

APPLICATION

INSTITUTING PROCEEDINGS

AGAINST

PAKISTAN

submitted on 24 April 2014

by

THE REPUBLIC OF THE MARSHALL ISLANDS

to

THE INTERNATIONAL COURT OF JUSTICE

re

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

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To the Registrar, International Court of Justice.

The Undersigned, being duly authorized by the Government of the Republic of the Marshall Islands, state as follows:

I. INTRODUCTION AND SUMMARY

1. In its Advisory Opinion of 8 July 1996 on the *Legality of the Threat or Use of Nuclear Weapons*,¹ this Court observed that “[t]he destructive power of nuclear weapons cannot be contained in either space or time” and that such weapons “have the potential to destroy all civilization and the entire ecosystem of the planet”.² It acknowledged “the unique characteristics of nuclear weapons, and in particular their destructive capacity, their capacity to cause untold human suffering, and their ability to cause damage to generations to come”.³ Largely based on its analysis of Article VI of the 1968 Treaty on the Non-Proliferation of Nuclear Weapons⁴ (hereafter “the Treaty” or “the NPT”), the Court *unanimously* concluded: “There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control”.⁵

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

3. Unless the required negotiations, aimed at reaching the required conclusions, take place, we shall continue to face the very real prospect of the “devastation that would be visited upon all mankind by a nuclear war”.⁶ We shall also continue to face the possibility, even the likelihood, of nuclear weapons being used by accident, miscalculation or design,⁷ and of their proliferation. As Nobel Peace Laureate Sir Joseph Rotblat pointed out: “If some nations – including the most powerful militarily – say that they need nuclear weapons for their security, then such security cannot be denied to other countries which really feel insecure. Proliferation of

¹ *I.C.J. Reports 1996*, p. 226.

² *Id.*, para. 35.

³ *Id.*, para. 36.

⁴ 729 UNTS 161.

⁵ *Id.*, para. 105, point 2F.

⁶ NPT preamble, 2nd recital.

⁷ In 1996 Lord Carver, former UK Chief of the Defence Staff (the professional head of the UK’s armed forces and the principal military adviser to the Secretary of State for Defence and to the UK Government) stated that “the indefinite deployment of nuclear weapons carries a high risk of their ultimate use - intentionally, by accident or inadvertence”. See Hansard, HL Deb, 28 October 1996, vol. 575, cols. 134.

nuclear weapons is the logical consequence of this nuclear policy”.⁸

4. In its Advisory Opinion, the Court observed: “In the long run, international law, and with it the stability of the international order which it is intended to govern, are bound to suffer from the continuing difference of views with regard to the legal status of weapons as deadly as nuclear weapons”.⁹ A coherent legal system cannot countenance its own destruction or that of the community whose activities it seeks to regulate.¹⁰ That is why fulfilment of the obligation “to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control” is so important.

5. Equally, a coherent and civilized legal system cannot tolerate unacceptable harm to humanity. A lawful and sustainable world order is predicated on a civilizational right to survival rooted in “the principles of humanity”¹¹ and “elementary considerations of humanity”¹² which help to shape an emerging “law of humanity”,¹³ the international law for humankind of which the nuclear disarmament obligation is a key element. Yet it is now 68 years since the very first United Nations General Assembly Resolution sought to put in motion the elimination from

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

⁹ *Id.*, para. 98.

¹⁰ As B.S. Chimni has stated, “No legal system can confer on any of its members the right to annihilate the community which engenders it and whose activities it seeks to regulate”. B.S. Chimni, “Nuclear Weapons and International Law: Some Reflections”, in *International Law in Transition: Essays in Memory of Judge Nagendra Singh*, 1992, p. 142. Quoted by Judge Weeramantry in Section V.1 of his Dissenting Opinion in the Advisory Opinion in *Legality of the Threat or Use of Nuclear Weapons*, *supra*, n. 1, at p. 522; *see also* the Dissenting Opinion of Judge Shahabuddeen, *id.*, p. 393: “Thus, however far-reaching may be the rights conferred by sovereignty, those rights cannot extend beyond the framework within which sovereignty itself exists; in particular, they cannot violate the framework. The framework shuts out the right of a State to embark on a course of action which would dismantle the basis of the framework by putting an end to civilization and annihilating mankind”.

¹¹ From the Martens Clause as expressed in Article 1, paragraph 2 of Protocol I 1977 Additional to the Geneva Conventions 1949: “In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience”.

