INTERNATIONAL COURT OF JUSTICE

OBLIGATIONS CONCERNING NEGOTIATIONS RELATING TO CESSATION OF THE NUCLEAR ARMS RACE AND TO NUCLEAR DISARMAMENT
(Marshall Islands *v.* India)

MEMORIAL
OF
THE MARSHALL ISLANDS

16 DECEMBER 2014

TABLE OF CONTENTS

LIST OF ANNEXES

Annex 1 – The 2014 Report on the Effects of Regional Nuclear Fallout Between India and Pakistan. Report by: Michael J. Mills, Owen B. Toon, Julia Lee-Taylor, and Alan Robock, "Multidecadal Global Cooling and Unprecedented Ozone Loss Following a Regional Nuclear Fallout", in Earth's Future

Annex 2 – The Map Series Demonstrating the Global Spread of Smoke from a Regional Nuclear Fallout Between India and Pakistan, and Selected Maps from the 2014 Report Submitted as Annex 1

Annex 3 – The Republic of India's Letter to the Court of 6 June 2014

Annex 4 – The Republic of India's Letter to the Court of 10 June 2014

Annex 5 – The Republic of India's Article 36 Declaration

Annex 6 – The Republic of the Marshall Islands' Article 36 Declaration

PART 1

INTRODUCTION

General Observations

1. In this Memorial the Republic of the Marshall Islands will, in accordance with the Court's Order of 16 June 2014, focus exclusively on the question of the jurisdiction of the Court with respect to the issues that are before the Court in the present case.

2. The subject matter of the present dispute brought before the Court by the Republic of the Marshall Islands (also referred to as 'Marshall Islands' or 'RMI' or 'Applicant') is the failure of the Republic of India (also referred to as 'India' or 'the Respondent') to honour its obligation towards the Applicant (and other States) 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. This obligation to negotiate a nuclear disarmament includes, in the first place, the obligation to negotiate in good faith to cease the nuclear arms race by each of the States that are in possession of nuclear weapons.

3. On 24 April 2014 the RMI submitted nine Applications to the Court. Each Application, filed against a different Respondent State, presented a different general background and was based on a different set of facts. The subject matter of all Applications related to a similar failure of each and every one of these nine States to live up to their obligation to pursue in good faith, and bring to a conclusion, negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.

4. Only three of the nine States involved currently recognize, as compulsory and without special agreement, the jurisdiction of the Court by means of a declaration under Article 36, para. 2 of the Statute of the International Court of Justice. Those three States are India, Pakistan and the United Kingdom. Each of those States recognizes the Court's jurisdiction on its own terms and conditions. In the Applications relating to the other six States the RMI has included an invitation as foreseen in Article 38, para. 5 of the Rules of Court.

5. To date, only the People's Republic of China has formally notified the Court that it does not consent to the jurisdiction of the Court. The other five States – the United States of America, the French Republic, the Russian Federation, the State of Israel and the Democratic People's Republic of Korea – have not formally responded to the RMI's Applications.

6. The fact that not all of the nine States are accepting to actually appear in theses respective cases before the Court cannot be deemed an obstacle for the Court to consider and adjudge each one of the three cases that are actually continuing (the present case against India as well as the cases against Pakistan and the United Kingdom). Each of the six States may be able to frustrate the case against itself by not appearing before the Court. However, it would not be acceptable to allow this non-appearance of third States to have a negative impact on the RMI's right to pursue the enforcement of the obligations involved by submitting a case to the Court.

The Nuclear Sword of Damocles

7. This case involves obligations of an *erga omnes* character, engaging RMI as a member of the international community. RMI's interests – even its existential interests - are also engaged by the issues at stake in this case. In particular, the potential threat of devastation caused by India's nuclear forces resulting in a substantial drop in temperature combined with the depletion of the global ozone layer. One or a few nuclear explosions, anywhere in the world, certainly in urban areas, would have devastating humanitarian effects,[1] which given its experience with the health and environmental consequences of nuclear testing the Marshallese naturally desire to prevent, as RMI emphasized in its written submission in *Legality of Threat or Use of Nuclear Weapons*.[2] Any such explosion would also have adverse effects on the global economy and likely on the nature of global political and legal order,[3] and therefore on the Marshall Islands. Beyond that, a nuclear exchange involving detonations in dozens of cities would have severe effects on the climate directly and substantially affecting the Marshall Islands. That risk is a stunning illustration of the Court's finding, quoted in para. 1 of the Application, that "the destructive power of nuclear weapons cannot be contained in either space or time".[4] The size of this threat has rather recently been demonstrated in a study in which the outcome of a nuclear exchange – between India

[1] See Tilman Ruff, "The health consequences of nuclear explosions," in Beatrice Fihn, ed., *Unspeakable suffering – the humanitarian impact of nuclear weapons* (Reaching Critical Will, 2013), http://www.reachingcriticalwill.org/images/documents/Publications/Unspeakable/Unspeakable.pdf [accessed on 11 December 2014]. Tilman Ruff is Associate Professor, Nossal Institute for Global Health, University of Melbourne, and Co-President, International Physicians for the Prevention of Nuclear War.

