RIGA GRADUATE SCHOOL OF LAW

# Flaws in the Treaty on the Non-Proliferation of Nuclear Weapons as shown by *Marshall Islands* v. *United Kingdom*, *Marshall Islands* v. *Pakistan*, *Marshall Islands* v. *India*

BACHELOR THESIS


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DECLARATION OF HONOUR:

I declare that this thesis is my own work, and that all references to, or quotations from, the work of others are fully and correctly cited.

(Signed) .....

RIGA, 2020

## ABSTRACT

The Treaty on the Non-Proliferation of Nuclear Weapons (NPT) amongst its goals included both non-proliferation of nuclear weapons and nuclear disarmament. The cases *Marshall Islands* v. *United Kingdom*, *Marshall Islands* v. *Pakistan*, *Marshall Islands* v. *India* show that nuclear disarmament remains an unresolved issue. These cases refer to Article VI of NPT as being breached, and allege that the NPT can be considered to be customary international law. Furthermore, nuclear non-proliferation obligation has been fulfilled, however the obligation of nuclear disarmament has not been fulfilled. The Marshall Islands cases present three significant flaws in the NPT. The first flaw which is the ambiguous wording of Article VI of the Treaty has allowed nuclear weapon states to ignore their obligation of nuclear disarmament. The second flaw which is the inequality between the signatories of the Treaty has aided nuclear weapon states in retaining their nuclear weapons. The third flaw of jurisdictive unclarity has resulted in the Treaty being difficult to enforce.

**Keywords:** Treaty on the Non-Proliferation of Nuclear Weapons, International Court of Justice, inequality between signatories of a treaty, flawed treaty.

## SUMMARY

This research paper explores the question of how flawed is the Treaty on the Non-Proliferation of Nuclear Weapons (NPT). The applications of Marshall Islands to the International Court of Justice (ICJ) were used to select the flaws for further discussion. Three cases of those Marshall Islands brought to the Court were used for this purpose. Those cases were *Marshall Islands* v. *United Kingdom*, *Marshall Islands* v. *Pakistan*, *Marshall Islands* v. *India*. From the flaws presented by these cases three were chosen. The first flaw chosen was the unequal sacrifices given by the signatories of the NPT, as the cases showed that non nuclear weapon states had fulfilled their obligations, but the nuclear weapon states had not fulfilled their obligations. The second flaw chosen was the ambiguous wording of Article VI of the NPT which prescribed the breached obligations to the nuclear weapon states. The third flaw chosen was the jurisdictive unclarity of the NPT, as the cases showed that currently it is unknown whether the NPT can be considered to be customary international law (CIL).

The first chapter of this research paper provides the background of the creation of the Non-Proliferation Treaty, in order for the reader to have the required contextual information for the following section. It also provides further details on the cases *Marshall Islands* v. *United Kingdom*, *Marshall Islands* v. *Pakistan*, *Marshall Islands* v. *India.* The contextual background reasons for why Marshall Islands submitted the applications is given, the allegations against the defendants are explained, the judgement by the Court is elaborated upon. This chapter also shortly describes the other six applications the Marshall Islands submitted to the International Court of Justice due to the other defendants also being nuclear weapon states, and explains why these cases were immediately dismissed. This chapter provides the necessary background information and contains the information which led to the three specific flaws being chosen.

The second chapter of this research paper analyses further the flaws selected in the first chapter. The first flaw analysed is the inequality between the signatories of the NPT. The chosen term for this issue is the principle of equality. This issue is analysed using the 1966 General Assembly statements of the defendants- United Kingdom, Pakistan, India. These statements show that states already in 1966 during the negotiations were worried about whether all obligations would be fulfilled equally. These statements also further the understanding of what the principle of equality means. The second flaw analysed in this chapter is the ambiguous wording of Article VI of the Non-Proliferation Treaty. The text of the article analysed and the 1996 advisory opinion by the ICJ on the Legality of the Threat or Use of Nuclear Weapons. This advisory opinion provided a clarification on the meaning of Article VI of the NPT. The third flaw analysed is the uncertainty in jurisdictive issues regarding the Non-Proliferation Treaty. The Marshall Islands applications alleged that Article VI of the NPT should be considered customary international law. This idea is developed further by exploring the concept of customary international law and how it can be ascertained whether a treaty should be considered CIL or not. The question of whether Article VI of the

Non-Proliferation Treaty should be considered customary international law is answered by the author by applying the methods previously explored.

The third chapter of this research paper analyses how these three flaws have impacted the Treaty on the Non-Proliferation of Nuclear Weapons. The principle of equality of sacrifice was not obeyed, and while non nuclear weapon states fulfilled their obligations, the nuclear weapon states did not. This has resulted in nuclear disarmament not having been achieved, nor any significant progress has been made towards it. The second flaw of the ambiguous wording of the Article VI of the NPT resulted in more than two decades passing before the ICJ provided the correct interpretation for the article. This in turn resulted in a long stretch of time in which the nuclear weapon states were free to not fulfill their obligations. The unclarity in jurisdictive issues regarding the Non-Proliferation Treaty have resulted in the Treaty being very difficult to enforce. These three flaws together have resulted in a treaty which has been only partially successful, hard to enforce and one which is unequal in regards to the obligations prescribed to the nuclear weapon states and non nuclear weapon states.

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## LIST OF ABBREVIATIONS

ICJ- International Court of Justice

NPT- Non-Proliferation Treaty

UN- United Nations

USSR- Union of Soviet Socialist Republics

USA/US- United States of America

UK- United Kingdom

VCLT- Vienna Convention on the Law of Treaties

MAD- Mutual Assured Destruction

CIL- Customary International Law

## INTRODUCTION

The Treaty on the Non-Proliferation of Nuclear Weapons (NPT) has not successfully fulfilled most of its goals. New nuclear weapon wielding states have emerged after the ratification of the Treaty, disarmament is a distant dream. The arms race between the United States and the Soviet Union was stopped, but since then little progress has been made in fulfilling the Treaty's goals of nuclear disarmament and non-proliferation.

The cases of *Marshall Islands* v. *India*, *Marshall Islands* v. *Pakistan*, and *Marshall Islands* v. *The United Kingdom* refer to several weaknesses in the Non-Proliferation Treaty. Vague wording of Article VI of the NPT, jurisdictive issues regarding the NPT, the unequality of the NPT on a practical level are the key issues which will be analysed in this research paper, which have been either referred to in the aforementioned cases, or explored during the negotiation process of the Non-Proliferation Treaty.

The hypothesis put forth by the author is that the Non-Proliferation Treaty is flawed, especially in regards to Article VI, jurisdictive unclarity and inequality between the signatories of the Treaty. The research question which will be answered by this research paper is as follows: to what extent has the ambiguous wording of Article VI, jurisdictive unclarity and inequality between the signatories of the Non-Proliferation Treaty as shown by the Marshall Islands cases resulted in a flawed Treaty?

This research will be divided in three distinct parts. Chapter I will contain the needed context regarding the Treaty and the cases. More specifically the procedural history of the Treaty will be laid out in order to understand the circumstances of its creation. After that two separate sections will take a look at the cases of *Marshall Islands* v. *Pakistan*, *Marshall Islands* v. *India*, *Marshall Islands* v. *United Kingdom*, and the final section of Chapter I will explore the rejected cases which Marshall Islands brought against the other nuclear weapon states. The second chapter will analyze the flaws and issues in the Treaty which either were referred to in the previously mentioned cases or which can be inferred from the cases. Three issues will be explored in detail- the principle of equality of sacrifice, the issues regarding Article VI of the Treaty as well as the unclarity of the customary international law status of the Treaty and Article VI of the Treaty. The third chapter of this research paper will attempt to draw further conclusions from the analysed flaws, in order to answer the research question and either prove or disprove the hypothesis put forth by the author.

This research paper will rely on the aforementioned cases of *Marshall Islands* v. *Pakistan*, *Marshall Islands* v. *India*, *Marshall Islands* v. *United Kingdom*, as well as other relevant International Court of Justice (ICJ) documents such as the advisory opinion regarding the legality of the threat or use of nuclear weapons, the text of the Treaty itself as well as copious amounts of United Nations (UN) verbatim records, resolutions, etc, and most importantly research done by experts in their fields.

# 1. CHAPTER I THE TREATY AND THE CASES

## 1.1 Procedural History of the Treaty

The United Nations being a body which consists of a multitude of states, rather than a homogeneous entity, relies on states to bring forth acute issues. At the same time, committees are tasked with providing a factual explanation of said issues, and with suggesting possible solutions. The Treaty came into force following this usual procedure.

The Disarmament Commission, the successor of the Atomic Energy Commission and the Commission for Conventional Armaments was established on 11th January 1952 with goals including, but not being limited to, the elimination of mass destruction weapons, prohibition of nuclear weapons.[1] However, the Disarmament Commission truly came in action at a later date, discussed further in the text.

On 17th October 1958, at the Thirteenth Session of the General Assembly Ireland introduced a draft resolution suggesting that the feasibility of an international agreement regarding the non-proliferation, non dissemination of nuclear weapons and cessation of nuclear weapon testing should be explored further[2]. This was the first inkling of the Treaty which was still to come. In the following, 14th, General Assembly session, the aforementioned resolution 1380 (XIV) was adopted and the Ten Nation Committee on Disarmament was tasked with analysing the feasibility of a voluntary international agreement regarding the previously mentioned issues[3].

The Ten Nation Committee did not consider the issue of nuclear weapon non-proliferation, and as such the General Assembly in the following 15th[4] and 16th[5] sessions reiterated the importance of nuclear weapon non-proliferation and in 16th session also tasked the General-Secretary to inquire what would be the necessary stipulations for an international agreement

[1] United Nations. Resolution 502 *Regulation, limitation and balanced reduction of all armed forces and all armaments ; international control of atomic energy*. Official records of the General Assembly, Sixth Session. Resolutions adopted on the reports of the First Committee. 11 January 1952 Available on: https://www.un.org/ga/search/view_doc.asp?symbol=a/res/502(VI). Accessed March 1, 2020.

[2] United Nations. *Official records of the General Assembly, Thirteenth Session, 953rd meeting of the First Committee*, 17 October 1958. Available on: https://unoda-web.s3-accelerate.amazonaws.com/documents/library/A-C1-SR953.pdf. Accessed March 1, 2020.

[3] United Nations. Resolution 1380 *Prevention of the wider dissemination of nuclear weapons.* Official records of the General Assembly, Fourteenth Session. 21 November 1959. Available on: https://www.un.org/ga/search/view_doc.asp?symbol=a/res/1380(xiv). Accessed March 1, 2020.

[4] United Nations. Resolution 1576 *Prevention of the wider dissemination of nuclear weapons.* Official records of the General Assembly, Fifteenth Session, Resolutions adopted on the reports of the First Committee, 20 December 1960. Available on: https://www.un.org/ga/search/view_doc.asp?symbol=a/res/1576(xv). Accessed March 1, 2020.

