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## Article

### Hurting More than Helping:

### How the Marshall Islands' Seeming Bravery Against Major Powers Only Stands to Maim the Legitimacy of the World Court

Katherine Maddox Davis\*

#### I. INTRODUCTION

As Greenpeace and a contingency of world leaders laud the Marshall Islands' legal crusade against nuclear weapons states, the cases themselves appear mostly dead on arrival.<sup>1</sup> Of nine ICJ suits filed against the nuclear weapons states, six never progressed for lack of jurisdiction.<sup>2</sup> Of the remaining three, legal arguments are attenuated against India and Pakistan as non-parties to the NPT and the proceedings on the merits against the United Kingdom are presently suspended for deliberation on preliminary objections.<sup>3</sup>

The potential ramifications of the Marshall Islands' legal indiscretion extend beyond these immediate legal losses. The legal action may jeopardize the ICJ's compulsory jurisdiction over the only submitting major powers, India and the United

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1. Professor Julian Ku characterized the proceedings as “[m]ostly just grandstanding by a very small nation with the help of a savvy (but sloppy) US law firm.” See Julian Ku, *Marshall Islands Sues to Enforce Nuclear Non-Proliferation Treaty; U.K. May Be Dragged into ICJ*, OPINIO JURIS (Apr. 24, 2014, 2:48 PM), <http://opiniojuris.org/2014/04/24/marshall-islands-sues-enforce-nuclear-non-proliferation-treaty-uk-may-dragged-icj/>.

2. See *infra* Section II(B)(2).

3. In an American federal district court, an additional suit against the United States was dismissed and is now on appeal before the Ninth Circuit. See *infra* Section II(A).

Kingdom.<sup>4</sup> Among probable outcomes to the Marshall Islands' suits, the ICJ will be forced to draw attention to its anemic authority, and major powers may be prompted to withdraw from compulsory jurisdiction. In a lamentable irony, the Marshall Islands' suits stand to do more damage to the ICJ's legitimacy than positively impact nuclear disarmament.

This Article contends that submission to compulsory jurisdiction is the gold standard of the ICJ's legitimacy. That submission is what the Marshall Islands now threaten. India is already taking steps identical to the United States' first actions before withdrawing its submission.<sup>5</sup> The United Kingdom altered its agreement of jurisdiction with the ICJ, seemingly to block this very case, and has already begun to challenge the proceedings, though the grounds of its challenge are not yet public.<sup>6</sup> The most probable outcome of the Marshall Islands' action is not that the Nuclear Nonproliferation Treaty (NPT) will be more strictly enforced, but that the Marshall Islands' applications will be dismissed for lack of jurisdiction (conceding how little authority the ICJ has), or that India and/or the United Kingdom will follow the example of China, France, and the United States in revoking submission to the ICJ's opt-in provision to compulsory jurisdiction, known as the Optional Clause.<sup>7</sup> Either of the probable outcomes could decrease the legitimacy of the ICJ, ominously continuing a downward trend nearly a century in the running.<sup>8</sup> The Marshall Islands' self-

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4. While the same may be true for Pakistan, this Article focuses on India and the United Kingdom because the major powers' withdrawals would have a greater impact on the legitimacy of the ICJ. For purposes of this work, 'major powers' will be defined by economic productivity. According to the World Bank, the ten largest national economies by GDP in 2014 were the United States, China, Japan, Germany, France, the United Kingdom, Brazil, Italy, Russia, and India. See World Bank, *Gross Domestic Product 2014*, in WORLD DEVELOPMENT INDICATORS 1 (2015), <http://databank.worldbank.org/data/download/GDP.pdf>. Pakistan's GDP was ranked forty-third. *Id.*

5. See *infra* Section VI.

6. See *infra* Section II(B)(1). See Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. U.K.), Order (June 19), <http://www.icj-cij.org/docket/files/160/18710.pdf>. ICJ rules maintain that pleadings may not be made public, if at all, until the oral proceedings stage. Rules of the International Court of Justice, 1978 I.C.J. Acts & Docs. 6, at art. 53(2) ("The Court may, after ascertaining the views of the parties, decide that copies of the pleadings and documents annexed shall be made accessible to the public on or after the opening of the oral proceedings.") [hereinafter Rules of Court].

7. See *infra* Section III.

8. See *infra* Section III(A).

lauded efforts may backfire in the face of everything that proponents of public international law sought to achieve in the past century.

This Article proceeds with background information on the NPT, laying ground to assess the legal merits of the Marshall Islands' arguments. Section II summarizes the Marshall Islands' action thus far in U.S. federal court and before the ICJ, analyzing the strategies for short- and long-term success. Ironically, Section II finds greater long-term potential in American courts than before the ICJ. Section III assesses the waning authority of the ICJ, and Section IV recounts the manners in which China, France, and the United States withdrew from the ICJ's compulsory jurisdiction.

Taking cues from past circumstances of withdrawal, Sections V and VI assess the likelihood that the United Kingdom and India, respectively, will throw off compulsory jurisdiction in the wake of the Marshall Islands' legal campaign. Attention is first given to procedural bars, rooted in Optional Clause declarations, then to the legal merits in the event that the procedure is deemed permissible, and finally to the likelihood of revoking submission to the Optional Clause.

Section V finds that procedure seems on the United Kingdom's side, though a yet-tested reservation could be a wild card, and that if the United Kingdom acts as the United States did, the state will withdraw its Optional Clause declaration if it loses on procedure; that the ICJ would be hard pressed to find against the United Kingdom on the merits; and that overall, the United Kingdom would have little to lose by withdrawing its declaration.

Section VI finds more questions than answers in the Indian case, though none would help the reputation of the ICJ, and any may lead India to consider withdrawing from the Optional Clause. The question of jurisdiction in the Indian case is any state's game, as India has seen mixed success in recent attempts to argue lack of ICJ jurisdiction based upon its Optional Clause reservations.<sup>9</sup> The Marshall Islands' legal arguments against India fall dismally flat in light of India's lack of affiliation with the NPT.<sup>10</sup> However, due to India's ongoing proliferation of nuclear weapons technology, even a perceived loss of invincibility before the ICJ may spook India into withdrawing

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9. See *infra* Section VI(A).

10. See Treaty on the Non-Proliferation of Nuclear Weapons, *infra* note 17.

from the Optional Clause should the ICJ incorrectly find jurisdiction. India may be particularly calculated because of its present campaign for a permanent seat on the U.N. Security Council, though such a procedural long shot may not be worth compromising in the present case.<sup>11</sup>

Even if either case reaches judgment without prompting the withdrawal of a major power, the likelihood of enforcement is nearly non-existent;<sup>12</sup> thus, legitimacy will be inevitably siphoned from the ICJ. Ultimately, this Article finds little long-term merit in the Marshall Islands' strategy, and great potential loss for the ICJ as the hapless victim of its own idealism.

#### A. THE NUCLEAR NON-PROLIFERATION TREATY

As a threshold matter, the murky language of the NPT handicaps the merits of the Marshall Islands' arguments. At the time of the treaty's negotiation, the five major victors of World War II maintained operational nuclear weapons.<sup>13</sup> The NPT came into force in 1970 as a major compromise between these states and non-weapons states.<sup>14</sup> Given the ongoing spoils of victor's justice, such as permanent U.N. Security Council seats, other nations were hesitant to allow the five nuclear weapons states further opportunities to permanently entrench their power.<sup>15</sup> India, Israel, Pakistan, and the Democratic People's Republic of Korea (DPRK) each developed and tested nuclear weapons after the treaty came into force.<sup>16</sup> However, the treaty restricts the title of "nuclear weapons state" to those countries that tested weapons prior to January 1, 1967.<sup>17</sup> The latecomers'

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11. Adding a permanent member to the Security Council would require amending the United Nations Charter, which would require a majority vote of all member states. See U.N. Charter art. 108. Such a feat is highly unlikely.

12. See *infra* Section III(A).

13. See REBECCA JOHNSON, UNFINISHED BUSINESS: THE NEGOTIATION OF THE CTBT AND THE END OF NUCLEAR TESTING 2 (U.N. Institute for Disarmament Research ed., 2009).

14. See Nobuyasu Abe, *The Current Problems of the NPT: How to Strengthen the Non-Proliferation Regime*, in THE NUCLEAR NON-PROLIFERATION TREATY AND INDIA 38 (Rajiv Nayan ed., 2012).

15. See generally Leonard Weiss, *India and the NPT*, in THE NUCLEAR NON-PROLIFERATION TREATY AND INDIA (Rajiv Nayan ed., 2012) (proposing that India must end nuclear testing in order to strengthen non-proliferation).

16. See James Conca, *The Nuclear Weapons States—Who Has Them and How Many*, FORBES (Sept. 25, 2014), <http://www.forbes.com/sites/jamesconca/2014/09/25/the-nuclear-weapons-states-who-has-them-and-how-many/>.

17. Treaty on the Non-Proliferation of Nuclear Weapons art. IX, July 1,

only options were to join the NPT as non-weapons states—tainting the legitimacy of their sophisticated status—or to abstain from joining the treaty. Most chose not to join.<sup>18</sup>

The three pillars of the NPT are “[n]on-proliferation, disarmament, and the right to peaceful use of nuclear energy.”<sup>19</sup> Non-proliferation and disarmament are addressed in NPT Article VI—the subject of the Marshall Islands’ suits.<sup>20</sup> The right to peaceful use of nuclear energy is addressed in Article IV. Article VI tentatively calls for an end to the creation of nuclear weapons and the beginning of a conversation to destroy existing nuclear weapons, and to pen a new treaty for strict control of nuclear armaments.<sup>21</sup> The language most at issue is the commitment to “[u]ndertake[] to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date.”<sup>22</sup>

Today, the Marshall Islands argue that Article VI has been breached because nuclear weapons still exist.<sup>23</sup> The Marshall Islands opine that the suits are “[n]ot an attempt to re-open the question of the legality of nuclear weapons,” but to focus on “[t]he failure to fulfill the obligations of customary international law with respect to cessation of the nuclear arms race at an early date and nuclear disarmament enshrined in Article VI of the NPT and declared by the Court.”<sup>24</sup> As for obligations of custom, the battle is damned by the sheer non-existence of the customary international law on which the Marshall Islands rests much of its case.<sup>25</sup> The NPT interpretation is also extreme, as

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1968–Mar. 2, 1970, 21 U.S.T. 483, 729 U.N.T.S. 161.

18. See Abe, *supra* note 14, at 38.

19. Arvind Gupta, *NPT Review Conference 2010: Issues and Prospects*, in *THE NUCLEAR NON-PROLIFERATION TREATY AND INDIA* 42 (Rajiv Nayan ed., 2012).

20. See Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 17, at art. VI. See also Application Instituting Proceedings Against the Republic of India, *infra* note 23.

21. See Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 17, at art. VI. (“Each of the Parties to the Treaty undertakes to pursue negotiations in good faith . . . on a treaty on general and complete disarmament under strict and effective international control.”).

22. *Id.*

23. See Application Instituting Proceedings Against the Republic of India, Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. India), Pleadings, 3 (Apr. 24, 2014), <http://www.icj-cij.org/docket/files/158/18292.pdf>.

24. *Id.*

25. See, e.g., *infra* Section II(B).

emphasized by attempts of the Nuclear Age Peace Foundation—the organization behind the suits—to name the Marshall Islands’ legal action “the Nuclear Zero Lawsuits.”<sup>26</sup>

The fuzzy language of Article VI creates an uphill battle distinguishing compliance from non-compliance. The noncommittal language, “[u]ndertakes to pursue negotiations in good faith,” makes the Marshall Islands’ interpretation particularly extreme, especially in light of Article IV, which condones and even encourages the peaceful use of nuclear energy.<sup>27</sup> The NPT drafters demonstrated convictions that ending nuclear energy entirely was against the interests of society.<sup>28</sup> Even before the provision on ending the arms race, Article IV clarifies:

1. Nothing in this Treaty shall be interpreted as affecting the inalienable right of all the Parties to the Treaty to develop research, production and use of nuclear energy for peaceful purposes without discrimination and in conformity with Articles I and II of this Treaty.

2. All the Parties to the Treaty undertake to facilitate, and have the right to participate in, the fullest possible exchange of equipment, materials and scientific and technological information for the peaceful uses of nuclear energy.<sup>29</sup>

An “inalienable right” to nuclear research is strong language, indeed. Because the treaty leaves “nuclear arms race” undefined in Article VI, any nation wishing to parse the legal ambiguities of the treaty to fit its needs may conflate conducting research and taking up arms. Consequently, the NPT language does not position the Marshall Islands to reasonably expect success.

## II. THE MARSHALL ISLANDS’ LEGAL STRATEGIES

Shortly before the 2014 NPT Preparatory Committee

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26. See *infra* Section II(B)(2); NUCLEAR ZERO, [www.nuclearzero.org](http://www.nuclearzero.org) (last visited Feb. 16, 2016).

27. See Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 17, at art. IV, VI.

28. *Id.* at art. IV.

29. *Id.*

meetings, the Marshall Islands filed legal action against all nine nuclear weapons states.<sup>30</sup> The Marshall Islands' actions were based on assertions that the states are in breach of the NPT's Article VI, calling for an end to the nuclear arms race and for general disarmament.<sup>31</sup> As explained *infra*, these arguments are particularly attenuated against India, Pakistan, the DPRK, and Israel; none of which are parties to the NPT.<sup>32</sup> While the proceedings have yet to receive extensive news coverage, likely because of lengthy ICJ procedures,<sup>33</sup> Greenpeace issued a statement lauding the nation's efforts.<sup>34</sup> A group of eighty-six figures from around the globe permitted their names to appear at the bottom of a blog post constituting an 'open letter' supporting the Marshall Islands' legal action.<sup>35</sup> That the

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30. See Press Release 2014/18, INT'L CT. JUST., The Republic of the Marshall Islands Files Applications Against Nine States for Their Alleged Failure to Fulfil Their Obligations with Respect to the Cessation of the Nuclear Arms Race at an Early Date and to Nuclear Disarmament, (Apr. 25, 2014), <http://www.icj-cij.org/presscom/files/0/18300.pdf>.

