INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

OBLIGATIONS CONCERNING NEGOTIATIONS RELATING TO CESSATION OF THE NUCLEAR ARMS RACE AND TO NUCLEAR DISARMAMENT

(MARSHALL ISLANDS *v.* PAKISTAN)

JURISDICTION AND ADMISSIBILITY

JUDGMENT OF 5 OCTOBER 2016

2016

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

OBLIGATIONS RELATIVES À DES NÉGOCIATIONS CONCERNANT LA CESSATION DE LA COURSE AUX ARMES NUCLÉAIRES ET LE DÉSARMEMENT NUCLÉAIRE

(ÎLES MARSHALL c. PAKISTAN)

COMPÉTENCE ET RECEVABILITÉ

ARRÊT DU 5 OCTOBRE 2016

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JUDGMENT

Present: *President* ABRAHAM; *Vice-President* YUSUF; *Judges* OWADA, TOMKA, BENNOUNA, CANÇADO TRINDADE, GREENWOOD, XUE, DONOGHUE, GAJA, SEBUTINDE, BHANDARI, ROBINSON, CRAWFORD, GEVORGIAN; *Judge* ad hoc BEDJAOUI; *Registrar* COUVREUR.

In the case regarding obligations concerning negotiations relating to cessation of the nuclear arms race and to nuclear disarmament,

between

the Republic of the Marshall Islands,

represented by

H.E. Mr. Tony A. deBrum, Minister for Foreign Affairs of the Republic of the Marshall Islands,
Mr. Phon van den Biesen, Attorney at Law, van den Biesen Kloostra Advocaten, Amsterdam,

as Co-Agents;

Ms Deborah Barker-Manase, Chargé d'affaires a.i. and Deputy Permanent Representative of the Republic of the Marshall Islands to the United Nations, New York,

as Member of the delegation;

Ms Laurie B. Ashton, Attorney, Seattle,
Mr. Nicholas Grief, Professor of Law, University of Kent, member of the English Bar,

Mr. Luigi Condorelli, Professor of International Law, University of Florence, Honorary Professor of International Law, University of Geneva,
Mr. Paolo Palchetti, Professor of International Law, University of Macerata,
Mr. John Burroughs, New York,
Ms Christine Chinkin, Emerita Professor of International Law, London School of Economics, member of the English Bar,
Mr. Roger S. Clark, Board of Governors Professor, Rutgers Law School, New Jersey,

as Counsel and Advocates;

Mr. David Krieger, Santa Barbara,
Mr. Peter Weiss, New York,
Mr. Lynn Sarko, Attorney, Seattle,

as Counsel;

Ms Amanda Richter, member of the English Bar,
Ms Sophie Elizabeth Bones, LL.B., LL.M.,
Mr. J. Dylan van Houcke, LL.B., LL.M., Ph.D. Candidate, Birkbeck, University of London,
Mr. Loris Marotti, Ph.D. Candidate, University of Macerata,
Mr. Lucas Lima, Ph.D. Candidate, University of Macerata,
Mr. Rob van Riet, London,
Ms Alison E. Chase, Attorney, Santa Barbara,

as Assistants;

Mr. Nick Ritchie, Lecturer in International Security, University of York,

as Technical Adviser,

and

the Islamic Republic of Pakistan,

represented by

H.E. Mr. Moazzam Ahmad Khan, Ambassador of the Islamic Republic of Pakistan to the Kingdom of the Netherlands,

as Co-Agent (until 27 September 2016);

H.E. Ms Iffat Imran Gardezi, Ambassador of the Islamic Republic of Pakistan to the Kingdom of the Netherlands,

as Co-Agent (from 27 September 2016);

Mr. Ahmer Bilal Soofi, Advocate, Supreme Court of Pakistan,

as Co-Agent,

THE COURT,

composed as above,

after deliberation,

delivers the following Judgment:

1. On 24 April 2014, the Government of the Republic of the Marshall Islands (hereinafter the "Marshall Islands" or the "Applicant") filed in the Registry

of the Court an Application instituting proceedings against the Islamic Republic of Pakistan (hereinafter "Pakistan" or the "Respondent"), in which it claimed that:

> "13. Pakistan has not fulfilled its obligation under customary international law to pursue in good faith negotiations to cease the nuclear arms race at an early date, and instead is taking actions to improve and expand its nuclear forces and to maintain them for the indefinite future.
>
> 14. Similarly, Pakistan has not fulfilled its obligation under customary international law to pursue in good faith negotiations leading to nuclear disarmament in all its aspects under strict and effective international control, in particular by engaging a course of conduct, the quantitative build-up and qualitative improvement of its nuclear forces, contrary to the objective of nuclear disarmament."

In its Application, the Marshall Islands seeks to found the jurisdiction of the Court on the declarations made, pursuant to Article 36, paragraph 2, of the Statute of the Court, by Pakistan on 12 September 1960 (deposited with the Secretary-General of the United Nations on 13 September 1960), and by the Marshall Islands on 15 March 2013 (deposited with the Secretary-General on 24 April 2013).

2. In accordance with Article 40, paragraph 2, of the Statute, the Registrar immediately communicated the Application to the Government of Pakistan; and, under paragraph 3 of that Article, he notified all other States entitled to appear before the Court of the Application.

