

to build the new boats are then tendered, and billions more pounds will be irrevocably committed to construction of a new generation of nuclear weapons.⁶⁶

48. The Strategic Defence and Security Review 2010 states:

Under the 1958 UK-US Agreement for Cooperation on the Uses of Atomic Energy for Mutual Defence Purposes (the ‘Mutual Defence Agreement’) we have agreed on the future of the Trident D5 delivery system and determined that a replacement warhead is not required until at least the late 2030s. Decisions on replacing the warhead will not therefore be required in this Parliament. This will defer £500 million of spending from the next 10 years.⁶⁷

49. Under the UK-US Mutual Defence Agreement, a new “arming, fusing and firing system” developed by the US is to be used in current UK warheads.⁶⁸ The system would improve the nuclear warhead’s effectiveness against hardened targets. The Trident II D5 missile can carry two types of re-entry vehicle that house each nuclear warhead: the Mark 4 for the U.S. W76 warhead and the Mark 5 for the more modern and higher yield W88 warhead. The UK purchased the Mark 4 RV and designed a warhead to meet Mk4 RV specifications in terms of weight, size, shape, centre of gravity, and centre of inertia. The U.S. is modernizing its W76 warheads and Mk4 re-entry vehicles, including launcher, navigation, fire control, guidance, and re-entry systems.⁶⁹ The modernized W76-1 and Mk4A RV have improved the accuracy of the warheads.⁷⁰ These improvements have cascaded through to the UK’s Trident warhead and re-entry vehicle.⁷¹ The UK government has acknowledged procurement of the Mk4A RV.⁷²

⁶⁶ Briefings on Nuclear Security, ‘Trident: The Initial Gate Decision’, *available at* <http://www.britishpugwash.org/documents/Briefing%203%20-%20Initial%20Gate.pdf>.

⁶⁷ *Supra*, n. 48, para. 3.12.

⁶⁸ Richard Norton-Taylor, “Trident more effective with US arming device, tests suggest,” *The Guardian*, 6 April 2011, *available at* <http://www.theguardian.com/uk/2011/apr/06/trident-us-arming-system-test>; *see also* Hans M. Kristensen and Robert S. Norris, “British Nuclear Forces,” *Bulletin of the Atomic Scientists*, September/October 2011 vol. 67 no. 5 89-97, *available at* <http://bos.sagepub.com/content/67/5/89.full#ref-24>.

⁶⁹ Ainslie, *supra*, n. 44, at pp. 71-72.

⁷⁰ *Id.*, at p. 72; Hans Kristensen, ‘Administration Increases Submarine Nuclear Warhead Production Plan’, FAS Blog, Federation of American Scientists, 30 August 2007, *available at* http://www.fas.org/blog/ssp/2007/08/us_triples_submarine_warhead.php.

⁷¹ Ainslie, *id.*; *see also* Hans Kristensen, ‘British Submarines, to Receive Upgraded US Nuclear Warhead’, FAS Strategic Security Blog, 1 April 2011, *available at* <http://www.fas.org/blog/ssp/2011/04/britishw76-1.php>.

Preliminary work on a successor warhead is also underway under the Nuclear Warhead Capability Sustainment Programme at AWE Aldermaston.⁷³ The replacement submarine will be quieter and stealthier.⁷⁴ All of these efforts confirm that the UK continues to be actively engaged in qualitative improvements to its nuclear weapons system.

50. On 2 November 2010, the UK and France concluded a bilateral Treaty for Defence and Security Cooperation.⁷⁵ Article 1 of the Treaty provides, *inter alia*:

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

...

4. ensuring the viability and safety of their national deterrents, consistent with the Treaty on the Non-Proliferation of Nuclear Weapons.⁷⁶

51. On 18 May 2011, when informing Parliament that the Government had approved the 'Initial Gate' for the nuclear weapons system successor programme, the Secretary of State for Defence explained:

We have now agreed the broad outline design of the submarine, made some of the design choices—including the propulsion system and the common US-UK missile compartment—and the programme of work we need to start building the first submarine after 2016. We have also agreed the amount of material and parts we will need to buy in advance of the main investment decision... Between now and main gate we expect to spend about 15% of the total value of the programme.⁷⁷

⁷² Ainslie, *id.*, pp. 68-69; Hansard, HC, 8 December 2009, col. 214W.

