

No. 15-15636

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

THE REPUBLIC OF THE MARSHALL ISLANDS,

Plaintiff - Appellant,

v.

THE UNITED STATES OF AMERICA, ET AL.,

Defendants- Appellees

On Appeal from the United States District Court for the
Northern District of California; No. 2:13-cv-05324-BRO-JCG
Hon. Jeffrey S. White, United States District Judge

**BRIEF OF AMICI CURIAE PHYSICIANS FOR SOCIAL
RESPONSIBILITY, INTERNATIONAL PHYSICIANS FOR
THE PREVENTION OF NUCLEAR WAR, AND PAX
CHRISTI INTERNATIONAL IN SUPPORT OF THE
REPUBLIC OF THE MARSHALL ISLANDS**

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INTRODUCTION

Amici curiae file this brief to (1) address the District Court's improper resolution of factual questions that should not have been resolved for the defendant on the motion to dismiss, and (2) to demonstrate that the gravity of the issues presented outweighs the technical legalistic concerns that prompted the District Court to dismiss the complaint.

I.

This Amicus Brief is Filed by Consent

In compliance with FRAP 29(a), your amicus curiae obtained the consent of the appellee to the filing of this amicus brief, per an email stating "We consent" from attorney Sushma Soni of the U. S. Department of Justice on July 2, 2015.

II.

The District Court Erred in Several Ways.

First, it is axiomatic that on a motion to dismiss, the District Court is not allowed to resolve disputed questions of fact. Yet the District Court resolved a fundamental question of fact adversely to plaintiff when it stated the complaint was based on "a generalized and *speculative fear of the*

possibility of future use of nuclear weapons. Order, p. 4:4 (emphasis added).

As shown below, the fear of the possibility of future use is not speculative.

History supplies multiple near misses, both by accident and by intentional threat, and even today nuclear armed nations like Russia threaten “the possibility of future use.” Recently Newsweek reported regarding Russia that:

Since [2007], Russia has instigated two wars in Europe and has conducted escalating conventional and *nuclear probes*, which are overflights by conventional and *nuclear-capable aircraft*. It has *deployed nuclear and conventional-based submarines* in Swedish waters and the English Channel, *deployed nuclear weapons in Kaliningrad* and threatened to do so in Crimea.¹

In this light, there exists at least a factual dispute whether the future use of nuclear weapons is merely speculative.

In addition, the District Court adopts a skewed evaluation of standing, asserting that plaintiff fails to allege a “concrete harm *unique* to Plaintiff,”

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<http://www.newsweek.com/putins-thinly-veiled-threat-nuclear-war-working-339817> (June 5, 2015).

but rather asserts an injury that will be shared with “all mankind” and “in common with people generally.” Order, at 4:7-8 (emphasis added). It is odd for a court to fault the plaintiff for lack of standing simply because the asserted harm from nuclear weapons—incineration, starvation, or radiation poisoning—will affect others as well as plaintiff.

Finally, although the NPT is indisputably a “law,” the District Court granted dismissal in part by mischaracterizing this controversy as “revolv[ing] around policy choices and value determinations committed for resolution to the halls of Congress or the confines of the Executive Branch.” Order at 6:1-2. On the contrary. The “policy choices and value determinations” allocated to Congress and the Executive *have already been made*. They were made when President Johnson signed the Treaty, when the Senate consented to its ratification, and when President Nixon ratified it.

All that remains now is the simple judicial task of enforcing the law that the defendant has already agreed to comply with. The dismissal order should be reversed so the District Court can perform that task.

III.

The District Court Failed to Appreciate the Substantial Risk.

A. The risk of nuclear war is substantial.

Another flaw in the Order of dismissal is the District Court's failure to appreciate the likelihood of the use of nuclear weapons, whether "by accident or miscalculation or by madness." As President Kennedy stated at the United Nations:

Every man, woman and child lives under a nuclear sword of Damocles, hanging by the slenderest of threads, capable of being cut at any moment by accident or miscalculation or by madness. The weapons of war must be abolished before they abolish us.²

The dismissal order fails to acknowledge that the risk of injury created by the United States' failure to negotiate in good faith to abolish nuclear weapons is greater than speculative, and is the risk materialized, it would be catastrophic.

² Speech to the United Nations General Assembly, Sept. 25, 1961. <http://www.state.gov/p/io/potusunga/207241.htm>.

