

CASE ANALYSIS ON MARSHALL ISLANDS v. INDIA

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Overview:

On 24 April 2014, the Marshall Islands filed an application against India accusing the latter of not fulfilling its obligations relating to the cessation of the nuclear arms race at an early date and to nuclear disarmament. Government of Republic of Marshall Islands an application in the International Court of Justice (ICJ) instituting proceedings against India in which it claimed: Treaty on Non-Proliferation of Nuclear Weapons (NPT) applies to Article VI, whereby “the parties undertake to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control”. Though India was not a party to aforementioned treaty but it was argued from the other side that certain obligations laid down in the Treaty apply to all States as a matter of customary international law. India contended that it considers that the Court does not have jurisdiction in the alleged dispute. But the Court in an Order of 16th June 2014, found that it was necessary to resolve that question which should accordingly be separately determined before any proceedings on the merits. The Republic of Marshall islands accused India on the grounds that it carries nuclear arms which they believe is a “flagrant denial of human justice.” On the basis of India’s refusal to disarm, the island nation decided to take up the matter to the International Court of Justice (ICJ) in Hague, Netherlands. However, India countered that the claim is beyond the jurisdiction of the court.

Background:

Marshall Islands is a small South Pacific nation with a population of 70,000. The country had been occupied by the United States during the Second World War, following which the US had conducted a series of nuclear tests on its site. It was the site of dozens of atomic-bomb tests

by the United States after the World War II. Between 1946 and 1958, 67 nuclear tests had been carried out in the islands causing large scale destruction. The most destructive of these testings' was the hydrogen atomic bomb tested at Bikini Atoll on March 1, 1954, which was reported to be equal in its capacity to 1000 Hiroshima sized bombs. The testing which went by the code name Castle Bravo led to the complete vaporisation of two small islands.

Almost 23 nuclear devices were detonated by the US at Bikini atoll, which consists of 23 islands spread in 3.4 sq. km. area in the Marshall Islands, between 1946 and 1958. In the 1980s, the Marshall Islands signed an agreement with the United States that made it a self-governing country. Since 1986, the US has been paying compensation to the island country for the destruction caused.

India, also called the Republic of India, is a country in South Asia. It is the seventh-largest country by area, the second-most populous country (with over 1.2 billion people), and the most populous democracy in the world. It is bounded by the Indian Ocean on the south, the Arabian Sea on the southwest, and the Bay of Bengal on the southeast. India conducted its first nuclear weapons test in 1974 and carried out further underground testing in 1998. Despite criticism and military sanctions, India has signed neither the Comprehensive Nuclear-Test-Ban Treaty nor the Nuclear Non-Proliferation Treaty, considering both to be flawed and discriminatory. India maintains a *no first use* nuclear policy and is developing a nuclear triad capability as a part of its *minimum credible deterrence* doctrine. In 2008, a civilian nuclear agreement was signed between India and the United States. Although India possessed nuclear weapons at the time and was not party to the Nuclear Non-Proliferation Treaty, it received waivers from the International Atomic Energy Agency and the Nuclear Suppliers Group, ending earlier restrictions on India's nuclear technology and commerce. As a consequence, India became the sixth nuclear weapons state.

The Marshall Islands had filed a number of suits in the ICJ. Marshall Islands originally filed cases against all nine nations that are believed to possess nuclear weapons: The U.S., Russia, Britain, France, China, India, Pakistan, Israel, and North Korea. But only the cases against Britain, India, and Pakistan got to the preliminary stage of proceedings. The other nuclear

powers including declared powers China, France, Russia and the United States as well as undeclared nuclear states Israel and North Korea did not respond to the suit the islands filed. Through the suits, Marshall Islands had sought to urge countries like Britain, India and Pakistan to resume negotiations to eradicate the world's stockpile of nuclear weapons. The Marshall Islands had argued that nuclear powers weren't doing enough to adhere to the 1970 Treaty on the Non-Proliferation of Nuclear Weapons.

Decision Held:

The International Court of Justice (ICJ) held in favour of the Indian government by upholding the claims raised by India. The Court held that there is lack of jurisdiction in the case and the court does not have the power to adjudicate on this case under Article 36 of the statute. The Court further said that the main and predominant reason that ousts the jurisdiction of the court is the absence of dispute between the two parties or the failure on the part of Marshall Islands to establish a dispute.

After holding hearing from 7 to 16 March 2016, the Court delivered its Judgment on the objections raised by India to the jurisdiction of the Court and the admissibility of the Application on 5 October 2016, finding that India's objection to jurisdiction based on the absence of a dispute between the Parties must be upheld. It further concluded that, lacking jurisdiction under Article 36, paragraph 2, of its Statute, it cannot proceed to the merits of the case. Given this conclusion, the Court found no need to consider the other objections raised by India.

