

INTERNATIONAL COURT OF JUSTICE

**APPLICATION  
INSTITUTING PROCEEDINGS**

filed in the Registry of the Court  
on 24 April 2014

**OBLIGATIONS CONCERNING NEGOTIATIONS  
RELATING TO CESSATION OF THE NUCLEAR ARMS RACE  
AND TO NUCLEAR DISARMAMENT**

(MARSHALL ISLANDS *v.* INDIA)

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COUR INTERNATIONALE DE JUSTICE

**REQUÊTE  
INTRODUCTIVE D'INSTANCE**

enregistrée au Greffe de la Cour  
le 24 avril 2014

**OBLIGATIONS RELATIVES À DES NÉGOCIATIONS  
CONCERNANT LA CESSATION DE LA COURSE AUX ARMES  
NUCLÉAIRES ET LE DÉSARMEMENT NUCLÉAIRE**

(ÎLES MARSHALL *c.* INDE)

I. LETTER FROM THE MINISTER OF FOREIGN AFFAIRS  
AND CO-AGENT OF THE REPUBLIC  
OF THE MARSHALL ISLANDS TO THE REGISTRAR  
OF THE INTERNATIONAL COURT OF JUSTICE

Majuro, 6 April 2014.

I have the honour to submit herewith nine Applications to the Court. In six of these Applications the Marshall Islands is requesting the Respondent State to consent to the Court's jurisdiction for the purposes of this particular case.

All of the Applications are delivered to you on Thursday, 24 April 2014, by our Co-Agent, Mr. Phon van den Biesen. Attached to this letter are nine letters in which I make it known to the Court that Mr. van den Biesen has been duly appointed as Co-Agent for each of these cases.

Each of the nine Applications is submitted to the Court in two original copies. In addition, 30 paper copies of each Application are provided to the Court as well as one USB device containing digital copies of each Application. I certify that these paper copies and the digital versions are true copies of their respective originals.

*(Signed)* Tony A. DEBRUM,  
Minister of Foreign Affairs and Co-Agent,  
Republic of the Marshall Islands.

APPOINTMENT DECISION

Referring to the duly adopted laws of the Republic of the Marshall Islands, and the constitutional procedures in place, I herewith decide as follows:

Mr. Phon van den Biesen, Attorney at Law in Amsterdam, the Netherlands at the offices of van den Biesen Kloostra Advocaten (address: Keizersgracht 253, 1016 EB Amsterdam, phonvandenbiesen@vdbkadvocaten.eu), is hereby appointed as Co-Agent of the Republic of the Marshall Islands before the International Court of Justice in its case against the Republic of India concerning the Application of Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) and/or related rules of international law, among them rules of customary law (the "proceedings").

Mr. van den Biesen is entitled to submit the Application introducing the proceedings to the Court and to further represent the Republic of the Marshall Islands either alone or together with the other Co-Agent, identified below.

Tony A. deBrum is also hereby appointed as Co-Agent in the proceedings.

This decision will be submitted to the Court with the cover letter submitting the Application.

Majuro, Marshall Islands, 25 March 2014.

*(Signed)* Tony A. DEBRUM,  
Minister of Foreign Affairs.

## II. APPLICATION INSTITUTING PROCEEDINGS

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## I. INTRODUCTION AND SUMMARY

1. In its Advisory Opinion of 8 July 1996 on the *Legality of the Threat or Use of Nuclear Weapons*<sup>1</sup>, this Court observed that “[t]he destructive power of nuclear weapons cannot be contained in either space or time” and that such weapons “have the potential to destroy all civilization and the entire ecosystem of the planet”<sup>2</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>3</sup>. Largely based on its analysis of Article VI of the 1968 Treaty on the Non-Proliferation of Nuclear Weapons<sup>4</sup> (hereafter “the Treaty” or “the NPT”), the Court *unanimously* concluded: “There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.”<sup>5</sup>

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

3. Unless the required negotiations, aimed at reaching the required conclusions, take place, we shall continue to face the very real prospect of the “devastation that would be visited upon all mankind by a nuclear war”<sup>6</sup>. We shall also continue to face the possibility, even the likelihood, of nuclear weapons being used by accident, miscalculation or design<sup>7</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.”<sup>8</sup>

4. In its Advisory Opinion, the Court observed:

“In the long run, international law, and with it the stability of the international order which it is intended to govern, are bound to suffer from the continuing difference of views with regard to the legal status of weapons as deadly as nuclear weapons.”<sup>9</sup>

A coherent legal system cannot countenance its own destruction or that of the

<sup>1</sup> *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 226.

<sup>2</sup> *Ibid.*, para. 35.

<sup>3</sup> *Ibid.*, para. 36.

<sup>4</sup> United Nations, *Treaty Series*, Vol. 729, p. 161.

<sup>5</sup> See *supra* note 1, para. 105, point 2F.

<sup>6</sup> NPT preamble, 2nd recital.

<sup>7</sup> In 1996 Lord Carver, former United Kingdom Chief of the Defence Staff (the professional head of the United Kingdom’s armed forces and the principal military adviser to the Secretary of State for Defence and to the United Kingdom 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.

<sup>8</sup> Joseph Rotblat, “Science and Nuclear Weapons: Where Do We Go from Here?” *The Blackaby Papers*, No. 5, December 2004, p. 7.

<sup>9</sup> See *supra* note 1, para. 98.

community whose activities it seeks to regulate<sup>10</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.

5. Equally, a coherent and civilized legal system cannot tolerate unacceptable harm to humanity. A lawful and sustainable world order is predicated on a civilizational right to survival rooted in “the principles of humanity”<sup>11</sup> and “elementary considerations of humanity”<sup>12</sup> which help to shape an emerging “law of humanity”<sup>13</sup>, the international law for humankind of which the nuclear disarmament obligation is a key element. Yet it is now 68 years since the very first United Nations General Assembly resolution sought to put in motion the elimination from national arsenals of nuclear and other weapons of mass destruction<sup>14</sup>, almost 45 years since the NPT entered into force and nearly 20 years since the Court delivered its Advisory Opinion. The long delay in fulfilling the obligations enshrined in Article VI of the NPT and customary international law constitutes a flagrant denial of human justice<sup>15</sup>.

