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CURRENT DEVELOPMENTS

The 2016 Judicial Activity of the International Court of Justice

*By Christine Gray**

The International Court of Justice (ICJ or Court) did not give judgment on the merits in any cases in 2016, but it decided on preliminary objections in five cases, and on one application for provisional measures. The three highest profile cases were those brought by the Marshall Islands against India, Pakistan, and the UK for violation of their nuclear disarmament obligations; the Court held that it had no jurisdiction to decide the cases on the merits. The other two cases were brought by Nicaragua against Colombia; both arose out of an earlier 2012 judgment in a maritime boundary case between those states. One concerned a request for the delimitation of the outer continental shelf beyond two hundred nautical miles; it raised questions about the application of the *res judicata* doctrine and about the significance of Article 76 of the United Nations Convention on the Law of the Sea (UNCLOS). The other concerned alleged violations of Nicaragua's rights in the maritime zones delimited in the 2012 judgment. In both cases, the Court found that it had jurisdiction.

I. The Court's Judicial Activity

Question of the Delimitation of the Continental Shelf Between Nicaragua and Colombia Beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia)

Nicaragua brought a case against Colombia concerning the delimitation of Nicaragua's continental shelf beyond two hundred nautical miles and Colombia's continental shelf.[1] The Court had not determined the boundary of the outer continental shelf when it delimited the maritime boundary between the two states in its earlier judgment in *Territorial and Maritime Dispute* (the 2012 Judgment).[2] Nicaragua brought a new case against Colombia on the basis that the Court had jurisdiction under the Pact of Bogotá.[3] Nicaragua also claimed that the subject matter of its Application remained within the jurisdiction of the Court

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[1] Question of the Delimitation of the Continental Shelf Between Nicaragua and Colombia Beyond 200 Nautical Miles from the Nicaraguan Coast (Nicar. v. Colom.), Preliminary Objections, Judgment (Int'l Ct. Justice Mar. 17, 2016) [hereinafter Delimitation Case]. All the materials of the Court cited in this report are available on its website, http://www.icj-cij.org.

[2] Territorial and Maritime Dispute (Nicar. v. Colom.), Judgment, 2012 ICJ Rep. 624 (Nov. 19) [hereinafter Territorial & Maritime Case]. Judge Owada in his Separate Opinion set out some of the background of the 2012 case; he pointed out that Nicaragua had only introduced its request for the delimitation of the outer continental shelf very late in the proceedings. Delimitation Case, *supra* note 1, Sep. Op. Owada, J., paras. 10–16.

[3] The American Treaty on Pacific Settlement, Apr. 30, 1948, 30 UNTS 55 (entered into force June 5, 1949). Article XXXI provides that the parties recognize as compulsory the jurisdiction of the Court "as long as the present Treaty is in force."

established in the 2012 case. It made two requests to the Court: first, to determine the precise course of the maritime boundary in the areas of continental shelf beyond the boundaries determined in the 2012 Judgment; second, to declare the principles and rules of international law that determine the rights and duties of the two states in relation to the area of overlapping continental shelf claims and the use of its resources, pending the delimitation of the maritime boundary between them.

Colombia raised five preliminary objections. The Court unanimously upheld part of its fifth objection: that Nicaragua's second request was a matter for the merits and one on which there was no dispute.[4] But it rejected all the other objections,[5] and held by 8–8 (by casting vote of the president) that it could proceed with the examination of the merits of Nicaragua's first request. Colombia's first, and not very convincing, preliminary objection was that it had denounced the Pact of Bogotá on November 27, 2012, in accordance with Article LVI.[6] The first paragraph of the Pact states: "The present treaty shall remain in force indefinitely, but may be denounced upon one year's notice, at the end of which period it shall cease to be in force with respect to the state denouncing it . . . ." The second paragraph provides that "The denunciation shall have no effect with respect to pending procedures initiated prior to the transmission of the particular notification." However, Colombia's notice of denunciation stated that it "takes effect as of today with regard to procedures that are initiated after the present notice."[7] Nicaragua brought its case on November 26, 2013, just less than a year after Colombia's notice of termination of the Pact of Bogotá.

Colombia tried to argue that its denunciation had taken immediate effect, and that therefore the Court did not have jurisdiction under the Pact of Bogotá. It made a series of tortuous arguments that the Court examined extremely painstakingly.[8] Colombia claimed that because Article LVI expressly provided that procedures initiated *before* denunciation were not affected, this meant that procedures initiated *after* the denunciation were affected, with the result that Nicaragua's Application was not admissible, although it came within the one-year period established by the first paragraph of Article LVI.

However, the Court said that Colombia's argument turned not on the ordinary meaning of the words of the second paragraph, but upon an inference that might be drawn from what the paragraph does not say (an *a contrario* reading).[9] The Court took an admirably robust approach to this argument: such a reading was only warranted when it was appropriate in the light of the whole text, the context, and the object and purpose of the treaty. Here, the object and purpose of the treaty was clearly to further the peaceful settlement of disputes. In seeking to determine the meaning of the second paragraph of Article LVI, the Court should not adopt an interpretation which rendered the first paragraph—requiring one year's notice

[4] Delimitation Case, *supra* note 1, Judgment, paras. 116–25.

[5] The Court rejected the fourth preliminary objection—that Nicaragua was seeking to appeal the 2012 Judgment—unanimously with very little discussion. *Id.*, paras. 89–90. It saw no need to decide on the second preliminary objection to Nicaragua's claim that the Court had continuing jurisdiction based on the 2012 Judgment; it had already decided that it had jurisdiction under the Pact of Bogotá and so it was unnecessary to decide whether an additional ground of jurisdiction existed. *Id.*, paras. 91–94.

[6] *Id.*, para. 18.

[7] *Id.*, para. 21.

[8] *Id.*, paras. 19–48.

[9] *Id.*, para. 34.

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of denunciation—devoid of purpose or effect.[10] The absence of objection by other states to Colombia's notice of denunciation did not constitute agreement with its interpretation of Article LVI.[11] Nor did the preparatory works support Colombia's interpretation. The Court unanimously rejected Colombia's first preliminary objection.

It then considered Colombia's third objection, that the Court had already adjudicated on Nicaragua's request for a delimitation of its outer continental shelf in its 2012 Judgment and that the principle of *res judicata* barred the Court from examining Nicaragua's request.[12] This objection proved much more controversial. The key question was the significance of subparagraph 3 of the operative clause of the 2012 Judgment, that "it *cannot uphold* the Republic of Nicaragua's claim . . . that the appropriate form of delimitation . . . is a continental shelf boundary dividing by equal parts the overlapping entitlements to a continental shelf of both Parties."[13]

The parties agreed on the principle of *res judicata* that decisions are final and cannot be reopened by the parties as regards issues that have been determined, where there is identity of the parties, object, and legal ground between the cases.[14] But they disagreed on the meaning of subparagraph 3, and in particular on the significance of the phrase "cannot uphold." That is, they disagreed on what the Court had actually decided in 2012, even though many of the judges on the present Court had also sat on the 2012 Court.[15] Colombia argued that in the 2012 case, Nicaragua had claimed a continental shelf beyond two hundred nautical miles on the basis of geological or geomorphological criteria, and had claimed an equal share of the areas in which the continental shelves of the two states overlapped, but it said that Nicaragua had not demonstrated that its continental margin extended sufficiently far to overlap with Colombia's continental shelf. Colombia's position was that the Court had rejected Nicaragua's claim on the merits for lack of evidence, and this should be the end of the matter.[16] Nicaragua replied that no force of *res judicata* could be attached to a matter that had not actually been decided by the Court; the Court in its 2012 Judgment had expressly refused to make a decision on the delimitation of the outer continental shelf beyond two hundred nautical miles from the Nicaraguan coast because Nicaragua at that time had not submitted the information necessary for a decision to the Commission on the Limits of the Continental Shelf (CLCS) as required by UNCLOS Article 76.[17]

[10] *Id.*, para. 44.

[11] *Id.*

[12] *Id.*, paras. 47–88. The Court regarded this as an objection to admissibility rather than to jurisdiction. *Id.*, para 48. On the difference between the two, see Yuval Shany, *Jurisdiction and Admissibility*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 779 (Cesare Romano, Karen Alter & Yuval Shany eds., 2014).

[13] Delimitation Case, *supra* note 1, para. 49 (quoting Territorial & Maritime Dispute, *supra* note 2, para. 17) (emphasis added).

[14] *Id.*, para. 55. *See id.*, Sep. Op., Owada, J., and *id.*, Sep. Op., Greenwood, J. for fuller discussion of this doctrine.

[15] *Id.*, Joint Diss. Op., Yusuf, Cançado Trindade, Xue, Gaja, Bhandari, Robinson, JJ., Brower, J. ad hoc, para. 2 [hereinafter Joint Diss. Op.]. For an opposing view, see *id.*, Sep. Op., Owada, J., paras. 17–29.