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

¹³ *See e.g.* the Opinion of the Tribunal in the *Einsatzgruppen Case* (1948): “[An] evaluation of international right and wrong, which heretofore existed only in the heart of mankind, has now been written into the books of men as the law of humanity. This law is not restricted to events of war. It envisages the protection of humanity at all times”. *United States of America v. Otto Ohlendorf, et al*, Military Tribunal II, Case No. 9 (1948), in *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10*, Vol. IV, Nuernberg, October 1946 – April 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.

national arsenals of nuclear and other weapons of mass destruction,¹⁴ almost 45 years since the NPT entered into force and nearly 20 years since the Court delivered its Advisory Opinion. The long delay in fulfilling the obligations enshrined in Article VI of the NPT and customary international law constitutes a flagrant denial of human justice.¹⁵

6. Inspired and guided by these principles and values, this is an Application instituting proceedings against Pakistan, a State possessing nuclear weapons not party to the NPT. The underlying claims, described in more detail herein, are that Pakistan is: (i) in continuing breach of its obligations under customary international law, including specifically its obligation to pursue in good faith negotiations to cease the nuclear arms race at an early date, as well as to pursue in good faith negotiations leading to nuclear disarmament in all its aspects under strict and effective international control; and (ii) in continuing breach of its obligation to perform its international legal obligations in good faith.

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

8. While cessation of the nuclear arms race and nuclear disarmament are vitally important objectives for the entire international community, the Marshall Islands has a particular awareness of the dire consequences of nuclear weapons. The Marshall Islands was the location of repeated nuclear weapons testing from 1946 to 1958, during the time that the international community had placed it under the trusteeship of the United States (“U.S.”).¹⁶ During those 12 years, 67 nuclear weapons of varying explosive power were detonated in the Marshall Islands, at varying distances from human population.¹⁷ According to the 3 September 2012 Report of Calin Georgescu, a Special Rapporteur to the UN Human Rights Council, the devastating adverse impact on the Marshall Islands of those nuclear substances and wastes continues to this day.¹⁸ The Special Rapporteur concludes that “the harm suffered by the Marshallese people has resulted in an increased global understanding of the movement of radionuclides through marine and

¹⁴ A/RES/1(I), 24 January 1946.

¹⁵ Cf. Judge Cançado Trindade’s remarks in para. 145 of his Separate Opinion in *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, I.C.J. Reports 2012, pp. 544-548; especially at para. 145 where he contrasts “the brief time of human beings (*vita brevis*) and the often prolonged time of human justice”.

¹⁶ Report of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes, Calin Georgescu; Addendum, Mission to the Marshall Islands (27-30 March 2012) and the United States of America (24-27 April 2012): 3 September 2012, Doc. A/HRC/21/48/Add.1.

¹⁷ *Id.*, paras. 1-18.

¹⁸ *Id.*, para. 19.

terrestrial environments”, and urges the international community to “learn from the Marshallese experience with nuclear contamination, particularly the...understanding of the relationship between radioiodine and thyroid cancer”.¹⁹

9. With regard to the RMI’s interest in bringing this Application to the Court, the following should be added. It is well known that over recent years the RMI has been preoccupied with combating the extremely harmful consequences that the effects of climate change have for its very survival. While focusing on the problem of climate change, the RMI has come to realize that it cannot ignore the other major threat to its survival: the ongoing threat posed by the existence of large arsenals of nuclear weapons the use of which, according to the Court, “seems scarcely reconcilable with respect for [...] requirements [of the principles and rules of law applicable in armed conflict]”.²⁰ It is obvious that the RMI’s participation in the common struggle against climate change needs to lead to firm commitments by all States, which commitments must include not only moral, but also legal obligations aimed at realizing concrete, clear-cut goals in order to remove the threat of devastation caused by continued reliance on the use of fossil fuel energy sources. It is from this perspective of striving to reach agreement on such commitments in the struggle against climate change that the RMI has concluded that it is no longer acceptable simply to be a Party to the NPT while total nuclear disarmament pursuant to Article VI and customary international law remains at best a distant prospect. This Application seeks to ensure that Pakistan fulfils in good faith and in a timely manner all its legal obligations in relation to cessation of the nuclear arms race and to nuclear disarmament.