3. In accordance with Article 31, paragraph 3, of the Statute, the Marshall Islands chose Mr. Mohammed Bedjaoui to sit as judge *ad hoc* in the case. The Government of Pakistan did not exercise its right under the same Article to choose a judge *ad hoc*.

4. By a Note Verbale dated 9 July 2014, received in the Registry the same day, the Pakistani Government indicated, *inter alia*, that "Pakistan is of the considered opinion that the ICJ lacks jurisdiction . . . and considers the . . . Application inadmissible", and requested the Court "to dismiss this Application *in limine*". At the meeting held by the President of the Court later the same day with the representatives of the Parties, pursuant to Article 31 of the Rules of Court, those representatives made known the views of their respective Governments with regard to questions of procedure in the case, in particular in the light of the above-mentioned Note Verbale.

5. By an Order of 10 July 2014, the President of the Court held, pursuant to Article 79, paragraph 2, of the Rules of Court, that, in the circumstances of the case, it was necessary first of all to resolve the questions of the Court's jurisdiction and the admissibility of the Application, and that these questions should accordingly be separately determined before any proceedings on the merits; to that end, the President decided that the written pleadings should first be addressed to the said questions, and fixed 12 January 2015 and 17 July 2015 as the respective time-limits for the filing of a Memorial by the Marshall Islands and a Counter-Memorial by Pakistan. The Memorial of the Marshall Islands was filed within the time-limit thus prescribed.

6. By a letter dated 1 April 2015, the Government of the United Kingdom of Great Britain and Northern Ireland, referring to Article 53, paragraph 1, of the Rules of Court, asked to be furnished with copies of the pleadings and documents annexed in the case. Having ascertained the views of the Parties pursuant

to that same provision, the Court decided not to grant this request. By letters dated 13 July 2015, the Registrar duly informed the Government of the United Kingdom and the Parties of that decision.

By a letter dated 26 November 2015, the Government of the Republic of India, referring to Article 53, paragraph 1, of the Rules of Court, asked to be furnished with copies of the pleadings and documents annexed in the case. Having ascertained the views of the Parties pursuant to that same provision, the Court decided not to grant this request. By letters dated 26 February 2016, the Registrar duly informed the Government of India and the Parties of that decision.

7. By a Note Verbale dated 2 July 2015, Pakistan requested a six-month extension of the time-limit for the filing of its Counter-Memorial. By a letter dated 8 July 2015, the Marshall Islands stated that it could agree to a three-month extension of the time-limit. By an Order of 9 July 2015, the President of the Court extended to 1 December 2015 the time-limit for the filing of Pakistan's Counter-Memorial. That pleading was duly filed within the time-limit thus extended.

8. By a letter dated 2 March 2016, Pakistan informed the Court that it would not be participating in the oral proceedings on jurisdiction and admissibility, stating in particular that it "does not feel that its participation in the oral proceedings will add anything to what has already been submitted through its Counter-Memorial".

9. Pursuant to Article 53, paragraph 2, of the Rules of Court, the Court, after ascertaining the views of the Parties, decided that copies of the pleadings and documents annexed would be made accessible to the public on the opening of the oral proceedings.

10. A public hearing on the questions of the jurisdiction of the Court and the admissibility of the Application was held on Tuesday 8 March 2016, at which the Court heard the oral arguments of:

For the Marshall Islands: H.E. Mr. Tony deBrum,
Mr. Phon van den Biesen,
Mr. Nicholas Grief,
Mr. Luigi Condorelli,
Ms Laurie B. Ashton,
Mr. Roger S. Clark,
Mr. Paolo Palchetti,
Mr. John Burroughs.

*

11. In the Application, the following claims were made by the Marshall Islands:

> "On the basis of the foregoing statement of facts and law, the Republic of the Marshall Islands requests the Court
>
> *to adjudge and declare*
>
> *(a)* that Pakistan has violated and continues to violate its international obligations under customary international law, by failing to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international

control, in particular by engaging a course of conduct, the quantitative buildup and qualitative improvement of its nuclear forces, contrary to the objective of nuclear disarmament;

(b) that Pakistan has violated and continues to violate its international obligations under customary international law with respect to cessation of the nuclear arms race at an early date, by taking actions to quantitatively build up its nuclear forces, to qualitatively improve them, and to maintain them for the indefinite future, and by blocking negotiations on a Fissile Materials Cut-off Treaty;

(c) that Pakistan has failed and continues to fail to perform in good faith its obligations under customary international law by taking actions to quantitatively build up its nuclear forces, to qualitatively improve them, and to maintain them for the indefinite future, and by blocking negotiations on a Fissile Materials Cut-off Treaty; and

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

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

to order

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

12. In the written proceedings, the following submissions were presented by the Parties:

On behalf of the Government of the Marshall Islands,

in the Memorial on the questions of the jurisdiction of the Court and the admissibility of the Application:

"In accordance with the Order of the Court of 10 July 2014, this Memorial is restricted to questions of jurisdiction and admissibility raised by Pakistan. As for the merits of the case, the Applicant maintains its Submissions, including the Remedies requested, as set out in the Application of 24 April 2014. For further stages of the procedure the Applicant reserves its right to clarify, modify and/or amend these Submissions.

