INDIA AND NUCLEAR DISARMAMENT: A DISCUSSION IN LIGHT OF THE APPLICATION BY THE REPUBLIC OF THE MARSHALL ISLANDS BEFORE THE INTERNATIONAL COURT OF JUSTICE

Abstract

The Republic of Marshall Islands has recently filed an application before the International Court of Justice against India, alleging breach of India's obligations to pursue, in good faith, negotiations leading to nuclear disarmament. This paper analyses the legal issues in relation to the application. The paper first examines the potential grounds on which India could challenge the court's jurisdiction. Subsequently, the substantive law relating to the obligation to negotiate nuclear disarmament in customary international law is discussed. Finally, the legal repercussions of non-appearance of a party in a dispute admitted by the court are examined, as well as the advantages and disadvantages of India choosing to appear before the court in this case.

I Introduction

THE REPUBLIC of Marshall Islands (RMI) recently filed an application against India in the International Court of Justice (hereinafter ICJ or the court) alleging India's breach of its obligation to pursue in good faith and conclude negotiations leading to nuclear disarmament.[1]

The same allegation has been made in separate applications against China, France, Israel, North Korea, Pakistan, Russia, the United Kingdom (UK) and the United States of America (USA). Subsequently, India informed the court that it believes that the court does not have jurisdiction in the instant dispute.[2] To settle the question of jurisdiction, the court has fixed time limits for both states to submit pleadings on this issue – RMI in December 2014 and India in June 2015, so that the court can rule on jurisdiction separate from the merits, at the first stage.[3]

This paper analyzes the legal issues involved in the dispute between RMI and India before the ICJ. In the first section, we analyze the jurisdiction of the court in

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1 Application instituting proceedings against the Republic of India submitted on Apr. 24, 2014 by the Republic of the Marshall Islands to the International Court of Justice regarding obligation to pursue in good faith and conclude negotiations leading to nuclear disarmament (RMI Application), *available at:* www.icj-cij.org/docket/files/158/18292.pdf (last accessed on Jul. 10, 2014).

2 Obligations Concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (*Marshall Islands* v. *India*), Order of June 16, 2014 (ICJ), 2, *available at:* www.icj-cij.org/docket/files/158/18340.pdf (last visited on July 10, 2014).

3 *Ibid.*

relation to this dispute and also examine the possible grounds on which India could challenge the court's jurisdiction in this case. In the second section, we discuss the substantive law relating to the obligation to negotiate nuclear disarmament. In this section, although we outline the scope of the obligation to negotiate under the Nuclear Non-Proliferation Treaty[4] , the thrust of our analysis is on the existence of this obligation under customary international law. This is due to the fact that RMI is not making a treaty claim against India. Rather, RMI's application is based on India's alleged violation of customary international law, and the treaty's provisions are mentioned only as a tool to explain the content of the obligation. The third section studies the legal repercussions of non-appearance of a party in a dispute that the ICJ has admitted. This is in light of the fact that India has expressed a disinclination towards appearing before the court to defend its position against RMI. We also briefly explore the advantages or disadvantages of India choosing to appear before the ICJ in the present case.

II Jurisdiction before the ICJ

In this section, after a brief overview of the ways in which the ICJ can be seized of a dispute, we focus on the only way in which India may be bound to appear before the ICJ – the compulsory jurisdiction clause. We also address India's primary means of challenging the court's jurisdiction in the dispute with RMI.

Types of jurisdiction

The cornerstone of ICJ jurisdiction is consent. Such consent may be either given for specific disputes as they arise, or the consent may be of a general nature, given in advance. Consent for specific disputes may be through special agreement between the parties, or through acceptance of a unilateral application of one party by the other. General consent under the statute of the ICJ[5] may be given through a declaration accepting the 'compulsory jurisdiction' of the court under article 36(2) of the statute. The nature of this declaration is discussed in further detail below.

Compulsory jurisdiction

The 'compulsory' jurisdiction clause of the statute, also known as the 'optional clause', provides a choice to a state party to the statute to recognise the jurisdiction of the court as compulsory, for a certain category of disputes, in relation to any other state accepting the same obligation.[6] In such a case, a unilateral application by one state suffices to initiate a dispute, and no special agreement is required. However, the

4 Treaty on the Non-Proliferation of Nuclear Weapons (adopted on July 1, 1968, entered into force on Mar. 5, 1970) 729 UNTS 161 ('NPT').

5 Statute of the International Court of Justice (signed on June 26, 1945) 33 UNTS 993 (ICJ Statute).

6 ICJ Statute, art. 36(2).

jurisdiction of the court exists only as long as the commitments of the parties coincide.[7] The term 'reciprocity' appears only in paragraph 3, but it permeates article 36 in its entirety.

