INTERNATIONAL DECISIONS

EDITED BY DAVID P. STEWART

International Court of Justice—jurisdiction—existence of dispute—Treaty on the Non-Proliferation of Nuclear Weapons—treaty interpretation—duty to negotiate—acceptance of compulsory jurisdiction

OBLIGATIONS CONCERNING NEGOTIATIONS RELATING TO CESSATION OF THE NUCLEAR ARMS RACE AND TO NUCLEAR DISARMAMENT (Marshall Islands v. United Kingdom). *At* http://www.icj-cij.org.

OBLIGATIONS CONCERNING NEGOTIATIONS RELATING TO CESSATION OF THE NUCLEAR ARMS RACE AND TO NUCLEAR DISARMAMENT (Marshall Islands v. Pakistan). *At* http://www.icj-cij.org.

OBLIGATIONS CONCERNING NEGOTIATIONS RELATING TO CESSATION OF THE NUCLEAR ARMS RACE AND TO NUCLEAR DISARMAMENT (Marshall Islands v. India). *At* http://www.icj-cij.org.
International Court of Justice, October 5, 2016.

In this trio of decisions, the International Court of Justice (ICJ or Court) rejected applications in which a small island state claimed that three larger states known to possess nuclear weapons had breached their international obligations to undertake and conclude negotiations leading to nuclear disarmament.[1] The Republic of the Marshall Islands, the Court acknowledged, had been the location of repeated nuclear weapons testing from 1946 to 1958, when the United States administered the archipelagic nation under the trusteeship system of the United Nations. The Court further recognized that the applicant, "by virtue of the suffering which its people endured as a result of it being used as a site for extensive nuclear testing programs, has special reasons for concern about nuclear disarmament" (para. 44). Nevertheless, it ruled that the cases could not go forward because the requisite legal dispute was absent at the time that the Marshall Islands filed its applications against India, Pakistan, and the United Kingdom.

[1] The Court simultaneously issued three separate judgments, all similarly titled, and all available at http://www.icj-cij.org. For ease and economy of reference, this note will focus on, and refer primarily to the text of, OBLIGATIONS CONCERNING NEGOTIATIONS RELATING TO CESSATION OF THE NUCLEAR ARMS RACE AND TO NUCLEAR DISARMAMENT (Marsh. Is. v. UK), Judgment (Oct. 5, 2016) (hereinafter *RMI v. UK*). As explained in the text, with a few exceptions *mutatis mutandis*, the opinions in each case are quite similar but do differ in some respects; where appropriate, references to the other two decisions—OBLIGATIONS CONCERNING NEGOTIATIONS RELATING TO CESSATION OF THE NUCLEAR ARMS RACE AND TO NUCLEAR DISARMAMENT (Marsh. Is. v. Pak.), Judgment (Oct. 5, 2016), and OBLIGATIONS CONCERNING NEGOTIATIONS RELATING TO CESSATION OF THE NUCLEAR ARMS RACE AND TO NUCLEAR DISARMAMENT (Marsh. Is. v. India), Judgment (Oct. 5, 2016)—will be indicated as "*RMI v. Pakistan*" and "*RMI v. India*," respectively. Where required, references to concurring and dissenting opinions are separately noted.

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The Court's ruling comprised three separate judgments, each upholding the respondents' objections, plus multiple separate opinions. Each decision revealed divisions, not only on the precise issue of the threshold for initiating a case before the Court, but also on the role of the Court itself. Overall, the judgments signaled that at least in disputes implicating difficult issues of geopolitics, the Court likely will continue to apply a cautious standard to the question whether an application may advance to adjudication on the merits. What is more, the United Kingdom's post-judgment amendment to its acceptance of ICJ jurisdiction seems likely, for the foreseeable future, to block new cases respecting nuclear weapons or disarmament.

The cases began on April 24, 2014, when the Republic of the Marshall Islands filed applications against nine states that it said possess nuclear weapons: China, the Democratic People's Republic of Korea, France, India, Israel, Pakistan, the Russian Federation, the United Kingdom, and the United States. The Court placed only the applications against India, Pakistan, and the United Kingdom on its General List, because only those states had recognized the Court's compulsory jurisdiction and none of the others had agreed to accept jurisdiction for purposes of the case (para. 22). In all three of the ensuing judgments, the Court ruled narrowly in favor of the respondents; indeed, in *Marshall Islands v. United Kingdom*, the margin was eight votes to eight, with the president's casting vote (para. 59).