6. Inspired and guided by these principles and values, this is an Application instituting proceedings against the Republic of India (“India”), a State possessing nuclear weapons not party to the NPT. The underlying claims, described in more

<sup>10</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”, *International Law in Transition: Essays in Memory of Judge Nagendra Singh*, 1992, p. 142. Quoted by Judge Weeramantry in Section V.1 of his dissenting opinion in the Advisory Opinion in *Legality of the Threat or Use of Nuclear Weapons*, see *supra* note 1, 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.”

<sup>11</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>12</sup> *Corfu Channel (United Kingdom v. Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 22.

<sup>13</sup> See e.g., the opinion of the Tribunal in the *Einsatzgruppen Case* (1948): “[An] evaluation of international right and wrong, which heretofore existed only in the heart of mankind, has now been written into the books of men as the law of humanity. This law is not restricted to events of war. It envisages the protection of humanity at all times”. *United States of America v. Otto Ohlendorf et al., Military Tribunal II, Case No. 9* (1948), in *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10*, Vol. IV, Nuremberg, October 1946-April 1949 (US Government Printing Office, 1950-872486), p. 497, available at: [http://www.loc.gov/rr/frd/Military\\_Law/pdf/NT\\_warcriminals\\_Vol-IV.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/NT_warcriminals_Vol-IV.pdf).

<sup>14</sup> A/RES/1(I), 24 January 1946.

<sup>15</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), Judgment, I.C.J. Reports 2012 (II)*, pp. 544-548; especially at paragraph 145 where he contrasts “the brief time of human beings (*vita brevis*) and the often prolonged time of human justice”.

detail herein, are that India is: (i) in continuing breach of its obligations under customary international law, including specifically its obligation to pursue in good faith negotiations to cease the nuclear arms race at an early date, as well as to pursue in good faith negotiations leading to nuclear disarmament in all its aspects under strict and effective international control; and (ii) in continuing breach of its obligation to perform its international legal obligations in good faith.

7. The Applicant herein is the Republic of the Marshall Islands (the “Marshall Islands” or “RMI”). The Applicant is a non-nuclear-weapon State (“NNWS”) party to the NPT. The Marshall Islands acceded to the Treaty as a party on 30 January 1995, and has continued to be a party to it since that time.

8. While cessation of the nuclear arms race and nuclear disarmament are vitally important objectives for the entire international community, the Marshall Islands has a particular awareness of the dire consequences of nuclear weapons. The Marshall Islands was the location of repeated nuclear weapons testing from 1946 to 1958, during the time that the international community had placed it under the trusteeship of the United States<sup>16</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>17</sup>. According to the 3 September 2012 Report of Calin Georgescu, a Special Rapporteur to the United Nations Human Rights Council, the devastating adverse impact on the Marshall Islands of those nuclear substances and wastes continues to this day<sup>18</sup>. The Special Rapporteur concludes that “the harm suffered by the Marshallese people has resulted in an increased global understanding of the movement of radionuclides through marine and terrestrial environments”, and urges the international community to “learn from the Marshallese experience with nuclear contamination, particularly the . . . understanding of the relationship between radioiodine and thyroid cancer”<sup>19</sup>.

9. With regard to the RMI’s interest in bringing this Application to the Court, the following should be added. It is well known that over recent years the RMI has been preoccupied with combating the extremely harmful consequences that the effects of climate change have for its very survival. While focusing on the problem of climate change, the RMI has come to realize that it cannot ignore the other major threat to its survival: the ongoing threat posed by the existence of large arsenals of nuclear weapons the use of which, according to the Court, “seems scarcely reconcilable with respect for . . . requirements [of the principles and rules of law applicable in armed conflict]”<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 pros-

<sup>16</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>17</sup> *Ibid.*, paras. 1-18.

<sup>18</sup> *Ibid.*, para. 19.

<sup>19</sup> *Ibid.*, para. 66 (b).

<sup>20</sup> See *supra* note 1, para. 95.

pect. This Application seeks to ensure that India fulfils in good faith and in a timely manner all its legal obligations in relation to cessation of the nuclear arms race and to nuclear disarmament.

10. One of the reasons why the RMI became a party to the NPT is that this Treaty is the key instrument of the international community for ridding the world of nuclear weapons<sup>21</sup>. 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.”<sup>22</sup>

11. As previously stated, the Court concluded its Advisory Opinion of 8 July 1996 by *unanimously* holding that “[t]here exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control”<sup>23</sup>.

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

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

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

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

## II. FACTS

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

16. The United States was the first country in the world to develop and test nuclear weapons. The United States used nuclear weapons in warfare on the Japa-

<sup>21</sup> At the United Nations High-Level Meeting on Nuclear Disarmament, 26 September 2013, Hon. Mr. Phillip Muller, Minister of Foreign Affairs, Republic of the Marshall Islands, stated that the RMI’s “deeper purpose” is “that no nation and people should ever have to bear witness to the burden of exposure to the devastating impacts of nuclear weapons”, [http://www.un.org/en/ga/68/meetings/nucleardisarmament/pdf/MH\\_en.pdf](http://www.un.org/en/ga/68/meetings/nucleardisarmament/pdf/MH_en.pdf).

<sup>22</sup> See *supra* note 4.

<sup>23</sup> See *supra* note 1, para. 105, point 2F.

nese cities of Hiroshima and Nagasaki on 6 August 1945 and 9 August 1945 respectively. The United States was the sole possessor of nuclear weapons in the world until the Soviet Union tested its first nuclear weapon on 29 August 1949. In 1952, the United Kingdom tested its first nuclear weapon. In 1960, France tested its first nuclear weapon. In 1964, China tested its first nuclear weapon.

17. In the 1960s, negotiations eventuated in agreement on the Nuclear Non-Proliferation Treaty. The United States, Russia, the United Kingdom, France and China, all parties to the NPT, are the only States meeting the Treaty's definition of a "nuclear-weapon State" for "the purposes of this Treaty"<sup>24</sup>.

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

#### *B. The Nine States Possessing Nuclear Weapons*

19. In addition to the five NPT nuclear-weapon States, four non-NPT States are known to possess nuclear weapons: India, Pakistan, Israel and the Democratic People's Republic of Korea ("DPRK")<sup>25</sup>.

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

*World Nuclear Forces, January 2013<sup>26</sup>  
(All figures are approximate)*

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

<sup>a</sup> "Deployed" means warheads placed on missiles or located on bases with operational forces.