[5] United Nations. Resolution 1665 *Prevention of the wider dissemination of nuclear weapons.* Official records of the General Assembly, Sixteenth Session, Resolutions adopted on the reports of the First Committee, 4 December 1961. Available on: https://www.un.org/ga/search/view_doc.asp?symbol=a/res/1665(xvi). Accessed March 1, 2020.

on the non dissemination of nuclear weapons to be introduced[6]. The finding of common ground between several member states, especially the USSR and the United States at the time was a tall order to fulfill, even as it was a necessity to progress further with the idea of nuclear non-proliferation.

The results of the inquiry were submitted to the Disarmament Committee on 2nd April 1962. After this, the motion towards a treaty prohibiting dissemination and proliferation of nuclear weapons picked up speed. In 1961 the Ten Nation Committee was succeeded by the Eighteen Nation Disarmament Committee which had the goal of a "general and complete disarmament under effective international control"[7], while general and complete disarmament did not necessarily refer to only nuclear weapons, they were a critically important issue of the time period and received a large amount of attention. Less than a year later, in 1962, both the US and the USSR had submitted their versions of a draft treaty regarding general and complete disarmament.[8]

The draft treaty by the USSR was submitted on 15th March 1962, by the US on 18th of April 1962. Half a year later and the Cuban Missile Crisis took place, regarded by most as the time when the world came closest to an all out nuclear war. Progress, however small, became of crucial importance. And so, for a while progress towards a comprehensive nuclear arms treaty was stalled, while other, smaller treaties, became the focal point. Year 1963 saw the Treaty banning nuclear weapon tests in the atmosphere, in outer space and under water (usually referred to as Partial Test Ban Treaty) come into force, which was a small step, but one needed for a world which had come so close to nuclear destruction.

At the same time, the space race between the USSR and the United States was heating up. United Nations General Assembly's Eighteenth Sessions resolutions[9] show a high level of concern about the possibility that carriers of nuclear missiles would be launched in space, as well as concern regarding nuclear tests in space. However, as the aforementioned document shows, neither the USSR nor the United States were interested in pursuing the placement of nuclear weapons in space.

In 1965 a new wave of urgency overtook the United Nations. The success of the Partial Test Ban Treaty showed that progress was possible, and it became time to once again turn towards a nuclear arms treaty. The nuclear weapon issue was highlighted in the work of both the Eighteen Nation Disarmament Committee, and the United Nations Disarmament Committee

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[6] United Nations. Resolution 1664 *Question of disarmament.* Official records of the General Assembly, Sixteenth Session, Resolutions adopted on the reports of the First Committee, 4 December 1961. Available on: https://www.un.org/ga/search/view_doc.asp?symbol=a/res/1664(xvi). Accessed March 1, 2020.

[7] United Nations. Resolution 1722 *Question of disarmament.* Official records of the General Assembly, Sixteenth Session, Resolutions adopted on the reports of the First Committee, 20 December 1961. Available on: https://www.un.org/ga/search/view_doc.asp?symbol=a/res/1722(xvi). Accessed March 1, 2020.

[8] United Nations. *Introductory note to the Treaty on the Non-Proliferation of Nuclear Weapons*. Available on: https://legal.un.org/avl/ha/tnpt/tnpt.html. Accessed March 2, 2020.

[9] United Nations. Resolution 1908 *Question of general and complete disarmament.* Official records of the General Assembly, Eighteenth Session, Resolutions adopted on the reports of the First Committee, 27 November 1963. Available on: https://www.un.org/ga/search/view_doc.asp?symbol=a/res/1908(XVIII). Accessed March 2, 2020.

once again. In 1965 draft treaties and motions regarding non-proliferation of nuclear weapons were submitted by the US, Italy, the eight states which joined the Eighteen Nation Disarmament Committee when it succeeded the Ten Nation Committee (them being Brazil, Burma, Ethiopia, India, Mexico, Nigeria, Sweden, the United Arab Republic), and the USSR.[10]

In 1967 the Eighteen Nation Disarmament Committee held a conference in Geneva regarding the non-proliferation of nuclear weapons and working towards a definite version of a treaty, a year later in 1968 the Conference of Non-Nuclear-Weapon States took place in Geneva with the same goal.[11] After the Non-Nuclear-Weapon State conference further improvements were made to the draft treaties submitted by the US and the USSR in 1967. In 1968 on 11th of March the USSR and the US submitted a joint draft treaty, although it must be pointed out that all treaties previously separately submitted by the USSR and the US regarding nuclear weapon non-proliferation were either the same in spirit, or completely identical.

After the consideration of the draft treaty by the First Commission and revision, it was adopted as the Treaty on the Non-Proliferation of Nuclear Weapons. To summarise the results, the Treaty obliged the nuclear power states to never transfer nuclear weapons to another state, and for non nuclear weapon states to never receive nuclear weapons. Non nuclear weapon states agreed to accept safeguard for ensuring that their obligations are being fulfilled. The Treaty specifically allowed all peaceful nuclear power technology to be shared and obliged all states to facilitate this process.

### 1.2 *Marshall Islands* v. *India, Marshall Islands* v. *Pakistan, Marshall Islands* v. *United Kingdom*

Marshall Islands submitted cases to the International Court of Justice against all nuclear power states, however only three of them were accepted by the Court. These three cases were *Marshall Islands* v. *India, Marshall Islands* v. *Pakistan*, *Marshall Islands* v. *United Kingdom.* This section will focus solely on these three cases with the reasons for dismissing the other cases explained in the following section.

The timing of the submission of the cases was chosen purposefully. The cases were submitted on the 24th of April 2014, just after the 2014 February Conference on the Humanitarian Impact of Nuclear Weapons[12], and only four days before the 2014 Preparatory Committee for the 2015 Nuclear Non-Proliferation Treaty Review Conference[13], where the minister of foreign affairs delivered a scathing reminder to the present parties of the dangers of nuclear

[10] United Nation. *Supra* note 8.
[11] *Ibid*.
[12] Federal Ministry for European and International Affairs. Vienna Conference on the Humanitarian Impact of Nuclear Weapons. Available on: https://www.bmeia.gv.at/en/european-foreign-policy/disarmament/weapons-of-mass-destruction/nuclear-weapons/vienna-conference-on-the-humanitarian-impact-of-nuclear-weapons/. Accessed March 3, 2020.
[13] United Nations Office for Disarmament Affairs. 2014 Preparatory Committee for the 2015 Nuclear Non-Proliferation Treaty Review Conference. Available on: https://www.un.org/disarmament/wmd/nuclear/npt2015/prepcom2014/. Accessed March 3, 2020.

weapons[14]. Furthermore, Marshall Islands were, and remain, uniquely suited for bringing any breaches of the NPT to the ICJ, as due to being a nation which has suffered much from nuclear testing they are a singularly invested party.

Marshall Islands became an independent state only in 1986, when the United States officially signed the Compact of Free Association between the Federated States of Micronesia and the United States in law[15], as since 1944 the United States had held the Marshall Islands. During the years that the United States held the Marshall Islands in trusteeship it was used as grounds for extensive nuclear weapon testing. After the end of World War II the United States began their nuclear weapon tests, and from 1946 until 1958 the United States had performed 67 nuclear weapon tests[16], which left the islands with an incredibly high level of radiological contamination.[17] The 1954 test Bravo was deemed "the worst radiological disaster in US history"[18], understandable as it was "1,000 times the destructive power of the Hiroshima atomic bomb"[19]. The Atomic Heritage Foundation lists the known long term effects and issues faced by the people of the Marshall Islands as "forced relocation, burns, birth defects, and cancers."[20]. To sum up, the nuclear weapon issue has created a multitude of issues to the Marshall Islands, and the Marshall Islands are determined to bring back the topic of nuclear disarmament to the minds of the international community. This is evident from both the history of Marshall Islands, them submitting cases against all nuclear weapon states (including Israel, which has not admitted to having nuclear weapons), and as well from the specifically chosen date for the submission of the applications to the ICJ.

From the three cases which proceeded to the ICJ, only one was against a state party to the NPT. As such, the case against the United Kingdom will be analysed separately from the cases against Pakistan and India.

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[14] Tony de Brum. *Statement at the General Debate of the third Meeting of the Preparatory Committee for the 2015 Nuclear Non-Proliferation Treaty Review Conference*. Delivered at United Nations, New York, 28 April 2014. Available on: https://papersmart.unmeetings.org/media2/2927404/marshall-islands.pdf..

[15] Legal Information System of the Federated States of Micronesia. Compact of Free Association. Available on: http://www.fsmlaw.org/compact/. Accessed March 3, 2020.

[16] Calin Georgescu. *Report of the Special Rapporteur on the human rights obligations related to environmentally sound management and disposal of hazardous substances and waste.* United Nations Human Rights Council, Twenty-first session. Available on: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G12/149/26/PDF/G1214926.pdf?OpenElement.

[17] Robert C. Whitcomb, JR. *Reconstruction and analysis of cesium- 137 fallout deposition in the Marshall Islands* (Gainesville: University of Florida, 2000). Available on: https://ia802305.us.archive.org/28/items/reconstructionan00whit/reconstructionan00whit.pdf.

[18] Radiochemistry Society. Operation castle 1954 – Pacific Proving Ground. U.S. Nuclear tests info gallery. Available on: http://www.radiochemistry.org/history/nuke_tests/castle/index.html. Accessed March 3, 2020.

[19] Robert Alvarez. The Marshall Islands and the NPT. Bulletin of the Atomic Scientists. Available on: https://thebulletin.org/2015/05/the-marshall-islands-and-the-npt/. Accessed March 3, 2020.

[20] Atomic Heritage Foundation. Marshall Islands. Available on: https://www.atomicheritage.org/location/marshall-islands. Accessed March 3, 2020.

### 1.2.1 *Marshall Islands* v. *United Kingdom*

The Marshall Islands in their application against the United Kingdom accused it of breaching international law on three points, them being firstly the obligation to negotiate in good faith so as to stop the nuclear arms race as per Article VI of the NPT, secondly the obligation to negotiate in good faith so as to achieve nuclear disarmament as per Article VI of the NPT, and thirdly the obligation to perform its legal duties in good faith by itself, as well as customary international law which encompasses all previously mentioned obligations.[21]

Regarding the accusation against the United Kingdom of their not negotiating in good faith so as to stop the nuclear arms race, the Marshall Islands submitted an account of the numerous modernisation efforts which the United Kingdom had taken in the years following their ratification of the NPT.[22]

Regarding the nuclear disarmament issue, the modernisation of the United Kingdom's nuclear arsenal is by itself against the disarmament principle, however in this case the applicant provided several examples of occasions where the United Kingdom explicitly refused to enter negotiations regarding nuclear disarmament.[23]

The accusation that the United Kingdom had breached their obligation to perform legal duties in good faith largely required the same evidence as the previous two accusations, since Article VI of NPT which impressed the previous two obligations explicitly names an obligation to negotiate in *good faith*. Furthermore, not only was this explicitly named obligation breached, but the very fact itself that Article VI was breached on the aforementioned two fronts signifies that the United Kingdom had not performed their obligations in good faith. The final accusation of breaching customary international law will be discussed further in the following sections.