[16] *Id.*, paras. 63–67.

[17] *Id.*, paras. 68–71. The Commission on the Limits of the Continental Shelf (CLCS) was a body of scientific experts whose task it was to recommend the outer limit of the continental shelf of states, partly in order to establish the division between the shelf and the common heritage of mankind, the deep-sea bed.

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The Court was fundamentally divided on Colombia's third objection, and came to a decision to reject it by an 8–8 vote on the casting vote of the president. The Court did "not . . . linger" on the meaning of "'cannot uphold,' taken in isolation."[18] Seven of the eight dissenting judges expressed regret at this approach in their Joint Dissenting Opinion: it was "a mistake and a missed opportunity."[19] They claimed that the term "cannot uphold" in the *dispositif* had in the past been employed by the Court to reject a claim by a party. It had not been used to refrain from making a decision until the claimant state adduced sufficient evidence.[20] However, the Court was more concerned with the identification of the substance of the 2012 decision. It said that in 2012 it had not analyzed the parties' geological and geomorphological evidence on the extent of the outer continental shelf; it had not considered the substantive legal standards Nicaragua had to meet to show an entitlement to an outer continental shelf.[21] It had decided that Nicaragua's claim could not be upheld because it had not discharged its obligations to deposit with the CLCS the information required by UNCLOS Article 76.[22] The delimitation of the continental shelf beyond two hundred nautical miles from the Nicaraguan coast was conditional on the submission by Nicaragua of information on the limits of its shelf. It had not settled the question of delimitation because it was not in a position to do so. It was therefore not precluded by the *res judicata* principle from ruling on the current Application.[23] The president's casting vote on this objection allowed the Court to continue to the merits.

The Joint Dissenting Opinion challenged the view that the 2012 Judgment had imposed a procedural requirement that Nicaragua should submit information to the CLCS. The Court had not suggested that Nicaragua would be able to return to the Court after it had made its submission to the CLCS. In previous cases when the Court intended to admit the possibility of further proceedings it had expressly provided for such possibility.[24] The Joint Dissenting Opinion also stressed the potential negative effect of repeat litigation. It stated that, even if one were to accept the Court's interpretation of the 2012 Judgment, Nicaragua should not now be allowed to return to the Court to attempt to remedy the procedural flaw.[25] For the dissenters, the overriding concern was the finality of litigation and protection of the respondent from repeat litigation. In contrast, it seemed that the majority did not want to leave the dispute on the delimitation of the outer continental shelf unresolved. This would be the first time that the ICJ could decide on this issue, and it would be able to play a creative role in the

[18] *Id.*, para. 74.

[19] *Id.*, Joint Diss. Op., para. 16.

[20] *Id.*, Joint Diss. Op. Judge Greenwood challenged this interpretation. *See id.*, Sep. Op., Greenwood J., paras. 18–19.

[21] *Id.*, Judgment, para. 82.

[22] Some judges expressed disquiet about this part of the judgment. Judge Robinson asked what was the basis for requiring a submission under Article 76, given that Colombia was not a party to UNCLOS, and given that in 2012, the Court had said that the applicable law was customary international law. *Id.*, Decl., Robinson, J. Judge Donoghue expressed similar concerns in her Dissenting Opinion in the 2012 Judgment, Territorial & Maritime Case, *supra* note 2, Diss. Op., Donoghue, J., and again in the current case, Delimitation Case, *supra* note 1, Diss. Op., Donoghue, J., para. 48.

[23] Delimitation Case, *supra* note 1, Judgment, paras. 85–88.

[24] *Id.*, Joint Diss. Op., para. 20.

[25] *Id.*, Joint Diss. Op., para. 59; *see also id.*, Diss. Op., Donoghue, J., paras. 42–45.

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development of the law.[26] Judge Greenwood raised the practical question: if the case were to be rejected on the basis of *res judicata*, how could Nicaragua get the issue resolved?[27]

The Court also rejected Colombia's fifth preliminary objection, by a vote of 11–5. Although Nicaragua had submitted the information about its shelf to the CLCS after the 2012 Judgment, Colombia argued that this was only one of the requirements in UNCLOS Article 76. It also provided for a recommendation by the CLCS as to the outer limits of a state's continental shelf in order that the coastal state might establish a final and binding outer limit. As there had been no such recommendation by the CLCS, Colombia argued that Nicaragua's request to the Court to determine the precise course of the maritime boundary was inadmissible.[28] This argument by Colombia was problematic because it was not itself a party to UNCLOS. Judge Owada raised this difficulty in his Separate Opinion.[29] However, the Court did not address this issue, perhaps because in its 2012 Judgment it had observed that the fact that Colombia was not a party "d[id] not relieve Nicaragua of its obligations under [UNCLOS] Article 76."[30] In reply, Nicaragua argued that a coastal state had inherent rights over the continental shelf. The CLCS was concerned only with the precise location of the outer limits of the continental shelf; it did not grant or recognize the rights of a coastal state over its shelf and it was not empowered to delimit boundaries in the shelf.[31]

This question of the relationship of the CLCS and judicial bodies tasked with the delimitation of the outer continental shelf between states has been the subject of considerable discussion.[32] It has come up before the International Tribunal for the Law of the Sea and Annex VII arbitral tribunals, but only in the special geographical situation of the Bay of Bengal where there was no disagreement as to the existence of an outer continental shelf.[33] One of the problems is that in the event of a dispute over the outer continental shelf, the CLCS in accordance with its rules and practice does not address a recommendation to states. If the Court were also to refuse to act because the CLCS had not made a recommendation, "the result would be an impasse . . . ."[34]

The Court therefore rejected Colombia's fifth objection. It said that the role of the CLCS related only to the delineation of the outer limits of the shelf and not to delimitation between

[26] The delimitation of the outer continental shelf has come up before the UNCLOS dispute settlement bodies, but only in the special geographical and geomorphological situation of the Bay of Bengal. *Infra* notes 32, 33.

[27] Delimitation Case, *supra* note 1, Sep. Op., Greenwood, J., para. 6. Judge Greenwood and Judge Donoghue point out that the question of the delimitation of the outer shelf between Nicaragua and certain Colombian islands had not been raised in the 2012 Judgment and so could not be covered by any claim of *res judicata*. *Id.*, Sep. Op., Greenwood, J., paras. 12–14; *id.*, Diss. Op., Donoghue, J., para. 43.

[28] The eight dissenting judges argued that it was illogical to treat only the first requirement in Article 76 as a prerequisite. *Id.*, Joint Diss. Op., paras. 50–51; *id.*, Diss. Op., Donoghue, J., paras. 47–51.

[29] *Id.*, Sep. Op., Owada, J., paras 33–39.

[30] Territorial & Maritime Case, *supra* note 2, para. 126.

[31] Delimitation Case, *supra* note 1, paras. 101–04.

[32] *See, e.g.*, Yao Huang & Xuexia Liao, *Natural Prolongation and Delimitation of Continental Shelf Beyond 200nm: Implications of the Bangladesh/Myanmar Case*, 4 ASIAN J. INT'L L. 281 (2014); Bjarni Mar Magnusson, *Is There a Temporal Relationship Between Delineation and Delimitation of the Continental Shelf Beyond 200nm?*, 28 INT'L J. MARINE & COASTAL L. 465 (2013); Delimitation Case, *supra* note 1, Decl., Gaja, J. Judge Bhandari argued in his Declaration that the Court should not proceed to the merits phase without a recommendation by the CLCS.

[33] *See* discussion by Judge Donoghue: Delimitation Case, *supra* note 1, Diss. Op., Donoghue, J., para. 31.

[34] *Id.*, Judgment, para. 104.

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states. UNCLOS Article 76(10) expressly provided that "the provisions of this article are without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts."[35] Therefore a recommendation by the CLCS was not a prerequisite for a claim to the ICJ. This is an important decision by the Court; it remains to be seen whether it will be followed by the UNCLOS dispute settlement bodies. The Court's final decision was unanimous that it had jurisdiction, and by a vote of 8–8 (on the casting vote of the President) that the case was admissible.

Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)

The second case brought by Nicaragua against Colombia[36] also arose out of the 2012 Judgment, and there are some overlaps between this case and that just discussed above. Nicaragua alleged, first, that Colombia had violated its rights in maritime zones delimited by the Court in its 2012 Judgment and, second, that it had violated Article 2(4) of the UN Charter. Nicaragua again based the Court's jurisdiction mainly on the Pact of Bogotá. Colombia raised five preliminary objections, but these were overwhelmingly rejected by the Court and it held by a vote of 14–2 that it had jurisdiction on the merits. The Court was less divided in this case, but questions may be asked regarding whether Nicaragua's real aim was to enforce the 2012 Judgment and regarding the proper role of the Court in such a case.