History is littered with catastrophic occurrences that were foreseeable but were ignored—causing unacceptable fatalities. Indeed, on many occasions nuclear states, including the defendant, created a substantial risk of intentional or accidental nuclear war. Although the NPT was created to eliminate this risk, still, some 45 years later, the defendant refuses to take the steps mandated by the NPT to eliminate this risk, thereby putting the entire world (including plaintiff) at risk.

A familiar historical analogy illustrates the point and shows why this Court should reject the government's argument minimizing the risk.

Before July 25, 2000, the Concorde airplane had flown for 27 years without a fatal mishap. Like the government here, before July 25, 2000, everyone associated with the Concorde would have regarded the risk of a fatal crash "speculative" and, like defendant's inaction with regard to nuclear risks, would have disregarded that risk. Yet on that day the plane caught fire and crashed, killing all 109 persons aboard. The crash resulted from a sequence of mishaps that were foreseeable and several of which had occurred several times before: (1) on the runway was debris that (2) hit the plane's tire, (3) causing the tire to blow out, (4) which caused the fuel tank

to rupture, (5) which caused a fire (6) that caused a loss of control and the fatal crash.³

Before this crash, Air France (like defendant here) ignored substantial evidence of the serious risk of accidental catastrophe. Specifically, from 1979 to 1981, Concorde taking off in the U.S. suffered tire failures *four times*. On one occasion, the tire ruptured three fuel tanks and tore a hole in the wing. *Ibid.*

Despite these "close calls," Air France, like the government here, refused to act to avert the foreseeable risk that eventually killed everyone on board.

Similarly, so far there have been no complete failures of nuclear deterrence. But that good fortune does not support the Order's conclusion that injury to the Marshall Islands is "speculative." As shown below, during tense times and calm times, the catastrophic danger created by the government's noncompliance with its NPT obligations creates a risk that violates the Treaty, as this Court should declare.

³ http://en.wikipedia.org/wiki/Air_France_Flight_4590

B. Avoiding nuclear war requires "perfection"—but “we are not perfect.”

Refuting the Order’s mischaracterization that the risk of injury from nuclear catastrophe is “speculative,” amici cite the admission of an American general that avoiding accidental nuclear war requires “perfect” performance—but that such perfect performance is impossible. Specifically, in 2008 Gen. Kevin Chilton, commander of the United States Strategic Command (STRATCOM), admitted:

We have a lot of balls we juggle every day in this command Most of them that we drop, they’re going to bounce. . . . But the nuclear missile is a crystal ball. We cannot afford to drop that. This is a mission area where we as human beings are challenged to be perfect. *We are not perfect.*⁴

It is this lack of perfection that puts plaintiff at risk and gives plaintiff standing.

⁴ E. Scarry, *Thermonuclear Monarchy*, at 397 (2014)(emphasis added).

C. The Cuban Missile Crisis: The risk of nuclear war was "between one-out-of- three and even." Accidents almost triggered nuclear war *six times*.

1. The risk was "between one-out-of-three and even."

The Cuban Missile Crisis showed that nuclear war could readily begin either intentionally or by accident. Indeed the world came close to nuclear war *six times* because nations are willing to engaged in intentional or unintentional provocations that foreseeably risked nuclear catastrophe. As President Kennedy said, the risk of nuclear war during the Cuban Missile Crisis was "between one out of three and even." Theodore C. Sorensen, *Kennedy*, p. 705 (1965). The NPT obligates defendant to work in good faith to reduce this risk to zero.

2. Six accidents almost triggered nuclear war.

The Cuban Missile Crisis in October 1962 provides substantial evidence that states are "not perfect" in managing their nuclear arsenals and in preventing accidental nuclear war.

