

**INTERNATIONAL COURT OF JUSTICE**

**OBLIGATIONS CONCERNING NEGOTIATIONS RELATING TO CESSATION OF  
THE NUCLEAR ARMS RACE AND TO NUCLEAR DISARMAMENT  
(Marshall Islands v. United Kingdom)**

**MEMORIAL  
OF  
THE MARSHALL ISLANDS**

**16 March 2015**

## TABLE OF CONTENTS

<b>PART 1 – INTRODUCTION</b>	<b>12</b>
<b>General Observations and Summary</b>	<b>12</b>
<b>General observations on the present Memorial</b>	<b>17</b>
<b>The Nuclear Sword of Damocles</b>	<b>19</b>
<b>PART 2 – FACTS</b>	<b>22</b>
<b>The UK’s current nuclear arsenal</b>	<b>22</b>
<b>Nuclear policy, doctrine and expenditure</b>	<b>24</b>
<b>Current plans for modernization and qualitative improvements of the UK’s nuclear arsenal</b>	<b>27</b>
<b>The UK and nuclear disarmament</b>	<b>35</b>
<i>History and general policy regarding negotiation of nuclear disarmament</i>	<i>35</i>
<i>The UK’s opposition to the negotiation of a Nuclear Weapons Convention</i>	<i>39</i>
<b>PART 3 – JURISDICTION AND ADMISSIBILITY</b>	<b>42</b>
<b>Jurisdiction</b>	<b>42</b>
<b>The existence of a “dispute”</b>	<b>42</b>
<b>Locus standi</b>	<b>46</b>
<b>PART 4 – HISTORICAL DEVELOPMENT OF THE OBLIGATIONS RELATING TO NUCLEAR DISARMAMENT AND CESSATION OF THE NUCLEAR ARMS RACE IN THE UNITED NATIONS AND UNDER THE NUCLEAR NON-PROLIFERATION TREATY</b>	<b>50</b>
<b>Early UN General Assembly resolutions</b>	<b>50</b>
<b>The Nuclear Non-Proliferation Treaty</b>	<b>51</b>
<i>Negotiation of the NPT</i>	<i>51</i>
<i>Review Conferences</i>	<i>56</i>
<i>Non-Implementation of NPT Conference Outcomes</i>	<i>59</i>
<b>The 1978 General Assembly Special Session on Disarmament</b>	<b>60</b>
<b>General Assembly resolutions adopted post-Advisory Opinion</b>	<b>62</b>
<b>UN Security Council resolutions</b>	<b>63</b>
<b>PART 5 – ARTICLE VI OF THE NUCLEAR NON-PROLIFERATION TREATY</b>	<b>65</b>
<b>The content of Article VI</b>	<b>65</b>
<i>General principles concerning the interpretation of Article VI</i>	<i>66</i>
<i>The three components of Article VI</i>	<i>70</i>
(i) Effective Measures Relating to Cessation of the Nuclear Arms Race at an Early Date	70
(ii) Effective Measures Relating to Nuclear Disarmament	72
(iii) A Treaty on General and Complete Disarmament	72
<i>The Content of the Obligation in Article VI as a Whole</i>	<i>73</i>
<b>The obligation to pursue negotiations in good faith</b>	<b>75</b>
<i>Introduction</i>	<i>75</i>
<i>The obligation to pursue negotiations</i>	<i>75</i>
<i>In good faith</i>	<i>76</i>
<i>An obligation of result not merely of conduct</i>	<i>80</i>

<b>PART 6 – THE EXISTENCE OF AN OBLIGATION UNDER CUSTOMARY INTERNATIONAL LAW TO NEGOTIATE IN GOOD FAITH FOR NUCLEAR DISARMAMENT</b>	<b>82</b>
<b>Introduction</b>	<b>82</b>
<b>The norm-creating character of Article VI</b>	<b>82</b>
<b>The 1996 Advisory Opinion</b>	<b>85</b>
<b>General Assembly and Security Council resolutions recognizing the existence of an obligation upon all States to negotiate in good faith for nuclear disarmament</b>	<b>86</b>
<b>PART 7 – UK BREACHES OF OBLIGATIONS CONCERNING NEGOTIATIONS RELATING TO CESSATION OF THE NUCLEAR ARMS RACE AND TO NUCLEAR DISARMAMENT</b>	<b>90</b>
<b>Introduction</b>	<b>90</b>
<b>Article VI of the NPT</b>	<b>90</b>
<i>Nuclear Disarmament</i>	<i>90</i>
<i>Cessation of the Nuclear Arms Race</i>	<i>93</i>
<b>Customary International Law</b>	<b>95</b>
<b>Good Faith</b>	<b>95</b>
<b>Frustration of Fulfillment of Obligations by Non-Nuclear Weapon States</b>	<b>96</b>
<b>PART 8 – SUMMARY</b>	<b>98</b>
<b>PART 9 – SUBMISSIONS</b>	<b>100</b>

## LIST OF ANNEXES

### VOLUME I

#### PART 1

ANNEX 1 – Hansard, HL Deb, 28 October 1996, vol. 575, col. 134,  
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**ANNEX 70** - Article 36 para. 2 Declarations of The Republic of the Marshall Islands and the United Kingdom of Great Britain and Northern Ireland

**ANNEX 71** – Statement by Hon. Mr. Phillip Muller, Minister of Foreign Affairs of the Republic of the Marshall Islands, 26 September 2013,  
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**ANNEX 80** – Statement by H.E. Mr. Edi Yusup, Ambassador and Deputy Permanent Representative of the Republic of Indonesia in Geneva, on behalf of the Group of Member States of the Non-Aligned Movement Parties to the [NPT], Cluster 1 Specific Issues, Nuclear disarmament and security assurance, 25 April 2013, Geneva, pp. 1-2, [http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/npt/prepcom13/statements/25April\\_NAM.pdf](http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/npt/prepcom13/statements/25April_NAM.pdf)

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**ANNEX 82** – A. Cassese, *The Israel-PLO Agreement and Self-Determination*, 4 *European Journal of International Law* 567 (1993), <http://www.ejil.org/pdfs/4/1/1219.pdf>

## **PART 6**

**ANNEX 83** – UN Secretary-General, Message to the Vienna Conference on the Humanitarian Impact of Nuclear Weapons, Vienna, 8 December 2014. [http://www.bmeia.gv.at/fileadmin/user\\_upload/Zentrale/Aussenpolitik/Abruestung/HINW14/HINW14\\_Message\\_from\\_UN\\_Secretary\\_General.pdf](http://www.bmeia.gv.at/fileadmin/user_upload/Zentrale/Aussenpolitik/Abruestung/HINW14/HINW14_Message_from_UN_Secretary_General.pdf)

## **PART 7**

**ANNEX 84** – Hansard, HC Deb, 19 June 1989, vol. 155, cc.31-3W, <http://www.publications.parliament.uk/pa/cm198889/cmhansrd/1989-06-19/Writtens-4.html>

**ANNEX 85** – Yearbook of the International Law Commission. 1966, Volume II, p. 211: commentary on draft Article 23 (Pacta Sunt Servanda), para. 4, [http://legal.un.org/ilc/publications/yearbooks/Ybkvolumes%28e%29/ILC\\_1966\\_v2\\_e.pdf](http://legal.un.org/ilc/publications/yearbooks/Ybkvolumes%28e%29/ILC_1966_v2_e.pdf)

## PART 1

### INTRODUCTION

#### General Observations 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*.<sup>1</sup> The bargain which this Memorial concerns is that embodied in the 1968 Treaty on the Non-Proliferation of Nuclear Weapons (hereafter “the Treaty” or “the NPT”),<sup>2</sup> whereby the non-nuclear-weapon States have agreed not to acquire nuclear weapons and the NPT nuclear-weapon States have agreed to negotiate their elimination.
2. These proceedings are 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*.<sup>3</sup> Rather, the focus of this Memorial is the UK’s failure to fulfil the obligations enshrined in Article VI of the NPT and customary international law; and particularly the failure of the Respondent to keep its 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”.<sup>4</sup>
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”.<sup>5</sup> 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”.<sup>6</sup>

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<sup>1</sup> Expressed in Article 26 of the Vienna Convention on the Law of Treaties 1969.

<sup>2</sup> The Treaty on the Non-Proliferation of Nuclear Weapons, London, Moscow, and Washington DC, 1 July 1968, in force March 5 1970, 729 UNTS 161.

<sup>3</sup> *Advisory Opinion of 8 July 1996 on the Legality of the Threat or Use of Nuclear Weapons I.C.J. Reports 1996*, p. 226.

<sup>4</sup> *Ibid.*, para. 105, point 2F.

<sup>5</sup> *Ibid.*, para. 35.

<sup>6</sup> *Ibid.*, para. 36.

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”.<sup>7</sup> We shall also continue to face the possibility, even the likelihood, of nuclear weapons being used by accident, miscalculation or design,<sup>8</sup> 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” (**Annex 2**).<sup>9</sup>
  
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”.<sup>10</sup> A coherent legal system cannot countenance its own destruction or that of the community whose activities it seeks to regulate.<sup>11</sup> 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

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<sup>7</sup> *Supra*, n. 2, preamble, 2<sup>nd</sup> paragraph.

<sup>8</sup> 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, col. 134 (**Annex 1**).

<sup>9</sup> J. Rotblat, *Science and Nuclear Weapons: Where Do We Go From Here? (The Blackaby Papers)* (Abolition 2000 UK, No. 5 2004) p. 7. In February 2007, Mohamed ElBaradei, then Director General of the IAEA, said that Britain cannot “modernise its Trident submarines and then tell everyone else that nuclear weapons are not needed in the future”. See David Blair, ‘UN nuclear watchdog: Trident is hypocritical’, *Daily Telegraph*, 20 February 2007 (**Annex 3**).

<sup>10</sup> *Supra*, n. 3, para. 98.

<sup>11</sup> 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*, 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, *ibid.*, 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”.

survival rooted in “the principles of humanity”<sup>12</sup> and “elementary considerations of humanity”<sup>13</sup> which help to shape an emerging “law of humanity”,<sup>14</sup> the international law for humankind of which the nuclear disarmament obligation is a key element. Yet it is now more than 69 years since the very first United Nations General Assembly Resolution sought to put in motion the elimination from national arsenals of nuclear weapons and other weapons of mass destruction,<sup>15</sup> over 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 constitutes a flagrant denial of human justice.<sup>16</sup>

7. Inspired and guided by these principles and values, the underlying claims, described in more detail herein, are that the UK, an NPT nuclear-weapon State, 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 Republic of the Marshall Islands (the “Marshall Islands”, “RMI” or “Applicant”) is a non-nuclear-weapon State Party to the NPT. The Marshall Islands acceded to the Treaty 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

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<sup>12</sup> 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”.

<sup>13</sup> *Corfu Channel Case (United Kingdom v. Albania), Judgment, 1949, I.C.J. Reports 1949 p. 22.*

<sup>14</sup> See e.g. the Opinion of the Tribunal in the Opinion of the Tribunal in the *Einsatzgruppen case* (Case 9) 8 April 1948, Military Tribunal II (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 1949 (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](http://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-IV.pdf).

<sup>15</sup> UNGA Resolution A/RES/1(1), 24 January 1946.

<sup>16</sup> Cf. Judge Cançado Trindade’s remarks in Section XIII 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”.

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.”).<sup>17</sup> During those 12 years, 67 nuclear weapons of varying explosive power were detonated in the Marshall Islands, at varying distances from human population.<sup>18</sup> According to the 3 September 2012 Report of Calin Georgescu, a Special Rapporteur to the UN Human Rights Council on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes, the devastating adverse impact on the Marshall Islands of those nuclear substances and wastes continues to this day.<sup>19</sup>

10. With regard to the RMI’s interest in bringing this case 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]”.<sup>20</sup> It is obvious that the RMI’s participation in the common struggle against climate change needs to lead to firm commitments by all States, which commitments must include not only moral, but also legal obligations aimed at realizing concrete, clear-cut goals in order to remove the threat of devastation caused by continued reliance on the use of fossil fuel energy sources. It is from this perspective of striving to reach agreement on such commitments in the struggle against climate change that the RMI has concluded that it is no longer acceptable simply to be a party to the NPT while total nuclear disarmament pursuant to Article VI and customary international law remains at best a distant prospect. This Application seeks to ensure that the legal obligations undertaken 45 years ago by the UK in the context of the NPT do indeed deliver the promised result.
  
11. One of the reasons why the RMI became a Party to the NPT is that this Treaty is the key instrument of the international community for ridding the world of nuclear weapons. 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

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<sup>17</sup> 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.

<sup>18</sup> *Ibid.*, paras. 1-18.

<sup>19</sup> *Ibid.*, para. 19.

<sup>20</sup> *Supra*, n. 3, para. 95.

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" (**Annex 4**).<sup>21</sup> This is entirely consistent with the RMI's Written Statement submitted to the Court in the Advisory proceedings regarding the *Legality of the Threat or Use of Nuclear Weapons*, in which the RMI stated:

"Given its extensive first hand experience with adverse impacts of nuclear weapons, Marshall Islands' decision to ratify the Nuclear Non-Proliferation Treaty this year is understandable. This objective of the treaty of "the cessation of the manufacture of nuclear weapons, the liquidation of all their existing stockpiles, and the elimination from national arsenals of nuclear weapons" is wholly consistent with Marshall Islands' foreign policy of peaceful co-existence as well as with the overarching goal of the international community to achieve global peace" (**Annex 5**).<sup>22</sup>

The Treaty contains this 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."

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".<sup>23</sup>

14. Nearly five decades after signing and ratifying the NPT, the UK is still maintaining and continuously modernizing its nuclear arsenal.

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<sup>21</sup>Statement by Hon. Mr. Phillip Muller, Minister for Foreign Affairs Republic of the Marshall Islands, UN High Level Meeting on Nuclear Disarmament 26 September 2013, [http://www.un.org/en/ga/68/meetings/nucleardisarmament/pdf/MH\\_en.pdf](http://www.un.org/en/ga/68/meetings/nucleardisarmament/pdf/MH_en.pdf) [accessed on 10 March 2015].

<sup>22</sup> Letter dated 22 June 1995 from the Permanent Representative of the Marshall Islands to the United Nations, together with Written Statement of the Government of the Marshall Islands, <http://www.icj-cij.org/docket/files/95/8720.pdf> [accessed on 10 March 2015].

<sup>23</sup> *Supra*, n. 3, para. 105, point 2F.

15. The UK 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 system and to maintain it for the indefinite future.
16. Similarly, the UK 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 States Parties to the Treaty, but also apply to all States as a matter of customary international law.
18. Further, the obligation of a State to perform its legal obligations in good faith, whether arising under a Treaty or pursuant to customary international law, is itself a legal obligation that the UK has breached.

#### **General observations on the present Memorial**

19. In this Memorial the Marshall Islands will, in accordance with Article 49, para. 1 of the Rules of Court, present its case by stating the relevant facts and the law that lead it to its Submissions. In doing so, the RMI will also state why the Court has jurisdiction to adjudge this case and why its claims are admissible.
20. The subject matter of the present dispute brought before the Court by the Marshall Islands is the failure of the UK to honour its obligation towards the Marshall Islands (and other States) 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. This obligation to negotiate a nuclear disarmament includes, in the first place, the obligation to negotiate in good faith to cease the nuclear arms race by each of the States that are in possession of nuclear weapons. These obligations are expressed in Article VI of the NPT<sup>24</sup>. The breaches alleged by the RMI of the UK's Article VI obligations are central to the present case. In addition, in order to provide for the wider legal context, the RMI has chosen to set out the fact that the obligations that are central in this case are also obligations of customary international law.<sup>25</sup>

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<sup>24</sup> *Supra*, n. 2; United Kingdom - Signed: 1 July 1968, Ratified: 27 November 1968; Marshall Islands - Accession: 30 January 1995.

<sup>25</sup> See Part 6 of this Memorial.

21. On 24 April 2014 the RMI submitted nine Applications to the Court. Each Application, filed against a different Respondent State, presented a different general background and was based on a different set of facts. The subject matter of all Applications related to the similar, individual, failure of each and every one of these nine States to live up to its 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.
22. Only three of the nine States involved currently recognize, as compulsory and without special agreement, the jurisdiction of the Court by means of a declaration under Article 36, para. 2 of the Statute of the International Court of Justice. Those three States are the UK, the Republic of India and Pakistan. Each of those States recognizes the Court's jurisdiction on its own terms and conditions. In the Applications relating to the other six States the RMI has included an invitation as foreseen in Article 38, para. 5 of the Rules of Court.
23. To date, only the People's Republic of China has formally notified the Court that it does not consent to the jurisdiction of the Court. The other five States – the U.S., the French Republic, the Russian Federation, the State of Israel and the Democratic People's Republic of Korea – have not formally responded to the RMI's Applications.
24. The fact that not all of the nine States are accepting to actually appear in their respective cases before the Court cannot be deemed an obstacle for the Court to consider and adjudge each one of the three cases that are proceeding (the present case against the United Kingdom as well as the cases against India and Pakistan). Each of the other six States may be able to frustrate the case against itself by not appearing before the Court. However, it would not be acceptable to allow this non-appearance of third States in cases brought against them to have a negative impact on the RMI's right to pursue the enforcement of the obligations involved by submitting the present case to the Court.
25. The Marshall Islands will demonstrate in this Memorial that the United Kingdom is continuously and actively opposing efforts of a great majority of the States of the world to initiate negotiations that are to lead to total nuclear disarmament. It consistently votes against the General Assembly Resolution that is proposed and passed each year since the Court delivered its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*.<sup>26</sup> It also objects strongly to an initiative of the General Assembly to initiate deliberations on proposals that would get started multilateral disarmament negotiations. This initiative was named the Open Ended Working Group; the UK not only voted against the initiative but also announced that it would not support any outcome that this

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<sup>26</sup> See section titled 'The UK and nuclear disarmament' in Part 2 of this memorial.

working group might produce.<sup>27</sup> At no point did the UK propose an alternative initiative to pursue and conclude negotiations on total nuclear disarmament. For years the UK merely mentions its being in favour of a “step-by-step approach” without ever clarifying what that approach might involve and how it would lead to the conclusion of negotiations on total nuclear disarmament.

## The Nuclear Sword of Damocles

26. This case involves obligations of an *erga omnes* character, engaging RMI as a member of the international community. RMI’s interests – even its existential interests – are also engaged by the issues at stake. One or a few nuclear explosions anywhere in the world, certainly in urban areas, would have devastating humanitarian effects<sup>28</sup> which, given its experience with the health and environmental consequences of nuclear testing, the Marshallese naturally desire to prevent, as RMI emphasized in its written submission in *Legality of Threat or Use of Nuclear Weapons*.<sup>29</sup> Any such explosion would also have adverse effects on the global economy and likely on the global political and legal order,<sup>30</sup> and therefore on the Marshall Islands. In general, as observed in the Summary of Findings of the recent Vienna Conference on the Humanitarian Impacts of Nuclear Weapons:

“The impact of a nuclear weapon detonation, irrespective of the cause, would not be constrained by national borders and could have regional and even global consequences, causing destruction, death and displacement as well as profound and long-term damage to the environment, climate, human health and well-being,

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<sup>27</sup> See para. 76 of this memorial.

<sup>28</sup> See T. Ruff, “The health consequences of nuclear explosions,” in Beatrice Fihn, ed., *Unspeakable suffering – the humanitarian impact of nuclear weapons* (Reaching Critical Will, 2013), <http://www.reachingcriticalwill.org/images/documents/Publications/Unspeakable/Unspeakable.pdf> [accessed on 11 December 2014] (**Annex 6**). Tilman Ruff is Associate Professor, Nossal Institute for Global Health, University of Melbourne, and Co-President, International Physicians for the Prevention of Nuclear War.

<sup>29</sup> Letter dated 22 June 1995 from the Permanent Representative of the Marshall Islands to the United Nations, together with Written Statement of the Government of the Marshall Islands, <http://www.icj-cij.org/docket/files/95/8720.pdf> [accessed on 11 December 2014].

<sup>30</sup> Cf. President Barack Obama, Prague speech, April 5, 2009: “One nuclear weapon exploded in one city – be it New York or Moscow, Islamabad or Mumbai, Tokyo or Tel Aviv, Paris or Prague – could kill hundreds of thousands of people. And no matter where it happens, there is no end to what the consequences might be for our global safety, our security, our society, our economy, to our ultimate survival” (**Annex 7**).

[http://www.whitehouse.gov/the\\_press\\_office/Remarks-By-President-Barack-Obama-In-Prague-As-Delivered](http://www.whitehouse.gov/the_press_office/Remarks-By-President-Barack-Obama-In-Prague-As-Delivered) [accessed on 11 December 2014].

socioeconomic development, social order and could even threaten the survival of humankind.” (Annex 8)<sup>31</sup>

27. Regarding climate consequences, a nuclear exchange involving detonations in dozens of cities would have severe effects on the climate directly and substantially affecting the Marshall Islands. That risk is a stunning illustration of the Court’s finding, quoted in para. 1 of the Application, that “the destructive power of nuclear weapons cannot be contained in either space or time”.<sup>32</sup> The scale of this threat was recently demonstrated in a study in which the outcome of a nuclear exchange totalling 100 15-kiloton weapons was modelled (Annex 9).<sup>33</sup> This study demonstrates that the effects of such a nuclear war, using only 0.03% of the world’s nuclear arsenal, would be global and devastating. In addition to immediately killing millions of people, it would produce a large amount of smoke that would rise into the stratosphere, spreading globally and causing a drop in temperature on the Earth’s surface, while heating up the stratosphere. As the smoke absorbs the sunlight it will heat up and damage the ozone layer, which will result in harmful UV rays reaching the surface. The damage to human health, agriculture, and sea life would be immense. The study suggests a number of detrimental consequences, including the global food supply being threatened.
28. The UK's maintenance and qualitative improvement of nuclear forces presenting all the threats outlined above, taking place at the same time as the UK is failing to live up to its central 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, in itself is a clear demonstration of the scale and the nature of the dispute that exists between the two Parties to the present case. For all of these reasons, a clear interest of the RMI in bringing this case against the United Kingdom is engaged. This interest derives in the first place from the RMI's former experience with nuclear explosions. Second, It derives from its status as party to an interdependent treaty - the NPT - a treaty whose breach is "of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation".

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<sup>31</sup> Report and Summary of Findings of the Conference presented under the sole responsibility of Austria, Vienna Conference on the Humanitarian Impact of Nuclear Weapons, 8 to 9 December 2014, [http://www.bmeia.gv.at/fileadmin/user\\_upload/Zentrale/Aussenpolitik/Abruestung/HINW14/HINW14\\_Chair\\_s\\_Summary.pdf](http://www.bmeia.gv.at/fileadmin/user_upload/Zentrale/Aussenpolitik/Abruestung/HINW14/HINW14_Chair_s_Summary.pdf) [accessed on 8 January 2015].

<sup>32</sup> *Supra*, n. 3, para. 35.

<sup>33</sup> M.J Mills *et al.*, “Multi-decadal Global Cooling and Unprecedented Ozone Loss Following a Regional Nuclear Conflict”, *Earth’s Future Research Paper* 2014, at p. 161. For a presentation based on the study with additional information, see Dr. Michael J. Mills, National Centre for Atmospheric Research, “Global Famine after a Regional Nuclear War: Overview of Recent Research,” Vienna Conference on the Humanitarian Impacts of Nuclear Weapons, 8 December 2014, [http://www.bmeia.gv.at/fileadmin/user\\_upload/Zentrale/Aussenpolitik/Abruestung/HINW14/Presentation\\_s/HINW14\\_S1\\_Presentation\\_Michael\\_Mills.pdf](http://www.bmeia.gv.at/fileadmin/user_upload/Zentrale/Aussenpolitik/Abruestung/HINW14/Presentation_s/HINW14_S1_Presentation_Michael_Mills.pdf) [accessed on 12 March 2015].

Finally, it derives from its status as a member of the international community reacting against a breach of an *erga omnes* obligation.

## PART 2

### FACTS

#### The UK's current nuclear arsenal

29. The UK's nuclear weapons system is based upon the submarine-launched Trident D5 missile (**Annex 10**).<sup>34</sup> It is the UK's third-generation strategic nuclear weapon system. Trident was procured during the final decade of the Cold War and was brought into service to replace Polaris over a six-year period beginning in December 1994.<sup>35</sup> It is now the UK's only nuclear weapons system, the UK having retired its air-launched WE177 free-fall nuclear bombs and repatriated forward-deployed U.S. tactical nuclear weapons operated by UK forces under dual-key arrangements in the 1990s.<sup>36</sup>
30. The Trident nuclear weapons system has three technical components<sup>37</sup>:
- a) The Vanguard-class nuclear-powered ballistic submarines (SSBN), of which the UK has four: HMS Vanguard, HMS Victorious, HMS Vigilant and HMS Vengeance, designed and built in the UK by Vickers Shipbuilding and Engineering Ltd (VSEL), now BAE Systems Maritime, in Barrow-in-Furness, Cumbria. Refit and maintenance are carried out by Babcock Marine Limited at HMNB Devonport, Plymouth, UK.<sup>38</sup>
  - b) The Trident D5 submarine-launched intercontinental ballistic missile (ICBM), manufactured in the U.S. by Lockheed Martin. Under the Polaris Sales Agreement as modified for Trident,<sup>39</sup> the UK has title to 58 missiles

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<sup>34</sup> See House of Commons Defence Committee, 'The Future of the UK's Nuclear Deterrent: the White Paper' (HC 225-1), Vol. 1, ch. 2.

<sup>35</sup> HMS Vanguard, the first Trident missile-carrying submarine, was commissioned on 14 August 1993 and sailed on the first Trident operational patrol in December 1994. HMS Repulse returned to Faslane on 13 May 1996 at the end of the final Polaris operational patrol, marking the end of Polaris' 27 years of continuous patrols. See P. Hennessy, *Cabinets and the Bomb*, (The British Academy, 2007) p. 18.