Colombia's first preliminary objection was the same as in the earlier *Delimitation* case, and the Court rejected it in identical language.[37] The second preliminary objection was that there was no dispute between the parties, as required by the Pact of Bogotá. Here, as later in the *Marshall Islands* cases, the Court went through its own jurisprudence on the meaning of "dispute."[38] It considered Nicaragua's two claims separately.

Nicaragua accused Colombia of defying the 2012 Judgment by arguing that: (1) Colombia had refused to accept that delimitation until a treaty had been concluded with Nicaragua on the implementation of the judgment; (2) it had established a new maritime zone (a contiguous zone) that was incompatible with the judgment; and (3) there had been a series of incidents at sea in areas that had been attributed to Nicaragua.[39] Colombia denied that there was a dispute.[40] It said that Nicaragua had never alerted Colombia that Colombia was violating Nicaragua's rights and maritime zones as declared by the 2012 Judgment. The Application had come as a complete surprise, given the peaceful situation at sea and the shared commitment to negotiate a treaty to implement the 2012 Judgment. Colombia was not repudiating the 2012 Judgment; its concern was how to implement it domestically.

The Court took a flexible approach to the question of the existence of a dispute, consistent with its earlier jurisprudence.[41] It noted that the president of Colombia had said that the 2012

[35] *Id.*, para. 110.
[36] Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicar. v. Colom.), Judgment (Int'l Ct. Justice Mar. 17, 2016) [hereinafter Alleged Violations Case].
[37] *Id.*, paras. 20–48.
[38] *Id.*, para. 50.
[39] *Id.*, paras. 53–54, 61–66.
[40] *Id.*, paras. 55–60.
[41] *Id.*, paras. 49–79.

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Judgment infringed Columbia's rights. In contrast, Nicaragua had insisted that the maritime zones declared by the Court in the 2012 Judgment must be respected. It was therefore clear that the parties held opposing views regarding their respective rights in the maritime areas. They also held different views on whether the contiguous zone was consistent with the 2012 Judgment. Colombia did not deny that it had continued exercising jurisdiction in the maritime zones claimed by Nicaragua under the 2012 Judgment. There was no need for a formal diplomatic protest to establish the existence of a dispute. The Court said that "Colombia was aware that its enactment of Decree 1946 and its conduct in the maritime areas declared by the 2012 Judgment to belong to Nicaragua were positively opposed by Nicaragua."[42] Colombia could not have misunderstood the position of Nicaragua over such differences. Thus, there was a dispute concerning the alleged violations of Nicaragua's rights in the maritime zones.[43] It was this passage in paragraph 73 that was later relied on in the *Marshall Islands* cases, not as here in order to confirm that there was a dispute, but to use the "awareness" test to reject jurisdiction.

In the only Dissenting Opinion, Judge ad hoc Caron was extremely critical of the Court's flexible approach. Judge Caron stated that the Court had not established that Nicaragua had made a claim that Colombia could oppose.[44] The Court had referred to only two statements to support its conclusion that there were opposing views on their respective rights and that a dispute existed.[45] Judge Caron examined statements by Nicaragua and found no allegations of violation of its rights; its concern was with the implementation of the 2012 Judgment. He said that the Court's statement in paragraph 73 turned its previous jurisprudence on its head. The Court did not ask whether the Applicant had made a claim of legal violation; rather it inferred that the Respondent must have been aware that the Applicant positively opposed the Respondent's actions.[46]

Regarding Nicaragua's second claim that Colombia had violated Article 2(4), the Court took a stricter approach, and its discussion contrasts with its reasoning on the first claim. It said briefly that "nothing in the evidence suggests that Nicaragua had indicated that Colombia had violated its obligations under Article 2, paragraph 4 . . . ."[47] On the contrary, Nicaragua itself had stated that there had been no confrontations. The situation was calm and stable. The Court unanimously decided that there was no dispute on this issue. It appears that once again the Court has been keen to avoid a decision on the use of force.[48]

Colombia's third preliminary objection was that the Pact of Bogotá imposed a precondition on recourse to judicial settlement that was not met at the date of the Application.[49] Article II provides that parties are bound to submit to judicial settlement when a controversy

[42] *Id.*, para. 73.
[43] *Id.*, para. 74.
[44] *Id.*, Diss. Op., Caron, J. ad hoc, paras. 14–17.
[45] *Id.*, Diss. Op., Caron, J. ad hoc,
[46] *Id.*, Diss. Op., Caron, J. ad hoc,
[47] *Id.*, para. 76.
[48] It had earlier avoided pronouncement on alleged violations of Article 2(4) in *Land and Maritime Boundary Between Cameroon and Nigeria* (Cameroon v. Nigeria), 2002 ICJ Rep. 303, and more recently in *Certain Activities Carried out by Nicaragua in the Border Area* (Costa Rica v. Nicar.), Judgment, 2015 ICJ Rep. 665, para. 97 (Dec. 16). *See* critical account by Surabhi Ranganathan, *The 2015 Judicial Activity of the International Court of Justice*, 110 AJIL 504, 520–21 (2016).
[49] Alleged Violations Case, *supra* note 36, Judgment, para. 80.

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arises "which, in opinion of the parties, cannot be settled by direct negotiations through the usual diplomatic channels . . . ." Colombia claimed that it was willing to settle any alleged controversy by direct negotiations, and so both parties did not have the opinion that negotiations would not be effective. Nicaragua replied that it was not necessary for both parties to share this opinion; events had demonstrated that the dispute could not be settled by direct negotiations.[50] The Court avoided the issue—caused in part by a discrepancy between the official texts of Article II—in this case.[51] Instead it adopted a novel test: whether the evidence demonstrated that "neither of the Parties could plausibly maintain that the dispute between them could be settled by direct negotiations through the usual diplomatic channels."[52] It said that no evidence submitted to the Court indicated that the parties were in a position to hold negotiations, and therefore rejected Colombia's objection by a vote of 15–1. Again, this indicates a flexible, objective approach.

Colombia's fourth preliminary objection concerned Nicaragua's claim that the Court had "inherent power" to pronounce on the actions required by its 2012 Judgment. Colombia rejected this claim as having no basis in the Statute of the Court or in its case law.[53] The Court held unanimously that there was no need to deal with this issue as it had decided that jurisdiction existed pursuant to the Pact of Bogotá.[54] However, Judge Cançado Trindade, in his relatively brief Separate Opinion, expressed regret that the Court did not address this important question. He discussed the desirable scope of such "inherent powers" and the question whether they could extend to the implementation of the Court's judgments.[55]

Colombia's closely related fifth preliminary objection was that the application was in reality an attempt to enforce the 2012 Judgment, even though the Court has no post-adjudication enforcement jurisdiction.[56] The Court rejected this objection in a cursory fashion, even though in many ways the objection was plausible, given the way that Nicaragua had framed its case.[57] The Court held that it was for the Court, not Nicaragua, to decide the real character of the dispute before it, and then simply asserted that "Nicaragua does not seek to enforce the 2012 Judgment as such."[58] Only Judge Bhandari dissented on this point.[59]

[50] *Id.*, paras. 88–91.

[51] *Id.*, paras. 92–101. It had earlier avoided the same question in *Border and Transborder Armed Actions* (Nicar. v. Hond.), Jurisdiction and Admissibility, Judgment, 1988 ICJ REP. 95, para. 65 (Dec. 20).

[52] Alleged Violations Case, *supra* note 36, Judgment, para. 95.

[53] *Id.*, paras. 102–03.

[54] *Id.*, para. 104.

[55] *Id.*, Sep. Op., Cançado Trindade, J. The question of the Court's inherent power had also arisen, and been avoided, in the 2016 Delimitation Case, *supra* note 5. *See* Chester Brown, *The Inherent Powers of International Courts and Tribunals*, 76 BRIT. Y.B. INT'L L. 195 (2005).

[56] Alleged Violations Case, *supra* note 36, Judgment, para. 105.

[57] As Judge ad hoc Caron pointed out in *id.*, Diss. Op., Caron, J., para. 74.

[58] *Id.*, Judgment, para. 109.

[59] *Id.*, Decl., Bhandari, J.

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Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. UK; Marshall Islands v. India; Marshall Islands v. Pakistan)[60]

A year after it had accepted the jurisdiction of the Court under Article 36(2) of the Statute of the Court, the Republic of the Marshall Islands (RMI) initiated cases against all the nine nuclear weapons states for violation of their disarmament obligations under Article VI of the Non-Proliferation Treaty (NPT) and customary international law.[61] But only three of those states had made declarations accepting the jurisdiction of the Court, and the cases against the other six did not proceed.[62] The judgments in these three cases were notable in the history of the Court because this was the first time that the Court had held that it had no jurisdiction on the sole basis that there was no dispute between the parties. In one way, this did not come as a surprise. The Court had in four earlier cases avoided questions concerning nuclear weapons: the two *Nuclear Tests* cases (1975);[63] the attempt by New Zealand to reopen the *Nuclear Test* case in 1995;[64] and the notorious central finding in the *Nuclear Weapons* Advisory Opinion (1996) that many interpreted as a *non liquet*, or a refusal to decide.[65]

In the three *Marshall Islands* cases, the Court avoided a decision on the merits by taking a strict approach to the question of the existence of a dispute. It was deeply divided on this issue, and all the judges (apart from the UK and Russian judges) issued individual opinions and declarations. In the case against the UK, the Court made its decision that there was no dispute by the casting vote of the president of the Court. This was reminiscent of the *Nuclear Weapons* Advisory Opinion twenty years earlier, where Judge Bedjaoui as president of the Court gave the casting vote on the central paragraph in the judgment.[66] Judge Bedjaoui came out of retirement to serve as an ad hoc judge for the RMI, and he expressed his bitter regret at the Court's decision in his Dissenting Opinion.

