INTERNATIONAL COURT OF JUSTICE

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

MEMORIAL
OF
THE MARSHALL ISLANDS

12 JANUARY 2015

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PART 1

INTRODUCTION

General Observations

1. In this Memorial the Republic of the Marshall Islands will, in accordance with the Court's Order of 10 July 2014, focus exclusively on the questions of the jurisdiction of the Court and the admissibility of the Application.

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 Islamic Republic of Pakistan (also referred to as 'Pakistan' or 'the Respondent') to honor 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 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.

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 their 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 proceeding (the present case against Pakistan as well as the cases against India and the United Kingdom). Each of the other 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. Below, the RMI will deal with the Note Verbale that Pakistan sent to the Court on 9 July 2014. At this point the Applicant draws attention to the statement that Pakistan made in para. 2, point II of its Note Verbale, suggesting that "Pakistan's nuclear program does not have any direct bearing on interests of the Republic of the Marshall Islands […]". The following should suffice to demonstrate that this statement is incorrect.

8. 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 particular, there is a risk of devastation caused by Pakistan'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 their written submission in *Legality of Threat or Use*

[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. See also Report and Summary of Findings of the Conference presented under the sole responsibility of Austria, Vienna Conference on the Humanitarian Impact of Nuclear Weapons, 8 to 9 December 2014, which states: "The impact of a nuclear weapon detonation, irrespective of the cause, would not be constrained by national borders and could have regional and even global consequences, causing destruction, death and displacement as well as profound and long-term damage to the environment, climate, human health and well-being, socioeconomic development, social order and could even threaten the survival of humankind." http://www.bmeia.gv.at/fileadmin/user_upload/Zentrale/Aussenpolitik/Abruestung/HINW14/HINW14_Chair_s_Summary.pdf [accessed on 8 January 2015].

of Nuclear Weapons.[2] Any such explosion would also have adverse effects on the global economy and likely on the 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 scale of this threat was recently demonstrated in a study in which the outcome of a nuclear exchange – between Pakistan and India – was 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 detonated fifty 15-kiloton weapons on the other side's cities, it would produce a large amount of smoke that would rise into the stratosphere, spreading globally and causing a drop in temperature on the Earth's surface, whilst heating up the stratosphere.

9. The vast cities in both Pakistan and India not only house 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 stratosphere with severe adverse consequences for the Earth's inhabitants. The smoke from the fires would absorb sunlight; as a result, the temperature on the Earth's surface would be much cooler. As the smoke absorbed the sunlight it would heat up and damage the ozone layer, which would 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.

10. The Marshall Islands' reliance on the ocean for food supplies is exacerbated by the lack of suitable farming soil.[6] The RMI relies on imports for a large part of its food supply, especially animal products.[7] Any change in the Earth's atmosphere affecting

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[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] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996, I.C.J. Reports 1996*, p. 226, para. 35.

[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].

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 the Marshall Islands' only real accessible food source. The Marshall Islands has 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 Marshallese 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 war. 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**).

11. The maintenance and expansion of this threat, while at the same time not living up to Pakistan's 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 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.

Pakistan's Note Verbale to the Court

12. 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 9 July 2014 Pakistan sent a Note Verbale to the Court informing the Court of its position with respect to the RMI's Application (**Annex 3**).

13. In its Note Verbale Pakistan informed the Court that "[…] it is of the considered opinion that the ICJ lacks jurisdiction, the competency and considers the said Application inadmissible […]", for which it then went on to provide several reasons (para. 2 of the Note Verbale). On the basis of this position presented by Pakistan, the Court decided in its Order of 10 July 2014 "that the written pleadings shall first be addressed to the questions of the jurisdiction of the Court and the admissibility of the Application". In doing so the Court implicitly rejected Pakistan's request (para. 3 of its Note Verbale) to dismiss the RMI's Application without any further proceedings.

14. 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 this Memorial exclusively focused on the jurisdictional and admissibility issues raised by Pakistan in its Note Verbale of 9 July 2014. The RMI wishes to underline that it is, indeed, restricting its observations to the issues effectively raised by Pakistan 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, if any, possible additional objections of the Respondent there 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 Pakistan on this phase of the case.

PART 2

GENERAL OBSERVATIONS ON JURISDICTION

15. The Republic of the Marshall Islands rests its claim of jurisdiction in these proceedings on Article 36, paragraph 2 of the Statute of the Court and on the Declarations of the RMI and Pakistan Recognizing the Jurisdiction of the Court as Compulsory.