On the basis of the foregoing statements of facts and law, the Republic of the Marshall Islands requests the Court to adjudge and declare that it has jurisdiction with respect to the present case and that the Application is admissible."

On behalf of the Government of Pakistan,

in the Counter-Memorial on the questions of the jurisdiction of the Court and the admissibility of the Application:

> "The Government of the Islamic Republic of Pakistan respectfully submits that the Court should adjudge and declare, for each and all of the foregoing reasons, that the claims set forth in the [Marshall Islands'] Application of 24 April 2014 (1) are not within the jurisdiction of the Court and (2) are inadmissible."

13. In the oral proceedings, the following submissions were presented by the Government of the Marshall Islands at the hearing of 8 March 2016:

> "The Marshall Islands respectfully requests the Court:
>
> *(a)* to reject the objections to its jurisdiction and to the admissibility of the Marshall Islands' claims, as submitted by Pakistan in its Counter-Memorial of 1 December 2015;
> *(b)* to adjudge and declare that the Court has jurisdiction over the claims of the Marshall Islands submitted in its Application of 24 April 2014; and
> *(c)* to adjudge and declare that the Marshall Islands' claims are admissible."

* * *

I. Introduction

A. Historical Background

14. Since the creation of the United Nations, and in line with its Purposes under Article 1 of the Charter, the issue of disarmament has been central to the Organization's concerns. In this regard, the Charter gives three separate bodies a role in international disarmament efforts: the General Assembly (Art. 11, para. 1), the Security Council (Art. 26) and the Military Staff Committee (Art. 47, para. 1). The General Assembly has been active in the field of international disarmament generally and nuclear disarmament in particular. With respect to international disarmament generally, the General Assembly created the first United Nations Disarmament Commission under the Security Council in 1952 (resolution 502 (VI) of 11 January 1952). In 1978, it held a Special Session on disarmament, at which it established the current United Nations disarmament mechanisms consisting of: the First Committee of the General Assembly, the mandate of which was redefined to deal exclusively with questions of disarmament and related international security questions; a new Disarmament Commission as a subsidiary organ of the General Assembly, composed of all Member States of the United Nations (replacing the United Nations Disarmament Commission created in 1952); and a Committee on Disarmament devoted to negotiations (resolution S-10/2 of 30 June 1978, paras. 117, 118 and 120). The latter was redesignated the

Conference on Disarmament with effect from 1984 (General Assembly resolution 37/99 K, Part II, of 13 December 1982; Report of the Committee on Disarmament to the United Nations General Assembly, 1 September 1983, doc. CD/421, para. 21) and now consists of 65 members.

With respect to nuclear disarmament efforts in particular, it may be recalled that, in its very first resolution, unanimously adopted on 24 January 1946, the General Assembly established a Commission to deal with "the problems raised by the discovery of atomic energy" (resolution 1 (I) of 24 January 1946; this Commission was dissolved in 1952 when the first United Nations Disarmament Commission, mentioned above, was established). As early as 1954, the General Assembly also called for a convention on nuclear disarmament (resolution 808 (IX) A of 4 November 1954) and has repeated this call in many subsequent resolutions. In addition, the mechanisms set out above, created by the General Assembly in view of general international disarmament efforts, have also dealt specifically with questions of nuclear disarmament.

15. By resolution 21 of 2 April 1947, the United Nations Security Council placed a group of Pacific Islands, including those making up the present-day Marshall Islands, under the trusteeship system established by the United Nations Charter, and designated the United States of America as the Administering Authority. From 1946 to 1958, while under this trusteeship, the Marshall Islands was the location of repeated nuclear weapons testing. By resolution 683 of 22 December 1990, the Security Council terminated the Trusteeship Agreement concerning the Marshall Islands. By General Assembly resolution 46/3 of 17 September 1991, the Marshall Islands was admitted to membership in the United Nations.

16. The Respondent gained independence on 14 August 1947. By General Assembly resolution 108 (II) of 30 September 1947, Pakistan was admitted to membership in the United Nations. Pakistan conducted at least two nuclear tests on 28 and 30 May 1998, and is known to possess nuclear weapons.

17. Following extensive negotiations in the 1960s, in which both nuclear-weapon States and non-nuclear-weapon States participated, the Treaty on the Non-Proliferation of Nuclear Weapons (hereinafter "NPT") was opened for signature on 1 July 1968. It entered into force on 5 March 1970 and was extended indefinitely in 1995. Review conferences have been held every five years since its entry into force, pursuant to Article VIII, paragraph 3, of the NPT. One hundred and ninety-one States have become parties to the NPT; on 10 January 2003, the Democratic People's Republic of Korea announced its withdrawal. The Marshall Islands acceded to the NPT on 30 January 1995; Pakistan has not become a party to it.

18. The NPT seeks to limit the proliferation of nuclear weapons and provides certain rights and obligations for parties designated as "nuclear-weapon State Part[ies]" and "non-nuclear-weapon State Part[ies]" (including, *inter alia*, the right of all States to develop and use nuclear energy for peaceful purposes, the obligation of nuclear-weapon States parties not to transfer nuclear weapons to any recipient, and the obligation of non-nuclear-weapon States parties not to receive such a transfer). The preamble to the NPT also declares the intention of the parties "to achieve at the earliest possible date the cessation of the nuclear arms race and to undertake effective measures in the direction of nuclear disarmament". In this connection, Article VI of the NPT 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."