The Marshall Islands' legal claims against the UK were based on the NPT[67] and also on customary international law.[68] The RMI claimed that the UK had failed to pursue in good

[60] Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh Is. v. UK; Marsh. Is. v. India: Marsh. Is. v. Pak.), Judgment (Int'l Ct. Justice Oct. 5, 2016) [hereinafter RMI v. UK; RMI v. India; RMI v. Pakistan].

[61] Apart from the UK, India, and Pakistan, these are the United States, China, Russia, France, North Korea, and Israel (which does not openly acknowledge its possession of nuclear weapons).

[62] The RMI made a declaration under Article 36(2) on March 15, 2013, deposited it with the UN secretary-general on April 24, 2013, and brought the cases a year later. The RMI invited the six other nuclear weapons states to accept the jurisdiction of the Court under Article 38 of the ICJ Statute. China expressly rejected this invitation and the other states made no reply. RMI v. UK, *supra* note 60, Judgment, paras. 1, 22.

[63] Nuclear Tests Cases (Austl. v. Fr.) 1974 ICJ Rep. 253 (Dec. 20); (N.Z. v. Fr.) 1974 ICJ Rep. 457 (Dec. 20).

[64] Request for an examination of the situation in accordance with paragraph 63 of the Court's judgment of December 20, 1974 in the Nuclear Tests Case (N.Z. v. Fr.), Order, 1995 ICJ Rep. 288 (Sept. 22).

[65] Legality of the Use or Threat of Nuclear Weapons, Advisory Opinion,1996 ICJ Rep. 226, para. 105(E) (July 8) [hereinafter Nuclear Weapons Advisory Opinion]. "[I]n view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake." *See* Gleider Hernandez, The International Court of Justice and the Judicial Function 266–67 (2014).

[66] Legality of the Use or Threat of Nuclear Weapons, *supra* note 65, Decl., Bedjaoui, J.

[67] Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, 21 UST 483, 729 UNTS 161 (entered into force Mar. 5, 1970). The UK has been a party since its entry into force in 1970; the RMI acceded to the treaty in 1995.

[68] RMI v. UK, *supra* note 60, Judgment, paras. 11–12.

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faith and bring to a conclusion negotiations leading to nuclear disarmament and that it had taken actions to qualitatively improve its nuclear weapons system and to maintain it for the indefinite future. The RMI also asserted that the UK had failed to perform in good faith its obligations under the NPT and under customary international law by: modernizing, updating, and upgrading its nuclear weapons capacity; maintaining its declared nuclear weapons policy for an unlimited period of time; and effectively preventing the great majority of non-nuclear weapons states parties to the treaty from fulfilling their part of the obligations under Article VI and customary international law with respect to nuclear disarmament and cessation of the nuclear arms race. It asked the Court to order the UK to take all necessary steps to comply with its obligations under Article VI of the NPT and under customary international law within one year of the Judgment, including the pursuit of negotiations in good faith aimed at the conclusion of a convention on nuclear disarmament.

The cases against India and Pakistan were essentially the same as that against the UK, but they were based only on customary international law as neither India nor Pakistan was a party to the NPT. Moreover, the RMI accused India and Pakistan of the quantitative build-up, as well as the qualitative improvement, of their nuclear forces.[69] In this report, I will generally discuss the three cases together because the substance of the Court's judgments is, for the most part, identical. Further, some of the Separate and Dissenting Opinions are also essentially identical in all three cases.[70] There were, however, some salient differences between the pleadings of the parties. Pakistan was not willing to share its documents with the other respondents as India and the UK had requested, but it seems from the similarities in their pleadings that there was some cooperation between the UK and India.[71]

As mentioned above, it was in its case against the UK that the RMI came nearest to victory. The Court was evenly split by a vote of 8–8 on the crucial issue of the existence of a dispute, and the President of the Court, Ronny Abraham (France), gave the casting vote that there was no dispute. The Court then voted 9–7 that it could not proceed to the merits of the case.[72] It is interesting to note that the judges of the five permanent members of the UN Security Council, all nuclear weapons states, all said that the Court had no jurisdiction. In contrast, in the cases against India and Pakistan, the Court rejected the Application by the narrowest possible majority, in a vote of 9–7. The difference was due to Judge Yusuf who regretted that the Court had not distinguished between the cases.[73] He said that there was an incipient dispute in the case against the UK, resulting from the UK's course of conduct. This dispute had fully crystallized during the proceedings. For him, this was an important feature that distinguished the case against the UK from those against Pakistan and India.[74] The UK had voted against all attempts in the UN General Assembly to call for the immediate commencement of negotiations on a convention on nuclear disarmament or to ensure concrete follow-up to the

[69] RMI v. India, *supra* note 60, Judgment, para. 1; RMI v. Pakistan, *supra* note 60, Judgment, para. 1.

[70] RMI v. UK, *supra* note 60, Sep. Op., Owada, J.; Decls. Abraham, J., Xue, J., Donoghue, J., Gaja, J.

[71] RMI v. Pakistan, *supra* note 60, Judgment, para. 6. Pakistan did not seek the appointment of an ad hoc judge; it did not make any oral pleadings.

[72] Judge Tomka voted with the minority that there was a dispute, but joined the majority in holding that the Court could not proceed to the merits (on the basis that the case was inadmissible because of the absence of the other nuclear powers in the proceedings). RMI v. UK, *supra* note 60, Sep. Op., Tomka, J., paras. 33–41.

[73] RMI v. UK, *supra* note 60, Diss. Op., Yusuf, J., para. 2.

[74] *Id.*, para. 32.

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Nuclear Weapons Advisory Opinion. It had made many public statements in justification of its position.[75] In contrast, there was no course of conduct in positive opposition to disarmament negotiations by India and Pakistan.[76] Judge Yusuf's questionable reliance on India and Pakistan's public statements, in which they pay lip service to disarmament rather than on their actual expansion of their nuclear arsenals, follows the approach of the majority in this case.

The Court began all three cases with a brief exposition of the historical background. Since the creation of the UN, and in line with its Purposes set forth in Article 1 of the Charter, the issue of disarmament had been central to the organization's concerns. From 1954, the General Assembly had regularly called for a convention on nuclear disarmament. The NPT entered into force in 1970 and was based on the strategic bargain that non-nuclear-weapon states agreed not to acquire nuclear weapons and nuclear-weapon states agreed to negotiate their elimination.[77] Article VI of the NPT, the provision at the core of the case against the UK, provides:

> 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 concern.

In 1996, the ICJ released its Advisory Opinion in the *Nuclear Weapons* case. It said there that the obligation set forth in Article VI went beyond a mere obligation of conduct and was an obligation to achieve a precise result—nuclear disarmament in all its aspects.[78] And in the operative part, the Court held unanimously 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."[79] The General Assembly has passed resolutions every year since the Advisory Opinion calling on all states to fulfill that obligation.

The Court acknowledged that the RMI had special reasons for concern about nuclear disarmament: it was a former Trust Territory of the United States, which had carried out sixty-seven nuclear weapons test explosions in the Marshall Islands between 1946 and 1958.[80] However, the RMI did not bring the case as an injured state, though it stressed that it was a specially affected state because of its history. It relied on the right to bring an action for violation of obligations owed to the international community, *erga omnes* obligations. In its Application, it referred to the Court's statement in the *Nuclear Weapons* Advisory Opinion that nuclear disarmament was an objective of vital importance to the whole international community, and argued that this was tantamount to saying that the obligation in Article VI was an obligation *erga omnes*.[81] Every state had an interest in its timely performance

[75] *Id.*, paras. 48–60.

[76] *Id.*; *see also* RMI v. Pakistan, *supra* note 60, Decl., Yusuf, J., paras. 23–30.

[77] *See* RMI v. UK, Application Instituting Proceedings, para. 82 (Int'l Ct. Justice Apr. 24, 2016) [hereinafter RMI v. UK, Application].

[78] Nuclear Weapons Advisory Opinion, *supra* note 65, para. 99.

[79] *Id.*, para. 105(2)(F).

