THE REQUIREMENT OF 'AWARENESS' AS A PRECONDITION FOR THE EXISTENCE OF A 'LEGAL DISPUTE' UNDER ARTICLE 36(2) OF THE STATUTE OF THE ICJ

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Abstract

In October 2016 the International Court of Justice (ICJ) handed down judgments in the so-called Marshall Islands *cases. The Marshall Islands were seeking an order from the ICJ, declaring that the United Kingdom (UK), India and Pakistan were in breach of its obligations under the NPT and customary international law. This article focuses on the claim against the UK. The ICJ on the narrowest of majorities dismissed the claim on the sole ground that a 'legal dispute' did not exist between the parties and that, by virtue of article 36(2) of the ICJ Statute, the court had no jurisdiction to proceed with the case. The court held that a 'legal dispute' under article 36(2) implied that a respondent state was 'aware or could not have been unaware' that its actions were opposed by the applicant state. This introduction of the requirement of 'awareness' to indicate that a legal dispute under 36(2) exists now places a higher burden on applicant states and has created a new hurdle to be overcome by applicate states. The case was decided by the casting vote of the president and the minority judgments were highly critical of the majority. The decision raises the question whether the ICJ's make-up has not become ill-suited to handling multilateral global security disputes.*

Keywords: legal disputes in article 36(2) of ICJ Statute; 'awareness' introduced to interpret article 36(2); bare majority criticised by minority; suitability of ICJ to handle global security issues questioned; *Marshall Islands* cases; nuclear disarmament cases

1 Introduction

In October 2016 the International Court of Justice (ICJ) handed down judgment in three parallel proceedings regarding nuclear disarmament in *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v*

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United Kingdom) (Preliminary Objections),[1] *Marshall Islands v India*[2] and *Marshall Islands v Pakistan.*[3]

In April 2014 the Marshall Islands filed proceedings at the International Court of Justice (ICJ) against the United Kingdom (UK), China, North Korea, France, India, Israel, Pakistan, Russia and the United States of America (USA). The Marshall Islands alleged that these states had breached their obligations to fulfil negotiations relating to the cessation of the nuclear arms race and nuclear disarmament under article VI of the Treaty on the Non-Proliferation of Nuclear Weapons (NPT).[4] As the UK, Pakistan and India were the only three states to have made optional declarations recognising the compulsory jurisdiction of the ICJ pursuant to article 36(2) of the Statute of the ICJ (the Statute), the proceedings only proceeded against these three states. (The other states did not consent to the jurisdiction of the ICJ pursuant to article 38(5) of the ICJ Rules of Court.)

The Marshall Islands claimed that the three respondent states had failed to meet their obligations to negotiate the cessation of the nuclear arms race and nuclear disarmament in good faith as obligated by article VI of the NPT and customary international law. It was further alleged that these states had, in breach of article VI of the NPT and customary international law, modernised and maintained their nuclear arsenals. (The Marshall Islands and the UK are parties to the NPT, India and Pakistan are not.) This article will deal only with the proceedings against the UK.

2 Legal Dispute

The Marshall Islands were seeking an order from the ICJ declaring that the UK was in breach of its obligations under the NPT and must take all steps necessary to comply with its article VI obligations of the NPT and customary international law.

The ICJ, in the proceedings against the UK, dismissed the claims at the preliminary objections phase on the sole ground that a legal dispute did not exist between the parties. The ICJ by the narrowest of majorities, requiring the casting vote of the president, held that it had no jurisdiction under article 36(2) of the Statute to proceed with the case as there was no legal dispute.

A brief discussion of article 36 of the Statute is necessary. Article 36 is known as the 'optional clause'. It represents a compromise between

1 2016 ICJ Reports 833.
2 2016 ICJ Reports 255.
3 2016 ICJ Reports 552.
4 729 UNTS 161.

those states that favour compulsory jurisdiction and those that oppose it, as it allows states to 'opt in' for compulsory jurisdiction by accepting the compulsory jurisdiction of the ICJ in relation to any other state that similarly accepts such jurisdiction. As ICJ President McNair pointed out in his individual opinion in the *Anglo-Iranian Oil Case,*[5] the 'optional clause' is that of 'contracting in', not of 'contracting out'. The 'optional clause' does not by itself impose on states any obligation whatsoever but provides a basis for states undertaking, by unilateral declaration, obligations additional to those stated in the Statute with regard to the court's jurisdiction. Along with article 36(2), article 36(3) is also often consigned to the 'optional clause' insofar as it contains further elements concerning the compulsory jurisdiction of the ICJ. The totality of the declarations of acceptance made under the 'optional clause' constitutes a special regime called the system of compulsory jurisdiction or 'optional clause' system.

