# APPLICATION

**INSTITUTING PROCEEDINGS**

**AGAINST**

## THE UNITED STATES OF AMERICA

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

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

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

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

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

[2] 729 UNTS 161.

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

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

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

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

[7] NPT preamble, 2nd recital.

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

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

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

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[8] *See, e.g.*, WMDC Report 2006 and Commentary Nuclear Disorder or Cooperative Security? U.S. Weapons of Terror, the Global Proliferation Crisis, and Paths to Peace (May 2007), http://wmdreport.org/pages/nucleardisorder-announce.htm ('So long as any State has such weapons — especially nuclear arms — others will want them. So long as any such weapons remain in any State's arsenal, there is a high risk that they will one day be used, by design or accident. Any such use would be catastrophic.').

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

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

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

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

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

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

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

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

9. While cessation of the nuclear arms race and nuclear disarmament are vitally important objectives for the entire international community, the Marshall Islands has a particular awareness of the dire consequences of nuclear weapons. The Marshall Islands was the location of repeated nuclear weapons testing from 1946 to 1958, during the time that the international community had placed it under the trusteeship of the U.S. [17] During those 12 years, 67 nuclear

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

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

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

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

weapons of varying explosive power were detonated in the Marshall Islands, at varying distances from human population. [18] According to the 3 September 2012 Report of Calin Georgescu, a Special Rapporteur to the UN Human Rights Council, the devastating adverse impact on the Marshall Islands of those nuclear substances and wastes continues to this day.[19] The Special Rapporteur concludes that "the harm suffered by the Marshallese people has resulted in an increased global understanding of the movement of radionuclides through marine and terrestrial environments", and urges the international community to "learn from the Marshallese experience with nuclear contamination, particularly the…understanding of the relationship between radioiodine and thyroid cancer".[20] To be clear, this Application is *not* directed at compensation for such testing or its ongoing effects, or at the continuing testing in the Marshall Islands by the U.S. of its nuclear weapons delivery systems. Rather, this background is provided to explain in part the Applicant's firsthand experience of the long-term lethal effects of nuclear weapons, as well as its interest, as a member of the international community and as a Party to the NPT, in compliance with the obligations under Article VI of the NPT and customary international law.

10. With regard to the RMI's interest in bringing this Application to the Court, the following should be added. It is well known that over recent years the RMI has been preoccupied with combating the extremely harmful consequences that the effects of climate change have for its very survival. While focusing on the problem of climate change, the RMI has come to realize that it cannot ignore the other major threat to its survival: the ongoing threat posed by the existence of large arsenals of nuclear weapons the use of which, according to the Court, "seems scarcely reconcilable with respect for […] requirements [of the principles and rules of law applicable in armed conflict]".[21] It is obvious that the RMI's participation in the common struggle against climate change needs to lead to firm commitments by all States, which commitments must include not only moral, but also legal obligations aimed at realizing concrete, clear-cut goals in order to remove the threat of devastation caused by continued reliance on the use of fossil fuel energy sources. It is from this perspective of striving to reach agreement on such commitments in the struggle against climate change that the RMI has concluded that it is no longer acceptable simply to be a party to the NPT while the NPT nuclear-weapon States are refusing even to begin negotiations that will lead to total nuclear disarmament. This Application seeks to ensure that the legal obligations undertaken 44 years ago by the U.S. in the context of the NPT do indeed deliver the promised result.

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

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

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

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

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

11. One of the reasons why the RMI became a Party to the NPT is that this Treaty is the key instrument of the international community for ridding the world of nuclear weapons.[22] The Treaty contains the solemn promise and legal obligation of the nuclear weapon States to sit down and negotiate towards total nuclear disarmament. That promise has been broken and that obligation has not been met.

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

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

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

14. More than four decades after signing and ratifying the NPT, the U.S. maintains and continuously modernizes its nuclear arsenal.

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

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

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

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

[23] *Supra*, n. 2.