However, the ICJ after the examination of whether it is able to judge this case discovered that the provided evidence by the Marshall Islands is not sufficient to deem that a dispute between the Marshall Islands and the United Kingdom exists.[24] The judgement was based mainly on the fact that there had been no bilateral conversation between the Marshall Islands and the United Kingdom, nor had Marshall Islands *directly* informed the United Kingdom of the dispute. The Marshall Islands evidence of the existence of a dispute was mainly declarations on the international stage calling for progress in nuclear disarmament, the very application to the ICJ being an act of informing the other party, and voting records of the parties regarding

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[21] Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom), Application Instituting Proceedings, I.C.J. Filed in the Registry of the Court on 24 April 2014, paras. 15-17. Available on: https://www.icj-cij.org/files/case-related/160/160-20140424-APP-01-00-EN.pdf.

[22] *Ibid*. pp. 16-36.

[23] *Ibid*. pp. 36-46.

[24] Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016, p. 833., paras. 26-58. Available on: https://www.icj-cij.org/files/case-related/160/160-20161005-JUD-01-00-EN.pdf.

nuclear disarmament and connected issues.[25] All of these arguments were deemed lacking by the ICJ and the case was dismissed on the grounds of absence of a dispute.[26]

### 1.2.2 *Marshall Islands* v. *Pakistan*, *Marshall Islands* v. *India*

The Marshall Islands applications to the ICJ against India and Pakistan were similar in build, if not in content. Both India and Pakistan were not and are not signatories to the NPT, and as such Article VI of the NPT couldn't be considered breached. However, as mentioned in the previous section Marshall Islands argued that NPT, and more specifically the obligations impressed by Article VI of the NPT (to negotiate in good faith towards nuclear disarmament and to negotiate in good faith towards a stop to the nuclear arms race) should be considered as customary international law.[2728] Furthermore, the Marshall Islands accused Pakistan and India of failing their obligation to perform their legal obligations in good faith.[2930]

Given the similar nature of both the Pakistani case and the Indian case, the build of the applications against them is almost identical. Accusations against India and Pakistan regarding them not performing their obligation to negotiate in good faith towards stopping the nuclear arms race were proved by the same approach as that to the United Kingdom case. Namely, regarding Pakistan, the state has allegedly not stopped increasing their nuclear weapon stockpile, as well as has continuously improved their weapon production capabilities and the nuclear weapon capabilities themselves, and blocked negotiations on a subject matter directly related to the nuclear weapon arms race.[31] In the application against India, the allegations are more of the same, the breach of CIL can be seen in that India has continued improving their nuclear weapon capabilities, as well as has been increasing their stockpile of weapon-grade plutonium.[32]

Regarding nuclear disarmament, India has supported the commencement of nuclear weapon disarmament convention negotiations[33], however, the Marshall Islands argue that as per the ICJ advisory opinion on the Legality of the Threat or Use of Nuclear Weapons, the obligation

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[25] *Ibid.* paras. 48-69.

[26] *Ibid*. paras. 58-59.

[27] Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. Pakistan), Application Instituting Proceedings, I.C.J. Filed in the Registry of the Court on 24 April 2014, pp. 26-30 and pp. 35-36. Available on: https://www.icj-cij.org/files/case-related/159/159-20140424-APP-01-00-EN.pdf.

[28] Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India), Application Instituting Proceedings, I.C.J. Filed in the Registry of the Court on 24 April 2014, pp. 28-32 and pp. 36-38. Available on: https://www.icj-cij.org/files/case-related/158/158-20140424-APP-01-00-EN.pdf.

[29] Marshall Islands v. Pakistan, *supra* note 27, pp. 30-34 and pp. 34-36.

[30] Marshall Islands v. India, *supra* note 28, pp. 32-36 and pp. 36-38.

[31] Marshall Islands v. Pakistan, *supra* note 27, pp. 27-30.

[32] Marshall Islands v. India, *supra* note 28, paras 29-34.

[33] *Ibid*., paras 35-37.

by CIL is to also *conclude* negotiations, not only begin them, as well as India by improving their nuclear capabilities and increasing stockpiles have acted contrary to the goal of nuclear disarmament[34]. This will be discussed further in detail at a later point. The application against Pakistan as well alleges that while Pakistan has supported calls for a convention on nuclear disarmament, the CIL obligation to conclude negotiations on this matter has not been fulfilled, and by increasing stockpiles of the necessary components to create nuclear weapons as well as improving their nuclear weapon capabilities have acted directly against the goal of nuclear disarmament.[35]

The allegation of Pakistan and India having breached their obligation under CIL to fulfill their legal obligations in good faith is evidenced by the factors discussed in the previous two paragraphs. Marshall Islands elaborates, that these breaches are counter to the principle of good faith by directly hindering the fulfillment of the previously discussed obligations. Furthermore, the increase of nuclear weapon stockpiles and nuclear weapon capabilities might urge other nuclear powers into doing the same, in that way inducing other states to breach their obligations in return as well.[36,37]

The question of whether NPT can be considered as CIL or not will be discussed in a further section. Regardless, due to much of the same reasons as the Marshall Islands application against the United Kingdom, these applications were also dismissed on the grounds of no dispute existing between the parties.[38,39] The submitted evidence by the Marshall Islands was of the same concept as that in their application against the United Kingdom. Namely, declarations on the international sphere, the submission of the application itself and voting records as well as noninvolvement in possible negotiations towards nuclear disarmament.

### 1.2.3 The Marshall Islands v. the Other Nuclear States, Where the Other Cases Ended Up

The Marshall Islands experience with the United States is undoubtedly worse than the experiences it has had with the United Kingdom, Pakistan or India due to the nuclear tests that were done on the Marshall Islands soil by the United States. However, the Marshall Islands did not bring a single case before the ICJ against the United States, or even four cases if the

[34] *Ibid*., paras 38-49 and paras. 57-58.

[35] Marshall Islands v. Pakistan, *supra* note 27, paras 30-32, paras 33-44 and paras 52-53.

[36] Marshall Islands v. Pakistan, *supra* note 27, paras 56-59.

[37] Marshall Islands v. India, *supra* note 28, paras 61-64.

[38] Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India), Jurisdiction and Admissibility, Judgment, I.C.J, Report 2016, paras 22-56 Available on: https://www.icj-cij.org/files/case-related/158/158-20161005-JUD-01-00-EN.pdf

[39] Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. Pakistan), Jurisdiction and Admissibility, Judgment, I.C.J, Report 2016, paras 25-56 Available on: https://www.icj-cij.org/files/case-related/159/159-20161005-JUD-01-00-EN.pdf

previously mentioned cases against the United Kingdom, Pakistan and India are counted as well. The Marshall Islands in one fell swoop attempted to bring cases against all nuclear weapon holding states to the ICJ, all similarly accused of breaching Article VI of the Non-Proliferation Treaty. Given that Article VI imposes duty to negotiate on nuclear disarmament, and as ICJ ruled, to also reach a conclusion in the negotiations, all nuclear weapon holding states have indeed breached this article in the most basic sense. However as time limits have not been set in the Treaty, nor a specific course of action, so the cases remain highly complex, especially as the ICJ advisory opinions are non binding, even if they carry a great weight in the international community.[40]

Regardless, the Marshall Islands attempted to bring the cases against all of the nuclear weapon holding states to the ICJ, as mentioned previously. However, this research focuses on the United Kingdom, Pakistan and India cases because none of the other attempted cases ended up being judged by the ICJ, nor even reached the Court.

Regarding the application Marshall Islands attempted to bring to the ICJ against the United states, they were unsuccessful as in 1985 the United States withdrew from the International Court of Justice's jurisdiction[414243], and the United States did not accept the jurisdiction of the ICJ in this case either. The Marshall Islands were able to bring their case before the courts of the United States, however their case was in the end dismissed in 2017[44], due to the court not recognising the Non-Proliferation Treaty as being the jurisdiction of a domestic court. Of course, the end result was that the Marshall Islands were unable to pursue their grievance of the United States breach of Article VI of the NPT any further. In conclusion, the case of *Marshall Islands* v. the *United States* could not be pursued at any level, with none of the courts to which the Marshall Islands attempted to bring their case to recognising their jurisdiction over the Treaty matters. It is a clear difference from the incredible urgency which the United States felt when the Treaty negotiation process had just ended, recalling the words of the President of the United States of America at the General Assembly Planetary Session where Lyndon B. Johnson professed that

[40] United Nations Dag Hammarskjöld Library. What is an Advisory Opinion of the International Court of Justice (ICJ)? Available on: http://ask.un.org/faq/208207. Accessed March 14, 2020.

[41] Stephen P. Mulligan. "The United States and the "World Court"," *Congressional Research* Service (October 17, 2018). Available on: https://fas.org/sgp/crs/row/LSB10206.pdf. Accessed March 14, 2020.

[42] The New York Times Archives. Text of U.S. Statement on Withdrawal from Case before the World Court. January 19, 1985. Available on: https://www.nytimes.com/1985/01/19/world/text-of-us-statement-on-withdrawal-from-case-before-the-world-court.html. Accessed March 14, 2020.

[43] Sean D. Murphy. ''The United States and the International Court of Justice: Coping with Antinomies,'' in *The United States and International Courts and Tribunals*, edited by Cesare Romano. Washington, D.C: George Washington University Law School, 2008. Available on: https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=1902&context=faculty_publications.

[44] Republic of the Marshall Islands *v.* United States of America, United States Court of Appeals for the Ninth Circuit. No. 15-15636 D.C. No. 4:14-cv-01885- JSW Opinion. Case: 15-15636, 07/31/2017, ID: 10526450, DktEntry: 64-1. Filed July 31, 2017. Available on: https://www.courthousenews.com/wp-content/uploads/2017/07/9CA-Marshall-Nuclear-OPINION.pdf.

> we shall, as a major nuclear-weapon Power, promptly and vigorously pursue negotiations on effective measures to halt the nuclear arms race and to reduce existing nuclear arsenals.[45]

The applications to the ICJ against the other nuclear power states- China, France, Israel, North Korea, Russia were also not successful. None of these states has recognized the jurisdiction of the ICJ, and, as the Article 38, paragraph 5, of the Rules of Court stipulates;

> When the applicant State proposes to found the jurisdiction of the Court upon a consent thereto yet to be given or manifested by the State against which such application is made, the application shall be transmitted to that State. It shall not however be entered in the General List, nor any action be taken in the proceedings, unless and until the State against which such application is made consents to the Court's jurisdiction for the purposes of the case.[46]

Unsurprisingly the accused parties did not consent to the ICJ's jurisdiction regarding this matter and so the Marshall Islands cases were rejected.[47] Israel of course has never formally admitted to having nuclear weapons, although it is considered to be an open secret by now.[48]

The rejection of 6 out of 9 cases which the Marshall Islands attempted to bring before the ICJ, often called World Court, showcases the problems with enforcing the Non-Proliferation Treaty, which will be discussed further in the following sections.

[45] United Nations. Address by Mr. Lyndon B. Johnson, President of the United States of America. Official records of the General Assembly, Twenty-Second Session. New York, 12 June 1968. Available on: https://www.un.org/ga/search/view_doc.asp?symbol=A/PV.1672. Accessed March 15, 2020.