At issue before the ICJ was the interpretation of article 36, subsections 1 to 3 of the Statute which reads that:

(1) The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.
(2) The states parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other states accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:
    (a) the interpretation of a treaty;
    (b) any questions of international law;
    (c) the existence of any fact which, if established, would constitute a breach of an international obligation;
    (d) the nature or extent of the reparation to be made for the breach of an international obligation.
(3) The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain states, or for a certain time.

The ICJ more specifically addressed the words 'all legal disputes' as they appear in article 36(2). The majority reasoned (para 36) that the ICJ under article 36(2) of its Statute had jurisdiction over legal disputes between states that had made 'optional clause' declarations accepting the compulsory jurisdiction of the ICJ. The existence of a dispute between

[5] 1952 ICJ Reports 93 116. See *Cameroon v Nigeria (Preliminary Objections)* 1998 ICJ Reports 275 291 para 25.

states was thus a condition for the ICJ to have jurisdiction. The essence of a legal dispute, the majority held (para 37), was that two parties must 'hold clearly opposite views concerning the question of the performance or non-performance of certain international obligations'. The majority (paras 39–40) held that the existence of a dispute can be ascertained from statements by the parties, or documents exchanged between them prior to the filing of an application, or by the failure of a state to respond to claims in circumstances where a response is expected. Conduct subsequent to an application being filed may be relevant to confirm or deny the existence of a dispute (para 143). Ultimately, the majority held (para 39) that the existence of a dispute is an objective determination by the ICJ after examining the facts.

3 'Awareness'

However, the majority (para 41) further added the new requirement of 'awareness' to determine a dispute. This requirement states that for a dispute to exist it must be 'demonstrated, on the basis of evidence, that the respondent was aware, or could not have been unaware, that its views or actions were positively opposed by the applicant'.

Here the majority relied on two relatively recent cases: *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russia) (Preliminary Objections) (Georgia v Russia)*[6] and *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v Colombia) (Preliminary Objections).*[7]

In rejecting the arguments put forward by the Marshall Islands, the ICJ held as follows:

First, that statements invoked by the Marshall Islands did not sufficiently demonstrate the existence of a dispute (para 51); that such statements were formulated in hortatory terms and did not allege that the UK was in breach of its NPT obligations; and that such statements lacked the clarity and detail needed to make the UK 'aware' that its views were opposed by the Marshall Islands.

Second (para 56), that voting patterns within political organs, such as the UN General Assembly, cannot demonstrate the existence of a dispute.

Third (para 54), that the filing of the application itself could not demonstrate the existence of a dispute or create a dispute *de novo*.

Fourth (para 58), there was no evidence that the UK could have been 'aware' that its views on nuclear arms and nuclear disarmament were positively opposed by the Marshall Islands.

6 2011 ICJ Reports 70.
7 2016 ICJ Reports 3.

This meant, according to the majority, that the ICJ had no basis to find that a dispute existed and the ICJ thus had no power to exercise its jurisdiction under article 36(2) of the ICJ Statute to determine the merits of the case (para 58). The result was that the parties were not given the opportunity to address the substantive issues of the case.

The 'awareness' requirement in determining a legal dispute has shifted the determination from an objective one based on an examination of the facts to one where the ICJ must delve into the mind of a respondent state. Only in this way can the ICJ determine whether the respondent state was 'aware' that its views are opposed by the applicant. Does this mean that the ICJ may in future dismiss a case on the narrow ground that a respondent state was 'unaware' that its views were opposed by the applicant? This 'awareness' requirement would appear to be in conflict with the objective approach the ICJ has emphasised in the past.[8] The requirement of 'awareness' shifts the ICJ towards formalistic reasoning.[9]

4 Raising the Threshold

The 'awareness' requirement raises the threshold for a dispute to exist by placing a higher burden on an applicant state to show that a dispute exists. On the one hand, this could be a positive element as it may influence more states to accept the jurisdiction of the ICJ as there will be greater scrutiny before a legal dispute is established and a claim proceeds on its merits. 'Awareness' may also enable the ICJ to better determine whether the parties' views are genuinely opposed. On the other hand, the 'awareness' principle could create a new hurdle to be overcome if the applicant is unable to show 'awareness' on the part of the respondent state. This would be in contrast to the statements of the ICJ in previous cases such as *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States) (Merits) (Nicaragua v United States)*[10] (para 27) where it was held that the ICJ will always try where possible to entertain a case if it has a legal dimension.