10. One of the reasons why the RMI became a Party to the NPT is that this Treaty is the key instrument of the international community for ridding the world of nuclear weapons.²¹ Article VI of the Treaty states, in its entirety, as follows:

Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.²²

11. As previously stated, the Court concluded its Advisory Opinion of 8 July 1996 by *unanimously* holding that “[t]here exists an obligation to pursue in good faith and bring to a

¹⁹ *Id.*, para. 66(b).

²⁰ *Supra*, n. 1, para. 95.

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

²² *See supra*, n. 4.

conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control”.²³

12. More than four decades after the NPT entered into force, Pakistan 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. Pakistan 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, Pakistan 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 Pakistan has breached.

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

II. FACTS

A. The Five Nuclear Weapon States Parties to the NPT

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

17. In the 1960s, negotiations eventuated in agreement on the Nuclear Non-Proliferation Treaty. The U.S., Russia, the UK, France and China, all Parties to the NPT, are the only States meeting the Treaty's definition of a "nuclear-weapon State" for "the purposes of this Treaty".²⁴

18. The Treaty was opened for signature on 1 July 1968, and entered into force on 20 March 1970.

B. The Nine States Possessing Nuclear Weapons

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

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

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

²⁵ See *infra*, n. 71.

World nuclear forces, January 2013²⁶

(All figures are approximate)

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

^a 'Deployed' means warheads placed on missiles or located on bases with operational forces.

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

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

^d This figure includes the U.S. Department of Defense nuclear stockpile of c. 4650 warheads and another c. 3000 retired warheads that are awaiting dismantlement.

^e This figure includes c. 700 warheads for nuclear-powered ballistic missile submarines (SSBNs) in overhaul and bombers, 2000 non-strategic nuclear weapons for use by short-range naval, air force and air defense forces, and c. 4000 retired warheads awaiting dismantlement.

^f This includes a military stockpile of c. 4500 nuclear warheads and another c. 4000 retired warheads await dismantlement.

C. Pakistan and the Nuclear Arms Race

1. Early Nuclear History

21. Pakistan's nuclear weapons program dates back to its defeat in the 1971 Indo-Pakistani war and the 1974 Indian detonation of a 'peaceful' nuclear device.²⁷ It built centrifuges

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

²⁷ See Feroz Hassan Khan, "Pakistan's Perspective 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) (hereafter "Khan"), pp. 214-215; Timothy McDonnell,

for enrichment of uranium based on designs stolen from the European consortium URENCO by A. Q. Khan.²⁸ Reportedly, Pakistan fielded its first deliverable nuclear weapon around 1986.²⁹ After India conducted nuclear weapons explosive tests on 11 May 1998, Pakistan conducted at least two such tests on 28 and 30 May 1998.³⁰ Pakistan has conducted no further such tests.

2. Pakistan's Current Nuclear Arsenal

22. As of 2013, Pakistan was estimated to have 100 to 120 nuclear warheads.³¹ The arsenal has grown from an estimated two warheads in 1998.³² The operational delivery systems are two types of intermediate range aircraft, the F-16A/B and Mirage V, and three types of short and intermediate range land-based ballistic missiles.³³

3. Nuclear Policy, Doctrine, and Expenditure

23. Pakistan has released no official doctrine regarding possible use of nuclear weapons. It has refused to adopt a no-first-use policy.³⁴ Observers agree that while preserving

"Nuclear Pursuits: Non-P-5 nuclear-armed states, 2013", Bulletin of the Atomic Scientists, Nuclear Notebook (69(1), 2013) (hereafter "McDonnell"), p. 68, <http://bos.sagepub.com/cgi/reprint/69/1/62>; A.H. Nayyar and Zia Mian, "Pakistan", in International Panel on Fissile Materials, Country Perspectives on the Challenges to Nuclear Disarmament (2010), p. 69, http://fissilematerials.org/library/2010/05/country_perspectives_on_the_c.html.

²⁸ See McDonnell, *supra*, n. 27, p. 68; Khan, *supra*, n. 27, pp. 223-224.

²⁹ See McDonnell, *supra*, n. 27, p. 64.

³⁰ See *id.*, pp. 64-65.

³¹ *Supra*, n. 26 and chart in text. The term "nuclear warheads" as used here refers to both warheads deliverable by missile and gravity bombs deliverable by aircraft.

³² See Zia Mian, "Pakistan", 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 "Mian"), p. 51, <http://www.reachingcriticalwill.org/images/documents/Publications/modernization/assuring-destruction-forever.pdf>.

