To the Registrar, International Court of Justice.

The Undersigned, being duly authorized by the Government of the Republic of the Marshall Islands, state as follows:

I. INTRODUCTION AND SUMMARY

1. It is a most fundamental legal and moral principle that bargains should be kept. This is embedded in international law through the principle of *pacta sunt servanda*.[1] The bargain which this Application concerns is that embodied in the 1968 Treaty on the Non-Proliferation of Nuclear Weapons (hereafter "the Treaty" or "the NPT"),[2] whereby each non-nuclear-weapon State ("NNWS") has agreed not to acquire nuclear weapons and each NPT nuclear-weapon State has agreed to negotiate their elimination.

2. This Application is not an attempt to re-open the question of the legality of nuclear weapons addressed by this Court in its Advisory Opinion of 8 July 1996 on the *Legality of the Threat or Use of Nuclear Weapons*.[3] Rather, the focus of this Application is the failure to fulfil the obligations enshrined in Article VI of the NPT and customary international law; and particularly the failure of the NPT nuclear-weapon States to keep their part of the strategic bargain and do what the Court *unanimously* called for based on its analysis of Article VI, namely "pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control".[4]

3. In its Advisory Opinion, the Court observed that "[t]he destructive power of nuclear weapons cannot be contained in either space or time" and that such weapons "have the potential to destroy all civilization and the entire ecosystem of the planet".[5] It acknowledged "the unique characteristics of nuclear weapons, and in particular their destructive capacity, their capacity to cause untold human suffering, and their ability to cause damage to generations to come".[6]

4. Unless the required negotiations, aimed at reaching the required conclusions, take place, we shall continue to face the very real prospect of the "devastation that would be visited upon all mankind by a nuclear war".[7] We shall also continue to face the possibility, even the

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[1] Expressed in Article 26 of the Vienna Convention on the Law of Treaties 1969.

[2] 729 UNTS 161.

[3] *I.C.J. Reports 1996*, p. 226.

[4] *Id.*, para. 105, point 2F.

[5] *Id.*, para. 35.

[6] *Id.*, para. 36.

[7] NPT preamble, 2nd recital.

likelihood, of nuclear weapons being used by accident, miscalculation or design,[8] and of their proliferation. As Nobel Peace Laureate Sir Joseph Rotblat pointed out: "If some nations – including the most powerful militarily – say that they need nuclear weapons for their security, then such security cannot be denied to other countries which really feel insecure. Proliferation of nuclear weapons is the logical consequence of this nuclear policy".[9]

5. In its Advisory Opinion, the Court observed: "In the long run, international law, and with it the stability of the international order which it is intended to govern, are bound to suffer from the continuing difference of views with regard to the legal status of weapons as deadly as nuclear weapons".[10] A coherent legal system cannot countenance its own destruction or that of the community whose activities it seeks to regulate.[11] That is why fulfilment of the obligation "to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control" is so important.

6. Equally, a coherent and civilized legal system cannot tolerate unacceptable harm to humanity. A lawful and sustainable world order is predicated on a civilizational right to survival rooted in "the principles of humanity"[12] and "elementary considerations of humanity"[13]

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[8] In 1996 Lord Carver, former UK Chief of the Defence Staff (the professional head of the UK's armed forces and the principal military adviser to the Secretary of State for Defence and to the UK Government) stated that "the indefinite deployment of nuclear weapons carries a high risk of their ultimate use - intentionally, by accident or inadvertence". *See* Hansard, HL Deb, 28 October 1996, vol. 575, cols. 134.

[9] Joseph Rotblat, "Science and Nuclear Weapons: Where Do We Go From Here?" The Blackaby Papers, No. 5, December 2004, p. 7.

[10] *Supra*, n. 3, para. 98.

[11] As B.S. Chimni has stated, "No legal system can confer on any of its members the right to annihilate the community which engenders it and whose activities it seeks to regulate". B.S. Chimni, "Nuclear Weapons and International Law: Some Reflections", in International Law in Transition: Essays in Memory of Judge Nagendra Singh, 1992, p. 142. Quoted by Judge Weeramantry in Section V.1 of his Dissenting Opinion in the Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, *supra*, n. 3, at p. 522; *see also* the Dissenting Opinion of Judge Shahabuddeen, *id.*, p. 393: "Thus, however far-reaching may be the rights conferred by sovereignty, those rights cannot extend beyond the framework within which sovereignty itself exists; in particular, they cannot violate the framework. The framework shuts out the right of a State to embark on a course of action which would dismantle the basis of the framework by putting an end to civilization and annihilating mankind".

[12] From the Martens Clause as expressed in Article 1, paragraph 2 of Protocol I 1977 Additional to the Geneva Conventions 1949: "In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience".

[13] *Corfu Channel case, Judgment of April 9th, 1949, I.C.J. Reports 1949*, p. 22.

which help to shape an emerging "law of humanity",[14] the international law for humankind of which the nuclear disarmament obligation is a key element. Yet it is now 68 years since the very first United Nations General Assembly Resolution sought to put in motion the elimination from national arsenals of nuclear and other weapons of mass destruction,[15] almost 45 years since the NPT entered into force and nearly 20 years since the Court delivered its Advisory Opinion. The long delay in fulfilling the obligations enshrined in Article VI of the NPT and customary international law constitutes a flagrant denial of human justice.[16]

7. Inspired and guided by these principles and values, this is an Application against the People's Republic of China ("China"), an NPT nuclear-weapon State. The underlying claims, described in more detail herein, are that China is: (i) in continuing breach of its obligations under Article VI of the NPT, including specifically its obligation to pursue in good faith negotiations to cease the nuclear arms race at an early date, as well as to pursue in good faith negotiations leading to nuclear disarmament in all its aspects under strict and effective international control; (ii) in continuing breach of customary international law with respect to the same obligations; and (iii) in continuing breach of its obligation to perform its international legal obligations in good faith.