<sup>36</sup> *Supra*, n. 34, Vol.1, para. 8.

<sup>37</sup> *Ibid.*, paras. 9-10.

<sup>38</sup> Babcock International Group bought Devonport Dockyard from Devonport Management Limited (DML) in June 2007.

<sup>39</sup> The Polaris Sales Agreement was signed in Washington DC on 6 April 1963. On 30 September 1980 an exchange of diplomatic notes incorporated the Trident sale into the Polaris Sales Agreement.

(Annex 11).<sup>40</sup> Aside from those currently deployed, the missiles are held in a communal pool at the U.S. Strategic Weapons facility at King's Bay, Georgia, U.S. Each submarine is capable of carrying up to 16 Trident D5 missiles.

c) The components for the nuclear warheads, including qualitative improvements to them, are made in the UK at the Atomic Weapons Establishment (AWE) Aldermaston, Berkshire, and assembled at nearby AWE Burghfield. There is extensive collaboration between the UK and the U.S. on the production of the UK's warheads under the Mutual Defence Agreement, "which provides for extensive cooperation on nuclear warhead and reactor technologies, in particular the exchange of classified information concerning nuclear weapons to improve 'design, development and fabrication' capability and the transfer of nuclear warhead-related materials."<sup>41</sup> As a result, some components of the UK warheads are manufactured, and undergo qualitative improvements, in the U.S. (Annex 12).<sup>42</sup>

31. The submarine fleet is supported by an extensive onshore infrastructure. The Vanguard-class submarines are based at HM Naval Base Clyde, Faslane, Scotland. Nuclear warheads are fitted to the D5 missiles at the Royal Naval Armaments Depot Coulport (part of HM Naval Base Clyde). The warheads are transported by road from AWE Burghfield to Coulport, where they are placed in underground bunkers in the Trident Area. When required they are taken to the Explosive Handling Jetty where they are fitted onto the missiles on the Vanguard-class submarines.
32. The Strategic Defence Review, published on 8 July 1998,<sup>43</sup> affirmed the Government's commitment to maintaining a nuclear weapons system but made a number of changes to it. The warhead stockpile was to be cut from the ceiling of up to 300 warheads maintained by the previous government to fewer than 200 operationally available warheads (Annex 13). The patrol cycle of the Trident submarines was also relaxed with normally only one submarine on patrol at any one time.<sup>44</sup> As with pre-Chevaline Polaris,<sup>45</sup> each submarine would now carry a maximum of 48 warheads, rather than the

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<sup>40</sup> House of Commons Defence Committee, Session 2005-06, Eighth Report, para. 21.

<sup>41</sup> N. Ritchie, *A Nuclear Weapons-Free World? Britain, Trident and the Challenges Ahead* (Palgrave Macmillan 2012) p. 92. Ritchie goes on to state that "Britain remains highly dependent on the US for nuclear weapon systems, technology, and support": *ibid.*, p. 95.

<sup>42</sup> J. Ainslie, "United Kingdom," in *Assuring Destruction Forever: Nuclear Weapon Modernization Around the World*, Reaching Critical Will, 2012, p. 68, <http://www.reachingcriticalwill.org/images/documents/Publications/modernization/assuring-destruction-forever.pdf> [accessed on 12 March 2015].

<sup>43</sup> The Strategic Defence Review, published on 8 July 1998 Cm 3999.

<sup>44</sup> *Ibid.*, para. 66.

<sup>45</sup> See para. 36 of the Memorial.

previous Government's declared ceiling of up to 96 (**Annex 14**).<sup>46</sup> The Trident submarine's alert status was also to be reduced. Missiles had not been targeted for some years but, in addition, submarines would normally now be at several days' rather than 15 minutes' notice to fire.<sup>47</sup> A requirement for an additional seven Trident missile bodies was cancelled, leaving a new total of 58.

33. The Strategic Defence and Security Review ("SDSR") (**Annex 15**), published on 19 October 2010,<sup>48</sup> reaffirmed the UK's commitment to a submarine-launched nuclear weapons system on continuous alert based on the Trident missile delivery system, and announced that: the number of warheads on board each deployed submarine would be reduced from 48 to 40; the requirement for operationally available warheads would be reduced from fewer than 160 to no more than 120; the number of operational missiles on the Vanguard-class submarines would be reduced to no more than 8; and the UK's overall nuclear weapons stockpile would be reduced from not more than 225 to no more than 180 by the mid-2020s.<sup>49</sup>
34. On 20 January 2015 in a written statement, the Secretary of State for Defence, Michael Fallon, informed the House of Commons that the programme for implementing the 2010 SDSR warhead reductions had been completed (**Annex 17**).<sup>50</sup>

### **Nuclear policy, doctrine and expenditure**

35. The Royal Navy has maintained unbroken nuclear weapon patrols since 1968. The 1998 Strategic Defence Review stated that the UK would continue to maintain these continuous-at-sea nuclear-armed patrols.
36. Trident is the UK's most advanced nuclear weapon system to date. With a range of between 6,500 kilometres and 12,000 kilometres, depending on payload, Trident's greater speed, accuracy and multiple independently targetable warheads distinguish it from, and enable it to reach more targets than, its predecessor, Polaris Chevaline.
37. As the Defence Select Committee noted in 1994:

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<sup>46</sup> Ministry of Defence, Statement on the Defence Estimates 1995, Cm 2800 (HMSO: London, 1995), p. 39.

<sup>47</sup> *Supra*, n. 43 para. 68.

<sup>48</sup> The Strategic Defence and Security Review, published on 19 October 2010 Cm 7948.

<sup>49</sup> *Ibid.*, para. 3.11. In January 2014, the Stockholm International Peace Research Institute (SIPRI) reported that the UK had a total inventory of 225 warheads, including 160 deployed warheads, <http://www.sipri.org/research/armaments/nuclear-forces> [accessed on 12 March 2015] (**Annex 16**).

<sup>50</sup> Hansard, HC, 20 January 2015, col. 4WS (HCWS210); and HC Deb, 20 January 2015, col. 105 (**Annex 18**).

“Trident’s accuracy and sophistication in other respects does - and was always intended to - represent a significant enhancement of the UK’s nuclear capability. We have invested a great deal of money to make it possible to attack more targets with greater effectiveness using nominally equivalent explosive power”.<sup>51</sup>

38. Trident was originally designed as a strategic nuclear system with respect to threats posed by the Soviet Union. In 1993, however, following the end of the Cold War, the then Secretary of State for Defence announced that in future Trident’s role would be to deter “potential aggressors” from threatening UK “vital interests”. In order to do this, Trident was assigned an additional “sub-strategic” role (**Annex 19**):<sup>52</sup>

“The ability to undertake a massive strike with strategic systems is not enough to ensure deterrence. An aggressor might, in certain circumstances, gamble on a lack of will ultimately to resort to such dire action. It is therefore important for the credibility of our deterrent that the United Kingdom also possesses the capability to undertake a more limited nuclear strike in order to induce a political decision to halt aggression by delivering an unmistakable message of our willingness to defend our vital interests to the utmost”.<sup>53</sup>

39. As part of the agreement under which the UK procured Polaris and subsequently Trident missiles from the U.S., UK Trident forces are assigned to NATO to be used for the defence of the Alliance “except where the UK government may decide that supreme national interests are at stake” (**Annex 20**).<sup>54</sup> The UK is therefore committed to NATO’s nuclear policy, which since the mid-1960s has been based on a doctrine of “flexible response” (**Annex 21**).<sup>55</sup> One of the key elements of NATO’s nuclear doctrine is that the

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<sup>51</sup> Defence Select Committee HC 297 of Session 1993-94, p. xiv.

<sup>52</sup> Hansard, HC Deb, 18 October 1993, col. 34. The UK’s sub-strategic capability was at that time provided by the soon to be retired WE177 bomb carried on Tornado aircraft.

<sup>53</sup> M. Rifkind, “UK Defence Strategy: A Continuing Role for Nuclear Weapons”, Centre for Defence Studies, King’s College London, (1993). *Supra*, n. 43, para. 63: “The credibility of deterrence also depends on retaining an option for a limited strike that would not automatically lead to a full scale nuclear exchange. Unlike Polaris and Chevaline, Trident must also be capable of performing this ‘sub-strategic’ role.”

<sup>54</sup> The British Strategic Nuclear Force: Text of Letters exchanged between the Prime Minister and the President of the United States and between the Secretary of State for Defence and the U.S. Secretary of Defense. The letters are reproduced in ‘Polaris Sales Agreement between the United States and the United Kingdom’ signed in Washington on 6 April 1963.

<sup>55</sup> “The Alliance’s Strategic Concept”, NATO Press Release NAC-S(99)65, April 24 1999.

Alliance refuses to rule out the first use of NATO nuclear weapons, thereby allowing its nuclear planners to prepare for that option (**Annex 22**).<sup>56</sup>

40. Similarly, the UK has always refused to rule out the first use of its nuclear weapons, especially in cases where biological or chemical weapons may have been used. For example, shortly after the 1997 general election, the then Minister of State Dr John Reid stated:

“The role of deterrence...must not be overlooked. Even if a potential aggressor has developed missiles with the range to strike at the United Kingdom, and nuclear, biological or chemical warheads to be delivered by those means, he would have to consider – he would do well to consider – the possible consequences of such an attack...It seems unlikely that a dictator who was willing to strike another country with weapons of mass destruction would be so trusting as to feel entirely sure that that country would not respond with the power at its disposal.” (**Annex 23**)<sup>57</sup>

41. Following the terrorist attacks on the U.S. in September 2001, a new chapter of the Strategic Defence Review extended the role of nuclear weapons further to include allegedly deterring terrorist organisations:

“The UK’s nuclear weapons have a continuing use as a means of deterring major strategic military threats, and they have a continuing role in guaranteeing the ultimate security of the UK. But we also want it to be clear, particularly to the leaders of states of concern and terrorist organisations, that all our forces play a part in deterrence, and that we have a broad range of responses available.” (**Annex 24**)<sup>58</sup>

The implication is that the UK is willing, if deemed to be necessary, to use its nuclear weapons against States of concern and terrorist organisations (**Annex 25**).<sup>59</sup>

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<sup>56</sup> In 2006 the then Defence Secretary, Des Browne, stated: “A policy of no first use of nuclear weapons would be incompatible with our and NATO’s doctrine of deterrence,” Hansard, HC, 22 May 2006, col. 1331W.

<sup>57</sup> Hansard, HC Deb, 4 December 1997, cols. 576-577.

<sup>58</sup> Strategic Defence Review, New Chapter, 18 July 2002, Vol.1, para. 22.

<sup>59</sup> The 2006 White Paper on *The Future of the United Kingdom’s Nuclear Deterrent* stated, at 3-11: “We know that international terrorists are trying to acquire radiological weapons. In future, there are risks that they may try to acquire nuclear weapons. While our nuclear deterrent is not designed to deter non-state actors, it should influence the decision-making of any state that might consider transferring nuclear weapons or nuclear technology to terrorists.”

42. The 2010 Strategic Defence and Security Review stated that the UK “would only consider using nuclear weapons in extreme circumstances of self-defence, including the defence of our NATO allies”, adding: “we remain deliberately ambiguous about precisely when, how and at what scale we would contemplate their use.”<sup>60</sup>
43. The Strategic Defence and Security Review reaffirmed in modified form existing assurances to non-nuclear-weapon States Parties to the NPT. It stated “that the UK will not use or threaten to use nuclear weapons against non-nuclear weapon states parties to the NPT” but notes that “this assurance would not apply to any state in material breach of those non-proliferation obligations.” It also noted that “while there is currently no direct threat to the UK or its vital interests from states developing capabilities in other weapons of mass destruction, for example chemical and biological, we reserve the right to review this assurance if the future threat, development and proliferation of these weapons make it necessary.”<sup>61</sup>
44. The UK has continued to maintain and modernize its nuclear forces with annual expenditure on capital and running costs at around 5 to 6 per cent of the UK defence budget (**Annex 26**).<sup>62</sup> This does not include costs for recapitalising the Trident system estimated to be £25 billion at outturn prices (**Annex 31**).<sup>63</sup>

### **Current plans for modernization and qualitative improvements of the UK’s nuclear arsenal**

45. In December 2006 the UK Government published a White Paper that formally opened the process to replace the UK’s Trident nuclear weapons system.<sup>64</sup> The White Paper was endorsed by the House of Commons on March 14, 2007 when the following motion was carried by 409 votes to 161:

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<sup>60</sup> *Supra*, n. 48, 3.5.

<sup>61</sup> *Ibid.*, 3.7.

<sup>62</sup> House of Commons Defence Committee, *The Future of the UK’s Nuclear Deterrent: the White Paper*, Ninth Report of Session 2006-07, paras. 149, 152. See also Hansard, HL, 7 June 2010, col. WA28 (**Annex 27**); HC, 20 December 2012, col. 908W (**Annex 28**). In 2010-11 the defence resource budget was c £28bn: Public Expenditure Statistical Analysis 2011, Departmental Budgets, HM Treasury, table 1.3a, available at [http://www.hm-treasury.gov.uk/d/pesa\\_2011\\_chapter1.pdf](http://www.hm-treasury.gov.uk/d/pesa_2011_chapter1.pdf) [accessed on 12 March 2015] (**Annex 29**). A recent analysis by Scientists for Global Responsibility has revealed that the UK Government spent an average of £327 million per year on nuclear weapons research and development over the three years from 2008 to 2011. See *UK nuclear weapons R&D spending: Addendum AA1 to Offensive Insecurity*, February 2014, available at <http://www.sgr.org.uk/publications/uk-nuclear-weapons-rd-spending> [accessed on 12 March 2015] (**Annex 30**).

<sup>63</sup> Ministry of Defence (2011) *Initial Gate Parliamentary Report* (London: Ministry of Defence), p. 10.

<sup>64</sup> Ministry of Defence and Commonwealth Office, *The Future of the United Kingdom’s Nuclear Deterrent*, Cm 6994.

“That this House supports the Government’s decisions, as set out in the White Paper *The Future of the United Kingdom’s Nuclear Deterrent* (Cm 6994), to take the steps necessary to maintain the UK’s minimum strategic nuclear deterrent beyond the life of the existing system and to take further steps towards meeting the UK’s disarmament responsibilities under Article VI of the Non-Proliferation Treaty.”<sup>65</sup>

46. According to British Pugwash, the effect of that vote and its present and future consequences are as follows:

“Parliament voted to authorize the initial ‘Concept’ phase of the Trident replacement system. The next major milestone, known as the ‘Initial Gate’ decision, was to move to the ‘Assessment’ phase, involving further detailed refinement of a set of design options to enable selection of a preferred solution. The government announced the Initial Gate decision on May 18, 2011. The next big decision to move to the ‘Demonstration and Manufacture’ phase is the Main Gate’ decision, now scheduled for 2016 (delayed from 2014 in October 2010). That is supposed to be the key decision-point when the finalized submarine design is adopted; contracts to build the new boats are then tendered, and billions more pounds will be irrevocably committed to construction of a new generation of nuclear weapons. (**Annex 33**)”<sup>66</sup>

47. On 18 May 2011, when informing Parliament that the Government had approved the ‘Initial Gate’ for the nuclear weapons system successor programme,<sup>67</sup> the Secretary of State for Defence explained:

“We have now agreed the broad outline design of the submarine, made some of the design choices—including the propulsion system and the common US-UK missile compartment—and the programme of work we need to start building the first submarine after 2016. We have also agreed the amount of material and parts we will need to buy in advance of the

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<sup>65</sup> Hansard, HC Deb, 14 March 2007, cols. 298-407 (**Annex 32**).

<sup>66</sup> Briefings on Nuclear Security, ‘Trident: The Initial Gate Decision’, <http://www.britishpugwash.org/documents/Briefing%203%20-%20Initial%20Gate.pdf> [accessed on 1 March 2015].

<sup>67</sup> i.e. the Initial Gate investment stage for the procurement of the successor submarines to the Vanguard-class SSBNs. See further “The United Kingdom’s Future Nuclear Deterrent: The Submarine Initial Gate Parliamentary Report” (May 2011), [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/27399/submarine\\_initial\\_gate.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/27399/submarine_initial_gate.pdf) [accessed 1 March 2015] (**Annex 34**).

main investment decision... Between now and main gate we expect to spend about 15% of the total value of the programme.” (Annex 35)<sup>68</sup>

48. Although the Secretary of State for Defence denied that the Government was “locked into any particular strategy before main gate in 2016” and stated that he would “assist the Liberal Democrats in making the case for alternatives”,<sup>69</sup> he declared:

“I am absolutely clear that a minimum nuclear deterrent based on the Trident missile delivery system and continuous-at-sea deterrence is right for the United Kingdom and that it should be maintained, and that remains Government policy.”<sup>70</sup>

49. On the same day, the Prime Minister told Parliament:

“the Government’s policy is absolutely clear: we are committed to retaining an independent nuclear deterrent based on Trident.”<sup>71</sup>

50. On 30 April 2012, at the First Preparatory Committee for the Ninth Review Conference of the NPT, the Head of the UK Delegation stated:

“As long as large arsenals of nuclear weapons remain and the risk of nuclear proliferation continues, the UK’s judgment is that only a credible nuclear capability can provide the necessary ultimate guarantee to our national security. The UK Government is therefore committed to maintaining a minimum national nuclear deterrent, and to proceeding with the renewal of Trident and the submarine replacement programme.”<sup>72</sup>

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<sup>68</sup> Hansard, HC Deb, 18 May 2011, col. 352.

<sup>69</sup> In order to satisfy Liberal Democrat concerns, the government’s Coalition Agreement negotiated after the 2010 general election stated that “we will maintain Britain’s nuclear deterrent, and have agreed that the renewal of Trident should be scrutinized to ensure value for money. Liberal Democrats will continue to make the case for alternatives.” In May 2011 agreement was reached that the government would conduct a formal 18-month assessment of “credible alternatives” to a like-for-like replacement led by the Cabinet Office. *See below*, paras. 55-56.

<sup>70</sup> *Supra*, n. 68, col. 352.

<sup>71</sup> *Ibid.*, col. 338. *See also* the Prime Minister’s statement at a press conference on 2 November 2010 after the UK-France summit at which the Treaty for Defence and Security Cooperation was concluded: “while we will always retain an independent nuclear deterrent, it is right that we look for efficiencies in the infrastructure required to develop and sustain our separate deterrents...”, <http://www.number10.gov.uk/news/uk-france-summit-press-conference/> [accessed 1 March 2015]

(Annex 36).

<sup>72</sup> [http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/npt/prepcom12/statements/30April\\_UK.pdf](http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/npt/prepcom12/statements/30April_UK.pdf) [accessed 1 March 2015] (Annex 37).

51. On 5 March 2013, in a Statement on Nuclear Disarmament, the UK's Permanent Representative to the Conference on Disarmament declared:

“In 2007, the United Kingdom Parliament debated, and approved by a clear majority, the decision to continue with the program to renew the UK's nuclear deterrent. The Government set out in the 2010 Strategic Defence and Security Review that the UK would maintain a continuous submarine-based deterrent and begin the work of replacing its existing submarines which are due to leave service in the 2020s. This remains the UK Government's policy”. (Annex 38)<sup>73</sup>

52. On 5 June 2013, in response to a question in Parliament, the Prime Minister stated:

“I am strongly committed to the renewal of our deterrent on a like-for-like basis. I think that is right for Britain.”<sup>74</sup>

53. The Trident Alternatives Review was published on 16 July 2013.<sup>75</sup> It had been tasked to answer three questions:

- a. Are there credible alternatives to a submarine-based deterrent?
- b. Are there credible submarine-based alternatives to the current proposal, *e.g.* Astute with cruise missiles?
- c. Are there alternative nuclear postures, *i.e.* non-continuous-at-sea deterrence (“CASD”), which could maintain credibility?”

54. The Trident Alternatives Review concluded:

“None of these alternative systems and postures offers the same degree of resilience as the current posture of Continuous at Sea Deterrence, nor could they guarantee a prompt response in all circumstances.”<sup>76</sup>

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<sup>73</sup> [http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/cd/2013/Statements/5March\\_UK.pdf](http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/cd/2013/Statements/5March_UK.pdf) [accessed 1 March 2015].

<sup>74</sup> Hansard, HC Deb, 5 June 2013, col. 1518.

<sup>75</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/212745/20130716\\_Trident\\_Alternatives\\_Study.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/212745/20130716_Trident_Alternatives_Study.pdf) [accessed on 12 March 2015]. For a commentary on the review, *see* <http://www.basicint.org/sites/default/files/ingramcommentary-tar-jul2013.pdf> [both accessed 1 March 2015] (Annex 39).

<sup>76</sup> Trident Alternatives Review (TAR), Executive summary, para 32. The Review also concluded that “transitioning to any of the realistic alternative systems is now more expensive than a 3 or 4-boat Successor SSBN fleet”: *ibid.*, para. 34. For a critique of the TAR, see T. Fenwick, “Retiring Trident: an alternative proposal for UK nuclear deterrence”, *CentreForum*, (2015) p. 32: <http://www.centreforum.org/assets/pubs/retiring-trident.pdf> [accessed 1 March 2015] (Annex 40).

55. On 6 March 2014, the Secretary of State for Defence, Philip Hammond, informed the House of Commons that he had “decided to refuel the nuclear reactor in HMS Vanguard, one of the UK’s 4 ballistic missile submarines, during its planned deep maintenance period, which begins in 2015” and that “[t]he refuelling will increase our confidence that Vanguard will be able to operate effectively and safely until the planned fleet of Successor submarines begins to be delivered from 2028.” (Annex 41).<sup>77</sup>
56. On 18 December 2014 the UK Government’s 2014 Update to Parliament on Trident was published.<sup>78</sup> It stated that since publication of the 2013 report, and with agreement from HM Treasury, the Ministry of Defence had “re-profiled £261M of funding into the Assessment Phase in order to bring forward essential elements of the programme and offer better overall value for money”. In other words, a further £261 million has been rescheduled to be spent on the project ahead of the Main Gate stage, when MPs will decide whether to authorise the construction of new submarines. The total Assessment Phase approval is now £3.3Bn.<sup>79</sup>
57. The 2014 Update indicated that the Main Gate decision is to be reached in early 2016.<sup>80</sup> It also confirmed the Government’s planning assumptions and overall policy:

“Current planning assumptions are based on a future four boat SSBN deterrent fleet, but a final decision on the number of submarines needed to maintain continuous at sea deterrent patrols will be taken in 2016 at the end of the Assessment Phase, when the necessary information on the maintenance requirements of the new submarine design becomes available.

[...]

In July 2013, the Government published the Trident Alternatives Review, a Cabinet Office led study into alternative deterrent systems and postures. The Review demonstrated that no alternative system is as capable, or cost effective, as a Trident-based deterrent. It showed that there are alternative non-continuous postures that could be adopted, although none that would offer the same degree of resilience as continuous at sea deterrence. Government policy remains to maintain

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<sup>77</sup> Hansard, HC Deb, 6 March 2014, cols. 1077-1078.

<sup>78</sup> “The United Kingdom’s Future Nuclear Deterrent: 2014 Update to Parliament”. This was the third annual report since the Assessment Phase began in 2011. The main purpose of the Assessment Phase is “to refine the design of the submarine and mature the costs in order to make a ‘Main Gate’ investment decision in 2016”, *ibid.*

<sup>79</sup> *Ibid.*

<sup>80</sup> “We plan to next report to Parliament at Main Gate in early 2016”, *ibid.*

a continuous at sea deterrent and proceed with the Assessment Phase programme to build a new fleet of ballistic missile submarines.”<sup>81</sup>

58. On 20 January 2015, MPs debated the renewal of Trident in the House of Commons. The motion-“That this House believes that Trident should not be renewed” was defeated (**Annex 42**).<sup>82</sup> On the same day, the Secretary of State for Defence, Michael Fallon, stated:

“The nuclear deterrent remains to serve as the ultimate means to deter the most extreme threats. The Government continues to plan to renew the UK’s independent strategic nuclear deterrent, though the Liberal Democrats will continue to make the case for alternatives. A ‘Main Gate’ investment decision will be required in 2016 to replace the four Vanguard-class SSBNs currently in service. At the same time, as a responsible nuclear weapon state and party to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) the UK remains committed to creating the conditions for a world without nuclear weapons. The completion of these reductions is a key milestone, demonstrating the UK’s continued leadership within the NPT.” (**Annex 43**)<sup>83</sup>

59. In terms of the UK’s Trident nuclear warheads, the Strategic Defence and Security Review 2010 stated:

“Under the 1958 UK-US Agreement for Cooperation on the Uses of Atomic Energy for Mutual Defence Purposes (the ‘Mutual Defence Agreement’) we have agreed on the future of the Trident D5 delivery system and determined that a replacement warhead is not required until at least the late 2030s. Decisions on replacing the warhead will not therefore be required in this Parliament. This will defer £500 million of spending from the next 10 years.”<sup>84</sup>

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<sup>81</sup> *Ibid.*

<sup>82</sup> Hansard, HC Deb, 20 January 2015, col. 183; Division No. 133: Ayes 35 votes, Noes 364 votes. During the debate, the Parliamentary Under-Secretary of State for Defence, Philip Dunne, stated: “The Government White Paper presented to Parliament in 2006 estimated a cost of £15 billion to £20 billion, at 2006 prices, for the Successor submarine infrastructure and refurbishment of warheads. We remain within these initial estimates, which in 2011 were updated for the capital costs of Successor submarines to £25 billion at outturn prices”, *ibid.*, col. 182.

<sup>83</sup> Hansard, HC, 20 January 2015, col. 4WS (HCWS210).