ICJ has a negative response towards nuclear disarmament. In a 1996 advisory opinion, the ICJ had said that using or threatening to use nuclear arms would generally be contrary to the laws of war and humanitarian law. But it added that it could not definitively rule on whether the threat or use of nuclear weapons would be legal in an extreme circumstance of self-defense where the very survival of a state would be at stake. The judges in 1996 also unanimously stated that there is a legal obligation to pursue nuclear disarmament talks in good faith. Marshall Islands failed to prove that a legal dispute over disarmament existed between it and the three

nuclear powers before the case was filed in 2014, and that “consequently the court lacks jurisdiction.” The world court accepted India’s argument that the ICJ had no jurisdiction in Marshall Islands suit.

The decision held by International Court of Justice (ICJ) is a huge disappointment for Marshall Islands as well as for activists who still fight for a nuclear-free world under nuclear disarmament campaign. The rejection marked a defeat of activists seeking nuclear disarmament in the world. The top United Nations court accepted India’s argument that the International Court of Justice does not have any jurisdiction in the suits filed by the Marshall Islands.

Case Analysis:

The claims in the ICJ cases are for:

1. Breach of the obligation to pursue in good faith negotiations leading to nuclear disarmament, by refusing to commence multilateral negotiations to that end and/or by implementing policies contrary to the objective of nuclear disarmament
2. Breach of the obligation to pursue negotiations in good faith on cessation of the nuclear arms race at an early date, by engaging in modernization of nuclear forces and in some cases (Pakistan, India) by quantitative build-up as well
3. Breach of the obligation to perform the above obligations in good faith, by planning for retention of nuclear forces for decades into the future; failure to perform obligations relating to nuclear disarmament and cessation of the nuclear arms race in good faith by effectively preventing the great majority of non-nuclear weapon states from fulfilling their part of those obligations.

However, some of the majors thinkers stated that the judgment given by the ICJ is completely flawed as court have entered into self-contradiction by dismissing the case wholly on the ground of jurisdiction. The case from the very beginning highlights that the two countries held completely opposite view-points right from the starting as India always worked towards improving its nuclear arsenal instead of taking steps towards the nuclear disarmament.

India's arguments objecting to the ICJ's jurisdiction, as presented by its lawyers in their written and oral proceedings, were four-fold.

- *First*, that there was no dispute between the parties
- *Second*, even if the court finds that there is a dispute, it could only be settled if at least all the states possessing nuclear weapons and certainly more than one were parties to the proceedings; this not being the case, the court has to decline to exercise jurisdiction.
- *Third*, several reservations to India's optional declaration under Article 36 (2) bar the court's jurisdiction
- *Fourth*, that any judgment rendered in these circumstances would be devoid of any concrete practical effect.

Marshall Islands had moved the ICJ on the need to speed up the process of global nuclear disarmament, India stressed that it too had been fighting for the same objective so the question of a dispute between the two countries did not arise. In ruling that it lacked jurisdiction, the ICJ relied on the absence of any material that could establish that there was a dispute between the two countries and that India was made aware of it by the Marshall Islands. The court refused to look into India's argument that the voting record on various disarmament resolutions at the UN would establish the insincerity of the Marshall Islands' claims.

Respondents converged on four major arguments in their preliminary objections to the case:

- the non-existence of a legal dispute
- the absence of indispensable parties in the proceedings
- reservations in their respective declarations accepting the Court's jurisdiction
- the lack of a practical consequence of a judgment on the merits.

Non Existence of Legal Dispute:

Challenging the Court's jurisdiction is a common litigation strategy mainly in cases founded on optional declarations and compromissory clauses. The crux of the case was the reasoning

adopted to dismiss the claim *non-existence of a dispute*. The ICJ has well-established criteria for determining the existence of a legal dispute. It is a well-trodden path start with the Mavrommatis definition of a dispute as being “a disagreement on a point of law or fact a conflict of legal views or of interests”, then add that a Party’s claim must be “positively opposed by the other” and finally stress that this is “a matter for objective determination”. The ICJ went a step further in the present case by introducing a subjective criterion, *the respondent’s awareness of the existence of a disagreement*. This is the major departure from previous case law which focused solely on objective criteria.

The majority argues that declarations cited by the Marshall Islands to support its claim are of general content and not directed to the specific respondents. Hence, it was concluded that none of the statements articulate an alleged breach by each of the respondents in correspondence to the obligation enshrined in Article VI of the Treaty on Non-Proliferation of Nuclear Weapons (NPT). In the majority’s view, the respondent states could not be aware that the Marshall Islands were making a claim on their potential breach of obligations towards nuclear disarmament. It is understandable that courts will be cautious about frivolous litigations. At the same time, they must balance this concern against the international community’s interest in providing access to justice and promoting the peaceful settlement of disputes. After this case, the Court has shifted from a “tradition of flexibility” to a “formalistic approach” adding another obstacle to accessing international adjudication.

One of the critiques made in the dissenting opinions is that the judgments failed to give persuasive reasons for departing from the ICJ’s jurisprudence on the characterization of a dispute.