16. The Declaration of the RMI accepts the jurisdiction (with minor exceptions not apposite in these proceedings and which have not been raised by Pakistan) by using the general words "in conformity with paragraph 2 of Article 36 of the Statute of the Court" (**Annex 4**).

17. For its part, the Declaration of Pakistan repeats the specific language of paragraph 2 of Article 36 of the Statute (**Annex 5**). It contains three exceptions, two of which have been relied upon by Pakistan in its Note Verbale dated 9 July 2014. Specific references will be made to the relevant exceptions at appropriate points as this Memorial addresses the arguments made in that Note Verbale. The Applicant considers that Pakistan's reliance on those exceptions is not well founded.

18. The Application by the RMI relies in particular on paragraphs b, c and d of Pakistan's Declaration pursuant to Article 36, paragraph 2 of the Statute of the Court. Those paragraphs correspond with the relevant language (and numbering) of Article 36, paragraph 2.

19. The Application by the RMI concerns, first, a dispute concerning a "question of international law" within the meaning of paragraph b of Pakistan's Declaration. In its Advisory Opinion of 8 July 1996 this Court held unanimously that "[t]here 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".[8] Pakistan evidently denies the existence of this obligation and/or that it is in breach of it. See Point III of its Note Verbale to the Court dated 9 July 2014. Pakistan there states, correctly, that it is "not a party to the Non-Proliferation Treaty". It then asserts that "[t]he exaggerated and unfounded interpretation of Article VI of the NPT is not applicable on non-NPT States and is not *Erga Omnes".* The RMI is not clear what is "exaggerated and unfounded" in its Application,[9] but it is apparent that there is a dispute about a question of international law—namely the application to Pakistan of

[8] Para. 105(2)F.
[9] The apparent denial of a customary law obligation is surprising in that Pakistan has voted for a series of General Assembly resolutions underlining the obligation to pursue negotiations in good faith. See Application by the Marshall Islands, para, 40.

the obligation, as a matter of customary international law, to pursue in good faith and conclude negotiations leading to nuclear disarmament.

20. In the second place, the dispute between the RMI and Pakistan concerns the existence of facts that "constitute a breach of an international obligation" (see paragraph c of the Pakistan Declaration). The RMI contends that the facts asserted in its Application (and which it will develop further at the Merits stage) demonstrate a breach of Pakistan's obligations under customary international law as recognized in the Court's Advisory Opinion of 8 July 1996. Pakistan apparently denies this.

21. In respect of paragraph d of Pakistan's Declaration, the Judgment requested by the RMI includes a set of declarations concerning Pakistan's breach of its international obligations as well as an order and is therefore clearly about "[t]he nature or extent of the reparation to be made for the breach of an international obligation".

22. Pakistan's Declaration excludes disputes "arising under" a multilateral treaty unless "all parties to the treaty affected by the decision are also parties to the case before the Court". The RMI Application against Pakistan does not "arise under" the Nuclear Non-Proliferation Treaty. The fundamental assertion by the Applicant is that Pakistan is bound by customary international law. In addition to its statement of the disarmament obligation, the Court considered:

> "In these circumstances, the Court appreciates the full importance of the recognition by Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons of an obligation to negotiate in good faith a nuclear disarmament."[10]

The Court also referred to the obligation as being "expressed" by Article VI.[11] It is under this customary international law obligation that the present case must be seen to "arise".

Point I of Pakistan's Note Verbale

23. Point I of Pakistan's Note Verbale dated 9 July 2014 appears to assert three distinct legal arguments about jurisdiction or admissibility. The first is that the Application is "purely political in nature"; the second is that it "involv[es] issues of national security in Pakistan's domestic jurisdiction"; the third is that the "Application has no *locus standi*". Each of these arguments is without merit.

[10] Para. 99.
[11] Paras. 102, 103.

The Political Question Argument

24. Unlike some national jurisdictions, this Court has never developed any general principle of abstaining from deciding cases on the basis that a legal dispute has political aspects or implications. Brief quotations from two of the Court's judgments suffice to make this point:

> "Again, in the Turkish Ambassador's letter of 24 April 1978, the further argument is advanced that the dispute between Greece and Turkey is "of a highly political nature". But a dispute involving two States in respect of the delimitation of their continental shelf can hardly fail to have some political element and the present dispute is clearly one in which "the parties are in conflict as to their respective rights". (*Aegean Sea Continental Shelf Case*)[12]

> "It must be remembered that, as the *Corfu Channel Case (ICJ Reports 1949*, p. 4) shows, the Court has never shied away from a case before it merely because it had political implications or because it involved serious elements of the use of force". (*Military and Paramilitary Activities in and against Nicaragua)*[13]

