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Issue Brief

The Clarion Call from the Atolls: Marshall Islands Puts the Nuclear Powers on Notice

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Summary

The RMI petitions, interestingly, do not seem to have considered the feasibility of the solution for which it seeks a legal remedy. The preamble of the NPT specifies that cessation of nuclear weapons production and elimination of arsenals will be pursuant to a Treaty on general and complete disarmament. The failure of the disarmament movement is easily attributable to the inability to formulate such a standalone instrument for disarmament, as the NPT has not set a timeline. Some nations have proposed the Nuclear Weapons Convention as a means towards a nuclear weapons prohibition treaty, which the RMI petition also alludes to. Further, the recent efforts to highlight the humanitarian consequences of nuclear weapons have also heralded the cause of a nuclear weapons ban treaty. While these initiatives echo the increasing support among non-weapon states for a turnaround, that none of the nuclear-armed states (but for India's support to the NWC) have endorsed these efforts, in fact, justifies the RMI's decision to seek legal recourse on this front.

The story of the Republic of Marshall Islands (RMI) evokes awe as well as sympathy. This Pacific island republic has for long been at the forefront of projecting the perils that small island nations confront from climate change and rising sea levels.[1] Theirs has been a historic struggle for survival ever since the US used their islands to conduct nuclear tests through the 1940s and 50s. Since then, the inhabitants of the Bikini Islands – part of a chain of atolls that constitute the RMI – have been living a nomadic life, moving from one atoll to another in search of a permanent habitat even as rising tides and toxic environs made each of them uninhabitable. Through a resettlement fund[2] and a Compact of Free Association of 1983[3] with RMI, the US government was supposed to compensate for the radioactive fallout of nuclear testing and the displacement of the islanders by providing USD 150 million to create a Fund for addressing "past, present and future consequences of the US Nuclear Testing Programme." However, the RMI filed a *Changed Circumstances Petition* with the US Congress in September 2000, claiming additional compensation, beyond the USD 150 million designated in the Compact, as "new and additional" information on the wider extent of radioactive fallout than previously known was discovered, rendering the provisions of the Compact "manifestly inadequate."[4] For their part, the Bikini Islanders are also now seeking a new deal[5] on the terms of the resettlement fund, with the hope of relocating to the US – a proposal that has gained backing from the US Department of Interior as well.[6]

While this crusade defines the Marshallers' decades-old pursuit of justice as victims of nuclear testing, the campaign that has now caught the global imagination is the RMI's unprecedented action of suing nine nuclear powers – including the five recognised nuclear weapon states (NWS)and the four non-NPT (Treaty on the Non-Proliferation of Nuclear Weapons) nuclear-armed states – at the International Court of Justice (ICJ) for breaching their 'legal obligation' to eliminate their nuclear arsenals.[7] Through separate petitions, RMI is seeking to challenge the nuclear powers for what it terms as a "flagrant denial of human justice" amid

1 Coral Davenport, The Marshall Islands are Disappearing, *The New York Times*, 1 December 2015.

2 U.S. Reparations for Damages, People of Bikini vs. U.S. Lawsuit Court Filings & Updates.

3 Agreement between the United States of America and the Marshall Islands Amending the Agreement of June 25, 1983, concerning the Compact of Free Association, As Amended Signed at Majuro April 30, 2003.

4 Republic of the Marshall Islands Changed Circumstances Petition to Congress, 16 May 2005.

5 Matt McGrath, Bikini islanders seek US refuge as sea levels threaten homes, *BBC*, 27 October 2015.

6 Interior Proposes Legislation to Expand Bikini Islanders' Use of Resettlement Fund beyond the Marshall Islands, Office of the Assistant Secretary for Insular Areas, US Department of the Interior, 20 October 2015.

7 Julian Borger, Marshall Islands sues nine nuclear powers over failure to disarm, The Guardian, 24 April 2014.

questions on whether the petitions will stand scrutiny at the ICJ, whether the remedies it seeks could lead to a paradigmatic shift in the disarmament movement or whether disarmament could fructify with judicial intervention. The proceedings so far – starting with the petitions filed at ICJ on 24 April 2014 – have remained inconclusive, as the petitioner and the respondents differ on the ICJ's jurisdiction on this matter.

RMI contends that the recognised nuclear powers are: (a) in continuing breach of Article VI obligations under NPT, to pursue negotiations on nuclear disarmament and to cease the nuclear arms race; (b) in continuing breach of customary international law on the same obligations; and, (c) failing to perform international legal obligations in good faith.[8] As for the non-NPT states including India, Pakistan, Israel and North Korea, RMI argues that, despite not being NPT members, they have the obligation under *customary international law* to pursue negotiations in good faith to cease the nuclear arms race and engage in nuclear disarmament.[9] However, since only the UK, India and Pakistan have recognised, as compulsory and without special agreement, the ICJ's jurisdiction under Article 36(2) of its Statute (with exemptions), RMI has filed Memorials against the three detailing its case. China has responded, though not consenting to the ICJ's jurisdiction, while the other five are yet to respond.[10]