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

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

## II. FACTS

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

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

20. In the 1960s, negotiations eventuated in agreement on the Nuclear Non-Proliferation Treaty. The U.S., Russia, the UK, France and China, all Parties to the NPT, are the only States meeting the Treaty's definition of a "nuclear-weapon State" for "the purposes of this Treaty".[25]

21. The Treaty was opened for signature on 1 July 1968, and entered into force on 5 March, 1970. President Lyndon Johnson signed the Treaty on 1 July 1968. The Senate voted to consent to ratification by the U.S. on 13 March 1969, by a vote of 83 to 15, and President Richard Nixon signed the ratification documents for the Treaty on 24 November 1969.

### B. The Nine States Possessing Nuclear Weapons

22. In addition to the five NPT nuclear-weapon States, four non-NPT States are known to possess nuclear weapons: India, Pakistan, Israel and the Democratic People's Republic of Korea ("DPRK").[26]

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

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[25] 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 infra*, n. 86.

**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 |
| 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. The U.S. and the Nuclear Arms Race

### 1. Early Nuclear History

24. Following World War II and continuing the nuclear arms race, on 1 November 1952, the U.S. detonated the world's first *thermo*nuclear weapon—a hydrogen bomb, on Eniwetok atoll, an atoll in the Marshall Islands.[28] The blast had an explosive yield of 10.4

[27] 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.

[28] *See* http://www.pbs.org/wgbh/amex/bomb/peopleevents/pandeAMEX63.html.

megatons, over 400 times the destructive force of the bomb the U.S. dropped on Hiroshima.[29]

25. Thereafter, the U.S. rapidly built its nuclear arsenal, including vast numbers of strategic and tactical nuclear weapons, and land, air and naval capabilities, while warning times for nuclear strikes continued to shrink.

### 2. The U.S. Current Nuclear Arsenal

26. Independent estimates place the total number of nuclear weapons currently in the active U.S. stockpile at 4650.[30] These estimates indicate it also has approximately 3000 "retired" warheads, an unknown number of which are being maintained for possible reactivation.

27. The U.S. currently reports 1688 nuclear warheads on 809 deployed ICBMs, SLBMs, and heavy bombers.[31] This does not include warheads that are in the stockpile that could be carried by delivery systems not defined as deployed.

28. The U.S. is estimated to have 450 Minuteman III ICBM's each deployed with between one and three warheads with the capacity for additional warheads to be uploaded, 14 Trident missile submarines each with 24 launch tubes for the Trident D5 submarine launched ballistic missile with 1152 warheads deployed, and 94 nuclear capable strategic bombers, 20 B2's and 78 B52Hs.[32]

29. Independent estimates indicate the U.S. stockpile has 760 non-strategic nuclear weapons with about 200 deployed at air bases in NATO countries in Europe.[33]

### 3. Nuclear Policy, Doctrine and Expenditure

30. The 2010 Nuclear Posture Review Report carried forward longstanding US policy. It states that the "fundamental role of U.S. nuclear weapons … is to deter nuclear attack

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[29] CTBTO Preparatory Commission, "The United States' Nuclear Testing Programme", http://www.ctbto.org/nuclear-testing/the-effects-of-nuclear-testing/the-united-states-nuclear-testing-programme.

[30] Global Fissile Material Report 2013: *Increasing Transparency of Nuclear Warhead and Fissile Material Stocks as a Step Toward Disarmament, International Panel on Fissile Materials*, October 2013, p. 50.

[31] *See* Amy F. Woolf, *U.S. Strategic Nuclear Forces: Background, Developments, and Issues, Congressional Research Service*, 22 October 2013, p. 1, *available at* http://www.state.gov/t/avc/rls/ 215000.htm (hereinafter "Woolf Strategic Forces"), *citing* U.S. Department of State, Bureau of Arms Control, Verification, and Compliance, New START Treaty Aggregate Numbers of Strategic Offensive Arms, Fact Sheet, Washington, DC, October 1, 2013, http://www.state.gov/t/avc/rls/ 215000.htm.