At the center of this litigation was the 1968 Treaty on the Non-Proliferation of Nuclear Weapons, to which 191 states are parties, including the Marshall Islands and the United Kingdom, but excluding India and Pakistan.[2] Article VI of the Treaty states:

> Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.[3]

In its 1996 advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the Court had construed Article VI to impose upon states parties a "twofold obligation": "[T]here 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."[4] Later the same year, a UN General Assembly resolution urged "all States to fulfil that obligation immediately by commencing multilateral negotiations."[5]

The Marshall Islands' application asserted that the United Kingdom had neither pursued nor concluded good faith negotiations as required, but rather had taken actions to improve its nuclear weapons system and further had opposed efforts to initiate negotiations. The application thus claimed that the United Kingdom had breached its obligations as a matter of treaty-based and customary international law, and it asked the Court to order the respondent to "take all steps necessary to comply . . ." (paras. 11–12). The Marshall Islands' applications

[2] Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, 21 UST 483, 729 UNTS 161 [hereinafter Non-Proliferation Treaty]. For a list of states parties, see http://disarmament.un.org/treaties/t/npt.

[3] Non-Proliferation Treaty, Art. VI.

[4] *RMI v. UK*, *supra* note 1, para. 20, *quoting* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 ICJ Rep. 226, paras. 100, 105(2)(F) (July 8).

[5] GA Res. 51/45 M (Dec. 10, 1996). The UN General Assembly has enacted similar resolutions annually since 1996.

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against India and Pakistan made analogous assertions and requests; however, because those respondents are not states parties to the Non-Proliferation Treaty, the applications relied solely on customary international law.[6]

The United Kingdom raised five preliminary objections, the first being that "the Marshall Islands has failed to show that there was, at the time of the filing of the Application, a justiciable dispute between the Parties" respecting the alleged failure to pursue negotiations.[7] India and Pakistan raised similar sets of objections.[8] The Court resolved all three cases solely on the first objection.

Noting that Article 36(2) of its Statute confers jurisdiction in "legal disputes,"[9] the Court drew from its own decisions and those of its predecessor, the Permanent Court of International Justice, to define "dispute" as "a disagreement on a point of law or fact, a conflict of legal views or of interests," and to state that the existence of a dispute depended on a showing "that the claim of one party is positively opposed by the other."[10] The respondents argued that a party must give notice of its claim before filing an application, but the Court disagreed, describing its inquiry as one of substance rather than procedure—as an "objective determination by the Court which must turn on an examination of the facts" (paras. 38–39).[11] With regard to timing, the Court stated: "In principle, the date for determining the existence of a dispute is the day on which the application is submitted to the Court" (para. 42). It added that while conduct after the filing of the application may be "relevant . . . to confirm the existence of a dispute," such conduct alone cannot establish that a dispute exists (paras. 42–43). It thus held that the requisite dispute had not been established by the evidence proffered, which included statements made by the parties during the proceedings, divergences in the parties' votes on pertinent General Assembly resolutions, and conduct that the applicant characterized as the respondents' non-cooperation with certain disarmament initiatives (paras. 53–57).

The applicant's claim that a dispute did exist relied heavily on two statements predating the filing of the applications. First, in 2013 the Marshall Islands' Minister for Foreign Affairs had "'urg[ed] all nuclear weapons states to intensify efforts to address their responsibilities in moving towards an effect and secure disarmament'" (para. 28). Second, in February 2014, the Marshall Islands declared at the Second Conference on the Humanitarian Impact of Nuclear Weapons "'that States possessing nuclear arsenals are failing to fulfil their legal

[6] *RMI v. India*, *supra* note 1, paras. 1, 11; *RMI v. Pakistan*, *supra* note 1, paras. 1, 11.

[7] *RMI v. UK*, *supra* note 1, para. 23 (setting out, in addition to the first objection just quoted, four others, pertaining to treaty reservations, the absence of third-party nuclear-weapon states "whose essential interests are said to be engaged in the proceedings," and the assertion that a judgment on the merits "would have no practical consequence").

[8] *RMI v. India*, *supra* note 1, paras. 22–24 (using the term "legal dispute" rather than the term put forward by the United Kingdom, "justiciable dispute"); *RMI v. Pakistan*, *supra* note 1, paras. 22–24 (same).

