

RMI v. INDIA: AN EPOCH-MAKING LAWSUIT IN THE SPHERE OF NUCLEAR ARSENAL

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ABSTRACT

*This paper basically revolves around the dispute raised by Marshall Island in the International Court of Justice against India and other nuclear powers (Nuclear nine Nations). The purpose of the paper is to highlight and analyze the critical grounds and contentions raised by the Republic of Marshall Island against the nuclear nine countries (specifically India). Thus in order to achieve the said purpose, this paper shall follow the structured chronological pattern starting with, first, the discussion of the idea and principles of NPT and countries parties to it. Secondly, the article shall go in detail provision of NPT, specifically the obligation *Erga Omnes*, touching the principles of Customary International Law and the principle of good faith. The second part of the paper shall deal with the historical background of the issue of Marshall Island vis-à-vis role of India in relation to the breach of obligation under customary International law and that of good faith. In the final part of the paper, author shall try to portrait the current scenario of the issue with the possible ruling which ICJ may provide in favor or against India.*

INTRODUCTION

Once somebody said, *atom is the reason for the creation of this world and shall be the reason for its destruction*. The suggestion may not have been considered to have much weightage in those days, but at present its validity cannot be questioned. It is an undisputed fact that the creation of nuclear weapons will definitely result into mass destruction. Evidence for the same is the result of nuclear bombing over Japan during 1945 World War II. The bombing was a black spot in the history of mankind. Though, initially, the day was celebrated by USA and allied force as a victory over Japan by the name of “V-J Day” but was later condemned.

After 1945, from 1946 to 1958, Martial Island was used as a test ground for the U.S. nuclear programs. A total of 67 nuclear bombs detonated over the Marshall Island. Also, 1.7 Hiroshima bombs detonated daily for 12 years. Among them was the one called *Castel Bravo*, which was

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the largest bomb ever tested by the U.S. of about 1000 times larger than that of Hiroshima and Nagasaki.

The concern of huge destruction was realized by the whole world and a multilateral treaty was entered between nations to stop this nuclear arm-race among those who owe this technology. The treaty was called *The Non-proliferation Treaty of 1970*, which was signed to prevent the proliferation of Nuclear Weapons and obligates nation to negotiate for Global Disarmament. Thus, to understand the core of this matter, it is important to understand the principles of *treaty* signed, first, and then go to issues raised by *Republic of Marshall Islands* against Nuclear-Nine, specifically, *India*.

THE NON-PROLIFERATION TREATY: AN ATTEMPT TO PREVENT DESTRUCTION

The very first time when United States tested its first nuclear devise was at Alamogordo, New Mexico in 1945. It was only from then that the International community started to think about how to restrain the atom's destructive effect and at the same time use it for peaceful use.² Thus the treaty of Non-proliferation was strived to achieve three objective i.e. Non-proliferation, the peaceful use of nuclear energy and disarmament.

Non-proliferation

Article I, II, and III of the Treaty make a reference to such clause where *Article I* talks about the obligation of each *nuclear state* *not to transfer or assist* in manufacture of any kind of nuclear explosive devices. While *Article II* puts an obligation on *non-nuclear-weapon state* party to not receive the transfer from any transferor of nuclear weapons or to manufacture or acquire nuclear weapons.

Peaceful use

Article IV of the treaty seeks to encourage the peaceful use of such energy. It not only encourages but recognizes the right of each party to develop nuclear energy for peaceful purpose and to get benefit from International community in this field but condition to the conformity with that of Article I, II and III of the treaty.

² Treaty on the Non-Proliferation of Nuclear Weapons, U.S Delegation to the 2010 Nuclear Non-Proliferation Treaty Review conference 2010. Also see, <http://www.state.gov/documents/organization/141503.pdf> (Last accessed 9th March, 2016).

Disarmament

Article VI of the treaty specifically talks about the duty of state parties to pursue negotiation in *good faith* relating to *cessation of nuclear arm race and to nuclear disarmament*. Article VI involves 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.³ Court also observed that, “fulfilling the obligation expressed in Article VI...remains without any doubt an objective of vital importance to the whole of the international community.”⁴ “This recognizes that the provisions of Article VI...go beyond mere obligations of conduct- to pursue nuclear disarmament negotiations in good faith- and actually involves an obligation of result, i.e., to conclude those negotiations.”⁵

Thus the above principles of NPT are the core principles of nuclear disarmament and regulation. Where this treaty giving/recognizing rights of every state to utilize the energy in the peaceful manner, with this right comes the obligations as well as to non-proliferate such technology for destruction purpose.