States also have the option to restrict their declarations of acceptance of the jurisdiction of the court by appending reservations to the same.[8] The nature, extent and procedure for such reservations have been the subject of some confusion before the court[9] and its predecessor, the Permanent Court of International Justice ('PCIJ')[10]. The court has, however, never declared any reservation unlawful and therefore invalid.[11]

At present, only 70 states have accepted the compulsory jurisdiction of the court, India and RMI being two among them. India submitted its existing declaration accepting the compulsory declaration of the ICJ on 18 September 1974, superseding its earlier declaration of 1959, after an ICJ decision on the *Right of Passage of Portugal over Indian Territory*, which was a landmark decision on the law of reservations to such declarations. It is interesting to note how India has shaped its declaration, after the *Right of Passage* judgment.[12] It has been said of India's existing declaration:[13]

> Nowhere has the quantity and density of reservations reached the same level as in the case of India, which has succeeded in shaping an instrument that will certainly prevent any attempt to bring an application against it, thus converting the act of acceptance into a hardly veiled act of non-acceptance.

This is due to the fact that while India has accepted the compulsory jurisdiction of the court over "all disputes", the acceptance has been made subject to 11 reservations, which, in effect, exclude a large majority of disputes from the ambit of ICJ jurisdiction under article 36(2) of its statute.

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7 S Rosenne, *The World Court: What It Is and How It Works* 89 (MartinusNijhoff, Leiden, 1989).

8 ICJ Statute, art 36(3).

9 *Case Concerning Right of Passage over Indian Territory* (*Portugal* v. *India)* (Preliminary Objections) (1957) ICJ Rep 125 (*Right of Passage* case); *Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria* (*Cameroon* v. *Nigeria*) (Preliminary Objections) (1998) ICJ 275; *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *USA*) (Jurisdiction and Admissibility), (1984) ICJ Rep 392 (*Nicaragua* v. *USA*).

10 *Phosphates in Morocco Case* (*Italy* v. *France*) (Preliminary Objections) PCIJ Rep Series A/B No. 74; *Electricity Company of Sofia Case* (*Belgium* v. *Bulgaria*) (Preliminary Objections) PCIJ Rep Series A/B No. 77.

11 C Tomuschat, "Article 36" in Andreas Zimmerman, Christian Tomuschat and Karin Oellers-Frahm (eds.), *The Statute of the International Court of Justice: A Commentary* 639 (Oxford University Press, 2006).

12 *Right of Passage* case, *supra* note 9.

13 *Supra* note 11 at 627.

It is on the grounds of some of these several reservations that India may challenge the jurisdiction of the court in the dispute brought against it by RMI. In the next section, we discuss a few possible grounds of challenge to jurisdiction and whether they would withstand judicial scrutiny.

Possible challenges to jurisdiction in the nuclear disarmament case

In this part, we examine three of the reservations in India's current declaration accepting the compulsory jurisdiction of the court, which may be relevant, in the context of its pending dispute against RMI.

Disputes relating to self-defence

The fourth reservation in India's declaration accepting the ICJ's compulsory jurisdiction is a wide clause, excluding the following disputes:[14]

> [D]isputes relating to or connected with facts or situations of hostilities, armed conflicts, individual or collective actions taken in self-defence, resistance to aggression, fulfilment of obligations imposed by international bodies, and other similar or related acts, measures or situations in which India is, has been or may in future be involved.

Clause (4) covers a number of cases under its broad ambit. For the purposes of this case, this dispute is not directly related to hostilities, armed conflicts, individual or collective actions taken in self-defence or resistance to aggression. However, it can be persuasively argued that it would be covered under the residuary clause of "other similar or related acts, measures or situations" related to self-defence.

In the case of *Djibouti* v. *France,* the ICJ has stated that "the consent allowing the court to assume jurisdiction must be certain".[15] Further, the court has clearly laid down that "the attitude of the respondent State must be capable of being regarded as an "unequivocal indication" of the desire of that State to accept the Court's jurisdiction in a 'voluntary and indisputable' manner" for establishing the basis of jurisdiction of the ICJ.[16] The Indian government's stance that the nuclear weapons programme has been initiated and implemented as a national defence and security measure is clearly established from the statements provided in the RMI Application itself. For example,

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14 Declarations Recognizing the Jurisdiction of the Court as Compulsory: India (18 September 1974), *available at*: www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3&code=IN (last visited on June 27, 2014) (Declaration of India).

