

THE CURRENT MARSHALL ISLANDS ICJ CASES

Roger Clark filling in for Tony de Brum, 8 July 2016

I am obviously not Tony de Brum, but I have known him for four decades. We met in New York at the UN Trusteeship Council in 1976 or 1977. He was a young agitator from the Marshalls presenting a petition. I was a slightly older agitator presenting a petition on behalf of the International League for Human Rights. We each made essentially the same pitch, that the United States should clean up its mess from the 67 tests it conducted in the Marshalls and that it should facilitate the exercise of self-determination of the peoples of the Trust Territory of the Pacific Islands. Marshall Islands has been a member of the UN since 1991, but much of the mess remains. I am sure that if Tony were here today he would say something like what he said last March at The Hague in introducing the case against India. He referred to the Marshall Islands' "unique and devastating history with nuclear weapons". He added, referring to the 1954 hydrogen test that I mentioned this morning:

One "test" in particular, called the "Bravo" test was one thousand times stronger than the bombs dropped on Hiroshima and Nagasaki. From approximately 200 miles away, I witnessed this shocking explosion as a nine-year-old while fishing with my grandfather on the beach of Likiep Atoll: the entire sky turned blood red. The distance from which I witnessed this explosion was, in rough terms, approximately equal to the distance between The Hague and Paris – so a significant distance. [O]ur people continue to bear the horrific brunt of these exposures....¹

He continued:

¹ Public Sitting of the ICJ, Monday 7 March 2016 at 10 a.m., Doc. CR 2016/1, para. 5.

[T]o be clear, while these experiences give us a unique perspective that we never requested, they are *not* the basis of this dispute. But they do explain why a country of our size and limited resources would risk bringing a case such as this regarding an enormous nuclear-armed State such as India, and its breach of customary law with respect to negotiations for nuclear disarmament and an end to the nuclear arms race.²

Let me put the case in perspective.

You will appreciate from listening to Dr. George Salmond this morning that there are two kinds of proceedings that can come before the International Court of Justice, Advisory Proceedings and Contentious Proceedings.

Advisory Opinions may be sought by the General Assembly or the Security Council of the UN “on any legal question”.³ The General Assembly may authorize other organs of the UN and specialized agencies, such as WHO, to “request advisory opinions on legal questions arising within the scope of their activities.”⁴ The 1995-6 proceedings were of an advisory nature, generated by questions of law promulgated by the WHO and the General Assembly. Dr. Salmond has talked about some of the big issues in mounting an effort for an advisory opinion, notably lining up the votes. As a lawyer, I would add, it is fundamental in such proceedings to get a good question, one that the advocates can argue for unequivocally. The ultimate resolution of the WHO request, a finding that asking the question was *ultra vires* the organization,

² Ibid. para. 6

³ UN Charter Art 96 (1).

⁴ UN Charter Art 96 (2). It was the phrase “arising within the scope of their activities” that stymied the WHO in the 1996 decision.

demonstrates one hazard of such proceedings, that the judges may find a way to duck the question on “technical” grounds.⁵

Contentious proceedings, like the current Marshalls cases, may be commenced only by states, not organizations. They are normally brought by a single state, but occasionally by states acting in parallel, as in the cases on South West Africa brought by Ethiopia and Liberia or the Nuclear Tests Cases brought by New Zealand Australia. There are (arcane) procedures for other states to come in later. Contentious cases present their own difficulties. The Applicant states must find a jurisdictional basis to get their way into the Court, whose jurisdiction in such proceedings is said to be “consensual”. I have always been a bit bemused at the notion that a defendant charged with murder or theft can cheerfully say to a court, “sorry, but I don’t agree to be here”. Even Judge Harold Evans would have laughed that one out of his Court! But States can do that to the ICJ. Australia and New Zealand tried to make adjudication compulsory in the negotiations on the UN Charter in 1945, but failed.