For the purposes of the NPT, a "nuclear-weapon State is one which has manufactured and exploded a nuclear weapon or other nuclear explosive device prior to 1 January 1967" (Article IX.3). There are five nuclear-weapon States under the NPT: China, France, the Russian Federation, the United Kingdom and the United States of America. In addition to Pakistan — which, as noted above (see paragraph 17), is not party to the NPT — certain other States possess, or are believed to possess, nuclear weapons.

19. By resolution 49/75 K of 15 December 1994, the General Assembly requested the International Court of Justice to give an advisory opinion on whether the threat or use of nuclear weapons is permitted in any circumstance under international law. In the reasoning of its Advisory Opinion of 8 July 1996, the Court appreciated "the full importance of the recognition by Article VI of the [NPT] of an obligation to negotiate in good faith a nuclear disarmament" (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 263, para. 99). It added that this obligation went "beyond . . . a mere obligation of conduct" and was 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" (*ibid.*, p. 264, para. 99). The Court stated that "[t]his twofold obligation to pursue and to conclude negotiations formally concerns [all] States parties to the [NPT], or, in other words, the vast majority of the international community", adding that "any realistic search for general and complete disarmament, especially nuclear disarmament, necessitates the co-operation of all States" (*ibid.*, para. 100). In the conclusions of the Advisory Opinion, the Court unanimously declared 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" (*I.C.J. Reports 1996 (I)*, p. 267, para. 105 (2) F).

20. In its resolution 51/45 M of 10 December 1996, the General Assembly "[u]nderline[d] the unanimous conclusion of the Court 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

> "[c]all[ed] upon all States to fulfil that obligation immediately by commencing multilateral negotiations in 1997 leading to an early conclusion of a nuclear-weapons convention prohibiting the development, production, testing, deployment, stockpiling, transfer, threat or use of nuclear weapons and providing for their elimination".

The General Assembly has passed a similar resolution on the follow-up to the Court's Advisory Opinion every year since then. It has also passed numerous other resolutions encouraging nuclear disarmament.

B. Proceedings Brought before the Court

21. On 24 April 2014, the Marshall Islands filed, in addition to the present Application (see paragraph 1 above), separate applications against the eight other States which, according to the Marshall Islands, possess nuclear weapons (China, the Democratic People's Republic of Korea, France, India, Israel, the Russian Federation, the United Kingdom of Great Britain and Northern Ireland and the United States of America), also alleging a failure to fulfil obligations concerning negotiations relating to the cessation of the nuclear arms race at an early date and to nuclear disarmament. The cases against India, Pakistan and the United Kingdom of Great Britain and Northern Ireland were entered in the Court's General List, as the Applicant had invoked these States' declarations recognizing the compulsory jurisdiction of the Court (pursuant to Article 36, paragraph 2, of the Statute of the Court) as a basis for jurisdiction. In the applications against China, the Democratic People's Republic of Korea, France, Israel, the Russian Federation and the United States of America, the Marshall Islands invited these States to accept the jurisdiction of the Court, as contemplated in Article 38, paragraph 5, of the Rules of Court, for the purposes of the case. None of these States has done so. Accordingly, these applications were not entered in the Court's General List.

22. In its Note Verbale dated 9 July 2014 (see paragraph 4 above) and in its Counter-Memorial, Pakistan raised several objections to the Court's jurisdiction or the admissibility of the Application. In particular, it argues that:

— the Marshall Islands has failed to show that there was, at the time of the filing of the Application, a legal dispute between the Parties with

respect to an alleged failure to pursue negotiations in good faith towards the cessation of the nuclear arms race at an early date and nuclear disarmament;
— the Court's jurisdiction is precluded by a number of reservations in the Parties' declarations under Article 36, paragraph 2, of the Statute;
— the Court is prevented from exercising its jurisdiction in this case, on account of the absence from the proceedings of "indispensable parties", in particular the other States possessing nuclear weapons;
— the Marshall Islands does not have standing to bring the claims formulated in the Application; and
— the Application is inadmissible for other reasons, for instance because a judgment on the merits in the present case would be devoid of any practical legal effect.

23. In its Memorial and its final submissions presented during the oral proceedings, the Marshall Islands requested the Court to reject the objections of Pakistan in their entirety and to find that it has jurisdiction and that the Application is admissible (see paragraphs 12 and 13 above).

24. The Court will first consider the objection based on the absence of a dispute.

* * *

II. The Objection Based on the Absence of a Dispute

25. The Marshall Islands claims there exists a legal dispute between itself and Pakistan concerning the latter's failure to comply with what the Applicant maintains is a customary law obligation to pursue in good faith, and to bring to a conclusion, negotiations leading to nuclear disarmament in all its aspects under strict and effective international control, as well as a customary law obligation concerning the cessation of the nuclear arms race at an early date.