15 *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France)* (Judgment) (2008) ICJ Rep 177, 204, para 62.

16 *Djibouti* v. *France, Case Concerning Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda)* (Jurisdiction and Admissibility) (2006) ICJ Rep 6, 18, para 21.

at the 2009 plenary of the conference on disarmament, India stated that "[n]uclear weapons are an integral part of our national security and will remain so, pending the global elimination of all nuclear weapons on a universal, non-discriminatory basis."[17] The Indian government's stance that "nuclear weapons will only be used in retaliation against a nuclear attack on Indian territory or Indian forces anywhere"[18] has also been expressed unequivocally.

Further, Judge De Castro's dissenting opinion in the *Nuclear Test Cases* before the ICJ, which concerned the legality of atmospheric nuclear tests conducted by France in the South Pacific, further supports the interpretation that cases relating to nuclear weapons fall within the national defence and security of a country. Judge De Castro was of the view that the French reservation relating to national defence[19] would apply to the nuclear tests.[20] Thus, it can be persuasively argued that the current application falls within the fourth reservation of India's declaration, being an issue related to the self-defence of the country, and India has therefore, not accepted the jurisdiction of the ICJ over such cases.

Multilateral treaty reservation

The seventh reservation in India's declaration accepting the jurisdiction of the court exempts the following disputes from the purview of the ICJ's jurisdiction:[21]

> [D]isputes concerning the interpretation or application of a multilateral treaty unless all the parties to the treaty are also parties to the case before the Court or Government of India specially agree to jurisdiction.

It has been argued that India may raise this reservation as a challenge to the court's jurisdiction.[22] This argument seems to be based on the premise that since RMI has alleged the breach of a provision in a multilateral treaty, i.e. the NPT,[23] the court cannot hear the dispute unless all parties to the NPT are joined as parties to this dispute.

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17 *Supra* note 1 at 11.

18 *Ibid.*

19 France's 1966 Declaration Accepting the Compulsory Jurisdiction of the ICJ as cited in *Nuclear Tests Cases (Australia* v. *France)* (Judgment) (Dis Op De Castro) (1974) ICJ Rep 372, 376.

20 *Nuclear Tests Cases* (Dis Op De Castro), *ibid.*

21 *Supra* note 14.

22 Dan Joyner, "India and Pakistan May Successfully Argue Lack of the ICJ's Jurisdiction in the Marshall Islands Case" (24 April 2014), *available at*: http://armscontrollaw.com/2014/04/24/india-and-pakistan-may-successfully-argue-lack-of-the-icjs-jurisdiction-in-the-marshall-islands-case/ (last visited on June 27, 2014).

23 *Supra* note 4.

However, this reservation only applies when a multilateral treaty (or treaty provision) is the subject of interpretation, the parties to the dispute necessarily being parties to the treaty. It cannot apply in a case where the issue is related to the alleged breach of a principle of customary international law, which though also embodied in a multilateral treaty, is not being challenged as a breach of the treaty.

In the present case, it would be difficult to argue an exemption from the ICJ's jurisdiction based on this reservation, for the following reasons. India is not a party to the multilateral treaty in question in this dispute – the NPT. Moreover, RMI is seeking to find India liable for breach of customary international law, which is, at the same time, embodied in article VI of the NPT. The court's assessment of the existence and scope of the provision in customary international law may be completely independent of a discussion of the treaty provision. Its interpretation of the obligation in issue will only affect the meaning of the obligation under customary international law, not the corresponding provision under the NPT.

In the case of *Nicaragua* v. *USA*,[24] USA had challenged the jurisdiction of the court based on an almost identical reservation in its declaration (called the 'Vandenberg reservation'). In the US declaration, the reservation exempted disputes "arising under a multilateral treaty", as opposed to disputes "concerning the interpretation or application of a multilateral treaty" in the Indian declaration. USA argued that its reservation barred the court from determining the case even on the basis of customary and general principles of international law because customary law provisions, which Nicaragua relied on, were identical to provisions in treaties sought to be excluded by the reservation.[25] The court disagreed, holding that multilateral treaty reservations could not preclude the court from determining cases relying on customary international law because the latter exists independently of treaty law.[26]

India's reservation may be argued to be broader in scope than the Vandenberg reservation. However, the difference in phrasing between the two is not relevant for the purpose of this discussion, since the focus is on the allegation of breach of a "multilateral treaty" and it is irrelevant whether it arises out of the treaty or concerns its interpretation or application.

Thus, in light of the reasons stated above, including the ICJ's decision in *Nicaragua* v. *USA*, it appears that such a reservation will not preclude the court from accepting jurisdiction in the present dispute.

