

MARSHALL ISLANDS V. PAKISTAN

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ABSTRACT

The purpose of this Opinion Paper is to point out the legal and logical inaccuracies and disagreements with the holding of the International Court of Justice in the case of Marshall Islands v. Pakistan¹. Wherein the claims of Pakistan, as to the lack of jurisdiction and inadmissibility of the matter before the ICJ were upheld.

It is pertinent to mention here that both the Marshall Islands and Pakistan had accepted the jurisdiction of the Statute of the International Court of Justice by way of their Declarations² in 2013 and 1960 respectively³, therefore upon existence of the dispute the ICJ would have complete jurisdiction over the adjudication of the dispute.

The impugned judgment will be criticised on the following grounds:

- I) THE CLAIM OF MARSHALL ISLANDS ON GOUNDS OF VIOLATION OF INTERNATIONAL CUSTOMARY LAW BY PAKISTAN WAS WELL FOUNDED

The application of Marshall Islands⁴ stated that Pakistan did not respect it's obligations to "pursue in good faith negotiations and efforts regarding nuclear disarmament"⁵. Such a claim was not given due diligence to by the judgement. The United Nations General Assembly has been actively seized in the matter of nuclear disarmament, from establishing the United Nations Disarmament Committee⁶ to holding the Special Sessions on Nuclear

¹ Marshall Islands v. Pakistan (5 October,2016)

² Article 36 (3), Statute of ICJ.

³ Para 1, Supra 1.

⁴ Para 11 (a), (b),(c), Marshall Islands v. Pakistan (5 October,2016)

⁵ Para 25, *Ibid.*

⁶ Resolution 502 (VI) of 11 January 1952.

Disarmaments in 1978 and further General Assembly Resolution 37/99⁷; Report of the Committee on Disarmament to the United Nations General Assembly⁸ all of the above have been recognised in Para 14 of the Judgment⁹. The UNGA further recognised the “unanimous conclusion of the Court 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”¹⁰. It is also hereby established that Pakistan is a member of the United Nations since 1947.¹¹

UNGA resolutions in their nature do hold the power to form Customary International Law wherein they can provide a milestone of (i) state practise or (ii) indicate opinion juris of the state.¹² Therefore, the above commitments made by the UNGA, do hold the power to be treated as customary international law, and Pakistan being a member of the UNGA does believe and consent to numerous such commitments (which will be laid down in this paper) and thus, any derogation from such commitments would constitute as a breach of any of the above Resolutions by the UNGA and consequently, the Customary International Law they lay down.

II) MARSHALL ISLANDS PROVED THE EXISTENCE OF A DISPUTE

There is reliance on the statements made by Marshall Islands in multilateral fora to prove the existence of the dispute. The first instance was in 2013, wherein it was urged to the international community at large to recognise the responsibility to disarm¹³ and the second one claimed that a “failure to seriously engage in multilateral negotiations amounted to a breach of international obligations under customary international law”¹⁴. Moreover, as far as the generality of the statement is concerned, the statement was clearly made in reference to all nations including the nation of Pakistan, who was in attendance. It is further established that a statement made by the highest representatives in a public fora, which in this case were made by the applicant,

⁷ K, Part II, of 13 December 1982

⁸ 1 September 1983, doc. CD/421, para. 21

⁹ *Supra* 1.

¹⁰ Resolution 51/45 M, 10/12/1996.

¹¹ UNGA Resolution 108 (ii), 30/09/1947

¹² Sinclair (1994), pp.10-11

¹³ Para 26, Marshall Islands v. Pakistan (5 October, 2016)

¹⁴ *Ibid.*

cannot be misinterpreted by any nation with regards to the position of such state on a particular issue.¹⁵

Moreover, as pointed out in the dissenting judgement by Vice-President Yusuf, there need not be a full fledged dispute between the states and it need only be “in principle” and such a provision exists so that excess formalism is removed from bringing a dispute to the ICJ.¹⁶ Further, the ICJ should consider the existence of a dispute on the basis of substance not procedures.¹⁷ Therefore, an active disagreement to international obligations by Pakistan which is subject matter for a dispute by Marshall Islands does have the jurisdiction to be entertained by the ICJ.