8. The Applicant herein is the Republic of the Marshall Islands (the "Marshall Islands" or "RMI" or "Applicant"). The Applicant is an NNWS Party to the Treaty. It acceded to the Treaty as a Party on 30 January 1995, and has continued to be a Party to it since that time.

9. While cessation of the nuclear arms race and nuclear disarmament are vitally important objectives for the entire international community, the Marshall Islands has a particular awareness of the dire consequences of nuclear weapons. The Marshall Islands was the location of repeated nuclear weapons testing from 1946 to 1958, during the time that the international community had placed it under the trusteeship of the United States ("U.S."). [17] During those 12

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[14] *See e.g.* the Opinion of the Tribunal in the *Einsatzgruppen Case* (1948): "[An] evaluation of international right and wrong, which heretofore existed only in the heart of mankind, has now been written into the books of men as the law of humanity. This law is not restricted to events of war. It envisages the protection of humanity at all times". *United States of America v. Otto Ohlendorf, et al*, Military Tribunal II, Case No. 9 (1948), in *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10*, Vol. IV, Nuernberg, October 1946 – April 1940 (U.S. Government Printing Office, 1950-872486), p. 497, *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-IV.pdf.

[15] A/RES/1(I), 24 January 1946.

[16] *Cf.* Judge Cançado Trindade's remarks in para. 145 of his Separate Opinion in *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), I.C.J. Reports 2012*, pp. 544-548; especially at para. 145 where he contrasts "the brief time of human beings (*vita brevis*) and the often prolonged time of human justice".

[17] Report of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes, Calin Georgescu; Addendum, Mission to

years, 67 nuclear weapons of varying explosive power were detonated in the Marshall Islands, at varying distances from human population. [18] According to the 3 September 2012 Report of Calin Georgescu, a Special Rapporteur to the UN Human Rights Council, the devastating adverse impact on the Marshall Islands of those nuclear substances and wastes continues to this day.[19] The Special Rapporteur concludes that "the harm suffered by the Marshallese people has resulted in an increased global understanding of the movement of radionuclides through marine and terrestrial environments", and urges the international community to "learn from the Marshallese experience with nuclear contamination, particularly the…understanding of the relationship between radioiodine and thyroid cancer".[20]

10. With regard to the RMI's interest in bringing this Application to the Court, the following should be added. It is well known that over recent years the RMI has been preoccupied with combating the extremely harmful consequences that the effects of climate change have for its very survival. While focusing on the problem of climate change, the RMI has come to realize that it cannot ignore the other major threat to its survival: the ongoing threat posed by the existence of large arsenals of nuclear weapons the use of which, according to the Court, "seems scarcely reconcilable with respect for […] requirements [of the principles and rules of law applicable in armed conflict]".[21] It is obvious that the RMI's participation in the common struggle against climate change needs to lead to firm commitments by all States, which commitments must include not only moral, but also legal obligations aimed at realizing concrete, clear-cut goals in order to remove the threat of devastation caused by continued reliance on the use of fossil fuel energy sources. It is from this perspective of striving to reach agreement on such commitments in the struggle against climate change that the RMI has concluded that it is no longer acceptable simply to be a Party to the NPT while total nuclear disarmament pursuant to Article VI and customary international law remains at best a distant prospect. This Application seeks to ensure that the legal obligations undertaken 22 years ago by China in the context of the NPT do indeed deliver the promised result.

11. One of the reasons why the RMI became a Party to the NPT is that this Treaty is the key instrument of the international community for ridding the world of nuclear weapons.[22]

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the Marshall Islands (27-30 March 2012) and the United States of America (24-27 April 2012): 3 September 2012, Doc. A/HRC/21/48/Add.1.

[18] *Id.*, paras. 1-18.

[19] *Id.*, para. 19.

[20] *Id.*, para. 66(b).

[21] *Supra*, n. 3, para. 95.

[22] At the UN High-Level Meeting on Nuclear Disarmament, 26 September 2013, Hon. Mr. Phillip Muller, Minister of Foreign Affairs, Republic of the Marshall Islands, stated that the RMI's "deeper purpose" is "that no nation and people should ever have to bear witness to the burden of exposure to the devastating impacts of nuclear weapons", http://www.un.org/en/ga/68/meetings/nucleardisarmament/pdf/MH_en.pdf.

The Treaty contains the solemn promise and legal obligation of the NPT nuclear-weapon States to sit down and negotiate towards total nuclear disarmament. That promise has been broken and that obligation has not been met.

12. Article VI of the Treaty states, in its entirety, as follows:

> Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.[23]

13. As previously stated, the Court concluded its Advisory Opinion of 8 July 1996 by *unanimously* holding that "[t]here exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control".[24]

14. More than two decades after becoming a party to the NPT, China maintains and continuously modernizes its nuclear arsenal.

15. China has not pursued in good faith negotiations to cease the nuclear arms race at an early date through comprehensive nuclear disarmament or other measures, and instead is taking actions to improve its nuclear weapons systems and to maintain them for the indefinite future.

16. Similarly, China has not fulfilled its obligation to pursue in good faith negotiations leading to nuclear disarmament in all its aspects under strict and effective international control and instead has opposed the efforts of the great majority of non-nuclear-weapon States to initiate such negotiations.

17. These obligations are not limited to the Parties to the Treaty, but also apply to all States as a matter of customary international law.

18. Further, the obligation of a State to perform its legal obligations in good faith, whether arising under a treaty or pursuant to customary international law, is itself a legal obligation which China has breached.

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[23] *See supra*, n. 2.