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24 *Supra* note 9.

25 *Id.,* paras 68-69.

26 *Id.,* para 73.

Declaration for a specific purpose

The fifth reservation in India's declaration accepting ICJ's compulsory jurisdiction excludes the following disputes:[27]

> [D]isputes with regard to which any other party to a dispute has accepted the compulsory jurisdiction of the International Court of Justice exclusively for or in relation to the purposes of such dispute; or where the acceptance of the Court's compulsory jurisdiction on behalf of a party to the dispute was deposited or ratified less than 12 months prior to the filing of the application bringing the dispute before the Court.

RMI has filed the application against India after 12 months of its acceptance of the court's compulsory jurisdiction, and thus, the second part of this exclusion cannot be applied. However, the first part, which excludes any dispute with regard to which a party has accepted the compulsory jurisdiction exclusively in relation to such dispute could be argued on the basis of circumstantial evidence present. Such evidence includes the fact that RMI accepted the compulsory jurisdiction just a year before filing the current application to the date, i.e. it filed its acceptance on 23 April 2013 and filed the current application on 24 April 2014. Further, till this date, RMI had not accepted the compulsory jurisdiction of the ICJ and its acceptance allows RMI to withdraw its acceptance at any point from the date of notice of such withdrawal. These facts allow for an argument to be made that the RMI has accepted the ICJ's compulsory jurisdiction exclusively for the purposes of filing the current applications and thus falls within the exception provided in clause (5).

However, it needs to be pointed out that these are only circumstantial arguments and such a claim cannot be conclusively proved by India. Therefore, in the end it would turn on the court's opinion of the authenticity of RMI's acceptance and whether it has been indeed submitted merely for the purposes of filing these applications or not.

III RMI's allegation of India's violation of international law

In this section, we provide a legal analysis of (1) the meaning and scope of the obligation to negotiate nuclear disarmament under the NPT; and (2) the existence of such an obligation under customary international law that would bind India under international law. The thrust of our analysis is on the second part – the existence of this obligation under customary international law. We have nevertheless outlined in the beginning, the scope of the obligation to negotiate under the NPT. This is because RMI has contextualised its application against India in the backdrop of article VI,

27 *Supra* note 14.

NPT to explain the content of the norm contended to be international custom and thereby binding on India.

Scope of article VI of the NPT

Article VI of the NPT 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 control.

The court, in its *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* (*Nuclear Weapons* Opinion), examined article VI of the NPT and held in its operative part (*dispositif*): [28]

> 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.

With respect to this obligation, the court further elucidated that it was "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."[29] The finding of the court here thus seems to require something more from the NPT state parties than just a policy of deterrence.[30] This conclusion of the court has been criticised by some authors as being contrary to the language and intent of article VI. Article VI merely provides for state parties to pursue negotiations in good faith, without a positive obligation to engage in, and conclude, such negotiations for disarmament.[31]

However, even if this interpretation of article VI by the ICJ imposes a positive obligation on state parties to the NPT to take steps to not only negotiate, but also achieve a result, this cannot be extended as being applicable to non-party states. The court itself observed that the obligation under article VI of the NPT "formally concerns the 182 State parties to the Treaty on the Non-proliferation of Nuclear

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28 *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) (1996) ICJ Rep 226, 267, para 105(2)(F) ('*Nuclear Weapons Opinion*').

29 *Id.* at 263-64, para 99.

30 Ivan Krmpotic, "To the Edge and Back: The ICJ Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons" 9 *Mich. St. U. DCL J. Int'l L.* 315, 325 (2000).

31 For further discussion, see Christopher A Ford, "Debating Disarmament: Interpreting Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons" 14(3) *Nonproliferation Rev.* 401, 403-10 (2007).

Weapons"[32] and though it added that "any realistic search for general and complete disarmament, especially nuclear disarmament, necessitates the cooperation of all States",[33] this can be seen more as an observation than any clear obligation being imposed on non-party states.

The court has thus identified a two-fold positive obligation on the state parties to the NPT under article VI of the NPT to not only pursue, but also conclude negotiations that would lead to complete disarmament of all parties of the NPT. This is the obligation which RMI attempts to extend to non-state parties such as India by claiming it to be a norm of customary international law.[34] However, as discussed in the next part, this is a dubious argument and cannot be sustained.