<sup>b</sup> These are warheads in reserve, awaiting dismantlement or that require some preparation (e.g., assembly or loading on launchers) before they become fully operationally available.

<sup>24</sup> Article IX.3 of the NPT provides: "For the purposes of this Treaty, a nuclear-weapon State is one which has manufactured and exploded a nuclear weapon or other nuclear explosive device prior to 1 January 1967."

<sup>25</sup> See *infra* note 81.

<sup>26</sup> See Shannon N. Kile, "World Nuclear Forces", *SIPRI Yearbook 2013*, Oxford University Press, 2013. The question mark (?) against North Korea's total inventory is in the original.

<sup>c</sup> In addition to strategic warheads, this figure includes nearly 200 non-strategic (tactical) nuclear weapons deployed in Europe.

<sup>d</sup> This figure includes the United States Department of Defense nuclear stockpile of c. 4,650 warheads and another c. 3,000 retired warheads that are awaiting dismantlement.

<sup>e</sup> This figure includes c. 700 warheads for nuclear-powered ballistic missile submarines (SSBNs) in overhaul and bombers, 2,000 non-strategic nuclear weapons for use by short-range naval, air force and air defence forces, and c. 4,000 retired warheads awaiting dismantlement.

<sup>f</sup> This includes a military stockpile of c. 4,500 nuclear warheads and another c. 4,000 retired warheads await dismantlement.

### C. India and the Nuclear Arms Race

#### 1. Early nuclear history

21. Indian Prime Minister Lal Bahadur Shastri authorized limited movement toward a nuclear weapons programme following the nuclear explosive test conducted by China in 1964<sup>27</sup>. India conducted its first test in 1974 when it exploded a plutonium fission device<sup>28</sup> in what it described as a “peaceful nuclear explosion experiment”<sup>29</sup>. At the time of that test the Atomic Energy Commission of India stated that “India had no intention of producing nuclear weapons”<sup>30</sup>. By 1986-1988, India is believed to have had nuclear bombs deliverable by aircraft<sup>31</sup>.

22. In 1998, India conducted five nuclear weapon test explosions, of various types, including thermonuclear<sup>32</sup>. India has conducted no further tests.

#### 2. India's current nuclear arsenal

23. As of 2013, India was estimated to have 90-110 nuclear warheads<sup>33</sup>. The operational delivery systems reportedly are two intermediate range aircraft, the Mirage 2000 H and Jaguar IS/IB, and two short or intermediate range land based

<sup>27</sup> See Rajesh M. Basrur, “Indian Perspectives on the Global Elimination of Nuclear Weapons”, in Barry M. Blechman and Alexander K. Bollfrass (eds.), *National Perspectives on Nuclear Disarmament*, Washington, Henry L. Stimson Center, 2010, pp. 60-61.

<sup>28</sup> See Timothy McDonnell, “Nuclear Pursuits: Non-P-5 Nuclear-Armed States, 2013”, *Bulletin of the Atomic Scientists, Nuclear Notebook*, Vol. 69 (1), 2013 (hereafter “McDonnell”), pp. 64 and 67, <http://bos.sagepub.com/cgi/reprint/69/1/62>.

<sup>29</sup> Report of the Conference of the Committee on Disarmament, 29th session (A/9627), New York, 1975, p. 8, [https://disarmament-library.un.org/UNODA/Library.nsf/6dc03c1297fa943485257775005b138c6d913cb85a9acfd85257833006db095/\\$FILE/A-9627.pdf](https://disarmament-library.un.org/UNODA/Library.nsf/6dc03c1297fa943485257775005b138c6d913cb85a9acfd85257833006db095/$FILE/A-9627.pdf).

<sup>30</sup> *Ibid.*

<sup>31</sup> See McDonnell, *op. cit. supra* note 28.

<sup>32</sup> M. V. Ramana, “India”, in Ray Acheson (ed.), *Assuring Destruction Forever: Nuclear Weapon Modernization around the World* (Reaching Critical Will: A Project of the Women's International League for Peace and Freedom, 2012) (hereafter “Ramana”), p. 34, <http://www.reachingcriticalwill.org/images/documents/Publications/modernization/assuring-destruction-forever.pdf>; cf. McDonnell, *op. cit. supra* note 28, at pp. 65 and 67.

<sup>33</sup> See Shannon N. Kile, Phillip Schell and Hans M. Kristensen, “World Nuclear Forces”, Chap. VI, *Indian Nuclear Forces*, 2013, <http://www.sipri.org/yearbook/2013/06>; see also *infra* note 34.

ballistic missiles, Prithvi I and Agni I<sup>34</sup>. It is reported that India's warheads are not deployed, but are instead in central storage<sup>35</sup>.

### 3. Nuclear policy, doctrine and expenditure

24. India has stated: "Nuclear weapons are an integral part of our national security and will remain so, pending the global elimination of all nuclear weapons on a universal, non-discriminatory basis."<sup>36</sup>

25. According to a 2003 statement of the Government of India concerning a cabinet committee review of nuclear doctrine, "nuclear weapons will only be used in retaliation against a nuclear attack on Indian territory or on Indian forces anywhere", and such "retaliation to a first strike will be massive and designed to inflict unacceptable damage"<sup>37</sup>. The statement also says: "However, in the event of a major attack against India, or Indian forces anywhere, by biological or chemical weapons, India will retain the option of retaliating with nuclear weapons."<sup>38</sup>

26. Regarding the 1996 Comprehensive Nuclear-Test-Ban Treaty (CTBT), India is one of the 44 Annex II countries that must ratify the Treaty for it to enter into force<sup>39</sup>. India has not signed or ratified the CTBT, and has given no clear signals that it intends to do so<sup>40</sup>. When the CTBT was adopted in September 1996, India objected strongly that the Treaty is "unequal" and perpetuates the "existing

<sup>34</sup> See Hans M. Kristensen and Robert S. Norris, *Bulletin of the Atomic Scientists, India Nuclear Forces*, 2012 (hereafter "Kristensen and Norris"), p. 100, <http://bos.sagepub.com/content/68/4/96.full.pdf+html>; Ramana, *op. cit. supra* note 32, pp. 35-36. The Mirage 2000H aircraft has a range of 1,800 km; the Jaguar IS/IB, 1,600. The Prithvi I missile has a range of 150 km; the Agni I 700 plus. These analysts note that other aircraft and missiles, e.g., Agni II with a range of 2,000 km, may be capable of delivering nuclear warheads.

