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Obligations concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v United Kingdom), Preliminary Objections

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I. PROCEDURAL BACKGROUND

On 24 April 2014, the Marshall Islands instituted proceedings against the UK, and filed separate applications against China, the Democratic People's Republic of Korea, France, India, Israel, Pakistan, the Russian Federation, and the US. The claims in these applications are similar; they concern the failure to fulfil the obligations concerning negotiations relating to the cessation of the nuclear arms race at the early date and to nuclear disarmament either under the Treaty on the Non-Proliferation of Nuclear Weapons (hereinafter, 'NPT') or customary international law or both. While the applications against UK, India, and Pakistan were entered in the Court's General List, the rest were not. This was because only the three states had accepted the compulsory jurisdiction of the Court under Article 36, paragraph 2, of the Statute.

With regard to the claim against the UK, the Marshall Islands argued specifically, that the UK violated, in particular, Article VI of the NPT and the corresponding obligation under customary international law.[1] Article VI provides that:

> *'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.'*

On 15 June 2015, the UK raised preliminary objections. As a result, the proceedings on the merits were suspended.[2]

II. ISSUES

The UK raised five preliminary objections which have been summarised in the words of the Court as follows:

> *'According to the first preliminary objection, the Marshall Islands has failed to show that there was, at the time of the filing of the Application, a justiciable dispute between*

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Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v United Kingdom), Preliminary Objections, Judgment, ICJ Reports 2016, para 12 (Hereinafter, 'Marshall Islands v UK').

[2] *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v United Kingdom), Order of 19 June 2015, ICJ Reports 2015,* p 578.

> *the Parties with respect to an alleged failure to pursue negotiations in good faith towards the cessation of the nuclear arms race at an early date and nuclear disarmament. In its second and third preliminary objections, the United Kingdom argues that the Court's jurisdiction is precluded by reservations in the Parties' declarations under Article 36, paragraph 2, of the Statute. The fourth preliminary objection is based on the absence from the proceedings of third parties, in particular the other States possessing nuclear weapons, whose essential interests are said to be engaged in the proceedings. According to the fifth preliminary objection, the Court should decline to exercise its jurisdiction because a judgment on the merits in the present case would have no practical consequence.* '[3]

In the oral proceedings, the UK allocated significant amount of time to the first objection.[4] As will be shown in the next section, the Court upheld the first preliminary objection and did not consider other objections at all. Therefore, the central issue of the case is the existence of the dispute between the Marshall Islands and the UK at the time of the institution of proceedings by the Marshall Islands.

III. JUDGEMENT

In the operative part of the judgment, the Court, firstly, upheld the first preliminary objection raised by the UK 'based on the absence of a dispute between the parties'.[5] It follows from this that 'the Court does not have jurisdiction under Article 36, paragraph 2, of its Statute'.[6] The Court further found that, secondly, it could not proceed to the merits of the case.[7] The first finding was decided by eight votes to eight, with the casting vote of the President.

The reasoning behind the finding that there is no dispute between the parties may be summarised as the lack of sufficient evidence indicating that, at the time of the instituting the proceedings, the UK was aware or could have been aware of the existence of the dispute between the UK and the Marshall Islands as appeared in the claims of the latter. In coming to this conclusion, the Court first explaining its long jurisprudence including the judgment on the preliminary objections in *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v Colombia)* which was delivered on17 March 2016 and after the oral proceedings of the present case. In this connection, it rejected UK's argument that 'there is a principle of customary international law which requires 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'.[8] It held that in its jurisprudence the Court 'treats the question of the existence of a dispute as a jurisdictional one that turns on whether there is, in substance, a dispute, not on what form that dispute takes or whether the respondent has been notified.'[9] The Court then went on to examine the evidence adduced by the Marshall Islands to ascertain whether the UK was aware or could have been aware of the existence of the dispute at the time of the institution of the proceedings. The test was formulated in rather stringent terms: 'that the parties before it held "clearly opposite views"'[10] and that 'a statement can give

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[3] *Marshall Islands v UK*, para 23.

[4] See CR 2016/3 (Sir Daniel Bethlehem).

[5] *Marshall Islands v UK*, para 59.

[6] *Marshall Islands v UK*, para 58.

[7] *Marshall Islands v UK*, para 59.

[8] *Marshall Islands v UK*, para 27.

[9] *Marshall Islands v UK*, para 46.

[10] *Marshall Islands v UK*, para 48.

rise to a dispute only if it refers to the subject-matter of a claim "with sufficient clarity to enable the State against which [that] claim is made to identify that there is, or may be, a dispute with regard to that subject-matter"'.[11] The Court concluded that the Marshall Islands did not adduce sufficient evidence to establish the awareness of the UK.[12]

IV. DEVELOPMENTS

On the basis of the arguments put forward in the case, the UK has amended its declaration accepting the ICJ jurisdiction[13] which now excludes the followings from the compulsory jurisdiction under Article 36, paragraph 2, of the Statute:

> *'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.'*[14]

This amendment seems to have closed the possibility for the Marshall Islands to bring the same claims against the UK before the ICJ.