1. On October 27, 1962, nuclear war was almost triggered when an American U-2 spy plane was shot down over Cuba, killing the pilot.⁵

2. Nuclear war was almost triggered again on October 27, 1962, when the U.S. Navy dropped depth charges on a Soviet submarine at the blockade line. The U.S. Navy was unaware this submarine was armed with a 15-kiloton nuclear torpedo and had orders allowing use of the torpedo under

⁵ M. Dobbs, *One Minute to Midnight: Kennedy, Khrushchev, and Castro on the Brink of Nuclear War*, pp. 241-242 (2008).

certain conditions. The decision to launch these torpedoes required agreement from all three officers on board, but fortunately one of them objected and the launch was averted.⁶

3. Nuclear war was almost triggered again on October 27, 1962, when a U.S. U-2 spy plane engaged in air sampling made an accidental and unauthorized overflight of the Soviet Union's far eastern coast. The Soviets responded by scrambling fighters, and the United States responded by launching fighters armed with nuclear air-to-air missiles over the Bering Sea.⁷ Though authority to launch the nuclear air-to-air missiles rested with the military commander, actual control over the nuclear weapons depended on "the discipline of the individual pilots." Scott D. Sagan, *The Limits of Safety*, at 137 (1993). Fortunately the U-2 pilot established visual contact with one of the U.S. planes and was escorted to a remote landing site on the coast. *Ibid.* at 137. This incident risked nuclear war either because the Soviets could have attacked or the American interceptors could have engaged the Soviet fighters with nuclear-armed air-to-air missiles. *Ibid.* at 142. A serious U.S. error was made when no order was given to terminate the air sampling flights until the crisis was over. The Air Force had continued the U-2 flights even during the missile crisis, and even though

⁶ *Ibid.*, pp. 303, 317.

⁷ M. Dobbs, "Why We Should Still Study the Cuban Missile Crisis," Special Report 205. United States Institute of Peace (<http://www.usip.org/files/resources/dr205.pdf>); S. Schoenherr, "The Thirteen Days, October 16-28, 1962" (<http://history.sandiego.edu/gen/filmnotes/thirteendays4.html>)

two months earlier—on August 30, 1962—a U-2 plane conducting air sampling had already accidentally flown into the Soviet Union. *Ibid.* at 138.

4. Nuclear war was almost triggered on October 25, 1962, when an Air Force guard in Minnesota shot at what appeared to be a saboteur climbing the base security fence. The guard set off a sabotage alarm tied into the alarm systems at nearby bases, causing dozens of armed sabotage alert squads to be sent to patrol base perimeters. But at a Wisconsin base, the alarm system was faulty and, instead of triggering the sabotage alarm, ordered an immediate launch of nuclear-equipped aircraft. As pilots began to taxi down the runway, they believed a nuclear war had just started. S. Sagan, *The Limits of Safety* at 99 (1993). Fortunately, just before the planes took off, an officer who had learned no nuclear attack was underway drove onto the tarmac, signaling the aircraft to stop. *Id.* at 100.

5. Nuclear war was almost triggered by a false U.S. radar report of an attack by a missile from Cuba. On October 28, 1962, radar in New Jersey showed a missile launch from Cuba, reported to be over Florida with a predicted impact 18 miles west of Tampa in about two minutes. NORAD officers immediately passed this warning on to Strategic Air Command in Omaha. After the expected detonation failed to occur, the NORAD command center was told that a test tape had been inserted in the equipment, causing the test missile to be interpreted as real. *Ibid.* at 130-131.

6. Finally, nuclear war could have been triggered on October 26, 1962, by the regularly scheduled launch of an American test ICBM from Vandenberg Air Force Base in California. This launch created the risk that

the Soviets might interpret this launch as a nuclear attack. Despite the severity of the Cuban missile crisis, the alert level, and the emergency operations taking place, this ICBM was launched without further orders from Washington. *Ibid.* at 79. Fortunately, the Soviets did not detect it.

D. Multiple episodes show the risk of intentional nuclear war.

The risk of intentional nuclear war is substantial because (as shown below) national leaders, including Presidents Truman, Eisenhower, Johnson, Nixon, and Ford, have all seriously considered using nuclear weapons. In this light, plaintiff is at risk from the possession of nuclear weapons, not only by defendant, but also by less stable signatories of the NPT.

Pres. Truman. In 1950, when North Korean forces were winning, Pres. Truman stated that any weapon in the U.S. arsenal might be used. In March 1951, he ordered that nuclear weapons be assembled on Okinawa, within range of North Korea. In April 1951, he authorized the use of nuclear weapons, with possible targets including Shanghai, Chinese industrial cities, and four North Korean cities.⁸

Pres. Eisenhower. On two occasions, Pres. Eisenhower contemplated using nuclear weapons—in Korean and in the Taiwan Straits crisis. “Thermonuclear Monarchy,” at 38-39, and fn. 4. During the Korean war, Pres. Eisenhower, at his first National Security Council meeting on February 11, 1953, discussed using nuclear weapons in the Kaesong area of

⁸ J. Gerson, *Empire and the Bomb*, at 82 (2007).

