

ICJ HOLDS NO JURISDICTION TO HEAR MARSHALL ISLANDS CASES

Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament

(Marshall Islands v. Pakistan)

(Marshall Islands v. India)

(Marshall Islands v. United Kingdom)

Introduction

In a series of three decisions handed down on 5 October 2016 (Marshall Islands v Pakistan; Marshall Islands v United Kingdom; Marshall Islands v India), the International Court of Justice (by a majority) upheld the objections to jurisdiction raised by Pakistan, India and the United Kingdom, based on the absence of a dispute between the parties, and found that it could not proceed to the merits of the case.

Background

The proceedings arise out of nuclear testing conducted on the Marshall Islands between 1946 and 1958, during which the Marshall Islands, then a trust territory of the United States, sustained significant damage and radiological contamination from 67 US atmospheric nuclear weapons tests.

On April 24, 2014, the Republic of the Marshall Islands (“RMI”) filed applications in the International Court of Justice against the nine nuclear-armed states, claiming those states had violated their nuclear disarmament obligations under the Non-Proliferation Treaty (NPT) and customary international law (as Pakistan, amongst others, was not covered by the NPT). The respondent states were the United States, United Kingdom, France, Russia, China, India, Pakistan, Israel, and North Korea. The RMI also filed a companion case against the United States in U.S. federal court (the US motion to dismiss based on non-justiciability was granted).

This is the first time the ICJ has been asked to address issues relating to nuclear weapons since its 1996 advisory opinion, in which it unanimously concluded that there "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.

The ICJ only admitted three cases brought against Britain, India and Pakistan because they already recognised the ICJ’s authority. Each state filed a counter-memorial or preliminary objections denying that the ICJ had jurisdiction over the alleged dispute.

On 7-11, 14 and 16 March 2016, the International Court of Justice (ICJ) heard arguments on jurisdiction and admissibility in each of the three cases. While both India and the United Kingdom appeared before the ICJ, Pakistan declined to do so.

Decisions

In each decision (which is final and without appeal) the ICJ held that it had no jurisdiction due to a lack of a dispute between the parties, and found therefore that it could not proceed to consider the merits of the case. The basis for doing so in each case was slightly different, and is accordingly set out below.

Pakistan

In Marshall Islands v Pakistan, the ICJ:

(1) Upheld, by nine votes (President Abraham; Vice-President Yusuf; Judges Owada, Greenwood, Xue, Donoghue, Gaja, Bhandari, Gevorgian) to seven (Judges Tomka, Bennouna, Cañado Trindade, Sebutinde, Robinson, Crawford; Judge ad hoc Bedjaoui), the objection to jurisdiction raised by Pakistan, based on the absence of a dispute between the Parties;

(2) Found, by ten votes to six, that it could proceed to the merits of the case.

In its reasoning, the Court held that it was a precondition of jurisdiction that a dispute – where the two sides held clearly opposite views concerning the question of the performance or non-performance of certain international obligations – must exist.

Whether a dispute existed was to be determined at the date of the time of the application, and would be found when the evidence demonstrated that the respondent was aware, or could not have been unaware, that its views were positively opposed by the applicant.

The ICJ (by a majority) rejected the RMI's assertions that the existence of a dispute could, in the circumstances of the case, be established on the basis of one or more of:

- the RMI's statements in multilateral fora (namely statements made at the High-level Meeting of the General Assembly on Nuclear Disarmament, on 26 September 2013; and in the context of the Second Conference on the Humanitarian Impact of Nuclear Weapons on 13 February 2014);
- the filing of the Application itself;
- inferences from Pakistan's conduct.

India

In Marshall Islands v India, the ICJ:

(1) Upheld, by nine votes to seven, the objection to jurisdiction raised by India, based on the absence of a dispute between the Parties;

(2) Found, by ten votes to six, that it could proceed to the merits of the case.

The decision of the majority was based on the same reasoning as outlined in respect of Marshall Islands v Pakistan.

United Kingdom

In Marshall Islands v United Kingdom, the ICJ:

(1) Upheld, by eight votes to eight, by the President's casting vote, the first preliminary objection to jurisdiction raised by the United Kingdom, based on the absence of a dispute between the Parties;

(2) Found, by nine votes to seven, that it could proceed to the merits of the case.

In addition to the reasons for the existence of a dispute put forward in the other two cases, in Marshall Islands v United Kingdom, RMI also sought to argue that a dispute could be established based on the Parties' voting records in multilateral fora on nuclear disarmament. This was also dismissed by a majority of the ICJ.

In contrast to the position taken in the Marshall Islands' cases involving India and Pakistan, Vice President Yusuf would have dismissed the United Kingdom's preliminary objection to jurisdiction based on the absence of a dispute. In particular, Vice President Yusuf drew attention to the distinctive features of Marshall Islands v United Kingdom, which were in his view that (1) both the Republic of the Marshall Islands and the United Kingdom are parties to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT), and hence the current proceedings are concerned with the interpretation and application of this Treaty, and in particular Article VI thereof; and the arguments put forward by the United Kingdom regarding the inexistence of a dispute (particularly its argument that there was "*no justiciable dispute between the UK and Marshall Islands in relation to the UK's obligations, whether arising under the NPT or under customary international law, to pursue negotiations in good faith on effective measures of nuclear disarmament*").

The full judgments can be found on the ICJ website: <http://www.icj-cij.org/>

Our previous mailing on these proceedings can be found [here](#).

18th October 2016