



बिदेश मंत्रालय, नई दिल्ली
MINISTRY OF EXTERNAL AFFAIRS
NEW DELHI

23 March 2016

Excellency,

Reference the question posed by Judge Cancado Trindade at the conclusion of oral hearings on 16 March 2016 in the case regarding Obligations concerning Negotiations relating to Cessation of Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v India).

In this regard kindly find enclosed the response of India.

Please accept assurances of my highest consideration.

[Dr. Neeru Chadha]
Agent of the Republic of India
before the International Court of Justice

Mr. Phillippe Couvereur
Registrar
International Court of Justice
Peace Palace
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Obligations concerning Negotiations relating to Cessation of Nuclear Arms
Race and to Nuclear Disarmament (Marshall Islands v India)

India's response to the question from Judge Cançado Trindade

1. Judge Cançado Trindade on conclusion of the Oral hearings on 16 March 2016, put the following question to the Parties:

“In the course of the written submissions and oral arguments, the two contending Parties, the Marshall Islands and India, both referred to U.N. General Assembly resolutions on nuclear disarmament. Parallel to the resolutions on the matter which go back to the early 70's (First Disarmament Decade), there have been two more recent series of General Assembly resolutions, namely: those condemning nuclear weapons, extending from 1982 to date, and those adopted as a follow-up to the 1996 I.C.J. Advisory Opinion on Nuclear Weapons, extending so far from 1997 to 2015. In relation to this last series of General Assembly resolutions, – referred to by the contending Parties, – I would like to ask both the Marshall Islands and India whether, in their understanding, such General Assembly resolutions are constitutive of an expression of *opinio juris*, and, if so, what in their view is their relevance to the formation of a customary international law obligation to pursue negotiations leading to nuclear disarmament, and what is their incidence upon the question of the existence of a dispute between the Parties.”¹

2. The contribution of General Assembly Resolutions to the formation of customary international law was examined by ICJ in the *Legality of Nuclear Weapons* case where certain States were of the view that, “the important series of General Assembly resolutions, beginning with resolution 1653 (XVI) of 24 November 1961, that deal with nuclear weapons and that affirm, with consistent regularity, the illegality of nuclear weapons, signify the existence of a rule of international customary law which prohibits recourse to those weapons”. However according to other States “the resolutions in question have no binding character on their own account and are not declaratory of any customary rule of prohibition of nuclear weapons; some of these States have also pointed out that

¹ CR 2016/8, 16 March 2016, p. 38 (Judge Cançado Trindade).

this series of resolutions not only did not meet with the approval of all of the nuclear-weapon States but of many other States as well".²

3. In its 1996 Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the Court held that

"General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character."³

4. These criteria are equally relevant in the present case for the Resolutions adopted subsequent to this Advisory Opinion for testing the existence of rule of customary international law putting a legal obligation on States to pursue negotiations in good faith towards nuclear disarmament.

5. The U.N. General Assembly resolutions identified in Judge Cançado Trindade's question can be divided in two categories.

6. The first category consists of resolutions advocating measures of restraint with a view to slowing down vertical proliferation and/or increasing restraints on nuclear use. These include India's resolution on the Convention on the Prohibition of the use of Nuclear Weapons tabled since 1982 as well as the India's resolution tabled since 1998 on reducing nuclear danger. This category could include the so-called 'freeze' resolutions tabled from 1982 to 1992.

7. It could also include the resolution on a Fissile Material Cut-off Treaty (FMCT) to prohibit the production of fissile material for nuclear weapons and other nuclear explosive devices.

² I.C.J., Advisory Opinion, 8 July 1996, *Legality of the Threat or Use of Nuclear Weapons*, Reports 1996, p. 254, para. 68.

³ *Ibid.*, pp. 254-255, para. 70.

8. In a sense these resolutions even though voted upon imply an acceptance of the reality of the existence of nuclear weapons and focus on practical measures to strengthen non-proliferation in all its aspects and to diminish the role of nuclear weapons in international affairs and security doctrines to ease the path to their elimination. These resolutions propose specific measures to facilitate as a final objective nuclear disarmament but do not in themselves constitute comprehensive proposals for the global elimination of nuclear weapons.

9. The second category includes resolutions advocating complete elimination of nuclear weapons or taking forward multilateral nuclear disarmament negotiations either through a step by step approach or a more comprehensive approach.

10. This category includes the nuclear disarmament resolutions tabled by Myanmar since 1996, the resolutions on taking forward multilateral nuclear disarmament negotiations tabled since 2012 and the resolutions on follow up to the advisory opinion of the ICJ since 1996. These resolutions contain various proposals for the complete elimination of nuclear weapons.