[24] *Supra*, n. 3, para. 105, point 2F.

II. FACTS

A. The Five Nuclear Weapon States Parties to the NPT

19. The U.S. was the first country in the world to develop and test nuclear weapons. The U.S. used nuclear weapons in warfare on the Japanese cities of Hiroshima and Nagasaki on 6 August 1945 and 9 August 1945 respectively. The U.S. was the sole possessor of nuclear weapons in the world until the Soviet Union tested its first nuclear weapon on 29 August 1949.[25] In 1952, the UK tested its first nuclear weapon. In 1960, France tested its first nuclear weapon. In 1964, China tested its first nuclear weapon.

20. In the 1960s, negotiations eventuated in agreement on the Nuclear Non-Proliferation Treaty. The U.S., Russia, the UK, France and China, all Parties to the NPT, are the only States meeting the Treaty's definition of a "nuclear-weapon State" for "the purposes of this Treaty".[26]

21. The Treaty was opened for signature on 1 July 1968, and entered into force on 5 March 1970. China acceded to the Treaty on 9 March 1992, and became a Party to it.

B. The Nine States Possessing Nuclear Weapons

22. In addition to the five NPT nuclear-weapon States, four non-NPT States are known to possess nuclear weapons: India, Pakistan, Israel and the Democratic People's Republic of Korea ("DPRK").[27]

23. According to the Stockholm International Peace Research Institute ("SIPRI"), the individual and collective world nuclear forces as of January 2013, were as follows:

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[25] For matters occurring prior to 1991 this Application refers to the Soviet Union. For matters occurring during or after 1991, including the current status of the obligations under the NPT, this Application refers to the Russian Federation or Russia, as the successor state to the Soviet Union's obligations under the NPT.

[26] Article IX.3 of the NPT provides: "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".

[27] *See infra*, n. 63.

World nuclear forces, January 2013[28]

(All figures are approximate)

Country	Year of first nuclear test	Deployed Warheads[a]	Other Warheads[b]	Total Inventory
United States	1945	2,150[c]	5,550	~7 700[d]
Russia	1949	~1,800	6,700[e]	~8 500[f]
United Kingdom	1952	160	65	225
France	1960	~290	~10	~300
China	1964		~250	~250
India	1974		90-110	90-110
Pakistan	1998		100-120	100-120
Israel			~80	~80
North Korea	2006			6-8?
Total		**~4,400**	**~12,865**	**~17,270**

[a] 'Deployed' means warheads placed on missiles or located on bases with operational forces.
[b] These are warheads in reserve, awaiting dismantlement or that require some preparation (*e.g.* assembly or loading on launchers) before they become fully operationally available.
[c] In addition to strategic warheads, this figure includes nearly 200 non-strategic (tactical) nuclear weapons deployed in Europe.
[d] This figure includes the U.S. Department of Defense nuclear stockpile of c. 4650 warheads and another c. 3000 retired warheads that are awaiting dismantlement.
[e] This figure includes c. 700 warheads for nuclear-powered ballistic missile submarines (SSBNs) in overhaul and bombers, 2000 non-strategic nuclear weapons for use by short-range naval, air force and air defense forces, and c. 4000 retired warheads awaiting dismantlement.
[f] This includes a military stockpile of c. 4500 nuclear warheads and another c. 4000 retired warheads await dismantlement.

C. China and the Nuclear Arms Race

1. Early Nuclear History

24. Following its first nuclear test in 1964, China exploded its first hydrogen bomb just 32 months later, in 1967.[29] During the ensuing decade, the Cultural Revolution delayed the

[28] Shannon N. Kile, "World Nuclear Forces", SIPRI Yearbook 2013 (Oxford University Press: Oxford, 2013). The question mark (?) against North Korea's total inventory is in the original.

growth of the Chinese nuclear arsenal. Since that time, China has maintained consistently a dual nuclear force—land and air.[30] It consistently pursued a sea component to its nuclear forces, and at various times it was reported to have an inoperable sea component; however it is currently reported to have an operable sea component, as of 2013, completing its nuclear triad.[31]

25. In more recent years, there have been some conflicting reports on growth in the size of the Chinese nuclear arsenal, with the most current sources indicating that the arsenal is expanding.[32]

2. China's Current Nuclear Arsenal

26. Because there is so little transparency regarding the size and composition of China's nuclear arsenal, some reports differ in their estimates, but most current estimates place the size of the arsenal at approximately 240-250.[33]

27. As of 2013, the Chinese nuclear forces were reported as follows:[34]

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[29] *See* Encyclopedia Britannica (2014), http://www.britannica.com/EBchecked/topic/421827/nuclear-weapon/275662/China.

[30] United States Department of Defense, *Annual Report to Congress: Military and Security Developments Involving the People's Republic of China 2013*, 2013, p. 31, *available at* http://www.defense.gov/pubs/2013_china_report_final.pdf.

[31] *See id.* ("After a round of successful testing in 2012, the JL-2 [sea-based platform] appears ready to reach initial operation capability".).

[32] *See* Shannon N. Kile, Phillip Schell and Hans M. Kristensen, "World Nuclear Forces", Chapter VI, Chinese nuclear forces (2013) (sources omitted), *available at* http://www.sipri.org/yearbook/2013/06 ("China appears to be expanding the size of its nuclear arsenal".).

[33] *See id.*(report indicates 250 total warheads); *see also* Hans M. Kristensen and Robert S. Norris, "Chinese nuclear forces, 2013", Bulletin of the Atomic Scientists, Nuclear Notebook 69(6), 2013) (hereafter "Kristensen and Norris"), p. 80, *available at* http://bos.sagepub.com/content/69/6/79.full.pdf+html.