26. The Marshall Islands contends that the Parties' statements and conduct before and after the filing of the Application demonstrate the existence of such a dispute. It recalls that, prior to seising the Court on 24 April 2014, it had called on nuclear-weapon States to abide by their obligation to negotiate towards nuclear disarmament. The Marshall Islands refers in particular to two statements. The first one was made on 26 September 2013 at the High-Level Meeting of the General Assembly on Nuclear Disarmament, when its Minister for Foreign Affairs "urge[d] all nuclear weapons states to intensify efforts to address their responsibilities in moving towards an effective and secure disarmament".

The second one was made by its representative at Nayarit, Mexico, on 13 February 2014, in the context of the Second Conference on the Humanitarian Impact of Nuclear Weapons. This second statement, which the Marshall Islands regards as clearly demonstrating the content of its claim against all States possessing nuclear arsenals, reads as follows:

> "[T]he Marshall Islands is convinced that multilateral negotiations on achieving and sustaining a world free of nuclear weapons are long overdue. Indeed we believe that States possessing nuclear arsenals are failing to fulfil their legal obligations in this regard. Immediate commencement and conclusion of such negotiations is required by legal obligation of nuclear disarmament resting upon each and every State under Article VI of the Non-Proliferation Treaty and customary international law."

The Marshall Islands maintains that, by this public statement, made in the context of an international conference in the presence of Pakistan, the latter "was made aware that the [Marshall Islands] believed that its failure to seriously engage in multilateral negotiations amounted to a breach of its international obligations under customary international law". In its view, this statement, as well as the overall position it has taken on the issue of nuclear disarmament in recent years, is clear evidence that the Marshall Islands had raised a dispute "with each and every one of the States possessing nuclear weapons, including with Pakistan".

27. The Marshall Islands adds that Pakistan has explicitly disputed the claim that it was under any international obligation regarding nuclear disarmament in the current proceedings. It argues that, by expressing its opposition to the Marshall Islands before the Court, Pakistan has confirmed the existence of a legal dispute between the Parties. In this connection, the Marshall Islands avers that, according to the Court's established case law, while the "dispute must in principle exist at the time the Application is submitted", it may also be evidenced by the positions of the parties before the Court (e.g., *Certain Property (Liechtenstein* v. *Germany), Preliminary Objections, Judgment, I.C.J. Reports 2005*, p. 19, para. 25; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 317, para. 93; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, pp. 614-615, para. 29). It also suggests that the Court's use of the phrase "in principle" leaves open the possibility that a legal dispute could even come into being after a party seises the Court. Nevertheless, the Marshall Islands considers that, at the moment of the filing of the Application in the present case, a legal dispute already existed.

28. The Marshall Islands further contends that Pakistan has opposed the claims made against it by its conduct. In particular, the Applicant maintains that, while the Respondent has "frequently" reaffirmed in public statements its commitment to nuclear disarmament, it has in fact engaged in a course of conduct consisting of the "quantitative build-up" and the "qualitative improvement" of its nuclear arsenal. In its Application, the Marshall Islands also refers to Pakistan's alleged blockage of negotiations on a Fissile Materials Cut-off Treaty.

29. The Marshall Islands rejects the existence of any rule or principle of international law that requires the exhaustion of negotiations or any other forms of communication before seising the Court. It adds that Pakistan was informed of the claim prior to the filing of the Application through the public statements of the Marshall Islands' representatives (in particular those made at Nayarit in February 2014), as explained above.

*

30. Pakistan, for its part, considers that there was no legal dispute with the Marshall Islands at the time the Application was filed. In Pakistan's view, the Marshall Islands has failed to set out any claims with sufficient clarity for Pakistan to have been aware of the existence of a dispute with the Applicant.

31. In particular, Pakistan contends that the "brief" statements made by the Marshall Islands on 26 September 2013 and on 13 February 2014 (see paragraph 26 above) were not directed specifically at Pakistan and did not identify the subject-matter of any dispute between them. In addition, Pakistan notes the inconsistency in the positions taken by the Marshall Islands at the General Assembly in respect of nuclear disarmament: while Pakistan voted in favour of the resolutions entitled "Follow-up to the Advisory Opinion of the International Court of Justice in the *Legality of the Threat or Use of Nuclear Weapons*", the Marshall Islands abstained from voting on several occasions before 2013.

32. Pakistan also notes the absence of any relevant diplomatic exchanges between the Parties prior to the seisin of the Court. In its view, this demonstrates that no positively opposed claims exist in the present case. Recognizing that the determination of whether a dispute exists is a matter of substance and not of form, the Respondent nonetheless contends that in every case in which the Court has found a dispute to exist, it has been possible for it to point to some prior correspondence, communication or negotiation between the parties on the issues in dispute. Moreover, recalling the Court's decision in the *Georgia* v. *Russia* case (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 84, para. 30), Pakistan claims that the exchanges between the Parties must be sufficiently

clear in order for the Respondent to identify the existence of a dispute. Since no such exchange took place in the present case, a dispute between the Marshall Islands and Pakistan could not have arisen or "crystallized" as a consequence of, or after, the Application. Pakistan further criticizes the Marshall Islands' reliance on the Court's Judgment in *Cameroon* v. *Nigeria*, in which the Court affirmed that the existence of a dispute could be inferred from the conduct of the parties regardless of their professed views (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 315, para. 89). According to Pakistan, that Judgment was rendered in a different context and is not relevant in the present case.