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8 See A Bianchi 'Choice and (the awareness of) its consequences: The ICJ 'structural bias' strikes again in the *Marshall Islands* case' 2017 (111) *American Journal of International Law Unbound* 81 and the dissent of Judge Crawford (para 5).

9 L Marota 'Establishing the existence of a dispute before the International Court of Justice: Glimpses of flexibility within formalism' 2017 (45) *Quarterly of International Law* 77; VJ Proulx 'The *Marshall Islands* judgements and multilateral disputes at the World Court: Whither access to international justice' 2017 (111) *American Journal of International Law Unbound* 96.

10 1986 ICJ Reports 14. See R Kolb 'Military and paramilitary activities in and against Nicaragua (*Nicaragua v United States of America*) (1984 to 1986)' in E Bjorge & C Miles (eds) *Landmark Cases in Public International Law* (2017) 349.

5 The ICJ and the NPT

It may be significant to note that the eight judges who found that a dispute did not exist were from states that have nuclear weapons or from states that benefit from nuclear deterrence offered by their allies. This could be interpreted as votes in favour of national interest rather than what is in the best interests of the international community and could impact on the ICJ's reputation for impartiality.

The case once again illustrated the ICJ's reluctance to deal with issues relating to nuclear weapons. This reluctance was indicated in *Nuclear Test Cases (Australia and New Zealand v France) Provisional Measures;*[11] *Nuclear Test Cases (Australia and New Zealand v France);*[12] *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Courts' Judgement of 20 December 1974 in the Nuclear Tests (New Zealand v France)*[13] and *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion).*[14] The question arises whether the role of the ICJ in issues involving nuclear weapons has not become obsolete and that such matters must be dealt with by means of negotiations between states or by treaties.

6 Narrow Majority

The fact that the case was decided by the casting vote of the ICJ's president brings into stark focus the dissenting judgments.

Judge Crawford criticised the majority decision for being 'formalistic'.[15] Judge Cançado Trinidade criticised the 'formalistic reasoning' and 'formalistic approach' used by the majority throughout the judgment.[16] Judge Bennouna, similarly, took issue with the majority's 'pure formalism' in eventually coming to the conclusion that there was no dispute among the parties.[17]

If all the dissenting judgments are dissected, it would appear that the main criticism was that the majority emphasised form over substance, focusing rather on rules and not taking any policy considerations into account that may be relevant to explain the context in which the application of the rules must take place.

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11 1973 ICJ Reports 99 135.

12 1974 ICJ Reports 253.

13 1995 ICJ Reports 288.

14 1996 ICJ Reports 226. This case is discussed by GN Barrie & TK Reddy 'The International Court of Justice's advisory opinion on the legality of the threat or use of nuclear weapons' 1998 (115) *South African Law Journal* 457.

15 Id paras 11–31. The dissenting judgements of Judge Robinson, Vice-President Jusuf and Judge ad hoc Bedjaoui were in the same vein as that of Judge Crawford.

16 Id paras 11–13, 23–24, 28–30.

17 Id para 1.

Furthermore, it seems that the court intended to achieve outcomes that were not potentially divisive and implied a commitment to the status quo in which the role of international law was to preserve current power structures.

