APPLICATION

INSTITUTING PROCEEDINGS

AGAINST

THE DEMOCRATIC PEOPLE'S REPUBLIC OF KOREA

(Requesting the Respondent to accept the jurisdiction of the Court pursuant to Article 36, paragraph 1, of the Statute of the Court and Article 38, paragraph 5, of the Rules of Court)

submitted on 24 April 2014

by

THE REPUBLIC OF THE MARSHALL ISLANDS

to

THE INTERNATIONAL COURT OF JUSTICE

re

obligation to pursue in good faith and conclude negotiations
leading to nuclear disarmament

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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. In its Advisory Opinion of 8 July 1996 on the *Legality of the Threat or Use of Nuclear Weapons*,[1] this 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".[2] 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".[3] Largely based on its analysis of Article VI of the 1968 Treaty on the Non-Proliferation of Nuclear Weapons[4] (hereafter "the Treaty" or "the NPT"), the Court *unanimously* concluded: "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".[5]

2. This Application is not an attempt to re-open the question of the legality of nuclear weapons. Rather, the focus of this Application is the failure to fulfil the obligations of customary international law with respect to cessation of the nuclear arms race at an early date and nuclear disarmament enshrined in Article VI of the NPT and declared by the Court.

3. 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".[6] We shall also continue to face the possibility, even the likelihood, of nuclear weapons being used by accident, miscalculation or design,[7] 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

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

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

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

[4] 729 UNTS 161.

[5] *Supra*, n. 1, para. 105, point 2F.

[6] NPT preamble, 2nd recital.

[7] 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.

nuclear weapons is the logical consequence of this nuclear policy".[8]

4. 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".[9] A coherent legal system cannot countenance its own destruction or that of the community whose activities it seeks to regulate.[10] 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.

5. 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"[11] and "elementary considerations of humanity"[12] which help to shape an emerging "law of humanity",[13] 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

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

[9] *Supra*, n. 1, para. 98.

[10] 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 in *Legality of the Threat or Use of Nuclear Weapons*, *supra*, n. 1, 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".

[11] 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".

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

[13] *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.

national arsenals of nuclear and other weapons of mass destruction,[14] 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.[15]

6. Inspired and guided by these principles and values, this is an Application instituting proceedings against the Democratic People's Republic of Korea ("DPRK"), a State possessing nuclear weapons not party to the NPT. The underlying claims, described in more detail herein, are that the DPRK is: (i) in continuing breach of its obligations under customary international law, 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; and (ii) in continuing breach of its obligation to perform its international legal obligations in good faith.

7. The Applicant herein is the Republic of the Marshall Islands (the "Marshall Islands" or "RMI" or "Applicant"). The Applicant is a non-nuclear-weapon State ("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.

8. 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."). [16] During those 12 years, 67 nuclear weapons of varying explosive power were detonated in the Marshall Islands, at varying distances from human population.[17] 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.[18] The Special Rapporteur concludes that "the harm suffered by the Marshallese people has resulted

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

[15] *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".

[16] 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 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.

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

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

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".[19]

9. 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]".[20] 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 DPRK fulfils in good faith and in a timely manner all its legal obligations in relation to cessation of the nuclear arms race and to nuclear disarmament.

10. 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.[21] 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.[22]

11. As previously stated, the Court concluded its Advisory Opinion of 8 July 1996 by

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

[20] *Supra*, n. 1, para. 95.

[21] 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.

[22] *Supra*, n. 4.

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".[23]

12. More than four decades after the NPT entered into force, the DPRK has not re-joined the Treaty as a non-nuclear-weapon State,[24] and instead has tested nuclear weapons and acquired a nuclear arsenal which it is maintaining, improving, diversifying, and expanding.

13. The DPRK has not fulfilled its obligation under customary international law to pursue in good faith negotiations to cease the nuclear arms race at an early date, and instead is taking actions to improve and expand its nuclear forces and to maintain them for the indefinite future.