* *

33. Under Article 38 of the Statute, the function of the Court is to decide in accordance with international law disputes that States submit to it. Under Article 36, paragraph 2, of the Statute, the Court has jurisdiction in all "legal disputes" that may arise between States parties to the Statute having made a declaration in accordance with that provision. The existence of a dispute between the Parties is thus a condition of the Court's jurisdiction.

34. According to the established case law of the Court, a dispute is "a disagreement on a point of law or fact, a conflict of legal views or of interests" between parties (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11). In order for a dispute to exist, "[i]t must be shown that the claim of one party is positively opposed by the other" (*South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328). The two sides must "'hold clearly opposite views concerning the question of the performance or non-performance of certain' international obligations" (*Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 26, para. 50, citing *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 74).

35. The Court's determination of the existence of a dispute is a matter of substance, and not a question of form or procedure (cf. *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 84, para. 30; *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów) (Germany* v. *Poland), Judgment No. 11, 1927, P.C.I.J., Series A, No. 13*, pp. 10-11). Prior negotiations are not required where the Court has been seised on the basis of declarations made pursuant to Article 36, paragraph 2, of its Statute, unless one of the relevant declarations so provides (*Land and Maritime Boundary between*

Cameroon and Nigeria (Cameroon v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 322, para. 109). Moreover, "although a formal diplomatic protest may be an important step to bring a claim of one party to the attention of the other, such a formal protest is not a necessary condition" for the existence of a dispute (*Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 32, para. 72). Similarly, notice of an intention to file a case is not required as a condition for the seisin of the Court (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 297, para. 39).

36. Whether a dispute exists is a matter for objective determination by the Court which must turn on an examination of the facts (*Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 26, para. 50). For that purpose, the Court takes into account in particular any statements or documents exchanged between the parties (*Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012 (II)*, pp. 443-445, paras. 50-55), as well as any exchanges made in multilateral settings (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 94, para. 51; p. 95, para. 53). In so doing, it pays special attention to "the author of the statement or document, their intended or actual addressee, and their content" (*ibid.*, p. 100, para. 63).

37. The conduct of the parties may also be relevant, especially when there have been no diplomatic exchanges (*Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 32-33, paras. 71 and 73). As the Court has affirmed,

> "a disagreement on a point of law or fact, a conflict of legal views or interests, or the positive opposition of the claim of one party by the other need not necessarily be stated *expressis verbis* . . . [T]he position or the attitude of a party can be established by inference, whatever the professed view of that party." (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 315, para. 89.)

In particular, the Court has previously held that "the existence of a dispute may be inferred from the failure of a State to respond to a claim in circumstances where a response is called for" (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation)*, *Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 84, para. 30, citing *Land and Maritime Bound-*

ary between Cameroon and Nigeria (Cameroon v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 315, para. 89).

38. The evidence must show that the parties "hold clearly opposite views" with respect to the issue brought before the Court (see paragraph 34 above). As reflected in previous decisions of the Court in which the existence of a dispute was under consideration, a dispute exists when it is demonstrated, on the basis of the evidence, that the respondent was aware, or could not have been unaware, that its views were "positively opposed" by the applicant (*Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 32, para. 73; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 99, para. 61, pp. 109-110, para. 87, p. 117, para. 104).

39. In principle, the date for determining the existence of a dispute is the date on which the application is submitted to the Court (*Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 27, para. 52; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 85, para. 30). Indeed, when it is stated in Article 38, paragraph 1, of the Court's Statute that the Court's function is "to decide in accordance with international law such disputes as are submitted to it", this relates to disputes existing at the time of their submission.

40. Conduct subsequent to the application (or the application itself) may be relevant for various purposes, in particular to confirm the existence of a dispute (*East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 100, para. 22 and p. 104, para. 32), to clarify its subject-matter (*Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile), Preliminary Objection, Judgment, I.C.J. Reports 2015 (II)*, p. 602, para. 26) or to determine whether the dispute has disappeared as of the time when the Court makes its decision (*Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, pp. 270-271, para. 55; *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 476, para. 58).

However, neither the application nor the parties' subsequent conduct and statements made during the judicial proceedings can enable the Court to find that the condition of the existence of a dispute has been fulfilled in the same proceedings (*Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012 (II)*, pp. 444-445, paras. 53-55). If the Court had jurisdiction with regard to disputes resulting from exchanges in the proceedings before it, a respondent would be deprived of the opportunity to react before the institution of proceedings to the claim made against its own conduct. Furthermore,

the rule that the dispute must in principle exist prior to the filing of the application would be subverted.

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41. The Court notes that the Marshall Islands, by virtue of the suffering which its people endured as a result of it being used as a site for extensive nuclear testing programs, has special reasons for concern about nuclear disarmament (see paragraph 15 above). But that fact does not remove the need to establish that the conditions for the Court's jurisdiction are met. While it is a legal matter for the Court to determine whether it has jurisdiction, it remains for the Applicant to demonstrate the facts underlying its case that a dispute exists (*Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 75, para. 16).