Sometimes jurisdiction can be found in bilateral treaties (such as treaties of friendship) or in multilateral ones like the Genocide Convention. Or parties can agree once a particular dispute has arisen, to take it jointly to the Court by means of a “special agreement”. But commonly there is need to look to Article 36 (2) of the Statute of the Court, the so-called “compulsory” clause under which states “may at any time declare that they recognize as compulsory *ipso facto* in relation to any other state accepting the same obligations, the jurisdiction of the Court in all legal disputes concerning”, in particular, interpretation of a treaty or any question of international law. Seventy-two of the 193 Members of the UN have made such declarations but they have developed the genre into a complex strategic art form. Virtually everybody’s declaration has

⁵ The general Assembly’s power to ask “any” legal question prevented it from being vulnerable to the WHO objection, but various arguments were made (and addressed seriously) that the Court should decline to answer.

some exclusions designed to make it possible for states to hale their adversaries into the Court when they want to and make it hard for their adversaries to get *them* there.

Without one or other of these procedures in place, the best a state can do is file and invite the other side to proceed voluntarily; this is known as *forum prorogatum* proceedings.

In 2014 Marshalls filed what are called Applications against each of the nine states possessing nuclear weapons.⁶ There were declarations in place for the United Kingdom, India and Pakistan, each with differing exceptions. There was a deafening silence from the Foreign Offices of France, Russia, Israel, the Democratic Republic of Korea and the United States. Of the no-declaration group only China responded to the ICJ Registrar's announcement of the Application, explaining, diplomatically, that it had the honour to inform him that it did not wish to participate.

An advisory opinion seeks a statement of the law which is presumably useful to the organ which has requested it and should also have some shaming effect on those States to whom it speaks directly – such, in the present context, as nuclear powers. The requestor will normally act on it in some way. The General Assembly acted on the 1996 Opinion by adopting resolutions with varying degrees of support, the strongest support coming from the Assembly for the Court's somewhat unexpected pronouncement on Article VI of the NPT and what we understand to be customary international law to the same effect, binding on parties and non-parties to the NPT alike. In its *dispositif* or operative clause, the Court asserted unanimously that:

⁶ Only the three cases in which there is an arguable jurisdictional theory are to be found on the website of the Court. See the Court's website for 2014 proceedings entitled Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament, available at: <http://www.icj-cij.org/docket/index.php?p1=3&p2=3>. The Application against all nine states possessing nuclear weapons may be found on the website of the Nuclear Age Peace Foundation which has been assisting with the cases: <https://www.wagingpeace.org/nuclearzero/>.

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.⁷

This is a paraphrase plus a gloss on Article VI of the NPT under which

Each of the Parties to the Treaty undertakes 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.⁸

The Opinion makes it clear that the “obligation goes beyond that of a mere obligation of conduct; the obligation involved here is *an obligation to achieve a precise result* – nuclear disarmament in all its aspects – by adopting a particular course of conduct, namely, the pursuit of negotiations on the matter in good faith.”⁹ Marshall Islands reads the Court’s discussion of the NPT and of a series of General Assembly resolutions, beginning with its very first in January 1946,¹⁰ as crystallizing the existence of a rule of customary law, essentially the same as that in the NPT, which is binding on all states including the handful of non-parties to the Treaty. This is fundamental to the cases against India and Pakistan.¹¹ This discussion in the Advisory Opinion is the nub of the Marshall Islands cases.

⁷ Advisory Opinion, para. 105 (2) F.

⁸ NPT Art VI.

⁹ Advisory Opinion, para. 99. Emphasis added. The language of the Court treats the phrase “under strict and effective international control” as separately applying both to “nuclear disarmament” and to “general and complete disarmament”. Nuclear disarmament and the regime for its enforcement is an end in itself which does not have to await achievement of the aspired-for general and complete disarmament.

¹⁰ G.A. Res. 1 (I), adopted on 24 January 1946, ambitiously entitled Establishment of a Commission to Deal with the Problem Raised by the Discovery of Atomic Energy.

¹¹ And potential ones against the DPRK (although there is debate about whether it validly withdrew from the NPT) and Israel.