25. To the same effect are the Court's pronouncements in instances where it was asked for an Advisory Opinion on sensitive matters. In the Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons*, for example, the Court said:

> "The question put to the Court by the General Assembly is indeed a legal one, since the Court is asked to rule on the compatibility of the threat or use of nuclear weapons with the relevant principles and rules of international law. To do this, the Court must identify the existing principles and rules, interpret them and apply them to the threat or use of nuclear weapons, thus offering a reply to the question posed based on law. The fact that this question also has political aspects, as, in the nature of things, is the case with so many questions which arise in international life, does not suffice to deprive it of its character as a "legal question" and to "deprive the Court of a competence expressly conferred on it by its Statute […]"."[14]

The same is to be found in the Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*:

> "[T]he Court cannot accept the view, which has also been advanced in the present proceedings, that it has no jurisdiction because of the "political" character of the question posed. As is clear from its long-standing

[12] *Aegean Sea Continental Shelf Case (Greece v Turkey), Judgment, I.C.J. Reports 1978,* p. 3, para. 351.

[13] *Judgment of 26 November 1984, Jurisdiction of the Court and Admissibility of the Application*, *I.C.J. Reports 1984*, p. 392, 435, para. 96.

[14] Para. 13.

jurisprudence on this point, the Court considers the fact that a legal question also has political aspects,

> "as, in the nature of things, is the case with so many questions which arise in international life, does not suffice to deprive it of its character as a 'legal question' and to 'deprive the Court of a competence expressly conferred on it by its Statute' (*Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973,* p.172, para 14). Whatever its political aspects, the Court cannot refuse to admit the legal character of a question which invites it to discharge an essential judicial task, namely, an assessment of the legality of the possible conduct of States with regard to the obligations imposed upon them by international law (cf. *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion 1948, I.C.J. Reports 1947-1948,* pp. 61-62; *Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, I.C.J. Reports 1950,* pp. 6-7; *Certain Expenses of the United Nations (Article 17, para 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962,* p. 155)." (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I),* p. 234, para. 13.)"[15]

26. The dispute submitted to the Court is also a legal one, namely whether the Respondent has complied with its obligation under customary international law to pursue and conclude negotiations in good faith. In order to rule on the Marshall Islands' requests for declaratory relief and the requested order, the Court will need to "identify the existing principles and rules of international law, interpret them and apply them" to the situation alleged by the Applicant.

27. The International Criminal Tribunal for the former Yugoslavia has commented on this Court's decisions as follows:

> "The doctrines of 'political questions' and 'non-justiciable disputes' are remnants of the reservations of 'sovereignty' and 'national honour', etc in very old arbitration treaties. They have receded from the horizon of contemporary international law, except for the occasional invocation of the 'political question' argument before the International Court of Justice in advisory proceedings and, very rarely in contentious proceedings as well. The Court has

[15] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004, I.C.J. Reports 2004*, p. 136, para. 41.

consistently rejected this argument as a bar to examining a case. It considered it unfounded in law."[16]

28. In his classic 1951 study of the law of the United Nations, Hans Kelsen offers the following analysis of the difference between legal and political disputes:

> "According to the usual terminology, 'legal' disputes are distinguished from non-legal, *i.e.*, 'political' disputes. The legal or non-legal, that is, political, character of a dispute does not depend on its substance, *i.e.*, the subject-matter with respect to which the parties are in conflict, but on the norms which are to be applied to it. The dispute is legal if it is to be decided according to norms of positive law; it is non-legal, *i.e.*, political, if it is to be decided according to other norms, especially according to principles of justice or equity."[17]

29. The former is precisely the situation here. The RMI seeks to apply the norms of positive law in its dispute with Pakistan.

The Domestic Jurisdiction Argument

30. Pakistan's Declaration Recognizing the Jurisdiction of the Court as Compulsory excepts "[d]isputes relating to questions which by international law fall exclusively with the domestic jurisdiction of Pakistan". "Exclusively" is a strong word. An obligation under customary international law to negotiate in good faith to rid the world of nuclear weapons cannot be characterized as "exclusively within the domestic jurisdiction" of any State, let alone that of a State that is one of nine possessing such weapons of mass destruction.

The Locus Standi Argument

31. The RMI has explained in its Application its own particular experience of nuclear weapons testing, and also in this Memorial has set forth its interests in ending the nuclear threat ("Nuclear Sword of Damocles," *supra*). Its essential contention is that each State has *locus standi* to seek to enforce the customary international law obligation on all others (and especially those, like Pakistan, possessing nuclear weapons) 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". As indicated in paragraph 35 of its Application, the RMI contends that the customary obligation to conduct negotiations is an obligation *erga omnes*. As such, every State has a legal interest in its timely performance.