[9] ICJ Statute Article 36(2) prescribes conditions for exercising the jurisdiction of the Court in all legal disputes concerning: "(a) the interpretation of a treaty; (b) any question of international law; (c) the existence of any fact which, if established, would constitute a breach of an international obligation; and (d) the nature or extent of the reparation to be made for the breach of an international obligation."

[10] *See, e.g.*, Mavrommatis Palestine Concessions (Greece v. Britain), Judgment No. 2, 1924 PCIJ (ser. A) No. 2, at 11; South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.), Preliminary Objections, Judgment, 1962 ICJ REP. 319, 328.

[11] India and the United Kingdom had sought to draw support for their notice claim from the Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries Thereto, Art. 43, *in* Int'l Law Comm'n Rep. on the Work of Its Fifty-Third Session, UN GAOR, 56th Sess., Supp. No. 10, at 43, UN Doc. A/56/10 (2001). *RMI v. UK*, *supra* note 1, paras. 27, 45.

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obligations'" to negotiate, and it insisted that "'[i]mmediate commencement and conclusion of such negotiations is required by legal obligation of nuclear disarmament resting upon each and every State . . .'" (para. 28).

In the view of the Court, these statements did not demonstrate a dispute within the meaning of Article 36(2). The Court deemed the first statement "hortatory" and insufficiently precise (para. 49). As for the second statement, the Court took note of the United Kingdom's absence from the 2014 conference—India and Pakistan were present—and further emphasized that the conference concerned "not specifically the question of negotiations with a view to nuclear disarmament, but the broader question of the humanitarian impact of nuclear weapons . . ." (para. 50). It added that the 2014 statement "does not specify the conduct of the United Kingdom that gave rise to the alleged breach" (*id.*)[12]

At this juncture, the Court articulated the standard underlying its decision: "[I]t 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" (para. 52). Reasoning that the Marshall Islands' statements had failed to provide "any particulars regarding the United Kingdom's conduct," the Court ruled that the awareness standard had not been met, and thus upheld the initial preliminary objection (para. 57).

Voting in favor of the United Kingdom were eight judges; another eight voted against.[13] The votes favoring India and Pakistan were nine to seven.[14] The Court further ruled that it could not proceed to the merits, by votes of nine to seven with respect to the United Kingdom and ten to six with respect to India and Pakistan.[15]

The separate submissions by individual members of the Court spanned many more than the twenty-or-so pages in each of the Court's three judgments. Indeed, all but two members of the Court appended a statement, and each of the three dissents filed by Judge Cançado Trindade consumed more than eighty pages. Immediately striking was the first separate submission, by President Abraham, who wrote that in the last decade, the Court had shifted away from a "flexible and pragmatic" approach and toward one that conditioned jurisdiction on proof of the existence of a dispute as of "the date of the institution of the proceedings . . . ."[16] Abraham previously had voted against this shift, yet joined the majority in these cases. He maintained that in the interest of consistency, "even if a judge has expressed reservations,

[12] In the two other judgments, the Court applied verbatim language to reach these same conclusions regarding the United Kingdom to the other two respondents, India and Pakistan, and thus upheld the analogous preliminary objection in each case.

[13] Voting for: President Ronny Abraham (France), along with Judges Hisashi Owada (Japan), Christopher Greenwood (United Kingdom), Xue Hanqin (China), Joan E. Donoghue (United States), Giorgio Gaja (Italy), Dalveer Bhandari (India), and Kirill Gevorgian (Russian Federation); voting against: Vice-President Abdulqawi Ahmed Yusuf (Somalia) and Judges Peter Tomka (Slovakia), Mohamed Bennouna (Morocco), Antônio Augusto Cançado Trindade (Brazil), Julia Sebutinde (Uganda), Patrick Lipton Robinson (Jamaica), and James Richard Crawford (Australia), as well as Judge ad hoc Mohammed Bedjaoui, a jurist and diplomat from Algeria chosen by the applicant, given that the permanent members of the Court do not include a Marshall Islands national.

[14] In both these cases, Judge Tomka added his vote to the majority.

[15] In all three cases, Vice-President Yusuf added his vote to the majority.

[16] *RMI v. UK*, *supra* note 1, Decl., Abraham, Pres., paras. 3–4.

