INTERNATIONAL COURT OF JUSTICE

OBLIGATIONS CONCERNING NEGOTIATIONS RELATING TO CESSATION OF THE NUCLEAR ARMS RACE AND TO NUCLEAR DISARMAMENT
(Marshall Islands *v.* United Kingdom) (Preliminary Objections)

Reply of the Marshall Islands
to the question put by Judge Cançado Trindade at the end of the public sitting of 16 March 2016 at 3 p.m.

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Question:

The Marshall Islands, in the course of the written submissions and oral arguments, and the United Kingdom, in its document on Preliminary Objections (of 15 June 2015) have 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 United Kingdom 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.

Answer by the Marshall Islands:

A) Whether, in the Marshall Islands' understanding, the General Assembly resolutions referred to in the question are constitutive of an expression of *opinio iuris* and what in its view is their relevance to the formation of a customary international law obligation to pursue negotiations leading to nuclear disarmament.

1. In the Marshall Islands' view, the customary international law obligation to pursue negotiations leading to nuclear disarmament was authoritatively recognized for the first time in the Court's Advisory Opinion of 8 July 1996, which established that "[t]here exists an obligation to pursue in good faith and

bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control"[1].

2. Already in the First Disarmament Decade of the 1970s, the U.N. General Assembly had called upon States to negotiate for complete nuclear disarmament and a halt to the nuclear arms race.[2] Since 1982, several recurring UNGA resolutions have underlined the imperative of negotiations on nuclear disarmament. Illustratively, in the 1982 *Nuclear arms freeze* resolution[3], the General Assembly recognized "the urgent need for a negotiated reduction of nuclear-weapon stockpiles leading to their complete elimination". In a 1983 resolution concerning *Nuclear weapons in all aspects*[4], the General Assembly, beyond stressing "the urgent need for the cessation of the development and deployment of new types and systems of nuclear weapons as a step on the road to nuclear disarmament", recognized that "priority in disarmament negotiations should be given to nuclear weapons". Similarly, in a 1986 resolution on *Cessation of the nuclear-arms race and nuclear disarmament*, the General Assembly expressed the view that "all nations have a vital interest in negotiations on nuclear disarmament"[5]. In a 1994 resolution on *Bilateral nuclear-arms negotiations and nuclear disarmament*,[6] the UNGA stressed that "it is the responsibility of all States to adopt and implement measures towards the attainment of general and complete disarmament under effective international control".

3. The General Assembly resolutions on *Nuclear disarmament* adopted after the 1996 Advisory Opinion and the resolutions following up on the Advisory Opinion are clear on the obligation to pursue negotiations leading to nuclear disarmament and on its customary status. In the latter resolutions, the UNGA has constantly underlined "the unanimous conclusion of the International Court of Justice that there exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control", and called "upon *all States* to fulfil immediately that obligation by commencing multilateral

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[1] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, para. 105, point 2F.

[2] *See* A/RES/S-10/2, 30 June 1978 (without a vote), adopting the Final Document of the Tenth Special Session (First Special Session on Disarmament) of the General Assembly, esp. para. 50 ("achievement of nuclear disarmament will require urgent negotiation of agreements").

[3] A/RES/37/100B, 13 December 1982 (119-17-5), Nuclear arms freeze.

[4] A/RES/38/183D, 20 December 1983 (108-19-16), Nuclear Weapons in All Aspects.

[5] A/RES/41/86F, 4 December 1986 (130-15-5), Cessation of nuclear-arms race and nuclear disarmament.

[6] A/RES/49/75L, 15 December 1994 (without a vote), Bilateral nuclear-arms negotiations and nuclear disarmament.

negotiations leading to an early conclusion of a nuclear weapons convention"[7]. While there are a number of States abstaining from or voting against these resolutions, the opposition of these States generally is not directed against the recognition of an obligation to pursue in good faith and conclude negotiations on nuclear disarmament. This is demonstrated by the separate vote in 2006 retaining operative paragraph one welcoming the Court's conclusion regarding the disarmament obligation by a vote of 168 to three with five abstentions[8].

4. In a similar vein, in the *Nuclear disarmament* resolutions, the UNGA has welcomed "the unanimous reaffirmation by all Judges of the Court that there exists an obligation for *all States* 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."[9]

5. In the RMI's view, the attitude of States towards General Assembly resolutions is an important element for determining the existence of a customary international rule. As the International Court of Justice observed in *Nicaragua* v. *United States*, "*opinio juris* may, though with all due caution, be deduced from, inter alia, the attitude of the Parties and the attitude of States towards certain General Assembly resolutions"[10] In the same vein, the Court, in the 1996 Advisory Opinion, noted that UNGA resolutions "can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*"[11].

6. More recently, and by the same token, the International Law Commission's Draft Conclusions on the Identification of Customary International Law, provisionally adopted on first reading by the Drafting Committee in 2015, recognize the importance of the attitude of States towards General Assembly

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[7] *See, e.g.*, A/RES/68/42, 5 December 2013 (133-24-25), Follow-up to the advisory opinion of the International Court of Justice on the legality of the threat or use of nuclear weapons, paras. 1, 2, p. 3/3 (emphasis supplied).

[8] A/RES/61/83, 6 December 2006, Follow-up to the advisory opinion of the International Court of Justice on the legality of threat or use of nuclear weapons, was adopted as a whole by a vote of 118-27-26; operative paragraph one was retained by a vote of 168 to 3 (Israel, Russia, United States) with 5 abstentions (Belarus, France, Latvia, Kyrgyzstan, UK). See Official Records, General Assembly, 67th plenary meeting, 6 December 2006, A/61/PV.67, pp. 26-27.

