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H.E. Mr. Philippe Couvreur
Registrar
International Court of Justice
Peace Palace
2517 KJ The Hague

Your Excellency,

Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Republic of Marshall Islands v. United Kingdom)

I have the honour to refer to your letter of 16 March 2016 transmitting the questions addressed by Judge Cançado Trindade to both Parties and Judge Greenwood to the United Kingdom at the end of the public sitting that day.

I further have the honour to enclose the written reply of the Government of the United Kingdom of Great Britain and Northern Ireland to those questions within the deadline requested.

Accept, Sir, the assurances of my highest consideration.

Iain Macleod
Agent of the United Kingdom of Great Britain and Northern Ireland before the International Court of Justice

cc: Ms. Catherine Adams
Deputy Agent of the United Kingdom of Great Britain and Northern Ireland before the International Court of Justice

cc: Mr. Shehzad Charania
Deputy Agent of the United Kingdom of Great Britain and Northern Ireland before the International Court of Justice
The Hague

INTERNATIONAL COURT OF JUSTICE

OBLIGATIONS CONCERNING NEGOTIATIONS RELATING TO CESSATION OF THE NUCLEAR ARMS RACE AND TO NUCLEAR DISARMAMENT (MARSHALL ISLANDS v. UNITED KINGDOM)

Written Reply of the United Kingdom of Great Britain and Northern Ireland to Questions from Judges Cançado Trindade and Greenwood

23 March 2016

Question from Judge Cançado Trindade: "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 the 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.

Response

1. The United Kingdom agrees with Draft Conclusion 13 of the Special Rapporteur of the International Law Commission on the identification of custom. Draft Conclusion 13 reads as follows:

> "*Resolutions of international organizations and conferences*
>
> Resolutions adopted by international organizations or at international conferences may, in some circumstances, be evidence of customary international law or contribute to its development; they cannot, in and of themselves, constitute it."[1]

2. As explained by the Special Rapporteur,[2] whether a particular resolution or a series of resolutions is evidence of custom will depend on the assessment of wide range of factors and circumstances.

3. The United Kingdom has not found the need to conduct any such assessment of the resolutions of the General Assembly adopted as a follow-up to the 1996 advisory opinion of the Court on the *Legality of the Use of Threat to Use Nuclear Weapons* and considers that any such assessment and conclusion, whatever it may be, would have no bearing on the existence of a dispute between the Parties to the present proceedings given that the obligations to pursue negotiations leading to nuclear disarmament in Article VI of the NPT have been binding upon the

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[1] Michael Wood, Special Rapporteur, *Third report on identification of customary international law*, A/CN.4/682, 27 March 2015, at p. 41, paragraph 54; http://legal.un.org/docs/?symbol=A/CN.4/682

[2] *Id.*, at paragraphs 45 to 53.

Parties as of the date of the accession of the Marshall Islands to the NPT on 30 January 1995, i.e., before the 1996 advisory opinion. This is accepted by the Marshall Islands, viz: "Since the UK and the RMI are both parties to the NPT, the obligation set forth in Article VI of the NPT applies to them irrespective of whether that obligation corresponds to customary international law."[3]

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Question from Judge Greenwood: "During the course of its response this afternoon to Judge Bennouna's question, the Marshall Islands referred to certain documents not previously put before the Court. Does the United Kingdom consider that these documents bear upon the existence of a dispute, in the sense in which that term is used in the jurisprudence of the Court?"

Response

1. In response to Judge Bennouna's question, the Marshall Islands contends[4] that at the time of filing its Application, the Marshall Islands:

(a) understood the interpretation of Article VI to be that set out in the Court's advisory opinion of 8 July 1996;

(b) believed that each of the nuclear-weapon States, including the United Kingdom, was in continuing breach of the obligations under Article VI; and

(c) believed that all States possessing nuclear weapons were in breach of a parallel obligation in customary international law.

2. The Marshall Islands cited seven documents as evidence of their contention that they had expressly or impliedly adopted the above position.

3. Amongst these seven documents are the statement by the Marshall Islands' Minister for Foreign Affairs at the UN General Assembly High-Level Meeting on Nuclear Disarmament dated 26 September 2013 and the Marshall Islands' statement at the Nayarit Conference in February 2014. For the reasons set out in the United Kingdom's written and oral submissions, these statements do not evidence the existence of a dispute between the Marshall Islands and the United Kingdom prior to 24 April 2014.

4. As regards the five additional documents adduced by the Marshall Islands in its oral rejoinder in support of its contention, the United Kingdom does not accept that any of these new documents establishes the existence of a dispute between the Marshall Islands and the United Kingdom. In particular:

(a) The Message from HE Christopher J Loeak, President of the Marshall Islands was manifestly not addressed to the United Kingdom, nor does the Marshall Islands suggest that it was, at any stage prior to 24 April 2014. Indeed, the United Kingdom was unaware of this Message until it was brought to the United Kingdom's, and the Court's, attention during the course of the hearing. Furthermore, this Message states only that the President stands with the Hiroshima Youth Committee "to reinforce the views that have been expressed by representatives of over 140 countries in concluding a nuclear-weapons convention." This statement cannot be taken as any express or implied representation that

[3] Memorial of the Marshall Islands, at paragraph 189.
[4] CR 2016/9, pp. 8–11.

the United Kingdom (or indeed any other State) is in breach of its obligations under Article VI of the NPT and/or any parallel rule of customary international law.

(b) The Joint Statement on the Humanitarian Consequences of Nuclear Weapons, made in the First Committee on 21 October 2013 states that: "All States share the responsibility to prevent the use of nuclear weapons, to prevent their vertical and horizontal proliferation and to achieve nuclear disarmament, including through fulfilling the objectives of the NPT and achieving its universality." Again, this statement contains no express or implied representation that the United Kingdom (or indeed any other State) is in breach of its obligations under Article VI of the NPT and/or any parallel rule of customary international law.

(c) The three General Assembly Resolutions dated 5 December 2013, *inter alia*, reiterate the obligation upon States to pursue and bring to a conclusion negotiations leading to nuclear disarmament and call upon States to comply with that obligation. They contain no express or implied representation that the United Kingdom (or indeed any other State) is in breach of Article VI or any parallel obligation under customary international law. Moreover, the fact that the Marshall Islands voted in favour of these resolutions whilst the United Kingdom (along with many other States) did not do so, cannot be taken as indicating the existence of a dispute between the Marshall Islands and the United Kingdom in relation to the interpretation or application of that obligation. As is typically the case, these resolutions are complex and multi-faceted. The preambular and operative paragraphs of the resolutions address a number of detailed issues. States may agree with some paragraphs but not all. A State's decision to vote for or against a resolution is based on a variety of political and legal factors. It cannot be assumed that, because one State votes for a resolution and another votes against, a dispute exists between them.

5. In summary, the United Kingdom does not consider that any of the documents put forward by the Marshall Islands in response to Judge Bennouna's question evidences that:

(a) there existed, on or before 24 April 2014, a claim by the Marshall Islands against the United Kingdom which was actively opposed by the United Kingdom; and/or

(b) there was any exchange or communication of views between the Marshall Islands and the United Kingdom which was sufficient to crystallise a dispute on or before 24 April 2014.

6. Accordingly, the United Kingdom does not consider that any of the documents put forward by the Marshall Islands in answer to Judge Bennouna's question has any bearing on the question whether a dispute existed between the United Kingdom and the Marshall Islands on 24 April 2014.