14. Similarly, the DPRK has not fulfilled its obligation under customary international law to pursue in good faith negotiations leading to nuclear disarmament in all its aspects under strict and effective international control, in particular by engaging a course of conduct, the quantitative build-up and qualitative improvement of its nuclear forces, contrary to the objective of nuclear disarmament.

15. 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 that the DPRK has breached.

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[23] *Supra*, n. 1, para. 105, point 2F.

[24] *See infra*, para. 21.

II. FACTS

A. The Five Nuclear-Weapon States Parties to the NPT

16. 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. 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.

17. 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".[25]

18. The Treaty was opened for signature on 1 July 1968, and entered into force on 5 March, 1970.

B. The Nine States Possessing Nuclear Weapons

19. In addition to the five NPT nuclear-weapon States, four non-NPT States are known to possess nuclear weapons: India, Pakistan, Israel and the DPRK.[26]

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

[25] 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".

[26] *See* Part II.C.1, *infra*, para. 21.

World nuclear forces, January 2013[27]

(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
DPRK	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. The DPRK and the Nuclear Arms Race

1. Early Nuclear History

21. The DPRK acceded to the NPT as an NNWS on 12 December 1985.[28] It first announced its withdrawal from the NPT on 12 March, 1993, citing "supreme national security

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

[28] Arms Control Association, Chronology of U.S. – North Korean Nuclear and Missile Diplomacy, 2014 Feb., https://www.armscontrol.org/factsheets/dprkchron.

considerations" pursuant to Article X of the NPT.[29] However, just before the effective date of the withdrawal, the DPRK announced its suspension of its decision to withdraw.[30] Following many rounds of disputes and negotiations with the International Atomic Energy Association, as well as South Korea, the U.S., China, Japan, Russia and other countries, the DPRK again announced its withdrawal on 10 January 2003, claiming that the effective date was immediate, because it related back to the 1993 announcement of withdrawal, which was suspended just prior to becoming effective.[31] Whether the DPRK effectively withdrew from the NPT is in dispute, and States Parties to the NPT continue to express divergent views regarding the status of the DPRK under the NPT.[32]

22. The DPRK's nuclear weapon capability is opaque and very secretive. Following its announcement of withdrawal from the NPT in 2003, the DPRK conducted three nuclear tests: the first occurred on 9 October 2006; the second on 25 May 2009; and the third on 12 February 2013.[33] Although it is unclear precisely how the DPRK would deliver nuclear weapons, it has reportedly focused on ballistic missile development, with the goal of developing a missile capable of threatening the United States.[34] Although it is currently working to achieve a nuclear delivery system, it reportedly has not fully demonstrated the capabilities necessary for a nuclear armed missile.[35]

2. The DPRK's Current Nuclear Arsenal

23. Although there is no publicly available evidence regarding the size and composition of the DPRK's nuclear arsenal, many reports place the size at approximately 6-10

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[29] *See id.*

[30] *Id.*

[31] *Id.*

[32] *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.

[33] *See* Mary Beth Niktin, *North Korea's Nuclear Weapons: Technical Issues*, Congressional Research Service, RL34256, pp. 14-16, 3 April 2013.

[34] "DPRK NDC Reiterates to Fight It Out Against U.S. and S. Korean Regime", *Korean Central News Agency,* 9 October 2012, http://www.kcna.co.jp/item/2012/201210/news09/20121009-21ee.html; *see also* Timothy McDonnell, "Nuclear pursuits: Non-P-5 nuclear armed states, 2013", *Bulletin of the Atomic Scientists* 2013 69:62, DOI: 10.1177/0096340212470816, p. 69, 7 January 2013, http://bos.sagepub.com/content/69/1/62.full.pdf+html.

