

Marshall Islands v The World: A Case for Criminalizing Nuclear Proliferation?

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Aryan Tulsyan*

Introduction:

The Republic of Marshall Islands (“Marshall Islands”) is an independent country in the Central Pacific Ocean and is composed of more than 1,200 islands and islets. The country was administered by the United States of America, as part of the Trust Territory of the Pacific Islands, up until 1984 when it was dissolved. From 1946 to 1958, the USA tested 67 nuclear weapons across 29 atolls of the Marshall Islands, the payloads of which were 1,000 times greater than the bombs dropped on Hiroshima and Nagasaki. Radiological contamination, a result of the numerous tests, is still a persistent problem in these islands and has adversely impacted the livelihood of its residents. Keeping in mind the development of nuclear weapons, and juxtaposing it with the horrors faced by the country, the Marshall Islands decided to make use of the international legal forum to prevent the mad race for nuclear proliferation.

Legal Action was taken by the Republic of Marshall Islands:

In light of the “suffering which its people endured as a result of it being used as a site for extensive nuclear testing”, the Marshall Islands decided to approach the International Court of Justice to seek relief, and to reignite the debate on nuclear non-proliferation. Nuclear non-proliferation includes efforts made to minimise the risks of nuclear weapons and technology by the reduction of the production and the disposal of nuclear weapons. The 1968 Treaty on the Non-Proliferation of Nuclear Weapons (NPT), was signed by nations of the world for achieving this purpose of nuclear non-proliferation, and exists as the only binding commitment in a multilateral treaty to the goal of disarmament by the nuclear-weapon States.

The Marshall Islands, on 24 April 2014, filed applications against all nine nuclear states, namely, the Russian Federation, United Kingdom of Great Britain and Northern Ireland, United States of America, China, France, India, Israel, Pakistan, and Democratic People's Republic of Korea, and accused them of not fulfilling their obligations with respect to the cessation of nuclear arms at an early date. The Marshall Islands also alleged a failure to initiate active and effective nuclear disarmament negotiations, a breach of Article VI of the NPT, and of customary international law. A compilation of applications filed by the Marshall Islands can be found [here](#).

United States of America, China, France, Russian Federation, Israel, and Democratic People's Republic of Korea.

In accordance with Article 38, paragraph 5, of the Rules of the World Court, the Applications filed by the Marshall Islands against these six States were transmitted to them but not entered in the General List, and no action was taken in the proceedings in the absence of their consent, as these countries do not have compulsory jurisdiction of the ICJ.

The United States, which greatly promoted the ICJ in its early years, renounced its compulsory jurisdiction in 1985 during the period of the case involving military and paramilitary operations against Nicaragua. Furthermore, Israel has never given an official stance on the possession of nuclear weapons, and has maintained ambiguity over the matter. Therefore, the applications filed by the Marshall Islands were to be combated by the United Kingdom, India, and Pakistan.

The United Kingdom

The UK recognized the compulsory jurisdiction of the ICJ, pursuant to Article 36, paragraph 2, of its Statute. The Marshall Islands contested that the UK's commitment to nuclear non-proliferation was contradictory to their actions, pointing towards their voting record on disarmament at the United Nations General Assembly. The Marshall Islands alleged a breach of Article VI of the NPT, of which the UK is a signatory, as the UK failed to "negotiate in good faith on effective measures."

India and Pakistan

Although India and Pakistan are not signatories of the NPT, the Marshall Islands had initiated a suit against them on the grounds of violation of customary international law. There has been a continuing debate on whether nuclear non-proliferation can attain the status of customary international law. However, scholars have concluded that since there is insufficient state practice as well as *opinion juris*, nuclear non-proliferation does not have a customary character. India has reserved itself from signing the NPT, stating the importance to depend on its own resources to build on the capabilities in the military, nuclear, space and cyber domains. The states recognised the compulsory jurisdiction of the ICJ, similar to the UK. The apparent expansion of the weapons program was evident as India test-fired its nuclear capable K-4 SLBM on 7th March 2016, the first day of the hearings.

Decision taken by the Court:

The ICJ held hearings for the suit between 7-16 March 2016, and it was dismissed by the Court on 5 October 2016, on procedural grounds, allowing India, Pakistan, and UK to walk free. The ICJ did not find the presence of any international dispute to evaluate the case on its merits, and this was supplemented by strong disarmament records presented by the three countries. In principle, dispute must be shown to have existed as of the date of application before the Court. The Court departed from previous case laws while determining what constitutes as a dispute, and by rendering it as a subjective criterion. The Court also furthered itself from the 1996 Advisory Opinion, where it unanimously held that nations have a legal obligation to pursue disarmament talks in “good faith”. The judgement of the Court can be found [here](#), [here](#), and [here](#).

The United Kingdom

The ICJ ruled for the UK, by a narrow margin of a single vote casted by Judge Abraham, President of the Court, preceding which the vote was 8-8. The majority believed that Marshall Islands’ arguments were “general”, and since they were not directed at a specific breach, the UK could not be held liable, under Article VI of the NPT. Article VI of the NPT imposes an obligation on the Parties to pursue good faith negotiations relating to cessation of the nuclear arms race. Furthermore, the Court decided here that there must be an objective awareness of the Respondent state, prior to the filing of the applications, and it decided that UK was not aware that the Marshall Islands would be bringing a claim against them, even though there have been various instances where Marshall Islands’ officials have spoken about the issue. Doing so, the Court furthers itself from previous case laws.