42. As noted above at paragraph 32, Pakistan relies on the fact that the Marshall Islands did not commence negotiations or give notice to it of the claim that is the subject of the Application to support its contention that there is no dispute between the Parties. However, the Court has rejected the view that notice or prior negotiations are required where it has been seised on the basis of declarations made pursuant to Article 36, paragraph 2, of the Statute, unless one of those declarations so provides. The Court's jurisprudence treats the question of the existence of a dispute as a jurisdictional one that turns on whether there is, in substance, a dispute, not on what form that dispute takes or whether the respondent has been notified (see paragraph 35 above).

43. The Marshall Islands seeks to demonstrate that it had a dispute with Pakistan in essentially three ways. First, it refers to its own statements, as formulated in multilateral fora. Secondly, it argues that the very filing of the Application, as well as the positions expressed by the Parties in the current proceedings, show the existence of a dispute between the Parties. Thirdly, it relies on Pakistan's conduct both before and after the filing of the Application.

44. The Marshall Islands does not refer to any bilateral diplomatic exchanges or official communications between it and Pakistan, or to any bilateral consultations or negotiations that have taken place, concerning the alleged breach of Pakistan's obligations.

45. The Marshall Islands refers to two statements made in multilateral fora before the date of the filing of its Application which, in its view, suffice to establish the existence of a dispute. As the Court has already explained, the opposition of the Parties' views could also be demonstrated by exchanges made in multilateral settings (see paragraph 36 above). In such a setting, however, the Court must give particular attention, *inter*

alia, to the content of a party's statement and to the identity of the intended addressees, in order to determine whether that statement, together with any reaction thereto, show that the parties before it held "clearly opposite views" (see paragraphs 34 and 36 above). The question in this case is therefore whether the statements invoked by the Marshall Islands are sufficient to demonstrate the existence of such opposition.

46. The Marshall Islands relies on the statement made at the High-Level Meeting of the General Assembly on Nuclear Disarmament, on 26 September 2013 by its Minister for Foreign Affairs, "urg[ing] all nuclear weapons states to intensify efforts to address their responsibilities in moving towards an effective and secure disarmament". However, this statement is formulated in hortatory terms and cannot be understood as an allegation that Pakistan (or any other nuclear power) was in breach of any of its legal obligations. It does not mention the obligation to negotiate, nor does it say that the nuclear-weapon States are failing to meet their obligations in this regard. It suggests that they are making "efforts" to address their responsibilities, and calls for an intensification of those efforts, rather than deploring a failure to act. Moreover, a statement can give rise to a dispute only if it refers to the subject-matter of a claim "with sufficient clarity to enable the State against which [that] claim is made to identify that there is, or may be, a dispute with regard to that subject-matter" (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 85, para. 30). While the Court reached that conclusion in the context of a compromissory clause, the same reasoning applies to a dispute over a customary international law obligation regardless of the underlying jurisdictional basis alleged, since the Court made clear that it was dealing with the requirements of a dispute in general (*ibid.*, p. 84, para. 29). The 2013 statement relied upon by the Marshall Islands does not meet these requirements.

47. The statement made by the Marshall Islands at the Nayarit conference on 13 February 2014 (see paragraph 26 above) goes further than the 2013 statement, in that it contains a sentence asserting that "States possessing nuclear arsenals are failing to fulfil their legal obligations" under Article VI of the NPT and customary international law. Pakistan was present at the Nayarit conference. However, the subject of the conference was not specifically the question of negotiations with a view to nuclear disarmament, but the broader question of the humanitarian impact of nuclear weapons, and while this statement contains a general criticism of the conduct of all nuclear-weapon States, it does not specify the conduct of Pakistan that gave rise to the alleged breach. Such a specification would have been particularly necessary if, as the Marshall Islands con-

tends, the Nayarit statement was aimed at invoking the international responsibility of the Respondent on the grounds of a course of conduct which had remained unchanged for many years. Given its very general content and the context in which it was made, that statement did not call for a specific reaction by Pakistan. Accordingly, no opposition of views can be inferred from the absence of any such reaction. The Nayarit statement is insufficient to bring into existence, between the Marshall Islands and Pakistan, a specific dispute as to the existence or scope of the asserted customary international law obligations to pursue in good faith, and to bring to a conclusion, negotiations leading to nuclear disarmament in all its aspects under strict and effective international control, as well as to cease the nuclear arms race at an early date, or as to Pakistan's compliance with any such obligations.

48. In all the circumstances, on the basis of those statements — whether taken individually or together — it cannot be said that Pakistan was aware, or could not have been unaware, that the Marshall Islands was making an allegation that Pakistan was in breach of its obligations.

49. Secondly, the Marshall Islands argues that the very filing of the Application could suffice to establish the existence of a dispute. It also points to other statements made in the course of the proceedings by both Parties as evidence of their opposition of views.