31. See *id.* at 2–3.

32. See *id.*

33. All cases were filed in April 2014. In the ICJ proceedings concerning India, for example, the Marshall Islands were given until December 2014 to brief the court on jurisdiction, with India's brief due in September 2015. See Press Release 2014/22, INT'L CT. JUST., Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. India) Fixing of Time-Limits for Filing of Pleadings on the Question of Jurisdiction (June 19, 2014), <http://www.icj-cij.org/docket/files/158/18334.pdf>; Press Release 2015/14, INT'L CT. JUST., Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. India) Extension of the Time-Limit for the Filing of India's Counter-Memorial (June 2, 2015), <http://www.icj-cij.org/docket/files/158/18682.pdf>. While no public announcement has been made, the author contacted the Marshall Islands' legal counsel and was privately assured that the memorial was filed before the December 2014 deadline (e-mail on file with author). Per ICJ rules, memorials will not be made public until the oral proceedings stage. See Rules of Court, *supra* note 6, at art. 53(2). In the case against the United Kingdom, the United Kingdom's counter-memorial was due December 16, 2015. See Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. U.K.), Order, 5 (June 16, 2014), <http://www.icj-cij.org/docket/files/160/18342.pdf> [hereinafter June 16, 2014 Order]. The United Kingdom filed timely preliminary objections to the case in June 2015, suspending procedure on the merits. See Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. U.K.), Order, 2 (June 19, 2015), <http://www.icj-cij.org/docket/files/160/18710.pdf>. Final rulings should not be expected soon.

34. See Press Release, Nuclear Age Peace Foundation, Greenpeace Champions the Marshall Islands (Nov. 4, 2014), <http://www.wagingpeace.org/greenpeace-champions-marshall-islands/>.

35. See *Open Letter in Support of the Marshall Islands' Nuclear Zero*



Marshall Islands could have expected these proceedings to lead to total disarmament of nuclear weapons is an imaginative stretch for even the most idealistic among the disarmament movement.<sup>36</sup>

Given the Marshall Islands' willingness to enter domestic jurisdiction in the United States, and the weakness of the Marshall Islands' ICJ suit against India, the Marshall Islands at least should have attempted an action against India in Indian court. Indian state and federal courts are historically welcome forums for customary international law arguments.<sup>37</sup> At best, the Marshall Islands missed an opportunity to show a fuller commitment to overturning every stone in seeking nuclear disarmament. At worst, the Marshall Islands missed a chance for a positive ruling that could have impacted Indian efforts to negotiate an end to the arms race. While the Marshall Islands may have missed an opportunity in India, the state took a fascinating risk in a U.S. court which may provide greater dividends for other treaty parties for years to come.

#### A. THE MARSHALL ISLANDS' SUIT IN THE UNITED STATES

On the same day that the Marshall Islands took legal action before the ICJ, the nation filed a complaint against the United States in an American federal district court.<sup>38</sup> The complaint was made on identical grounds to those of the ICJ cases, for breach of custom and the NPT Article VI.<sup>39</sup> The Marshall Islands requested that the court articulate American obligations under Article VI, determine whether the United States is in compliance, and call for remedial measures in the event of noncompliance.<sup>40</sup> The United States quickly filed a motion to

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*Lawsuits*, NUCLEAR AGE PEACE FOUND., <http://www.wagingpeace.org/rmi-open-letter/> (last visited Jan. 12, 2016).

36. See generally 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) (commenting on the European legal academy's ICJ idealism).

37. See Katherine M. Davis, *I, Too, Sing America: Customary International Law for American State and Federal Courts' Post-Kiobel Jurisprudence, Guided by Australian and Indian Experiences*, 29 *EMORY INT'L L. REV.* 119, 158–64 (2014).

38. See Complaint at ¶ 1, *Republic of the Marsh. Is. v. United States*, No. 14-CV-1885 (N.D. Cal. Apr. 24, 2014).

39. *Id.*

40. *Id.* ¶ 3.

dismiss the case on an array of grounds, including lack of standing, justiciability, lack of a private cause of action, improper venue, and timeliness.<sup>41</sup> The parties expanded their arguments in additional filings, as did a handful of the Marshall Islands' supporters in amicus briefs.<sup>42</sup>

The federal district court was initially scheduled to rule on the motion to dismiss in January 2015.<sup>43</sup> Before doing so, the court made an atypical display of piqued interest. Two days early, the court issued a tentative decision granting the United States' motion to dismiss.<sup>44</sup> In a tentative order, the court dispensed of any desire to hear oral arguments on the merits, but expressed a willingness to hear twenty minutes from each side on five questions it laid out alongside the tentative ruling.<sup>45</sup> Soon thereafter, the court granted the United States' motion to dismiss.<sup>46</sup>

The court found that the Marshall Islands lacked standing because the alleged injury was without redress, and the political question doctrine rendered the matter nonjusticiable.<sup>47</sup> The court declined to articulate American obligations under the treaty.<sup>48</sup> Additional matters relating to right of action, venue,

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41. See Motion to Dismiss at 2, 4, 7, 10, 12, Republic of the Marsh. Is. v. United States, No. 14-CV-1885 (N.D. Cal. July 21, 2014).

42. See Opposition to Motion to Dismiss, Republic of the Marsh. Is. v. United States, No. 14-CV-1885 (N.D. Cal. Aug. 21, 2014); Reply Memorandum in Support of Motion to Dismiss, Republic of the Marsh. Is. v. United States, No. 14-CV-1885 (N.D. Cal. Sept. 8, 2014); Brief of Tri-Valley CAREs as Amicus Curiae in Support of Venue in the Northern District of California, Republic of the Marsh. Is. v. United States, No. 14-CV-1885 (N.D. Cal. Oct. 28, 2014); Brief of Nuclear Watch New Mexico as Amicus Curiae in Support of Plaintiff and in Opposition to Defendants' Motion to Dismiss, Republic of the Marsh. Is. v. United States, No. 14-CV-1885 (N.D. Cal. Oct. 6, 2014).

43. See Notice of Tentative Ruling and Questions at 1, Republic of the Marsh. Is. v. United States, No. 14-CV-1885 (N.D. Cal. Jan. 14, 2015).

44. See *id.*

45. See *id.* at 1, 2.

46. See Order Granting Motion to Dismiss at 1, Republic of the Marsh. Is. v. United States, No. 14-CV-1885 (N.D. Cal. Feb. 3, 2015). See also Judgment, Republic of the Marsh. Is. v. United States, No. 14-CV-1885 (N.D. Cal. Feb. 3, 2015).

47. See Order Granting Motion to Dismiss, *supra* note 46, at 5, 7.

48. While making no pronouncement, the court did quote the U.S. Senate report that accompanied ratification. See Order Granting Motion to Dismiss, *supra* note 46, at 2. That report articulated the core purpose of the treaty as slowing—not stopping—the spread of nuclear weapons by prohibiting weapon states from transferring weapons and prohibiting non-weapon states from obtaining nuclear weapons. *Id.* If this dicta were construed as a full articulation of American NPT obligations, the Marshall Islands' current arguments would

and timeliness were not reached.<sup>49</sup> To be fair, the Marshall Islands had a decent shot at surviving the motion to dismiss, given the lack of jurisdiction-specific precedent on the matter.<sup>50</sup> Counsel for the Marshall Islands filed a notice of appeal in April 2015.<sup>51</sup>

While prospects seem dashed for the Marshall Islands in the immediate case, the action charted a potentially powerful path for other states with stronger treaty breach claims to seek relief in American court. The prospect of treaty parties choosing to seek a federal district court's interpretation of treaty obligations and assessing whether those obligations are presently met is a powerful prospect. This strategy is not new, but has been out of vogue for the better part of two centuries. The parties simply need to bring action concerning treaties of which the United States is actually in breach, and make a clearer argument for overcoming the political question doctrine.<sup>52</sup>

American treaty breaches are hardly difficult to come by.<sup>53</sup> A variety of U.S. district courts interpreting American treaty obligations could highlight the best of American federalism.<sup>54</sup> As major powers grow increasingly reticent to bring their concerns to the International Court of Justice, and the success rate of enforcement among major powers remains abysmal, domestic courts may see an increase in the volume of international treaty

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be negated.

49. *E.g.*, Order Granting Motion to Dismiss, *supra* note 46.

50. The lack of jurisdiction-specific precedent was evident by both parties' reliance on decisions from other federal district courts. *See* Motion to Dismiss, *supra* note 41; Opposition to Motion to Dismiss, *supra* note 42; Reply Memorandum in Support of Motion to Dismiss, *supra* note 42. The standing section of the court's dismissal order cited only two U.S. Supreme Court cases, five Ninth Circuit cases, and five cases from other federal jurisdictions. *See* Order Granting Motion to Dismiss, *supra* note 46, at 3–5.

51. *See* Plaintiff's Notice of Appeal at 1–2, Republic of the Marsh. Is. v. United States, No. 14-CV-1885 (N.D. Cal. Apr. 2, 2015).

52. Complaint at 4, Republic of the Marshall Islands v. United States, No. 14-CV-01885 (N.D. Cal. Apr. 24, 2014). While some may be quick to cite *Goldwater v. Carter*, 444 U.S. 996 (1979) as a bar to this litigation, that case was specific to presidential authority to withdraw from a treaty and does not address simply articulating American treaty obligations. If federal courts cannot pronounce American obligations under legal instruments, the political question doctrine will have regrettably built an end-run to perpetuate American exceptionalism in international law. *See* Katherine Maddox Davis, *Promise Despite Overreach in Marshall Islands v. United States*, 30 EMORY INT'L L. REV. (forthcoming 2016).

53. JOHAN D. VAN DER VYVER, IMPLEMENTATION OF INTERNATIONAL LAW IN THE UNITED STATES 93 (Peter Lang ed., 2010).

54. *See* ROBERT A. SCHAPIRO, POLYPHONIC FEDERALISM 164 (2009).

issues on their dockets.<sup>55</sup> The trend would mesh with the growing role of domestic courts in engaging international matters like arbitral enforcement.<sup>56</sup> In sum, despite the anemic merits of the present case, the Marshall Islands may have invited a future for American accountability to treaty obligations. Once all is said and done before the ICJ, dwelling on that glimmer of hope for future American lawsuits may be the only way to charitably view the Marshall Islands' legal campaign.

One modern champion of introducing international law into American courts is Justice Stephen Breyer, whose judicial philosophies on international law are explored in his *Medellin v. Texas* dissent and echoed in his more recent *Kiobel v. Royal Dutch Petroleum* concurrence, and his majority opinion in *BG Group, plc v. Republic of Argentina*.<sup>57</sup> Justice Breyer's slow climb from a dissent, to a concurrence, to a majority opinion in cases inviting international legal interpretation and enforcement may indicate a broader thread of his influence bringing international law into United States courts.<sup>58</sup>

#### B. THE INTERNATIONAL COURT OF JUSTICE CASES

Ironically, while even the Marshall Islands' failed American strategy may reconvene a fascinating judicial dialogue, the ICJ litigation stands to do nearly the opposite. The following section will explore the potential long-term detriment to the ICJ.

First, a discussion of the Optional Clause outlines the Marshall Islands' anemic jurisdictional claims. The legal merits of the Marshall Islands' arguments are analyzed for the unlikely event that they are reached. The Marshall Islands' treaty-based, CIL, and obligation *erga omnes* arguments are found glaringly insufficient. Even if the arguments were legally adequate, the Marshall Islands would have little to pin on the United Kingdom, and little to pin on India that the ICJ would likely feel comfortable laying at the feet of a single state. The Marshall Islands' only hope on the merits, therefore, is a dramatic about-

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55. See *infra* Section III(A).

56. E.g., *BG Group plc v. Republic of Argentina*, 134 S. Ct. 1198 (2014).

57. See *BG Group*, 134 S. Ct.; *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013) (Breyer, J., concurring); *Medellín v. Texas*, 552 U.S. 491, 536 (2008) (Breyer, J., dissenting).

58. See *BG Group*, 134 S. Ct. at 1198; *Kiobel*, 113 S. Ct. at 1669; *Medellín*, 552 U.S. at 536.

face by the ICJ from its 1996 advisory opinion on the use of nuclear weapons.<sup>59</sup>

1. A Failure of Procedure: The Optional Clause and the Nature of the ICJ's Compulsory Jurisdiction

The ICJ's jurisdiction is comprised of “[a]ll cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties or conventions in force.”<sup>60</sup> The ICJ Charter provides an Optional Clause for states to embrace the court's jurisdiction broadly rather than doing so piecemeal. Article 36(2) of the ICJ Statute characterizes the option as recognizing the court's jurisdiction “as compulsory ipso facto and without special agreement.”<sup>61</sup> While the ICJ characterizes the action of states that accept the Optional Clause as “recogniz[ing] the compulsory jurisdiction of the Court,”<sup>62</sup> this phrase is misleading. The Optional Clause is specific to “other state[s] accepting the same obligation,” and constrains the compulsory jurisdiction to legal disputes concerning four matters:

- a. the interpretation of a treaty;
- b. any question of international law;
- c. the existence of any fact which, if established, would constitute a breach of an international obligation;
- d. the nature or extent of the reparation to be made for the breach of an international obligation.<sup>63</sup>

For the purposes of this Article, “recognizing the compulsory jurisdiction of the court” will be referenced as accepting the Optional Clause.

Today, only one third of U.N. member states accept the Optional Clause.<sup>64</sup> The ICJ's compulsory jurisdiction is

59. See *infra* Section II(B)(ii).

60. Statute of the International Court of Justice art. 36, ¶ 1, June 26, 1945, 33 U.N.T.S. 993 [hereinafter ICJ Statute].

61. *Id.* ¶ 2.