[2] Letter dated 22 June 1995 from the Permanent Representative of the Marshall Islands to the United Nations, together with Written Statement *of* the Government of the Marshall Islands, http://www.icj-cij.org/docket/files/95/8720.pdf [accessed on 11 December 2014].

[3] Cf. President Barack Obama, Prague speech, April 5, 2009: "One nuclear weapon exploded in one city – be it New York or Moscow, Islamabad or Mumbai, Tokyo or Tel Aviv, Paris or Prague – could kill hundreds of thousands of people. And no matter where it happens, there is no end to what the consequences might be for our global safety, our security, our society, our economy, to our ultimate survival".
http://www.whitehouse.gov/the_press_office/Remarks-By-President-Barack-Obama-In-Prague-As-Delivered [accessed on 11 December 2014].

[4] Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons at para 35.

and Pakistan – has been tested (**Annex 1**).[5] This study demonstrates that the effects of such a nuclear war, using only 0.03% of the world's nuclear arsenal, would be global and devastating. If each side detonates fifty 15-kiloton (kt) weapons it could produce a large amount of smoke that would rise into the atmosphere, spreading globally and causing a drop in temperature on the Earth's surface, whilst heating up the stratosphere.

8. The vast cities in both India and Pakistan not only are housing millions of people, but also provide fuel for fires post-detonation. Therefore a nuclear war between the two States would not only directly kill millions of people, but would also result in massive amounts of dark smoke rising into the atmosphere indirectly signing a death warrant for the rest of the Earth's inhabitants. The smoke from the fires will absorb sunlight; as a result the temperature on Earth's surface will be much cooler. As the smoke absorbs the sunlight it will heat up and damage the ozone layer, which will result in harmful UV rays reaching the surface. The damage to human health, agricultural and sea life would be immense. The study suggests a number of detrimental consequences, including the global food supply being threatened.

9. The Marshall Islands' reliance on the ocean for food supplies is exacerbated by the lack of suitable farming soil.[6] It relies on imports for a large part of its food supply, especially animal products.[7] Any change in the Earth's atmosphere affecting farming in countries that the RMI relies on for food support, for example the United States, would cause a widespread food shortage. Even a slight amount of damage to the aquatic ecosystem as a result of the ozone layer deteriorating could do away with their only real accessible food source. The Marshall Islands have a limited amount of food production, and changes in temperature and rainfall will directly impact that production. The lack of viable food sources could mean that the RMI would find themselves starving, and most likely before the rest of the world. As mentioned, the study referred to above provides an in-depth analysis of the devastating global effects of a nuclear fallout. The maps – to which the Applicant has added its own explanation in italics – taken from the report of this study and the related website show the speed at which resulting smoke spreads across the globe and up into the atmosphere and the changes in the surface air temperature and growing seasons as a result of such nuclear fallout (**Annex 2**).

10. The maintenance and expansion of this threat, while at the same time not living up to its central 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

[5] M.J Mills *et al.,* "Multi-decadal Global Cooling and Unprecedented Ozone Loss Following a Regional Nuclear Conflict", *Earth's Future Research Paper* 2014, at p. 161.
[6] http://www.fao.org/ag/AGP/AGPC/doc/Counprof/southpacific/marschall.htm [accessed on 11 December 2014].
[7] http://atlas.media.mit.edu/profile/country/mhl/ [accessed on 11 December 2014].

control, in itself is a clear demonstration of the scale and the nature of the dispute that exists between the two Parties to the present case.

India's Letter to the Court

11. By a letter of 28 April 2014 the Court invited the Applicant and the Respondent to meet with its President for the purposes set out in Article 31 of the Rules of Court. On 6 June 2014 India sent a letter to the Court informing the Court of its position with respect to the RMI's Application (**Annex 3**). By a letter of 10 June 2014 India informed the Court that it would not be able to attend the meeting with the Court's President scheduled for 11 June 2014 (**Annex 4**).

12. In its first letter India raised several issues that led it to conclude that the Court "[…] does not have jurisdiction in the alleged dispute" (para. 4 of the letter). On the basis of this claim the Court decided in its Order of 16 June 2014 "that the written pleadings shall first be addressed to the question of the jurisdiction of the Court". The Applicant respects the Court's Order. Therefore, at the present time it will not submit a Memorial that conforms to Article 49, para. 1 of the Rules of Court. Instead, the Applicant is submitting a Memorial exclusively focused on the jurisdictional issues raised by India in its letter of 6 June 2014. The RMI wishes to underline that it is, indeed, restricting its observations to issues effectively raised by India since the Applicant cannot be expected to go beyond what the Respondent has raised in its letter. It is up to the Party raising objections to fully specify and define those objections. Moreover, it is not for the Applicant to divine what the objections of the Respondent may be. A different approach would be contrary to rules of proper proceedings. In any case, the RMI reserves the right to supplement the present Memorial in writing or at the oral stage of the proceedings after it has had the opportunity to study the Counter-Memorial of India on this phase of the case.