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or indeed his disagreement, at the time the Court established its jurisprudence, once the Court has done so, he must consider himself bound by it thereafter (not legally, of course, but morally) . . . ."[17]

Likewise acknowledging a jurisprudential shift was Judge Donoghue, who explained that in her view, statements by the Marshall Islands did not permit an inference that each respondent "'was aware, or could not have been unaware'" of the applicant's claim.[18] In contrast, Judge Owada characterized the awareness standard as reflective of "an essential common denominator" in the Court's prior judgments; he applied a case-specific inquiry to conclude that "*even when taken as a whole*," the evidence did not establish the existence of a dispute.[19]

Meanwhile, Judge Xue allowed "it may be arguable" that since "by now the dispute is indeed crystallized[, f]or judicial economy, realism and flexibility seem called for under the present circumstances."[20] She nonetheless voted with the majority on the grounds that the evidence put forward by the Marshall Islands was "noticeably insufficient" and ran the risk of "'surprise' litigation," undesirable in a system aimed at peaceful settlement of disputes.[21] Xue further stated that the Marshall Islands had instituted the proceedings not "merely for the protection of its own interest," but "more the interest of the international community," a factor that invited consideration of "standing, *locus standi*, an issue that is yet to be developed in international law."[22] She, like Judges Gaja and Bhandari, wrote that the Court should have addressed other preliminary objections raised by the respondents.[23]

Common among the dissenting opinions were complaints that the Court's approach was unduly formalistic and that it injected a new, subjective criterion—awareness—into the dispute determination. For instance, Judge Crawford objected: "But a requirement of objective awareness is not to be found in the case law of the Court."[24] Judge Tomka criticized what he called the judgment's "very strict requirement," and asked: "Is it really the case that the" parties had no dispute about compliance with nuclear weapons disarmament, "and that they do not have such a dispute now?"[25] Several dissenters wrote movingly of the merits issue which, as Judge ad hoc Bedjaoui put it, "touches on nothing less than the survival of humanity."[26] Cançado Trindade faulted the Court as "[a]lways attentive and over-sensitive to the position of nuclear-weapon States," while Judge Robinson surmised that "it is as though the Court has

[17] *Id.*, para. 9. In contrast, Judge Cançado Trindade adhered to his earlier opposition on this point, and thus dissented from the judgment. *See RMI v. UK*, *supra* note 1, Diss. Op., Cançado Trindade, J., para. 13.

[18] *RMI v. UK*, *supra* note 1, Decl., Donoghue, J., para. 8.

[19] *RMI v. UK*, *supra* note 1, Sep. Op., Owada, J., paras. 13, 20 (emphasis in original).

[20] *RMI v. UK*, *supra* note 1, Decl., Xue, J., para. 4. *See also id.*, Diss. Op., Yusuf, VP, para. 60 (voting against the United Kingdom on the ground that in that case, a "nascent dispute has fully crystallized during the proceedings"). *But see RMI v. India*, *supra* note 1, Decl., Yusuf, VP, para. 32; *RMI v. Pakistan*, *supra* note 1, Decl., Yusuf, VP, para. 30 (finding no such dispute as to India or Pakistan).

[21] Decl., Xue, J., *supra* note 20, paras. 5–7.

[22] *Id.*, para. 8. In similar vein, Judge Tomka wrote that "the absence of other nuclear powers in the proceedings prevents the Court from considering the Marshall Islands' claims in their proper multilateral context, . . . " and concluded the application was inadmissible. *RMI v. UK*, *supra* note 1, Sep. Op., Tomka, J, para. 41.

[23] Decl., *supra* note 20, paras. 9–16; *RMI v. UK*, *supra* note 1, Decl., Gaja, J.; *RMI v. UK*, *supra* note 1, Sep. Op., Bhandari, J., paras. 1, 16–24 (providing as well an extended discussion of India's conduct).

[24] *See RMI v. UK*, *supra* note 1, Diss. Op., Crawford, J., para. 1.

[25] Sep. Op., Tomka, J., *supra* note 22, paras. 3, 18.

[26] *RMI v. UK*, *supra* note 1, Diss. Op., Bedjaoui, J., para. 1 (translation from French original by this author).