⁷³ Ainslie, *id.*, pp. 70-71; Hansard, HC Deb, 28 November 2012, col. 353W.

⁷⁴ Ainslie, *id.*, at pp. 72-73.

⁷⁵ France No. 01 (2010), available at [http://www.ukdf.org.uk/assets/downloads/UKFranceDefenceCooperationTreaty.pdf#search="defence and security cooperation"](http://www.ukdf.org.uk/assets/downloads/UKFranceDefenceCooperationTreaty.pdf#search=).

⁷⁶ The UK and France also signed a Treaty on Joint Radiographic/Hydrodynamics Facilities to build joint nuclear warhead diagnostic and development facilities at the Valduc site of the Commissariat à l'Énergie Atomique et aux Énergies Alternatives – Direction des Applications Militaires (CEA-DAM) and at AWE Aldermaston. See <http://www.ukdf.org.uk/assets/downloads/UKFranceNuclearTreaty.pdf>.

⁷⁷ Hansard, HC Deb, 18 May 2011, col. 352.

52. Although the Secretary of State for Defence denied that the Government was “locked into any particular strategy before main gate in 2016” and stated that he would “assist the Liberal Democrats in making the case for alternatives”,⁷⁸ he declared:

I am absolutely clear that a minimum nuclear deterrent based on the Trident missile delivery system and continuous-at-sea deterrence is right for the United Kingdom and that it should be maintained, and that remains Government policy.⁷⁹

53. On the same day, the Prime Minister told Parliament: “the Government’s policy is absolutely clear: we are committed to retaining an independent nuclear deterrent based on Trident”.⁸⁰

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

As long as large arsenals of nuclear weapons remain and the risk of nuclear proliferation continues, the UK’s judgment is that only a credible nuclear capability can provide the necessary ultimate guarantee to our national security. The UK Government is therefore committed to maintaining a minimum national nuclear deterrent, and to proceeding with the renewal of Trident and the submarine replacement programme.⁸¹

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

In 2007, the United Kingdom Parliament debated, and approved by a clear majority, the decision to continue with the programme to renew the UK’s

⁷⁸ In order to satisfy Liberal Democrat concerns, the government’s Coalition Agreement negotiated after the 2010 general election stated that “we will maintain Britain’s nuclear deterrent, and have agreed that the renewal of Trident should be scrutinized to ensure value for money. Liberal Democrats will continue to make the case for alternatives”. In May 2011 agreement was reached that the government would conduct a formal 18-month assessment of “credible alternatives” to a like-for-like replacement led by the Cabinet Office.

⁷⁹ *Supra*, n. 77, col. 352.

⁸⁰ *Id.*, col. 338; *see also* the Prime Minister’s statement at a press conference on 2 November 2010 after the UK-France summit at which the Treaty for Defence and Security Cooperation was concluded: “while we will always retain an independent nuclear deterrent, it is right that we look for efficiencies in the infrastructure required to develop and sustain our separate deterrents...”, *available at* <http://www.number10.gov.uk/news/uk-france-summit-press-conference/>.

⁸¹ *Available at* http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/npt/prepcom12/statements/30April_UK.pdf.

nuclear deterrent. The Government set out in the 2010 Strategic Defence and Security Review that the UK would maintain a continuous submarine-based deterrent and begin the work of replacing its existing submarines which are due to leave service in the 2020s. This remains the UK Government's policy.⁸²

56. On 5 June 2013, in response to a question in Parliament, the Prime Minister stated: "I am strongly committed to the renewal of our deterrent on a like-for-like basis. I think that is right for Britain".⁸³

57. The Trident Alternatives Review⁸⁴ was published on 16 July 2013.⁸⁵ It had been tasked to answer three questions:

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

58. The Trident Alternatives Review concluded: "None of these alternative systems and postures offers the same degree of resilience as the current posture of Continuous at Sea Deterrence, nor could they guarantee a prompt response in all circumstances".⁸⁶

⁸² Available at http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/cd/2013/Statements/5March_UK.pdf.

