APPLICATION

INSTITUTING PROCEEDINGS

AGAINST

THE STATE OF ISRAEL

(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

Table of Contents

I. INTRODUCTION AND SUMMARY 3

II. FACTS 8

A. The Five Nuclear Weapon States Parties to the NPT 8

B. The Nine States Possessing Nuclear Weapons 8

C. Israel and the Nuclear Arms Race 9

1. Early Nuclear History 9

2. Israel's Current Nuclear Arsenal 10

3. Nuclear Policy, Doctrine, and Expenditure 11

4. Current Plans for Expansion, Improvement, and Diversification of Israel's Nuclear Arsenal 12

D. Israel and Nuclear Disarmament 12

III. THE LAW 15

A. Article VI of the NPT: An Obligation *Erga Omnes* 15

B. Customary International Law 16

C. Good Faith 17

IV. OBLIGATIONS BREACHED BY ISRAEL 20

A. Breach of Customary International Law 20

B. Breach of the Obligation to Perform Its Obligations in Good Faith 21

V. JURISDICTION OF THE COURT 22

VI. FINAL OBSERVATIONS 22

REMEDIES 23

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

---

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

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

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

[4] 729 UNTS 161.

[5] *Id.*, 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

---

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

[9] *Id.*, 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 State of Israel ("Israel"), a State possessing nuclear weapons not party to the NPT. The underlying claims, described in more detail herein, are that Israel 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 in an increased global understanding of the movement of radionuclides through marine and

---

[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.

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 Israel 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 *unanimously* holding that "[t]here exists an obligation to pursue in good faith and bring to a

---

[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] *See supra*, n. 4.

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, Israel has not joined the Treaty as a non-nuclear-weapon State, and instead has tested nuclear weapons and acquired a nuclear arsenal which it is maintaining, improving, and diversifying.

13. Israel 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 diversify its nuclear forces and to maintain them for the indefinite future.

14. Similarly, Israel 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 and instead has opposed the efforts of the great majority of States to initiate such negotiations.

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 Israel has breached.

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

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".[24]

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 Democratic People's Republic of Korea ("DPRK").[25]

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

---

[24] 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".

[25] *See infra*, n. 66.

World nuclear forces, January 2013[26]

(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. Israel and the Nuclear Arms Race

1. Early Nuclear History

21. Israel has never officially confirmed or denied having nuclear weapons. As reported consistently by non-governmental sources, however, "Israel is universally believed to possess nuclear arms".[27] Israel officially maintains a nuclear ambiguity, referred to as "nuclear

[26] 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.

[27] *See, e.g.*, Arms Control.Org Fact Sheet, Nuclear Weapons: Who Has What at a Glance (Nov. 2013), http://www.armscontrol.org/factsheets/Nuclearweaponswhohaswhat; *see also,* Nuclear Threat Initiative,

opacity", which limits the understanding of Israel's nuclear status.[28] It has been reported that Israel completed its first nuclear device by 1967, on the eve of the Six-Day War, and achieved a semi-deployable nuclear weapons delivery capability in 1969 or 1970.[29]

22. Israel's nuclear testing record is also opaque. In September 1979, based upon radiological data and a U.S. Vela early-warning satellite, an almost-certain nuclear detonation was detected over the Southern India Ocean, believed to be a collaborative nuclear testing effort between South Africa and Israel.[30]

2. Israel's Current Nuclear Arsenal

23. Based in part on recent purchases, analysts consistently report that Israel has a nuclear triad: land, air and sea.[31]

24. Israel's nuclear opacity contributes to the uncertainty of how it will alter its nuclear arsenal. It has been reported that its arsenal may increase.[32]

25. Because Israel's nuclear program is built upon a non-acknowledgment policy, some reports differ in estimates of Israel's size and composition of its nuclear arsenal, ranging from 80 to 400 warheads. The most frequently cited figure and most current estimate is 100-200

Israel "Overview", (Dec. 2013), http://www.nti.org/country-profiles/israel/ ("Israel is widely understood to possess a sizeable nuclear arsenal".).

[28] Timothy McDonnell, "Nuclear pursuits: Non P-5 nuclear armed states, 2013", *Bulletin of the Atomic Scientists*, p. 66, 2013, DOI: 10.1177/0096340212470816, *available at* http://bos.sagepub.com/content/69/1/62.full.pdf+html; *see also* Phillip Schell and Hans M. Kristensen, "World Nuclear Forces", Chapter VI, Israeli Nuclear Forces, http://www.sipri.org/yearbook/2013/06 ("Israel continues to maintain its long-standing policy of nuclear opacity".); *see also infra* n. 34 ("Israel follows a policy of strategic ambiguity or "nuclear opacity" regarding its nuclear weapons status").