ICJ stand on nuclear tests over the years:

The relationship between the ICJ and issues pertaining to nuclear weapons appears to be marked by firsts. In the Nuclear Test cases (1974), the Court for the first time gave binding effect to unilateral declarations made outside of a specific context (negotiation or litigation). As a consequence, the International Court of Justice refrained from deciding whether France’s

nuclear tests in the South Pacific Ocean were consistent with international law following French public declarations stating its intention to abstain from future tests. Some twenty years later, the World Court refrained from providing a definite answer on a crucial aspect of a legal question submitted to it by the UN General Assembly. In the Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons (1996), the ICJ affirmed that it could not “conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self- defense”. This controversial statement is the only declaration on non-liquet to date (i.e., the ICJ implied that there is no applicable law on the question).

Now, after another two decades, the ICJ again had the opportunity to decide on issues pertaining to nuclear weapons. And, again, the ICJ evaded the question. This majority’s novelty in assessing the existence of a dispute did not pass unnoticed by other judges. As highlighted by Judge Tomka in his Separate Opinion, “for the first time in almost a century of adjudication of inter-State disputes in the Peace Palace, the World Court (the Permanent Court of International Justice and the International Court of Justice) has dismissed a case on the ground that no dispute existed between the Applicant and the Respondent prior to the filing of the Application instituting proceedings”.

Just as the Nuclear Tests case is associated with the doctrine on unilateral declarations, so does the present dispute run the risk of being known solely for new requirements in determining the existence of a dispute.

Nuclear Disarmament:

A more accurate reading might be to see the Marshall Islands cases in which the ICJ was asked to address the question of nuclear disarmament but found new technical arguments to avoid dealing with its substance. Nico Krisch points out that six out of the eight judges who dismissed the case against the UK were nationals of nuclear weapons States, while the other two were nationals of countries that benefited from the cooperation of a nuclear weapon State. So, the dismissal of the cases can be viewed as resulted not from the willingness of the majority to reinterpret what a legal dispute is but rather from their views on nuclear disarmament.

The Advisory Opinion by International Court of Justice in 1996 did not show a clear division between possessor and non-possessor states according to the distribution of votes on the most controversial holding. In the view of the ICJ President at the time, this was “a mark of the independence of the Members of the Court” (Separate Opinion, Judge Bedjaoui). A reading of the individual opinions might give a different impression. Nationals of nuclear weapon states disagreed on the best approach for the Court to deal with the issue, not on the legality of the use of nuclear weapons.

It might be said that the split in the Court merely reflected divergent views of States on nuclear disarmament. However, if the ICJ’s composition proportionally reflected State positions on this matter, the vote would likely have tended against the legality of nuclear weapons and in favor of effective disarmament.

Given consistent failed attempts to seize the ICJ on this relevant and urgent matter, one might question whether international litigation is a viable strategy for nuclear disarmament. The Marshall Islands judgment provides insight about the majority’s views on this topic.¹⁵

What’s next for Nuclear States?

1. Those 9 countries will have to prove in court they’re committed towards nuclear disarmament, otherwise ICJ might pronounce a legally binding verdict on disarmament.
2. But, Israel already stated we are not party to NPT, this case has no “legs”. India/ Pak may take the same line.
3. India has accepted ICJ’s compulsory jurisdiction. But only with respect to multilateral treaties. But since we are not party to NPT, ICJ cannot exercise jurisdiction over us.
4. North Korea may not even bother sending lawyer to defend themselves at ICJ.
5. China may even say NPT has been extended to infinite time; there is no ‘deadline’ to begin disarmament.
6. USA and Russia are sincerely taking steps for nuclear disarmament
 - Strategic Arms Limitation Talks (SALT) of 1970s
 - Strategic Arms Reduction Treaty (START) from 2010

Conclusion

It can be concluded that this is yet another example of a poorly laid down judgment where the court took a very hypocritical stance. Court by disagreeing with its own judgments and deviating from the set precedence has completely lost its credibility. Moreover, by running away from its sole responsibility of granting justice by adjudicating cases it has also shown that the international court is the not the right forum to seek justice. It can also be seen that International Court of justice, having the opportunity to decide on issues pertaining to nuclear weapons, had evaded the question.

Although the foregoing judgments expose serious limitations to addressing nuclear disarmament at the ICJ, resort to international tribunals could remain a viable option in the long run. A slightly different composition of the Court could have led to different results, as the votes were evenly split both in the 1996 Advisory Opinion and in the case between the Marshall Islands and the UK. Nevertheless, international litigation should not be regarded as the main avenue to secure progress for nuclear disarmament. Instead, it should be seen as complimentary to multilateral negotiations. Since the ICJ decision, UN Member States adopted a landmark resolution to convene a multilateral conference in 2017 to negotiate a treaty that would prohibit nuclear weapons. This significant step in multilateral negotiations may have a much more far-reaching impact on disarmament than bilateral litigation.