<sup>84</sup> “Securing Britain in an Age of Uncertainty: The Strategic Defence and Security Review’, October 2010 (Cm 7948), 3.12:

[http://www.direct.gov.uk/prod\\_consum\\_dg/groups/dg\\_digitalassets/@dg/@en/documents/digitalasset/dg\\_191634.pdf](http://www.direct.gov.uk/prod_consum_dg/groups/dg_digitalassets/@dg/@en/documents/digitalasset/dg_191634.pdf) [accessed 1 March 2015]. The Mutual Defence Agreement has been extended a number of times throughout its history, most recently in 2014; see para 62 of this Memorial.

60. Under the UK-US Mutual Defence Agreement, a new “arming, fusing and firing system” developed by the U.S. is to be used in current UK warheads (**Annex 44**).<sup>85</sup> The system would improve the nuclear warhead’s effectiveness against hardened targets. The Trident II D5 missile can carry two types of re-entry vehicle that house each nuclear warhead: the Mark 4 for the U.S. W76 warhead and the Mark 5 for the more modern and higher yield W88 warhead. The UK purchased the Mark 4 RV and designed a warhead to meet Mk4 RV specifications in terms of weight, size, shape, centre of gravity, and centre of inertia. The U.S. is modernizing its W76 warheads and Mk4 re-entry vehicles, including launcher, navigation, fire control, guidance, and re-entry systems.<sup>86</sup> The modernized W76-1 and Mk4A RV have improved the accuracy of the warheads.<sup>87</sup> These improvements have cascaded through to the UK’s Trident warhead and re-entry vehicle.<sup>88</sup> The UK government has acknowledged procurement of the Mk4A RV.<sup>89</sup> Preliminary work on a successor warhead is also underway under the Nuclear Warhead Capability Sustainment Programme at AWE Aldermaston.<sup>90</sup> A life-extended Trident II missile is being developed by the U.S. and will be deployed on UK submarines.<sup>91</sup> It will have a guidance system designed to provide flexibility for new missions and make the missile more accurate.<sup>92</sup> The replacement submarine will be quieter and stealthier.<sup>93</sup> All of these efforts confirm that the UK continues to be actively engaged in qualitative improvements to its nuclear weapons system.
61. The Mutual Defence Agreement referred to above was originally concluded in 1958 and has been extended several times throughout its history, most recently in 2014. The

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<sup>85</sup> R. Norton-Taylor, “Trident more effective with US arming device, tests suggest”, *The Guardian*, 6 April 2011, <http://www.theguardian.com/uk/2011/apr/06/trident-us-arming-system-test> [accessed 12 March 2015]; see also H.M. Kristensen and R.S. Norris, “British Nuclear Forces”, *Bulletin of the Atomic Scientists*, Vol. 67(5) (2011), <http://bos.sagepub.com/content/67/5/89.full#ref-24> [accessed 12 March 2015].

<sup>86</sup> *Supra*, n. 42, at pp. 71-72.

<sup>87</sup> *Ibid.*, at p. 72; H.M. Kristensen, “Administration Increases Submarine Nuclear Warhead Production Plan”, *FAS Blog, Federation of American Scientists*, (2007), [http://www.fas.org/blog/ssp/2007/08/us\\_tripplis\\_submarine\\_warhead.php](http://www.fas.org/blog/ssp/2007/08/us_tripplis_submarine_warhead.php) [accessed 1 March 2015].

<sup>88</sup> *Ibid.* See also H.M. Kristensen, “British Submarines, to Receive Upgraded US Nuclear Warhead”, *FAS Blog, Federation of American Scientists*, (2011), <http://www.fas.org/blog/ssp/2011/04/britishw76-1.php> [accessed 1 March 2015].

<sup>89</sup> *Ibid.*, pp. 68-69; Hansard, HC, 8 December 2009, col. 214W (**Annex 45**).

<sup>90</sup> *Ibid.*, pp. 70-71; Hansard, HC Deb, 28 November 2012, col. 353W (**Annex 46**).

<sup>91</sup> H.M. Kristensen and R.S. Norris, “US nuclear forces, 2014”, *Bulletin of the Atomic Scientists*, Vol. 70(1) (2014), p.85, 91, <http://bos.sagepub.com/content/70/1/85.full.pdf+html> [accessed 1 March 2015].

<sup>92</sup> *Ibid.*; T. Postol, ‘How the Obama Administration Learned to Stop Worrying and Love the Bomb,’ *The Nation*, 10 December 2014, “Upgrades to the submarine-launched Trident II dramatically improve the US capacity to destroy Russian silo-based ICBMs, and with less warning time.”, <http://www.thenation.com/article/192633/how-obama-administration-learned-stop-worrying-and-love-bomb>; *supra*, n. 42, at pp. 71-72 (**Annex 47**).

<sup>93</sup> *Ibid.*, at pp. 72-73.

renewal of the MDA is itself inconsistent with Article VI of the NPT because it is directed towards the continuation and enhancement of the UK's nuclear capability.<sup>94</sup>

62. The development of a successor nuclear warhead is being facilitated by research conducted jointly by the UK and France. On 2 November 2010, the UK and France concluded a bilateral Treaty for Defence and Security Cooperation. Article 1 of the Treaty provides, *inter alia*:

“The Parties, building on the existing strong links between their respective defense and security communities and armed forces, undertake to build a long-term mutually beneficial partnership in defense and security with the aims of:

[...]

Ensuring the viability and safety of their national deterrents, consistent with the Treaty on the Non-Proliferation of Nuclear Weapons.” (**Annex 48**)<sup>95</sup>

63. On November 2, 2010, the UK and France also concluded a Treaty on Joint Radiographic/Hydrodynamics Facilities to build joint nuclear warhead diagnostic and development facilities at the Valduc site of the Commissariat à l’Energie Atomique et aux Energies Alternatives – Direction des Applications Militaires (CEA-DAM) and at AWE Aldermaston (**Annex 49**).<sup>96</sup>
64. Co-operation between the UK and France on nuclear warhead research was subsequently extended under an agreement reached by Prime Minister David Cameron and President François Hollande at their summit at RAF Brize Norton on 31 January 2014. Under the new arrangements, co-operation and information sharing will now take place over a wider range of scientific matters than was specified in the 2010 Treaty. The Declaration on Security and Defence issued after the summit<sup>97</sup> announced that the UK and France had

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<sup>94</sup> The Agreement between the UK and the USA for Cooperation in the Uses of Atomic Energy for Mutual Defence Purposes. This was one of the conclusions of an opinion by Rabinder Singh QC and Professor Christine Chinkin, 21 July 2008, available at <http://www.acronym.org.uk/proliferation-challenges/nuclear-weapons-possessors/united-kingdom/trident/legal-opinion-mutual-defence-agreement-and-nuclear-no?page=show>. On the 2014 renewal of the MDA, see further <http://www.parliament.uk/business/publications/research/briefing-papers/SN03147/ukusa-mutual-defence-agreement>

<sup>95</sup> Treaty between the United Kingdom of Great Britain and Northern Ireland and the French Republic for Defence and Security Co-operation, France No. 01 (2010): <http://www.ukdf.org.uk/assets/downloads/UKFranceDefenceCooperationTreaty.pdf> [accessed 1 March 2015].

<sup>96</sup> <http://www.ukdf.org.uk/assets/downloads/UKFranceNuclearTreaty.pdf> [accessed 1 March 2015].

<sup>97</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/277167/France-UK\\_Summit-Declaration\\_on\\_Security\\_and\\_Defence.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/277167/France-UK_Summit-Declaration_on_Security_and_Defence.pdf) [accessed 1 March 2015].

“agreed to subject more of the technical and scientific data that underpins warhead certification to peer review; to work together on developing energetic materials for the future; and to conduct joint research at the laser facilities located at AWE Orion and CEA/DAM - LMJ.” (Annex 50).<sup>98</sup>

## The UK and nuclear disarmament

### *History and general policy regarding negotiation of nuclear disarmament*

65. As set forth in more detail below, the UK has refused to enter the Trident system (or its predecessors) into nuclear disarmament negotiations despite requests to do so.
66. During the 1970s and 1980s, the UK repeatedly refused to enter its nuclear weapon systems into the disarmament negotiations of that time. During the SALT I and SALT II talks in the 1970s, the UK’s refusal to allow Polaris to be considered caused problems during negotiations. The Soviet Union repeatedly called for the ballistic missile submarines of U.S. allies in NATO to be taken into consideration and argued that if “US allies in NATO should increase the number of their modern submarines... the Soviet Union will have the right to a corresponding increase in the number of its submarines” (Annex 52).<sup>99</sup>
67. When the UK first announced its decision to procure the Trident I C4 nuclear weapon system in 1980, it argued that Trident was compatible with the UK’s arms control obligations on the grounds that it was “fully consistent with the terms of the SALT II Treaty”; that “the scale of our new capability will in no way disturb existing and prospective East/West relativities”; and that “Britain’s strategic SLBM force lies outside the category of those United States and Soviet long-range, land-based theatre nuclear

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<sup>98</sup> *Ibid.*, para. 30. AWE Orion is the ‘Orion’ nuclear test laser at AWE Aldermaston and CEA/DAM – LMJ is the ‘Laser Mégajoule’ at the CEA-DAM Cesta site near Bordeaux. The first experimental firing of the Laser Mégajoule took place on October 23, 2014: see <http://nuclearinfo.org/article/government-development-awe-aldermaston/uk-and-france-extend-warhead-research-collaboration> (Annex 51). The NIS commentary explains: “High powered superlasers such as Orion and the Laser Mégajoule allow researchers to conduct experiments which subject warhead materials and components to pressures and temperatures similar to those encountered during a nuclear test, generating results which can be used to model how a nuclear warhead would behave as it exploded. Such experiments have become increasingly important to nuclear-armed states following agreement of the Comprehensive Nuclear Test-Ban Treaty, which prohibits the underground ‘live’ testing of nuclear weapons.”

<sup>99</sup> “Interim Agreement between the United States of America and the Union of Soviet Socialist Republics on Certain Measures with respect to the Limitation of Strategic Offensive Arms”, Unilateral Statement by Minister Semenov, May 17, 1972.

forces about whose limitation the United States... invited the Soviet Union to negotiate” (Annex 53).<sup>100</sup>

68. Similarly, when the UK announced that it was changing to procure the Trident II D5 system in 1982, it argued that the deployed Polaris system and planned Trident system were not relevant to the INF and START negotiations. The government argued that its strategic nuclear weapon systems were not relevant because these negotiations were “bilateral”, aimed at achieving a “level of strategic parity” between the U.S. and the Soviet Union. The UK argued that the “British strategic force will account for no more than a very small fraction of the total size of the strategic nuclear forces maintained by the United States and the Soviet Union” (Annex 54).<sup>101</sup>
69. The end of the Cold War resulted in massive cuts to Soviet/Russian military capabilities, in particular reductions in nuclear weapons. However, the UK Government would not allow the UK’s nuclear weapons to be included in the negotiations on reductions. In 1987 Presidents Reagan and Gorbachev signed the Intermediate Range Nuclear Forces Treaty (“INF”). The Soviet Union had tried to involve UK nuclear weapons in the INF negotiations, but the UK, backed by its NATO allies, opposed this. Prime Minister Margaret Thatcher’s response to INF was that she believed that nuclear arms cuts in Europe had gone far enough: “I will never give up Britain’s independent nuclear deterrent”, she told the media.<sup>102</sup>
70. According to the Defence Select Committee, as U.S. and Soviet nuclear reductions gathered pace, Mrs. Thatcher “sought and received assurances from the United States that the supply of Trident missiles to the UK will in no way be affected by any future arms control agreement.” (Annex 55).<sup>103</sup>
71. The Strategic Defence Review 1998 stated:

“The Government wishes to see a safer world in which there is no place for nuclear weapons. Progress on arms control is therefore an important objective of foreign and defence policy.”<sup>104</sup>

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<sup>100</sup> “The Future United Kingdom Strategic Nuclear Deterrent Force”, Defence Open Government Document 80/23, Ministry of Defence, July 1980.

<sup>101</sup> “The United Kingdom Trident Programme”, Defence Open Government Document 82/1, Ministry of Defence, Cmnd 8517, March 1982.

<sup>102</sup> N. Ashford and A. Chancellor, “Arms reduction accord threatens UK deterrent”, *The Independent*, 22 September 1987.

<sup>103</sup> “Progress of the Trident Programme”, 422 of 1987-88, HMSO, May 11 1988.

<sup>104</sup> *Supra*, n. 43, at para. 60.

72. However, the UK continued to make negotiations on nuclear disarmament a long-term aspiration rather than an immediate policy objective. The Strategic Defence Review continued: “while large nuclear arsenals and risks of proliferation remain, our minimum deterrent remains a necessary element of our security.”<sup>105</sup> It essentially ruled out any further reductions in UK nuclear weapons until the U.S. and Russia had made further reductions.

73. This has remained the UK Government’s position. In his speech to the 2004 NPT PrepCom, the UK Ambassador stated:

“We have consistently stated that when we are satisfied that sufficient progress has been made – for example, in further deep cuts in their nuclear forces by the US and Russia – to allow us to include the UK’s nuclear weapons in any multilateral negotiations, without endangering our security interests, we will do so.” (Annex 56)<sup>106</sup>

74. On 17 March 2009, after observing that between them the U.S. and Russia retained around 95% of the nuclear weapons in the world and that the START Treaty, “the mainstay of their bilateral arms control effort”, would expire later that year, the then Prime Minister, Gordon Brown stated:

“For our part - as soon as it becomes useful for our arsenal to be included in a broader negotiation, Britain stands ready to participate and to act.” (Annex 57)<sup>107</sup>

75. On 6 July 2010, the then Secretary of State for Defence, Dr Liam Fox, reiterated the previous government’s position that “as soon as it becomes useful for the UK to include its nuclear stockpiles in broader disarmament negotiations, we stand ready to participate and to act” (Annex 58).<sup>108</sup>

76. On 3 January 2012, the UN General Assembly decided to establish an Open-Ended Working Group (OEWG) to develop proposals to take forward multilateral nuclear disarmament negotiations for the achievement and maintenance of a world without

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<sup>105</sup> *Ibid.*

<sup>106</sup> Statement by Ambassador David Broucher, NPT Preparatory Committee 2004, Cluster I, May 3 2004.

<sup>107</sup> 10 Downing Street, Press Notice, Speech on Nuclear Energy and Proliferation, 17 March 2009: <http://image.guardian.co.uk/sys-files/Politics/documents/2009/03/17/PMSPEECH170309.pdf?guni=Article:manual-trailblockpackage:Position3> [accessed on 1 March 2015].

<sup>108</sup> Hansard, HC Deb, 6 July 2010, col. 159W. *See also* the Statement by Ambassador John Duncan to the 2010 Non-Proliferation Treaty Review Conference: [http://www.un.org/en/conf/npt/2010/statements/pdf/uk\\_en.pdf](http://www.un.org/en/conf/npt/2010/statements/pdf/uk_en.pdf) [accessed on 1 March 2015] (Annex 59).

nuclear weapons.<sup>109</sup> However, the UK voted against the resolution<sup>110</sup> and did not attend any of the Working Group's meetings.<sup>111</sup>

77. In a statement made jointly with France and the U.S. in the UN General Assembly First Committee on 6 November 2012, the UK declared that it was “unable to support this resolution, the establishment of the OEWG and *any outcome it may produce*” (**Annex 60**, emphasis added).<sup>112</sup>
78. The UK Government “considers that a practical step by step approach is needed, using existing mechanisms such as the Non - Proliferation Treaty and the Conference on Disarmament.” (**Annex 61**)<sup>113</sup>
79. On 9 December 2014 at the third International Conference on the Humanitarian Impact of Nuclear Weapons, hosted by the Austrian Foreign Ministry in Vienna, the UK delegation stated:
- “The UK agrees that we must also pursue the goal of a world without nuclear weapons, and we are active here too. Some have argued that the way to this goal is to ban nuclear weapons now, or to fix a timetable for their elimination. The UK considers that this approach fails to take account of, and therefore jeopardises, the stability and security which nuclear weapons can help to ensure. The UK believes that the step-by-step approach through the NPT is the only way to combine the imperatives of disarmament and of maintaining global stability.” (**Annex 62**)<sup>114</sup>
80. On 14 January 2015, when answering a question in Parliament about the Vienna Conference on the Humanitarian Impact of Nuclear Weapons, Foreign and Commonwealth Office minister, Tobias Ellwood, declared: “as stated at the Conference, the UK will continue to follow the step-by-step approach to disarmament through the existing UN disarmament machinery and the Nuclear Non-Proliferation Treaty.” (**Annex 63**).<sup>115</sup>

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<sup>109</sup> UNGA Resolution A/RES/67/56, 4 January 2013, “Taking forward multilateral nuclear disarmament negotiations for the achievement and maintenance of a world without nuclear weapons” (147-4-31).

<sup>110</sup> Along with France, the Russian Federation and the U.S.: UNGA Resolution A/67/PV.48, 3 December 2012, pp. 20-21.

<sup>111</sup> Hansard, HL Deb, 15 July 2013, col. WA93.

<sup>112</sup> [http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/1com/1com12/eov/L46\\_France-UK-US.pdf](http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/1com/1com12/eov/L46_France-UK-US.pdf) [accessed on 1 March 2015].

<sup>113</sup> Hansard, HL Deb, 15 July 2013, col. WA93.

<sup>114</sup> Statement by Susan le Jeune d'Allegeershecque, UK Permanent Representative to the UN in Vienna, at the Vienna Conference on the Humanitarian Impact of Nuclear Weapons, 9 December 2014.

<sup>115</sup> Written Question 907116, answered on 20 January 2015.

81. On 4-5 February 2015 the UK hosted the sixth Conference of the P5 Nuclear Weapon States in London.<sup>116</sup> In a Joint Statement issued at the conclusion of the Conference, the P5 “restated their belief that the Non-Proliferation Treaty remains the essential cornerstone for the nuclear non-proliferation regime and the foundation for the pursuit of nuclear disarmament”; but “reaffirmed that a step-by-step approach to nuclear disarmament that promotes international stability, peace and undiminished and increased security for all remains the only realistic and practical route to achieving a world without nuclear weapons.” (**Annex 64**).<sup>117</sup>

*The UK’s opposition to the negotiation of a Nuclear Weapons Convention*

82. The UK 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,<sup>118</sup> underlines the ICJ’s unanimous conclusion that there is an obligation to pursue negotiations leading to nuclear disarmament and calls on all States to immediately fulfil that obligation by commencing multilateral negotiations leading to the early conclusion of a Nuclear Weapons Convention.
83. In 1997, at the request of Costa Rica, the UN Secretary-General circulated to all UN Member States a Model Nuclear Weapons Convention.<sup>119</sup> 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.<sup>120</sup> In 2008, at the request of Costa Rica and Malaysia, the Secretary-General circulated an updated version of the Model Convention.<sup>121</sup> The Secretary-General later described the Model Convention as “a good point of departure” for negotiation of a Nuclear Weapons Convention (**Annex 65**).<sup>122</sup>
84. 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

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<sup>116</sup> This was the sixth P5 Conference since 2009 and the last before the NPT Review Conference in April 2015.

<sup>117</sup> <https://www.gov.uk/government/news/joint-statement-from-the-nuclear-weapon-states-at-the-london-p5-conference> [accessed on 1 March 2015].

<sup>118</sup> Most recently on December 2 2014, UNGA Resolution A/RES/69/43.

<sup>119</sup> Letter dated October 31, 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.

<sup>120</sup> *Ibid.*

<sup>121</sup> Letter dated 17 December 2007 from the Permanent Representatives of Costa Rica and Malaysia to the United Nations Addressed to the Secretary-General, UN Doc. A/62/650 (Jan. 18, 2008).

<sup>122</sup> Press Release, Secretary-General Ban Ki-moon, The United Nations and Security in a Nuclear-Weapon-Free World, U.N. Doc. SG/SM/11881 (Oct. 24, 2008), <http://www.un.org/News/Press/docs/2008/sgsm11881.doc.htm> [accessed 1 March 2015].

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 Comprehensive Nuclear-Test Ban Treaty (“CTBT”), regional nuclear weapon-free zones, UN Security Council Resolution 1540, the International Convention for the Suppression of Acts of Nuclear Terrorism, and bilateral nuclear force reduction agreements between Russia and the U.S.

85. Despite the annual UN General Assembly resolution discussed above, there have been no inter-governmental negotiations or deliberations in any official forum leading toward the adoption of a Nuclear Weapons Convention, except in the above-mentioned Open-Ended Working Group in which the UK and the other NPT nuclear weapon States refused to participate.
86. 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.” (**Annex 66**).<sup>123</sup>
87. The UK Government officially expresses opposition to a Nuclear Weapons Convention. A 2009 policy paper provided that while a Nuclear Weapons Convention will “likely be necessary to establish the final ban on nuclear weapons”, it is “premature and potentially counter-productive” to prioritise such a convention “when the many other conditions necessary to enable a ban have yet to be put in place” (**Annex 67**).<sup>124</sup>
88. In June 2010, Lord Howell of Guildford (Minister of State, Foreign and Commonwealth Office) stated:

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<sup>123</sup> *Nuclear Disarmament and the NPT: The Responsibility of the Nuclear-Weapon States*, at “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](http://www.un.org/disarmament/HomePage/HR/docs/2008/2008Feb16_London.pdf) [accessed 1 March 2015].

<sup>124</sup> Foreign and Commonwealth Office, *Lifting the Nuclear Shadow*, 2009, p. 34.

“The idea of a nuclear weapons convention is a fine one, but... [a] whole series of things need to be done before one comes to the happy situation where the nuclear world is disarmed and a convention could then get full support”. (**Annex 68**)<sup>125</sup>

89. In August 2011, the Prime Minister stated that he disagreed “that negotiations now on a nuclear weapons convention should be the immediate means of getting us to a world free of nuclear weapons”.<sup>126</sup> While he acknowledged that a Nuclear Weapons Convention “could ultimately form the legal underpinning for this end point”, he considered that the prospects of reaching agreement on a convention “are remote at the moment”.<sup>127</sup>
90. The first-ever UN General Assembly High-Level Meeting on Nuclear Disarmament was held on 26 September 2013, pursuant to a 2012 resolution which was opposed by the UK.<sup>128</sup> At that meeting the UK representative delivered a 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.” (**Annex 69**).<sup>129</sup>
91. The UK subsequently voted against a new UN General Assembly resolution following up the High-Level Meeting.<sup>130</sup> The resolution called 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.
92. Similarly, in December 2014 the UK voted against the successor UN General Assembly resolution following up the 2013 High-Level Meeting. The resolution endorsed a comprehensive convention on nuclear weapons and called for the urgent commencement of negotiations in the Conference on Disarmament for that purpose.<sup>131</sup>

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<sup>125</sup> Hansard, HL Deb, 9 June 2010, col. 641: answer to a question by Baroness Williams of Crosby (Liberal Democrat), who had pointed out that “the great bulk of non-nuclear powers decided to press for a nuclear weapons convention to abolish nuclear weapons completely by 2025”.

<sup>126</sup> Letter from the Prime Minister to Jeremy Corbyn MP, 15 August 2011.

<sup>127</sup> *Ibid.*

<sup>128</sup> UNGA Resolution A/RES/67/39, 3 December 2012.

<sup>129</sup> Open Ended Working Group hereafter “OEWG”,

[http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/HLM/26Sep\\_UKUSFrance.pdf](http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/HLM/26Sep_UKUSFrance.pdf) [accessed on 1 March 2015].

<sup>130</sup> UNGA Resolution A/RES/68/32, 5 December 2013.

<sup>131</sup> UNGA Resolution A/RES/69/58, 2 December 2014.

## PART 3

### JURISDICTION AND ADMISSIBILITY

#### Jurisdiction

93. The Republic of the Marshall Islands rests its claim of jurisdiction in these proceedings on Article 36, paragraph 2 of the Statute of the Court and on the Declarations of the RMI and the United Kingdom Recognizing the Jurisdiction of the Court as Compulsory. The Declaration of the Marshall Islands was deposited on 24 April 2013 and the relevant Declaration of the United Kingdom was deposited on 5 July 2004 (**Annex 70**).<sup>132</sup>
94. The Declarations of each party accept the jurisdiction of this Court (with exceptions not apposite in these proceedings) by using the general words “in conformity with paragraph 2 of Article 36 of the Statute of the Court”.

#### The existence of a “dispute”

95. The Marshall Islands has a *legal* dispute with the United Kingdom, as required by Article 36(2) of the Statute of the Court. The dispute concerns the United Kingdom’s non-compliance with its legal obligations under Article VI of the NPT and under customary international law, 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.
96. The Court has identified clear parameters for determining the existence of a dispute. According to the established case law of the Court, “[a] dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons.”<sup>133</sup> Moreover, “[w]hether there is a dispute in a given case is a matter for ‘objective determination’ by the Court”<sup>134</sup> and “[t]he Court’s determination must turn on an

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<sup>132</sup> On 31 December 2014, the United Kingdom deposited a revised Declaration that has no application to the present proceedings.

<sup>133</sup> *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11; most recently, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 84, para. 30.

<sup>134</sup> *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 74.

examination of the facts. The matter is one of substance, not of form.”<sup>135</sup> In particular, what must be shown is “that the claim of one party is positively opposed by the other”.<sup>136</sup> However, the opposition to the claim of one party may also be inferred from the attitude taken by the other party in respect to such claim. As the Court has stated, “a disagreement on a point of law or fact, a conflict of legal views or interests, or the positive opposition of the claim of one party by the other need not necessarily be stated *expressis verbis*. In the determination of the existence of a dispute, as in other matters, the position or the attitude of a party can be established by inference, whatever the professed view of that party”.<sup>137</sup>

97. These criteria are fulfilled in the present case. The statements and conduct of the parties reflect the existence of a legal dispute between the United Kingdom and the RMI over whether the United Kingdom is complying with its 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.
  