[46] International Court of Justice. Rules of Court (1978). Adopted on 14 April 1978 and entered into force on 1 July 1978. Available on: https://www.icj-cij.org/en/rules.

[47] International Court of Justice. Basis of the Court's jurisdiction. Available on: https://www.icj-cij.org/en/basis-of-jurisdiction. Accessed March 15, 2020.

[48] The Nuclear Threat Initiative. Country overview – Israel. Available on: https://www.nti.org/learn/countries/israel/. Accessed March 15, 2020.

# 2. CHAPTER II THE THREE FLAWS OF THE TREATY

## 2.1 The Principle of Equality of Sacrifice in the NPT

The Non-Proliferation Treaty came into force in 1970, at a time when the dangers of nuclear weapons were fresh on everybody's minds. The main aims of the Treaty, of those

> 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[49]

took around 20 years to be put on paper in a form which the United Nations member states were willing to agree upon.

And still, the Treaty has at times been deemed unequal,[50] with the non nuclear weapon holding states giving up their rights to security measures and the nuclear weapon holding states undertaking the obligation to negotiate. After the 1940's and 1950's the need for international peace was pressing, and partially that can explain why the non nuclear weapon holding states were ready to adhere to clearly outlined restrictions in order to receive vague reassurances.[51] However, the dismissal of the Marshall Island submitted applications seems to imply that the nuclear disarmament clause is currently unenforceable in court, which raises the question of inequality in the Treaty. Largely the non-proliferation clause has been adhered to by the signatory states and the nuclear disarmament negotiations haven't progressed.

At the same time as deeming the Treaty unequal in the weight of obligation, signatory states have stressed that the Treaty contains an implied obligation to protect the non nuclear weapon holding states and further steps should be taken to assure the non weapon holding states of this, especially clearly expressing this in the 1995 Review and Extension Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons.[52] This again returns the discussion to the principle of equality of sacrifice.

Further on, the Treaty does not contain a hierarchical order of its aims merely a temporal one, which is to say that non-proliferation cannot be considered to be a more important part of the Treaty than the nuclear disarmament part. As the case of the "Joint Declaration on the question of Hong Kong"[53] showcases, the name of a treaty can even contain a misnomer and

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[49] United Nations office for Disarmament Affairs. Treaty on the Non-Proliferation of Nuclear Weapons (NPT). Available on: https://www.un.org/disarmament/wmd/nuclear/npt/text/. Accessed March 24.

[50] For further discussion see the rest of this section.

[51] Shirley V. Scott. ''The Problem of Unequal Treaties in Contemporary International Law: How the Powerful have Reneged on the Political Compacts within which Five Cornerstone Treaties of Global Governance are Situated'', *Journal of International Law & International Relations* 4, no. 2 (2008). Available on: https://www.westlaw.com/Document/I5f5cdd882f0f11deb055de4196f001f3/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0. Accessed March 24, 2020.

[52] *See* NPT/CONF.1995/32 (Part I) Decision 2, Principles and Objectives for Nuclear Non-Proliferation and Disarmament 'further steps should be considered to assure non-nuclear-weapon States party to the Treaty against the use or threat of use of nuclear weapons. These steps could take the form of an internationally legally binding instrument.' Available on: https://unoda-web.s3-accelerate.amazonaws.com/wp-content/uploads/assets/WMD/Nuclear/1995-NPT/pdf/NPT_CONF199501.pdf

[53] *See* "The Joint Declaration on the question of Hong Kong" treaty registry at the United Nations https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800d4d6e&clang=_en where the Joint Declaration rests proudly in the UN Treaty Collection.

that still cannot change the fact that in the eye of the law it is considered a treaty. Which is to say, despite the title of the Treaty on the Non-Proliferation of Nuclear Weapons referring only to non-proliferation, that does not expressly mean that non-proliferation can be considered as the main goal.

However, despite the letter of the law not containing a hierarchical order of aims, in reality the United Nations documentation on the negotiation process and debates regarding the Treaty shows that a large number of states considered non-proliferation to be the key goal, with only some acknowledging the inequality of the Treaty arising from the comparatively vague obligations of nuclear states towards nuclear disarmament. At this moment, a brief reference must be made to the VCLT provided supplementary means of interpretation. While the following section on the interpretation of Article VI elaborates on why Article VI should be interpreted by using the VCLT provided supplementary means in addition to the text of the Treaty, the hierarchical order of the goals of non-proliferation and nuclear disarmament should not necessitate the use of supplementary interpretative means resulting in a difference of the importance of the two goals. The NPT consistently refers to non-proliferation and nuclear disarmament (as well as the other goals) with the same weight and importance, in the preamble as well as the body of the Treaty.[54]

Returning to the issue of the principle of equality of sacrifice, as well as the unequal nature of the treaty, The United Nations General Assembly Twenty-First Sessions official records of the general debate will be used as explanatory material. Specifically the declarations of the parties to the aforementioned cases of Marshall Islands v. United Kingdom, Marshall Islands v. Pakistan, Marshall Islands v. India, will be analysed. At the time Marshall Islands themselves were under the trusteeship of the United States and as such did not participate. The declarations of these parties to the case all discuss the principle of equality of sacrifice, and by that the inequality of the Treaty.

### 2.1.1 The United Kingdom v. the Principle of Equality of Sacrifice

This particularly revealing debate contains expressions of several major powers of the time, some of which as mentioned were a part of the Marshall Islands cases. Lord Chalfont of the United Kingdom expressed the view that non-proliferation had to come first before nuclear disarmament, as well as urged the other nuclear powers to consider, as he referred to it, "equality of sacrifice"[55]. Equality of sacrifice refers to the previously introduced concept of the unequal treaty, namely that as non-nuclear states give up their right to security, the

[54] Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 49, the Preamble and Article VI.

[55] United Nations. Renunciation by States of actions hampering the conclusion of an agreement on the non-proliferation of nuclear weapons. Official records of the General Assembly, Twenty-First Session. New York, 25 October 1966, paras. 11-27. Available on: https://www.un.org/ga/search/view_doc.asp?symbol=A/C.1/SR.1432. Accessed April 3, 2020.

nuclear-power states must sacrifice something[56] of equal importance. The United Kingdom, being a nuclear power state, disagreed with this principle, outlining that non-proliferation was in the interests of both nuclear power and non nuclear power states. Nuclear weapons were "a ruinously expensive enterprise"[57], which shouldn't be considered by anyone of sound mind as an option, as by one new nuclear state emerging it would cause numerous other nuclear states to emerge, exponentially increasing the risks associated with holding nuclear weapons. As such, the United Kingdom pointed out that the sacrifice of non nuclear states was little more than a thought experiment, as regardless of non-proliferation being binding by way of a Treaty, it would still have to be adhered to for the security and order of the world.

Regarding nuclear non-proliferation being the priority over any nuclear disarmament, the United Kingdom largely referred to the temporal order of these two issues. Put frankly, the debates regarding these two issues had been ongoing for years already. In order to progress on a Treaty regarding nuclear weapons, the United Kingdom elaborated, non-proliferation had to be considered as the first step. A joint nuclear disarmament and non-proliferation treaty, which would put nuclear disarmament in strong terms, with deadlines, penalties and so forth, would take too long to be created, and the nuclear weapon issue was a pressing one.

The author must elaborate that these expressions of the United Kingdom showcased the nuclear weapon treaty issue quite well. A solution, a treaty, had to be created sooner rather than later, and a treaty which put nuclear non-proliferation as the first step and left room to argue the issue of nuclear disarmament at least would achieve nuclear non-proliferation if not solve the nuclear issue as a whole. However, in the years following the creation of the Non-Proliferation Treaty, the original goal of the Treaty, a world safe from nuclear weapons, was not achieved, nor realistically saw any progress. As much as nuclear disarmament is a logistically complicated issue, it should not have been neglected for such a long time, as the Marshall Islands argued in their applications to the ICJ. To sum up, the United Kingdom did not consider the principle of equal sacrifice to be sound, and as such rejected the possibility of the Treaty being an unequal treaty. At the same time, it is important to note that the main goal of any state is survival and most often also the safeguarding of their interests. At the time of the negotiations, as United Kingdom put it:

> what effect would it have on the policy and attitude of their Governments with regard to non-proliferation if the United Kingdom were to announce the next day that it would abandon its nuclear capability and destroy its nuclear weapons?[58].

This question can be interpreted differently by each of the states present at the debates, which can be safely assumed to have been the intent of the United Kingdom. On the one hand the United Kingdom could be referring to the deterrence capabilities of nuclear weapons. On the

[56] Nuclear weapons being the "something". However, as an outright demand to destroy all nuclear weapons would hinder the negotiations, the "something" being nuclear weapons was only implied, even if understood by all. At times "something" could also be a reference to other safeguards such as additional military alliance contracts, contracts to never strike first with nuclear weapons against non nuclear weapon carrying states, etc.

[57] Renunciation by States of actions hampering the conclusion of an agreement on the non-proliferation of nuclear weapons, *supra* note 55, para. 16.

[58] Renunciation by States of actions hampering the conclusion of an agreement on the non-proliferation of nuclear weapons, *supra* note 55, para. 17.

other hand, those states which considered nuclear non-proliferation to be the main priority could take a nuclear power state giving up their nuclear weapons as a favourable sign that no nuclear disarmament clause was truly necessary. Both of these possibilities would have hindered the negotiation process. At the same time this question could have also been used as a way to urge the present states to doubt their own intentions and cast their attention away from the intentions of the United Kingdom. Regardless of the United Kingdom at the time declaring that

> To those who might ask why, in that case, the United Kingdom did not give up its nuclear weapons, he would reply that his Government was prepared to do so within the framework of an agreed disarmament process in which other countries possessing those weapons took part.[59]

the reality shows that despite the United Kingdom proclaiming their readiness to disarm themselves and the obligation of the Article VI of the NPT to negotiate towards this end, these proclamations nor obligations have been fulfilled.

### 2.1.2 Pakistan and Elaborations on the Principle of Sacrifice

Pakistan, by way of Amjad Ali, also expressed their views regarding nuclear disarmament and nuclear non-proliferation.[60] At the time of this debate in 1966, Pakistan did not have nuclear weapons. Their approach differed from that of the United Kingdom in that Pakistan was concerned with issues which would be caused by a non-proliferation treaty without a nuclear disarmament clause, while at the same time proclaiming nuclear non-proliferation to be the highest priority of all nuclear disarmament questions[61].

On the issue of non-proliferation Pakistan expressed itself most strongly, that without solving the nuclear non-proliferation issue an arms race would be unavoidable and that would in return cripple the economies of most states.[62] The large amount of resources nuclear weapon programs demand was an issue also brought up by the United Kingdom. It is important to keep in mind that the MAD relationship between the United States and the USSR could be a tempting option to states which did not have enough conventional military strength to be able to claim deterrence by those means. The remainders uttered by both the United Kingdom and Pakistan served as reminders to those states in attendance which were interested in acquiring nuclear weapons that the price of them were most likely more than those states would be able to afford.

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[59] *Ibid*.