³³ See Hans M. Kristensen and Robert S. Norris, "Pakistan's nuclear forces, 2011", Bulletin of the Atomic Scientists, Nuclear Notebook (67(4), 2011) (hereafter Kristensen and Norris), p. 93, <http://bos.sagepub.com/cgi/reprint/65/5/82>; Hans M. Kristensen, "Nuclear Weapons and Arms Control: Modernizing Nuclear Arsenals", Briefing, 3 November 2013 (hereafter Kristensen), slide 14, https://www.fas.org/programs/ssp/nukes/publications1/Brief2013_GWU-APS.pdf; Mian, *supra*, n. 32, p. 52. The range of the F-16A/B is 1,600 km and the Mirage V, 2,100 km. The ballistic missiles are the Ghaznavi (Hatf-3), with a range of ~ 400 km; the Shaheen-1 (Hatf-4), 450+ km; and Ghaury (Hatf-5), 1,200+.

³⁴ See Khan, *supra*, n. 27, p. 215; Vipin Narang, "Posturing for Peace? Pakistan's Nuclear Postures and South Asian Stability", *International Security*, Vol 34, No. 3 (Winter 2009/10) (hereafter "Narang"), pp. 56-57, www.mitpressjournals.org/doi/pdf/10.1162/isec.2010.34.3.38; Jane Perlez, "India's Suspicion of Pakistan Clouds U.S. Strategy", *New York Times*, 27 November 2008.

ambiguity, Pakistan is signaling the possibility of resort to nuclear weapons if faced with an overwhelming conventional attack by India striking deep into Pakistani territory, and perhaps in other circumstances creating strategic vulnerabilities for Pakistan.³⁵

24. Regarding the 1996 Comprehensive Nuclear-Test-Ban Treaty, Pakistan is one of the 44 Annex II countries that must ratify the treaty for it to enter into force.³⁶ Pakistan has not signed or ratified the treaty, nor has it in recent years given any indication that it intends to do so.³⁷

25. Regarding a Fissile Materials Cut-off Treaty (FMCT), since 2009 Pakistan has been blocking consensus in the Conference on Disarmament on commencing negotiations on such a treaty.³⁸ Pakistan has two main objections. The first is that the negotiating mandate does not specify that the treaty would address the reduction of existing stocks of fissile materials.³⁹ The second is that the program of work envisaging negotiation of an FMCT provides only for discussions short of negotiations on other items, namely complete nuclear disarmament, assurances of non-use of nuclear weapons against non-nuclear-weapon States, and prevention of an arms race in outer space.⁴⁰ Pakistan maintains that the Conference on Disarmament should first and foremost address negotiation of complete nuclear disarmament.⁴¹ In the view of many

³⁵ See Narang, *supra*, no. 34, pp. 58-60; Khan, *supra*, n. 27, p. 218; A. H. Nayyar, "A Pakistani Perspective on Nuclear Disarmament and Non-proliferation", Briefing Paper 9 (Friedrich Ebert Stiftung, August 2008) (hereafter, "Nayyar"), p. 4, <http://library.fes.de/pdf-files/iez/global/05652.pdf>.

³⁶ Per Article XIV.

³⁷ See Eloise Watson, *The CTBT: Obstacles to Entry into Force* (New York: Reaching Critical Will of the Women's International League for Peace and Freedom, September 2012), pp. 18-19, <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 U.S. Ratification", 17 *Nonproliferation Review* (No. 2, July 2010), pp. 249-250.

³⁸ See Zia Mian and A.H. Nayyar, "Playing the Nuclear Game: Pakistan and the Fissile Material Cutoff Treaty", *Arms Control Today*, April 2011 (hereafter "Mian and Nayyar"), http://www.armscontrol.org/act/2010_04/Mian. Pakistan has maintained its opposition to commencement of negotiations on the treaty through early 2014.

³⁹ See, e.g., Statement by Ambassador Zamir Akram, Permanent Representative of Pakistan to the UN at the CD Plenary, 12 February 2013, http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/cd/2013/Statements/12Feb_Pakistan.pdf.

⁴⁰ See, e.g., Statement by Ambassador Zamir Akram, Permanent Representative of Pakistan to the United Nations, Geneva, at the First Committee General Debate (67th Session of the UNGA), 15 October 2012, p. 3, http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/1com/1com12/statements/15Oct_Pakistan.pdf.