98. As set out in its Application and in the Introduction to the present Memorial, the RMI is particularly aware of the potentially dire consequences of nuclear weapons and in recent years has enhanced its commitment to promoting greater global progress to nuclear disarmament. On several occasions, and in different fora, it has asked States possessing nuclear weapons to abide by their obligations to take action towards nuclear disarmament. For instance, on 26 September 2013, at the occasion of the UN High Level Meeting on Nuclear Disarmament, the Minister of Foreign Affairs for the RMI urged “all nuclear weapons states to intensify efforts to address their responsibilities in moving towards an effective and secure disarmament” (**Annex 71**).<sup>138</sup> Marshall Islands invites the Court to compare the RMI statement with the statement made by the United Kingdom on that occasion, regretting the energy “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.”<sup>139</sup> The Marshall Islands submits that the United Kingdom’s statement, while paying lip service to the obligations under the NPT and under customary international law, demonstrates a fundamental disagreement, a dispute, with the Marshall Islands concerning the correct

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<sup>135</sup> *Supra*, n. 133, para. 30.

<sup>136</sup> *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, Preliminary Objections, Judgment, I.C.J. Reports 1962, p. 328, and most recently *supra*, n. 16, at para. 46.

<sup>137</sup> *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, Preliminary Objections, Judgment, I.C.J. Reports 1998, p. 315, paras. 89 ff.

<sup>138</sup> Statement by Hon. Mr. Phillip Muller, Minister of Foreign Affairs of the Republic of the Marshall Islands, 26 September 2013, [http://www.un.org/en/ga/68/meetings/nucleardisarmament/pdf/MH\\_en.pdf](http://www.un.org/en/ga/68/meetings/nucleardisarmament/pdf/MH_en.pdf) [accessed on 2 March 2015].

<sup>139</sup> See para 77 & 225 of this Memorial.

understanding of those obligations and the extent to which the United Kingdom is fulfilling them.

99. On 13 February 2014, at the Second Conference on the Humanitarian Impact of Nuclear Weapons, the RMI reiterated its position and expressly stated that the failure of States possessing nuclear weapons to engage in negotiations leading to nuclear disarmament amounted to a breach of their international obligations. It observed that:

“(.. .) the Marshall Islands is convinced that multilateral negotiations on achieving and sustaining a world free of nuclear weapons are long overdue. Indeed we believe that states possessing nuclear arsenals are failing to fulfill their legal obligations in this regard. Immediate commencement and conclusion of such negotiations is required by legal obligation of nuclear disarmament resting upon each and every state under Article VI of the Non-Proliferation Treaty and customary international law.” (Annex 72)<sup>140</sup>

100. This unequivocal statement confirmed to States possessing nuclear weapons, including the United Kingdom, that the RMI believes that their failure to engage seriously in multilateral negotiations amounts to a breach of their international obligations under the Non-Proliferation Treaty and under customary international law. This public statement, as well as the overall position taken by the RMI on this issue over recent years, is clear evidence that the RMI had raised a dispute with each and every one of the States possessing nuclear weapons, including with the United Kingdom. The subject matter of this dispute is the same as that later submitted to the Court through the RMI’s Application. In its judgment in the case concerning the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)* the Court recognized:

“[w]hile it is not necessary that a State must expressly refer to a specific treaty in its exchanges with the other State to enable it later to invoke that instrument before the Court (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, pp. 428 - 429, para. 83), the exchanges must refer to the subject-matter of the treaty with sufficient clarity to enable the State against which a claim is made to identify that there is, or may be, a dispute with regard to that subject-matter”.<sup>141</sup>

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<sup>140</sup> Marshall Islands Statement, Second Conference on the Humanitarian Impact of Nuclear Weapons Nayarit, Mexico, 13-14 February 2014, <http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/nayarit-2014/statements/MarshallIslands.pdf>, [accessed on 1 March 2015].

<sup>141</sup> *Supra*, n. 133 para. 30.

While this statement refers to a dispute with regard to compliance with a Treaty, the same also applies to disputes under customary international law. In the present case there is no doubt that the RMI referred to the subject matter of its claims against the United Kingdom with sufficient clarity to enable the United Kingdom “to identify that there is, or may be, a dispute with regard to that subject-matter”. Thus, the United Kingdom cannot now seriously contend that the RMI failed to raise a dispute with it over the United Kingdom’s non-fulfilment of its Treaty and customary international law obligations to engage in negotiations leading to nuclear disarmament.

101. It can hardly be denied that the RMI’s claims have been positively opposed by the United Kingdom. The United Kingdom’s opposition to such claims can be inferred from its conduct. While in public statements the United Kingdom has frequently reaffirmed its commitment to the goal of a nuclear weapon free world,<sup>142</sup> its conduct, which has continued unchanged despite the RMI’s claims and requests, reveals that the United Kingdom is not fulfilling its obligation under the Non-Proliferation Treaty and under customary international law 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. Instead, the United Kingdom opposes initiation of multilateral negotiations on nuclear disarmament and continues to engage in a course of conduct consisting of the long-term maintenance and qualitative improvement of its nuclear arsenal, which is contrary to the objective of nuclear disarmament. In Part 2 of this Memorial, the RMI has set out the United Kingdom’s opposition to multilateral negotiations on nuclear disarmament and its current plans for the long-term maintenance and improvement of its nuclear arsenal. What must be emphasized is that the United Kingdom’s conduct provides clear evidence of its opposition to the RMI’s claims. As this Court said, when it comes to determining the existence of a dispute, “[t]he matter is one of substance, not of form”.<sup>143</sup> And the substance is that the United Kingdom continues to engage in conduct that is contrary to its Treaty and customary international legal obligations 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.
102. It may be concluded that, as demonstrated above and also in Part 2, especially under the heading *The UK’s opposition to the negotiation of a Nuclear Weapons Convention*, the RMI and the United Kingdom, by their opposing statements and conduct, have manifested the existence of a dispute over the United Kingdom’s non-compliance with its Treaty and customary international law obligations to pursue in good faith, and bring to a

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<sup>142</sup> E.g., statement at the Vienna Conference on the Humanitarian Impact of Nuclear Weapons, *supra* n. 31.

<sup>143</sup> *Supra*, n. 3.

conclusion, negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.

### **Locus standi**

103. The RMI has explained in Part 1 of this Memorial its own particular experience of nuclear weapons testing and also in this Memorial has set forth its interests in ending the nuclear threat (“Nuclear Sword of Damocles,” *supra*). Because of these interests, there is little doubt that the RMI has *locus standi* to bring a case against the United Kingdom for breaches of the obligations set forth in Article VI of the NPT. The RMI can be qualified as an injured State within the definition provided by Article 42 (b) (ii) of the International Law Commission’s Articles on Responsibility of States for Internationally Wrongful Acts.<sup>144</sup> However, this is not the only ground which can justify the existence of a *locus standi* in the present case. The RMI submits that every State has *locus standi* to seek to enforce the obligations 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” since this obligation is an obligation *erga omnes* (or “opposable *erga omnes*”, as President Bedjaoui put it).<sup>145</sup> As such, every State has a legal interest in its timely performance.
104. The Marshall Islands draws attention to the following language in the decision of this Court in its judgment concerning the *Barcelona Traction, Light and Power Company, Limited*:<sup>146</sup>

“[...] an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.

Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*,

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<sup>144</sup> UNGA Resolution A/RES/56/83, 28 January 2002.

<sup>145</sup> *Supra*, n. 3, p. 274.

<sup>146</sup> *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain); Second Phase, Judgment of 5 February 1970, I.C.J. Reports 1970*, p. 3.

*Advisory Opinion, I.C.J. Reports 1951*, p. 23); others are conferred by international instruments of a universal or quasi-universal character.”<sup>147</sup>

105. A striking feature of this statement bears emphasizing at the outset. Namely, as the Court asserts in its reference to genocide, obligations *erga omnes*, and corresponding rights of protection, can arise under customary international law as well as under Treaty law. The obligation involved in the proceedings that the RMI has brought against all those States possessing nuclear weapons illustrate the overlap between these two sources. Insofar as a State is a party to the NPT, the obligation can clearly be regarded as a Treaty obligation. But in respect of each of the four non-party States, the obligation is only customary in nature and constitutes, to use the *Barcelona Traction* expression, “general international law”.<sup>148</sup>
106. It is true that this Court may have to elaborate on the nature of the obligations that are owed *erga omnes partes* and/or *erga omnes*. It is equally the case that in *Barcelona Traction* the Court was not setting out a closed list of the obligations to which it was referring, but rather giving examples. As the list is not exhaustive, it should also include an issue which is fundamental to the very survival of humanity, and which has been on the agenda of the United Nations since its inception – the abolition of nuclear weapons.<sup>149</sup> As the Court said in its Advisory Opinion of 8 July 1996:

“The destructive power of nuclear weapons cannot be contained in either space or time. They have the potential to destroy all civilization and the entire ecosystem of the planet.”<sup>150</sup>

107. The RMI is a small island State whose only power is the power of the law. Surely it must have standing to enforce existing Treaty and customary international law obligations to pursue and conclude negotiations leading to the elimination of nuclear weapons that have “the potential to destroy all civilization and the entire ecosystem of the planet”.
108. There is a close analogy here with the obligations that this Court has previously addressed concerning genocide and torture. In *Questions relating to the Obligation to Prosecute or Extradite*, this Court posed the question “whether being a party to the

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<sup>147</sup> *Ibid.*, p. 32.

<sup>148</sup> To the extent that the customary law obligations are parallel to those in a Treaty, it is worth noting that the Genocide Convention has 146 parties, the Convention against Torture has 156 and the NPT has 189. This overwhelming support for the NPT might, of itself, suggest that article VI has become a source of customary law. See Part 6 of this Memorial.

<sup>149</sup> See the discussion of the General Assembly’s first resolution on any subject and subsequent practice in paras. *Supra*, n. 3, at paras. 100-103.

<sup>150</sup> *Ibid.*, at para. 35.

[Torture] Convention is sufficient for a State to be entitled to bring a claim to the Court concerning the cessation of alleged violations by another State party of its obligations under that instrument”.<sup>151</sup> The Court held:

“68. As stated in its Preamble, the object and purpose of the Convention [against Torture] is “to make more effective the struggle against torture . . . throughout the world”. The States parties to the Convention have a common interest to ensure, in view of their shared values, that acts of torture are prevented and that, if they occur, their authors do not enjoy impunity. . . . All the other States parties have a common interest in compliance with these obligations by the State in whose territory the alleged offender is present. That common interest implies that the obligations in question are owed by any State Party to all the other States parties to the Convention. All the States Parties “have a legal interest” in the protection of the rights involved (*Barcelona Traction, Light and Power Company Limited (Belgium v. Spain)*, *Second Phase, Judgment*, *I.C.J. Reports 1970*, p. 32, para. 33). These obligations may be defined as “obligations *erga omnes partes*” in the sense that each State party has an interest in compliance with them in any given case. In this respect, the relevant provisions of the Convention against Torture are similar to those of the Convention on the Prevention and Punishment of the Crime of Genocide, with regard to which the Court observed that: “In such a convention the contracting States do not have any interest of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d’être* of the Convention.” (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion*, *I.C.J. Reports 1951*, p. 23.).

69. The common interest in compliance with the relevant obligations under the Convention against Torture implies the entitlement of each State party to the Convention to make a claim concerning the cessation of an alleged breach by another State party. If a special interest were required for that purpose, in many cases no State would be in a position to make such a claim. It follows that any State party to the Convention may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations *erga omnes partes*, such as those under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention, and to bring that failure to an end.”<sup>152</sup>

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<sup>151</sup> *Supra*, n. 16, para. 67.

<sup>152</sup> *Ibid.*, pp. 449-450.

109. The same is true here. The very Treaty that contains a “recognition . . . of an obligation to negotiate in good faith a nuclear disarmament”<sup>153</sup> has the parties asserting in the Preamble, *inter alia*, the following underpinnings of that obligation:

“Considering 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,

[...]

Declaring their intention to achieve at the earliest possible date the cessation of the nuclear arms race and to undertake effective measures in the direction of nuclear disarmament,

[...]

Desiring to further the easing of international tension and the strengthening of trust between States in order to facilitate the cessation of the manufacture of nuclear weapons, the liquidation of all their existing stockpiles, and the elimination from national arsenals of nuclear weapons and the means of their delivery pursuant to a treaty on general and complete disarmament under strict and effective international control.”<sup>154</sup>

110. For the reasons set forth in the previous paragraphs, it should be concluded that the RMI has *locus standi* in the present proceedings and that its position on standing finds support in Article 42 and Article 48 of the International Law Commission’s Articles on Responsibility of States for Internationally Wrongful Acts.<sup>155</sup>

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<sup>153</sup> *Supra*, n. 3, at para. 99.

<sup>154</sup> *Supra*, n. 2, Preamble.

<sup>155</sup> *Supra*, n. 144.

## PART 4

### HISTORICAL DEVELOPMENT OF THE OBLIGATIONS RELATING TO NUCLEAR DISARMAMENT AND CESSATION OF THE NUCLEAR ARMS RACE IN THE UNITED NATIONS AND UNDER THE NUCLEAR NON-PROLIFERATION TREATY

111. The focus of the RMI's case is Article VI of the NPT but it is important to contextualize the Treaty in relation to the development of the relevant norms, including international customary law, within the United Nations. The following section provides an overview of this context, before and after the adoption of the NPT, as well as the negotiation of the Treaty.

#### Early UN General Assembly resolutions

112. Five months after the U.S. nuclear bombings of Hiroshima and Nagasaki, in its very first resolution, unanimously adopted on 24 January 1946 at the London session, the United Nations General Assembly established a commission to make specific proposals for, among other things, "the elimination from national armaments of atomic weapons and of all other major weapons adaptable to mass destruction".<sup>156</sup> The Atomic Energy Commission so created was then presented with conflicting proposals from the United States and the Soviet Union.<sup>157</sup> In response, on 14 December 1946, the General Assembly unanimously adopted a resolution recommending that the United Nations Security Council "facilitate the work of the Commission" and also that the Council "expedite consideration of a draft convention or conventions for the creation of an international system of control and inspection, these conventions to include the prohibition of atomic and all other major weapons adaptable now and in the future to mass destruction and the control of atomic energy to the extent necessary to ensure its use only for peaceful purposes."<sup>158</sup> The resolution further recommended that the Council, in accordance with Article 26 of the United Nations Charter, formulate plans for the "general regulation and reduction of armaments and armed forces".<sup>159</sup> In the end the Council took no action

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<sup>156</sup> UNGA Resolution A/RES/1 (I), 24 January 1946, cited in the Court's Advisory Opinion on nuclear weapons, *supra* n. 2, para. 101.

<sup>157</sup> E.L. Meyrowitz, *Prohibition of Nuclear Weapons: The Relevance of International Law* (Transnational Publishers, 1990) pp. 106.

<sup>158</sup> UNGA Resolution A/RES/41 (1), 14 December 1946.

<sup>159</sup> *Ibid.*

regarding elimination of nuclear and other weapons of mass destruction, nor did the Council formulate plans for general disarmament. The Atomic Energy Commission was dissolved in 1952.<sup>160</sup>

113. The General Assembly remained seized of these matters. Thus in a resolution unanimously adopted on 4 November 1954, it concluded:

“that a further effort should be made to reach agreement on comprehensive and co-ordinated proposals to be embodied in a draft international disarmament convention providing for

- (a) The regulation, limitation and major reduction of all armed forces and all conventional armaments;
- (b) The total prohibition of the use and manufacture of nuclear weapons and weapons of mass destruction of every type, together with the conversion of existing stocks of nuclear weapons for peaceful purposes;
- (c) The establishment of effective international control, through a control organ with rights, powers and functions adequate to guarantee the effective observance of the agreed reductions of all armament and armed forces and the prohibition of nuclear and other weapons of mass destruction, and to ensure the use of atomic energy for peaceful purposes only”.<sup>161</sup>

## **The Nuclear Non-Proliferation Treaty**

### *Negotiation of the NPT*

114. In 1961, the General Assembly unanimously adopted an Ireland-sponsored resolution calling for conclusion of an international agreement to prevent an imminent increase in the number of States possessing nuclear weapons.<sup>162</sup> Consistently with the terms of that resolution, in the summer of 1965 the Soviet Union and the U.S. introduced draft treaties in the Eighteen Nation Disarmament Committee (ENDC) prohibiting the acquisition of

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<sup>160</sup> UNGA Resolution A/RES/502 (VI), 11 January 1952, which created the Disarmament Commission. Regarding UN efforts relating to general and complete disarmament prior to negotiation of the NPT, see Randy Rydell, “Nuclear Disarmament and General and Complete Disarmament,” in D. Krieger, ed., *The Challenge of Abolishing Nuclear Weapons* (Transaction Publishers 2009), pp. 229-234, available at <http://www.un.org/disarmament/content/speeches/oda-ny/rydell/>. Rydell was Senior Political Affairs Officer in the Office of the High Representative for Disarmament Affairs.

<sup>161</sup> UNGA Resolution A/RES/808 A (IX), 4 November 1954, cited in Nuclear Weapons Advisory Opinion, *supra*, n. 2, para. 101.

<sup>162</sup> UNGA Resolution A/RES/1665 (XVI), 4 December 1961. An earlier resolution sponsored by Ireland on the same subject was adopted in 1959. UNGA Resolution A/RES/1380 (XIV), 20 November 1959.

nuclear weapons by and transfer of such weapons to non-possessing States.<sup>163</sup> While there were preambular references, varying between the drafts, to cessation of the nuclear arms race and nuclear disarmament, and to peaceful uses of nuclear energy, the drafts contained no operative provisions on those matters.

115. The eight non-aligned members of the ENDC produced a joint memorandum in response to the drafts. It stated:

“measures to prohibit the spread of nuclear weapons should be coupled with or followed by tangible steps to halt the nuclear arms race and to limit, reduce and eliminate the stocks of nuclear weapons and the means of their delivery.”<sup>164</sup>

Later that year, a General Assembly resolution formulated the five principles on which the Treaty should be based; they included:

“b. The treaty should embody an acceptable balance of mutual responsibilities and obligations of the nuclear and non-nuclear Powers;  
c. The treaty should be a step toward the achievement of general and complete disarmament and, more particularly, nuclear disarmament.”<sup>165</sup>

116. Subsequently, India, Brazil, Scandinavian States, Canada, the United Arab Republic and the Federal Republic of Germany “brought strong pressure upon the [U.S. and Soviet] Co-chairmen to obtain some statement within the treaty concerning nuclear disarmament.”<sup>166</sup> In August 1967, the Soviet Union and the U.S. put forward a new draft that, *inter alia*, included Article IV recognizing the right to peaceful uses of nuclear energy.<sup>167</sup> References to cessation of the nuclear arms race and nuclear disarmament remained preambular. In response, reflecting in part earlier discussions in the ENDC,<sup>168</sup> Mexico proposed an obligation as follows, taking language regarding measures from the preamble and adding a measure regarding the prohibition of nuclear weapons tests:

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<sup>163</sup> ENDC/152, 17 August 1965 (U.S.) and A/5976, 24 September 1965 (Soviet), reproduced in M.I. Shaker, *The Nuclear Non-Proliferation Treaty: Origin and Implementation, 1959–1979* (London: Oceana Publications, Vol. III 1980) pp. 937-943.

<sup>164</sup> ENDC/158, 15 Sept. 1965, reproduced in *Shaker*, Vol. I, p. 55. The eight non-aligned members of the ENDC were Brazil, Burma, Ethiopia, India, Mexico, Nigeria, Sweden, and the United Arab Republic.

<sup>165</sup> UNGA Resolution A/RES/2028 (XX), 19 November 1965, adopted by a vote of 93 to zero, with five abstentions.

<sup>166</sup> E. Firmage, “The Treaty on the Non-Proliferation of Nuclear Weapons”, 63 *American Journal of International Law* (1969) 711, 732.

<sup>167</sup> ENDC/192, 24 August 1967 (US) and ENDC/193, 24 August 1967 (Soviet), reproduced in Shaker, *supra*, n. 163, Vol. III, at pp. 946-950.

<sup>168</sup> The eight non-aligned members of the ENDC, India and Sweden jointly and separately, and Romania all made proposals relating to nuclear disarmament and cessation of the nuclear arms. *Ibid.*, Vol. II, pp. 565-572.

“Each nuclear-weapon State Party to this Treaty undertakes to pursue negotiations in good faith, with all speed and perseverance, on agreements regarding the prohibition of all nuclear weapons tests, the cessation of the manufacture of nuclear weapons, the liquidation of all their existing stockpiles, the elimination from national arsenals of nuclear weapons and the means of their delivery, as well as to reach agreement on a treaty on general and complete disarmament under strict and effective international control.”<sup>169</sup>

Brazil described the U.S.-Soviet draft as “one-sided and discriminatory.”<sup>170</sup> It proposed as Article II (A):

“Each nuclear-weapon State Party to this Treaty undertakes the obligation to negotiate at the earliest possible date a Treaty for the cessation of nuclear arms race and for the eventual reduction and elimination of their nuclear arsenals and the means of delivery of their nuclear weapons.”<sup>171</sup>

117. A January 1968 draft put forward by the Soviet Union and U.S. strengthened Article IV by adding an obligation regarding cooperation in development of peaceful uses of nuclear energy. It also contained new provisions, promising non-nuclear weapon States access to any benefits of “peaceful nuclear explosions” (Article V), recognizing the right of States to form regional nuclear-weapon-free zones (Article VII), providing for a decision as to extension of the Treaty 25 years after entry into force (Article X (2)), and Article VI largely as it was finally agreed.<sup>172</sup> Article VI included the obligation to pursue negotiations in good faith as proposed by Mexico but made no reference to specific measures, which remained in the preamble. In accordance with a Swedish proposal, “at an early date” was subsequently added after “cessation of the nuclear arms race,” “nuclear” was inserted prior to disarmament in the phrase “effective measures relating to ... disarmament”, and a Treaty comprehensively banning nuclear test explosions was referenced in the preamble.<sup>173</sup> The inclusion of Article X (2) reflected among other things the view of some non-nuclear weapon States that they should not be permanently bound

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<sup>169</sup> Final Verbatim Record of the 331<sup>st</sup> Meeting of the Eighteen-Nation Committee on Disarmament, 19 September 1967, ENDC/PV.331, p. 10.

<sup>170</sup> Final Verbatim Record of the 327<sup>th</sup> Meeting of the Eighteen-Nation Committee on Disarmament, 31 August 1967, ENDC/PV.327, p. 4.

<sup>171</sup> Final Verbatim Record of the 343<sup>d</sup> Meeting of the Eighteen-Nation Committee on Disarmament, 31 October 1967, ENDC/PV.343, p. 5. India and Romania also made proposals. *Supra* n. 163, at pp. 557, 570-571, 574-575.

<sup>172</sup> ENDC/192/Rev. 1, 18 January 1968 (U.S.) and ENDC/193/ Rev. 1, 18 January 1968 (Soviet), *supra*, n. 163, Vol. III, at pp. 951-956.

<sup>173</sup> Final Verbatim Record of the 363<sup>d</sup> Meeting of the Eighteen-Nation Committee on Disarmament, 31 October 1967, ENDC/PV.363, pp. 6-7; *Supra* n. 163, Vol. II, at pp. 576-577.

if disarmament measures are not implemented.<sup>174</sup> After some further adjustments to the draft, the General Assembly adopted a resolution endorsing the Treaty on 12 June 1968.<sup>175</sup>

118. The negotiating history confirms that Article VI is “a provision essential to the accomplishment of the object or purpose of the [NPT]”,<sup>176</sup> reflecting a “strategic bargain” between States that renounced acquisition of nuclear arms and States possessing them (**Annex 73**).<sup>177</sup> According to one scholar:

“The fact that Article VI has its place in the treaty is a testament to the tenacity of the non-nuclear-weapon States in demanding some form of quid pro quo for their renunciation of nuclear weapons.”<sup>178</sup>

The history further shows not only the centrality of Article VI to adoption of the Treaty but also that implementation of Article VI was expected to yield results in a timely manner. Mohamed Shaker, a member of the delegation of the United Arab Republic to the ENDC during the negotiations, noted in his three-volume study of the NPT that a number of non-nuclear weapon States “generally felt that negotiating was not an end in itself but a means to achieving concrete results.”<sup>179</sup> Commenting on the January 1968 draft, the UK Minister of State for Foreign Affairs, Frederick Mulley, stated:

“Article VI concerns what is certainly the most important by-product of the treaty and one of its most important provisions. Most of us have spoken at one time or another on the need for a link between this treaty and further measures of

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<sup>174</sup> *Supra* n. 163, Vol. II, at pp. 860-862. Switzerland commented in an aide-memoire that “the non-nuclear-weapon States certainly cannot take the responsibility of tying their hands indefinitely if the nuclear-weapon States fail to arrive at positive results in that direction [limitation of armaments].” *Ibid.* at p. 861, citing ENDC/204, 24 November 1967. The United Kingdom stated that Article X(2) “takes into account the concern of many countries that circumstances might alter and that a treaty of this importance should be open to termination in due course if its wider purposes, including the need for further disarmament measures, are not being achieved.” Final Verbatim Record of the 358th Meeting of the Eighteen-Nation Committee on Disarmament, 23 January 1968, ENDC/PV.358, pp. 9-10 (Minister of State for Foreign Affairs Frederick Mulley).

<sup>175</sup> UNGA Resolution A/RES/2373 (XXII), 12 June 1968, adopted by a vote of 94 to 4 (Albania, Cuba, Tanzania, and Zambia), with 21 abstentions.

<sup>176</sup> Article 60(3)(b) of the Vienna Convention on the Law of Treaties 1969.

<sup>177</sup> T. 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](http://cns.miis.edu/npr/pdfs/151_correspondence.pdf) [accessed on 1 March 2015]. Graham was the U.S. Special Representative for Non-Proliferation at the 1995 NPT Review and Extension Conference.

<sup>178</sup> *Supra* n. 166, at p. 733. See also *supra* n. 163, at p. 564 (responsibility of nuclear-weapon States under Article VI “was looked upon by the non-nuclear-weapons States not only in the context of achieving a more secure world but as a *quid pro quo* for the latter’s renunciation of nuclear weapons”).