RMI has framed its petitions on the basis of the ICJ Advisory Opinion of 8 July 1996 on the *Legality of the Threat or Use of Nuclear Weapons*, which stated that "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."[11] Besides maintaining that the NWS have 'breached' the NPT obligations, RMI insists that many ICJ verdicts and UN resolutions have given the NPT obligations the character of customary international law, which is also backed by ICJ President Mohammed Bedjaoui's pronouncement to the same effect.[12] Further, weighing in on the ICJ opinion that nuclear disarmament is not merely an "obligation of conduct...(but) to achieve a precise result," RMI contends that the nuclear powers have not created favourable conditions for success in the disarmament process nor acted in good faith. The qualitative improvement and

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[8] For a reference on the petition against nuclear weapon states, see Application Instituting Proceedings against the United States of America, by the Republic of the Marshall Islands, 24 April 2014.

[9] For a reference on the petition against the non-NPT states, see Application Instituting Proceedings against the Republic of India, 24 April 2014.

[10] For a template, see (Marshall Islands v. India) Memorial of the Marshall Islands, 16 December 2014.

[11] Legality of the Threat or Use of Nuclear Weapons, Summary of ICJ Advisory Opinion, 8 July 1996.

[12] The report of proceedings quoted the President's words thus: President Bedjaoui stated that "there in fact exists a twofold *general obligation*, opposable *erga omnes*, to negotiate in good faith and to achieve a specified result"... in other words...that obligation has now assumed customary force.

quantitative build-up of nuclear forces and their disinclination to realistically engage in negotiations or disarmament initiatives are listed as proof of continuing breach of these obligations.

The rationale for targeting the non-NPT nuclear-armed states, which have consistently rejected any obligations under the NPT, is propelled by RMI's contention that the NPT's deemed existence as *customary international law* along with many ICJ verdicts and UN resolutions make these obligations *erga omnes* – owing to the international community as a whole.[13] While a study[14] on the impact on ozone levels of a regional nuclear conflict has been listed to project the implications of nuclear testing by India and Pakistan, open sources have been cited to describe Israel as a nuclear-armed state that has breached these obligations.[15]

The three respondents to the RMI application – UK, India and Pakistan – have refused to accept the ICJ's jurisdiction on nuclear disarmament, citing exceptions in their acceptance of Article 36(2). They have also refuted the notion of a dispute with RMI (or RMI initiating any bilateral negotiations in this regard), whereas RMI has contended that their divergent perceptions itself denote the existence of a dispute. India, in its counter-memorial, rejected the *customary international law* logic stating that there is no agreement within the NPT on the nature or scope of compliance with Article VI nor could the Court compel it to accept treaty obligations to which its sovereign consent is not provided.[16] Besides listing its record on various disarmament initiatives, India pointed to the artificiality of the RMI's petition by stating that any judgement rendered in this issue would be devoid of any concrete effect and the remedies sought could not be granted in the absence of other states, thus implying that disarmament cannot be addressed as a matter involving only a few parties or at the ICJ. Both India and Pakistan argued in their counter-memorials that matters concerning national security are excluded from the ICJ's jurisdiction and that their nuclear programmes have no bearing on the RMI's interests.

Pakistan's *Note Verbale* stated that the RMI's petition is political in nature, that Article VI obligations cannot be considered as *erga omnes* and that any Court proceedings will be discriminatory if only some states are targeted.[17] Pointing out the ICJ's observation that good faith is not in itself a course of obligation, Pakistan argued that this judicial process is incapable of resolving questions of nuclear

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13 Ardit Memeti and Bekim Nuhija, The Concept of Erga Omnes Obligations in International Law, *New Balkan Politics*, No.14, 2013.

14 Michael J. Mills (et.al), Multi-decadal global cooling and unprecedented ozone loss following a regional nuclear conflict, Earth's Future, January 2014.

15 Application Instituting Proceedings against the State of Israel, 24 April 2014.

16 Counter-Memorial of the Republic of India, 16 September 2015.

17 Application Institute Proceedings against Pakistan, 24 April 2014.

disarmament, nor should the Court adjudicate on a dispute on which its decision could not contribute to a resolution.[18] Pakistan maintained that RMI cannot pursue the case based on *action popularis* (lawsuit by third party in public interest) as it has failed to identify the existence of a legal dispute or submit evidence of imminent harm traced to the challenged action or inaction (of the respondent).

The UK, in its preliminary objections to the RMI petition, argued that there was no 'justiciable dispute' and that the ICJ lacks jurisdiction owing to *ratione temporis* (temporal restrictions) vis-à-vis the RMI's Optional Clause Declaration (excluding jurisdiction of situations or facts prior to 17 September 1991),besides the exclusions in UK's own Optional Clause Declaration.[19] Further, it held that the absence of other essential parties whose interests are involved in the allegations makes the petition inadmissible and that any judgement will have no practical consequence and falls outside the Court's "proper judicial function". The document notes the "silence" of RMI on the "progressive unilateral reductions" pursued by the UK and its contribution to disarmament initiatives. Asserting that the UK cannot conduct or conclude disarmament negotiations on its own, it states that the ICJ cannot determine whether the UK is in breach of obligations without determining the actions of other states.