North Korea.⁹ On March 21, 1953, Eisenhower ordered the Pentagon to develop an offensive plan to move the line of conflict to the waistline of Korea. If the plan required atomic strikes against military targets, Eisenhower had no objections.¹⁰ Further, in August 1953, Eisenhower dispatched 20 nuclear-armed B-36 bombers to Okinawa.¹¹ And in 1957, Eisenhower deployed nuclear-armed missiles, bombers, and fighter planes near the Korean demilitarized zone. These nuclear weapons remained there for 43 years.¹²

During the Taiwan Straits crisis over the islands Quemoy and Matsu, Pres. Eisenhower said on January 21, 1955, that he would do “*whatever had to be done* to protect the vital interests of the United States . . . even if his actions should be interpreted as acts of war.” “Thermonuclear Monarchy,” at 39 & fn. 5 (emphasis added). He stated at a March 16 press conference that he did not understand why nuclear weapons “shouldn’t be used just exactly as you would use a bullet or anything else.” “Empire and the Bomb” at 86-87. In late August, 1955, Eisenhower sent the nuclear-armed Pacific

⁹ Cameron Forbes, *The Korean War* (2012); Appu Soman, *Double-edged Sword: Nuclear Diplomacy in Unequal Conflicts: the United States and China, 1950-58* (2000).

¹⁰<http://www.theaustralian.com.au/news/features/korean-war-faced-atomic-bomb-conclusion/story-e6frg6z6-1225975201581?nk=f46684d30299760afd75d01f7e2def2b>, quoting Forbes, *The Korean War* (2012).

¹¹ *Empire and the Bomb*, at 83.

¹² *Ibid.*

Fleet to the Taiwan Strait, putting on alert over 200 nuclear-capable warplanes. Under instructions from Pres. Eisenhower, the Joint Chiefs publicly stated that the best hope for protecting the islands and Taiwan was to “counter-attack with atomic weapons.” *Id.* at 88.

Pres. Lyndon Johnson. Pres. Johnson contemplated a preemptive nuclear strike against China to prevent that country from developing nuclear weapons. *Thermonuclear Monarchy*, at 16 and 410, fn. 20.

Pres. Richard Nixon. Pres. Nixon contemplated using nuclear weapons against North Vietnam. *Thermonuclear Monarchy*, at 16 and 410, fn. 20.

Pres. Ford. In 1976, a North Korean soldier’s murder of two U.S. soldiers at the DMZ caused Pres. Ford to activate U.S. nuclear forces, including a nuclear-armed aircraft carrier task force sent to Korean waters and nuclear-equipped B-52 bombers sent to fly near the DMZ.

These historical episodes (including the Cuban Missile Crisis) prove the substantial risk that national leaders will, in a perceived crisis, contemplate using nuclear weapons.

E. Multiple episodes have risked nuclear war by mistake.

A substantial risk of nuclear war arises from threats that are regenerated by mistake or that are perceived by mistake—through human or technical error.

The false NORAD warning. On November 9, 1979, NORAD, SAC and the Pentagon were confronted with a realistic warning of a Soviet nuclear missile attack. Sagan at 228. NORAD alerted its entire air defense

interceptor force, launched 10 interceptor aircraft, and launched the president's special "doomsday plane." Sagan at 229-230. Pres. Carter's national security advisor, Zbigniew Brezinski, was awakened at 3:00 a.m. to be told that *250 Soviet missiles* were headed toward the United States. The President's decision time to order retaliation was three to seven minutes. When Brezinski sought confirmation, he was told *2,200 Soviet missiles* had been launched. But one minute before Brezinski intended to call the President, he was told that other warning systems did not confirm the earlier warnings.¹³

The flawed computer chip warning. On June 3, 1980, SAC command and the National Military Command Center received a false warning of an attack by Soviet submarine-launched ballistic missiles (SLBMs) and ICBMs. Sagan at 231. In response, B-52 and FB-111 bomber crews started their engines, Minuteman Launch Control officers prepared for launch orders, and the Pacific Command's airborne Command Post was launched. Sagan at 231. A similar false warning had occurred three days later. Sagan at 232. These false warnings were caused by the failure of a 64-cent computer chip. Sagan at 232.