[35] *See* Statement by James R. Clapper on North Korea's Nuclear Capability, United States of America Director of National Intelligence, 11 April 2013, http://www.dni.gov/index.php/newsroom/press-releases/191-press-releases-2013/839-dni-statement-on-north-korea-s-nuclear-capability?highlight=YTo0OntpOjA7czo1OiJub3J0aCI7aToxO3M6NToia29yZWEiO2k6MjtzOjc6Imtvcm VhJ3MiO2k6MztzOjExOiJub3J0aCBrb3JlYSI7fQ==.

warheads.[36]

24. The DPRK has been testing ballistic missiles with the intention of developing a viable nuclear weapons delivery system.[37] Despite the DPRK announcing in 2012 that it would suspend testing long-range ballistic missiles, it has test-launched multiple satellites into orbit and has developed new launch-pad bases comprising several missile assembly and testing structures.[38]

25. In March 2014, it was reported that the DPRK supports a diverse ballistic missile program estimated to include 600-1,000 missiles of all types.[39] In that same month, it was also reported that "two medium-range Rodong missiles . . . were launched, eventually splashing down in the Sea of Japan".[40]

3. Nuclear Policy, Doctrine, and Expenditure

26. The United Nations Security Council has adopted, unanimously, four major resolutions aimed at sanctioning the DPRK for its nuclear weapons program. The Security Council passed the first two resolutions in 2006[41] and 2009[42], after the DPRK completed nuclear tests. The Security Council passed the third resolution in January, 2013[43], after the DPRK

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[36] *See* Federation of American Scientists, Status of World Nuclear Forces 2013, https://www.fas.org/programs/ssp/nukes/nuclearweapons/nukestatus.html (lists <10 warheads); *see also,* Shannon Kile, "World Nuclear Forces", Chapter VII, North Korea's military nuclear capabilities, 2013, http://www.sipri.org/yearbook/2013/06 (lists 6-8 warheads).

[37] *See* Duyeon Kim, Fact Sheet: North Korea's Nuclear and Ballistic Missile Programs, The Center for Arms Control and Non-proliferation, 2013 June, http://armscontrolcenter.org/publications/factsheets/fact_sheet_north_korea_nuclear_and_missile_programs/; *see also infra,* n. 48 ("It does not possess the capability to deliver atomic bombs using long-range missiles, but this is clear their delivery system of choice and an earnest effort is underway to develop this capability".).

[38] *See* Nuclear Threat Initiative ("NTI"), Country Profiles, North Korea, March 2014, http://www.nti.org/country-profiles/north-korea/delivery-systems/.

[39] *See* Judah Grunstein, et al., "Global Insider: North Korea's Ballistic Missile Arsenal is Diversified and Robust", *World Politics Review*, 11 March 2014, http://www.worldpoliticsreview.com/trend-lines/13622/global-insider-north-korea-s-ballistic-missile-arsenal-is-diversified-and-robust.

[40] Euan McKirdy, "North Korea Ups Stakes with Latest Missile Launch", *CNN,* 26 March 2014, http://www.cnn.com/2014/03/26/world/asia/north-korea-rodong-missile-launch/.

[41] United Nations Security Council S/RES/1718 (2006), http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1718(2006).

[42] United Nations Security Council S/RES/1874 (2009), http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1874(2009).

[43] United Nations Security Council S/RES/2087 (2013), http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/2087(2013).

launched in December, 2012 a satellite with technology considered applicable to the development of ballistic missiles. The Security Council passed the fourth resolution in March, 2013[44], after the DPRK completed another nuclear test in February, 2013. The resolutions all call upon the DPRK to rejoin the NPT as an NNWS.[45]

27. Despite these resolutions and calls for the DPRK to rejoin the NPT, in March 2013, the DPRK self-reported that its nuclear weapons arsenal is "the nation's life" and vowed to expand its nuclear arsenal.[46] It has also been reported that its objective is to develop missiles capable of delivering nuclear warheads targeted at adversaries.[47]

28. The DPRK has not signed the Comprehensive Nuclear-Test-Ban Treaty.

29. It is reported that the DPRK spends approximately 33 percent of the country's national income on the military, with U.S. $700 million spent on nuclear weapons in 2010 and the same in 2011.[48]

4. Current Plans for Expansion, Improvement, and Diversification of the DPRK's Nuclear Arsenal

30. The DPRK is reported to be continuing to advance its nuclear technology and capabilities, as well as testing and developing long-range ballistic missiles.[49]

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[44] United Nations Security Council S/RES/2094 (2013), http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/2094(2013).