As some of you are aware, there were discussions over several years about going back to the Court for a further Advisory Opinion on the duty to negotiate.¹² Marshall Islands, however, took a different tack and decided to try contentious proceedings. In principle this means that a decision can be reached that is binding on the opposing party. I am not sure that the difference in legal effect between the two types of proceedings is really all that stark. The law as stated by the Court in an advisory proceeding is generally regarded as a definitive statement of doctrine and is used in subsequent proceedings as such. There are no blue helmets out there shutting down defence departments. The power is the power of the law as an instrument of persuasion. In a contentious proceeding, there are really only two types of remedy (aside from damages which are not sought here): a declaration (or set of declarations) that the opponent is acting unlawfully, and some kind of order to try to make it behave differently. Thus, each of the Marshalls Applications, while a little different in each instance, asks the Court to adjudge and declare that the nuclear power in question is in breach of its obligations in failing to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament. Nuclear arms-racing is condemned. Declarations are also sought in relation to engaging in the quantitative buildup and qualitative improvement of nuclear forces, contrary to the objective of nuclear disarmament. An Order is requested that the state in question “take all steps necessary to comply with its obligations ... within one year of the Judgment, including the pursuit, by initiation if necessary, of negotiations in good faith aimed at the conclusion of a convention on nuclear disarmament in all its aspects under strict and effective international control.”¹³ The Respondents, with assorted variations, have argued that the Court should not issue remedies such as these that would be

¹² See International Association of Lawyers against Nuclear Arms & International Human Rights Clinic at Harvard Law School, *Good Faith Negotiations Leading to the Total Elimination of Nuclear Weapons: Request for an Advisory Opinion from the International Court of Justice. Legal Memorandum* (2009).

¹³ Application Instituting Proceedings against the Republic of India, 24 April 2014, Remedies section (slightly different wording in other Applications).

futile in the absence of other nuclear powers. I call this the “Who me?” argument. We, of course, argue that the remedies are eminently practical and just what is needed to push the inevitable negotiations along.

The proceedings in March were about jurisdiction and admissibility, about whether we can get to the merits of the obligation to negotiate. The declarations accepting the jurisdiction being different, different considerations applied in each case. For example, India and Pakistan both argued that their nuclear activity was within their domestic jurisdiction and not amenable to international adjudication. We argued that this was palpably absurd. All three Respondents contended, moreover, that the issues were not amenable to the judicial process. Marshalls saw them as perfectly justiciable. All three argued that Marshalls ran foul of a common exception of disputes with regard to which the other party has accepted jurisdiction exclusively to or in relation to the purposes of such dispute. Marshalls responded that its declaration deposited on 24 April 2013 was done with other matters in mind, explicitly climate change litigation then contemplated. India and Pakistan, not surprisingly, relied on a reservation in their declaration excepting disputes arising under multilateral treaties unless all parties to the treaty are also parties to the case before the Court. The UK did not have such an exception. There are some ironies here. These cases against India and Pakistan perhaps would have been dead in the water if we had been relying solely on the treaty. We argued that our case against them, being based on customary law, does not arise under the treaty; they argue that the NPT is a fundamental premise of our customary argument. Finally, all three contend that we have no “dispute” with them in terms of Article 36 of the Statute. They are totally committed to fulfilling any obligations they may have and it is others who are stymieing them. Moreover, the UK, in particular, contends, we did not get in touch with them in advance to explain our problem. The

Court’s case-law on these issues is extremely complicated, but we believe we made credible arguments to pass our way through it.

In a few months we shall find if we negotiated the first hurdle.

Postscript

It was on the “dispute” procedural ground that the cases ultimately foundered.¹⁴ Having held against the Marshall Islands on this point, the Court chose not to address the other issues raised by the Respondents.¹⁵

According to an early decision of the Court’s predecessor, the Permanent Court of International Justice,¹⁶ a dispute is a “disagreement on a point of law or fact, a conflict of legal views or interests”. The earlier decisions abounded in confusion about the extent to which the dispute must be crystallized and formulated at the time the suit is filed, and whether the subsequent actions of the parties could make up for any deficit upon filing. There was no real doubt that, once issue was joined in the present cases, there was a dispute, at the latest at the point of oral argument. But the majority judges took the position that the dispute requirement had to be fulfilled at the point of filing.¹⁷ A majority of the Court drew from the previous cases, for the first time, the proposition that “a dispute exists when it is demonstrated, on the basis of the evidence, that the respondent was aware, or could not have been unaware, that its views were ‘positively opposed’ by the applicant”.¹⁸

¹⁴*Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)* (Preliminary Objections) [2016] ICJ Rep 833; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India)* (Jurisdiction of the Court and Admissibility of the Application) [2016] ICJ Rep 255; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. Pakistan)* (Jurisdiction of the Court and Admissibility of the Application) [2016] ICJ Rep 552.