The false Soviet early warning. On September 26, 1983, the Soviet early warning system reported American intercontinental ballistic missiles (ICBMs) headed toward the U.S.S.R. A Soviet officer, Stanislav Petrov, was monitoring the early warning system to notify his superiors of any

¹³ Robert M. Gates. *From the Shadows: The Ultimate Insider's Story of Five Presidents and How they Won the Cold War* (New York: Simon & Shuster, p. 114 (1996).

impending nuclear missile attack. If inbound missiles were detected, the Soviet strategy was an immediate nuclear counter-attack against the United States (launch on warning).

Shortly after midnight, the early warning computers reported that one intercontinental ballistic missile was headed toward the Soviet Union from the U.S. Fortunately, Petrov considered the warning to reflect a computer error. Later, the computers identified four additional missiles headed toward the Soviet Union. Again, Petrov correctly suspected a computer malfunction, although he had no other source of information to confirm his suspicions. In truth, these false alarms were caused by a rare alignment of sunlight on high-altitude clouds and the orbits of the detection satellites.

Pres. Yeltsin received a false warning. In January 1995, Russian radar misinterpreted a Norwegian scientific rocket as a U.S. submarine-launched ballistic missile. Pres. Boris Yeltsin was presented with the “nuclear suitcase.” He had just a few minutes to decide whether to launch a barrage of nuclear missiles. He decided the radar was in error.¹⁴ In a second human error, although the Norwegians had told Russia weeks earlier of the launch, the Russian early warning radar crew had not been told.

In sum, the Order erroneously resolves against plaintiff the risk of the nuclear threat that plaintiff is facing, and that warrants reversal of the order of dismissal.

¹⁴ J. Cirincione, *Nuclear Nightmares* at 53 (2013); [http://www.pbs.org/wgbh/pages/frontline/shows/russia/close call/](http://www.pbs.org/wgbh/pages/frontline/shows/russia/close_call/).

IV.

Nuclear War Will Threaten Plaintiff with Famine.

Peer-reviewed scientific studies of the effects of nuclear war on the atmosphere, climate, and agriculture to demonstrate that a regional nuclear war between India and Pakistan would put two billion people at risk of dying from starvation. See I. Helfand, Nuclear Famine: Two Billion People at Risk (2013) ["Nuclear Famine"].¹⁵

A. Regional nuclear war will reduce temperature and rainfall.

"Nuclear Famine" cited a 2007 study showing that a "limited" nuclear war involving 100 Hiroshima-sized bombs (less than 0.5% of the world's nuclear arsenal) would cause global climate disruption—obviously affecting plaintiff.¹⁶ In such a conflict, 6.6 Teragrams (Tg) [= 6.6 million metric tons] of black carbon aerosol particles would rise into the upper troposphere. The study used a NASA climate model to find that 5 Tg of black carbon particles would cause a global average surface cooling of -1.25°C that would persist for years, with the greatest cooling over land. This cooling would reduce rainfall over major grain-growing regions in North American and Eurasia. Nuclear Famine, at 4.

¹⁵ Dr. Ira Helfand is a member of the National Board of Physicians for Social Responsibility and a Co-President of the International Physicians for the Prevention of Nuclear War. His medical specialty is Emergency Medicine.

<http://www.ippnw.org/pdf/nuclear-famine-two-billion-at-risk-2013.pdf>

¹⁶ Robock, A., L. Oman, G. Stenchikov, O. Toon, C. Bardeen and R. Turco, Climatic consequences of regional nuclear conflicts. *Atmospheric Chemistry & Physics*, 7:2003-12 (2007).

B. Regional nuclear war will put 2 billion people at risk of famine.

1. A nuclear exchange will create famine.

Dr. Helfand's paper, "Nuclear Famine" showed that food production would be significantly reduced by a regional nuclear war. "Nuclear Famine" cited a study of the impact on US corn and soybean production of a limited nuclear war in South Asia, based on the climate findings of Robock, et al. The conclusion was that production would decline 10%, with a downward spike in year five of 20%.¹⁷ Nuclear Famine, at 7-8.