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[16] *Prosecutor v Tadic (Defence Motion for Interlocutory Appeal on Jurisdiction)*, Case No. IT 94-1-AR72 (2 October 1995) [24].

[17] Hans Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems* 478 (1951).

32. The Applicant draws attention to the following language in the decision of this Court in its judgment concerning the *Barcelona Traction, Light and Power Company, Limited*:[18]

> "[…] an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. 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.*
>
> Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23); others are conferred by international instruments of a universal or quasi-universal character."[19]

33. A striking feature of this statement bears emphasizing at the outset. Namely, as the Court asserts in its reference to genocide, obligations owed to all other States in the international community, and corresponding rights of protection, can arise under customary international law as well as under treaty law. The obligation involved in the proceedings that the RMI has brought against all those States possessing nuclear weapons illustrate the overlap between these two sources. Insofar as a State is a party to the NPT, the obligation can clearly be regarded as a treaty obligation. But in respect of each of the four non-party States, including Pakistan, the obligation is customary in nature and constitutes, to use the *Barcelona Traction* expression, "general international law".[20]

34. It is true that this Court may have to elaborate on the nature of the obligations that are owed *erga omnes.* It is equally the case that in *Barcelona Traction* the Court was not

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[18] *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain); Second Phase*, *Judgment of 5 February 1970, I.C.J. Reports 1970*, p. 3.
[19] *Ibid.,* p. 32.
[20] To the extent that the customary law obligations are parallel to those in a treaty, it is worth noting that the Genocide Convention has 146 parties, the Convention against Torture has 156 and the NPT has 190. This overwhelming support for the NPT might, of itself, suggest that article VI has become a source of customary law. But it is not necessary to rely on that alone since the Court's 1996 Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons* at paras. 99-101 refers both to Article VI and General Assembly practice to support the existence of a customary law obligation. The (now) 190 ratifications and subsequent practice, especially in the General Assembly, no doubt solidify that custom.

setting out a closed list of the obligations to which it was referring, but rather giving examples. As the list is not exhaustive, it may also include an issue which is fundamental to the very survival of humanity, and which has been on the agenda of the United Nations since its inception – the abolition of nuclear weapons.[21] As the Court said in its Advisory Opinion of 8 July 1996:

> "The destructive power of nuclear weapons cannot be contained in either space or time. They have the potential to destroy all civilization and the entire ecosystem of the planet."[22]

35. The RMI is a small island State whose only power is the power of the law. Surely it must have standing to enforce an existing obligation to pursue and conclude negotiations leading to the elimination of nuclear weapons that have "the potential to destroy all civilization and the entire ecosystem of the planet".

36. There is a close analogy here with the obligations that this Court has previously addressed concerning genocide and torture. In *Questions relating to the Obligation to Prosecute or Extradite,* this Court posed the question "whether being a party to the [Torture] Convention is sufficient for a State to be entitled to bring a claim to the Court concerning the cessation of alleged violations by another State party of its obligations under that instrument".[23] The Court held:

> "68. As stated in its Preamble, the object and purpose of the Convention [against Torture] is "to make more effective the struggle against torture . . . throughout the world". The States parties to the Convention have a common interest to ensure, in view of their shared values, that acts of torture are prevented and that, if they occur, their authors do not enjoy impunity. . . . All the other States parties have a common interest in compliance with these obligations by the State in whose territory the alleged offender is present. 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 (*Barcelona Traction, Light and Power Company Limited (Belgium v. Spain), Second Phase, Judgment, I.C.J. Reports 1970*, p. 32, para. 33). 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. In this respect, the relevant provisions of the Convention against Torture are similar to those of the Convention on the Prevention and Punishment of

[21] See the discussion of the General Assembly's first resolution on any subject and subsequent practice in paras. 100-103 of this Court's Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons.*

[22] Para. 35.

[23] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment of 20 July 2012, I.C.J. Reports 2012*, p. 422, para. 67.

