consequences: The ICJ's "Structural Bias" Strikes again in the Marshall Islands case*, 111 AJIL UNBOUND 81 (2017).

<sup>20</sup> Surabhi Ranganathan, *Nuclear Weapons and the Court*, 111 AJIL UNBOUND 88 (2017).

<sup>21</sup> See [Nuclear Tests Case](#) (N.Z. v. Fr.), 1974 ICJ REP. 253, 457 (Dec. 20); [Legality of the Threat or Use of Nuclear Weapons](#), Advisory Opinion, 1996 ICJ REP. 226 (July 8) [hereinafter UNGA-Nuclear Weapons].

<sup>22</sup> [UNGA-Nuclear Weapons](#), *supra* note 19, at paras. 99–103, 105(2)(F).

<sup>23</sup> Ranganathan, *supra* note 20, at 88 and Venzke, *supra* note 9, at 68.

[Proulx's](#) scrupulous analysis suggests how inapposite and startling the sudden formulation and deployment of this criterion was.<sup>24</sup> The Marshall Islands may still have prevailed if the Court had merely followed its previous flexible approach to the issue of assessing the existence of a dispute; but President Abraham reversed his earlier advocacy of such an approach, and readers of the Court's judgment are treated to the awkward spectacle of his attempts to justify this reversal in order to deny the Court jurisdiction, thus in effect granting victory to the nuclear powers.

How can it be argued after this that international law is not biased against the weaker and smaller states? That is an issue [Galindo](#) discusses in his analysis of how the Court resorted to the most traditional dichotomy, between "form" and "substance," to defeat RMI's case.<sup>25</sup> Galindo further argues that this dichotomy has a long history of use as a means of defeating the claims of less powerful states, no matter how well founded jurisprudentially. As Proulx further suggests, the RMI may very well not have succeeded in its case—it faced many obstacles that he outlines, and these are also considered by Ranganathan.<sup>26</sup> But to have dismissed the RMI cause in such a casual and jurisprudentially unpersuasive way cannot inure well either for the Court or the Judges involved. One is almost rendered nostalgic for the craftsmanship of Judges Spender and Fitzmaurice in *South West Africa* when their elaborate reasoning controversially led to the Court reversing its position on the standing of the applicants, Ethiopia and Liberia.<sup>27</sup> The RMI outcome makes [David Kennedy's](#) darkly brilliant analysis of the Court—and our hopelessly hopeful expectations as international lawyers for the Court—seem both prophetic and decisive.<sup>28</sup>

"The title by conquest is acquired and maintained by force. The conqueror prescribes its limits," asserted Chief Justice Marshall.<sup>29</sup> It follows then, that the Courts of the conqueror too are subject to this principle. The actions of an empire cannot be questioned by the very courts it creates, except to the extent it permits. Imperial rule may be the source of law and order and indeed, it is perhaps through imperial rule that "the rule of law" is articulated and enforced. But imperial rule prevents any scrutiny of its own legitimacy and origins. This is one way to understand the ICJ's inglorious engagement with nuclear issues and the rule of international law.

The UN Charter was signed on June 26, 1945 and entered into force on October 24, 1945; the London Agreement setting up the Nuremberg trials on August 8, 1945. These legal instruments, with their various condemnations of war, aggression, war crimes, and crimes against humanity, outline the very foundations of the modern international legal order, the world in which we think we live. Nagasaki was bombed on August 6, 1945 and Hiroshima on August 9, 1945. It became clear that for the first time in history, man could destroy the earth. Thousands of civilians were killed, suffering agonizing deaths, and many survivors suffered even more. The bombings occurred on either side of the London Agreement, chronologically enfolded, enshrouding, the legal instrument that condemned the horrors of war and sought for the first time to criminalize the people responsible for them. How should we understand this juxtaposition? Is it the case that unprecedented violence is the foundation of order?<sup>30</sup> And more particularly, the current world order, with its promotion of human rights and the rule of law and all the elements outlined in such moving and soaring terms in the Preamble and Article 1 of the UN

<sup>24</sup> Vincent-Joël Proulx, *The Marshall Islands Judgments and Multilateral Disputes at the World Court: Whither Access to International Justice?*, 111 *AJIL UNBOUND* 96 (2017).

<sup>25</sup> Galindo, *supra* note 18.

<sup>26</sup> Proulx, *supra* note 24, at 96 & Ranganathan, *supra* note 20, at 88.

<sup>27</sup> *South West Africa Cases*, *supra* note 8.

<sup>28</sup> David Kennedy, *The Nuclear Weapons Case*, in *INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE AND NUCLEAR WEAPONS* 462 (Laurence Boisson de Chazournes & Philippe Sands eds., 1999).

<sup>29</sup> *Johnson v. McIntosh*, 21 U.S. 543.

<sup>30</sup> Jacques Derrida, *The Force of Law: the Mystical Foundation of Authority*, 11 *CARDOZO L. REV.* 919 (1990).