[9] See e.g. A/RES/68/47, 5 December 2013 (122-44-17), Nuclear disarmament, p. 3/7 (emphasis supplied).

[10] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 100, para. 188.

[11] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, pp. 254-255, para. 70. Note that the Court also observed that "several of the resolutions under consideration in the present case have been adopted with substantial numbers of negative votes and abstentions; thus, although those resolutions are a clear sign of deep concern regarding the problem of nuclear weapons, they still fall short of establishing the existence of an *opinio juris* on the illegality of the use of such weapons." (para. 71)

resolutions.[12] Draft Conclusion 6 provides that "forms of State practice include ... conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference". Draft Conclusion 10 establishes that "forms of evidence of acceptance as law (*opinio juris*) include ... conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference". Such a view also finds resonance among scholars[13].

7. In the RMI's view, the attitude taken by States towards the resolutions adopted by the General Assembly from 1982 to 1995 is to be regarded as an indication of an emerging *opinio juris* as to the customary law obligation to conduct negotiations in good faith leading to general and complete nuclear disarmament. With regard to the attitude of States towards the resolutions adopted after 1996, particularly those which clearly affirm the existence of a general obligation to pursue in good faith negotiations leading to nuclear disarmament, this attitude constitutes an expression of *opinio juris* which supports and confirms the Court's recognition in its 1996 Advisory Opinion that this obligation is imposed by a rule having a customary status.

B) What is their incidence upon the question of the existence of a dispute between the Parties?

8. In the Marshall Islands' view, the opposing attitudes of States towards General Assembly resolutions may contribute to demonstrating the existence of a dispute. Such attitudes may reveal opposing views as to the existence of an obligation, as to the interpretation of its scope and/or as to the way in which this obligation is to be implemented. However, the importance to be attached to a State's attitude towards General Assembly resolutions must be assessed in the light of the specific circumstances of each case. In certain situations, this attitude simply confirms the overall position of that State in relation to the question which constitutes the subject matter of the dispute. In other situations, the attitude towards certain resolutions does not of itself say much

[12] A/CN.4/L.869, *Draft Conclusions on the Identification of customary international law*, provisionally adopted by the Drafting Committee on the 14 July 2015. In the words of the Special-Rapporteur: "*Opinio juris* may be deduced from the attitudes of States vis-à-vis such non-binding texts that purport, explicitly or implicitly, to declare the existing law, as may be expressed by both voting (in favour, against or abstaining) on the resolution, by joining a consensus, or by statements made in connection with the resolution". A/CN.4/672, p. 65.

[13] Cf. Antônio Augusto Cançado Trindade, *International Law for Humankind: towards a new Jus Gentium*, Vol. 316 (2005), *Recueil des Cours*, p.168, according to whom "[t]he element of *opinio juris* may be more predominant in resolutions of the declaratory kind; in any case, resolutions of international organizations, and in particular those of the UN General Assembly, have been accepted as 'sources' of International Law not only by the ICJ by also by other international (arbitral) tribunals. They often give expression to values and aspirations of the international community as a whole".

about the existence of a dispute, for instance because the State's support for resolutions recognizing the existence of a certain obligation is contradicted by the subsequent conduct of the State, which does not conform to the obligation in question.

9. As to the incidence of the abovementioned resolutions upon the question of the existence of a dispute between the Marshall Islands and the United Kingdom, it is submitted that the diverging voting records of the two Parties are a clear indication of the opposing views of the Parties. The United Kingdom has constantly voted against three UNGA resolutions relating to the obligation recognized in the Advisory Opinion and/or commencement of multilateral negotiations on nuclear disarmament that the Marshall Islands voted for[14]. By voting against these resolutions, the United Kingdom confirms that it ignores the Advisory Opinion and gives a different interpretation to the prescriptions contained in article VI of the NPT and in the corresponding customary international rule[15].

23 March 2016

Phon van den Biesen
Co-Agent of the Republic of the Marshall Islands
before the International Court of Justice

[14] See CR 2016/9, paras. 2 and 11 (van den Biesen), referring to A/RES/68/32, 5 December 2013 (137-38-20), Follow-up to the 2013 high-level meeting of the General Assembly on nuclear disarmament; A/RES/68/42, 5 December 2013 (133-24-25), Follow-up to the advisory opinion of the International Court of Justice on the legality of the threat or use of nuclear weapons; A/RES/68/47, 5 December 2013 (122-44-17), Nuclear disarmament. The three resolutions were also adopted in 2014 and 2015. See A/RES/69/58, 2 December 2014 (139-24-19), Follow-up to the 2013 high-level meeting of the General Assembly on nuclear disarmament; A/RES/69/43, 2 December 2014 (134-23-23), Follow-up to the advisory opinion of the International Court of Justice on the legality of the threat or use of nuclear weapons; A/RES/69/48, 2 December 2014 (121-44-17), Nuclear disarmament; A/RES/70/34, 7 December 2015 (140-26-17), Follow-up to the 2013 high-level meeting of the General Assembly on nuclear disarmament; A/RES/70/56, 7 December 2015 (137-24-25), Follow-up to the advisory opinion of the International Court of Justice on the legality of the threat or use of nuclear weapons; A/RES/70/52, 7 December 2015 (127-43-15), Nuclear disarmament.

[15] For UK statements, see CR 2016/9 (van den Biesen – answer to Judge Bennouna's question), para. 11.