<sup>179</sup> *Supra*, n. 163, at p. 572.

disarmament .... One way of providing this necessary, balancing obligation between the nuclear and non-nuclear signatories was to write the undertaking into the body of the treaty.... [M]y Government accepts the obligation to participate fully in the negotiations required by article VI; and it is our desire that these negotiations should begin as soon as possible and should produce speedy and successful results. There is no excuse now for allowing a long delay to follow the signing of this treaty, as happened after the [1963 signing of the] partial test-ban treaty ..., before further measures can be agreed and implemented.”<sup>180</sup>

119. The Treaty was opened for signature on 1 July 1968 and entered into force on 5 March 1970. It currently has 189 States Parties.<sup>181</sup>
120. In general terms, the obligations imposed by the Treaty are the following. Article I obligates NWS not to transfer nuclear weapons to “any recipient whatsoever”. Under Articles II and III, NNWS are obligated not to acquire nuclear weapons and to accept monitoring of their civilian nuclear programs through safeguards administered by the International Atomic Energy Agency (IAEA). Article IV recognizes the right “to develop research, production and use of nuclear energy for peaceful purposes” and obligates States to cooperate in the development of such peaceful uses, especially in NNWS. Article VI requires the pursuit of negotiations in good faith on effective measures relating to cessation of the nuclear arms race and to nuclear disarmament, and on a Treaty on general and complete disarmament. Other provisions include Article VIII, which provides for convening of a conference every five years to review the operation of the Treaty, and Article X(2), which provides for a conference 25 years after entry into force to decide the terms on which the Treaty should be extended. A brief account of the history of negotiation of the NPT and of key review conferences follows, centred on Article VI.
121. Soon after the Treaty was opened for signature, on 13 August 1968, Mexico stated that non-nuclear weapon States “made their signature of the treaty depend on one condition, ... that the nuclear Powers should within a reasonable time fulfil the two basic commitments assumed by them” in Article VI and Article IV.<sup>182</sup>

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<sup>180</sup> Final Verbatim Record of the 358th Meeting of the Eighteen-Nation Committee on Disarmament, 23 January 1968, ENDC/PV.358, pp. 9-10.

<sup>181</sup> UN Office for Disarmament Affairs, Treaty on the Non-Proliferation of Nuclear Weapons, Status of the Treaty, available at <http://www.un.org/disarmament/treaties/t/npt.html> [accessed on 12 March 2015]. The Office for Disarmament Affairs lists the number of States Parties as 190 because it includes the Democratic People’s Republic of Korea (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.

<sup>182</sup> Final Verbatim Record of the 389th Meeting of the Eighteen-Nation Committee on Disarmament, 13 August 1968, ENDC/PV.389, p. 17.

122. On 15 August 1968, the ENDC adopted an agenda whose first item was listed under a heading taken from Article VI:

“1. Further effective measures relating to the cessation of nuclear arms race at an early date and to nuclear disarmament. Under this heading members may wish to discuss measures dealing with the cessation of testing, the non-use of nuclear weapons, the cessation of production of fissionable materials for weapons use, the cessation of manufacture of weapons and reduction and subsequent elimination of nuclear stockpiles, nuclear-free zones, etc.  
2. Non-nuclear measures. Under this heading, members may wish to discuss chemical and bacteriological warfare, regional-arms limitations, etc.  
3. Other collateral measures. Under this heading, members may wish to discuss prevention of an arms race on the sea-bed, etc.  
4. General and complete disarmament under strict and effective international control.”<sup>183</sup>

Item 1 encapsulated multilateral measures contemplated during negotiation of the NPT for the fulfilment of the Article VI obligations as to cessation of the nuclear arms race and nuclear disarmament. It includes reduction and subsequent *elimination* of nuclear stockpiles as an effective measure.

#### *Review Conferences*

123. Review Conferences were convened regularly every five years following the NPT's entry into force in 1970. The 1975 and 1985 conferences reached agreement on substantive final documents.<sup>184</sup> Regarding Article VI, the two conferences paid special attention to U.S.-Soviet negotiations on strategic arms limitations and to a comprehensive ban on nuclear testing. The 1985 conference in addition called for the commencement of multilateral negotiations on nuclear disarmament in the Conference on Disarmament.<sup>185</sup>

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<sup>183</sup> Final Verbatim Record of the 390th Meeting of the Eighteen-Nation Committee on Disarmament, 15 August 1968, ENDC/PV.390, p. 30.

<sup>184</sup> NPT/CONF/35/1, 30 May 1975; NPT/CONF.III/64/1, 25 September 1985. Both final documents are available at [http://www.un.org/disarmament/WMD/Nuclear/NPT\\_Review\\_Conferences.shtml](http://www.un.org/disarmament/WMD/Nuclear/NPT_Review_Conferences.shtml) [accessed 12 March 2015].

<sup>185</sup> The 1985 Final Document states: “The Conference urges the Conference on Disarmament, as appropriate, to proceed to early multilateral negotiations on nuclear disarmament in pursuance of paragraph 50 of the Final Document of the First Special Session of the General Assembly of the United Nations devoted to disarmament.” NPT/CONF.III.64/1, *supra* n. \_\_\_, Annex I, Final Declaration, p. 13.

124. In 1995, pursuant to Article X, the Review and Extension Conference decided to extend the Treaty's duration indefinitely.<sup>186</sup> In connection with that decision, the Conference adopted procedures to strengthen the review process,<sup>187</sup> Principles and Objectives on Nuclear Non-Proliferation and Disarmament,<sup>188</sup> and a resolution on the Middle East calling for efforts to make that region free of nuclear weapons and other weapons of mass destruction.<sup>189</sup>
125. The 2000 NPT Review Conference “agree[d]” on “practical steps for the systematic and progressive efforts to implement article VI ... and paragraphs 3 and 4(c) of the [1995 Principles and Objectives].”<sup>190</sup> The practical steps include Step 6 setting forth an “unequivocal undertaking by the nuclear-weapon States to accomplish the total elimination of their nuclear arsenals leading to nuclear disarmament, to which all States parties are committed under article VI.” Also included is Step 9, which sets forth a number of “[s]teps by all the nuclear-weapon States leading to nuclear disarmament ...”:
- further efforts to reduce nuclear arsenals unilaterally;
  - increased transparency;
  - further reduction of non-strategic nuclear weapons;
  - “[c]oncrete agreed measures to further reduce the operational status of nuclear weapons systems”;
  - “[a] diminishing role for nuclear weapons in security policies to minimize the risk that these weapons will ever be used and to facilitate the process of their total elimination”;
  - “engagement as soon as appropriate of all the nuclear-weapon States in the process leading to the total elimination of their nuclear weapons”.
- Separately from the practical steps, the “Conference reaffirm[ed] that the total elimination of nuclear weapons is the only absolute guarantee against the use or threat of use of nuclear weapons.”<sup>191</sup>
126. The 2005 Review Conference failed to reach agreement on a substantive Final Document. In its Final Document,<sup>192</sup> the 2010 Review Conference reaffirmed the

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<sup>186</sup> Final Document, 1995 NPT Review and Extension Conference, NPT/CONF.1995/32 (Part I), Annex, pp. 12-13, available at [http://www.un.org/disarmament/WMD/Nuclear/NPT\\_Review\\_Conferences.shtml](http://www.un.org/disarmament/WMD/Nuclear/NPT_Review_Conferences.shtml) [accessed 12 March 2015].

<sup>187</sup> *Ibid*, at p. 8.

<sup>188</sup> *Ibid*, at pp. 9-12.

<sup>189</sup> *Ibid*, at pp. 13-14.

<sup>190</sup> NPT/CONF.2000/28 (Parts I and II), pp. 14-15, <http://www.un.org/disarmament/WMD/Nuclear/2000-NPT/pdf/FD-Part1and2.pdf> [accessed on 1 March 2015].

<sup>191</sup> *Ibid*, at p. 15.

<sup>192</sup> NPT/CONF.2010/50 (Vol. I), [http://www.un.org/ga/search/view\\_doc.asp?symbol=NPT/CONF.2010/50%20\(VOL.I\)](http://www.un.org/ga/search/view_doc.asp?symbol=NPT/CONF.2010/50%20(VOL.I)) [accessed 1 March 2015].

practical steps adopted in 2000,<sup>193</sup> and, building on the practical steps, adopted an “action plan on disarmament” setting forth 22 actions, including:

- “Action 2. All states parties commit to apply the principles of irreversibility, verifiability and transparency in relation to the implementation of their treaty obligation.”<sup>194</sup>
- Action 3. In implementing the unequivocal undertaking by the nuclear-weapon States to accomplish the total elimination of their nuclear arsenals, the nuclear-weapon States commit to undertake further efforts to reduce and ultimately eliminate all types of nuclear weapons, deployed and non-deployed, including through unilateral, bilateral, regional and multilateral measures.<sup>195</sup>
- Action 5. The nuclear-weapon states commit to accelerate concrete progress on the steps leading to nuclear disarmament, contained in the [2000 Final Document].”<sup>196</sup>

A number of steps are identified in Action 5 as to which the nuclear-weapon States “are called upon to promptly engage”. They include: “[r]apidly moving toward the reduction of the overall global stockpile of all types of nuclear weapons” and to “further diminish the role and significance of nuclear weapons”.

127. Also in the 2010 Final Document, a provision reflecting the CTBT preamble, but not previously included in NPT conference outcomes, “recognizes the legitimate interests of non-nuclear-weapon states in the constraining by the nuclear-weapon States of the development and qualitative improvement of nuclear weapons and ending the development of advanced new types of nuclear weapons.”<sup>197</sup> Another innovative provision expresses the Conference’s “deep concern at the catastrophic humanitarian consequences of any use of nuclear weapons, and reaffirms the need for all states at all times to comply with applicable international law, including international humanitarian law.”<sup>198</sup> The 2010 Final Document additionally includes a general commitment “to pursue policies that are fully compatible with the Treaty and the objectives of achieving a world without nuclear weapons”.<sup>199</sup> It “affirms that all States need to make special efforts to establish the necessary framework to achieve and maintain a world without nuclear weapons,” coupled with an acknowledgement of the UN Secretary-General’s proposal for

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<sup>193</sup> The Final Document states: “The Conference reaffirms the continued validity of the practical steps agreed to in the Final Document of the 2000 Review Conference.” *Ibid* at p. 19.

<sup>194</sup> *Ibid.*, at p. 20.

<sup>195</sup> *Ibid.*

<sup>196</sup> *Ibid.*, at p. 21.

<sup>197</sup> *Ibid.*, at p. 20.

<sup>198</sup> *Ibid.*, at p. 19.

<sup>199</sup> *Ibid.*, at p. 20 (Action 1).

negotiation of a convention or framework of instruments to that end.<sup>200</sup> Early in the Review Conference, a draft of the action plan on nuclear disarmament included a provision for an international conference in 2014 to “consider ways and means to agree on a roadmap for the complete elimination of nuclear weapons within a specified timeframe, including by means of a universal, legal instrument.”<sup>201</sup> That provision had disappeared by the end of the Conference due to opposition from some of the nuclear-weapon States (**Annex 74**).<sup>202</sup>

### *Non-Implementation of NPT Conference Outcomes*

128. The commitments made at the 1995 Review and Extension Conference, and the 2000 and 2010 Review Conferences,<sup>203</sup> have largely not been fulfilled. In 2006, The Weapons of Mass Destruction Commission, chaired by Hans Blix, observed that “it is easy to see that the nuclear-weapon states parties to the NPT have largely failed to implement” the commitment made in the 1995 Principles and Objectives to pursue “systematic and progressive efforts to reduce nuclear weapons globally” and “have failed to ‘pursue negotiations in good faith’ on nuclear disarmament as required of them under the NPT.” (**Annex 75**).<sup>204</sup> “Indeed,” the Commission added, “all states that have nuclear weapons are still seeking to modernize their nuclear capabilities.”<sup>205</sup> The Commission also referred to a “failure of the nuclear-weapon states ... to honour their additional commitments to disarmament made at the 1995 and 2000 NPT Review Conferences”.<sup>206</sup> The picture is the same regarding commitments made at the 2010 Review Conference, which as noted above mostly repeat those made in 2000. A report released in 2014 by The James Martin

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<sup>200</sup> *Ibid.* The Secretary-General’s proposal is contained his address, “The United Nations and Security in a Nuclear-Weapon-Free World,” 24 October 2008, [http://www.un.org/apps/news/infocus/sgspeeches/search\\_full.asp?statID=351](http://www.un.org/apps/news/infocus/sgspeeches/search_full.asp?statID=351) [accessed 12 March 2015].

<sup>201</sup> Report of Main Committee I: Chairman’s Draft on Substantive Elements, NPT/CONF.2010/mc.1/CRP.2, 14 May 2010, Action 7, p. 8, <http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/npt/revcon2010/MCI-ChairsDraft.pdf> [accessed on 1 March 2015].

<sup>202</sup> W. Potter, et al, “The 2010 NPT Review Conference: Deconstructing Consensus”, CNS Special Report, James Martin Center for Non-proliferation Studies, June 17, 2010, p. 8, [http://cns.miis.edu/stories/pdfs/100617\\_npt\\_2010\\_summary.pdf](http://cns.miis.edu/stories/pdfs/100617_npt_2010_summary.pdf). The report states that the proposal for an international conference was opposed by the U.S., France, and Russia. The report indicates that until late in the Conference, the UK delegation took no position as it did not have instructions from its newly-formed government.

<sup>203</sup> *Supra*, paras. 123 – 127 of the Memorial.

<sup>204</sup> H. Blix (Chairman), ‘Weapons of Terror: Freeing the World of Nuclear, Biological and Chemical Arms’, *The Weapons of Mass Destruction Commission*, (2006), p. 94, [http://www.un.org/disarmament/education/wmdcommission/files/Weapons\\_of\\_Terror.pdf](http://www.un.org/disarmament/education/wmdcommission/files/Weapons_of_Terror.pdf) [accessed on 1 March 2015].

<sup>205</sup> *Ibid.*

<sup>206</sup> *Ibid.*, p. 53.

Center for Nonproliferation Studies assesses that “Overall progress in implementing disarmament action items since 2010 has been very limited.” (Annex 76).<sup>207</sup>

### The 1978 General Assembly Special Session on Disarmament

129. The 1978 Special Session of the General Assembly established the UN disarmament machinery in its current form, with a reformed Conference on Disarmament devoted to negotiations, the Disarmament Commission devoted to deliberation, and the First Committee of the General Assembly exclusively devoted to questions of disarmament and related international security questions. The Special Session’s unanimously adopted Final Document thus carries additional weight, compared to other General Assembly resolutions, in interpreting Article VI and the customary international law obligation of nuclear disarmament.<sup>208</sup> In the Final Document, the General Assembly observed that “[n]uclear weapons pose the greatest danger to mankind and to the survival of civilization,”<sup>209</sup> and made several statements emphasizing the need to halt and reverse the nuclear arms race, prevent proliferation and achieve the elimination of nuclear weapons.<sup>210</sup> The Assembly identified general and complete disarmament under effective international control as the “ultimate objective”,<sup>211</sup> and gave first priority in negotiations to nuclear weapons, followed by other weapons of mass destruction; conventional weapons, including any which may be deemed to be excessively injurious or to have indiscriminate effects; and reduction of armed forces.<sup>212</sup>
130. Regarding negotiations on nuclear weapons, the General Assembly stated:

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<sup>207</sup> G. Mukhatzhanova, “Implementation of the Conclusions and Recommendations for Follow-on Actions Adopted at the 2010 NPT Review Conference: Disarmament Actions 1-22”, *2014 Monitoring Report*, James Martin Center for Non-proliferation Studies, (2014), p. 1, [http://www.nonproliferation.org/wp-content/uploads/2014/04/CNS-Monitoring-Report\\_2014\\_web.pdf](http://www.nonproliferation.org/wp-content/uploads/2014/04/CNS-Monitoring-Report_2014_web.pdf) [accessed 1 March 2015]. See also, e.g., G. Evans, T. Ogilvie-White and R. Thakur, *Nuclear Weapons: The State of Play 2015* (Centre for Nuclear Non-Proliferation and Disarmament, February 2015), <https://cnnd.crawford.anu.edu.au/publication/cnnd/5328/nuclear-weapons-state-play-2015> [accessed 4 March 2015], a report that assesses implementation of 2010 NPT Review Conference and other commitments. The report states, “While the need for total nuclear disarmament is more urgent than ever, its achievement remains little or no closer ....” *Ibid.*, p. 3 (Annex 77).

<sup>208</sup> Final Document of the Tenth Special Session of the General Assembly, adopted by A/RES/S-10/2, 30 June 1978, without a vote.

<sup>209</sup> *Ibid.*, para. 47.

<sup>210</sup> E.g., *ibid.*, at para. 20: It is “imperative to remove the threat of nuclear weapons, to halt and reverse the nuclear arms race until the total elimination of nuclear weapons and their delivery systems has been achieved, and to prevent the proliferation of nuclear weapons.”

<sup>211</sup> *Ibid.*, para. 19.

<sup>212</sup> *Ibid.*, para. 45.

“50. The achievement of nuclear disarmament will require urgent negotiation of agreements at appropriate stages and with adequate measures of verification satisfactory to the States concerned for:

- (a) Cessation of the qualitative improvement and development of nuclear-weapon systems;
- (b) Cessation of the production of all types of nuclear weapons and their means of delivery, and of the production of fissionable material for weapons purposes;
- (c) A comprehensive, phased programme with agreed time-frames, whenever feasible, for progressive and balanced reduction of stockpiles of nuclear weapons and their means of delivery, leading to their ultimate and complete elimination at the earliest possible time.”<sup>213</sup>

The 1985 NPT Review Conference quoted this paragraph in its entirety in its Final Document and urged the Conference on Disarmament to proceed to early multilateral negotiations on nuclear disarmament in pursuance of the paragraph.<sup>214</sup>

131. The Assembly also referred to the importance of concluding negotiations on a Treaty comprehensively banning testing of nuclear weapons<sup>215</sup> and of concluding existing U.S.-Soviet negotiations on strategic nuclear arms limitations and pursuing further such negotiations.<sup>216</sup> The Assembly also specified that “[q]ualitative and quantitative disarmament measures are both important for halting the arms race,” and added that “[e]fforts to that end must include negotiations on the limitation and cessation of the qualitative improvement of armaments, especially weapons of mass destruction and the development of new means of warfare.”<sup>217</sup>

132. The Assembly further stated:

“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.”<sup>218</sup>

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<sup>213</sup> *Ibid.*, para. 50.

<sup>214</sup> *Supra* n. 184, pp. 11, 13.

<sup>215</sup> Final Document of the Tenth Special Session of the General Assembly, *supra* n. 208, at para. 51.

<sup>216</sup> *Ibid.*, para. 52.

<sup>217</sup> *Ibid.*, para. 39.

<sup>218</sup> *Ibid.*, para. 41.

## General Assembly resolutions adopted post-Advisory Opinion

133. On 8 July 1996 this Court delivered its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* in response to the request by the UN General Assembly on 15 December 1994.<sup>219</sup> The 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" was first adopted in 1996,<sup>220</sup> shortly after the Opinion was delivered, and has been adopted every year since then.<sup>221</sup> Its lead sponsor is Malaysia. It underlines the ICJ's unanimous conclusion that there is an obligation to pursue in good faith and conclude negotiations leading to nuclear disarmament and calls on all States to immediately fulfil that obligation by commencing multilateral negotiations leading to the early conclusion of a Nuclear Weapons Convention.
134. No such multilateral negotiations have been commenced in any forum. The Conference on Disarmament, which operates on the basis of consensus, has been stalemated since the conclusions of negotiations on a CTBT in 1996, and has not conducted any discussions, deliberations, or negotiations on complete nuclear disarmament pursuant to an agreed programme of work. In response to the stalemate, in recent years the General Assembly has sought to revitalize the UN disarmament machinery. Notably, in 2012 the General Assembly, by resolution sponsored by Austria, Mexico, and Norway, decided to establish the Open-Ended Working Group – as briefly referred to in paragraph 90 of this memorial – in 2013 to develop proposals to take forward multilateral nuclear disarmament negotiations for the achievement and maintenance of a world without nuclear weapons.<sup>222</sup> The OEWG met in Geneva during the summer of 2013 and delivered a report on its deliberations to the General Assembly that October.<sup>223</sup> The Assembly adopted a resolution welcoming the report and leaving open the possibility of re-establishing the OEWG.<sup>224</sup>
135. Also in response to the stalemate in the Conference on Disarmament, and the general lack of progress on nuclear disarmament, the first-ever UN General Assembly High-Level Meeting on Nuclear Disarmament was held on 26 September 2013 pursuant to a 2012 resolution.<sup>225</sup> A new General Assembly resolution, sponsored by Indonesia on behalf of

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<sup>219</sup> UNGA Resolution A/RES/49/75 K, 15 December 1994.

<sup>220</sup> UNGA Resolution A/RES/51/45 M, 10 December 2006 (115-22-32).

<sup>221</sup> Most recently on December 2, 2014 (A/RES/69/43, 134-23-23).

<sup>222</sup> UNGA Resolution A/RES/67/56, 3 December 2012, "Taking forward multilateral nuclear disarmament negotiations for the achievement and maintenance of a world without nuclear weapons" (147-4-31).

<sup>223</sup> UNGA Resolution A/68/514, 9 October 2013.

<sup>224</sup> UNGA Resolution A/RES/68/46, 10 December 2013, "Taking forward multilateral nuclear disarmament negotiations" (158-4-20).

<sup>225</sup> UNGA Resolution A/RES/67/39, 3 December 2012.

the Non-Aligned Movement, followed up on the High-Level Meeting.<sup>226</sup> It called 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, and further decided to convene, no later than 2018, a UN high-level international conference (not meeting) on nuclear disarmament to review progress.

136. The General Assembly has adopted several series of resolutions relating to the outcomes of the 2000 and 2010 NPT Review Conferences. Notably, in October 2000 the Assembly adopted a resolution<sup>227</sup> sponsored by the New Agenda group of states (Brazil, Egypt, Ireland, Mexico, New Zealand, South Africa, and Sweden) that had taken a leading role in negotiating with the nuclear-weapon States the practical steps for disarmament set forth in the Final Document adopted by the 2000 NPT Review Conference. The resolution incorporated the practical steps and went further to affirm “that a nuclear-weapon-free world will ultimately require the underpinnings of a universal and multilaterally negotiated legally binding instrument or a framework encompassing a mutually reinforcing set of instruments.”<sup>228</sup> In subsequent years the New Agenda group has sponsored similar resolutions focusing on disarmament commitments made in the 2000 and 2010 NPT Review Conferences, most recently one entitled “Towards a nuclear-weapon-free world: accelerating the implementation of nuclear disarmament commitments”.<sup>229</sup> Another series of resolutions relating to Review Conference outcomes, addressing both non-proliferation and disarmament commitments, has been championed by Japan; the most recent is entitled “United action towards the total elimination of nuclear weapons”.<sup>230</sup> A series of resolutions entitled “Nuclear disarmament” combines references to NPT Review Conference commitments and calls for agreement on a time-bound program on elimination of nuclear weapons and a comprehensive convention.<sup>231</sup> That series is sponsored by a large number of Non-Aligned Movement states.

### **UN Security Council resolutions**

137. The UN Security Council has called for the implementation of Article VI, by NPT States Parties and by third States as well. In resolution 984 of 11 April 1995,<sup>232</sup> the Council:

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<sup>226</sup> UNGA Resolution A/RES/68/32, 5 December 2013 (137-28-20). A successor resolution to the same ends was adopted on 2 December 2014, UNGA Resolution A/RES/69/58 (139-24-19).

<sup>227</sup> UNGA Resolution A/RES/55/33C, “Towards a Nuclear-Weapon-Free World: The Need for a New Agenda,” 20 November 2000 (154-3-8). China, the U.S., and the UK voted for the resolution; France and Russia abstained; India, Israel, and Pakistan voted no.

<sup>228</sup> *Ibid.*, at para. 18.

<sup>229</sup> UNGA Resolution A/RES/69/37, 2 December 2014 (169-7-5).

<sup>230</sup> UNGA Resolution A/RES/69/52, 2 December 2014 (170-1-14)

<sup>231</sup> Most recently, UNGA Resolution A/RES/69/48, 2 December 2014 (121-44-17).

<sup>232</sup> *Supra* n. 3, para. 103.

“8. Urges all States, as provided for in Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons, to pursue negotiations in good faith on effective measures relating to nuclear disarmament and on a treaty on general and complete disarmament under strict and effective international control which remains a universal goal.”

In resolution 1887 of 24 September 2009, the Council, in the first preambular paragraph, resolves:

“to seek a safer world for all and to create the conditions for a world without nuclear weapons, in accordance with the goals of the Treaty on the Non-Proliferation of Nuclear Weapons (NPT), in a way that promotes international stability, and based on the principle of undiminished security for all[.]”

In an operative provision of resolution 1887, the Council

“5. *Calls upon* the Parties to the NPT, pursuant to Article VI of the Treaty, to undertake to pursue negotiations in good faith on effective measures relating to nuclear arms reduction and disarmament, and on a Treaty on general and complete disarmament under strict and effective international control, and *calls on* all other States to join in this endeavor[.]”

The Council has also repeatedly determined that the proliferation of weapons of mass destruction is a threat to international peace and security.<sup>233</sup>

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<sup>233</sup> *E.g.*, Security Council Resolution 1887 of 24 September 2009, fourth preambular para.

## PART 5

### ARTICLE VI OF THE NUCLEAR NON-PROLIFERATION TREATY

#### The content of Article VI

138. 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.”

139. As stated above,<sup>234</sup> Article VI constitutes a provision essential to the accomplishment of the NPT’s object or purpose. Its importance has been recognized by commentators. It has been called “*the single most important provision of the treaty ... from the standpoint of long-term success or failure of its goal of proliferation prevention*”.<sup>235</sup>

140. In the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* this Court also recognized the significance of Article VI, declaring that:

"Each of the Parties to the [NPT] 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.