[32] *See* Woolf Strategic Forces, *id.*

[33] *See* Amy F. Woolf, *Nonstrategic Nuclear Weapons, Congressional Research Service*, 3 January2014, p. 2.

on the United States, our allies, and partners".[34] However, with respect to "states that possess nuclear weapons and states not in compliance with their nuclear non-proliferation obligations[,] there remains a narrow range of contingencies in which U.S. nuclear weapons may still play a role in deterring a conventional or CBW [chemical or biological weapon] attack against the United States or its allies and partners".[35] The Report adds that the "United States wishes to stress that it would only consider the use of nuclear weapons in extreme circumstances to defend the vital interests of the United States or its allies and partners".[36]

31. On the issue of nuclear testing, the U.S. has signed but not ratified the Comprehensive Test-Ban-Treaty ("CTBT"); ratification was rejected by the U.S. Senate in 1999 even after a bargain was made to modernize its nuclear weapons infrastructure in exchange for ratification.

32. The Obama administration has stated that CTBT ratification "remains a top priority for the United States",[37] but to date there have been no congressional hearings on the treaty during his Administration.

33. The U.S. unilaterally withdrew from the Anti-Ballistic Missile Treaty in 2002; continuing U.S. development and deployment of ballistic missile defense systems is a serious impediment to further disarmament progress.[38]

34. U.S. nuclear weapons, the associated systems for fighting nuclear wars, and the factories and laboratories to design, produce, and maintain these weapons all are owned, managed, and operated by an interlocking network of public agencies and private corporations.[39]

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[34] U.S. Department of Defense, Nuclear Posture Review Report, April 2010, p. 15, *available at* http://www.defense.gov/npr/.

[35] *Id.* at p. 16.

[36] *Id.* A 2013 presidential nuclear weapons employment guidance, described by a report of the Department of Defense, reaffirms the Nuclear Posture Review. Defense Department (June 2013) Report on Nuclear Employment Strategy of the United States, *available at* http://www.defense.gov/pubs/; *see also* Hans M. Kristensen and Robert S. Norris, U.S. nuclear forces, 2014, Bulletin of the Atomic Scientists, 2014, *available at* http://bos.sagepub.com/cgi/reprint/70/1/85.

[37] Rose Gottemoeller, Acting Under Secretary for Arms Control and International Security, remarks, "The Obama Administration's Second Term Priorities for Arms Control and Nonproliferation", Geneva Centre for Security Policy, 20 March 2013; Jonathan Medalia, Comprehensive Nuclear-Test-Ban Treaty: Background and Current Developments, Congressional Research Service, 10 June 2013, p. 2.

[38] *See* Andrew Lichterman, "United States", 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) (hereafter "Lichterman"), p. 98, http://www.reachingcriticalwill.org/images/documents/Publications/modernization/assuring-destruction-forever.pdf.

[39] *See id.*, pp. 100-104.

These in turn are part of a military-industrial-political complex of unprecedented size and power.[40]

35. The fiscal year 2012 U.S. military budget, including nuclear weapons spending, totaled about US$650 billion, which is about 43% of global military spending.[41] It is difficult to calculate total annual U.S. spending on nuclear weapons in a consistent manner. Although most budgetary information directly related to nuclear weapons programmes is not classified, it is spread across many programs administered by different agencies and is not cumulatively tracked or reported.

36. In a December, 2013 report on the projected costs of U.S. nuclear forces, the Congressional Budget Office estimated that over the next ten years $136 billion will be spent for nuclear delivery systems, $105 billion in nuclear weapons and nuclear reactors, and $56 billion for nuclear command, control, communications, and early warning systems. There are other estimates in the report, based on past cost growth, which set aside an additional $59 billion in other related nuclear forces costs. At the time of the Fiscal Year 2012 President's Budget Request submitted to Congress in early February 2011, the administration anticipated spending approximately $88 billion for bombs and warheads and supporting infrastructure and about $125 billion for delivery systems over a ten year period.[42] Independent estimates of total U.S. spending for nuclear weapons and related programmes place the number even higher, at $31 billion or more annually.[43]

37. Nuclear weapons programmes of the National Nuclear Security Administration are proposed to increase 4.1% according to comparison of budget categories used for the first time in the FY2013 budget request submitted to Congress. If consistent sets of budget lines are compared, the increase in weapons activities is 7.5% from the FY2013 continuing resolution enacted into law in March 2013.

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[40] *Id.* at p. 100.

[41] Friends Committee on Legislation, "Comparison of FY 2011 and FY 2012 military spending", *available at* http://www.noodls.com/viewNoodl/12697867/fcnl---friends-committee-on-national-legislation/comparison-of-fy-2011-and-fy-2012-military-spending, *citing* Conference Report, Consolidated Appropriations Act, 23 December 2011.