These findings are conservative, not considering adverse effects of (1) increased UV light secondary to ozone depletion, (2) daily temperature extremes that shorten the growing season, and (3) decreased petroleum supplies (vital to modern agricultural production) and higher petroleum prices. Nuclear Famine, 5-7.

"Nuclear Famine" also cited a study showing that a nuclear war-triggered 5 Tg event would cause reductions in rainfall, solar radiation, and temperature that would reduce Chinese middle season rice production.¹⁸ The study showed a 21% yearly decline in Chinese middle season rice production in the first four years after nuclear war and 10% yearly decline for the next 6 years. Nuclear Famine at 8.

¹⁷ Ozdogan, Mutlu, Alan Robock, and Christopher Kucharik, Impacts of Nuclear Conflict in South Asia on Crop Production in the Midwestern United States (2012), cited in Nuclear Famine at 8.

¹⁸ Xia, Lili, and Alan Robock, Impacts of Nuclear Conflict in South Asia on Rice Production in Mainland China, Climatic Change (2012), cited in Nuclear Famine at 11.

This study is also conservative for not considering adverse effects of UV light increases or daily temperature extremes or decline (and price increases) in petroleum products (fertilizer, pesticide, and gasoline).

“Nuclear Famine” also cited a 2013 study by Xia, Robock, Dr. Helfand, and others of the effect of post-nuclear war climate change on rice, maize, and wheat production in China. This study showed that winter wheat production would decline during the first year by over 50%, for the first five years by 39%, and for the full decade by 31%. For maize the average decline was 16% annually for a decade. Rice production would decline 20% for the first five years and 17% for the entire decade. Nuclear Famine, at 9.¹⁹

2. Famine will threaten up to 2 billion people.

The foregoing effects of nuclear explosions and fire on climate and agriculture would reduce food production, causing catastrophic famine for up to two billion people.

First, according to U.N. and U.S. officials, the current supply of food stocks will last between 68-77 days. Nuclear Famine, at 12.²⁰

Further, the U.N. Food and Agriculture Organization estimates that the number of people already suffering from malnutrition is 870 million.²¹

¹⁹ Xia, L., Robock, A., Mills, M., Stenke, A, Helfand, I., “Global famine after a regional nuclear war,” submitted to *Earth’s Future* for publication October 2013.

²⁰ www.fao.org/worldfoodsituation/wfs-home/csdb/en/;
www.usda.gov/oce/commodity/wasde/latest.pdf.

²¹ www.fao.org/publications/sofi/en/.

In case of a South Asia nuclear war famine, these people would be priced out of the market because, even at baseline prices, they cannot afford to buy enough food. One study, using a recognized global economy model, found that if all global crops suffered the same yield declines predicted for maize and soybeans in the US corn belt, an additional 215 million people would become malnourished during the 10 years following the nuclear war. Specifically, a 20% decline in crop yield would cause a 20% rise in food prices. Moreover, This study also showed that a rise in prices would cause a non-linear decrease in food accessibility, causing prices to spike further due to commodity speculation, hoarding, and increased private transactions. Nuclear Famine at 13-14.²² Historical confirmation exists in the Japanese occupation of Burma, which reduced the amount of grain exported to Bengal. As a result, hoarding and five-fold price increases made rice unaffordable for those already at risk. Nuclear Famine, at 13-14.²³

Nuclear war disruption of agriculture would threaten not only those who are malnourished, but also the hundreds of millions of people who depend on imported food from nations that would no longer export food. Prior declines in food production show that leading food exporters simply suspend food exports—Canada in 2002 suspended wheat exports; the European Union and Russia in 2003 suspended wheat exports; Vietnam in 2004 suspended rice exports; India in 2007 suspended rice exports; Vietnam, Egypt and China in 2008 restricted rice exports.²⁴ North African

²² ipnwn.org/pdf/projected-impacts-webb.pdf;

²³ Sen, A., *Poverty and Famines* (1981).