[60] United Nations. Renunciation by States of actions hampering the conclusion of an agreement on the non-proliferation of nuclear weapons. Official records of the General Assembly, Twenty-First Session. New York, 28 October 1966, paras. 37-63. Available on: https://www.un.org/ga/search/view_doc.asp?symbol=A/C.1/SR.1434. Accessed April 5, 2020.

[61] *Ibid*., para. 37.

[62] *Ibid*., para. 38.

Further regarding the treaty on nuclear non-proliferation in works, several issues and possible outcomes were analysed. The first issue which Pakistan brought up was the interpretation of the term "nuclear proliferation", especially in regards to military alliances. On one hand there was the possibility that military alliances (collective nuclear defence arrangements) wouldn't lead to nuclear proliferation, on the other hand there was also the possibility that these alliances would become fronts for new states to acquire nuclear weapons.[63] The interpretation of the terms of the treaty being negotiated on was the key issue.[64] Without a joint interpretation which would be accepted by all parties, the negotiations would stall, or the treaty would become unenforceable.

Onwards Pakistan turned to the issue of nuclear disarmament. Here Pakistan echoed the concerns of the United Kingdom in that by introducing strict requirements of nuclear disarmament to the treaty on non-proliferation the progress would stall. Even with most if not all states agreeing on a non-proliferation treaty being necessary, the negotiations progressed at a pace slower than that preferred. At the same time, a declaration of intent to embark on nuclear disarmament, or other reassurances were necessary, as with solely non-proliferation being the core issue of the treaty new difficulties would arise. [65]

One possibility was that if non-proliferation was enforced and yet nuclear states did not disarm themselves, then it was probable that power would become concentrated in the hands of those with nuclear weapons. A legal document allowing for specific states to hold such power over other states would not be accepted by the international community. Another option would be that nuclear states would simply not move towards nuclear disarmament, especially having received the assurance that no new states would become nuclear weapon holders.[6667]

This in turn led to the everpresent principle of equality of sacrifice, to which Pakistan added another discussable issue. While equality of sacrifice could be discussed, at the basis of the concept was the idea that the sacrifice was going to be honored. Non nuclear weapon states not acquiring nuclear weapons and in return the nuclear powers disarming themselves of nuclear weapons. One without the other would be a betrayal of the principle, keeping in mind that logistics required non-proliferation to be assured first and only then turning to the issue of nuclear disarmament. Pakistan questioned whether the option of honoring the sacrifice would be enough to force the nuclear power states to fulfill their own obligations of disarmament. Pakistan further emphasized that the question should be approached practically and not by

[63] *Ibid*., para. 43.

[64] The disagreement was mainly between the US and the USSR, however, without their involvement the Treaty would be impossible.

[65] Renunciation by States of actions hampering the conclusion of an agreement on the non-proliferation of nuclear weapons, *supra* note 60, para. 47.

[66] Which seems a reasonable hypothesis given that little progress has been made in the last five decades towards a world free of nuclear weapons.

[67] Renunciation by States of actions hampering the conclusion of an agreement on the non-proliferation of nuclear weapons, *supra* note 60, para. 49.

replying dogmatically, which due to ethics would insist that the sacrifice should be honored and as such will be.[68]

However, as Pakistan stressed, both the US and the USSR had provided reassurance[69] that non-proliferation was not considered as the stopping point, but "it should be viewed solely as a step towards the prohibition and destruction of nuclear weapons"[70].

Regardless of the declarations of the two superpowers of the time, it was possible that some nuclear states wouldn't ratify the treaty, which concerned Pakistan as that raised the question of how non nuclear state security could be assured.[71] At the same time, an iron clad treaty was not possible at the time, and without concessions by the non nuclear power states the treaty wouldn't progress.[72] Nowadays, as mentioned in the sections discussing the Marshall Islands cases, Pakistan itself is a nuclear power state which has not ratified the NPT.

Pakistan provided some additional points on the security of non nuclear states, which while weren't connected to the principle of equality of sacrifice by Pakistan, can be considered tangential. For non nuclear state security to be guaranteed, then no first strike protocols (meaning that nuclear weapons would only be used in retaliation against nuclear weapons) would need to be received from all nuclear states, otherwise they wouldn't hold weight. Any states not willing to adhere to such a protocol would shift the equality of sacrifice in an unfavourable direction for the non nuclear power states, as their agreement to non-proliferation would not be returned with assurances of security or nuclear disarmament. Another option would be to court one or more nuclear states for protection in case of a nuclear strike from the other states. However, this once again would be an option resulting in the accumulation of power in the hands of the nuclear power states.[73]

Pakistan in their arguments before the General Assembly made clear that there were still many obstacles for the negotiations to decide on. On the issues previously discussed there was no consensus among the involved parties. However, Pakistan proposed that in order to create a treaty which would satisfy all states, small and large, non nuclear and nuclear, the viewpoint of the smaller, non nuclear states must be heard. The proposed action was for the non nuclear states to hold a conference in order to discuss the aforementioned topics and issues.[74]

The principle of the equality of sacrifice was weighed against pragmatism in the Pakistani declaration. On the one hand, Pakistan admitted that inequality between the nuclear power states and non nuclear power states was concerning. Primarily from the security aspect, as the danger of any nuclear power states which wouldn't ratify the treaty remained. However also

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[68] *Ibid*.

[69] See the rest of the general debate, especially statements made by the US and the USSR.

[70] Renunciation by States of actions hampering the conclusion of an agreement on the non-proliferation of nuclear weapons, *supra* note 60, para. 50.

[71] *Ibid*., para. 54.

[72] *Ibid.*, para. 51.

[73] Ibid., paras. 53 and 54.

[74] Renunciation by States of actions hampering the conclusion of an agreement on the non-proliferation of nuclear weapons, *supra* note 60, paras. 57-63.

from the possibility that nuclear disarmament would be a provision ignored once the non-proliferation clause was fulfilled and continued to be so. On the other hand, outright rejecting the treaty or not accepting compromises would make the treaty impossible to conclude. In the end, Pakistan balanced the two needs by proposing that a stronger voice could be given to the non nuclear power states, while keeping in mind that the cooperation of the nuclear states was a necessity.

### 2.1.3 India and a Balanced Treaty

At the time of the debate in 1966 India was not yet a nuclear power state. India by way of Mr. Trivedi had yet another approach to the treaty in negotiations, as the question of nuclear weapon proliferation was considered from the linguistic and grammatical perspective. Nuclear weapon non-proliferation was to be considered as firstly proliferation in the sense of dissemination, as in one state transferring nuclear weapons or their plans to another state. Additionally, proliferation was to be considered in the conventional sense, as in a rapid growth in the number of something. For nuclear weapons it would mean an increase in the nuclear weapon stockpiles would fall under this definition.[75] From the discussed states, India is the only one connecting proliferation to increases in stockpiles.

Further on India elaborated, that new states acquiring nuclear weapons or starting nuclear programs lead to instability in the relevant regions. However, the continuing arms race and growing stockpiles of the existing nuclear powers was the real danger, as for years those nuclear powers had already been capable of destroying the world as we know it. The reasons for the arms race were those of security and also prestige.[76] While nuclear weapon deterring capabilities couldn't be denied, the arms race of increasingly sophisticated weapons and sheer amount of weapons was one of prestige, rather than security, since their destructive capabilities were already sufficient for destroying the world. The key end goal was a world free from the destructive nuclear weapons, and nuclear non-proliferation, in all meaning of the word, was only the first step towards the ultimate goal of nuclear disarmament.

The idea of nuclear weapon states no longer increasing the amount of weapons they hold and in return non nuclear weapon states undertaking to not receive nuclear weapons was referred to as balance or mutual obligations and responsibilities.[77] However, the core idea was the same as that of the principle of equality of sacrifice, which was discussed by both the United Kingdom and Pakistan.

The difference lies in the shift of responsibility for nuclear weapon states, from a promise of disarmament to a clause of non-proliferation of their own. However, India does acknowledge

[75] United Nations. Renunciation by States of actions hampering the conclusion of an agreement on the non-proliferation of nuclear weapons. Official records of the General Assembly, Twenty-First Session. New York, 31 October 1966, paras. 8 and 9. Available on: https://www.un.org/ga/search/view_doc.asp?symbol=A/C.1/SR.1436.
[76] *Ibid*., para. 12.
[77] *Ibid*., para. 13.

the necessity to conclude a non-proliferation treaty first, and only then turn towards complete nuclear disarmament. At the same time, India's version of non-proliferation would bring closer the gap between the treaty in works at the time, and the possible future treaty on nuclear disarmament. With non-proliferation having an additional meaning, the interpretation proposed by India would introduce stricter bounds for nuclear weapon states and bring closer nuclear disarmament by way of weapon stockpile stall. There remains a possibility that if India's proposition would have been added to the NPT it wouldn't have been fulfilled. However, an introduction of more concrete and less vague articles would have lessened the chance of incorrect interpretations.

In the context of nuclear weapon non-proliferation, the question of control over nuclear weapons versus owning nuclear weapons is a clear issue to India. This question was also brought up by Pakistan, when it debated the issue of military alliances and nuclear weapon proliferation. By the assessment of India, non-proliferation is applicable to both owning and controlling. At the same time, a distinction of nuclear weapons and nuclear technology must be made. For the less developed states to progress technology is of key importance, and despite concerns of nuclear weapon proliferation, peaceful non weaponized nuclear technology cannot remain solely in the arms of current nuclear states.[78]

From the United Kingdom, Pakistan and India, it was India which spent the most time discussing issues pertaining to developing countries and matters regarding the peaceful use of nuclear energy. Nuclear disarmament was not a goal to be achieved in the future, but one towards which steps had to be and could be taken simultaneously with the NPT.

## 2.2 Article VI of the Treaty

The case law of Marshall Islands v. United Kingdom, Marshall Islands v. Pakistan, Marshall Islands v. India has been previously used in this research and in each of these cases Marshall Islands accused the other party of breaching Article VI of the Treaty. As such, this segment of the research paper will elaborate on Article VI and especially the second obligation prescribed by it. The further discussed ambiguous wording and unclear purpose behind Article VI of the NPT has created differences in the interpretation of the Treaty, as seen in the Marshall Island cases. This is one of the more important flaws in the NPT, as this has firstly created issues in the enforceability of the Treaty and secondly provided states which do not wish to comply an opportunity to do so. The issues in Article VI will be discussed further on.

Article VI of the Treaty on Non-Proliferation of Nuclear Weapons lays out the obligation for states to pursue negotiations in good faith with three goals. The first being a cessation of the nuclear arms race at an early date, a key issue at the time of the Cold War, with time being paramount. The second being nuclear disarmament, which has not been reached in the 50

[78] Renunciation by States of actions hampering the conclusion of an agreement on the non-proliferation of nuclear weapons, *supra* note 75, paras. 15 and 16.

years since this Treaty entered into force. The final goal of a treaty on general and complete disarmament directly echoes the goal of the Eighteen Nation Disarmament Committee, as discussed beforehand.