[42] Congressional Budget Office. *Projected Costs of U.S. Nuclear Forces, 2014 to 2023,* December 2013, p. 6, *available at* http://www.cbo.gov/publication/44968.

[43] *See, e.g.*, Bruce G. Blair & Matthew A. Brown, *"World Spending on Nuclear Weapons Surpasses $1 Trillion per Decade"*, Global Zero Technical Report, Nuclear Weapons Cost Study, 2011; *see also* Russell Rumbaugh and Nathan Cohn, *Resolving Ambiguity: Costing Nuclear Weapons,* The Henry L. Stimpson Center, June 2012.

### 4. Current Plans for Modernization and Qualitative Improvements of the U.S. Nuclear Arsenal

38. The U.S. government is officially committed to modernizing its nuclear bombs and warheads; the submarines, missiles, and aircraft that carry them; and the laboratories and plants that design, maintain, and manufacture nuclear weapons.

39. U.S. policy documents manifest intent to keep some thousands of nuclear weapons in service for the foreseeable future, together with the capability to bring stored weapons back into service and to design and manufacture new weapons should they be desired.

40. A recent Air Force solicitation for next-generation land-based nuclear missiles, for example, called for nuclear missile concepts that could share components with non-nuclear "prompt global strike" systems, asked contractors to explore new basing modes including mobile missiles, and stated that proposed replacement systems should "provide or *enable new capabilities*".[44]

41. The U.S. is refurbishing and upgrading many of the facilities where nuclear weapons are designed, tested, and manufactured, and is expanding its capacity to produce tritium (a relatively short-lived radioactive isotope used to boost the yield in nuclear weapons) using a commercial reactor.[45]

42. Two ongoing nuclear modernization programs in the U.S., the W78 Life Extension Program (LEP) and the B61-12 LEP, demonstrate that the U.S. continues to build nuclear weapons with new military characteristics that are capable of being deployed for an additional *thirty years or more*. Simultaneous plans by the U.S. to design, manufacture, and deploy new generations of bombers, submarines, and land-based missiles demonstrate that the U.S. plans to rely on nuclear weapons for decades to come.

43. Based on government documentation, one non-governmental organization summarized the modernization programs for the U.S. Department of Defense and the U.S. National Nuclear Security Administration in the following tables:[46]

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[44] Air Force Nuclear Weapons Center (AFNWC), Intelligence, Program Development and Integration Directorate (XZ), Broad Agency Announcement, Ground Based Strategic Deterrent, BAA-AFNWC-XZ-13-001, 7 January 2013 (emphasis added).

[45] Elaine M. Grossman, "Some Nuclear Experts Question Ramp-up in U.S. Tritium Production", *Global Security Newswire,* 28 October 2011; *see also* Department of Energy, *FY 2014 Congressional Budget Request: National Nuclear Security Administration*, April 2013, V. 1 pp. 153-155.

[46] Arms Control Association, "U.S. Nuclear Modernization Programs", January 2014, http://www.armscontrol.org/factsheets/USNuclearModernization#chart).

| U.S. NUCLEAR MODERNIZATION PROGRAMS | | | | |
|---|---|---|---|---|
| **Department of Defense Programs** | | | | |
| **System** | **Modernization Plan** | **Costs** | **Length of Deployment** | **Additional Information** |
| **Minuteman III ICBM** | Modernization and Replacement Program | $7 billion | through 2030 and possibly longer | Modernizes the propellant, guidance systems, propulsion system, targeting system, reentry vehicles and continues work on the rocket motors |
| **Next ICBM** | ICBM follow on study | $10 billion (FY 2014-2023) | | Analysis of Alternatives will be completed in 2014, at which point the Air Force will determine if it will go forward with the program |
| **B-2 Bomber** | Modernization Program | $9.5 billion (FY 2000-2014) | 2050s | Improves radar and high frequency satellite communications capabilities for nuclear command and control |
| **B-52H Bomber** | On-going modifications | | 2040s | Incorporates global positioning systems, updates computers and modernizes heavy stores adapter beams, and a full array of advance weapons |
| **Long Range Strike Bomber** | Research and development phase | $32 billion (FY 2014-2023) | | The exact specifications of the new bomber are yet to be determined |
| **Long Range Standoff Cruise Missile** | Replacement for the ALCM | $10-20 billion (estimated) | | Air Force is completing the Analysis of Alternatives. |
| **SSBNX** | New ballistic missile submarine | $100 billion (estimated) | 2031 - 2080s | Replacement submarine for the existing Ohio-class SSBN |
| **Trident II D5 SLBM LEP** | Modernization and life extension | | 2042 | |