[80] *See* RMI v. UK, *supra* note 60, Judgment, para. 44. For a history of the tests, see RMI. v. UK, Verbatim Record, ICJ Doc. CR 2016/5, at 11, paras. 21–29 (Int'l Ct. Justice Mar. 11, 2016) [hereinafter RMI v. UK, Verbatim Record].

[81] RMI v. UK, Application, *supra* note 77, para. 85.

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and a corresponding legal obligation to help to bring it about. In its Memorial, the RMI developed this argument regarding standing.[82] It now asserted an interest in bringing the case because of its former experience with nuclear explosions, as a party to the NPT, an interdependent treaty whose "breach is 'of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation,'" and as a member of the international community reacting to a breach of an *erga omnes* obligation.[83] The RMI invoked the Court's famous dictum in *Barcelona Traction*,[84] where it first asserted the existence of *erga omnes* obligations, and its revolutionary judgment in *Belgium v. Senegal*, where it allowed for the implementation of those rights.[85] The RMI claimed that obligations *erga omnes* could arise under customary international law as well as treaty, and it found support for its position in the International Law Commission's (ILC) Articles on State Responsibility.

Pakistan directly challenged the RMI's standing to enforce *erga omnes* obligations, and argued that NPT Article VI was not an *erga omnes* obligation.[86] The UK and India did not take this approach. Instead, India argued that if the obligation to negotiate on disarmament was an *erga omnes* obligation, the Court could not hear the case in the absence of indispensable parties.[87] Both India and the UK argued that the case could not be decided without the participation of all nuclear weapons states,[88] and that the case could have no useful outcome in the absence of the other nuclear weapons states.[89] They quoted the statement in the *Nuclear Weapons* Advisory Opinion that "any realistic search for general and complete disarmament, especially nuclear disarmament, necessitates the cooperation of all states." Judges Tomka[90] and Xue[91] were sympathetic to this argument; they agreed that the cases were not bilateral and so were not admissible. Judge Xue reasserted the position she had taken in *Belgium v. Senegal*,[92] that the issue of standing to bring claims for violations of *erga omnes* obligations had yet to be developed in international law.[93] Even Judge Crawford, the ILC's former Special Rapporteur on State Responsibility, addressed this issue only very

[82] RMI v. UK, RMI Memorial, paras. 26–28, 103–10 (Int'l Ct. Justice Mar. 16, 2015) [hereinafter RMI v. UK, RMI Memorial].

[83] *Id.*, para. 28. In its cases against India and Pakistan, the RMI argued that the *erga omnes* obligation was customary in nature. RMI v. Pak., RMI Memorial, para. 33 (Int'l Ct. Justice Jan. 12, 2015).

[84] Barcelona Traction, Light and Power Company Limited (Belg. v. Spain), Judgment, 1970 ICJ REP. 32, para. 33 (Feb. 5).

[85] Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), Judgment, 2012 ICJ REP. 422, para. 67 (July 20) [hereinafter Belg. v. Sen.].

[86] RMI v. Pak., Pakistan Counter-Memorial, para. 8.50–8.51 (Int'l Ct. Justice Dec. 1, 2015) [hereinafter RMI v. Pakistan, Pakistan Counter-Memorial]. *See also* RMI v. Pakistan, *supra* note 60, Diss. Op., Cançado Trindade, J., para. 17.

[87] RMI v. India, India Counter-Memorial, paras. 27, 34–42 (Int'l Ct. Justice Sept. 16, 2015) [hereinafter RMI v. India, India Counter-Memorial].

[88] RMI v. UK, UK Preliminary Objections, paras. 83–103 (Int'l Ct. Justice June 15, 2015) [hereinafter RMI v. UK, UK Preliminary Objections]; RMI v. India, India Counter-Memorial, *supra* note 87, paras. 27–42.

[89] RMI v. UK, UK Preliminary Objections, *supra* note 88, paras. 104–12; RMI v. India, India Counter-Memorial, *supra* note 87, paras. 88–92.

[90] RMI v. UK, *supra* note 60, Sep. Op., Tomka, J., paras. 31–41.

[91] RMI v. UK, *supra* note 60, Decl., Xue, J., para. 9.

[92] Belg. v. Sen., *supra* note 85, Diss. Op., Xue, J., paras. 12–23.

[93] Interestingly she had not raised this concern in *Whaling in the Antarctic* (Austl. v. Japan: N.Z. Intervening), 2014 ICJ REP. 226 (Mar. 31).

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briefly. He said that "disputes can crystallize in multilateral fora involving a plurality of States" and that states can be parties to disputes about obligations in the performance of which they have no specific material interests, as was clear from Article 48 of the ILC Articles on State Responsibility.[94] He did not go into the issue of whether the obligations in these three cases were *erga omnes* obligations.

The Court itself did not address this question of standing.[95] It did not consider whether the duty to negotiate nuclear disarmament was actually an *erga omnes* obligation under the NPT and in customary international law. In its Memorial, the RMI argued that there was a dispute,[96] and when this was challenged by the respondent states in their Counter-Memorials, it addressed these challenges in its oral pleadings.[97] However, it did not argue that their challenges were misconceived because it was seeking to enforce *erga omnes* obligations. This enabled the Court to reject the case simply on the basis that there were no such disputes; it did not address the question whether the strict tests it applied to determine the existence of a dispute were appropriate in a case based on *erga omnes* obligations.[98] Considerable uncertainty about the scope and enforcement of *erga omnes* obligations remains.[99]

The central issue in the judgment was thus the existence of a dispute. The UK argued there was no "justiciable dispute."[100] India and Pakistan said that there was "no legal dispute."[101] The Court first went thought its substantial jurisprudence, from the *Mavrommatis* case, which set out the basic position that "a dispute is 'a disagreement on a point of law or fact, a conflict of legal views or interests . . . ,'" to its most recent cases.[102] It repeated the well-established position that the claim of one party must be positively opposed by the other. The two sides must hold clearly opposite views concerning the question of the performance or non-performance of certain international obligations. The existence of a dispute is a matter of substance, and not a question of form or procedure: prior negotiations are not required for jurisdiction under Article 36(2) unless one of the declarations so provides; a formal protest is not a necessary condition for the existence of a dispute; and notice of intention to file a case is not necessary. Whether a dispute exists is a matter for objective determination by the Court. The Court takes into account any statements or documents exchanged between the parties, as well as any exchanges in multilateral settings. The conduct of the parties may also be relevant,

[94] RMI v. UK, *supra* note 60, Diss. Op., Crawford, J., paras. 20–22.

[95] Similarly, the Court had not raised this issue in the *Whaling* case, *supra* note 93. *See* Christine Gray, *The 2014 Judicial Activity of the ICJ*, 109 AJIL 583 (2015).

[96] RMI v. UK, RMI Memorial, *supra* note 82, paras. 95–102.

[97] RMI v. UK, Verbatim Record, *supra* note 80, paras. 1–21.

[98] *See* Federica Paddeu, *Multilateral Disputes in Bilateral Settings: International Practice Lags Behind Theory*, 76 CLJ 1 (2017), for a critical account.

[99] *See* Gleider Hernandez, *supra* note 65, at 224–29; Christian Tams & Antonios Tzanakopoulos, *Barcelona Traction at 40*, 23 LEIDEN J. INT'L L. 781 (2010).

[100] RMI v. UK, *supra* note 60, Judgment, paras. 26, 36–40. Judge Yusuf was very critical of this "legal relic," an old and controversial concept, used to distinguish political disputes from legal ones. RMI v. UK, *supra* note 60, Diss. Op., Yusuf, J., paras. 10–13.

[101] RMI v. India, *supra* note 60, Judgment, para. 22; RMI v. Pakistan, *supra* note 60, Judgment, para. 22.

[102] RMI v. UK, *supra* note 60, Judgment, paras. 37–40. Judge Owada in his Separate Opinion, RMI v. UK, *supra* note 60, Sep. Op., Owada, J., para. 9, calculated that there had been nineteen cases on this question in the history of the PCIJ and ICJ. On the increasing trend for the Court to refer to its own jurisprudence, see Wolfgang Alschner & Damien Charlotin, *The Growing Complexity of the ICJ's Self-Citation Network: Institutional Achievement or Access-to-Justice Concern?* (University of Cambridge Faculty of Law Research Paper No. 59/2016, 2016).

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especially when there have been no diplomatic exchanges. The existence of a dispute may be inferred from the failure of a state to respond to a claim in circumstances where a response is called for.