[34] *See* Kristensen and Norris, *id.*

China nuclear forces, 2013

Type	NATO Designation	Number of launchers	Year deployed	Range (kilometers)	Warhead x yield (kilotons)	Number of warheads
	Land Based ballistic missiles					
DF-3A	CSS-2	~8	1971	3,000	1 x 3.300	~8
DF-4	CSS-3	~12	1980	5,500+	1 x 3,300	~12
DF5-A	CSS-4	~20	1981	13,000+	1 x 4,000-5,000	~20
DF-15	CSS-6	~100[a]	1990	600	1 x ?	?
DF-21	CSS-5 Mods 1, 2	~80[b]	1991	2,150	1 x 200-300	~80
DF-31	CSS-10 Mod 1	~8	2006	7,000+	1 x 200-300?	~8
DF-31A	CSS-10 Mod 2	~20	2007	11,000+	1 x 200-300?	~20
Subtotal		*248*				*~148[c]*
	Submarine-launched ballistic missiles[d]					
JL-1	CSS-NX-3	12	1986	1,000+	1 x 200-300	n.a.
JL-2	CSS-NX-14	36	2013	7,000+	1 x 200-300?	n.a.
Subtotal		48				*n.a.*
	Aircraft[e]					
H-6	B-6	~20	1965	3,100+	1 x bomb	~20
Fighters	?	?	?	-	1 x bomb	~20
	Cruise missles[f]					
DH-10	CJ-10	~250	2006?	1,500?	1 x ?	?
DH-20	CJ-20?	?	?	?	1 x ?	?
Total						**~190[g]**

a The CIA concluded in 1993 that china "almost certainly" had developed a warhead for the DF-15.

b This table only counts nuclear versions DF-21 (CSS-5 Mod1) and DF-21A (CSS-5 Mod 2), each of which has fewer than 50 launchers deployed. The conventional DF-21C and DF-21D are not counted.

c The missile and warhead inventory may be larger than the number of launchers, some of which can be reused to fire additional missiles.

d Neither the JL-1 nor the JL-2 SLBM is fully operational, although warheads probably are available. The JL-2 is under development.

e China is thought to have a small stockpile of nuclear bombs with yields between 10 kilotons and 3 megatons. Figures are for only those aircraft that are estimated to have a secondary nuclear mission. Aircraft range is equivalent to combat radius, which for some H-6 bombers can be extended with air refueling.

f US Air Force intelligence lists the ground-launched DH-10 land-attack cruise missile as "conventional or nuclear". US Air Force Global Strike Command also lists the air-launched CJ-20 ALCM as nuclear-capable, but it is unclear whether that is a coordinated intelligence assessment.

g An estimated 60 additional warheads include those produced for SLBMs and others awaiting dismantlement, for a total inventory of approximately 250 warheads.

3. Nuclear Policy, Doctrine and Expenditure

28. China self-reports that it is "firmly committed to a nuclear strategy of self-defense and has always exercised utmost restraint in the development of its nuclear weapons".[35]

29. Though China self-reports that it does not take part in arms racing, operates under a no-first use policy, and commits that it will not use nuclear weapons against non-nuclear-weapon States, it leaves open the potential for use of nuclear weapons against those States that are armed with nuclear weapons.[36]

30. It is reported that, assuming the Chinese government spends approximately 5% of its military budget on its nuclear weapons programme, its annual nuclear weapons budget would be approximately US $4.5 to $9 billion.[37] A non-governmental organization reports that it was approximately $7.6 billion in 2011.[38]

4. Current Plans for Modernization and Qualitative Improvements of China's Nuclear Arsenal

31. China is modernizing its nuclear weapons arsenal, and advancing the sophistication of its nuclear weapons[39] as well as quantitatively expanding its arsenal.[40]

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[35] *See* Statement of Mr. Pang Sen, Director-General of the Dept. of Arms Control and Disarmament of MFA, Head of the Chinese Delegation at the UNGA High-Level Meeting on Nuclear Disarmament (26 Sept. 2013), p. 3, *available at* http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/HLM/26Sep_China.pdf.

[36] *See id.*, p. 4.

[37] Hui Zhang, "China", in Ray Acheson, ed., Still assuring destruction forever (Reaching Critical Will – a project of the Women's International League for Peace and Freedom, 2013), http://www.reachingcriticalwill.org/images/documents/Publications/modernization/still-assuring-destruction-forever.pdf., *citing*, *e.g.*, Brigadier Vijai K. Nair, "China's Nuclear Strategy and Its Implications for Asian Security", China Brief, Vol. 4, Issue 3, 4 February 2004.

[38] Bruce G. Blair and Matthew A. Brown, Nuclear Weapons Cost Study, Global Zero Technical Report, June 2011, p. 1 (annual expenditure is US$7.6 billion), *available at* http://www.globalzero.org/files/gz_nuclear_weapons_cost_study.pdf.

[39] *See e.g.*, Zhang *supra*, n. 37, citing Kearns, "Beyond the United Kingdom: Trends in the Other Nuclear Armed States", British American Security Information Council (BASIC), November 2011, p. 1; *see also supra*, n. 30, pp. 31-32, ("these technologies and training enhancements strengthen China's nuclear force and enhance its strategic strike capabilities".).