> the Crime of Genocide, with regard to which the Court observed that: "In such a convention the contracting States do not have any interest of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the Convention." *(Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23.)
>
> 69. The common interest in compliance with the relevant obligations under the Convention against Torture implies the entitlement of each State party to the Convention to make a claim concerning the cessation of an alleged breach by another State party. If a special interest were required for that purpose, in many cases no State would be in a position to make such a claim. It follows that any State party to the Convention may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations *erga omnes partes*, such as those under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention, and to bring that failure to an end."[24]

37. The same is clearly true here. The very Treaty that contains a "recognition . . . of an obligation to negotiate in good faith a nuclear disarmament"[25] has the parties asserting in the Preamble, *inter alia*, the following underpinnings of that obligation:

> "Considering the devastation that would be visited upon all mankind by a nuclear war and the consequent need to make every effort to avert the danger of such a war and to take measures to safeguard the security of peoples,
> […]
> Declaring their intention to achieve at the earliest possible date the cessation of the nuclear arms race and to undertake effective measures in the direction of nuclear disarmament,
> […]
> Desiring to further the easing of international tension and the strengthening of trust between States in order to facilitate the cessation of the manufacture of nuclear weapons, the liquidation of all their existing stockpiles, and the elimination from national arsenals of nuclear weapons and the means of their delivery pursuant to a treaty on general and complete disarmament under strict and effective international control."[26]

38. These are the same considerations that underpin the customary international law obligation to which this Court referred in its Advisory Opinion. The RMI contends

[24] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012*, pp. 449-450.
[25] Advisory Opinion, *Legality of Threat or Use of Nuclear Weapons*, para. 99.
[26] Treaty on the Non-Proliferation of Nuclear Weapons 729 UNTS 161, Preamble.

that an obligation to negotiate in such a context is an obligation that any member of the international community can seek to enforce.

39. In addition to analogous holdings of this Court in relation to genocide and torture, the Applicant's position on standing finds support in Article 42 or Article 48 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts.[27]

Point II of the Note Verbale

40. Point II of Pakistan's Note Verbale of 9 July 2014 consists of three sentences that contain four different arguments against jurisdiction in or admissibility of the Marshall Islands case.

Locus Standi Redux

41. The first sentence argues that "Pakistan's nuclear program does not have any direct bearing on the interests of the Republic of Marshall Islands". This appears to be another iteration of an argument about *locus standi.* This argument has already been dealt with in the section of this Memorial headed "The Nuclear Sword of Damocles", setting out the RMI's interests in ending the nuclear threat, and in the section headed "The *Locus Standi* Argument". The potential use of nuclear weapons does bear on the interests of the Marshall Islands because it subjects the Marshall Islands to substantial and unacceptable risks. Further, Pakistan's ongoing nuclear weapons program, and that of the other nuclear powers, is, to reiterate, of fundamental concern to the international community, of which the Marshall Islands is part. And that continuing program is part of the evidence on which the Marshall Islands relies to demonstrate Pakistan's breach of its obligation to proceed effectively and in good faith in the direction of abolition.

The Existence of a "Dispute"

42. The second sentence of Point II of the Note Verbale offers two arguments, the first of which appears to be that the Marshall Islands has not alleged a dispute within the meaning of Article 36(2) of the Statute of the Court ("The Republic of Marshall Islands has no dispute directly or indirectly with the Islamic Republic of Pakistan".) As noted above in "General Observations on Jurisdiction", the Applicant not only has a "dispute" with Pakistan; that dispute is also a *legal* dispute, as is required by Article 36 (2) of the Statute and by the terms of Pakistan's Declaration Recognizing the Jurisdiction of the Court as Compulsory. The dispute concerns Pakistan's compliance or non-compliance with its obligation under customary international law to pursue in

[27] UNGA Responsibility of States for Internationally Wrongful Acts (2002) A/RES/56/83.

good faith, and bring to a conclusion, negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.

43. 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."[28] Moreover, "[w]hether there is a dispute in a given case is a matter for 'objective determination' by the Court"[29] and "[t]he Court's determination must turn on an examination of the facts. The matter is one of substance, not of form."[30] In particular, what must be shown is "that the claim of one party is positively opposed by the other".[31] 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".[32]

44. These criteria are fulfilled in the present case. The statements and conduct of the parties reflect the existence of a legal dispute between Pakistan and the RMI over whether Pakistan 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.

45. 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

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[28] *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.
[29] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 74.
[30] *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.
[31] *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.
[32] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 315, paras. 89 ff.

responsibilities in moving towards an effective and secure disarmament".[33] 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."[34]

46. 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 Pakistan. 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.

47. By this unequivocal statement, made in the context of an international conference in which Pakistan participated, Pakistan 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 Pakistan. 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

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[33] 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).

[34] 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).

against which a claim is made to identify that there is, or may be, a dispute with regard to that subject-matter".[35] 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 Pakistan with sufficient clarity to enable Pakistan "to identify that there is, or may be, a dispute with regard to that subject-matter". Thus, Pakistan cannot now seriously contend that the RMI failed to raise a dispute with Pakistan over Pakistan's non-fulfillment of its customary international law obligation to engage in negotiations leading to nuclear disarmament.