62. Press Release 2014/18, *supra* note 30.

63. ICJ Statute art. 36, ¶ 2 (elaborating on other states who accept the similar obligations).

64. THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY 677 (Andreas Zimmermann et al. eds., 2012) [hereinafter ICJ Statute Commentary].

“regarded as a failure.”<sup>65</sup> Since the ICJ Charter came into force nearly sixty years ago, many states found that the terms of the Optional Clause were too broad.<sup>66</sup> The United States initiated a trend recognizing compulsory jurisdiction with reservations.<sup>67</sup> France and India were among the first states to do likewise.<sup>68</sup> Presently, most states that submit to the Optional Clause presently do so with explicit reservations.<sup>69</sup>

Conveniently, the Marshall Islands accepted the Optional Clause one year and one day before initiating these proceedings and, in so doing, registered multiple reservations.<sup>70</sup> The timing of the Marshall Islands’ acceptance demonstrates the length of planning that went into the ICJ filings. By the language of the ICJ Statute alone, a state could file an Optional Clause declaration one day, bring action at the ICJ the next, and withdraw its declaration on the third day.<sup>71</sup> The ICJ Statute merely requires that states party to ICJ litigation have declarations in force on the same day.<sup>72</sup> Not to be fooled by this invitation for “hit-and-run” litigation, the United Kingdom’s reservations include a provision that the ICJ will not have jurisdiction in any proceeding filed against the United Kingdom by a state whose declaration was filed less than twelve months prior to filing its application to bring suit.<sup>73</sup>

China, France, and the United States each revoked acceptance of the Optional Clause within thirty years of

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65. DAVID J. BEDERMAN, *INTERNATIONAL LAW FRAMEWORKS* 261 (3d ed. 2010).

66. *New Declarations of Acceptance by France and India of the Jurisdiction of the World Court Under Article 36(2) of Its Statute*, 1960 DUKE L.J. 84, 84 (1960) [hereinafter *New Declarations*].

67. *Id.* 84–85. The first American reservation was that parties, rather than the ICJ, should determine whether a contingency was raised. *Id.* The matter arose in response to *Case of Certain Norwegian Loans*, 1957 I.C.J. 9, 27 (July 6).

68. *New Declarations*, *supra* note 66.

69. ICJ STATUTE COMMENTARY, *supra* note 64, at 677. *See also* BEDERMAN, *supra* note 65, at 259.

70. Press Release, INT’L CT. JUST., *Declarations Recognizing the Jurisdiction of the Court as Compulsory: Marshall Islands*, (Apr. 24, 2013), <http://www.icj-cij.org/jurisdiction/?p1=5&p2=1&p3=3&code=MH>.

71. BEDERMAN, *supra* note 65, at 260.

72. ICJ Statute art. 36, ¶ 2; BEDERMAN, *supra* note 65, at 260 (explaining the ‘hit-and-run’ characterization).

73. Press Release, INT’L CT. JUST., *Declarations Recognizing the Jurisdiction of the Court as Compulsory: United Kingdom of Great Britain and Northern Ireland*, (Dec. 31, 2014), <http://www.icj-cij.org/jurisdiction/?p1=5&p2=1&p3=3&code=GB>; BEDERMAN, *supra* note 65, at 260.

submission.<sup>74</sup> Today, the United Kingdom is the only permanent member of the U.N. Security Council that submits to the Clause.<sup>75</sup> Of the nine nuclear weapons states, only the United Kingdom, India, and Pakistan submit to the optional clause. While the Marshall Islands brought individual action against each of the nine states before the ICJ, proceedings were only certified against the three submitting states.<sup>76</sup> The other six states were invited to accept the ICJ's jurisdiction strictly for these proceedings and have not done so, effectively ending those cases.<sup>77</sup>

Neither India nor Pakistan has ever been party to the NPT. While the Marshall Islands asserts that India and Pakistan are bound to the spirit of NPT Article VI through the ICJ's 1996 advisory opinion on the legal status of nuclear weapons,<sup>78</sup> the next section demonstrates that the Marshall Islands' argument does not square with the advisory opinion.

## 2. A Failure on the Merits: Rewriting the 1996 Advisory Opinion

While the Marshall Islands is unlikely to reach argument on the merits, given the strength of India and the United Kingdom's prospective arguments against jurisdiction, the Marshall Islands would likely fail on the merits anyhow. Because India is not party to the NPT, the Marshall Islands could only bring an argument of facial treaty obligation against the United

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74. *See infra* Section III.

75. ICJ STATUTE COMMENTARY, *supra* note 64, at 676.

76. Press Release 2014/18, *supra* note 30.

77. Rep. of the I.C.J., ¶ 4, U.N. Doc. A/69/4 (Aug. 1, 2014) ("In accordance with article 38, paragraph 5, of the Rules of Court, copies of the applications were transmitted to the Governments of the States concerned, but the new cases were not entered in the Court's List and no action will be taken in the proceedings against any one of those States unless and until it consents to the Court's jurisdiction for the purposes of the case.")

78. Press Release 2014/18, *supra* note 30. *See also* Application Instituting Proceedings Against the Republic of India, Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. India), Pleadings, 18 ¶¶ 42–44 (Apr. 24), <http://www.icj-cij.org/docket/files/158/18292.pdf> [hereinafter Application Against India]; Application Instituting Proceedings Against the United Kingdom of Great Britain and Northern Ireland, Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. U.K.), Pleadings, 31 ¶¶ 87–89 (Apr. 24, 2014), <http://www.icj-cij.org/docket/files/160/18296.pdf> [hereinafter Application Against United Kingdom and Northern Ireland].

Kingdom. To reach beyond the NPT parties, the Marshall Islands argues that the United Kingdom and India are bound to the principles of the NPT through attenuated constructions of obligations *erga omnes* and customary international law. These arguments can only be made by re-writing an advisory opinion issued nearly twenty years prior.

In 1996, the ICJ responded to a request from the United Nations General Assembly to address whether “the threat or use of nuclear weapons in any circumstance [was] permitted under international law.”<sup>79</sup> The Marshall Islands contends that the advisory opinion expressed “customary international law as it stands today” when the court quoted the NPT.<sup>80</sup> A brief review of the advisory opinion reveals otherwise.

The opinion unanimously affirmed the group-effort language of the NPT Article VI: “[t]here exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.”<sup>81</sup> On the matter of the obligation to pursue disarmament negotiations, the court made no mention of custom. The prospect of the ICJ leaving such a landmark expression to derivation is unimaginable.

To the contrary, both the ICJ’s findings and lack of findings regarding custom were express. The court stated unanimously that “[t]here is in neither customary nor conventional international law any specific authorization of the threat or use of nuclear weapons,” and by eleven votes to three, “[t]here is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such.”<sup>82</sup> In a seven-to-seven split won by the President’s casting vote, the opinion noted an inability to definitively conclude “whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defense, in which the very survival of a State would be at stake.”<sup>83</sup> These holdings demonstrate anything

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79. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8) [hereinafter *Nuclear Weapons Case*].

80. Application Against India, *supra* note 78, at 18 ¶¶ 42–44; Application Against United Kingdom and Northern Ireland, *supra* note 78, at 31 ¶¶ 87–89.

81. *Nuclear Weapons Case*, *supra* note 79, at 226 ¶ 105 (2)F.

82. *Id.* at (2)A, B.

83. *Id.* The opinion further expressed that any threat or use of nuclear weapons must comply with pertinent international laws of armed conflict and humanitarian law, as well as any pertinent treaties or other legal obligations (unanimous), while any threat or use contrary to the United Nations Charter is



but an implied expression of custom.

The Marshall Islands' *erga omnes* arguments are hardly stronger. Obligations *erga omnes* are those owed to the entire international community.<sup>84</sup> The term means "flowing to all."<sup>85</sup> By contrast, obligations *erga omnes partes* are more narrowly construed as owed to a specific subset of states.<sup>86</sup> The ICJ rarely names an obligation *erga omnes*, and expressly declined opportunities to do so.<sup>87</sup> Here, the Marshall Islands inappropriately hangs its *erga omnes* construction on dicta, using a single footnote to cite a single sentence from then-ICJ President Bedjaoui's declaration in the *Nuclear Weapons Case*.<sup>88</sup> President Bedjaoui noted:

As the Court has acknowledged, the obligation to negotiate in good faith for nuclear disarmament concerns the 182 or so States parties to the Non-Proliferation Treaty. I think one can go beyond that conclusion and assert that there is in fact a twofold general obligation, opposable *erga omnes*, to negotiate in good faith and to achieve the desired result.<sup>89</sup>

This non-binding dicta was expressly the judge's personal opinion and, more importantly, expressly "beyond [the] conclusion" of the ICJ.<sup>90</sup>

The Marshall Islands' complaint against India (and Pakistan) incorrectly conflates portions of the 1996 advisory opinion as stating that every single nation has an obligation *erga*

unlawful (unanimous). *Id.*

84. Inna Uchkunova, *Belgium v. Senegal: Did the Court End the Dispute between the Parties?*, EJIL: TALK! (July 25, 2012), <http://www.ejiltalk.org/belgium-v-senegal-did-the-court-end-the-dispute-between-the-parties/>.

85. M. Cherif Bassiouni, *International Crimes: Jus Cogens and Oblatio Erga Omnes*, 59 L. & CONTEMP. PROBS. 63, 72 (1996).

86. Uchkunova, *supra* note 84.

87. See *East Timor (Port. v. Austl.)* 1995 I.C.J. 90, 214 (June 30) (Weeramantry, J., dissenting) ("Although in this fashion the *erga omnes* principle has played an apparently frequent role in the Court's recent jurisprudence, it has not yet drawn a definitive decision from the Court in relation to the manner in which the principle will operate in case of breach.").

88. *Application Against India*, *supra* note 78, at 17 n.77; *Application Against United Kingdom and Northern Ireland*, *supra* note 78, at 30 n.122.

89. *Marsh. Is. v. India*, *supra* note 80, at 17 n.77; *Marsh. Is. v. U.K.*, *supra* note 80, at 30 n.122 (both citing *Nuclear Weapons Case*, *supra* note 79, 273-74, ¶ 23).

90. *Nuclear Weapons Case*, *supra* note 79, at 272.

*omnes* to fulfill the language of the NPT Article VI.<sup>91</sup> Just one year earlier, in yet another case in which jurisdiction was blocked by a state's reservations to the Optional Clause, Judge Weeramantry's *East Timor* dissent noted the court's failure to ever find a breach of an obligation *erga omnes*.<sup>92</sup> The ICJ's first *erga omnes* finding came more than a decade later in *Belgium v. Senegal*, though even that finding was merely obligation *erga omnes partes*.<sup>93</sup>

The Marshall Islands construes its finding by conflating a slew of phrases from the 1996 opinion as "tantamount" to an obligation *erga omnes*. As with the CIL argument, one could hardly imagine the ICJ leaving anything that it believes reaches the *erga omnes* threshold in the shadow of "tantamount" equation. The ICJ is "very cautious" when handling *erga omnes* at all.<sup>94</sup> One could imagine a future case in which the ICJ may hold that testing nuclear weapons violates an obligation *erga omnes* for the protection of citizens and the environment alike, drawing on Judge Weeramantry's dissent to the 1996 advisory decision.<sup>95</sup> Judge Weeramantry's *East Timor* dissent further asserted that even the *Monetary Gold* principle does not block

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91. Application Instituting Proceedings Against the Republic of India, Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. India), Pleadings, 17 (Apr. 24), <http://www.icj-cij.org/docket/files/158/18292.pdf>; Application Instituting Proceedings Against Pakistan, Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. Pak.), Pleadings, 15 (Apr. 24), <http://www.icj-cij.org/docket/files/159/18294.pdf>.

92. Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. India), Application Instituting Proceedings Against the Republic of India, 17 (Apr. 24), <http://www.icj-cij.org/docket/files/158/18292.pdf>.

93. Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), Judgment, 2012 I.C.J. 422, 449 (July 30) ("These obligations may be defined as 'obligations *erga omnes partes*' in the sense that each State party has an interest in compliance with them in any given case."). See also Uchkunoa, *supra* note 84 (citing this case as the first instance of the ICJ finding an obligation *erga omnes*, with only one prior finding by the Permanent Court of International Justice in 1928).

94. Jacob Werksman & Ruth Khalastchi, *Nuclear Weapons and Jus Cogens Peremptory Norms and Justice Preempted?*, in INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE AND NUCLEAR WEAPONS 183 (Laurence Boisson de Chazournes & Philippe Sands eds., 1999).

95. See *Nuclear Weapons Case*, *supra* note 79, at 517 (Weeramantry, J., dissenting) ("The widespread contamination of the environment may even lead to a nuclear winter and to the destruction of the ecosystem. These results will ensue equally, whether the nuclear weapons causing them are used in aggression or in self-defence.").

action to enforce obligations *erga omnes*.<sup>96</sup> Still, the Marshall Islands' attempt to find an existing *erga omnes* obligation in the majority opinions of the advisory opinion is unfounded.

The Marshall Islands contends that the ICJ's advisory opinion prescribed this phantom custom and obligation *erga omnes* to the world, "not confining its remarks to the States Parties to the NPT."<sup>97</sup> But nothing in the 1996 opinion states that the obligations of the NPT Article VI extend beyond the NPT parties. Alongside interpretations of customary and conventional international law, the ICJ affirmed the language of NPT Article VI without citing the NPT and without any explanation.<sup>98</sup> The ICJ's earlier commentary on the NPT consistently referenced NPT obligations relative to treaty parties.