[40] *See* Kile *supra*, n. 32 ("China appears to be expanding the size of its nuclear arsenal"); *but see* Hui Zhang, "China", in Ray Acheson, ed., Assuring Destruction Forever: Nuclear Weapon Modernization Around the World (Reaching Critical Will – a project of the Women's International League for Peace

32. China is reported specifically to be currently modernizing, either in the fielded stage or in the planning stage, the following components of its nuclear arsenal:[41]

ICBM (Intercontinental ballistic missile)/MRBM (Medium-range ballistic missile):

- DF-31 (CSS-10 Mod 1) ICBM fielding
- DF-31A (CSS-10 Mod 2) ICBM fielding
- DF-21 (CSS-5 Mod 1/2) MRBM fielding
- DF-41 ICBM planning

SSBN/SLBM (Submarine-launched ballistic missile):

- Jin (Type-094) SSBN fielding (3+)
- Type-096 SSBN planning
- JL-2 (CSS-N-14) SLBM fielding

Cruise Missiles:

- ALCM (CJ-20 on H-6 bomber) planning
- GLCM (DH-10/CJ-10) fielding

D. China and Nuclear Disarmament

33. On 3 December 2012 the UN General Assembly decided to establish an Open-Ended Working Group to develop proposals to take forward proposals for multilateral nuclear disarmament negotiations for the achievement and maintenance of a world without nuclear weapons.[42] The resolution was adopted by 147 votes to 4 with 31 abstentions. China abstained from voting and declined to participate in the Open-Ended Working Group.

34. China votes for UN General Assembly resolutions regarding a Nuclear Weapons Convention. For example, China voted in favour of the UN General Assembly's Resolution on

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and Freedom, 2012), p. 17 (as of 2012, "there is no obvious increase of nuclear warheads"), http://www.reachingcriticalwill.org/images/documents/Publications/modernization/assuring-destruction-forever.pdf.

[41] Hans M. Kristensen, Federation of American Scientists, Nuclear Weapons and Arms Control: Modernizing Nuclear Arsenals, Presentation to Short Course on Nuclear Weapons Issues in the 21st Century, Elliott School of International Affairs, George Washington University, Washington, D.C., 3 November 2013, *available at* http://www.fas.org/programs/ssp/nukes/publications1/Brief2013_GWU-APS.pdf.

[42] UNGA Resolution A/RES/67/56, "Taking forward multilateral nuclear disarmament negotiations for the achievement and maintenance of a world without nuclear weapons" (147-4-31).

"Follow-up to the advisory opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons". [43]

35. The first-ever UN General Assembly High-Level Meeting on Nuclear Disarmament was held on September 26, 2013, pursuant to a 2012 resolution which was supported by China.[44] China subsequently voted in favour of a UN General Assembly resolution following up the High-Level Meeting.[45] The resolution calls for "the urgent commencement of negotiations, in the Conference on Disarmament, for the early conclusion of a comprehensive convention" to prohibit and eliminate nuclear weapons.

36. Despite these votes, however, in a statement on 26 September 2013 at the UN High-Level Meeting on Nuclear Disarmament, the Director-General of the Department of Arms Control and Disarmament said that while China has maintained "complete prohibition and thorough destruction of nuclear weapons" as an unswerving goal, the conditions are not "ripe" now to achieve that goal.[46]

37. China signed the Comprehensive Nuclear-Test-Ban Treaty in 1996, but has failed to ratify it.[47] It is reported that China will not ratify that treaty until the U.S. does so,[48] though China publicly claims that it "has steadily advanced its preparation work for implementation of the CTBT pending it [sic] entry into force and is dedicated in promoting its entry-into-force".[49]

38. China's precondition to negotiations for complete nuclear disarmament is that the U.S. and Russia first reduce their arsenals further; until then, China will not begin negotiations for the elimination of its arsenal.[50]

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[43] Most recently on 5 December 2013 (A/RES/68/42).

[44] A/RES/67/39, 3 December 2012.

[45] A/RES/68/32, 5 December 2013.

[46] *See supra*, n. 35 at p. 1.

[47] *See* Zhang, *supra,* n. 37.

[48] *Id.*

[49] *See supra.* n. 35, p. 4.

[50] *See* Zhang, *supra,* n. 37.

III. THE LAW

A. Article VI of the NPT

39. Article VI provides:

> Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.

40. The drafting history of the NPT demonstrates that the treaty constitutes a "strategic bargain": the NNWS Parties agreed not to acquire nuclear weapons and the NPT nuclear-weapon States agreed to negotiate their elimination.[51] This has been confirmed by NPT Review Conferences. In particular, the 2010 Review Conference noted that the overwhelming majority of States entered into their legally binding commitments not to acquire nuclear weapons "in the context, inter alia, of the corresponding legally binding commitments by the nuclear weapon States to nuclear disarmament in accordance with the Treaty".[52]

41. Article VI is "the single most important provision of the treaty ... from the standpoint of long-term success or failure of its goal of proliferation prevention".[53]

42. In its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, the Court declared that Article VI involves "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".[54] The Court went on to conclude, *unanimously,* that "[t]here exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control".[55] This "recognizes that the provisions of Article VI...go beyond mere obligations of conduct - to pursue nuclear disarmament negotiations in good faith - and actually involve an

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[51] Thomas Graham, Correspondence, The Origin and Interpretation of Article VI, 15 Nonproliferation Review 7, 9 (2008), *available at* http://cns.miis.edu/npr/pdfs/151_correspondence.pdf.

[52] 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Final Document, Volume I, "Review of the operation of the Treaty", p. 2, para. 2, http://www.un.org/ga/search/view_doc.asp?symbol=NPT/CONF.2010/50 (VOL.I).

[53] E. Firmage, 'The Treaty on the Non-Proliferation of Nuclear Weapons', 63 American Journal of International Law (1969) 711, 732.

[54] *Supra*, n. 3, para. 99.