48. It can hardly be denied that the RMI's claims have been positively opposed by Pakistan. Pakistan's opposition to such claims can be inferred, in the first place, from its conduct. While in public statements Pakistan has frequently reaffirmed its commitment to the goal of a nuclear weapon free world,[36] its conduct, which continued unchanged despite the RMI's claims and requests, reveals that Pakistan 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, Pakistan 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 Pakistan's current plans for the expansion, improvement and diversification of its nuclear arsenal.[37] There is no reason to return to this issue here. At this stage, what must be emphasized is that Pakistan's conduct provides clear evidence of its opposition to the RMI's claims. As the Court said, when it comes to determining the existence of a dispute, "[t]he matter is one of substance, not of form".[38] And the substance is that Pakistan 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.

49. Not only can Pakistan's opposition to the RMI's claims be inferred from its conduct, Pakistan has also explicitly disputed that the claims are well-founded. In its Note Verbale of 9 July 2014, Pakistan stated (para. 2, Point III) that the "exaggerated and unfounded interpretation of Article VI of the NPT is not applicable of non-NPT States and is not *Erga Omnes*". Pakistan also stated (Point VII) that it "has consistently supported general, complete and verifiable disarmament, at appropriate multinational fora, based on the principles of universality and non-discrimination under an effective international control regime."

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[35] *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.
[36] For references see RMI Application, paras. 30-32.
[37] RMI Application, paras. 27-29.
[38] See supra footnote 35.

50. Regarding Pakistan's status as a non-party to the NPT, it is clear from the RMI Application that the RMI's claims against Pakistan rely only on customary international law. It is difficult to discern from the Note Verbale exactly what Pakistan's position is regarding the obligation to pursue in good faith and conclude negotiations leading to nuclear disarmament. Nonetheless, it is apparent that there is a legal dispute between Pakistan and the RMI as to the content and implications of the obligation as set out in the Application; whether the obligation is customary in nature and therefore applies to Pakistan; and whether the obligation is owed *erga omnes* by Pakistan. Further, to the extent that Pakistan is claiming that it is in compliance with the obligation simply by virtue of positions it takes in multinational fora, that claim is denied by the RMI, as the Application demonstrates.

51. While any question concerning the content of the obligation to negotiate invoked against Pakistan is to be left for the merits phase of the case, what has to be stressed at the present stage is that the Pakistan Note Verbale 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, Pakistan 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".[39] To the same extent it may be said that in the present proceedings, complaints of law formulated by the RMI are denied by Pakistan and that therefore, by virtue of this denial, there is a legal dispute between the RMI and Pakistan.

52. 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

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

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”.[40]

53. 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”.[41] 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”.[42] Moreover, while obviously, as the Court put it, the “dispute must in principle exist at the time the Application is submitted to the Court”,[43] 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.[44]

54. It may be concluded that the RMI and Pakistan, by their opposing statements and conduct both prior to and after the submission of the Application, have manifested the existence of a dispute over Pakistan’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. Pakistan’s objection in this respect must therefore be rejected.

No Treaty or Convention in Force

55. The second part of the second sentence of Point II of the Note Verbale adds the argument that “nor is there any treaty or convention in force between the two countries which confers jurisdiction upon this Court in this Application under Article

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[40] *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), 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.

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

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

[43] *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.

[44] 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.

36 of its Statute". The RMI agrees that there are no "treaties or conventions in force" that confer jurisdiction upon this Court pursuant to Article 36, paragraph 1 of the Court's Statute. However, the RMI's Application is not based on that paragraph. As noted in paragraph 60 of the Application, it is founded entirely on the reciprocal obligations of the parties pursuant to their Declarations made under Article 36, paragraph 2 of the Statute of the Court. These two paragraphs of Article 36 of the Court's Statute represent distinct bases of jurisdiction and either one will suffice to afford jurisdiction.

The Multilateral Treaty Reservation

56. The third sentence of Point II of the Note Verbale suggests that the Marshall Islands' Application "has failed to take into account the reservations to the declaration of Pakistan (under the optional clause) that bar any party to invoke the jurisdiction of the Court concerning any dispute arising from the interpretation or application of multilateral treaty". The Applicant has already dealt with the substance of this argument in "General Observations on Jurisdiction", *supra*. The Marshall Islands' dispute with Pakistan arises from the obligation of Pakistan under customary international law, not from any multilateral treaty obligation. The RMI will expand on this argument in the following paragraphs.