⁸³ Hansard, HC Deb, 5 June 2013, col. 1518.

⁸⁴ See *supra*, n. 78.

⁸⁵ Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/212745/20130716_Trident_Alternatives_Study.pdf. For a commentary on the review, see <http://www.basicint.org/sites/default/files/ingramcommentary-tar-jul2013.pdf>.

⁸⁶ Trident Alternatives Review, *supra*, n. 85, Executive Summary, para 32. The Review also concluded that "transitioning to any of the realistic alternative systems is now more expensive than a 3 or 4-boat Successor SSBN fleet": *id.*, para. 34.

D. The UK and Nuclear Disarmament

1. History and General Policy Regarding Negotiation of Nuclear Disarmament

59. As set forth in more detail below, the UK has refused to enter the Trident system (or its predecessors) into nuclear disarmament negotiations despite requests to do so.

60. During the 1970s and 1980s, the UK repeatedly refused to enter its nuclear weapon systems into the disarmament negotiations of that time. During the SALT I and SALT II talks in the 1970s, the UK's refusal to allow Polaris to be considered caused problems during negotiations. The Soviet Union repeatedly called for the ballistic missile submarines of US allies in NATO to be taken into consideration and argued that if "US allies in NATO should increase the number of their modern submarines... the Soviet Union will have the right to a corresponding increase in the number of its submarines".⁸⁷

61. When the UK government first announced its decision to procure the Trident I C4 nuclear weapon system in 1980, it argued that Trident was compatible with the UK's arms control obligations on the grounds that it was: "fully consistent with the terms of the SALT II Treaty"; that "the scale of our new capability will in no way disturb existing and prospective East/West relativities"; and that "Britain's strategic SLBM force lies outside the category of those United States and Soviet long-range, land-based theatre nuclear forces about whose limitation the United States... invited the Soviet Union to negotiate".⁸⁸

62. Similarly, when the UK announced that it was changing to procure the Trident II D5 system in 1982, it argued that the deployed Polaris system and planned Trident system were not relevant to the INF and START negotiations. The government argued that its strategic nuclear weapon systems were not relevant because these negotiations were "bilateral", aimed at achieving a "level of strategic parity" between the U.S. and the Soviet Union. The UK argued that the "British strategic force will account for no more than a very small fraction of the total size of the strategic nuclear forces maintained by the United States and the Soviet Union".⁸⁹

63. During the 1980s, the end of the Cold War resulted in massive cuts to Soviet/Russian military capabilities, in particular reductions in nuclear weapons. However, the UK Government would not allow the UK's nuclear weapons to be included in the negotiations

⁸⁷ "Interim Agreement between the United States of America and the Union of Soviet Socialist Republics on Certain Measures with respect to the Limitation of Strategic Offensive Arms", Unilateral Statement by Minister Semenov, 17 May 1972.

⁸⁸ "The Future United Kingdom Strategic Nuclear Deterrent Force", Defence Open Government Document 80/23, Ministry of Defence, July 1980.

⁸⁹ "The United Kingdom Trident Programme", Defence Open Government Document 82/1, Ministry of Defence, Cmnd 8517, March 1982.

on reductions. In 1987, the INF Treaty was signed by Presidents Reagan and Gorbachev. The Soviet Union had tried to involve UK nuclear weapons in the INF negotiations, but the UK, backed by its NATO allies, opposed this. Prime Minister Margaret Thatcher's response to INF was that she believed that nuclear arms cuts in Europe had gone far enough: "I will never give up Britain's independent nuclear deterrent", she told the media.⁹⁰

64. According to the Defence Select Committee, as US and Soviet nuclear reductions gathered pace, Mrs. Thatcher "sought and received assurances from the United States that the supply of Trident missiles to the UK will in no way be affected by any future arms control agreement".⁹¹

65. The Strategic Defence Review 1998 stated: "The Government wishes to see a safer world in which there is no place for nuclear weapons. Progress on arms control is therefore an important objective of foreign and defence policy".⁹² However, the UK Government continued to make negotiations on nuclear disarmament a long-term aspiration rather than an immediate policy objective. The Strategic Defence Review continued: "while large nuclear arsenals and risks of proliferation remain, our minimum deterrent remains a necessary element of our security".⁹³ It essentially ruled out any further reductions in UK nuclear weapons until further reductions had been made by the US and Russia.