In order to fully understand the implications of Article VI, the 1996 advisory opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons must be referred to. The United Nations with the resolution 49/75 K sought the opinion of the ICJ on whether the threat or use of nuclear weapons is permitted under international law.[79] The Court considered that the use of nuclear weapons was a continuous danger to the international order, and for peace to be kept the goal of Article VI must be upheld, that being nuclear disarmament.[80]

Furthermore, the Court ruled that,

> The legal import of that obligation goes beyond that of a mere obligation of conduct; the obligation involved here is an obligation to achieve a precise result-nuclear disarmament in all its aspects-by adopting a particular course of conduct, namely, the pursuit of negotiations on the matter in good faith. [81]

which in essence prescribes the signatory parties an obligation to reach the goal of nuclear disarmament, not only conduct negotiations regarding it. This ruling provides a key alternative in interpretation, as the wording of Article VI can otherwise be interpreted as imposing an obligation to negotiate, which in effect weakens the enforceability of this article.

At the same time, preparatory works which are available to the public states repeatedly refer to the dangers of nuclear weapons and a world in which they are readily available. The end goal being a world free of nuclear weapons and the dangers they pose is understood by all parties involved in the preparatory process.[82,83,84] Vienna Convention on the Law of Treaties, although having come in force 10 years after the NPT came in force, is generally understood to be a codification of customary law and as such can be taken as a provisional guide for the interpretation of NPT, and Article VI of it. Article 32 of VCLT elaborates on what supplementary documents can be used for the further interpretation of a treaty in a case where

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[79] United Nations. *Resolutions adopted by the General Assembly on General and Complete disarmament, A Prohibition of the dumping of radioactive wastes*. A/RES/49/75, adopted on 9 January 1995. Available on: https://undocs.org/A/res/49/75.

[80] International Court of Justice. Legality of the Threat or Use of Nuclear Weapons. Advisory Opinion of 8 July 1996, paras. 98-103. Available on: https://www.icj-cij.org/files/case-related/95/7497.pdf.

[81] *Ibid*.

[82] Renunciation by States of actions hampering the conclusion of an agreement on the non-proliferation of nuclear weapons, *supra* note, para. 13.

[83] United Nations. Renunciation by States of actions hampering the conclusion of an agreement on the non-proliferation of nuclear weapons. Official records of the General Assembly, Twenty-First Session. New York, 26 October 1966, para. 5. Available on:https://www.un.org/ga/search/view_doc.asp?symbol=A/C.1/SR.1433.

[84] Countless other examples can be given for states expressing their horror of nuclear weapons, but these two can serve as illustrations. For further examples the verbatim records of First Committee of the General Assembly, meeting Nos. 1431 to 1450, held on 20 October to 10 November 1966 (A/C.1/SR.1431, 1432, 1433, 1434, 1435, 1436, 1437, 1438, 1439, 1440, 1441, 1442, 1443, 1444, 1445, 1446, 1447, 1448, 1449 and 1450) can be referred to, found at the UN Library Database.

the text of the treaty "leaves the meaning ambiguous or obscure"[85], and preparatory work of the treaty as well as the circumstances of its conclusion are considered to be usable[86].

Given that a clarification by the ICJ was necessary, it can provisionally be said that the wording of Article VI did indeed leave the meaning of it ambiguous. At this time, the advisory opinion of the ICJ can be echoed. The preparatory work of the Treaty showed time and time again that the United Nations member states understood the dangers of nuclear weapons. Nuclear weapon holding states were generally more concerned with non-proliferation than nuclear disarmament. But given the MAD nature of the relationship between the United States and the USSR, these states were understandably unwilling to give up their deterrence powers, especially with the logistical impossibility of a simultaneous nuclear disarmament and the lack of feasible reassurance that the other party would indeed destroy any and all nuclear weapons. The non nuclear weapon holding states on the other hand were understandably just as concerned with nuclear disarmament as they were with non-proliferation. Not much good would be gained by non nuclear states if they promised to never obtain nuclear weapons, while at the same time the nuclear weapon holding states would always retain their nuclear weapons and still pose danger to them. This is further elaborated upon the sections discussing the principle of equality of sacrifice.

What all states were able to agree upon was that nuclear weapons were dangerous, the world peace and international order was at stake at the time. They were not quite able to agree on the importance of nuclear disarmament. The previously provided references to verbatim records of planetary sessions show this dual nature quite well. The United States as well as the USSR avoid mentioning nuclear disarmament and focus on nuclear non-proliferation, while other states quite often refer to nuclear disarmament as a lofty goal but one worth pursuing.

The other provided for aspect for interpretation mentioned beforehand was the circumstances of the conclusion of the treaty in question. Even a loose understanding of the state of politics at the time of the creation of the Treaty provides an immediate answer for why Article VI was so ambiguously worded. The theory of mutual assured destruction emerged in the 1960's at a time when the world balance still hung by a thread. In short, the MAD theory prescribes that two or more states holding nuclear weapons would not strive to ever strike first, as due to the other state having different delivery systems of nuclear weapons it would still be able to retaliate even when struck first. The deterring nature of the nuclear weapons and MAD was sorely relied upon by both the United States and the USSR. On one hand, their reliance on the deterrence of nuclear weapons was an unique aspect of that time period, and seemingly a necessary evil. At the same time, by 1970 it was unavoidably known that nuclear weapons had an immense destructive power and posed danger to the entire world.

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[85] United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969. Available on: https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

[86] *Ibid*.

This dual nature of nuclear weapons having a deterring quality and yet being incredibly dangerous is still present today as much as it was at the time of the conclusion of the treaty. And so, while VCLT allows for the use of preparatory works and circumstances of the time to interpret vaguely worded articles, the truth remains that the states weren't quite in agreement on Article VI. Of the three goals of Article VI- stopping the arms race, nuclear disarmament, general and complete disarmament, only one has been achieved. The conclusion of the arms race between the United States and the USSR was achieved, and simultaneously it was the only goal on which all states could truly agree upon. Nuclear disarmament, as discussed beforehand, was questioned by the nuclear power holding states, or at the very least avoided. General and complete disarmament is an unimaginable goal even today, one which seems to be even more ambitious than just solely nuclear disarmament.

In conclusion, the ICJ advisory opinion provided an interpretation that not only Article VI requires the holding of negotiations, it also requires for states to conclude the negotiations. The Treaty itself does not quite provide specific enough wording for Article VI to have only one interpretation, and VCLT provided for supplementary interpretation methods also cannot reveal a single interpretation. This is one of the failings of the NPT which suggests that at the very basis of it, it is an unequal treaty due the ambiguous parts pertaining to the obligations of the nuclear weapon states.

## 2.3 Jurisdiction Over the Treaty, Can it be Considered Customary International Law

To begin any discussion on whether the NPT can be considered customary international law, firstly it must be determined what is the status of the NPT currently and at the time of the submission of the Marshall Islands cases. After the submission of the Marshall Islands applications to the ICJ, the possibility of the NPT being officially welcomed as customary international law was widely discussed.[87,88] However, without a favourable judgement by the ICJ, which had dismissed the cases before the question of the NPT being customary international law could be discussed, the Treaty for now is not considered to be customary international law.

In order to analyse whether NPT should or could be considered CIL, the next question to be answered is what are the methods of determining whether a treaty can be considered to be CIL, and what is the accepted definition of CIL. To begin with, customary international law signifies that the source of state legal obligations is not written law, but the states themselves adhering to these obligations, and these obligations being the customary practice by the states

[87] Dan Joyner. *Is the NPT Customary International Law?: A question Central to the Marshall Islands ICJ Case.* Arms Control Law. Published May 7, 2014. Available on: https://armscontrollaw.com/2014/05/07/is-the-npt-customary-international-law-a-question-central-to-the-marshall-islands-icj-case/. Accessed April 24, 2020.

[88] Avner Cohen and Lily Vaccaro. The import of the Marshall Islands nuclear lawsuit. Bulletin of the Atomic Scientist. Published May 6, 2014. Available on: https://thebulletin.org/2014/05/the-import-of-the-marshall-islands-nuclear-lawsuit/#. Accessed April 24, 2020.

despite not having been put down in written form[89,90]. This is why VCLT is considered to be codification of customary international law, that is, CIL which existed before VCLT, and with the creation of the VCLT was put in written form. However, as Marshall Islands argued in their application, the main concern is not of the NPT as a whole being considered customary international law, but whether the obligations prescribed by Article VI of the NPT should be considered as CIL.

For the sake of narrowing the question of how CIL is determined, this section will solely consider the methods of ascertaining the existence of CIL as they are used by the ICJ, due to this court being the one to which the Marshall Islands cases were submitted to[91].

Generally there are two possible approaches to how the customary international law nature of a practice can be determined. First approach is inductive, meaning that by analysing the actions of states in regards to the principle, and examining whether the actions are in accordance with the principle, whether this adherence is consistent, and whether it has continued for a sufficient length of time.[92,93] This would, in simplified terms, mean using specific actions by states to formulate a general practice, from specific to general. However, in some cases due to logistic reasons the inductive method cannot be used. This could be due to the newness of the issue, as was the case in the 1984 judgement on *Canada* v. *United States of America* according to the ICJ.[94]

In such a case, it might be possible to apply deductive reasoning, however based in legal theory not the conventional meaning of deductive. While inductive reasoning means approaching the question from the specific to the general, deductive reasoning uses the opposite method. Deductive reasoning can be further divided in additional formats of deduction. For the purpose of this research paper, a brief summary is sufficient. Deductive approach can take the form of using existing legal norms to formulate narrowed applications for them which logistically are a part of the original legal norm.[95] Secondly, deductive reasoning can be applied to persons or organisations, inferring their capabilities not only from the official documentation of them, but also by the generally accepted practice.[96] Finally, deductive reasoning can take the shape of law being applied to a case which it originally wouldn't have included, or which the text of it does not specifically recognise.[97]

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[89] Cornell Law School. Customary International Law. Available on: https://www.law.cornell.edu/wex/customary_international_law. Accessed April 24, 2020.

[90] Dan Joyner, *supra* note 87.

[91] With the single exception of the Marshall Islands later application to the courts of the US which came after the rejection by the ICJ.

[92] Dan Joyner, *supra* note 87.

[93] Stefan Talmon, ''Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion,'' *European Journal of International Law* 26 (2) (2015): Chapter III. Available on: https://doi.org/10.1093/ejil/chv020.

[94] Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, 1. C.J. Reports 1984, p. 246, para 81. Available on: https://www.icj-cij.org/files/case-related/67/067-19841012-JUD-01-00-EN.pdf.

[95] Stefan Talmon , *supra* note 93, Chapter IV.

[96] *Ibid*.

[97] *Ibid*.

The final method, one most often used by the ICJ, is assertion, or simply neither applying the deductive or inductive method, but stating what the law is, and in this case, which law is to be considered customary international law.[98] With the necessary aspects of customary international law, and its identification methods explained, it is now necessary to apply those to the NPT.

Referring to case law of *Marshall Islands* v. *Pakistan, Marshall Islands* v. *India*, it can be seen that the Marshall Islands argued that despite both Pakistan and India not being signatory states to the Treaty, it regardless applied as it could be considered international customary law. As discussed by Pakistan in 1966, any nuclear weapon states which wouldn't ratify the NPT would remain a danger to the non nuclear weapon states. However, if the NPT was to be considered as codification of international customary law, or its contents had become customary international law, it would bring all states which hadn't ratified the NPT under its provisions. In return, this would firstly create a Treaty with a better chance of enforceability, and secondly bring the balance in equality of sacrifice towards a neutral one.