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written the foreword in a book on its irrelevance to the role envisaged for it in the peaceful settlement of disputes that implicate highly sensitive issues such as nuclear disarmament."[27]

Four months after these pronouncements, one of the respondents, the United Kingdom, informed the UN secretary-general of changes to its declaration recognizing the jurisdiction of the Court as compulsory. By this amendment, the United Kingdom will require six months' notice of another state's intention to file a claim against it in the Court, and furthermore will not accept jurisdiction of "nuclear disarmament and/or nuclear weapons" cases unless all other nuclear weapons states party to the Non-Proliferation Treaty also consent to the proceedings.[28]

* * * *

These decisions warrant careful consideration, and not just because the result signals a move toward higher thresholds for initiating cases in the International Court of Justice. Also noteworthy is the reasoning laid bare in an abundance of separate opinions, many of them drafted in unusually pointed language. Their rationales expose disagreement about the Court's role, particularly in contexts that Judge Owada aptly labeled "legal, though politically charged . . . ."[29]

Disagreement about the weight to give to precedent is apparent. In 2011, a former ICJ president explained that the Court's Statute rejects the common law principle of *stare decisis*, so that its judges are not bound to apply prior decisions.[30] Yet in the instant case the casting vote—entrenching a jurisprudential shift toward a stricter filing requirement—hinged on a consideration that a judge is "bound" as a "moral" matter. It is true that decades earlier, a president of the PCIJ posited, as the "two pillars of the judicial function," the "rational element" of "juridical logic" and the "moral element" of "justice."[31] Still, the invocation of a moral dimension in the instant cases is curious, not only because the newly accepted rule is of relatively recent vintage, but also because international lawyers tend to value a more relaxed view on precedent for the reason that it allows easier adaptation to changed circumstances in law and society.

Also curious, the jurisprudential shift in these cases was effected by an inquiry into whether each respondent "was aware, or could not have been unaware" of the existence of a dispute. Nearly all the members of the Court who submitted opinions effectively conceded the novelty

[27] *See* Diss. Op., Cançado Trindade, J., *supra* note 17, para. 27; *RMI v. UK*, *supra* note 1, Diss. Op., Robinson, J., para. 70.

[28] *See* Declarations Recognizing the Jurisdiction of the Court as Compulsory, United Kingdom of Great Britain and Northern Ireland (Feb. 22, 2017), *at* http://www.icj-cij.org/jurisdiction/?p1=5&p2=1&p3=3&code=GB. *See also* Sir Alan Duncan, Minister of State for Foreign and Commonwealth Affairs, Amendments to the UK's Optional Clause Declaration to the International Court of Justice: Written Statement – HCWS489 (Feb. 23, 2017), *at* https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2017-02-23/HCWS489.

[29] Sep. Op., Owada, J., *supra* note 19, para. 2.

[30] Gilbert Guillaume, *The Use of Precedent by International Judges and Arbitrators*, 2 J. INT'L DISPUTE SETTLEMENT 5, 6–12 (2011) (citing, inter alia, Article 38 of the Court's Statute).

[31] PCIJ, Series C: Acts and Documents Relating to Judgments and Advisory Opinions Given by the Court/Pleadings, Oral Arguments and Documents—Speeches Made and Documents Read Before the Court, No. 7-I, at 18 (translation of President Max Huber's original French version by this author), *quoted in* MOHAMED SHAHABUDDEEN, PRECEDENT IN THE WORLD COURT 6 (1996).

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of that standard. This scarcely surprises, given this statement in the leading treatise on the practice of the Court:

> Whether a dispute exists or not is a matter for objective determination by the Court. It is dependent neither upon the subjective assertion by one party that a dispute exists, nor upon an equally subjective denial by a party that a dispute exists.[32]

Further compounding matters is the negative phrasing of the standard: whether a party "could not have been unaware" (para. 52) of the existence of a dispute seems an inquiry not susceptible to easy determination.

The applicant in the instant cases marshaled evidence of its efforts to press for nuclear weapons disarmament on several occasions since its recognition as a UN member state in 1991, decades after its territory had been used for nuclear tests. Five years later, after the Court enunciated the obligation of states not only to conduct nuclear disarmament negotiations, but also to bring those negotiations to a conclusion. The obligation was announced as a construction of the Non-Proliferation Treaty; given the disposition of these applications, whether the obligation now constitutes a norm of customary international law norm remains an open question. At least one of the official statements on which the Marshall Islands relied cited the dual obligation articulated by the Court. Yet the Court applied its awareness standard to rule that the statements had failed to alert states of a legal dispute, and further that no subsequent events had altered matters. Capturing the strain in this result is Judge Tomka's protestation (by way of a rhetorical question) that by the time of filing there remained little doubt of the existence of a dispute. Opinions suggested consensus, moreover, that subsequent proceedings established a dispute; judicial economy might better have been served by a decision proceeding to the merits of that dispute.[33]