Existence of the above obligation in customary international law

Treaties cannot create obligations for third parties

The Vienna Convention on the Law of Treaties of 1969[35] ('VCLT') lays down the law applicable to treaties between states. Although neither India nor RMI are parties to the VCLT, many of its provisions are considered to be a part of customary international law today and the ICJ has never found that the VCLT does not reflect customary law.[36] Articles 34-38 of the VCLT posit the rules regarding third states, that is, states not party to a treaty. A treaty does not create rights or obligations for a third state without its consent,[37] except that obligations may arise if specifically intended by parties to the treaty and accepted by the third state in writing.[38] Only as an exception to these rules, a treaty provision may bind a third state if the rule is recognised as a norm of customary international law.[39]

India is not a party to the NPT. The above discussion of the meaning and scope of article VI of the NPT is thus without consequence unless it is established that India is bound by this obligation under customary international law.

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32 *Supra* note 28 at 264, para 100.

33 *Ibid.*

34 *Supra* note 1 at 17.

35 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 ('VCLT').

36 V Lowe and M Fitzmaurice (eds), *Fifty Years of the International Court of Justice* 66 (CUP 1996); Hugh Thirlway, "The Law and Procedure of the International Court of Justice" *BYIL* 3 (1991); Anthony Aust, "Limping Treaties: Lessons from Multilateral Treaty-making" *NILR* 248-51 (2003).

37 *Supra* note 35, art. 34.

38 *Supra* note 35, art. 35.

39 *Supra* note 35, art. 38.

Interpretation of the Nuclear Weapons Opinion

Several scholars are of the opinion that paragraph 2(F) (the last paragraph, unanimously adopted) of the *dispositif*[40] in the ICJ's *Nuclear Weapons Opinion* is an implied endorsement of the proposition that the obligation under article VI, NPT, as defined by the ICJ in the same opinion, is an obligation in customary international law.[41] However, a close analysis of the court's opinion seems to indicate a different interpretation. An expansion of the statement in the *dispositif* may be found towards the end of its opinion, where the court states: [42]

> This twofold obligation to pursue and to conclude negotiations formally concerns the 182 States parties to the [NPT], or, in other words, the vast majority of the international community. Virtually the whole of this community appears moreover to have been involved when resolutions of the United Nations General Assembly concerning nuclear disarmament have repeatedly been unanimously adopted. Indeed, any realistic search for general and complete disarmament, especially nuclear disarmament, necessitates the co-operation of all States.

The court further goes on to opine: [43]

> The importance of fulfilling the obligation expressed in Article VI of the [NPT] was also reaffirmed in the final document of the Review and Extension Conference of the parties to the [NPT], held [in] 1995. In the view of the Court, it remains without any doubt an objective of vital importance to the whole of the international community today.

However, nowhere does the ICJ clearly specify in its 45 page opinion that the above obligation exists in customary international law. It is pertinent to note that its *dispositif* clearly mentions, in every paragraph, the existence, or otherwise, of a norm in customary international law. However, the court refrained from mentioning this in the last paragraph of the *dispositif* regarding the obligation to negotiate, thereby leaving it ambiguous. The only possible explanation is that, fully aware that this obligation does not exist in customary international law, the court carefully worded its *dispositif*.

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40 *Supra* note 28 at 267, para 105(2)(F).

41 International Law Association, "Nuclear Weapons, Non-Proliferation and Contemporary International Law: Second Report – Legal Aspects of Nuclear Disarmament" 3-4 (Washington Conference, 2014).

42 *Supra* note 28 at 264, para 100.

43 *Id.* at 265, para 103.

Further light may be thrown on this observation by referring to Judge Schwebel's dissent, where he argues that:[44]

> If this obligation is that only of "Each of the Parties to the Treaty" as Article VI of the Non-Proliferation Treaty states, this is another anodyne asseveration of the obvious, like those contained in operative paragraphs 2 A, 2 B, 2 C and 2 D. If it applies to States not party to the NPT, it would be a dubious holding. It would not be a conclusion that was advanced in any quarter in these proceedings; it would have been subjected to no demonstration of authority, to no test of advocacy; and it would not be a conclusion that could easily be reconciled with the fundamentals of international law.

He went on to state that in any event, since paragraph 2(F) was not responsive to the question asked of the court in the request for the advisory opinion, it was to be treated as irrelevant to the question at hand.[45] It must however be kept in mind that although Judge Schwebel appended a dissent to the advisory opinion, the court was unanimous on the finding recorded in paragraph 2(F) of the *dispositif*.

Further, even though Judge Bedjaoui, in his declaration, argues that there is an obligation *erga omnes* as well as a norm of customary international law, to negotiate in good faith as well as achieve the desired result of disarmament,[46] this is not the opinion of the majority of the court, as evident from Judge Bedjaoui's statement that "one can go beyond [the court's] conclusion and assert that…"[47] Therefore, it is tenuous to infer, from the operative paragraphs of the *Nuclear Weapons* Opinion, that the ICJ considered the obligation under article VI of the NPT as a norm of customary international law.