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

We have consistently stated that when we are satisfied that sufficient progress has been made – for example, in further deep cuts in their nuclear forces by the US and Russia – to allow us to include the UK's nuclear weapons in any multilateral negotiations, without endangering our security interests, we will do so.⁹⁴

67. On 17 March 2009, after observing that between them the US and Russia retained around 95% of the nuclear weapons in the world and that the START Treaty, "the mainstay of their bilateral arms control effort", would expire later that year, the then Prime Minister, Gordon

⁹⁰ Nicholas Ashford and Alexander Chancellor, "Arms reduction accord threatens UK deterrent", *The Independent*, 22 September 1987.

⁹¹ "Progress of the Trident Programme", 422 of 1987-88, HMSO, 11 May 1988.

⁹² *Supra*, n. 45, para. 60.

⁹³ *Id.*

⁹⁴ Statement by Ambassador David Boucher, NPT Preparatory Committee 2004, Cluster I, 3 May 2004.

Brown stated: “For our part - as soon as it becomes useful for our arsenal to be included in a broader negotiation, Britain stands ready to participate and to act”.⁹⁵

68. On 6 July 2010, the then Secretary of State for Defence, Dr Liam Fox, reiterated the previous government’s position that “as soon as it becomes useful for the UK to include its nuclear stockpiles in broader disarmament negotiations, we stand ready to participate and to act”.⁹⁶

69. On 3 January 2012, the UN General Assembly decided to establish an Open-Ended Working Group (OEWG) to develop proposals to take forward multilateral nuclear disarmament negotiations for the achievement and maintenance of a world without nuclear weapons.⁹⁷ However, the UK voted against the resolution⁹⁸ and did not attend any of the Working Group’s meetings.⁹⁹

70. In a statement made jointly with France and the U.S. in the UN General Assembly First Committee on 6 November 2012, the UK declared that it was “unable to support this resolution, the establishment of the OEWG and *any outcome it may produce*” (emphasis added).¹⁰⁰

2. Opposition to Negotiation of a Nuclear Weapons Convention

71. Similarly, the UK has always voted against the UN General Assembly’s Resolution on “Follow-up to the advisory opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons”. The Resolution, adopted every year since 1996,¹⁰¹ underlines the ICJ’s unanimous conclusion that there is an obligation to pursue negotiations leading to nuclear disarmament and calls on States to immediately fulfil that

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

⁹⁶ Hansard, HC Deb, 6 July 2010, col. 159W. See also the Statement by Ambassador John Duncan to the 2010 Non-Proliferation Treaty Review Conference, available at http://www.un.org/en/conf/npt/2010/statements/pdf/uk_en.pdf.

⁹⁷ UNGA Resolution A/RES/67/56, “Taking forward multilateral nuclear disarmament negotiations for the achievement and maintenance of a world without nuclear weapons” (147-4-31).

⁹⁸ Along with France, the Russian Federation and the US: UN Doc A/67/PV.48, pp. 20-21.

⁹⁹ Hansard, HL Deb, 15 July 2013, col. WA93.

¹⁰⁰ Available at http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/1com/1com12/eov/L46_France-UK-US.pdf.

¹⁰¹ Most recently on 5 December 2013 (A/RES/68/42).

obligation by commencing multilateral negotiations leading to the early conclusion of a Nuclear Weapons Convention.

72. In 1997, at the request of Costa Rica, the UN Secretary-General circulated to all UN Member States a Model Nuclear Weapons Convention.¹⁰² Costa Rica submitted the Model Convention as “an effective and helpful instrument in the deliberative process for the implementation of” the annual resolution on follow-up to the ICJ Advisory Opinion.¹⁰³ In 2008, at the request of Costa Rica and Malaysia, the Secretary-General circulated an updated version of the Model Convention.¹⁰⁴ The Secretary-General later described the Model Convention as “a good point of departure” for negotiation of a Nuclear Weapons Convention.¹⁰⁵

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

74. Despite the annual UN General Assembly resolution discussed above, however, there have been no inter-governmental negotiations or deliberations in any official forum leading toward adoption of a Nuclear Weapons Convention, except in the above-mentioned Open-Ended Working Group in which the UK and the other NPT nuclear weapon States refused to participate.