Just before declaring the matters at hand, the final prelude discussed the NPT language of Article VI. The ICJ took every opportunity to make its comments specific to states party to the treaty, using language like "each of the parties,"<sup>99</sup> "concerns the 182 States parties,"<sup>100</sup> and "need for all States parties."<sup>101</sup> Surely, if the ICJ judges intended to say that the NPT Article VI language was binding as customary international law, let alone *erga omnes*, they would have said so expressly. Finding a universal obligation to Article VI on behalf of parties and non-parties alike would have conflicted with the ICJ's unwillingness to find custom against the possibility of the threat or use in extreme circumstances of self-defense.<sup>102</sup>

Even in an opinion critiqued as the ICJ's attempt to re-establish authority by creating international law at the end of a century during which the court watched its decline in prominence,<sup>103</sup> the ICJ did not go so far as to assert that every

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96. East Timor (Port. v. Austl.) 1995 I.C.J. 102, 173 (Weeramantry, J., dissenting).

97. Application Against India, *supra* note 78, at 18 ¶ 43; Application Against United Kingdom and Northern Ireland, *supra* note 78, at 31 ¶ 88.

98. *Nuclear Weapons Case*, *supra* note 79, at 266 ¶ 105 (2)(E).

99. *Id.* ¶ 99 (quoting the opening language of NPT Article VI, which establishes that the obligation is party specific).

100. *Id.* ¶ 100.

101. *Id.* ¶ 103.

102. *Id.* ¶ 105 (2)(E) ("[T]he [c]ourt cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.").

103. See *infra* Section II. *E.g.*, Kennedy, *supra* note 36.

nation in the world is bound by obligations *erga omnes* to the language of Article VI. Thus, the Marshall Islands has no legal footing to argue Article VI obligations from NPT non-parties India and Pakistan, whether by custom or obligations *erga omnes*. The sole viable candidate for NPT accountability in the ICJ would be the United Kingdom were that measure not futile.

As District Judge Jeffrey White noted in the order dismissing the Marshall Islands' complaint against the United States, the NPT "is silent as to the proper enforcement mechanism."<sup>104</sup> Moreover, "[t]he Treaty does not create, and the [U.S. District] Court may not enforce, a bilateral obligation."<sup>105</sup> The NPT did not purport to ban nuclear weapons itself, and the Marshall Islands cannot simply argue that failure to negotiate an end to the arms race on its own time somehow violates measures not present in the NPT.

In sum, the Marshall Islands stand on perilously little legal ground asserting ICJ jurisdiction in the cases against India and the United Kingdom, let alone in successfully arguing on the merits. Those things established, the greater possible outcome of the legal campaign is a threat of the ICJ's already-waning legitimacy.

### III. THE AUTHORITY AND LEGITIMACY OF THE ICJ IS IN JEOPARDY

Before considering the potential ramifications of the Marshall Islands' legal action, the current pulse of the ICJ must be taken. This section identifies the ICJ's prime in the rearview mirror. That backward glance sets the stage for Section IV's accounts of major powers abstaining and withdrawing from the Optional Clause.

The ICJ embodies an attempt to capture a lofty ideal in a grandiose palace with beautiful gardens, set back from a quiet street in a charming city. Unfortunately, however, the court outlived the mid-twentieth century idealism of its inception. The ICJ's Charter fundamentally establishes jurisdiction for advisory proceedings and contentious cases.<sup>106</sup> Advisory

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104. *Marsh. Is. v. United States*, 79 F. Supp. 3d 1068, 1074 n.2 (N.D. Cal. 2015).

105. *Id.* at 1072.

106. *See* ICJ Statute art. 36.

proceedings can hardly be enforced.<sup>107</sup> The ICJ's jurisdiction over contentious proceedings of first instance<sup>108</sup> encompasses cases of special agreement,<sup>109</sup> treaty or convention-based cases,<sup>110</sup> cases in which all state parties submit to the Optional Clause for compulsory jurisdiction,<sup>111</sup> and cases in which a state which does not accept the Optional Clause grants jurisdiction to the ICJ on an ad hoc basis for the specific proceeding.<sup>112</sup>

In cases of special agreement, "the ICJ is just a glorified arbitration panel," and an unsung arbitration panel at that.<sup>113</sup> Since 1949, the ICJ has heard just eighteen special agreement cases, only four of which involved a major power.<sup>114</sup> Treaty- or convention-based cases are hardly brought either. Since 1946, the rate at which states enter treaties with clauses granting ICJ jurisdiction has consistently decreased.<sup>115</sup>

Given the anemic state of all other forms of ICJ jurisdiction, acceptances of the Optional Clause are arguably the gold standard of the ICJ's legitimacy. Compounding misfortune, the ICJ does not appear thrilled to ground its jurisdiction in the Optional Clause.<sup>116</sup> This section contends that the ICJ's legitimacy is already in jeopardy, such that the loss of India's or the United Kingdom's acceptance of the Optional Clause would be a substantial blow. The court's authority arguably peaked nearly a century ago, during its identity as the PCIJ, and recent

107. *See supra* Section II(B)(2).

108. ICJ Statute art. 36, ¶ 6. Aside from matters of first instance, the ICJ Charter also permits jurisdiction to interpret or revise a judgment. *Id.* at art. 60.

109. ICJ Statute art. 36, ¶ 1.

110. *Id.*

111. *Id.* at art. 36, ¶¶ 2–5.

112. *See Basis of the Court's Jurisdiction, (d) Forum Prorogatum*, INT'L CT. JUST., <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=2#2> (last visited Jan. 8, 2016).

113. Eric A. Posner, *The Decline of the International Court of Justice* 9 (John M. Olin Law & Economics, Working Paper No. 233, 2004), [http://www.law.uchicago.edu/files/files/233.eap\\_icj\\_.pdf](http://www.law.uchicago.edu/files/files/233.eap_icj_.pdf).

114. *See List of Contentious Cases by Date of Introduction*, INT'L CT. OF JUST., <http://www.icj-cij.org/docket/index.php?p1=3&p2=3> (last visited Jan. 8, 2016) (special agreement cases are noted by a forward slash between party names). The four instances of major power participation were *Minquiers and Ecrehos (Fr./U.K.)*, 1953 I.C.J. 47 (Nov. 17); *North Sea Continental Shelf (Fed. Republic Ger./Neth.)*, 1967 I.C.J. 3 (Feb. 20); *North Sea Continental Shelf (Fed. Republic Ger./Den.)*, 1967 I.C.J. 3 (Feb. 20); and *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can./U.S.)*, 1984 I.C.J. 246 (Oct. 12). *Id.*

115. Posner, *supra* note 113, at 9.

116. BEDERMAN, *supra* note 65, at 261.

gains in state acceptances of the Optional Clause do not begin to outweigh the withdrawals. Not to say that there is no hope for a change of course; only acknowledging that the ICJ has not seen an uptick of legitimacy in years.

#### A. THE ICJ'S MOST AUTHORITATIVE DAYS ARE BEHIND IT

The ICJ is not what the Permanent Court of International Justice was in its Roaring Twenties heyday, nor has it consistently attempted to maintain the same authority.<sup>117</sup> In the 1920s, the court presented itself “like a national supreme court, [and] international law like national law.”<sup>118</sup> “Today, this image is more common in Europe than in the United States, and in the polemics of advocacy than in academic commentary.”<sup>119</sup> After 1945, the ICJ became an organ of the United Nations<sup>120</sup>—a system “languishing now in the chaos of institutional proliferation, non-stop budgetary crises and internal reforms.”<sup>121</sup> While the U.N. Charter deems the ICJ its “principal judicial organ,”<sup>122</sup> submission to the ICJ is entirely separate from admission to the United Nations,<sup>123</sup> placing the court’s authority in a precarious position from the start. Hopes for a “tight network” of states submitting to the court’s jurisdiction never materialized under the League of Nations or the United Nations.<sup>124</sup> That said, requiring compulsory jurisdiction of all United Nations members would only lead to a parade of unenforced judgments.<sup>125</sup> Because the ICJ lacks a solid enforcement mechanism, the only available choices are a few freely consenting states abiding by judgments or unenforceable universal jurisdiction. From 1951–2004, there was only one ICJ case in which jurisdiction was clearly grounded in the Optional Clause, the court sided with the applicant, and the respondent

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117. See *Corfu Channel (U.K. v. Alb.)*, 1949 I.C.J. 4, 43 (Apr. 9) (separate opinion of Judge Alvarez) (characterizing the ICJ as an “international social function of a psychological character”).

118. Kennedy, *supra* note 36, at 464.

119. *Id.*

120. *The Court: History*, INT’L CT. OF JUST., <http://www.icj-cij.org/court/index.php?p1=1&p2=1> (last visited Nov. 9, 2015).

121. Kennedy, *supra* note 36, at 463.

122. U.N. Charter art. 92.

123. ICJ STATUTE COMMENTARY, *supra* note 64, at 647.

124. *Id.* at 676.

125. *Id.* at 648.

complied with the judgment.<sup>126</sup>

Even in the words of an ICJ judge, the court is an “international social function of a psychological character.”<sup>127</sup> Over the course of the twentieth century, the ICJ has digressed to be “one cultural and political institution among others, crafting its [nuclear weapons] decision to enhance its legitimacy and pull towards compliance, the decision a drop in the ocean of world public opinion.”<sup>128</sup>

The dawn of specialized courts provides another reason why the ICJ lost de facto authority. Fewer cases had reason to come to the ICJ once European nations—the ICJ’s great champions<sup>129</sup>—created their own Court of Human Rights with far stronger jurisdictional authority.<sup>130</sup> Separate courts were created for international criminal conflicts, the Law of the Sea, conflict in Lebanon, the Rwandan genocide, atrocities in the former Yugoslavia, and for international arbitration—none of which cede appellate jurisdiction to the ICJ. These courts carved authority squarely out of the original vision for the ICJ’s authority as the final word on matters of international law. The ICJ’s oft-used title as ‘World Court’ would require a remarkably involved asterisk to account for every type of international legal dispute outside the court’s jurisdiction.

In sum, the ICJ has no surplus of legitimacy. There is no plausible outcome in which the Marshall Islands’ cases will increase the piecemeal authority of the ICJ. Cases that acknowledge a lack of jurisdiction may not seem significant. To the contrary, United States federal courts routinely dismiss cases for lack of jurisdiction. Forcing the ICJ to acknowledge its lack of jurisdiction over something as intuitively within its authority as multilateral treaty enforcement, however, highlights the ICJ’s greater failure to maintain the grand authority for which it was designed.

#### B. GAINS AND LOSSES IN THE GOLD STANDARD OF THE ICJ’S LEGITIMACY: SUBMISSION TO COMPULSORY JURISDICTION

Aside from the ICJ’s failure to launch, and the de facto loss

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126. Posner, *supra* note 113, at 8 n.14.

127. Kennedy, *supra* note 36, at 464 (citing *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4, 43 (Apr. 9)).

128. Kennedy, *supra* note 36, at 464.

129. *Id.*

130. ICJ STATUTE COMMENTARY, *supra* note 64, at 711.

of jurisdiction in the face of new regional and subject matter-specific courts, major powers' late twentieth century withdrawals and permitted lapses in their Optional Clause declarations further cut against the ICJ's legitimacy.

By 1950, shortly after the ICJ Statute came into force, sixty percent of states accepted the Optional Clause.<sup>131</sup> While the total number of states accepting the Optional Clause increased in time, the proportion of states dwindled to thirty-four percent.<sup>132</sup> Some see encouragement in gains from former socialist states.<sup>133</sup> Most of the gains came from small states like Barbados, Togo, and Costa Rica, though larger players like Germany and Australia also signed on in recent years.<sup>134</sup> Nevertheless, successful invocation of the Optional Clause decreased. Only four victories on the merits occurred from 1946–1965, eleven from 1966–1985, and three from 1986–2004.<sup>135</sup>

From 1951–2005, thirteen state declarations on the ICJ's jurisdiction expired or were terminated and not replaced.<sup>136</sup> Turkey allowed its submission to lapse in 1972,<sup>137</sup> as did a handful of other smaller nations.<sup>138</sup> These losses pale in comparison to the Optional Clause revocation of three major world powers in the late twentieth century. Section IV recounts how three major powers' Optional Clause declaration revocations came to pass, parsing for clues as to how the United Kingdom and India may respond to the Marshall Islands' legal action before the ICJ. As this section revealed, the ICJ's legitimacy is in dicey enough shape that either state's withdrawal would be a substantial blow.

#### IV. PRIOR REVOCATIONS BY WORLD POWERS

Some say the ICJ is “being abandoned by the major

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131. Posner, *supra* note 113, at 8.

132. *Id.* at n.14.

133. ICJ STATUTE COMMENTARY, *supra* note 64, at 676.

134. *Id.* at 676–77.

135. Posner, *supra* note 113, at 8.

136. 59 I.C.J. Y.B. 107, 113 n.1 (2004–2005) (listing declarations from Bolivia, Brazil, China, Colombia, El Salvador, France, Guatemala, Iran, Israel, South Africa, Thailand, Turkey, and the United States).

137. Gary L. Scott & Craig L. Carr, *The ICJ and Compulsory Jurisdiction: The Case for Closing the Clause*, AM. J. INT'L L. 57, 58 n.9 (1987).