PART 2

THE EXISTENCE OF A DISPUTE

13. This section responds to India's statement that "[t]he Application of Marshall Islands against India fails to establish any dispute between the Marshall Islands and India with regard to the non-fulfillment of any treaty or customary international law obligations".[8] This objection is groundless. There is a legal dispute between the RMI and India within the meaning of Article 36, para. 2 of the Statute. The dispute concerns India's compliance or non-compliance with its obligation under customary international law 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.

14. The Court has identified clear parameters for determining the existence of a dispute. According to the established case law of the Court, "[a] dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons."[9] Moreover, "[w]hether there is a dispute in a given case is a matter for 'objective determination' by the Court"[10] and "[t]he Court's determination must turn on an examination of the facts. The matter is one of substance, not of form."[11] In particular, what must be shown is "that the claim of one party is positively opposed by the other".[12] However, the opposition to the claim of one party may also be inferred from the attitude taken by the other party in respect to such claim. As the Court has stated, "a disagreement on a point of law or fact, a conflict of legal views or interests, or the positive opposition of the claim of one party by the other need not necessarily be stated *expressis verbis*. In the determination of the existence of a dispute, as in other matters, the position or the attitude of a party can be established by inference, whatever the professed view of that party".[13]

---

[8] Letter of 6 June 2014.

[9] *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11, and, most recently, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 84, para. 30.

[10] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 74.

[11] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 84, para. 30.

[12] *South West Africa (Ethiopia v. South Africa ; Liberia v. South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328, and most recently *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012*, p. 442, para. 46.

[13] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 315, paras. 89 ff.,

15. These criteria are fulfilled in the present case. The statements and conduct of the parties reflect the existence of a legal dispute between India and the RMI over whether India is complying with its obligation to pursue in good faith and bring to a conclusion negotiation leading to nuclear disarmament in all its aspects under strict and effective international control.

16. As set out in its Application and in the introduction to the present Memorial, the RMI has a particular awareness of the potentially dire consequences of nuclear weapons and in recent years has enhanced its commitment to promoting greater global progress to nuclear disarmament. On several occasions, and in different fora, it has asked States possessing nuclear weapons to abide by their obligations to take action towards nuclear disarmament. For instance, on 26 September 2013, at the occasion of the UN High Level Meeting on Nuclear Disarmament, the Minister of Foreign Affairs for the RMI urged "all nuclear weapons states to intensify efforts to address their responsibilities in moving towards an effective and secure disarmament".[14] On 13 February 2014, at the Second Conference on the Humanitarian Impact of Nuclear Weapons, the RMI reiterated such demand and expressly stated that the failure of States possessing nuclear weapons to engage in negotiation leading to nuclear disarmament amounted to a breach of their international obligations. It observed that:

> "(…) the Marshall Islands is convinced that multilateral negotiations on achieving and sustaining a world free of nuclear weapons are long overdue. Indeed we believe that states possessing nuclear arsenals are failing to fulfill their legal obligations in this regard. Immediate commencement and conclusion of such negotiations is required by legal obligation of nuclear disarmament resting upon each and every state under Article VI of the Non Proliferation Treaty and customary international law."[15]

17. This statement illustrates with perfect clarity the content of the claim of the RMI. The claim was unequivocally directed against all States possessing nuclear arsenals, including India. The contested conduct was clearly stated – the failure by these States to seriously engage in multilateral negotiations leading to a nuclear disarmament. The legal basis of the claim was also clearly identified to include the legal obligation resting upon each and every State under customary international law.

---

[14] Statement by Hon. Mr. Phillip Muller, Minister of Foreign Affairs of the Republic of the Marshall Islands, 26 September 2013 (available at http://www.un.org/en/ga/68/meetings/nucleardisarmament/pdf/MH_en.pdf).