57. The words used in the reservation indicate that the application of this reservation is subjected to two conditions. The first condition relates to the subject matter of the dispute. Namely, the reservation applies to disputes "arising under a multilateral treaty". Thus, 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 parties to the treaty affected by the decision" are "also parties to the case before the Court" or, lacking such condition, that Pakistan has specially 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 Pakistan is a party may be brought against Pakistan alone, without the other parties to the treaty that are affected by the decision also being parties to the case and therefore being bound by the Court's interpretation of that multilateral treaty.

58. This reservation cannot serve to exclude the Court's jurisdiction in relation to the dispute submitted by the RMI because there is no dispute between the Marshall Islands and Pakistan "arising under 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 Marshall Islands and Pakistan is not a dispute "arising under" the NPT, because Pakistan is not a party to that treaty. What is before the Court is a dispute concerning exclusively Pakistan'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 under the NPT.

59. Pakistan'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. The wording of the reservation of the United States is functionally the same as that of Pakistan. Thus, the view taken 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." [45]

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".[46]

60. It must be noted that in the *Military and Paramilitary Activities in and against Nicaragua* 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 Pakistan is, and can only be, a dispute exclusively under customary international law. This is because Pakistan is not a party to the NPT. This renders the invocation of this reservation by Pakistan, if

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[45] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction of the Court and Admissibility of the Application, Judgment of 26 November 1984, I.C.J. Reports 1984*, p. 424, para. 73.

[46] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Merits, Judgment of 27 June 1986, I.C.J. Reports 1986*, p. 14, p. 38, para. 56.

possible, even more groundless.

61. For all the reasons set forth above, the objection raised by Pakistan on the basis of its multilateral treaty reservation must be rejected.

Point III of the Note Verbale

The Non-NPT Party Argument

62. Point III of the Note Verbale of 9 July 2014 refers to the fact that Pakistan is not a party to the NPT, a fact with which the Marshall Islands concurs. It also makes an argument that appears to deny the existence and *erga omnes* nature of the customary international law obligation recognized in the Advisory Opinion of 8 July 1996. The substance of these matters has been dealt with in the sections "General Observations on Jurisdiction", "The *Locus Standi* Argument" and "the Existence of a Dispute", *supra*.

Point IV of the Note Verbale

The "Non-Discrimination" Argument

63. Point IV of the Note Verbale of 9 July 2014 claims a "principle of non-discrimination" requiring that "every State possessing Nuclear Weapons [be] made a party to these proceedings and each State possessing Nuclear Weapons [accept] the jurisdiction of the Court, in this case." The Applicant's research has failed to discover any such "principle" in the jurisprudence of this Court or its predecessor, the Permanent Court of International Justice. The nearest analogy, an inexact one, is found in this Court's decision in the *Monetary Gold* case and its progeny.

64. According to the Court's case law, the Court cannot exercise its jurisdiction when a third State may be said to have a legitimate interest in a dispute before the Court and such legal interest "would not only be affected by a decision, but would form the very subject-matter of the decision" of the Court.[47] In the *Monetary Gold* case, the Court refrained from exercising its jurisdiction since it could not have decided the main dispute between Italy and the United Kingdom without pronouncing on a necessary preliminary question concerning the international responsibility of a State, Albania, which was not a party to the proceedings. Equally, in the *East Timor* case the Court held that it could not "exercise the jurisdiction it has by virtue of the declarations

[47] *Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America), Preliminary Question*, *Judgment of 15 June 1954*, I.C.J. Reports 1954, p. 19, 32.

made by the Parties under Article 36, paragraph 2, of its Statute because, in order to decide the claims of Portugal, it would have to rule, as a prerequisite, on the lawfulness of Indonesia's conduct in the absence of that State's consent".[48]

65. The present dispute concerning the obligation of Pakistan to pursue in good faith and conclude negotiations leading to nuclear disarmament does not raise the question of the indispensable third party. The subject-matter of the present dispute is the claimed noncompliance by the Respondent with its customary international law obligation. This claim can be maintained while at the same time it could be alleged that the same wrongful conduct is imputable to other States. As stated in Article 47, paragraph 1 of the Articles on Responsibility of States for Internationally Wrongful Acts,[49] "where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act." In order to decide the issue of noncompliance by the Respondent with the obligation set forth in customary international law, there would be no need for the ICJ to pronounce, as a preliminary matter, on the legal position of a third State. It may be true that in some abstract fashion all States could be "affected" by the Court's interpretation of customary international law, even though the judgment of the Court would not be legally binding for third States. However, the existence of an interest in the delineation of customary international law obligations must be distinguished from the situation in which the legal position of third States would "form the very subject-matter" of the decision. The application of the indispensable party exception is therefore not justified.