This is not to say that a merits ruling would have issued without dissent. To the contrary, adjudication of the merits of whether nuclear weapons states have breached international obligations likely would expose tensions present since 1945. Those tensions are evident in the 1968 Non-Proliferation Treaty, which establishes different standards depending on a state's nuclear status. Indeed, those tensions surfaced in two 1996 decisions of the Court: in one, it rejected as *ultra vires* a World Health Organization request for an advisory opinion on the use of nuclear weapons, and in the other, respecting a similar General Assembly request, the Court declined to hold that the threat or use of nuclear weapons violated international law in all circumstances.[34] It was in this latter judgment that the Court advanced the twofold obligation to pursue and conclude nuclear disarmament negotiations. "The legal import of that obligation goes beyond that of a mere obligation of conduct," the Court there stressed, adding that "the obligation involved here is an obligation to achieve a precise result—nuclear disarmament in all its aspects—by adopting a particular course of conduct, namely, the pursuit of negotiations on the matter in good faith" (para. 99).

[32] MALCOLM N. SHAW QC, II ROSENNE'S LAW AND PRACTICE OF THE INTERNATIONAL COURT: 1920–2015, at 528 (5th ed. 2016).

[33] *See id.* at 530–31 (discussing Court decisions that adopted a looser construction of the timing requirement, in part in the interest of judicial efficiency).

[34] *See* Legality of the Use by a State of Nuclear Weapons in Armed Conflict, *supra* note 4, 66 (at the request of the World Health Organization), 226 (at the request of the UN General Assembly).

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The contemporary meaning, nature, and extent of that dual obligation remain questions of general concern to the global community. They are also questions of special concern to states like the applicant, which unquestionably has suffered from nuclear testing, and to the nuclear weapons states named as respondents. Yet this Court's resolution of these questions seems remote, not only because of the Court's narrowed requirements, but also because of the United Kingdom's decision no longer to consent to a case on this issue unless it is joined by the several nuclear weapons states that refused to participate in the litigation under review.

Diane Marie Amann
University of Georgia School of Law
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Sovereign Immunity—diplomatic immunity—employment of local nationals—compliance with local law—execution of judgments—espousal—objections to customary international law

Garcia de Borissow and Others v. Supreme Court of Justice – Labor Chamber, Embassy of the Lebanese Republic in Colombia and Embassy of the United States of America in Colombia. Judgment SU-443/16. *At* http://www.corteconstitucional.gov.co. Constitutional Court of the Republic of Colombia, August 18, 2016.

On August 18, 2016, the Constitutional Court of the Republic of Colombia (Constitutional Court or Court) rendered a significant decision in the *Garcia de Borissow and Others* case on issues of immunity from execution, diplomatic protection, and objections to customary international law in its review of two combined cases brought by former local employees against the embassies of the Lebanese Republic and the United States of America in Bogotá.[1] While upholding the diplomatic missions' immunity from execution of lower court judgments awarding monetary sums, the Constitutional Court instructed the Colombian Ministry of Foreign Affairs (Foreign Ministry) to pursue recovery of such amounts either by diplomatic means or through enforcement of those judgments in Lebanese and American courts. The decision is both unique and problematic as a matter of international and domestic law.

The cases arose in the context of the common practice of states employing local nationals to perform various kinds of service at their embassies (and other diplomatic and consular missions) in other states. The plaintiffs, Ms. Adelaida Garcia de Borissow and Mr. Omar Castaño, both Columbian nationals, worked as local staff at the embassies of the Lebanese Republic and the United States of America, respectively.[2] However, Ms. Garcia de Borissow had not been enrolled in Colombia's national social security system for retirement pensions (a requirement for all employers under Colombian law); moreover, her contract was unilaterally terminated on the basis that Lebanese law only allows individuals to work until

[1] Corte Constitutional [C.C.] [Constitutional Court], agosto 18, 2014, Sentencia SU-443/16, *available* (in Spanish) *at* http://www.corteconstitucional.gov.co/relatoria/2016/SU443-16.htm. No official translation is available; references to the Court's decision are based on the author's own translation.

[2] Ms. Garcia de Borissow worked as a "Secretary" from April 1981 through November 2004; Mr. Castaño worked as a "Real Estate Assistant" from July 1986 until November 2006. *See* Labor Chamber Judgment of September 2, 2008, para. 5; Labor Chamber Judgment of March 10, 2010, paras. 10, 13 (respectively). No further details as to their functions were given.