[15] Marshall Islands Statement, Second Conference on the Humanitarian Impact of Nuclear Weapons Nayarit, Mexico, 13-14 February 2014 (available at http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/nayarit-2014/statements/MarshallIslands.pdf)

18. By this unequivocal statement, made in the context of an international conference in which India participated, India was made aware that the RMI believed that its failure to seriously engage in multilateral negotiations amounted to a breach of its international obligations under customary international law. This public statement, as well as the overall position taken by the RMI on this issue over recent years, is clear evidence that the RMI had raised a dispute with each and every one of the States possessing nuclear weapons, including with India. The subject matter of this dispute is the same as that later submitted to the Court through the RMI's Application. In its judgment in the case concerning the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)* the Court recognized that "[w]hile it is not necessary that a State must expressly refer to a specific treaty in its exchanges with the other State to enable it later to invoke that instrument before the Court (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, pp. 428-429, para. 83), the exchanges must refer to the subject-matter of the treaty with sufficient clarity to enable the State against which a claim is made to identify that there is, or may be, a dispute with regard to that subject-matter".[16] While this statement refers to a dispute with regard to compliance with a treaty, the same also applies to disputes under customary international law. In the present case there is no doubt that the RMI referred to the subject matter of its claims against India with sufficient clarity to enable India "to identify that there is, or may be, a dispute with regard to that subject-matter". Thus, India cannot now seriously contend that the RMI failed to raise a dispute with India over India's non-fulfillment of its customary international law obligation to engage in negotiations leading to nuclear disarmament.

19. It can hardly be denied that the RMI's claims have been positively opposed by India. India's opposition to such claims can be inferred, in the first place, from its conduct. While in public statements India has frequently reaffirmed its commitment to the goal of a nuclear weapon free world,[17] its conduct, which continued unchanged despite the RMI's claims and requests, reveals that India is not fulfilling its obligation under customary international law to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects. Instead, India continues to engage in a course of conduct consisting of the quantitative build-up and qualitative improvement of its nuclear arsenal, which is contrary to the objective of nuclear disarmament. In its Application, the RMI has already set out India's current plans for the expansion, improvement and diversification of its nuclear arsenal.[18] There is no reason to return to this issue here. At this stage, what must be emphasized is that India's conduct provides clear evidence of its opposition to the RMI's claims. As the

[16] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 84, para. 30.
[17] For references see RMI Application, paras 36-37.
[18] RMI Application, paras 29-34.

Court said, when it comes to determining the existence of a dispute, "[t]he matter is one of substance, not of form".[19] And the substance is that India continues to engage in conduct that is contrary to its customary international legal 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.

20. Not only can India's opposition to the RMI's claims be inferred from its conduct, India has also explicitly disputed that the claim is well-founded. In its letter to the Court of 6 June 2014, India denied the existence of "any dispute between the Marshall Islands and India with regard to the non-fulfillment of any treaty or customary international law obligations". Its view on this issue was based on the following argument:

> "India has not accepted, ratified or acceded to the NPT. The 1969 Vienna Convention on the Law of Treaties, which codified prevailing customary international law, provides that States are bound by a treaty based on the principle of free consent. Given India's consistent objection to the NPT, the obligations arising from it cannot selectively apply to India as a matter of customary international law. A global approach is inherent in the nature of the subject of the Application, namely nuclear disarmament, and a selective remedy cannot be sought against a State or a few States."[20]

21. India's argument is based on two propositions: a) that the obligations set forth in the NPT do not apply to it since India is not a party to that Treaty; and b) that, even assuming the existence of an obligation as a matter of customary international law – a point which India does not concede, at least not expressly – this obligation cannot be selectively invoked against India because "[a] global approach is inherent in the nature of the subject of the Application". As regards the first proposition, it is clear from the Application that the RMI's claims against India rely only on customary international law. As to the second proposition, India's view on this point is clearly incorrect. Under customary international law, every State is under an obligation *erga omnes* to pursue in good faith negotiations leading to nuclear disarmament. This obligation applies to India, as it applies to each and every State, irrespective of the attitudes of the other States in respect to the same obligation. In other words, the fact that other States may have breached the obligation to negotiate does not and cannot exclude the possibility for the Court to assess independently whether India is complying with the same obligation. There is no reason to believe that this obligation is of such a nature that it cannot be invoked against a single State, or against a few States. The possibilities of seeking remedies against one State, or of bringing the question of that State's compliance with this obligation before an international tribunal, are not

[19] See supra footnote 18.
[20] Letter of 6 June 2014.

excluded just because other States are under the same obligation to negotiate nuclear disarmament. As it has been observed, "should the presence of all responsible States be required, the need for the existence of a jurisdictional link between the claimant State and all the respondent States would be likely to lead to the consequence that all the latter States would enjoy immunity from judicial scrutiny".[21]

22. While any question concerning the content of the obligation to negotiate invoked against India is to be left for the merits phase of the case, what has to be stressed at the present stage is that India's statement only goes to confirm the existence of a dispute between itself and the RMI. By the very act of setting out its disagreement with the RMI's positions over the existence of an international obligation that can be invoked against it, India itself demonstrates the existence of a dispute between the Parties. This Court has the obligation, and jurisdiction, to hear the dispute and to declare what customary international law requires. In its judgment in the case concerning *Certain Property (Liechtenstein v. Germany)*, the Court observed that "in the present proceedings complaints of fact and law formulated by Liechtenstein against Germany are denied by the latter. In conformity with well-established jurisprudence (…), the Court concludes that '[b]y virtue of this denial, there is a legal dispute' between Liechtenstein and Germany".[22] To the same extent it may be said that in the present proceedings, complaints of law formulated by the RMI are denied by India and that therefore, by virtue of this denial, there is a legal dispute between the RMI and India.