[55] *Id.* para. 105, point 2 F.

obligation of result, i.e., to conclude those negotiations".[56]

43. The Court observed that "fulfilling the obligation expressed in Article VI ... remains without any doubt an objective of vital importance to the whole of the international community today".[57] The Court has long emphasized the importance of obligations *erga omnes*, owed to the international community as a whole.[58] Its conclusion in the Advisory Opinion was tantamount to declaring that the obligation in Article VI is an obligation *erga omnes*.[59] Every State has a legal interest in its timely performance, therefore,[60] and a corresponding legal obligation to help bring it about.[61]

B. Customary International Law

44. The obligations enshrined in Article VI of the NPT are not merely treaty obligations; they also exist separately under customary international law.[62]

45. In its Advisory Opinion, after noting that the twofold obligation in Article VI to pursue and to conclude negotiations *formally* concerns the (now 190[63]) States Parties to the NPT, the Court added that "any realistic search for general and complete disarmament, especially

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[56] M. Marin Bosch, "The Non-Proliferation Treaty and its Future", in L. Boisson de Chazournes and P. Sands, eds, International Law, the International Court of Justice and Nuclear Weapons, 1999, 375.

[57] *Supra*, n. 3, para. 103.

[58] *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 3, para. 33.

[59] *See* President Bedjaoui's Declaration in *Legality of Threat or Use of Nuclear Weapons, supra*, n. 3 at pp. 273-274: "As the Court has acknowledged, the obligation to negotiate in good faith for nuclear disarmament concerns the 182 or so States parties to the Non-Proliferation Treaty. I think one can go beyond that conclusion and assert that there is in fact a twofold *general obligation*, opposable *erga omnes*, to negotiate in good faith and to achieve the desired result".

[60] *See supra*, n. 58.

[61] *Cf. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, paras. 154-159.

[62] In *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*), *Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 392, at para. 94, the ICJ held that the fact that principles of customary international law are enshrined in multilateral conventions does not mean that they cease to exist and to apply as principles of customary law.

[63] There are 190 States Parties including the DPRK. Although the DPRK announced its withdrawal from the NPT on 10 January 2003, States Parties continue to express divergent views regarding its status under the Treaty. *See* UN Office for Disarmament Affairs, Treaty on the Non-Proliferation of Nuclear Weapons, Status of the Treaty, http://disarmament.un.org/treaties/t/npt.

nuclear disarmament, necessitates the cooperation of all States".[64]

46. In point 2F of the *dispositif*, moreover, not confining its remarks to the States Parties to the NPT, the Court *unanimously* declared: "There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control".[65]

47. The Court's declaration is an expression of customary international law as it stands today. *All* States are under that obligation, therefore. This is consistent with the view expressed by President Bedjaoui in his Declaration: "Indeed, it is not unreasonable to think that, considering the at least formal unanimity in this field, this twofold obligation to negotiate in good faith and achieve the desired result has now, 50 years on, acquired a *customary character*".[66]

48. As the Court itself noted, the UN General Assembly has been deeply engaged in working for universal disarmament of weapons of mass destruction since its very first resolution in 1946.[67] The UN Security Council also has repeatedly called for the implementation of Article VI by all States,[68] not only Parties to the NPT. In Resolution 1887 of 24 September 2009, after calling upon States Parties to the NPT to implement Article VI, the Council called on "all other States to join in this endeavour".[69] The Council has also described the proliferation of weapons of mass destruction as a threat to international peace and security.[70]

49. Regarding the obligation of cessation of the nuclear arms race at an early date set forth in Article VI, it stands on its own as a customary international law obligation based on the very widespread and representative participation of States in the NPT and is inherent in the customary international law obligation of nuclear disarmament.

50. The General Assembly has declared the necessity of cessation of the nuclear arms race. In the Final Document of its first Special Session on Disarmament, held in 1978, the

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[64] *Supra*, n. 3, p. 226, para. 100.

[65] *Id.*, para. 105.

[66] President Bedjaoui's Declaration in *Legality of Threat or Use of Nuclear Weapons*, *supra*, n. 3, p. 274, para. 23. President Bedjaoui was referring to the 50 years that had then elapsed since the adoption of the UN General Assembly's first resolution in 1946 and the normative language repeatedly reiterated in its resolutions on nuclear weapons and in other instruments since then.

[67] A/RES/1(I) of 24 January 1946, cited by the Court in para. 101 of the Advisory Opinion.

[68] *E.g.*, Resolution 984 of 11 April 1995, cited by the Court in para. 103 of the Advisory Opinion, and Resolution 1887 of 24 September 2009.

[69] Resolution 1887, 24 September 2009, operative para. 5.

[70] *E.g.*, Resolution 1887, 24 September 2009.

General Assembly stated that it is "imperative … to halt and reverse the nuclear arms race until the total elimination of nuclear weapons and their delivery systems has been achieved".[71]

C. Good Faith

51. That good faith constitutes a "fundamental principle" of international law is beyond dispute.[72] Not only is it a general principle of law for the purposes of Article 38(1)(c) of the Statute of the International Court of Justice[73] and a cardinal principle of the Law of Treaties,[74] it also encapsulates the essence of the Rule of Law in international society[75] and is one of the Principles of the United Nations.

52. Article 2, paragraph 2 of the UN Charter provides: "All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter". The Declaration on Principles of International Law 1970 makes it clear that this duty applies not only to obligations arising under the Charter but also to those arising "under the generally recognized principles and rules of international law" and "under international agreements valid under the generally recognized principles and rules of international law".[76]

53. In the *Nuclear Tests* cases, the ICJ declared: "One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international cooperation, in

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[71] Final Document of the Tenth Special Session of the General Assembly, adopted by A/RES/S-10/2, 30 June 1978, without a vote, para. 20; *see also, e.g.*, paras. 47, 50, http://www.un.org/disarmament/HomePage/SSOD/ssod4-documents.shtml. The 1978 Special Session established UN disarmament machinery in its current form, with the Conference on Disarmament devoted to negotiations, the Disarmament Commission devoted to deliberation, and the First Committee of the General Assembly devoted to agenda-setting. The Special Session thus was a quasi-constitutional assembly with respect to disarmament.