11. None of the resolutions of the second category was a consensus resolution that could be adopted without voting. The voting record on the ICJ resolution over the years (as reproduced below) is illustrative. Approximately 2/3rd of the member States of the UN vote in favour of the resolution, while nearly 1/3rd either abstain or vote against. In 2015, for example, in the voting on the ICJ resolution in the General Assembly Plenary, among the 49 countries that voted against or abstained, there were 48 states which are party to the NPT, including 4 of the nuclear weapon states party to the NPT (voting record attached). Even the biennial resolution on follow-up to nuclear disarmament obligations agreed to at the review conferences of the parties to the NPT remains a voted resolution with 60 states either voting against or abstaining on the resolution tabled in 2015.

Year	Yes-No-Abstain
1996	115-22-32
1997	116-26-24
1998	123-25-25
1999	114-28-22
2000	119-28-22
2001	111-29-21
2002	117-30-24
2003	124-29-22
2004	132-29-24
2005	126-29-24
2006	125-27- 29
2007	127-27-27
2008	127-30-23
2009	124-31-21
2010	133-28-23
2011	130-26-23
2012	135-22-26
2013	133-24-25
2014	134-23-23
2015	137-24-25

12. Further, in recent years, within the second category of resolutions, there has been an increase in the number of voted resolutions advocating a specific approach to nuclear disarmament.

13. Pertinent examples of this recent trend are the resolution on follow-up to the 2013 High-Level Meeting of the General Assembly on nuclear disarmament, which proposes the negotiation in the CD of a Comprehensive Nuclear Weapons Convention, the resolution on setting up an Open-Ended Working Group (OEWG) as well as the resolution on the Humanitarian consequences of nuclear weapons. This illustrates that the international community remains divided both on the process for achieving as well as the substantive form and content of international obligations on the complete elimination of nuclear weapons.

14. The lack of unanimity and the abstention or negative vote of States whose interests are specially affected cast doubt on the normative value of these UNGA resolutions and on the existence of an *opinio juris*.

15. India reiterates that its constant sponsoring and support of the ICJ resolution at the General Assembly is the expression of its commitment, as underlined by the 1996 Advisory Opinion of the ICJ, 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. India's support to the resolution also underlines that nuclear disarmament cannot be achieved save and except through a multilateral platform.

16. The recent voting record of the Marshall Islands demonstrates the Parties' common support of these resolutions and of nuclear disarmament. Moreover, "[g]iven the public statements made by the highest representatives of the Parties, such as those [made at the Nayarit Conference], [the Marshall Islands] could not have misunderstood the position of [India]"⁴. And "[i]t is apparent from these statements that the Parties [did not hold] opposing views⁵ on the question of pursuing in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.

⁴ I.C.J., Judgment, 17 March 2016, *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, par. 73.

⁵ *Ibid.*, para. 69.

17. India's view, as outlined in its written counter-memorial as well as its oral pleadings on March 10 and March 16 is that the evolution of an *opinio juris* would be facilitated by a number of measures, including reaffirmation of the unequivocal commitment by all nuclear weapon states to the goal of complete elimination of nuclear weapons and an agreement on a step by step process underwritten by universal commitment for the global elimination of nuclear weapons. This step-by-step process should also have a place for measures of the kind envisaged under the resolutions in the first category mentioned above so that the role of nuclear weapons can be diminished over time as has also been emphasised by the RMI. The steps that India has strongly advocated for will hopefully result in this being achieved, and a time may come when an *opinio juris* would evolve that would promote global nuclear disarmament.

18. It is also India's view that the best forums to pursue these measures are inter-governmental and this in fact has been agreed by consensus by the international community since SSOD 1 (1978). There is a need to uphold genuine multilateralism to increase trust and confidence among all states, both nuclear and non-nuclear, and to strengthen dialogue so as to close the gaps both on the constitution and expression of international will regarding the pursuit of negotiations leading to nuclear disarmament. As such, India has supported the negotiation in the CD of a Comprehensive Nuclear Weapons Convention, as well as has reiterated its readiness to negotiate a Convention on the Prohibition of the Use of Nuclear Weapons, most recently in the CD Plenary on 26 January 2016.⁶ Evidently, there is no dispute between India and the RMI on the urgent necessity of the pursuit of negotiations leading to global, non-discriminatory and verifiable nuclear disarmament.

⁶ Statement by Ambassador DB Venkatesh Varma Permanent Representative of India at the CD Plenary, 26 January 2016 ([http://www.unog.ch/80256EDD006B8954/%28httpAssets%29/0F86F21DED77FD7EC1257F4600584456/\\$file/1371+India.pdf](http://www.unog.ch/80256EDD006B8954/%28httpAssets%29/0F86F21DED77FD7EC1257F4600584456/$file/1371+India.pdf)).