23. The fact that these elements are sufficient to prove the existence of a dispute is confirmed by the Court's established case law, according to which:

> "[…] the manifestation of the existence of the dispute in a specific manner, as for instance by diplomatic negotiations, is not required. It would no doubt be desirable that a State should not proceed to take as serious a step as summoning another State to appear before the Court without having previously, within reasonable limits, endeavoured to make it quite clear that a difference of views is in question which has not been capable of being otherwise overcome. But in view of the wording of the article, the Court considers that it cannot require that the dispute should have manifested itself in a formal way; according to the Court's view, it should be sufficient if the two Governments have in fact shown themselves as holding opposite views in regard to the meaning or scope of a judgment of the Court".[23]

---

[21] G. Gaja, 'The Protection of the General Interests in the International Community. General Course on Public International Law', *Recueil des cours*, vol. 364 (2014), p. 118.

[22] *Certain Property (Liechtenstein v. Germany), Preliminary Objections, Judgment, I.C.J. Reports 2005*, p. 19, para. 25.

[23] *Interpretation of Judgments Nos 7 and 8 (Factory of Chorzow), Judgment No. 11, 1927, P.C.I.J., Series A, No. 13*, pp. 10-11.); also *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the Continental Shelf (Tunisia v. Libyan Arab Jamahiriya),*

24. With regard to this finding, it has been observed that "[t]his amounts to saying that the establishment of a dispute presupposes a claim by one side, opposed by another, but that the opposition does not have to be the result of prior negotiations or prior contact between the disputing States".[24] The same author also noted that, in order for a conflict to give rise to a dispute, "it is necessary that one of the States concerned should 'activate' the conflict by formulating claims that the other will have to resist. This can happen through prior diplomatic negotiations or through declarations to the Court itself".[25] Moreover, while obviously, as the Court put it, the "dispute must in principle exist at the time the Application is submitted to the Court",[26] the existence of the dispute as defined in the Application may also be evidenced by the positions of the parties before the Court. Indeed, in several cases the Court has accorded evidentiary value to the Parties' statements before the Court for the purposes of determining the existence of a dispute.[27]

25. It may be concluded that the RMI and India, by their opposing statements and conduct both prior to and after the submission of the Application, have manifested the existence of a dispute over India's non-compliance with its 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. India's objection in this respect must therefore be rejected.

Judgment of 10 December 1985, I.C.J. Reports 1985, p. 218, para. 46. While this case satisfies even this standard, which is a reference to a dispute required under Article 60 of the Statute, a dispute under Article 36 may encompass a much broader range of differences of fact and law.

[24] R. Kolb, *The International Court of Justice*, Hart Publishing, 2013, p. 314.

[25] *Ibid.*, p. 306.

[26] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 85, para. 30; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012*, p. 442, para. 46.

[27] See, among others, *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, *I.C.J. Reports 1998*, p. 315, para. 93; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), I.C.J. Reports 1996 (II)*, pp. 614- 615, para. 29; *Certain Property (Liechtenstein v. Germany)*, *I.C.J. Reports 2005*, p. 19, para. 25.

PART 3

THE INTERPRETATION OF DECLARATIONS ACCEPTING THE JURISDICTION OF THE COURT

General observations

26. The Court has jurisdiction over the present dispute by reason of the respective Declarations made by India and the RMI under Article 36, para. 2 of the Court's Statute. India signed its Declaration on 15 September 1974 and deposited it on 18 September 1974 (**Annex 5**). The RMI's Declaration was deposited on 24 April 2013 (**Annex 6)**. Both Declarations were in force when the RMI submitted its Application to the Court.

27. As stated by this Court, "[i]t is for each State, in formulating its declaration, to decide upon the limits it places upon its acceptance of the jurisdiction of the Court".[28] When a Party places such limits, "the interpretation of declarations made under Article 36, paragraph 2, of the Statute, and of any reservations they contain, is directed to establishing whether mutual consent has been given to the jurisdiction of the Court".[29] While both Parties have made reservations to their respective Declarations under Article 36, para. 2, a plain reading of the text of these two Declarations makes clear that the Parties have given their mutual consent to the Court's jurisdiction in relation to the dispute submitted by the RMI, since neither of these two Declarations places a limit on the Court's jurisdiction in relation to the present case. In particular, the reservations contained in their respective Declarations are simply not pertinent for the purposes of the present case.

28. In its letter of 6 June 2014, India did not mention the Declaration of acceptance of the Court's jurisdiction made by the RMI on 24 April 2013. This is not surprising as the few limitations on the Court's jurisdiction contained in that Declaration clearly do not concern the dispute brought by the RMI against India.