¹⁵ Judges Xue, Bhandari and Gaja (above note 14, Declaration of Judge Xue, Separate Opinion of Judge Bhandari, Declaration of Judge Gaja) suggested that judicial economy would be better served if some of the other issues were addressed, since, now it was clear that a dispute existed, Marshall Islands might re-file. Marshall Islands did not, in the event, try again.

¹⁶ *Mavrommatis Palestine Concessions* (Judgment No 2) [1924] PCIJ Rep Series A No 2, 11.

¹⁷ President Abraham had taken a different position in prior cases, but now felt he was “not legally, of course, but morally” bound to follow earlier precedent. *Marshall Islands v UK*, above note 14, Declaration of President Abraham, 860, para 9.

¹⁸ *Marshall Islands v UK*, above note 14, 850, para 41.

As the Court noted,¹⁹ Marshall Islands sought to demonstrate its dispute “in essentially four ways”:

First it refers to its own statements, as formulated in multilateral fora. Secondly, it argues that the very filing of the Application, as well as the positions expressed by the Parties in the current proceedings, show the existence of a dispute between the Parties. Thirdly, it relies on the United Kingdom’s voting records on nuclear disarmament in multilateral fora. Fourthly, it relies on the United Kingdom’s conduct before and after the filing of the Application.²⁰

The United Kingdom had contended that “there is a principle of customary international law that a State intending to invoke the responsibility of another State must give notice of its claim to that State, such notice being a condition of the existence of a dispute”.²¹ The Court accepted that no

¹⁹ Ibid, 852, para 46.

²⁰ Ibid.

²¹ Ibid, 846, para 27. A notice-giving State runs the risk its opponent will rush to change its art 36 (2) declaration to avoid the anticipated claim. The UK, like many others, reserves the right in its declaration to amend it at any time, effective immediately. The United Kingdom did not get prior wind of the Marshall Islands case, but subsequently changed its declaration of acceptance twice. On 31 December 2014, it added an exception reading: ‘any dispute which is substantially the same as a dispute previously submitted to the Court by the same or another Party’. This had two apparent objectives, (a) precluding the Marshall Islands from re-filing essentially the same claim if the ‘no dispute’ argument succeeded (as it did), (b) precluding other States from filing similar cases to support the Marshalls. After the decision, it added these three paragraphs:

- iv) any claim or dispute which is substantially the same as a claim or dispute previously submitted to the Court by the same or another Party;
- v) any claim or dispute in respect of which the claim or dispute in question has not been notified to the United Kingdom by the State or States concerned in writing, including of an Intention to submit the claim or dispute to the Court failing an amicable settlement, at least six months in advance of the submission of the claim or dispute to the Court;
- vi) any claim or dispute that arises from or is connected with or related to nuclear disarmament and/or nuclear weapons, unless all of the other nuclear-weapon States Party to the Treaty on the Non-Proliferation of Nuclear Weapons have also consented to the jurisdiction of the Court and are party to the proceedings in question.

In a written statement on 23 February 2017, HCWS489, The Minister of State for Foreign and Commonwealth Affairs asserted:

*The ICJ case on nuclear disarmament filed by the **Marshall Islands** against the United Kingdom in 2014 concluded with a judgment of 5 October 2016 that upheld the United Kingdom’s preliminary objections to jurisdiction. **We have now decided to build into our Declaration two key elements that underpinned the principal arguments that the Government made in those preliminary objections.***

The revised Declaration incorporates the UK position that was advanced in the proceedings that prior notification of the kind described is an appropriate step before an application instituting proceedings, seising the Court, can be submitted.

such notice was necessary and that a dispute could be inferred from actions in multilateral forums. Nevertheless a bare majority held that the evidence, notably statements made by Marshall Islands at the High-Level Meeting of the General Assembly on Nuclear Disarmament, on 26 September 2013, “urg[ing] all nuclear weapons states to intensify efforts to address their responsibilities in moving towards an effective and secure environment”, and at the Nyarit (Mexico) conference on humanitarian impact of nuclear weapons on 13 February 2014 that “States possessing nuclear arsenals are failing to fulfil their legal obligations” under Article VI of the NPT and customary international law, were not sufficiently precise to specify the breach involved.²²