Fulfilment of the requirements of customary international law

Judge Schwebel's criticism apart, an independent legal assessment demonstrates that the two requirements for existence of international custom – state practice and *opinio juris*[48] – have not been met in the context of article VI of NPT. There is prevailing scholarly opinion that the court clearly felt that the obligation it identified under article VI, NPT –to achieve a precise result, that is, nuclear disarmament in all its aspects – has not been met by the official nuclear weapon states. Such contrary state practice

44 *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) (Dis Op Schwebel) (1996) ICJ Rep 311, 329 ('*Nuclear Weapons Schwebel*').

45 *Ibid.*

46 *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) (Decl Bedjaoui) (1996) ICJ Rep 268, 273-74, para 23.

47 *Id.* at 273, para 23.

48 Michael Wood, "First Report on Identification of Customary International Law" UN Doc A/CN.4/6663 (2013).

means that it is impossible to view article VI as being additionally binding in customary international law.[49] We have addressed the importance of the practice of 'specially affected states' in further detail below. Moreover, a positive *opinio juris*, reflective of the formation of customary international law, cannot be discerned from resolutions of the UN General Assembly, as elaborated below.

(a) *Widespread ratification of treaty does not make its provisions customary*

That treaties influence the formation of customary international law[50] is confirmed both in theory[51] and in ICJ jurisprudence[52] The relationship between customary international law and treaties is, however, not straightforward. Treaties can be an evidence of pre-existing customary law, multilateral treaties can provide the impetus for formation of new customary law through state practice, multilateral treaties could also assist in crystallisation of emerging rules of customary international law, however there is no automatic presumption that they do so.[53] The only conduct that can definitely act as contributing towards the formation of a customary rule is conduct that involves non-parties to the treaty or is at least conduct between a party and a non-party. Actions taken in compliance with treaty obligations cannot, at the same time, count towards formation of a customary rule.[54]

The only notable exception to this rule when a very widespread and representative participation in a treaty suffices to establish customary international law, is if it includes the participation of 'States whose interests were specially affected'[55]. This has even

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49 Daniel H. Joyner, *International Law and the Proliferation of Weapons of Mass Destruction* 69 (2009) as quoted in James A Green, "India's Status as a Nuclear Weapons Power under Customary International Law" 24(1) *Natn'l L. Sch. India Rev* 125, 133, 137 (2012).

50 International Law Association, "Committee on Formation of Customary (General) International Law: Final Report on Statement of Principles Applicable to the Formation of General Customary International Law" 712 (London Conference 2000), in particular, Part V: "The Role of Treaties in the Formation of Customary International Law" 753-65 (London Principles).

51 Anthony D'Amato, "Manifest Intent and the Generation by Treaty of Customary Rules of International Law" 64 *AJIL* 892 (1970); R Baxter, "Treaties and Custom" 129 *RdC* 25, 42 (1970); Hugh Thirlway, *International Customary Law and Codification* 80 (Leiden, 1972).

52 *North Sea Continental Shelf Cases (FR Germany* v. *Denmark) (FR Germany* v. *Netherlands)* (Judgment) (1969) ICJ Rep 3, 38-39 (*North Sea Continental Shelf*); *Nicaragua* v. *USA, supra* note 9, 424, para 71.

53 Malgosia Fitzmaurice, "Third Parties and the Law of Treaties" in J.A. Frowein and R Wolfrum (eds.), *Max Planck Yearbook of United Nations Law*, 37-137 (Kluwer 2002), 58 (Fitzmaurice).

54 *Id.* at 57; s*upra* note 50 at 758.

55 *North Sea Continental Shelf, supra* note 54 at 42, para 73.

been argued by the USA, before the ICJ, specifically in context of the use of nuclear weapons:[56]

> [W]ith respect to the use of nuclear weapons, customary law could not be created over the objection of the nuclear weapon States, which are the states whose interests are most specially affected.[56]

As succinctly put by the International Law Association, the extensive character of state practice is more a qualitative than a quantitative criterion: [57]

> [I]f all major interests ("specially affected States") are represented, it is not essential for a majority of States to have participated (still less a great majority, or all of them).