The overarching benefit provided by the NPT is that of enhanced international peace and security⁶. NPT is the only international-binding agreement that provides a global barrier to the spread of nuclear weapons.⁷ But what happens when there is any breach of the obligations mentioned can be seen through the example of the case of North Korea mentioned below:

- Case of North Korea: The major problem of implementing the NPT arises in the implementation of Non-proliferation clause. North Korea, after its violation of NPT’s non-

³ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, p. 99, International Court of Justice (ICJ), 8 July 1996. Also see, <http://www.icj-cij.org/court/index.php?p1=1&p2=8> (Last accessed at 8th August, 2016).

⁴ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, p. 103, International Court of Justice (ICJ), 8 July 1996. Also see, <http://www.icj-cij.org/court/index.php?p1=1&p2=8> (Last accessed at 8th August, 2016).

⁵ M. Marin Bosch, “*The Non-Proliferation Treaty and its future*”, International Law, the International court of justice and nuclear weapons (1999), p. 375.

⁶ Supra note 2.

⁷ Supra note 2.

proliferation commitment declared to withdraw itself from the treaty. But later in the joint statement of the six-party talk promised to come back to its original commitment to NPT and thereby abandon all its nuclear weapons and programs. But unfortunately, again they failed to honor their words and currently face sanctions under two UN Security Council Resolutions for its announced nuclear test in 2006 and 2009.⁸

Non-signatories to NPT treaty

Countries like India, Pakistan, Israel and North Korea are not signatories to NPT treaty and thereby pose a greater threat to mankind since they do not have any obligation enshrined under NPT. Exempt from the NPT's legal construct, these states develop weapons programs with little punishment and are not required to accept the International Atomic Energy Agency (IAEA) safeguard.⁹

Because the scope of this paper is restricted to the role of India only, it will be not of much use if the reference is made of other countries as well. Therefore, at this juncture it would be pertinent to raise the issue of role of India as to how India looks to this treaty and why Republic of Martial Island believes India to be a violator and on what accord.

INTERNATIONAL COURT OF JUSTICE ON NUCLEAR DISARMAMENT

General assemble in the year 1994 presented a question to the ICJ in order to receive an advisory opinion as to whether the threat or use of nuclear weapons was illegal because the effect of nuclear war was so detrimental to the environment and to health.¹⁰ Accepting the concern raised, ICJ issued following statement:

The threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law. However, in 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

⁸ Supra note 2.

⁹ The Nuclear Non-Proliferation Treaty (NPT), British American Security Information council (April 2015). Also see, http://www.basicint.org/sites/default/files/basic_npt_briefing_april2015.pdf (last accessed at, 8th August, 2016).

¹⁰ Leonard Weiss, “India and the NPT”, Routledge Taylor and Francis Group, Strategic Analysis (2010), Vol. 34(2), p. 255-271.

*would be lawful or unlawful in an extreme circumstance of self defence, in which the very survival of a State would be at stake.*¹¹

Court also emphasized on the point that:

*There exists an obligation to pursue in faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.*¹²

Thus by stating this, ICJ gave Article VI binding support. But it is important to mention that India is not a party to NPT because of the fact that India is not considered as a nuclear state by the treaty. India condemned this discrimination and therefore only India had refrained itself from signing this treaty.

THE CASE OF REPUBLIC OF MARSHALL ISLANDS v. INDIA

The Case of Marshall Island:

The Republic of Martial Island has filed the case in ICJ against Nine nuclear country including India for the breach of following, namely:

- 1- Breach of the Customary International Law.
- 2- Breach of the obligation to perform its obligations in Good faith.

Since, India is not a party to NPT, it is not governed by the principles/obligations enshrined there under. And, therefore, in order to understand the breach above mentioned, it is pertinent to know how there exists the liability of India under customary International law and how the obligation of good faith can be imposed (as contended by RMI).

A- Customary International Law

In its advisory opinion, the court added that “*any realistic search for general and complete disarmament, especially nuclear disarmament, necessitates the corporation of all states*”.¹³

¹¹ Supra note 9.

¹² Supra note 9.

¹³ Obligation to pursue in good faith and conclude negotiation leading to nuclear disarmament (*The Republic of the Marshall Islands vs. The republic of India*), 2014 I.C.J (24th April, 2014).