| Department of Energy - NNSA Weapons Activities | | | | |
|---|---|---|---|---|
| **System** | **Modernization Plan** | **Costs** | **Length of Deployment** | **Additional Information** |
| **W76** | Life Extension Program | $4 billion | 2040-2050 | Scheduled for completion in 2018 |
| **B61 - 3/4/7/10** | Life Extension Program | $10 billion | 2040s | Scheduled for completion in 2023 |
| **W78** | Life Extension Program | $5 billion | 2050s | Scheduled for completion in 2025 |
| **W88** | Life Extension Program | | | Scheduled to begin in FY 2016 and end in FY 2031 |

44. Under the UK-U.S. Mutual Defence Agreement, a new "arming, fusing and firing system" developed by the U.S. is to be used in current UK warheads.[47] The system would improve the nuclear warhead's effectiveness against hardened targets.

## D. The U.S. and Nuclear Disarmament

### 1. History and General Policy Regarding Negotiation of Nuclear Disarmament

45. On 3 January 2012 the UN General Assembly decided to establish an Open-Ended Working Group to develop proposals to take forward multilateral nuclear disarmament negotiations for the achievement and maintenance of a world without nuclear weapons.[48] The resolution was adopted by 147 votes to 4 with 31 abstentions. The U.S. voted against the resolution along with France, the UK and Russia.[49]

46. In a statement made jointly with France and the UK in the UN General Assembly First Committee on 6 November 2012, the U.S. declared that it was "unable to support this resolution, the establishment of the OEWG and *any outcome it may produce*" (emphasis

[47] Richard Norton-Taylor, "Trident more effective with U.S. arming device, tests suggest", *The Guardian*, 6 April 2011, http://www.theguardian.com/uk/2011/apr/06/trident-us-arming-system-test; *see also* Hans M. Kristensen and Robert S. Norris, "British Nuclear Forces", *Bulletin of the Atomic Scientists*, September/October 2011 vol. 67 no. 5 89-97, http://bos.sagepub.com/content/67/5/89.full#ref-24.

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

[49] UN Doc A/67/PV.48, pp 20-21; *see also* Beatrice Fihn, "Disarmament Machinery", First Committee Monitor, Reaching Critical Will, 12 November 2012, www.reachingcriticalwill.org.

added).[50]

47. Although the U.S. negotiated the CTBT and signed it in 1996, it has failed to ratify the treaty. Since signing the CTBT, the U.S. has conducted subcritical nuclear tests.[51] The first subcritical nuclear experiment was conducted by the U.S. on2 July 1997.[52] To date, the U.S. has conducted at least 26 subcritical nuclear experiments.[53] The subcritical tests are just one element of a large-scale experimental and supercomputing enterprise, known as "Stockpile Stewardship", put into place to substitute for nuclear explosive testing.[54] After the 2000 Treaty Review Conference and before the 2005 Treaty Review Conference, the U.S. announced it would not seek Senate approval of the CTBT, thus sending a message to the world that the U.S. was not pursuing ratification of the CTBT.[55] During the same time period, the U.S. also withdrew from the 1972 Anti-Ballistic Missile Treaty ("AMB"), paving the way for further testing and deployment of missile defense systems that would help drive the continued offensive nuclear arms race with Russia and China.[56] The Obama administration has announced its intent to seek Senate approval of the CTBT, but no Senate hearings have taken place or been scheduled. No steps have been taken to replace the ABM Treaty.