29. In the same letter, India argued that "the International Court of Justice does not have jurisdiction in the alleged dispute".[30] In support of this argument, it invoked two reservations contained in its Declaration of acceptance of the Court's jurisdiction, namely reservations (4) and (7). None of the other reservations contained in India's Declaration was referred to in the letter of 6 June 2014. Therefore, there is no reason

[28] *Fisheries Jurisdiction (Spain v. Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, pp. 452-453, para. 44.
[29] *Ibid.*
[30] Letter of 6 June 2014, para. 4.

to enter into an examination of these other reservations. Indeed, that would be an exercise of little utility, as it is clear from the outset that they also do not limit the Court's jurisdiction in relation to the present dispute.

30. The next sections of this Memorial will show that neither of the two reservations invoked by India creates a bar to the Court's jurisdiction. The interpretation of these reservations leaves no doubt as to the existence of the mutual consent of the Parties to the Court's jurisdiction. Before examining them, it is useful to recall the rules of international law that apply to the interpretation of unilateral declarations made under Article 36, para. 2 of the Court's Statute and of the reservations contained therein.

31. According to the well-established case law of this Court, a declaration "must be interpreted as it stands, having regard to the words actually used".[31] Moreover, "the Court cannot base itself on a purely grammatical interpretation of the text. It must seek the interpretation which is in harmony with a natural and reasonable way of reading the text".[32] When interpreting a declaration, the Court gives due regard on the intention of the depositing State at the time of its acceptance:

> "The Court will thus interpret the relevant words of a declaration including a reservation contained therein in a natural and reasonable way, having due regard to the intention of the State concerned at the time when it accepted the compulsory jurisdiction of the Court".[33]

The Court has also observed that "where an existing declaration has been replaced by a new declaration which contains a reservation, as in this case, the intentions of the Government may also be ascertained by comparing the terms of the two instruments".[34]

India's Reservation Regarding Interpretation of Multilateral Treaties

32. Reservation (7) excludes from India's consent to the Court's jurisdiction "disputes 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".

[31] *Anglo-Iranian Oil Co. (United Kingdom v. Iran), Preliminary Objection, Judgment, I.C.J. Reports 1952*, p. 105.
[32] Ibid., p. 104.
[33] *Fisheries Jurisdiction (Spain v. Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 454, para. 49.
[34] Ibid., p. 454, para. 50.

33. The words used in this reservation indicate that the application of this reservation is subjected to two conditions. The first condition relates to the subject matter of the dispute. Thus, the reservation applies to disputes over the interpretation or application of a multilateral treaty. In other words, the existence of a dispute having this subject matter presupposes that the claims put forward by the applicant are based on a multilateral treaty that is applicable in the relationship between the applicant and the respondent. The second condition is that all the parties to the treaty are parties to the case brought before the Court or, in absence thereof, that India has specifically agreed to the Court's jurisdiction. The intention underlying the adoption of this text is that of excluding the possibility that a dispute concerning a multilateral treaty to which India is a party may be brought against India alone, without the other parties to the treaty also being parties to the case and therefore also being bound by the Court's interpretation of that multilateral treaty.

34. This reservation cannot serve to exclude the Court's jurisdiction in relation to the dispute submitted by the RMI for the obvious reason that there is no dispute between the RMI and India over the interpretation and application of a multilateral treaty. It is true that the obligation to engage in good faith in negotiations leading to nuclear disarmament is also contained in Article VI of the NPT. However, the dispute between the RMI and India cannot concern the interpretation or application of the NPT, because India is not a party to that treaty. What is before the Court in this case is a dispute exclusively concerning India's compliance with the obligation under customary international law 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. The fact that the rule set forth in Article VI of the NPT may have the same content as the customary international rule on which the RMI bases its claims does not and cannot transform the present dispute into a dispute over the interpretation and application of the NPT.

35. India's objection runs squarely counter to the position held by this Court in its Judgment in the *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* case. While the wording of the reservation of the United States differed slightly from that of India, the view held by the Court in that case also applies to the present case. The United States had argued that, if the claims of the applicant merely restate its claims based expressly on certain multilateral treaties, the reservation also applies to disputes that are formulated in terms of customary international law. The Court rejected this argument by observing:

> "The Court cannot dismiss the claims of Nicaragua under principles of customary and general international law, simply because such principles have been enshrined in the texts of the conventions relied upon by Nicaragua. The fact that the abovementioned principles, recognized as such, have been codified or embodied in multilateral conventions does not mean that they cease

to exist and to apply as principles of customary law, even as regards countries that are parties to such conventions".[35]

It also observed:

> "[…] the effect of the reservation in question is confined to barring the applicability of the United Nations Charter and Organization of American States Charter as multilateral treaty law, and has no further impact on the sources of international law which Article 38 of the Statute requires the Court to apply".[36]

36. It must be noted that in the *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* case the invocation of the multilateral-treaty reservation had been prompted by the fact that the dispute submitted by Nicaragua was in fact a dispute under both multilateral treaties and customary international law. However, unlike that dispute, the present dispute between the RMI and India is, and can only be, a dispute exclusively under customary international law. This is so because India is not a party to the NPT. This renders the invocation of this reservation by India, if possible, even more groundless.