50. The Marshall Islands relies on three cases in support of its contention that the statements made by the Parties during the proceedings may serve to evidence the existence of a dispute (see paragraph 27 above). However, these cases do not support this contention. In the case concerning *Certain Property*, the existence of a dispute was clearly referenced by bilateral exchanges between the parties prior to the date of the Application (*Certain Property (Liechtenstein* v. *Germany), Preliminary Objections, Judgment, I.C.J. Reports 2005*, p. 19, para. 25). The reference to subsequent materials in the *Cameroon* v. *Nigeria* case related to the scope of the dispute, not to its existence (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 317, para. 93). Moreover, while it is true that the Court did not explicitly reference any evidence before the filing of the application demonstrating the existence of a dispute in its Judgment in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia)*, in the particular context of that case, which involved an ongoing armed conflict, the prior conduct of the parties was sufficient to establish the existence of a dispute (*Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 614, paras. 27-29). Instead, the issues the Court focused on were not the date when the dispute arose but the proper subject-matter of that dispute, whether it fell within the scope of the relevant compromissory clause, and whether it "persist[ed]" at the date of the Court's decision. As stated above, although statements made

or claims advanced in or even subsequently to the application may be relevant for various purposes — notably in clarifying the scope of the dispute submitted — they cannot create a dispute *de novo*, one that does not already exist (see paragraph 40 above).

51. Thirdly, the Marshall Islands argues that, irrespective of verbal support for negotiations on nuclear disarmament on the part of Pakistan, its actual conduct in maintaining and upgrading its nuclear arsenal, and in failing to co-operate with certain diplomatic initiatives, allows the Court to infer the existence of a dispute as to the scope of and compliance with its obligations, even if such a dispute had not, prior to the Application, been articulated in legal terms by the Marshall Islands.

52. The Court recalls that the question whether there is a dispute in a particular contentious case turns on the evidence of opposition of views (see paragraphs 34, 36 and 37 above). In this regard, the conduct of a respondent can contribute to a finding by the Court that the views of the parties are in opposition (see paragraph 37 above). However, as the Court has previously concluded (see paragraphs 46-48 above), in the present case neither of the statements that were made in a multilateral context by the Marshall Islands offered any particulars regarding Pakistan's conduct. On the basis of such statements, it cannot be said that Pakistan was aware, or could not have been unaware, that the Marshall Islands was making an allegation that Pakistan was in breach of its obligations. In this context, the conduct of Pakistan does not provide a basis for finding a dispute between the two States before the Court.

53. Finally, regarding Pakistan's argument based on the Parties' voting records on General Assembly resolutions on nuclear disarmament (see paragraph 31 above), the Court notes that considerable care is required before inferring from votes cast on resolutions before political organs such as the General Assembly conclusions as to the existence or not of a legal dispute on some issue covered by a resolution. The wording of a resolution, and votes or patterns of voting on resolutions of the same subject-matter, may constitute relevant evidence of the existence of a dispute in some circumstances, particularly where statements were made by way of explanation of vote. However, some resolutions contain a large number of different propositions; a State's vote on such resolutions cannot by itself be taken as indicative of the position of that State on each and every proposition within that resolution, let alone of the existence of a legal dispute between that State and another State regarding one of those propositions.

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54. The Court therefore concludes that the first objection made by Pakistan must be upheld. It follows that the Court does not have jurisdiction under Article 36, paragraph 2, of its Statute.

55. Consequently, it is not necessary for the Court to deal with the other objections raised by Pakistan. The questions of the existence of and extent of customary international law obligations in the field of nuclear disarmament, and Pakistan's compliance with such obligations, pertain to the merits. But the Court has found that no dispute existed between the Parties prior to the filing of the Application, and consequently it lacks jurisdiction to consider these questions.

* * *

56. For these reasons,

THE COURT,

(1) By nine votes to seven,

Upholds the objection to jurisdiction raised by Pakistan, based on the absence of a dispute between the Parties;

IN FAVOUR: *President* Abraham; *Vice-President* Yusuf; *Judges* Owada, Greenwood, Xue, Donoghue, Gaja, Bhandari, Gevorgian;

AGAINST: *Judges* Tomka, Bennouna, Cançado Trindade, Sebutinde, Robinson, Crawford; *Judge* ad hoc Bedjaoui;

(2) By ten votes to six,

Finds that it cannot proceed to the merits of the case.

IN FAVOUR: *President* Abraham; *Vice-President* Yusuf; *Judges* Owada, Tomka, Greenwood, Xue, Donoghue, Gaja, Bhandari, Gevorgian;

AGAINST: *Judges* Bennouna, Cançado Trindade, Sebutinde, Robinson, Crawford; *Judge* ad hoc Bedjaoui.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this fifth day of October, two thousand and sixteen, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Republic of the Marshall Islands and the Government of the Islamic Republic of Pakistan, respectively.

(Signed) Ronny ABRAHAM,
President.

(Signed) Philippe COUVREUR,
Registrar.

President ABRAHAM and Vice-President YUSUF append declarations to the Judgment of the Court; Judges OWADA and TOMKA append separate opinions to the Judgment of the Court; Judges BENNOUNA and CANÇADO TRINDADE append dissenting opinions to the Judgment of the Court; Judges XUE, DONOGHUE and GAJA append declarations to the Judgment of the Court; Judges SEBUTINDE and BHANDARI append separate opinions to the Judgment of the Court; Judges ROBINSON and CRAWFORD append dissenting opinions to the Judgment of the Court; Judge *ad hoc* BEDJAOUI appends a dissenting opinion to the Judgment of the Court.

(Initialled) R.A.
(Initialled) Ph.C.