[29] See *supra,* n. 28, McDonnell, "Nuclear pursuits: Non P-5 nuclear armed states, 2013".

[30] *See* Lenard Weiss, *Israel's 1979 Nuclear Test and the U.S. Cover-Up,* Middle East Policy, Vol. XVIII, No. 4, 2011; *see also, supra,* n. 28, McDonnell, "Nuclear pursuits: Non P-5 nuclear armed states, 2013" p. 67.

[31] *E.g.*, Merav Datan, "Israel", 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 and Freedom, 2012), p. 44, http://www.reachingcriticalwill.org/images/documents/Publications/modernization/assuring-destruction-forever.pdf; *see also* Ian Kearns, *Beyond the United Kingdom: Trends in Other Nuclear Armed States,* Discussion Paper 1 of the BASIC Trident Commission, p. 27, 2011, http://www.basicint.org/sites/default/files/commission-briefing1.pdf ("In terms of delivery systems, Israel has options across land, sea and air"); *see also infra* n. 33.

[32] *See* Hans Kristensen and Robert S. Norris, "Global nuclear weapons inventories, 1945-2013", *Bulletin of the Atomic Scientists,* p. 76, 2 Sept. 2013, http://bos.sagepub.com/content/69/5/75.full.pdf+html.

warheads.[33] It is on the basis of such reporting that the Applicant takes the position that Israel, indeed, possesses, nuclear weapons.

3. Nuclear Policy, Doctrine, and Expenditure

26. Israel's officials state that it would not be the first nation in that region to introduce nuclear weapons.[34] Although Israel does not acknowledge their nuclear weapons capability and has no official policy regarding possible use of nuclear weapons, as early as 1966, it began implying it would use nuclear weapons if certain "red lines" were crossed.[35] These red lines are reported to include a penetration by Arab forces into populated areas within Israel, destruction of Israeli Air Forces, biological or chemical attacks on Israeli cities, and the use of nuclear weapons against Israel.[36]

27. Israel signed the Comprehensive Nuclear-Test-Ban Treaty in 1996, but has failed to ratify it. It is reported that Israel will not ratify that treaty until a comprehensive Mideast peace is secured, and officially would also require regional adherence to the CTBT prior to considering ratification.[37]

28. Israel historically has been very cautious about a Fissile Materials Cut-off Treaty (FMCT), and in the past decade its position has moved to opposition, at least as far as its own participation in such a treaty.[38] In 2012, Israel abstained on the General Assembly resolution calling for negotiations on an FMCT in the Conference on Disarmament.[39]

---

[33] *See* Merav Datan, "Israel", in Ray Acheson, ed., Still assuring destruction forever (Reaching Critical Will – a project of the Women's International League for Peace and Freedom, 2013), p. 12, http://www.reachingcriticalwill.org/images/documents/Publications/modernization/still-assuring-destruction-forever.pdf.

[34] *See* Jonathan Medalia et al., *Nuclear Weapons R&D Organizations in Nine Nations*, Congressional Research Service, R40439, p. 6, 1 May 2013, *available at* https://www.fas.org/sgp/crs/nuke/R40439.pdf.

[35] *See* Harold A. Feiveson et al., "Viewpoint: No First Use of Nuclear Weapons", *Nonproliferation Review,* pp. 3-4, http://cns.miis.edu/npr/pdfs/102feiv.pdf.

[36] *Id.*

[37] The Center for Arms Control, "CTBT at Fourteen: Prospects for Entry into Force", http://armscontrolcenter.org/issues/nuclearweapons/articles/ctbt_at_fourteen_prospects_for_entry_into_force/; *see also,* Katarzyna Kubiak, CTBT Entry into Force Taken Hostage by Regional Conflicts, prepared for the "Comprehensive Test Ban Treaty (CTBT) Entry-Into-Force Issues" Conference, IGCC Nuclear Security D.C. Policy Series, p. 5, September 2011, http://igcc.ucsd.edu/assets/001/503346.pdf.

[38] Avner Cohen and Marvin Miller, "Israel", in Country Perspectives on the Challenges to a Fissile Material (Cutoff) Treaty, International Panel on Fissile Materials, 2008, pp. 29-32, http://ipfmlibrary.org/gfmr08cv.pdf; *see also,* Kubiak, CTBT Entry into Force, *supra*, n. 37, p. 6.

[39] A/RES/67/53, 3 December 2012.