<sup>35</sup> FAS, "Status of World Nuclear Forces 2013", <https://www.fas.org/programs/ssp/nukes/nuclearweapons/nukestatus.html>.

<sup>36</sup> Conference on Disarmament, CD/PV.1139, Final record of the 1139th plenary meeting on 29 May 2009, p. 8, [https://disarmament-library.un.org/UNODA/Library.nsf/a61ff5819c4381ee85256bc70068fa14/fc4bbebce96dc99c85257678005353ed/\\$FILE/CD-PV1139.pdf](https://disarmament-library.un.org/UNODA/Library.nsf/a61ff5819c4381ee85256bc70068fa14/fc4bbebce96dc99c85257678005353ed/$FILE/CD-PV1139.pdf).

<sup>37</sup> "The Cabinet Committee on Security Reviews Operationalization of India's Nuclear Doctrine", Indian Government Statement, New Delhi, 4 January 2003, <http://www.acronym.org.uk/docs/0301/doc06.htm>.

<sup>38</sup> *Ibid.* The committee reportedly adopted a 1996 draft report on nuclear doctrine by the National Security Advisory Board, available at <http://www.fas.org/nuke/guide/india/doctrine/990817-indnucl.htm>. However, the reservation of an option for a nuclear response to a biological or chemical attack is not explicitly stated in the draft report. The report had retained flexibility in that and other respects by stating that "the fundamental purpose", and therefore perhaps not the only purpose, "of Indian nuclear weapons is to deter the use and threat of use of nuclear weapons by any State or entity against India and its forces".

<sup>39</sup> Per Article XIV.

<sup>40</sup> See Eloise Watson, "The CTBT: Obstacles to Entry into Force" (New York: Reaching Critical Will: A Project of the Women's International League for Peace and Freedom, September 2012), pp. 11-13, <http://www.reachingcriticalwill.org/images/documents/Publications/ctbt-obstacles.pdf>; Liviu Horovitz and Robert Golan-Vilella, "Comprehensive Nuclear-Test-Ban Treaty: How the Dominoes Might Fall After US Ratification", 17 *The Nonproliferation Review* (No. 2, July 2010), pp. 246-248.

global insecurity born of a world divided unequally into nuclear haves and have-nots”<sup>41</sup>. However, should the United States and China ratify the CTBT, prospects would greatly improve for India to join the Treaty, as the Indian Prime Minister acknowledged in 2009<sup>42</sup>.

27. Regarding a Fissile Materials Cut-off Treaty, “[w]ithout prejudice to the priority we attach to nuclear disarmament”, India accepts a Conference on Disarmament programme of negotiations on a Fissile Materials Cut-off Treaty and discussions short of negotiations on nuclear disarmament, assurances of non-use of nuclear weapons against non-nuclear-weapon States, and prevention of an arms race in outer space<sup>43</sup>.

28. India does not release information on its nuclear weapons spending, and it is difficult to reliably estimate such spending<sup>44</sup>. One non-governmental estimate is that India’s nuclear weapons spending in 2010 was United States \$4.1 billion, and that in 2011, the spending increased to United States \$4.9 billion<sup>45</sup>.

#### 4. *Current plans for expansion, improvement and diversification of India’s nuclear arsenal*

29. India’s development of its nuclear arsenal has focused on increasing the diversity, range, and sophistication of its nuclear delivery vehicles, including land and sea based missiles, aircraft, and submarines<sup>46</sup>.

30. India is developing at least five land and sea based missiles, as summarized in this chart prepared by Hans Kristensen and Robert Norris, whose analyses for the *Bulletin of Atomic Scientists* are widely cited:

<sup>41</sup> Statement in explanation of vote by Ms Arundhate Ghose, Ambassador/Permanent Representative of India to the UN offices at Geneva, on item 65: CTBT at the 50th Session of the UN General Assembly at New York on 10 September 1996, [http://www.fas.org/news/india/1996/ctbt\\_UN\\_september\\_10\\_96.htm](http://www.fas.org/news/india/1996/ctbt_UN_september_10_96.htm).

<sup>42</sup> Minutes of Joint Press Conference by Prime Minister Yukio Hatoyama of Japan and Prime Minister Manmohan Singh of India Following the Japan-India Summit Meeting, 29 December 2009: “Prime Minister Singh indicated that should the US and China sign the CTBT, a new situation would in fact emerge, and that he considered it necessary to work globally towards the early entry into force of the Treaty”; see also “The CTBT: Obstacles to Entry into Force”, *op. cit. supra* note 40 at p. 15.

<sup>43</sup> See *infra* note 64; Statement by India at the CD Plenary on 4 February 2014, [http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/cd/2014/Statements/part1/4Feb\\_India.pdf](http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/cd/2014/Statements/part1/4Feb_India.pdf); Statement by the Mr. D. B. Venkatesh Varma, Permanent Representative of India to the Conference on Disarmament at the CD Plenary, 3 March 2014, [http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/cd/2014/Statements/part1/3March\\_India.pdf](http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/cd/2014/Statements/part1/3March_India.pdf).

<sup>44</sup> M. V. Ramana, “India”, in Ray Acheson (ed.), *Still Assuring Destruction Forever* (Reaching Critical Will: A Project of the Women’s International League for Peace and Freedom, 2013) (hereafter, “Ramana, *Still Assuring Destruction Forever*”), p. 10, <http://www.reachingcriticalwill.org/images/documents/Publications/modernization/still-assuring-destruction-forever.pdf>.

<sup>45</sup> Bruce G. Blair *et al.*, “Global Zero Technical Report; Nuclear Weapons Costs Study, June 2011”, [http://www.globalzero.org/files/gz\\_nuclear\\_weapons\\_cost\\_study.pdf](http://www.globalzero.org/files/gz_nuclear_weapons_cost_study.pdf).

<sup>46</sup> Ramana, *Still Assuring Destruction Forever*, *op. cit. supra* note 44.