[45] *See supra,* notes 41 through 44.

[46] Cheo Sang-Hun, "North Korea Vows to Keep Nuclear Arms and Fix Economy", *The New York Times,* 31 March 2013, http://www.nytimes.com/2013/04/01/world/asia/north-korea-vows-to-keep-nuclear-arms-and-fix-economy.html?_r=0; *see also supra,* n. 33, p. 17.

[47] *See supra,* n. 37 ("Apparent Objective: Improve conventional war capabilities. Develop missiles capable of delivering nuclear warheads targeted at regional adversaries and the continental US").

[48] Bruce G. Blair and Matthew A. Brown, Nuclear Weapons Cost Study, Global Zero Technical Report, June 2011, p. 1 (annual expenditure is U.S. $700 million), http://www.globalzero.org/files/gz_nuclear_weapons_cost_study.pdf.

[49] *See* U.S. Office of the Secretary of Defense, Department of Defense, Military and Security Developments Involving the Democratic People's Republic of Korea 2012, Annual Report to Congress, 15 Feb. 2013, http://www.defense.gov/pubs/report_to_congress_on_military_and_security_developments_involving_the_dprk.pdf; *see also* S/2012/422, Report of the Panel of Experts established pursuant to resolution 1874 (2009), p. 4, 14 June 2012.

31. Although there is no official confirmation that it has achieved the ability to place a nuclear warhead on a missile and effectively launch it, the DPRK is reported to be currently modernizing and upgrading is nuclear weapons capabilities as follows:[50]

Ballistic Missiles	**Estimated Range (km)**	**Notes**
Short Range		
KN-01	160	
KN-02	100-120	
Hwasong-5 (Scud-B)	300	900 kg payload
Hwasong-6 (Scud-C, Scud-PIP)	500	700-800 kg payload
Medium Range		
Rodong (Nodong-1)	1,000-1,500	1,000 kg payload--capable of carrying a simple nuclear warhead
Intermediate-Range		
Taepodong-1 (Paektusan-1)	2,000-2,900	100-200 kg payload
Taepodong-2 (Paektusan-2/Unha-2/Unha-3)	Unknown; possible ranges of 3,400-15,000	
Musudan-1 (Tapodong-X, Nodong-B, BM-25)	2,500-4,000	
Intercontinental-Range		
KN08		Not believed to be tested nor operational
Long-Range Rockets (Space Launch Vehicles)		
Unha rocket-Kwangmyongsong satellite combination		

D. The DPRK and Nuclear Disarmament

32. The DPRK has not re-joined the NPT as an NNWS, the only option open to it under the terms of the Treaty.[51]

[50] *See supra,* n. 37; *see also supra,* n. 49, S/2012/422, pp. 16-19.

[51] The DPRK does not qualify as a nuclear-weapon State under Article IX.3 of the Treaty.

33. On 3 December 2012 (A/RES/67/56), the UN General Assembly ("UNGA") adopted a resolution to establish an Open-Ended Working Group for taking forward multilateral nuclear disarmament negotiations. The resolution was adopted by 147 votes to 4 with 31 abstentions.[52] The DPRK voted in favour of the resolution, but did not participate in the Open-Ended Working Group.