The sections concerning the NPT being international customary law were identical in the Marshall Islands applications against Pakistan and India.[99][100] The Applicant listed several well founded reasons for the NPT being CIL. To begin with, the Applicant referred to the aforementioned 1996 advisory opinion of the ICJ, which specified the correct interpretation of Article VI of the Treaty. The words of the Court "Indeed, any realistic search for general and complete disarmament, especially nuclear disarmament, necessitates the cooperation of all [emphasis added] States."[101], as well as the preceding text which impressed the importance of obligations prescribed by Article VI was interpreted as referring to all states, not only signatories to the Treaty, as such signaling the opinion of the Court that the Treaty applied to all equally as customary law. Further on, the words of President Bedjaoui were referred to, once again expressed in the 1996 advisory opinion, where he expressed his views that the Treaty impressed the obligations of Article VI to all states, not only signatories, and as such had assumed customary force.[102] Following that the Marshall Islands invoked the resolutions and declarations of the United Nations, UN General Assembly, UN Security Council condemning nuclear weapons and stressing the importance of, and adherence to, Article VI.[103][104] In the cases of Marshall Islands v. Pakistan and Marshall Islands v. India as well as Marshall Islands v. United Kingdom, the Court rejected the applications on the grounds of no dispute existing, and as such did not proceed to the next stage of ruling on the customary international law aspect of the Article VI of the Treaty.

[98] *Ibid*., Chapter VII
[99] Marshall Islands v. Pakistan, *supra* note 27, pp. 26-30.
[100] Marshall Islands v. India, *supra* note 28, pp. 28-32.
[101] Legality of the Threat or Use of Nuclear Weapons, *supra* note 80, paras. 98-103.
[102] Legality of the Threat or Use of Nuclear Weapons, *supra* note 80, the Declaration of President Bedjaoui.
[103] Marshall Islands v. Pakistan, *supra* note 27.
[104] Marshall Islands v. India, *supra* note 28.

The arguments given by the Applicant regarding the existence of a dispute were similar enough of the nature, that the Court rulings did not differ in spirit, and as such none of the rulings added anything to the others and they can be referred to at the same time for the purposes of this section. The opinions of the accused states mirrored each other as well, not considering Article VI to be international customary law.

However, the 1996 ICJ advisory opinion furthermore consisted of numerous additional statements which implied that Article VI can be considered CIL, and acknowledgements that certain criteria for being considered CIL had been fulfilled. The Court acknowledged that NPT concerns "the vast majority of the international community"[105], and moreover as previously mentioned that the involvement of all states is necessary for nuclear disarmament to be achieved. Several UN resolutions pertaining to nuclear disarmament have been adopted unanimously, and the necessity of nuclear disarmament has been expressed also outside of the UN in various instruments, according to the ICJ.[106] These facts taken together showcase that all states[107] had agreed on the necessity of nuclear disarmament. For ICJ nuclear disarmament "remains without any doubt an objective of vital importance to the whole of the international community today"[108].

In spirit, states do agree upon the dangers of nuclear weapons and the future necessity of nuclear disarmament, however as the Marshall Islands cases show, taking action to move towards nuclear disarmament is a different question. However, if the same question is applied to, for example, human rights a different argument can be seen. According to Brian D. Lepard human rights are undoubtedly customary international law, and despite the often transgressions against human life and inviolability by states, they are taken as a violation of human rights, not as an accepted state practice.[109] Whether this approach can also be taken in regards to nuclear disarmament is not clear currently, however, the aforementioned ICJ judgements do signal that despite state actions nuclear disarmament remains a paramount necessity.

Having determined the most often used method by the ICJ, analysed the arguments provided by the Marshall Islands in their application and keeping in mind the 1996 advisory opinion by the ICJ, it seems that Article VI of the NPT could be considered to be customary international law. States are consistently in agreement upon the necessity of nuclear disarmament, the judgements by ICJ imply the customary nature of Article VI, and while states have acted against the principle of nuclear disarmament, it might be possible to approach this issue from the same viewpoint as human rights norms are approached. A definite answer has yet to be

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[105] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1. C.J. Reports 1996, p. 226, para 101. Available on: https://www.icj-cij.org/files/case-related/95/095-19960708-ADV-01-00-EN.pdf.

[106] *Ibid.*

[107] At least for a single moment at the time of the adoption of the specific resolution discussed with the exception of those states which at the time could have had a pending UN membership. Furthermore, actions are as important as proclamations.

[108] Legality of the Threat or Use of Nuclear Weapons, *supra* note, para. 103.

[109] Brian D. Lepard. Why customary international law matters in protecting human rights. Völkerrechtsblog, published on 25 February, 2019. Available on: https://voelkerrechtsblog.org/why-customary-international-law-matters-in-protecting-human-rights/. Accessed April 29, 2020.

provided by the ICJ. The Marshall Islands cases would have provided an answer, however without a definite answer currently only speculation and theorizing is available. Despite that, the arguments for tentatively considering Article VI of NPT to be customary international law are strong.

# 3. CHAPTER III THE FLAWED TREATY

## 3.1 Select Opinions on the Flawed Nature of the NPT

The words flawed treaty are not a defined term, but rather a description of the effectiveness of a treaty. Non-Proliferation Treaty however is quite often called a flawed treaty.[110,111,112] Flaws are generally considered to be deficiencies in the object, imperfections in the planned end-result. In treaties they can take several forms.

For India the NPT is flawed as it is discriminatory against nuclear weapon states which would wish to accede to the Treaty currently, namely India would need to disarmament before acceding to the Treaty, as its definition of nuclear weapon states, given in Article IX section 3. is

> For the purposes of this Treaty, a nuclear-weapon State is one which has manufactured and exploded a nuclear weapon or other nuclear explosive device prior to 1 January 1967.[113]

and India acquired nuclear weapons after this date.

The UN in contrast with India lauds the NPT as "an essential pillar of international peace and security"[114], which has achieved considerable results. Dr Leonard Weiss, an expert in the non-proliferation sphere[115] on the other hand has created a list of 14 flaws in NPT which should be fixed[116], which in turn lacks the flaws discussed in this research paper.

The following sections of this chapter will consist of elaborations on the previous analysis of principle of equality, Article VI and CIL nature of NPT, and attempt to further explain how these issues flaw the NPT. As to how these flaws came to be, the possible reasons have at times been theorised in the previous sections, however a more concise summary should be given of which will be added to each of the respective following sections.

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[110] Binoy Kampmark. Golden Anniversaries For Flawed Treaties: The NPT Turns Fifty. Scoop: Independent News, published 11 March 2020. Available on: https://www.scoop.co.nz/stories/HL2003/S00111/golden-anniversaries-for-flawed-treaties-the-npt-turns-fifty.htm. Accessed May 4, 2020.

[111] Leonard Weiss. The Nuclear Non-proliferation Treaty: Strengths and Gaps. Available on: https://fas.org/irp/threat/fp/b19ch2.htm. Accessed May 4, 2020.

[112] The Times of India. Inda dismisses NPT as 'flawed' treaty. The Times of India, published Mar 23, 2007. Available on: https://timesofindia.indiatimes.com/world/rest-of-world/India-dismisses-NPT-as-flawed-treaty/articleshow/1799434.cms. Accessed May 4, 2020.

[113] Treaty on the Non-Proliferation of Nuclear Weapons (NPT), *supra* note 49.

[114] United Nations Secretary General. Statement attributable to the Spokesman of the Secretary-General - on the fiftieth anniversary of the entry-into-force of the Treaty on the Non-Proliferation of Nuclear Weapons. Available on: https://www.un.org/sg/en/content/sg/statement/2020-03-05/statement-attributable-the-spokesman-of-the-secretary-general-the-fiftieth-anniversary-of-the-entry-force-of-the-treaty-the-non-proliferation-of-nuclear-weapons. Accessed May 4, 2020.

[115] Stanford Center for International Security and Cooperation. Leonard Weiss academic profile. Available on: https://cisac.fsi.stanford.edu/people/leonard_weiss. Accessed May 4, 2020.

[116] Leonard Weiss, *supra* note 111.

## 3.2 The Unsuccessful Application of the Principle of Equality

The principle of equality has been called balance of the treaty, inequality between signatories and other terms. However, the base definition of these versions remains the same. The non nuclear weapon states promise to not receive nor achieve nuclear weapons and nuclear weapon states promise to not transfer nuclear weapons to non nuclear weapon states and negotiate on nuclear disarmament. Additionally, the Nuclear Non-Proliferation Treaty also includes that peaceful nuclear technology should be available for all and prescribes states to facilitate exchange of peaceful nuclear technology research. This balance between obligations and promises is what equality of sacrifice refers to.

Marshall Islands in comparison to the accused parties of Pakistan, India and the United Kingdom is not anywhere near to being a regional power, or a major player in the international sphere. As explored in the previous sections, they were victims of nuclear testing in their current territory, with far reaching consequences. Nor had they any influence on the creation of the NPT, being under the trusteeship of the United States.

During the negotiation process of the NPT, the declarations of the United Kingdom, Pakistan and India all referenced the equality of sacrifice. However, their declarations were made with the hopes of raising questions to be answered in the further negotiation process, or to offer possible solutions for identified issues. Whether the NPT is a treaty with equal balance in sacrifices given, or not, can only be truly understood with the benefit of hindsight.

The applications of the Marshall Islands signify that there are definite issues in the balance of the Treaty. The non-proliferation aspect of the Treaty has been fulfilled by its signatories, of the states which have acquired nuclear weapons after the coming in force of the NPT none have been signatories of the NPT. However, nuclear disarmament negotiations haven't been concluded by the signatories. Regardless of possible mitigating circumstances, the results are that nuclear disarmament has not occured.

Furthermore, some of the doubts raised by Pakistan and India regarding the weak points in the NPT have been fulfilled. Pakistan raised the issue of nuclear weapon state sacrifice not being fulfilled, that is, that non-proliferation would be adhered to, but nuclear disarmament wouldn't. This has become the truth, and the best example of why the NPT has not been successful in the application of the principle of equality of sacrifice.

India however brought up the point that a complete nuclear disarmament would be the only successful nuclear disarmament. Nuclear weapons are capable of destroying the world, and despite only one fifth of them remaining from the times of the Cold War[117], the remaining ones are still capable of destroying the world. Pakistan also had brought up the possibility of newly emerged nuclear weapon states not acceding to the NPT, which once again has come true. However, given that acceding to the NPT for newly emerged nuclear weapon states is a

[117] Michael E. O'Hanlon, Robert Einhorn, Steven Pifer, and Frank A. Rose. Experts assess the nuclear Non-Proliferation Treaty, 50 years after it went into effect. Brookings, published March 3, 2020. Available on: https://www.brookings.edu/blog/order-from-chaos/2020/03/03/experts-assess-the-nuclear-non-proliferation-treaty-50-years-after-it-went-into-effect/. Accessed May 4, 2020.

laborious effort, this is the occasion where mitigating circumstances can be taken into account.