[72] *See* Robert Kolb, *La bonne foi en droit international public: Contribution à l'étude des principes généraux de droit*, pp. 112-113 (2011).

[73] *Cf, The Free Zones of Upper Savoy and the District of Gex, Second Phase (1930) PCIJ*, Series A, No.24, p.12; *see also* J. Crawford, *Brownlie's Principles of Public International Law*, Oxford, 8th edition, 2012, pp.36-37.

[74] Articles 26 and 31(1) of the Vienna Convention on the Law of Treaties 1969.

[75] V. Lowe, *International Law*, Oxford, 2007, p.116.

[76] Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, U.N.G.A. Res. 2625 (XXV), 24 October 1970.

particular in an age when this co-operation in many fields is becoming increasingly essential".[77]

54. In the Final Document of the first Special Session on Disarmament, the General Assembly called upon all States to meet requirements of good faith, declaring:

> In order to create favourable conditions for success in the disarmament process, all States should strictly abide by the provisions of the Charter of the United Nations, *refrain from actions which might adversely affect efforts in the field of disarmament, and display a constructive approach to negotiations and the political will to reach agreements.*[78]

55. As set forth above, Article VI of the NPT and customary international law require both conduct *and* result: States must not only negotiate in good faith with serious efforts to achieve the elimination of nuclear weapons, but must also actually *achieve* that result.[79]

56. The Court has stated that the "principle of good faith obliges the Parties to apply [a treaty] in a reasonable way and in such a manner that its purpose can be realized".[80] Conduct that prevents the fulfilment of a treaty's object and purpose is proscribed.[81] Further, conduct that calls into question a State's commitment to the achievement of agreed objectives undermines the trust necessary for successful cooperation towards their achievement. All of this applies equally to the obligation to fulfil customary international law obligations in good faith.[82]

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[77] *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974,* p. 253, at p.268, para. 46; *Nuclear Tests (New Zealand v. France), Judgment, Id.*, p. 457, at p. 473, para. 49.

[78] *Supra*, n. 71, para. 41 (emphasis added).

[79] *See supra*, para. 42.

[80] *Case Concerning the Gabcíkovo-Nagymaros Project (Hungary v. Slovakia), I.C.J. Reports 1997*, p. 7, para. 142.

[81] *Report of the International Law Commission Covering its 16th Session, 727th Meeting*, 20 May 1964: Pursuant to the VCLT Article 26 obligation that every treaty in force must be performed by the parties in good faith, the duty of the parties is "not only to observe the letter of the law but also to abstain from acts which would inevitably affect their ability to perform …"; Antonio Cassese, *The Israel-PLO Agreement and Self-Determination*, 4 EUR. J. INT'L L. 567 (1993), *available at* http://www.ejil.org/journal/Vol4/No4/ (when there is an obligation of good faith negotiation, "both Parties are not allowed to (1) advance excuses for not engaging into or pursuing negotiations or (2) to accomplish acts which would defeat the object and purpose of the future treaty"); Judge Mohammed Bedjaoui, "Good Faith, International Law, and Elimination of Nuclear Weapons", Keynote Address, 1 May 2008, http://www.lcnp.org/disarmament/2008May01eventBedjaoui.pdf, pp. 24–29 (in the NPT context, good faith proscribes "every initiative the effect of which would be to render impossible the conclusion of the contemplated disarmament treaty").

[82] *See supra,* para. 52.

IV. OBLIGATIONS BREACHED BY CHINA

57. Part II of this Application has outlined the facts that are relevant for an assessment of the Respondent's non-compliance with its international obligations with respect to nuclear disarmament and the cessation of the nuclear arms race. Part III has outlined the legal basis for this case. The conduct of the Respondent will now be analyzed very briefly in light of the relevant law.

A. Breach of Article VI of the NPT

58. Two of the obligations entailed by Article VI are relevant for the present case: the obligation with regard to nuclear disarmament and the obligation with regard to the cessation of the nuclear arms race at an early date.

Nuclear disarmament

59. As set forth above, the Court has provided an authoritative analysis of the nuclear disarmament element of the obligations laid down by Article VI. It has held that "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".[83] In the *dispositif* of its Advisory Opinion the Court concluded *unanimously*: "There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control".[84]

60. While the Respondent votes in favour of UN General Assembly resolutions calling for negotiations to begin, it sets as a precondition further reductions in the nuclear forces of the U.S. and Russia.[85] The Respondent also did not participate in the Open-Ended Working Group. Further, as set forth in Part II, China is engaging in a course of conduct, the quantitative build-up and qualitative improvement of its nuclear forces, contrary to the objective of nuclear disarmament. Accordingly, the Respondent has breached and continues to breach its nuclear disarmament obligations under Article VI of the NPT.

Cessation of the nuclear arms race at an early date

61. With regard to the cessation of the nuclear arms race at an early date, the

[83] *Supra*, n. 3, para. 99.

[84] *Id.*, para. 105, point 2F.

[85] *See* Zhang, *supra*, n. 37.

Respondent's conduct is similarly negative and obstructive.

62. Its conduct, set forth in Part II of this Application, in (i) continuing engagement in material efforts to qualitatively improve its nuclear weapons systems; (ii) continuing engagement in material efforts to quantitatively expand its nuclear weapons systems; (iii) placement of a precondition on negotiations on comprehensive nuclear disarmament or other measures in multilateral forums; and (iv) continuing efforts to maintain and extend those systems indefinitely is clear evidence of the Respondent's ongoing breach of its Article VI obligation regarding the cessation of the nuclear arms race at an early date.

63. Despite having been a party to the NPT for 22 years, therefore, the Respondent has breached and continues to breach its obligation under Article VI regarding the cessation of the nuclear arms race at an early date.