34. The DPRK votes for UNGA resolutions regarding a Nuclear Weapons Convention. For example, the DPRK voted in favour of the UN General Assembly's Resolution on "Follow-up to the advisory opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons".[53]

35. The first-ever UN General Assembly High-Level Meeting was held on 26 September 2013, pursuant to a 2012 resolution which was supported by the DPRK.[54] The DPRK subsequently voted in favour of a new UN General Assembly resolution following up the High-Level Meeting.[55] 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. On 26 September 2013 the Vice Minister of Foreign Affairs of the DPRK, Mr. Pak Kil Yon, made a statement at the UN High-Level Meeting on Nuclear Disarmament, providing that the DPRK insists on the "complete prohibition and thorough destruction of nuclear weapons" and its "consistent position to achieve a peaceful solution".[56] However, the DPRK does not "expect any progress in nuclear disarmament if nuclear disarmament initiatives are purely for the sake of holding strategic superiority" and demands that "[i]n realizing nuclear disarmament, the United States should take the lead as the very first country that use nuclear weapons and has the largest stockpile of nuclear weapons".[57]

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[52] UN Doc A/67/PV.48, pp 20-21.

[53] Most recently on 5 December 2012 (A/67/PV.48).

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

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

[56] Statement by H.E. Mr. Pak Kil Yon, Vice Minister of Foreign Affairs for the Democratic People's Republic of Korea, at the high-level meeting on nuclear disarmament of the 68th UN General Assembly in New York, 26 September 2013, http://www.un.org/en/ga/68/meetings/nucleardisarmament/pdf/KP_en.pdf.

[57] *Id.*

III. THE LAW

A. Article VI of the NPT: An Obligation *Erga Omnes*

37. 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.

38. 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".[58] 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 control".[59] 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 obligation of result, *i.e.*, to conclude those negotiations".[60]

39. 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".[61] The Court has long emphasized the importance of obligations *erga omnes*, owed to the international community as a whole.[62] Its conclusion in the Advisory Opinion was tantamount to declaring that the obligation in Article VI is an obligation *erga omnes*.[63] Every

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[58] *Supra*, n. 1, para. 99.

[59] *Supra*, n. 1, para. 105, point 2 F.

[60] 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, p. 375.

[61] *Supra*, n. 1, para. 103.

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

[63] *See* President Bedjaoui's Declaration in *Legality of Threat or Use of Nuclear Weapons, supra*, n. 1 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".

State has a legal interest in its timely performance, therefore,[64] and a corresponding legal obligation to help bring it about.[65]

B. Customary International Law

40. The obligations enshrined in Article VI of the NPT are not merely treaty obligations; they also exist separately under customary international law.[66]

41. In its Advisory Opinion, after noting that the twofold obligation in Article VI to pursue and to conclude negotiations *formally* concerns the (now 190[67]) States Parties to the NPT, the Court added that "any realistic search for general and complete disarmament, especially nuclear disarmament, necessitates the cooperation of all States".[68]

42. 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".[69]

43. 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*".[70]

44. In voting over many years since 1996 for the General Assembly resolution on

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[64] *Barcelona Traction, Light and Power Company, Limited, supra,* n. 62.

[65] *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.

[66] 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 I.C.J. 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.

[67] There are 190 States Parties including the DPRK; 189 not including the DPRK. *See supra*, para 21.

[68] *Supra*, n. 1, para. 100.

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

[70] President Bedjaoui's Declaration in *Legality of Threat or Use of Nuclear Weapons, supra,* n. 1, 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.

follow-up to the Court's opinion, the DPRK appears to have accepted the universality of that obligation. In operative paragraph one of the resolution, the General Assembly: "*Underlines once again* the unanimous conclusion of the International Court of Justice that there exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control".[71]

45. 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.[72] The UN Security Council also has repeatedly called for the implementation of Article VI by all States,[73] 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".[74] The Council has also described the proliferation of weapons of mass destruction as a threat to international peace and security.[75]

46. 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.

47. 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 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".[76]

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[71] A/RES/68/42, 5 December 2013.

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

[73] *E.g.*, Resolution 984 of 11 April 1995, cited by the Court in para. 103 of the Advisory Opinion, *supra*, n. 1, and Resolution 1887 of 24 September 2009.

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

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

[76] 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.

C. Good Faith

48. That good faith constitutes a "fundamental principle" of international law is beyond dispute.[77] 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[78] and a cardinal principle of the Law of Treaties,[79] it also encapsulates the essence of the Rule of Law in international society[80] and is one of the Principles of the United Nations.