The legal import of that obligation goes beyond that of a mere obligation of conduct; the obligation involved here is an obligation to achieve a precise result - nuclear disarmament in all its aspects - by adopting a particular course of conduct, namely, the pursuit of negotiations on the matter in good faith.”<sup>236</sup>

141. The Court further 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.”<sup>237</sup>

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<sup>234</sup> See para. 118 of the Memorial.

<sup>235</sup> *Supra*, n. 166, p. 732.

<sup>236</sup> *Supra*, n. 3, para. 99.

<sup>237</sup> *Ibid.*, para. 103.

142. As previously noted, the UN General Assembly has adopted an annual resolution underlining the unanimous conclusion of this Court in its Advisory Opinion.<sup>238</sup> It has also consistently reiterated that each article of the NPT is “binding on the States parties at all times and in all circumstances and that all States parties should be held fully accountable with respect to strict compliance with their obligations under the Treaty.”<sup>239</sup> In particular the Assembly recalls “the specific reaffirmation of the unequivocal undertaking of the nuclear-weapon States to accomplish the total elimination of their nuclear arsenals leading to nuclear disarmament, to which all States parties are committed under article VI of the Treaty, recalls the commitment of the nuclear-weapon States to accelerate concrete progress on the steps leading to nuclear disarmament, and calls upon the nuclear weapon States to take all steps necessary to accelerate the fulfilment of their commitments”.<sup>240</sup>
143. The UN Security Council has also added its voice, unanimously calling upon “the Parties to the NPT, pursuant to Article VI of the Treaty, to undertake to pursue negotiations in good faith on effective measures relating to nuclear arms reduction and disarmament, and on a Treaty on general and complete disarmament under strict and effective international control, and [calling] on all other States to join in this endeavour”.<sup>241</sup>
144. Through these resolutions the Security Council and General Assembly are emphasizing the importance of the obligations that the UK has incurred under Article VI. Needless to say, the RMI considers that the UK is not properly living up to these obligations and thus seeks to make it accountable for its failure to comply with them.

*General principles concerning the interpretation of Article VI*

145. Article VI is subject to the over-riding principle applicable to all treaties that it is binding and must be performed by the States Parties to them in good faith: *pacta sunt servanda*.<sup>242</sup> Further, under the terms of the Vienna Convention on the Law of Treaties, 1969 it must be “interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”<sup>243</sup> This Court has recently reaffirmed that Treaty provisions must be

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<sup>238</sup> *Supra*, n. 118. Follow-up to the advisory opinion of the International Court of Justice on the legality of the threat or use of nuclear weapons, 11 December 2014 is the most recent of these Resolutions.

<sup>239</sup> *Supra*, n. 229, Towards a nuclear-weapon-free world: accelerating the implementation of nuclear disarmament commitments, operative para. 1. In 2014 the UNGA adopted 21 texts on nuclear disarmament.

<sup>240</sup> *Ibid*, 12 preambular para.

<sup>241</sup> UNSC Resolution 1887, 24 September 2009, operative para. 5.

<sup>242</sup> *Supra*, n. 1, Article 26.

<sup>243</sup> *Ibid.*, Article 31 (1). The VCLT, articles 31-33 provide the basic principles of treaty interpretation that are widely accepted as constituting customary international law; see e.g. *Kasikilil Sedudu Island (Botswana v. Namibia) Judgment*, I. C. J. Reports 1999, p. 1045, para. 18.

“interpreted in light of the object and purpose of the Convention and taking into account other provisions of the Convention”.<sup>244</sup> The RMI submits that, as shown by the history of the negotiation of the NPT,<sup>245</sup> Article VI is clearly an integral part of the NPT: enshrining the “strategic bargain” or *quid pro quo* demanded by the non-nuclear weapon states for their renunciation of nuclear weapons.

146. It is thus necessary to determine the ordinary meaning of the terms of Article VI in light of the object and purpose of the NPT. The VCLT, Article 31(2) makes it clear that: “The context for the purpose of the interpretation of a treaty” includes “its preamble and annexes”.<sup>246</sup> The NPT, article VIII (3), spells out the important role of the preamble in clarifying the purposes of the Treaty and the linkage between it and the operative articles of the Treaty. Article VIII (3) provides that “Five years after the entry into force of this Treaty, a conference of Parties to the Treaty shall be held ... in order to review the operation of this Treaty with a view to assuring that the purposes of the Preamble and the provisions of the Treaty are being realized.”

147. The preamble to the NPT is lengthy and sets out in its first paragraph the context for its adoption:

“Considering 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”.

Preambular paragraph 8 declares the parties’ intention “to achieve at the earliest possible date the cessation of the nuclear arms race and to undertake effective measures in the direction of nuclear disarmament,” and preambular paragraph 12 identifies the objective of “the elimination from national arsenals of nuclear weapons and the means of their delivery”. Thus the function of the NPT is to protect the planet and all of humanity by providing a legal framework designed to avoid a nuclear war; with the over-arching purpose of the establishment of a more secure world free from nuclear weapons.<sup>247</sup> The measures set out in the Treaty are directed towards this end and centrally concern the non-proliferation and disarmament of nuclear weapons.

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<sup>244</sup> *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening) Judgment, I.C.J. Reports 2014*, p. 1, para. 55.

<sup>245</sup> See paras. 114 – 122 of this Memorial.

<sup>246</sup> There are no Annexes to the NPT.

<sup>247</sup> *Supra*, n. 241. This is affirmed by the UN Security Council which resolved “to seek a safer world for all and to create the conditions for a world without nuclear weapons, in accordance with the goals of the Treaty on the Non-Proliferation of Nuclear Weapons (NPT), in a way that promotes international stability, and based on the principle of undiminished security for all.”

148. The Vienna Convention on the Law of Treaties, Article 32 allows for recourse to “supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31”. Accordingly, in interpreting the UK’s obligations under Article VI of the NPT, the RMI makes reference to the negotiating history to provide confirmation of the meaning of the text.

149. The Vienna Convention on the Law of Treaties Article 31 (3) provides that any subsequent agreement between the parties, or subsequent practice “which establishes the agreement of the parties regarding its interpretation” may be taken into account in interpretation. The RMI makes reference to the successive Review Conferences that have taken place between States Parties in accordance with the NPT, Article VIII (2). The objective of a Review Conference is to determine whether the purposes of the Treaty (as expressed in the preamble) and its provisions are being complied with. The Decision on Strengthening the Review Process adopted at the 1995 Review and Extension Conference provided also:

“Review Conferences should look forward as well as back. They should evaluate the results of the period they are reviewing, including the implementation of undertakings of the States parties under the Treaty, and identify the areas in which, and the means through which, further progress should be sought in the future.”<sup>248</sup>

150. The 2000 and 2010 Review Conferences were collaborative efforts to assess achievement of Treaty’s objectives and to map further action to meet those objectives. Final Documents adopted at the Review Conferences represent the participating States Parties’ understanding, at a particular point in time, of what is reasonable and practicable, for instance the thirteen steps agreed at the 2000 Review Conference as “practical steps for the systematic and progressive efforts” for the implementation of Article VI of the NPT. Commitments made at the Review Conferences do not relieve States Parties of their legal obligations under Article VI. The RMI also notes that as explained above,<sup>249</sup> the UK accepted in 1968 that Article VI imposed a “firm commitment” (**Annex 78**);<sup>250</sup> any weakening of its position at Review Conferences cannot detract from its continuing Treaty obligation.

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<sup>248</sup> 1995 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N95/178/16/PDF/N9517816.pdf?OpenElement> [accessed on 10 March 2015].

<sup>249</sup> See paragraph 118 of the Memorial.

<sup>250</sup> “One of the important aspects of the Treaty is the firm commitment to further measures of nuclear disarmament.” Mr Frederick Mulley, Minister for Disarmament, HC Deb, 27 November 1968, vol. 774, cc501-5501.

151. The RMI considers that such Final Documents, which are adopted by consensus, substantiate, support and reinforce the ordinary meaning of Article VI. In this sense they carry “considerable weight in the interpretation of the Convention”.<sup>251</sup>
152. This is supported by the language of the Final Documents, for instance by the “unequivocal undertaking by the nuclear-weapon states to accomplish the total elimination of their nuclear arsenals leading to nuclear disarmament to which all States Parties are committed under Article VI.”<sup>252</sup> This is a collective confirmation by NPT States Parties that the obligation of Article VI is indeed to accomplish the elimination of nuclear weapons, and furthermore that it need not be accomplished through a Treaty on general and complete disarmament or in the context of general and complete disarmament.
153. Other language that supports the RMI’s position that the Final Documents of the Review Conferences reinforce the meaning of Article VI is that of “reaffirmation”, as in the one adopted at the 2010 Review Conference:

“79. The Conference notes the reaffirmation by the nuclear-weapon States of their unequivocal undertaking to accomplish, in accordance with the principle of irreversibility, the total elimination of their nuclear arsenals leading to nuclear disarmament, to which all States parties are committed under article VI of the Treaty.”<sup>253</sup>

154. This Court too accorded weight to the documentation of the NPT Review Conference process when it noted that the 1995 Review Conference had reaffirmed the importance of fulfilling the obligation of the NPT, Article VI in its determination that the obligation “remains without any doubt an objective of vital importance to the whole of the international community today.”<sup>254</sup>

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<sup>251</sup> T. Aust, *Modern Treaty Law and Practice*, (Cambridge University Press, 3<sup>rd</sup> ed 2013) 212-6; see also the opinion that documents adopted at the review conferences have “juridical significance ‘as a source of authoritative interpretation of the treaty.’” B. Carnahan, “Treaty Review Conferences”, *American Journal of International Law*, Vol. 81 (1987) 226, 229.

<sup>252</sup> 2000 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons (Thirteen Steps), Step 6, <http://www.un.org/disarmament/WMD/Nuclear/2000-NPT/pdf/FD-Part1and2.pdf> [accessed on 10 March 2015].

<sup>253</sup> 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Article VI and eighth to twelfth preambular paragraphs, para. 79, [http://www.un.org/ga/search/view\\_doc.asp?symbol=NPT/CONF.2010/50%20%28VOL.I%29](http://www.un.org/ga/search/view_doc.asp?symbol=NPT/CONF.2010/50%20%28VOL.I%29) [accessed on 1 March 2015].

<sup>254</sup> *Supra*, n. 3, at para. 103.

155. The RMI also submits that the resolutions of the General Assembly discussed above reinforce and support its interpretation of NPT Article VI.

*The three components of Article VI*

(i) Effective Measures Relating to Cessation of the Nuclear Arms Race at an Early Date

156. The NPT preamble underlines that cessation of the nuclear arms race is to be accomplished, soon. In it, the States concluding the Treaty declare “their intention to achieve at the earliest possible date the cessation of the nuclear arms race.” This is repeated in Article VI: “at an early date”.
157. As a matter of ordinary meaning, the term “nuclear arms race” has both qualitative and quantitative elements. The NPT negotiating history confirms this. In negotiating the NPT, States understood cessation of the nuclear arms race at an early date as ending the quantitative build-up and qualitative improvement of nuclear arsenals prior to negotiations on their elimination.<sup>255</sup>
158. The principal means of cessation were understood as a ban on nuclear testing, addressed to the qualitative arms race, and a ban on production of fissile materials for nuclear weapons, and strategic nuclear arms limitation agreements, capping build-ups, between the U.S. and the Soviet Union,<sup>256</sup> addressed to quantitative aspects.
159. At the 1995 Review and Extension Conference, the bans on testing and production of fissile materials were still on the table. The Principles and Objectives for Nuclear Non-Proliferation and Disarmament adopted by the Conference in connection with the decision to extend the Treaty indefinitely set out a programme of action including the completion of negotiations on the CTBT no later than 1996, and the “immediate commencement and early conclusion” of a convention banning the production of fissile material for nuclear weapons.
160. Negotiations on the latter convention, a Fissile Material Cut-off Treaty, have yet to be commenced. As now conceived it would prevent quantitative arms racing only by non-NPT nuclear-armed states and possibly China.<sup>257</sup> The CTBT was adopted in 1996, but has

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<sup>255</sup> *Supra*, n. 163, vol. 2, pp. 572–580, 583–585.

<sup>256</sup> *Ibid.*, Cessation of manufacture of nuclear weapons was also considered by some States as a step to be taken early, prior to the final elimination of nuclear arsenals.

<sup>257</sup> Four of the NPT nuclear-weapon States (UK, France, Russia, U.S.) have built up very large stocks of weapons-grade fissile materials and are no longer producing such materials; this is probably also true of China. See International Panel on Fissile Materials, *Global Fissile Material Report 2013*, p. 3, <http://ipfmlibrary.org/gfmr13.pdf> [accessed on 12 March 2015] (**Annex 79**). A verified ban on production of fissile materials for nuclear weapons, as a stand-alone Treaty or as part of a comprehensive convention on nuclear disarmament, would be an essential element of the architecture of a nuclear weapons-free world, and may also help build the trust needed for reduction and elimination of nuclear

yet to enter into force.<sup>258</sup> It is a measure that impedes the nuclear arms race. As a preambular recital “recogniz[es]”, an end to nuclear explosions will “constrain [...] the development and qualitative improvement of nuclear weapons.” However, a halt to testing does not comprehensively prevent modernization adding to military capabilities. Among other things, it does not affect improvements in missile capability and accuracy of warhead delivery.

161. Non-nuclear weapon States maintained shortly after the NPT was signed,<sup>259</sup> and have continued to maintain, that measures in addition to the CTBT are needed to prevent qualitative development of nuclear warheads and delivery systems. The Final Document of the 2010 NPT Review Conference “recognizes” the “legitimate interest” of non-nuclear weapon States in “constraining” the development of nuclear weapons.<sup>260</sup> At the 2013 preparatory meeting for the 2015 review, the Indonesian delegate, speaking on behalf of Non-Aligned Movement NPT States Parties, stated that:

“In order to comply with their obligations under Article VI of the Treaty, as well as with their commitments under the 13 practical steps and 2010 Action Plan on nuclear disarmament, the NWS must immediately cease their plans to further invest in modernizing, upgrading, refurbishing, or extending the lives of their nuclear weapons and related facilities.” (Annex 80)<sup>261</sup>

162. The commitment to a “diminishing role of nuclear weapons in security policies to minimize the risk that these weapons ever be used and to facilitate the process of their total elimination”<sup>262</sup> adopted at the 2000 Review Conference also bears upon the qualitative aspect of cessation of the nuclear arms race. Improvements in military capabilities of nuclear forces imply an expanding, not diminishing, role of nuclear weapons – operational, if not doctrinal – in security policies.

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arsenals. But, it is no longer crucial to preventing arms racing among the NPT nuclear-weapon States. Contrary to the intention when the NPT was negotiated, that race with respect to production of fissile materials has occurred.

<sup>258</sup> The UK ratified the CTBT on 6 April 1998.

<sup>259</sup> An agenda proposed in 1968 after the NPT was signed by non-nuclear-weapons States for the Eighteen-Nation Committee on Nuclear Disarmament lists as its first item: “the prevention of the further development and improvement of nuclear weapons and their delivery systems”. Final Document of the Conference of Non-Nuclear-Weapon States (A/CONF.35/10, 1 Oct. 1968), Resolution C, p. 8), cited in *supra* n. 163, Vol. 2, p. 579.

<sup>260</sup> *Supra*, n. 253.

<sup>261</sup> Statement by H.E. Mr. Edi Yusup, Ambassador and Deputy Permanent Representative of the Republic of Indonesia in Geneva, on behalf of the Group of Member States of the Non-Aligned Movement Parties to the [NPT], Cluster 1 Specific Issues, Nuclear disarmament and security assurance, 25 April 2013, Geneva, pp. 1-2, [http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/npt/prepcom13/statements/25April\\_NAM.pdf](http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/npt/prepcom13/statements/25April_NAM.pdf).

<sup>262</sup> *Supra*, n. 252.

(ii) Effective Measures Relating to Nuclear Disarmament

163. The second distinct component of Article VI is the negotiation of “effective measures relating ... to nuclear disarmament”. The NPT negotiating history, and the establishment of an agenda for the ENDC shortly after the NPT was signed,<sup>263</sup> demonstrate that “effective measures” refers to both the reduction and the elimination of nuclear arsenals.
164. The 1995 Principles and Objectives likewise are consistent with understanding “effective measures” as concerning both the reduction and elimination of nuclear arsenals. In its paragraph 3, “the nuclear-weapon States reaffirm their commitment, as stated in article VI, to pursue in good faith negotiations on effective measures related to nuclear disarmament.” The next paragraph specifies “measures” whose “achievement ... is important in the full realization and effective implementation of Article VI,” including “(c) The determined pursuit by the nuclear-weapon States of systematic and progressive efforts to reduce nuclear weapons globally, with the ultimate goals of eliminating those weapons ...”
165. The Practical Steps agreed at the 2000 NPT reinforce and strengthen the obligation under Article VI and the Principles and Objectives in this regard. The Practical Steps include:
- “6. An unequivocal undertaking by the nuclear-weapon States to accomplish the total elimination of their nuclear arsenals leading to nuclear disarmament, to which all States parties are committed under article VI.”

(iii) A Treaty on General and Complete Disarmament

166. Thirdly, Article VI requires the pursuit of “negotiations in good faith ... on a treaty on general and complete disarmament under strict and effective international control.” The preamble refers to “elimination from national arsenals of nuclear weapons and the means of their delivery pursuant to a Treaty on general and complete disarmament under strict and effective international control.”
167. When the NPT was negotiated, such a Treaty was understood, as set out in General Assembly resolution 808(A) of 4 November 1954, as providing for the prohibition and elimination of nuclear weapons and other weapons of mass destruction, the limitation and reduction of armed forces and conventional armaments, and the establishment of effective international control through an organ. Subsequent to entry into force of the NPT, the practice of States has been to negotiate separate conventions on prohibition and elimination of weapons of mass destruction, with the 1972 Biological Weapons Convention and the 1993 Chemical Weapons Convention. The Court took note of this

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<sup>263</sup> See paras. 114 – 122 of the Memorial.

practice, stating that “The pattern until now has been for weapons of mass destruction to be declared illegal by specific instruments.”<sup>264</sup> The practice of States has also been to negotiate separate treaties on other types of weapons, such as anti-personnel landmines and cluster munitions. All of these matters are considered by the General Assembly under the rubric of “general and complete disarmament.”

168. In light of this history, a comprehensive convention on nuclear disarmament (or instruments to the same end) would, like the conventions on chemical weapons and biological weapons, partially fulfil the general and complete disarmament prong of Article VI. It could be considered a Treaty on general and complete nuclear disarmament to accompany the treaties on general and complete disarmament of biological and chemical weapons. The Review Conference Final Documents in 1995, 2000, and 2010 accord with this view. The 1995 Principles and Objectives distinguish between the “goal of eliminating [nuclear] weapons,” whose “determined pursuit” is a responsibility of the nuclear-weapon States, and “general and complete disarmament” to be pursued by all States.<sup>265</sup> Similarly, in the 2000 Practical Steps, step 6, “An unequivocal undertaking by the nuclear-weapon States to accomplish the total elimination of their nuclear arsenals ...”, is set out separately from step 11, “Reaffirmation that the ultimate objective of the efforts of States in the disarmament process is general and complete disarmament under effective international control.”
169. The practice of States parties and the agreements reached in the Final Documents adopted by NPT Review Conferences demonstrate that the third component of Article VI cannot be interpreted as requiring that nuclear disarmament is to be implemented through one Treaty covering other weapons and armed forces generally. Rather a nuclear disarmament convention (or similar instrument or instruments), like the conventions on biological and chemical weapons, would be a contribution to the objective of general and complete disarmament.

#### *The Content of the Obligation in Article VI as a Whole*

170. The RMI submits that Article VI must be understood in the context of the NPT, not solely as a contract between States Parties but as a regime founded upon the three pillars of non-proliferation of nuclear weapons, peaceful use of nuclear energy and nuclear disarmament.<sup>266</sup>

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<sup>264</sup> *Supra*, n. 3, para. 57.

<sup>265</sup> *Supra*, n. 186, para. 4(c).

<sup>266</sup> In its Final Document, *supra*, n. 184, Annex I, Final Declaration, p. 1, the 1985 Review Conference identified the three objectives of the NPT as “the prevention of proliferation of nuclear weapons ...; the cessation of the nuclear arms race, nuclear disarmament and a Treaty on general and complete disarmament; and the promotion of co-operation between States Parties in the field of the peaceful uses of nuclear energy.” The Principles and Objectives for Nuclear Non-Proliferation and Disarmament adopted

171. At its core is the key objective of Article VI: complete nuclear disarmament. The NPT is a powerful legal regime in that it provides specific obligations and non-nuclear weapon States have sacrificed the right to nuclear armament in the expectation of compliance with Article VI by the nuclear weapon states. All of its Articles are equally essential to the effective operation of this regime,<sup>267</sup> which cannot operate effectively unless all States Parties act in conformity with all its provisions. Failure to do so weakens the effectiveness of the regime to the detriment of all.
172. The objective of complete nuclear disarmament is affirmed by the preamble and negotiating history of the NPT, as supported and reinforced by subsequent Final Documents and United Nations resolutions. Cessation of the nuclear arms race is an objective, whose early achievement is to facilitate the reduction and elimination of nuclear arsenals. Complete nuclear disarmament can be considered both an “effective measure” under the second component of Article VI, and as partial fulfilment of the objective of general and complete disarmament of the third prong.
173. The Court’s formulation of the nuclear disarmament obligation is in harmony with this interpretation of Article VI. The Court unanimously concluded:

“There exists an obligation to pursue in good faith and bring to a conclusion negotiations on nuclear disarmament in all its aspects under strict and effective international control.”

The obligation so stated encompasses both the second component of Article VI referring to nuclear disarmament and the third component referring to disarmament “under strict and effective international control”. As a subsidiary obligation, cessation of the nuclear arms race is an “aspect” of nuclear disarmament.

174. Regarding the Court’s inclusion of an obligation of result, to “bring to a conclusion negotiations on nuclear disarmament in all its aspects,” it is supported by the action-oriented language in the preamble: “to *achieve* cessation of the nuclear arms race,” “to

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at the NPT Review and Extension Conference, *supra*, n. 186, refer in the third preambular paragraph to “a set of principles and objectives in accordance with which nuclear non-proliferation, nuclear disarmament and international cooperation in the peaceful uses of nuclear energy should be vigorously pursued.” *See also* UNSC Resolution. 1887, 24 September 2009: “Underlining that the NPT remains the cornerstone of the nuclear non-proliferation regime and the essential foundation for the pursuit of nuclear disarmament and for the peaceful uses of nuclear energy, ...”.

<sup>267</sup> *Supra*, n. 244, diss op Judge Owada, para. 11, “It is therefore of cardinal importance that the Court understands this object and purpose of the Convention in its proper perspective, which defines the essential characteristics of the régime established under the [Whaling] Convention”.

*undertake effective measures*” of nuclear disarmament.<sup>268</sup> It is also supported by the preamble’s identification of results, which leaves no doubt whatever that the objective is complete nuclear disarmament: “the cessation of the manufacture of nuclear weapons, the liquidation of all their existing stockpiles, and the elimination from national arsenals of nuclear weapons and the means of their delivery”.

## **The obligation to pursue negotiations in good faith**

### *Introduction*

175. The obligation to pursue negotiations in good faith is spelled out both in the NPT, Article VI and by the ICJ in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*. The obligation of good faith has long been integral to the law of treaties,<sup>269</sup> from their conclusion through to their execution.<sup>270</sup> Specifically under the Vienna Convention on the Law of Treaties, 1969, Article 26 requires the performance of treaties in good faith<sup>271</sup> and, as discussed above, Article 31 requires that treaties be interpreted in good faith.<sup>272</sup> The obligation under Article 26 applies to all provisions of the NPT and accordingly to Article VI, and in addition Article VI itself requires negotiations to be pursued in good faith.

### *The obligation to pursue negotiations*

176. The essence of negotiations is communication and discussion:

“Negotiations are discussions held with a view to reaching a mutually acceptable settlement of some matter in issue between two (or more) states.”<sup>273</sup>

The RMI refers to the Court’s recognition that negotiations are “distinct from mere protests or disputations.” They require “at the very least — a genuine attempt by one of the disputing parties to engage in discussions with the other disputing party, with a view

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<sup>268</sup> Emphasis added.

<sup>269</sup> O. Connor, *Good Faith in International Law* (Dartmouth, 1991).

<sup>270</sup> E Zoller, *La Bonne Foi en Droit International Public* (Pedone 1977) p. 48 (conclusion); p. 78 (exécution).

<sup>271</sup> *Supra*, n. 1 Article 26: “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”

<sup>272</sup> *Ibid.*, Article 31 (1): “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”

<sup>273</sup> Sir R. Jennings and Sir A. Watts (eds), *Oppenheim’s International Law* (Oxford University Press, 9<sup>th</sup> ed. 1992) p.1182, para. 573.

to resolving the dispute.”<sup>274</sup> Whether negotiations have taken place is a matter of fact “for consideration in each case.”<sup>275</sup>

177. The RMI accepts that in the case of the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* the Court spelled out its understanding of what constitutes negotiations in a dispute resolution context – interpretations of the requirements of the compromissory clause contained in Article 22 of the Convention on the Elimination of All Forms of Racial Discrimination as a pre-condition for the jurisdiction of the Court. The present case concerns negotiations towards a specified goal, in accordance with a prior agreement, the NPT. However, the RMI recalls that the Court has held that the “meaning of negotiations for the purposes of dispute settlement, or the obligation to negotiate has been clarified” through its own jurisprudence and that of the PCIJ and arbitral bodies.<sup>276</sup> The RMI therefore submits that the Court’s ruling that “negotiations must relate to the subject-matter of the treaty” is equally relevant to the present context: States parties to the NPT must actively “pursue negotiations” that “concern the substantive obligations contained in the treaty in question”,<sup>277</sup> cessation of the arms race and nuclear disarmament.