48. On5 April 2009, President Obama, in a speech in Prague, Czech Republic, said, "So today, I state clearly and with conviction America's commitment to seek the peace and security of a world without nuclear weapons". He continued, "I'm not naive. This goal will not be reached quickly -- perhaps not in my lifetime".[57]

49. While the U.S. has pursued negotiations on strategic arms reductions and has reached agreements with the Soviet Union (and then with its successor state, Russia) to reduce the number of nuclear warheads deployed on delivery systems in their respective arsenals, the U.S. has not engaged in good faith negotiations to *disarm* its nuclear arsenal. Such negotiations

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[50] *See* http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/1com/1com12/eov/L46_France-UK-US.pdf.

[51] *See, e.g.*, Jonathan Medalia, Comprehensive Nuclear-Test-Ban Treaty: Background and Current Developments, 10 June 2013 (Congressional Research Service); Jonathan Medalia, Nuclear Weapons: Comprehensive Test Ban Treaty (2 June 2005), *available at* http://www.history.navy.mil/library/online/nucweps.text.ban.html.

[52] *Id.*

[53] *Id.*

[54] *See* Lichterman, *supra*, n. 38 at pp. 95-96.

[55] *See* Medalia, *supra,* n. 51.

[56] *See, e.g.*, Federation of American Scientists, The Nuclear Information Project, Anti-Ballistic Missile Treaty News, *available at* https://www.fas.org/nuke/control/abmt/news/.

[57] President Barack Obama, Remarks in Prague, Czech Republic (5 April 2009), http://prague.usembassy.gov/obama.html (emphasis added).

would have the goal of a new treaty, a Nuclear Weapons Convention, for the complete elimination of nuclear arms.

50. In 2010, Ellen Tauscher, the then U.S. Under-Secretary for Arms Control and International Security, stated:

> "Nuclear disarmament is not the Holy Grail. It's only worth pursuing in so far as it increases our national security".[58]

51. During his confirmation hearings, on24 January 2013, John Kerry, now the Secretary of State, in sworn testimony stated that nuclear disarmament is "an aspiration. And we should always be aspirational . . . But it's not something that could happen in today's world . . ."[59]

**2. Opposition to Negotiation of a Nuclear Weapons Convention**

52. The U.S. is generally opposed to a Nuclear Weapons Convention. The U.S. 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,[60] 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.

53. At the NPT Review Conference in 2010, the U.S. argued that a convention is not achievable in the near term and therefore is not a realistic alternative to the step-by-step approach to disarmament currently under way.[61]

54. The U.S. has also argued that "trying to combine all the issues into a single negotiation" would be "a formula for deadlock", and expressed concern that such an effort would distract energy and attention from practical steps.[62]

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[58] Ellen Tauscher, Under Sec'y for Arms Control & Int'l Sec., U.S. Dep't of State, Remarks at the Global Zero Summit (Feb. 3, 2010), http://www.state.gov/t/us/136425.htm (emphasis added); *see also* Peter Weiss, Taking the Law Seriously: The Imperative Need for a Nuclear Weapons Convention, 34 Fordham Int'l L.J. 776, 782-83 (2011), *citing* same.

[59] As reported at http://www.cnn.com/2013/01/24/politics/kerry-nomination/.

[60] Most recently on 5 December 2013 (A/RES/68/42), *available at* http://www.un.org/en/ga/68/resolutions.shtml.

[61] Statement by the U.S. to the NPT Review Conference, New York, 10 May 2010, *available at* http://www.icanw.org/wp-content/uploads/2012/08/nwcguide2012.pdf.

[62] *Id.*

55. The U.S. has stated that it believes that it is not possible to negotiate a Nuclear Weapons Convention before negotiating a fissile materials cut-off treaty.[63]

56. In the UN General Assembly's First Committee in October 2010, the U.S. expressed support for "a pragmatic step-by-step approach" to nuclear disarmament but opposed what it termed "the impractical leap of seeking to negotiate a nuclear weapons convention".[64]

57. At a UN conference in Japan in 2011, the U.S. stated that "unfortunately" it cannot support a Nuclear Weapons Convention "at this time".[65]

58. In 1997, at the request of Costa Rica, the UN Secretary-General circulated to all UN Member States a Model Nuclear Weapons Convention.[66] 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.[67] In 2008, at the request of Costa Rica and Malaysia, the Secretary-General circulated an updated version of the Model Convention.[68] The Secretary-General later described the Model Convention as "a good point of departure" for negotiation of a Nuclear Weapons Convention.[69]

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

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[63] Statement by the U.S. to the Conference on Disarmament, Geneva, 7 September 2010, *available at* http://www.icanw.org/wp-content/uploads/2012/08/nwcguide2012.pdf.