¹⁰² See Letter dated 31 October 1997 from the Charge d'affaires a.i. of the Permanent Mission of Costa Rica to the United Nations Addressed to the Secretary-General, U.N. Doc. A/C.1/52/7 (17 November 1997).

¹⁰³ *Id.*

¹⁰⁴ Letter dated 17 December 2007 from the Permanent Representatives of Costa Rica and Malaysia to the United Nations Addressed to the Secretary-General, U.N. Doc. A/62/650 (18 January 2008).

¹⁰⁵ Press Release, Secretary-General Ban Ki-moon, The United Nations and Security in a Nuclear-Weapon-Free World, U.N. Doc. SG/SM/11881 (24 October 2008), available at <http://www.un.org/News/Press/docs/2008/sgsm11881.doc.htm>.

75. In February 2008, the UN High Representative for Disarmament Affairs, Sergio Duarte, condemned the great powers' "refusal to negotiate or discuss even the outlines of a nuclear-weapons convention" as "contrary to the cause of disarmament".¹⁰⁶

76. The UK Government officially expresses opposition to a Nuclear Weapons Convention. A 2009 policy paper provided that while a Nuclear Weapons Convention will "likely be necessary to establish the final ban on nuclear weapons", it is "premature and potentially counter-productive" to prioritise such a Convention "when the many other conditions necessary to enable a ban have yet to be put in place".¹⁰⁷

77. In June 2010, Lord Howell of Guildford (Minister of State, Foreign and Commonwealth Office) stated: "The idea of a nuclear weapons convention is a fine one, but... [a] whole series of things need to be done before one comes to the happy situation where the nuclear world is disarmed and a convention could then get full support".¹⁰⁸

78. In August 2011, the Prime Minister stated that he disagreed "that negotiations now on a nuclear weapons convention should be the immediate means of getting us to a world free of nuclear weapons".¹⁰⁹ While he acknowledged that a Nuclear Weapons Convention "could ultimately form the legal underpinning for this end point", he considered that the prospects of reaching agreement on a Convention "are remote at the moment".¹¹⁰

79. The first-ever UN General Assembly High-Level Meeting on Nuclear Disarmament was held on September 26, 2013, pursuant to a 2012 resolution which was opposed by the UK.¹¹¹ At that meeting the UK representative delivered a statement on behalf of the UK, France and the U.S. in which they welcome "the increased energy and enthusiasm around the nuclear disarmament debate" but "regret that this energy is being directed toward initiatives such

¹⁰⁶ *Nuclear Disarmament and the NPT: The Responsibility of the Nuclear-Weapon States*, at "Global Summit for a Nuclear Weapon-Free World: Laying the Practical, Technical, and Political Groundwork", Campaign for Nuclear Disarmament and Acronym Institute for Disarmament Diplomacy, London, 16 February 2008, available at http://www.un.org/disarmament/HomePage/HR/docs/2008/2008Feb16_London.pdf.

¹⁰⁷ Foreign and Commonwealth Office, *Lifting the Nuclear Shadow*, 2009, p. 34.

¹⁰⁸ Hansard, HL Deb, 9 June 2010, col. 641: answer to a question by Baroness Williams of Crosby (Liberal Democrat), who had pointed out that "the great bulk of non-nuclear powers decided to press for a nuclear weapons convention to abolish nuclear weapons completely by 2025".

¹⁰⁹ Letter from the Prime Minister to Jeremy Corbyn MP, 15 August 2011.