138. Anthony Giustini, *Compulsory Adjudication in International Law: The Past, the Present, and Prospects for the Future*, 9 FORDHAM INT'L L.J. 213, 237 (1985).



powers,”<sup>139</sup> and that “all in all, the ICJ’s compulsory jurisdiction has been regarded as a failure.”<sup>140</sup> “The practice under the Optional Clause has confirmed the fact that relatively few states are inclined to use the [c]ourt.”<sup>141</sup> Further, states that revoked submission to the Optional Clause were hardly making much use of it beforehand. Among the ten state members with the largest economies, two have never been respondents in an ICJ case beyond the filing stage, let alone brought action themselves.<sup>142</sup>

On one extreme of the major powers, Russia has never accepted the Optional Clause; on the other, the United Kingdom hangs on to this day.<sup>143</sup> States who maintain declarations pursuant to the Optional Clause “are regarded as targets of opportunity” by aggrieved nations.<sup>144</sup> The other three permanent Security Council members, China, France, and the United States, each revoked acceptance of the Optional Clause over the course of the 1970s and 1980s.<sup>145</sup> As discussed *infra*, China is an outlier because its revocation was a function of the rise of the People’s Republic of China.<sup>146</sup>

In the experience of both France and the United States—and perhaps in the forthcoming experience of the United Kingdom and/or India—a major power walked away from the ICJ’s compulsory jurisdiction in response to legal action from a particularly small nation. These instances illustrate a growing

139. Posner, *supra* note 113, at 6.

140. BEDERMAN, *supra* note 65, at 261.

141. Giustini, *supra* note 138, at 236.

142. Posner, *supra* note 113, at 6 (“[C]onsider the countries that currently have the ten largest economies: USA, China, Japan, India, Germany, U.K., France, Italy, Brazil, and Russia. Four of these states—China, Japan, Brazil, and Russia (U.S.S.R.)—have never brought a proceeding, and never been a respondent beyond the filing stage.”). *See also List of Contentious Cases by Date of Introduction*, INT’L CT. OF JUST., <http://www.icj-cij.org/docket/index.php?p1=3&p2=3> (last visited Jan. 8, 2016) (stating that after Posner’s paper was written, Japan was a respondent in *Australia v. Japan* in 2010 and Russia was a respondent in *Georgia v. Russian Federation* in 2008).

143. ICJ STATUTE COMMENTARY, *supra* note 64, at 676 (stating that “Russia (formerly the Soviet Union) . . . have never submitted to the compulsory jurisdiction of the ICJ according to Art. 36, para. 2”). *See also* 1 I.C.J. Y.B. 195, 212 (1946–1947) (statement of Secretary of State for Foreign Affairs) (“On behalf of His Majesty’s Government in the United Kingdom, I now declare that they accept as compulsory ipso facto . . . the jurisdiction of the Court, in conformity with paragraph 2 of Article 36 of the Statute of the Court . . .”).

144. BEDERMAN, *supra* note 65, at 261.

145. *E.g.*, Giustini, *supra* note 138.

146. *See infra* Section IV(A).

trend of small and relatively weak states dragging major powers into the ICJ.<sup>147</sup> While facially ironic, the ICJ is blind to state size—at least in theory. Counsel for the United States delivered this message before the ICJ during the case that led to withdrawal from the Optional Clause:

Nicaragua's assertion that it is small and weak and the United States large and powerful. Nicaragua's request would have this court violate the most fundamental tenet of modern international law; the equality of sovereign States before the law. That tenet respects the right of the weak as well as the powerful, the small as well as the large. Indeed, the States best served by a rigorous adherence to the principle of equality as well as to the rule of law in general are the small and the weak. Any departure from those principles ultimately adversely affects them the most.<sup>148</sup>

In that case, the United States responded initially in the precise manner that India is now responding; addressing the lack of jurisdiction by arguing that its reservations to the Optional Clause barred the proceedings.<sup>149</sup> A thorough recollection of how France and the United States proceeded in the face of contentious proceedings before the ICJ may provide insight into how India and the United Kingdom will respond to the Marshall Islands.

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147. Posner, *supra* note 113, at 7. (“In the first twenty year period [1946–1965], a major power was an applicant in 60 percent of the cases, and a respondent in 60 percent of the cases. In the second period [1966–1985], a major power was an applicant a little under 50 percent of the time, and a respondent a little under 50 percent of the time . . . . In the last period [1986–2004], a major power was an applicant in only 13 percent of the cases; a major power was a defendant in 100 percent of the cases.”). See also *List of Contentious Cases by date of introduction*, INT’L CT. OF JUST., <http://www.icj-cij.org/docket/index.php?p1=3&p2=3> (last visited Feb. 5, 2015).

148. See, e.g., THE INTERNATIONAL COURT OF JUSTICE: ITS FUTURE ROLE AFTER FIFTY YEARS 11 (A.S. Muller et al. eds., 1997).

149. See Press Release 2014/22, *supra* note 33 (“[B]y a letter dated 6 June 2014, the Ambassador of the Republic of India to the Kingdom of the Netherlands informed the Court, *inter alia*, that ‘India . . . considers that the International Court of Justice does not have jurisdiction in the alleged dispute.’”).

## A. CHINA REVOKED ACCEPTANCE FOR COMMUNISM

In 1946, China accepted the Optional Clause without reservation.<sup>150</sup> Within a year of France withdrawing its acceptance of the Optional Clause, China withdrew as well. China's motivations were the result of a new political regime rather than reactive to a particular case. The United Nations General Assembly voted to recognize the People's Republic of China as the representative Chinese authority in 1971.<sup>151</sup> The next year, the Chinese government submitted a letter to the United Nations stating that it did not recognize the former Chinese government's statement accepting the Optional Clause.<sup>152</sup> As other major powers withdrew from the Optional Clause in coming years, their circumstances would prove more contentious.

## B. FRANCE REACTED TO A CONTENTIOUS CASE FROM NEW ZEALAND

Throughout the 1960s and early 1970s, Australia and New Zealand made vain efforts to stop French atmospheric nuclear weapons tests in the South Pacific.<sup>153</sup> The Prime Minister of New Zealand wrote the President of France in May 1973, giving notice that New Zealand intended to take the matter to the ICJ.<sup>154</sup> New Zealand made good on its word within a week, submitting an initial ICJ application.<sup>155</sup> France renounced its acceptance of the ICJ's compulsory jurisdiction in January

150. 1 I.C.J. Y.B. 195, 218 (1946–1947).

151. Phil C.W. Chan, *China's Approaches to International Law Since the Opium War*, 24 LEIDEN J. INT'L L. 859, 882 (2014).

152. 27 I.C.J. Y.B. 46, 52 (1972–1973) (“[B]y letter of 5 September 1972 the Government of the People's Republic of China indicated that it ‘does not recognize the statement made by the defunct Chinese government on 26 October 1946 . . . concerning the acceptance of the compulsory jurisdiction of the Court.’”). See also WEIXING HU, GERALD CHAN, & DAOJIONG ZHA, *CHINA'S INTERNATIONAL RELATIONS IN THE 21ST CENTURY: DYNAMICS OF PARADIGM SHIFTS* 186 (2000).

153. Don MacKay, *Nuclear Testing: New Zealand and France in the International Court of Justice*, 19 FORDHAM INT'L L.J. 1857, 1863 (1995).

154. *Id.*

155. Nuclear Tests Cases (N.Z. v. Fr.), Pleadings 3 (May 9), <http://www.icj-cij.org/docket/files/59/9447.pdf>. See also MacKay, *supra* note 153, at 1863 (“Subsequently, on May 14th, a Request by New Zealand for Interim Measures of Protection was lodged with the Court. Australia filed a parallel but not identical case.”).

1974.<sup>156</sup> That May, the French ambassador to the Netherlands wrote that France found the ICJ “manifestly” incompetent to hear the case.<sup>157</sup> The letter further stated that France had no intention to appoint an agent in the case, and requested that the ICJ withdraw the matter from its case list.<sup>158</sup> The ICJ requested memorials from each nation on the matter of jurisdiction.<sup>159</sup> New Zealand complied, and France abstained from participation.<sup>160</sup> Ultimately, the proceedings were rendered moot because France seemed to intend to cease its atmospheric tests.<sup>161</sup> The resulting withdrawal of France’s submission to the Optional Clause was permanent.

Still, France maintains a noteworthy interaction with the ICJ since revocation. In 2002, the Republic of the Congo initiated proceedings against France, disputing French criminal proceedings.<sup>162</sup> As in the present case, France was invited to submit to the court’s jurisdiction for that case alone. France consented exclusively to “the claims formulated by the Republic of the Congo.”<sup>163</sup> Careful to avoid even the impression of creating

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156. Nuclear Tests (N.Z. v. Fr.), Memorial of the Republic of France 2, [http://www.amun.org/final/03/ICJ\\_France\\_Memorial.pdf](http://www.amun.org/final/03/ICJ_France_Memorial.pdf). See also MacKay, *supra* note 153, at 1866 (“France subsequently moved to denounce the General Act, and also to remove itself entirely from the compulsory jurisdiction . . . months after Australia and New Zealand initiated their proceedings.”).

157. Nuclear Tests (N.Z. v. Fr.), Judgment, 1974 I.C.J. 457, ¶ 4 (Dec. 20) (“By a letter dated 16 May 1973 from the Ambassador of France to the Netherlands, handed by him to the Registrar the same day, the French Government stated that, for reasons set out in the letter and an Annex thereto, it considered that the Court was manifestly not competent in the case.”).

158. *Id.*

159. *Id.* ¶ 6.

160. *Id.* ¶ 6. *E.g.*, Memorial on Jurisdiction and Admissibility Submitted by the Government of New Zealand (N.Z. v. Fr.) (Oct. 29), <http://www.icj-cij.org/docket/files/59/9451.pdf>. See also Oral Arguments on Jurisdiction and Justiciability, 1974 I.C.J. 250, <http://www.icj-cij.org/docket/files/59/9453.pdf> (statement of counsel for the Government of New Zealand) (“No representative of the French Government is present in [c]ourt.”).

161. *E.g.*, Nuclear Tests (N.Z. v. Fr.), Judgment, *supra* note 157.

162. Certain Criminal Proceedings in France (Congo v. Fr.), Application Instituting Proceedings, 3 (Apr. 11), <http://www.icj-cij.org/docket/files/129/7067.pdf>.

163. Press Release 2010/36, INT’L CT. JUST., Certain Criminal Proceedings in France (Republic of the Congo v. France) Case Removed from the Court’s List at the Request of the Republic of the Congo (Nov. 17), <http://www.icj-cij.org/docket/files/129/16233.pdf> (“By a letter dated 8 April 2003 and received in the Registry on 11 April 2003, France stated that . . . its consent to the Court’s jurisdiction applied strictly within the limits ‘of the claims formulated by the Republic of the Congo.’”). See also Letter from the Minister for Foreign Affairs of the French Republic (Consent to the Jurisdiction of the Court to Entertain

jurisdiction on any other grounds, France further highlighted that “Article 2 of the Treaty of Co-operation signed on 1 January 1974 by the French Republic and the People’s Republic of the Congo, to which the latter refers in its Application, does not constitute a basis of jurisdiction for the Court in the present case.”<sup>164</sup> While the proceedings would have presented an intriguing case study in one-off submission to ICJ jurisdiction, the Republic of the Congo withdrew its application initiating proceedings in 2010.<sup>165</sup> France, of course, replied expressing no objection to the withdrawal.<sup>166</sup>

### C. THE UNITED STATES REACTED TO A CONTENTIOUS CASE FROM NICARAGUA

One decade after France, the United States terminated its acceptance of compulsory jurisdiction amidst similar circumstances. The American exit was prompted by a contentious case brought by Nicaragua over military and paramilitary activity. The United States involved itself in overthrowing the leftist Sandinistas regime in Nicaragua, and Nicaragua asserted that American intervention violated international law.<sup>167</sup> Unlike France, the United States made preemptive attempts to skirt the matter before withdrawing its submission to compulsory jurisdiction entirely. Days before Nicaragua filed its ICJ application, the United States informed the United Nations Secretary-General that its submission to compulsory jurisdiction would not apply to proceedings involving Central American nations.<sup>168</sup> Once in court, the U.S. team compounded its argument by asserting that Nicaragua lacked

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the Application Pursuant to Article 38, Paragraph 5 of the Rules of Court) to the International Court of Justice (Apr. 8, 2003), <http://www.icj-cij.org/docket/files/129/13344.pdf> (French only).

164. Press Release 2010/36, *supra* note 163 (“In its letter, France added that . . . ‘Article 2 of the Treaty of Co-operation signed on 1 January 1974 by the French Republic and the People’s Republic of the Congo, to which the latter refers in its Application, does not constitute a basis of jurisdiction for the Court in the present case.’”). *See also* Letter from the Minister for Foreign Affairs of the French Republic, *supra* note 163.

165. *See* Certain Criminal Proceedings in France (Congo v. Fr.), Judgment, 2010 I.C.J. 635 (Nov. 16), <http://www.icj-cij.org/docket/files/129/16266.pdf>.

166. *Id.*

167. BEDERMAN, *supra* note 65, at 233.

168. Monroe Leigh, *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. United States of America)*, 79 AM. J. INT’L L. 442, 442 (1985).

standing because the state never submitted to the ICJ's compulsory jurisdiction itself.<sup>169</sup> The ICJ was not swayed, and issued a judgment that the case was properly brought under both the ICJ Statute and a treaty between the United States and Nicaragua.<sup>170</sup> The United States responded by withdrawing from the Optional Clause entirely, technically defaulting on the merits of the case, but paying no mind.<sup>171</sup> Explaining its decision, the U.S. Department of State wrote:

In 1946 we accepted the risks of our submitting to the Court's compulsory jurisdiction because we believed that the respect owed to the Court by other states and the Court's own appreciation of the need to adhere scrupulously to its proper judicial role, would prevent the Court's process from being abused for political ends. Those assumptions have now been proved wrong.<sup>172</sup>

The episode did not conclude solely in the superpower's Optional Clause declaration withdrawal. Procedurally, the matter was complicated by the United States' failed Hail Mary to qualify the limits of its Optional Clause declaration. In response, a slew of nations subsequently altered the language of their own Optional Clause declarations, reserving the right to immediate withdrawal from compulsory jurisdiction.<sup>173</sup> Those nations included Australia, Cyprus, Guinea, Nigeria, Peru, Slovakia, Germany, and most notably, the United Kingdom.<sup>174</sup>

#### D. CONCLUSION ON WITHDRAWALS

Of the three NPT party nuclear weapon states to submit to the Optional Clause, three distinct withdrawal strategies were displayed. China withdrew immediately before any entanglement could occur at the ICJ. France withdrew nearly as soon as a contentious case was filed against it, not waiting for

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169. *Id.*

170. *Id.*

171. BEDERMAN, *supra* note 65, at 233.

172. THE INTERNATIONAL COURT OF JUSTICE: ITS FUTURE ROLE AFTER FIFTY YEARS 117, 129 n.50 (A.S. Muller et al. eds., 1997) (citing Department of State Letter and Statement Concerning Termination of Acceptance of ICJ Compulsory Jurisdiction, 24 I.L.M. 1742, 1744 (1985)).