The broad nature of the petitions and counter-arguments underline the complexities the Jury will face if it decides to undertake a meaningful intervention and provide the relief sought by RMI, which include: (a) a declaratory judgment of breach of obligations; and, (b) an order to the respondents to take, within a year of the judgment, all steps necessary to comply with those obligations, including the pursuit of negotiations in good faith aimed at the conclusion of a convention on nuclear disarmament in all its aspects. Beyond the contents of the petitions, there are various aspects pertaining to the normative process of disarmament, limitations of Article VI, the peculiar drafting history of NPT and the nature of ICJ Advisory Opinion that need contemplation.

Article VI and an Imbalanced NPT

The UK's argument that Article VI is a shared obligation for all states, not just the NWS, is a clear reflection of the NPT text, which specifies that "*each state* ...undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race and to nuclear disarmament..." [emphasis added]. The shift from disarming the nuclear powers to making it a uniform obligation was the outcome of power politics shaping the NPT negotiations. Notwithstanding the illusions of a balanced bargain that the NPT espouses, the

[18]Counter-Memorial of Pakistan, 1 December 2015.

[19]Preliminary Objections of the United Kingdom in RMI vs United Kingdom, 15 June 2015.

reality of the Treaty is its bias towards non-proliferation (for non-weapon states to not acquire nuclear weapons) while disarmament remains a common objective for all state-parties.

While RMI has referred to this bargain and the NPT's drafting history in its petitions, it should not lose sight of the fact that the final text of the treaty was a US-Soviet joint draft – a result of superpower connivance to protect their interests. Many states that abstained or voted against the NPT resolution in 1968 had highlighted the flawed bargain and discrimination inherent in the Treaty. India's counter-memorial refers to Resolution 2028– initiated by the non-aligned grouping at the Eighteen Nation Disarmament Committee (ENDC) – which enunciated the principles for the Treaty, including that it should be void of loopholes, should embody an acceptable balance of mutual obligations and responsibilities, and be a step towards disarmament.[20] India had then argued that the NPT text did not fulfil the 2028 stipulations, and that Article VI does not create any "juridical obligation" and is an "imperfect obligation with no sanction behind it."[21]

No disarmament treaty in sight

The RMI petitions, interestingly, do not seem to have considered the feasibility of the solution for which it seeks a legal remedy. The preamble of the NPT specifies that cessation of nuclear weapons production and elimination of arsenals will be *pursuant* to a Treaty on general and complete disarmament. The failure of the disarmament movement is easily attributable to the inability to formulate such a standalone instrument for disarmament, as the NPT has not set a timeline. Some nations have proposed the Nuclear Weapons Convention (NWC)[22] as a means towards a nuclear weapons prohibition treaty, which the RMI petition also alludes to. Further, the recent efforts to highlight the humanitarian consequences of nuclear weapons have also heralded the cause of a nuclear weapons ban treaty.[23] While these initiatives echo the increasing support among non-weapon states for a turnaround, that none of the nuclear-armed states (but for India's support to the NWC) have endorsed these efforts, in fact, justifies the RMI's decision to seek legal recourse on this front.

20 Text of Resolution 2028.

21 See debate at First Committee 1567th meeting, 14 May 1968.

22 Text of Model Nuclear Weapons Convention.

23 For an analyses of the humanitarian initiative, see Reframing the Disarmament Discourse: Can the Humanitarian Paradigm make a difference? IDSA Strategic Comments, 26 May 2015.

Will the legal route work?

The RMI petitions may turn out to be a predicament rather than a legal challenge for the ICJ, whose earlier experience of dealing with questions of nuclear weapons proved inconclusive and was marked by severe dissensions in the Jury. In July 1996, the ICJ had concluded that it was not able to give an advisory opinion on the "Legality of the Use by a State of Nuclear Weapons in Armed Conflict" requested by the World Health Organisation (WHO). To the question on the "Legality of Threat or Use of Nuclear Weapons", the Court was vertically divided on various aspects though unanimously concluding on the opinion that the RMI has cited. However, that opinion had not implied that the obligation is only for nuclear-armed states or that the obligation has an *erga omnes* character.[24]

On the RMI petition, the Court is currently hearing submissions on its jurisdiction and is yet to assess the merits of the petition. The pivotal question, though, is whether a judicial intervention, in the absence of any political stimulus, can make a meaningful difference to the disarmament movement. Also, will the ICJ be able to rule in favour of the RMI when a majority of the petitioned states, including the US, have been unresponsive to the petition? With the respondents also rejecting the Court's jurisdiction on this matter, is the case destined for a premature rejection? As the UK caustically remarked about the RMI's "long-standing frustration" against the US for not fulfilling its commitments on the radiation fall-out, is RMI aiming for a larger political bargain?

[24] Detailed report of ICJ hearing.

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