49. 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".[81]

50. 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 particular in an age when this co-operation in many fields is becoming increasingly essential".[82]

51. 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*

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

[78] *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.

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

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

[81] 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.

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

political will to reach agreements.[83]

52. As set forth above, the customary international law obligation of nuclear disarmament requires 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.[84]

53. 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".[85] Conduct that prevents the fulfilment of a treaty's object and purpose is proscribed.[86] 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.[87]

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[83] *Supra*, n. 76, para. 41 (emphasis added).

[84] *Supra*, para. 38.

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

[86] 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").

[87] *See supra*, para. 49.

IV. OBLIGATIONS BREACHED BY THE DPRK

54. 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 Customary International Law

Nuclear disarmament

55. As set forth above, the Court has provided an authoritative analysis of the obligation of nuclear disarmament. With respect to Article VI of the NPT, 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".[88] 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".[89]

56. Although the DPRK expressly supports the commencement of nuclear disarmament negotiations,[90] it has breached this obligation of customary international law by engaging in a course of conduct, the quantitative build-up and qualitative improvement of its nuclear forces, contrary to the objective of nuclear disarmament.[91]

Cessation of the nuclear arms race at an early date

57. The customary international law obligation of cessation of the nuclear arms race at an early date is rooted in Article VI of the NPT and resolutions of the General Assembly and the Security Council and is inherent in the obligation of nuclear disarmament enunciated by the Court. The Respondent is failing to comply with this obligation; on the contrary, it is engaged in all-out nuclear arms racing and has conducted nuclear explosive tests.

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[88] *Supra*, n. 1, para. 99.

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

[90] *See supra*, Part II.D.

[91] *See supra*, Part II.

58. Its conduct, set forth in Part II of this Application, in quantitatively building up its nuclear forces, qualitatively improving and diversifying them, planning and preparing to maintain them for the indefinite future, and conducting nuclear explosive tests, is clear evidence of the DPRK's ongoing breach of the obligation regarding the cessation of the nuclear arms race at an early date.

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

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

60. As set forth in Part II of this Application, the Respondent is engaged in the quantitative build-up, diversification, and qualitative improvement of its nuclear arsenal. This constitutes vertical nuclear proliferation that clearly conflicts with the Respondent's obligations of 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.

61. The Respondent's plans and policies also manifest an intention to rely on its nuclear arsenal for the indefinite future, and it is conducting nuclear explosive tests.

62. In short, by engaging in conduct that directly conflicts with the obligations of nuclear disarmament and cessation of the nuclear arms race at an early date, the Respondent has breached and continues to breach its legal duty to perform its obligations under customary international law in good faith.

V. JURISDICTION OF THE COURT

63. 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.

64. 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 been reported to be continuing to quantitatively and qualitatively improve its own nuclear arsenal. The 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.

65. 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.

66. 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

67. 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.

68. 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 the DPRK 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, in particular by engaging a course of conduct, the quantitative buildup and qualitative improvement of its nuclear forces, and the conducting of nuclear explosive tests, contrary to the objective of nuclear disarmament;

b) that the DPRK has violated and continues to violate its international obligations under customary international law with respect to cessation of the nuclear arms race at an early date, by taking actions to quantitatively build up its nuclear forces, to qualitatively improve them, to maintain them for the indefinite future, and to conduct nuclear explosive tests;

c) that the DPRK has failed and continues to fail to perform in good faith its obligations under customary international law by taking actions to quantitatively build up its nuclear forces, to qualitatively improve them, to maintain them for the indefinite future and to conduct nuclear explosive tests; and

d) that the DPRK has failed and continues to fail to perform in good faith its obligations under customary international law by effectively preventing the great majority of non-nuclear-weapon States from fulfilling their part of the obligations under customary international law and Article VI of the NPT 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

the DPRK to take all steps necessary to comply with its obligations under customary international law with respect to cessation of the nuclear arms race at an early date and nuclear disarmament 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