*In good faith*

178. This Court will read into a Treaty an obligation on the parties to negotiate in good faith even when it contains no express requirement to that effect.<sup>278</sup> The NPT, Article VI explicitly spells out this obligation: to pursue negotiations in good faith. Under Article VI, every State Party is under the same obligation to pursue in good faith negotiations leading to nuclear disarmament; the obligation thus lies on all States Parties to the NPT. It applies to the UK, as it applies to each and every other State Party, irrespective of the attitudes of the other States in respect to the same obligation. In other words, the fact that other States may have breached the obligation to negotiate does not and cannot exclude the possibility for the Court to assess independently whether the UK is complying with the same obligation.
179. The RMI submits that a Treaty requirement to negotiate in good faith is “perfectly in keeping with the requirements of international law on the subject, since the mechanism for co-operation between States is governed by the principle of good faith.”<sup>279</sup> In *Pulp Mills* this Court recalled that: “One of the basic principles governing the creation and

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<sup>274</sup> *Supra*, n. 133, para. 157.

<sup>275</sup> *Ibid.*, at para. 160.

<sup>276</sup> *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece)*, Judgment of 5 December 2011, I.C.J. Reports 2011, p. 644, para. 132.

<sup>277</sup> *Supra*, n. 133 para. 161.

<sup>278</sup> *Nuclear Tests (Australia v. France)*, Judgment, I.C.J. Reports 1974, p. 268, para 145.

<sup>279</sup> *Supra*, n. 287, para 145.

performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential.”<sup>280</sup>

180. There can be few more important areas in international relations where co-operation, trust and confidence are essential than in nuclear issues.<sup>281</sup> The non-nuclear states entered into the NPT in the trust that all States parties would meet the promise of Article VI. The indefinite extension of the NPT in 1995 was agreed in the same expectation of fulfilment of the obligations undertaken under the Treaty.
181. Ruzicka and Wheeler argue that “[t]he basic bargain of the NPT thus represents a trusting relationship. There would have been little incentive for those who signed the Treaty to do so if they thought they could not trust the other parties.... all states that are party to the NPT, irrespective of their nuclear status, enter into a trusting relationship with each other. The difference is in the degree of vulnerability to which the two groups of states are exposed as a result of exhibiting trust.” (Annex 81).<sup>282</sup> Negotiations in good faith on effective measures for nuclear disarmament in accordance with Article VI are the means whereby that trust is to be vindicated.
182. The principle of good faith is unarguably a “fundamental principle of international law.”<sup>283</sup> It is normative<sup>284</sup> and a general principle of law under the Statute of the ICJ, Article 38 (1) (c) “of overriding importance”.<sup>285</sup> It encapsulates the essence of the rule of law in international society,<sup>286</sup> even “[i]n many respects, [constituting] the postulate on

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<sup>280</sup> *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010, p. 14, para 145; *Nuclear Tests (Australia v. France)*, Judgment, I.C.J. Reports 1974, p. 268, para. 46; *Nuclear Tests (New Zealand v. France)*, Judgment, I.C.J. Reports 1974, p. 473, para. 49.

<sup>281</sup> *Supra*, n. 2, preamble, 11<sup>th</sup> preambular paragraph: “Desiring to further the easing of international tension and the strengthening of trust between States in order to facilitate the cessation of the manufacture of nuclear weapons, the liquidation of all their existing stockpiles, and the elimination from national arsenals of nuclear weapons and the means of their delivery pursuant to a Treaty on general and complete disarmament under strict and effective international control,…”.

<sup>282</sup> J. Ruzicka and N.J. Wheeler, “The Puzzle of Trusting Relationships in the Nuclear Non-Proliferation Treaty”, *International Affairs*, Vol. 86(1) (2010) p. 69.

<sup>283</sup> R. Kolb, “*La bonne foi en droit international public: contribution à l’étude des principes généraux du droit*”, (Presses Universitaires de France, 2001) pp. 112-113.

<sup>284</sup> Good faith is a topic which “on the one hand is not open to serious question, yet on the other hand is imprecise and even fluid, defying formal definition ... Yet it is a rule of law, and has been so stated not only by the International Court of Justice itself, but also by major international plenipotentiary conferences and by the International Law Commission, throughout the twentieth century.” A.M. Stuyt, “Good and Bad Faith”, *Netherlands International Law Review*, Vol. 83 (1981) p. 54.

<sup>285</sup> *Supra*, n. 273, p 38; *Supra*, n. 276, para 28, per Diss. Op. Judge *ad hoc* Roucouas.

<sup>286</sup> V. Lowe, *International Law* (Oxford University Press, 2007), p. 116.

which this order rests in its entirety.”<sup>287</sup> It is a foundational principle of the United Nations Organization. The UN Charter, Article 2 requires that “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 UN General Assembly has affirmed the Charter obligations and also affirmed that States have the duty to fulfil in good faith their obligations under international agreements valid under “generally recognized principles and rules of international law”,<sup>288</sup> which is indisputably the case of the NPT. It is thus a legal requirement underpinning the carrying out of an existing obligation.

183. The issue is therefore to determine the meaning of the obligation to negotiate in good faith. This Court and its predecessor, the PCIJ, have on many occasions stated that good faith with respect to negotiations requires States “not only to enter into negotiations, but also to pursue them as far as possible, with a view to concluding agreements”.<sup>289</sup> Further, the Court has emphasized that after engaging in discussions (entering into negotiations) for the ensuing negotiations to be understood as being undertaken in good faith, they must be “meaningful”,<sup>290</sup> that is the discussions must comprise more than merely going through a formal process.<sup>291</sup> “To be meaningful, negotiations have to be entered into with a view to arriving at an agreement.”<sup>292</sup>
184. A number of elements are identified that constitute “meaningful negotiations” pursued in good faith:
- The duty to pursue negotiations in good faith requires first entering into negotiations: “Nor should we overlook the psychological value of the opening of negotiations ... the opening of negotiations is often a decisive step toward the conclusion of an agreement.”<sup>293</sup> It thus “requires — at the very least — a genuine attempt by one of the

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<sup>287</sup> M. Virally, “Good Faith in Public International Law”, *American Journal of International Law*, Vol. 11 (1983) p. 130, 132.

<sup>288</sup> UNGA Resolution 2625 (XXV), 24 October 1970, Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

<sup>289</sup> *Railway Traffic between Lithuania and Poland*, Advisory Opinion, 1931, P.C.I.J., Series A/B, No. 42, p. 116; *Supra*, n. 273, para 132.

<sup>290</sup> *Supra*, n. 280, para 146.

<sup>291</sup> *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment, I.C.J. Reports 1969, p. 47, para. 85; “Consultations and negotiations between the two States must be genuine, must comply with the rules of good faith and must not be mere formalities.” *Lac Lanoux Arbitration (France v. Spain) (1957) 12 R.I.A.A. 281; 24 I.L.R. 101 16 November, 1957* p. 16.

<sup>292</sup> *Claims arising out of Decisions of the Mixed Graeco-German Arbitral Tribunal Set Up under Article 304 in Part X of the Treaty of Versailles (Greece v. Germany) 19 R.I.A.A (1972)* para. 65.

<sup>293</sup> *Supra*, n. 136, para. 188, Dissenting Opinion Judge De Visscher.

disputing parties to engage in discussions with the other disputing party, with a view to resolving the dispute.”<sup>294</sup>

- Once negotiations have been entered into, this Court has explained further that good faith is not satisfied where States parties “obstruct negotiations, for example, by interrupting communications or causing delays in an unjustified manner or disregarding the procedures agreed upon.”<sup>295</sup> The Arbitral Tribunal in *Lake Lanoux*, also ruled that good faith would be violated by an “unjustified breaking off of the discussions, abnormal delay, disregard of the agreed procedures, [and] systematic refusals to take into consideration adverse proposals”.<sup>296</sup> The RMI submits that the notion of undue or abnormal delay applies both to such delay in commencing negotiations, and in sustaining them.
- This Court has emphasized a further condition that must be satisfied for negotiations to be meaningful: “Negotiations with a view to reaching an agreement also imply that the parties should pay reasonable regard to the interests of the other.”<sup>297</sup> Thus negotiations are not “meaningful”, for example, where either of the parties refuses to compromise and “insists upon its own position without contemplating any modification of it”.<sup>298</sup> A party cannot simply ignore the interests of the other party, nor impose its own view as to how this might be achieved. Such behaviour is against the essence of negotiation. In similar language the *Aminoil Arbitration* explained “the general principles that ought to be observed in carrying out an obligation to negotiate, - that is to say, good faith as properly to be understood; sustained upkeep of the negotiations over a period appropriate to the circumstances; awareness of the interests of the other party; and a persevering quest for an acceptable compromise.”<sup>299</sup>
- States subject to an obligation of negotiation “are not allowed ... to accomplish acts which defeat the object and purpose of the future treaty.” (**Annex 82**).<sup>300</sup> In general, the principle of “[g]ood faith forbids contracting parties to behave in any way that is

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<sup>294</sup> *Supra*, n. 133, para 157.

<sup>295</sup> *Supra*, n. 276; *Fisheries Jurisdiction (United Kingdom v. Iceland)*, Merits, Judgment, I.C.J. Reports 1974, p. 33, para. 78.

<sup>296</sup> *Supra*, n. 291, *Lac Lanoux* p. 23.

<sup>297</sup> *Supra*, n. 276, para 132.

<sup>298</sup> *Supra*, n. 291, *North Sea Continental Shelf* para. 85; see also *supra*, n. 280, *Pulp Mills* para. 146.

<sup>299</sup> *Arbitration between Kuwait and American independent Oil Company (AMINOIL)*, 24 March 1982 21 ILM 976, para 70. The arbitrators were Professor Paul Reuter (President), Professor Hamed Sultan and Sir Gerald Fitzmaurice, Q.C.

<sup>300</sup> A. Cassese, *The Israel-PLO Agreement and Self-Determination*, European Journal of International Law Vol. 567(4) (1993), <http://www.ejil.org/pdfs/4/1/1219.pdf>. Cf. Hisashi Owada, “Pactum de contrahendo, pactum de negotiando,” Max Planck Encyclopedia of Public International Law (article last updated April 2008), para. 34, citing General Assembly resolution A/RES/53/101, 8 December 1998, “Principles and guidelines for international negotiations.”

intended to frustrate the meaning and purpose of a treaty.”<sup>301</sup> This Court has asserted that “it is the purpose of the Treaty, and the intentions of the parties in concluding it, which should prevail over its literal application. The principle of good faith obliges the Parties to apply it in a reasonable way and in such a manner that its purpose can be realized.”<sup>302</sup> Importantly the obligation of good faith does not require “actual damage. Instead its violation may be demonstrated by acts and failures to act which, taken together render the fulfilment of specific treaty obligations remote or impossible.”<sup>303</sup> Accordingly the UK must not by its acts or omissions frustrate the purpose of the NPT, including the purpose of Article VI as core to the strategic bargain.

*An obligation of result not merely of conduct*

185. The ICJ, following its predecessor, has noted in general that the requirement of meaningful negotiations does not mean that there is “an obligation to reach an agreement.”<sup>304</sup> The fact that there is no satisfactory outcome does not of itself mean that the obligation to negotiate in good faith was violated. As previously noted, however, in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* the ICJ asserted that in the context of NPT, Article VI there “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.”<sup>305</sup> There is thus a two-fold obligation on each of the States parties to the Treaty: both conduct (negotiation in good faith) and result (“nuclear disarmament in all its aspects”).<sup>306</sup>
186. In the *dispositif* the Court *unanimously* continued this approach, concluding 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.”<sup>307</sup> This holding “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.”<sup>308</sup>

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<sup>301</sup> Muller, “Article 2 (2)” in Bruno Simma et al *The Charter of the United Nations A Commentary*, (Oxford University Press, 3<sup>rd</sup> ed. 2012).

<sup>302</sup> *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, *I.C.J. Reports 1997*, p. 7 para. 142.

<sup>303</sup> G.G. Gill, “State Responsibility and the ‘Good Faith’ Obligation in International Law”, in M. Fitzmaurice and D. Sarooshi (eds), *Issues of State Responsibility before International Judicial Institutions* (Clifford Chance Series Volume VII, 2004) p. 75 at 84.

<sup>304</sup> *Supra*, n. 289, p. 116; see also *supra*, n. 280, *Pulp Mills*, para. 150.

<sup>305</sup> *Supra*, n. 3, para. 99.

<sup>306</sup> *Ibid.*

<sup>307</sup> *Supra*, n. 3, para. 105 (2)(F).

<sup>308</sup> M.M. 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*, (Cambridge University Press, 1999), p. 375.

187. The fact that the Court has differentiated between obligations of conduct and of result in other decisions makes it clear that this is a well-considered statement. For instance, in the Genocide case it expressly stated the obligation under the Genocide Convention to be one of conduct:

“the obligation in question is one of conduct and not one of result, in the sense that a State cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide: the obligation of States parties is rather to employ all means reasonably available to them, so as to prevent genocide so far as possible.”<sup>309</sup>

188. The Court’s holding on Article VI was essential to the Advisory Opinion as a whole. The Court introduced the part of its Advisory Opinion relating to Article VI by presenting it squarely as a “part of the question before it”. It placed it in the broader context of the threat to the stability of the international legal system caused by the diversity of views about the legality of nuclear weapons and regarded the obligations incurred under Article VI as the appropriate way of putting an end to this situation.<sup>310</sup>

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<sup>309</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Merits, Judgment, I.C.J. Reports 2007, p. 43, para. 430 ; see also *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, 1999 I.C.J. Reports*, p. 62, para. 57 ; See also para. 62: Malaysia argued that there was an obligation of result, not of conduct; the Court determined the obligation to be one of conduct.

<sup>310</sup> *Supra*, n. 3, para. 98.

## PART 6

### THE EXISTENCE OF AN OBLIGATION UNDER CUSTOMARY INTERNATIONAL LAW TO NEGOTIATE IN GOOD FAITH FOR NUCLEAR DISARMAMENT

#### Introduction

189. Since the UK and the RMI are both parties to the NPT, the obligation set forth in Article VI of the NPT applies to them irrespective of whether that obligation corresponds to customary international law. However, for the sake of completeness, the RMI asks the Court to adjudge and declare that the UK has violated and continues to violate its obligation under customary international law 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. As this Court put it in its Judgment in the *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* case, the fact that principles of customary and general international law “have been codified or embodied in multilateral conventions does not mean that they cease to exist and to apply as principles of customary law.”<sup>311</sup>
190. The purpose of this Part is to demonstrate the existence under customary international law of 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. This will be done by focusing, in particular, on three elements:
- 1) the “norm-creating character” of Article VI of the NPT;
  - 2) the Court’s 1996 Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*;
  - 3) UN General Assembly’s and Security Council’s resolutions recognizing that all States have the obligation to negotiate in good faith to achieve nuclear disarmament.

#### The norm-creating character of Article VI

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<sup>311</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Jurisdiction and Admissibility, Judgment*, I.C.J. Reports 1984, p. 424, para. 73.

191. In its Judgment in the *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)*<sup>312</sup> the International Court of Justice used the notion of “norm-creating provision” in order to refer to a provision contained in a multilateral Treaty, “which has constituted the foundation of, or has generated a rule which, while only conventional or contractual in its origin, has since passed into the general corpus of international law, and is now accepted as such by the *opinio juris*, so as to have become binding even for countries which have never, and do not, become parties to the Convention”. According to the Court, “[t]here is no doubt that this process is a perfectly possible one and does from time to time occur”. The Court identified three requirements: first, “the provision concerned should, at all events potentially, be of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law”; secondly, “even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected”; thirdly, “State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; - and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved”.
192. There is no doubt that Article VI can be regarded as forming the basis of a general rule. By its very content, the obligation to negotiate in good faith for nuclear disarmament is aimed at protecting a collective interest of the international community as a whole. The negotiation to which this provision refers is relevant to all States, and not merely the States parties to the NPT. As the Court put it, “any realistic search for general and complete disarmament, especially nuclear disarmament, necessitates the co-operation of all States”.<sup>313</sup> This point is made clear by the preamble of the NPT, where it is established that:

“The States concluding this Treaty, hereinafter referred to as the Parties to the Treaty,  
[...]  
Declaring their intention to achieve at the earliest possible date the cessation of the nuclear arms race and to undertake effective measures in the direction of nuclear disarmament,  
Urging the co-operation of *all States* in the attainment of this objective,” (italics added)

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<sup>312</sup> *Supra*, n.291, North Sea, paras 70-71.

<sup>313</sup> *Supra*, n. 3, para. 100.

193. Moreover, the norm-creating character of the rule set forth in Article VI is confirmed by the way in which this provision is formulated. In particular, the obligation to negotiate is not made subject to other conditions or to the exhaustion of other procedures applicable in the relation between the parties to the NPT, nor is it subject to any express provision that allows for derogation by the parties.
194. As for the second requirement, the very widespread and representative participation in the NPT is a matter of fact. There are 189 States Parties to the NPT. Very few multilateral treaties have had the same success in terms of number of States parties. Two examples are the UN Charter and a few international humanitarian law conventions. With regard to the UN Charter, this Court recognized that customary international law “has in the subsequent four decades developed under the influence of the Charter, to such an extent that a number of rules contained in the Charter have acquired a status independent of it”.<sup>314</sup> With regard to international humanitarian law conventions, it observed that “[t]he extensive codification of humanitarian law and the extent of the accession to the resultant treaties, as well as the fact that the denunciation clauses that existed in the codification instruments have never been used, have provided the international community with a corpus of treaty rules the great majority of which had already become customary and which reflected the most universally recognized humanitarian principles.”<sup>315</sup> The same conclusion applies to the NPT, particularly as far as Article VI is concerned. With regard to this provision, the general attitude of States, including States that are not parties to the NPT, appears to be a decisive element. While four nuclear-armed States – India, Pakistan, Israel, and the Democratic People’s Republic of Korea (DPRK) – are not parties to the NPT, virtually all States have generally manifested their commitment to engage in negotiation with a view to nuclear disarmament. This commitment has been expressed in many ways, including, as it will be shown, by supporting resolutions of international organizations expressly referring to the obligation of all States to participate to negotiation with a view to disarmament. The widespread and representative participation in the NPT, combined with the lack of any opposition by States not parties to the NPT against the existence of the obligation set forth in Article VI, are clear indications of the customary nature of that obligation.
195. Finally, there is no need to spend many words on the last requirement. Practice in this area can be deduced from the countless initiatives, taken at both the universal and the regional level, aimed at progressing towards the goal of global nuclear disarmament. On the other hand, the recognition that a rule of law or legal obligation is involved can be deduced, *inter alia*, from the widespread support of UN General Assembly and Security

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<sup>314</sup> *Supra*, n. 311, pp. 96-97.

<sup>315</sup> *Supra*, n. 3, p. 258.

Council resolutions recognizing the existence of an obligation to negotiate for nuclear disarmament.

### The 1996 Advisory Opinion

196. This Court's 1996 Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* constitutes the most authoritative recognition of the customary status of the obligation "recognized"<sup>316</sup> and "expressed"<sup>317</sup> in Article VI of the NPT. While the subject-matter of the question requested to the Court concerned the permissibility under international law of the threat or use of force, several States referred in their pleadings to the rule contained in Article VI of the NPT. Support was also expressed to the view that that provision corresponds to a rule of customary international law. Thus, for instance, Australia observed that "[a]ll States, including the nuclear weapon States are prohibited by customary international law from engaging in any action inconsistent with [the commitment to complete nuclear disarmament]."<sup>318</sup>
197. Unanimously, the Court found 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" (**Annex 83**).<sup>319</sup> While the Court did not expressly say that the rule contained in Article VI of the NPT has customary status, the recognition of such status can be inferred from the Court's reasoning. In particular, the Court appeared to base such a view mainly on the norm-creating character of Article VI and on the unanimous adoption of General Assembly resolutions concerning nuclear disarmament. The Court observed:

"This twofold obligation to pursue and to conclude negotiations formally concerns the 182 States parties to the Treaty on the Non-Proliferation of Nuclear Weapons, or, in other words, the vast majority of the international community.

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<sup>316</sup> *Supra*, n. 3, para 99

<sup>317</sup> *Ibid.*, para. 102.

<sup>318</sup> I.C.J. Verbatim Record, CR 1995/22 ¶ 56 (Oct. 30, 1995) (public sitting held at 10 a.m. at the Peace Palace, President Bedjaoui presiding).

<sup>319</sup> *I.C.J. Reports 1996*, p. 267. In a recent statement, the UN Secretary-General interpreted the Court's conclusion as follows: "No country disputes the desirability of achieving a nuclear-weapon-free world. After all, this was the very first objective identified by the United Nations General Assembly. The universal acceptance of this goal led the International Court of Justice to determine that the disarmament obligation transcends any treaty and is a requirement under customary international law." UN Secretary-General, Message to the Vienna Conference on the Humanitarian Impact of Nuclear Weapons, Vienna, 8 December 2014.

[http://www.bmeia.gv.at/fileadmin/user\\_upload/Zentrale/Aussenpolitik/Abruestung/HINW14/HINW14\\_Message\\_from\\_UN\\_Secretary\\_General.pdf](http://www.bmeia.gv.at/fileadmin/user_upload/Zentrale/Aussenpolitik/Abruestung/HINW14/HINW14_Message_from_UN_Secretary_General.pdf).

Virtually the whole of this community appears moreover to have been involved when resolutions of the United Nations General Assembly concerning nuclear disarmament have repeatedly been unanimously adopted.”<sup>320</sup>

198. The customary status of the obligation contained in Article VI found confirmation in the Declaration of the President of the Court, Bedjaoui. As he observed, “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”.<sup>321</sup>

### **General Assembly and Security Council resolutions recognizing the existence of an obligation upon all States to negotiate in good faith for nuclear disarmament**

199. As recognized by this Court,

“General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule.”<sup>322</sup>

200. Several General Assembly resolutions contain a reference to the obligation of States to pursue in good faith negotiations to achieve nuclear disarmament. Since 1997, the General Assembly has each year adopted a resolution entitled “Follow-up to the advisory opinion of the International Court of Justice on the legality of the threat or use of nuclear weapons”. Paragraphs 1 and 2 of this resolution are formulated as follows:

“The General Assembly,  
(...)

1. Underlines once again the unanimous conclusion of the International Court of Justice that there exists an obligation to pursue in good faith and bring to a

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<sup>320</sup> *Supra*, n. 3, para. 100. Today this number stands at 189 – *supra*, n. 181.

<sup>321</sup> *Supra*, n. 3, p. 274. Vice-president Schwebel took a more cautious position. It must be noted, however, that he did not rule out the possibility that Article VI reflected a rule of customary international law. He mainly criticized the Court for not having subjected its conclusion to a “demonstration of authority” or to a “test of advocacy”. *Ibid.*, p. 329.

<sup>322</sup> *Ibid.*, p. 254-255.

conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control;

2. Calls once again upon *all States* to fulfil immediately that obligation by commencing multilateral negotiations in 1999 leading to an early conclusion of a nuclear weapons convention prohibiting the development, production, testing, deployment, stockpiling, transfer, threat or use of nuclear weapons and providing for their elimination”.<sup>323</sup> (italics added)

201. The same concept has been reiterated in different form in other resolutions. For instance, General Assembly resolution 56/24R on “Nuclear disarmament” contains in its preamble a paragraph having this content:

“Recalling the advisory opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons, issued on 8 July 1996, and welcoming the unanimous reaffirmation by all Judges of the Court that there exists an obligation *for all States* 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”.<sup>324</sup> (italics added)

202. By relying on paragraph 2F of the operative part of the Court’s opinion, the General Assembly has recognized that there is an obligation to negotiate in good faith for nuclear disarmament and that this obligation is incumbent on all States, and not merely on States parties to the NPT. In other words, the Assembly recognizes the customary status of this obligation. The fact that these resolutions receive support from a great number of States, including from India, Pakistan, and the DPRK, three of the four nuclear-armed States

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<sup>323</sup> See for instance A/RES/52/38, adopted on 8 January 1998, pp. 23-24; A/RES/53/77, adopted on 12 January 1999, p. 35; A/RES/54/54, adopted on 10 January 2000, p. 34; A/RES/55/33, adopted on 12 January 2001, p. 41; A/RES/56/24, adopted on 10 January 2002, p. 32; A/RES/57/85, adopted on 9 January 2003; A/RES/58/46, adopted on 8 January 2004; A/RES/59/83, adopted on 16 December 2004; A/RES/60/76, adopted on 11 January 2006; A/RES/61/83, adopted on 18 December 2006; A/RES/62/39, adopted on 8 January 2008; A/RES/63/49, adopted on 12 January 2009; A/RES/64/55, adopted on 12 January 2010; A/RES/65/76, adopted on 13 January 2011; A/RES/66/46, adopted on 12 January 2012; A/RES/67/33, adopted on 4 January 2013; A/RES/68/42, adopted on 10 December 2013; A/RES/69/43, adopted on 11 December 2014..