⁴¹ See, e.g., Statement by Ambassador Zamir Akram, Permanent Representative of Pakistan to the United Nations, Geneva, at the First Committee General Debate (68th Session of the UNGA), 18 October 2013, p. 2, http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/1com/1com13/statements/18Oct_Pakistan.pdf.

observers, contrary to Pakistan's stated rationales, blocking negotiations on an FMCT serves *inter alia* to enable Pakistan to build up its fissile materials stockpile and nuclear arsenal.⁴²

26. Because Pakistan does not release information on its nuclear weapons spending and receives extensive external military assistance, it is difficult to reliably estimate such spending.⁴³ One estimate is that Pakistan spends about .5% of its gross domestic product on its nuclear weapons program, including health and environmental costs, which for 2011 is about \$2.4 billion.⁴⁴

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

27. Zia Mian, a physicist and analyst at Princeton University and a member of the International Panel on Fissile Materials,⁴⁵ summarizes trends in Pakistan's nuclear arsenal as follows: "Pakistan has been rapidly developing and expanding its nuclear arsenal, increasing its capacity to produce plutonium, and testing and deploying a diverse array of nuclear-capable ballistic and cruise missiles. Pakistan is moving from an arsenal based wholly on highly enriched uranium to greater reliance on lighter and more compact plutonium-based weapons, which is made possible by a rapid expansion in plutonium production capacity. Pakistan is also moving from aircraft-delivered nuclear bombs to nuclear-armed ballistic and cruise missiles and from liquid-fueled to solid-fueled medium-range missiles. Pakistan also has a growing nuclear weapons research, development, and production infrastructure".⁴⁶ Plutonium-based warheads are more suitable for use on missiles.⁴⁷

28. Three types of ballistic missiles, from battle-field range (60 km) to intermediate range (2000 km) are under development.⁴⁸ Two types of short-range cruise missiles, air-launched

⁴² *E.g.*, Mian and Nayyar, *supra*, n. 38.

⁴³ Mian, *supra*, n. 32, p. 55.

⁴⁴ *Id.*

⁴⁵ Mian directs the Project on Peace and Security in South Asia, at the Program on Science and Global Security, Princeton University, and is Co-Editor of *Science & Global Security*, an international journal of technical analysis for arms control, disarmament and non-proliferation policy.

⁴⁶ Zia Mian, "Pakistan", in Ray Acheson, ed., *Still assuring destruction forever (Reaching Critical Will – a project of the Women's International League for Peace and Freedom, 2013)*, p. 14, <http://www.reachingcriticalwill.org/images/documents/Publications/modernization/still-assuring-destruction-forever.pdf>. *see also* Kristensen and Norris, *supra*, n. 33.

⁴⁷ *See* Kristensen and Norris, *supra*, n. 33, p. 94.

⁴⁸ *See* Kristensen and Norris, *supra*, n. 33, pp. 95-96; Kristensen, *supra*, n. 33, slide 14; Mian, *supra*, n. 32, p. 52.

(350 km) and ground-launched (600 km), are under development.⁴⁹

29. Pakistan has been producing highly enriched uranium for nuclear weapons since the 1980s and producing plutonium for weapons since the late 1990s.⁵⁰ Pakistan has two operating plutonium production reactors and one plutonium reprocessing facility, and is building two additional production reactors and a second reprocessing facility.⁵¹ In 2011, Hans Kristensen and Robert Norris, who prepare widely cited analyses for the Bulletin of the Atomic Scientists, described Pakistan as having “the world’s fastest-growing nuclear stockpile”.⁵² Taking into account ongoing production of plutonium and highly enriched uranium and additional capacity being developed, they found: “If today’s rate of expansion continues, we estimate that over the next 10 years Pakistan’s nuclear weapons stockpile could potentially reach 150-200 warheads – a number comparable to the future British nuclear stockpile”.⁵³

D. Pakistan and Nuclear Disarmament

30. Pakistan has not joined the NPT as an NNWS, the only option open to it under the terms of the Treaty.⁵⁴ Pakistan 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.⁵⁵ However, Pakistan has consistently voted for the General Assembly resolution welcoming the Court’s conclusion regarding the disarmament obligation.⁵⁶ Pakistan also contends it is not contributing to the further spread of nuclear weapons. It states that it has adopted effective

⁴⁹ See Kristensen and Norris, *supra*, n. 33, pp. 96-97; Kristensen, *supra*, n. 33, slide 14; Mian, *supra*, n. 32, p. 52. Cruise missiles are regarded as more capable of penetrating planned Indian missile defences. Kristensen indicates that a submarine-launched cruise missile may also be planned.