*In addition, the revised Declaration also includes a reservation **excluding from the Court’s jurisdiction any cases related to nuclear weapons and/or nuclear disarmament unless the other four Nuclear Non-Proliferation Treaty (NPT) nuclear-weapons States also accept the Court’s jurisdiction with respect to the case.** The Government does not believe the United Kingdom’s actions in respect of such weapons and nuclear disarmament can meaningfully be judged in isolation. This amendment to our Declaration provides that the ICJ will only have jurisdiction over nuclear weapons or nuclear disarmament disputes when the proceedings involve all five of the NPT nuclear-weapons States.*

*We have also made changes to advance the cut-off date for historical cases to 1987, keeping it at thirty years, and to make clear that **a repeated claim, as well as a dispute, is also excluded.***

Apparently the UK concluded that its 2014 reference to a “dispute” did not quite do the trick since, if there was no “dispute” the first time, the second one could not be the “same dispute”. In his dissenting opinion, para 70, Judge Robinson commented that “one would be forgiven for concluding that, with this Judgment, it is as though the Court has written the Foreword in a book on its irrelevance to the role envisaged for it in the peaceful settlement of disputes that implicate highly sensitive matters such as nuclear material”. Even so, the UK apparently intends to take no chances.

²² The Court split 8-8 on the dispute issue in the UK case, with the President’s casting vote in favour of the UK, and 9-7 in the other two cases. In the majority in the UK case were President Abraham (France) and Judges Owada (Japan), Greenwood (UK), Xue (China), Donoghue (USA), Gaja (Italy), Bhandari (India) and Gevorgian (Russia). The dissenters were Judges Yusuf (Somalia), Tomka (Slovakia), Bennouna (Morocco), Cançado Trindade (Brazil), Sebutinde (Uganda), Robinson (Jamaica), Crawford (Australia) and Judge ad hoc Bedjaoui (Algeria). The UK chose not to participate in Nyarit but that absence does not appear determinative – India and Pakistan were there, but the Court found the Marshalls statement insufficiently precise for them also. In the UK case, Judge Yusuf disagreed with the requirement of “awareness” created in the main judgment and believed that “an incipient dispute existed” between the Marshall Islands and the UK “prior to the submission of the application by the former and that this dispute crystallized during the proceedings before the Court.” Dissenting Opinion of Vice-President Yusuf, above note 9, para 5. Judge Yusuf placed reliance on the Nyarit statement and a number of statements made by the UK “with regard to the calls by the United Nations General Assembly for the immediate commencement of nuclear disarmament negotiations”. Ibid, para 60. On the other hand, he did not find that a dispute existed in the India and Pakistan cases, given their public positions supporting negotiations for nuclear disarmament. *Marshall Islands v India*, above note 14, Dissenting Opinion of Vice-President Yusuf, paras 25-32; *Marshall Islands v Pakistan*, above note 14, Dissenting Opinion of Vice-President Yusuf, paras 23-30. Judge Tomka dissented on the dispute issues but still held that the cases could not proceed in the absence of other nuclear powers. He said (*Marshall Islands v UK*, above note 14, Separate Opinion of Judge Tomka, 898, para 38):

This is not a question of ruling on the responsibility of those other States as a precondition for ruling on the responsibility of the Respondent such that the Monetary Gold principle would apply. It is rather a question

Not surprisingly, the dissenting judges saw the majority's decision as an exercise in formalism. As Judge Bennouna, who had been President of the Court at the time of the Advisory Proceedings, put it:

International judges had a duty to be even more vigilant in the present case, which concerns a question of crucial importance for the security of the world. That is another reason for the principal judicial organ of the United Nations to undertake its role fully. Indeed, how can it shelter behind purely formalistic considerations which both legal professionals and ordinary citizens would find difficult to understand, rather than contributing, as it should do, to peace through international law, which is the *raison d'être* of the Court.²³

of whether it is possible for the Court, in this context, to undertake consideration of a single State's conduct without considering and understanding the positions taken by the other States with which that State (the Respondent in the case at hand) would need to have negotiated, and with which it would need to agree on the steps and measures to be taken by all concerned in order to achieve the overall goal of nuclear disarmament.

²³ *Marshall Islands v UK*, above note 14, Dissenting Opinion of Judge Bennouna, 901.