*Indian Nuclear Forces, 2012*<sup>47</sup>

Type/designation	Range (km)	Payload (kg)	Comment
<i>Aircraft:</i>			
Mirage 2000 H/Vajra	1,800	6,300	Gwalior Air Force Station
Jaguar IS/IB/Shamsher	1,600	4,775	Ambala Air Force Station
<i>Land based missiles:</i>			
Prithvi I	150	1,000	Nuclear version entered service after 1998 with the army's 333rd and 355th Missile Groups
Agni I	700+	1,000	Deployed with the army's new 334 Missile Group in 2004
Agni II	2,000+	1,000	Under development
Agni II+	2,000+	1,000	Under development
Agni III	3,000+	1,500	Under development
<i>Sea based missiles:</i>			
Dhanush	350	500	Under development
Sagarika/K-15	300-700	300-700	Under development

In addition to the missiles under development listed above, India is believed to be planning an intercontinental ballistic missile (ICBM), the Agni VI, and a ground-launched cruise missile<sup>48</sup>.

31. In April 2012, India conducted a test-launch of a land based ballistic missile, the Agni V, with a range reportedly greater than 5,000 km enabling coverage of any target in China<sup>49</sup>.

32. In January 2013, India conducted its first publicly announced test of a ballistic missile suitable for launch from a submarine<sup>50</sup>. India has had a nuclear-powered submarine for deployment of missiles under development for more than three decades<sup>51</sup>. It aims to have a sea based nuclear force in the

<sup>47</sup> Kristensen and Norris, *op. cit. supra* note 34, p. 100.

<sup>48</sup> See Hans M. Kristensen, Federation of American Scientists, "Nuclear Weapons and Arms Control: Modernizing Nuclear Arsenals, Presentation to Short Course on Nuclear Weapons Issues in the 21st Century", Elliott School of International Affairs, George Washington University, Washington, D.C., 3 November 2013, slide 15, [http://www.fas.org/programs/ssp/nukes/publications1/Brief2013\\_GWU-APS.pdf](http://www.fas.org/programs/ssp/nukes/publications1/Brief2013_GWU-APS.pdf).

<sup>49</sup> Kristensen and Norris, *op. cit. supra* note 34, p. 96; Ajai Shukla, "India launches 5,000-km range Agni-5 missile successfully", *Business Standard*, 24 April 2012, [http://www.business-standard.com/article/economy-policy/ajai-shukla-perfect-launch-for-5-000-km-range-missile-112041900152\\_1.html](http://www.business-standard.com/article/economy-policy/ajai-shukla-perfect-launch-for-5-000-km-range-missile-112041900152_1.html).

<sup>50</sup> Y. Mallikarjun and T. S. Subramanian, "India successfully test-fires underwater missile", 27 January 2013, <http://www.thehindu.com/news/national/india-successfully-testfires-underwater-missile/article4350553.ece>. The missile tested was the Sagarika/K-15 with a range of 700 km.

<sup>51</sup> Ramana, *op. cit. supra* note 32, p. 36. At least two other nuclear-powered submarines are being developed. *Ibid.*; see also *supra* note 50.

near future, if it is not already operational, in addition to its land and air based forces<sup>52</sup>.

33. Regarding air-based Indian nuclear forces, it is reported that in 2012 discussions between India and France began for the purchase by India from France of 126 nuclear-capable Rafale jets, with a tentative delivery date of 2016-2017<sup>53</sup>.

34. India uses plutonium for the explosive core of nuclear warheads<sup>54</sup>, and continues to add to its stockpile of weapons-grade plutonium<sup>55</sup>. India currently has one operating plutonium production reactor, and is building another<sup>56</sup>. India is also building a fast-breeder reactor that once operational will significantly increase its capacity to produce weapons-grade plutonium<sup>57</sup>. India also has a large stockpile of reactor-grade plutonium that could be used for weapons if India so chooses<sup>58</sup>.

#### D. India and Nuclear Disarmament

35. India has not joined the NPT as an NNWS, the only option open to it under the terms of the Treaty<sup>59</sup>. India further maintains that commitments and calls made in conferences of NPT States parties do not apply to it, in particular rejecting calls made by NPT States parties, as well as the General Assembly and the Security Council, for it to join the NPT as an NNWS<sup>60</sup>. However, India has consistently voted for the General Assembly resolution welcoming the Court's conclusion regarding the disarmament obligation<sup>61</sup>. India states that it has never contributed to the spread of sensitive technologies<sup>62</sup>. It adds that it is updating regulations relating to export controls and taking measures to strengthen nuclear security in accord with international efforts to prevent the acquisition of nuclear weapons by non-state actors and additional States<sup>63</sup>.

<sup>52</sup> Ramana, *Still Assuring Destruction Forever*, *op. cit. supra* note 44, p. 10.

<sup>53</sup> See, e.g., "France Sells Nuclear-Capable Aircraft to India", *Global Security Newswire*, 7 February 2012, [www.nti.org/gsn](http://www.nti.org/gsn); Kristensen and Norris, *op. cit. supra* note 34, p. 97; Tamir Eshel, "Rafale Deliveries Could Begin in 2016-2017", *Defense Update*, 18 June 2013, <http://defense-update.com>.

<sup>54</sup> Ramana, *op. cit. supra* note 32, p. 36.

<sup>55</sup> See estimates of the International Panel on Fissile Materials cited in Ramana, *Still Assuring Destruction Forever*, *op. cit. supra* note 44, p. 10, and Ramana, *op. cit. supra* note 32, p. 36.

<sup>56</sup> Ramana, *op. cit. supra* note 32, pp. 36-37. The second reactor will be part of a new complex, and is planned to be operational by 2018. *Ibid.*, at p. 37.

<sup>57</sup> Kristensen and Norris, *op. cit. supra* note 34, p. 97; Ramana, *op. cit. supra* note 32, p. 37.

<sup>58</sup> Ramana, *op. cit. supra* note 32, p. 36.

<sup>59</sup> India does not qualify as a "nuclear-weapon State" under Article IX, paragraph 3, of the Treaty.

<sup>60</sup> E.g., "India EOVS: L. 43 United action towards the total elimination of nuclear weapons [A/RES/68/51]", 4 November 2013, [http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/1com/1com13/eov/L43\\_India.pdf](http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/1com/1com13/eov/L43_India.pdf).

<sup>61</sup> Most recently adopted as A/RES/68/42, 5 December 2013.