The court's declaration is an expression of customary international law as it stands today and therefore, all states are under that obligation.¹⁴ UN General Assembly has also indulge in the call for universal disarmament of weapons of mass destruction. The UNSC had also called for the implementation of NPT Article VI not only by state parties to the treaty but also to the parties not to the treaty. Regarding the obligation of cessation of the nuclear arm race at an early date set forth in Article VI, it stands on its own as a customary international law obligation based on the very widespread and representative of state in the NPT and is inherently in the customary international law obligation of nuclear disarmament.¹⁵

So, what RMI contending is that , “Although India expressly supports the commencement of nuclear disarmament negotiations and participated in the Open-Ended Working Group, it has breached this obligation of customary International law by engaging in a course of conduct, the *quantitative build-up and quantitative improvement of its nuclear forces*, contrary to the objective of nuclear disarmament.”¹⁶

B- Good Faith

It is undisputable that the *good faith principle* constitutes “*fundamental principle*” of international law. This principle of good faith not only forms the intrinsic part of the Article 38(1)(c) of the statute of the International Court of Justice in the form of general principles of law and also a cardinal principle of law of treaties, ‘but it also encapsulates the essence of the Rule of Law in International society and is one of the Principles of the United Nations’.¹⁷

In the case of *Australia vs. France* and in *New Zealand vs. France*, commonly referred as Nuclear Test Judgments, the ICJ declared that: “One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good

¹⁴ Ibid.

¹⁵ Supra note 13.

¹⁶ Supra note 13.

¹⁷ Supra note 13.

faith. Trust and confidence are inherent in International co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential".¹⁸

So, as stated in the above head of Customary International law, state is required both the conduct and result while disarming nuclear weapons. Thus, state must not only negotiate in good faith and serious efforts to achieve the elimination of nuclear weapons, but also actually achieve that result.¹⁹

Therefore, the obligation of good faith obliged the states to fulfill the obligations of treaty in an effective manner, making the purpose be realized. So a conduct that prevent the fulfillment is prohibited. And all these are considered equally to the obligation to fulfil customary international obligation in good faith.

Because India is engaged in the building up of, diversifying and qualitative improvement of the nuclear arsenals, this act clearly conflict with the obligation of nuclear disarmament. And therefore, India has breached its legal duty to perform its obligation under International customary law in good faith.

The Case of India:

In reply to the above mentioned application of Marshall Island, India filed a counter-memorial denying any obligation against RMI as alleged, among other claims. India demonstrated that, "*...there is no legal dispute between India and the RMI. Furthermore, even if the court were to find that the dispute as identified in the memorial exists, the court would nonetheless lack jurisdiction since the other indispensable Parties are not taking part in the proceedings and the remedies which the RMI is seeking against India cannot be granted practically.*"²⁰ Following head shall try to bring forth the arguments advanced by India and authorities cited favoring its arguments.

(A) Non-existence of the dispute

¹⁸ Nuclear Test (New Zealand v. France), judgment, I.C.J. Reports 1974, p. 457 at p.268 para. 46.

¹⁹ Supra note 13.

²⁰ Obligation to pursue in good faith and conclude negotiation leading to nuclear disarmament (*The Republic of the Marshall Islands vs. The republic of India*), 2015 I.C.J (16th September, 2015), p. 7.

India contended that “*a dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons*”²¹ and “*whether there is a dispute in a given case is a matter of objective determination by the court*”²², therefore, “*it is not sufficient for a party to a contentious case to assert that a dispute exist with the other party*”.²³

To substantiate its argument, India further contended that:

- a- it [India] has been a strong supporter of the necessity of nuclear disarmament²⁴;
- b- RMI has never sought to engage in bilateral consultation with India²⁵; and
- c- RMI’s claims are artificial and abusive in character²⁶.

(B) The judgment would serve no legitimate purpose

In its counter submission, India relied upon the judgment of *Northern Cameroons case*²⁷ where ICJ held that “the court’s judgment must have some practical consequence”. In view of Article

²¹ P.C.I.J., Judgment, 30 August 1924, *Mavrommatis Palestine Concessions, Series A, No. 2*, p. 11.

²² I.C.J., Advisory Opinion, 30 March 1950, *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Reports 1950*, p. 74.

²³ I.C.J., Judgment, 21 December 1962, South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Reports 1962, p. 328.