¹¹⁰ *Id.*

¹¹¹ A/RES/67/39, 3 December 2012.

as this High-Level Meeting, the humanitarian consequences campaign, the Open-Ended Working Group and the push for a Nuclear Weapons Convention”.¹¹²

80. The UK subsequently voted against a new UN General Assembly resolution following up the High-Level Meeting.¹¹³ The resolution calls for “the urgent commencement of negotiations, in the Conference on Disarmament, for the early conclusion of a comprehensive convention” to prohibit and eliminate nuclear weapons.

¹¹² Available at http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/HLM/26Sep_UKUSFrance.pdf.

¹¹³ A/RES/68/32, 5 December 2013.

III. THE LAW

A. Article VI of the NPT

81. 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.

82. The drafting history of the NPT demonstrates that the treaty constitutes a “strategic bargain”: the non-nuclear-weapon States agreed not to acquire nuclear weapons and the NPT nuclear-weapon States agreed to negotiate their elimination.¹¹⁴ This has been confirmed by NPT Review Conferences. In particular, the 2010 Review Conference noted that the overwhelming majority of States entered into their legally binding commitments not to acquire nuclear weapons “in the context, inter alia, of the corresponding legally binding commitments by the nuclear weapon states to nuclear disarmament in accordance with the Treaty”.¹¹⁵

83. Article VI is “the single most important provision of the treaty... from the standpoint of long-term success or failure of its goal of proliferation prevention”.¹¹⁶

84. 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”.¹¹⁷ 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”.¹¹⁸ This “recognizes that the provisions of Article VI...go beyond mere obligations of conduct - to

¹¹⁴ Thomas Graham, Correspondence, “The Origin and Interpretation of Article VI”, 15 *Nonproliferation Review* 7, 9 (2008), available at http://cns.miis.edu/npr/pdfs/151_correspondence.pdf.

¹¹⁵ 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Final Document, Vol. I, “Review of the operation of the Treaty,” p. 2, para. 2, available at [http://www.un.org/ga/search/view_doc.asp?symbol=NPT/CONF.2010/50\(VOL.I\)](http://www.un.org/ga/search/view_doc.asp?symbol=NPT/CONF.2010/50(VOL.I)).

¹¹⁶ E. Firmage, ‘The Treaty on the Non-Proliferation of Nuclear Weapons’, 63 *American Journal of International Law* (1969) 711, 732.

¹¹⁷ *Supra*, n. 3, para. 99.

¹¹⁸ *Id.*, para. 105, point 2 F.

pursue nuclear disarmament negotiations in good faith - and actually involve an obligation of result, i.e., to conclude those negotiations".¹¹⁹

85. 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".¹²⁰ The Court has long emphasized the importance of obligations *erga omnes*, owed to the international community as a whole.¹²¹ Its conclusion in the Advisory Opinion was tantamount to declaring that the obligation in Article VI is an obligation *erga omnes*.¹²² Every State has a legal interest in its timely performance, therefore,¹²³ and a corresponding legal obligation to help bring it about.¹²⁴

B. Customary International Law

86. The obligations enshrined in Article VI of the NPT are not merely treaty obligations; they also exist separately under customary international law.¹²⁵

87. In its Advisory Opinion, after noting that the twofold obligation in Article VI to pursue and to conclude negotiations *formally* concerns the (now 190¹²⁶) States Parties to the

¹¹⁹ 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.

¹²⁰ *Supra*, n. 3, para. 103.

¹²¹ *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 3, para. 33.

¹²² See President Bedjaoui's Declaration in the *Nuclear Weapons Case*, *supra*, n. 3, at pp. 273-274, para. 23: "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".

¹²³ See *supra*, n. 121, para. 33.

¹²⁴ 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.

¹²⁵ In *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 392, at para. 94, the ICJ held that the fact that principles of customary international law are enshrined in multilateral conventions does not mean that they cease to exist and to apply as principles of customary law.

¹²⁶ 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*, available at <http://disarmament.un.org/treaties/t/npt>.

NPT, the Court added that “any realistic search for general and complete disarmament, especially nuclear disarmament, necessitates the cooperation of all States”.¹²⁷

88. 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”.¹²⁸

89. 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*”.¹²⁹

90. 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 1946.¹³⁰ The UN Security Council also has repeatedly called for the implementation of Article VI by all States,¹³¹ 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”.¹³² The Council has also described the proliferation of weapons of mass destruction as a threat to international peace and security.¹³³

91. 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.