173. ICJ STATUTE COMMENTARY, *supra* note 64, at 680 n.271.

174. *Id.*

the ICJ to request jurisdictional submissions.<sup>175</sup> The United States attempted to untimely alter its reservation, then objected to the applicant state's standing, then waited for the ICJ to determine its jurisdiction, and withdrew after losing that battle.<sup>176</sup> The next sections will estimate where the United Kingdom or India may find themselves along this continuum.

## V. WILL THE UNITED KINGDOM WITHDRAW?

The United Kingdom keeps a low profile before the ICJ. The United Kingdom has only been an applicant before the ICJ in four cases (excluding special agreement actions), the last of which was filed in 1972.<sup>177</sup> Likewise, the United Kingdom has only been a respondent in four cases (excluding special agreement actions), the last of which was filed in 1999, and none of which were filed by major powers.<sup>178</sup> The United Kingdom's absence from the ICJ may be the result of the European Court of Human Rights, displacing much of the United Kingdom's need for a supranational court and providing more reliable jurisdiction.<sup>179</sup>

This section will begin by exploring the procedural weakness of the Marshall Islands' argument for jurisdiction against the United Kingdom, then the weakness of the legal and factual merits of the argument, concluding with the likelihood that all this argumentation could cause the United Kingdom to withdraw its submission to the Optional Clause entirely.

175. See *supra* Section IV(B).

176. See *supra* Section IV(C).

177. Posner, *supra* note 113, at 6–7 tbl.2. Those cases were United Kingdom v. Albania (1947), United Kingdom v. Norway (1949), United Kingdom v. Iran (1951), and United Kingdom v. Iceland (1972). *Id.* While Posner's piece is more than a decade old, the United Kingdom has not filed any additional applications for contentious proceedings before the ICJ since 2004. See *List of Contentious Cases by Date of Introduction*, INT'L CT. OF JUST., <http://www.icj-cij.org/docket/index.php?p1=3&p2=3> (last visited Oct. 17, 2015).

178. Posner, *supra* note 113, at 6–7 tbl.2. Those cases were Greece v. United Kingdom (1951), Cameroon v. United Kingdom (1961), Libya v. United Kingdom (1992), and Yugoslavia v. United Kingdom (1999). *Id.* Outside of the Marshall Islands' 2014 filing, no state has filed any additional applications for contentious proceedings against the United Kingdom since 2004. See *List of Contentious Cases by Date of Introduction*, *supra* note 114.

179. See ICJ STATUTE COMMENTARY, *supra* note 64, at 711 (noting the firm jurisdiction of the European Court of Human Rights—innately connected to the treaties it is charged with enforcing—in comparison to the ICJ's “consensual regime,” which the author characterizes as outdated).

Procedurally, this section finds that the United Kingdom's untested reservation to its Optional Clause declaration could be interpreted for or against the Marshall Islands; and that a loss on the procedural matter of jurisdiction alone could be grounds for the United Kingdom's withdrawal, if following the United States' tactics. Withdrawal would be considered defaulting on the merits, though it would still mean that the judgment would be unrecognized by the United Kingdom, furthering the tradition of unenforced ICJ judgments.<sup>180</sup>

Still, if the ICJ finds jurisdiction, the United Kingdom may stick around unthreatened because arguments against the legal and factual merits of the case are so strong. Even setting aside the precedent that obligations *erga omnes* cannot be enforced when all states allegedly at fault are not party to the proceedings,<sup>181</sup> the United Kingdom is a model party to the NPT.<sup>182</sup>

This section finds no footing for the Marshall Islands on the factual merits: the United Kingdom's significant reduction of nuclear arms is openly acknowledged by the United Kingdom's government and non-governmental organizations alike.<sup>183</sup> Moreover, there is no way around the United Kingdom's commitment to the Partial Test Ban Treaty, or its signing and ratification of the Comprehensive Test Ban Treaty a decade before the Marshall Islands did so. If the United Kingdom bows out of the Optional Clause, it will likely do so after the jurisdiction is decided.

#### A. LOSING ON PROCEDURE: THE UNITED KINGDOM'S HISTORY BEFORE THE ICJ

As the only permanent member of the Security Council currently submitting to the Optional Clause,<sup>184</sup> the United Kingdom maintains a sophisticated set of reservations in its declaration.<sup>185</sup> The aforementioned provision denying

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180. See Posner, *supra* note 113, at 8 n.14; *supra* Section III(A).

181. See discussion of *Monetary Gold* *infra* Section V(C).

182. See *infra* Section V(B).

183. *Id.*

184. BEDERMAN, *supra* note 65, at 259.

185. See Chapter 1 *Charter of the United Nations and Statute of the International Court of Justice*, 4. *Declarations Recognizing as Compulsory Jurisdiction of the International Court of Justice Under Article 36, Paragraph 2, of the Statute of the Court, Texts of the Declarations, United Kingdom of Great*



jurisdiction in “hit-and-run” cases<sup>186</sup> is not the only ace up the United Kingdom’s sleeve. As the United Kingdom saw in the present case, the Marshall Islands was willing to submit to compulsory jurisdiction and wait a year to file action just to comply with the opposition’s compulsory jurisdiction declaration.<sup>187</sup> Not to be beaten at its own game, the United Kingdom updated its reservations to compulsory jurisdiction eight months after the Marshall Islands filed suit.<sup>188</sup> The United Kingdom added a reservation excluding compulsory jurisdiction in “any dispute which is substantially the same as a dispute previously submitted to the Court by the same or another Party.”<sup>189</sup>

On June 15, 2015, the United Kingdom filed timely preliminary objections to the case.<sup>190</sup> In accordance with ICJ procedure, the details of the objections were not made public, though they are assumedly regarding jurisdiction.<sup>191</sup> The Marshall Islands was granted the standard four months to respond.<sup>192</sup>

The new reservation seems specially tailored to block the Marshall Islands’ case. The Marshall Islands’ filings against the United Kingdom, India, and Pakistan are nearly identical.<sup>193</sup> However, because the Marshall Islands filed contemporaneous action against all nine nuclear weapons states, the Marshall Islands could argue that the United Kingdom’s reservation does not apply against its case because of the “previously submitted”

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*Britain and Northern Ireland*, UNITED NATIONS TREATY COLLECTION, [https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg\\_no=I-4&chapter=1&lang=en#EndDec](https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=I-4&chapter=1&lang=en#EndDec) (last visited Oct. 18, 2015) [hereinafter *Texts of the U.K. Declarations*].

186. See *supra* Section II(B)(1).

187. *Id.*

188. See *Texts of the U.K. Declarations*, *supra* note 185. The updated reservations were filed on December 31, 2014. *Id.*

189. *Id.* at ch. 1 § 4. As part of this update, the United Kingdom also stated that it would accept compulsory jurisdiction over disputes arising after January 1, 1984, updating this date from its prior 2004 declaration, which recognized disputes arising after January 1, 1974. *Id.*

190. Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. U.K.), Order, ¶ 5 (June 19), <http://www.icj-cij.org/docket/files/160/18710.pdf>.

191. See Rules of Court, *supra* note 6.

192. Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. U.K.), Order, *supra* note 190, at ¶¶ 8–9.

193. See Press Release 2014/18, *supra* note 30.

language.<sup>194</sup> The ICJ found against Japan on similar jurisdictional questions within the past decade.<sup>195</sup>

If argued, the “previously submitted” language could burn the United Kingdom in the same manner as Japan. Because the ICJ has had no prior opportunity to interpret the United Kingdom’s new reservation, the court’s interpretation for the matter at hand cannot be assessed with precision. If the United Kingdom’s presumed argument against jurisdiction is denied, the nation could imaginably go the way of France or the United States, withdrawing entirely from submission to the Optional Clause, rather than face a potentially strong ruling from the ICJ. Again, because the United Kingdom’s reservations include a provision for immediate effect after withdrawal,<sup>196</sup> the United Kingdom would not be left adrift waiting out its own action as the United States was against Nicaragua.<sup>197</sup> Again, if the United Kingdom does argue against the ICJ’s jurisdiction in any form, the strategy not to do so up front, as India did, is curious.<sup>198</sup>

#### B. LOSING ON THE MERITS: THE UNITED KINGDOM’S HISTORY WITH THE NPT

The merits of the Marshall Islands’ case against the United Kingdom are just as weak as the procedure. While the Marshall Islands can argue NPT breach against the United Kingdom, the United Kingdom has arguably acted as a model nuclear weapon state in terms of treaty compliance. To public knowledge, the United Kingdom has not tested a nuclear weapon since 1991.<sup>199</sup>

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194. *Texts of the U.K. Declarations, supra* note 185, at ch. 1 § 4.

195. See Whaling in the Antarctic (Austl. v. Japan, N.Z. intervening), Judgment, ¶¶ 32–41 (Mar. 31), <http://www.icj-cij.org/docket/files/148/18136.pdf> (rejecting Japan’s contention that the ICJ lacked jurisdiction because the dispute fell under one of Australia’s Optional Clause reservations).

196. See *Texts of the U.K. Declarations, supra* note 185, at 2.

197. See *supra* Section IV(C).

198. Compare Press Release 2014/22, *supra* note 33, at ¶ 4 (“[b]y a letter dated 6 June 2014, the Ambassador of the Republic of India to the Kingdom of the Netherlands informed the Court, *inter alia*, that ‘India . . . considers that the International Court of Justice does not have jurisdiction in the alleged dispute.’”) with Press Release 2014/21, INT’L CT. JUST., Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. U.K.), Fixing of Time-Limits for Filing of Initial Pleadings (June 19, 2014), <http://www.icj-cij.org/docket/files/160/18332.pdf> (providing no mention of jurisdiction arguments).

199. BESFORT T. RRECAJ, POLITICS OF LEGAL REGIMES OF NUCLEAR ENERGY IN THE ASPECT OF INTERNATIONAL SECURITY 57 (2014).

Even the Nuclear Threat Initiative acknowledges that “[t]he British government has progressively reduced its nuclear weapons stockpile.”<sup>200</sup>

In October 2010, British Prime Minister David Cameron presented a Strategic Defence and Security Review to Parliament.<sup>201</sup> Among other things, the study reassessed what nuclear arsenal was necessary for “credible deterrence” in light of the international order.<sup>202</sup> Finding that a smaller arsenal would suffice for credible deterrence, the government announced plans to reduce its requirement for “operationally available warheads” by twenty-five percent, and reduce its overall nuclear weapon stockpile, among other actions.<sup>203</sup> Even if the Marshall Islands were able to argue the non-existent unilateral obligation from the United Kingdom to the island nation, the Marshall Islands would be hard pressed to argue that the United Kingdom has not made sufficient strides to further nuclear non-proliferation.

The United Kingdom is a state party to the Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, known as the Partial Test Ban Treaty, and the Comprehensive Nuclear Test-Ban Treaty.<sup>204</sup> A December 2014 statement by the United Kingdom’s Permanent Representative to the United Nations in Vienna emphasized the difference of NPT interpretation between the United Kingdom and the

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200. *United Kingdom Profile*, NUCLEAR THREAT INITIATIVE, <http://www.nti.org/country-profiles/united-kingdom/> (last updated Oct. 2014) (noting that “there has been no attempt to reduce the role of nuclear weapons in the military and security doctrines of the five permanent members of the UN Security Council,” and that “Britain is about to commit to modernising its forces”).

201. CABINET OFFICE OF THE UNITED KINGDOM, SECURING BRITAIN IN AN AGE OF UNCERTAINTY: THE STRATEGIC DEFENCE AND SECURITY REVIEW 38 (2010) [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/62482/strategic-defence-security-review.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/62482/strategic-defence-security-review.pdf).

202. *Id.* at 38.

203. *Id.* (stating “reduce our requirement for operationally available warheads from fewer than 160 to no more than 120”).

204. See Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, *opened for signature* Aug. 5, 1963, 14 U.S.T. 1313, 480 U.N.T.S. 43; Comprehensive Nuclear Test-Ban Treaty, *opened for signature* Sept. 24, 1996, 35 I.L.M. 1439. See App’x III, Comprehensive Nuclear Test Ban Treaty & Partial Test Ban Treaty, NUCLEAR THREAT INITIATIVE, [http://www.nti.org/media/pdfs/apmctbt\\_2.pdf?\\_=1328040541&\\_=1328040541](http://www.nti.org/media/pdfs/apmctbt_2.pdf?_=1328040541&_=1328040541) (last updated Jan. 17, 2012), for a list of current signatories of both treaties. The U.K. ratified the Comprehensive Treaty eleven years before the Marshall Islands. *Id.*

Marshall Islands:

Some have argued that the way to this goal is to ban nuclear weapons now, or to fix a timetable for their elimination. The UK considers that this approach fails to take account of, and therefore jeopardises, the stability and security which nuclear weapons can help to ensure. A declaratory ban, or a timetable not underpinned by the necessary trust, confidence and verification measures, would jeopardise strategic stability. None of us would gain from a loss of that stability.<sup>205</sup>

The representative went on to defend fellow major powers, drawing attention to collective reductions of stockpiles between the United States, Russia, and the United Kingdom alike.<sup>206</sup>

Whether viewed alone or relative to other nuclear weapons states, short of the argument that the mere continued existence of nuclear weapons constitutes an NPT breach, anyone would have a hard time arguing that the United Kingdom is noncompliant to the NPT—let alone the Marshall Islands’ irresponsibly construed obligation *erga omnes* to “pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.”<sup>207</sup>

#### C. THE UNITED KINGDOM’S CURRENT CIRCUMSTANCES COMPARED TO PAST OPTIONAL CLAUSE WITHDRAWALS

Among the Optional Clause revocations, the United Kingdom’s present stance is most analogous to the United States’ experience. The United Kingdom sent representation to a preliminary meeting with the ICJ President in June 2014.<sup>208</sup> That act is distinguishable from French non-engagement.