⁵⁰ Mian, *supra*, n. 32, p. 53.

⁵¹ See Kristensen and Norris, *supra*, n. 33, pp. 93-94; Mian, *supra*, n. 32, pp. 53-54.

⁵² See Kristensen and Norris, *supra*, n. 33, p. 91.

⁵³ *Id.*, p. 94.

⁵⁴ Pakistan does not qualify as a nuclear-weapon State under Article IX.3 of the Treaty. According to A. H. Nayyar: “Like India, Pakistan would like to join the NPT regime as a declared nuclear weapon state. Since this is not possible under the current formulation of the Treaty, and since the two countries are not inclined to join the Treaty as non-weapon states, Pakistan and India are likely to remain outside of the Treaty for the foreseeable future”. Nayyar, *supra*, n. 35, p. 5.

⁵⁵ *E.g.*, “Explanation of Vote on resolution entitled ‘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_Pakistan.pdf.

⁵⁶ Most recently adopted as A/RES/68/42, 5 December 2013.

policies, laws, and regulations in accord with international efforts such as export control regimes to prevent the acquisition of nuclear weapons by additional States and by non-state actors.⁵⁷

31. Regarding nuclear disarmament, in addition to its position in the Conference on Disarmament, Pakistan votes for resolutions in the UN General Assembly calling for commencement of negotiations on a convention prohibiting and eliminating nuclear weapons.⁵⁸ It also voted for the resolution establishing the Open-Ended Working Group on taking forward proposals for multilateral nuclear disarmament negotiations,⁵⁹ and participated in 2013 Working Group meetings.

32. Pakistan places its call for the commencement of negotiations on a convention for the elimination of nuclear weapons within the context of a wider disarmament and security agenda, including strategic and conventional weapons limitations and reductions.⁶⁰ In the South Asian setting, Pakistan advocates a “strategic restraint regime that establishes nuclear restraint, balance in conventional forces and a mechanism for conflict resolution”.⁶¹

⁵⁷ See Pakistan National Statement, Nuclear Security Summit, Seoul, 26-27 March, 2012, <http://pgstest.files.wordpress.com/2013/06/pakistan-national-statement2.pdf>.

⁵⁸ Most recently, A/RES/68/42, 5 December 2013; A/RES/68/32, 5 December 2013.

⁵⁹ A/RES/67/56, 3 December 2012.

⁶⁰ See Statement of Ambassador Akram, 18 October 2013, *supra*, n. 41.

⁶¹ Statement by H.E. Mr. Muhammad Nawaz Sharif, Prime Minister of the Islamic Republic of Pakistan at the High-Level Meeting of the General Assembly on Nuclear Disarmament, 26 September 2013, p. 2, http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/HLM/26Sep_Pakistan.pdf.

III. THE LAW

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

33. 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.

34. In its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, the Court declared that Article VI involves “an obligation to achieve a precise result – nuclear disarmament in all its aspects – by adopting a particular course of conduct, namely, the pursuit of negotiations on the matter in good faith”.⁶² 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”.⁶³ 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”.⁶⁴

35. 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”.⁶⁵ The Court has long emphasized the importance of obligations *erga omnes*, owed to the international community as a whole.⁶⁶ Its conclusion in the Advisory Opinion was tantamount to declaring that the obligation in Article VI is an obligation *erga omnes*.⁶⁷ Every State has a legal interest in its timely performance, therefore,⁶⁸ and a corresponding legal

⁶² *Supra*, n. 1, para. 99.

⁶³ *Supra*, n. 1, para. 105, point 2 F.

⁶⁴ 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.

⁶⁵ *Supra*, n. 1, para. 103.

⁶⁶ *Barcelona Traction, Light and Power Company, Limited, Judgment*, I.C.J. Reports 1970, p. 3, para. 33.

⁶⁷ See President Bedjaoui’s Declaration in *Legality of Threat or Use of Nuclear Weapons*, *supra*, n. 1 at pp. 273-274: “As the Court has acknowledged, the obligation to negotiate in good faith for nuclear disarmament concerns the 182 or so States parties to the Non-Proliferation Treaty. I think one can go beyond that conclusion and assert that there is in fact a twofold *general obligation*, opposable *erga omnes*, to negotiate in good faith and to achieve the desired result”.