¹²⁷ *Supra*, n. 3, para. 100.

¹²⁸ *Id.*, para. 105.

¹²⁹ *Supra*, n. 3, at p. 274, Declaration of President Bedjaoui, 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.

¹³⁰ A/RES/1(I) of 24 January 1946, cited by the Court in para. 101 of the Advisory Opinion.

¹³¹ *E.g.*, Resolution 984 of 11 April 1995, cited by the Court in para. 103, and Resolution 1887 of 24 September 2009.

¹³² Operative para. 5.

¹³³ *E.g.*, Resolution 1887, 2009.

92. The UN 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”.¹³⁴

C. Good Faith

93. That good faith constitutes a “fundamental principle” of international law is beyond dispute.¹³⁵ 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 Justice¹³⁶ and a cardinal principle of the Law of Treaties,¹³⁷ it also encapsulates the essence of the Rule of Law in international society¹³⁸ and is one of the Principles of the United Nations.

94. 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”.¹³⁹

¹³⁴ 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. *See* <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.

¹³⁵ *See* Robert Kolb, *La bonne foi en droit international public: Contribution à l'étude des principes généraux du droit*, pp. 112-13 (2001).

¹³⁶ *Cf. The Free Zones of Upper Savoy and the District of Gex*, Second Phase (1930) PCIJ, Series A, No.24, p. 12; *and see* J. Crawford, *Brownlie's Principles of Public International Law*, Oxford, 8th edition, 2012, pp. 36-37.

¹³⁷ Articles 26 and 31(1) of the Vienna Convention on the Law of Treaties 1969.

¹³⁸ V. Lowe, *International Law*, Oxford, 2007, p. 116.

¹³⁹ 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.

95. In the *Nuclear Tests* cases, the ICJ declared: “One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international cooperation, in particular in an age when this co-operation in many fields is becoming increasingly essential”.¹⁴⁰

96. 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*.¹⁴¹

97. As set forth above, Article VI of the NPT 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.¹⁴²

98. 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”.¹⁴³ Conduct that prevents the fulfilment of a treaty’s object and purpose is proscribed.¹⁴⁴ Further, conduct that calls into question a State’s commitment to the achievement of agreed objectives undermines the

¹⁴⁰ *Nuclear Tests (Australia v. France)*, Judgment, I.C.J. Reports 1974, p. 253, at p. 268, para. 46; *Nuclear Tests (New Zealand v. France)*, Judgment, *id.*, p. 457, at p. 473, para. 49.

¹⁴¹ *Supra*, n. 134, para. 41. Emphasis added.

¹⁴² *See supra*, para. 84.

¹⁴³ *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, I.C.J. Reports 1997, p. 7, para. 142.

¹⁴⁴ *Report of the International Law Commission Covering its 16th Session, 727th Meeting, 20 May 1964*: Pursuant to the VCLT Article 26 obligation that every treaty in force must be performed by the parties in good faith, the duty of the parties is “not only to observe the letter of the law but also to abstain from acts which would inevitably affect their ability to perform ...”; Antonio Cassese, *The Israel-PLO Agreement and Self-Determination*, 4 Eur. J. Int’l L. 567 (1993), available at <http://www.ejil.org/journal/Vol4/No4/> (when there is an obligation of good faith negotiation, “both Parties are not allowed to (1) advance excuses for not engaging into or pursuing negotiations or (2) to accomplish acts which would defeat the object and purpose of the future treaty”); *see also* Judge Mohammed Bedjaoui, “Good Faith, International Law, and Elimination of Nuclear Weapons,” Keynote Address, 1 May 2008, available at <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”).

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.¹⁴⁵

¹⁴⁵ *See supra*, para. 94.