Therefore, in spite of a significant majority of states being parties to the NPT, an argument of customary international law cannot be made in favour of article VI of the NPT. This is because there is evidence of contrary practice and *opinio juris* from 'specially affected' states – that is, those states, both parties and non-parties to the NPT, that possess nuclear weapons.[58]

(b) *UN General Assembly Resolutions as sources of customary international law*

RMI, in its application, has relied on resolutions of the General Assembly[59]('GA') to contend that the obligation under article VI is recognised as part of customary international law. First, it relied on a GA resolution of 2013[60] which merely quotes verbatim and underlines the obligation set forth by the ICJ in paragraph 105(2)(F) of the *Nuclear Weapons* Opinion. For reasons described above, the same cannot be read to include the article VI NPT obligation within international custom.

Moreover, GA resolutions in general cannot be relied on as sources of customary international law. They may, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. Unanimous

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56 Legality of Use by a State of Nuclear Weapons in Armed Conflict, UNGA Request for Advisory Opinion, Statement by USA, 8-9 (June 1995).

57 *Supra* note 50 at 26.

58 Edda Kristjansdottir, "The Legality of the Threat or Use of Nuclear Weapons under Current International Law: the Arguments behind the World Court's Advisory Opinion" 30 *NYU J Int'l L Pol* 291, 324 (1998); Marco Roscini, "My thoughts on the customary status of Article VI of the NPT" (27 May 2014), *available at*: http://armscontrollaw.com/2014/05/27/my-thoughts-on-the-customary-status-of-article-vi-of-the npt (last accessed on 26 June 2014).

59 *Supra* note 1 at 19.

60 UN General Assembly Res 68/42 (Dec. 5, 2013) UN Doc A/RES/68/42.

adoption of a declaration may point towards a declaration of existing international law.[61] As stated by the ICJ itself: [62]

> To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule.

In the *Nuclear Weapons* Opinion, the ICJ even found that many of the GA resolutions that were cited in support of the customary character of article VI, NPT had been adopted with a substantial numbers of negative votes and abstentions. Thus, the court found that they did not meet the threshold of establishing the existence of an *opinio juris* on the illegality of the use of such weapons.[63]A dissenting opinion even went as far as to say that a large number of GA resolutions repeating the same obligation in fact demonstrate what the law is not; it is a mark of the ineffectuality in the formation of law.[64]

(c) *Status of the article VI obligation as an obligation erga omnes*

RMI has contended that not only is article VI, NPT a codification of customary law, it is, in fact, an obligation *erga omnes*, i.e., an obligation owed to the entire international community.[65] However, as we found above, since it is not a customary norm and is only a treaty obligation, it is, at best, an obligation *erga omnes partes*,[66] and not *erga omnes*.[67] In other words, it is an obligation assumed towards the group of the states parties collectively considered, but not towards the international community as a whole.[68]

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61 *Supra* note 44 at 319.

62 *Supra* note 28 at 254-55, para 70.

63 *Id.* at 255, para71.

64 *Supra* note 44 at 319-20.

65 *Case Concerning the Barcelona Traction, Light and Power Company, Limited* (*Belgium* v. *Spain*) (2nd Phase) (1970) ICJ Rep 3, para 33: "In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*."

66 *Case Concerning Questions Relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)* (Judgment), (2012) ICJ Rep 422, 449, para 68 (in context of the Convention Against Torture): "That common interest implies that the obligations in question are owed by any State party to all the other States parties to the Convention. All the States parties "have a legal interest" in the protection of the rights involved […]. These obligations may be defined as "obligations *erga omnes partes"* in the sense that each State party has an interest in compliance with them in any given case."

67 *Supra* note 58.

68 *Ibid.*

IV Non appearance of one party

The ICJ's order fixing time limits for filing memorials on jurisdiction by both parties indicates that India is unwilling to participate in proceedings before the court.[69] In light of such a stance by India, this section examines the legal and procedural consequences of a party failing, or choosing not, to appear before the court in a dispute which the court has admitted.

Article 53 of the statute of the court governs those situations where one of the parties to a dispute does not appear before the court or fails to defend its case. In such a situation, the statute provides that the court may nevertheless proceed to decide the case, when being called upon to do so by the appearing party.[70] Before doing so, the court must satisfy itself that it has jurisdiction, under its statute, to hear the dispute, and that "the claim is well founded in fact and law".[71]

The expression "must satisfy itself" implies that the court must attain the same degree of certainty as in any other case: that the claim of the party appearing is sound in law, and so far as the nature of the case permits, that the facts on which it is based are supported by convincing evidence.[72]

For the purpose of determining whether the claim is 'well founded in law', the court is not solely dependent on the argument of the parties before it with respect to the applicable law, so that the absence of one party has less impact.[73] This is based on the principle of *jura novit curia*, or, 'the court knows the law'. As the ICJ has held in the past, as an international judicial organ, it is:[74]