[64] Statement by the U.S. to the UN General Assembly's First Committee, New York, 5 October 2010, *available at* http://www.abolitionforum.org/site/wp-content/uploads/2011/08/NWC-positions-December2010.pdf.

[65] Oral remarks by the U.S. to the UN Conference on Disarmament Issues, Matsumoto, 28 July 2011, *available at* http://www.icanw.org/wp-content/uploads/2012/08/nwcguide2012.pdf.

[66] *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 Nov., 1997).

[67] *Id.*

[68] 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).

[69] 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.htm.

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.

60. 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 the U.S. and the other NPT nuclear weapon States refused to participate.

61. 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".[70]

62. The first-ever UN General Assembly High-Level Meeting on Nuclear Disarmament was held on September 26, 2013, pursuant to a 2012 resolution which was opposed by the U.S.[71] At that meeting the UK representative delivered a joint statement on behalf of the UK, France and the U.S. in which they welcome "the increased energy and enthusiasm around the nuclear disarmament debate" but "regret that this energy is being directed toward initiatives such as this High-Level Meeting, the humanitarian consequences campaign, the Open-Ended Working Group and the push for a Nuclear Weapons Convention".[72]

63. The U.S. subsequently voted against a new UN General Assembly resolution following up the High-Level Meeting.[73] 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.

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[70] '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.

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

[72] http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/HLM/26Sep_UKUSFrance.pdf.

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

## III. THE LAW

### A. Article VI of the NPT

64. 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.

65. The drafting history of the NPT demonstrates that the treaty constitutes a "strategic bargain" whereby each NNWS Party agreed not to acquire nuclear weapons and each NPT nuclear-weapon State agreed to negotiate their elimination.[74] This has been confirmed by NPT Review Conferences. In particular, the 2010 Review Conference noted that the overwhelming majority of States entered into their legally binding commitments not to acquire nuclear weapons "in the context, inter alia, of the corresponding legally binding commitments by the nuclear weapon states to nuclear disarmament in accordance with the Treaty".[75]

66. Article VI is "the single most important provision of the treaty . . . from the standpoint of long-term success or failure of its goal of proliferation prevention".[76]

67. In its Advisory Opinion on *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".[77] The Court went on to conclude, *unanimously,* that "[t]here exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control".[78] This "recognizes that the provisions of Article VI…go beyond mere obligations of

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

[75] 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Final Document, Volume I, "Review of the operation of the Treaty", p. 2, para. 2, http://www.un.org/ga/search/view_doc.asp?symbol=NPT/CONF.2010/50 (VOL.I).

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

[77] *Id.*, para. 99.

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

conduct - to pursue nuclear disarmament negotiations in good faith - and actually involve an obligation of result, i.e., to conclude those negotiations".[79]

68. 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".[80] The Court has long emphasized the importance of obligations *erga omnes*, owed to the international community as a whole.[81] Its conclusion in the Advisory Opinion was tantamount to declaring that the obligation in Article VI is an obligation *erga omnes*.[82] Every State has a legal interest in its timely performance, therefore,[83] and a corresponding legal obligation to help bring it about.[84]

## B. Customary International Law

69. The obligations enshrined in Article VI of the NPT are not merely treaty obligations; they also exist separately under customary international law.[85]

70. In its Advisory Opinion, after noting that the twofold obligation in Article VI to pursue and to conclude negotiations *formally* concerns the (now 190[86]) States Parties to the NPT,

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

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

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

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

[83] *See supra*, n. 81.

[84] *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.

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

[86] 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.

the Court added that "any realistic search for general and complete disarmament, especially nuclear disarmament, necessitates the cooperation of all States".[87]

71. 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".[88]

72. 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*".[89]

73. 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.[90] The UN Security Council also has repeatedly called for the implementation of Article VI by all States,[91] 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".[92] The Council has also described the proliferation of weapons of mass destruction as a threat to international peace and security.[93]

74. 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.