²⁴ To substantiate this claim, India stated that Jawaharlal Nehru, India’s first Prime Minister, was among the first world leader to champion the cause of nuclear disarmament. India also produced its letter dated 6th June, 2014 (declaring India’s commitment to the goal of a nuclear weapon free world through global, verifiable and non-discriminatory nuclear disarmament). Also, India presented its 2006 working paper on Nuclear Disarmament which urges the reaffirmation of the unequivocal commitment of all nuclear weapon state to the goal of complete elimination of nuclear weapon. India also presented the list of General Assembly resolutions on nuclear disarmament like Resolution 67/39 of 3rd December 2012, Resolution 68/32 and 68/46 of 5th December 2013 and Resolution 69/41 of 2nd December 2014.

²⁵ India contended that a dispute is arose when there is an attempt to raise an issue and it is the failure to resolve the same resultant in dispute. If RMI was serious in relation to the matter raised, it should have first approached India with the matter. Since, RMI never brought its claim to India’s attention nor invoked responsibility, it cannot raise any issue with ICJ. To substantiate this argument India cited the *Free zones case* (P.C.I.J., Order, 19 August 1929) where P.C.I.J explained that, “*the judicial settlement of international disputes, wih a view to which the court has been established, is ‘simply an alternative to the direct and friendly settlement of such disputes between the parties’*”.

²⁶ India claim that RMI had changed its original stand, which it contended in its original application against India, after India arose the jurisdiction issue. India contended that after reading the application, it becomes evident that RMI seek to cast upon India the obligation of complying with Article VI of the NPT to which India is not a signatory. India also submits that this court (ICJ) does not vest any jurisdiction to compel any state to accept an obligation in a treaty to which it is not signatory. This would lead to the erosion of the principle of sovereignty of state. So, India cannot be mandated to comply with the provision of NPT and hence cannot be held liable as per.

59 of the Court's Statute a judgment is binding only on the concerned Parties, thus, a judgment in the present case would not bring about a resolution of the alleged dispute.²⁸

(C) The remedies sought by the RMI cannot be granted in the absence of other states

India contend that since RMI filed application against nine nuclear nations, it is only India, Pakistan and the United Kingdom, the only three states possession nuclear weapon that recognizes the jurisdiction of the court by means of declaration under Article 36(2) of the statute of the Court. And among the remaining six states, China has formally notified that it does not consent to the jurisdiction of the court and other remaining states have not even responded to the application.²⁹ Stating the well-known "*Monetary Gold principle*"³⁰ where court declined to exercise its jurisdiction, similarly, in the present case, since all nine states are not party to the proceedings, the court cannot affect its ruling in absence of other parties.

Thus, with the above submission from the side of Republic of India, it is humbly prayed to adjudge and declare that it has no jurisdiction with respect to the present case.

ROAD AHEAD

The debate of non-proliferation of nuclear weapons and nuclear disarmament is not new this century. The ground has already been set. But the only thing requires is the intention of the states to bring into the effect to this long chased dream. No doubt that this case of Marshall Island against the nuclear nine states may trigger the effective desire to achieve the goal but the issues like *defectum jurisdictionis* of ICJ or denial of recognition of jurisdiction by any state party or non-compliances to the order of ICJ are few hurdlers among many for the achievement of nuclear weapon free world.

²⁷ I.C.J., Judgment, 2 December 1963, *Case concerning the Northern Cameroons (Cameroon v. United Kingdom), Preliminary Objections*, Reports 1963, p. 34.

²⁸ Obligation to pursue in good faith and conclude negotiation leading to nuclear disarmament (*The Republic of the Marshall Islands vs. The republic of India*), 2015 I.C.J (16th September, 2015), pg. 44.

²⁹ Obligation to pursue in good faith and conclude negotiation leading to nuclear disarmament (*The Republic of the Marshall Islands vs. The republic of India*), 2015 I.C.J (16th September, 2015), pg. 17.

³⁰ "One of the fundamental principle of the court's statute is that it cannot decide a dispute between states without the consent of those states to its jurisdiction." Also see, *Monetary Gold case from Rome 1943*.

At present, India has successfully presented itself against the application of RMI through its counter memorial. The arguments are equipped with authorities and reasons but the eyes of the world are upon the ruling of the ICJ on the matter as this is the first time that such a small nation (group of Island) has challenged the nuclear powers of the world and has compelled the few to reply to its appeal.