<sup>62</sup> E.g., Statement of Indian Prime Minister Manmohan Singh at Seoul Nuclear Security Summit, 27 March 2012, <http://www.mea.gov.in/Speeches-Statements.htm?dtl/19078/>: "India has never been a source of proliferation of sensitive technologies and we are determined to further strengthen our export control systems to keep them on par with the highest international standards."

<sup>63</sup> Nuclear Security Summit National Progress Report, 27 March 2012, <http://www.mea.gov.in/bilateral-documents.htm?dtl/19074/>.

36. India supports the commencement of negotiations on complete nuclear disarmament in the Conference on Disarmament<sup>64</sup>. It also votes for United Nations General Assembly resolutions calling for negotiation of a Nuclear Weapons Convention, including “Follow-up to the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons”<sup>65</sup>, and a resolution newly offered in 2013 following up on the High-Level Meeting on Nuclear Disarmament<sup>66</sup>. The latter resolution calls for “the urgent commencement of negotiations, in the Conference on Disarmament, for the early conclusion of a comprehensive convention” to prohibit and eliminate nuclear weapons<sup>67</sup>. India abstained on the 2012 resolution establishing an Open-Ended Working Group to take forward proposals for multilateral nuclear disarmament negotiations<sup>68</sup>, but subsequently participated in the Working Group.

37. The first ever United Nations General Assembly High-Level Meeting on Nuclear Disarmament, referenced in the preceding paragraph, was held on 26 September 2013, pursuant to a 2012 resolution which was supported by India<sup>69</sup>. At that meeting, Salman Khurshid, Minister of External Affairs of India, placed India’s support for nuclear disarmament in the context of the 1988 Rajiv Gandhi “Action Plan for a nuclear weapon free and non-violent world order”<sup>70</sup>. He stated that India has a “posture of no-first use”, maintained that India “refuse[s] to participate in an arms race, including a nuclear arms race”, and noted that India’s “proposal for a Convention banning the use of nuclear weapons remains on the table”<sup>71</sup>.

### III. THE LAW

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

38. 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.”

39. In its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the Court declared that Article VI involves “an obligation to achieve a

<sup>64</sup> Statement by H.E. Mr. Salman Khurshid, Minister of External Affairs of India, at the High Level Meeting of the General Assembly on Nuclear Disarmament, 68th United Nations General Assembly in New York, 26 September 2013, [http://www.un.org/en/ga/68/meetings/nucleardisarmament/pdf/IN\\_en.pdf](http://www.un.org/en/ga/68/meetings/nucleardisarmament/pdf/IN_en.pdf).

<sup>65</sup> Most recently on 5 December 2013 (A/RES/68/42).

<sup>66</sup> A/RES/68/32, 5 December 2013.

<sup>67</sup> *Ibid.*

<sup>68</sup> A/RES/67/56, 3 December 2012; UN doc. A/67/PV.48, pp. 20-21.

<sup>69</sup> A/RES/67/39, 3 December 2012.

<sup>70</sup> Statement by H.E. Mr. Salman Khurshid, *supra* note 64.

<sup>71</sup> *Ibid.*

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>72</sup>. The Court went on to conclude, *unanimously*, that “[t]here exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective control”<sup>73</sup>. This “recognizes that the provisions of Article VI . . . go beyond mere obligations of conduct — to pursue nuclear disarmament negotiations in good faith — and actually involve an obligation of result, *i.e.*, to conclude those negotiations”<sup>74</sup>.

40. The Court observed that “fulfilling the obligation expressed in Article VI . . . remains without any doubt an objective of vital importance to the whole of the international community today”<sup>75</sup>. The Court has long emphasized the importance of obligations *erga omnes*, owed to the international community as a whole<sup>76</sup>. Its conclusion in the Advisory Opinion was tantamount to declaring that the obligation in Article VI is an obligation *erga omnes*<sup>77</sup>. Every State has a legal interest in its timely performance, therefore<sup>78</sup>, and a corresponding legal obligation to help bring it about<sup>79</sup>.

#### B. Customary International Law

41. The obligations enshrined in Article VI of the NPT are not merely treaty obligations; they also exist separately under customary international law<sup>80</sup>.

42. In its Advisory Opinion, after noting that the twofold obligation in Article VI to pursue and to conclude negotiations *formally* concerns the (now 190<sup>81</sup>) States parties to the NPT, the Court added that “any realistic search for general

<sup>72</sup> See *supra* note 1, para. 99.

<sup>73</sup> See *ibid.*, para. 105, point 2F.

<sup>74</sup> M. Marin Bosch, “The Non-Proliferation Treaty and Its Future”, in L. Boisson de Chazournes and P. Sands (eds.), *International Law, the International Court of Justice and Nuclear Weapons*, 1999, p. 375.

<sup>75</sup> See *supra* note 1, para. 103.

<sup>76</sup> *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Second Phase, Judgment, *I.C.J. Reports 1970*, p. 32, para. 33.

<sup>77</sup> See President Bedjaoui’s declaration in *Legality of Threat or Use of Nuclear Weapons*, *supra* note 1, at pp. 273-274:

“As the Court has acknowledged, the obligation to negotiate in good faith for nuclear disarmament concerns the 182 or so States parties to the Non-Proliferation Treaty. I think one can go beyond that conclusion and assert that there is in fact a twofold *general obligation*, opposable *erga omnes*, to negotiate in good faith and to achieve the desired result.”

<sup>78</sup> *Barcelona Traction, Light and Power Company, Limited*, see *supra* note 76.

<sup>79</sup> Cf. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, *I.C.J. Reports 2004 (I)*, pp. 199-200, paras. 154-159.

<sup>80</sup> In *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, Judgment, *I.C.J. Reports 1984*, p. 434, at para. 94, the International Court of Justice held that the fact that principles of customary international law are enshrined in multilateral conventions does not mean that they cease to exist and to apply as principles of customary law.

<sup>81</sup> There are 190 States parties including the DPRK. Although the DPRK announced its withdrawal from the NPT on 10 January 2003, States parties continue to express divergent views regarding its status under the Treaty. See UN Office for Disarmament Affairs, Treaty on the Non-Proliferation of Nuclear Weapons, Status of the Treaty, <http://disarmament.un.org/treaties/t/npt>.

and complete disarmament, especially nuclear disarmament, necessitates the co-operation of all States”<sup>82</sup>.