<sup>324</sup> A/RES/51/45, adopted on 10 January 1997, p. 27; A/RES/52/38, adopted on 8 January 1998, p. 17; A/RES/53/77, adopted on 12 January 1999, p. 37; A/RES/54/54, adopted on 10 January 2000, p. 30; A/RES/55/33, adopted on 12 January 2001, p. 33; A/RES/56/24, adopted on 10 January 2002, p. 28; A/RES/57/79, adopted on 8 January 2003; A/RES/58/56, adopted on 17 December 2003; A/RES/59/77, adopted on 16 December 2004; A/RES/60/70, adopted on 6 January 2006; A/RES/61/78, adopted on 18 December 2006; A/RES/62/42, adopted on 8 January 2008; A/RES/63/46, adopted on 12 January 2009; A/RES/64/53, adopted on 12 January 2010; A/RES/65/56, adopted on 13 January 2011; A/RES/66/51, adopted on 12 January 2012; A/RES/67/60, adopted on 4 January 2013; A/RES/68/47, adopted on 10 December 2013; A/RES/69/48, adopted on 11 December 2014.

which are not parties to the NPT, is to be underlined. As the Court put it, “[t]he effect of consent to the text of such resolutions cannot be understood as merely that of a ‘reiteration or elucidation’ of the treaty commitment... the attitude referred to expresses an *opinio juris* respecting such rule (or set of rules), to be thenceforth treated separately from the provisions, especially those of an institutional kind, to which it is subject on the treaty-law plane”.<sup>325</sup> Moreover, while there are a number of States abstaining or voting against these resolutions, the opposition of these States generally is not directed against the recognition of an obligation to pursue in good faith and conclude negotiations on nuclear disarmament.<sup>326</sup>

203. There are also Security Council resolutions that, by referring to the obligation contained in Article VI of the NPT, call upon all States to comply with what is required by that provision. Thus, in Resolution 984 (1995), which is also mentioned in the 1996 Advisory Opinion, the Security Council urged “*all States*, as provided for in Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons, to pursue negotiations in good faith on effective measures”.<sup>327</sup> Resolution 1887 (2009) addressed to both Parties and non-Parties of the NPT the request to comply with the obligation contained in Article VI. In particular, it called upon “the *Parties to the NPT*, pursuant to Article VI of the Treaty, to undertake to pursue negotiations in good faith on effective measures relating to nuclear arms reduction and disarmament, and on a Treaty on general and complete disarmament under strict and effective international control”, and called on “*all other States* to join in this endeavour”.<sup>328</sup>
204. Finally, reference must be made to the fact that, in the debate leading to the adoption of resolutions dealing with matters related to nuclear weapons, States have recognized that the rule contained in Article VI of the NPT corresponds to a customary international rule and therefore that it imposes an obligation which is incumbent on all States. In particular, there are cases in which States parties to the NPT expressly request States which are not

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<sup>325</sup> *Supra*, n. 311, p. 100.

<sup>326</sup> This is demonstrated by the votes in the General Assembly in 2006 on “Follow-up to the advisory opinion of the International Court of Justice on the legality of threat or use of nuclear weapons,” A/RES/61/83, 6 December 2006. That year, a separate vote was taken on operative paragraph one welcoming the Court’s conclusion regarding the disarmament obligation. The paragraph was approved by a vote of 168 to 3 (Israel, Russia, U.S.) with 5 abstentions (Belarus, France, Latvia, Kyrgyzstan, UK). In contrast, the resolution as a whole was approved by a vote of 118 to 27 with 26 abstentions. See Official Records, General Assembly, 67<sup>th</sup> plenary meeting, 6 December 2006, A/61/PV.67, pp. 26-27, [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/61/PV.67&Lang=E](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/61/PV.67&Lang=E). Japan’s explanation of its abstention in the vote on the resolution as a whole in the First Committee, taken 11 October 2006, is illustrative. It states that Japan supported the ICJ’s conclusion regarding the disarmament obligation but differed with other aspects of the resolution. Explanation of Vote by Japan, <http://reachingcriticalwill.org/images/documents/Disarmament-fora/1com/1com06/EOV/L.44japan.pdf>.

<sup>327</sup> UNSC Resolution S/RES/984 (1995), para. 8 of the operative part. (italics added).

<sup>328</sup> UNSC Resolution S/RES/1887 (2009), para. 5 of the operative part. (italics added).

parties to abide by this obligation. Thus, in the debate leading to the adoption of resolution 1172 (1998), in which the Security Council condemned nuclear tests conducted by India and by Pakistan, several States asked Pakistan and India to comply with the obligation contained in Article VI. Such claims are based on the assumption that this provision has customary status. For instance, the delegate of New Zealand in the Security Council made the following statement:

“The International Court of Justice has confirmed, in a unanimous decision, the obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects and under strict and effective international control. That obligation applies just as much to India and Pakistan as it does to other States.”<sup>329</sup>

Similarly, according to the delegate of Mexico,

“The commitment of all States to nuclear disarmament does not stem solely from the provisions of the Non-Proliferation Treaty. In fact, the historic advisory opinion of the International Court of Justice, of 8 July 1996, establishes unambiguously the obligation to pursue in good faith and to bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control”.<sup>330</sup>

205. These declarations, formulated as it were in clear legal terms and related to a specific conduct of two States which are not parties to the NPT, provide important evidence of the *opinio juris* of States as to the customary nature of the obligation contained in Article VI. Significantly, the delegate of Pakistan did not oppose these statements.<sup>331</sup>
206. Taking into account all these elements, it must be concluded, as this Court did in 1996, that there exists under customary international law “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”.<sup>332</sup>

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<sup>329</sup> S/PV. 3890, p. 23.

<sup>330</sup> *Ibid.*, p. 24.

<sup>331</sup> *Ibid.*, pp. 28-32. India did not request an invitation to participate in the discussion.

<sup>332</sup> *Supra*, n. 3, p. 267.

## PART 7

### UK BREACHES OF OBLIGATIONS CONCERNING NEGOTIATIONS RELATING TO CESSATION OF THE NUCLEAR ARMS RACE AND TO NUCLEAR DISARMAMENT

#### Introduction

207. The International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, Article 12, states:

”There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.”

The ILC's Commentary to Article 2 of the Articles explains that “breach of an international obligation of the State is used ... to cover both treaty and non-treaty obligations.”<sup>333</sup>

208. The RMI asserts that the UK is not acting in conformity with its obligations under Article VI of the NPT.<sup>334</sup>

#### Article VI of the NPT

##### *Nuclear Disarmament*

209. As set forth above,<sup>335</sup> the Court has provided an authoritative analysis of the nuclear disarmament component 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”.<sup>336</sup> In the *dispositif* of its Advisory Opinion the Court concluded *unanimously*:

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<sup>333</sup> [http://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf), [accessed on 12 March 2015].

<sup>334</sup> *Supra*, n. 276, para 134.

<sup>335</sup> *See* para. 140 – 141 of the Memorial.

<sup>336</sup> *Supra*, n. 3, para. 99.

“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”.<sup>337</sup>

210. The UK has breached this obligation in the first place by failing to pursue negotiations on nuclear disarmament. No such negotiations exist or have existed, and the UK has failed to seek to bring them into existence. Indeed, the UK has actively opposed the commencement of such negotiations as well as the UN General Assembly’s effort to facilitate their commencement. It opposes General Assembly resolutions calling for negotiations to begin.<sup>338</sup> The UK also refused to support the establishment of the 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, declared pre-emptively that it would not support “any outcome it may produce”, and did not participate in the working group’s deliberations.<sup>339</sup> Such acts reflect stated UK policy. The UK Government has stated that “it is premature and potentially counter-productive” to prioritize a Nuclear Weapons Convention.<sup>340</sup> At the 2013 High-Level Meeting on Nuclear Disarmament, the UK representative delivered a joint statement in which the UK, France, and U.S. “regret” that “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”.<sup>341</sup> Later that year and again in 2014, the UK voted against UN General Assembly resolutions following up the High-Level Meeting.<sup>342</sup>
211. Not only has the UK rejected such initiatives; it has not offered any meaningful alternative proposals. Although it has stated that it will only work through existing mechanisms such as the Conference on Disarmament, it voted against the 2013 and 2014 General Assembly resolutions that called for negotiations in that body.
212. The ordinary meaning<sup>343</sup> of “pursue” includes: “To seek to reach or attain”; “To try to obtain or accomplish, to work to bring about, to strive for (a circumstance, event, condition, etc.); to seek after, aim at.”<sup>344</sup> The UK has failed to “pursue” negotiations on

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<sup>337</sup> *Ibid.*, para.105, point 2F.

<sup>338</sup> See paras. 65 – 81 of the Memorial.

<sup>339</sup> *Ibid.*

<sup>340</sup> See para. 25 of the Memorial.

<sup>341</sup> Available at [http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/HLM/26Sep\\_UKUSFrance.pdf](http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/HLM/26Sep_UKUSFrance.pdf), [accessed on 1 March 2015].

<sup>342</sup> UNGA Resolution A/RES/68/32, 5 December 2013 and UNGA Resolution A/RES/69/58, 2 December 2014.

<sup>343</sup> *Supra*, n. 1, Article 31(1).

<sup>344</sup> OED Online, available at <http://www.oed.com/view/Entry/155076?redirectedFrom=pursue#eid>. [accessed on 11 March 2015].

nuclear disarmament under any of these definitions; thus it has failed to work to bring them about. Moreover, for Article VI negotiations to be conducted in good faith, they must first begin. Accordingly, the duty to pursue negotiations requires first a good-faith effort to enter into negotiations. As the Court has stated, appositely though in a different context, “the concept of ‘negotiations’ ... requires — at the very least — a genuine attempt by one of the disputing parties to engage in discussions with the other disputing party, with a view to resolving the dispute”.<sup>345</sup> The UK’s failure to seek to engage in negotiations, and its opposition to efforts by other States to begin or facilitate negotiations, is thus a breach of Article VI.

213. Forty-five years after entry into force of the NPT, the UK’s delay in fulfilling its obligation to pursue negotiations on nuclear disarmament is manifestly unreasonable.
214. The UK’s breach of its obligation under Article VI concerning negotiation of nuclear disarmament is in the first instance a breach of an obligation of conduct, the failure to pursue in good faith negotiations on nuclear disarmament. It also is a breach of an obligation of result for which the UK shares responsibility: negotiations on nuclear disarmament have not been concluded. Consequently, an objective of the NPT as set forth in its preamble, “the elimination from national arsenals of nuclear weapons and the means of their delivery”, the “precise result” of “nuclear disarmament in all its aspects” referred to by the Court,<sup>346</sup> has not been achieved, nor is it in sight. Further reinforcing the breach is the UK’s planning and budgeting to maintain its nuclear weapon system for many decades to come, actions that undermine and frustrate achievement of the objective of nuclear disarmament.<sup>347</sup> As the UK Government’s 2014 Update to Parliament makes clear, “Government policy remains to maintain a continuous at sea deterrent and proceed with the Assessment Phase programme to build a new fleet of ballistic missile submarines.”<sup>348</sup>
215. The UK has special responsibilities in this regard. As one of the NPT’s three Depositary Governments,<sup>349</sup> it is responsible for preserving the integrity and stability of the Treaty, which is a pillar of international peace and security (**Annex 84**).<sup>350</sup> The UK is also a

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<sup>345</sup> *Supra*, n. 133, para. 157. This Court, and its predecessor the PCIJ, have on many occasions stated that good faith with respect to negotiations requires States “*not only to enter into negotiations, but also to pursue them as far as possible, with a view to concluding agreements*” (emphasis supplied). *Supra*, n. 289, p. 116; *Supra*, n. 276, para 132.

<sup>346</sup> *Supra*, n. 3, para. 99.

<sup>347</sup> See paras. 45 – 64 of the Memorial.

<sup>348</sup> “The United Kingdom’s Future Nuclear Deterrent: 2014 Update to Parliament”, *supra*, n. 64.

<sup>349</sup> *Supra*, n 2, Article IX.2.

<sup>350</sup> The UK’s special responsibilities as a Depositary have been recognized in exchanges in Parliament. See e.g. Hansard, HC Deb, 19 June 1989, vol. 155, cc.31-3W.

permanent member of the Security Council,<sup>351</sup> which has primary responsibility for the maintenance of international peace and security.<sup>352</sup> In breaching its obligation under Article VI concerning negotiation of nuclear disarmament, therefore, the UK is also failing to meet these special responsibilities.

### *Cessation of the Nuclear Arms Race*

216. Article VI of the NPT also requires States Parties to “pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date”. The NPT’s preamble declares the “intention *to achieve at the earliest possible date* the cessation of the nuclear arms race”.<sup>353</sup> The original aim was to end the quantitative build-up and qualitative improvement of nuclear arsenals prior to negotiations on their elimination.<sup>354</sup>
217. The UK and other nuclear-weapon States Parties to the NPT, with the possible exception of China, have ceased the quantitative build-up of nuclear arsenals through expansion of the number of warheads and the stocks of weapons-grade fissile materials. That is not true with respect to qualitative improvement. In the case of the UK, upgrades to its nuclear weapons system adding military capabilities are clearly underway in multiple respects.<sup>355</sup>
218. A new “arming, fusing and firing system” developed by the US is to be used in current UK warheads.<sup>356</sup> The system would improve the nuclear warhead’s effectiveness against hardened targets. The UK has purchased from the U.S. the Mark 4 Reentry Vehicle and designed a warhead to meet Mk4 RV specifications in terms of weight, size, shape, centre of gravity, and centre of inertia. The U.S. is modernizing its W76 warheads and Mk4 re-entry vehicles, including launcher, navigation, fire control, guidance, and re-entry systems.<sup>357</sup> The modernized W76-1 and Mk4A RV have improved the accuracy of the warheads.<sup>358</sup> These improvements have cascaded through to the UK’s Trident warhead and re-entry vehicle.<sup>359</sup> The UK government has acknowledged procurement of the

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<sup>351</sup> Article 23(1) of the U.N. Charter.

<sup>352</sup> *Ibid.*, Article 24(1).

<sup>353</sup> Emphasis added.

<sup>354</sup> *Supra*, n. 163, vol. 2, pp. 572–580, 583–585.

<sup>355</sup> *See paras.* 45 – 64 of the Memorial.

<sup>356</sup> R. Norton-Taylor, ‘Trident more effective with US arming device, tests suggest,’ *The Guardian*, 6 April 2011, <http://www.theguardian.com/uk/2011/apr/06/trident-us-arming-system-test> [accessed on 1 March 2015]; *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> [accessed on 1 March 2015].

<sup>357</sup> *Supra*, n. 42, at pp. 71-72.

<sup>358</sup> *Ibid.*, at p. 72; *supra*, n. 87.

<sup>359</sup> *Supra*, n. 42; *See also supra*, n. 88.

Mk4A RV.<sup>360</sup> Preliminary work on a successor warhead is also under way under the Nuclear Warhead Capability Sustainment Programme at AWE Aldermaston.<sup>361</sup> It is reasonable to assume that the development of a successor warhead will also be facilitated by the research being conducted jointly by the UK and France.<sup>362</sup>

219. A life-extended Trident II missile is being developed by the U.S. and will be deployed on UK submarines.<sup>363</sup> It will have a guidance system designed to provide flexibility for new missions and make the missile more accurate.<sup>364</sup> The replacement submarine will be quieter and stealthier.<sup>365</sup>
220. All of these efforts and actions confirm that the UK continues to be actively engaged in qualitative improvements to its nuclear weapons system.
221. The most straightforward way to bring to an end the qualitative improvement of the UK's nuclear weapons system would be to eliminate the system. The UK's failure to pursue negotiations on nuclear disarmament is therefore also a violation of the subsidiary obligation to pursue negotiations on cessation of the nuclear arms race at an early date. The UK is additionally in breach of the obligation relating to cessation of the nuclear arms race because it is not pursuing negotiations on any measures short of complete nuclear disarmament that would halt qualitative improvement of nuclear forces.<sup>366</sup> Forty-five years after entry into force of the NPT, the UK's delay in fulfilling its obligation to pursue negotiations on cessation of the nuclear arms race is manifestly unreasonable.

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<sup>360</sup> *Ibid.*, pp. 68-69; Hansard, HC, 8 December 2009, col. 214W.

<sup>361</sup> *Ibid.*, pp. 70-71; Hansard, HC Deb, 28 November 2012, col. 353W.

<sup>362</sup> See para. 64 of the Memorial.

<sup>363</sup> *Supra*, n. 91, p. 85.

<sup>364</sup> *Ibid.*; T. Postol, 'How the Obama Administration Learned to Stop Worrying and Love the Bomb,' *The Nation*, 10 December 2014 ("Upgrades to the submarine-launched Trident II dramatically improve the US capacity to destroy Russian silo-based ICBMs, and with less warning time."), <http://www.thenation.com/article/192633/how-obama-administration-learned-stop-worrying-and-love-bomb> [accessed on 10 March 2015]; *supra*, n. 42, 71-72.

<sup>365</sup> *Supra* n. 42, at pp. 72-73.

<sup>366</sup> For example, a ban on equipping missiles with multiple independently targetable warheads (MIRVs) could be negotiated. See Z. Keck, 'Breaking the nuclear gridlock: it's time to ban land-based MIRVs,' *Bulletin of the Atomic Scientists*, 17 June 2014, <http://thebulletin.org/breaking-nuclear-gridlock-it%E2%80%99s-time-ban-land-based-mirvs7245> [accessed on 10 March 2015]. It would directly help to prevent arms racing, in particular but not only among Asian nuclear-armed states whose missiles are currently not MIRVed. It would also reduce military capability of other states, including the UK, whose missile are MIRVed, and thus contribute to disarmament. Another example: A nuclear weapons accountability agency or mechanism could be created that would among other things monitor a freeze on qualitative improvements and other arms racing. Cf. J. Burroughs, "International Law," in *Assuring Destruction Forever: Nuclear Weapon Modernization Around the World* (Reaching Critical Will, 2012), p. 122, <http://www.reachingcriticalwill.org/images/documents/Publications/modernization/assuring-destruction-forever.pdf> [accessed on 1 March 2015].

222. The UK's breach of the Article VI obligation concerning negotiation of cessation of the nuclear arms race is, in the first instance, a breach of an obligation of conduct, the failure to pursue in good faith negotiations on cessation of the nuclear arms race. It also is a breach of an obligation of result for which the UK shares responsibility: negotiations have not been concluded on all aspects of cessation of the nuclear arms race. Consequently, an objective of the NPT set forth in its preamble, "to achieve at the earliest possible date the cessation of the nuclear arms race", has not been met, nor is it in sight. Further reinforcing the breach are the projected improvements of military capability of the UK's nuclear weapon system, including the submarine, missile, re-entry vehicle, and warhead, actions that undermine achievement of the objective of cessation of the nuclear arms race.

### **Customary International Law**

223. For the reasons set out above,<sup>367</sup> the obligations enshrined in Article VI of the NPT are not merely Treaty obligations; they also exist separately under customary international law. On the same grounds as those relied on above with respect to Article VI, 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.

### **Good Faith**

224. The Respondent has breached its obligation to act in good faith in respect of its performance of its Treaty and customary international law obligations regarding nuclear disarmament and cessation of the nuclear arms race at an early date.

225. The Respondent has displayed unwillingness to compromise and a lack of awareness of the interests of other States in its opposition to their efforts to facilitate or begin negotiations on nuclear disarmament by General Assembly resolutions and the OEWG. The UK's lack of good faith is particularly evident with respect to the OEWG. The OEWG was engaged in the exercise of *pursuing* multilateral negotiations on nuclear disarmament in the sense of developing proposals that would make their commencement possible. It thus was entirely in harmony with the spirit and letter of Article VI and the customary international law obligation relating to nuclear disarmament. While openness to compromise and awareness of interests of other parties are requirements of good faith ordinarily applied to the conduct of negotiations, they are equally appropriate in the

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<sup>367</sup> See Part 6 of the Memorial.

context of pre-negotiation discussions of the type held in the OEWG. By refusing to participate, and by pre-emptively declaring it would not accept “any outcome” of the OEWG,<sup>368</sup> the UK violated those requirements.

226. The Respondent is also engaged in activities that render remote or impossible the achievement of the objectives of nuclear disarmament and cessation of the nuclear arms race. In its planning, budgeting, and preparations,<sup>369</sup> it is projecting the retention of its nuclear weapon system for decades to come, the very opposite of accomplishment of nuclear disarmament in a reasonable timeframe. The UK is also engaged in vertical proliferation by modernizing and improving its nuclear weapon system, including the submarine, the missile, the re-entry vehicle, and the warhead, the very opposite of cessation of qualitative nuclear arms racing. Those activities retard, rather than advance, the objectives of nuclear disarmament and cessation of the nuclear arms race. Their vigorous and well-funded prosecution undermines the trust that is necessary for a successful collective disarmament enterprise in accordance with Treaty and customary obligations. They are thus contrary to the object and purpose of the NPT, the establishment of a safer, nuclear weapons free world through compliance with non-proliferation and disarmament obligations, and to the object and purpose of a future disarmament agreement. The lack of good faith is reinforced by the fact that at the same time that the UK is modernizing its nuclear weapon system and planning to retain it over the long term, it is opposing the commencement of multilateral negotiations on nuclear disarmament.

### **Frustration of Fulfillment of Obligations by Non-Nuclear Weapon States**

227. The United Kingdom is also failing to perform in good faith its obligations under the NPT by effectively preventing the non-nuclear-weapon States Parties to the Treaty from fulfilling their obligations under Article VI to negotiate for nuclear disarmament and cessation of the nuclear arms race at an early date. As noted above, “all States need to make special efforts to establish the necessary framework to achieve and maintain a world without nuclear weapons”<sup>370</sup> and all States Parties to the NPT are committed to nuclear disarmament under Article VI.<sup>371</sup>
228. The duty not to obstruct the non-nuclear-weapon States’ fulfilment of their obligations under the NPT is implicit in the UK’s obligation to perform in good faith its own

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<sup>368</sup> See para. 77 of the Memorial.

<sup>369</sup> The May 2011 Initial Gate report states that the submarines will be operational “until the 2060s”.

*Supra*, n. 63, at p. 75.

<sup>370</sup> See para. 127 of the Memorial.

<sup>371</sup> See paras. 138 - 144 of the Memorial.

obligations under the NPT,<sup>372</sup> because such obstruction frustrates the object and purposes of the Treaty. In its commentary on the Draft Articles on the Law of Treaties, the International Law Commission said:

"Some members felt that there would be advantage in also stating that a party must abstain from acts calculated to frustrate the object and purposes of the treaty. The Commission, however, considered that this was clearly implicit in the obligation to perform the treaty in good faith..." (**Annex 85**)<sup>373</sup>

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<sup>372</sup> *Supra*, n. 1, Article 26.

<sup>373</sup> Yearbook of the International Law Commission. 1966, Volume II, p. 211: commentary on draft Article 23 (Pacta Sunt Servanda), para. 4, [http://legal.un.org/ilc/publications/yearbooks/Ybkvolumes%28e%29/ILC\\_1966\\_v2\\_e.pdf](http://legal.un.org/ilc/publications/yearbooks/Ybkvolumes%28e%29/ILC_1966_v2_e.pdf) [accessed on 10 March 2015].

## PART 8

### SUMMARY

229. In accordance with the Court's Practice Direction II the Marshall Islands provides the following short summary of its reasoning.
230. The Applicant provides in this Part of this Memorial, in conformity with the Court's Practice Direction II, a short summary of the reasoning followed by RMI in this Memorial. Whenever it would appear that there would be a discrepancy between this Summary and the full text of this Memorial, the full text prevails.
231. The Court's jurisdiction is based on declarations - made in accordance with Article 36(2) of the Statute of the Court - that each of the Parties has deposited with the Secretary General of the United Nations. Given the immeasurable destructive consequences of even a limited nuclear war and given the *erga omnes* character of the obligations at stake in this case the Applicant has *locus standi* and the Application is admissible.
232. Central to this case is 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."<sup>374</sup>
233. Specifically, the Applicant alleges that the Respondent acts in violation of Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) which reads:

"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."<sup>375</sup>

Both the Applicant and the Respondent are a Party to the NPT together with 187 other States.

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<sup>374</sup> *Advisory Opinion of 8 July 1996 on the Legality of the Threat or Use of Nuclear Weapons I.C.J. Reports 1996*, p. 226, para. 105, point 2F.

<sup>375</sup> Treaty on the Non-Proliferation of Nuclear Weapons 1968 729 UNTS 161, Article VI.

234. In this Memorial the Applicant also asserts that the said obligation is not only a central provision of the NPT, but that it is also firmly based in customary international law.
235. The Respondent is a nuclear-weapon State. The Applicant has shown in this Memorial that the Respondent is not only maintaining its nuclear arsenal, but is also engaging in the modernization of said arsenal. As a result of this modernization process the military capabilities of the Respondent's nuclear weapons will be increased; they will become even more effective as weapons.
236. The Respondent has also been explicit about its not being prepared to engage in negotiations leading to the conclusion of establishing nuclear disarmament in all its aspects under strict and effective international control. In other words, the Respondent has been taking and continues to take the position that it is not going to honour its obligations under Article VI of the NPT, nor its obligations under customary international law.
237. As demonstrated in this Memorial the Respondent is clearly not performing its obligations under the NPT in good faith, and is far from *good faith negotiating* as required by the aforementioned obligations.
238. The Applicant cannot be expected to accept the continuance of this situation. As such, and "Considering 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,"<sup>376</sup> it has therefore submitted the present case to this Court.

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<sup>376</sup> Preamble to the NPT.

## PART 9

### SUBMISSIONS

239. 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 Kingdom 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 Kingdom 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 system and to maintain it for the indefinite future, and by failing to pursue negotiations that would end the nuclear arms race through comprehensive nuclear disarmament or other measures;
  - c) that the United Kingdom 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 Kingdom has violated and continues to violate its international obligations under customary international law, by taking actions to qualitatively improve its nuclear weapons system and to maintain it for the indefinite future, and by failing to pursue negotiations that would end the nuclear arms race through comprehensive nuclear disarmament or other measures;
  - e) that the United Kingdom 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

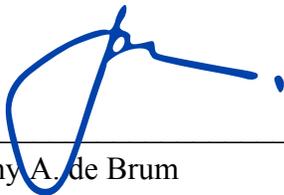
time, while at the same time failing to pursue negotiations as set out in the four preceding counts; and

- f) that the United Kingdom 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 Parties to the Treaty 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.

240. In addition, The Republic of the Marshall Islands requests the Court **to order**

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

16 March 2015



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Tony A. de Brum  
Co-Agent of the Republic of  
the Marshall Islands  
before the International Court of Justice



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Phon van den Biesen  
Co-Agent of the Republic of  
the Marshall Islands  
before the International Court of Justice