66. In other words, it may be said that a decision of the Court concerning the duties of a State that possesses nuclear weapons under customary international law might have implications for all other States possessing nuclear weapons, notably insofar as their position would not be different from that of the Respondent State. However, this situation must be distinguished from the case in which the legal position of a third State forms the very subject-matter of the dispute. As the Court observed in the *Phosphate Lands* case, "a finding by the Court regarding the existence or the content of the responsibility attributed to Australia by Nauru might well have implications for the legal situation of the two other States concerned [New Zealand and the United Kingdom, which, together with Australia, were Nauru's administering authorities before the independence of that State] but no finding in respect of that legal situation will be needed as a basis for the Court's decision on Nauru's claims against Australia".[50] In that judgment the Court did not uphold Australia's objection that the Court should refrain from exercising its jurisdiction as New Zealand and the United Kingdom were not parties to the proceedings. Similarly, no finding in respect of the

[48] *Case concerning East Timor (Portugal v. Australia), Judgment of 30 June 1995*, I.C.J. Reports 1995, p. 90, 105, para. 35.
[49] See supra footnote 27.
[50] *Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections*, Judgment of 26 June 1992, I.C.J. Reports 1992, p. 240, 261-262, para. 55.

legal situation of the other States possessing nuclear-weapons will be needed for the Court to assess whether the Respondent is violating its obligations under customary international law, even if its decision "might well have implications for the legal situation" of those States.

67. Indeed, the Marshall Islands' position is even stronger than Nauru's in *Certain Phosphate Lands.* There, it was arguable that Australia's obligation was joint and several with the obligations of New Zealand and the United Kingdom. In the present proceedings, the obligation that the Marshall Islands seeks to enforce is an individual one which each State owes under customary international law.

68. The Marshall Islands regrets that it has not been able to able to obtain jurisdiction before this Court over all the States possessing nuclear weapons. But it is the nature of Article 36 (2) of the Statute that not all States are as commendable as Pakistan in agreeing to accept the jurisdiction of the Court.

Point V of the Note Verbale

The "Purported Technicality" Claim

69. The content of Pakistan's objections in Point V of the Note Verbale of 9 July 2014 as well as in Points VI and VII is hard to understand and the RMI reserves its right to reply to these arguments if later clarified by Pakistan. Point V does not appear to contain a legal argument. Needless to say, the RMI does not believe that a finding by this Court that there is jurisdiction and admissibility would be "on the basis of any purported technicality". Nor would it be "palpably an abuse of the Court process".

Point VI of the Note Verbale

A General Reference to Earlier Arguments

70. Point VI of the Note Verbale of 9 July 2014 does not appear to make any arguments that have not already been made in previous Points. It seems to be a mere repetition of the general arguments about jurisdiction and admissibility, which are dealt with in other parts of this Memorial.

Point VII of the Note Verbale

The Apparent Assertion that Pakistan is Complying with Its Obligation

71. Point VII of the Note Verbale of 9 July 2014 is capable of being interpreted as a contention that Pakistan is complying with the customary international law obligation recognized in the Court's Advisory Opinion of 8 July 1996. To the extent that the Point conveys that suggestion, it concerns questions (of law and fact) that go to the merits of the Applicant's case; it is not a question of a preliminary nature to be determined at this stage of the proceedings.

Point VIII of the Note Verbale

Reservation of Rights

72. Pakistan asserts in Point VIII that it "reserves all rights to protect its vital national interests". The RMI affirms that all States have such rights within the bounds of international law.

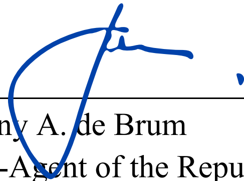
PART 3

CONCLUSION

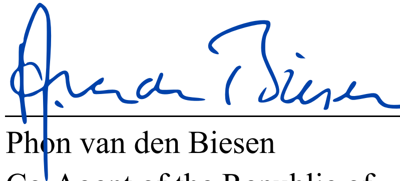
73. In accordance with the Order of the Court of 10 July 2014, this Memorial is restricted to questions of jurisdiction and admissibility raised by Pakistan. As for the merits of the case, the Applicant maintains its Submissions, including the Remedies requested, as set out in the Application of 24 April 2014. For further stages of the procedure the Applicant reserves its right to clarify, modify and/or amend these Submissions.

74. 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 and that the Application is admissible.

12 January 2015



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



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