V. COMMENTS

The judgment has already ignited some strong responses from scholars,[15] not least because, as emphasised by many judges, this is the first occasion where the Court refused to entertain the merits of the case in its entirety on the sole basis that there is no dispute between the parties. A quick glance at the voting pattern, coupled with dissenting opinions of the judges, should suffice to show that the finding of the Court is highly controversial. The requirement that the respondent must have known or should have known the specific claim against it at the time of institution of the proceedings seems to attract the strongest criticism. Dissenting judges disagreed with the Judgment on this point on many levels, ranging from the reading of a specific judgment in the previous case, to the flexibility with which the evidence should be assessed. Judge Crawford, for instance, argued that the Court has introduced the requirement of 'objective awareness', based apparently on the *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea* judgment. But, for him, 'that decision is not authority for the objective awareness requirement: the Court simply observed that, as a matter of fact,

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[11] *Marshall Islands v UK*, para 49.

[12] The Court has disposed of the cases against India and Pakistan in essentially the same way.

[13] See, Amendments to the UK's Optional Clause Declaration to the International Court of Justice: Written statement - HCWS489 <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2017-02-23/HCWS489/> access on 30 January 2018.

[14] See, International Court of Justice, Declaration Recognizing the Jurisdiction of the Court as Compulsory <http://www.icj-cij.org/en/declarations> access on 30 January 2018.

[15] See e.g., 'The Symposium on the Marshall Islands case', (111) *AJIL Unbound* (2017) pp 62-102.

Colombia knew of the existence of the dispute.'[16] This is the squarely opposite position taken, for instance, by President Abraham who explained that this judgment is part of the long series jurisprudence since *Georgia v Russia* in 2011 concerning the requirement for a dispute to exist between the parties at the time of the institution of proceedings.[17] In future cases before the Court, it may be that the applicant state will chose a safer course of action by specifically notifying the claim to the state against which that claim is made prior to the institution of proceedings. This will mean that this point about the awareness of the respondent state may not be revisited by the Court itself. Nevertheless, what the dissenting opinions have shown is that the Court did have the choice in interpreting the requirement of the existence of the dispute between the parties under the Statute. The question then arises whether the choice made in this case a good one. As Sir Robert Jennings put it with his characteristic clarity and subtlety,

> *'[i]n any case likely to come before the International Court of Justice, there are choices to be made even in terms of the meaning of the applicable law. If the law was clear the case would never have been brought to the Court. The legal choices to be made comprise also political consequences of the choice. A good judge will be at least aware of those political consequences and implications. Nevertheless, his choices must be within the framework of legal possibilities, and the reasoning must be such as to withstand intellectual requirements for legal reasoning."*[18]

Judge Crawford's dissenting opinion also indicated that the fourth preliminary objection of the UK concerning the *Monetary Gold* principle was 'perhaps the most plausible of the other objections to jurisdiction and admissibility'.[19] This statement reaffirms that the Court had before it a number of good arguments from which it had to make a choice to reach its decision. The same question arises: whether the choice made by the Court to uphold the first preliminary objection thereby refusing to entertain the merits of the case a good one. As several Judges reminded us in *Legality of the Use of Force (Serbia Montenegro v Belgium)* with regard to the selection of the ground for decision, 'the principle of certitude' should require the Court 'to choose the ground which is most secure in law and to avoid a ground which is less safe and, indeed, perhaps doubtful.'[20] Moreover, Sir Robert Jennings' advice about the 'political consequences and implications' is equally applicable here. By refusing to hear the merits of this case, one is inevitably left with the feeling that the judicial organ of the United Nations is not ready to take its constructive part in the topic which involves admittedly controversial high politics of nuclear disarmament. But, perhaps paradoxically, nuclear disarmament is the topic of the very first resolution of the General Assembly of the United Nations which the Court has expressly referred to in its judgment.[21]

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[16] *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v United Kingdom), Preliminary Objections, Judgment, Dissenting Opinion of Judge Crawford, ICJ Reports 2016,* para 4.

[17] *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v United Kingdom), Preliminary Objections, Judgment, Declaration of President Abraham, ICJ Reports 2016*, para 1.

[18] R Jennings, 'Judicial Reasoning at an International Court', (236) *Vorträge, Reden und Berichte aus dem Europa-Institut, Europa-Institut Saarbrücken* (1991) p 6.

[19] *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v United Kingdom), Preliminary Objections, Judgment, Dissenting Opinion of Judge Crawford, ICJ Reports 2016,* para 32.

[20] *Legality of Use of Force (Serbia and Montenegro v Belgium), Preliminary Objections, Judgment, ICJ Reports 2004, Joint Declaration of Vice President Ranjeva, Judges Guillaume, Higgins, Kooijmans, Al-Khasawneh, Buergenthal, and Elaraby*, paras 2-3.

[21] *Marshall Islands v UK*, para 12.