All these statements derived from the Court's jurisprudence are entirely orthodox and uncontroversial. They show the Court's flexible, pragmatic approach in the past. It is in paragraph 41 that the signs of a new, strict approach first appeared. Here the Court said that a dispute exists "when it is demonstrated, on the basis of evidence, that the respondent was aware, or could not have been unaware that its views were 'positively opposed' by the applicant." It cited two recent cases in support of this position: *Alleged Violations* (discussed above), and *Georgia v. Russia*.[103] The Court did not say at this stage that awareness was a *necessary* condition for the existence of a dispute, as opposed to one possible way of establishing the existence of a dispute. However, the reference to the judgment in *Alleged Violations* as authority on this point—a point that turned out to be crucial in the *Marshall Islands* cases[104]—is open to serious criticism. The problem was that the Court rendered judgment in *Alleged Violations* on March 17, 2016, that is, *after* the end of the oral proceedings in the *Marshall Islands* cases on March 16, 2016. It does not seem satisfactory that the Court should rely on its judgment in *Alleged Violations* when no opportunity had been given to the parties to consider the Court's approach in that case. Judge Bennouna in his Dissenting Opinion was rightly critical of this aspect of the Court's judgment.[105]

As part of their argument that there was no dispute, the UK and India set out at some length a surprising, and entirely specious, argument on the basis of the principle set out in Article 43 of the ILC Articles on State Responsibility—the principle that prior notification of a claim was necessary.[106] The Court not surprisingly rejected this in summary fashion. It noted that the ILC's Commentary specified that the present articles "are not concerned with questions regarding the jurisdiction of international courts and tribunals, or in general with the conditions for the admissibility of cases brought before such courts or tribunals."[107] The Court had in other cases consistently rejected the view that notice or prior negotiations were required under Article 36(2) of the Statute, unless one of the declarations so provided.[108]

The RMI sought to demonstrate that it had a dispute against the UK in four ways: its statements in multilateral fora; the very filing of the application and the positions expressed in the

[103] Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georg. v. Russ.), Preliminary Objections, Judgment 2011 ICJ REP. 70, paras. 61, 87, 104 (Apr. 1). These paragraphs do not obviously support the Court's position as to the existence of an awareness test. Moreover *Georgia v. Russia* was not an Optional Clause case. The Court in the Marshall Islands cases did not consider whether it was appropriate to refer to Article 36(1) cases as authoritative with regards to the question whether there was a dispute under Article 36(2). *See* RMI v. UK, *supra* note 60, Sep. Op., Tomka, J., para. 10.

[104] RMI v. UK, *supra* note 60, Judgment, paras. 52, 57.

[105] Judge Crawford noted this fact, and also argued convincingly that the *Alleged Violations* case was actually not authority for the objective awareness requirement that the Court derived from it. RMI v.UK, *supra* note 60, Diss. Op., Crawford, J., paras. 4–6.

[106] RMI v. UK, UK Preliminary Objections, *supra* note 88, paras. 6, 29–44.

[107] RMI v. UK, *supra* note 60, Judgment, para. 45.

[108] *See also* the strong rejections of the UK's position in RMI v. UK, *supra* note 60, Sep. Op., Tomka, J., para. 12; Diss. Op., Cançado Trindade, J., para. 13. However, as Judge Bedjaoui pointed out, the Court later revived the notification requirement in the new guise of the "awareness test." RMI v. UK, *supra* note 60, Diss. Op., Bedjaoui, J., paras. 26–27.

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proceedings; the UK's voting records on nuclear disarmament in multilateral fora;[109] and the UK's conduct before and after the filing of the application. The Court discussed the first of these at some length.[110] As regards the RMI's two statements in multilateral fora, the Court paid particular attention to the content of the statements and the identity of the intended addressees and held that because the statements were general and did not allege that the UK was in breach of its legal obligations, they did not refer to the subject matter of a claim with sufficient clarity to enable the UK to identify that there was a dispute with regard to that subject matter, and did not call for a specific reaction by the UK. The Court concluded that, "it cannot be said that the United Kingdom was aware, or could not have been unaware, that the Marshall Islands was making an allegation that the United Kingdom was in breach of its obligations."[111] Here the Court applied the "awareness" test with decisive effect.[112]

In contrast, the dissenting judges did not treat the lack of specific mention of the respondent state as decisive, stating that because there were so few nuclear weapons states, it was obvious that the statements were addressed to each of them. It was not necessary to single them out individually by name.[113] They were also willing to accept that the UK's voting record in multilateral fora on nuclear disarmament and its conduct in declining to cooperate with certain diplomatic initiatives, in failing to initiate any disarmament negotiations, and in replacing and modernizing its nuclear weapons, together with its statements that its conduct was consistent with its treaty obligations, justified a finding that the views of the parties were in opposition. For Judge Bedjaoui, the fact that the disarmament obligations in the NPT (which he saw as an unequal treaty) and in the *Nuclear Weapons* Advisory Opinion had still not been implemented demonstrated the existence of an ongoing dispute.[114]

However, the Court said that "considerable care [was] required before inferring" the existence of a legal dispute from votes on resolutions before political organs.[115] A state's vote cannot by itself be taken as indicative of the position of that state on each and every proposition within a resolution, let alone of the existence of a legal dispute between that state and another state regarding one of those propositions. Moreover, none of the RMI's statements offered any particulars regarding the UK's conduct. The Court's conclusion was that

> [o]n the basis of such statements it cannot be said that the United Kingdom was aware, or could not have been unaware, that the Marshall Islands was making an allegation that the United Kingdom was in breach of its obligations.[116]

Therefore, there was no dispute and the Court did not have jurisdiction.

[109] Unlike the UK, India and Pakistan had spoken and voted in favor of disarmament. The dissenting judges nevertheless said that their conduct in maintaining and upgrading their nuclear weapons since 1998 allowed the inference that there was a dispute.

[110] RMI v. UK, *supra* note 60, Judgment, paras. 48–52.

[111] *Id.*, para. 52.

[112] The UK had put forward this test in its Preliminary Objections. RMI v. UK, Preliminary Objections, *supra* note 88, para. 44.

[113] RMI v. UK, *supra* note 60, Diss. Op., Sebutinde, J., para. 29; Diss. Op., Cançado Trindade, J., paras. 18–19; Diss. Op., Crawford, J., para. 26; Diss. Op., Bedjaoui, J., paras. 28–29.

[114] RMI v. UK, *supra* note 60, Diss. Op., Bedjaoui, J., paras. 59–68.

[115] RMI v. UK, *supra* note 60, Judgment, para. 56.

[116] *Id.*, para. 57.

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Many of the dissenting judges expressed very strong criticism of the Court's approach. For Judge Robinson, it was "a conspicuous aberration and an unwelcome deviation from the Court's long-applied position on this question."[117] For Judge ad hoc Bedjaoui, the Court's retreat into formalism would have a cascade of undesirable consequences.[118] They and other dissenting judges stressed the role of the Court as the principal judicial organ of the UN in the maintenance of international peace and security. It should have followed its traditional flexible approach to the question of whether there was a dispute. In particular, they were concerned that the Court's focus on the date of the Application was too restrictive. The Court cited *Alleged Violations* and *Georgia v. Russia* as authority that *in principle* the date for determining the existence of a dispute is that on which the Application is submitted to the Court.[119] Subsequent conduct may confirm the existence of a dispute, clarify its subject matter, or determine whether the dispute has disappeared as of the time when the Court makes its decision. However, on the facts of the case, neither the Application nor the parties' subsequent conduct and statements during the judicial proceeding enabled the Court to find that the condition of the existence of a dispute had been fulfilled. The dissenting judges stressed that the words "in principle" made it clear that this was not an absolute rule, and argued that the Court should have followed its previous flexible approach.[120]

The dissenting judges expressly rejected the "awareness" test because it was inconsistent with the Court's jurisprudence, and because the cases cited by the Court to support the test did not actually do so. Awareness had not actually been identified as a criterion for the existence of a dispute in those cases.[121] Several judges also criticized the "awareness" test for its subjective nature.[122] "It plunges us, quite unnecessarily, into the murky legal world of the state of mind of a State."[123] The Court had rejected the notice requirement, but in raising a precondition of awareness, reintroduced it by the backdoor.[124] Some judges also argued that the adoption of the "awareness" test undermined the principle of judicial economy by inviting submissions of second applications for the same dispute.[125] If an "awareness" requirement is demanded, the applicant state may be able to fulfill such a condition at any time by instituting fresh proceedings before the Court. If the UK was not aware of the RMI's claims, a simple note from the RMI would make it so aware. In earlier cases, such as *Nicaragua v. USA*,[126] the Court had followed the principle of the sound administration of justice; it had refused to

[117] RMI v. UK, *supra* note 60, Diss. Op., Robinson, J., para. 68.

[118] RMI v. UK, *supra* note 60, Diss. Op., Bedjaoui J. ad hoc, paras. 70–87.

[119] RMI v. UK, *supra* note 60, Judgment, para. 42 (italics added).

[120] *See, e.g.*, RMI v. UK, *supra* note 60, Sep. Op., Tomka, J., paras. 18–32; Diss. Op., Bedjaoui, J., para. 32; Diss. Op., Robinson, J., paras 41, 45–46, 49; Diss. Op., Crawford, J., para. 11.