B. Breach of Customary International Law

64. For the reasons set out above, the obligations enshrined in Article VI of the NPT are not merely treaty obligations; they also exist separately under customary international law.

65. On the same grounds as those relied on in the preceding Section of this Application, the Respondent has breached and continues to breach its obligations under customary international law with regard to nuclear disarmament and the cessation of the nuclear arms race at an early date.

C. Breach of the Obligation to Perform Its Obligations in Good Faith

66. In the previous two Sections, the Applicant has submitted that the Respondent has breached and continues to breach its obligations under both the NPT and customary international law regarding nuclear disarmament and cessation of the nuclear arms race at an early date. The Respondent is also failing to act in good faith as far as its performance of those obligations is concerned.

67. As set forth in Part II of this Application, the Respondent has been actively upgrading, modernizing, improving and quantitatively adding to its nuclear arsenal. This constitutes qualitative and quantitative vertical nuclear proliferation that clearly conflicts with the Respondent's fundamental commitment to nuclear disarmament and cessation of the nuclear arms race at an early date. It also encourages other States possessing nuclear weapons to follow suit and may induce non-nuclear-weapon States to reconsider their non-nuclear posture.

68. The Respondent's modernization programs also reveal its intention to rely on its nuclear arsenal for the foreseeable future.[86]

69. In short, by not actively pursuing negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and instead engaging in conduct that directly conflicts with those legally binding commitments, the Respondent has breached and continues to breach its legal duty to perform its obligations under the NPT and customary international law in good faith.

[86] *See supra*, Part II.C.4.

V. JURISDICTION OF THE COURT

70. The Applicant and the Respondent are parties to the Statute of the Court by virtue of their status as Members of the United Nations. Whereas the Applicant accepted the compulsory jurisdiction of the Court through the Declaration of 15 March 2013 (deposited on 24 April 2013), the Respondent has not made any declaration under Article 36, paragraph 2, of the Statute of the Court. Accordingly, pursuant to Article 36, paragraph 1, of the Statute of the Court and Article 38, paragraph 5, of the Rules of Court, the Applicant seeks to found the Court's jurisdiction on the consent of the Respondent, which the Applicant assumes will be given for the purposes of this case.

71. Ever since this Court declared in its Advisory Opinion of 8 July 1996 that "[t]here exists an *obligation* to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control" (emphasis added), the Respondent has placed a precondition on its participation in such negotiations, that the U.S. and Russia must first reduce their arsenals. Further, Respondent has simultaneously continued to quantitatively and qualitatively improve its own nuclear arsenal. Respondent has engaged in these actions even though a great majority of UN Member States have time and again in the General Assembly and elsewhere called upon all States to fulfil the obligation stipulated by the Court.

72. Given the enormity of the issue at stake, and "[c]onsidering the devastation that would be visited upon all mankind by a nuclear war and *the consequent need to make every effort to avert the danger of such a war and to take measures to safeguard the security of peoples*" (NPT preamble, emphasis added), the Respondent may be expected to come forward and explain to this Court, the World Court, why it continues to breach this essential obligation.

73. Therefore, the Applicant respectfully requests and urges the Respondent to consent to the jurisdiction of the Court for the purposes of this case.

VI. FINAL OBSERVATIONS

74. Pursuant to Article 31 of the Statute of the Court and Article 35, paragraph 1 of its Rules, the Applicant will exercise the power conferred by Article 31 of the Statute and choose a person to sit as judge ad hoc and will so inform the Court in due course.

75. The Applicant reserves the right to modify and extend the terms of this Application, the grounds invoked and the Remedies requested.

REMEDIES

On the basis of the foregoing statement of facts and law, the Republic of the Marshall Islands requests the Court

to adjudge and declare

a) that China has violated and continues to violate its international obligations under the NPT, more specifically under Article VI of the Treaty, by failing to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control;

b) that China has violated and continues to violate its international obligations under the NPT, more specifically under Article VI of the Treaty, by taking actions to qualitatively and quantitatively improve its nuclear weapons arsenal and to maintain it for the indefinite future, and by failing to pursue negotiations that would end nuclear arms racing through comprehensive nuclear disarmament or other measures;

c) that China has violated and continues to violate its international obligations under customary international law, by failing to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control;

d) that China has violated and continues to violate its international obligations under customary international law, by taking actions to qualitatively and quantitatively improve its nuclear weapons systems and to maintain them for the indefinite future, and by failing to pursue negotiations that would end nuclear arms racing through comprehensive nuclear disarmament or other measures;

e) that China has failed and continues to fail to perform in good faith its obligations under the NPT and under customary international law by modernizing, updating and upgrading its nuclear weapons capacity and maintaining its declared nuclear weapons policy for an unlimited period of time, while at the same time failing to pursue negotiations as set out in the four preceding counts; and

f) that China has failed and continues to fail to perform in good faith its obligations under the NPT and under customary international law by effectively preventing the great majority of non-nuclear weapon States from fulfilling their part of the obligations under Article VI of the Treaty and under customary international law with respect to nuclear disarmament and cessation of the nuclear arms race at an early date.

In addition, the Republic of the Marshall Islands requests the Court

to order

China to take all steps necessary to comply with its obligations under Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons and under customary international law within one year of the Judgment, including the pursuit, by initiation if necessary, of negotiations in good faith aimed at the conclusion of a convention on nuclear disarmament in all its aspects under strict and effective international control.

DATED this 24TH of April 2014

Tony A. deBrum
Co-Agent of the
Republic of the Marshall Islands
and Minister of Foreign Affairs of the
Republic of the Marshall Islands

Phon van den Biesen
Co-Agent of the
Republic of the Marshall Islands