⁶⁸ *Barcelona Traction, Light and Power Company, Limited*, *supra*, n. 66.

obligation to help bring it about.⁶⁹

B. Customary International Law

36. The obligations enshrined in Article VI of the NPT are not merely treaty obligations; they also exist separately under customary international law.⁷⁰

37. In its Advisory Opinion, after noting that the twofold obligation in Article VI to pursue and to conclude negotiations *formally* concerns the (now 190⁷¹) States Parties to the NPT, the Court added that “any realistic search for general and complete disarmament, especially nuclear disarmament, necessitates the cooperation of all States”.⁷²

38. 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”.⁷³

39. 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*”.⁷⁴

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

⁶⁹ Cf. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, I.C.J. Reports 2004, p. 136, paras. 154-159.

⁷⁰ *In Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment*, I.C.J. Reports 1984, p. 392, at para. 94, the I.C.J. held that the fact that principles of customary international law are enshrined in multilateral conventions does not mean that they cease to exist and to apply as principles of customary law.

⁷¹ 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>.

⁷² *Supra*, n. 1, para. 100.

⁷³ *Id.*, para. 105.

⁷⁴ President Bedjaoui’s Declaration in *Legality of Threat or Use of Nuclear Weapons*, *supra*, n. 1, p. 274, para. 23. President Bedjaoui was referring to the 50 years that had then elapsed since the adoption of the UN General Assembly’s first resolution in 1946 and the normative language repeatedly reiterated in its resolutions on nuclear weapons and in other instruments since then.

follow-up to the Court's opinion, Pakistan appears to have accepted the universality of that obligation. In operative paragraph one of the resolution, the General Assembly: "*Underlines once again* the unanimous conclusion of the International Court of Justice that there exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control".⁷⁵

41. As the Court itself noted, the UN General Assembly has been deeply engaged in working for universal disarmament of weapons of mass destruction since its very first resolution in 1946.⁷⁶ The UN Security Council also has repeatedly called for the implementation of Article VI by all States,⁷⁷ 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".⁷⁸ The Council has also described the proliferation of weapons of mass destruction as a threat to international peace and security.⁷⁹

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

43. 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".⁸⁰

44. 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,

⁷⁵ 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. Pakistan 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/ga10547.doc.htm>.

⁷⁶ A/RES/1(I) of 24 January 1946, cited by the Court in para. 101 of the Advisory Opinion.

⁷⁷ *E.g.*, Resolution 984 of 11 April 1995, cited by the Court in para. 103 of the Advisory Opinion, and Resolution 1887 of 24 September 2009.

⁷⁸ Resolution 1887, 24 September 2009, operative para. 5.

⁷⁹ *E.g.*, Resolution 1887, 24 September 2009.

⁸⁰ Final Document of the Tenth Special Session of the General Assembly, adopted by A/RES/S-10/2, 30 June 1978, without a vote, para. 20; *see also, e.g.*, paras. 47, 50, <http://www.un.org/disarmament/HomePage/SSOD/ssod4-documents.shtml>. The 1978 Special Session established UN disarmament machinery in its current form, with the Conference on Disarmament devoted to negotiations, the Disarmament Commission devoted to deliberation, and the First Committee of the General Assembly devoted to agenda-setting. The Special Session thus was a quasi-constitutional assembly with respect to disarmament.

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”.⁸¹

C. Good Faith

45. That good faith constitutes a “fundamental principle” of international law is beyond dispute.⁸² 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 Justice⁸³ and a cardinal principle of the Law of Treaties,⁸⁴ it also encapsulates the essence of the Rule of Law in international society⁸⁵ and is one of the Principles of the United Nations.

46. Article 2, paragraph 2 of the UN Charter provides: “All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter”. The Declaration on Principles of International Law 1970 makes it clear that this duty applies not only to obligations arising under the Charter but also to those arising “under the generally recognized principles and rules of international law” and “under international agreements valid under the generally recognized principles and rules of international law”.⁸⁶

47. In the *Nuclear Tests* cases, the ICJ declared: “One of the basic principles governing the creation and performance of legal obligations, *whatever their source*, is the principle of good faith. Trust and confidence are inherent in international cooperation, in

⁸¹ 6 June 1998, operative paras. 2, 7.