Therefore, the criterion of the existence of a dispute from the statements of Marshall Islands in 2013 and 2014 as well as a fundamental violation of the same is thereby proved.

III) THE EXISTENCE OF A DISPUTE WAS PROVED BY PAKISTAN

Even though the Third World Critique to International Law to the NPT exists and has been used by the ICJ in stating that Pakistan did not ratify it with justified reasons as the NPT created an unfair divide between the have and have-nots in the nuclear weapon race, there are other examples which recognise Pakistan’s commitment to the same.

It is stated in Pakistan’s reply to the application, (which proves the dispute as 2 opposing claims wherein what Pakistan claimed was in direct contravention to Marshall Islands’ claims¹⁸) that Pakistan has acceded and accepted the follow up to Advisory Opinion of the International Court of Justice in the Legality of the Threat or Use of Nuclear Weapons¹⁹. The Advisory Opinion of the ICJ recognises the “good faith” principle of following international obligations related to Nuclear Disarmament. An action to the contrary, would prove the justification to the claim of Marshall Islands as the commitment taken on by Pakistan as stated above was not respected.

¹⁵ Para 73, Nicaragua v. Colombia

¹⁶ Para 34, Dissenting Opinion of V.P. Yusuf.

¹⁷ Germany v. Poland found at: Para 35 of MI v. Pakistan.

¹⁸ Ethiopia v. South Africa found at : Para 18, Dissenting Opinion of V.P. Yusuf.

¹⁹ Para 31, *Supra* 13.

It is further provided in the reply of Pakistan that there needs to be some prior correspondence for a dispute to exist.²⁰ There was indeed prior correspondence, although not directly, in 2013 as well as 2014 by the Applicant in the same matter.

Since, Pakistan is actively seized in commitments of the same nature which are disputed, and cannot claim unawareness of the correspondence as proved earlier²¹, in addition to the denial of the claims and active opposition to the Marshall Islands application, it can be established that by inference, that the view of Pakistan can prove the existence of the dispute.²² Moreover, the defence of not having any diplomatic relations with Marshall Islands cannot be claimed as for the existence of a dispute the same is not required to prove the existence of a dispute.²³

CONCLUSION

The requirement of a dispute as stated by the ICJ is there is positive opposition by both parties²⁴. The conduct of Pakistan and their claim of Marshall Islands itself varying their stance on Nuclear Disarmament²⁵ fulfils such criteria. Moreover, the criteria of the dispute being actively brought with reasons to the ICJ by application under Article 36 (2) (c) of the Statute of ICJ as well as their conduct on public fora, fulfils all elements²⁶ of the existence of a dispute, which was disregarded by the ICJ.

Moreover, considering the plight of the Third World nations such as India and Pakistan, who are recognisably on the suffering end of treaties such as the NPT and therefore have not signed it and are not currently in the process of disarmament, the ICJ should have given more cognizance to the interest of international peace, as the threat of either countries having nuclear arsenals amidst their constant tensions, is an issue of international importance. Therefore, the case should not have been dismissed just on the basis of jurisdiction.

²⁰ Para 32, *Ibid.*

²¹ *Supra* 15.

²² Cameroon v. Nigeria, found at : Para 37 of the MI v. Pakistan.

²³ Nicaragua v. Colombia found at : Para 35 of MI v. Pakistan

²⁴ Para 34, Marshall Islands v. Pakistan (5 October, 2016)

²⁵ Para 31, *Ibid.*

²⁶ Paper on Marshall Islands v Pakistan & ors. found at:

<https://www.mcnairchambers.com/client/publications/2016/ICJ%20HOLDS%20NO%20JURISDICTION%20TO%20HEAR%20MARSHALL%20ISLANDS%20CASES.pdf>