India and Pakistan

The court ruled favourably for India and Pakistan, casting a 9-7 vote. When India and Pakistan submitted that the Court lacked jurisdiction to entertain the suit, and Marshall Islands’ plaint was inadmissible, the Court accepted that the resolution of these questions was necessary, before questions on merits could be entertained, as given by Article 79, paragraph 2, of the Rules of Court. Furthermore, Judges who voted against India and Pakistan recognised that even though India and Pakistan are not signatories to the NPT, they would be bound by customary international law. When the question on the existence of a dispute was raised, India argued that its advocacy of disarmament shows the absence of a dispute.

Effects of the suit:

Even though the Marshall Islands could not get the verdict to their advantage, the case was far from a loss in terms of nuclear disarmament. The case threw a spotlight on the policies of nuclear weapon states, who claim to be devoted to disarmament efforts, but fail to show willingness to achieve it. Countries like France who are shrinking their arsenal are to realise that reduction is different from elimination, and superpowers like US and Russia have not even begun the process of nuclear disarmament. Furthermore, merely two days before the ruling of the Court, the UNGA revitalized the disarmament negotiations, and the Treaty on Prohibition of Nuclear Weapons was passed in 2017. Arguing that Marshall Islands’ suit contributed towards the action taken at the international forums would be far from being an overstatement.

Notwithstanding the contributions made by the suit towards nuclear disarmament, there were no binding and enforceable outcomes which would lead to more certain acts of disarmament. It can be argued that the incapability of the ICJ, to render a binding and enforceable decision which would ensure nuclear disarmament, is because of the legal regime where disarmament laws are situated in. Neither the NPT, nor customary international law, provide for criminal liability in cases of failure to pursue disarmament upon nations. Therefore, an argument can be made, that criminalising nuclear proliferation and failure to pursue disarmament, may provide for a stronger basis to enforce disarmament and prevent nuclear proliferation.

The case for criminalising nuclear weapons proliferation:

Nuclear weapons proliferation can be expressed in two ways: Horizontal Proliferation (spread of nuclear weapons to States that did not previously possess them, for example, India, Pakistan, Israel) and Vertical Proliferation (increase in the number of nuclear weapons by States already possessing them, for example, USA, UK). Neither of these types of proliferation attract criminal liability in any of the existing legal regimes. Although one can argue that international criminal liability might be imposed upon the use of nuclear weapons, and this might discourage the same, criminalising the mere possession and accumulation of nuclear weapons can prevent the occurrence of mass atrocities.

The main international convention prohibiting nuclear proliferation is the NPT. The NPT does not impose criminal liability on nuclear weapons proliferation, nor does it contain a requirement that the parties adopt criminal laws banning private behaviour inconsistent with the treaty, which is present in the Chemical and Biological Weapons Conventions. An inclusion of criminal liability within the NPT would restrict both horizontal and vertical proliferation of nuclear weapons of NPT member states. Even if there is a move to prosecute States for use of nuclear weapons, States which are not a party to the NPT cannot be imposed with criminal liability for mere proliferation.

Another effective way to criminalise nuclear weapons proliferation, which would be inclusive of States not a party to the NPT, such as India or Pakistan, would be the inclusion of nuclear weapons proliferation as a war crime, by the way of a separate provision within Article 8(2)(b), or annexation into Article 8(2)(b)(xx) of the Rome Statute. This inclusion would give jurisdiction to the International Criminal Court to criminally prosecute acts of nuclear weapons proliferation. As per the present legal regime, even the use of nuclear weapons fails to meet the 'comprehensive prohibition' criterion contained in Article 8(2)(b)(xx) of the Rome Statute.

Finally, criminalisation of nuclear proliferation could be attained through a separate multilateral international treaty between States, including nuclear and non-nuclear states. The Harvard-Sussex Program on CBW Armament and Arms Limitation had prepared a draft treaty which criminalized activities involving chemical and biological weapons. This criminalization extended not just to the use, but also to the proliferation, preparations, assistance, and construction of relevant facilities to produce such weapons. Although the extent of the draft treaty is limited to chemical and biological weapons, the text can be altered accordingly to include nuclear weapons as well.

Conclusion:

After American nuclear tests at Bikini Atoll, the Marshall Islands have remained at the forefront of anti-nuclear activism. Marshall Islands' suit reaffirmed the Court's 1996 ruling, and even though it would be non-binding and without an enforcement mechanism, it could serve as a precursor to nuclear disarmament. It is expected that in the future, even if the Court is cautious about frivolous litigation, they keep into account the needs of the world being built around peaceful resolution of conflicts and nuclear disarmaments. The failure of the ICJ to compel nuclear disarmament propounds the case of criminalisation of nuclear weapons through the methods discussed above. Although there are many economic, political, and logistical challenges to it, the effect of the use of nuclear weapons could lead to the instant death of half of the world's population, and long-term radiation effects to the others. Thus, if international law is successful in criminalising nuclear proliferation in future, countries such as the Marshall Islands would be able to achieve a verdict different than the one by the ICJ in 2016—and would pave the way for actual nuclear disarmament.

*Aryan Tulsyan is a fourth-year student at Jindal Global Law University, Sonipat,