29. Although there have been some reports indicating that there is a lack of reliable estimates on Israel's nuclear weapon spending,[40] it also has been reported that Israel's nuclear spending in 2010 and 2011 was approximately U.S. $1.9 billion each year.[41]

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

30. It is reported that Israel is steadily modernizing its nuclear arsenal and advancing the sophistication of its nuclear weapons.[42] In light of recent purchases by Israel, it has been reported that it is continuing to enhance its triad of delivery systems.[43]

31. Israel is reported to be currently modernizing, either in the fielded stage or in the planning stage, the following components of its nuclear arsenal:[44]

IRBM (Intermediate-range ballistic missile):

- Jericho III IRBM planning?

SSG / SLBM (Submarine-launched ballistic missile):

- Dolphin SSG fielding
- SLCM (Submarine-launched cruise missile; Popeye Turbo/Harpoon) fielding?

Bomber:

- F-35 acquisition

D. Israel and Nuclear Disarmament

32. Israel has not joined the NPT as an NNWS, the only option open to it under the

---

[40] *See supra,* n. 33 at 13.

[41] Bruce G. Blair and Matthew A. Brown, Nuclear Weapons Cost Study, Global Zero Technical Report, June 2011, p. 1 (annual expenditure is US $1.9 billion), http://www.globalzero.org/files/gz_nuclear_weapons_cost_study.pdf.

[42] *See* 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, http://www.fas.org/programs/ssp/nukes/publications1/Brief2013_GWU-APS.pdf.

[43] *See supra,* n. 33.

[44] *See* Kristensen, Modernizing Nuclear Arsenals, *supra* n. 42.

terms of the Treaty.[45]

33. On 3 December 2012 (A/RES/67/56), the UN General Assembly 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.[46] Israel abstained from voting and declined to participate in the Open-Ended Working Group.

34. Israel has not participated in negotiations regarding a Nuclear Weapons Convention and opposes doing so.[47]

35. Israel has always voted against 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". The Resolution, adopted every year since 1996,[48] underlines the ICJ's unanimous conclusion that there is an obligation to pursue negotiations leading to nuclear disarmament and calls on States to immediately fulfil that obligation by commencing multilateral negotiations leading to the early conclusion of a Nuclear Weapons Convention.

36. In 1997, at the request of Costa Rica, the UN Secretary-General circulated to all UN Member States a Model Nuclear Weapons Convention.[49] Costa Rica submitted the Model Convention as "an effective and helpful instrument in the deliberative process for the implementation of" the annual resolution on follow-up to the ICJ Advisory Opinion.[50] In 2008, at the request of Costa Rica and Malaysia, the Secretary-General circulated an updated version of the Model Convention.[51] The Secretary-General later described the Model Convention as "a good point of departure" for negotiation of a Nuclear Weapons Convention.[52]

37. The Model Convention applies the approach taken by the Chemical Weapons Convention. The Model Convention provides general obligations regarding the non-use and

---

[45] Israel does not qualify as a nuclear-weapon State under Article IX.3 of the Treaty.

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

[47] Vote on A/RES/66/46, 2 December 2011.

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

[49] *See* Letter dated 31 October 1997 from the Charge d'affaires a.i. of the Permanent Mission of Costa Rica to the United Nations Addressed to the Secretary-General, U.N. Doc. A/C.1/52/7 (17 November 1997).

[50] *Id.*

[51] Letter dated 17 December 2007 from the Permanent Representatives of Costa Rica and Malaysia to the United Nations Addressed to the Secretary-General, U.N. Doc. A/62/650 (18 January 2008).

[52] Press Release, Secretary-General Ban Ki-moon, The United Nations and Security in a Nuclear-Weapon-Free World, U.N. Doc. SG/SM/11881 (24 October 2008), *available at* http://www.un.org/News/Press/docs/2008/sgsm11881.doc.html.

non-possession of nuclear weapons and their verified dismantlement; sets out phases of elimination; provides for multiple means of reporting, monitoring and verification, from declarations of states to satellite observation; prohibits production of fissile material for nuclear weapons; requires national implementation measures; provides for prosecution of individuals accused of committing crimes proscribed by the convention; establishes an implementing agency; and establishes mechanisms for dispute resolution and compliance inducement and enforcement. The Model also builds upon existing nuclear non-proliferation and disarmament regimes and verification and compliance arrangements, including the NPT, International Atomic Energy Agency safeguards, the International Monitoring System for the CTBT, regional nuclear weapon-free zones, UN Security Council Resolution 1540, the International Convention for the Suppression of Acts of Nuclear Terrorism, and bilateral agreements between Russia and the United States.