37. For all these reasons, the objection raised by India through the invocation of the multilateral treaty reservation must be rejected.

India's Reservation Regarding Self-Defence

38. Reservation (4) excludes the Court's jurisdiction over disputes relating to or connected with "facts or situations" of hostilities involving India. The first part of the reservation refers to "disputes 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". The second part of the reservation, introduced by the conjunction "and", excludes in addition "other similar or related acts, measures or situations in which India is, has been or may in future be involved". It is apparent that the two parts of the reservation are strictly connected. As the Court put it in a recent case where it noted that "[t]he wording of the second part of the reservation is closely linked to that of the first part", "[t]he reservation thus has to be read as a unity".[37] The same applies to the interpretation of the present reservation.

---

[35] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 424, para. 73.
[36] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Merits, I.C.J. Reports 1986*, p. 38, para. 56.
[37] *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), Judgment*, para. 37.

39. The reservation must first "be interpreted as it stands, having regard to the words actually used".[38] Here we can leave aside the reference to the "fulfillment of obligations imposed by international bodies", which is clearly not pertinent for the purposes of the present case. As a whole, the words *"[f]acts* or *situations* of hostilities, armed conflicts, individual or collective actions taken in self-defence, resistance to aggression" naturally and reasonably refer to particular uses of force, i.e. to specific situations involving India in which force is used. The inclusion among the listed "facts or situations" of "individual or collective *actions taken* in self-defence" means that the exclusion of the Court's jurisdiction operates in case of disputes concerning "actions taken" in self-defence. The word "taken" reinforces the reading according to which the first part of the reservation operates if the dispute between India and another State concerns a specific situation of use of force, including cases of self-defense.

40. The second part of the reservation must be read in the light of the first part. When the exception under (4) is interpreted "as a unity", it becomes clear that the second part also refers to particular situations of use of force. This is confirmed by the words "*similar or related* acts, measures or situations" (italics added). The particular situations of use of force to which the reservation refers may also be ones in which India is not currently involved but in which it "may in future be involved". It remains, however, that the application of the reservation clearly requires that two conditions be satisfied: that there exists a specific situation of use of force (or related acts and measures) in which India is, has been or may in future be involved; and that the dispute between the Parties relates to, or is connected with, that particular situation.

41. India's Declaration of 14 September 1959, which, on 18 September 1974, was replaced by the Declaration currently in force, contained a similar reservation. It provided as follows:

> "Disputes concerning any question relating to or arising out of belligerent or military occupation or the discharge of any functions pursuant to any recommendation or decision of an organ of the United Nations, in accordance with which the Government of India have accepted obligations."[39]

If one compares the terms of the two reservations, it can be observed that the new reservation differs from its precedent by being both broader and more precise. It is broader since it covers other situations in addition to "belligerent or military occupation or the discharge of any functions pursuant to any recommendation or

[38] *Anglo-Iranian Oil Co. (United Kingdom v. Iran), Preliminary Objections, Judgment, I.C.J. Reports 1952*, p. 105.
[39] *Trial of Pakistani Prisoners of War (Pakistan v. India), Correspondence*, p. 142.

decision of an organ of the United Nations". It is also more precise because, instead of using the generic word "question", it refers to "fact or situations".

42. In regard to the objectives that the new reservation was intended to achieve, it can be observed that the new Declaration was deposited by India a few months after the filing by Pakistan of the case concerning the *Trial of Pakistani Prisoners of War (Pakistan v. India)*. Significantly, Pakistan had sought to base the Court's jurisdiction over that case also on the Declarations of the Parties under Article 36, para. 2 of the Statute.[40] This circumstance suggests that the purpose of the new Declaration was to prevent the Court from exercising its jurisdiction over particular situations of the use of force involving India or over related acts and measures, including obviously the treatment of prisoners of war. In other words, the close temporal link between Pakistan's Application and the modification of India's Declaration provides support for the view that the new reservation was intended to cover disputes relating to, or connected with, particular situations of the use of force, such as the dispute submitted to the Court by Pakistan. Thus, the historical context of this modification of its reservation seems to provide evidence for the intention of India "at the time when it accepted the compulsory jurisdiction of the Court".[41]

43. It is apparent that the dispute between the RMI and India does not fall within the ambit of reservation (4), included in India's current Declaration under Article 36, para. 2. All the reservation is designed to cover is particular uses of force involving India or similar or related acts, measures or situations. The present dispute is not related to, nor is connected with, any such acts, measures or situations.