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205. Susan le Jeune d’Allegeershecque, U.K. Permanent Representative to the U.N. in Vienna, U.K. Intervention at the Humanitarian Impact of Nuclear Weapons 2014 Conference (Dec. 9, 2014), *transcript* <https://www.gov.uk/government/world-location-news/uk-intervention-at-the-vienna-conference-on-the-humanitarian-impact-of-nuclear-weapons>.

206. *Id.*

207. Application Against United Kingdom and Northern Ireland, *supra* note 78, at pt. 1 ¶ 3.

208. June 16, 2014 Order, *supra* note 33, at ¶¶ 7–8.

Because the United Kingdom's Optional Clause declaration has such strong reservation language, the state is likely to have confidence in its preliminary argument against jurisdiction.

The United Kingdom chose to stick around for the jurisdiction arguments as the United States did, assumedly hoping that the case will be dismissed. The United States withdrew after unsuccessfully arguing against jurisdiction, and the United Kingdom may do the same if its own arguments fail. After all, as the only permanent Security Council member currently submitting to the ICJ, the United Kingdom's withdrawal from the Optional Clause is not likely to prompt an image problem or inconvenience its judicial needs.

The United Kingdom seems to have little to fear on the merits, though the sheer shock of reaching the merits may give enough pause for the United Kingdom to weigh the risk of continuing to submit to the Optional Clause. While the Marshall Islands can only argue attenuated customary international law breaches against India or Pakistan, the Marshall Islands can compound the CIL case with treaty breach argument against the United Kingdom. Luckily, given that there is some small risk to reaching the merits, the United Kingdom may be able to argue in the alternative against the case.

Still, if arguments against jurisdiction fail, the United Kingdom could also pose a separate argument to avoid the merits. In 1954, the ICJ decided *Monetary Gold Removed from Rome in 1943*, known as the "Monetary Gold Case."<sup>209</sup> Italy brought action against France, the United Kingdom, and the United States for priority ownership of Albanian gold seized for World War II restitution.<sup>210</sup> Italy's first request was an opinion from the court on jurisdiction.<sup>211</sup> At that point, each of the defendant states submitted to the compulsory jurisdiction of the ICJ. Reservations in Optional Clause declarations were not yet in vogue,<sup>212</sup> so none were raised. However, India raised an interrelated claim against Albania, which did not accept the Optional Clause. The ICJ found unanimously that it could not adjudicate the claims against Albania absent Albania's consent

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209. *Monetary Gold Removed from Rome in 1943 (Italy v. Fr., U.K., U.S.)*, 1954 I.C.J. 19 (June 15).

210. See generally Oliver J. Lissitzyn, *Case of the Monetary Gold Removed from Rome in 1943*, 48 AM. J. INT'L L. 649 (1954) (analyzing and excerpting the opinion).

211. *Monetary Gold*, 1954 I.C.J. at 22.

212. See *New Declarations*, *supra* note 66, at 84–85 and accompanying text.

to jurisdiction.<sup>213</sup>

Then, by a vote of thirteen to one, the court held that it could not decide the interrelated issues concerning France, the United Kingdom, and the United States without deciding the greater issue concerning all the parties.<sup>214</sup> Therefore, Albania's lack of Optional Clause acceptance kept the entire case out of the ICJ.<sup>215</sup> While some could contrast the *Nicaragua v. U.S.* decision, in which the ICJ dismissed the American objection that Nicaragua lacked standing for not submitting to the Optional Clause, the position of the parties distinguishes the cases.<sup>216</sup> Nicaragua arguably submitted to the international equivalent of personal jurisdiction by bringing its case before the ICJ, whereas Albania was a respondent whose actions could not be construed as submitting to the court's jurisdiction.

The United Kingdom could argue the same principle today. Given the communal nature of the requirements of the NPT Article VI—a commitment to dialogue among nations rather than unilateral action—how could the ICJ rule on the United Kingdom's compliance when six of the nine nuclear weapons states do not accept the Optional Clause and have not accepted the court's invitations to accept jurisdiction in this matter?

If the United Kingdom were to make and lose a *Monetary Gold* argument, the state would be foolish not to withdraw its Optional Clause declaration. The prospect of being held responsible for other states' collective actions would be a dangerous precedent. Luckily, should the United Kingdom feel inclined to withdraw consent entirely, the United Kingdom currently reserves the right to do so with immediate effect, unlike the United States.<sup>217</sup>

Bottom line, short of the United Kingdom arguing against jurisdiction and the ICJ agreeing, this case will not provide the United Kingdom any good reason to maintain Optional Clause submission. The United Kingdom may already have one foot out the door as is given the absence of any other permanent Security Council members from Optional Clause submission. Drawing from the French experience, the United Kingdom could rest assured that its withdrawal would not foreclose the option of submitting to the ICJ's jurisdiction on a case-by-case basis in

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213. See Lissitzyn, *supra* note 210.

214. *Id.*

215. *Id.* at 653.

216. See *supra* Section IV(C).

217. ICJ STATUTE COMMENTARY, *supra* note 64, at 680–81 n.271.

matters of optional jurisdiction.<sup>218</sup> Optional Clause withdrawal, ironically, would simply make such jurisdiction optional. Any trouble from the Marshall Islands' case may be an all-too-welcome prompting for the United Kingdom to withdraw its reservation.

## VI. WILL INDIA WITHDRAW?

Like France and the United States, and unlike the United Kingdom in this case, India responded to the Marshall Islands by arguing that one of India's reservations barred the case.<sup>219</sup> India has a one-for-one record arguing that its reservations bar ICJ jurisdiction.<sup>220</sup> Procedurally, the battle over jurisdiction in *Marshall Islands v. India* is any state's game. This section will demonstrate the open question of jurisdiction through a brief recollection of India's four contentious cases before the ICJ. Procedure undecided, this section addresses the merits of the Marshall Islands' case by considering India's unique relationship with the NPT and with nuclear weapons generally, particularly its ongoing development of new nuclear weapons. Ultimately, the merits of the Marshall Islands' case against India may be strong enough to prompt India to consider withdrawing from the Optional Clause before the ICJ could rule against it, though implications for external international relations dynamics must be taken into account—particularly India's campaign for a permanent seat on the United Nations Security Council.

### A. LOSING ON PROCEDURE: INDIA'S HISTORY BEFORE THE ICJ

India has been a party to four contentious filings before the ICJ. India was a respondent in contentious cases filed by Portugal (1955) and Pakistan (1973 and 1999), and an applicant against Pakistan in 1971.<sup>221</sup> Foreshadowing how India will

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218. See *supra* Section IV(B).

219. See Press Release 2014/22, *supra* note 33, ¶ 4.

220. Right of Passage Over Indian Territory (Port. v. India), Judgment, 1957 I.C.J. 125 (Nov. 26) (lost); Aerial Incident of 10 August 1999 (Pak. v. India), Judgment, 2000 I.C.J. 12 (June 21) (won); Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pak.), Judgment, 1972 I.C.J. 46 (Aug. 18) (not raised); Trial of the Pakistani Prisoners of War (Pak. v. India), Order, 1973 I.C.J. 347 (Dec. 15).

221. See *List of Contentious Cases by Date of Introduction*, *supra* note 114.

respond to the Marshall Islands, in each prior instance India strove to block the proceedings by arguing that the ICJ lacked jurisdiction.<sup>222</sup>

India was among the first nations to file a declaration of acceptance (and reservations) to the Optional Clause, accepting compulsory jurisdiction in 1940.<sup>223</sup> Portugal filed its declaration on December 19, 1955, and its application against India on December 22.<sup>224</sup> The case concerned whether India violated obligations to Portugal's right of passage in Indian coastal territory.<sup>225</sup> Not to be out-filed, India updated its reservations on January 7, 1956.<sup>226</sup> India made six preliminary objections to jurisdiction, including an unsuccessful argument that one of Portugal's reservations was inappropriately retroactive and therefore out of line with Article 36 of the ICJ Charter.<sup>227</sup> Three further objections were based on India's own declaration, including arguments concerning reciprocity and exclusive domestic jurisdiction.<sup>228</sup> The ICJ voted overwhelmingly to reject four of the objections, but joined two to the merits of the case, including the matter of exclusive domestic jurisdiction and the date of commencement for ripeness purposes.<sup>229</sup> The court found that it had jurisdiction, but ultimately found that India had not violated its obligations to Portugal.<sup>230</sup>

India's single application to the ICJ was unusual. After a dramatic falling out over airspace, Pakistan filed a complaint before the Council of the International Civil Aviation

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222. See Sushant Singh, *Going to the Hague: India and the ICJ, the Big Picture*, INDIAN EXPRESS (June 4, 2015), <http://indianexpress.com/article/explained/going-to-the-hague-india-and-icj-the-big-picture/>.

223. See *New Declarations*, *supra* note 66 (stating that "half a dozen other states, among them France and India, followed the precedent set by the United States [and appended to their declaration of acceptance various un contemplated reservations]"). See also Brunson MacChesney, *Judicial Decisions: Case Concerning Right of Passage Over Indian Territory (Port. v. India)*, 52 AM. J. INT'L L. 320, 327 (1958).

224. See MacChesney, *supra* note 223, at 327–28.

225. See *id.* at 327 ("Portugal filed an application submitting to the [c]ourt a dispute between Portugal and India concerning the right of passage over Indian territory between the territory of Daman and two enclaved territories as well as between the two enclaved territories.").

226. *Id.* at 330.

227. *Id.* at 329.

228. *Id.* at 331–37.

229. *Id.* at 337.

230. Brunson MacChesney, *Judicial Decisions: Case Concerning Right of Passage Over Indian Territory (Port. v. India)*, 54 AM. J. INT'L L. 673, 690 (1960).



Organization.<sup>231</sup> In 1971, India appealed to the ICJ for a ruling on whether the Council was competent to entertain Pakistan's complaint.<sup>232</sup> In turn, Pakistan objected that the ICJ was not competent to determine the Council's competence.<sup>233</sup> Ultimately, the ICJ held that it was competent to determine the Council's competence, and that the Council was authorized to rule on Pakistan's complaint.<sup>234</sup>

Pakistan's filing against India in 1973 alleged genocide against Pakistani nationals and was voluntarily dismissed after the two nations negotiated in New Delhi.<sup>235</sup> Pakistan filed against India again in 1999.<sup>236</sup> In that case, the ICJ found that it lacked jurisdiction to rule on the merits.<sup>237</sup> Among other reasons, the court relied on India's September 1974 declaration relating to the Optional Clause.<sup>238</sup> India's "Commonwealth reservation," barring jurisdiction in matters brought between Commonwealth states, was successfully invoked.<sup>239</sup>

Looking forward, one commentator noted, "[g]iven the Court's approach to the Optional Clause and the extremely broad reservations contained in India's Optional Clause declaration, it is unlikely that the Court will be able to entertain any dispute involving that country, whether as applicant or as respondent, based on the Optional Clause."<sup>240</sup> Indeed, for now, India may bet that its strong reservations will block the Marshall Islands' case. While India largely hung its hat on the Commonwealth reservation in 1999, the Marshall Islands is no Commonwealth state. Further, in cases of major powers subsequent to India's last brush with the World Court, such

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231. *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pak.)*, Judgment of 18 August 1972, U.N. Y.B. 1972, 203-06 <http://legal.un.org/UNJuridicalYearbook/pdfs/english/ByChapter/chpVII/1972/chpVII.pdf>.

232. Alona E. Evans, *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pak.): Judgment of 18 August 1972*, 67 AM. J. INT'L L. 127, 127 (1973).

233. *Id.* at 129.

234. *Id.* at 145 (holding that India's unilateral suspension of the pertinent treaties did not render inoperative those treaties' clauses granting jurisdiction to the ICAO Council).

235. *Trial of Pakistani Prisoners of War (Pak. v. India)*, Judgment, 1973 I.C.J. 347, 348 (Dec. 15).

236. *Case Concerning the Aerial Incident of 10 August 1999 (Pak. v. India)*, Judgment, 2000 I.C.J. 12, ¶ 1 (June 21).

237. *Id.* ¶ 46.

238. *Id.*

239. *Id.*

240. Peter H.F. Bekker, *Aerial Incident of 10 August 1999 (Pak. v. India)*, 94 AM. J. INT'L L. 707, 712-13 (2000).

broad deference has not been shown to reservations in Optional Clause declarations. In the past decade, Japan lost arguments against ICJ jurisdiction.<sup>241</sup>

India's reservations continued to ebb and flow over the late twentieth century, more carefully worded as time passed. As one commentator characterized India's reservations, "[s]uch exceptions effectively nullify any acceptance of compulsory jurisdiction."<sup>242</sup> Another predicted:

Nowhere has the quantity and density of reservations reached the same level as in the case of India, which has succeeded in shaping an instrument that will certainly prevent any attempt ever to bring an application against it, thus converting the act of acceptance into a barely veiled act of non-acceptance.<sup>243</sup>

India did not withdraw its Optional Clause declaration the last time the nation was forced to argue against jurisdiction on grounds of its reservations. Why would India withdraw now? Because the Court has since construed Optional Clause reservations more narrowly, and at least one major power lost the jurisdiction argument on grounds of its reservations within the past decade.

If seeking to argue against jurisdiction, India could also make the *Monetary Gold* argument as the United Kingdom may, asserting that the ICJ cannot decide a matter of breached obligations when some bound parties are not included.<sup>244</sup> Further, without even taking the energy to eviscerate the Marshall Islands' *erga omnes* construction from the 1996 advisory opinion, India could analogize to the 2012 *Belgium v. Senegal* case and characterize the obligation as *erga omnes partes*, which seems to be a more comfortable stance for the ICJ—arguing that the obligation is specific to the subset of states party to the NPT.<sup>245</sup> While India may have a strong case

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241. See, e.g., *Whaling in the Antarctic* (Austl. v. Japan, N.Z. intervening), Judgment, 2014 I.C.J. 225, at ¶¶ 36–41 (Mar. 31), <http://www.icj-cij.org/docket/files/148/18136.pdf> (holding that Japan's objection to the Court's jurisdiction cannot be upheld).