38. Despite the annual UN General Assembly resolution discussed above, however, there have been no inter-governmental negotiations or deliberations in any official forum leading toward adoption of a Nuclear Weapons Convention, except in the above-mentioned Open-Ended Working Group in which Israel declined to participate.

39. In February 2008, the UN High Representative for Disarmament Affairs, Sergio Duarte, condemned the great powers' "refusal to negotiate or discuss even the outlines of a nuclear-weapons convention" as "contrary to the cause of disarmament".[53]

40. The first-ever UN General Assembly High-Level Meeting on Nuclear Disarmament was held on 26 September 2013, pursuant to a 2012 resolution on which Israel abstained.[54] Israel did not speak. It subsequently voted against a new UN General Assembly resolution following up on 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.

---

[53] 'Nuclear Disarmament and the NPT: The Responsibility of the Nuclear-Weapon States', by Sergio Duarte, High Representative for Disarmament Affairs, United Nations, Global Summit for a Nuclear Weapon-Free World: Laying the Practical, Technical, and Political Groundwork, Campaign for Nuclear Disarmament and Acronym Institute for Disarmament Diplomacy, London, 16 February 2008, http://www.un.org/disarmament/HomePage/HR/docs/2008/2008Feb16_London.pdf.

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

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

III. THE LAW

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

41. 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.[56]

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".[57] 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".[58] 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".[59]

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

---

[56] *See supra*, n. 4.

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

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

[59] 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.

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

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

[62] *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,[63] and a corresponding legal obligation to help bring it about.[64]

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.[65]

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)[66] 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".[67]

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".[68]

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*".[69]

---

[63] *Barcelona Traction, Light and Power Company, Limited, supra,* n. 61.

[64] *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.

[65] *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.

[66] 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.

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

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

[69] 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

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.[70] The UN Security Council also has repeatedly called for the implementation of Article VI by all States,[71] 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".[72] The Council has also described the proliferation of weapons of mass destruction as a threat to international peace and security.[73]

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 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".[74]

C. Good Faith

51. That good faith constitutes a "fundamental principle" of international law is beyond dispute.[75] Not only is it a general principle of law for the purposes of Article 38(1)(c) of

---

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.

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

[71] *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.

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

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

[74] 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.

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

the Statute of the International Court of Justice[76] and a cardinal principle of the Law of Treaties,[77] it also encapsulates the essence of the Rule of Law in international society[78] 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".[79]

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 particular in an age when this co-operation in many fields is becoming increasingly essential".[80]

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.*[81]

55. 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

---

[76] *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.

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

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

[79] 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.

[80] *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).

[81] *Supra*, n. 74, para. 41 (emphasis added).

result.[82]

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".[83] Conduct that prevents the fulfilment of a treaty's object and purpose is proscribed.[84] 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.[85]

---

[82] *Supra*, para. 42.

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

[84] 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 . . ."; *see also,* 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"); *see also,* 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").

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

IV. OBLIGATIONS BREACHED BY ISRAEL

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 Customary International Law

Nuclear disarmament

58. 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".[86]

59. 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".[87]

60. Israel has breached and continues to breach this obligation of customary international law by opposing negotiations for nuclear disarmament and a Nuclear Weapons Convention and by failing to participate in the Open-Ended Working Group.[88]

Cessation of the nuclear arms race at an early date

61. 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 nuclear arms racing.

62. Its conduct, set forth in Part II of this Application, in qualitatively improving and

---

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

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

[88] *See supra*, Part II.

diversifying its nuclear forces, and planning and preparing to maintain them for the indefinite future, and by failing to pursue negotiations on comprehensive nuclear disarmament or other measures that would end nuclear arms racing, is clear evidence of Israel'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

63. 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 failing to act in good faith as far as its performance of those obligations is concerned.

64. As set forth in Part II of this Application, the Respondent is engaged in the 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.

65. The Respondent's plans and policies also manifest an intention to rely on its nuclear arsenal for decades to come.

66. As further set forth in Part II of this Application, while engaging in vertical nuclear proliferation, Respondent opposes negotiations for nuclear disarmament and a Nuclear Weapons Convention.

67. 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

68. 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.

69. 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 refused to initiate or to participate in such negotiations. It has refused to do so 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.

70. 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.

71. 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

72. 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.

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 Israel 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;

b) that Israel 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 diversify and qualitatively improve its nuclear forces, 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;

c) that Israel has failed and continues to fail to perform in good faith its obligations under customary international law by taking actions to qualitatively improve and diversify its nuclear forces, and to maintain them for the indefinite future, while at the same time failing to pursue negotiations as set out in the two preceding counts; and

d) that Israel 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

Israel 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