As seen by Bianchi, this was not the first time the ICJ had used a specific characterisation of a dispute to avoid taking up a sensitive issue.[18] Bianchi uses as an example the case concerning the *Legality of Use of Force (Yugoslavia v UK) Provisional Measures*[19] which the ICJ dismissed for lack of *prima facie* jurisdiction and due to the sensitivities of enjoining NATO to stop their bombings against the Federal Republic of Yugoslavia. Proulx is also of the view that the majority judgment of the court was too formalistic and an example of the court veering towards 'jurisdictional formalism'.[20] He would prefer the ICJ to interpret its jurisdiction in a more flexible and progressive manner. Venzke compares the 'excessive' formalistic approach of the majority of the ICJ with that of the court in the controversial *South West Africa* cases.[21]

7 Article 36(2): A Controversial Clause

Article 36(2) of the Statute has been a controversial mechanism for conferring jurisdiction on the ICJ. As far back as 1970, Greig[22] stated that article 36(2) has been the subject of much judicial interpretation and juristic discussion. Merrills in 1979 saw article 36(2), by allowing states to make emasculating declarations, as a clear indication of a lack of confidence in the ICJ and an attempt to circumscribe the jurisdiction of the court.[23] Oda, writing in 1986, was in accordance with this, stating that the 'optional clause' is encumbered by the great number of reservations attached to it and saw article 36(2) as being an endangered species.[24] Booysen in 1989 declared that there are authors who question the desirability of article 36(2).[25]

Klabbers, in the 2017 edition of his work, sums up the recent views

18 Bianchi (n 8 above) 85.
19 1999 ICJ Reports 826.
20 Proulx (n 9 above) 1.
21 I Venzke 'Public interest in the International Court of Justice – A comparison between the *Nuclear Arms Race* (2016) and *South West Africa* (1966)' 2017 (11) *American Journal of International Law Unbound* 68. See *Ethiopia v South Africa; Liberia v South Africa* 1962 ICJ Reports 319.
22 DW Greig *International Law* (1970) 405.
23 JG Merrills 'The optional clause today' 1979 (50) *British Yearbook of International Law* 50 116.
24 S Oda 'Reservations in the Declarations of Acceptance of the Optional Clause and the period of validity of those declarations: The effect of the Schultz letter' 1988 (59) *British Yearbook of International Law* 18–23.
25 H Booysen *Volkereg* (1989) 468.

of most authors on article 36(2).[26] He states that the sting has been removed from the original intention of article 36(2) by allowing states to insert all sorts of conditions and clauses and, since the system works on the basis of reciprocity, the ICJ can only work on the basis of the lowest common denominator. He refers to declarations that exclude disputes with particular groups. An example is that of the UK, which excludes disputes with a country that is or has been a member of the Commonwealth. He states that article 36(2) allows states to exclude issues that they anticipate to be controversial. He sees it as a problem that article 36(2) allows states to make declarations accepting the jurisdiction of the court except for matters falling within the state's domestic jurisdiction or related to its national security.

Dugard sees article 36(2) as the most controversial mechanism for conferring jurisdiction upon the ICJ.[27] He criticises post-apartheid South Africa's failure to accept the 'optional clause' because South Africa believes that every attempt should first be made to settle disputes by negotiation rather than by judicial decision. He finds equally disturbing the fact that Britain is the only permanent member of the UN Security Council to have made a declaration under article 36(2). He points out that at present (2018) only a third of the states parties to the ICJ Statute have made declarations under article 36(2).

8 Conclusion

The ICJ has been criticised for interpreting article 36(2) too cautiously as in the *Nuclear Test* cases[28] and has been condemned for interpreting it with too little caution as in the *Nicaragua* case.[29] Only time will tell into which of these two categories *Marshall Islands v United Kingdom* will fall.

Because the ICJ has now demanded that the respondent (defendant) state must be 'aware' that its actions were positively opposed by the applicant state before a legal dispute between them can exist under article 36(2) of the Statute, the chances are greater that 'defendant' states will refuse to appear before the ICJ by submitting that they were not 'aware' of the dispute. The ICJ may thus be more regularly faced with

26 J Klabbers *International Law* (2017) 165–166.

27 J Dugard, M du Plessis, T Maluwa & D Tladi *Dugard's International Law: A South African Perspective* (2018) 675–681. See H Waldock 'The decline of the optional clause' 1995/6 (32) *British Yearbook of International Law* 244; JP Kelly 'The ICJ: Crisis and reformation' 1987 (12) *Yale Journal of International Law* 342; S Alexandrov 'Accepting the compulsory jurisdiction of the International Court of Justice with reservations: An overview of practice with a focus on recent trends and cases' 2001 (14) *Leiden Journal of International Law* 89.