242. Giustini, *supra* note 138, at 239.

243. ICJ STATUTE COMMENTARY, *supra* note 64, at 677.

244. See *supra* Section V(C).

245. See *supra* Section II(B)(2). Again, the ICJ has never found a breach of a universal obligation *erga omnes*, and only in one instance found a breach of an obligation *erga omnes partes*. See Uchkunova, *supra* note 84.

against jurisdiction, and even a memory of winning the argument before, losing the jurisdiction question may prompt India to withdraw its declaration to the Optional Clause for sheer desire to avoid entanglement in the merits arguments.

#### B. LOSING ON THE MERITS: INDIA'S HISTORY WITH THE NPT

Luckily for India, given the unsure footing of its potential arguments for procedural bars, the Marshall Islands' merits claims are weak. The Marshall Islands' case against India can only be based on attenuated interpretations of custom and obligations *erga omnes*. India's history relative to the NPT is rich.

India's position toward nuclear weapons and the international community, generally, can best be summarized by the mid-twentieth century statement of Dr. Homi Bhabha, Secretary of the Indian Department of Atomic Energy under Jawaharlal Nehru: "We must have the capability [for nuclear weapons]. We should first prove ourselves and then talk of Gandhi, non-violence and a world without nuclear weapons."<sup>246</sup> India has consistently employed strong rhetoric against proliferation, all the while developing its own technology and stating that non-proliferation should only be discussed when every nuclear weapons state intended to do away with their weapons.

India made strong efforts to influence the language of the NPT in early deliberations. Negotiations on NPT's Articles IV, V, and VI were insufficient to convince India to sign, and India was the only nation to reject the NPT on principle.<sup>247</sup> According to Indira Gandhi, "India's refusal to sign the NPT was based on enlightened self-interest and the considerations of national security . . . nuclear weapon powers insist on their right to continue to manufacture more weapons . . . . India does not propose to manufacture nuclear weapons."<sup>248</sup>

India's subsequent nuclear explosion in 1974 was allegedly a peaceful one, though twenty-three years later the bomb designer stated, "there was nothing peaceful about it. I just want

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246. Weiss, *supra* note 15, at 73.

247. Aaron Tovish, *India and the NPT*, in *THE NUCLEAR NON-PROLIFERATION TREATY AND INDIA* 89, 89 (Rajiv Nayan ed., 2012) (stating China did not sign either).

248. Weiss, *supra* note 15, at 79.

to make clear that the test was not all that peaceful.”<sup>249</sup> By then, India was stuck. In what Indian officials deemed “nuclear apartheid,” the nation could join the NPT as a non-nuclear weapons state—the only option available to a nation that tested after January 1967, maiming the legitimacy of the nation’s proud nuclear program—or remain a rogue, armed outsider.<sup>250</sup> India chose the latter.

India’s rhetoric again countered its actions two decades later. Anticipating the ICJ’s advisory opinion on nuclear weapons, India submitted a brief to the ICJ in 1995, strongly denouncing the legality of even the “production and manufacture of nuclear weapons;” just three years later, India conducted five nuclear tests.<sup>251</sup> Not surprisingly, Pakistan responded with six nuclear tests within two weeks.<sup>252</sup> If anyone was in a nuclear arms race, patently violating the spirit of NPT Article VI, India and Pakistan were. But could a nuclear arms race by non-parties to the NPT amount to a violation of international law?

Despite India’s patent refusal to sign the NPT, seemingly anticipating a suit such as the Marshall Islands’ present action, India carefully argued that its policies and procedures were in line with the NPT. India likewise refused to sign the Rome Statute in 1999, in protest that use of nuclear weapons was not included as a punishable crime.<sup>253</sup> India’s fresh nuclear weapons tests weakened its discourse.<sup>254</sup> When India chose not to attend the 2000 NPT Review Conference, External Affairs Minister Jaswant Singh told Parliament that their government functioned “consistent[ly] with the key provisions of [the] NPT that apply to nuclear weapon states,” notably Article VI.<sup>255</sup> While the five nuclear weapon states acting under the blessing of the NPT have each abstained from further testing, and none are engaged in a “nuclear arms race,” India continues to build a

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249. *Id.*

250. See Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 17; Richard Price, *Nuclear Weapons Don’t Kill People, Rogues Do*, 44 INT’L POL. 232, 239 (2007) (“nuclear apartheid”).

251. Weiss, *supra* note 15, at 82–83. See generally *Status of Nuclear Weapons in International Law: Request for Advisory Opinion of the International Court of Justice*, 37 INDIA J. INT’L L. 244, 244–49 (1997) (describing India’s general views on the legality of nuclear weapons).

252. Weiss, *supra* note 15, at 83.

253. MARLIES GLASIUS, *THE INTERNATIONAL CRIMINAL COURT: A GLOBAL CIVIL SOCIETY ACHIEVEMENT* 102 (2006).

254. *Id.* at 103 (India defended itself by maintaining that possession and testing of nuclear weapons is lawful but actual use is illegal).

255. Weiss, *supra* note 15, at 83–84.

“credible minimum deterrent” amounting to an arms race with Pakistan, and an arguable attempt to establish nuclear weaponry on equal footing with China.<sup>256</sup> Throughout this period, the United States and other world powers overwhelmingly accepted India’s nuclear weapons status, even outside the blessing of the NPT.<sup>257</sup> Any global appeals the Marshall Islands would attempt to make against India coloring outside the lines of the NPT would likely fall on deaf ears—at least the ears of major powers.<sup>258</sup>

C. INDIA’S PREDICAMENT RESEMBLES THOSE OF FRANCE AND THE UNITED STATES BEFORE THEIR OPTIONAL CLAUSE REVOCATIONS

Long before the Marshall Islands filed suit against India at the ICJ, India laid groundwork to defend itself. India’s reservations to the Optional Clause were meticulously planned, and the nation made clear that even as a non-party to the NPT, India found itself in compliance with the NPT’s requirements for nuclear weapons states—at least it did fourteen years ago.

When the day finally came to answer accusations of violating international law with its nuclear weapons, India did not refute the attenuated *erga omnes* argument. At first glance, this strategy seems odd, as the Marshall Islands’ argument seems easily overcome. However, India’s actions could be easily explained by an intention to ultimately withdraw from the Optional Clause and to keep the company of other world powers in how it does so. India argued that this case falls within one of India’s reservations to the Optional Clause, just as France argued in the *Nuclear Tests* case and as the United States argued against Nicaragua.<sup>259</sup> In this case, India declined to attend an initial meeting at the ICJ to flesh out procedural matters,<sup>260</sup> just as France declined its initial meeting before withdrawal.

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256. *Id.* at 84.

257. See Kate Sullivan, *How the World Warms to a Nuclear India*, INSIDE STORY (May 3, 2012), [www.insidestory.org.au/how-the-world-warmed-to-a-nuclear-india](http://www.insidestory.org.au/how-the-world-warmed-to-a-nuclear-india).

258. *Id.*

259. See *supra* Section IV(B–C).

260. See Press Release 2014/22, *supra* note 33.

## D. INDIA MAY STAY FOR LEGITIMACY

Compulsory submission is seemingly dispensable these days. Why would India cling to it? Perhaps for legitimacy.<sup>261</sup> India has little footing as a non-party to the NPT and only recently gained a permanent ICJ judge for the first time in more than two decades.<sup>262</sup> India is certainly not holding on to European idealism of international law. Even in its history of nuclear weapons development, India has proven to be a scrappy, self-serving country willing to assert its own opinions and to absorb the consequences of not joining the NPT when its attempts to influence NPT negotiations failed. More likely, India is self-conscious about legitimacy and social capital.<sup>263</sup>

India has long wished to join the ranks of the permanent members of the U.N. Security Council. Were the matter simply left to the current permanent members, India may gain a permanent seat with little fanfare. British Prime Minister Gordon Brown was on board in 2008, though seemingly without the company of the United States, Russia, or China.<sup>264</sup> Nicolas Sarkozy strongly supported the vision in 2010.<sup>265</sup> Barack Obama vocalized support during his 2010 visit to India,<sup>266</sup> and again

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261. Scott & Carr, *supra* note 137, at 58 (“The less powerful states may still see some political advantage in accepting compulsory jurisdiction, thereby gaining a modicum of equality with other nations of the world, and the more powerful states still see some political advantage in avoiding the acceptance of genuine legal equality.”).

262. See *Permanent Indian Judge at ICJ After 21 Years*, INDIAN EXPRESS (Apr. 28, 2012), <http://archive.indianexpress.com/news/permanent-indian-judge-at-icj-after-21-years/942619/>.

263. Kate Sullivan, POLICY REPORT: IS INDIA A RESPONSIBLE NUCLEAR POWER? 9 (2014) (“India has maintained a powerful moral position in objection to the persistence of two tiers of states in the global nuclear order and it may be wise to try and revive the former social capital among developing countries that derives from this.”). See also Katherine M. Davis, *The Gujarat Shift: The Tipping Point in India’s Post-Cold War Discourse on Human Rights* 4 (May 29, 2012) (unpublished M.Sc. dissertation, University of Oxford), <http://ssrn.com/abstract=2577114> (after the Cold War, “Indian leaders learned that affirmation of international human rights norms was a litmus test for the liberal, democratic status it so desired and the moral authority it did not realize it had lost”).

264. See Will Woodward, “*An Idea Whose Time Has Come*”: Brown Backs UN Security Council Seat for India, THE GUARDIAN (Jan. 20, 2008), <http://www.theguardian.com/politics/2008/jan/21/india.wto>.

265. See *Sarkozy Calls for Permanent Security Council Seat For India*, HINDU (Dec. 5, 2010), <http://www.thehindu.com/news/national/sarkozy-calls-for-permanent-security-council-seat-for-india/article931213.ece>.

266. See Jason Burke, *Barack Obama Offers Backing to India’s Bid for UN*

when visiting in early 2015.<sup>267</sup> China and Russia both appear to have warmed to the idea.<sup>268</sup> Still, the current permanent members would not make the decision in a vacuum. An effort to give India a permanent seat would require an amendment to the U.N. Charter, requiring a vote of two-thirds of the General Assembly and ratification by two-thirds of all U.N. members, including every permanent Security Council member.<sup>269</sup> As India gains pivotal progress toward a permanent seat, its hesitance to rock the boat before another United Nations organ would be understandable.

#### VII. CONCLUSION: BETTER LUCK LEAVING THE ICJ FOR DOMESTIC COURTS (OR, WHAT THE MARSHALL ISLANDS GOT RIGHT)

Given the French and American experiences withdrawing from the Optional Clause, an imminent British or Indian withdrawal is wholly imaginable. While either state may remain in order to make a statement, there is no imaginable scenario in which the Marshall Islands could win either case on the merits. A finding of obligations *erga omnes* or customary international law would be unfounded and unprecedented; India has never been party to the NPT, and if nothing else, the *Monetary Gold* precedent should terminate these proceedings.<sup>270</sup> In any probable outcome, the ICJ will likely lose an additional shred of legitimacy.

As the world waits to learn how India and the United

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*Security Council Seat*, THE GUARDIAN (Nov. 8, 2010), <http://www.theguardian.com/world/2010/nov/08/obama-india-un-security-council>.

267. Press Release, The White House, Statements by President Obama and Prime Minister Modi of the Republic of India (Jan. 25, 2015), <http://www.whitehouse.gov/the-press-office/2015/01/25/statements-president-obama-and-prime-minister-modi-republic-india>; Press Release, The White House, Remarks by President Obama in Address to the People of India (Jan. 27, 2015), <http://www.whitehouse.gov/the-press-office/2015/01/27/remarks-president-obama-address-people-india>.

268. Ananth Krishnan, *India Gets Greater Backing from China and Russia Over UN Security Council Seat*, DAILY MAIL (Feb. 2, 2015), [www.dailymail.co.uk/indiahome/indianews/article-2937182/China-Russia-India-seat-security-council.html](http://www.dailymail.co.uk/indiahome/indianews/article-2937182/China-Russia-India-seat-security-council.html).

269. U.N. Charter art. 108.

270. Press Release 2014/18, *supra* note 30 (“In accordance with Article 38, paragraph 5, of the Rules of Court, the Applications of the Republic of the Marshall Islands have been transmitted to the six Governments concerned. Unless and until consent is given to the Court’s jurisdiction, there is no case to be entered in the General List.”).

Kingdom will respond to the Marshall Islands, the ICJ's legitimacy hangs in the balance. If the number of states submitting to the Optional Clause is truly any standard of the ICJ's legitimacy, and if either of these nations withdraws in the face of these proceedings, the ICJ will be one step closer to illegitimacy. The irony of this possible outcome, coupled with the futility of the Marshall Islands' arguments on the merits, begs the question of what end game the Marshall Islands envisioned at the start. Even if the cases never reach the merits, and the ICJ is forced to articulate one or two more instances in which it lacks jurisdiction to resolve interstate disputes, a sting of illegitimacy will be felt. The ICJ was designed to thrive in this arena.

The probable backfiring of these proceedings highlights the need for a practical analysis of where the ICJ is headed, whether its initial ideals are worth salvaging, and whether revitalization is even feasible. As the ICJ cases falter, the world should look back to the Marshall Islands' American case for a new way forward. Despite a seeming destiny for failure before the International Court of Justice, the Marshall Islands may reconvene an impactful and long forgotten method of counteracting major powers' exceptionalism in international law—seeking relief in the powers' own courts.<sup>271</sup>

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<sup>271</sup> See Katherine Maddox Davis, *Promise Despite Overreach in Marshall Islands v. United States*, 30 EMORY INT'L L. REV. (forthcoming 2016).