43. In point 2F of the *dispositif*, moreover, not confining its remarks to the States parties to the NPT, the Court *unanimously* declared: “There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.”<sup>83</sup>

42. The Court’s declaration is an expression of customary international law as it stands today. *All* States are under that obligation, therefore. This is consistent with the view expressed by President Bedjaoui in his declaration:

“Indeed, it is not unreasonable to think that, considering the at least formal unanimity in this field, this twofold obligation to negotiate in good faith and achieve the desired result has now, 50 years on, acquired a *customary character*.”<sup>84</sup>

45. In voting over many years since 1996 for the General Assembly resolution on follow-up to the Court’s opinion, India appears to have accepted the universality of that obligation. In operative paragraph 1 of the resolution, the General Assembly:

“[u]nderlines once again the unanimous conclusion of the International Court of Justice that there exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control”<sup>85</sup>.

46. As the Court itself noted, the United Nations General Assembly has been deeply engaged in working for universal disarmament of weapons of mass destruction since its very first resolution in 1946<sup>86</sup>. The United Nations Security Council also has repeatedly called for the implementation of Article VI by all States<sup>87</sup>, not only parties to the NPT. In resolution 1887 of 24 September 2009, after calling upon States parties to the NPT to implement Article VI, the Council called on “all other States to join in this endeavour”<sup>88</sup>. The Council has also described the proliferation of weapons of mass destruction as a threat to international peace and security<sup>89</sup>.

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

<sup>82</sup> See *supra* note 1, para. 100.

<sup>83</sup> *Ibid.*, para. 105.

<sup>84</sup> President Bedjaoui’s declaration in *Legality of Threat or Use of Nuclear Weapons*, see *supra* note 1, p. 274, para. 23. President Bedjaoui was referring to the 50 years that had then elapsed since the adoption of the UN General Assembly’s first resolution in 1946 and the normative language repeatedly reiterated in its resolutions on nuclear weapons and in other instruments since then.

<sup>85</sup> A/RES/68/42, 5 December 2013. During some of the years since the resolution was first put forward in 1997, a separate vote was held on the first operative paragraph. India voted “yes” on those occasions. Regarding the vote on that paragraph in A/61/83, 6 December 2006, see UN Department of Public Information, GA/10547, <http://www.un.org/News/Press/docs/2006/AG10547.doc.htm>.

<sup>86</sup> A/RES/1 (I) of 24 January 1946, cited by the Court in paragraph 101 of the Advisory Opinion.

<sup>87</sup> E.g., resolution 984 of 11 April 1995, cited by the Court in paragraph 103 of the Advisory Opinion, and resolution 1887 of 24 September 2009.

<sup>88</sup> Resolution 1887, 24 September 2009, operative para. 5.

<sup>89</sup> E.g., resolution 1887, 24 September 2009.

in the NPT and is inherent in the customary international law obligation of nuclear disarmament.

48. The General Assembly has declared the necessity of cessation of the nuclear arms race. In the Final Document of its First Special Session on Disarmament, held in 1978, the General Assembly stated that it is “imperative . . . to halt and reverse the nuclear arms race until the total elimination of nuclear weapons and their delivery systems has been achieved”<sup>90</sup>.

49. Shortly after India and Pakistan conducted nuclear explosive tests in 1998, in resolution 1172 the Security Council demanded that the two countries refrain from further tests, called on all States to refrain from tests in accordance with the provisions of the Comprehensive Nuclear-Test-Ban Treaty, and called on India and Pakistan

“immediately to stop their nuclear weapon development programmes, to refrain from weaponization or from the deployment of nuclear weapons, to cease development of ballistic missiles capable of delivering nuclear weapons and any further production of fissile material for nuclear weapons”<sup>91</sup>.

### C. Good Faith

50. That good faith constitutes a “fundamental principle” of international law is beyond dispute<sup>92</sup>. Not only is it a general principle of law for the purposes of Article 38 (1) (c) of the Statute of the International Court of Justice<sup>93</sup> and a cardinal principle of the Law of Treaties<sup>94</sup>, it also encapsulates the essence of the Rule of Law in international society<sup>95</sup> and is one of the principles of the United Nations.

51. Article 2, paragraph 2, of the United Nations Charter provides: “All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter.” The declaration of 1970 on Principles of International Law makes it clear that this duty applies not only to obligations arising under the Charter but also to those arising “under the generally recognized principles and rules of international law” and “under international agreements valid under the generally recognized principles and rules of international law”<sup>96</sup>.

<sup>90</sup> Final document of the 10th Special Session of the General Assembly, adopted by A/RES/S-10/2, 30 June 1978, without a vote, para. 20; see also, e.g., paras. 47 and 50, <http://www.un.org/disarmament/HomePage/SSOD/ssod4-documents.shtml>. The 1978 Special Session established UN disarmament machinery in its current form, with the Conference on Disarmament devoted to negotiations, the Disarmament Commission devoted to deliberation, and the First Committee of the General Assembly devoted to agenda-setting. The Special Session thus was a quasi-constitutional assembly with respect to disarmament.

<sup>91</sup> 6 June 1998, operative paras. 2 and 7.

<sup>92</sup> See Robert Kolb, *La bonne foi en droit international public: contribution à l'étude des principes généraux de droit*, 2001, pp. 112-113.

<sup>93</sup> Cf. *Free Zones of Upper Savoy and the District of Gex, Order of 6 December 1930, P.C.I.J., Series A, No. 24*, p. 12; see also, J. Crawford, *Brownlie's Principles of Public International Law*, Oxford University Press, 8th edition, 2012, pp. 36-37.

<sup>94</sup> Articles 26 and 31 (1) of the Vienna Convention on the Law of Treaties (1969).

<sup>95</sup> V. Lowe, *International Law*, Oxford University Press, 2007, p. 116.

<sup>96</sup> Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, General Assembly resolution 2625 (XXV), 24 October 1970.

52. In the *Nuclear Tests* cases, the International Court of Justice declared:

“One of the basic principles governing the creation and performance of legal obligations, *whatever their source*, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential.”<sup>97</sup>

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

“In order to create favourable conditions for success in the disarmament process, all States should strictly abide by the provisions of the Charter of the United Nations, *refrain from actions which might adversely affect efforts in the field of disarmament, and display a constructive approach to negotiations and the political will to reach agreements.*”<sup>98</sup>

54. As set forth above, the customary international law obligation of nuclear disarmament requires both conduct *and* result: States must not only negotiate in good faith with serious efforts to achieve the elimination of nuclear weapons, but must also actually *achieve* that result<sup>99</sup>.