> [D]eemed to take judicial notice of international law, and is therefore required in a case falling under Art 53 of the Statute, as in any other case, to consider on its own initiative all rules of international law which

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69 *Supra* note 2 at 2: "whereas India was invited to appoint an Agent in the case […] and whereas it has not appointed an Agent to date; […] Whereas, by a letter dated 6 June 2014, the Ambassador of India to the Kingdom of the Netherlands informed the Court, *inter alia*, that 'India . . . considers that the International Court of Justice does not have jurisdiction in the alleged dispute'; Whereas, by a letter dated 10 June 2014, the Ambassador of India […] indicated that 'India regrets to inform [the Court] that it will not be able to participate in the proposed meeting to be held by the President with the representatives of the Parties.'

70 *Supra* note 5, art. 53(1).

71 *Supra* note 5, art. 53(2).

72 *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *USA*) (Merits), (1986) ICJ Rep 14, paras 28-29.

73 *Ibid.*

74 *Fisheries Jurisdiction Case* (*UK* v. *Iceland*) (Merits), (1974) ICJ Rep 3, para 17.

> may be relevant to the settlement of the dispute. It being the duty of the Court itself to ascertain and apply the relevant law in the given circumstances of the case, the burden of establishing or proving rules of international law cannot be imposed upon any of the parties, for the law lies within the judicial knowledge of the Court.

Thus, in spite of its absence, a non-appearing party has this distinct advantage before the ICJ.

Although the court is expected to know the law, the same cannot be said of the factual background. Therefore, as a consequence of non-appearance of a party, its disadvantage exists to the extent that it forfeits the opportunity to counter any factual allegations of the opponent. The court cannot, by its own enquiries, entirely make up for the absence of one of the parties; that absence in a case involving extensive questions of fact must necessarily limit the extent to which the court is informed of the facts.[75] Letters sent to the ICJ, containing factual allegations, if unsupported by evidence furnished by the non-appearing party, cannot provide a basis on which the court can form a judicial opinion on the truth or otherwise of the matters alleged therein.[76] The ICJ's basic premise in such cases is that the party which declines to appear cannot be permitted to profit from its absence, since this would amount to placing the party appearing at a disadvantage.[77]

However, in spite of its non-appearance, it remains a party to the dispute, the case continues without its participation, and it is bound by the judgment under article 59 of the statute.[78] Given that India has an arguable case against jurisdiction a strong case on the merits of this dispute, and in light of the state's constitutional obligation to endeavour to foster respect for international law,[79] it is arguably in India's interest that it adheres to the deadline for filing counter-memorials on jurisdiction and participate in all proceedings before the ICJ.

V Conclusion

RMI's application against India and the other states believed to be armed with nuclear weapons is primarily an attempt to bring the issue of nuclear disarmament to the forefront and restart the discussion around it in international fora. The need and importance of complete nuclear disarmament cannot be denied and India has also, at

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75 *Supra* note 73 at para 30.

76 *Case Concerning United States Diplomatic and Consular Staff in Tehran* (*USA* v. *Iran*) (Judgment) (1980) ICJ Rep 3, para 82.

77 *Supra* note 73 at para 31.

78 *Supra* note 73 at paras 28, 31.

79 The Constitution of India, art. 51(c).

various times and in various public fora, declared its support behind achievement of this aim, particularly towards having a nuclear weapons convention with uniform obligations of disarmament on all states.

Having said that, as discussed above, the current case against India can be argued strongly not only on issue of jurisdiction, but also on merits. There is no customary international legal obligation on India to negotiate in good faith and reach a conclusion resulting in nuclear disarmament. Further, there is a strong case to be made regarding the lack of jurisdiction of the court in this case due to the fifth reservation in India's declaration accepting ICJ's jurisdiction. The issue of nuclear weapons and disarmament can be persuasively argued to be within "matters related to self-defence". Therefore, it is argued in this paper that India should appear before the ICJ and argue its position, keeping in line with article 51 of the Indian Constitution, which states that India shall endeavour to foster respect for international law and treaty obligations. Such a step will show India's respect for international law and the ICJ. In addition, it will allow India the chance to clearly put forth its point of view regarding the importance of nuclear weapons to India's self-defence programme while at the same time, re-affirm its clear intention of working towards nuclear disarmament by all nations of the world.

Rukmini Das &*

*Shubhangi Bhadada***

* Former Research Fellow at the Vidhi Centre for Legal Policy, New Delhi, and currently a Research Scholar at the University of Geneva.

** Research Fellow at the Vidhi Centre for Legal Policy, New Delhi.