28 See nn 11 and 12 above.

29 See n 10 above.

absent defendants as happened in *US Diplomatic and Consular Staff in Tehran* case[30] and the *Nicaragua* case.[31] In these cases Iran and the USA respectively objected to the ICJ's jurisdiction and, having failed to avoid compulsory jurisdiction, refused to appoint counsel or to appear before the court to argue the merits.

With the introduction of the 'awareness' element as a prerequisite for a legal dispute to be present before applying article 36(2) of the Statute it is a moot point whether the ICJ will survive as an effective institution for the settlement of disputes between states.

To date the judicial consequences of making a declaration under article 36(2) of the Statute has never been stated in a precise and non-controversial manner. As pointed out by Greig[32] as far back as 1970, it was no easy task to specify precisely when a dispute arose and even more difficult to decide when situations or facts out of which a dispute arose occurred. By introducing the concept of 'awareness' in 2016 in determining whether there is a legal dispute, the ICJ has made the interpretation of article 36(2) of the Statute still more imprecise and controversial.

It is submitted that the ICJ needs to formulate its decisions in politically sensitive matters more carefully. Such matters are arising more frequently. Matters relating to the nuclear arms race, such as M*arshall Islands v United Kingdom*[33] and the *Nuclear Weapons*[34] cases, together with the use-of-force issues such as the *Wall*[35] and *Kosovo*[36] Opinions, are prime examples of this tendency. Such cases put stress on the legal nature of the ICJ and impacts on its prestige. If the court is seized by this type of dispute for propaganda purposes or to embarrass an opposing state, the court's reputation could be damaged. Keen attention must thus be paid to the precise wording of decisions in these politically sensitive areas.

It can be predicted that in future the use of the word 'awareness' by the ICJ as a prerequisite for a legal dispute to exist under article 36(2) of the Statute will be dissected in great detail by states attempting to escape the jurisdiction of the court by not being 'aware' of the dispute.

It is disconcerting, to say the least, that five judges who are nationals of

30 1980 ICJ Reports 3.
31 See n 10 above.
32 Greig (n 22 above) 507.
33 See n 1 above.
34 See nn 11 to 14 above.
35 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* 2004 ICJ Reports 136. See GN Barrie 'The neglected ICJ's Wall opinion on the consequences of internationally wrongful acts' 2014 (XLVII) *Comparative and International Law Journal of Southern Africa* 129.
36 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* 2010 ICJ Reports 412.

the five permanent members of the UN Security Council – incidentally all nuclear powers – all sided with the majority to dismiss the case. Bianchi poses the question whether the majority of the court in the *Marshall Islands* cases realised that the ICJ may be alienating those who still believe in the liberating power of international law, its capacity to restrain power and the credibility of the rule of law in international relations.[37] Even before the judgments were delivered, concerns were raised that the cases would undermine the court's legitimacy.[38]

The Marshall Islands, a small state, has suffered much from nuclear testing. Its attempt to seek justice at the ICJ, the principal judicial organ of the UN, by demanding compliance with conventional and/or customary obligations under international law has been futile. The naked truth appears to be that the ICJ expeditiously refused to look at the merits of the *Marshall Islands* case.

The court's jurisdictional make-up might have become ill-suited to handling multilateral global security disputes such as those emanating from disarmament treaties or treaties prohibiting the use of particular weapons. The uncomfortable question arises whether issues such as nuclear disarmament should not be reserved for the international political arena and not be put to the ICJ for judicial determination. The possibility has been suggested to utilise the Security Council's Chapter VI dispute settlement function as a locus at which nuclear disarmament international law violations may be voiced and the necessary consequences imposed.[39] Chapter VI empowers the Security Council to address disputes that in its judgment do not threaten international peace within the meaning of Chapter VII, but that, if continued, are 'likely to endanger the maintenance of international peace and security'. This may alleviate the ICJ's trepidation to accept jurisdiction over cases lying at the intersection of law and politics.

37 Bianchi (n 8 above) 85.

38 K Davis 'Hurting more than helping: How the Marshall Islands' seeming bravery could undermine the legitimacy of the World Court' 2016 (15) *Minnesota Journal of International Law* 79.

39 See in general V Proulx *Institutionalizing State Responsibility: UN Organs and Global Security* (Part II) (2016).