[121] *See* RMI v. UK, *supra* note 60, Diss. Op., Bennouna, J., para. 3; Diss. Op., Yusuf, J., paras 21, 22; Diss. Op., Crawford, J., paras. 4–6, 19; Diss. Op., Robinson, J., paras. 26–40; Diss. Op., Sebutinde, J., paras. 15, 30; Diss. Op., Cançado Trindade, J., para. 20. Even one of the judges in the majority, Judge Bhandari, did not agree with this test. RMI v. UK, *supra* note 60, Sep. Op., Bhandari, J., paras. 9–15.

[122] *See, e.g.*, RMI v. UK, *supra* note 60, Diss. Op., Yusuf, J., para. 15; Diss. Op., Bennouna, J., paras. 5–6.

[123] RMI v. UK, *supra* note 60, Diss. Op., Robinson, J., para. 24; *see also* Diss. Op., Sebutinde, J., paras. 30–31; Diss. Op., Bedjaoui, J., para. 31; Diss. Op., Crawford, J., paras. 4–6.

[124] RMI v. UK, *supra* note 60, Diss. Op., Robinson, J., para. 24.

[125] RMI v. UK, *supra* note 60, Diss. Op., Yusuf, J., para. 24; Diss. Op., Bennouna, J., para. 4; Sep. Op., Tomka, J., paras. 25–26; Diss. Op., Robinson, J., paras. 52–55.

[126] Military and Paramilitary Activities in and Against Nicaragua, (Nicar. v. U.S.), Jurisdiction and Admissibility,1984 ICJ REP. 392 (Nov. 26).

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declare itself incompetent when it was possible for the Applicant to file a new application to remedy a procedural or other defect. Judge Bedjaoui warned of a danger if the Court did not assert jurisdiction: on December 31, 2014, the UK had made a new reservation to its acceptance of the Optional Clause to exclude "any dispute which is substantially the same as a dispute previously submitted to the Court by the same or another party." This prevented the RMI from ever going back to the Court with respect to the current dispute.[127] It was now or never for the Court to decide the case.

The casting vote on the existence of a dispute was given by Judge Abraham (France). There was a certain piquancy in this action because he had in earlier cases argued strongly against the position now adopted by the Court. But now in the *Marshall Islands* cases, Judge Abraham dramatically shifted his views: he would follow the Court's approach in *Georgia v. Russia*, *Belgium v. Senegal*, and *Alleged Violations*, even though he had himself argued against the Court's approach in the first two of those cases. He now said that the date of the institution of the proceedings was the crucial date, and that it was necessary that a dispute had been revealed by exchanges between the parties before that date. The respondent state must not discover the existence of a claim against it in the document instituting proceedings; it had to have been informed of it beforehand.[128]

In explanation of his radical shift he said,

> I nonetheless take the view that even if a judge has expressed reservations, or indeed his disagreement, at the time the Court established its jurisprudence, once the Court has done so, he must consider himself to be bound by it thereafter (not legally of course, but morally) just as much as if he had agreed with it.[129]

It is a judicial imperative that the Court "must be highly consistent in its jurisprudence, both in the interest of legal security and to avoid any suspicion of arbitrariness."[130] He went on to say,

> I am not sure that the Court was right, with its *Georgia v. Russian Federation* and especially *Belgium v. Senegal* Judgments, to make a significant change to its earlier approach to the condition relating to the existence of a dispute. But given that it did so by adopting a clear and well-considered solution, there would be no justification, to my mind, for it to depart from that course now.[131]

Accordingly, he had changed his position in *Alleged Violations*, and he voted with the majority now. This reasoning does not seem entirely persuasive, and Judge Abraham's willingness to abandon his earlier strongly argued position because the Court had (allegedly) changed its approach in three cases contrasts with the famous persistence of Judge Oda (Japan) in maintaining his firm commitment to a strict interpretation of the

[127] RMI v. UK, *supra* note 60, Diss. Op., Bedjaoui, J., paras 37, 48, 70–71. *See also*, RMI v. UK, Verbatim Record, ICJ Doc. CR/2016/9, at 12, paras. 7–9 (Int'l Ct. Justice Mar. 16, 2016).
[128] RMI v. UK, *supra* note 60, Decl., Abraham, J., para. 4.
[129] *Id.*, para. 9.
[130] *Id.*, para. 10.
[131] *Id.*, para. 12.

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dispute requirement, over twenty-seven years, in the face of the Court's flexible approach.[132]

The Court did not address the other preliminary objections of the respondents. These were based on: first, the absence of essential third parties; second, the reservations of all three respondent states;[133] and third, the argument that a judgment would have no practical consequences. Some judges in the majority disagreed with this approach. They recognized that it was taken on the basis of judicial economy, as the Court had already decided it had no jurisdiction because of the absence of a dispute. But if the cases were to be brought again—on the basis that the "awareness" test was now satisfied—it would have to consider these arguments.[134]

It is difficult to resist the view that a majority of the ICJ neither wanted to hear this politically sensitive case nor, in all probability, did it want to find a violation by the UK (and therefore, by implication, by other nuclear weapons states) of the obligation to negotiate nuclear disarmament. Just as a majority of the Court had not wanted to hear the *Georgia v. Russia* case arising out of the 2008 conflict between Russia and Georgia, and just as in the future the Court may wish to avoid a decision on a similar case brought by Ukraine against Russia in 2017, so in these cases it used the absence of a dispute (under its new strict "awareness" test) as a way of escape.

Immunities and Criminal Proceedings (Equatorial Guinea v. France)

Finally, Equatorial Guinea brought a case against France, the latest in a series of cases on state immunity from criminal proceedings.[135] It arose out of French efforts, as part of a global movement set in motion by the work of NGOs, to recover money and assets looted by state officials from developing states. In this unedifying story, Teodoro Nguema Obiang Mangue (Obiang), the son of the longest-serving president in the world, with the rank of vice-president of Equatorial Guinea, was accused of enriching himself at the expense of the impoverished people of his country and of investing misappropriated funds in France. Due to these allegations, he was subjected to criminal proceedings in France. The pictures of luxury cars—including two Ferraris, three Bugattis, two Bentleys, and a Maserati—works of art, and expensive suits being taken by French officials from 42 Avenue Foch attracted worldwide attention.[136] France claimed that this property on the most expensive street in Paris was initially purchased by Obiang out of the proceeds of the offenses under investigation, and then subsequently transferred by him to Equatorial Guinea. Equatorial Guinea asserted that Obiang had sovereign immunity and that 42 Avenue Foch was inviolable diplomatic premises. It brought a case against France for violation of its rights and requested the indication

[132] *See* JUDGE SHIGERU ODA AND THE PATH TO JUDICIAL WISDOM 147–62 (Edward McWhinney & Mariko Kawano eds., 2006).

[133] Pakistan relied on its domestic jurisdiction reservation to make the doubtful claim that "Pakistan's nuclear programme is a matter of Pakistan's defence policy, which falls within Pakistan's domestic jurisdiction. It is not to be called into question by any court . . . ." RMI v. Pakistan, Pakistan Counter-Memorial, *supra* note 86, para. 7.45.

[134] RMI v. UK, *supra* note 60, Decls., Gaja, J.; Xue, J., para 9; Sep. Op., Bhandari, J., paras. 14–16.

[135] Immunities and Criminal Proceedings (Eq. Guinea v. Fr.), Judgment (Int'l Ct. Justice Dec. 7, 2016) [hereinafter Eq. Guinea v. Fr.].

[136] *See* Eq. Guinea v. Fr., Verbatim Record, ICJ Doc. CR 2016/15, at 21, para. 21 (Int'l Ct. Justice Oct. 18, 2016).

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of provisional measures. The French position was that "Equatorial Guinea has had the bright idea of calling the premises at 42 Avenue Foch its 'embassy' in order to help one of its nationals escape from criminal proceedings and the potential consequences for the assets he had accumulated there."[137]

The Court unanimously ordered provisional measures. It expressly reaffirmed that its order was binding, following its landmark decision in *LaGrand*.[138] It began by considering whether it had prima facie jurisdiction under Article 4 of the Convention against Transnational Organized Crime (the Palermo Convention). The Palermo Convention obliges states to criminalize certain transnational offences such as money laundering. Article 4(1) is a general provision: "States Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States, and that of non-intervention in the domestic affairs of other States." The Court held that this article does not appear to create rules about immunities of holders of high-ranking office, or to incorporate rules of customary international law. The alleged dispute concerned a distinct issue: whether the vice-president enjoyed immunity *ratione personae* under customary international law, and whether France had violated that immunity by instituting proceedings against him. Therefore, there was no prima facie jurisdiction under the Palermo Convention.[139] This interpretation follows the approach in the *Oil Platforms* case where the Court had refused to read wider international law obligations into a general provision in a friendship treaty.[140]

The fact that there was a disagreement between the judges on Article 4 was revealed only in the separate opinions and declarations. These made clear that Judges Xue, Gevorgian, and Kateka thought that there was actually a dispute under this article.[141] Judge Gaja accordingly called for greater transparency: he said that "divergent views were expressed concerning the request for immunity" and that the Order should have made this clear.[142]

However, the Court unanimously found that there was prima facie jurisdiction under the Optional Protocol to the Vienna Convention on Diplomatic Relations; there was a dispute between the parties as to whether 42 Avenue Foch housed the premises of Equatorial Guinea's diplomatic mission and therefore enjoyed inviolability under Article 22 of the Vienna Convention.[143] The Court discounted French arguments that there was an abuse of process by Equatorial Guinea, and that its claim of inviolability for 42 Avenue Foch under Article 22 was a sham.