44. In its letter of 6 June 2014, India alluded to the existence of a link between the possession of nuclear armaments and its right of self-defence. It observed that, "pending global nuclear disarmament, India is committed for reasons of national security and self-defence to building and maintaining a credible minimum nuclear deterrent".[42] With regard to this statement, the RMI incidentally notes that it strongly opposes the view that the right of self-defence *per se* may justify the possession or the use of nuclear armaments. At this stage, however, it confines itself to observing that this statement fails to establish any link between the possession of nuclear armaments and the application of reservation (4) to the present dispute. This is hardly surprising.

---

[40] *Trial of Pakistani Prisoners of War (Pakistan v. India), Minutes of the Public Sittings held at the Peace Palace, The Hague, 4 June 1973 (Request for the indication of interim measures of protection), Argument by Mr. Bakhtiar,* CR 1973, p. 54.

[41] *Fisheries Jurisdiction (Spain v. Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 454, para. 49. In the same judgment it is said that "[t]he Court will thus interpret the relevant words of a declaration including a reservation contained therein in a natural and reasonable way, having due regard to the intention of the State concerned at the time when it accepted the compulsory jurisdiction of the Court. The intention of a reserving State may be deduced not only from the text of the relevant clause, but also from the context in which the clause is to be read, and an examination of evidence regarding the circumstances of its preparation and the purposes intended to be served." Ibid.

[42] Letter of 6 June 2014, para. 2.

As it has been shown, only the existence of a particular situation of armed conflict may trigger the application of such reservation and the present dispute does not relate to, and is not connected with, any such situation. But even assuming, *arguendo*, that a dispute over India's possession of a nuclear arsenal might be regarded as falling within the ambit of the reservation, this would not exclude the Court's jurisdiction over the present dispute.

45. The subject matter of the RMI's Application does not concern the question of whether India has a right to possess a nuclear armament. Nor does the RMI claim that India is under a duty to unilaterally dismantle its nuclear arsenal. The RMI claims that, particularly by engaging in a program of quantitative build-up and qualitative improvement of its nuclear forces, India is not complying with its obligation to pursue in good faith negotiations leading to nuclear disarmament in all its aspects. However, this does not mean that a dispute over the obligation to negotiate nuclear disarmament, including cessation of the nuclear arms race, in good faith is a dispute over the possession of a nuclear armament. The subject matter of the dispute brought before the Court by the RMI concerns the obligation to negotiate, not the possession of a nuclear arsenal. Consequently, any decision the Court may take on the dispute submitted by the RMI would not directly affect India's possessing – for whatever reason – a nuclear arsenal. What the Court is called upon to do is to ascertain whether India has complied and is complying with its obligation to pursue in good faith, and bring to a conclusion, negotiations leading to nuclear disarmament in all its Order os under strict and effective international control.

46. The legality or illegality of the possession and threat or use of nuclear weapons and States' compliance or non-compliance with the obligation to pursue in good faith negotiations leading to nuclear disarmament are two separate aspects of the complex question concerning "the legal status of weapons as deadly as nuclear weapons".[43] The Court expressly acknowledged the difference between these two aspects in its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons. The Court drew a clear distinction between "the eminently difficult issues that arise in applying the law on the use of force and above all the law applicable in armed conflict to nuclear weapons" and "one further aspect of the question before it, seen in a broader context",[44] namely the existence of an obligation to negotiate in good faith a nuclear disarmament. The separate nature ofseparate nature of these two different aspects is also reflected in the operative part of the Court's opinion.[45]

47. The dispute between India and the RMI does not relate to, nor is it connected with, a particular situation of the use of force. This is sufficient to exclude the applicability of reservation (4). *Ex abundanti cautela*, it can be added that, more broadly, this dispute

[43] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 263, para. 98.
[44] Ibid.
[45] Ibid., para. 105.

does not concern the question of India's right to possess a nuclear arsenal or to use nuclear weapons in self-defence. The present dispute, as defined in the RMI's Application, is about whether India has complied and is complying with its 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. Given its subject matter, this dispute is unrelated to the disputes that are covered by reservation (4).

PART 4

CONCLUSION

48. In accordance with the Order of the Court of 16 June 2014, this Memorial is restricted to questions of jurisdiction raised by India. As for the merits of the case, the Applicant maintains its Submissions, including the Remedies requested, as set out in the Application of 24 April 2014. For further stages of the procedure the Applicant reserves its right to clarify, modify and/or amend these Submissions.

49. On the basis of the foregoing statements of facts and law, the Republic of the Marshall Islands requests the Court to adjudge and declare that it has jurisdiction with respect to the present case.

16 December 2014

Tony A. de Brum
Co-Agent of the Republic of
the Marshall Islands
before the International Court of Justice

Phon van den Biesen
Co-Agent of the Republic of
the Marshall Islands
before the International Court of Justice