55. The Court has stated that the “principle of good faith obliges the Parties to apply [a treaty] in a reasonable way and in such a manner that its purpose can be realized”<sup>100</sup>. Conduct that prevents the fulfilment of a treaty’s object and purpose is proscribed<sup>101</sup>. Further, conduct that calls into question a State’s commitment to the achievement of agreed objectives undermines the trust necessary for successful co-operation towards their achievement. All of this applies equally to the obligation to fulfil customary international law obligations in good faith<sup>102</sup>.

<sup>97</sup> *Nuclear Tests (Australia v. France)*, Judgment, I.C.J. Reports 1974, p. 268, para. 46 (emphasis added); *Nuclear Tests (New Zealand v. France)*, Judgment, I.C.J. Reports 1974, p. 473, para. 49 (emphasis added).

<sup>98</sup> See *supra* note 90, para. 41 (emphasis added).

<sup>99</sup> See para. 39.

<sup>100</sup> *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, pp. 78-79, para. 142.

<sup>101</sup> Report of the International Law Commission Covering its 16th Session, 727th Meeting, 20 May 1964: pursuant to the VCLT Article 26 obligation that every treaty in force must be performed by the parties in good faith, the duty of the parties is “not only to observe the letter of the law but also to abstain from acts which would inevitably affect their ability to perform . . .”; Antonio Cassese, “The Israel-PLO Agreement and Self-Determination”, 4 *Eur. J. Int’l Law* 567 (1993), available at: <http://www.ejil.org/journal/Vol4/No4/> (when there is an obligation of good faith negotiation, “both parties are not allowed to (1) advance excuses for not engaging into or pursuing negotiations or (2) to accomplish acts which would defeat the object and purpose of the future treaty”); Judge Mohammed Bedjaoui, “Good Faith, International Law and Elimination of Nuclear Weapons”, Keynote Address, 1 May 2008, <http://www.lcnp.org/disarmament/2008May01eventBedjaoui.pdf>, pp. 24-29 (in the NPT context, good faith proscribes “every initiative the effect of which would be to render impossible the conclusion of the contemplated disarmament treaty”).

<sup>102</sup> See para. 51.

#### IV. OBLIGATIONS BREACHED BY INDIA

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

##### *A. Breach of Customary International Law*

###### *1. Nuclear disarmament*

57. As set forth above, the Court has provided an authoritative analysis of the obligation of nuclear disarmament. With respect to Article VI of the NPT, it has held that “the obligation involved here is an obligation to achieve a precise result — nuclear disarmament in all its aspects — by adopting a particular course of conduct, namely, the pursuit of negotiations on the matter in good faith”<sup>103</sup>. In the *dispositif* of its Advisory Opinion the Court concluded *unanimously*: “There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.”<sup>104</sup>

58. Although India expressly supports the commencement of nuclear disarmament negotiations and participated in the Open-Ended Working Group<sup>105</sup>, it has breached this obligation of customary international law by engaging in a course of conduct, the quantitative build-up and qualitative improvement of its nuclear forces, contrary to the objective of nuclear disarmament<sup>106</sup>.

###### *2. Cessation of the nuclear arms race at an early date*

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

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

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

61. In the previous Section, the Applicant has submitted that the Respondent has breached and continues to breach its obligations under customary international law regarding nuclear disarmament and cessation of the nuclear arms race

<sup>103</sup> See *supra* note 1, para. 99.

<sup>104</sup> *Ibid.*, para. 105, point 2F.

<sup>105</sup> See Part II D.

<sup>106</sup> See Part II.

at an early date. The Respondent is especially failing to act in good faith as far as its performance of those obligations is concerned.

62. As set forth in Part II of this Application, the Respondent is engaged in the quantitative build-up, diversification, and qualitative improvement of its nuclear arsenal. This constitutes vertical nuclear proliferation that clearly conflicts with the Respondent's obligations of nuclear disarmament and cessation of the nuclear arms race at an early date. It also encourages other States possessing nuclear weapons to follow suit and may induce non-nuclear-weapon States to reconsider their non-nuclear posture.

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

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

#### V. JURISDICTION OF THE COURT

65. In accordance with the provisions of Article 36, paragraph 2, of the Statute, jurisdiction exists by virtue of the operation of the Declaration of the Marshall Islands dated 15 March 2013 (and deposited 24 April 2013) and the Declaration of the Republic of India dated 15 September 1974 (and deposited 18 September 1974), each Declaration without pertinent reservation.

#### VI. FINAL OBSERVATIONS

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

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

#### REMEDIES

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

*to adjudge and declare*

- (a) that India has violated and continues to violate its international obligations under customary international law, by failing to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control, in particular by engaging a course of conduct, the quantitative buildup and qualitative improvement of its nuclear forces, contrary to the objective of nuclear disarmament ;

- (b) that India has violated and continues to violate its international obligations under customary international law with respect to cessation of the nuclear arms race at an early date, by taking actions to quantitatively build up its nuclear forces, to qualitatively improve them, and to maintain them for the indefinite future;
- (c) that India has failed and continues to fail to perform in good faith its obligations under customary international law by taking actions to quantitatively build up its nuclear forces, to qualitatively improve them, and to maintain them for the indefinite future; and
- (d) that India has failed and continues to fail to perform in good faith its obligations under customary international law by effectively preventing the great majority of non-nuclear-weapon States from fulfilling their part of the obligations under customary international law and Article VI of the NPT with respect to nuclear disarmament and cessation of the nuclear arms race at an early date.

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

India to take all steps necessary to comply with its obligations under customary international law with respect to cessation of the nuclear arms race at an early date and nuclear disarmament within one year of the Judgment, including the pursuit, by initiation if necessary, of negotiations in good faith aimed at the conclusion of a convention on nuclear disarmament in all its aspects under strict and effective international control.

Dated this 24th of April 2014.

(Signed) Tony A. DEBRUM,  
Co-Agent and Minister of Foreign Affairs  
of the Republic of the Marshall Islands.

(Signed) PHON VAN DEN BIESEN,  
Co-Agent of the Republic  
of the Marshall Islands.