The Court then considered whether provisional measures were necessary to preserve the respective rights of the parties.[144] First, was the right claimed by Equatorial Guinea "plausible"?[145] This test was introduced by the Court in 2009 in *Belgium v. Senegal*:[146] provisional

[137] Eq. Guinea v. Fr., Verbatim Record, ICJ Doc. CR 2016/17, at 6, para. 12 (Int'l Ct. Justice Oct. 19, 2016).
[138] LaGrand Case (Ger. v. U.S.), Judgment, 2001 ICJ Rep. 466, paras. 92–110 (June 27).
[139] Eq. Guinea v. Fr., Order, paras. 31–50 (Int'l Ct. Justice Dec. 7, 2016) [hereinafter Eq. Guinea v. Fr., Order].
[140] Oil Platforms (Iran v. U.S.), Preliminary Objections, 1996 ICJ Rep. 803, paras 24–31 (Dec. 12).
[141] Eq. Guinea v. Fr., Order, *supra* note 139, Sep. Op., Xue, J.; Decl., Gevorgian, J.; Sep. Op., Kateka, J. ad hoc.
[142] Eq. Guinea v. Fr., Order, *supra* note 139, Decl., Gaja, J.
[143] Eq. Guinea v. Fr., Order, *supra* note 139, paras. 51–69.
[144] *Id.*, para. 71.
[145] *Id.*, para. 78.
[146] Belg. v. Sen., Provisional Measures, Order, 2009 ICJ Rep. 140, paras. 57–60 (May 28).

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measures were not to be indicated where there was no chance of success on the merits. Equatorial Guinea had claimed that it had used the building for its diplomatic mission from October 4, 2011. As part of the proceedings against Obiang, this building had been searched by French officials, and was subject to an order of attachment. France had acknowledged that from summer 2012, certain services of the Embassy appeared to have been transferred to 42 Avenue Foch. Therefore, Equatorial Guinea had a plausible right that the premises should be accorded the protections of Article 22, and protected from any intrusion.

Second, was there a real risk of irreparable prejudice to the rights of Equatorial Guinea?[147] The Court held that the order of attachment had created a risk of confiscation, and there was a continuous risk of intrusion because France did not accept that the building was diplomatic premises. There had been searches in 2011 and 2012, and it was "not inconceivable" that the building would be searched again at the request of a French tribunal. If this were to happen, and if it were to be established that the building was diplomatic premises, the daily activities of that mission would risk being seriously impeded, as a result of the presence of police or seizure of documents. Any infringement of Equatorial Guinea's rights might not be capable of remedy since it might not be possible to restore the situation to the *status quo ante*. The risk was imminent in that prejudice could occur at any moment. The Court was not persuaded by France's argument that its criminal procedures were so slow that there was no urgency, because there could be no confiscation of the property until after the final conclusion of proceedings, not to be expected until 2019.[148]

The Court ordered provisional measures that were different from those requested, as allowed under Article 75(2) of the Rules of Court, and as is common in recent cases. It held that

> France shall . . . take all measures at its disposal to ensure that the premises presented as housing the diplomatic mission of Equatorial Guinea at 42 Avenue Foch in Paris enjoy treatment equivalent to that required by Article 22 of the Vienna Convention, in order to ensure their inviolability.

This careful formulation may reflect a certain skepticism about Equatorial Guinea's claims, and was apparently chosen in order not to prejudge the merits of the case.[149]

II. Conclusion

The deep divisions in the Court in four of its five cases on jurisdiction and admissibility (the three *Marshall Islands* cases, and the *Delimitation* case) are striking. Such cases give the strong impression that the law is indeterminate and therefore may risk undermining the standing of the Court. On the surface, the divisions arose out of procedural legal questions—the test for the existence of a dispute and the application of *res judicata*—rather than substantive issues of international law, and so the seriousness of the risk may be significantly less. But the divisions reflect underlying differences about the role of the Court. The

[147] Eq. Guinea v. Fr., Order, *supra* note 139, paras. 82–91.

[148] *Id.*, para 86.

[149] Judge ad hoc Kateka objected to this form of words. Eq. Guinea v. Fr., Order, *supra* note 139, Sep. Op., Kateka, J. ad hoc, para. 30.

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separate and dissenting opinions openly address these issues, but, not surprisingly, the Court itself does not.

Thus, in the *Marshall Islands* cases, those in the minority, outvoted by the casting vote of the president, stressed the status of the Court as the principal judicial organ of the UN with a role to play in the maintenance of international peace and security. This perception of the role of the Court reinforced their determination to assert jurisdiction for the first time in a case concerning nuclear weapons, and to decide on an issue seen by several of them as crucial for the security of humanity—the duty to negotiate nuclear disarmament. Nuclear weapons states have been unable or unwilling to make progress on this project since the entry into force of the NPT in 1970. The unanimous call on all states "to pursue in good faith and bring to conclusion negotiations leading to nuclear disarmament" in the *Nuclear Weapons* Advisory Opinion (1996) remains far from fulfillment. In contrast, the majority were able to take a simple way out: the denial of the existence of a dispute. For the first time in the history of the Court, this was the sole ground for the rejection of jurisdiction. The judgment did not go into the question of whether the obligation to negotiate nuclear disarmament was an *erga omnes* obligation; it did not consider whether the test for the existence of a dispute should be less strict in such cases than in traditional bilateral disputes. It did not go into the other preliminary objections by India, Pakistan, and the UK—academically very interesting arguments on reservations, essential parties, and the need for a useful outcome. It did not consider whether it was obligatory under the NPT and customary international law to pursue unilateral nuclear disarmament without the other nuclear weapons states.

Moreover, the Court in the *Marshall Islands* cases used a problematic test for the existence of a dispute. Although it relied on earlier cases, including the *Alleged Violations* cases, to support the "awareness" test, it is not clear that they provide authority for such a dramatic change. There are obvious differences of approach between the *Marshall Islands* cases and *Alleged Violations*. In the latter, the Court did not specifically identify an "awareness" test, and insofar as it did use that language, it did so in order to assert the existence of a dispute. And in that case, it was willing to identify a dispute on the basis of only two statements; it also decided on the "real character" of the dispute before it and held that Nicaragua was not seeking to enforce the 2012 Judgment. In this case and in the *Delimitation* case, the Court avoided any examination of the inherent powers of the Court to follow up earlier judgments.

However, there is no consistent difference between those judges who are keen to assert jurisdiction and those who are more cautious. Some of those who voted for jurisdiction in the *Marshall Islands* cases voted against it in the *Delimitation* case where the majority, by the casting vote of the president, held that the doctrine of *res judicata* did not prevent the Court from deciding on the delimitation of the outer continental shelf, and playing an important role in the development of the law in this area. In all the cases the respondent states made arguments that the applicants were acting for improper motives: in the *Marshall Islands* cases the UK made a veiled threat to withdraw from the Optional Clause and warned that, if the Court went ahead to decide what it characterized as an "artificial" case, this would call into question the judicial function of the Court.[150] The RMI expressed unhappiness at this

[150] RMI v. UK, Verbatim Record, ICJ Doc. CR 2016/3, at 31, paras. 55–59 (Int'l Ct. Justice Mar. 9, 2016). The UK had already modified its optional clause declaration, *supra* note 127.

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threat.[151] India also spoke of the "artificiality and abusive character of the RMI's claim."[152] Pakistan accused the RMI of bringing the case in bad faith.[153] In the *Delimitation* case, Colombia argued that Nicaragua was guilty of an abuse of procedure;[154] in *Alleged Violations* Colombia claimed that Nicaragua was improperly seeking to enforce the Court's 2012 Judgment; in *Immunities and Criminal Proceedings* France said that Equatorial Guinea's request for provisional measures was a sham. These arguments did not appeal to the Court; their use may suggest that the respondents were not confident of victory on the merits.

[151] RMI v. UK, Verbatim Record, *supra* note 80, at 48, paras. 15–17.
[152] RMI v. India, India Counter-Memorial, *supra* note 87, para. 5.
[153] RMI v. Pakistan, Pakistan Counter-Memorial, *supra* note 86, paras. 3.1–3.5.
[154] Delimitation Case, Verbatim Record, ICJ Doc. CR 2015/26, at 9, para. 14 (Int'l Ct. Justice Oct. 5, 2015).

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