IV. OBLIGATIONS BREACHED BY THE UK

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

A. Breach of Article VI of the NPT

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

Nuclear disarmament

101. As set forth above, the Court has provided an authoritative analysis of the nuclear disarmament element of the obligations laid down by Article VI. It has held that "the obligation involved here is an obligation to achieve a precise result - nuclear disarmament in all its aspects - by adopting a particular course of conduct, namely, the pursuit of negotiations on the matter in good faith".¹⁴⁶ 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".¹⁴⁷

102. The Respondent has stated that "it is premature and potentially counter-productive" to prioritise a Nuclear Weapons Convention¹⁴⁸ and opposes UN General Assembly resolutions calling for negotiations to begin.¹⁴⁹

103. The Respondent also refused to support the establishment of the Open-Ended Working Group and even declared preemptively that it would not support "any outcome it may produce".¹⁵⁰

¹⁴⁶ *Supra*, n. 3, para. 99.

¹⁴⁷ *Id.*, para. 105, point 2F.

¹⁴⁸ *See supra*, para. 76.

¹⁴⁹ *See supra*, para. 78.

¹⁵⁰ *See supra*, para. 70.

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

Cessation of the nuclear arms race at an early date

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

106. Its conduct, set forth in Part II of this Application, in (i) continuing engagement in material efforts to qualitatively improve its nuclear weapons system; (ii) continuing efforts to maintain and extend that system indefinitely; and (iii) opposing negotiations on comprehensive nuclear disarmament or other measures in multilateral forums, including the Open-Ended Working Group and the UN General Assembly, is clear evidence of the UK’s ongoing breach of its Article VI obligation regarding the cessation of the nuclear arms race at an early date.¹⁵¹

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

B. Breach of Customary International Law

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

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

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

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

¹⁵¹ See *supra*, Part II.C.4 and II.D.

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

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

112. The Respondent has also repeatedly declared its intention to rely on its nuclear arsenal for decades to come.¹⁵²

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

¹⁵² The May 2011 Initial Gate report states that the submarines will be operational "until the 2060s". See *The United Kingdom's Future Deterrent: The Submarine Initial Gate Parliamentary Report*, May 2011, para 3.1; cited by Ainslie, *supra*, n. 44, at p. 75.

V. JURISDICTION OF THE COURT

114. 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 Applicant dated 15 March 2013 (and deposited 24 April 2013) and the Declaration of the United Kingdom dated 5 July 2004, each Declaration without pertinent reservation.

VI. FINAL OBSERVATIONS

115. 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.

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

REMEDIES

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

to adjudge and declare

- a) that the United Kingdom has violated and continues to violate its international obligations under the NPT, more specifically under Article VI of the Treaty, by failing to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control;
- b) that the United Kingdom has violated and continues to violate its international obligations under the NPT, more specifically under Article VI of the Treaty, by taking actions to qualitatively improve its nuclear weapons system and to maintain it for the indefinite future, and by failing to pursue negotiations that would end nuclear arms racing through comprehensive nuclear disarmament or other measures;
- c) that the United Kingdom has violated and continues to violate its international obligations under customary international law, by failing to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control;
- d) that the United Kingdom has violated and continues to violate its international obligations under customary international law, by taking actions to qualitatively improve its nuclear weapons system and to maintain it for the indefinite future, and by failing to pursue negotiations that would end nuclear arms racing through comprehensive nuclear disarmament or other measures;
- e) that the United Kingdom has failed and continues to fail to perform in good faith its obligations under the NPT and under customary international law by modernizing, updating and upgrading its nuclear weapons capacity and maintaining its declared nuclear weapons policy for an unlimited period of time, while at the same time failing to pursue negotiations as set out in the four preceding counts; and

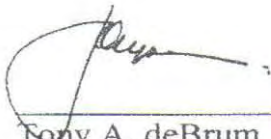
- f) that the United Kingdom has failed and continues to fail to perform in good faith its obligations under the NPT and under customary international law by effectively preventing the great majority of non-nuclear-weapon States Parties to the Treaty from fulfilling their part of the obligations under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

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

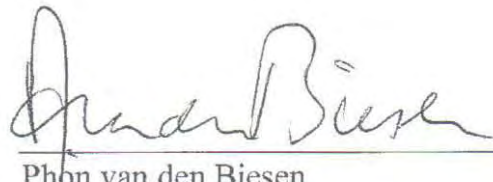
to order

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

DATED this 24th of April 2014



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



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