⁸² See Robert Kolb, *La bonne foi en droit international public: Contribution à l'étude des principes généraux de droit*, pp. 112-113 (2011).

⁸³ Cf. *The Free Zones of Upper Savoy and the District of Gex, Second Phase (1930) PCIJ, Series A, No. 24*, p. 12; see also, J. Crawford, *Brownlie's Principles of Public International Law*, Oxford, 8th edition, 2012, pp. 36-37.

⁸⁴ Articles 26 and 31(1) of the 1969 Vienna Convention on the Law of Treaties.

⁸⁵ V. Lowe, *International Law*, Oxford, 2007, p. 116.

⁸⁶ Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, U.N.G.A. Res. 2625 (XXV), 24 October 1970.

particular in an age when this co-operation in many fields is becoming increasingly essential”.⁸⁷

48. 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*.⁸⁸

49. 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.⁸⁹

50. 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”.⁹⁰ Conduct that prevents the fulfilment of a treaty’s object and purpose is proscribed.⁹¹ Further, conduct that calls into question a State’s commitment to the achievement of agreed objectives undermines the trust necessary for successful cooperation towards their achievement. All of this applies equally to the obligation to fulfil customary international law obligations in good faith.⁹²

⁸⁷ *Nuclear Tests (Australia v. France)*, Judgment, I.C.J. Reports 1974, p. 253, at p. 268, para. 46 (emphasis added); *Nuclear Tests (New Zealand v. France)*, Judgment, Id., p. 457, at p. 473, para. 49 (emphasis added).

⁸⁸ *Supra*, n. 80, para. 41 (emphasis added).

⁸⁹ *Supra*, para. 34.

⁹⁰ *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, 1997 I.C.J. Reports, p. 7, para. 142.

⁹¹ Report of the International Law Commission Covering its 16th Session, 727th Meeting, 20 May 1964: Pursuant to the VCLT Article 26 obligation that every treaty in force must be performed by the parties in good faith, the duty of the parties is “not only to observe the letter of the law but also to abstain from acts which would inevitably affect their ability to perform . . .”; Antonio Cassese, *The Israel-PLO Agreement and Self-Determination*, 4 EUR. J. INT’L L. 567 (1993), available at <http://www.ejil.org/journal/Vol4/No4/> (when there is an obligation of good faith negotiation, “both Parties are not allowed to (1) advance excuses for not engaging into or pursuing negotiations or (2) to accomplish acts which would defeat the object and purpose of the future treaty”); Judge Mohammed Bedjaoui, “Good Faith, International Law, and Elimination of Nuclear Weapons”, Keynote Address, 1 May 2008, <http://www.lcnp.org/disarmament/2008May01eventBedjaoui.pdf>, pp. 24–29 (in the NPT context, good faith proscribes “every initiative the effect of which would be to render impossible the conclusion of the contemplated disarmament treaty”).

⁹² *See supra*, para. 46.

IV. OBLIGATIONS BREACHED BY PAKISTAN

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

A. Breach of Customary International Law

Nuclear disarmament

52. 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".⁹³ 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".⁹⁴

53. Although Pakistan expressly supports the commencement of nuclear disarmament negotiations and participated in the Open-Ended Working Group,⁹⁵ 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.⁹⁶

Cessation of the nuclear arms race at an early date

54. 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

⁹³ *Supra*, n. 1, para. 99.

⁹⁴ *Id.*, para. 105, point 2F.

⁹⁵ *See supra*, para. 31.

⁹⁶ *See supra*, Part II.

all-out nuclear arms racing.

55. 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, and in blocking negotiations on a Fissile Materials Cut-off Treaty, is clear evidence of Pakistan'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

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

57. 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, and is blocking negotiations on a Fissile Materials Cut-off Treaty. 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.

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

59. 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

60. 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 Pakistan dated 12 September 1960 (and deposited 13 September 1960), each Declaration without pertinent reservation.

VI. FINAL OBSERVATIONS

61. 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.

62. 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

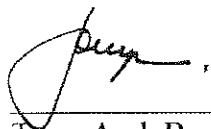
- a) that Pakistan has violated and continues to violate its international obligations under customary international law, by failing to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control, in particular 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 Pakistan 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, and by blocking negotiations on a Fissile Materials Cut-off Treaty;
- c) that Pakistan 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 by blocking negotiations on a Fissile Materials Cut-off Treaty; and
- d) that Pakistan 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

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

DATED this 24th of April 2014



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