Charter? After all, the enunciation of these principles was coeval with the peace founded on the use of nuclear weapons and massive civilian casualties: “[s]o death doth touch the Resurrection.”<sup>31</sup>

We live in a world governed by the empire of nuclear weapons and the rules it prescribes. The edicts of this empire are translated and elaborated for us into the commanding and uncontested rules of security, self-defense, and sovereignty by experts in strategic studies and international relations. And the Court created by an organization whose existence is founded by that empire cannot question it. This is not some simply metaphysical argument. It is the five major nuclear powers, after all, that occupy permanent seats on the Security Council and this situation is unlikely to change barring a catastrophe of unimaginable consequences. It is in this way that the empire of nuclear weapons has entrenched itself in the very structure of international law. Nationals of these five permanent members have invariably been members of the Court, a constant feature of the composition of the Court since China assumed its place on the Council. There is then, as Andrea Bianchi points out, a corresponding structural bias in the Court.<sup>32</sup> Six nuclear powers, France, China, Russia, the United Kingdom, United States, and India, had nationals on the Court, and every one of these judges voted against the RMI. This is surely striking but not at all surprising. To point this out is not to cast aspersions on the judicial integrity of the individuals involved; but the ad hoc judge mechanism of the Court itself recognizes implicitly the link between a judge and her nationality. The rules of this empire might also be discerned in the policies of North Korea which has come to the understandable conclusion that sovereignty *is* nuclear weapons. In confronting North Korea, the global community confronts the bizarre but logical outcome of its own founding principles exposed now not through judicial scrutiny but this jeering and deformed version of sovereignty which dispenses with even a minimal concern for the everyday welfare of its people.

And yet, to argue that such a nuclear empire exists, that it is beyond law, that the conqueror prescribes the limits, is to succumb perhaps to unwarranted determinism. As the eloquent and carefully presented dissenting opinions of Judges Crawford, Bennouna, Cançado Trindade, and Robinson suggest, it could and should all have been different. The dissenting opinions are notable on occasion for their passion, such as Judge Cançado Trindade’s insistence that his conscience compels him to speak. It is of course the case that a Judgment adverse to the nuclear powers might have been simply disregarded. But as [Judge Weeramantry](#) put it in 1996, “[h]owever, collisions with the colossal have not deterred the law on its upward course towards the concept of the rule of law. It has not flinched from the task of imposing constraints upon physical power when legal principle so demands.”<sup>33</sup> And yet, perhaps it is always the case of empire that its effective contestation appears so infinitesimally close and so infinitely out of reach. As it is, the capitulation of the Court leaves unchallenged by law the rule of nuclear empire which seems to decree that world peace and the prevention of nuclear war is best achieved by producing even more, supposedly better nuclear weapons, by opposing any effort to legally implement the NPT and by thwarting any international initiative in the United Nations. It is all of this and the threat of war against certain states when they attempt to develop weapons. Starting a nuclear war, after all, may be the best way of stopping a nuclear war.

The ICJ could have not only enhanced its reputation and prestige immeasurably, but spoken justice to power, redeemed the rights of a small nation, affirmed the basic principle of the sovereign equality of states, and outlined the law on an issue of fundamental importance to the global community. Its failure to do so will leave enduring

<sup>31</sup> John Donne, [Hymn to God in My Sickness](#). (The crucial nuclear test in New Mexico that preceded the Hiroshima and Nagasaki bombings was named “Trinity” by Robert Oppenheimer. When asked why he chose that title, he referred to this poem by Donne, although the Trinity is more explicitly referred to in another of Donne’s poems, Holy Sonnet 14—“Batter my heart three person’d God.” The startling imagery of this poem too is eerily evocative: “That I may rise, and stand, o’erthrow me and bend/Your force to break, blow, burn and make me new.”).

<sup>32</sup> Bianchi, *supra* note 19 at 81.

<sup>33</sup> See UNGA-Nuclear Weapons, [Dissenting Opinion of Judge Weeramantry](#), 1996 I.C.J. 207, 219.

effects. It seems only fitting then that Andrea Bianchi presents both a detailed analysis of why the Court decided as it did, and also an affecting elegy for a certain vision of the Court, and of international law.<sup>34</sup> The essays in this collection offer different dimensions of the tragedy that occasions the Court's surrender of its vocation: Not with a bang but a whimper.

<sup>34</sup> Bianchi, *supra* note 19.

## CORRIGENDUM

### POLITIC, CAUTIOUS, AND METICULOUS: AN INTRODUCTION TO THE SYMPOSIUM ON THE MARSHALL ISLANDS CASE—CORRIGENDUM

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Due to an editing error, we regret that the dates relating to Hiroshima (August 6, 1945) and Nagasaki (August 9, 1945) were inadvertently reversed in the original version of this essay.<sup>1</sup>

<sup>1</sup> Antony T. Anghie, *Politically, Cautious, and Meticulous: An Introduction to the Symposium on the Marshall Islands Case*, 111 *AJIL UNBOUND* 62, 65 (2017).