The Non-Proliferation Treaty could have become unbalanced in several ways, and of those quite a few have occured. The worries that nuclear disarmament wouldn't take place, or wouldn't be completed, that new nuclear weapon states would emerge and not accede to the Treaty have been fulfilled. And furthermore, the Marshall Islands applications and their subsequent dismissal shows both this issue in the balance of sacrifice as well as the unwillingness of the ICJ to admit to the inequality.

As for why this inequality of sacrifice was allowed to happen, the answer is very multifaceted. Firstly, at the time of the creation of the NPT the priority of all states was to stop the spread of nuclear weapons and to stop the arms race between the US and the USSR. The other issues, such as nuclear disarmament were not as high of a priority at the time, since the possible destruction of the world took precedence. The Non-Proliferation Treaty was a study in compromise, as while non nuclear weapon states demanded their voices to be heard, the Treaty couldn't exist without nuclear weapon states and they were the ones which in the end held more power. The subsequent events which allowed for the nuclear weapon states to comparatively ignore their obligation to disarm themselves of nuclear weapons were numerous. However, this research paper is primarily concerned with the existence of flaws in the NPT, not the diplomatic, military and political history of nuclear weapon states.

## 3.3 No Unanimous Interpretation of Article VI

Article VI might have attempted to urge nuclear weapon states towards compliance with the obligation to negotiate on nuclear disarmament with the addition of the good faith clause, however evidently it has not been successful. The evidence Marshall Islands provided in their applications show that nuclear disarmament has not taken place, nor have the nuclear weapon states sought to partake in negotiations towards it.

While it is possible that a strictly worded nuclear disarmament obligation would have been adhered to by the nuclear weapon states, the reality is that until the oft referred to advisory opinion of the ICJ, which included a specification on the meaning of Article VI, the obligations prescribed by it were interpretable. Room for interpretation in treaties provides opportunities for states to interpret them in their own favor and not in accordance with how they were meant to be interpreted.

In the case of Article VI, the obligation to pursue negotiations could just as well be taken the obligation to, in opportunities where negotiation was possible to participate in good faith. This interpretation does not include the nuclear weapon states initiating negotiations, nor the necessity for them to conclude the negotiations with a favourable resolution of nuclear disarmament.

The fact itself that ICJ saw the necessity to define the obligations of Article VI signified that the article was ambiguously enough worded that obligations were unclear. Between the

coming in force of the Treaty in 1970 and the advisory opinion which specified the obligations of Article VI in 1996 a quarter of a century had passed. During this time, the obligation to conclude nuclear disarmament negotiations was firstly not agreed upon, and secondly it was unenforceable.

A treaty whose obligations aren't clear to those which they apply to and whose obligations subsequently aren't enforceable is a treaty with a critical flaw. Although this section specifically concerns itself with Article VI, only one section of the Treaty, Article VI encompassed some of the main goals which the NPT was attempting to achieve.

As to how this issue came to be, the reasons are mainly the same as those mentioned in the previous section. With the nuclear weapon states holding the main negotiating power (nuclear weapons), the Treaty had to be one they would all accept. Furthermore, the priority at the time was non-proliferation, not nuclear disarmament. As such, the wording of Article VI ended leaning in the favor of nuclear weapon states, being ambiguously interpretable regarding nuclear disarmament.

## 3.4 Non-Enforceable Treaty

While the previous section discussed the issues with the enforceability of Article VI due to its unclarity, the enforceability of the Treaty as a whole remains discussable. The fears of Pakistan in 1966 came true and currently there are nuclear weapon states which aren't bound to the terms of the NPT. Subsequently, unless these states willingly choose to obey the Non-Proliferation Treaty, the obligations and responsibilities of it aren't enforceable. Furthermore, currently the Treaty doesn't provide for nuclear weapon states which achieved nuclear weaponry after 1970, so even in a case if these non signatory states would want to accede it would require heavy concessions from the nuclear weapon states or amendments to the NPT.

However, as discussed previously the possibility remains that NPT Article VI could come to be considered customary international law. If it were so, then those nuclear states which have not acceded to the Treaty would become liable for their actions. However, the Marshall Islands cases were dismissed by the International Court of Justice before the matter of the customary international law nature of the Non-Proliferation Treaty could be judged.

Regarding the dismissal of the case by the ICJ, there is some controversy regarding their decision to judge the issue as no grounds.[118] However, perhaps more concerning is the fact that that ICJ judgements are final and without the possibility of appeal[119], which means that the Marshall Islands applications cannot be brought back to the ICJ. Without new evidence a

[118] The Guardian. Marshall islands nuclear arms lawsuit thrown out by UN's top court. The Guardian, published 6 October 2016. Available on: https://www.theguardian.com/world/2016/oct/06/marshall-islands-nuclear-arms-lawsuit-thrown-out-by-uns-top-court. Accessed May 4, 2020.

[119] International Court of Justice. How the Court Works? Available on: https://www.icj-cij.org/en/how-the-court-works. Accessed May 4, 2020.

revision of the case seems unlikely, and a decision to revise the judgement remains in the arms of the ICJ, according to their Rules of Court. Currently for a new case to be judged in the ICJ regarding NPT Article VI it seems that the defendant needs to be officially made aware that the applicant considers their noncompliance an issue, and it is still unknown whether customary international law argument would be accepted, although as the previous sections show it is likely.

In conclusion, the Non-Proliferation Treaty is hard to enforce. The advisory opinion of 1996 by the ICJ might have deemed that NPT prescribes signatories to conclude nuclear disarmament negotiations, but the enforceability of this obligation is a different matter. From Marshall Islands applications against nuclear weapon states which have ratified the NPT only the application against the United Kingdom was under the jurisdiction of the ICJ. From the nuclear weapon states which haven't ratified the NPT, only the applications against Pakistan and India were admissible. And it is unknown if the cases had progressed further than the discovery of there being no dispute between the parties, that is whether the customary international law aspect of the Non-Proliferation Treaty would have been recognised and the application against Pakistan and India would have progressed further. Subsequently, in ICJ the only surety is that the United Kingdom (meaning one from nine nuclear weapon states) can be judged on non adherence to the NPT.

As to how the unenforceability of the Non-Proliferation Treaty came to be, a key issue is the fact the treaties are difficult to enforce. With no overarching supranational court states have to be willing to go to court. No single cause for how this reality of law came to be can be pinpointed, but regardless an unenforceable treaty remains a flawed treaty.

## CONCLUSION

This research paper has used the vessel of the Marshall Islands cases to explore three specific flaws inherent in the Treaty on Nuclear Non-Proliferation. While the Marshall Islands submitted nine applications to the ICJ, one against each of the nuclear weapon states, only three weren't dismissed outright. These three cases *Marshall Islands* v. *United Kingdom*, *Marshall Islands* v. *Pakistan* and *Marshall Islands* v. *India,* have been used as a basis in which the possible flaws of the Non-Proliferation Treaty were located.

The inequality between the signatories of NPT, more specifically between the non nuclear weapon states and nuclear weapon states was best seen in the *Marshall Islands* v. *United Kingdom* case. Later the term for inequality between the states was specified to "equality of sacrifice", borrowed from the 1966 declaration by the United Kingdom. However the fact remains that 44 years after the Non-Proliferation Treaty came into force a non nuclear weapon state was forced to bring a case to the International Court of Justice against a nuclear weapon state. The inequality was immediately noticeable, as the non-proliferation obligation can be seen fulfilled just as well as the nuclear disarmament obligation can be seen unfulfilled.

This principle of equality of sacrifice was explored by analysing the declarations made by the United Kingdom, Pakistan and India in the 1966 General Assembly. Further research would be necessary to achieve the full picture, however these three declarations alone were already dissenting. This is proof of the first flaw in the Non-Proliferation Treaty, that of states not being in agreement whether the Treaty was fair, or "equal in sacrifices", or not. The advantage of hindsight affords us the opportunity to conclude that the principle of equality of sacrifice was not upheld, as the nuclear weapon states have made little progress towards nuclear disarmament.

Division in views of what the Treaty should consist of left its marks on its contents. All of the Marshall Islands cases accused the defendants of breaching Article VI of the NPT, and all of them as well referred to the 1996 ICJ advisory opinion on the Legality of the Threat or Use of Nuclear Weapons. In this advisory opinion Article VI of the Non-Proliferation Treaty necessitated the International Court of Justice to provide the correct interpretation in the advisory opinion, as the ambiguous wording left too much room for interpretation. These 26 years between the NPT coming in force and ICJ clarifying Article VI could have been spent more productively, if the negotiating states were able to agree on stricter wording. However, it is possible that even if Article VI were to be clearly and unmistakably worded, the enforceability of the article would still remain an issue.

From the nine cases that Marshall Islands submitted, three weren't dismissed outright. Of those, two relied on the assumption that the Non-Proliferation Treaty could be considered customary international law since the defendants weren't signatories. All three cases, *Marshall Islands* v. *United Kingdom*, *Marshall Islands* v. *Pakistan*, *Marshall Islands* v. *India,* were dismissed on the grounds of no dispute between the parties, before the International Court of Justice came to a stage where the customary international law nature of the Non-Proliferation Treaty could be discussed. The enforceability of the Non-Proliferation Treaty is

perhaps the worst flaw of it. The nine cases which the Marshall Islands submitted were clear proof of it. And while the analysis done in this research paper shows that it is likely that the Non-Proliferation Treaty could be considered customary international law by the International Court of Justice, it still leaves the question of how compliance could be enforced for the six nuclear weapons states against whom the applications were dismissed outright due to ICJ not having the jurisdiction to judge.

These flaws in the Non-Proliferation Treaty are not fatal ones. While the Non-Proliferation Treaty has been shown to be unfair, imbalanced, vague and unenforceable, it still has achieved much in the sphere of non-proliferation. In conclusion, the research question of "to what extent has the ambiguous wording of Article VI, jurisdictive unclarity and inequality between the signatories of the Non-Proliferation Treaty as shown by the Marshall Islands cases resulted in a flawed Treaty?" has been extensively answered by this research paper. The three flaws of NPT- the ambiguous wording of Article VI, jurisdictive unclarity and inequality between the signatories of the Non-Proliferation Treaty, have directly worsened the enforceability of the NPT, have created long stretches of time where the obligations of the NPT have been unclear, and have created an unequal, flawed treaty. These flaws have extensively influenced the Treaty and flawed it. The hypothesis put forth by the author that the Non-Proliferation Treaty is flawed, especially in regards to Article VI, jurisdictive unclarity and inequality between the signatories of the Treaty, has been proven to be true. As previously stated, these three issues have directly flawed the Non-Proliferation Treaty.

This research paper has explored three specific issues in the Non-Proliferation Treaty, however further research should be conducted on other flaws in the very build of the Treaty. Several other flaws have been mentioned in the analysis, such as the obstacles for states which would want to accede to the Non-Proliferation Treaty, and the problems in amending the Treaty. Furthermore, the question of customary international law nature of treaties and how it can be ascertained deserve a separate discussion which is able to go further in detail.

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