²⁴ Brown, LR., *Outgrowing the Earth*, WW Norton & Co. (2004);

nations import over 45% of their food.²⁵ South Korea, Japan, and Taiwan import 50% of their grain. These nations would be devastated by the unavailability of grain imports. Nuclear Famine at 16.²⁶

Finally, the effect on China of the food shortage caused by a regional South Asia nuclear war must be considered. Wheat accounts for 1/3 of Chinese grain consumption (125 million tons per year),²⁷ but a 31% shortfall in wheat production, coupled with a predicted 15% decline in rice production, would exhaust China's reserves in two years. "Nuclear Famine," at 16. Moreover, maize production, essential as animal feed, would be reduced by 15%, according to the new study by Xia and Robock. These reductions in wheat, rice, and maize, would lead to a 10% decline in average caloric intake in China—but due to economic inequality, the impact of this decline would not be evenly distributed, threatening famine for a large percentage of the Chinese population. "Nuclear Famine" at 17.

Based on the foregoing analysis, PSR estimates that a regional nuclear war would put 2 billion people at risk of famine. *Id.* The foregoing analysis supports the complaint's reference in paragraph 11 to "nuclear famine."

www.businessweek.com/news/2010-10-04/medvedev-orders-review-of-russia-grain-export-ban-at-harvest-end.html.

²⁵

www.ers.usda.gov/publications/gfa16/GFA16CountryTablesNAfrca.xls.

²⁶ www.iucn.org/themes/wani/eatlas/html19.html.

²⁷ http://www.daff.gov.au/_data/assets/pdf_file/0006/2259123/food-consumption-trends-in-china-v2.pdf.

V.

The Catholic Church Supports Total Nuclear Disarmament. Possession of nuclear weapons for deterrence is unacceptable.

The NPT's requirement of total nuclear disarmament is supported by the Catholic Church, but Catholic leaders charge the major nuclear states, including defendant, with failing to act in "good faith" to achieve nuclear disarmament. *E.g.*, Complaint, para. 83.

A. The Catholic Church supports total nuclear disarmament.

Soon after the Cuban Missile Crisis, Pope John XXIII wrote in *Pacem in Terris* that "Nuclear weapons must be banned."²⁸

Vatican Council II (1962-1965) taught: "Any act of war aimed indiscriminately at the destruction of entire cities or other extensive areas along with their population is a crime against God and man himself. It merits unequivocal and unhesitating condemnation." Pastoral Constitution on the Church in the Modern World. (Part 80).²⁹

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http://www.vatican.va/holy_father/john_xxiii/encyclicals/documents/hf_j-xiii_enc_11041963_pacem_en.html. (Para. 112.)

29

http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_cons_19651207_gaudium-et-spes_en.html.

In 1982, Pope John Paul II said at the United Nations that “deterrence” was “morally acceptable” only “as a step on the way to progressive *disarmament*”³⁰ (Emphasis added.)

In 1993, the U.S. Conference of Catholic Bishops advocated total nuclear disarmament: “The eventual elimination of nuclear weapons is more than a moral ideal; it should be a policy goal.” The Bishops expressed “skepticism” over maintaining nuclear weapons for deterrence where deterrence provided an excuse for not pursuing nuclear disarmament: “What previously had been defined as a safe and stable system of deterrence is today viewed with political and moral skepticism” because deterrence does not provide “the long-term basis for peace.” In sum, “Nuclear deterrence may be justified only as a step on the way toward *progressive disarmament*. . . .”³¹

Pope John Paul II told Pax Christi International in 1995: “it is to be hoped that *all countries will strive to implement this treaty [NPT] fully and effectively*, with a view to creating an international order guaranteeing security for all through the achievement of *disarmament*.”³² (Emphasis added.)

³⁰ Pope John Paul II, Message to the General Assembly of the United Nations, June 7, 1982, No. 8.

³¹ “The Harvest of Justice is Sown in Peace.”
<http://www.usccb.org/beliefs-and-teachings/what-we-believe/catholic-social-teaching/the-harvest-of-justice-is-sown-in-peace.cfm>.

³² Pope John Paul II, address to Pax Christi International, May 29, 1995. www.ewtn.com/library/PAPALDOC/J950529.HTM (emphasis added).

In December 2014 Pope Francis addressed the Vienna Conference on the Humanitarian Impact of Nuclear Weapons.³³ In his address the Pope said “Nuclear deterrence and the threat of mutually assured destruction cannot be the basis for an ethics of fraternity and peaceful coexistence among peoples and states.” He also said: “‘A world without nuclear weapons’ is a goal shared by all nations and echoed by world leaders, as well as the aspiration of millions of men and women. The future and the survival of the human family hinges on moving beyond this ideal and ensuring that it becomes a reality.”