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

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

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

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

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

[91] *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.

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

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

General Assembly stated that it is "imperative ... to halt and reverse the nuclear arms race until the total elimination of nuclear weapons and their delivery systems has been achieved".[94]

## C. Good Faith

76. That good faith constitutes a "fundamental principle" of international law is beyond dispute.[95] 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[96] and a cardinal principle of the Law of Treaties,[97] it also encapsulates the essence of the Rule of Law in international society[98] and is one of the Principles of the United Nations.

77. 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".[99]

78. 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

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[94] 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.

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

[96] *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.

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

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

[99] 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.

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".[100]

79. 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.*[101]

80. As set forth above, Article VI of the NPT and customary international law require both conduct *and* result: States must not only negotiate in good faith with serious efforts to achieve the elimination of nuclear weapons, but must also actually *achieve* that result.[102]

81. 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".[103] Conduct that prevents the fulfilment of a treaty's object and purpose is proscribed.[104] 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.[105]

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[100] *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.* at p. 473, para. 49 (emphasis added).

[101] *Supra*, n. 94, para. 41 (emphasis added).

[102] *See supra*, para. 67.

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

[104] 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"); *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").

[105] *See supra*, para. 77.

## IV. OBLIGATIONS BREACHED BY THE U.S.

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

### A. Breach of Article VI of the NPT

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

*Nuclear disarmament*

84. As set forth above, the Court has provided an authoritative analysis of the nuclear disarmament element of the obligations laid down by Article VI. It has held that "the obligation involved here is an obligation to achieve a precise result - nuclear disarmament in all its aspects - by adopting a particular course of conduct, namely, the pursuit of negotiations on the matter in good faith".[106] 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".[107]

85. The Respondent opposes UN General Assembly resolutions calling for negotiations to begin,[108] and the current Secretary of State has testified that nuclear disarmament is only "an aspiration and we should always be aspirational . . . But it's not something that could happen in today's world . . ."[109]

86. The Respondent also refused to support the establishment of the Open-Ended Working Group and even declared preemptively that it would not support "any outcome it may produce".[110]

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

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

[108] *Supra*, para. 52.

[109] *Supra*, para. 51.

[110] *Supra*, para. 45. *et seq.*

87. As set forth herein, including in Part II of this Application, the U.S. clearly has not actively pursued "negotiations leading to nuclear disarmament in all its aspects under strict and effective international control". On the contrary, it has opposed the efforts of the great majority of States to initiate such negotiations. Accordingly, the Respondent has breached and continues to breach its nuclear disarmament obligations under Article VI of the NPT.

*Cessation of the nuclear arms race at an early date*

88. With regard to the cessation of the nuclear arms race at an early date, the Respondent's conduct is similarly negative and obstructive.

89. Its conduct, set forth in Part II of this Application, in (i) continuing engagement in material efforts to qualitatively improve its nuclear weapons systems; (ii) continuing efforts to maintain and extend those systems indefinitely; and (iii) opposing negotiations on comprehensive nuclear disarmament or other measures in multilateral forums, including the Open-Ended Working Group and the UN General Assembly, is clear evidence of the Respondent's ongoing breach of its Article VI obligation regarding the cessation of the nuclear arms race at an early date.[111]

90. Despite having been a Party to the NPT for 44 years, therefore, the Respondent has breached and continues to breach its obligation under Article VI regarding the cessation of the nuclear arms race at an early date.

## B. Breach of Customary International Law

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

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

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

93. In the previous two Sections, the Applicant has submitted that the Respondent has breached and continues to breach its obligations under both the NPT and customary international

[111] *See supra*, Parts II.C.4 and II.D.

law regarding nuclear disarmament and cessation of the nuclear arms race at an early date. The Respondent is also failing to act in good faith as far as its performance of those obligations is concerned.

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

95. The Respondent has also repeatedly declared its intention to rely on its nuclear arsenal for decades to come.[112]

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

[112] *Id.*

## V. JURISDICTION OF THE COURT

97. 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.

98. 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.

99. 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.

100. 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

101. 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.

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

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

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

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

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

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

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

**to order**

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

DATED this 24th of April 2014

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

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