The Holy See also submitted to the Vienna Conference a paper entitled: “Nuclear Disarmament: Time for Abolition.”³⁴ This document extended the Church’s position from tolerating possession of nuclear weapons for deterrence, while rejecting their use, to rejecting both possession and use:

The political and military officials of nuclear possessing states assume the responsibility to use these weapons if deterrence fails. But since what is intended is mass destruction—with extensive and lasting collateral damage, inhumane suffering, and the risk of escalation—the system of nuclear deterrence

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<http://www.news.va/en/news/message-of-the-holy-father-on-the-occasion-of-the->

³⁴ <http://archive.paxchristi.net/MISC/2014-0393-en-gl-SD.pdf>

can no longer be deemed a policy that stands firmly on moral ground.

Id. at 4.

“The time has come to embrace the abolition of nuclear weapons as an essential foundation of collective security.”

Id. at 5.

B. Catholic leaders charge nuclear weapons states with “dodging” their NPT obligations.

The Catholic Church recognizes that the doctrine of deterrence fostered by the major nuclear weapons states is increasingly problematic because those states are not progressing toward total nuclear disarmament.

The Holy See. From 2010 to 2014, Archbishop Francis Chullikatt served as Permanent Observer of the Holy See to the United Nations in New York. His address on the occasion of the 2014 NPT PrepCom criticized the nuclear weapons states for their "unbalanced" approach—enforcing the non-proliferation obligation of others, but neglecting their own nuclear disarmament obligation.³⁵ The Archbishop stated the hope of the Holy See that "the major states will take more substantial and resolute action to eliminate the scourge of these morally unacceptable nuclear weapons that

³⁵ Intervention of H.E. Archbishop Francis Chullikatt, Apostolic Nuncio, Permanent Observer of the Holy See to the UN, NPT PrepCom, (30 April 2014, UN Headquarters, New York); <http://www.holyseemission.org/statements/statement.aspx?id=457> (¶¶ 3-5).

could indiscriminately annihilate non-combatants and combatants alike in times of war as well as in times of peace."³⁶

Douglas Roche. Ambassador Roche, former advisor to the Holy See Delegation at the United Nations and Canadian Ambassador to the United Nations' Disarmament Committee, has charged the major nuclear weapons states as having "consistently dodged any real efforts for nuclear disarmament," and using numerical reductions in arsenals to "mask[] their continued modernization of warheads, delivery systems and infrastructure." He cited criticism that "the nuclear weapons powers, which continue to deploy new nuclear weapons and delivery systems, 'appear determined to retain their nuclear arsenals indefinitely.'" He charged the NATO states with a "double standard" by reaffirming both "their commitment to the Non-Proliferation Treaty goal of nuclear disarmament and their NATO dependence on nuclear weapons. [¶] The policies are incoherent." He noted that U.S. tactical weapons in Europe are "a standing provocation to Russia, which is consequently disinclined to lower its own huge numbers of tactical nuclear weapons. Russia is unlikely to give up its nuclear weapons while it is virtually surrounded by an expanding NATO."³⁷

³⁶ *Id.* at ¶ 8.

³⁷ <http://www.wagingpeace.org/author/douglas-roche/> (Sept. 18, 2013.)

CONCLUSION

The order of dismissal must be reversed because plaintiff is presently at risk of a nuclear exchange whose consequences will be catastrophic. This risk persists because the defendant has neglected its nuclear disarmament obligations under the NPT. Hence, plaintiff has standing to enforce the NPT bargain, and the dismissal order should be reversed.

July 20, 2015

Respectfully submitted,

SMITH & MCGINTY

_____/s_____

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CERTIFICATE OF SERVICE

I hereby certify that on July 20, 2015, I electronically filed the foregoing document with the Clerk of the Court, using the CM/ECF system, which will send notification of such filing to the counsel of record in this matter who are all registered on the CM/ECF system.

Executed at San Francisco, California on July 20, 2015.

_____/s/_____

Daniel U. Smith

CERTIFICATION

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7) because this brief contains 5,362 words as authorized by Fed. R. App. P. 32(a)(7)(ii), excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(6) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief was prepared in proportionally-spaced 14 point typeface using Word Perfect X4.

Dated: July 20, 2015.

Signed: _____ /s

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